

A **R v Powys CC ex p Hambidge**

Court of Appeal
Gibson, Schiemann and Mantell LJ
2 July 1998

B
Health and Social Services and Social Security Adjudications Act 1983 s17 entitles local authorities to charge for services provided under Chronically Sick and Disabled Persons Act 1970 s2.
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C **Facts**

C The respondent authority provided the applicant with home help and adaptations services under Chronically Sick and Disabled Persons Act 1970 (CSDPA) s2 at the charge of £10.00 per week. An issue arose as to whether the respondent authority was empowered to levy that charge by Health and Social Services and Social Security Adjudications Act 1983 (HASSASSAA) s17, which provides that:

- D (1) . . . an authority providing a service to which this section applies may recover such charge (if any) for it as they consider reasonable.
E (2) his section applies to services provided under the following enactments-
(a) section 29 of the National Assistance Act 1948; . . .
(c) Schedule 8 to the National Health Service Act 1977 . . .

F It was accepted on behalf of the applicant that arrangements for the provision of services under CSDPA 1970 s2 are made in the exercise of functions under National Assistance Act 1948 (NAA) s29. It was however submitted that there was a distinction between the provision of services pursuant to a duty under CSDPA 1970 s2 and the provision of services under NAA 1948 s29 and National Health Service Act 1977 (NHS Act) Sch 8 and that the enactment of CSDPA 1970 s2 removed the right to charge for the services referred to therein, being services previously provided and charged for under NAA 1948 s29 and NHS Act 1977 Sch 8.

Held:

- 1 Prior to the enactment of CSDPA 1970 s2 local authorities provided the services referred to in that section under NAA 1948 s29 or NHS Act 1977 Sch 8. There was no dispute that at that time when such services were provided, local authorities were entitled to charge. CSDPA 1970 extends the circumstances in which local authorities are obliged to provide those services. There is nothing in CSDPA 1970 s2 which expressly removes the right to charge and the court was unable to spell out any Parliamentary intention that the right to charge should be removed. All that HASSASSAA 1983 did of relevance to the present issue was to repeal the original provisions which entitled the local authority to charge and replace by them by a new provision: HASSASSAA 1983 s17.

Cases referred to in judgment:

- J *R v Gloucestershire CC and Secretary of State for Health ex p Barry* (1997) 1 CCLR 40; [1997] 2 All ER 1; [1997] 2 WLR 459, HL.
R v Gloucestershire CC ex p Mahfood (1997) 1 CCLR 7; (1996) 8 Admin LR 181; (1996) 160 LG Rev 321; (1996) 30 BMLR 20; [1996] COD 67; (1995) *Times*, 21 June; (1995) *Independent*, 20 June, QBD.
K *Wyatt v Hillingdon LBC* (1978) 122 SJ 349; (1978) 76 LGR 727, CA.

Legislation/guidance referred to in judgment:

Children Act 1989 — Chronically Sick and Disabled Persons Act 1970 ss1, 2 and 28A — Disabled Persons (Services, Consultation and Representation) Act 1986 s4 — Health and Social Services and Social Security Adjudications Act 1983 s17 and Sch 10 — Local Authority Social Services Act 1970 s2 and Sch 1 — Local Government Act 1972 s195 and Sch 30 — Mental Health Act 1983 s117 — National Assistance Act 1948 ss29, 30 and 36 — National Health Service Act 1946 s29 — National Health Service Act 1977 Schs 8 and 15 — National Health Service and Community Care Act 1990 ss46 and 47.

This case also reported at:

(1998) *Times*, 20 July.

Representation

Richard Gordon QC and Stephen Cragg (instructed by Thorpes) appeared on behalf of the appellant.

Clive Lewis (instructed by the Legal Department, Powys County Council) appeared on behalf of the respondent.

Nigel Fleming QC and Steven Kovats (instructed by the solicitor to the Departments of Health and Social Security for the Secretary of State) appeared on behalf of the Secretary of State for Health.

Judgment**LORD JUSTICE SCHIEMANN:***Introduction*

Mrs Hambidge is severely disabled. The County Council provides community care services for her consisting largely of practical assistance in the home and help with adaptations. The question at issue in this appeal is one of general importance to local authorities subject to duties to make arrangements for the provision of services to the disabled: are they entitled to charge for the provision of those services? Popplewell J held that they are so entitled because of the provisions of s17 of the Health and Social Services and Social Security Adjudications Act 1983 ('HASSASSAA'). Before the court is an appeal with his leave against that decision.

Section 17 of HASSASSAA states:

(1) *Subject to subsection (3) below, an authority providing a service to which this section applies may recover such charge (if any) for it as they consider reasonable.*

(2) *This section applies to services provided under the following enactments –*

(a) *section 29 of the National Assistance Act 1948 . . . ;*

(b) *...*

(c) *Schedule 8 to the National Health Service Act 1977 . . . ;*

(d) *...*

(e) *...*

(3) *If a person–*

(a) *avails himself of a service to which this section applies, and*

(b) *satisfies the authority providing the service that his means are insufficient for it to be reasonably practicable for him to pay for the service the amount which he would otherwise be obliged to pay for it,*
the authority shall not require him to pay more for it than it appears to them that it is reasonably practicable for him to pay.

The crucial question in this case is whether the community care services which

- A the disabled receive are 'provided under' any of the enactments listed in s17(2). It is common ground that if they are not then the Council is not entitled to charge. It is common ground that s2 of the Chronically Sick and Disabled Persons Act 1970 ('CSDPA') imposed a duty on some local authorities to make arrangements for the provision of some services (including the ones with which we are concerned). Mr Richard Gordon QC, who appears for Mrs Hambidge, points out that the CSDPA is not listed in s17(2) of HASSASSAA and submits that the services in question were 'provided under' CSDPA and were not provided under the enactments listed in s17(2) of HASSASSAA.

- B Popplewell J held that although s2 of CSDPA imposed a duty to make arrangement for the provision of the services they were nevertheless 'provided under' s29 of the National Assistance Act 1948.

- C In order to understand the submissions on each side it is necessary to consider not merely a number of Acts but also their legislative history. It is convenient to show the relevant sections as originally enacted and as they now appear. Words inserted after the original enactment appear in square brackets. Those which have been repealed are shown deleted.

The National Assistance Act 1948, s29:

- E (1) A local authority [may, with the approval of the Secretary of State, and to such extent as he may direct in relation to persons ordinarily resident in the area of the local authority] shall ~~have power to~~ make arrangements for promoting the welfare of persons to whom this section applies, that is to say persons [aged eighteen or over] who are blind, deaf or dumb, or who [suffer from mental disorder of any description], and other persons [aged eighteen or over] who are substantially and permanently handicapped . . .

- F ~~(2) In relation to persons ordinarily resident in the area of a local authority the authority shall, to such extent as the Minister may direct, be under a duty to exercise their powers under this section.~~

- G ~~(3) The arrangements made by a local authority under this section shall be carried into effect in accordance with a scheme made thereunder.~~

- ...
H ~~(5) A local authority may recover from persons availing themselves of any service provided under this Section such charges (if any) as, having regard to the cost of the service, the authority may determine, whether generally or in the circumstances of any particular case.~~

- (6) Nothing in the foregoing provisions of this section shall authorise or require –

- (a) . . .; or
I (b) the provision of any accommodation or services required to be provided under the National Health Service Act 1946¹ [1977]² . . .

Note 1

Section 29 of the 1946 Act provided:

- J (1) A local health authority may make such arrangements as the Minister may approve for providing domestic help for households where such help is required owing to the presence of any person who is ill, lying-in, an expectant mother, mentally defective, aged, or a child . . .

- K (2) A local health authority may, with the approval of the Minister, recover from persons availing themselves of the domestic help so provided such charges (if any) as the authority consider reasonable, having regard to the means of those persons.

Note 2 See page 461.

It is common ground that s29 as originally enacted did a number of things. It gave local authorities powers to make arrangements for the provision of services to a group whom I shall describe as the disabled. This is a power they previously lacked. It imposed a duty on authorities to make such arrangements for persons ordinarily resident in their area but only when so directed by the Minister. The Act gave no immediately enforceable rights to a disabled citizen. The section left untouched the provision of any accommodation or services required to be provided under the National Health Service Act. Both the 1946 and the 1977 National Health Service Acts expressly provided for the recovery of charges. Similarly, s29(5) of the National Assistance Act 1948 gave authorities express powers to charge for the services provided under that section. Thus there was a power to charge whether the services were provided under one Act or the other.

In 1970 two relevant Acts were passed on the same day – the Local Authority Social Services Act ('LASSA') and the CSDPA.

Local Authority Social Services Act 1970 s2:

(1) Every local authority shall establish a social services committee and . . . there shall stand referred to that committee all matters relating to the discharge by the authority of –

(a) their functions under the enactments specified in the first column of Schedule 1 to this Act . . .

Schedule 1 specified separately very many sections including s29 of the National Health Service Act 1946^{3 4}, ss29 and 30 of the National Assistance Act 1948 and ss1 and 2 of the CSDPA.

The Chronically Sick and Disabled Persons Act 1970, s2:

(1) Where a local authority having functions under section 29 of the National Assistance Act 1948 are satisfied in the case of any person to whom that section applies who is ordinarily resident in their area that it is necessary in order to meet the needs of that person for that authority to make arrangements for all or any of the following matters, namely –

(a) the provision of practical assistance for that person in his home;

(b) . . .

(c) . . .

Note 2

The National Health Service Act 1977 provides in paragraph 3 of Schedule 8:

(1) It is the duty of every local social services authority to provide on such a scale as is adequate for the needs of their area . . . home help for households where such help is required owing to the presence of –

(a) a person who is suffering from illness, lying-in, an expectant mother, aged, handicapped . . .

(2) A local social services authority may recover from persons availing themselves of services provided in pursuance of arrangements under this paragraph such charges (if any) as the authority consider reasonable, having regard to the means of those persons.

Note 3 See Note 1 on page 460.

Note 4 By virtue of paragraph 51 of Schedule 15 to the National Health Service Act 1977 this is to be read as a reference to National Health Service Act 1977 Schedule 8.

- A (d) ...
 (e) *the provision of assistance for that person in arranging for the carrying out of any works of adaptation in his home or the provision of any additional facilities designed to secure his greater safety, comfort or convenience;*
 (f) ...
 B (g) ...
 (h) ...
then, notwithstanding anything in any scheme made by the authority under the said section 29, ... it shall be the duty of that authority to make those arrangements in the exercise of their functions under the said section 29.
 C ~~(2) ... , subsection (3) of the said section 29 ... shall not apply~~
~~(a) to any arrangements made in pursuance of this section [Repealed by the Local Government Act 1972.]~~

Thus s2 of CSDPA imposes a duty on authorities to exercise those powers if they are satisfied that it is necessary to do so. That left unspecified any mechanism through which the local authority could arrive at a state of such satisfaction.

- D The crux of Mr Gordon's submissions is that the enactment of this section had the effect of removing from authorities the power to make charges for the services mentioned in it.

- E The Local Government Act 1972 in effect did away with schemes such as those made under s29 of the National Assistance Act 1948 and repealed subsections (2) and (3) of that section [Local Government Act 1972 s195(2) and Schedule 30]. The next statutory provision of significance in the present context was HASSASSAA which was passed in 1983. This expressly repealed in Schedule 10 the charging provisions in s29(5) of the National Assistance Act 1948 and the charging provisions in the National Health Service Act 1977 Schedule 8 paragraph 3(2). This was no doubt because the provisions of s17 of HASSASSAA which I have set out at the beginning of this judgment replaced them.

- F Returning to the mechanism of how a local authority could achieve the state of being satisfied that it was necessary in order to meet the needs of the disabled to make arrangements for the provision of practical assistance etc to that person, this problem was addressed first in the Disabled Persons (Services, Consultation and Representation) Act 1986 ('The 1986 Act'), section 4:

- When requested to do so by –
 H (a) *a disabled person ...*
a local authority shall decide whether the needs of the disabled person call for the provision by the authority of any services in accordance with section 2(1) of the [CSDPA]

- I That however did not provide for the situation where a disabled person made no request. This was addressed in the National Health Service and Community Care Act 1990 ('The 1990 Act').

This contains two sections of present relevance:

- 46.–(1) *Each local authority –*
 J (a) *shall ... prepare and publish a plan for the provision of community care services in their area;*
 (b) *shall keep the plan prepared by them under paragraph (a) above ... under review ...*
 (3) *In this section ...*
 K 'community care services' means services which a local authority may provide ... under any of the following provisions –

- (a) *Part III of the National Assistance Act 1948; [This includes s29.]* A
- (b) *section 45 of the Health Services and Public Health Act 1968;*
- (c) *section 21 of and Schedule 8 to the National Health Service Act 1977; and*
- (d) *section 117 of the Mental Health Act 1983.*

47.-(1) . . . where it appears to a local authority that any person for whom they may provide . . . community care services may be in need of any such services, the authority –

- (a) *shall carry out an assessment of his needs for those services; and*
- (b) *having regard to the results of that assessment, shall then decide whether his needs call for the provision by them of any such services.* B

(2) If at any time during the assessment of the needs of any person under subsection (1)(a) above it appears to a local authority that he is a disabled person, the authority –

- (a) *shall proceed to make such a decision as to the services he requires as is mentioned in section 4 of the [1986 Act] without his requesting them to do so under that section; and* C
- (b) *shall inform him that they will be doing so and of his rights under that Act.* D

. . .

(7) *This section is without prejudice to section 3 of the [1986 Act].*

(8) *In this section –*

'disabled person' has the same meaning as in that Act; and 'local authority' and 'community care services' have the same meanings as in section 46 above. E

The Submissions

Having set out the statutory provisions I can turn to the parties' submissions. There is a certain amount of common ground: F

1. The respondent authority has functions under s29 of the National Assistance Act 1948.
2. Mrs Hambidge was a person to whom that section applied.
3. She was ordinarily resident in their area.
4. The respondent authority were satisfied that it was necessary in order to meet her needs to make arrangements for the provision of home help. G
5. In those circumstances s2 of CSDPA imposed upon the authority a duty to make those arrangements. That duty can give rise to a right of enforcement in an individual.
6. Prior to 1970 there was, absent a direction from the Minister under s29(2) of the National Assistance Act 1948 and leaving aside duties under the National Health Service Act 1946, no such duty to make arrangements for the provision of home help H
7. The authority made those arrangements 'in exercise of their functions under . . . section 29' of the National Assistance Act 1948. I

The Mahfood Submission

Mr Gordon relied on a passage in the judgment of McCowan LJ in the Divisional Court in *R v Gloucestershire CC, ex p Mahfood* (1997) 1 CCLR 7; 8 Admin LR 180. That was a case which raised the same issue as was later argued in the House of Lords in *R v Gloucestershire CC, ex p Barry* (1997) 1 CCLR 40; [1997] AC 584. The issue was whether or not a local authority, in coming to a decision under s2 of CSDPA whether it was necessary in order to meet the needs of a disabled person to make certain provision, was entitled to take its own resources into account. The House of Lords held that it was. That was the same conclusion as McCowan LJ had reached in *Mahfood*. J K

A The passage in the judgment of McCowan LJ upon which Mr Gordon relies is one in which the Lord Justice rejects an argument advanced by the advocate for the Council namely that:

1. the only duty to provide home help arose under the National Health Service Act 1977;
 - B 2. therefore by virtue of the provisions of s29(6) of the National Assistance Act 1948 there was no power to provide home help under that Act;
 3. unless there was power to provide home help under s29 of the 1948 Act there could be no duty to provide it under CSDPA;
 - C 4. and therefore there was no duty to provide home help under CSDPA.
- McCowan LJ stated, at p193 [(1997) 1 CCLR 7 at p17C-D]:

D *The short answer to the point, however, is that section 29(6) of the 1948 Act merely states that 'nothing in the foregoing provisions of this section shall authorise or require'. What is authorising the local authority to make arrangements under section 2 is section 2.*

Mr Gordon submitted that this passage showed that there was a distinction between the provision of services pursuant to a duty under s2 of CSDPA and the provision of services under s29 of the National Assistance Act or Schedule 8 to the National Health Service Act 1977.

E The first point to be made in relation to that passage is that it was obiter: the County Council won the case notwithstanding that it lost that particular argument.

F The next point is that it seems from the reports that Counsel appearing for Gloucestershire in *Barry* did not repeat his argument based on the National Health Service Act 1977 in the Court of Appeal and the House of Lords and the speeches there do not touch on it. They proceed on the tacit assumption that the 1977 Act has nothing to do with the case. It may be that this is because undoubtedly duties to provide services can arise under s29 of the National Assistance Act 1948 if the Secretary of State makes the appropriate directions.

G For my part I do not see the relevance of the National Health Service legislation to the issue which the court has to resolve. In so far as services were or are required to be provided under the National Health Service Act there was and is no need to authorise or require them under the National Assistance Act 1948 or under CSDPA. What seems clear is that in either event historically charges could be made for such services: in the case of National Health Service Act services pursuant to s29(2) of the National Health Service Act 1946 and later paragraph 3(2) of Schedule 8 to the National Health Service Act 1977, and in the case of National Assistance Act services pursuant to s29(5) of the National Assistance Act 1948. The right to charge under those provisions was repealed by Schedule 10 to HASSASSAA and replaced by a right to charge under s17 of that Act.

The Community Care Submission

J Mr Gordon pointed out that the provision of home help, whether falling within the National Health Service Act or the National Assistance Act amounts to the provision of 'community care services' as that phrase is defined for the purposes of the 1990 Act of which I have set out the relevant provisions. He pointed out that s47(2) of that Act created a special regime for the disabled. So it does. Its effect is that the duty under s4 of the 1986 Act (to decide whether the needs of a disabled person call for the provision of any services in accordance with s2(1) of CSDPA) can be triggered without any request by the disabled person. But for my part I can not see that this sheds any light on the question which we have to decide.

The Children Act 1989 Submission

Mr Gordon pointed out that the effect of the Children Act 1989 was to insert the words 'aged eighteen or over' in s29 of the National Assistance Act and that this took children out of that section. The effect of that, looking purely at s2 of CSDPA, would be to remove children from being the object of duties under that section. However, he pointed out, that s28A of CSDPA, inserted by the Children Act, provides:

This Act applies in respect of disabled children . . . as it applies in relation to persons to whom section 29 of the National Assistance Act 1948 applies.

All this is true but, as it seems to me, neutral as to the issue we have to decide.

The LASSA Schedule Submission

Mr Gordon pointed out that LASSA Schedule 1 sets out a list of enactments conferring functions which that Act assigns to the Social Services Committee and that one finds not only s29 of the National Assistance Act 1948 but also s2 of CSDPA listed amongst other sections from CSDPA. He submits that this would not be necessary unless s2 of CSDPA was regarded as conferring functions which were not conferred by the 1948 Act. Mr Pleming QC, who appeared for the Secretary of State who was an intervenor in this litigation, was inclined to concede this point and submitted that the insertion arose out of an abundance of caution in the draftsman. For my part, I do not give the separate presence of s2 in the Schedule a significant weight as a factor in deciding the issue before us. As it seems to me, s2 undoubtedly imposed a duty on the authority and all that the draftsman was doing was spelling out that this duty was to be exercised by the social services committee just as the powers under s29 of the 1948 Act were to be exercised by that committee.

The Mental Health Act Submission

Mr Gordon pointed out that services provided under s117 of the Mental Health Act 1983 (which are community care services within s46(3) of the 1990 Act which I have cited above) are not mentioned in s17 of HASSASSAA. He maintained that no local authority levied charges for these services under any provision. He submitted that the right of the disabled under s2 of CSDPA was analogous to the right of one who is mentally ill under s117 of the Mental Health Act 1983 to the provision of after-care. He submitted that if it was policy not to charge for the provision of services to the mentally ill however wealthy it must be policy not to charge the disabled however wealthy. I put it that way because s17 of HASSASSAA makes clear that no more is to be charged than is reasonable.

In my judgment it would be wrong for this court to make that policy assumption. One can easily see a case for having the same policy for the disabled as for the mentally ill but I can find nothing in the legislation which leads to the conclusion that Parliament intended this. On the contrary. For the disabled there is a long history of express powers to make charges.

Conclusion

Like the judge I have come to the conclusion that the authority is entitled to charge for the provision of these services. There is no dispute that authorities were entitled to provide them (and bound to provide them in some circumstances) prior to 1970. There is no dispute that where they were provided, the authorities were entitled to charge. That is so whether the services were provided under the National Health Service Act or under the National Assistance Act. The CSDPA extends the circumstances in which the authority was obliged to provide

A those services. There is nothing in CSDPA which expressly removes the right to charge and I can not spell out any Parliamentary intention that the right to charge should be removed. All that HASSASSAA did which is of relevance to the present issue is to repeal the original provisions which entitled the authority to charge and replace them by a new provision.

B We were referred to *Wyatt v Hillingdon LBC* (1978) 76 LGR 727, a decision of this Court (Geoffrey Lane and Eveleigh LJJ). That was a case in which an authority was sued by a disabled person for breach of the duty imposed by s2 of CSDPA. Her case was struck out on the basis that her proper remedy was to persuade the Minister to use his default powers under s36 of the National Assistance Act 1948.

C Mr Clive Lewis, who appeared for the authority in the present case, submitted that we were bound by that decision. I do not pause to examine that submission. I am content to observe that the decision is consonant with the view which I have reached independently of it.

D I make the same observation in relation to a submission by Mr Fleming to the effect that subsection (2) of s2 of CSDPA as originally enacted would have been unnecessary if the arrangements described in s2(1) were not made under s29 of the National Assistance Act 1948. The submission was accepted by Mr Gordon as being well founded but he submitted that it was of no great weight.

I would dismiss this appeal.

E **LORD JUSTICE MANTELL:** I agree.

LORD JUSTICE PETER GIBSON: I also agree.

Order: Appeal dismissed with costs.

F Legal aid taxation of applicant.

Section 18 order, leave to appeal to the House of Lords refused.