IN THE HIGH COURT OF JUSTICE CO 0186/99, CO 0464/99

QUEEN'S BENCH DIVISION CO 2491/99 and
(CROWN OFFICE LIST) CO 2840/99

Royal Courts of Justice
Strand
London WC2

Wednesday, 28th July 1999

B e f o r e:

MR JUSTICE SULLIVAN

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REGINA

-v-

LONDON BOROUGH OF RICHMOND
EX PARTE WATSON

- - - - - - -

REGINA

-v-

REDCAR AND CLEVELAND BOROUGH COUNCIL
EX PARTE ARMSTRONG

- - - - - - -

REGINA

-v-

MANCHESTER CITY COUNCIL
EX PARTE STENNETT

- - - - - - -

REGINA

-v-

LONDON BOROUGH OF HARROW
EX PARTE COBHAM

- - - - - - -

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MR R DRABBLE QC and MR D WOLFE (instructed by Public Law Project, London WC1E 7HN) appeared on behalf of the Applicant, Watson.

MR R LISSACK QC, MISS R WILLMOT and MR M MULLENS (instructed by legal department, London Borough of Richmond) appeared on behalf of the Respondent, the London Borough of Richmond.

MR R DRABBLE QC and MR D WOLFE (instructed by Public Law Project, London WC1E 7HN) appeared on behalf of the Applicant, Armstrong.

MR R LISSACK QC, MISS R WILLMOT and MR M MULLENS (instructed by Social Services Department, Redcar) appeared on behalf of Redcar and Cleveland Borough Council.

MISS J RICHARDS (instructed by Hogans, Merseyside M35 0LP) appeared on behalf of the Applicant, Stennett.

MR S LISSACK QC, MISS R WILLMOT and MR M MULLENS (instructed by Sharpe Pritchards, London agents for Manchester City Council appeared on behalf of the Respondent, Manchester City Council.

MISS J RICHARDS (instructed by Mackintosh Duncan, London SE1 1NN) appeared on behalf of the Applicant, Cobham.

MR S LISSACK QC, MISS R WILLMOT and MR M MULLENS (instructed by Legal Department, London Borough of Harrow) appeared on behalf of the Respondent, the London Borough of Harrow.

J U D G M E N T
(As Approved)



Wednesday, 28th July 1999

MR JUSTICE SULLIVAN: These four applications for judicial review have been heard together, because they all raise

the same important issue. All four Applicants have been subject to detention under section 3 of the Mental Health Act 1983 ("The Act") each has been discharged from hospital, and upon discharge has been provided with residential accommodation by his or her social services authority (the four Respondents).

The issue in each case is whether the Respondent is entitled to charge the Applicant for that residential accommodation, that is the principal issue which I have to determine. There are two subsidiary issues which arise on the facts of three of the individual cases.

Before summarising the factual background in the individual cases, it is helpful to refer to the statutory framework which is contained within the Act.

Section 2 provides that a patient may be admitted to hospital and detained for a temporary period for the purpose of assessment if such temporary detention is warranted by the nature or degree of his mental disorder and he ought to be so detained in his own interest, or for the protection of others.

Under section 3, a patient may be admitted to hospital and detained for the purpose of treatment if:

"(2)(a) he is suffering from mental illness, severe mental impairment, psychopathic disorder or mental impairment and his mental disorder is of a nature or degree which makes it appropriate for him to receive medical treatment in a hospital; and

(b) in the case of psychopathic disorder or mental impairment, such treatment is likely to alleviate or prevent a deterioration of his condition; and

(c) it is necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment and it cannot be provided unless he is detained under this section."

In some cases, the patient's mental condition may be such that a guardianship application under section 7 may be an alternative to admission to, or continuing care in, hospital. By section 7(2):

"A guardianship application may be made in respect of a patient on the grounds that-
(a) he is suffering from mental disorder, being mental illness, severe mental impairment, psychopathic disorder or mental impairment and his mental disorder is of a nature or degree which warrants his reception into guardianship under this section; and
(b) it is necessary in the interests of the welfare of the patient or for the protection of other persons that the patients should be so received."

The guardian, normally the local social services authority, then has the power inter alia "to require the patient to reside at a place specified by the guardian" (see section 8 (1)(a)).

The responsible medical officer may give a patient leave of absence from hospital, subject to such conditions, which would include conditions as to residence, which he considered necessary in the interests of the patient or for the

protection of other persons (see section 17(1)).

Provision is made by section 19 for the transfer of patients from one hospital to another, or from hospital into guardianship. I will return to its precise terms in due course. Section 20 imposes time limits on admission for treatment and guardianship. The patient's condition is reviewed regularly. Authority for detention or guardianship may be renewed. If the criteria for renewal are not met, the patient is discharged. Those who have been so ill that they have had to be admitted for treatment under section 3 are bound to require some care after they have been discharged and leave hospital. Provision for such after care is made in section 117 (as amended) which is of central importance in this case.

"117(1) This section applies to persons who are detained under section 3 above, or admitted to a hospital in pursuance of a hospital order made under section 37 above, or transferred to a hospital in pursuance of a hospital direction made under section 45A above or a transfer direction made under section 47 or 48 above, and then cease to be detained and (whether or not immediately after so ceasing) leave hospital.

(2) It shall be the duty of the Health Authority and of the local social services authority to provide, in cooperation with relevant voluntary agencies, after-care services for any person to whom this section applies until such time as the Health Authority and the local social services authority are satisfied that the person concerned is no longer in need of such services; but they shall not be so satisfied in the case of a patient who is subject to after-care under supervision at any time while he remains so subject."

The concept of after care under supervision was introduced by Mental Health (Patients in the Community) Act 1995 ("the 1995 Act"), which inserted sections 25A-25J into the Act. By section 25A(1):

"Where a patient-

(a) is liable to be detained in a hospital in pursuance of an application for admission for treatment;

(b).....

an application may be made for him to be supervised after he leaves hospital, for the period allowed by the following provisions of this Act, with a view to securing that he receives the after-care services provided for him under section 117 below.

(2).....

(3).....

(4) A supervision application may be made in respect of a patient only on the grounds that-
(a) he is suffering from mental disorder, being mental illness, severe mental impairment, psychopathic disorder or mental impairment.
(b) there would be a substantial risk of serious harm to the health or safety of the patient or the safety of other persons or of the patient being seriously exploited, if he were not to receive the after-care services to be provided for him under section 117 below after he leaves hospital; and
(c) he being subject to after-care under supervision is likely to help to secure that he receives the after-care services to be so provided."

A supervision application must be made by the responsible medical officer and by subsection (6):

"A supervision application in respect of a patient shall be addressed to the Health Authority which will have the duty under section 117 below to provide after-care services for the patient after he leaves hospital."

Section 25D provides that:

"(1) Where a patient is subject to after-care supervision (or, if he has not yet left hospital, is to be so subject after he leaves hospital), the responsible after-care bodies have power to impose any of the requirements specified in subsection (3) below for the purpose of securing that the patient receives the after-care services provided for him under section 117 below.

(2).....

(3) The requirements referred to in subsection (1) above are-
(a) that the patient reside at a specified place..."

Section 118 imposes a duty on the Secretary of State to prepare a Code of Guidance in relation to these matters. The Code has to be laid before Parliament.

Paragraph 1.1 of the Code explains that the detailed guidance needs to be read in the light of certain broad principles. Among those principles are that patients should:

. be treated and cared for in such a way as to promote to the greatest practicable degree their self determination and personal responsibility, consistent with their own needs and wishes;

. be discharged from detention or other powers provided by the Act as soon as it is clear that their application is no longer justified."

The Code explains the purpose of guardianship, whether as an alternative to admission to hospital, or as an alternative to continued care in hospital, as follows:

"13.1 The purpose of guardianship is to enable patients to receive care in the community where it cannot be provided without the use of compulsory powers. It provides an authoritative framework for working with a patient, with a minimum of constraint, to achieve as independent a life as possible within the community. Where it is used it must be part of the patient's overall care and treatment plan.

13.2 After-care under supervision provides an alternative statutory framework for the after-care of patients who have been detained in hospital for treatment and meet the criteria set out in section 25A of the Act."

Part 20 of the Code deals with leave of absence. Paragraph 20.7 says:

"The rmo's responsibilities for the patient's care remain the same while he or she is on leave although they are exercised in a different way. The duty to provide after-care under section 117 includes patients who are on leave of absence."

After care is dealt with in Part 27 of the Code:

"27.1 While the Act defines after-care requirements only in very broad terms, it is clear that the central purpose of all treatment and care is to equip patients to cope with life outside hospital and function there successfully without danger to themselves or other people. The planning of this needs to start when the patient is admitted to hospital.

27.3 Section 117 of the Act requires Health Authorities and local social services authorities, in conjunction with voluntary agencies, to provide after-care for certain categories of detained patients. This includes patients given leave of absence under section 17. The after-care detained patients should be included in the general arrangements for implementing the Care Programme Approach, but because of the specific statutory obligation it is important that all patients who are subject to section 117 are identified and records are kept of them. There is a section 117 after-care entitlement when the patient stays in hospital informally after ceasing to be detained under the Act, and also when a patient is released from prison, if they have spent part of their sentence detained in hospital."

After care under supervision is explained in Part 28 of the Code:

"28.2 After-care under supervision is an arrangement by which a patient who has been detained in hospital for treatment under the provisions of the Act may be subject to formal supervision after he or she is discharged. Its purpose is to help ensure that the patient receives the after-care services to be provided under section 117 of the Act. It is available for patients suffering from any of the four forms of mental disorder in the Act but is primarily intended for those with severe mental illness.

28.5 If a patient needs to receive after-care within a formal structure but he or she does not meet all the criteria for after-care under supervision guardianship under section 7 of the Act may be used."

The factual background in the four cases can be summarised as follows:

Mr Armstrong

Mr Armstrong is 28. In May 1995, while he was studying for a PhD in Cambridge, he was detained under section 2 and later section 3 of the Act. He was later diagnosed as suffering from schizophrenia. He was subsequently diagnosed as suffering from obsessive compulsive disorder; mention has also been made of autism.

In September 1997, he was offered the choice between transfer to a long stay hospital ward and transfer to Miltoun House, an independent residential care home for people with mental health problems.

On 17th November 1997, he transferred to Miltoun House on a trial basis on leave under section 17 of the Act while remaining subject to section 3 detention. The Respondent has charged him for his accommodation at Miltoun House from that date.

On 31st March 1998, he was transferred from section 3 detention to Guardianship. The terms of the guardianship require him to continue to live at Miltoun House.

Redcar funds his place at Miltoun House. Until 12th April 1999, the total cost of the place was £235 per week of which Redcar recovered £114.85 per week from Mr Armstrong in charges and a further £10 a week from his parents.

From 12th April 1999, the total cost was £240 with Mr Armstrong being charged £117.95 and his parents paying £10.

The Guardianship order was not renewed in mid-May 1999 but Mr Armstrong continues to live at Miltoun House.

Mrs Watson

Mrs Watson is 67. She had suffered from increasing dementia since an operation to remove a brain tumour in 1994.

On 11th March 1998, she was detained under section 2 of the Act. On 11th April 1998, she was detained under section 3.

She was then discharged into residential accommodation provided by Richmond in August 1998.

She has been charged £137 a week for her accommodation by Richmond.

Mr Stennett

Mr Stennett is a 34 year old man with a long history of mental health problems. He has been diagnosed as suffering from schizophrenia and has had many admissions under the Act. He has been described as a "revolving door patient", one who is admitted to hospital, discharged into the community then has to be admitted to hospital again and so forth.

His condition was described in a report dated 6th August 1996 as follows:

"When unwell he is very aroused, irritable and verbally hostile. He can be inappropriate towards member of the public and is perceived as threatening and hostile. In addition Mr Stennett has purchased knives and replica guns and has brandished these when unwell. He shows little regard or understanding of the reaction to such incidents from members of the public and refuses to acknowledge that his behaviour is a problem.
Mr Stennett does not appreciate his vulnerability when unwell and the potential risk he presents to himself or others."

He was detained under section 3 in December 1995. He was discharged from section 3 and transferred into guardianship on 12th November 1996. As a condition of that guardianship he was required to reside at Pilot House where he was provided with residential care.

He remained there until earlier this year when (following an assault on a member of staff and resident) he was transferred to Brook House where he remains (still subject to guardianship).

He has been charged by Manchester for his accommodation and care throughout his stay at Pilot House and Brook House until 14th June 1999. Between November 1996 and June 1999 he has contributed approximately £15,300 to the costs of his residential care, leaving him with £14-£15 per week. Whether he will be charged for the period post 14th

June 1999 depends upon the outcome of these applications.

Mrs Cobham

Mrs Cobham is 69. She has a long history of mental health problems and has been admitted many times under the Act. She was most recently detained under section 3 on 17th December 1996 following a suicide attempt.

She was informed that there was no prospect of her being discharged to her own home and a discharge would only be under supervision and to a registered care home. Her only alternative was to remain indefinitely in hospital.

She was discharged on those terms under supervision on 3rd September 1997. It was a requirement of her discharge, and part of her care plan, that she reside at Pine Trees Lodge Residential Home. If she did not keep to the care plan, consideration would be given to assessing her again for admission to hospital.

On 14th July 1998 Harrow required payment in full of outstanding arrears in respect of Pine Trees Lodge. She has not paid any charges, and the outstanding sum was over £21,000 at the beginning of this year. She ceased to be subject to supervision on 20th August 1998, but on the understanding that she would continue to reside at Pine Trees Lodge.

The principal issue

There is no definition of "after care" services in the Act. The Applicants submit that the natural meaning of the words include the provision of residential accommodation.

Mr Lissack QC on behalf of the Respondents concedes that "after care services" can include residential accommodation which is specially designed to care for the needs of persons who have been detained under section 3 and who have left hospital. In my view, he is right to make that concession. In Clunis -v- Camden & Islington Health Authority (1998) 1 CCLR 215, Beldam LJ at page 225G:

"After care services are not defined in the Act. They would normally include social work, support in helping the ex-patient with employment, accommodation or family relationships, the provision of domiciliary services and the use of day centre and residential facilities."

The Respondents further accept that they have no power to charge the Applicants for the provision of residential accommodation in the absence of express statutory authority and acknowledge that no such power is conferred by section 117. They contend that the Applicants' residential accommodation is being provided, not under section 117 but under section 21 of the National Assistance Act 1948 ("the 1948 Act") which (as amended) states:

"21(1) Subject to and in accordance with the provisions of this Part of this Act, a local authority may with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing-

(a) residential accommodation for persons aged 18 or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them.

(2) In making any such arrangements a local authority shall have regard to the welfare of all persons for whom accommodation is provided, and in particular to the need for providing accommodation of different descriptions suited to different description of such persons as are mentioned in the last foregoing subsection.

.....

(8) Nothing in this section shall authorise or require a local authority to make any provision authorised or required to be made (whether by that or by any other authority) by or under any enactment not contained in this Part of this Act or authorised or required to be provided under the National Health Service Act 1977."

The reference to the National Health Service Act 1977 ("the 1977 Act") was inserted by Schedule 9 to the National Health Service and Community Care Act 1990 ("the 1990 Act"). By section 22(1) of the 1948 Act:

"Subject to section 26 of this Act, where a person is provided with accommodation under this Part of this Act the local authority providing the accommodation shall recover from him the amount of the payment which he is liable to make in accordance with the following provisions of this section."

Subject to certain provisos arrangements under section 21 may include arrangements with a voluntary organisation or with other persons (see section 26(1)).

Section 29 of the 1948 Act provides that:

"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 make arrangements for promoting the welfare of persons to whom this section applies, that is to say persons aged 18 or over who are blind, deaf or dumb, or who suffer from mental disorder of any description and other persons aged 18 or over who are substantially and permanently handicapped by illness, injury, or congenital deformity or such other disabilities as may be prescribed by the Minister."

The Respondents argue that section 117 does not impose a freestanding duty to provide after care services, including "caring" residential accommodation. It is a "gateway" section, which imposes a duty to ensure that after care services are provided under such other enactments as may be appropriate. In the case of residential accommodation, the Respondents must ensure that it is provided under section 21 of the 1948 Act. Once accommodation is provided under section 21 then a charge must be made under section 22.

In respect of other aspects of after care, the Respondents must ensure that it is provided under inter alia section 29. They do not impose charges on the Applicants for that element of the after care package.

Whether section 117 itself imposes a duty on the Respondents to provide after care, or whether it merely imposes a duty upon them to ensure that after care is provided under other enactments is a question which is of considerable

practical importance for social services authorities generally.

A consistent approach to section 117 has not been adopted nationwide. It seems that authorities are fairly evenly split between those who charge, taking the view that accommodation is provided under section 21 of the 1948 Act; and those who do not, taking the view that accommodation is provided under section 117. On 28th July 1998, in answer to a Parliamentary question, the responsible minister, Mr Boateng expressed the view that:

"Charges cannot be levied for services, residential or non-residential, which are provided as part of the programme of aftercare for a patient who is entitled to such care under Section 117 of the Act."

A similar approach is implicit in Report Nos 97/0177 and 97/0755 of the Commissioner for Local Administration in Wales (the Local Government Ombudsman).

By contrast, the proposition that section 117 merely reinforces the duty to provide after care which already exists in other legislation is expressed in paragraph 275 of the Department of Health and the Welsh Office's Memorandum on Parts I-VI, VIII and X of the Act, which is published by HMSO. The learned author of the Mental Health Act Manual, 6th Edition 1999 takes issue with Mr Boateng's view in paragraph 1-972 on page 356.

The Respondents point out that the financial implications are considerable. All of the Applicants are in receipt of Residential Care Allowance, which is intended to meet the cost of residential care. If the Applicants' case succeeds, the Respondents will be unable to recover any contribution from them to the cost of their care, so that the Applicants will have received a windfall and the whole cost will have to be met from social services budgets.

In Manchester's case, the cost of not charging for after care accommodation would be in the region of £600,000 per annum, that is a significant amount when compared with an annual budget of £300,000 per annum for all new community care packages in mental health. Other Respondents have described the cut backs which will have to be made if the Applicants' interpretation of section 117 prevails, since funds will have to be provided from finite budgets. There is no reliable estimate of the cost to social service authorities nationwide, but the Respondents estimate that the sum would be significantly in excess of £50m.

They emphasise that charges are calculated in such a manner as to ensure that there is no question of persons in need of residential accommodation as part of their after care being either unable to pay, or being denied accommodation.

Whilst these practical considerations should not be overlooked, the question is one of statutory interpretation. I accept the submissions of Mr Drabble QC (on behalf of the first and second Applicants) and Miss Richards (on behalf

of the third and fourth Applicants) that the starting point must be the language in section 117 itself, considered not in isolation, but within the immediate framework provided by the Act and in the wider context of related legislation.

On the face of it, subsection 117(2) imposes a duty on the health authority and the local social services authority to provide after care services for persons to whom section 117 applies. It does not impose a duty to secure the provision of such services under other powers, no other enactments are mentioned in subsection (2) as a potential source of such power.

After care services may be withdrawn if the health authority and the social services authority agree that they are no longer needed, but they shall not be satisfied of that if a patient is subject to after care under supervision under section 25A.

One of the three grounds in section 25A(4) which must be satisfied when making a supervision application is that there would be a risk to the patient or the public if the patient "were not to receive the after-care services to be provided for him under section 117 below after he leaves hospital." By subsection (6) a supervision application must be addressed to a health authority "which will have the duty under section 117 to provide after-care services for the patient after he leaves hospital." I have read section 25D(1) which deals with the imposition of requirements:

"...for the purpose of securing that the patient receives the after-care services provided for him under section 117."

Similar provisions are to be found in sections 25E, 25F, 25G and 25H. It will be seen that all of these sections have been drafted upon the basis that section 117 does impose a freestanding duty to provide after care services.

Moving from the Act itself to related legislation, the extent of the after care services that is needed in any particular case falling within section 117 has to be determined.

Under section 47(1) of the National Health Service and Community Care Act 1990 ("the 1990 Act"):

"...where it appears to a local authority that any person for whom they may provide or arrange for the provision of 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."

The discretionary element in (b) is converted into a duty by section 117.

For the definition of "community care services" one is referred by section 47(8) to section 46(3) under which:

"'community care services' mean services which a local authority may provide or arrange to be provided under any of the following provisions-
(a) Part III of the National Assistance Act 1948

(b)...
(c)...
(d) section 117 of the Mental Health Act 1983."

If section 117 was merely a "gateway" to the provision of after care under Part III of the 1948 Act, paragraph (d) above would have been otiose.

Section 29(1) of the 1948 Act confers a power upon local authorities, subject to direction by the Secretary of State: they "may" make arrangements for promoting the welfare of those suffering from inter alia mental disorder. Section 2 of the Chronically Sick and Disabled Persons Act 1970 ("the 1970 Act") is an early example of a gateway section in the social services field. It provides:

"2(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... then... [subject to a number of provisos that are not relevant for relevant purposes] it shall be the duty of that authority to make those arrangements in exercise of their functions under the said section 29."

Thus the arrangements are to be made not under section 2, but under section 29.

The Applicants submit that such a model could have been used if the draftsman had intended that section 117 should describe the circumstances in which a duty was to be imposed to provide after care under the 1948 Act. The Respondents submit that this would have been complicated by the fact that the duty is cast not merely on the local authority but jointly on the health authority and the local authority and provision is to be made in cooperation with relevant voluntary agencies.

The Applicants point to the fact that the health authority is not able to charge for its services. Since the duty is jointly cast upon the health authority and the local authority, it is not surprising that neither should be entitled to charge for after care which is provided under section 117.

Notwithstanding the involvement of the health authority, I can see no reason why the drafting of a gateway provision along the lines of section 2 of the 1970 Act would have been beyond the skill of the Parliamentary draftsman. Thus far, there is nothing in the wording of section 117 itself, in the Act, or in related legislation, to indicate that the section does not impose a freestanding duty to provide after care.

It would be surprising if provision could be made under both section 117 and section 21 of the 1948 Act. Section 21 has been described as a "safety net" provision, see paragraph 21 of the Court of Appeal's decision in R -v- Royal

Borough of Kensington and Chelsea ex parte Kujtim, July 1999.

Section 21(1) enables residential accommodation to be provided, "which is not otherwise available" to those in need because of illness. Subsection 21(8) states that the Respondents may not make, under section 21, any provision "authorised or required to be made... by or under any enactment not contained in this part of this Act."
Without benefit of authority, I would have concluded that provision for after care, including residential accommodation where appropriate, is required to be made "by or under" section 117. Since that is an enactment which is not contained in Part III of the 1948 Act, provision of residential accommodation for the Applicants may not be made under section 21.

This conclusion is reinforced by the recent decision of the Court of Appeal in R -v- North East Devon Health Authority v Coughlan and others 16th July. The issue in that appeal was whether nursing care for a critically ill patient could lawfully be provided by the local authority as a social service (and charged for according to the patient's means) or whether it had to be provided free of charge as part of the National Health Service. Having considered the terms of section 21 and, in particular, the terms of subsection (8), the Court of Appeal concluded that certain nursing services could be provided by the local authority as part of social services care. In the Court's view subsection 21(8) provided "the key" to the problem,

"How are the words 'or authorised or required to be provided under' the Health Act to be applied?

28. Each word is significance. The powers of the local authority are not excluded by the existence of a power in the Health Act to provide the service, but they are excluded where the provision is authorised or required to be made under the Health Act. The position is different in the case of 'any other enactment', where it is sufficient if there is an authority or requirement to be made by or under the enactment."

Whilst section 117 was not in issue, and was not specifically referred to by the Court, Miss Richards (who appeared as second junior counsel on behalf of the Applicant in that case) told me that it was referred to during the course of argument as an example of "any other enactment".

Mr Lissack fairly acknowledged that paragraph 28 of Coughlan presented him with some difficulty. He sought to distinguish the Court's decision on the basis that since section 117 was not directly in issue, the final sentence of paragraph 28 was obiter. The court was concerned with whether the correct boundary had been drawn between what is the proper responsibility of the NHS and what is the proper responsibility of local authorities: see for example paragraphs 39 and 40 of the Court's judgment. By contrast section 117 does not define any such boundary.

Although section 117 was not in issue, the Court did have to construe the excluding provisions of section 21(8). The

contrast between the position where provision is authorised or required to be made under the 1977 Act, and by or under "any other enactment", including section 117, was central to the Court's decision. I am therefore satisfied that the approach of the Court to section 21(8) is binding upon me.

Looking at the language of section 117 and 21, the Respondents are under a duty to provide the Applicants with residential accommodation as part of their after care under section 117, and may not provide such accommodation under section 21, and charge for it under section 22.

Having looked at the language, it is sensible to stand back and see if that result gives rise to any anomaly, absurdity or injustice.

Mr Lissack submits that it does. He points out that if provision is to be made under section 117 it is open ended, in the sense that no limit is placed upon what might be included in "after care" services. Most patients admitted to hospital for inpatient psychiatric treatment are admitted informally, without there being any need for the authorities to have recourse to the provisions of the Act. For example, in 1995/1996 less that 10% of patients admitted to NHS psychiatric hospitals were admitted under the Act. Of those who were actually detained, about 35% had been admitted under section 3, as compared with 46% under section 2 for assessment. Smaller percentages came into hospital as emergency admissions or from prisons.

He submits that many of those who were informally admitted to hospital would be as ill as those who are detained under section 3. They will simply be more compliant and willing to accept treatment. It would be unfair if patient A, who was informally admitted to hospital and thereafter left hospital to live in accommodation provided by the local authority under section 21 of the 1948 Act had to pay charges for that accommodation; when patient B occupying the next room, who was in no greater medical need, but had been admitted to hospital under section 3, would not have to pay for his accommodation. There would be an incentive for the patient or his family to have him admitted under section 3 contrary to the policy of the Act.

He pointed out that other after care provision, such as day centres, can be charged for: see Schedule 8 to the 1977 National Health Service Act and section 17 of the Health and Social Services and Social Security Adjudication Act 1993 which enables local authorities to recover such charges, if any, as they consider reasonable for services provided under inter alia section 29 of the 1948 Act and Schedule 8 of the 1977 Act.

The Respondents contend that it would be illogical if there were some after care services for which they must

charge, some for which they may charge and some for which they may not charge. They point to certain guidance, for example, the Charges for Residential Accommodation Guide (CRAG), paragraph 2.006 which indicates that following the repeal of powers to make accommodation available under Schedule 8 to the 1977 Act, all adult residential accommodation placements made by local authorities will be made under the 1948 Act, and charged for accordingly.

I am not persuaded by these arguments, nor it seems are the 50% of local authorities who do not charge for residential accommodation provided as part of a package of after care under section 117. It is true that the duty is open ended, in the sense that there is no list of the after care services that may be provided, but it would seem sensible to confer a considerable degree of discretion upon health authorities and local authorities having to provide "after care" services in situations that are bound to be particularly problematic and demanding. It is not unusual for very broad discretions to be conferred in this field sometimes subject to approval or a direction of the Secretary of State: see for example section 29 of the 1948 Act, and Schedule 8 to the 1977 Act. The precise extent of the duty in any particular case will be defined by the local authority's assessment of a person's needs under section 47(1)(a) of the 1990 Act. Thereafter section 117 will impose not a general duty, but a duty to that individual to meet those needs: see the judgment of Otton J (as he then was) in R -v- Ealing District Health Authority ex parte Fox (1993) 3 All ER 170 at 181. After care provision does not have to continue indefinitely. It must continue until such time as the health authority and the local authority are satisfied that the individual is no longer in need of such services.

It may well be true that many patients who are informally admitted to hospital are as much in need of psychiatric treatment as those who are detained under section 3. But the Code of Practice makes it clear that "compulsory admission powers should only be exercised in the last resort" (paragraph 2.7).

Whilst there will always be individual exceptions, section 117(1) applies subsection (2) to those categories of mentally ill patients who are likely to have been seriously ill: those who have been detained under section 3, those who have been sent to hospital rather than prison by the courts, or those who have been transferred from prison to hospital. I can see no inherent unfairness in such a group being entitled to free accommodation as part of their package of after care in the community.

As is well-known, the underlying policy is that those who are suffering from mental illness should, if at all possible, be cared for within the community and not detained, as they use to be perhaps for many years, in large psychiatric hospitals. This policy background is explained in paragraph 2 of the Joint Health/Social Services Circular "The Care

Programme Approach". Under the heading "Policy Background" paragraph 2 says this:

"The 1975 White Paper, 'Better Services for the Mentally Ill' first set the general policy within which care programmes should be introduced: this general policy has been endorsed by the Government in the 1989 White Paper 'Caring for People'... Locally-based hospital and community health services, coordinated with services provided by social services authorities, voluntary and private sectors, and carers, can provide better care and treatment for many people with a mental illness than traditional specialist psychiatric hospitals.

3 Community based services are only an improvement when the patients who would otherwise have been hospital in-patients get satisfactory health care, and, where appropriate, social care."

If, as part of this programme, patients who would otherwise have been detained in hospital, at considerable cost to the NHS, are accommodated within the community as part of their after care, I can see good reason why the public purse and not the former patient should bear the cost of providing that accommodation. This applies with particular force to those patients who are released from hospital, whether on leave of absence under section 17, on transfer into guardianship under section 19, or on supervised after care under section 25A, and who are required, as a condition of their release to reside in particular accommodation. It would indeed be surprising if such a person could then be required to pay for the accommodation in which he was being compelled to live.

Because of the severity of their illnesses, many of those persons falling within section 117(1) are likely to be wholly or mainly dependent on state benefits. If anomalies are created within the benefits system by the fact that charges may not be made for accommodation provided for them under section 117, then the answer is to amend the benefits under the relevant regulations, for example, to reconsider the amount of the Residential Care Allowance payable to those who must be provided with free accommodation under section 117, and not to depart from the plain words of section 117.

I regard the suggestion that there would be an incentive to arrange matters so that admission to hospital was under section 3, rather than on an informal basis, as somewhat far-fetched. If benefit regulations were amended there would be no financial incentive for the great majority of patients. For those with significant private means there might be such an incentive, but I am not persuaded that any significant number of persons would deliberately choose to behave in such a way as to provoke their detention under section 3 rather than seek informal admission.

Given the very wide range of support that is provided by social services authorities for persons with a very wide range of disabilities, it should come as no surprise that some provision, for after care services under section 117, may not be charged for; some provision may be charged for: see section 17 of the 1983 Act; and some provision must be charged for: see section 22 of the 1948 Act. CRAG does not have the force of an enactment, it is guidance, and the guidance does not refer to the position under section 117.

Lastly, on the principal issue, I turn to

Mr Lissack's submissions under Pepper -v- Hart (1993) AC 593, that I should not speculate as to what Parliament intended to achieve by enacting section 117, but should look at the material in Hansard in 1982. He argues that the ambiguity in section 117, which has led to the division of opinion between the social services authorities, has become apparent as a result of attempts to apply the section in practice: see Lord Mackay's speech at page 614D of Pepper v Hart.

The Applicants opposed Mr Lissack's application. In my view they were right to do so. For the reasons set out above, I do not accept that there is any ambiguity or obscurity in the language of section 117, nor do I accept that the ordinary meaning of the words leads to any absurdity. Even if those conditions had been satisfied, the Parliamentary material placed before me singularly failed to disclose either the mischief aimed at or the legislative intention lying behind the words of section 117: see the speech of Lord Browne-Wilkinson at page 634 D to E. It seems that the clause originated as a backbench amendment in the House of Lords. It was opposed by the government in both the House of Lords and the House of Commons upon the basis that it was unnecessary because it would merely duplicate existing obligations upon on local authorities. Thus the government thought that there was no mischief to be aimed at. It is plain that neither house was persuaded by the government's arguments, but what the mischief was does not emerge with sufficient clarity from the debates for the material in Hansard to be of any assistance for present purposes.

Mr Lissack points out that no money provision was made relating to section 117, indeed the minister in the House of Commons said that it "would not raise legitimate demands for new services".

It would be unsafe to draw any conclusion from that fact alone. The Health and Social Services and Social Security Adjudications Act 1983 introduced a discretionary power to charge for a wide range of social service provision.

It is far from clear to what extent charges were being made in practice in 1982 for the provision of social services even in circumstances where local authorities were entitled, but not obliged, to charge for such services. Moreover, the power to provide accommodation under Schedule 8 of the 1977 Act was not reappealed until 1st April 1993: see paragraph 12 of Circular LAC (93)6. Thus there was power to provide accommodation, as part of the patient's after care, without charge. Since section 117 enjoined joint action between health authorities and local authorities, it is understandable that in the circumstances as they existed in 1982, it was not thought that any money provision would be necessary. In any event, the lack of a money provision could not of itself affect the proper interpretation of section 117.

That disposes of the principal argument; I can deal very briefly with the two subsidiary arguments.

In the case of Mrs Watson, her health was causing concern for some time prior to her detention under section 3 on 11th April 1998. By 1st April it had been decided that she needed residential care. At one stage in these proceedings there was a dispute as to whether her undoubted continuing need for accommodation was due to her underlying mental condition. That is no longer in issue. It is accepted that she needs after care under section 117 because of her dementia. Mr Lissack raises as the question one of principle: what are the local authorities' duties under section 117 towards a person, who because of old age, illness or other circumstances, has been provided with residential accommodation under section 21 of the 1948 Act, then becomes mentally unwell, is detained under section 3 of the Act, is discharged from hospital and returns to his or her former accommodation as part of their after care package.

In answer to that question, I can see no reason why such a person should be in any worse a position than the patient who has not previously been provided with accommodation under section 21. On leaving hospital, the local authority will owe them a duty under section 117. There may be cases where, in due course there will be no need for after care services for the person's mental condition, but he or she will still need social service provision for other needs, for example, physical disability. Such cases will have to be examined individually on their facts, through the assessment process provided for by section 47. In a case such as Mrs Watson's, where the illness is dementia, it is difficult to see how such a situation could arise in practice.

The second subsidiary argument turns on the interrelationship between sections 17 and 19 and section 3, and their combined effect upon section 117. Until May 1999, Mr Armstrong was subject to guardianship. Mr Stennett is still subject to guardianship. There was a period whilst Mr Armstrong was on leave from hospital under section 17.

Dealing first with the position of a patient who is on leave under section 17, I was referred by the Applicants to the observations of McCullough J in R -v- Hallstrom ex parte W (1986) QB 1090, at page 1101F as to the distinction between being "detained" in hospital and being "liable to be detained" in hospital. The Respondents say that McCullough J's approach was rejected by the Court of Appeal in R -v- Barking, Havering and Brentwood Community Healthcare NHS Trust (1999) 1 FLR 106, see per Lord Woolf MR 112D - 114F. The effect of the latter decision is that one should not place undue emphasis on the distinction between the words "detained" or "liable to be detained" in the Act. There may be cases where the draftsman uses "liable to be detained" when he means "detained".

I have not found these two authorities of any real assistance in interpreting section 117. In my view, this section is

dealing with a practical problem: what after care is to be provided for a patient who has suffered from mental illness requiring inpatient treatment when he actually leaves hospital? A person on leave under section 17 is in just as much, if not more, need of care when he leaves hospital as a person who leaves hospital subject to guardianship or supervision. For the purposes of section 117, he has ceased to be detained, and left hospital. It would be remarkable if, in such circumstances there was no duty to provide him with after care under section 117, even though it would almost certainly have been a condition of his being given leave that he should reside in particular accommodation. This conclusion accords with the guidance that is set out in the Code, which I have already read.

Turning to guardianship under section 19. The Respondents point to the terms of section 19(2) which are as follows:

"Where a patient is transferred in pursuance of regulations under this section, the provisions of this Part of this Act (including the subsection) shall apply to him as follows, that is to say-
(a) in the case of a patient who is liable to be detained in a hospital by virtue of an application for admission for assessment or for treatment and is transferred to another hospital, as if the application were an application for admission to that other hospital and as if the patient had been admitted to that other hospital at the time when he was originally admitted in pursuance of the application;

(b) in the case of a patient who is liable to be detained in a hospital by virtue of such an application and is transferred into guardianship, as if the application were a guardianship application duly accepted at the said time;"

The "said time" is clearly a reference to the time when the patient was originally admitted for assessment or treatment. Thus, Mr Armstrong and Mr Stennett are deemed, say the Respondents, by virtue of section 19(2)(b) never to have been admitted to hospital under section 3, but to have been under guardianship from the outset, therefore they do not fall within the terms of section 117(1).

It is only fair to say that the Respondents advanced this argument with some diffidence, because they acknowledged, as responsible social services authorities, that it would be most unfortunate if those who were transferred from section 3 detention in hospital to guardianship were not entitled to after care services under section 117.

I agree with the Applicants that on a proper construction of subsection (2) this unfortunate consequence does not arise. Subsection (2) does not say "the provisions of this Act (which would have included section 117) shall apply", but "the provisions of this Part (that is to say Part 2, which does not contain section 117) shall apply."

Moreover the legislative purpose is clear. From the patient's point of view subsection (2) ensures that the time limits for review of either detention under section 3 or guardianship are not extended merely because he has been transferred under section 19. From the hospital's point of view various procedures for admission including, for example, the

obtaining of reports from two doctors, do not have to be commenced afresh, merely because the patient has been transferred.

On its face, section 19(2) has no effect for the purposes of section 117, this view is reinforced when one has regard to its underlying purpose.

For these reasons, I conclude that all four Applicants fall within the terms of section 117(1). Their accommodation must be provided by the Respondents under section 117(2) and not under section 21 of the 1948 Act. It follows that the Respondents are not entitled to charge the Applicants for their accommodation.

MR DRABBLE: I do not know if this is a case in which formal relief is necessary? The relief we have sought, in both the case of Mrs Watson and Mr Armstrong's, is first of all a declaration that the Respondents has no power to charge the Applicant for her accommodation and the relevant order of certiorari aimed at the decision. I ask your Lordship at this stage to make those orders.

MR JUSTICE SULLIVAN: My instinct, Mr Drabble, is that certiorari is not necessary, because it is not one of those decisions which is final for all time unless it is quashed. I have no reason to believe that these authorities, as responsible social service authorities, will not proceed to act in accordance with the law as it is declared in this judgment. I would have thought that simply a declaration in terms of judgment would suffice, unless either you or Miss Richards feel very strongly to the contrary.

MR DRABBLE: I am entirely happy with that. My Lord, we did also seek an order requiring the Respondents to repay the sums paid. I understand there is no objection to that in principle, unless my learned friend has any further consequential applications he wishes to make and wishes to say something about that part of the case.

MR JUSTICE SULLIVAN: An order of that kind may raise interesting arguments, but I am bound to say I would rather declare the law at this stage -- particularly at 3.55 p.m. this afternoon, and leave the parties to resolve, amongst themselves, the implications for repayment. I would be quite happy to give liberty to apply.

MR DRABBLE: That is what I was going to ask for.

MR JUSTICE SULLIVAN: That is the better course, because I can see that that issue could raise interesting arguments. Would that be a course, Miss Richards, that you would think sensible?

MISS RICHARDS: I think liberty to apply would be very sensible.

MR JUSTICE SULLIVAN: What do you say, Mr Lissack?

MR LISSACK: My Lord, in the case of Mrs Watson and Mr Stennett, both authorities agreed in open correspondence to repay it, so the judgment went against them anyway. In the case of Harrow, nothing has been taken, obviously. In the case of Redcar, we are very happy with that.

MR JUSTICE SULLIVAN: I think the proper order is a declaration in the terms of the judgment and liberty to apply.

MR DRABBLE: My Lord, we ask for costs and legal aid taxation.

MISS RICHARDS: I incur with that request.

MR JUSTICE SULLIVAN: Can you resist that?

MR LISSACK: Yes, as to one part. In the case of Manchester only (Mr Stennett) application was made for leave to join the already extant proceedings in Mr Stennett's case. On that application, the costs of the application were reserved to this hearing.

We opposed the Manchester case being joined on the basis that it raised no new issue. It added nothing to your Lordship's judgment that it would not have had in any event. It has raised no new point and, in our submission, it would be quite wrong to make Manchester pay the costs of Mr Stennett in the circumstances. I realise for him, fortunately, the matter is perhaps academic. In our submission, it would be wrong to burden further this authority with paying those costs. On costs that is all I have to say.

MISS RICHARDS: My Lord, in relation to that, the application for leave and to have the Manchester case conjoined with the other cases was made before Owen J on notice to the Respondents. The Respondents choose not to attend. Leave was granted and Owen J directed that the cases be heard together.

The Respondents then made a subsequent application to Ognall J to say that leave should be set aside and that the listing order should be undone. They failed. Ognall J said he would not set aside leave and would not alter the direction made by Owen J to have the matters listed together. They are effectively seeking to do now what they failed to do on two previous occasions before this Court.

MR JUSTICE SULLIVAN: There is a factual point as well. Mr Stennett is still subject to guardianship, unlike Mr Armstrong whose guardianship has ceased, and had ceased for some time.

MISS RICHARDS: My Lord, it was certainly felt on this side that it would be important for your Lordship to see as many different ranges of factual situations, the kind of person who suffered, the kind of severity and range of risk that this poses.

MR JUSTICE SULLIVAN: Thank you very much. Do you want to add anything, Mr Lissack?

MR LISSACK: My Lord, there is a point of information as a footnote to this entirely unsuccessful afternoon. May I say that in the application before Ognall J, in which I did not appear but Miss Willmot did appear, what was said on behalf of Manchester was, there would be an additional discrete argument raised in Mr Stennett's case concerning legitimate expectation because of the change in policy that took place. That must have borne on Ognall J's mind as to whether or not it was necessary to add Manchester in to an already complicated litigation. My Lord, that is all I have to say.

MR JUSTICE SULLIVAN: Thank you very much. I am sorry,
Mr Lissack, I am not going to be able to improve the afternoon for you. In my judgment, it is right that all the Applicants should have their costs and legal aid taxation. If I could just explain Mr Stennett's case. I considered that it was right that his case should be joined, as Miss Richards says was right, in considering this important issue. The Court should have as wide a range of cases as possible, and I note that Mr Lissack found it helpful to refer to the background information which was produced by Manchester to illuminate the point from the Respondents' points of view. So, in my judgment, it was a proper course to join all four of these cases together to give the court a feel for the problem.

MR LISSACK: My Lord, May I just make one or two observations and then I have one application to make to your Lordship. The first is that I thank your Lordship, I am sure on behalf of all that I appear for and all other parties interested in this case, for producing in such a short time such a full judgment. I am very grateful to you for that. It will permit the early consideration of this matter, which is of national significance, to take place in full.

Your Lordship also understands, as you remarked upon it during argument, when perhaps less people were in attendance than are now, so I underline it, my Lord. Your Lordship well understood why the four authorities, who have brought this matter, as it were, have caused this matter to be brought to courts. It is a matter of concern. It was not a

piece of adversarial litigation that was ever sought and they would all wish me to underline, in the presence of the number of people who are now listening to what I say, that there was never any question whatsoever of any one of these Applicants being deprived of any individual service.

MR JUSTICE SULLIVAN: I hope you will accept that it is no criticism of the conduct of the authorities in my judgment. They made it perfectly clear that they viewed this matter as a issue of principle.

MR LISSACK: My Lord, your Lordship commented upon the consequences of being secondary or subsidiary (my words not your Lordship's) of course, to the issue of construction. Of course, whilst there is no doubt that it is entirely right from the Court's point of view, your Lordship will not be surprised to learn that those for whom we appear are deeply concerned by the practical consequences that now flow from your Lordship's judgment.

The annual figure of not less than £50m, let alone the roll-back provisions that may follow by way of repayment, have a potential catastrophe on local authority budgets in half the country who are affected. There are, therefore, for us, three options none of which affect the Applicants immediately and personally in any event. First is to leave things where they now lie. My Lord, that is on the affidavit evidence before you. It is not possible, in that money is not in the kitty to pay.

The second matter is as to appeal, to that I will revert in a moment. The third is, to raise the issue of central government outside these proceedings. The third has an appeal which I need not underline.

My Lord, it may well be that two will have to be followed, at least, for a short time in tandem. In that context, I have an application for leave to appeal. I am looking at Volume 1 page 1018, Ord 59 r 1B.

MR JUSTICE SULLIVAN: What is the page number?

MR LISSACK: Page 1018. Ord 59 r 1B(c) this is a case where I need either your Lordship's leave----

MR JUSTICE SULLIVAN: You need leave. You do not need to persuade me that you need leave.

MR LISSACK: May I have it, please.

MR JUSTICE SULLIVAN: Yes. We should address, should we not, the new test set out by the Court of Appeal for the grant of leave, and one of the questions I have to ask myself is, can I say that the propositions that you would seek to argue are simply not arguable? If anyone has the practice direction of the Master of the Rolls I can use the correct phraseology. Another factor I have to take into account is the importance of the issue. As to the latter, I think no one could be in any doubt. It is really just a question of whether I can say, I am satisfied that this is not arguable. That seems to be the test.

MR LISSACK: Your Lordship I am sure will detect again, as your Lordship rightly did from the manner in which I put the third submission, that what I say now carries a message that, in order to be able to appeal at any stage, we must fail here in the application. Your Lordship has heard the arguments, considered them in full and there is nothing that I propose to add at this stage.

MR JUSTICE SULLIVAN: Thank you. Mr Drabble do you want to say anything about leave? Is it possible that either yourself or Miss Richards has the text of the Practice Direction.

MR DRABBLE: I am afraid we do not have a copy. I oppose in very short terms the grant of leave. We say that this was and always is an issue of statutory reconstruction and, on the issue of statutory construction, no real alternative reading of the words has been put forward. There have been a lot of policy considerations, but they do not, in themselves, found an argument as to an alternative reading of section 117.

MR JUSTICE SULLIVAN: Yes, thank you. Anything you want to add Miss Richards?

MISS RICHARDS: I agree with Mr Drabble in relation to that.

MR JUSTICE SULLIVAN: I now have a copy of the Practice Direction. Paragraph 2.8 of the Practice Direction [1999] 1 WLR 1027 at 1033:

"2.8 The general rule... in deciding whether to grant permission, is that permission will be given unless an appeal would have no real prospect of success. A fanciful prospect is insufficient. Permission may also be given in exceptional circumstances even though the case has no real prospect of success if there is an issue which, in the public interest, should be examined by the Court of Appeal. Examples are where a case raises questions of great public interest or questions of general policy, or where authority binding on the Court of Appeal may call for reconsideration."

Mr Lissack, I can improve your afternoon to this extent: in my judgment, if one simply had to look at whether there was a real prospect of success, I could say that in the light of my judgment, there is no real prospect of success.

In my view, there is an issue here which, in the public interest, should be examined by the Court of Appeal because it does raise a question of very considerable public interest and a question of general policy. It is upon that basis that I think I am not entitled to refuse you leave. Therefore, I grant you leave.

MR LISSACK: Thank you very much indeed, my Lord.

MR JUSTICE SULLIVAN: I hope that does not sound too churlish, it was not intended to, it is merely because I have to set out my reasons for granting leave.

MR LISSACK: It does not sound churlish at all. Whether it was the best answer in all the circumstances for those whom I represent is another matter.

MR JUSTICE SULLIVAN: That is something they will have to consider.

MR LISSACK: Thank you.

MR JUSTICE SULLIVAN: Is there anything else? Thank you all very much.