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2011 was a turbulent year in terms of social care legal and policy developments. In *R (W) v. Birmingham CC* (2011) and again in *R (JM) v Isle of Wight* (2011) the Courts struck down attempts by councils to 'up' their **eligibility criteria** to 'critical only'. However, the Courts have been more accommodating when the move only involved abandonment of the 'moderate' band - as was the case in *R (JG) v. Lancashire County Council* (2011).

Tightened eligibility criteria have often been accompanied by increased home care charges and in a wide ranging report concerning Northamptonshire, the Ombudsman found **maladministration** in relation to a number of aspects of its revised **charging** regime.

Several legal challenges

have concerned the requirements of the '**public sector equality duty**' in the Equality Act 2010. Curiously the Act has attracted little formal attention by some councils, despite it repealing the Race, Sex and Disability Discrimination Acts.

Concern about the implementation of the **Mental Capacity Act 2005** continues. A recent maladministration finding by the Ombudsman illustrates a practice difficulty, when a capacity assessment arises in the context of a safeguarding issue. In this case the council denied a daughter access to her mother in a care home whilst undertaking the assessment — which the Ombudsman found to be mistaken.

Community Care and the Law

Luke Clements and Pauline Thompson

With
Carolyn Goodall
Jean Gould
Edward Mitchell
Camilla Parker
Alison Pickup



Fifth edition

LAG

2012 will see key judgments concerning the implementation of the **personalisation** programme, including a Supreme Court decision on computerised **Resource Allocation Schemes** in *R (KM) v Cambridgeshire CC*.

NHS Continuing Healthcare funding

The cumulative impact on older people can be profoundly depressing and stressful: tears, frustration, expressions of a desire to die and feelings of being stripped of self-worth and dignity ...

Equality & Human Rights Commission (2011)
Close to home: An inquiry into older people & human rights in home care

Significant variations in the application of the NHS Continuing Healthcare criteria continue. In the *Secretary of State for Work and Pensions v. Slavin* (2011) the Court of Appeal has helped clarify responsibility for one contested patient group – namely people with learning difficulties.

The case concerned a resident with a severe learning disability who lived in a residential care home. His challenging behaviour meant that he needed to be continuously

supervised by at least one, and sometimes two care staff. The staff had the skills to meet his needs, but lacked nursing qualifications.

The Court held that a learning disability of this nature fell within the definition of 'illness' in the NHS Acts and that 'his healthcare needs qualify him for an NHS-funded residential placement at a care home where he is provided with the specialist care he requires by reason of his illness'.

A particular problem with

the new NHS Continuing Care assessment procedures arises from the lamentable 'Decision Support Tool' prepared by the Department of Health / Welsh Government. Key to the application of this 'tool' is an appreciation that it is not a decision 'making' tool – but merely a 'support' tool. Most importantly, the Decision Support Tool must not be used in a way that conflicts with the Court of Appeal's 1999 *Coughlan* judgment.

s117 services and ordinary residence

In the United Kingdom we do not oblige people who can control their bodily functions to behave as if they cannot do so, unless they themselves find this the more convenient course. We are, I still believe, a civilised society. I would have allowed this appeal.

Lady Hale
dissenting opinion in
R (McDonald) v Royal Borough of Kensington & Chelsea (2011)

The judgment in *R (M) v (Hammersmith & Fulham LBC) v Hertfordshire CC* (2011) is likely to cause severe problems for some local authorities, until (as appears likely) the law is amended.

The councils at most risk are those whose area includes a concentration of care homes and a psychiatric unit.

The case concerned a resident in an 'out of county' placement. Such residents, although living in one council area, are generally deemed to be 'ordinarily resident' in the area of the funding authority.

The Court of Appeal held that this all changes if the resident is subsequently de-

tained under section 3 of the Mental Health Act 1983 (or detained under one of the Act's criminal provisions). Once a resident is sectioned, then the responsible authority becomes the one in which he or she was actually living when detained.

In the follow up judgment of *R (Sunderland City Council) v. South Tyneside Council* (2011) the Court has held that this new interpretation may not apply where the patient's residence in a local authority area was as a result of a short-term placement.

The Health and Social Care Bill, clause 37, proposes the transfer to Clinical Commis-

sioning Groups of the NHS's duty to provide s117 after-care and amends s117 to enable these CCG's or social services to terminate after-care (ie to take away the requirement that this be a joint decision).

As currently drafted, the Health and Social Care Bill will also restrict the power of the CCG's – to the commissioning of health services as part of after-care under section 117. This is a radical departure – since at present (as with NHS Continuing Healthcare) the NHS can have responsibility under s117 for all of a person's health and social care needs.

Carers' diminishing support

The latest English Community Care Statistics show a 3% fall in the number of carers being assessed by local authorities and a 9% fall in the number receiving a carer specific service. The Statistics also show a 7% decline in the number of disabled and elderly people receiving support from social services (now down to 1.57 million people): a figure that has been declining for the last 10 years, despite the increase in the number of older people and disabled people needing support.

The statistics suggest that it is carers who are experiencing the full impact of the service reductions (that result from harsher eligibility criteria). The fact that at the

same time their carer specific support services are being cut represents a double bind.

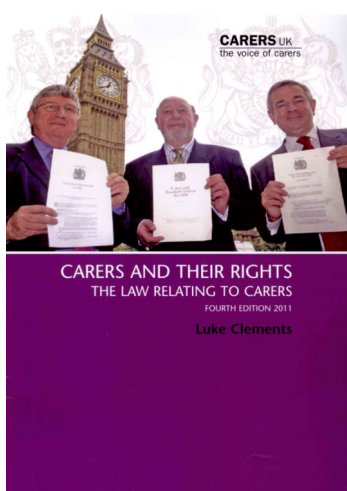
Unfortunately this bleak picture has been compounded by evidence that NHS expenditure on carers has also fallen. Research by the Princess Royal Trust showed that in 2011 spending on carers by PCTs fell by £2.4m despite receiving an extra £400m over four years to provide support for carers: the money was not, however ring-fenced.

Further evidence of the disproportionate impact being experienced by carers comes from a 2011 research report by Carers UK that found almost half of all carers were being made ill by

money worries.

On a more positive note, in Wales the commencement of the Carers Strategies (Wales) Measure 2010 obliges the NHS and local authorities to work jointly to prepare, publish and implement joint strategies relating to carers (primarily in relation to information and advice). The Measure derives from a similar initiative in the Community Care and Health (Scotland) Act 2002.

There are no plans for further carer specific legislation in England and (absent a Private Members Bill) developments of this kind will have to await the implementation of the Law Commission's recommendations for the reform of Adult Social Care Law.



Carers and the Law
4th edition (2010)
Clements, L at
www.lukecléments.co.uk/publications/

Adult Care and Law Reform

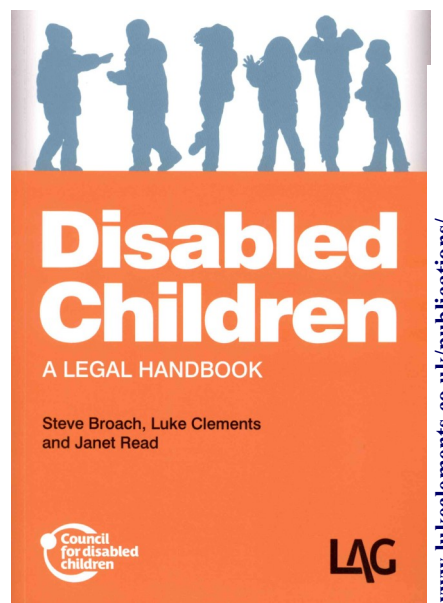
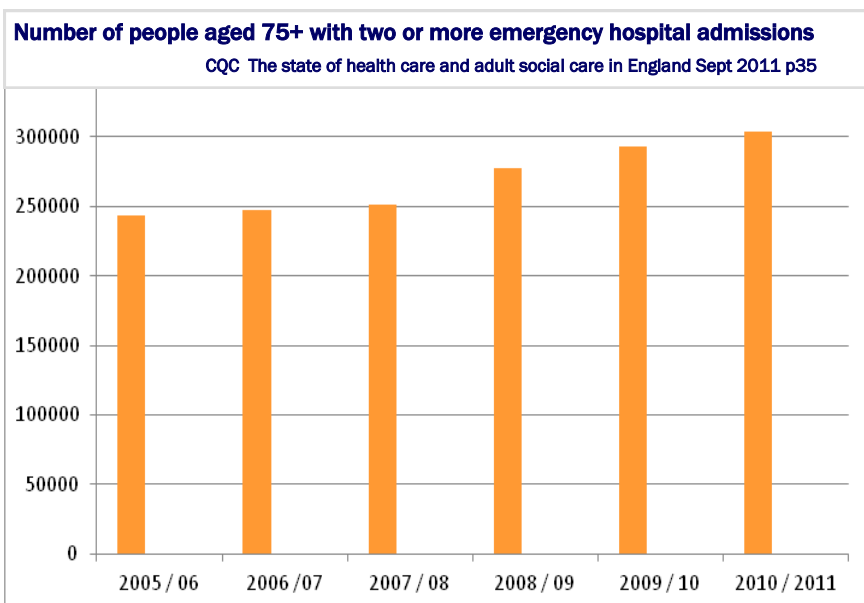
In the face of a relentless stream of depressing reports concerning the state of adult care, the timetable for the reform of Adult Care Law appears to be slipping.

2011 commenced with the NHS Ombudsman in England and the Older Person's Commissioner in Wales expressing severe concerns about the quality of care support services. It ended in the same vein with damning reports by the Equality and Human Rights Commis-

sion ('*Close to home*'), the Patients Association ('*16 shameful stories*'), and the Care Quality Commission concerning 'alarming' levels of care. What all the reports reveal is a wide difference in performance among local authorities and NHS bodies and what the reports all avoid is mention of the chronic underfunding of adult social care.

Proposals for root and branch reform of Adult Care Law are still on the agenda – but look to be stalling.

It seems reasonably clear that separate legislation will emerge in England and Wales – marking a further separation between the social care regimes in these two nations. England looks set to pursue a personalised / privatised 'choice agenda' (with greater rhetorical integration between health and social care) whereas Wales (like Scotland and Northern Ireland) looks to be putting greater emphasis on the quality of the service.



Care Home fees

The historic disinclination of courts to get involved in disputes about what care providers should be paid by local authorities – seems to be over. In a series of surprising decisions the High Court has ruled in favour of the disgruntled care providers.

In *Forest Care Homes Ltd v Pembrokeshire CC* (2010) the Court held that a rigid imposition of a fee limit for care home placements imposed by the council was unlawful, since it had failed to comply with the relevant Welsh Assembly Guidance.

As a result of the judgment the council revised its payment rates – purportedly in line with the Welsh Assembly guidance. However in doing the calculation it halved one of the key multipliers (the 'appropriate rate of return') based on its view concerning a fall in market values.

The Court in *R (Mavalon Care Ltd) v Pembrokeshire CC* (2011) held this to have been unlawful.

The *Forest Care Homes* decision was followed in *R (Sefton Care Association) v Sefton Council* (2011) where the Court had regard to the relevant English

guidance which it considered did 'not contemplate that there will be any significant imbalance between the usual cost of care and the actual cost' and that in the setting of fees a council had to take into account the providers 'legitimate, current and future costs'.

The Court considered that in fixing the fees Sefton had failed adequately to investigate or address the actual costs and the dangers that might flow from a failure to up-rate fees and ruled that this required 'meaningful consultation and an adequate risk assessment'.

Training courses

Luke Clements Training provides training and consultancy in all areas of adult care (health and social services) and the law relating to disabled children and their carers. Standard courses include:

- Community Care Law
- Community Care Law updates
- Carers Rights and the Law
- Equality Law and Human Rights in Social care
- Mental Capacity, Decision Making and the Law
- Deprivation of Liberty Safeguards & Mental Capacity
- Direct Payments, Personal Budgets and the Law
- Personalisation and the modernisation of Adult Care Law
- Disabled Children, the Law and Good Practice;
- NHS Continuing Care Responsibilities
- Ordinary Residence and the Law
- Safeguarding and Adult Social Care
- Young Carers and the Law

In relation to specialist **Mental Health Law training**, the partnership arranges training in conjunction with Edge Training Ltd, London.

General Terms

The daily training fee for a single speaker is £1,000.00 plus travel, and where necessary overnight accommodation.

For voluntary sector training (where the participants are from the voluntary or charitable sectors) the fee for a single speaker is £750.00 plus travel, and where necessary overnight accommodation.

We supply a top set of notes, consisting of a programme and a set of detailed notes. The local organiser is responsible for copying and distributing the notes/ programme and any register / appraisal sheets etc.

The (non-voluntary sector) fee is based upon a maximum class size of 60. For class sizes in excess of 60 an individual quote can be provided. In general there is no audience size limit for voluntary sector events.

**Luke Clements Training is a socio-legal training partnership
Partnership
Luke Clements and Mo Burns**

For details of training fees, terms and availability,
Contact Mo Burns at:
Luke Clements Training, 7 Nelson Street, Hereford, HR1 2NZ
Tel: 01432 343430
Mobile 07802 414 612
Email: lukeclementstraining@yahoo.com

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Forthcoming Conferences

October 12th 2012
Mental Health & Mental Capacity Law
Royal Northern College of Music
Manchester

Other pending Conferences

- Independent Living and Poverty
- The Children Act & Disabled Children
- The Law & 'Consent'

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