

Newsletter

Luke Clements Training: socio-legal training

Legal and social policy developments

Key practice

Assessments

The interplay between the eligibility criteria for carers and adults in need

NHS Continuing Care

The importance of the case law and the Framework guidance when determining eligibility

Transition

The new law concerning the duty to assess those likely to have needs under the Care Act and the power to continue Children Act support.

Mental Capacity Law

The relationship between the MCA 2005 and the Care Act and between 'best interests' assessments and 'needs' assessments.

Despite decades of deinstitutionalisation and the significant increase in the numbers of older people, the steady decrease in the support provided by social services continues. The most recent statistics show that between 2008-09 and 2013-14 the number of people getting support from councils in England fell from 1,782,000 to 1,273,000.

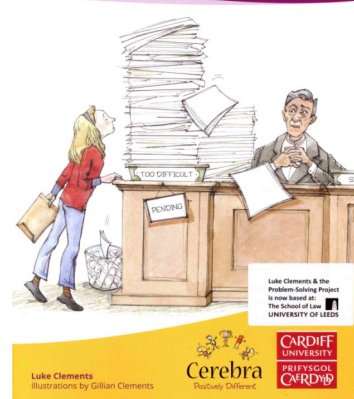
The recently published revised Statutory Guidance to the Care Act has much to recommend it, although some areas would benefit from greater coverage – eg the 'ordinary residence' rule. The Guidance also remains weak in relation to 'Safeguarding' This failing is all the more troubling given that a LGA report indicates that safeguarding enquiries have doubled since the Act came into force (100,000 in

the first six months). Sooner or later an English Government will have to grasp this particular nettle and enact specific legislation – as Scotland has already done with its Adult Support and Protection Act 2007.

The revised guidance is only available as separate web based chapters (which will be subject to *ad hoc* changes). This is troubling, both in 'rule of law' terms and also in practical terms (a full PDF version is a much more useful document for practitioners). Fortunately, Ferret Information Systems has put together an accessible PDF of the guidance – see <http://bit.ly/1M4e4Uk>.

Two valuable Ombudsmen 'Focus Reports' deserve mention as they highlight endemic problems: (1) 'Counting the cost of care' identifies the du-

Problem-Solving Toolkit



ties on councils to inform people about their care home choices and describes when a 'topping up arrangement' is unlawful; and (2) 'Making a house a home' provides guidance on Disabled Facilities Grants – an area where some up to date government guidance would be particularly welcome.

NHS Continuing Healthcare (NHS CC) and 'nursing'

I observed at the outset of the hearing that [for the Government] to describe a household where care was being provided for at least 35 hours a week as 'workless' was somewhat offensive.

Collins J in *Hurley v. Secretary of State for Work and Pensions* [2015] EWHC 3382 (Admin)

Eligibility for NHS CC funding occurs when the level of a person's nursing needs is above the limits of what social services can provide. NHS CC is a contested subject and a short YouTube introduction to this is available at www.lukeclements.co.uk/lecture-series/.

A not infrequent problem concerns what is meant by 'nursing' – with the NHS suggesting that an activity is not 'nursing' if it does not need to be done by a registered nurse.

This is a misunderstanding – not least because the Court of Appeal and the English and Welsh Guidance have made it clear that 'who is doing' the nursing is irrelevant.

The misunderstanding is due to grammar. The court in the leading case (*Coughlan*) did not use the verb 'to nurse' to mean 'something done by a nurse'. The OED definition of the verb has 21 meanings but only two use the noun 'nurse'. Nursing—in effect—means 'looking after an ill person'.

In the last 30 years the NHS has moved all but the most acutely ill people into the community. Welcome as this is, it has not been accompanied by a corresponding transfer of NHS personnel into community settings. Accordingly very many 'carers' are doing tasks which in previous times would have been done in hospital: these tasks are 'nursing' it matters not who is doing them. Something endorsed by the English and Welsh NHS CC Frameworks.

Carers and 'necessary care'

... this assessment was service-driven; it seems to me to have the feel of one which was carried out to justify a conclusion which had already been reached – that Mrs C needed to be admitted to a care home – rather than one which genuinely sought to establish her needs and devise a care plan to meet them.

Public Services Ombudsman
for Wales Report: Conwy,
Gwynedd & the CSSIW
April 2016 para 30

For disabled, elderly and ill people, the Care Act is essentially a reform Act that tidies up the law. It is in relation to carers that the Act is potentially transformative: removing the requirement that they provide 'substantial care' and creating a duty to meet their eligible needs.

The duty to meet their needs applies even if the person for whom they care is not eligible and can require the authority to meet the carers needs by providing services for that 'ineligible person' (eg respite care). The implications of this are potentially dramatic.

The regulations stipulate

that it is only 'necessary care' provided by a carer that is eligible for support. Some authorities are interpreting this as 'care necessary to meet an adult's eligible needs'. This is questionable on many grounds. For example a person visiting her elderly parent in a dementia care home does this because she 'cares'. Could this be described as 'necessary care' if (for example) the parent no longer knows who she is? When she visits she sometimes notices bruises – for which she requires an explanation—and she also observes the general behaviour of staff and the fabric of the

home: all of which is objectively 'necessary'. It does not address one of the resident's 'eligible needs' since 'keeping safe' is not a specified outcome in the eligibility regulations. It is unlikely that a court or ombudsman would hold that such visits were not 'necessary'.

It is possible that the carer's need in such a case could result in the local authority helping them with their travel costs – especially if the trip to the care home involves a long journey. In *Hurley v. DWP* (2015) the Government stated (at para 25) that support for carers could include such travel costs.

Young carers, parent carers and transition

The 2015 reforms affecting young carers, parent carers and disabled children 'in transition' are constructive and much needed.

Young carers

Young carers emerge as the group that has gained most in terms of rights and recognition. Prior to the reforms they were not mentioned in any Act: authorities frequently argued that they had no right to a separate 'needs' assessment and they were often overlooked by adult social services departments.

Young carers are now named as a discrete category in the Children Act (s17ZA) (and the Welsh legislation); there is a mandatory duty to assess all young carers and in England there is now a set of very prescriptive regulations spelling out how these assessments should be under-

taken. There is also a strategic duty to identify all young carers in a local authority area. The Care Act guidance identifies young carers as a specific group for whom the new 'preventative duty' must be targeted. Since about 70% of young carers are caring for an adult, it will generally be the adult team that has primary responsibility for identifying and ensuring that their needs are assessed.

Parent carers

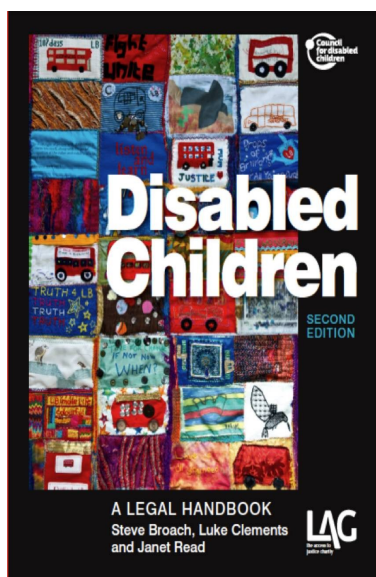
In similar terms, parent carers (ie adults caring for a disabled child) are now named as a discrete category in the Children Act (s17ZD) (and the Welsh legislation); there is a mandatory duty to assess all parent carers and in so doing, to have regard to the wellbeing duty – including their right to work, to participate in education, and

leisure activities. There is additionally a strategic duty to identify all parent carers.

Transition assessments

The Care Act places a duty on the adult social services team to assess disabled children (and young carers / parent carers) who are likely to have needs when they fall under the Care Act regime, and where it is of significant benefit that they be assessed.

For many disabled children and young carers this may well be when they reach 16. The assessment gives advance notice of the support they will receive under the Care Act. There is also an innovative legal mechanism that allows Children Act support to continue after the young person reaches 18—allowing for the switch to Care Act support to occur at the most appropriate time.



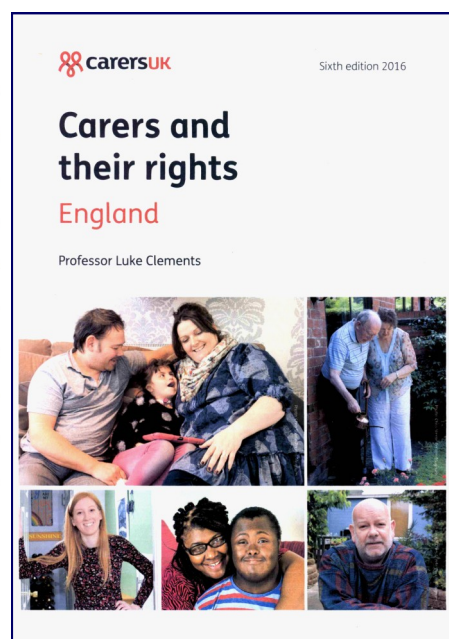
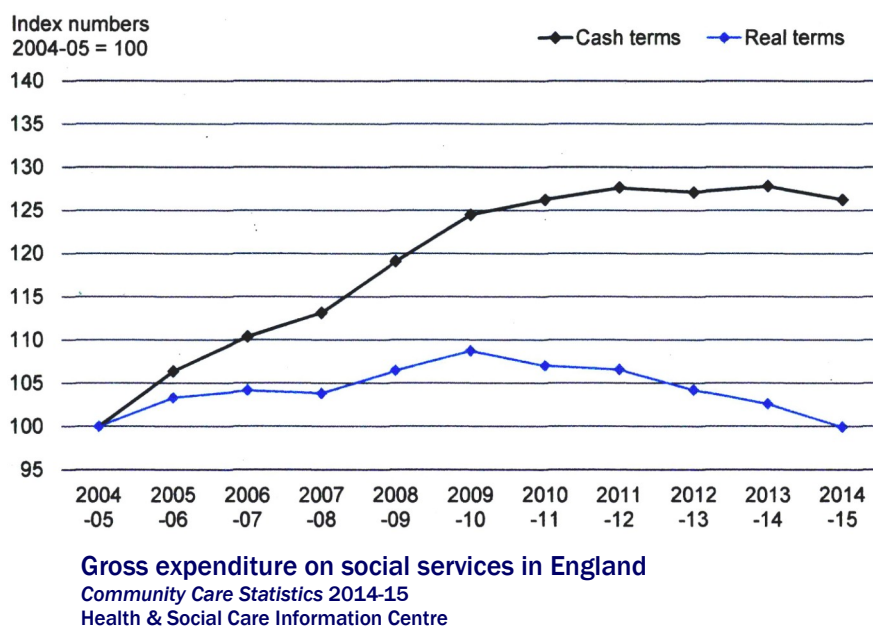
Section 117 Mental Health Act 1983

The nature and extent of s117 support continues to bewilder – primarily because slightly different rules apply to s117 services to those under the Care Act. These differences impact on decisions concerning ‘ordinary residence’, NHS Continuing Healthcare support and charging.

Many patients receiving s117 support will have a dual diagnosis and so may have a support package under both s117 and the Care Act/ Social Services and Well-being (Wales) Act 2014. The former will be free whereas the latter

will be means tested. The ordinary residence rules under both Acts differ so there may be two different councils assessing and care managing. A person eligible for NHS Continuing Healthcare funding will have all their health and social care needs met by the NHS but if they are then detained under the MHA 1983 for treatment – they will become the joint responsibility of the NHS and social services. What exactly does ‘joint’ mean at law? Although the wicked detail of the law is explained in a chapter devoted to s117 in the forth-

coming 6th edition of Community Care & the Law – in practice the approach must be based on good practice. Artificially breaking care plans into Care Act plans and s117 plans is unlikely to be cost effective (let alone conducive to the ‘wellbeing duty’) and agreement on a pooled budget to fund those who are subject to s117 aftercare as well as those that might also have been eligible for NHS Continuing Care funding (had they not been detained under the 1983 Act for treatment) would also appear to be the overwhelmingly sensible option.



Mental capacity and DoLS

A key Mental Capacity Act 2005 question is to be considered by the Supreme Court in December 2016. The case (*Re MN*) concerns the extent to which the Court of Protection can require a local authority to provide an alternative care plan – for example, support to enable the person to live at home.

The current legal position is that the court can only choose between the available options, so if a local authority is only offering a care home placement,

there is little the court can do.

The case of *North Yorks CC v. MAG* (2015) is a stark example of this policy. MAG was a young man with serious mental and physical impairments. He was under one-to-one care because of behavioural difficulties and fell therefore under the 2005 Act's Deprivation of Liberty Safeguards (DoLS) regime.

It was accepted that for several reasons he was (and had been for 10 years) living in an unsuitable placement. One reason for this was that its main passage

was not wide enough for his wheelchair and so he had to move by pulling himself around on his bottom and using his hands and knees - resulting in him sustaining painful bursitis in both knees and calluses to his knees and ankles.

Although the first judge refused to sanction the detention (due to the unsuitability of the care placement) this judgment was overturned on appeal on the basis that she had no power to require the local authority to provide any other care.

Training courses

Luke Clements Training provides training and consultancy in all areas of health and social care services for adults 'in need', carers and disabled children. Standard courses include:

- The Care Act 2014;
- The Social Services & Well-being (Wales) Act 2014;
- Social Care Legal and Policy Update;
- Carers Rights;
- Mental Capacity, Decision Making and the Law;
- Direct Payments, Personal Budgets and the Law;
- Disabled Children, the Law and Good Practice;
- Equality Law and Human Rights in Social Care;
- NHS Continuing Care Responsibilities;
- Ordinary Residence and the Law;
- Problem Solving in Social Care.



Luke Clements is the Cerebra Professor of Law and Social Justice at the School of Law, Leeds University.

The School of Law & the Centre for Disability Studies at Leeds offer a wide range of postgraduate study and research programmes.

Details at
www.law.leeds.ac.uk/postgraduates/

New resource materials

The National Charity **Cerebra** has published an innovative **Problem Solving Toolkit** written by Luke Clements with precedent letters and advice on dealing with commonly encountered problems

Cerebra and Luke Clements are collaborating on a new website 'www.difficultbox.com' which aims to provide a link to the many guides that exist concerning social care, education and health care rights in the UK's four nations. The site is still under construction but please visit it and give feedback on how you think it should develop.

Regular updating briefings

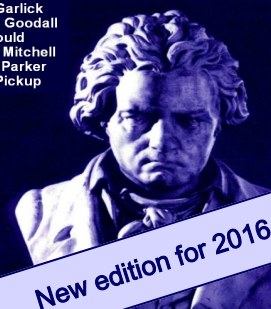
The 'what's new' section of the www.lukeclements.com website has regular updating briefings on social care law developments as well as new papers and articles on social care law and policy.

The 'resources' section of the website has precedent letters, advice on common problem areas in social care law and web-links to other materials.

Community Care and the Law

Luke Clements

With
Karen Ashton
Simon Garlick
Carolyn Goodall
Jean Gould
Edward Mitchell
Camilla Parker
Alison Pickup



New edition for 2016

Sixth edition

LAG

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

Training fee details are at www.lukeclements.co.uk/training/

For further information and for details of availability etc.

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A PDF copy of this newsletter is at www.lukeclements.co.uk/training/
Contact lukeclementstraining@gmail.com to be added to the Newsletter email list

CONFERENCES

Forthcoming events

Cardiff

June 24th 2016

Future Inn Cardiff Bay
with 'Cardiff University'

Details of Conferences and Events
can be accessed at:

www.lukeclements.co.uk/events/

Details of Conferences and Events
at the School of Law, Leeds
University can be accessed at:
www.law.leeds.ac.uk/events/