

Newsletter

Luke Clements partnership

Legal and social policy developments

Key practice

Evidence based

The crucial role of 'evidence' in determining eligibility and resulting care packages.

Well-being

The courts' and ombudsmen's approach to the 'well-being' duty and its role in interpreting the eligibility criteria.

Ordinary residence

Defining which local authority is responsible for an individual's care needs.

NHS continuing care

The Frameworks in England and Wales for adults and for children.

Carers and their rights

The new assessment obligations and duties to provide support for carers—including parent carers and young carers.

English and Welsh Ombudsman reports continue to provide key insights into the functioning of social care in the two nations. Several reports have highlighted the need for decisions to reduce a person's care and support to be rational and evidence based (see article on page 2). These have stressed that 'well-being' means more than simply 'coping' (No. [201700388 against Gwynedd](#)) and that the new legislation 'requires councils to meet eligible needs ... [and does] not allow rationing for any reason' (No. [16 015 946 against Wiltshire](#)).

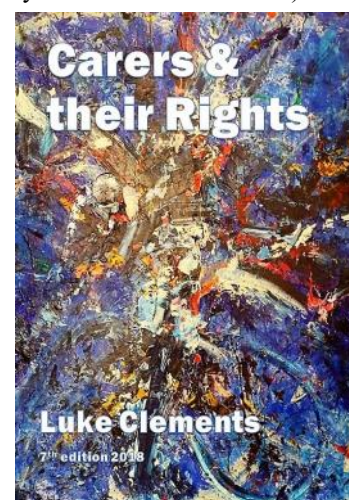
A clear example of this approach is given in a critical report concerning a 75% reduction to the care package a person had previously received from the Independent Living Fund (No. [16010078 against Waltham Forest](#)).

A number of reports relate to charging disputes – not least inappropriate residential care 'top-ups' being required when there is no suitable alternative home available. Report No. [17005 594 against Knowsley](#) provides a good indication of the law in this context.

Reports have also reminded councils that there is no exhaustive list of 'disability related expenditure' (DRE) that can be taken into account when assessing care charges. DRE may, for example, include [Court of Protection deputy fees](#) or (flagged up by recent research) [pet care costs](#).

The shunting of responsibility for patients with substantial long-term needs from the NHS to social services and to families continues. In the last three years there has been a significant reduction in the number people [eligible for NHS Continuing](#)

[Healthcare funding](#) in England (we don't have precise figures for Wales) as well as a loss of 8,500 NHS overnight beds. Almost a third of people held eligible for CHC funding in England obtained this via [the fast track](#) process (ie were likely to die in the near future).



Carers' rights

If the authority had done what it should have done in a timely professional manner, not only could they have saved themselves over £100,000 a year, and saved the cost to the taxpayer of these protracted High Court proceedings, they could have avoided P the years of misery from being kept a prisoner here, against her will.

Newton J in
[Lambeth LBC v. MCS](#)
[2018] EWCOP 14.

Although the 2014 reforms made only minor tweaks to the law relating to the rights of 'adults in need', the changes relating to carers were dramatic – the duty to assess 'on appearance of need'; the duty to meet eligible needs; and dispensing with the requirement that the care be 'substantial and regular'.

Curiously this has resulted in little or no litigation and these new rights do not appear to have materially improved the lives of carers. One often overlooked consequence of these changes is the fact that a

'carer's' eligibility does not depend on whether the 'adult for whom they care' has eligible needs ([Statutory Guidance](#) para 6.118). This means that a local authority may have a duty to provide support to meet a carer's needs, even though it doesn't have a duty to provide support for the person for whom they care (s 20 (7) Care Act 2014). Such a situation is likely to arise in many contexts. A carer may, for example, be eligible for support because of the 'cumulative' impact she experiences as a result of caring for

more than one person, even though the people she cares for may not, individually, be eligible for support themselves. This can lead to complications – since the council responsible for meeting her needs would be the one in whose area the adult in need is based (Care Act 2014 s20(1)) – a scenario considered by the [Statutory Guidance](#) (para 19.8). One thing such a carer may want is help with her travel costs – and in [Hurley v DWP](#) (2015) the Government accepted that this could be a carers service under the Act.

Ordinary residence

Up until 31 March 2017 the standard hourly rate was £10.57. Since 1 April 2017, the hourly rate for new cases is £8.71. For existing cases the rate remained at £10.57 per hour but from 1 April 2017 this will reduce to £9.57 per hour.

Council response to Leeds Law School Cerebra LEaP research (see Direct Payment article page 3).

The ordinary residence rules decide which local authority is responsible for meeting a person's social care needs. They are a throwback to the Poor Laws and councils have been suing each other for over 350 years to determine who is responsible.

Although the basic rules are straight-forward there are many quirks to the system. For example the rules vary depending on whether the person is an adult or a child; whether they are funded under the Care Act 2014, the NHS Act 2006 or the MHA 1983. They may also depend upon whether the person has the requisite mental capacity and upon the type of accommodation they occupy.

Just to make it more interesting, changes to the rules

are not normally backdated so it can be important to know if the person was in the particular living arrangement before (eg) 19 April 2010 when the NHS deeming rule first included non-hospital accommodation or 1 April 2015 when (in England only) the local authority deeming rule first covered shared lives and supported living schemes.

The ordinary residence rules are largely the same in England and Wales (with a couple of significant exceptions). In England, disputed ordinary residence cases are decided by the Department of Health and Social Care, which then publishes periodic (anonymised) lists of these 'determinations'. In Wales, the Welsh Government is responsible for making these

decisions — but it does not publish its determinations.

Recent English reports have included cases where the capacity of a person to decide to move to a new area has been challenged (generally unsuccessfully). Reports have also concerned the issue of young people (in transition to adult services) who have been placed by their funding authority in another council area. In 2015 the Supreme Court held that in general in such cases, councils should not be able to 'export' their responsibilities to another authority (R (Cornwall Council) v. Secretary of State).

In August the Local Government Association and ADASS published a short 'Ordinary Residence Guide' to the 'basics'.

The importance of evidence

Assessing eligibility for social care support is an evidence based and person centred process. The assessor gathers the evidence and makes a decision based on their professional judgment.

The process contains many inferences, presumptions and onuses – not least in social care – the presumption that the adult is best placed to judge their well-being [Care Act 2014 s1(3) and Social Services and Well-being (Wales) Act 2014 s6(3)].

If, for example, a person's support is to be reduced or withdrawn, the onus will be on the assessor to provide cogent evidence as to why the support they used to receive is no longer required. In the past councils could

change their 'eligibility criteria' and explain that the reduction in care was because the person no longer met the revised criteria. This is no longer possible because the criteria in England and Wales are now set out in regulations which only Parliament / the Welsh Assembly can change.

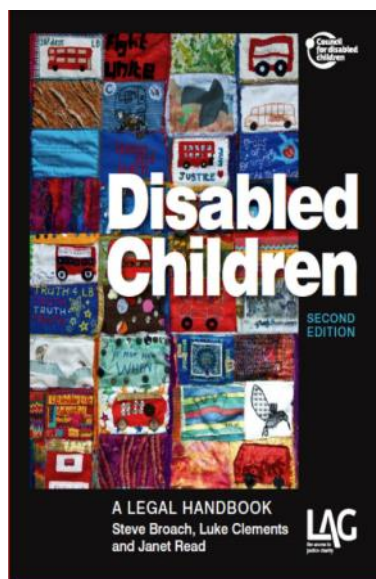
If an assessor decides that a need exists, but this is overruled by a senior officer or a 'panel', then the onus will be on the authority to provide 'a proper record' of the evidence that led to this decision (No. 16/003/985 against Lewisham).

Evidence based reasons must be given by councils to explain why a care package will actually meet a person's needs: it is not good enough

for an authority to simply say that the package can 'easily' meet the need (No. 17 002 906 against Gloucestershire).

If a person's care plan is reviewed and this then turns into a 'reassessment' then there is a need for evidence as to why this was necessary—ie that the person's needs had changed or their care package was failing etc.

As noted above (page 1) if a care plan is to be reduced and this will impact on a carer there must be evidence that the carer has agreed to this happening — a point made on a number of occasions by the ombudsman and now by the High Court in CP v. North East Lincolnshire Council [2018] EWHC 220 (Admin).



Home adaptations for disabled young people

It is possible that English and Welsh councils have been applying the wrong charging criteria when processing Disabled Facilities Grant (DFG) applications for adaptations required by disabled young people.

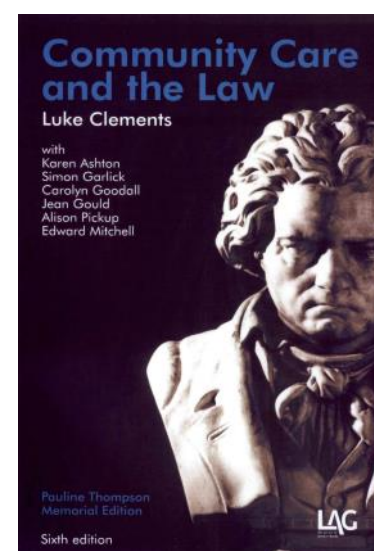
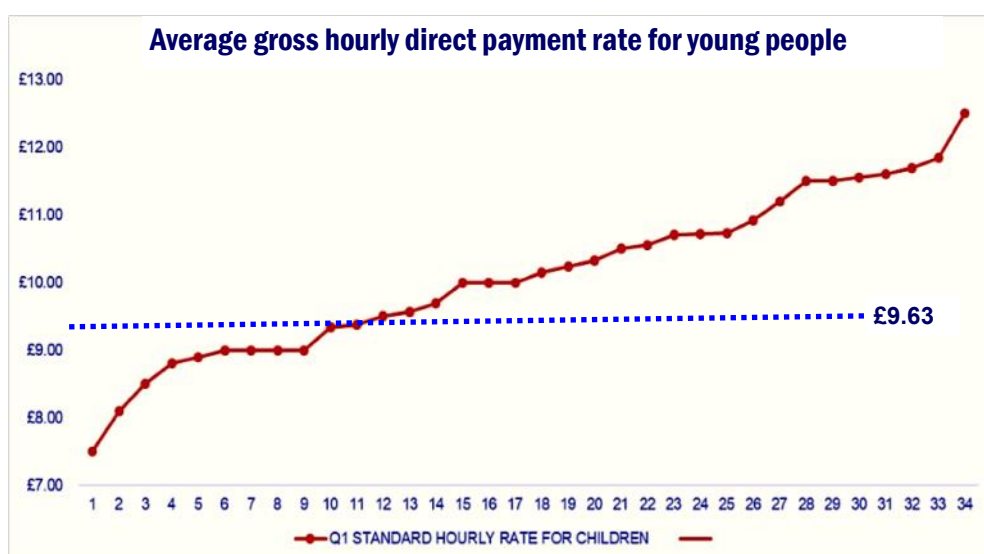
The problem has arisen because there are several laws that cover adaptations of this kind. DFGs are available under a 1996 Housing Act, and for young people there is no means test. However, the maximum mandatory DFG is limited to

£30,000 in England and £36,000 in Wales. Many disabled young people require more expensive adaptations and historically authorities have used a discretionary power to 'top up' the amount: a power that derives from a 2002 Regulatory Reform Order (RRO). The Order permits councils to charge for such top up grants and often councils use this to place a charge on the family home.

What appears to have been overlooked is that before considering their powers

under the RRO, councils must decide if the adaptation is necessary for the purposes of the Children Act 1989 (in England) and the Social Services and Well-being (Wales) Act 2014 (in Wales).

Most English councils do not charge for support under 1989 Act and in Wales there is a prohibition on charging under the 2014 Act. Two papers that consider this issue in detail (one for England and one for Wales) can be found at www.lukeclements.co.uk.



Procrustes and direct payments

In Greek mythology Procrustes claimed to have the perfect bed – it would fit everyone who used it. Unfortunately he achieved this by stretching or 'top and tailing' all those who slept on it. From this we get the word 'procrustean' (a one size fits all approach) and, of course, social care.

Direct payments (DPs) are a clear example. In many council areas it seems everyone who opts for a DP gets a single standard rate, that is often too low to enable them to employ a personal assistant (PA) with the necessary skills to meet their assessed needs. The above graph comes from a [Leeds Law School/Cerebra research](#) project concerning DP hourly rates – and it suggests that in a number of areas, the gross rate set by the authority is insufficient to even allow the PA to be paid the minimum wage. In general the gross rate must be at least

£9.36ph—and even this amount has been described as 'scandalously low'. The research findings are mirrored by a Frank Field MP [report](#) that found up to a third of care workers were paid less than the minimum wage.

Legally DP rates must be adjusted to ensure that they are sufficient to purchase care to meet a person's assessed care needs. The Statutory Guidance to the Care Act encourages councils to give people choice and flexibility about how to spend DPs and [2018 NICE guidance](#) notes that DP plans should enable people to 'use their money differently each week'. A recent ombudsman report (No. [17 013 291 against Norfolk](#)) also made this point, finding fault with a council that sought to define in narrow terms what might be a 'community activity'.

Councils must meet a person's eligible needs. If the assessment identifies that

the person needs support from someone with particular skills—for example an understanding of autistic behaviours that challenge / applied behaviour analysis or that continuity of care is important (because, for instance, the person is distressed by changes of carers or changes to their routine) then that need must be addressed in the care plan. If the need is to be met by way of a DP, then the hourly rate must be sufficient to pay for someone with the requisite skills and sufficient to retain them so that changes to personnel and care regime are minimised.

Some local authorities appear to have a single 'one size fits all' rate for DPs—a rate that is not adjusted to address specific needs. Like Procrustes they need to hope they avoid challenge – by Theseus in his case or the modern equivalent—the ombudsman.

Resources

An extensive range of social care legal / support resources can be accessed at both www.lukeclements.com and at the website of the disabled children's charity Cerebra which funds the LEaP research programme (see below) at the School of Law, Leeds University.

www.lukeclements.com

The website is open access and its materials include:

- A 'what's new' section that provides updating briefings and commentaries on social care legal and policy developments;
- A 'resources' section that includes a guide to the Care Act 2014 as well as advice on such questions as how to challenging cuts in care packages, decisions by 'funding panels' and home care charges;
- The ability to download without charge, social care publications;
- A list of forthcoming 'events' and a link to several YouTube lectures.

Rhydian: Social Welfare law in Wales

Social Care Law in Wales has become distinct from that in England and this site seeks to provide accessible, up-to-date information and critical commentary concerning the law as it applies in Wales. The Rhydian site is currently hosted at www.lukeclements.com and includes briefings on social care law and policy developments, a guide to the Social Services and Well-being (Wales) Act 2014 as well as an on-line journal.

Cerebra

Cerebra is national charity whose vision is that every family that includes a child with a brain condition will have the chance to discover a better life together.

Cerebra has published an innovative [Accessing Public Services Toolkit](#), a range of [template letters](#) and [resource guides](#). The [Cerebra Legal Entitlements and Problem Solving](#) (LEaP) project supports families encountering difficulties in obtaining assistance from children's social services authorities. Through this process Cerebra is able to identify common legal problems that confront families, and then to develop innovative ways of resolving these. The LEaP project is led by [Luke Clements](#) Professor of Law and Social Justice at the School of Law, University of Leeds and the research assisted by Law School students.



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

The School offers opportunities for undergraduates, postgraduates and specialised research including an [LLM in Law & Social Justice](#) and module in [Social Care Law: National and International Contexts](#)

Outcome theology

Jane Tunstill & James Blewett use this phrase in their excellent paper 'Mapping the journey: outcome-focused practice and the role of interim outcomes in family support services' in the Journal Child and Family Social Work 2015, 20, pp 234–243.

Such faith in the outcome mantra can at worst result in the families who cannot be seen to 'hit the outcome' within the relevant period being further stigmatized or labelled. At the same time, those practitioners, who cannot be seen to have waved a magic wand in the requisite time scale, will be seen as incompetent or unsuccessful. Indeed, ultimately aggregate blame can often be attached to a whole department, with the deployment of 'failing borough/ special measures' terminology.

Luke Clements Training is a socio-legal training partnership

Provides training in areas of health & social care services for adults 'in need', carers and disabled children—in England and Wales. Standard courses include:

- The Care Act 2014;
- The Social Services & Well-being (Wales) Act 2014;
- Eligibility criteria: making sense of the law and guidance;
- Carers Rights;
- 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 for adults;
- NHS Continuing Care Responsibilities for young people;
- Ordinary Residence and the Law;
- Problem Solving in Social Care;
- Social care law: recent developments in law and policy.

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

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A PDF copy of this newsletter is at www.lukeclements.co.uk/training/
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