

## Duty to meet need in times of budget cuts



This briefing examines a recent case taken by Law Centre (NI) - '*In the Matter of an Application by LW, acting by her mother JB, for Judicial Review [2010]*'.

The case has given the courts in Northern Ireland an opportunity to analyse the current duties of health and social care trusts to meet social care need. As we enter even more difficult funding times for trusts, this decision will help trust staff and service users understand their legal position.

### Case summary

LW, a 36 year old woman, was the victim of serious traumatic brain injuries and quadriplegia sustained as a result of a road traffic accident 20 years earlier. The ground for the judicial review was that the trust had acted unlawfully in failing to:

- provide adequate and suitable domiciliary care services in LW's home setting; and
- provide her with assessed residential care provision.

The argument relied on breaches framed under section 2 of the Chronically Sick and Disabled Persons Act (NI) 1978 and under Art 15 of the Health and Personal Social Services (NI) Order 1972. The Court found that the trust had acted unlawfully in its continuing failure to meet LW's needs.

This case is a significant addition to the case law in the community care field. The matter was not taken to appeal.

### Legislation

The principal statutes in the field of community care are:

- The Chronically Sick and Disabled Persons (NI) Act 1978 (the 1978 Act)
- The Health and Personal Social Services (NI) Order 1972 (the 1972 Order)
- The Health and Social Care (Reform) Act (NI) 2009 (the 2009 Act)

Although each of the above statutes is free-standing, Mr Justice McCloskey emphasised that the passing of the 1978 Act was designed to 'single out for special, additional treatment and attention' people in the community who are chronically sick and disabled. The use of the word 'further' in the longer title of the 1978 Act indicates that this Act was intended to make provision for the chronically sick and disabled in addition to provision already made for them in the 1972 Order. He also noted that trusts have a legal duty to 'proactively' identify all individuals who are chronically sick and disabled and to ascertain the need for making arrangements to promote the social welfare of each of them.

### Duty under section 2 of the 1978 Act

The trust had assessed LW as needing a high degree of domiciliary care with assistance with personal hygiene, bathing, dressings and other basic daily tasks including close supervision when eating. Her needs were such that specially trained carers were necessary. The suitability and availability of such carers had been persistently problematic.

In addressing whether the provision for LW's needs fell within the services listed in section 2 of the 1978 Act, the judge held that her complaint clearly fell within the scope of section 2 (a) - 'the provision of practical assistance for that person in his home'.

---

In considering whether there had been a breach of the trust's duty to LW, the judge referred to the House of Lords judgment in *R v Gloucester County Council ex parte Barry*. The decision, in favour of the county council, centred on section 2 of the Chronically Sick and Disabled Persons Act 1970 (the English equivalent to our Chronically Sick and Disabled Persons (NI) Act 1978). The Lords found that, in respect of section 2 of the 1970 Act, a local authority can take into account resources when assessing need. It can also do so when deciding whether it is necessary to make arrangements to meet those needs under the statute. The judgement in *Barry* saw the assessment of need for services as being a process containing three separate stages.

As in the *Barry* case, Mr Justice McCloskey in the LW judgement identifies three separate though inter-related exercises contemplated by Section 2 of the 1978 Act. These can be described as:

**Stage one** - the diagnostic stage where an assessment of the individual's needs is carried out;

**Stage two** - the prescription/determination stage - what measures an authority considers necessary to meet the individual's needs by reference to the table of services and facilities in paragraphs (a) - (h) of section 2 such as the provision of, practical assistance in the home, meals and works of adaptation to the home;

**Stage three** - the provision stage - what services an authority must put in place to meet the individuals needs.

### The duty to meet need

During the first two stages, a discretion may arise due to what the judge describes as 'material considerations'. An example of material considerations might be a situation where a relative or friend decides to provide care services her/himself to meet a loved one's care needs without assistance from a trust. There will be no duty on the trust but merely

a discretion to make provision. When a trust enters stage three, a statutory duty to provide arises. The duty is unequivocal and is owed to the individual.

A shortage of resources will not excuse a failure to perform that duty. The duty gives rise to clear enforceable rights for the disabled person concerned.

It is important to note that family or friends are not legally responsible for providing care services to a loved one and a trust should only consider such input if it is provided on a voluntary basis.

### Analysis

The judge considered that the persistent and extensive shortcomings in the home carer services provided to LW were inadequate and inefficient. The need was there. The trust was in breach of its statutory duty under section 2 of the Chronically Sick and Disabled Persons (NI) Act 1978 because it had identified the need for domiciliary care and had not done enough to meet the need.

### Duty under Article 15 of the 1972 Order

The judge found that the second aspect of the complaint, the trust's failure to provide LW with assessed residential care provision, did not fall under section 2 of the 1978 Act but did fall within the remit of Article 15 of the 1972 Order.

### Article 15 provides:

'...The department... shall make available advice guidance and assistance to such extent as it considers necessary and shall make such arrangements... as it considers suitable and adequate.'

In seeking to reach a conclusion, Mr Justice McCloskey made reference to the Northern Ireland case of *Re Hanna 's Application (2003) NIQB 79* and to the Scottish case of *McGregor v South Lanarkshire Council (2000) Scot CS 317*. The judgement in the former case had

---

allowed the trust in question to take resources into account in deciding 'when' to meet an individual's needs. The judgement in the latter case had decided that, once a local authority has determined that an individual's needs call for a particular provision, the authority is obliged to make that provision and could not refuse to do so if it did not have the necessary resources. It must be pointed out that, although the question of resources was referred to and important comments on the issue were made by the judge, the trust did not raise a lack of resources in the LW case.

The judge followed the approach in McGregor (which is analogous with the decision in the Barry case referred to above). He saw the language of article 15 as investing the authority with a 'discretion' in making available advice, guidance and assistance and in making such arrangements. He decided that, once a decision on what the authority considers 'necessary and suitable and adequate' has been made the discretion in play is exhausted and a duty of provision arises. He found that in making the assessment in each individual case the authority can properly take into account factors such as available resources and the demands on its budget. However, when the assessment has been made, that discretion is supplanted by duty and resources cannot play a part.

In an earlier Northern Ireland case *R v Judge* the court, in considering whether the trust had discharged its duty to the applicant, applied a test of 'reasonableness'. Mr Justice McCloskey found the trust to be in breach of its duty to provide LW with an appropriate residential placement under Article 15. He noted that it had not provided convincing evidence that it had made 'reasonable efforts' to discharge its duty to LW. Therefore, whether or not a trust is actually in breach of its statutory duty under Article 15 may depend on the efforts it has made to perform that duty. The judge did not make a specific ruling on whether there was an absolute unqualified duty of provision or a duty to make reason-

able effort because the trust had not even met the lower standard. Therefore, if a trust could show that it had made a reasonable and sustained effort to meet a service user's needs there may be no breach under Article 15.

## Conclusion

The LW judgement has set out that:

- Trusts can take into account budget factors when setting policy on care services and when determining which individual care needs it is necessary for the trust to meet.
- When the trust decides that it is necessary to meet a need under S.2 of the Chronically Sick and Disabled Persons (NI) Act 1978, for example, practical assistance in the home, provision of meals or help with travel then there is a clear legal duty on the trust to meet those needs regardless of budget constraints.
- When it is decided that someone needs other help, for example, residential accommodation, then once that need is identified, the trust is under a duty to meet it. If it does not manage to do so for a period because of budget constraints then, as a minimum, it must make reasonable efforts to fulfil its duty and may have to go further to meet that statutory obligation.

*For any queries arising from this briefing, please contact the community care unit of Law Centre (NI) on the advice line (028 9024 4401) or, in individual cases, please feel free to refer a client directly.*

## Note

The case citation is [2010] NIQB 62

You can find it on:

[www.bailii.org/nie/cases/NIHC/QB/2010/62.html](http://www.bailii.org/nie/cases/NIHC/QB/2010/62.html)