Case No: CO/2129/2016

Neutral Citation Number: [2016] EWHC 2855 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT (AT MANCHESTER)

Manchester Civil Justice Centre,
1 Bridge Street West, Manchester M60 9DJ

Date: 10 November 2016

Before:

HIS HONOUR JUDGE STEPHEN DAVIES
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

DAMIEN TINSLEY (By his litigation friend and property and affairs deputy HUGH JONES)	**Claimant**
- and -	
MANCHESTER CITY COUNCIL	**Defendant**
- and –	
SOUTH MANCHESTER CLINICAL COMMISSIONING GROUP	**Interested Party**

- -

Jenni Richards QC & Adam Fullwood
(instructed by **Hugh Jones Solicitors, Manchester**) for the **Claimant**

Hilton Harrop-Griffiths & Rhys Hadden
(instructed by **City Solicitor, Manchester City Council**) for the **Defendant**

The interested party did not attend and was no represented

Hearing date: 25 October 2016
Judgment produced in draft 28 October 2016

- -

JUDGMENT

His Honour Judge Stephen Davies

A. Introduction

1. Under s.117 of the Mental Health Act 1983 a person who has been compulsorily detained in a hospital for medical treatment for mental disorder under s.3 of that Act is entitled, upon ceasing to be detained and leaving the hospital, to be provided with after-care services by the relevant authorities, being the responsible clinical commissioning body and the local social services authority, until such time as they are satisfied that he is no longer in need of such services.

2. In the case of R v Manchester City Council ex p Stennett [2002] 2 AC 1127 the House of Lords held in clear terms that relevant authorities providing after-care services under s.117 were not entitled to charge for those services. Lord Steyn held that this was so as a matter of construction of s.117. He rejected an argument that it produced an anomalous result when the position of such a person was compared with someone who had been admitted informally to hospital and then discharged, who would – subject to a means assessment - be charged for such services. He agreed with Buxton LJ who had observed below that "it would be surprising, rather than the reverse, if they were required to pay for what is essentially a health-related form of care and treatment".

3. In this case the claimant suffered very serious head injuries in a road traffic accident on 26 May 1998 which left him with an organic personality disorder which in turn led to his being compulsorily detained in hospital under s.3. After being discharged he spent time in a mental health nursing home funded by the relevant authorities under s.117. In the meantime he brought proceedings against the driver involved in the accident who admitted 90% liability for the accident. The trial of the quantum of his claim came on before Leveson J. (as he then was) and, in a judgment given on 18 February 2005, Tinsley v Sarkar [2005] EWHC 192, he assessed those damages in a total sum approaching £3.5 million, of which £2,890,257 represented future care .

4. In so doing Leveson J. rejected a submission by the defendant in that case that because the relevant authorities were obliged to provide for the claimant's future care needs under s.117 no award should be made against him for those costs, since they were not going to be incurred by the claimant himself. He held [110], applying Court of Appeal authority, that the relevant authorities were entitled to have regard, when deciding how the claimant's needs were to be met, to the resources available to them, and he concluded [126] that they would not fund either a care regime which the claimant was prepared to accept or even the care regime which he had found to be reasonable. He made [129] his view clear that his instinctive feeling was that if he had accepted the defendant's submission he would have regarded his insurers as receiving an undeserved windfall.

5. Following that judgment the claimant left the nursing home funded by the relevant authorities and since then the cost of his accommodation and after-care services has been paid for by him (or, more accurately, by his deputy appointed by the Court of Protection to manage his property and affairs) from the damages received in the personal injury action.

6. In 2009 his current deputy was appointed in circumstances where there were concerns that his previous deputy had mismanaged his financial affairs. The current deputy is of the view that the claimant is unable to sustain the cost of funding his existing care arrangements and has, since 2010, sought to require the defendant as the relevant local social services authority to comply with what he contends is its duty to provide social care as an after-care service under s.117. Although there have been protracted discussions, the defendant's final communicated position has been that since it has no reason to believe that the claimant cannot continue to pay for his own care using funds derived from the damages he received for future care in the personal injury claim it does not consider itself to be under any duty to provide after-care services under s.117.

B. **The issue of principle between the parties**

7. Thus there is a fundamental issue between the parties which they require the court to resolve, which is whether or not it is lawful for the defendant to refuse to provide after-care services to the claimant under s.117 on the basis that he has no need of such provision because he is able to fund it himself from his personal injury damages. The claimant's position is that this is unlawful, and represents a thinly disguised attempt to charge through the back door in this particular category of cases when the House of Lords has confirmed in Stennett that it is impermissible to do so in any circumstances. The defendant's position is that to allow the claimant's deputy to claim the provision of after-care services on his behalf under s.117 would offend against the principle against double recovery which has been established in the decided cases in the personal injury field, most notably by the Court of Appeal in Crofton v NHSLA [2007] 1 WLR 923 and Peters v E. Midlands Strategic Health Authority [2010] QB 48.

8. HHJ Raynor, QC, sitting as a Judge of the High Court, ordered that this case should be heard as a rolled-up hearing. At the hearing before me the parties were agreed that I should determine this fundamental issue of principle as a preliminary issue. If I were to find for the defendant on the preliminary issue it would be necessary to hold a further hearing, if the parties are unable to reach agreement, as to whether or not the claim as advanced in this case does indeed offend against the double recovery principle. It is also agreed that the claimant's claim for damages for the recovery of payments made by the claimant for the cost of after-care services which he contends the defendant ought to have provided under s.117 should be left over for potential agreement or, if not, further case management and determination once the preliminary issue is decided.

9. The defendant, through Mr Hilton Harrop-Griffiths and Mr Rhys Hadden, submits that there are three separate ways in which it can succeed.

10. The first is that on a true interpretation of s.117 it is entitled to take into account, when deciding the question of need, the claimant's available funds represented by the personal injury damages. The defendant does however acknowledge that the decision in Crofton, although a decision about the provision of care costs under s.29 of the National Assistance Act 1948, rather than a decision under s.117 Mental Health Act 1983, is against this submission.

11. The second and most strongly advanced argument by the defendant, is founded on the proposition that for the claimant's deputy to advance a claim for double recovery would offend against the law, fairness and common sense, and he should not be permitted by the court to do so. This argument is said to be supported by certain observations made by Dyson LJ (as he then was) in Peters.

12. The third, which seems to me to be no more than a refinement of the second argument rather than a freestanding argument, is that in such circumstances the court should exercise its discretion under s.31(2) of the Senior Courts Act 1981 to refuse to grant the claimant relief.

13. The claimant, through Ms Jenni Richards QC and Mr Adam Fullwood, submit that none of these three arguments stand scrutiny.

14. As to the first, the claimant submits that the authorities make it clear beyond doubt that the funds available to him, from whatever source, are completely irrelevant to the question of his entitlement under s.117.

15. As to the second, whilst the claimant submits that on the facts of this case the claim for provision under s.117 does not fall foul of the double recovery principle anyway, it submits that even if it did that would not enable the defendant to refuse to make provision under s.117 because the double recovery principle has no relevance to the claimant's statutory non-means based entitlement to provision under s.117, whatever relevance it may have to a personal injury damages claim.

16. As to the third, the claimant submits that there is no principled basis upon which the court could refuse to grant relief to which he is entitled as a matter of law.

17. For the reasons which I set out below, I am satisfied that the claimant's arguments should prevail, and that the preliminary issue should be answered in his favour.

C. **Issue 1 - Construction of s.117 Mental Health Act 1983**

18. As I have already noted, the House of Lords held in Stennett that s.117 contained no express or implied power to charge for the provision of after-care services.

19. However in Tinsley itself Leveson J. said [113] that there was a separate question, that being whether or not when exercising the statutory power under s.117 the authority could take account of the extent to which the discharged person has "ample provision for aftercare such that he need resort to the use of public funds". The defendant relies on [122], where Leveson J. gave as an example a multi-millionaire previously compulsorily detained under s.3 and now needing 24 hour waking support, and where he suggested that when deciding whether or not his needs "call for" the relevant authority (at that point a Trust) to provide that support it could have regard to "the resources available [to the Trust], the other calls on those resources and the extent to which that particular person requires Trust support".

20. It may be that Leveson J. was placing reliance on an observation of Lord Lloyd of Berwick in his dissenting speech in R v Gloucestershire CC ex p Barry [1997] AC 584, in the context of the duty imposed on a local authority under s.2 of the Chronically Sick and Disabled Persons Act 1970 and by reference to its functions under s.29 of the National Assistance Act 1948 to make arrangements where it is satisfied that "it is necessary in order to meet the needs of that person". Lord Lloyd suggested (at p.597H - 598A) that it might not be necessary to make arrangements where for example that person "might be wealthy enough to meet his needs out of his own pocket". This observation was referred to by the Court of Appeal in R v Wandsworth LBC ex p Spink [2005] 1 WLR 2884 at para. 43, with seeming approval, albeit in the context of a statutory provision which entitled the authority to recoup the cost of providing the relevant services.

21. Alternatively, as Ms Richards submitted, it is possible that it was not intended to be a clear holding as to the proper construction of s.117. It is possible that it was simply a passing observation, relevant to his conclusion in [126] that the Trust would on the facts of that case, for defensible financial reasons based on its own resources, be justified in providing a lesser regime of after-care services than that which the postulated multi-millionaire would regard as appropriate for him, or even than the regime that which the judge had decided was appropriate and which the claimant, on this assumption being in receipt of damages for personal injuries including the assessed cost of such a regime, could afford.

22. If the former, the difficulty for the defendant now is the decision in Crofton, where the decision of the court was given by Dyson LJ. That was a claim for damages for personal injury where the issue was whether or not the local authority could and would make payments for care costs (again under s.2 of the Chronically Sick and Disabled Persons Act 1970 and by reference to its functions under

s.29 of the National Assistance Act 1948) despite the award of damages to the claimant, and if so whether or not such payments should be taken into account when assessing the damages payable to the claimant.

23. In Crofton the claimant, relying on the observations of Lord Lloyd in ex p Barry, submitted [48] that the local authority would not make payments because it could and would have regard to the fact that he had received a substantial award of damages. The court rejected that submission [63-72] on the basis that the relevant guidance in relation to means testing required the local authority to disregard an award of damages for personal injuries being administered by the Court of Protection (as would be the case there), and the local authority could not therefore have regard to such funds when deciding the threshold question of need. The court held in terms [70] that the observations of Lord Lloyd in ex p Barry did not assist in answering that question, not only because they were obiter but also because they begged the question as to whether or not an award of damages for personal injuries might be taken into account in deciding whether or not a person has resources.

24. The decision in Crofton was, as I have said, not a decision under s.117 of the Mental Health Act 1983 and, hence, is not strictly binding on me. There are material differences between the statutory provisions under consideration in Crofton and s.117, in particular those in relation to means testing and the express exclusion of personal injury damages from the financial assessment for that purpose, which are not to be found in s.117. Nonetheless as Ms Richards submitted, the position as regards s.117 is even stronger than the position as it was under the Chronically Sick and Disabled Persons Act and the National Assistance Act 1948 and as it now is under the Care Act 2014, where means testing was and is permitted but where damages for personal injuries are very substantially ring-fenced from means testing. That is because, as Stennett confirmed, provision under s.117 must be provided free of charge regardless of resources, and it would be anomalous if a claimant under s.117 with personal injury damages available to him could be in a worse position than a claimant under the statutory provisions where means testing was allowed but damages for personal injuries were excluded.

25. Furthermore, as Ms Richards also submitted, the decision in Peters, to which I shall refer under issue 2 below, is only explicable on the assumption that it was accepted by all involved that the claimant had a right to claim under the relevant statutory provisions applicable in that case notwithstanding her receipt of damages for personal injury.

26. I am, accordingly, satisfied, that it is not open to the defendant to refuse to make provision for a person otherwise entitled under s.117 on the basis that the claimant is in receipt of damages for personal injury including for the cost of such care.

D. **Issue 2 –advancing a claim under s.117 by the claimant's deputy offends against the law, fairness and common sense and should not be permitted**

27. Peters was another personal injury damages claim, where the judge at first instance (Butterfield J.) had held the claimant entitled to claim the full cost of care from the defendant tortfeasor rather than rely on provision by the local authority to which she had a statutory right. That decision was upheld on appeal (Dyson LJ giving the judgment of the court again) on the same ground, it being held that it was reasonable for the claimant to prefer self-funding to provision at public expense, and also that since the risk of double recovery by the claimant had been avoided she was entitled to recover the full cost of care from the defendant tortfeasor.

28. The defendant had argued that the claimant's deputy, owing statutory and fiduciary duties to act in the claimant's best interests, could not properly decline to claim state funding available to her, so

that if awarded damages for the cost of care as well she would secure double recovery for the claimant. It was argued for the claimant that once the deputy had decided to make the claimant self-funding through pursuing and obtaining an award of damages the deputy could not then act inconsistently with that decision by also claiming state funding.

29. The judge at first instance had accepted that there was no risk of double recovery since it was satisfied that if damages for the cost of care were awarded neither the deputy nor her successor would make a claim for state funding "at any rate in the absence of some wholly unexpected development". Butterfield J. placed reliance on the fact that she was, and any successor would be, appointed by the Court of Protection and would "unquestionably be a person of probity and integrity entirely fitted to be trusted not to abuse their position" [20], the inference being that it would be an abuse of her position to advance a claim for state funding in the absence of supervening unexpected developments.

30. At [57] Dyson LJ accepted that it was "trite law" that the claimant could not recover twice for the same loss. At [61] he rejected the submission that the deputy was under a duty to seek full public funding so as to achieve a double recovery because "there is no basis in law, fairness or common sense for such a duty". At [62] he considered the risk that a deputy might claim state funding in circumstances where there was no wholly unexpected development or where there was a dispute as to whether that had occurred. Dyson LJ noted, importantly in my view, that "it is not at all obvious how this would be policed and what right of recourse, if any, the defendants would have if [the deputy] did seek provision from the council in circumstances which were not 'wholly unexpected'".

31. Having agreed with Butterfield J. that the suggested undertakings proffered by the deputy below would not be apt to achieve this objective, at [63-65] Dyson LJ suggested an alternative approach, which was to require the deputy to apply to amend the order of the Court of Protection authorising her to act, so as to require her to obtain the authority of the Court of Protection before making an application for public funding and to enable the defendant to make representations in relation thereto. The deputy was willing to undertake to seek such an amendment, and the court was satisfied that this effectively avoided the risk of double recovery.

32. Before addressing the defendant's submissions founded on [61] of Peters it is worth noting that my attention was drawn to a decision of the Senior Judge of the Court of Protection given on 5 January 2010 in the case of Mark Reeves which concerned an application by a deputy for directions, at the instigation of the local authority concerned, as to whether he should be authorised to make a request for state funding in a case such as envisaged in Peters, but where at the time of the judgment in the personal injury action (which preceded the decision of the Court of Appeal in Peters) no similar undertaking had been sought nor given. The Senior Judge considered that it was neither appropriate nor necessary for such an application to be made, and also ventured some doubt as to whether or not it was appropriate for the Court of Protection to be the "appropriate forum to adjudicate on matters of this kind", especially since the supervision of deputies was now undertaken by the Office of the Public Guardian. For good measure he made an adverse costs order against the local authority which had instigated the application.

33. The defendant's submission was that the Administrative Court could, in a claim for judicial review such as the present, dismiss the claim on the ground that a deputy in seeking to obtain double recovery was acting unlawfully and in breach of duty, in this case it was said on the basis of a misconceived understanding of what his duty involved. It was submitted that in cases such as the present, where there is a dispute whether or not good grounds for making the application existed, the court could and should investigate the matter and determine accordingly.

34. The claimant's submission was that the defendant was wrongly seeking to elevate an observation by Dyson LJ into a freestanding rule of law so as to achieve an impermissible aim, which was to seek to prevent a person otherwise entitled from making a claim under s.117 to enforce his right to do so on the grounds that it would lead to double recovery, when that was a concept of the common law in relation to the assessment of damages which had no application to a claim for a statutory entitlement where that person was entitled to make such claim regardless of his or her financial circumstances. Ms Richards submitted that the proper control mechanism in such cases where there was abuse would involve either the procedure suggested by Dyson LJ in Peters when dealing with the personal injury damages claim, or by involving the Office of the Public Guardian as the body responsible for the supervision of deputies if it was felt that a deputy was acting contrary to his or her duty in seeking state funding in such circumstances. She submitted that the ultimate remedy lay with Parliament if it was ever considered that steps had to be taken to prevent a person in receipt of personal injury damages from making a subsequent state funding application where that would produce double recovery. She submitted, politely but firmly, that it was not for the Administrative Court to hold that a claimant was not entitled to succeed in a claim for state funding to which he was otherwise entitled under the relevant statute on the ground that he was already in receipt of personal injury damages and good reason for the deputy to seek state funding had not been shown. She submitted that the defendant's case was illogical, because there was no good reason for seeking to distinguish between a person whose affairs were controlled by a deputy, where on the defendant's case this defence would run, and those whose affairs were not so controlled, where it would not.

35. I agree with Ms Richards' submissions. In Peters Dyson LJ was concerned to make clear that it was no part of a deputy's duty to make any and all applications for state funding to which the person lacking capacity concerned was entitled where that person, before or after the appointment of the deputy, had previously successfully obtained damages to cover the cost of those services from the tortfeasor in the personal injury action. It does not seem to me that he was holding that there was some general duty upon the deputy, enforceable not only by the person concerned but also at the suit of third parties such as the local authority or the tortfeasor or his or her insurers, not to make applications for state funding unless or until that could be objectively justified by reference to a wholly unforeseen change in the financial position of the person concerned.

36. It does not seem to me to be possible to deny a remedy to a claimant, otherwise entitled to complain that the relevant authority has refused to provide aftercare services under s.117 by wrongfully relying on his receipt of personal injury damages, on the basis that his deputy ought not to be entitled to advance this claim because it would offend a common law rule as to the assessment of damages which has no role to play in the assessment under s.117. The deputy owes statutory duties under the Mental Capacity Act 2005 and duties at common law and in a fiduciary capacity in his capacity as receiver and manager, but only to the person lacking capacity upon whose behalf he acts. He does not owe duties to the local authority or to the defendant in the personal injury action. It is difficult to see how the Administrative Court could properly hold that such person should not be entitled to substantive relief in judicial review proceedings to which he was otherwise entitled because it considered that the deputy was acting contrary to some notional duty to such bodies or parties in making the application. I note that this did not seem to Dyson LJ to be an obvious mode of policing the actions of the deputy.

37. I also consider that it would be extremely difficult for the Administrative Court to make findings as to whether in an individual case the deputy was or was not acting in breach of his or her duty to his or her client in making an application for s.117 provision. What, for example, should the answer be if as a consequence of unwise decisions by the deputy the claimant was in need of s.117 provision? Should the deputy have to wait until all of the personal injury damages were exhausted before making an application? Should the deputy be entitled to make an application if all of the monies

awarded for future care were exhausted but the claimant still had substantial funds left over representing other elements of the award. It would appear to me to be a matter ultimately for the deputy to decide, subject to statutory control whether by the Court of Protection or the Office of Public Guardian or both. Whilst I appreciate that the decision of the Senior Judge in Reeves may appear to place certain obstacles in the path of a local authority attempting to force the deputy to apply to the Court of Protection, I do not consider that this is a good or sufficient reason for justifying intervention from the Administrative Court. If this position is felt to be unsatisfactory, then ultimately it is for Parliament to intervene.

38. I entirely accept that hard-pressed local authorities will be extremely frustrated if deputies do routinely make applications for full state funding which they are powerless to refuse in circumstances where there are sufficient resources from the proceeds of personal injury claims specifically awarded in relation to the cost of future care available to the claimant. However that is a consequence of the statutory regime, equating s.117 with general non means-based healthcare provision under the NHS, without creating an exception for successful personal injury claimants, which must be changed - if at all - by Parliament if it is thought that the existing control mechanisms are not sufficient to ameliorate the problem of double recovery. As Ms Richards submitted, since substantial changes have recently been made to s.117 through the Care Act 2014, Parliament has recently had the opportunity to make such changes, but has chosen not to do so. It is not for the court to intervene in such circumstances.

E. **Issue 3 – exercising a discretion to refuse relief**

39. For the reasons I have already given I see no separate basis for refusing relief, having found against the defendant on issue 2. This is really in my view a last ditch argument if all else fails. But it seems to me to be contrary to principle to deny relief if the right to relief has been established as a matter of fact and law, and none of the recognised circumstances in which it has been held that relief should be refused apply. This is not a case where it could be said, for example, that the claimant or the deputy has in some way been guilty of an abuse of the process of the court in bringing this claim.

F. **Relief / Order**

40. It is common ground that if the claimant succeeds, as he has, that permission should be granted and that an appropriate declaration should be made. I would propose to make a declaration along the following lines: It is declared that the defendant may not have regard to the claimant's ability to fund the cost of after-care services from damages awarded to him in his claim for personal injuries when determining whether or not to provide or arrange for the provision of after-care services under s.117 of the Mental Health Act 1983.

41. Ms Richards also invited me to make a mandatory order requiring the defendant to take over the funding of the claimant's care package. I am quite satisfied that it would be wrong for me to do so. I cannot second guess what after-care provision the defendant may determine should be provided under s.117 once it has taken a proper decision on the basis of a proper understanding of the law.

42. I do however consider that it would be appropriate to make an order quashing the determination made on 30 September 2015 and directing the defendant to make a fresh decision on the claimant's claim for provision under s.117 in accordance with the declaration made above within a reasonable time of this determination.

43. Finally, as regards the claim for damages, the defendant submitted that it was apparent from the recent decision of Newey J. in Richards v Worcestershire County Council [2016] EWHC 1954 (Ch) that any claim for restitution would have to be on the grounds of payment under a mistake, and that this could not run from 2010 onwards (being the relevant time for any non-statute barred claim) since there could be no mistake at a time when the deputy was actively pressing the defendant to make provision under s.117. However Ms Richards submitted that this was outside the scope of what was to be decided today, and that even if this objection was sound there were other possible avenues for recovery in restitution which could be formulated. In the circumstances I consider that I should defer the question of permission to advance the claim for damages and should make an order requiring the claimant to file and serve a statement of case setting out the details, factual and legal, of his claim for recovery of payments made by him for after-care services which he contends the defendant should have provided under s.117, for the defendant to file and serve a defence responding thereto, for there to be a stay for ADR, and in default of settlement for the parties to discuss proposed directions and in default of agreement to file their proposed directions and any further submissions on the issue of permission if still contested by the defendant, for a decision on the papers by the court, if practicable by me given my knowledge of the case and the issues, although that is not essential.

44. I end by expressing my gratitude to the legal representatives involved for the high quality of the preparation of the case and in particular to all of the advocates for the extremely helpful written and oral submissions.