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Recent Court of Appeal decision underlines the illegality of opaque care plans - opening the door to rights to repayment of money spent in lieu of a proper budget, in the field of special education and adults' social care

By Belinda Schwehr for Special Needs Jungle.

The Care Act is beginning to generate judgments of real use to young people with learning and other disabilities.

In *CP v NE Lincolnshire* (Court of Appeal, October 2, 2019), public law proceedings were used to challenge the sufficiency of the funding for a 22-year-old woman, CP, with complex and multiple disabilities requiring round-the-clock care.

JP, her father, acted as her litigation friend.

The council had asserted that the day provision she had benefitted from, during a long-running dispute, was being provided 'for free' by her father from choice (because he had started the charity that operated the service.)

The council was described as having 'a visceral resistance' to funding the package because they saw JP as *profiting*, but the council provided nothing else in lieu, and paid for the transport and the support worker to be with CP there.

By the time of the judicial review hearing, everyone was satisfied the service it counted as **education** for EHCP purposes, and what its value was, going forwards.

Just before the adjourned hearing resumed the Council formally agreed to pay a sum in respect of CP's placement at the day service amounting to £10,800pa. That was certified by the District Auditor as the objectively reasonable price for the service that the charity had provided to CP, although no detail is given as to how, or why, that was agreed to be a good way of quantifying its value, which must have been strongly disputed, we think, at the outset at least.

But some of the earlier care plans had failed to state a personal budget at all, for adult social care purposes, and none had set out any **breakdown** of the figure being offered at any given point.

There was a period before the day service was agreed to be educational in nature, when the fees for the day service had still not been covered; so, and despite agreement on other fronts, the case had continued to a hearing.

The first level judge found that the s26 Care Act duty to specify the personal budget for the adult required **a transparent figure** to identify how the person's assessed eligible needs could actually be met by various elements within it, such that no mistaken assumptions about informal care being willingly and freely provided by relatives could be made.

"The adult with eligible needs and those providing voluntary care should have a good understanding of the extent to which support will be provided by the local authority in respect of both those services which are provided directly by specialists (and paid for by the local authority) and those which will be funded by way of direct payment. Of course, because voluntary care figures in most assessments, and it is this aspect in which the family will be interested, if the personal budget covers the total cost of meeting the eligible needs, thus including the direct payments, **that element to be provided voluntarily will be easily discernible."**

"The duty is a clear one derived from section 26 of CA 2014, and any failure to provide **a transparent budget in a care and support plan** represents a *prima facie* breach of that duty which in my judgment **would be susceptible to legal challenge by way of judicial review."**

And in a section that will be manna to the souls of exhausted parents, the judge said this:

"It is also clear that an adult's family carer is under no obligation to meet the eligible needs of the adult and necessarily any plan must be contingent on such care being withdrawn, or the local authority being made aware that the carer is not in a position to cope."

Despite this, the lower court accepted that there should be no payment ordered for the early period of unpaid placement fees.

The Court of Appeal, however, held that if a council breaches the Care Act, then it is acting unlawfully**,** and that in this case, it had to pay back what it would otherwise have been obliged to pay towards the person's care plan, if it had acted lawfully.

"In the present case, having found the Council in breach of its statutory duties, [the judge in the High Court] should have gone on to hold that the Council had acted unlawfully and, accordingly, was liable in principle to compensate CP in respect of any monetary shortfall, in accordance with normal public law principles of legal accountability of public bodies."

The judgment

CP's lawyers submitted that the Council's mid-hearing acceptance of the principle of paying for the future **did not make irrelevant the unlawfulness of earlier plans.**

The Court agreed that the judge should have determined the legality of the Care Act 2014 plans starting with the 2016 plan first challenged.

"The Council's failure when drawing up CP's support plan dated 11th April 2016 to ensure that CP's personal budget included adequate payment for her needs, including her weekly

attendance at the placement, represented a failure by the Council *ab initio* to comply with its statutory duties under s. 26 of the Care Act 2014 (and the linked duties under ss. 18, 24 and 25 of the Care Act 2014) read in the light of the statutory Guidance.

The Council had acted unlawfully in failing to comply with its statutory obligations properly to fund CP's care and needs between 11th April 2016 and 17th November 2017; and as a result, CP has remained out of pocket ever since. …The Council's unlawful failure has, therefore, had a continuing effect on CP since her financial position has remained less than it should have been.

Accordingly, CP is entitled to compensation to reimburse her."

Nothing that transpired thereafter extinguished the Council's liability to make good its original breach or relieved the Council of its continuing obligation to comply with its said duties under the Care Act 2014.

The Council's arguments that failed, and *why*…

Voluntary provision? Not worth it? Not social care? A community asset?

The Council did not agree that this setting was the right venue to provide support to CP, and, in any event, it was a facility provided by CP's parents; in effect, her needs being met by her father, Mr JP.

At one point the council argued that the facility comprised "little more than empty rooms and a gym", despite the fact that it acknowledged internally that it was legally liable to pay for CP's attendance at the service.

Not only was it not 'education', as far as they were concerned, it was thus not a social care need that the Council was required to fund under paragraph 10.26 of the Guidance. Its argument here amounted to the contention that the Council was entitled to take the position that this was an inappropriate social care facility *selected and provided by CP's parents* and yet do **nothing about that**!

This was despite it being the view of both an educational psychologist and a special schools expert that CP was benefiting educationally from attendance.

The Court said "…there was no basis for suggesting that the facility was not a perfectly lawful charity, run on an arms-length basis. If and in so far as the facilities were adjudged suitable for CP, there is no reason why the charity should not charge for their use, just as they would any other user."

Conflict of interest?

The council argued that CP's father and litigation friend was the 'real claimant' in these proceedings and was, in effect, 'using the proceedings inappropriately to profit from the claim' since the charity was organised and controlled by him.

CP's lawyers said this, however: the fact that CP's litigation friend (her father) would also benefit from the claim did not make for a conflict of interest, let alone operate so as to deprive CP of a remedy.

The Court said the conflict contention was misconceived. "There is no conflict of interest on the part of Mr JP. The claim is brought in the name of CP because it is her legal rights which have been breached and it is her legal entitlement to compensation from the Council for failing to fulfil its statutory duty to provide fully for her care needs…"

Alternative remedies as a bar?

We suspect that at court, argument would have ranged over the absence of a formal adult social care complaint as a reason why no remedy should be awarded, even if the court was against the council on the legal principles.

The first instance judge had (worryingly) *hinted* that a statutory review or a complaint were apt for a family member to make their point about inadequate funding, saying:

"Unlawfulness could only be identified in circumstances where there had been **a refusal to review, in response to a *complaint***, or **insistence on family care in the light of clear evidence that the family was unwilling**, or that **there had been an irrationally low level of care identified on the assessment**."

The spectre of an alternative remedy being regarded as a bar to judicial review was thereby implicitly raised. There is no Tribunal to adjudicate upon (or even an appeal against) adult services care plans and budgets - and the complaint system is wholly inadequate to deal with matters of public law illegality, in practice.

So it is a relief that the Court of Appeal paid no heed to the notion that one must complain first before using judicial review. It said this: "CP has sought to enforce her **legal** rights by the various **legal** avenues open to her – judicial review proceedings and the SENDIST. But the question of liability under s.26 could *in no sense be 'ceded'* to the First Tier Tribunal.

…That CP could have appealed, and did, against the Children and Families Act 2014 EHC plan decisions [to the Tribunal] did not excuse the Council from making lawful **Care** Act 2014 social care plans. Section 21(5) of the CFA 2014 deems "social care provision" which educates or trains, to *be* SEP, but only for the purposes of CFA 2014 *and not so as to displace the Care Act 2014 obligations*, let alone while the Care Act 2014 points are subject to JR challenge."

CASCAIDr's view of the implications

We think that it is clear that a right to restitution of the nature discussed in the CP case arises in private law, once the public law unlawfulness error of law is conceded or put right, where involuntary personal or **commercial** services have been used, to the knowledge of the council, because of the service user's obligation to pay for them, even if lacking in capacity.

Here the claim was made in public law proceedings because the special education Tribunal could not determine anyone's rights in terms of social care.

The Court of Appeal said that CP "is simply asserting an orthodox public law right to be paid monies due to her under the Care Act 2014, and which the Council has *unlawfully* failed or refused to pay."

We think that restitution is a private law cause of action, but one that can and indeed MUST be advanced in a public law case, or on an appeal within the Tribunal's jurisdiction if it depends on a prior finding that the failure to provide the funding has been in breach of public law.

The significance for parents looking to avoid litigation but resolve the matter properly

Our stance would be that there should never **need** to be litigation, just for the purposes of getting back this valuable legal right to reimbursement, in a clear case of illegality, because the Monitoring Officer can put the matter right under s5(2) or s5A(2) of the Local Government and Housing Act 1989 and propose settlement under the provisions for *ex gratia* payments where there is fault by the council – the very same basis on which payments are made when the LGSCO recommends them.

CASCAIDr corresponds with many councils' Monitoring Officers **every week.** We use this statutory remedy to help people avoid getting stuck in the complaints system, and avoid having to get adversarial and threaten judicial review.

We are regularly told that we are wrong to say that a breach of a statutory duty of the type that CASCAIDr specialises in identifying (Care Act breaches), ever gives rise to the independent mandatory **duty** of a council's Monitoring Officer (under legislation promoting good governance, dating back to 1989, as mentioned), to report the matter to Members, if the Monitoring Officer can't otherwise sort it out.

We're often told that when a dispute arises about the discharge of Care Act duties, regarding a budget, care plan or the processes required by that Act (one where we've carefully probed and identified all the breaches) that their own governance duties are not triggered because (in some way that is never explained), that particular ***sort of dispute is not "really" about contravention of an enactment or a rule of law*** – and that the individual should just use the compla**i**nts service, even though the Ombudsman's own complaints service often describes failures in due process and fettered or unevidenced unarticulated thinking as **breach of the Care Act**.

It will not be in every case, however, that a person or a third party spends money to make up for the wrongs of the council's adult social care department.

Sometimes the person will just go ***without*** care and have a worse life.

In other cases, relatives (usually parents) will just step up, whatever the consequences for themselves, for want of legal awareness. We think that when an informal carer has just carried on doing the care, without realising that they didn't **have** to, there won't be any clear cut case for restitution, either, even if the service user succeeds in a challenge or a complaint, later on. Restitution is fundamentally about money, not labour provided voluntarily, even if by mistake.

Where however an informal contribution becomes **unwilling**, and is not continued, or is continued **but no explicit statement of the perceived coercion and no challenge to a failure to increase the care plan is even *intimated*,** the service user will either be left in unmet need - or looked after but without any chance of restitution for the carer.

Where a person or their family has paid out money for something that was missing and the necessity for which has long been clearly asserted in writing, and the council is shown to have **known** that such that it can fairly be said it's been taking the benefit of that provision, despite the paying person's objection of unwillingness, then there **will** be a strong claim for restitution, we believe.

But then again, sometimes the very people who are manoeuvred into stepping up will be close relatives who could not normally be paid through a direct payment, without a further discretionary decision as to necessity for exceptional permission under the Direct Payment regulations for the work to be done by a close relative, which may compel public law proceedings in any event.

Where a third party has actually been paid, the claim will be strongest. But even where the service using client has only incurred a *liability* to pay, and no money has changed hands, for instance where the needy person lacks capacity to contract but must pay a reasonable sum for necessaries under the Mental Capacity Act, then a reasonable sum for the service is the measure of what the council would have to reimburse, as a matter of both public and private law principle, because of the law of unjust enrichment.

Conclusions

The Court of Appeal was not saying here that the breach of statutory duty gives rise to *damages* to compensate CP for the effects or harm caused by non-provision of adult social care services.

That would be changing the law that breach of public law in the context of community care law does not sound in damages for breach of statutory duty or in parallel at common law in negligence, but is merely *enforceable* by way of public law.

It was saying that the council cannot be seen to retain the benefit of its own wrongdoing, and because of that, the expenditure incurred through the service having provided CP with a place, needed to be paid **over** to CP; in our view, no reasonable council could have defensibly payment for that service as **outside** of her social care rights, once the value per annum had been agreed.

What is exciting about this development is that it MIGHT make decent public law firms interested once again in private client work in the community care field, where the person in question has too much money for legal aid. The fact that actual money may be reimbursed would enable law firms to offer services on a 'no win no fee' basis, which could only be good news for the thousands of people getting fobbed off with less than their legal rights.

We think that people in similar situations should refer the council to para 10.86 of the statutory Care Act Guidance and demand the Management Review mentioned there, so that the council can put right any non-compliance with legislation, without further ado.

That will be especially important in any council where they are running the Care Act process on **Three Conversations** lines, unless they are documenting the conversations **compliantly** with the Care Act itself.

What is clear to us is that where expenditure has been the only way the person has coped, there will have to be a **public law challenge**, or at least a referral to the Monitoring Officer before a private law claim for the missing funding could be made.

If the likely rise in public law litigation is to be contained, no doubt on a No Win No Fee basis, once it is appreciated by lawyers that restitution represents a golden seam in a council's coffers, Monitoring Officers will need to engage properly with referrals which identify breaches of the Care Act, or otherwise have to answer, in one court or another, for failure to discharge their own duties under their governing legislation.

Belinda Schwehr, December 2019

CASCAIDr (The Centre for Adults' Social Care – Advice, Information and Dispute Resolution)

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