Welcome to Landmark Chambers' Social Care Webinar Series – Part 4

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Your speakers today are…

Landmark Chambers

Topic:
The interaction of health and social care services

Leon Glenister

Topic:
Contractual Disputes

Admas Habteslasie

Topic:
Difficult assessments of need

Stephen Knafler QC (Chair)

Topic:
Data protection and social care

Ben Fullbrook

Landmark Chambers

The interaction of health and social care services

Leon Glenister

Overview

- Introduction to NHS bodies, duties and the responsible commissioner
- Continuing healthcare
- Hospital discharge during COVID-19 pandemic

(1) Introduction: NHS bodies

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- NHS England:
  - Its duties are set out in the NHS Act 2006.
  - Its general duties remain as set out in the NHS Act 2006: to promote a comprehensive health service, exercising functions in view of continuous improvement of services, reducing inequality, promoting research, etc.
  - Main commissioner of primary and dental care and specialist services

(1) Introduction: NHS bodies

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- CCGs:
  - CCGs are in charge of commissioning health services, and its duties are set out in Chapter A2 of the NHS Act 2006 (inserted by HSCA 2012). Includes wide range of acute and community NHS services other than those commissioned by NHS England.
  - It general duties remain (which mirror those of NHSE).

- NHS Trusts
  - Sections 25-27 and Schedule 4 of the NHS Act 2006.
  - Provision of goods and services for the purpose of the health service.

(1) Introduction: local authorities

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- Section 2B of the NHS Act 2006 states “[e]ach local authority must take such steps as it considers appropriate for improving the health of the people in its area.”

- This can include:
  - “information and advice”
  - “providing services or facilities for the prevention, diagnosis or treatment of illness”
  - “providing assistance (including financial assistance) to help individuals to minimise any risks to health arising from their accommodation or environment”
  - “making available the services of any person or any facilities”

(1) Introduction: responsible commissioner

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- As a general rule, see section 3(1A) of the NHS Act 2006:

> "For the purposes of this section, a clinical commissioning group has responsibility for–
>
> (a) persons who are provided with primary medical services by a member of the group, and
>
> (b) persons who usually reside in the group's area and are not provided with primary medical services by a member of any clinical commissioning group"

(2) Continuing healthcare: why it matters

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- If individual eligible for NHS continuing healthcare then generally no charge is made; whereas LA care and support will usually lead to a charge.

- It also defines who is responsible for the cost of provision. If an individual has CHC funding, an LA will usually determine there is no ‘need’ for community care services.

- The LA cannot provide services that fall to be provided under the NHS 2006 unless such would be incidental or ancillary, or the service would be of a nature the LA could be expected to provide: section 22 of the Care Act 2014.

(2) Continuing healthcare: primary health need

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- Key concept of primary health need, explained in ‘National Framework for NHS continuing healthcare and NHS funded Nursing Care’:

> *“55. An individual has a primary health need if, having taken account of all their needs (following completion of the Decision Support Tool), it can be said that the main aspects or majority part of the care they require is focused on addressing and/or preventing health needs. Having a primary health need is not about the reason why an individual requires care or support, nor is it based on their diagnosis; it is about the level and type of their overall actual day-to-day care needs taken in their totality.”*

(2) Continuing healthcare: primary health need

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- Ineligible only where nursing or other healthcare services required (a) are no more than incidental or ancillary to the provision of accommodation the LA are under a duty to provide, and (b) are not of a nature beyond which a LA whose primary responsibility it is to provide social services could be expected to provide (paragraph 58 of Framework).

- Therefore crucial that LA is represented in the process, and CCG under duty to consult LA: regulation 22(1) NHS (Responsibility and Standing Rules) Regulations 2012.

- Based on assessment of needs: (1) nature, (2) intensity, (3) complexity, (4) unpredictability.

(2) Continuing healthcare: disputes between LA / CCG

- The decision is for the CCG: St Helens BC v Manchester PCT [2008] EWCA Civ 931. The LA has no veto.

- The LA has no right of appeal, resolution by dispute resolution between bodies: regulation 22(2) of the RSR Regs 2012.

- Does not specifically explain what happens if dispute resolution protocols are not agreed. Mediation? Complaints procedure? Judicial review?

(2) Continuing healthcare: no gap

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- Guidance is clear, and courts have been consistently clear that individuals should not fall between services.

- Paragraph 57 of the CHC Framework: “There should be no gap in the provision of care. People should not find themselves in a situation where neither the NHS nor the relevant local authority (subject to the person’s means and the person having needs that fall within the eligibility criteria for care and support) will fund care, either separately or together.”

(3) Hospital discharge during COVID-19

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- ‘COVID-19 Hospital Discharge Service Requirements’
- In organising community provision, CCGs would take lead but needed to work “hand in glove” with adult social care colleagues.
- LAs were asked to (1) agree a lead LA for each hospital/trust, (2) support discharge work for those leaving hospital, (3) take the lead in contracting in domiciliary care, care homes and reablement services.

(3) Hospital discharge during COVID-19

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- Duty to carry out CHC assessment can arise when patient is being discharged from hospital. All assessments were put off, but Government agreed to fund the discharge pathways.

- Mostly carried out by section 75 agreement, permitting CCGs and LAs to enter into partnership agreements to allow LA to perform health related functions.

(3) Hospital discharge during COVID-19

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- Not completely clear the duration of funding from pooled fund, e.g. person who was funded by LA but discharged from hospital and from pooled fund.
  - Section 75 agreement
  - Para 10.11: “Where a patient has been admitted to secondary care and had previously been in receipt of a funded care package (either in a care-home or in their own home) this guidance and additional funding is intended to support the restart of such a package also. I.e. restarted care following discharge will be counted as covered by this additional funding.”

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Social Care: Contractual Disputes

Admas Habteslasie

STRUCTURE OF TALK

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1) Contractual disputes in social care: the context, Care Act 2014
2) Market shaping: the duty under s.5 of the Care Act 2014
3) Public law challenges
    a) Consultation
    b) Breach of s.5 duty
4) Private law disputes
5) Is it a private law or public law dispute?

(1) CONTEXT

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- Shift to a market-based approach to social care services. Majority of social services now provided by the private sector. In 1979, proportion of residential and nursing care service provided by the state was 64%; by 2012, 6%.

- Local authorities remain the focal point of legal duties. The legal duties to (inter alia) assess and meet needs fall on local authorities (LAs). Key statute is the Care Act 2014.
  - Part 1 of the Care Act 2014 sets out certain general responsibilities/duties of local authorities.
  - Included is a general duty to promote diversity and quality in provision of services at s.5.

(2) Section 5 of the Care Act 2014

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Section 5(1) sets out the duty:

"A local authority must ***promote the efficient and effective operation of a market in services for meeting care and support needs*** *with a view to ensuring that any person in its area wishing to access services in the market*—

(a) has a variety of providers to choose from who (taken together) provide a variety of services;

(b) has a variety of high quality services to choose from;

(c) has sufficient information to make an informed decision about how to meet the needs in question."

(2) Section 5 of the Care Act 2014

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- Section 5(2) sets out factors that the LA must, in performing the s.5(1) duty, have regard to *"in particular"* :

"(a) the need to ensure that the authority has, and makes available, information about the providers of services for meeting care and support needs and the types of services they provide;

(b) the need to ensure that it is aware of current and likely future demand for such services and to consider how providers might meet that demand;

(c) the importance of enabling adults with needs for care and support, and carers with needs for support, who wish to do so to participate in work, education or training;

(d) the importance of ensuring the sustainability of the market (in circumstances where it is operating effectively as well as in circumstances where it is not);

(e) the importance of fostering continuous improvement in the quality of such services and the efficiency and effectiveness with which such services are provided and of encouraging innovation in their provision;

(f) the importance of fostering a workforce whose members are able to ensure the delivery of high quality services (because, for example, they have relevant skills and appropriate working conditions).

(2) Section 5 of the Care Act 2014

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- Therefore, the effect of s.5(1) and 5(2)(d) is that:
  - LA must promote the efficient and effective operation of a market in care services
  - With a view to ensuring that any person in its area has access to variety of providers offering a variety of services, high quality services to choose from, and sufficient information to make an informed decision about how to meet needs
  - In performing the duty to promote, the LA must have regard to a number of factors, one of which is the importance of ensuring the sustainability of the market

(2) Section 5 of the Care Act 2014: Guidance

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- Part 4 of *Care and Support Statutory Guidance* deals with market shaping and commissioning of adult care and support, and provides detailed guidance on discharge of s.5 duty. LA must act under the guidance: s.78, CA

- Guidance highlights 'principles of market-shaping and commissioning':
  - Focusing on outcomes
  - Promoting quality
  - Supporting sustainability
  - Ensuring choice
  - Co-production with stakeholders
  - Developing evidence-based local strategies

(2) Section 5 of the Care Act 2014: Guidance

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- Paragraph 4.4 onwards emphasises the need to commission services:
  - having regard to cost-effectiveness and value for money; and
  - so as to:
    - Effectively shape and influence the market
    - Ensure that fees will enable the agreed quality of care to be provided
    - Ensure that care providers' staff are properly remunerated (at *"at least"* the minimum wage level) and are provided with effective training and development
    - Allow for retention of staff
    - Ensure that there is a range of appropriate and high quality providers and services for people to choose from

(2) Section 5 of the Care Act 2014: Guidance

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"4.104 Contracts should incentivise value for money, sustainability, innovation and continuous improvement in quality and actively reward improvement and added social value. Contracts and contract management should manage and eliminate poor performance and quality by providers and recognise and reward excellence."

"10.27 In determining how to meet needs, the local authority may also take into reasonable consideration its own finances and budgetary position, and must comply with its related public law duties. This includes the importance of ensuring that the funding available to the local authority is sufficient to meet the needs of the entire local population. …"

(2) Section 5 of the Care Act 2014: setting standard rates

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TOO LOW	TOO HIGH	JUST RIGHT…
• Providers unable to improve or even maintain the quality of their service	• Not delivering value for money	• Allows section 5(1) duty to be met
• Can lead to a build up of liabilities, and perhaps lead to provider being unable to continue in business	• Detrimental effect on limited local authority budgets; unnecessary reductions will have to be made elsewhere	• Sufficient profit to enable providers to provide high quality services
		• Value for money for LA

(2) Section 5 of the Care Act 2014: overview

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- LA under a range of duties
  - Section 5(1) duty – directed to ensuring a person within LA's area has variety, high quality and sufficient information to make an informed decision
  - Market shaping duties
  - To engage with stakeholders, partners, potential service users as appropriate
  - General public law obligations, as reinforced by specific statutory scheme: e.g. duty to consult, procedural fairness, taking into account s.5(2) factors

- In practice: this process will coalesce into the contracting arrangement; therefore, there will also be obligations under contractual arrangements

CHALLENGES: can be on basis of public or private law

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- LAs will enter into contractual arrangements with private providers in order to discharge their statutory duties. Therefore, social care contracting disputes can straddle both:
  - Private law issues based on contract law
  - Public law issues: as LA is acting as a public authority and is bound by public law obligations and statute, particularly s.5 of the Care Act.
- Scope for claims and disputes on either or both bases.

(3) PUBLIC LAW CHALLENGES

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- Normal public law grounds of challenge apply:
  - Departure from guidance, e.g. where LA agreed to set care home fees by reference to a toolkit, departing from specified capital return rate in toolkit without a rational reason was unlawful: ***R (Mavalon Care Ltd) v Pembrokeshire CC*** [2011] EWHC 3371
  - Public Sector Equality Duty under s.149 of the Equality Act 2010
  - ECHR: Art.8 claims by providers precluded by s.7 HRA 1998; but claims on basis of A1P1 *"peaceful enjoyment of …possessions"* can be made: see ***R (Broadway Care Centre Ltd) v Caerphilly County Borough Council*** [2012] EWHC 37 (Admin)
  - Consultation?
  - Breach of s.5 Care Act duty?

(3) PUBLIC LAW CHALLENGES (a) Consultation

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- In relation to potential consultation challenges, note that guidance indicates importance of consulting appropriately by emphasis on:
  - Understanding the outcomes which matter most to people and ensuring that these outcomes are incorporated
  - Understanding the market, including: current and future needs, (where possible) providers' business models, and implications of future needs for service delivery
  - Understanding and working with stakeholders and partners in designing contractual mechanisms

- Requires LA to give careful thought to design of process for establishing contractual framework

(3) PUBLIC LAW CHALLENGES (b) Breach of s.5

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- A focal point for disputes between service providers and LAs: contractual rates for services

- Duty under s.5 Care Act, specifically s.5(2)(d), has provided a public law basis to ventilate such disputes

- Note relationship between market shaping duties, position of LA in market and level of fees:
  - LA will be the dominant commissioner in the market
  - Thus, the prices that LA sets will have a very significant influence on the operation of the market

(3) PUBLIC LAW CHALLENGES (b) Breach of s.5

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- *"Providers have become increasingly concerned that some commissioners have used their dominant position to drive down or hold down fees to a level that recognises neither the costs to providers nor the inevitable reduction in the quality of service provision that follows. This is short-sighted and may put individuals at risk. It is in conflict with the Government's Best Value policy. And it can destabilise the system, causing unplanned exits from the market. Fee setting must take into account the legitimate current and future costs faced by providers as well as the factors that affect those costs, and the potential for improved performance and more cost effective ways of working. …"*

From: ***Building Capacity and Partnership in Care: An Agreement between the statutory and the independent social care, health care and housing sectors***, Department of Health, October 2001

(3) PUBLIC LAW CHALLENGES (b) Breach of s.5

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What is the approach of the courts to a challenge to standard rates/fees on the basis of a breach of the section 5 duty?

(3) PUBLIC LAW CHALLENGES (b) Breach of s.5

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- Claimants in ***R (Care England) v Essex County Council*** [2017] EWHC 3035 (Admin) raised a challenge to care home fee increase on the basis that (inter alia) it did not go far enough for purposes of s.5(2)(d) and was irrational

Per Lavender J at [49]-[50]:

- S.5(1) does <u>not</u> confer specific rights on individuals or providers
- Regard must be had to all factors listed in s.5(2)
- There are means other than setting fees for promoting efficient and effective operation of a market
- One aspect of promoting efficiency can be ensuring fees are not set too high
- Sustainability factor can point towards ensuring that fees are not set too low

(3) PUBLIC LAW CHALLENGES (b) Breach of s.5

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- Lavender J began by noting that duty to have regard in s.5(2) imposed for a specific purpose, i.e. ensuring that people within the area had the three things specified in s.5(1). In this case, common ground s.5(1) objectives were being met. This was relevant to approach to s.5(2): [22].

- Lavender J dismissed the challenge on basis of s.5 breach, finding that Essex Council clearly did have regard to the importance of ensuring sustainability.

- As a matter of principle, provided *some* inquiry into the relevant factor, it is generally for the decision-maker to decide on the manner and intensity of the inquiry into the relevant factor

(3) PUBLIC LAW CHALLENGES (b) Breach of s.5

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- In making its decision, Essex had regard to range of materials, including a Pricing Report which:
  - considered financial pressure on sector and sources thereof
  - set out three pricing options, with pros/cons for each:
    - No increase – major con was pressure on providers
    - Increase to reflect increase in National Living Wage
    - Full cost of care increase – major con was financial impact on council

- This significantly undermined claimant's case

(3) PUBLIC LAW CHALLENGES (b) Breach of s.5

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- Claimants in ***Care England*** also raised a rationality challenge to fee increase on basis it not go far enough for sustainability.

- Lavender J said threshold for success on such a challenge *particularly* high in view of nature of statutory duty at [72]-[73]:

"72. …The Claimant's case, therefore, must be that there was a certain level of increase which was necessary if the section 5 duty was to be met. What that level was (assuming there was one), and, in particular, whether it was more or less than the level of the increases decided on in July 2016, is not a judgment which this court could easily make on an application for judicial review, and certainly not on the evidence in this case."

(3) PUBLIC LAW CHALLENGES (b) Breach of s.5

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Lavender J continued:

"73. It does not follow that, because some increase in fees was considered appropriate, the increase had to be one which addressed in financial terms each of the sources of financial pressure experienced by care home providers. That is not a necessary consequence of having regard to the sustainability factor. …The section 5 duty cannot be viewed in isolation. The Defendant faced other competing pressures and duties, including the limits on its resources and the duty to obtain value for money. …It was the Defendant's responsibility to strike a balance between these different considerations. …The weight to be given to different factors was a matter for the Defendant."

(3) PUBLIC LAW CHALLENGES (b) Breach of s.5

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Key points in relation to s.5 challenges:

- Where s.5(1) objectives are being met, review will likely be less intrusive
- Courts recognise the multi-factorial, judgment-laden nature of the s.5(2) exercise in the context of fees; therefore, once it is shown the factors have been considered, the threshold for a successful challenge will be high
- Evidence of the process very important. A claimant will need strong evidence that an LA ignored the statutory factor(s) in setting fees (etc). LA at significant legal risk without evidence setting out the process and showing relevant factors were considered

(4) Private law claims

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- Potential disputes could include:

  – As to the meaning of the contract. For example:
    - where a price review mechanism specifies a review at fixed intervals (e.g. annual), can rates be changed more frequently?
    - Does a dispute/arbitration clause apply to the dispute/preclude proceedings?
    - What happens when arrangements are made outside the contract?

  – Is one party (normally the LA) entitled to terminate the contract? Consequences of termination? See, e.g., ***Supportways***

(4) Private law claims

- Examples of pure private law disputes:
  - Exercise of a contractual right to terminate: private law ***R (Broadway Centre Ltd) v Caerphilly CBC*** [2012] EWHC 37 (Admin)
  - Dispute over whether contract gave provider power to unilaterally increase was a q of contractual interpretation: ***West Sussex CC v Amberley*** (UK) Ltd [2011] EWCA Civ 11

(4) Private law claims

- Procedure: claims would be brought as a Part 7 claim or, where no dispute of fact (e.g. pure q of interpretation on agreed facts), Part 8 claim

- Limitation period: 6 years from breach of contract, cf asap/3 months for JR

- Early resolution: Absent settlement or ability to obtain strike out/summary judgment, defendant LA may have little choice other than to 'ride out' proceedings to trial; cf permission stage, TWM certification in JR

- Cost: Such disputes can be high value and generally may be brought in High Court (QBD or Chancery Division). High Court private law proceedings can drive up costs significantly, particularly Part 7 proceedings

(5) Private law or public law dispute?

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- Challenges can straddle both. Why does distinction matter?
  - For claimants, potential for multiple avenues of ‘attack’
  - For defendants, opportunity for knock-out defence/undermining of claim

- Where is the dividing line?

“…the mere fact that the party alleged to be in breach of contract is a public body plainly cannot, on its own, transform what would otherwise be a private law claim into a public law claim.”

R (Supportways Community Services Ltd) v Hampshire County Council [2006] EWCA Civ 1035.

(5) Private law or public law dispute?

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- Q is: can claimant establish a *"relevant and sufficient nexus"* between contractual action and statutory/public law duty?
  - s.5(2)(d) seems to make this test considerably easier to meet: e.g. ***Care England***, where breach relevant to decision to set fees in the contract

- The test is specific to the legal context, so caution required in drawing analogies with pre-Care Act case law

- Where case is truly a private law claim, attempt to 'sneak in' public law arguments despite lack of nexus is abusive attempt to circumvent shorter limitation period for JR

(5) Private law or public law dispute?

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- Similarly, local authority cannot rely on public law arguments/procedural points to defeat what is in truth a private law issue.

- E.g.: ***Abbeyfield Newcastle Upon Tyne Society Ltd v Newcastle City Council*** [2014] EWHC 2437(Ch):
  - Issue was whether rate payable on expiry of contract was (i) old contractual rate or (ii) *quantum meruit* i.e. reasonable sum on basis of amount not being contractually stipulated
  - Court found (ii) was the case. Essentially a question of interpretation of the contract. Fact that LA had to have regard to public law duty capping its liability was an *"incidental consideration"* which did not affect nature of the dispute

(5) Private law or public law dispute?

- Courts will also deprecate the ventilation of what are in substance private law arguments via judicial review:

  "I would not wish to leave this case without stating that it is regrettable that scarce resources have been employed by the respondents in having to meet the claims of the applicants which I have held to be clearly inadmissible. Inappropriately these proceedings sometimes took on the appearance of a fiercely contested private law action"

From ***R (Cumbria Professional Care Ltd and Others) v Cumbria County Council*** (2000) 3 CCLR 79, QBD – judicial review claim where claimant failed to identify any public law wrong.

(5) Private law or public law dispute?

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- Other side of the coin: the mere presence of a contract does not transform a public law claim into a private law claim

- ***R (Davis) v West Sussex CC*** [2012] EWHC 2152 (Admin). LA terminated service contract following allegations of abuse. Care home owner challenged LA's investigation and decision-making on procedural grounds. LA argued that relationship was exclusively contractual, no public law issue.

- Court disagreed: the LA carried out the investigation under its public law powers and would have done so irrespective of the contractual arrangement. Termination of the contract was only one of many consequences of that investigation procedure.

(5) Private law or public law dispute?

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Key points

- Is LA exercising public law powers? JR is appropriate procedure
- Is it purely a contractual dispute? Private law proceedings in County Court or High Court
- If there is an overlap of private and public law issues, is there a relevant and sufficient nexus between the two? See s.5(2)(d), e.g. ***Care England*** case.
- Note key procedural differences:
  - Much short limitation period for JR
  - Less opportunity to dispose of unmeritorious claims earlier in private law proceedings; corresponding costs consequences for defendants, esp in High Court proceedings

Other potential issues

- Competition issues can arise:
  - See, e.g. ***Carewatch Care Services Ltd v Focus Caring Services Ltd*** [2014] EWHC 2313 (Ch):
    - dispute (between providers) about whether restrictive covenants (non-compete and non-solicitation clauses) in a franchise agreement for the provision of home care services were in breach of the prohibition on anti-competitive agreements in s.2(1) Competition Act 1998.
  - In principle, LA could abuse its dominant position as a purchaser of services so as to breach the provisions of Chapter II of the Competition Act but no case of actual abuse has ever been established.

SUMMARY

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- Contract disputes can straddle private/public law
- Section 5 Care Act 2014:
  - LA duty-bound to consider and weigh multiple, sometimes conflicting factors, including value for money and importance of ensuring sustainability of market
  - Section 5(2) a likely focal point for price disputes: see ***R (Care England) v Essex County Council*** [2017] EWHC 3035 (Admin)
  - Provided LA has taken factors into account, courts will afford LA significant leeway, particularly if s.5(1) objectives are being met
- Private law disputes likely to focus on interpretation of contract and termination issues, but can extend much further. NB potential for competition issues.
- Private/public law overlap provides potential for (sometimes) knockout procedural points

TIPS: CLAIMANTS

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- Section 5 Care Act: Can you dispute s.5(1) objectives being met? Is there good evidence of failure to take into account a mandatory factor under s.5(2)?
- In context of pricing disputes, s.5(2)(d) a strong answer to sufficient nexus test
- Potential consultation issues? See guidance.
- Challenges most logically to the formal process leading to the production of the contract; but arguments may be possible that reconsideration is required in light of some change of circumstance – e.g. effect of COVID-19 on care homes?
- Note potential procedural benefits of private law litigation

TIPS: DEFENDANTS

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- Section 5 Care Act:
  - Can you show/agree s.5(1) objectives being met? Focus of s.5(2) duty is s.5(1);
  - Is there good evidence of mandatory factors under s.5(2) being taken into account? Once shown factors *were* taken into account, LAs have significant latitude

- Where contractual scheme result of extended decision-making process, good argument that that is the only target for a public law challenge

- Public law claims procedurally more favourable: shorter limitation period, permission stage

- Courts unsympathetic to use of JR to litigate in substance private law points

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DIFFICULT ASSESSMENTS OF NEED

STEPHEN KNAFLER QC

DIFFICULT ASSESSMENTS OF NEED

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The statutory machinery for assessments:

- The Care Act 2014 ("the Act") at -
  - Sections 9 – 13 (adults and carers);
  - Sections 58 – 59 (children's needs after they turn 18);
  - Sections 60 – 62 (children's carers);
  - Sections 63 – 64 (young carers);
- The Care and Support (Assessment) Regulations 2014 ("the Regulations); and
- Chapters 6 and 7 of the *Care and Support Statutory Guidance* ("the Guidance")

Judicial review of assessments

- Many claims may fail because of the alternative remedy provided by the statutory complaints process (*R (F) v Wirral BC* [2009] EWHC 1626 Admin) or because of the circumspect approach of the Administrative Court in this context (*R (Ireneschild) v Lambeth LBC* [2007] EWCA Civ 234, *R (Lloyd) v Barking & Dagenham LBC* [2001] EWCA Civ 533, *R (Davey) v Oxfordshire CC* [2017] EWHC 354 Admin).
- Others may succeed, for example where there has been unfairness or a clear failure to take into account relevant evidence (*R (JG) v Southwark LBC* [2020] EWHC 1989 Admin (that a behavioural support plan was being followed, and expert evidence as to insomnia and mobility difficulties).
- The aim should be, however, to resolve a difficult situation as harmoniously as possible.

The basics (1)

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The essentials of a lawful assessment are:

- an assessment of whether '*the adult does have needs for care and support and…if the adult does, what those needs are'* (section 9(1) of the Act);
- an assessment of '*the impact on the adult's needs for care and support on the matters identified in section 1(2)*' (see section 9(4)(a) of the Act), which are:

1(2) "Well-being", in relation to an individual, means that individual's well-being so far as relating to any of the following—

(a) personal dignity (including treatment of the individual with respect);

(b) physical and mental health and emotional well-being;

The basics (2)

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(c) protection from abuse and neglect;

(d) control by the individual over day-to-day life (including over care and support, or support, provided to the individual and the way in which it is provided);

(e) participation in work, education, training or recreation;

(f) social and economic well-being;

(g) domestic, family and personal relationships;

(h) suitability of living accommodation;

(i) the individual's contribution to society;

an assessment of '*the outcomes the adult wishes to achieve in day-to-day life, and ….whether, and if so to what extent, the provision of care and support*

The basics (3)

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could contribute to the achievement of those outcomes' (section 9(4)(b) and (c) of the Act);

- a consideration of whether, and to what extent, '*matters other than the provision of care and support could contribute to the achievement of the outcomes the adult wishes to achieve in day-to-day life'* and '*whether the adult would benefit from the provision of anything under section 2* [preventative measures] *or 4* [information and advice] *or of anything that might be available in the community'* (section 9(5) of the Act);
- a consideration of '*the wishes and preferences of the individual to whom* [the assessment] *relates*'; of '*the outcome the individual seeks from the assessment*'; and of '*the severity and overall extent of the individual's needs'* (including, over a period of time, when the needs fluctuate (Regulation 3(2)

The basics (4)

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of the Regulations;

- a consideration of '*the impact of the needs of the individual to whom the assessment relates on'* any carer, or other persons the local authority considers relevant and, in particular, any impact on '*any child involved in providing care to any individual'* (Regulation 5 of the Regulations; and see paragraphs 6.65 to 6.72 of the Guidance on the '*Whole family approach*');
- finally, the provision of a written record of the assessment to the adult and, if the adult requests to any carer or any other person (section 12(3) of the Act).

Advance Information

- Regulation 3(4) and (5) of the Regulations;
- Paragraphs 6.22 and 6.38 of the Guidance.

Support

3 stages:

- seek to involve someone who can assist the adult to engage effectively: section 67 of Act; but
- Otherwise the local authority may need to appoint an '*independent advocate'*, under section 67 of the Act;
- Or an assessment of capacity will need to be undertaken under the Mental Capacity Act 2005 and an Independent Mental Capacity Advocate may need to be appointed.

Self-Assessment

Most individuals are entitled to self-assess/assess jointly with the local authority:

– Regulation 2 of the Regulations.

– Paragraphs 6.44 to 6.53 of the Guidance.

Who should the assessor be?

Someone appropriately experienced and trained:

- Regulations 5 and 6 of The Care and Support (Assessment) Regulations 2014;

- Paragraphs 6.85 to 6.90 of the *Care and Support Statutory Guidance*

Help from outside

- Specialist help: Regulation 5 of the Regulations 2014 and paragraph 6.26 of the Guidance.
- Delegation: section 79 of the Act.
- NHS assessment under NHS CHC machinery?

Is the process appropriate and proportionate?

- Regulation 3(1) of the Regulations.
- Paragraphs 6.35 to 6.43 of the Guidance.
- Integrated assessments (paragraphs 6.74 to 6.70 of the Guidance)

Refusals of assessments

Sometimes, the local authority must still complete one, because of section 11 of the Act. Where:

- The adult lacks capacity to refuse the assessment and the authority is satisfied that carrying out an assessment would be in his best interests;
- The adult is experienced, or is at risk of abuse or neglect;
- The adult changes his mind, and requests an assessment;
- The local authority things that the adult's needs or circumstances have changed (in which case they must renew the offer of an assessment).

Possible reduced needs

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Case-law and LGSCO decisions indicate that the following is required:

- A '*fair process*';
- A fair/accurate account of what the adult contends that his needs are;
- A fair/accurate account of what is the evidence supporting the adult's contention;
- A frank explanation of why the assessor does not agree, including a fair and un-exaggerated account of any evidence that exists supportive of the assessor's professional opinion;
- Explicit reference to the earlier assessment and an explanation of what has changed.

Some practical steps

- Changing the assessor;
- Adding a second assessor;
- Obtaining an external specialist report, potentially with the adult exercising some choice;
- Obtaining an independent social work report, potentially with the adult exercising some choice;
- Delegation;
- Early referral to a manager of an overview;
- Internal review or statutory complaints process;
- Mediation.

When a claim is threatened (1)

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- is everything the claimant says factually correct? Is everything the client department says factually correct? Are factual assertions consistent with the documents?
- is the authority in a position to respond compliantly with its *'duty of candour'*?
- is counsel needed at an early stage? When might that be the case?
- is this a claim that the authority wants to defend? –
  - is the decision (clearly) lawful?
  - is there a reputational risk?
  - how important is the case, for the authority?
  - is negotiation or mediation possible?

When a claim is threatened (2)

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- should the decision be re-made?
- how much will defending the claim cost?
- how much would conceding cost and are there consistency of treatment issues?
- who decides?
- is there a lateral solution or an alternative remedy?

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Data Protection and Social Care

Ben Fullbrook

Introduction – Key sources of data protection law

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- General Data Protection Regulation (EU 2016/679)
- Implemented and supplemented by Data Protection Act 2018
- Will still be relevant post Brexit!
- Big fines!

When will the GDPR apply?

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- Applies to the processing of personal data by a controller or processor in the EU, regardless of whether processing takes place in the EU

What is personal data?

- *Personal data* is defined as any information relating to a data subject.
- A *data subject* is the identified, or identifiable, person to whom the personal data relates.
- An *identified, or identifiable* person is a person who can be identified directly or indirectly by reference to an identifier (e.g. a name or reference number), or one or more factors specific to the ph physical, physiological, genetic, mental, economic, cultural or social identity of the individual
- *Indirect identification* is where a person is identified using a combination of the stored information and means reasonably likely to be used to identify them (e.g. a number plate or an IP address – see ***Mircom v Virgin Media*** [2019] EWHC 1827 (Ch) and ***Case C-582/14 Breyer v Federal Republic or Germany*** [2017] 1 WLR 569
- *"Relating to"* has been the subject of case law: see ***Durant v FSA*** [2003] EWCA Civ 1746 & ***TLT v SSHD*** [2018] EWCA Civ 2217

Other definitions

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- *Processing* is widely defined and, among other things, covers collecting, recording, storage, use and erasure or destruction of data. Simply having the name of an identifiable individual on a database will amount to processing personal data.

- A *controller* is a person (including a company) who determines the purposes and means of processing personal data. It is a concept that those in the data protection sector are already familiar with. Most obligations under the **GDPR** fall on controllers.

- A *processor* is a person who processes personal data on behalf of the controller

Key principles of GDPR

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- **Lawfulness, fairness and transparency.** Personal data must be processed lawfully, fairly and in a transparent manner in relation to the data subject. The controller must only process personal data on the basis of one or more of the legal grounds set out in Article 6 of the GDPR
- **Purpose limitation.** Personal data must only be collected for specified, explicit and legitimate purposes. It must not be further processed in any manner incompatible with those purposes
- **Data minimisation.** Personal data must be adequate, relevant and limited to what is necessary in relation to the purposes for which it is processed.
- **Accuracy.** Personal data must be accurate and, where necessary, kept up to date.
- **Storage limitation.** Personal data must not be kept in a form which permits data subjects to be identified for longer than is necessary for the purposes for which the data is processed.
- **Integrity and confidentiality.** Personal data must be processed in a way that appropriately ensures its security. Controllers and processors must use appropriate technical or organisational security measures to ensure this.
- **Accountability.** The controller is responsible for, and must be able to demonstrate, compliance with the other data protection principles

Processing

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- A controller may only process personal data on one of the legal grounds set out in Art.6 GDPR. These include where processing:
  - Has been done with the "freely given, specific, informed and unambiguous" *consent* of the data subject for one or more specific purposes
  - Is necessary for compliance with a legal obligation to which the controller is subject
  - Is necessary for protecting the vital interests of the data subject
  - Is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data is disclosed
  - Is necessary for the performance of a contract

Performance of a task carried out in the public interest

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- DPA 2018 clarifies that this includes processing that is necessary for the exercise of a function conferred by enactment or rule of law
- ICO guidance makes clear that a processor do not need a specific statutory power to process personal data, but its underlying task, function or power must have a clear basis in law
- But remember it must be necessary – so no reasonable less intrusive means could have been adopted to carry out the testing

Issues with consent for “public authorities”

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- Recital 43 of the GDPR notes that where a controller is a public authority there is likely to be a clear imbalance between it and the data subject, and it is therefore unlikely to be the case that consent can be freely given for the purposes of the GDPR
- Also consent can only be “freely given” and so requires a genuine choice and ability to refuse without detriment, which not always possible in social care situation
- ICO guidance actively encourages public authorities to rely on grounds other than consent
- Where consent is obtained, the subject needs to be told specific information (see Art. 7 GDPR) and it must be recorded.

Processing special categories of personal data

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- Subject to exceptions, the GDPR prohibits the processing of certain special categories of personal data, including racial or ethnic origin, sex life and sexual orientation and data concerning health (Article 9 GDPR)

- *Data concerning health is* defined as personal data related to the physical or mental health of a natural person, including the provision of health care services, which reveal information about that person's health status (Article 4(15), GDPR).

Exceptions

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- Special categories of personal data may be processed where one or more of the following exceptions apply (additional exceptions are contained in Art. 9(2) GDPR) AND one of the legal grounds in Art. 6 is satisfied
  - (a) the data subject has given explicit consent to the processing of those personal data for one or more specified purposes
  - (b) processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment and social security and social protection law in so far as it is authorised by Union or Member State law
  - (c) processing is necessary to protect the vital interests of the data subject or of another natural person where the data subject is physically or legally incapable of giving consent;
  - *(h) processing is necessary for the purposes of preventive or occupational medicine, for the assessment of the working capacity of the employee, medical diagnosis, the provision of health or social care or treatment or the management of health or social care systems and services on the basis of Union or Member State law or pursuant to contract with a health professional subject to the conditions and safeguards referred to in paragraph 3* (in UK – where by or under the responsibility of a health professional or a social work professional, or by another person who in the circumstances owes a duty of confidentiality under an enactment or rule of law (s. 11(1) DPA 2018));
- For (b) & (h) must also meet one of the conditions in Sch. 1 pt. 1 DPA 2018 (see s.10)

Conditions (Sch 1 DPA 2018)

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Health or social care purposes

2(1)This condition is met if the processing is necessary for health or social care purposes.

(2)In this paragraph “health or social care purposes” means the purposes of—

(a)preventive or occupational medicine,

(b)the assessment of the working capacity of an employee,

(c)medical diagnosis,

(d)the provision of health care or treatment,

(e)the provision of social care, or

(f)the management of health care systems or services or social care systems or service

Top tips for social care providers

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- Take great care when obtaining consent: give clear information and record unambiguous agreement
- Store records of consent safely
- Public authorities should generally avoid relying on consent
- Create and maintain clear data processing policies; seek professional assistance where uncertain
- Don’t forget your other responsibilities and remember that the exemptions are there to be used in appropriate circumstances

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Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the chat section which can be found along the top or bottom of your screen.

Thank you for listening

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