Care and Health Law

Defensible decision making
in relation to councils' service users

Assessment, Eligibility and Safeguarding

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Menu for today's sessions

- Legal literacy **and the statutory frameworks that social workers need to work within,** and ***use*** to shape their practice eg: the Care Act, Human Rights Act, Mental Capacity Act etc;
- looking at how legal competence can ***support*** decision making and strengthen social work practice, balancing legal duties to service users and Councils' wider responsibilities…
- defending and accounting for practice, through responding to legal challenge

….We'll achieve all this through thinking about the culture one needs in adult social services within a council, to be Care Act compliant [but not actually insolvent!!] and considering …

- Public law basics for staying out of trouble
- Steps for maximising positive risk-taking and management

Questions for discussion, first!

Assessment

- Are you accepting responsibility for assessing those not even yet here, when they have a genuine intention to come?
- Have there been any guidance to social workers/assessors if they find a person unable to achieve x, or xyz but believe that no consequential significant impact is being experienced as a result?
- Is eligibility being determined without regard to specific services: ie eligible for care planning, not eligible for any particular service?

Is this bit of the decision making counting the MET needs, as per the rules? (even though they will be discounted at the care planning stage?)

- Are **written decisions** about eligibility being given in every case, or even any single case?

Care Planning?

- How is review based care-planning going, for all the clients whose reviews have to be done before April 1st 2016?
- Are you telling ***eligible*** persons and/or their supporter or advocate that the person's needs can be met perfectly well, by going to something that's called a 'universal service'?
- Are you doing individuated care planning for older people or still maybe just saying 'needs 24 hr care'? What about shared care for younger people? Do they all have plans?
- Are people arguing about their budgets, and succeeding?
- Are you giving people reasons for why they can have £x but no more than £x after a Panel process?
- Is the DP rate the same as the councils contracted agency rate? Or more than the council can get the service for? Or less, even?
- Are you running ordinary residence properly, for out of area tenants? Do you have a space on that care plan for saying that their needs can only be met in specified accommodation?

Safeguarding questions…

- What about advocacy and SAFEGUARDING enquiries? Who is making that decision and do they know how? Is it a MASH safeguarding triage team, or an Adult Safeguarding Co-ordinator or lead, or a person on the team doing enquiries
- Have you delegated safeguarding to others such as the hospital or the mental health trust?
- What about causing providers to do actual safeguarding enquiries? Are you doing that?
- Are you discussing the perceived abuse and neglect with alleged victims as a matter of routine?
- Are you remembering that alleged perpetrators have rights too, rights to a fair chance to disabuse you of your concerns, by being told about them in most cases?
- Are you applying the MCA principles of best interests consultation about capacity, and doing balance sheet consideration before deciding on what to do?
- Have you got a sensible approach to self neglect and hoarding cases that allows for refusal of assessment in some cases?
- Do your staff use an escalator approach in safeguarding and document it so as to leave an audit trail which evidences proportionate responses?

Things to look out for in local practice

With **statutory duties and discretions**, the most **likely risks of being challenged in judicial review proceedings**, for acting *unlawfully* will arise from a council's

- **Not doing these duties at all, or taking unfeasibly long about it**
  - Eg: not providing advocacy where it is acknowledged to be necessary and an entitlement;
  - Not offering direct payments for a particular client group not excluded from the opportunity;
  - Stretching the assessment phase out, by offering prevention again and again, and never saying when they will get to an eligibility decision;
- **Not doing them sensibly, or in accordance with the guidance, without a good reason!**
  - Eg: running a waiting list for a scarce resource based on alphabetical order instead of need;
  - Not giving reasons for why an offered package or budget is considered to be enough…;
- **Not doing them legally, within the words used in the Act or Regs – or ignoring the statutory purpose**
  - Failing to allow a person to require the involvement of a nominated person in a decision where this is required, or regarding their relative as their informal supporter without getting the person's consent or making a BI decision.
  - Imposing a condition on a direct payment recipient that negates the whole point of the offer – choice/control
- **Fettering discretion or not doing decision making fairly, so far as procedural fairness rules are concerned...**
  - Failing to consider giving a person direct payments to spend on a close relative in the same household;
  - Not allowing a person to make representations in respect of their position on ability to achieve or what is wrong with the suggestion that a service available for free locally could appropriately meet a person's needs.

This is all *you* have to do, as practitioners:

- Take personal responsibility to be **aware of** and follow the **guidance** where it seems to be straightforward and says MUST or MUST ***NOT***
- If it says SHOULD or SHOULD NOT – then check out with your management whether your council is doing what is being expected, and bang on about it until management lets you know why. You should be practising lawfully, but the guidance is not *totally* binding.
- If it says MAY... then check out whether adoption of that recommendation is locally agreed. A policy should be applied across the whole client population unless there's a very good reason not – because of equity and discrimination principles.

- If the guidance seems a bit odd, ambiguous, or doesn't make sense to your way of thinking, ask your manager what they reckon, and between you formulate a *question* – you can't use search engines unless or until you can frame the question.
- Check it out in the regulations and the actual Act as far as you can: this is not hard, these days.
- If still in doubt, ask your legal team.
- Write it up and use as a resource for your colleagues

Assessment, Recording and Organisational Culture

- ***Assessment* of risk is all about using your common sense and experience**
- You need to know enough about a person to know what **could happen** and that means
  - Probing with your personal social skills and open questions
  - Being clever enough to read their medical report and their history,
  - or at least intelligent enough to understand that you don't understand it *all*, and pushy enough to ask for a translation to plain English!
- **Recording** is everything.
  - Good reasons for a conclusion, recorded at the time, are the best protection against criticism, even if the judge can see with the benefit of hindsight that you were wrong. ***Wrong is not unprofessional,*** at least not inevitably.
- **Cobbled-together explanations** done afterwards are not nearly so good, and risk being taken to pieces in cross-examination by clever barristers.

Positive risk taking

- ‘a course of purposeful action based on informed decisions concerning the possibility of positive and negative outcomes of types and levels of risk appropriate in certain situations’

Titterton M (2010) ***Positive Risk Taking*** HALE Series on Knowledge Transfer and Best Practice: Paper No. 2 Edinburgh : HALE

- Positive risk taking is a process which starts with the identification of potential benefit or harm. The desired outcome is to encourage and support people in positive risk taking

ADASS West Midlands/West Midlands Joint Improvement Partnership/NHS West Midlands (2011) ***A Positive Approach to Risk & Personalisation: A Framework***

Positive risk management

- ***Managing*** risk requires
  - a framework within which consistent decisions can be reached
  - a 'bottom-line', the point at which a risk cannot be accepted, and what happens next
  - Identifying potentially harmful situations and seeking collaboratively to
    - Reduce the likelihood of occurrence, and/or
    - Reduce negative consequences, and
    - Consider the consequences of not taking the risk

  in order to achieve an **acceptable** level of risk

You are not alone!

- "It is acknowledged that this is not an easy process and that as professionals we may have to deal with conflict and with grey areas."

- "Positive risk taking, while acting as an enabler in the lives of children and adults, can also be a challenge for staff, who have to justify and defend their decision making"

Titterton M (2010) ***Positive Risk Taking*** *HALE Series on Knowledge Transfer and Best Practice: Paper No. 2* Edinburgh : HALE

- **"risks need to be shared – no one person should take full responsibility"**

DH (2007) ***Independence Choice and Risk: a guide to best practice in supported decision-making***

Risks vs rewards, on that balance sheet – the culture needs to be one of *defensible* decision-making, not defensive!

- "The fact is that all life involves risk, and the young, the elderly and the vulnerable, are exposed to additional risks and to risks they are less well equipped than others to cope with. But just as wise parents resist the temptation to keep their children metaphorically wrapped up in cotton wool, so too we must avoid the temptation always to put the physical health and safety of the elderly and the vulnerable before everything else. Often it will be appropriate to do so, but not always. **Physical health and safety can sometimes be bought at too high a price in happiness and emotional welfare.**

- **The emphasis must be on *sensible* risk appraisal, not striving to avoid all risk, whatever the price, but instead seeking a proper balance and being willing to tolerate manageable or acceptable risks as the price appropriately to be paid in order to achieve some other good – in particular to achieve the vital good of the elderly or vulnerable person's happiness.**

- **What good is it making someone safer if it merely makes them miserable?"**

Classic risk matrix for exploring what needs to be managed, for *everyone's* peace of mind, if the authority is putting public money in.

Likelihood of it happening:		Rare	Unlikely	Possible	Likely	Almost Certain
Consequence if it happens		1	2	3	4	5
Catastrophic	5	5 Amber	10 DK Amber	15 Red	20 Red	25 Red
Major	4	4 Amber	8 DK Amber	12 DK Amber	16 Red	20 Red
Moderate	3	3 Green	6 Amber	9 DK Amber	12 DK Amber	15 Red
Minor	2	2 Green	4 Amber	6 Amber	8 DK Amber	10 DK Amber
Negligible	1	1 Green	2 Green	3 Green	4 Amber	5 Amber

The unavoidable truth: your organisational culture matters for defensible decision making

- How seriously is supervision taken? Whistleblowing? Attention to workload?
- If staff question the legality of something they've been asked to do, is this regarded as helpful, or as an irritation?
- Do senior managers go to legal update training? Legal awareness is going to be an inherent part of being skilled for management – it's a strategic *tool* and not a pain or a hindrance to meeting performance targets.
- Do members expect to be able to demand a change of policy or an exception to be made at the drop of a hat? That sort of culture feeds a perception of 'he who shouts loudest…', and saps morale.
- A well ***governanced*** council keeps its staff happier, and more engaged.... So they will do more, overall, for the money.

The Monitoring Officer's independent governance function

– clients, providers and advocates are going to learn about this much more effective way of complaining, in a council near yours, very soon!

- Anyone who is dissatisfied with a social services decision made by the local authority can make a **complaint** about that decision. The local authority must make its own arrangements for dealing with complaints in accordance with the **2009** regulations.
- The local authority's arrangements must ensure that those who make complaints receive, as far as reasonably practicable, assistance to enable them to understand the complaints procedure or advice on where to obtain such assistance.
- The complaint process takes ages, and the complaints person cannot tell the council to change its policies or practices, only how the staff failed to live up to those, if the complaint was justified. You can't go to the ombudsman until you've at least tried to complain.
- The complaint system can't be made to give you an injunction to continue a disputed budget or plan, pending resolution of the complaint.
- There is no appeal, only internal review, up through 2 or 3 more layers of ground down staff… and then only if you know to ask for that to happen. It's not statutory, but it is referred to in the Guidance, if disputes arise or agreement is not reached.
- However, there is also the **council's monitoring officer** as an addressee of a special kind of complaint and this route is never mentioned anywhere in local government advice and information services or central government information, which is a bit of a shame, since it's free, and saves a lot of aggravation for everyone (everyone except the poor Monitoring Officer, that is).

What does the Monitoring Officer have to do?

s5(2) of the Local Government and Housing Act 1989 ….says this: it shall be the duty of a relevant authority's Monitoring Officer, if it at any time *appears* to him, that **any proposal, decision or omission by the authority, …has** given rise to, or *is* ***likely*** *to* or would give rise to—

(a) a contravention … of any enactment (that means a *statute*, like the Care Act, or *Regulations* like the Assessment Regulations) or rule of law (that's a principle in the wider COMMON law applicable to public bodies)

… **to prepare a report to the authority with respect to that proposal, decision or omission…. and to arrange for a copy of it to be sent to each member of the authority.**

All such actions and proposals are automatically suspended during the time when the report is being considered by the members.

This is a personal, **non-delegable** duty, for the named MO/their Deputy, although s/he can take advice from specialist lawyers if the matter is not clear to them, using their own expertise. The MO is protected from dismissal other than through special steps, thus guaranteeing independence.

It is a high level form of governance and management of legal risk, designed to minimise the need for legal proceedings. The council is obliged to furnish the MO with the resources to do the job, so if s/he needs a barrister's opinion, they have to pay for that. **Independent advocates' reports should be sent to this person as well as to the council, in my view.**

The elected members – when they get such a report - must consider an MO's report within 21 days. That would be the Cabinet Lead for Adult Social Care, and the response would reassure the Monitoring Officer that the relevant issue had been sorted out.

Basic questions and answers about assessment

- Does it have to be done by a social worker **with a qualification**? No, but the person has to be trained and competent in relation to skill and the process.
- **Does it have to be someone working for the council?** No, not if the council has either delegated the role or bought help in for assessments, but in the latter case, the council still has to sign off the process….
- Does it have to be done **face to face**? No. But yes it 'should' be, if there is any doubt about the person's mental capacity.
  - Where **appropriate**, an assessment **may be carried out over the phone or online.** In adopting such approaches, local authorities should consider whether the proposed means of carrying out the assessment poses any challenges or risks for certain groups, particularly when assuring itself that it has fulfilled its duties around **safeguarding, independent advocacy, and assessing mental capacity.**

Is it an assessment for *services that will **meet** the needs*?

- NO. The process is **not an assessment for specific services**, or specific service ***providers. That's now for the CARE PLANNING stage, not assessment.***
- But because of the fact that **care and support** are words that do have some sort of irreducible **core** meaning, and because the **outcomes for eligibility** are described, inevitably, in words with ***clearish*** meanings, certain *types* of services will still be on everyone's minds….
- …Not *just* because it's what the council has always provided, but because **there's a logical link between the stages of the process involving identifying needs for care and support**, and working from there, through to deciding whether they are **eligible** needs.
- Nobody can now determine that helping a person to keep a very much loved dog in their life isn't ***capable*** of being seen as 'support'; but funding someone to buy a new budgie, cannot be said to be 'care', any more than buying someone a lottery ticket could be said to be 'accommodation', or say, suctioning a trachy tube could be regarded as 'personal care! Councils can always set up 'wellbeing' funds and agreements with health for one-off specials and non-social care services, if they have the nouse!
- The woolliest word in the s8 list of viable adult social care *responses* through the Care Act is now '**facilities'**. Given a fair wind, most of us should be able to stretch that word as far as anyone needs us to. I think that we should still bother to satisfy ourselves that we have power to do what we want to do, if we feel the need to push the point in a particular situation. That's spending public money, conscientiously!!

Looking backwards and forwards at service *profiles*

- **Shopping or escorted shopping**, for banking and accessing to food and drink might now be replaced by an online money management service and tuition as to use of an online delivery service
- **Cooking a meal** for someone might be replaced by a delivery of a microwave meal
- **Cleaning services** might be replaced by homemaking classes alongside other people with a similar need or support to a carer to steel themselves against doing it all.
- **Food preparation** might be replaced by the provision of a blender, to a wiling carer, and laundry services by a washing machine.
- **Services to help a person with parenting** or other responsibilities to a child might involve counselling or facilitated access to parenting classes through funding or referral, or by supported contact.
- A **waking night service or sleep in** might be replaced by a service that roves about the area, and lets staff in to check on someone, or by a piece of technology called Just Checking or a mattress that can predict if someone's vital signs suggest that they may be about to suffer a fit or stop breathing.
- **Transport services** to get people to services that are provided, or to necessary services in the community or to recreational facilities that meet the person's needs for leisure may be replaced by taxi services or by volunteer driving, if it is properly insured – but also for supervision whilst there.
- **Assistance to use the commode** at night might be replaced by a set of incontinence pads from the NHS.
- **Supported employment services** and services to support a person to access employment might be replaced by a life coach or other counsellor.
- **A day service** that provided company and stimulation might be replaced by an outings service that picks people up from their homes and takes them to universally available services.
- Lots of **mobility assistance** might be replaced by equipment that can either be controlled by the person or by a willing carer.

More questions

- Does it require a person's **consent**? No, but a person can refuse, and that *can* excuse the council from doing one. A person can't be made to co-operate.
- How er, quick or shallow can it be, and still *count*? The guidance wants it both ways: to make sure that **the core of the assessment function is done in every case**, whilst not *defining* it, and whilst saying it should be person-centred and catering to the person's particular wishes wherever possible. So I'm going to try to define it from a legal perspective by reference to questions and answers – that's the only way to do it.
- Can a person **pick and choose which bits to bother with?** No, the regulations underpin the process, and are mandatory, so every bit needs to be considered.
- Are the needs the same thing as the **inabilities that are called outcomes** in the regs? No, because the needs have to *cause* inability to achieve in relation to the outcomes (or domains, as I think they should be called, instead!).
  - So the needs are **the impediments generated, or the symptoms or consequences** of the conditions, illness or impairment or injury,
  - and the needs could be eligible, if they prevent ability by oneself and without significant paid, distress etc, to achieve the outcomes considered to be the bare minimum for a tolerable life.
- Is it an assessment of only the ***unmet*** need? No, it is an assessment of **all** the needs, **met and unmet** needs for care and support, and *especially* of the type related to the domains mentioned in the **regulations**.

A question on so called self-assessment, if any council is actually doing it, given it's a pain for everyone….

- If an adult with needs for care and support just fills out the 'supported self-assessment' form they've been given, and doesn't really understand how it works and struggles with getting the form done at all because of the effects of their disability, **can the local authority just consider their eligibility on the basis of the contents of that form alone, and decide they aren't eligible**?
- No, the council should not have **given** them a self assessment form in the first place if the person's capacity to **participate in what the guidance calls self assessment** was in doubt. An **advocacy** decision should have been made before the decision whether or not to give the person a form (for anything other than preparation purposes), for a start. A face to face assessment should have been organised if there was some concern about cognitive impairment (see the guidance).
- But in any event, if the form comes back, looking incomplete or internally inconsistent, or not holding together and making sense - the council is not allowed to take a user led document as the basis for its statutory assessment without **assuring itself of the accuracy of the contents**, which they have to do by going and talking to other people or checking the contents out!
- Regardless of how the form looks, the **council is the decision maker for eligibility**, not the aspiring client or a computer, and the eligibility decision must be based on a professional decision about consequential significant impact, not merely an assertion of inability to achieve, or the existence of problems, or the non-existence of problems. Reasons have to be given, either way.

ASSESSMENT: a virtual right, BUT in the end, an objective decision on a *subjectively-led* evaluation process: here's why -

Para 6.13 Local authorities **must undertake an assessment for *any adult with an appearance* of need for care and support, regardless of whether or not the local authority thinks the individual has eligible needs, or of their financial situation.**

[their *o/r* isn't relevant, either, incidentally…]

Para 6.14 Wherever an individual expresses a need, or any challenges and difficulties they face because of their condition(s), the local authority should ensure that it has established the **impact of that** on the individual's **day-to-day life**.

The local authority must also consider whether the individual's needs impact upon their wellbeing ***beyond*** **the ways identified by the individual**.

For example where an adult expresses a need regarding their physical condition and mobility, the local authority must establish the impact of this on the adult's **desired outcomes**; **and must also consider whether their need(s) have further consequences** on their wider wellbeing such as on their personal health or the suitability of their living accommodation.

Carer neutral (or '*blinkered*') needs assessment and eligibility decision-making

Para 6.15 During the assessment, local authorities must consider all of the adult's care and support needs, **regardless of any support being provided by a carer.**

Where the adult has a carer, information on the care that they are providing can be captured during assessment, **but it must not influence the eligibility determination**.

After the eligibility determination has been reached, if the needs are **eligible** or the local authority ***otherwise*** intends to meet them, the care which a carer is providing can be taken into account during the care and support planning stage.

The local authority is not required to meet any needs which are being met by a carer who is willing and able to do so, but it should record where that is the case. This ensures that the entirety of the adult's needs are identified and the local authority can respond appropriately if the carer feels **unable or unwilling to carry out some or all of the caring** they were previously providing.

Now required: advance notice of what it's all about!

And sensitivity to the implications of being assessed, itself!

Advocates must agitate for these things.

Para 6.38 To help the adult with needs for care and support, or the carer, prepare for the assessment **the local authority should provide in advance, and in an accessible format, the list of questions to be covered in the assessment.** This will help the individual or carer prepare for their assessment and think through what their needs are and the outcomes they want to achieve.

Para 6.40 Local authorities should also consider the impact of the assessment process itself on the individual's condition(s). People may feel uncertain and worried about what an assessment involves and may find the process itself to be strenuous. **Local authorities should therefore give consideration to the *preferences* of the individual with regards to the timing, location and medium of the assessment.**

…and maybe a pause in the process

Para 6.25 …Early or targeted interventions such as universal services, a period of re-ablement and providing equipment or minor household adaptions can **delay an adult's needs from progressing**. The first contact with the authority, which triggers the requirement to assess, **may lead to a pause in the assessment process to allow such interventions to take place and for any *benefit* to the adult to be determined**.

How NOT to do this stage, if you are a council!:

- Signposting, without finding out if there are actually vacancies or services out there still!
- Assuming that people can buy their own: no good if the services are not **affordable** to ordinary people – perverse disincentive to take personal responsibility.
- Not listening conscientiously as to why a person won't **avail** themselves of preventive services, but then taking that into account as relevant to significant impact considerations at the eligibility stage. If councils want to be brave and take it as relevant to significant impact, they'd need to make sure that there was ***no*** *very good reason*, or only a completely **indefensible** one, like racism, for the person's having turned down access to preventive or universally available services which were available at the time.

What is the purpose of the prevention duty and guidance?

- There is a duty on all councils to ensure that prevention services are available in the area – so as to help people *to help themselves*.
- There's also a requirement to consider prevention and reduction BEFORE assessment and DURING assessment.
- This sounds good, in terms of new services that might now be wanted - but the result is that councils will be encouraged to refer people off to prevention services without knowing very much about whether they are **suitable**, whether they have **closed**, since the grant was cut, or whether they even have a **vacancy**.
- **Saying no to prevention services does not exclude a person from assessment,** but it does enable a council to say that the impact can't be all that bad if the person won't even help themselves to minimise it.
- Some prevention services such as counselling, equipment or 6 weeks of reablement may have the effect of rubbing out the need altogether; others would merely be able to manage the need, but it would still count as existing for the purposes of eligibility when the assessment is actually completed.

Considering the person's strengths and capabilities

Para 6.63 At the same time as carrying out the assessment, the local authority must consider what else other than the provision of care and support might assist the person in meeting the outcomes they want to achieve. In considering **what else might help**, authorities should consider the person's own strengths and capabilities, and what support might be available from their wider support network or within the community to help. **Strengths-based approaches might include co-production of services with people who are receiving care and support to foster mutual support networks.** Encouraging people to use their gifts and strengths in a community setting could involve developing residents' groups and appropriate training to support people in developing their skills.

Para 6.64 Local authorities might also consider the ways a person's cultural and spiritual networks can support them in meeting needs and building strengths, and explore this with the person. **Any suggestion that support could be available from family and friends should be considered in light of their appropriateness, willingness and ability to provide any additional support and the impact on them of doing so. It must also be based on the agreement of the adult or carer in question**.

[but that doesn't **offset** need from consideration at this point, only **later**, please note]

Fluctuating needs

Para 6.111 Individuals with fluctuating needs may have needs which are not apparent at the time of the assessment, but may have arisen in the past and are **likely to arise again in the future.**

Therefore local authorities must consider an individual's need over an **appropriate period of time** to ensure that all of their needs have been accounted for when eligibility is being determined.

Where fluctuating needs are apparent, this should also be factored into the care plan, detailing the steps local authorities will take to meet needs in circumstances where these fluctuate.

For example, an adult with a mental illness, which has been managed in the past **eight** months but which could deteriorate, if circumstances in the adult's life change. **In such situations, local authorities must consider the nature of the adult's needs have been over the past *year* to get a complete picture of the adult's level of need.**

A basic professional responsibility – recognising when the council's assessor needs *help*!

Competence:

Local authorities must ensure that their staff are sufficiently **trained and equipped** to make the appropriate judgements needed to steer individuals seeking support towards information and advice, preventative services or a more detailed care and support assessment, or all of these. **They must also be able to identify a person who may lack mental capacity and to act accordingly.**

Para 6.86 Where the assessor does not have the necessary knowledge of a particular condition or circumstance, **they must consult someone who has relevant expertise**.

This is to ensure that the assessor can **ask the right questions** relating to the condition and **interpret these appropriately** to identify underlying needs.

A person with relevant expertise can be considered as somebody who, either through training or experience, has acquired knowledge or skill of the particular condition or circumstance.

Such a person may be a doctor or health professional, or an expert from the voluntary sector, but there is **no obligation** for the local authority to source an expert from an outside body **if the expertise is available in house.**

Supporting the person's involvement in the assessment

Para 6.30 Putting the person at the **heart of the assessment process** is crucial to understanding the person's needs, outcomes and wellbeing, and delivering better care and support.

The local authority must involve the person being assessed in the process as they are best placed to judge their own wellbeing. **In the case of an adult with care and support needs, the local authority must also involve any carer the person has (which may be more than one carer), and in all cases, the authority must also involve any other person requested.**

The local authority should have processes in place, and **suitably trained staff, to ensure *the involvement* of these parties**, so that their perspective and experience supports a better understanding of the needs, outcomes and wellbeing.

Mandatory ('MUST') process provisions which we all need to know about – and what the guidance draws on:

s9(5) A local authority, in carrying out *a needs assessment*, **must involve**

(a) the adult,

(b) any carer that the adult has, and

(c) any person whom the adult **asks** the authority to involve or, where the adult lacks capacity to ask the authority to do that, any person who appears to the authority to be interested in the adult's welfare.

Think about the implication of this – this means that **capacitated people can ask for their *current or preferred provider* to be involved,** not just rely on the authority to treat an existing provider as a best interests consultee, when and only when the person lacks capacity.

Or one of my crack team of hand-holders, who know the Care Act backwards, and who are cheaper than lawyers!! ☺

S11 - Refusal of assessment by the citizen

(1) Where an adult refuses a needs assessment, the local authority concerned ***is not required to carry out*** **the assessment** (and section 9(1) does not apply in the adult's case).

[this is **not** the same as saying you need someone's ***signed consent*** please note: it is **a discharge from the duty** to assess him/her, only…..]

(2) But the local authority may not rely on subsection (1) (and so **must** carry out a needs assessment) if-

[the assessor thinks/suspects/believes that ***either***….]

(a) the adult **lacks *capacity* to refuse the assessment** and the authority is satisfied that carrying out the assessment would be in the adult's **best interests**, or

(b) the **adult is experiencing, or is at risk of, abuse or neglect**.

[so that means proceeding, albeit without co-operation…]

(3) Where, having refused a needs assessment, an adult **requests** the assessment, section 9(1) applies in the adult's case (and subsection (1) above does not).

[change of mind **supersedes** the release from the duty]

What is the national eligibility threshold for adults presenting for assessment?

Para 6.98 The national eligibility criteria set a minimum threshold for adult care and support needs and carer support needs which local authorities must meet. All local authorities must comply with this national threshold. **Authorities can also decide to meet needs that are not deemed to be eligible if they chose to do so**.

Some people think that the criteria have got looser – so including *moderate* needs. Some think that they have got tighter. Here's a link to a very cogent piece of writing on it, which suggests that if staff do their jobs correctly, *more* people will end up not only as eligible but with a larger budget.

It's by Steve Broach, barrister. So bear in mind that all councils will have legitimate worries about that!

https://rightsinreality.wordpress.com/2014/10/27/care-act-2014-first-thoughts-on-eligibility-a-moderate-success/

FINAL reg 2 in the national regs – after a couple of drafts and discussion…..

(1) An adult's needs meet the eligibility criteria if—

– the adult's needs **arise from or are related to** a physical or mental impairment or illness;

– as a result of the adult's needs the adult is unable to achieve **two or more** of the **outcomes** specified in paragraph (2); and

– as a consequence there is, or is likely to be, a **significant impact** on the adult's well-being.

To be eligible…

- A person has to be **unable to achieve two or more outcomes from the list in the regulations.**
- And that inability has to give rise to **significant impact on wellbeing.** There is no definition of that, but it means **important**, **noteworthy**, **not minor or trivial** effects on the statutory aspects of wellbeing listed in the statute.
- The question of impact must be considered **without regard to what the carer is doing**, or the current **service** that is ***managing*** the impact.
- To be deemed **unable** has a special meaning **which Providers and advocates and councils' assessors simply must understand,** or otherwise risk undermining people's rightful allocations…on assessment **and** reviews – when it is tempting to just look at how well everything has been progressing!
  - If a person is ***able*** to achieve the task, but because of receiving **assistance** - even prompting - they **count** as unable.
  - Likewise if they can do it on their own, but it gives rise to significant pain, anxiety, distress
  - Or endangerment to self or others
  - Or because it takes significantly longer than it would, *without* the difficulty.

Critical for interpreting the eligibility criteria

Para 6.103 The second condition that authorities must consider is whether the adult is **"unable" to achieve two or more of the outcomes** set out in the regulations. Authorities must also be aware that the regulations provide that "being unable" to achieve an outcome **includes any of the following circumstances**, where the adult:

- is unable to achieve the outcome **without *assistance***. This would include where an adult would be unable to do so even when assistance is provided. It also includes where the adult may need **prompting, for example**, some adults may be physically able to wash but need reminding of the importance of personal hygiene;
- is able to achieve the outcome without assistance but doing so causes the adult **significant pain, distress or anxiety**. For example, an older person with severe arthritis may be able to prepare a meal, but doing so will leave them in **severe pain and unable to eat** the meal;
- is able to achieve the outcome without assistance, but doing so **endangers or is likely to endanger the health or safety of the adult, or of others** – for example, if the health or safety of another member of the family, **including any child**, could be endangered when an adult attempts to complete a task or an activity **without relevant support**;
- is able to achieve the outcome without assistance but **takes significantly longer than would normally be expected.** For example, an adult with a physical disability is able to dress themselves in the morning, but it takes them a long time to do this, leaves them exhausted and prevents them from achieving other outcomes.

What *is* *well-being*? Section 1 of the Act says this:

(1) The general duty of a local authority, in exercising a function **under this Part** in the case of an **individual**, is to **promote that individual's well-being**.

(2) "Well-being", in relation to an individual, **means** that individual's well-being so far as relating to any of the following— (ie., the ***scope*** of well-being, covers all these things, **so social care functions and services must at least be directed towards promoting these concepts of welfare and not undermining them.** There is **no *hierarchy***, please note: different people care more about different things.)

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

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

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

Consequential significant impact:

The guidance says that <u>local authorities should determine</u> whether:

- the adult's needs impact on **<u>an</u>** **area of wellbeing in a significant** way; or,
- the cumulative effect of the impact **on** **a number of the areas** of wellbeing mean that they have a significant impact on the adult's **overall** wellbeing.
- In considering the ***type*** **of needs** an adult may have, the local authority should note that there is **no hierarchy of needs** or of the constituent parts of wellbeing as described ….
- NB We are told that '**significant**' is an ordinary English word - so no help there then, other than what you get from management and practice, and the courts, over time.
- This is **deliberate**, in order to make it very hard for councils to be challenged, so long as they've explained themselves – hard to be challenged by management and hard for the public to challenge the final decision.
- That is not ***<u>cynicism</u>***: it's the way that welfare law works – decisions turn on professional judgements, and professionals are always given a wide margin of appreciation.

Interpreting the impact element of the eligibility criteria

Para 6.107 The term "significant" is not defined by the regulations, and must therefore be understood **to have its everyday meaning.** Local authorities will have to consider whether the adult's needs and their consequent inability to achieve the relevant outcomes will have an **important**, consequential effect on their daily lives, their independence and their wellbeing.

Para 6.108 In making this judgment, local authorities **should look to understand the adult's needs in the context of what is important to him or her.**

Needs may affect different people differently, because what is important to the individual's wellbeing **may not be the same in all cases**.

Circumstances which create a significant impact on the wellbeing of one individual **may not have the same effect on another**.

Para 6.112 When considering the type of needs an adult may have, local authorities should note that there is no hierarchy of needs or of the areas of wellbeing as described in chapter 1 of this guidance.

The domains or 'outcomes' in the regs

2(2) The [10] specified outcomes are—

a. managing and maintaining **nutrition**;

b. maintaining personal **hygiene**;

c. managing **toilet** needs;

d. being appropriately **clothed**;

e. being able to make use of the adult's **home safely**;

f. maintaining a **habitable home environment**;

g. developing and maintaining family or other personal **relationships**;

h. accessing and engaging in work, training, education or volunteering;

i. making use of necessary **facilities or services** in the local community including …public **transport**, and **recreational** facilities or services; and

j. carrying out any caring responsibilities the adult has for a **child**.

Old FACS – to show that there are definite differences, both tighter and looser:

Critical – it's when – if nothing is **done** about it by *social services-*

- **life** is, or will be, **threatened**; and/or
- **significant health problems** have developed or will develop; and/or
- there is, or will be, **little or no choice and control over vital aspects** of the immediate environment; and/or
- **serious abuse or neglect has occurred** or will occur; and/or
- there is, or will be, an inability to carry out **vital personal care or *domestic routines***; and/or
- **vital involvement in work, education or learning cannot or will not be sustained**; and/or
- **vital social support systems and relationships cannot or will not be sustained**; and/or
- **vital family and other social roles and responsibilities cannot or will not be undertaken**.

Substantial – it's when – if nothing is done about it -

- there is, or will be, **only partial choice and control** over the immediate environment; and/or
- **abuse** or **neglect** has occurred or will occur; and/or
- there is, or will be, an inability to carry out **the *majority* of personal care or domestic routines**; and/or
- involvement in ***many*** aspects of **work**, **education** or **learning cannot or will not be sustained**; and/or
- the ***majority* of social support systems and relationships** cannot or will not be sustained; and/or
- the ***majority* of family and other social roles and responsibilities** cannot or will not be undertaken.

What the guidance says about the right approach

Para 6.104 …The following section of the guidance provides examples of how local authorities **should consider** each outcome set out in the Eligibility Regulations (**"which do not constitute an exhaustive list" – although I do think they do, as it happens, in a legal sense**) when determining the adult's eligibility for care and support:

Eg managing and maintaining nutrition

- Local authorities should consider whether **the adult has access to food and drink to maintain nutrition**, and that the **adult is able** to **prepare** and **consume** the food and drink.

being appropriately clothed

- Local authorities should consider **the adult's ability to dress themselves** and to be appropriately dressed, for instance in relation to the weather to maintain their health.

being able to make use of the home safely

- Local authorities should consider the adult's ability to move around the home safely, which could for example include getting up steps, using kitchen facilities or accessing the bathroom. This should also include the **immediate environment around the home** such as access to the property, for example steps leading up to the home.

maintaining a habitable home environment [note: no reference here to the *adult's ability*….]

- Local authorities should consider whether **the condition of the adult's home is sufficiently clean and maintained to be safe**. A habitable home is safe and has essential amenities. An adult may require support to sustain their occupancy of the home and to maintain amenities, such as water, electricity and gas.

Interpreting the eligibility criteria

Para 6.105 The third condition that must be met is that local authorities must consider whether the adult's needs and their inability to achieve the outcomes above cause or risk causing a significant impact on their wellbeing. The meaning of "wellbeing" is set out in Section 1 of the Care Act and more detail is described in chapter 1of this guidance.

Para 6.106 Local authorities must determine how the adult's inability to achieve the outcomes above impacts on their wellbeing. **Where the adult is unable to achieve more than one of the outcomes**, [ie **two** or more] the local authority does not need to consider the impact of each **individually**, but should consider **whether the cumulative effect of being unable to achieve those outcomes is one of a "significant impact on wellbeing"**.

In doing so, local authorities should **also** consider whether:

- the adult's inability to achieve the outcomes above impacts **on at least one of the areas of wellbeing (as described in Section 1 of the Act and chapter 1 of this guidance) in a significant way**; or,
- the effect of the impact on a **number** of the areas of wellbeing mean that there is a **significant impact** on the adult's overall wellbeing.

So, this is how people working in social care can help clients *get*, and then *keep*, their care packages:

All **Council** and **providers' assessment staff** and **advocates**, need to know off by heart, the following aspects of the customer journey:

- The *scope* of the broad definition of well-being in s1(2) – so that you can help both the person and the council identify the way in which the person's difficulties *would or could impact on that whole statutory range of **well-being aspects** of their life;*
- The *detail* of how a council must SHOW that it has gone about promoting well-being in the right way – the matters to which it must have regard in s1(3);
- The list of activities that must be considered in an assessment in the **Eligibility** Regulations – activities of daily living, or domains common to us all, in any 'normal' lifestyle – but called ***outcomes*** in the regulations!
- Is the person unable? Using the extended definition of not being able to do something – which is helpful to the person, because it allows one to count as unable, even if one CAN do something on the list, but not without assistance - (including mere **prompting**), or significant pain, distress, endangering self or others, etc. (in the eligibility regulations, also)
- *BUT REMEMBER: There are no eligible needs, **unless** there is consequential significant impact on well-being, deriving from the inability to do these particular things.*

Record keeping *after* assessment and associated with eligibility decision making

s12(3) The local authority **must give a written record of a needs assessment** to-

(a) the **adult** to whom the assessment relates,

(b) any **carer** that the adult has, if the adult ***asks*** **the authority to do so**, and

(c) any other person **to whom the adult *asks*** the authority to give a copy.

[so *providers* could, and *should*, regularly say to their clients to ask for a copy!! This might help e-brokerage, ultimately, to be done on a much more transparent basis, with the current needs being more likely to be **properly identified**!]

Para 6.96 …

> Where an independent advocate, an Independent Mental Capacity Advocate or an Independent Mental Health Advocate is involved in supporting the individual, the local authority **should keep the advocate informed so that they can support the person to understand the outcome of the assessment and its implications**.

Minimum paperwork for due discharge of eligibility functions

13(1) Where a local authority is satisfied on the basis of a needs or carer's assessment that an adult **has needs for care and support** or that a carer has needs for support, it must determine **whether** any of the needs meet the eligibility criteria (see subsection (7)).

[so, we are now *past* assessment, *past* eligibility, and *before* care planning – this is where a council would discuss options or apply a resource allocation system if it had one]

13(2) Having made a determination under subsection (1), **the local authority must give the adult concerned a written record of the determination and the reasons for it.**

13(3) Where at least **some** of **an adult's** needs for care and support meet the eligibility criteria, the local authority **must-**

(a) consider what **could** be done to meet those needs that do,

(b) ascertain whether the adult **wants** to have those needs met by the local authority in accordance with this Part, and

(c) establish whether the **adult** is **ordinarily resident** in the local authority's area.

Basic questions about eligibility

- **What if a person has been signposted to preventive or universal services, and accessed them and is 'a bit better' than they were?**
  - If their needs have been managed for good, so that they are not unable, any longer, or they appear **to be minded to cope with the remaining impact to wellbeing**, they will not be eligible at that point.
  - If their needs have only been managed temporarily ie the need will come back again within a very short time IF the entitlement to the band-aid ceases, they are still eligible.
- **What if they have said 'no thanks' to preventive services?** They are still entitled to their eligibility decision because they still have an appearance of needs for care and support. But they might be told that the impact on them can't be seen as consequential/significant, because their stance on not helping themselves made that clear. IF, however, there was an obviously good reason for their saying No in the first place, the council can't hold that against them.
- Can an assessment be seen to be finished **without the council coming to an eligibility decision?** No, not if the council has recognised that there are ANY needs for care or support related to physical or mental impairment.
  - s13(1) Where a local authority is satisfied on the basis of a needs or carer's assessment that an adult ***has*** needs for care and support or that a carer ***has*** needs for support, **it must determine whether any of the needs meet the eligibility criteria** (see subsection (7)).

- **Does there have to be a space on the form where someone can disagree on inability or impact?** Not legally, but it would be daft of a council *not to provide one:*
  - because conscientious use of it will **prove involvement and engagement,** for a start.
  - It will also show a willingness to be open to evidence, which makes challenging the decision on the basis that the staff had closed minds, harder.
  - And the bottom line is that it will save massive **egg on face** to have got the person's reasons for not agreeing, out of them, before any final decision is made. At least some of the time, the person – being the best person for knowing themselves, will be proved **correct in their opinion**.
- **Can a council say to its staff that significant impact needs to be counted over criteria of the council's own making** which by that wording, make inabilities and struggles in some of the 10 eligibility domains less likely to matter….? I think not – the Isle of Wight was told off for something similar some years ago under FACS...

What about this 'two or more' outcomes issue? What are staff supposed to do, if….

…a person presents with only one area of inability, but significant impact seemingly arising from it?

- If they find them to be **ineligible**, as per the rules, they must give written reasons and refer them to alternative services or sources of prevention and reduction.
- Might the staff have another **go**, in case there are nagging doubts about the person's mental capacity, in their minds? That would be professional, but they still might not end ***up*** with any doubt: the person might just be even clearer, second time around…
- Could it be that the person has not considered themselves, ***unable***, because they didn't fully understand that the regulations ***count*** them as unable, even if they are *managing*, but managing because of the help they're getting? **That's quite likely, I think.** They should have had a leaflet or something before that point, explaining that it's the full need the council is assessing, not just whether the person is coping.
- In all such cases, the assessor **should remember that there is POWER to meet need,** even if there is not a duty. So there should never be any unthinking application of the two or more requirement….

- I've heard that an authority can say: "Yes you *have* got needs across several Outcomes and they are having an impact on your wellbeing but the impact isn't **significant,** as far as we are concerned, so you aren't eligible."
- If the prospective client thinks the impact on their wellbeing is **very** significant, who gets to judge this, and how do we know where this threshold is, and what can a person do about it, if the disagreement continues?
- **The council gets to decide, but subject to scrutiny and supervision against longstanding principles, by the Administrative Law Court.**
- The principles councils **must follow to make lawful decisions** involve being transparent, knowing the law, and interpreting it in a well-informed way, giving reasons, making decisions on the basis of an evidence basis and taking into account all relevant considerations (including what the statute says about well-being, cumulative effect, absence of hierarchy, and the views and feelings of the client) and leaving out *irrelevant* considerations.
- **I would be willing to stake my professional reputation on the prediction that the Courts would say that Councils' budgetary difficulties are not relevant to the existence of needs or to eligibility on a particular day.** The meaning of significant impact cannot change from one quarter to the next. The council's response to unmet need, can be affected by budget, within tolerable, sane parameters, but not the question of impact – it is **a professional judgement**. Having said that, the culture in which public sector staff have to operate, on a daily basis, may fatally obscure that legal truth, in practise.

So what could a client *do, in this scenario*?

- Most councils are working to a system whereby the front line staff are entitled to make **pure eligibility** decisions, for the council, and their views are only loosely line managed by middle management, **not put through Panel. *They've* seen the clients, and situation on the ground, after all. If they are properly trained, their evidence-based judgement and reasoning would be very, very hard to challenge, legally.**
- But if a panel of senior staff is actually making eligibility decisions and overriding front line staff, it must **be the Panel's reasons** that are given in the written record that s13 entitles the person to receive, and they'd have to be very powerful indeed, to override the credibility of the front line professional judgement to the opposite effect. The *Savva* case established that principle.
- A person can ask to make representations to the Panel, and this ought to be allowed in some shape or form, albeit not necessarily in person. Considering written submissions may be the only way the Panel can show that their view should be respected over and above the front line member of staff's. How much better to just have a space on the form for the client, carer's or advocate's or other best interests consultee's view, don't you think?
- If a person doesn't **like** a professional's judgement, they need to find out **what the professional's reasons were, in the first place, and then address those, in a coherent way.** They can use the complaints system, or the Monitoring Officer route, if the disagreement is based on the person's view that the professional HASN'T acted ***lawfully*** in line with the principles in this presentation. A good council will change its approach and make a better decision second time around – not necessarily a different one, but one that is **defensible**.
- That's all a formal legal challenge would get you anyway, apart from a lot of expense and aggravation. It's not an appeal, remember, it's a kind of arm's length special forces system throwing out indefensible approaches – but only if they are *really* demonstrably 'wrong-headed' - so it is in everyone's interests to **act lawfully, *first time around.***

Safeguarding – statutory, but still woolly!

- The old approach to safeguarding has brought councils and other agencies into disrepute – for
  - Too ***little*** safeguarding : ie, meetings, for years, about a situation, but no real **action - or**
  - Too ***much*** intervention and regardless of mental capacity considerations
  - Too **little focus** on the individual's perceptions, wishes and feelings
  - Too **much fascination with protocol and procedure**, and hardly any, it would seem, with **developing legal literacy** as a strategically crucial skill and tool for good health interventions and social work, at the sharp end...the proof being – sadly, and expensively, all the
    - Case law on DoLS
    - Case law on capacity and tenancies and direct payments
    - Case law on breach of the basic rules of fairness in and about safeguarding enquiries
    - Case law on best interests welfare interventions – asking for clarification as to when it is lawful to protect, and when it is lawful not to.
- The case law, inquiries and ombudsmen's reports are all output which castigates public bodies for **not *knowing* enough!**
- **So, all members of a MASH or intake team must aim to re-professionalise the staff, restoring trust, treating legal literacy as an essential, standing up for any decision-making which was the best it could be at the time, and insisting on a culture of *reading* and an appetite for using brainpower, for promotion and reward (not just budget management) amongst the staff.**

A *Hillingdon* lesson for us all

- **"Poor decision-making processes often lead to bad decisions.** Where a local authority wears a number of hats, it should be clear about who is responsible for its direction. Here, one sub-department of Hillingdon's adult social services provides **social work support** and another is responsible for running facilities such as the support **unit**. At the same time, senior social workers represent the **supervisory body** that determines whether or not a DOL authorisation should be granted.
- In that situation, welfare planning should be directed by the team to which the allocated social worker belongs, although there will of course be the closest liaison with those who run the support facilities. **The tail of service provision, however expert and specialised, should not wag the dog of welfare planning.**
- **Unfortunately, this case was characterised either by an absence of decision-making or by a disorganised situation** where nobody was truly in charge and it was consequently possible for nobody to take responsibility. **At various stages during the hearing, I asked Hillingdon witnesses to explain who was answerable for various actions, but no-one could say. Even when its position came under strong and public challenge** towards the end of the year, and when at least **one very senior social work manager had serious concerns** about what was happening, this had **no effect on the corporate position**".

The need for a source of power to intervene – even though the Care Act makes safeguarding statutory!

- This warning from the judge in a 2014 case against *Milton Keynes* was timely, we feel, for the authors of any ***local*** guidance:

  – **"Further, and almost more importantly, it is almost impossible to emphasise too strongly the message that acting on the basis of safeguarding concerns gives no *additional* powers to local authorities to intervene in the lives of vulnerable adults – those powers have to be found either in statute or in the common law. "**

- **Evidencing** those other prior efforts and why they didn't work, is important, humane and prudent, but that's part of good **management** systems within social care assessment, care planning and contract monitoring, in any event.

Working with the law, as to *whose* job it is to do *what*…

- Around a **safeguarding table**, you might find all the following, typically: the council, the police, the CQC, the NHS, a GP, an advocate, a family member, a care provider (homecare or care home) and other people from housing associations such as landlords or managing agents.
- Clearly, no-one can tell any other organisation how to do its job. But it really helps to think about where one organisation's job **starts**, and another's, **stops**.
- For instance, the police cannot ***tell*** the Local Authority not to do safeguarding, but they can ask the LA to take the risk to the pursuit of justice into account, in terms of how and when they ask questions or open up discussions with alleged perpetrators.
- Likewise the council can't tell the Police how to investigate crime, who to charge, or force the CPS to prosecute.
- The council can't ***tell*** the CCG to move a patient from a private hospital in order to manage safeguarding concerns, but it can refuse to accept the CCG's own enquiry into the risk as a s42 enquiry, under the Care Act, as long as it specifies good reasons.
- CQC cannot **tell** the council to stop placing clients in a home or commissioning from a home care agency - on account of preferring not to have to regulate it; but it could remind the LA of the duty to be satisfied that service arrangements must be **suitable** to the client's needs, and that 'open and still running' does not mean suitable for the specific individual.
- I am sure you can think of other examples, all of which turn on knowing what the thrust of and extent of one's own organisation's duties and discretions, ARE, and believing in a notion of co-operation. And that's down to *everyone's* understanding and applying the law and guidance.

Do 'we', in social services always OWE a duty of care in negligence? No, we owe a public law duty TO care, not a private law duty OF care!

- Social services staff are educated to assume that we *always* owe a duty of care, and CCG staff probably fear this risk too because of personal injury cases based on what's gone on at the provision stage in hospitals, always being on their minds - but in fact that **is not correct**, in law.
- An organisation can only owe a duty of care when it **has voluntarily assumed a responsibility. But we've got statutory duties – so we have no choice about it at all.** That's been enough, to create a body of decades of case law which has **explicitly established that local authorities DON'T owe a duty of care, in negligence, in respect of discretionary resource-driven policy-related resource based decisions within the community care statutory framework**…. Ie not in respect of their social work **thinking**. It would be the same for CCGs.
- I am not talking about *clinical* diagnosis and treatment plans – which have always attracted negligence actions against health service professionals.
- I am not talking about care provision negligence – at the hands on level.
- **I am talking about the assessment and planning stages of health and social care meeting of needs. And I would predict, confidently, that the same would be said about safeguarding functions – essentially because it IS an assessment and care planning role.**
- The duties ***to*** care - appropriately - can be enforced in **public** law, with a big margin for things like professional discretion, but not the private law of negligence.
- Even in private law proceedings, where actual provision has been done negligently – ie social ***care***, not social WORK, there is a big margin allowed for the unexpected actions of others – including the client – unless it was clear that the person did often *do* unexpected things, and could not be seen as capacitated when so doing.
- Just think how not understanding these principles drives a culture of **defensive**, as opposed to *defensible*, practice….

Why is there so rarely a duty of care found to be owed by councils, in terms of negligent social work services?

- It's because the **law** imposes social services duties on authorities, and they are **not voluntarily assumed**.
- Importantly, the same is true of **safeguarding duties**, even though they are now statutory and separate from assessment and care planning. The s42 duty isn't an absolute duty to prevent anyone ***ever being harmed***, is it?
- The judges also take the view that having a limited budget would make it unfair to the authority to expect it to shoulder the expense of liability, or insurance against that risk.
- And also that there would be a flood of cases, which is not in the public interest.
- Even when the mistake has been in the context of a triggered statutory duty, such as to supply/commission/arrange social services for eligible assessed needs, Judges have alternatively declared that these **duties are for the benefit of everyone**, really, not an individual victim of default! Eg delivering cot sides on time.
- Only ***some*** such duties are even **individually enforceable (even in public law)** – there's just been a case a while back, holding that the fact that a woman with mental health problems in Wales had to be accommodated in Brighton when sectioned, was not a breach of the NHS duty to make reasonable comprehensive provision throughout Wales!!
- Hardly any of these types of duties 'sound' in damages in private law – ie no compensation for breach of the duty to provide or to **meet needs**.

There has never been a successful action for negligent safeguarding, but other forms of accountability are likely!

- Now **the Care Act puts safeguarding onto a specific statutory footing** – separate from assessment and care planning, albeit often running in parallel, and ensures that the Local Authority is the lead responsible organisation.
- However, any discrete member organisation of the SA Board or MASH could **lose a Court of Protection case against it, directly, and be embarrassed;** or be **criticised** by a coroner for system failure when someone suffers or dies.
- A member of staff of a provider organisation and now an organisation as a whole could be found guilty of **wilful neglect**, and **regardless of whether the person is capacitated or incapacitated.** There's **corporate manslaughter**, too, relevant where the organisation is directly involved in a ***provision*** role.
- A member of staff could be guilty of **professional incompetence** or be the cause of the organisation being found to have caused **maladministration** – eg for not knowing what could have been done, and consequently, not capable of weighing the right factors in the balance. Wandsworth's *Coomeraswamy* coroner's findings are a famous example.
- A council or other **public officer** could be sued **for misfeasance in public office** - like the recent Southwark housing officers, who were seemingly on a personal *mission* to get rid of someone from a housing association.

Care and Health Law

Thank you for reading this !

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I am selling these to individuals for £10.00 a go, so that legal literacy will become part of the necessary knowledge base of everyone in adult social care.

Or email us: belinda@careandhealthlaw.com or debbie@careandhealthlaw.com