

*Charging for After-care services under Section 117 of
the Mental Health Act 1983 – The Final Word?**Charging for After-care Services under Section 117 of the
Mental Health Act 1983 – The Final Word?**Nicolette Priaulx**

R v Manchester City Council, ex parte Stennett, R v Redcar and Cleveland Borough Council, ex parte Armstrong, R v Harrow London Borough Council, ex parte Cobham [2002] UKHL 34; [2002] 3 W.L.R. 584; [2002] 4 All E.R. 124.

House of Lords (13, 14 May, 25 July 2002) Lord Slynn of Hadley, Lord Mackay of Clashfern, Lord Steyn, Lord Hutton and Lord Millett.

Introduction

With this important decision, the House of Lords confirmed that the services provided under section 117 of the Mental Health Act 1983 are provided as a consequence of a free-standing obligation on the authorities, and are free of charge.

Nearly two decades since section 117 of the Mental Health Act 1983 came onto the statute books, around two-thirds of authorities have been continuing to charge for after-care services in the absence of an express entitlement under s.117.¹ It is perhaps somewhat surprising that their actions were not subject to legal scrutiny much earlier than the summer of 1999, when the cases considered by the House of Lords first came before the High Court.²

While great confusion appears to have existed as to the scope and interpretation of s.117, guidance had in fact been provided on the matter some time ago. In January 1994 the Department of Health firmly adopted the position that s.117 imposed a duty on authorities to provide after-care services, including home care services, and that these services were not to be subject to charging.³ This position was confirmed by the Government when responding to a Parliamentary question in July 1998.⁴ Furthermore, the decision of the High Court in 1999 (which provided the first judicial confirmation of the position) led to a later Department of Health Circular which warned that 'social services authorities still charging for after-care services provided under section 117 should

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1 *Paragraph 4 of the judgment of Lord Steyn who gave the only detailed judgment in the case.*

2 [1999] 2 CCLR 402

3 *Advice Note for use by Social Security Inspectorate – Discretionary Charges for Adult Social Services (January 1994), para 2. This position is also reflected in*

various decisions of the Local Government Ombudsman, see for example Investigation into Complaint Nos 97/0177 and 97/0755 against the former Clwyd CC and Conwy County BC, 19 September 1997, 1 CCLR December 1998, (Legal Action Group); Investigation into Complaint No 98/B/0341 against Wiltshire CC, 14 December 1999, 3 CCLR March 2000, (Legal Action Group).

4 *Vol. 317 HC Official Report (July, 1998).*

immediately cease charging since there is no power to do so.⁵ And after the Court of Appeal⁶ upheld the High Court's decision, the Chairman of the Mental Health Strategy Group of the Association of Directors of Social Services wrote to all Directors of Social Services confirming that 'it was not lawful to charge for [section 117] services'.⁷

Therefore, one can hold little sympathy for authorities, which, despite such unequivocal guidance, have continued to charge some of the most vulnerable individuals in society for after-care services. Of course, one concern yet to be addressed, is the potential knock-on effect of this judgment, it being estimated that if repayment of charges levied since 1993 had to be made, the sum would sit at around £80 million.⁸ However, while the House of Lords recognised that this judgment held significant resource implications, Lord Steyn commented that "behind these figures lie, no doubt, innumerable tragic personal stories of mentally-ill individuals who were charged for after-care services."⁹

Facts

The respondents¹⁰ had been formally admitted to hospital under section 3 of the Mental Health Act 1983 ("the 1983 Act"). Following discharge they were placed into caring residential accommodation which constituted 'after-care services' falling within the meaning of s.117(2) of the 1983 Act. Under s.117(2) local authorities are under a duty to provide such services to persons to whom s.117 applies, such as the respondents. While s.117(2A)(a) refers to after-care services provided 'under this section', other provisions of the 1983 Act refer to after-care services provided 'under' section 117. Despite the fact that this section contains no charging provision, the appellants local social services authorities charged the respondents for the provision of after-care services. The respondents challenged the lawfulness of the decisions to charge for after-care services in judicial review proceedings. On 28th July 1999, in the High Court¹¹ Mr Justice Sullivan held that there was no right to charge for such after-care services. A year almost to the day later (27th July 2000), his decision was affirmed by the Court of Appeal (Otton, Buxton LJ and Hooper J).¹²

The authorities appealed to the House of Lords. The central question was whether section 117 is a 'free standing' provision which authorises and requires the provision of after-care services or whether it operates merely as a 'gateway' section to trigger provisions under other statutory provisions, such as s.21 of the National Assistance Act 1948. If the former view were taken, then there would be no right to charge for after-care services owing to the absence of a charging provision under s.117. However, if the latter view were adopted, the authorities would be entitled to charge under various statutory provisions even in cases covered by s.117.

5 HSC 2000/003: LAC (2000) 3, 10 February 2000, p.3.

6 [2000] 3 CCLR 276

7 Letter dated 30th October 2000

8 Lord Steyn illustrated some scepticism when addressing these 'unverified' figures, owing to different (and higher) estimates that had been presented to the Court of Appeal.

9 Paragraph 4 of Lord Steyn's judgment.

10 During the progression of these proceedings, this case

has been widely referred to as the 'Watson' ruling. Mary Watson, who was the first applicant in the High Court proceedings and the first respondent in the Court of Appeal, died before the hearing of the Appeal in the House of Lords. The authority in her case, Richmond London Borough Council, was not a party to the proceedings in the House of Lords but continued to act as an agent for the remaining authorities.

11 See footnote 2 above

12 See footnote 6 above.

Relevant Legal Provisions

The National Health Service and Community Care Act 1990 (“the NHSCCA 1990”) places responsibility onto local authorities for the effective delivery of community care services. Under the NHSCCA 1990, local authorities are required to prepare, publish and keep under review a plan for community care services in its area,¹³ in co-operation with housing authorities, health authorities and voluntary agencies. Community care services include those social care services provided under Part III of the National Assistance Act 1948¹⁴ and s.117 of the Mental Health Act 1983.¹⁵ Under section 47 of the NHSCCA 1990, local authorities are required to assess the needs of anyone who may be in need of community care services,¹⁶ and must determine in the light of that assessment whether such needs require the provision of such services.¹⁷ While a right to assessment exists under the NHSCCA 1990, it does not confer a guarantee that services will be provided. Those requiring community care services must look elsewhere amongst ‘a hotchpotch of conflicting statutes’¹⁸ for practical assistance.

Section 117 places a duty upon health and local authorities, in conjunction with voluntary agencies,¹⁹ to make arrangements for the continuing support and care of those former compulsorily detained patients to whom s.117 applies. Therefore, this section applies to individuals who have been detained for treatment under s.3 of the 1983 Act and are then discharged.²⁰ It also applies to persons who have been convicted of offences and have been made subject to a hospital order or a hospital direction or have been transferred from prison to hospital (under sections 37, 45A, 47 and 48 of the 1983 Act respectively) and who then cease to be detained.²¹ Section 117 requires both the health and social services authorities to provide after-care services until such time as they are satisfied that the individual is no longer in need of the services. The obligation under s.117 cannot be ended except by a joint decision of the health authority and social services, based on a proper assessment, that the person no longer needs the services. As acknowledged by the Mental Health Strategy Group of the Association of Directors of Social Services,²² ‘one of the key issues is determining the point a person might reasonably be deemed to no longer require services provided under section 117’.

While after-care services are not defined in the 1983 Act, in an earlier case in the Court of Appeal, Beldam LJ observed that they would “normally include social work, support in helping the ex-patient with problems of employment, accommodation or family relationships, the provision of domiciliary services and the use of day centre and residential facilities”.²³ It was common ground in the House of Lords that this was a correct description.²⁴

13 Section 46(1) NHSCCA 1990

14 Section 46(3)(a) NHSCCA 1990

15 Under section 46(3)(d) NHSCCA 1990. See also s.45 of the Health Services and Public Health Act 1968 and s.21 and schedule 8 of the National Health Service Act 1977: see s. 46(3) NHSCCA 1990.

16 Section 47(1)(a) NHSCCA 1990.

17 Section 47(1)(b) NHSCCA 1990.

18 Clements, L., (2000) *Community Care and the Law*, Legal Action Group. The quotation is taken from page 9 of the introduction to this comprehensive book about the legal basis of community care services.

19 Under section 117(2) of the 1983 Act

20 Section 117 also extends to patients who having been detained under section 3, are granted leave of absence under section 17, *R v Richmond L.B.C., ex parte Watson and other appeals* [2001] 1 All E.R. 436, and to those patients who have been conditionally discharged under section 73(2) (see Code of Practice para. 27.3.)

21 Under section 117(1) of the 1983 Act.

22 See footnote 7 above.

23 *Clunis v Camden and Islington Health Authority* [1998] 3 All ER 180 at 191, [1998] QB 978 at 992.

24 Paragraph 9 of Lord Steyn’s judgment

For those who do not fall within the scope of s.117 of the 1983, entitlement to the provision of accommodation may be found in s.21(1) of the National Assistance Act 1948 (“the 1948 Act”). Under this section, local authorities have a duty to provide residential accommodation²⁵ for those in their area aged eighteen years or over who by reason of age, illness or disability or any other circumstances are in need of care and attention which is not otherwise available to them. Once accommodation has been provided under s.21, the recipient of such accommodation is subject to a means-tested charge by reason of the provisions of s.22 of the 1948 Act, although the amount of capital that may be taken into account by local authorities is restricted under the Community Care (Residential Accommodation) Act 1998.²⁶

Judgment

Local social services authorities are not entitled to charge for after-care services provided as a consequence of their duty under s.117 of the 1983 Act. Had Parliament intended s.117(2) to be a gateway provision so that after-care services would be provided under other statutory provisions, it could be expected that s.117(2) would have specified those statutory provisions with appropriate wording. Section 117 is a freestanding provision, and s.117(2) was incapable of being interpreted as imposing a duty to secure the provision of such services under other unnamed enactments. The express references in s.117(2A)(a) to ‘after-care services provided...under this section’ and in other provisions of the 1983 Act to after-care services provided ‘under’ s.117 was inconsistent with the services being provided under any other statutory provisions. Contrary to the submission made on behalf of the appellants, their Lordships were of the view that the natural and obvious interpretation of s.117(2) is that the duty to provide services, by necessary implication imports a concomitant power to carry out the duty. According the appeal was dismissed.

Comment

The High Court and Court of Appeal had already provided a rather thorough treatment of the issues arising in this action.²⁷ For this reason, the unanimous decision of the House of Lords adds little more than the note of finality in confirming that individuals falling within the scope of s.117 of the 1983 Act may not be charged for the provision of after-care services. While on appeal to the House, counsel for the authorities put forward a slightly different argument and suggested that s.117(2) simply contained a general duty on authorities to co-operate about discharged patients, this matter was quickly disposed of. Lord Steyn rejected counsel’s argument as “untenable” owing to the imperative language providing that the authorities ‘shall...provide...after-care services’ until ‘the person concerned is no longer in need of such services’. His Lordship noted that as s.22 of the National Health Service Act 1977 Act already provided for such co-operation between health authorities and local authorities, it was unnecessary to enact s.117(2) for the ‘limited’ purpose of creating a duty to co-operate.

25 Other aspects of after-care (welfare services) are dealt with under section 29 of the 1948 Act.

26 For a detailed account of the various community care service provisions see (1) Clements, L (see footnote 18 above); (2) Bartlett, P. and Sandland, R. (2000) *Mental Health Law, Policy & Practice*, London: Blackstone

Press, pp. 298–323.

27 For an informative discussion of the proceedings in the High Court and Court of Appeal, see Mackintosh, N (2000) *Charges for Services Provided Under S.117 Mental Health Act 1983*, *Journal of Mental Health Law*, pp. 166–171.

Nevertheless, while the House of Lords has conclusively disposed of the central issues concerning s.117 and the funding of after-care services, a number of significant issues related to after-care provision remain on the legal landscape.

‘The Anomaly of the Compliant and Non-Compliant Patients in Adjacent Beds’

Counsel for the authorities referred the House to a comment made by Richard Jones in his influential ‘Mental Health Act Manual’²⁸ on the consequences of the Court of Appeal decision. He contrasts the situations of two men with pre-senile dementia, both being assessed as requiring accommodation for the rest of their lives, the crucial difference between the two being that the first was admitted *informally* to hospital as a compliant patient and the second under section 3 of the 1983 Act as he ‘happened not to be compliant when the crisis in his mental health occurred’.²⁹ Citing Jones, Counsel stated that the natural consequence of the Court of Appeal decision would be that the first would be charged for accommodation provision under s.22 of the 1948 Act, while the second individual would receive such services without charge, by virtue of falling within the ambit of s.117 of the 1983 Act. Counsel summed this up as ‘the anomaly of the compliant and non-compliant patients in adjacent beds’.

Nevertheless, Lord Steyn, describing this as Counsel’s ‘trump card’,³⁰ thought this view “too simplistic”, and noted that a reasonable view might be that patients compulsorily admitted under sections 3 and 37 pose a greater risk upon discharge to themselves and others than compliant patients, and highlighted that Parliament necessarily legislates for the generality of cases.³¹ Referring to certain paragraphs in the Code of Practice, Lord Steyn also took care to point out, ‘compulsory admission powers should be exercised in the last resort’, and that the principal factor in reaching a decision to admit is ‘the danger the patient presents to him or herself or others’.³²

But the ‘anomaly of the compliant and non-compliant patients in adjacent beds’, in itself, is far from ‘simplistic’ – it highlights the manifest unfairness which can arise from differential treatment in circumstances where the ‘needs’ of patients are objectively no different at all. Although such a consequentialist argument provides no good reason to deny **all** persons suffering from mental illness free after-care (the approach adopted by their Lordships), it does render a more sustainable argument that there should be a *similar provision* of services for everyone with *similar needs*.

On this latter point, Jones notes that it is certainly open to argument that an informal patient, who has been discharged from a psychiatric institution and is being charged for accommodation provided for his mental health needs, would have a valid claim under Article 14 ECHR.³³ In these circumstances, he suggests that it is arguable that Article 8 rights are invoked and such patients suffer discrimination as a result of their non-detained status.³⁴

It is perhaps understandable that their Lordships refrained from providing comment in relation to the position of the informal patient, for two reasons. Firstly, the role of the court was to deal with those to whom section 117(1) applies and the question here was whether local authorities could

28 Jones Richard (2001) *Mental Health Act Manual* 7th edition, London, Sweet & Maxwell

29 See footnote 28 above, para 1–967, p. 400.

30 Paragraph 13 of his judgment

31 See footnote 30 above.

32 Paragraph 2.7 of the Code of Practice. His lordship did

not comment in passing as he might have done, that this is not in fact the test laid down in the 1983 Act.

33 As confirmed by *Petrovic v Austria* (1998) 4 BHRC 232, even the most tenuous link with another provision of the ECHR would be sufficient in order to invoke Article 14.

34 See footnote 29 above.

legitimately charge for after-care services under s.117. As all of the respondents had previously been formally detained, an extended discussion of the unfairness that s.117 gives rise to in relation to the informally detained patient would be merely hypothetical. And secondly, section 117(1) is unambiguous as to which classes of individual fall within its scope – therefore, until the point is raised in a separate action, in the form described by Richard Jones, such a matter would seem to fall more appropriately to the legislature rather than the courts.

To charge or not to charge?

But for the purposes of ascertaining whether those falling within the scope of s.117 should be subject to charges for after-care services, perhaps there is a further crucial difference between the informal patient and section 3 patient described above. By comparison with those in need of care under the National Assistance Act 1948 who have the right to choose accommodation where the conditions specified in the National Assistance Act 1948 (Choice of Accommodation Directions) 1992 are satisfied, those patients subject to s.117 are deprived of any choice. This factor, combined with the continuing compliance required by some patients, clearly influenced Lord Steyn when contemplating the ‘far-reaching’ implications of acceding to the arguments of the appellants.

Lord Steyn noted that when a detained patient applies to a mental health review tribunal for discharge under s.72 of the 1983 Act, that on discharge pursuant to a direction by a tribunal, a patient might still require medical and other care. In these circumstances, caring residential care may be essential and would take the place of the hospital environment. Emphasising that the patient does not freely choose accommodation, Lord Steyn suggested that charging individuals for such accommodation in these circumstances would be surprising. His Lordship also noted that in the case of restricted patients (i.e. those patients made subject to a restriction order under s.41 of the 1983 Act) not only is the tribunal empowered under s.73 of the 1983 Act to impose conditions of discharge with which the patient is obliged to comply, but the Home Secretary also holds the power to impose conditions on the patient at any time (s. 42 of the 1983 Act). Lord Steyn suggested that:

“Plainly in such cases the patients do not voluntarily avail themselves of the after-care services. If the argument of the authorities is accepted that there is a power to charge these patients such a view of the law would not be testimony to our society attaching a high value to the need to care after the exceptionally vulnerable.”³⁵

Recovery of Charges³⁶

Where charges have been made for after-care services, authorities will now be subject to restitutionary claims on behalf of service recipients, which are unlikely to be defeated other than through the operation of a Limitation Act defence.³⁷ In addition, questions seem likely to arise in the future where decisions have been made to discharge individuals from section 117, the knee-jerk

35 Paragraph 15 of his judgment

36 In response to the House of Lords’ decision, the Bulletin of the Chief Executive of the Department of Health states ‘Those authorities that have made such a charge will no doubt now wish to address that issue and will each wish to seek their own advice as to the extent of their

liability’, Issue 135, 13th – 19th September 2002, DoH.

37 Different considerations apply to those who continue to suffer from a disability under the Limitation Act 1980. Under section 28(1) of the 1980 Act, the six-year period applicable to monetary claims, will not commence until he or she ceases to be under a disability or has died.

reaction of some local authorities to the initial stages of the *Watson* ruling. Where the provision of aftercare has been terminated in this way, and services have been provided under section 21 of the 1948 Act instead,³⁸ such decisions should be subjected to serious scrutiny.

It is abundantly clear that local authorities may not make charges unless there has been a proper assessment, resulting in a decision that the individual no longer needs aftercare.³⁹ Therefore the legality of decisions to discharge such individuals from s.117 should be doubted, in particular where the need for such services arises from the same mental health condition which led to detention for treatment initially.

Certainly the s.117 duty to provide after-care free of charge will be costly in terms of NHS and social services budgets. As the government has previously emphasised, social services and health agencies should establish joint policies on s.117.⁴⁰ The requirement for effective joint working arrangements cannot be overstated. These will not only need to contend with the provision of future aftercare, but following this judgment, for the sharing and apportioning of responsibility for restitutionary claims made by service recipients. In this respect, Rowley advises that some relief should be gained from the Health Service Act 1999 which enables both the pooling of budgets particularly where NHS and social care provisions overlap, and the ability to reach agreements as to the appropriate apportionment of funding responsibilities.⁴¹

Entitlement, Rights and the Draft Mental Health Bill 2002

‘Above all, legal reform must enshrine the principle of reciprocity...A new mental health act should continue legal provision for compulsion or persuasion of patients, whether in hospital or the community, only if the State also offers specific rights to treatment that go beyond the ineffective general rights to treatment offered by primary NHS legislation...Infringement of individual rights requires acceptance of social duties.’⁴²

As Fennell suggests, ‘mentally disordered patients may be said to have rights in two senses: negative rights to freedom from arbitrary detention or interference with their person; and positive rights to expect a certain minimum standard of service.’⁴³ He notes that s.117 is the one provision of the 1983 Act that actually reflects ‘positive rights in terms of entitlement to services’.⁴⁴ But the nature of that right is unquestionably qualified. Firstly, the 1983 Act is more intent on imposing a *duty* on health and social service authorities in circumstances where an individual is assessed as being in ‘need’.⁴⁵ Secondly, the extent and provision of aftercare remains a matter of medical discretion,

38 For which a charge is compulsory under s.22 of the National Assistance Act 1948.

39 As confirmed from *R v Ealing District Health Authority ex parte Fox* [1993] 1 WLR 393, the duty of Health Authorities to provide after-care services lasts as long as the patients needs it. Therefore, in these circumstances, patients have a continuing entitlement to the provision of after-care services.

40 See footnote 5 above.

41 Rowley, L (2002) *Mental Health News Brief, Issue Summer 2002*, London: *Hempsons Solicitors*, p.4. For a detailed assessment of the legal and financial implications of this judgment, see further, ‘Legal implications of the House of Lords’ s117 Mental Health Act aftercare decision in *Stennett v Manchester*

City Council and other conjoined cases’ (2002) *Public Law Health Check Issue 4*, Mayer Brown Rowe & Maw, pp. 12–15.

42 Eastman, N. (1994) *Mental health law: civil liberties and the principle of reciprocity*, *BMJ* 1994; 308: 43.

43 Fennell, P. (1999) ‘The Third Way in Mental Health Policy: Negative Rights, Positive Rights, and the Convention 26 *Journal of Law and Society* 1, pp. 103–127, 103.

44 Footnote 43 above, page 106.

45 Hatfield, B and Antcliff, V. (2001) *Detention under the Mental Health Act: balancing rights, risks and need for services*, *Journal of Social Welfare and Family Law*, 23(2), pp. 135–153, 149.

and resource considerations may be taken into account when making the decision as to the after-care to be provided.⁴⁶ And thirdly, few effective means are open to a patient seeking to enforce such a 'right'.

However, this House of Lords decision provides room for optimism in adopting a proactive approach towards protecting one of the cornerstones of community care policy. As those subject to s.117 are some of the most vulnerable individuals in society, access to much-needed health and community care should be unencumbered by financial obstacles. Therefore, while this decision provides a welcome confirmation of the duties of local authorities and rights of formally detained patients, will this measure be sufficient to ensure a **continued** protection of the entitlement to free after-care services?

The White Paper, *Reforming the Mental Health Act* stated that patients subject to a care and treatment order outside hospital will not be charged for the provision of any service that is specified as compulsory.⁴⁷ However, no section 117 equivalent has been included in the Draft Mental Health Bill 2000 ("the Draft Bill"),⁴⁸ nor any mention as to whether these services will be provided free of charge. Although the Consultation Document (published alongside the Draft Bill) states that the Draft Bill does not cover everything that will be included in the final Bill, taking into account the high profile of s.117 in recent years and benefit of lower court jurisprudence, one might have anticipated that after-care services would have featured more prominently. Instead, 'providing care for patients in the community' falls under 'additional issues' which will be considered in line with discussion with interested organisations including patients groups and local government representatives.⁴⁹ Related issues covered in the Draft Bill however are more promising. The Draft Bill confirms that the clinical supervisor will hold the power to discharge a patient from a care and treatment order only on the basis of an agreed written plan which sets out what continued care and treatment will be provided and when the plan will be reviewed. In addition, before a Tribunal discharges a patient, they will have to be satisfied that there are adequate after-care arrangements.

The absence of a proposed statutory duty as that provided under section 117 has attracted particularly severe criticism from numerous groups providing responses during the Consultation Period. The existence of a care plan, while unquestionably central to targeting the needs of individuals is, in itself, insufficient to ensure that 'the needs of vulnerable individuals will be met in the absence of a duty to provide what is set out in the plan'.⁵⁰ In this respect, the Mental Health Lawyers Association warns that the removal of such a duty will lead to:

46 *R v Somerset County Council ex parte Fewings* [1995] 1 W.L.R. 1037. See also *R v Camden and Islington Health Authority, ex parte K* [2001] EWHC Admin 353, (2001) BMLR 192, in which the Court held that the obligation to provide after-care under s.117 was not absolute where the Health Authority, despite 'reasonable endeavours', was unable to arrange specific care and treatment in the community attached as conditions of discharge. Here section 117's scope was considered a matter of discretion limited by budgetary constraints.

47 Department of Health (2000) *Reforming the Mental*

Health Act, Part I, The new legal framework, Cm 5015 – I, London: TSO at para 3.58.

48 Department of Health (2002) *Draft Mental Health Bill*, Cm 5538 – I, London: TSO

49 Department of Health/Home Office (2002) *Mental Health Bill Consultation Document*, Cm 5538 – III, London: TSO at para 4.4.

50 Mental Health Lawyers Association (2002) *Consultation Submission in Respect of the Draft Mental Health Bill 2002* (September 2002) p.7.

- (a) Patients spending longer in hospital whilst statutory duties and payment obligations are confirmed⁵¹;
- (b) Less critical support for patients in the community;
- (c) A greater risk of relapse;
- (d) The greater use of compulsory powers against the mentally unwell.⁵²

And questions must certainly arise in relation to the funding of after-care services. As Mind contends:

“Aftercare services must be available free of charge...Not only does this flow from the principle of reciprocity, it is implicit in human rights principles that a person’s freedom should not depend on whether s/he can afford the services on which it is based.”⁵³

Responses to the Consultation Period emphasise the need to address further issues correlated to after-care provision. Despite the Draft Bill confirming that the Tribunal will have an increased role in overseeing the provision of after-care, the concern which many share is whether such a function is accompanied by powers to enforce any apparent shortfall in the after-care package. In addition, the ‘rights’ afforded to patients in these circumstances, are clearly insufficient. At present, if there is an apparent shortfall in the after-care package, the tribunal does not have any power to police the work of the authorities.⁵⁴ And nor does it appear that the patient has a right to reparation where she/he has been subject to the provision of inadequate support.⁵⁵ However, a decision by a district health authority or a local social services authority under s.117 may be liable to judicial review at the instance of the patient.⁵⁶ But, the primary method of enforcement of the duty is by complaint to the Secretary of State.⁵⁷ As Mind suggests, a suitable means of enforcing this duty would be via a section 117 equivalent, alongside an enforcement mechanism available to individuals via the routes of the Tribunal or judicial review.

51 Nevertheless, it could be argued that if there is ‘excessive delay’, owing to the absence of safeguards to protect an individual’s right to liberty and security, this would violate Article 5. It would be necessary to show that the individual in question no longer requires detention in hospital and is insufficiently mentally disordered to be detained under the 1983 Act. Under these circumstances it would seem likely that the authorities would be in breach of Article 5(1)(e) ECHR (see *Johnson v United Kingdom* (1997) 27 EHRR 296).

52 See footnote 50 above, p.8.

53 MIND (2002) Mind Response to the Draft Mental Health Bill Consultation Document, Briefing on Proposed Mental Health Act Reforms (September 2002) at p.18.

54 *R v Mental Health Review Tribunal, ex parte Hall* (1999) 2 CCLR 383.

55 *Clunis v Camden and Islington Health Authority* [1998] 3 All E.R. 180: in which Clunis attempted to sue for the failure of authorities to provide after-care services under section 117 of the 1983 Act. The Court

of Appeal refused to allow his appeal. His case was recently declared as inadmissible in the European Court of Human Rights (*Clunis v United Kingdom* (App. No. 45049/98) ECtHR 11 September 2001. For an argument that suggests that a failure to provide after-care services might form the basis of an action for breach of statutory duty, see Montgomery, J. (2002) *Health Care Law*, Second Edition, Oxford: Oxford University Press, pp.75, 320–321.

56 *R v Ealing District Health Authority, ex parte Fox* [1993] 3 All ER 170.

57 See note 47 above. Section 124 of the 1983 Act provides for the Secretary of State to exercise enforcement powers where an authority is in default. Section 124(1) provides: ‘Where the Secretary of State is of opinion or otherwise that a local social services authority have failed to carry out functions conferred or imposed on the authority by or under this Act or have in carrying out the functions failed to comply with any regulations relating to those functions, he may after such enquiry as he thinks fit make an order declaring the authority to be in default.’

Conclusion

Section 117 is widely regarded as a provision ‘designed to promote the social welfare of a class of individuals and ensure that the services were made available’.⁵⁸ An important aspect of this section is the positive duty placed upon authorities to provide aftercare services to facilitate a patient’s speedy return to the community. As Glover-Thomas asserts, ‘the intention behind section 117 is clear...patients should be cared for in the least restrictive environment possible, and if they are suitable candidates for community care, after-care should be provided under the 1983 Act s.117 free of charge.’⁵⁹

Underpinning the unanimous decision of the House of Lords, is the notion that special provision should be made for those to whom s.117 applies. The rationale behind this statutory provision is well elucidated by Buxton LJ in the Court of Appeal:

“The persons referred to in s.117(1) are an identifiable and exceptionally vulnerable class. To their inherent vulnerability they add the burden, and the responsibility for the medical and social service authorities, of having been compulsorily detained. It is entirely proper that special provision should be made for them to receive after-care, and it would be surprising, rather than the reverse, if they were required to pay for what is essentially a health-related form of care and treatment.”⁶⁰

Seen in this light, the absence of a duty to provide free after-care services is indeed a ‘retrogressive step.’⁶¹ For this reason, it is doubted whether the House of Lords has provided the final word in relation to the funding of and duty to provide after-care. The Draft Bill in its current form threatens to undermine the future benefits to be gained from this judgment, and deprives individuals in receipt of after-care services of the ability to arrange their affairs accordingly.

And, as discussed earlier, Jones’ illustration highlights the dangers of limiting the scope of s.117 to those who have been subject to compulsory detention alone. The ‘theoretical’ demarcation between patients detained under the 1983 Act and those informally admitted, is no longer as clear following the *Bournewood*⁶² decision. For most purposes this means that while informal patients are effectively *de facto* detained, they continue to sit outside the protective mechanisms afforded for the formally detained⁶³ – this is certainly true in relation to after-care provision. In this regard, the legislature should endeavour to avoid ‘generality’ in marking out the boundaries of entitlement to after-care services. Such under-privileging of the informally detained is not only unsustainable in a mental health climate that seeks to promote a patient’s speedy return to the community life, but is an approach that appears highly vulnerable in the light of the Human Rights Act 1998.

58 See footnote 56 above.

59 Glover-Thomas, N. (2002) *Reconstructing Mental Health Law and Policy*, London: LexisNexis Butterworths Tolley, p. 91.

60 See footnote 6 above.

61 See note 50 above, p.8.

62 *R v Bournewood Community and Mental Health NHS Trust, ex parte L* [1998] 3 WLR 107.

63 See *Bartlett & Sandland op. cit.* at footnote 26 above.