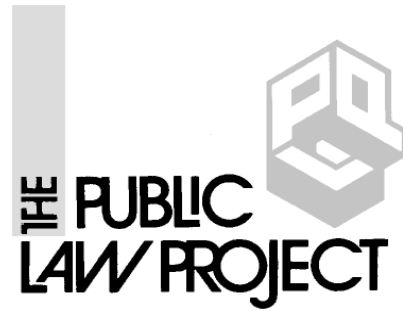


Provision of funding to voluntary and health sectors under National Health Service Act 1977 s3

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R (Keating & Others) v Cardiff Local Health Board [2005] EWCA Civ 847

Background

A voluntary sector organisation called Riverside Advice had been running a welfare benefits project for people with mental health difficulties funded by Cardiff Local Health Board (LHB), the Welsh equivalent of both a health authority and primary care trust (PCT). The project's funding was withdrawn following a review of voluntary sector funding by the LHB. Although the project had scored highly in the review assessment process and had been recommended to receive a new three-year service level agreement, the LHB said they did not have the power to fund this work under the National Health Service Act 1977.

The case had originally been brought as a challenge to the fairness of the review process, the claimants being service-users of the advice project and another mental health service running a peer education project, which had been unfairly treated within the voluntary sector review. Following the issue of proceedings, the LHB conceded on the fairness issues, agreeing to have a new process of review and decision-making for the peer education project. However, they maintained their position that it would be "ultra vires" for them to fund the Riverside Advice welfare benefits project as this was not a health service within the meaning of the 1977 Act.

The Claimants lost at first instance, as the case ultimately turned on s.3 of the Act which separated out the LHB's duties into services and facilities. It allowed for medical, nursing, dental and ambulance services, and services for diagnosis and treatment. In contrast, prevention of illness, care and aftercare provision was limited to "facilities" only and Mr Justice Moses found that this did not include a welfare benefits service. He applied a strict and narrow interpretation to the word "facilities" and did not accept that this implied services as well.

The Claimants were given permission to appeal, and the appeal was expedited as the project was in jeopardy following the funding cuts and the case had wide-spread implications for the voluntary sector and health sector generally, as a huge range of health-related projects were funded by Primary Care Trusts in England and LHBs in Wales.

Prior to the appeal being heard, the Secretary of State for Health applied to intervene and the intervention was allowed. The Secretary of State's submissions supported

the Claimants' arguments that s.3 of the 1977 Act should be broadly interpreted. Welsh Assembly Government supported the Secretary of State's intervention and submissions, although they chose not to intervene. Mind also made representations to the court in correspondence raising concerns as to the funding of numerous mental health projects that would be held to be unlawful if the appeal was not successful.

Decision

The Court of Appeal found that Moses J had adopted too restrictive an approach to the meaning of the word "facilities" where it appeared in s.3(1)(e) of the Act, in relation to the prevention of illness, care and after-care. Lord Justice Brooke held that its meaning should be derived from the context in which the word is used – it means "that which facilitates". The judgment continued: "Sometimes the word refers to tools, or accommodation, or plant, which facilitate the provision of a service. Sometimes it refers to an entire service provision, like a laundry service, or the provision of a day centre, which facilitates the prevention of illness, or the care of persons suffering from illness, or the after-care of persons who have suffered from illness." Lady Justice Arden and Lord Justice Longmore agreed.

Commentary

The decision on appeal is obviously very helpful in terms of clarification of what can be funded by health bodies, confirming that a broad interpretation of s.3 of the NHS Act 1977 is appropriate and that a wide range of services can be funded under this power. The judgment itself dealt with the point in a few sentences outlined above.

By the time of the appeal hearing, the arguments had moved away from whether a welfare benefits service was a "health" service or not. Although the Defendants had initially raised arguments that increasing income and decreasing the stress of the benefits appeals system did not improve someone's health (or prevent their ill health), the debate before the Court of Appeal centred on the distinction between "services" and "facilities". By that point, it was taken as read that benefits advice can be appropriately provided in a health setting and does relate to the health and well-being of the service-users. The Claimants relied on research and numerous Citizens Advice projects set in GPs surgeries, including a national service funded by the Welsh Department of Health.

In the lower court there had also been considerable argument as to whether the availability of joint flexibilities funding (by the local authority and the LHB) meant that there was either no need or no intention on Parliament's part for this type of project to be funded solely by a health body. However, these arguments had also rather faded into the background by the time the Court of Appeal considered the matter, and the Court focussed very much on the strict statutory interpretation of the relevant section.

Although the decision itself related to a pure construction point as it were, the case was also worth noting in that the public body conceded on the fairness issues after the issue and service of proceedings. They had vigorously defended their actions in

correspondence but then decided not to oppose the Claimants' application for permission. However, for whatever reason, they then agreed to a quashing order in relation to the peer education project, and agreed to carry out a fresh review. In relation to the welfare benefits project, once they had conceded the fairness issues, they agreed that if they were unsuccessful on the "ultra vires" point, they would enter into the new service level agreement which their own advisory group had recommended.

In the meantime the LHB had to adopt a rather disingenuous position that they needed the court's guidance as to whether they had the power to fund the project. This was despite the fact that no-one had challenged them on this point (i.e. no-one had accused them of doing anything unlawful), and nor had they sought any legal advice on this point prior to the challenge to the review process. The Defendants (who were in the midst of a cost-cutting exercise) had adopted this reason but not put it in their decision letter, nor was it minuted within the voluntary sector review. In the pre-action correspondence, the LHB were only saying that it *might* be ultra vires to fund the project and that the Claimants would have an uphill struggle to show it was.

Ultimately, the Claimants were successful both on the fairness arguments and the ultra vires point, although it proved to be a slow and expensive process.

Lastly, the court was also keen to emphasize the LHB's discretion in terms of what they could fund. As Lord Justice Brooke found: "In my judgment it [the LHB] is lawfully able to provide funding for services like the Riverside project, *if it considers it appropriate as part of the health service.*"

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