IN THE SUPREME COURT OF JUDICATURE NO. QBCOF99/0940/0941/0942/0943
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ORDER OF MR JUSTICE SULLIVAN

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday 27th July, 2000

B e f o r e:

LORD JUSTICE OTTON
LORD JUSTICE BUXTON
AND
MR JUSTICE HOOPER

– – – – – – –

RICHMOND BORO COUNCIL
MANCHESTER CITY COUNCIL
HARROW BORO COUNCIL
REDCAR BORO COUNCIL

Appellants

– v –

W/S/C/A

Respondents

– – – – – – – – – –

(Transcript of the Handed Down Judgment of
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Mr Richard Lissack QC/Mr Robin Tolson/Mr Mark Mullins (instructed by all Councils for the Appellants)
Mr Richard Drabble QC/Mr David Wolfe (instructed by the Public Law Project for W/A)
Ms Fenella Morris (instructed by Hogans for S)
Ms Jenni Richards (instructed by Mackintosh Duncan for C)

J U D G M E N T

As Approved by the Court

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LORD JUSTICE OTTON:

These four appeals involve an important issue as to whether charges can be levied by local authorities in relation to accommodation provided by them under section 117 of the Mental Health Act 1983 to persons who have been discharged from detention under section 3 of that Act. The appellant local authorities contend that charges can (and indeed must) be levied ; the respondents submit that there is no power to charge and charges cannot thus be made. On 28 July 1999 Mr Justice Sullivan held that there was no power for the respondents to charge for such residential accommodation in the absence of express statutory authority and that section 117 conferred no power to charge. He granted permission to appeal.

The outcome of these appeals has wide–ranging financial implications for all local authorities. We are told that in practice local authorities are divided on this issue. About half recognise that there is a positive obligation upon them to provide accommodation free to such patients ; the other half consider they have a right (or even a duty) to charge for this accommodation. The respondents in all four appeals have all been subject to detention under section 3 of the 1983 Act. Upon their respective discharge from that detention, the appellant Social Services Authority in each case has provided them with residential accommodation.

Statutory framework

The two principle statutory provisions for consideration are as follows :

Section 117 Mental Health Act 1983 (as amended):

"117 After–care

(1) This section applies to persons who are detained under section 3 above, or admitted to a hospital in pursuance of a hospital order made under section 37 above, or transferred to a hospital in pursuance of a transfer direction made under section 47 or 48 above, and then cease to be detained and [(whether or not immediately after so ceasing)] leave hospital.

(2) It shall be the duty of the [Health Authority] and of the local social services authority to provide, in co–operation with relevant voluntary agencies, after–care services for any person to whom this section applies until such time as the [Health Authority] and the local social services authority are satisfied that the person concerned is no longer in need of such services [; but they shall not be so satisfied in the case of a patient who is subject to after–care under supervision at any time while he remains so subject.]"

The expression "after care services" is not defined in the Act. Section 117 confers no express authority to charge for after care services. It is the appellants principle contention that the power to do so derives from the National Assistance Act 1948. Section 21, so far as is material, provides :

21. Duty of local authorities to provide accommodation

(1) [Subject to and in accordance with the provisions of this Part of the Act, a local authority may with the approval of the Secretary of State, and to such an extent as he may direct shall, make arrangements for providing]

(a) residential accommodation for persons [aged eighteen or over] who by reasons of age, [illness, disability] or any other circumstances are in need of care and attention which is not otherwise available to them : [and

(a) residential accommodation for expectant and nursing mothers who are in need of care and attention which is not otherwise available to the.]

(b)

(2) In making any such arrangements [a local authority shall have regard to the welfare of all persons for whom accommodation is provided and in particular to the need for providing accommodation of different descriptions suited to different descriptions of such persons as are mentioned in the last foregoing subsection.

However there is an important provision in sub–section (8) which provides :

"(8) .... nothing in this section shall authorise or require a local authority to make any provision authorised or required to be made (whether by that or by any other authority) by or under any enactment not contained in this Part of this Act [or authorised or required to be provided under the National Health Service Act 1977.]"

Section 22 (1) provides :

"22 Charges to be made for accommodation

(1) subject to section 26 of this Act, where a person is provided with accommodation under this Part of this Act the local authority providing the accommodation shall recover from him the amount of the payment which he is liable to make in accordance with the following provisions of this section."

Thus the NAA imposes a duty to charge for residential accommodation according to means.

Section 29 provides :

"29 Welfare arrangements for blind, deaf, dumb and crippled persons etc

(1) A local authority [may direct in relation to persons ordinarily resident in the area of the local authority shall make arrangements for promoting the welfare of person to whom this section applies, that is to say persons [aged eighteen or over] who are blind, deaf or dumb[or who suffer from mental disorder of any description]]. And other persons [aged eighteen or over] who are substantially and permanently handicapped by illness, injury, or congenital deformity or such other disabilities as may be prescribed by the Minister."

Before Sullivan J., the local authorities contended that section 117 does not impose a free–standing duty to provide after care services, including "caring" residential accommodation. It is a "gateway" section which imposes a duty to ensure that after care services are provided under such other enactment's that may be appropriate. In the case of residential accommodation the respondents must ensure that it is provided under section 21 of the 1948 Act. Once accommodation is provided under section 21 then a charge must be made under section 22. In respect of other aspects of after–care, the local authority must be sure that it is provided under, among others, section 29. A local authority does not impose charges or discharge payments for that element of the after care package.

Sullivan J. held that the question was one of statutory interpretation and accepted the submissions on behalf of the patients that the starting point must be the language in section 117 itself, considered not in isolation, but within the immediate framework provided by the Act and the wider

context of related legislation. He held that section 117(2) imposes a duty on the health authority and the local services authority to provide after care services for persons to whom section 117 applies. It does not impose a duty to secure the provision of such services under other powers, and that no other enactments are mentioned in sub–section 2 as a potential source of such power. He alluded to the fact that there are other sections of the Act (which have been incorporated by way of amendment in 1990) which expressly referred to the fact that section 117 imposed a free–standing duty to provide after–care services. Moreover, he held that section 117 is an "other enactment" within the terms of section 21(8). Given that section 117 both "authorises" and "requires" the provision of accommodation for these four patients the effect of sub–section (8) was specifically to disengage the respondents section 21(1) power.

He made a declaration in respect of each applicant in the following terms :

AND IT IS DECLARED

1. The Applicant falls within the terms of section 117(1) of the Mental Health Act 1983 ;
2. Her accommodation must be provided pursuant to section 117(2) of that Act, and not section section 21(1) of the National Assistance Act 1948 ;
3. Accordingly, the Respondents are not entitled to charge the Applicant for that accommodation.

Mr Richard Lissack QC on behalf of the appellants submitted that the judge's construction of section 117 conflicts with the language of the section, its place in the statutory regime and (if it is permissible in *Pepper v. Hart* terms to look at it) the singular Parliamentary history of section 117. He accepts that section 117 does create a duty : the duty to provide "after–care services." However, he contended that the right question to ask is ‘what services?'. It is either :

(a) a free–standing raft of otherwise undefined services (as the judge appears to have found) or,
(b) that body of services which the local authority has power to provide under other enactments, i.e. a ‘gateway' (as the appellants contend).

In support of his argument leading counsel points to the language of the section itself. First, he points to the lack of any definition of "services." A local authority only has those functions expressly conferred by statute or ancillary thereto pursuant to section 111 of the Local Government Act 1972. Hence, the functions of local authorities are usually tightly defined. If the judge is correct and section 117 operates outside section 21 then, in theory, "anything goes" for the more vulnerable section 117 qualifiers. In order to prevent such an open–ended commitment Parliament now circumscribes how (i.e. the administrative manner in which) the section 117 duty is to be performed. (See section 117(2)B) and section 32). He commented that it is odd for it not to have similarly incorporated regulations to govern the functions themselves if they are "free–standing." There is no need to, because they are not.

Second, the language of section 117 appears to place the same duty on both local authorities and health authorities, and raises the practical question of who should pay as between authorities.

Health authorities, and local authorities exercise different functions but the judge's construction strikes at the heart of this distinction. Leading counsel submitted that the purpose of section 117 is to impose a duty on both authorities to exercise their respective powers : not to require one to exercise the powers of the other.

Third, Mr Lissack relied heavily on the fact that there has been no amendment to section 117 "after–care services" since 1983. The after–care services which health authorities and local authorities provide in other contexts have changed since then. He submitted that the only explanation for no change is that the services which it envisages are those which the authorities have power, "outside of"section 117 to provide. Parliament should be presumed not to have intended that the 1983 position would continue to apply.

He further submitted that beyond the language of section 117 itself, the appellant's approach is harmonious and consistent. The section would guarantee that a person qualifying will be provided with the after–care services needed ; impose on the health authority and the local authority a duty to act in concert to avoid a section 3 qualifier from slipping through the net ; remove any discretion to provide ; and mark out a specific sub–group. In the light of this analysis section 117 would not run counter to present policy where, for example, local authorities have since 1993, been forbidden from providing (free) residential accommodation to the mentally ill. (see National Health Service Act 1977, Schedule 8, para.2 (4 AA)) In essence, it is submitted that the wider legislation provides, as Parliament and Government intended, for local authorities to charge for residential accommodation in all financially appropriate cases. Thus the appellant's construction allows "after–care services" in section 117 to move with the times.

Counsel for the four respondents made common cause and submitted that the statutory framework is clear and unambiguous and in their favour. In essence they contend :

> "(1) the provision of accommodation can and must be provided to these applicants pursuant to section 117
>
> (2) given that the section 117 is thus engaged, the section 21 power is expressly disengaged by section 21 itself. Accordingly, there can be no question of the local authority choosing to use the charge– attracting power."

Conclusions

All counsel agree that the starting point must be the language in section 117 itself. Mr Lissack concedes, in my view correctly, that the words "after–care services" in the MHA 1983 can include residential accommodation which is specifically designed to care for the needs of persons who have been detained under section 3 and who have left hospital. Like the learned judge, I consider leading counsel was correct to make that concession. In *Clunis* the Camden and Islington Health Authority (1998) 1 CCLR 215 AT 225G, Beldam L.J. said :

> "After–care services are not defined in the Act. 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."

The interpretation of section 117 was considered in *R. .v. Ealing District Health Authority* ex parte *Fox* (1993) 3 AER 170. At page 181 I said :

> "the duty is not only a general duty but a specific duty owed to the applicant to provide him with after–care services until such time as the district health authority and local social services authority are satisfied that he is no longer in need of such services."

It must follow that from the cessation of each respondent's respective detention under section 3 the appellants owed the respondents a specific duty to provide them with after–care services until the local authorities concerned become satisfied that the services are no longer needed. As Sullivan J. stated (page 17G–18A) :

> "On the face of it section 117(2) imposes a duty on the health authority and the local social services authority to provide after–care services for persons to whom section 117 applies. It does not impose a duty to secure the provision of such services under other powers, no other enactments are mentioned in sub–section (2) as a potential source of such power."

In my judgment, as a matter of construction, section 117 is unambiguous in its imposition of a free–standing duty to provide after–care services on local and health authorities. The language adopted by the draftsmen is in imperative form, providing that "It shall be the duty ..... ." There is no reference in that section or elsewhere in the Act to the exercise of this duty being dependent on any other provision in the Act or any other piece of legalisation (primary or secondary). Consequently, it would be artificial and contrary to the plain meaning of that section to imply a further requirement that the local authority can only exercise this duty by reference to a separate provision. Moreover, if section 117 had been intended as a gateway provision, one would expect to find an express reference to those other provisions in the section itself (for example see section 2 of the Chronically Sick and Disabled Persons Act 1970). The absence of any such reference suggests that to interpret section 117 as a gateway provision would be highly artificial. Thus in my view the interpretation of section 117 by the learned judge cannot be faulted.

The judge having so decided stated :

> "Having looked at the language, it is sensible to stand back and see if the result gives rise to any anomaly, absurdity or injustice."

This Mr Lissack invites us now to do.

I start by considering the language of the amendments to the 1983 Act contained in section 25 which deal with the "after–care under supervision" and thus are not directly relevant to these cases. However, Mr Richard Drabble QC on behalf of Mrs W and Mr A indicated 21 instances in section 25A–25J which were inserted by the Mental Health (Patients in the Community) Act 1995, where expressions such as "after–care services provided for him under section 117" "after– care services provided (or to be provided) under section 117 below," and "after–care services other than medical treatment) provided for the patient under section 117 below" are to be found.

I accept Mr Drabble's contention that if section 117 were not a direct provision–making section, then sections 25A–25H would not have been expressed as above.

I turn to consider the language and effect of section 21 of the 1948 Act. Sub–section (1) authorises the provision of accommodation to a person only where accommodation is "not otherwise available to them." In the present cases, accommodation *is (or was),* otherwise available to all the

respondents, namely by virtue of section 117. Thus, on my interpretation, the section 21(1) power does not (or did not) arise. Even in the absence of section 117, section 21(1) would permit the local authorities to provide section 3 persons with residential accommodation because they are in need of it "by reason of age, illness, disability or any other circumstances." This again supports the argument that section 117 is a self–standing provision and is not a gateway to sections 21 and 22 of the 1948 Act.

There was considerable argument concerning section 21(8) which states :

> "Nothing in this section shall authorise or require a local authority to make any provision authorised or required to be made (whether by that or by any other authority) by or under any enactment not contained in this part of this Act or authorised or required to be made under the National Health Service Act 1977."

In my judgment, all this means is that if one enactment authorises or requires the provision of residential accommodation (in this case section 117 N.H.A.), there is no power to provide residential accommodation under section 21(1). The effect of this provision was considered by the Court of Appeal in *North Devon Health Authority v. Coughlan* (1999) CCLR 285. Lord Woolf, delivering the decision of the Court, at paragraph 27 posed the question :

> "How are the words "or authorised or required to be provided under" the Health Act to be applied?
>
> 28. Each word is of significance. The powers of the local authority are not excluded *by* the existence of a power in the Health Act to provide the service, but they are excluded where the provision is authorised or required to be made *under* the Health Act. The position is different in the case of "any other enactment" where it is sufficient if there is an authority or requirement to be made *by or under* the enactments.
>
> 29. ––– The section (21(8)) should not be regarded as preventing a local authority from providing any health services. The sub–sections prohibitive effect is limited to those health services which, in fact, have been authorised or required to be provided under the Health Act. Such Health Services would not therefore include services which the Secretary of State legitimately decided under section 3(1) of the Health Act it was not necessary for the NHS to provide.-The true effect is to emphasise that Care Act provision, which is secondary to Health Act provision, may nevertheless include nursing care which properly falls outside the NHS."

Mr Lissack recognises that paragraph 28 presents difficulty but sought to distinguish the decision on the basis that since section 117 was not directly in issue, the final sentence of paragraph 28 was obiter. Addressing this argument, Sullivan J. said (page 23C) :

> "Although section 117 was not in issue, the Court did have to construe the excluding provisions of section 21(8). The contrast between the position where provision is authorised or required to be made under the 1977 Act, and by or under "any other enactment," including section 117, was central to the Court's decision. I am therefore satisfied that the approach of the Court to section 21(8) is binding upon me."

Although I have some reservations as to what paragraph 28 really means, I respectfully agree with the decision of the Court of Appeal and Sullivan J. Section 117 is an "other enactment" in the terms of section 21(8). Given that it both "authorises" and "requires" the provision of accommodation to these four patients, section 21(8) of the 1948 Act specifically disengages the

local authorities section 21(1) power. Accordingly the accommodation thus provided is being provided pursuant to section 117 of the MHA and is wholly independent of section 21 of the 1948 Act. It must follow that there is no power to levy charges for after–care services, including the residential accommodation, provided pursuant to section 117.

All counsel invited us to look at legislation outside the two immediate provisions which we have discussed to see if the result reached by Sullivan J. gives rise to any anomaly, absurdity or injustice. Ms Jenni Richards for C drew our attention to section 46(3) of the National Health Service and Community Care Act 1990 (NHSACCA 90) where there is a specific reference to section 117. Sub–section (1) requires each local authority to prepare and publish a plan for the provision of community care services in their area. Sub–section (3) provides :

> "community care services" means services which a local authority may provide or arrange to be provided under any of the following provisions –
>
> (a) part III of National Assistance Act 1948
> (b) section 45 of the Health Services and Public Health Act 1968 ;
> (c) section 21 and Schedule 8 of the National Health Service Act 1977 ; and
> (d) section 117 of the Mental Health Act 1983."

The effect of this section to my mind makes it clear that section 117 is concerned with the *direct* provision of services and is not merely a gateway to the provision of residential accommodation under section 21 NAA or to the provision of other services under unspecified enactments. She also pointed out that by section 47(1) the local authority must carry out an assessment of the person's needs for those services and, (b) having regard to the results the local authority must then decide whether his needs "call for the provision by them of any such services." i.e. under section 117 MHA. I was attracted by her argument that section 47(1) is in itself a gateway or trigger to community care services provided in the assessment and service provision decision regime. It is not necessary to go further to consider her contention that the argument advanced by the local authorities would provide, effectively, a gateway to a gateway. I did not find any of the Acts cited by Mr Lissack to carry any weight in this regard.

Mr Lissack advanced a number of "policy based" and consequential arguments to support a submission that the judge's decision and his reasoning were at fault. He suggested that upholding Sullivan J.'s construction would lead to a "windfall gain" for patients. The case has wide–ranging financial implications for all local authorities : the nation–wide annual loss of revenue may be around £100 million if the learned judge is right. The windfall gain to individuals receiving services would come largely from centrally funded State benefits. The question whether authorities are liable to repay to those hitherto charged also arises. There the amount at stake may be as high as £800 million. These figures were based on a study conducted by the Association of Directors of Social Services (ADSS).

I do not find the concept of a "windfall" convincing in the context of the provision of after–care services to all those who genuinely require them and who qualify for services provided for by Parliament. Section 3 persons are particularly vulnerable, they are probably unlikely to be able to manage to earn a living, or manage their affairs or return to their former home. As Ms Richards

succinctly put it "moreover the categorisation of the provision of free services to individuals who have been compulsorily detained in hospital and who may be amongst the most seriously ill and needy in society as a "windfall gain" is wholly inapt.

Similarly I consider the argument advanced by and on behalf of the local authorities that provision is made for those who "deserve" services and those who are "undeserving" (e.g. the "brain–damaged victim" on one hand as against the "elderly imprisoned criminal)" unhelpful in a situation where one is seeking to construe and give effect to an Act of Parliament. Suffice it to say that section 117 is concerned with those who have been detained under the powers of compulsory admission which are only to be exercised as a last resort. As Sullivan J. aptly put it :

> "(There is no) inherent unfairness in such a group being entitled to free accommodation as part of their package of after–care in the community .... If, as part of (the programme of community care) patients who would otherwise have been detained in hospital, at considerable cost to the NHS, are accommodated within the community is part of their after–care, I can see no good reason why the public purse and not the former patient should bear the cost of providing that accommodation."

I also found unattractive the suggestion that there was "a perverse incentive" to patients who will positively wish to be compulsorily detained under the MHA in order that they might benefit from section 117 when their compulsory detention terminates. To my mind the section 3 person and his family are unlikely to be able to make this fine judgment and the suggestion is also a slur on those members of the medical profession who are responsible for taking the decision whether or not to exercise the powers of compulsory admission. Sullivan J. rather kindly described this submission as "somewhat far–fetched."

I see nothing anomalous in imposing a joint duty on health and local authorities' social services to provide after–care services. Ms Fenella Morris pointed to a variety of statutory provisions which allow for joint or cross–funding for community care services such as section 28A NHS Act 1977 and section 113 Local Government Act 1972. The language of the section clearly reduces the opportunity of two such authorities to try to pass the buck and as a result no proper provision is made. The person's illness may require a particular type of provision more readily available from the health authority, another person may be in good physical health not requiring health service treatment but who is able and indeed obliged to reside in caring residential accommodation provided by the local authority. In time, the person in residential accommodation may experience a deterioration in his physical health in which case the responsibility may properly pass to a health authority. This is not an uncommon situation and the language of section 117 ensures a seamless provision for the section 3 person while at the same time permitting cross–funding of community care services between the two authorities. Thus I am not persuaded by the argument that Parliament could not have intended to impose an identical duty on local and health authorities. There is nothing inequitable in such an arrangement. On the contrary the health authority is not allowed to charge, to allow the local authority to recover the costs <u>would</u> produce an inequitable outcome. Moreover, this is not, as suggested, an open–ended commitment, by section 117(2) after–care services are provided only "until such time as the .... authority are satisfied that the person concerned is no longer in need of such services."

I am unconvinced by the argument that the absence of amendment since 1983 supports the local authorities contention that it is a gateway provision. The absence of amendment merely suggests that the provision has not been considered in need of change. It has not been suggested that the scheme does not work satisfactorily. Since the local authority has opted to make provision (as opposed to the other half of the authorities who have not), this strongly suggests that there is no need for further regulation.

I am unable to accept the appellants' contention that their approach is "harmonious and consistent." In the absence of ambiguity in the wording of section 117, the fact that another interpretation may accord with general policy has no bearing on the matter. Mr Lissack's four predicted outcomes of interpreting section 117 as a gateway provision would equally be true of the judge's interpretation of section 117 as a free−standing duty.

I have considered the appellants' assertion that no other provision imposes a duty on local authorities to provide residential accommodation for the mentally ill, free of charge. This, to my mind, is a circular argument. The fact that Parliament has made separate provision for a particular category of the mentally ill to be provided with caring residential accommodation after they have left hospital when no member of any other sub−group of the mentally ill is accorded the same treatment, does not undermine Parliament's specific intention. It simply demonstrates that those covered by section 117 are regarded as meriting different treatment by the provision of residential accommodation which, if they refuse to accept, will result in their compulsory return to hospital.

In summary, I am unpersuaded that any of these policy or social considerations can be deployed to any effect in what is essentially a question of construction. The appellants' suggestion that the interpretation which I favour can result in unfairness is not an argument for imposing an artificial construction on section 117. Giving full weight to the "unfair windfall" argument the appropriate response is to amend the benefits under the relevant regulations and not to depart from the plain words of section 117. It is unrealistic to suggest that mentally ill patients, or their relatives or doctors and medical staff would intentionally behave in such a way as to ensure a detention under section 3 so that on release the person would be entitled to accommodation without charge. If there be faults in the system they can only be remedied by further legislation.

The Pepper and Hart Argument

Since I have concluded that the wording of the section is unambiguous, there is no need to resort to policy arguments or to refer to Hansard to elucidate the Parliamentary intention behind the provisions. The appellants' point to the lack of "tightness" in the wording of the provision and the absence of regulations governing the exercise of the section 117 duty. Although there is a positive duty to provide the after−care services there is clearly a discretion as to the level of those services should be, bearing in mind that the obligation is to each individual patient and is circumscribed by the need of the patient. This discretion cannot be said to introduce ambiguity into the section. Similarly, the absence of any definition of "after−care services" does not render the provision ambiguous. The absence of a definition simply points to the discretion accorded to the authorities in the appropriateness of the provision for each individual patient. For reasons already given the

argument that Parliament could not have intended to impose an identical or joint duty on local and health authorities does not create an ambiguity.

Consequently, I have come to the conclusion that neither the interpretation of the section nor the outcome of the appeal depends upon policy considerations and reference to the Parliamentary history according to the criteria set out in *Pepper v. Hart* should not be permitted . Nevertheless, even if the correct construction of section 117 leads to anomalies, in the operation of the benefits system or for other sub–groups of the mentally ill, it is for Parliament to address them by legislation and does not justify a departure from the plain meaning of section 117 or an excursion into its Parliamentary history.

Accordingly, I would dismiss this Appeal.

Lord Justice Buxton:

I agree with Otton LJ that this appeal must be dismissed, and with the reasons that he gives for that conclusion. I venture to add a few words of my own.

This case turns on a small number of fundamental, even trite, propositions about the powers and duties of local authorities. They are:

1. A public body can only do that which it is authorised to do by positive law. In the words of Laws J in *R v Somerset CC ex p Fewings* [1995] 1 All ER 513 at p524*a* , that is a sinew of the rule of law.
1. In practical terms, the powers and duties of a local authority under that rule will only be found in statutory form.
1. A strong form of that inhibition on local authorities is to be found in the particular rule that financial charges can only be imposed by a public body with specific statutory approval: see the principle enunciated in *A−G v Wilts United Dairies* , cited by the House of Lords in *R v Richmond LBC ex p McCarthy & Stone* [1992] 2 AC 49 at p67C.
1. By the operation of the rule that Parliament does nothing in vain, (a) statutory provisions expressed in terms of duties are to be assumed to have operative force in imposing those duties; and (b) a duty imposed by one Act is to be assumed not to duplicate a duty already imposed by another Act.

It follows from these propositions that

1. When Parliament passed what is now section 117 of the Mental Health Act 1983, clear words would have been needed to establish either (a) that the terms of section 117(2) did not create a duty; or (b) that the duty that section 117(2) did create was duplicated by or was in the same terms as the duty created by section 21 of the National Assistance Act 1948. In that connection, the concept of a "gateway" section invoked by the appellants does not apply here. Such a section might be that cited by the Judge at page 20, section 2 of the Chronically Sick and Disabled Persons Act 1970, which imposes on the local authority a duty to exercise one of its existing and specified powers. But section 117(2) creates a duty that makes no reference to any other statutory power or duty.
1. The section 117 duty is *sui generis* , and does not repeat or overlap with the power or duty created by section 21.
1. In exercising the section 117 duty the local authority can only charge those in respect of whom it performs that duty if there is statutory authority to charge specific to that duty. No such authority exists.

1. It is not open to the local authority to claim that when providing accommodation to a person falling under section 117(1) it is exercising its powers under section 21. If that were the case, the local authority would be failing to perform its duty under section 117. Alternatively, where a specific duty without a charging provision is imposed on a local authority, it does not have *vires* in that case to exercise a more general power that does have a charging power attached to it.

Accordingly, the local authorities were obliged to provide accommodation as part of their after–care function by the provisions of section 117 but not otherwise; and thus could only impose contingent requirements on the receivers of those services if section 117 or a power attracted by section 117 so permitted. No such power exists.

That being the plain effect of the statutory provisions, it is very doubtful whether arguments based on the anomalous or unreasonable effect of the provisions could displace it. But in fact the statutory provision is not at all anomalous, and not at all surprising. The persons referred to in section 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.

These considerations enable to be put in perspective the argument based on section 21(8) of the 1948 Act, and the reference to that section that is contained in paragraph 28 of the judgment of this court in *R v North Devon Health Authority ex p Coughlan* , which my Lord has set out. The Respondents' argument was simple. The provision of residential accommodation is both authorised and required by section 117, which is plainly an enactment not contained in the 1948 Act. Therefore, the power to provide residential accommodation under section 21(1) of the 1948 and thus to charge for it is, as Mr Drabble put it, "disengaged" by the existence of the section 117 power. The Judge appears to have been persuaded by this argument, which he thought to be reinforced or justified by the observation about section 21(8) in para 28 of the judgment in *Coughlan* that

> The powers of the Local Authority..are excluded in the case of 'any other enactment', where it is sufficient if there is an authority or requirement to be made by or under the enactment.

I do not consider that either the terms of section 21(8) or the reference to it in *Coughlan* have the conclusive force attributed to them by the Judge. The argument based on section 21(8) necessarily presupposes that section 117 itself does indeed authorise or require the provision of residential accommodation: the very issue that lies at the heart of this appeal. If it does have that effect, then, as I have already indicated, because it has no charging provision attached to it the local authority cannot impose charges for that accommodation; and section 21(8) therefore adds nothing effective to the argument. If on the other hand section 117 does not itself authorise or require the provision of residential accommodation, then section 21(8) by its terms is not engaged at all. The same is true of the observations in *Coughlan* , which do no more than repeat the terms of section 21(8) in a

more difficult context, not engaged in our case, of the relationship between local authorities and the National Health Service in the provision of nursing care.

All that said, however, consideration of the relationship between section 117 and section 21(8) yields some further reflections that are of some general significance in this case. First, when one asks whether a section that in its terms says that it is the *duty* of the local authority to *provide* services is a section that authorises or requires the provision of services, it is very difficult to think of reasons for saying that it is not. Second, the rule emphasised in section 21(8) is a strong reflection of the general principle already set out that every local government power must be attributed to a specific and identifiable statutory authority: not least because of the issue that is central to this case, of determining the *vires* of any ancillary provisions, such as charging. It is very difficult against that background to think that Parliament would have placed on the statute book a provision like section 117 that appears to create, but on the Appellants' argument does not create, a specific duty. It is even less likely that authority would be conferred to make the same provision under two different statutory enactments which have different ancillary implications: a situation that in any event section 21(8) renders impossible so far as provision under section 21 is concerned.

Finally, Mr Lissack was properly diffident in invoking the jurisprudence of *Pepper v Hart* in this case, and he was right to show that caution. This case comes nowhere near to being one in which the *Pepper v Hart* criteria are present. There is no clear Parliamentary statement of the purpose of the Bill; and the important pre–condition of ambiguity in the Act's wording is not fulfilled either. Mr Lissack argued that the ambiguity was to be found in the term "after–care services" not being defined. But that term is certainly not *ambiguous*. Its meaning may, like many expressions, be subject to the possibility of some argument at its outer penumbra; but there can be no doubt at all that the service in issue in this case, the provision of residential accommodation, falls squarely within it.

For what it is worth, however, when we did look, as we were asked to do, at the Parliamentary material, none of it supported the case that the appellants wished to make. Some speakers, including the proposer of the amendment that became section 117, thought or may have thought that section 117, as it now is, converted a previous power into a duty. Some, including the Minister with departmental responsibility for the Bill, thought or may have thought that the duty that it created was the same as that already existing. None of them said that section 117 merely referred to the existing duty, and did not itself impose any duty at all. Whether government spokesmen would have persisted in that view, and thus have persisted in adopting the wording of section 117, if they had had the benefit of the arguments in this case is perhaps another matter. But the fact that that question simply cannot be answered is a very good demonstration of why the *Pepper v Hart* jurisprudence should only be used in those cases where the House of Lords clearly intended it to be used.

Mr Justice Hooper

I agree that the appeal should be dismissed.

Order: Appeal dismissed; legal aid taxation; leave to appeal refused.

(Order does not form part of approved judgment.)