

Legal Update



Our regular Care Team Newsletter will follow shortly but we thought you may be interested in our detailed look at the recent judgment in the case **Davey v. Oxfordshire County Council (2017)**.

This was the first legal challenge to consider how a council fulfils its statutory duty under the 'well-being principle' enshrined in section 1 of the Care Act 2014. Mr Davey was not successful in his challenge and the case provides a useful reminder to those of us who support clients about how far (or not) the courts will go in challenging local authority decisions about care packages. This is so important in managing client expectations, and giving them realistic information about the level of support they are likely to receive and the potential success of any challenge. As the welfare state continues to shrink, it is more important than ever that we all support people to plan ahead and prepare for care.

Davey v. Oxfordshire County Council (2017)

This is the first judicial review case where a service user challenged how their council (Oxfordshire County Council) applied the wellbeing principle which is the cornerstone of the Care Act 2014.

What is the well-being principle?

Set out under section 1 of the Care Act 2014, the well-being principle places a legal duty on local authorities to promote an individual's well-being when discharging its role in delivering social care.

Well-being is broadly defined in the Act and includes personal dignity, physical, mental, emotional social and economic well-being, community participation, protection from abuse and neglect and the suitability of living accommodation.

To satisfy this legal duty, a local authority must 'have regard' to a wide range of factors including the individual's wishes, feelings and beliefs and their particular circumstances. The local authority should also enable the individual to express their wishes and preferences and participate in the process. Finally, they must ensure that any resulting restrictions on that individual are kept to the absolute minimum necessary.

The extent to which Oxfordshire County Council 'had regard' to the range of issues in Mr Davey's case was the basis of his legal challenge.

What is a judicial review?

It's a legal challenge (made in the Administrative Court, part of the High Court) of a decision made by a public body, such as a local authority or clinical commissioning group. A judicial review looks at the process followed by a public body in making the decision, rather than whether the decision was 'good' or 'bad'. Mr Davey could not use the judicial review to simply argue that the cuts to his care were unfair, the challenge had to stem from whether Oxfordshire County Council had applied the law correctly during the assessment and care planning process. The judgment's conclusion in this case illustrates how it is the process that is under scrutiny:

'The task of the Court is to determine whether the [local authority] has acted unlawfully, by reference to established criteria...in the field of adult social care...I have identified no relevant legal error which warrants this Court in interfering with...[the local authority's] decision.....The result may impose change or even strictures upon [the individual] which are unwelcome, but that does not of themselves mean that the process has been unlawful' (paragraphs 185/186).



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What led to the case going to court?

Oxfordshire County Council advised Mr Davey that they were going to reduce his care package from £1651 to £950 per week. The reduction was driven in part by the closure of the Independent Living Fund in 2015 which triggered a fresh assessment of his needs for care and support. Mr Davey is severely disabled, with a range of conditions including quadriplegic cerebral palsy and severe visual impairment. He needs assistance with all aspects of personal care and daily living. The proposed changes to Mr Davey's weekly budget would mean that there would need to be adjustments in the pay for his long-standing team of personal assistants

(in that they may leave) and that he would need to spend significantly more time alone. Mr Davey's case was that these changes would put his well-being at risk and that the council had not properly applied the Care Act in reaching their decision. He believed that the council had set his budget and then assessed his needs to 'fit'. Mr Davey usually spent two hours on his own each week as he felt anxious when left alone. The revised care plan would see this gradually increase to six and a half hours per day. Mr Davey proposed a compromise which would have reduced the weekly cost to £1224 per week, but as this was rejected court proceedings got underway.



What happened next?

The Judge, Mr Justice Morris analysed the reasons ('the grounds') that Mr Davey's legal team presented for the decision being unlawful, alongside submissions from the council's legal team and a review of the relevant law.

There is a lot of issues considered in detail in the judgment, which you can read in full, here (<http://www.bailii.org/ew/cases/EWHC/Admin/2017/354.html>). We are going to focus on how the judgment considered Oxfordshire County Council's proposal for Mr Davey to spend more time alone, which Mr Justice Morris describes as 'the heart of the case'. Central to this issue was the tension between the council's view of Mr Davey's needs and Mr Davey's own view of his needs, something that we see in many cases affecting our clients.

The council's position was that increasing time Mr Davey spent alone would address the 'need' to develop independence and reduce anxiety.

Mr Davey's position was that the council had not properly considered the risks to his psychological well-being in arriving at how they would meet this 'need'. He experienced anxiety when left alone and had a history of low mood and depression. He did not want to spend more time on his own and questioned how the council could establish this as a need, effectively going against his views and wishes.

Mr Davey's challenge was not successful because:



- The aim, in the care plan, of reducing anxiety and developing independence was a legitimate need, established through the professional judgment of an experienced social worker
- There was no medical evidence to demonstrate that Mr Davey had a mental illness and previous episodes of depression happened a number of years ago
- The increase in time spent alone was to be introduced over a six month time period
- The social worker had been and would continue to monitor the impact on Mr Davey

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What can we learn from this?

This case considers what a local authority needs to do to meet its legal duty under the 'well-being principle'. We can infer some important points, which should always be brought to someone's attention when they are considering challenging a decision (be it through the court or complaint procedure):

- If a council fails to 'have regard' to factors that they must by law, take into account, the decision that they then make is invalid.
- The extent to which a local authority should 'have regard' depends on the circumstances of the case, but this judgment suggests that it should be proportionate to the available evidence. In Mr Davey's case the Judge considered that the local authority had given the appropriate level of consideration to Mr Davey's anxiety; '... the social worker did consider [Mr Davey's] psychological well-being and reached the view that the anxiety was not outside the normal range and did not warrant a fuller risk assessment' (paragraph 135). The social worker's experience, particularly in mental health issues was significant, as was the lack of medical evidence and involvement.
- 'Having regard' does not mean that the local authority must agree with an individual's wishes, views or preferences.
- This judgment, like many others, demonstrates the Court's reluctance to dabble with the content of a care plan - as we mentioned earlier, it's focus is the process.
- If you are going to argue that a council is not meeting a need, you need to be able to establish that it is a need, rather than the individual's preference as; '... the Claimant's [Mr Davey's] wishes are no more than that and are not "needs"; those "wishes", whilst of significant importance, are not paramount' (paragraph 121)
- Where a local authority identifies an eligible need, it must '... provide a budget capable of meeting needs' (paragraph 111), but again, this does not mean that it must provide the budget the client wants or thinks that they need.

Many have been disappointed that the first challenge has been unsuccessful, as the case appears to confirm that when it comes to social care provision, as long as the local authority applies the law correctly, it can effectively dictate the care package. It has previously been observed that what constitutes 'social care' and 'health care' necessarily changes as society itself changes...at the moment, due to financial pressures, we are continuing to see support being rolled back, under the guise of increasing independence.

So, how do you hold public bodies to account?

In the clear majority of cases, making a formal complaint is the most appropriate way to highlight concerns with a public body.

Health and social care organisations are required by law to have a system for dealing with complaints. The Local Authority Social Services and National Health Service Complaints (England) Regulations 2009 sets out how complaints should be handled, and requires the public bodies to report annually on complaint handling.

When you make a formal complaint, your concerns are investigated under certain timescales (although recently we have noticed a trend in these being exceeded).

Your complaint counts - monitoring can enable services to spot underlying problems or worrying trends.

If you are not happy with the final response, you can take the matter to either the Local Government or Health Service Ombudsman. If they uphold your complaint they can ask the organisation to put things right and, in some cases, request that the organisation makes a payment for the time, effort and distress you may have been put through.

Going to court, like Mr Davey did, should be regarded as the option of last resort due to the costs and work involved. You can still consider court proceedings if you think your complaint has not been addressed - but remember, a Judicial Review challenges the process and is subject to time limits.

Local councils unsuccessful in legal challenge for DOLS funding

Another recent court case ([available here](#)) further highlights the difficulties in challenging decisions about funding, albeit from a different perspective. Four councils - Liverpool, Nottinghamshire, Richmond and Shropshire - recently brought a case against the government about the current funding shortages for DOLS services.

In essence, they were concerned that their finances were not keeping pace with demand for DOLS authorisations (following the Cheshire West judgment) and, because of the delays this funding 'gap' created, councils were at risk of breaking the law by failing to meet their legal duties. There is, of course, much more detail in the judgment, but what is significant is that this argument did not succeed. Mr Justice Garnham referred to the discretion available to local authorities regarding how they spend their budget and that this discretion enables them to meet the demands of the DOLS regime even if they have to divert funds from other areas stating "...the evidence shows that complying with these obligations would necessitate diverting substantial sums from other parts of the Councils' budgets" (para 69). It seems therefore that councils will need to continue to make very difficult decisions about services, prioritising spending in those areas where they have specific legal duties - is this really discretion or out and out necessity?

If we are not going to court, why do we need a lawyer?

A fair question and more often than not you don't need a lawyer. Our clients, and other professionals come to us when they want;

The updates (which can be found in paragraphs 19.17 to 19.43) set out changes in the approach following the judgment regarding:

- Advice on the laws relating to health and social care before they make contact with services, so they know what to expect - many clients instruct us then to act 'in the background' to provide them with support and advice throughout assessments and care planning
- To check that what they are being told by professionals is in fact law
- To discuss whether they have a case to challenge health, social care or private providers
- To instruct us to gather and present the evidence for a complaint
- Independent advice and representation at meetings
- Advice and guidance before (and please make it before and not after!) signing contracts, including deferred payment agreements, care home contracts, placement agreements etc.

There is a huge amount of law, guidance and regulations across health and social care. Success can depend on where to find detailed and up to date information, so that you can challenge how it is applied...and that's where we can help.

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