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Abstracts

The Law and Older People Ian Purvis

Belinda Schwehr. 1997. A study in fairness in the field of community care law (1) and (110) *Journal of Social Welfare and Family Law*, **2**, 159–172 pp. and **3**, 247–265 pp.

Belinda Schwehr, Visiting Fellow of the University of Westminster, contributes a two-part article on fairness in Community Care Law. The first part looks at British courts' attitude to fairness. As the author points out, a problem for all concerned is that the law is inherently unclear about what precisely amounts to unfairness because the courts have retained the right to lay down different standards of procedural protection in various contexts. Furthermore, unreasonableness of outcome has also always been a very fluid concept.

Judges considering procedural fairness in decision-making in the general welfare law field have indicated minimum standards for the provision of information to individuals, prior to a decision; the form of any 'hearing'; an absence of any appearance of bias on the part of decision-makers; and the giving of reasons for decision, once they have been made.

Another aspect of fairness which is of concern to the courts is related to the fundamental notion that public bodies should treat similar cases in a like manner. To assist in this aim, the courts have upheld as lawful the practice of authorities of developing general policies about how their discretionary powers will be exercised. However the courts also insist that the public bodies also give individual consideration to cases and do not fetter their discretion by rigid adherence to a policy. The courts also try to give effect to 'legitimate expectation' which is trying to ensure that public bodies adhere wherever possible to statements and undertakings which have been made public.

The article then goes on to discuss these concepts of fairness in the community care context and examines a number of decided cases not least the decision of the House of Lords in *R.* v. *Gloucestershire County Council*, ***ex parte*** *Barry* (The Times, 21 March 1997).

The second part of the article looks at current trends in the law of fairness in the general welfare field, so that predictions may be made for social services users and practitioners about what the courts would expect in terms of fairness from decision-makers in community care. The point is made that in the United Kingdom there is no absolute basic minimum of fairness which applies across all types of public decision-making. The article examines the relevant statutory framework and the importance to be attached, for example, to 'Policy Guidance' or 'Directions'. Assessment is discussed in some detail and consideration is given to the effect of the new Carers (Recognition and Services) Act 1995. Fairness is also considered within the context of complaints,

panel hearings and charging decisions and appeals, as well as in the conduct of any investigation stage.

COMMENT

Anyone seeking to challenge a community care decision is recommended to read this article because, as the author puts it, 'the law of community care is in a mess, even after the *Gloucestershire* decision' and any help in understanding that law is very welcome. If the 'law of community care is a mess' there are now a number of lighthouses in the murk which guide the lawyer and non-lawyer alike and reference can usefully be made to Richards, M. 1996. Jordans, Bristol, *Community Care for Older People*, Gordon, R. and Mackintosh, N. 1996 *Community Care Assessments: A Practical Legal Framework*, FT Law & Tax, London and Clements, L. 1996, *Community Care and the Law*, Legal Action Group, London.

Jill Manthorpe. 1997. Is there money under the mattress? Means testing and money management. *Exchange on Ageing*, *Law and Ethics* (EAGLE), **6** 16–17 pp.

This article draws on recent research and published material to explore the contested process of means-testing. In particular, it focuses on the roles of social workers who may be care managers, care co-ordinators or assessment officers, and seeks to explain why they may encounter 'so many difficulties and dilemmas in this area'.

It is social workers who have to ask the questions about people's resources, often when those people are upset or unwell. It is they who have to 'convey the complexities of the local authority's charging policies' and it is they who may have to meet the sometimes angry responses of relatives who may fear the disappearance of an expected inheritance.

Many social workers find this area hard to handle and far from what they expected upon coming into social work. Attention is drawn to some of the adverse consequences reported which appear to rise from this situation and in particular the reluctance of such workers to be involved in these areas.

COMMENT

The author concludes that for many social workers the whole subject is one of conflict for they do not like means-testing in principle nor having to carry it out in practice. It is, perhaps, salutary to understand the sensitivities which arise for those toiling at the coal-face of community care.

Gordon Ashton. 1997. The legal dilemmas of risk and restraint. *EAGLE Exchange on Ageing*, *Law and Ethics*, **5**, 4–8 pp.

In this article District Judge Gordon Ashton seeks to answer two questions: Does the law allow people to put themselves at risk? In what circumstances does the law permit a person to be restrained?

The role of the law which has grown up piecemeal over the years is not only to regulate the support provided for those who are vulnerable but also to protect and empower them. That support, as provided by the state, comes from three distinct sources: Department of Social Security, Social Services Department or National Health Service and we are well aware of the demarcation disputes to which this can give rise.

So far as protection is concerned the author points out that, while there are many vulnerable individuals (including infirm older people), who despite not falling within the provisions of the Mental Health Act do need protection for abuse, neglect, exploitation or even the ordinary dangers of life, it is never easy to identify the stage at which to intervene for the well-being of an adult, especially when such intervention is unwelcome. It is argued that there must be a stage at which it becomes necessary to impose protection and the law should define and provide the means for this, but at present fails to do so.

The third role of the law is empowerment, which means enabling mentally frail adults to make personal choices because we now recognise that incapacitated people retain their personal rights and these should be supported by others. Furthermore, when decisions are made for them it should be on the basis of their best interests and not what other people think is best, which may mean best for the decision-maker.

Gordon Ashton highlights the inevitable conflict between empowerment and protection, between risk and restraint. Support is also relevant here because inadequate resources may prevent personal choice or give rise to the use of restraint to avoid risk. As he puts it 'if we provide enough support there can be more empowerment and there will be less need for protection.'

COMMENT

This article covers the legal framework and discusses the policy and procedures with particular emphasis on the principles at issue here. From knowledge as a council member of *Action on Elder Abuse*, I am driven to the view that a misunderstanding of such principles can often lie behind much unwitting elder abuse.

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