

Section 117 after-care – including ordinary residence

Tim Spencer-Lane
October 2024

agenda

- 1) introduction
- 2) Nature of the s117 duty
- 3) Case law
- 4) Section 117 & ordinary residence

Background

- Section 117 is a key legal duty by accident, not by design
- Originated as an opposition amendment to the Mental Health (Amendment) Bill 1981
- Government only accepted based on mistaken belief that it merely duplicated the general duties to provide services in the NHS Act
- A robust feature of community care law – survived two attempts to abolish it & the consolidation of adult social care law

Eligibility for s117 after-care

s.117 (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 hospital direction made under section 45A above or 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.*



Mental Health Act 1983

Provision of s117 after-care

s.117 (2) *It shall be the duty of the integrated care board or Local Health Board and of the local social services authority to provide or arrange for the provision of, in co-operation with relevant voluntary agencies, after-care services for any person to whom this section applies until such time as the integrated care board or Local Health Board 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 community patient while he remains such a patient.*



Mental Health Act 1983

The s117 assessment duty

s.47(1) *Where it appears to a local authority that any person for whom they may provide or arrange for the provision of services under section 117 of the Mental Health Act 1983 may be in need of any such services, the authority—*

- (a) shall carry out an assessment of his needs for those services; and*
- (b) having regard to the results of that assessment, shall then decide whether his needs call for the provision by them of any such services.*



National Health Service
and Community Care
Act 1990

CHAPTER 19

The nature of the s117 duty



Strength of s117

- Places an enforceable individual duty on social services and health bodies to provide & arrange after-care services to eligible individuals
- Resources are not relevant to whether the duty applies but can be relevant to how it is carried out
- Where resources are not available, must use “best endeavours” to arrange suitable services (*R(IH) v SoS* [2003] UKHL 59)
- Section 117 decisions can be challenged via judicial review
- The patient is not legally obliged to accept the after-care services that are offered

Who does s117 apply to?

- Joint duty on local NHS (ICBs & LHBs) & social services authorities (LSSA) to provide after-care
- **Eligibility (1)** – patient detained for treatment (ss 3, 37, 45A, or 47/48)
- **Eligibility (2)** – patient ceases to be detained & (whether or not immediately after so ceasing) leaves hospital
- **Eligibility (3)** – patient needs after-care services
- MHA Code says LSSA / [ICB] should maintain a record of people subject to s117 & what after-care services are provided (para 33.7)

Charging

R(Stennett) V Manchester CC [2002] UKHL 34

- The case considered if s117 is a gateway duty or a standalone duty
- Lord Steyn held it was the latter, and since it contained no charging provision, no charges should be made for s117 services, including residential accommodation
- The case does not establish any legal principle of reciprocity
- Gives rise to the '*compliant and non-compliant adjacent beds*' anomaly
- During passage of Health and Social Care Bill 2010 an attempt to recast s117 as a gateway duty abandoned due to opposition

Defining after-care (1)

s.117(6) ... *“after-care services”, in relation to a person, means services which have both of the following purposes—*

(a) meeting a need arising from or related to the person's mental disorder; and

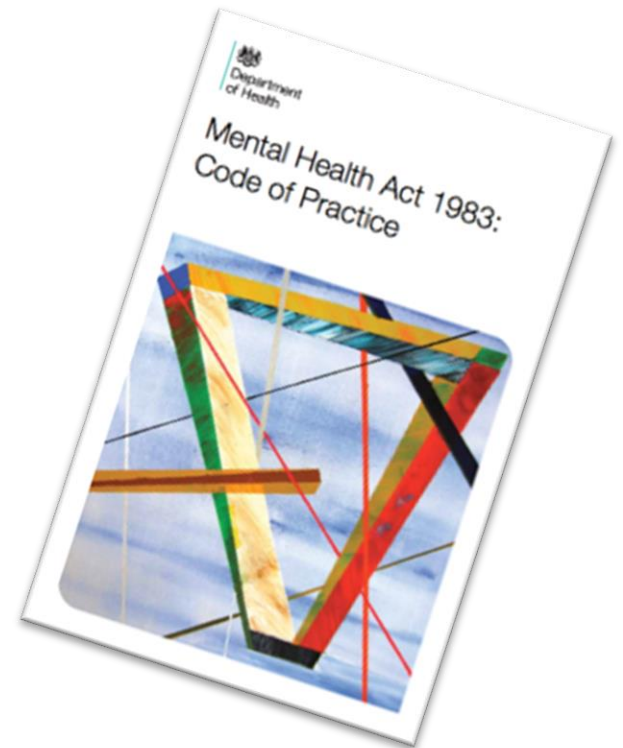
(b) reducing the risk of a deterioration of the person's mental condition (and, accordingly, reducing the risk of the person requiring admission to a hospital again for treatment for mental disorder).



Mental Health Act 1983

Defining after-care (2)

- Healthcare and social care
 - Employment services
 - Supported accommodation
 - Services to meet wider:
 - » Social needs
 - » Cultural needs
 - » Spiritual needs
- (MHA CoP, para 33.4)*



Relationship with NHS CHC (1)

337 ... *Where an individual is eligible for services under section 117 these must be provided under section 117 and not under NHS Continuing Healthcare. It is important for ICBs to be clear in each case whether the individual's needs (or in some cases which elements of the individual's needs) are being funded under section 117, NHS Continuing Healthcare or any other powers.*



Relationship with NHS CHC (2)

337 ... However, a person in receipt of after-care services under section 117 may for example have ongoing needs that do not arise from, or are not related to, their mental disorder and that may, therefore, not fall within the scope of section 117. Also a person may be receiving services under section 117 and then develop separate physical health needs (e.g. through a stroke) which may then trigger the need to consider NHS Continuing Healthcare, but only in relation to these separate needs, bearing in mind that NHS Continuing Healthcare must not be used to meet section 117 needs.



Discharge from mental health settings guidance

[Annex B: national guidance on how budgets and responsibilities should be shared to pay for section 117 aftercare](#)

- Five overarching principles for s117 after-care: the least restrictive option and maximising independence, empowerment and involvement, respect and dignity, purpose and effectiveness & efficiency and equity
- Reviews of s117 after-care
- Transition for young people to adult services
- Personal budgets & choice of accommodation
- Section 117 maturity matrix



Case law



When does s117 start?

R(CXF) v Central Bedfordshire [2017] EWCA Civ 2852

- CXF, 18-year-old with autism detained under s3 approx. 120 miles away from his mother who visited weekly at significant cost
- Prior to CXF turning 18, children services had funded her transport under s17 Children Act
- While on visits mother accompanied CXF on outings by bus, supervised by hospital staff
- Mother brought claim when funding for her visits stopped when CXF turned 18
- Judicial review claiming that the costs of the trips now fell under s117 of MHA
- **Held** – it depends on length of leave, level of restriction & purpose of leave
- Claim dismissed as trips out did not trigger s117 & CXF was still effectively detained in hospital

Section 117 & 'double counting'

Tinsely v Mancheser CC [2017] EWCA Civ 1704

- Patient injured in RTA which resulted in organic personality disorder and was detained under s3
- Receiver appointed by court as awarded £3.5 million in damages of which £2,890,257 represented his future care
- Patient left the LA funded care home & moved into private accommodation at the time of the award
- New deputy appointed (previous one suspected of financial mismanagement) & felt patient could not sustain the cost of care & sought s117 funding as was the state's responsibility under MHA
- The local authority refused as patient able to pay for own care
- **Held** – it is unlawful to have regard to patient's ability to pay from personal injury damages when determining s117 aftercare provision
- Appeal dismissed

Section 117 & ordinary residence



Who is responsible for s117 services?

- The planning of after-care needs to start as soon as the patient is admitted to hospital (MHA Code, para 33.10)
- The responsible CCG/ICB and LA should be established as soon as the need for s117 services is identified (London ADASS guidance 2018)
- LA responsibility based on ordinary residence (OR) status
- In cases of disputes between local authorities, the Secretary of State / Welsh Ministers can make determinations (s117(4))

ICBs – Who pays?

The 'Standing Rules' regulations 2012/2996

- The responsible NHS commissioner for the detention is the ICB in whose area the patient was ordinarily resident, immediately prior to being detained in hospital under the MHA
- But the body responsible for paying for s117 is:
 - NHS England where the patient is treated by a specialised service
 - The ICB of which the patient's GP is a member, or
 - If the patient is not registered, the ICB in whose area the patient is usually resident
- The 'originating ICB' is responsible for whole period of s117 after-care including future detentions and discharges

Ordinary residence

“Ordinarily resident refers to a man’s abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration.”

Lord Scarman, *Shah v LB Barnet* [1983] 2 AC 309

Those lacking capacity

“Therefore with regard to establishing the ordinary residence of adults who lack capacity, local authorities should adopt the Shah approach, but place no regard to the fact that the adult, by reason of their lack of capacity cannot be expected to be living there voluntarily. This involves considering all the facts, such as the place of the person’s physical presence, their purpose for living there, the person’s connection with the area, their duration of residence there and the person’s views, wishes and feelings (insofar as these are ascertainable and relevant) to establish whether the purpose of the residence has a sufficient degree of continuity to be described as settled, whether of long or short duration.”

Care & Support Statutory Guidance, para 19.32

Section 117(3)

- The 'relevant' LSSA will be that in whose area the person was OR 'immediately before being detained'
- The s117 duty lasts until the LSSA & ICB are satisfied that the person concerned is no longer in need of such services
- There are no deeming rules expressly stated in s117
- Care & Support Statutory Guidance says the deeming rules in the Care Act do not apply to s117 (para 19.67)

Care & Support Statutory Guidance

Para 19.64

- If a person is OR in area (A) immediately before detention, and moves on discharge to area (B) and moves again to area (C), local authority (A) will remain responsible for s.117.
- But if the patient, who is now OR in (B) or (C), is subsequently detained in hospital, local authority (B) or (C) will be responsible for s.117.

How should OR be applied to s117?

R (Worcestershire CC) v SSHSC [2023] UKSC 31

- Woman (JG) with schizoaffective disorder & lacked capacity to decide where to live
- Lived in a property in Worcestershire & detained under s3 MHA
- Agreed it was in her best interests to move to a care home close to where her daughter lived, in Swindon
- This was arranged & funded by Worcestershire
- A year later, JG was detained again under s3 & dispute arose between Worcestershire & Swindon over ordinary residence

The road to the Supreme Court

- Originally, Secretary of State determined JG was ordinarily resident in Swindon at the time of her second detention, but this was reversed on review
- Worcestershire successfully challenged this determination in the High Court, but overturned by Court of Appeal
- The decision was appealed to the Supreme Court

The arguments

- The s117 duty is placed on the local authority in whose area the person was ordinarily resident “immediately” before being detained (s117(3))
- Worcestershire argued this meant immediately before the **last** detention
- This interpretation confirmed in DHSC’s Care and Support Statutory Guidance
- The Secretary of State argued s117(3) was referring to immediately before the **first** detention
- In addition, ‘deeming rules’ can be read into s117(3)

Supreme Court decision

- The duty to provide after-care services automatically ceases when the person is re-detained for treatment under the MHA
- This was because the s117(1) criteria are no longer met (ie that individual is no longer a person who has ceased to be detained & has left hospital)
- This interpretation supported by the language & purpose of s117, especially the very concept of 'after-care'
- Also, s117 defines the purpose of after-care services as *“reducing the risk of a deterioration of the person’s mental condition (and, accordingly, reducing the risk of the person requiring admission to a hospital again for treatment for mental disorder)”*
- Rejected the argument that deeming rules should be read into s117

Issues arising

- Stayed s117 ordinary residence disputes will need to be determined
- The s117 duty does not apply to patients detained for treatment (even if they are receiving 'after-care' services)
- The judgment also says s117 ends if the person concerned were to "*die or was deported or imprisoned*"
- The judgment says that any best interests decision to place a person in an area means that the person has voluntarily adopted that residence

Draft Mental Health Bill

- Amends s117(2) to provide that the duty is only discharged if notice is jointly given by the LA & ICB/LHB in writing to the person
- New ss(3A) says for the purposes of determining the responsibility local authority, the deeming rules should be applied under the Children Act (for those under 18) and Care Act & SSWBA (for those over 18)

ANY QUESTIONS

DO YOU HAVE?

My contact details

tim@spencer-lane.com

Thank you for listening