



2 August 2017

PRESS SUMMARY

R (on the application of Forge Care Homes Ltd and others) (Appellants) v Cardiff and Vale University Health Board and others (Respondents) [2017] UKSC 56
On appeal from [2016] EWCA Civ 26

JUSTICES: Lady Hale (Deputy President), Lord Clarke, Lord Wilson, Lord Carnwath, Lord Hodge

BACKGROUND TO THE APPEALS

The issue in this appeal is whether the National Health Service or local authorities (with means-tested contributions from clients) are responsible for paying for the work done by registered nurses in social rather than health care settings.

Section 49 of the Health and Social Care Act 2001 provides that a local authority is not required to fund ‘nursing care by a registered nurse’, defined in subsection (2) as services ‘involving – (a) the provision of care, or (b) the planning, supervision or delegation of the provision of care, other than any services which having regard to their nature and the circumstances in which they are provided, do not need to be provided by a registered nurse’.

The owner of a care home providing nursing services to residents is obliged by regulation to ensure that a registered nurse is working at the care home at all times. This appeal concerns the funding of nursing care for residents who require some nursing care but for whom healthcare is not a primary need. Local Health Boards in Wales (‘the Boards’) decided to pay a flat weekly rate, following a survey which asked nurses to record and categorise the time they spent on different tasks: direct and indirect nursing care time, non-nursing care time and other time (which included stand-by time, paid breaks and time receiving supervision). The weekly rate excluded payment for time in the last two categories on the basis that these services fell within the exception in s 49(2).

The decision of the Boards to interpret s 49(2) in this way was challenged by eleven owners and operators of care homes in Wales, and all (save one) of the Welsh local authorities were joined as interested parties. The High Court quashed the decision, holding that the Boards should fund all the services in fact provided by a registered nurse. The Boards conceded that they should have covered nurses’ stand-by time but appealed the finding in respect of services which need not have been performed by a registered nurse. The Court of Appeal by a majority allowed the Boards’ appeal. The local authorities appealed to the Supreme Court.

JUDGMENT

The Supreme Court unanimously allows the local authorities’ appeal. It holds that the Boards have misinterpreted s 49(2) and that their decision must be quashed and re-taken in the light of the guidance given in the judgment. Lady Hale gives the only substantive judgment.

REASONS FOR THE JUDGMENT

The background to the introduction of section 49 was the anomaly that nursing care was either provided free by the NHS or bought in by the local authority or residents depending on where it was provided. It was intended to shift the boundary further in the direction of NHS funding, but the words at the end of s 49(2) could not be ignored [26].

If Parliament had wanted to restrict the definition of ‘nursing care by a registered nurse’ to tasks which could only be performed by a registered nurse then it could and would have said so [36]. Equally, if it had wanted to prohibit local authorities from paying for anything done by a registered nurse in a care home, it also could and would have said this [37]. Instead s 49 began with the broad concept of ‘any services provided by a registered nurse’ and then limited those services in two ways. The first was to services which ‘involve’ the care of residents ie looking after them, including personal and social care. The second was to exclude services which ‘having regard to their nature and the circumstances in which they are provided do not need to be provided by a registered nurse’. This latter category envisages that there will also be circumstances in which some personal or non-nursing care will need to be provided by a registered nurse, care which is associated with or ancillary to the nursing care she is providing [38].

The provision of an overall, holistic, person-centred plan for each resident who needs some nursing care requires the nurse to engage in social and personal tasks as part of that care. Some caring tasks cannot sensibly be parcelled up between nursing and non-nursing care. It is a matter of fact, and one for the decision makers, what part of the care provided by registered nurses will fall within this definition [39-41]. Time spent on paid breaks and on receiving supervision is, however, a necessary part of providing the services registered nurses are there to provide [42].

Accordingly, the correct interpretation of s 49 is that ‘nursing care by a registered nurse’ covers (a) time spent directly or indirectly on nursing care, in the sense of care which can only be provided by a registered nurse; (b) paid breaks; (c) time receiving supervision; (d) stand-by time; and (e) time spent on providing, planning, supervising or delegating the provision of other types of care which in all the circumstances ought to be provided by a registered nurse because they are ancillary to or closely connected with or part and parcel of the nursing care which she has to provide [44].

The Boards’ decision was therefore based on a misinterpretation of s 49(2) and must be quashed and retaken in the light of this guidance, ideally after negotiation with all the parties governed by the legislation and with an interest in the outcome [46].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>