[2017] UKSC 56

On appeal from: [2016] EWCA Civ 26

JUDGMENT

R (on the application of Forge Care Homes Ltd and others) (Appellants) v Cardiff and Vale University Health Board and others (Respondents)

before

Lady Hale, Deputy President

Lord Clarke

Lord Wilson

Lord Carnwath

Lord Hodge

JUDGMENT GIVEN ON

2 August 2017

Heard on 26 April 2017

Appellants	Respondents
Richard Gordon QC	Fenella Morris QC
Emily MacKenzie	Benjamin Tankel
Tom Pascoe	
(Instructed by Ceredigion County Council on behalf of all of the Local Authorities (except the County Council of the City and County of Cardiff))	(Instructed by Blake Morgan LLP (Cardiff))

Interven
(Secretary of
for Healt
Clive Sheldo
Sarah Wilki
(Instructed b
Government
Departme

LADY HALE: (with whom Lord Clarke, Lord Wilson, Lord Carnwath and Lord Hodge agree)

1.
The interface between health and social care is a difficult and controversial policy area. In general, health care is provided or arranged by the National Health Service, and is free for all patients irrespective of means, while social care is provided or arranged by local authorities with means-tested contributions from those clients who are deemed able to pay for some or all of it themselves. This case is not about the rights or wrongs of that general policy. This case is about who is legally responsible for paying for the work done by registered nurses in social rather than health care settings. Is the National Health Service responsible for all the work they do or are the social care funders responsible for at least some of it? The issue happens to arise in relation to Wales, where the legislation has since changed, as has the legislation in England, but very similar issues arise under the legislation now in force.

2.
The issue is the correct interpretation and application of section 49 of the Health and Social Care Act 2001, which is headed **Exclusion of nursing care from community care services**:

"(1) Nothing in the enactments relating to the provision of community care services shall authorise or require a local authority, in or in connection with the provision of any such services, to -

(a) provide for any person, or

(b) arrange for any person to be provided with,

nursing care by a registered nurse.

(2) In this section 'nursing care by a registered nurse' means any services provided by a registered nurse and 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." (emphasis supplied)

3.
The social care funders contend that this means that the NHS, in the shape of the Local Health Boards, is required to fund the full cost of a registered nurse's presence in a care home. This is in the context of regulation 18(3) of the Care Homes (Wales) Regulations 2002 (SI 2002/324), which requires that:

"Where the care home -

(a) provides nursing to service users; and

(b) provides, whether or not in connection with nursing, medicines or medical treatment to service users,

the registered person shall ensure that at all times a suitably qualified registered nurse is working at the care home." (emphasis supplied)

4.

The Local Health Boards, on the other hand, contend that the nurse's time can be divided into a series of discrete tasks or functions, some of which do not need to be provided by a registered nurse, so that they are responsible for only a proportion of her time working in the home.

How the dispute arose

5.
In practice, Local Health Boards pay for nurses' time in social care homes by a weekly flat rate payment for each care home resident who qualifies for some nursing care. Between September and November 2013, every Local Health Board in Wales decided to set the rate at £128.61 per resident per week. This was an increase on what they had previously been paying. Their decisions took account of a report by healthcare consultants Laing & Buisson.

6.
Laing & Buisson conducted a survey which asked nurses to record and categorise the time they spent during a particular shift into: (a) direct nursing care time, (b) indirect nursing care time (eg management of medicines, overall care planning, and hygiene standards), (c) non-nursing care time (eg social care including dressing and washing), and (d) other time (including stand-by time, paid breaks and time spent receiving supervision). They commented that splitting nurses time and costs in such detail was "always likely to prove challenging". If social care were excluded, homes might be "inclined to minimise nurses' participation in providing holistic and integrated nursing and social care support for residents". "Would it not be a lot simpler", they asked, "just for the NHS to pay for the full direct salary cost of registered nurses, rather than argue about the split between nursing and non-nursing care?" (NHS Wales Funded Nursing Care Review 2013, Laing & Buisson FNC Survey Report, pp 23, 26).

7.
The Health Boards decided that time in categories (c) and (d) did not fall within the definition of "nursing care by a registered nurse" in section 49(2) and therefore they would not fund it. This resulted in a weekly payment which was £27.33 lower than it would have been had that time been included. It has been estimated that the overall cost to the Health Boards in Wales if it were included would be between £7 and £13m a year.

8.
The decisions of the seven Local Health Boards, covering the whole of Wales, to set the flat rate at £128.61 (subsequently increased in accordance with an inflationary uplift mechanism which is not now disputed) were originally challenged by 11 owners and operators of care homes in Wales. All the local authorities in Wales were joined as interested parties. They (with the exception of the County Council of the City and County of Cardiff, which has taken no part in these proceedings) have effectively taken over the conduct of the case from the care home owners. The Welsh Ministers were also joined as interested parties but have taken no part in this appeal. The Secretary of State for Health, who is responsible for the NHS in England, has intervened in the appeal in support of the Local Health Boards.

9.
The care homes' challenge, on the ground that too restrictive an interpretation of "nursing care by a registered nurse" had been adopted, succeeded before Hickinbottom J: [2015] EWHC 601 (Admin); [2015] PTSR 945. He rejected the Health Boards' argument that it covered care which could only be provided by a registered nurse and accepted the challengers' argument that it covered all the services in fact provided by a registered nurse. Hence he quashed the Health Boards' decision.

10.
On appeal, the Health Boards conceded, as they had done below, that they had been wrong to exclude the nurses' stand-by time (part of (d) in para 6 above) from their calculations. Subject to that, the Court of Appeal, by a majority, allowed their appeal: [2016] EWCA Civ 26; [2016] PTSR 908. Laws LJ gave the leading judgment. He held that the Judge's construction gave insufficient weight to the excepting words at the end of section 49(2). These clearly distinguished between different services provided by a nurse at a care home. It did not follow from the fact that a nurse needed to be on call at all times that everything she did while on duty was a service which needed to be provided by a registered nurse. Whether what she did fell within the definition was a factual rather than a legal question.

11.
Elias LJ agreed that section 49(2) envisaged that there would be some services provided by a registered nurse which would not fall within the concept of "nursing care by a registered nurse". But it followed from the requirement to have a nurse or nurses in attendance at all times that the Health Boards had to pay for all the arrangements necessary to secure this, so not only stand-by time, but also meal breaks, supervision and administrative tasks associated with it. But if the costs were increased because she also provided social care that was not a service for which the Health Boards should pay.

12.
Lloyd Jones LJ agreed with Laws LJ. Distinguishing between the services provided by the nurse inevitably involved what had been referred to as a "task-based approach" apportioning her time according to how she spent it. He also agreed that it did not follow from the fact that a nurse had to be there at all times that everything she did while there was the responsibility of the Health Boards. The approach adopted by Elias LJ was inconsistent with the agreed requirement to distinguish between different categories of services.

13.
The local authorities now appeal to this Court.

The statutory context

14.
The powers and duties of local authorities in relation to what is now called social care were contained in a series of enactments which have now been replaced, in Wales, by the Social Services and Well-being (Wales) Act 2014 and, in England, by the Care Act 2014. At the relevant time, section 47 of the National Health Service and Community Care Act 1990 required a local authority, where it appeared that a person for whom they were responsible might be in need of community care services, to carry out an assessment of his need for those services and decide whether his needs called for them to provide such services. "Community care services" were defined in section 46 of the 1990 Act as services which a local authority might provide or arrange under a number of enactments, including Part III of the National Assistance Act 1948. Part III of the 1948 Act included section 21(1)(a), under which local authorities could provide or arrange "residential accommodation" for adults who "by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them", in other words care homes. This was a duty owed to people ordinarily resident in their area and other persons in urgent need (Local Authority Circular LAC (93)10).

15.

By section 21(5), “accommodation” included “board and other services, amenities and requisites provided in connection with the accommodation”. However, section 21(8) provided that:

“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 2006 or the National Health Service (Wales) Act 2006.”

16.
By section 3(1) of the National Health Service (Wales) 2006 Act (which is in substantially the same terms as its predecessors in the National Health Service Acts of 1946 and 1977):

“The Welsh Ministers must provide throughout Wales, to such extent as they consider necessary to meet all reasonable requirements -

(a) hospital accommodation,

(b) other accommodation for the purpose of any service provided under this Act,

(c) medical, dental, ophthalmic, nursing and ambulance services, …

(e) such other services or facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as they consider are appropriate as part of the health service,

(f) such other services or facilities as are required for the diagnosis and treatment of illness.”

17.
Under section 12, the Welsh Ministers may direct the Local Health Boards established under section 11 to exercise these functions. The effect of the directions current at the relevant time (the National Health Service (Nursing Care in Residential Accommodation) (Wales) Directions 2004) was that Local Health Boards were obliged to provide nursing care for those who required it, including those accommodated in care homes by local authorities. In practice, there are three categories of resident in care homes:

(1) A resident who has a “primary need” for health care. Local Health Boards fund the whole of her care, both nursing and non-nursing, and her accommodation. This is known as “Continuing Health Care”.

(2) A resident who requires some health care but for whom this is not a primary need. Local Health Boards fund the nursing care which she needs, known as “Funded Nursing Care”, while the resident herself, or the local authority, or both, fund the rest of her care and accommodation.

(3) A resident who requires no nursing care. The whole of her care and accommodation will be funded by the resident, or by the local authority, or by both.

18.
This case is concerned with the funding of nursing care for residents in category (2). The extent to which a local authority is neither allowed nor required to fund such care is governed by section 49 of the 2001 Act (subsequently replaced by section 47 of the 2014 Act, section 47(10) of which defines nursing care by a registered nurse in almost identical terms to section 49(2)). The case has been argued throughout on the basis that, if a local authority is not permitted to fund such care, then the

Local Health Boards are required, under section 3(1) of the 2006 Act, to do so: there will be no "funding gap".

19.
Part of the background to the enactment of section 49 is the decision of the Court of Appeal in R v North and East Devon Health Authority, Ex p Coughlan [2001] QB 213 (upholding the decision of the first instance Judge). The claimant was severely disabled as a result of a road traffic accident. She and others were placed in an NHS home for long term disabled people and assured that this would be their home for life. Then the health authority decided that they were in need of only "general" rather than "specialist" nursing services and that these should be purchased by the local authority rather than provided by the NHS. So the health authority decided to close the home and transfer their long-term care to the local authority. The case is generally known for holding that to close the home would be an unjustified breach of the legitimate expectations engendered by the health authority's promise and thus an abuse of power. But it is also important for its discussion of when nursing care could, and could not, be provided by local authorities in residential accommodation which they provided or arranged under section 21 of the 1948 Act. On the one hand, section 21(5) included in the provision of accommodation "board and other services, amenities and requisites provided in connection with the accommodation". This could obviously include nursing care for those residents who needed it. On the other hand, section 21(8) excluded anything "authorised or required to be provided under the National Health Service Act 1977". The court held that this was "limited to those health services which, in fact, have been authorised or required to be provided under the 1977 Act". It did not include "services which the Secretary of State [had] legitimately decided under section 3(1) of the 1977 Act it was not necessary for the NHS to provide" (per Lord Woolf MR, at para 29). There was no precise dividing line between those nursing services which are and those which are not capable of being treated as included in the "package of care" provided by the local authority (para 30(d)). But it could not be based solely on whether the nursing care was "general" or "specialist". The distinction was one of degree which would depend upon the facts of the individual case:

"However, as a very general indication as to where the line is to be drawn, it can be said that if the nursing services are (i) merely incidental or ancillary to the provision of the accommodation which a local authority is under a duty to provide … and (ii) of a nature which it can be expected that an authority whose primary responsibility is to provide social services can be expected to provide, then they can be provided under section 21." (para 30(e))

20.
The court acknowledged Mr Gordon's submission, on behalf of the claimant, that this was unfair: if a person received comparable nursing services in a hospital or at home, they would be free of charge. But that unfairness was part of the statutory scheme (para 30(c)). However, the NHS eligibility criteria could not place responsibility on a local authority which went beyond what section 21 permitted. These patients' health care needs went far beyond that. Hence the closure decision was unlawful.

21.
But the matter did not rest there. The other part of the background to section 49 of the 2001 Act is the Report of the Royal Commission on Long Term Care (chaired by Sir Stewart Sutherland), With Respect to Old Age: Long Term Care - Rights and Responsibilities (Cm 4192-I), published in March 1999 between the first instance and Court of Appeal judgments in the Coughlan case. This made two main recommendations. The first was that all nursing care, wherever it was delivered, should be free and funded by the NHS (recommendation 6.3 (para 6.26)). The current situation was "not justified or

defensible". By nursing care was meant "care which involves the knowledge or skills of a qualified nurse" (para 6.22). The second was that all personal care should also be free of charge and funded from general taxation (recommendation 6.4 (para 6.37)). By personal care was meant care which "involves touching a person's body. … It falls within the internationally recognised definition of nursing but may be delivered by many people who are not nurses …" (para 6.43). A long list of such tasks was provided (para 6.44).

22.
There was a Note of Dissent by Joel Joffe and David Lipsey. They agreed that the position on nursing care was a "glaring anomaly" and that it should be free and funded by the NHS wherever it was provided. But they defined it strictly as "that care which requires the specific knowledge and skills which only a registered nurse can provide" and then gave examples (para 65). Further, the dissenters could "not go along with" the central recommendation of the majority that personal care should be provided free of charge (para 1). This would cost a great deal of money while doing nothing to increase the funds actually devoted to personal care or to improve the quality of services provided.

23.
The Government published its response in July 2000, The NHS Plan: The Government's response to the Royal Commission on Long Term Care (Cm 4818-II). This rejected the recommendation on personal care, believing it not to be the best use of resources. But it accepted the recommendation on nursing care (para 2.5). This would require primary legislation, which would be introduced as soon as possible, with a view to introducing free NHS nursing care in all nursing homes by October 2001 (para 2.8). Crucially:

"2.9 In the future, the NHS will meet the costs of registered nurse time spent on providing, delegating or supervising care in any setting. This is a wider definition of nursing care than proposed in the Note of Dissent to the Royal Commission report, which suggested it should include those tasks that only a registered nurse could undertake.

2.10 Therefore people identified as needing nursing home care will no longer have to meet any of the costs for the registered nurses involved in their care, or for the specialist equipment used by those nurses. Instead the NHS will meet these costs. …" (emphasis supplied).

24.
Section 49 was enacted as a result. The Explanatory Notes to the 2001 Act confirm this:

"240. Section 49 removes local authorities' functions to purchase nursing care by a registered nurse. …

241. Subsection (1) removes the right of a local authority to provide or arrange nursing care by a registered nurse. It is intended that the NHS in pursuance of its powers and duties under the 1977 Act will provide or arrange nursing care by a registered nurse and such care will (in accordance with the 1977 Act) be free of charge. …

242. Subsection (2) defines 'nursing care by a registered nurse' as services provided by a registered nurse and involving either the provision of care or the planning, supervision or delegation of the provision of care, other than services which do not need to be provided by a registered nurse. In deciding whether services need to be provided by a registered nurse, it is necessary to have regard to the nature of those services and the circumstances in which they are provided. …"

25.

We have been referred to various ministerial statements made during the Parliamentary debates on the 2001 Bill, but I do not regard those statements as sufficiently clear and unequivocal to meet the stringent tests of admissibility laid down in Pepper v Hart [1993] AC 593 and R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd [2001] 2 AC 349. It is one thing for the Minister to say that "a nurse is not defined by the tasks that he or she performs" (Hansard, Standing Committee E, 6 February 2001, col 442); it is quite another thing to say that there is no limit to the work done by a registered nurse in a care home for which the NHS must pay. We are, however, entitled to take into account the preceding reports and explanatory notes to identify the mischief at which the legislation was aimed and the proposed solution to it.

The issue and the arguments

26.
There is no doubt that the mischief at which section 49 was aimed was the "glaring 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 clearly intended to shift the boundary established by the Coughlan decision further in the direction of NHS funding. But the question remains whether "nursing care by a registered nurse" covers everything that is done by a registered nurse in a care home, as it would in a hospital or other health service setting or (probably) in the patient's own home, as the appellant local authorities contend, or whether it covers only some of what she does, as the Health Boards contend. This turns on the meaning and purpose of the concluding words in section 49(2):

"… 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."

Had those words not been there, there is no doubt that the local authorities' interpretation would be correct and the NHS would have to pay for all the time spent by a registered nurse in a care home providing, planning, supervising or delegating care of any sort, at least for those residents whose needs were the reason for her presence. So the question is: why are those words there and what do they mean?

27.
There are no other decided cases which have discussed this question, perhaps surprisingly, given how important it is, not only to the Health Boards and local authorities in Wales, but also to thousands of care home residents who fund or contribute to the funding of their own care, as well as to those in England where the legislation is in similar terms. Section 49 is referred to in two cases, R (Grogan) v Bexley NHS Care Trust [2006] EWHC 44 (Admin); [2006] LGR 491) and R (St Helens Borough Council v Manchester Primary Care Trust [2008] EWCA Civ 931; [2009] PTSR 105, but in both cases the issue was the criteria for deciding whether an individual qualified for continuing NHS care (category (1) residents in para 17 earlier), with the consequence that the NHS was responsible for all their care costs, or whether they fell within the scheme under discussion here, in which case those costs might be shared. There was no detailed discussion of how those costs are to be shared, which is the issue in this case.

28.
Much of the oral argument in this court focussed upon the consequences of the requirement in regulation 18(3) of the Care Homes (Wales) Regulations 2002, that if a home "(a) provides nursing to service users; and (b) provides whether or not in connection with nursing, medicines or medical treatment to service users" a suitably qualified registered nurse must be working there at all times.

This means that in such homes there must always be a registered nurse on duty, even if she is doing nothing. This would in practice be the case even without regulation 18(3), because, as was the evidence at first instance, if a home has residents who need nursing care "they [will] need to be cared for in an environment where a registered nurse is available on a 24 hour basis. This will usually be because of the complexity, intensity or unpredictability of their needs" (First Witness Statement of Victoria Warner, para 8). The Local Health Boards therefore accepted before the judge that time spent on "stand-by" should have been included in the time for which they should pay. Mr Gordon, for the local authorities, argues that this means that they should pay for all the time that the nurse is there. She has to be there all the time and therefore all the services which she is providing while she is there need to be provided by her. Thus, the argument goes, even if the Health Boards are in principle correct to divide up the nurse's time according to what she is doing, in practice whatever she is doing needs to be done by her because she has to be there.

29.
This approach, it is argued, does not ignore the closing words of section 49(2) for two reasons. First, the NHS does not have to pay for roles which happen to be done by a registered nurse but could just as well be done by someone else. In many homes, for example, the manager is a registered nurse, but the manager's role does not need to be performed by a registered nurse. This argument does accept that "nursing care by a registered nurse" is defined by the sort of work the nurse is doing rather than by her formal qualifications. But defining her role is different from parcelling up her time in the manner put forward by the Health Boards. Against this, the Health Boards argue that the NHS is already protected by section 49 from having to pay for registered nurses doing something other than providing, arranging or supervising care. But it cannot have been intended that it should have to pay the full costs of employing a manager if she is also fulfilling the "on call" requirement.

30.
The second reason for suggesting that the local authorities' approach does not ignore the closing words is that the NHS does not have to pay for over-staffing. If the home only needs there to be one nurse on duty at all times, then the services provided by other nurses do not need to be provided by a registered nurse. Against this, the Health Boards argue that even if there are more nurses than required, the NHS still has to pay for that part of their work which does need to be done by a registered nurse.

31.
Overall, the Health Boards and the Secretary of State argue that the Government's policy decision was that personal care should be provided or arranged by local authorities and subject to means-tested charges. It would be contrary to that policy to oblige the NHS to pay the costs of personal care which happened to be provided by a registered nurse and absurd to make it pay the cost of a registered nurse on stand-by fulfilling some completely different role. Their interpretation encourages efficiency: homes should arrange their business so that nurses spend as much time as possible on nursing care, but when they are not, their time should be used productively on personal care rather than standing idle. Dividing up the nurses' time between nursing and non-nursing tasks is the only way to make sense of section 49 as a whole, including the closing words.

Discussion

32.
The parties in this appeal have adopted diametrically opposed positions. The Health Boards and Secretary of State argue that the consistent view of the case law has been to respect the decisions of

the NHS as to what services are necessary to meet all reasonable requirements, under section 3(1) of the 2006 Act, subject only to challenge on the usual judicial review grounds. Thus, it is said, there is nothing unusual in the NHS defining the limits of its responsibilities for itself. The proper construction of section 49(2) depends upon what the NHS decides is reasonably required. Against this, it is true that the courts have normally respected those decisions, subject only to challenges on conventional judicial review grounds; but in this case the NHS is arguing that it should be free to define the extent of the responsibilities of others, the local authorities or residents, by deciding for itself what is and what is not a nursing task, because all are agreed that there should be no funding gap between what is funded by the NHS and what is funded by local authorities with means-tested contributions from the clients. The limits of the local authorities' responsibilities are defined by Parliament in section 49. If Parliament had wanted to leave the division of responsibility in the hands of the NHS, it could and would have left the Coughlan decision undisturbed.

33.
On the other hand, the local authorities' primary argument before this Court was that the court should focus on the application rather than the interpretation of section 49. If it is accepted that the NHS must fund the presence of a nurse who is there to fulfil the legal or practical requirement that a nurse must be on duty at all times, then it follows that the NHS must fund everything that that nurse does while on call in this way. This cannot be correct. The task of this court is to interpret the meaning of the words used by Parliament to impose a restriction on what local authorities may provide or arrange and thus indirectly to impose an obligation on the NHS to fund what the local authorities cannot provide or arrange. Interpretation must come before application. Once interpreted, it is for those on the ground to put that interpretation into practice.

34.
Before turning to that task, it is worth bearing in mind that the current practice does not in fact reflect the logic of the Health Boards' interpretation. Their task-based approach would logically require an individualised assessment of what is in fact done by each registered nurse working in a care home and dividing it into nursing and non-nursing tasks. Instead, the Health Boards have relied on a survey to produce an average result and thus a flat rate contribution across the board. Furthermore, it appears that this is only done in relation to nurses' time in care homes. Section 49 applies to all kinds of community care services, including services in the clients' own homes, but we have no evidence of a similar apportionment being made in relation to home nursing services. Nor, of course, does it take place in hospital, where nurses may well spend time doing other tasks than those which the NHS argues are covered by section 49. The courts below accepted that this was the only practical solution to the problem but it is not necessarily logical.

35.
I start from the proposition that, in passing the 2001 Act, Parliament did not intend to leave the division of responsibility in the hands of the NHS. It clearly intended to provide a test, but a different test from that in section 21(8) of the 1948 Act (para 15 above). It must also have intended to depart from the position established in Coughlan, which depended upon the test in section 21(8).

36.
In construing the test in section 49(2), I bear in mind that, if Parliament had wanted to restrict the definition of "nursing care by a registered nurse" to tasks which can only be performed by a registered nurse, it both could and would have said so. It did not. The Government's response to the Royal Commission report clearly envisaged a wider test than that put forward by the dissenters to that report.

37.
On the other hand, if Parliament had wanted to prohibit local authorities from paying for anything done by a registered nurse in a care home, it both could and would have said so. It did not. It began with the broad concept of “any services provided by a registered nurse” but then limited those services in two ways. First, they must be services “involving” the provision, planning, supervision or delegation of “care”. So they are limited to services which have to do with the care of residents, that is, with looking after them. However, they are not limited to nursing services or nursing care. They could involve any form of care, nursing, personal or social.

38.
Secondly, however, “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” are excluded. This clearly envisages that there will 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 which she is providing obviously needs to be provided by her. When a registered nurse is engaged in providing nursing care, it makes no sense to say that she does not need to do the other things that the resident needs to have done while she is providing the nursing care.

39.
For example, there may be a reason why a nurse needs to take a patient to the lavatory. The tasks associated with taking a resident to the lavatory cannot be parcelled up between two carers in this way. Whoever is doing them needs to do them all. That applies to all sorts of caring tasks which a nurse needs to do for some reason and which cannot sensibly be parcelled up between nursing and non-nursing tasks.

40.
One service which a nurse undoubtedly has to do is to provide, as the Laing and Buisson report puts it, “an overall, holistic, person-centred plan” for each resident who needs some nursing care (p 6). In the course of doing this, she may very well have to engage in social and personal care tasks in order to understand the overall needs of the resident and provide an appropriate care plan to meet them.

41.
We are, by definition, looking at the funding of the care of residents who, although health care is not a “primary need” do have a need for some nursing care. That has to be provided by a registered nurse. Other kinds of care which are ancillary to or associated with the nursing care which these residents need does also have to be provided by a registered nurse. Any other approach is contrary to the holistic view which is now taken of looking after the whole person. It is a matter of fact what part of the care provided by registered nurses to residents who have a need for some nursing will fall within this definition; it may or may not be a substantial part of their care; but that is a matter for the decision-makers and not for us.

42.
I would also accept the view that time spent on paid breaks falls within the definition of “nursing care by a registered nurse”. Part of providing their caring services is taking the breaks necessary to be able to provide those services properly. The same applies to time spent receiving supervision, which is also a necessary part of providing the caring services they are there to provide.

43.
This construction is close, but not identical, to the third argument put forward in the local authorities’ case. Their first and second arguments, as we have seen, were that the NHS should pay for everything

done by a registered nurse whose presence was required in a care home and her time should not be “atomised” into different tasks. Their third argument was that time spent providing personal or social care, on paid breaks, or receiving supervision, should be included. The respondents argue that they should not be allowed to advance it. However, having rejected both parties’ primary arguments, it is our task to try to discern the true meaning of the legislation. As the legislation quite clearly envisages that there will be some circumstances in which care does need to be provided by a registered nurse, even though it is not care which only a registered nurse can provide, in my view it is our duty to say so.

44.
In my view, therefore, “nursing care by a registered nurse” covers (a) time spent on nursing care, in the sense of care which can only be provided by a registered nurse, including both direct and indirect nursing time as defined by the Laing and Buisson study; (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.

45.
In other words, the concentration in this case on the division between nursing and personal care has been a distraction. There is some personal care which, in all the circumstances, does need to be performed by a registered nurse, but there is some which does not. I agree with Laws LJ that this is a question of fact, although the only practical solution is to make a rough and ready calculation based on the generality of what takes place. Hence I also agree with Laws LJ and Lloyd Jones LJ that some differentiation between the care services provided is required. But I would draw the dividing line in a different place from them. It seems to me plain that Parliament envisaged that some care services would be included beyond those which could only be provided by a registered nurse: hence the addition of category (e) above to the list.

Decision

46.
It follows from this, and from the earlier concession that “stand-by” time should have been included, that the Health Boards’ decisions were based on a misinterpretation of section 49(2) and must be quashed and re-taken in the light of the guidance given in para 44 of this judgment. Ideally, this should be a matter for negotiation between all the parties who are governed by the legislation and have an interest in the outcome.