



## SCOTTISH EXECUTIVE

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Your ref:  
Our ref: FW/CoSLA/MacGregor2

17 January 2003

Dear Colleague

### MACGREGOR VS SOUTH LANARKSHIRE COUNCIL

You will be aware of this case which appeared to have major implications for local authority practice in relation to community care assessment and service provision. I am writing to provide further information on the case and to suggest action which it may be appropriate for you to take. The letter has been discussed with South Lanarkshire Council and COSLA, both of which agree its contents.

#### Background to Case

Arthur MacGregor, an elderly man who had lived alone without assistance, was admitted to Hairmyres Hospital in May 2000 after a fall. In July 2000, South Lanarkshire Council assessed Mr MacGregor's needs under Section 12A of the Social Work (Scotland) Act 1968. He required nursing home care but was told he would have to wait until public funding became available. His family found him a nursing home place at their own expense and challenged the Council's actions through a Judicial Review in the Court of Session. The Council took responsibility for funding Mr MacGregor's place from December 2000.

The issue was whether the Council had acted *ultra vires* in placing Mr MacGregor on a waiting list until public funds become available. In December 2000, Lord Hardie ruled that they had and that the effect of carrying out assessment under S12A was to place a **duty** on a local authority to provide the necessary assistance to meet the individual's need. The Council lodged an appeal, asserting they were merely following Scottish Executive Guidance on Assessment and Care Management (SWSG Circular 11/91) and that Mr MacGregor was being adequately cared for in the interim.

The case was sisted in January 2001 pending resolution of Mr MacGregor's legal aid case for his action to recover costs for the period in which his family had paid for his care. In the intervening period, the Council agreed to meet Mr MacGregor's costs for the period prior to its having assumed responsibility for them. It also drew up a draft Protocol (attached) for action by assessment and care management staff, to deal with the implications of the Hardie judgement. The Council sought QC's opinion on this Protocol and were of the view it meets the requirements of the original judgement. The Council advised the Executive they had taken steps to withdraw their appeal, and have had discussions with the Executive about implications for other Councils.



## Discussion of Implications for Councils

This case appeared to have crucial implications for local authorities in that it suggested that if someone had a need assessed under S12A, then the local authority had a duty to meet that need regardless of available local authority resources. Lord Hardie ruled that the resources available to a Council were irrelevant in coming to a judgement about an individual's needs. They were relevant however, in coming to a decision about **how** to meet these needs. He made clear however, that it was not an option for a local authority to do nothing if resources were not available.

The purpose of drawing up a Protocol which appears to meet the requirements of the Hardie judgement, is to ensure that those who have had needs assessed are not simply placed in a date order queue for services. The Protocol says that they must be systematically reviewed, and when resources become available these must be used for those in greatest need.

We are of the view that the Hardie judgement could be seen as rather contradictory. We are also of the view that the Protocol is a satisfactory document and that it makes any similar case in future less likely to succeed because if it is followed, it ensures the systematic review of those assessed as in need. It should ensure that people's needs are at the forefront of considerations by the local authority in allocating resources, and that date order queuing without ongoing needs reassessment should no longer be considered an acceptable practice.

### Action suggested

Given the above, we suggest that all local authorities review their assessment and care management practices to ensure they are taking action similar to that taken by South Lanarkshire, and which would ensure compliance with the Hardie judgement. Local authorities will of course, wish to be advised by their own solicitors but should also consider putting in place a protocol or similar, which ensures that those who have had needs assessed are having their case regularly reviewed while waiting for service provision, and that when resources become available they are provided to those assessed as having highest priority need.

We would be very interested in hearing from local authorities about what measures they have already taken, or plan to take, in relation to Hardie and would welcome contact and discussion of the issues.

A copy of the Hardie judgement is available on [http://www.scotcourts.gov.uk/opinions/P913\\_00.html](http://www.scotcourts.gov.uk/opinions/P913_00.html).

Please contact me at the above number if you would like to discuss the matter.

Yours sincerely



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COMMUNITY CARE DIVISION 1

# MACGREGOR VS SOUTH LANARKSHIRE COUNCIL

DRAFT PROTOCOL DRAWN UP BY SOUTH LANARKSHIRE COUNCIL

## Protocol for Assessment & Care Management Staff Following the MacGregor Judicial Review

South Lanarkshire Council was taken to a Judicial Review by Mr McGregor's family seeking review of the decision to delay provision of a nursing home placement for him. Lord Hardie's written judgement was received in December 2000, along with comment from the Council's Q.C.

The judgement raised issues for the assessment and care management process in the following areas:-

1. Recording of unmet need.
2. Clear distinction between needs assessment and consideration of available resources to implement care plan.
3. Need to review "unallocated" assessments on a regular basis.
4. In order to make informed decision re 3 need to have initial assessments, including risk assessments carried out at reception services.
5. Clear eligibility criteria for all services.
6. Where all/some of the services are not available at time of completion of care plan, need to make interim arrangements via interim care plan and regular review of same.
7. Where "waiting lists" for services are in operation need to regularly review the priority status of individuals.
8. Where care plan has implications for health or housing providers these should be raised with them at liaison meetings.

### Implications for Practice:-

1. Screening/Initial Assessment - Reception services to carry out initial assessment, including risk assessment, indicating the level of risk for referrals being passed to Care Teams.

**Action** Reception Services

2. Allocation — Senior Social Worker/Team Leader to review any "unallocated" referrals on a regular basis, taking account of the initial assessment/risk assessment from reception services. SSW/TL to log date of receipt of referral, priority rating and likely timescale for allocation. This should be done on a weekly basis at least.

**Action** Senior Social Workers/Team Leaders

3. Assessment — The assessment of need should be clearly distinguished from any consideration of available resources for the implementation of the care plan. Cognisance should be taken of the support of carers and a carers assessment/risk assessment completed, where appropriate.

**Action** All Assessment Staff

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| <p>4. <b>Care Planning</b> - Following assessment of needs, a care plan should be drawn up and implemented. At the stage at which the plan is drawn up full account should be taken of the Council's available finances. If for reasons of lack of available finance or lack of available resources the optimum care cannot be arranged, the care plan should note the care the Council can provide at the time. If the care plan does not provide for the optimum care it is considered the person needs a note of the unmet needs not being provided by the care plan should be made on the care plan form.</p>  | <p>All Assessment Staff</p>                    |
| <p>5. <b>Service Availability</b> -</p> <p>It is no longer appropriate to have "waiting lists". Where there is unmet need for types of services Senior Social Workers/Team Leaders should regularly review the priority accorded to individuals on the basis of their needs/risks to themselves (and carers). It is no longer sufficient to prioritise in date order only. There is a need to actively review individuals on a weekly basis at least. Additionally, individuals who are currently receiving care which is less than optimum (because of financial restrictions or lack of available resources) should be included on the "assessment and review register" in respect of the care elements they are not receiving.</p> <p>Correspondence with Users and Carers should reflect the regular review of "assessment and review registers."</p> <p>If the assessment and review register for care involves people in hospital and in the community it is suggested a quota of service available be allocated to facilitate hospital discharge and prioritised &amp; reviewed separately for those in hospital and the community.</p> | <p>Senior Social Workers.<br/>Team Leaders</p> |
| <p>6. <b>Liaison with other Providers</b> - If a care plan(s) identifies shortfalls in services provided by other providers i.e. health/housing/education, these shortfalls should be raised with the respective providers at local liaison meetings.</p>  | <p>Senior Social Workers/Team Leaders</p>      |