IN THE HIGH COURT OF JUSTICE **1998 R 4784**
QUEEN'S BENCH DIVISION
LIVERPOOL DISTRICT REGISTRY
MR JUSTICE MUNBY
(Sitting as an additional judge of the Queen's Bench Division)

(1) GERARD RYAN (A patient who proceeds by his mother and litigation friend Margaret Ryan)
(2) LIVERPOOL CITY COUNCIL

Claimants

v

LIVERPOOL HEALTH AUTHORITY

Defendant

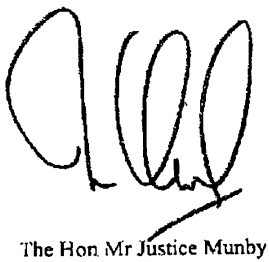
Mr B A Hytner QC (instructed by Messrs Maxwell Entwistle Byrne) appeared on behalf of the claimant Gerard Ryan

Mr Andrew Edis QC and Mr John de Bono (instructed by Head of Legal Services Agency, Liverpool City Council) appeared on behalf of Liverpool City Council

Mr Graham Morrow QC (instructed by Messrs Hill Dickinson) appeared on behalf of Liverpool Health Authority

This is the Judgment handed down in London (without the need for any attendance by the parties) at 2 pm on Monday 10th September 2001

I direct that no further note or transcript need be taken or made of the Judgment



10th September 2001 The Hon Mr Justice Munby

RYAN v LIVERPOOL HEALTH AUTHORITY

MR JUSTICE MUNBY 10 September 2001

1 Gerard Ryan, who I will refer to as the claimant, was born on 23 June 1952. Tragically for him and for his family he was so badly injured during the course of his birth that he has always required, and will always require, full time institutional care in a residential home. The cost of that care has hitherto been met by Liverpool City Council ("the local authority") in accordance with its obligations under the National Assistance Act 1948.

2 It is common ground between all the parties, putting the matter quite shortly, that section 26(2) of the 1948 Act requires the local authority to pay to the organisation providing the claimant's residential care the costs of that care and that section 26(2) also *requires* the local authority to recover those costs from the claimant unless he satisfies it that he is unable to make a full refund. If so satisfied the local authority must make an assessment of means in accordance with subordinate legislation, in particular in accordance with the requirements of *The National Assistance (Assessment of Resources) Regulations 1992, SI 1992 No 2977 (as amended)*, which I shall refer to as the Assessment Regulations. The relevant provisions of the Assessment Regulations cross-refer to *The Income Support (General) Regulations 1987, SI 1987 No 1967 (as amended)*, which I shall refer to as the Income Support Regulations. Hitherto his resources have been such that the claimant has not had to make any contribution at all to the cost of his care.

3 On 5 November 1998 the claimant, suing by his next friend and mother, Margaret Ryan, issued a writ against Liverpool Health Authority ("the defendant") claiming damages for negligence in respect of the injuries he suffered at birth. On 3 June 2000 the claim was compromised with the approval of Penry-Davey J and judgment was entered for the claimant against the defendant for 80% of the value of the claim on a full liability basis with damages to be assessed.

4 On 20 February 2001 the local authority issued an application seeking to be added as a party to the action. Its purpose was to make good its claim to be entitled to claw back from the damages awarded to the claimant the costs of funding his residential care. To that end it sought a declaration that in assessing the level of his contribution to the costs of that care it was entitled to take account of such *income* as might be received by the claimant from capital held in trust for him in consequence of his award of damages. (I shall explain in due course the reason why the local authority confines its claim to income.) On 12 June 2001 Sachs J made an order that the claimant might accept the sum of £1,000,000 in satisfaction of all claims presently pleaded in the action, leaving the issue of the cost of institutional care and consequential issues to be determined by the court. He ordered the hearing of those issues to be adjourned to 10 and 11 July 2001. He also ordered that the claimant's damages be carried over to the Court of

Protection to the credit of the claimant "there to be dealt with as the Court of Protection thinks fit".

5 In accordance with Sachs J's order the reserved issues came on for hearing before me at Leeds on 10 and 11 July 2001. The claimant was represented by Mr B A Hytner QC, the defendant by Mr Graham Morrow QC and the local authority by Mr Andrew Edis QC and Mr John de Bono. Mr Hytner and Mr Morrow made common cause in resisting the local authority's claim. I am very grateful to all counsel for their considerable assistance in taking me, if I may say so with great patience and skill, through what I think I can properly describe as some of the worst, if indeed not the worst, drafted and most confusing subordinate legislation it has ever been my misfortune to encounter.

6 Although he did not have to decide the precise issue which is now before me, some of the matters I have had to consider were referred to by His Honour Judge Robert Taylor (sitting as a Judge of the High Court) in his judgment in *Firth v Geo Ackroyd Junior Limited* [2000] Lloyds Rep Med 312. None of the counsel before me has sought to dispute any part of Judge Taylor's judgment.

7 The precise issue that I have to determine was considered by Stanley Burnton J as recently as 29 June 2001 in *Bell v Todd (NE990568)*, a case involving South Tyneside Metropolitan Borough Council. Stanley Burnton J decided the issue against the local authority. Not surprisingly Mr Hytner and Mr Morrow place considerable reliance upon, whilst Mr Edis says that I should not follow, my brother's judgment. I understand that his decision is the subject of a pending appeal to the Court of Appeal.

8 Thus far the claimant has made no claim against the defendant in respect of any liability he may have for the costs of this care. However in this case, as in *Bell*, it is not and could not be disputed that, if the claimant will be liable to contribute towards the cost of his care, that cost properly forms part of his damages claim against the defendant. In that event his award of damages will have to be 'grossed-up' to meet the additional liability.

9 Counsel were agreed that I should grant the local authority permission to be joined as a party. Counsel were also agreed that I should determine the following specific issue, namely

> "Is Liverpool City Council entitled to a declaration that it is required to take into account ..."

or, alternatively,

> "Are the claimant and the defendant entitled to a declaration that Liverpool City Council is not entitled to take into account ... "

and then in each case

> "... payments of income from capital administered by the Court of Protection in consequence of the claimant's settlement of his claim for personal injury when assessing his liability to contribute towards the cost of his residential accommodation?"

By consent I make an order to that effect.

10 Counsel were further agreed that, given the importance of the issue, not merely to the claimant and the local authority but also to many other litigants in the same situation, I should give whoever lost permission to appeal. I do that without hesitation. It seems to me that, irrespective of my conclusion, and whether or not it turns out that I agree with Stanley Burnton J, this important matter should be determined definitively, once and for all and at the earliest opportunity. Plainly it will make sense for the two appeals to be heard together.

11 I raised with counsel what the effect would be on whatever declaration I decide to grant were the law as I declare it to be subsequently "changed" (to adopt a convenient if inaccurate word) otherwise than by some judicial decision to which the parties before me were privy - for example, by some subsequent decision of either the Court of Appeal or the House of Lords in another case or as a result of some change in the Assessment Regulations. The parties, as was their right, declined to engage in that question and were agreed as to the form of the relief I should grant in either outcome. I am content to proceed on that basis. But I make it clear that, in agreeing to proceed accordingly, I express absolutely no view one way or the other as to what, if any, effect any "change" in the law of the kind I have mentioned will have on the declaration I grant.

12 Before embarking upon the one issue that I *do* have to decide I should first identify a number of issues, considered in the authorities to which I have referred, which have *not* been raised before me and which accordingly I do not have to decide.

(1) The claimant does *not* seek to take against the defendant (i) the 'indemnity' point considered in *Firth* at pp 319-321 or (ii) the 'additional damages' point considered in *Firth* at pp 321-322.

(2) The local authority does *not* seek to take against the other parties (i) the 'receiver' point considered in *Bell* paras [21]-[24] or (ii) the 'otherwise available' point under section 21(1)(a) of the 1948 Act considered in *Bell* paras [25]-[28] or (iii) the 'inability to pay' point under section 26(3) of the 1948 Act considered in *Bell* paras [29]-[30].

13 I turn to consider the Assessment Regulations.

14 An understanding of the relevant regulations is assisted by an appreciation of certain preliminary matters.

15 The Assessment Regulations, which regulate the liability to pay for the cost of

accommodation such as that provided for the claimant, mimic in many respects the Income Support Regulations, which relate to the entitlement to Income Support.

16 The general framework of both sets of Regulations is to provide that certain capital and income is to be disregarded when determining entitlement to Income Support or (as the case may be) liability to pay for the cost of accommodation. These disregards are achieved in different ways. There are provisions to the effect that certain forms of *capital* are to be disregarded. *Income* may be disregarded by one or other of two different routes. There are provisions for the disregard of certain forms of what is properly described as income for the purposes of assessment of income. However, there are also provisions that certain sums which would normally be characterised as income are to be treated for these purposes as capital: such sums will accordingly be disregarded as income (because they are deemed not to be such) and will be disregarded completely if, as capital, they are to be disregarded. It should be noted that in general both sets of Regulations provide for the income from capital to be treated as capital.

17 Reg 15(2) of the Assessment Regulations provides that there shall be disregarded from the calculation of a resident's gross income those sums specified in Schedule 3; similarly reg 21(2) provides that there shall be disregarded from the calculation of a resident's capital any capital specified in Schedule 4. In the like way reg 40(2) of the Income Support Regulations provides that there shall be disregarded from the calculation of a claimant's gross income those sums specified in Schedule 9; similarly reg 46(2) provides that there shall be disregarded from the calculation of a claimant's capital any capital specified in Schedule 10.

18 So far as material for present purposes Schedule 4 of the Assessment Regulations identifies two classes of capital which are to be disregarded:

(1) Para 10 of Schedule 4 provides that there is to be disregarded any amount which would be disregarded under para 12 of Schedule 10 to the Income Support Regulations, that is,

> "Where the funds of a trust are derived from a payment made in consequence of any personal injury to the claimant, the value of the trust fund and the value of the right to receive any payment under that trust."

(2) Para 19 of Schedule 4 provides that there is to be disregarded any amount which would be disregarded under para 44(a) of Schedule 10 to the Income Support Regulations, that is,

> "Any sum of capital administered on behalf of a person by the High Court under the provisions of Order 80 of the Rules of the Supreme Court ... or the Court of Protection, where such sum derives from ... an award of damages for a personal injury to that person."

19 So far as material for present purposes reg 22(4) of the Assessment Regulations (which corresponds to reg 48(4) of the Income Support Regulations) provides that

> "Except any income derived from capital disregarded under paragraph 1, 2, 5, 10 or 16 of Schedule 4, any income of a resident which is derived from capital shall be treated as capital but only from the date on which it is normally due to be paid to him."

It is important to note that whereas para 10 of Schedule 4 *is* included in the list of excepted cases under reg 22(4), para 19 of Schedule 4 has *not* been included in the list. So, as Mr Morrow points out, although income from a para 10 trust "derived from a payment made in consequence of any personal injury to the claimant" (the words in para 12 of Schedule 10 to the Income Support Regulations) *will remain income*, income generated from para 19 "capital administered ... by the High Court ... or the Court of Protection" *is treated as capital*, even "where such sum derives from ... an award of damages for a personal injury" (the words in para 44(a) of Schedule 10 to the Income Support Regulations).

20 So far as material for present purposes para 14(1) of Schedule 3 to the Assessment Regulations (corresponding to para 22(1) of Schedule 9 to the Income Support Regulations) provides that there is to be disregarded

> "Any income derived from capital to which the resident is ... beneficially entitled but ... not income derived from capital disregarded under paragraph 1, 2, 5, 10 or 16 of Schedule 4."

Again, it is important to note that whereas para 10 of Schedule 4 *is* included in the list of excepted cases under para 14(1), para 19 of Schedule 4 has *not* been included in the list. So, as Mr Morrow points out, although income from a para 10 trust "derived from a payment made in consequence of any personal injury to the claimant" *is* taken into account as income, income generated from para 19 "capital administered ... by the High Court ... or the Court of Protection" is *not*, even "where such sum derives from ... an award of damages for a personal injury".

21 Now pausing there, the effect of the Assessment Regulations so far as relates to para 19 "capital administered ... by the High Court ... or the Court of Protection, where such sum derives from ... an award of damages for a personal injury" is that

(i) the income from the trust fund is disregarded as income (para 14(1) of Schedule 3),

(ii) the income from the trust fund is treated as capital (reg 22(4)), and

(iii) the monies, both capital and income treated as capital, are disregarded as capital (para 19 of Schedule 4).

In other words, a para 19 fund is disregarded both as to capital and as to income.

22 In contrast, the effect of the Assessment Regulations so far as relates to a para 10 "trust ... derived from a payment made in consequence of any personal injury to the claimant" is that

(i) the monies are disregarded as capital (para 10 of Schedule 4),

(ii) the income from the trust fund is treated as income (reg 22(4), and

(iii) the income from the trust fund is *not* disregarded but is taken into account (para 14(1) of Schedule 3).

In other words, although the capital of a para 10 trust is disregarded the income from such a trust is taken into account.

23 The point can be expressed more shortly as follows: Whether a fund is a Schedule 4 para 10 trust or a Schedule 4 para 19 fund administered by the court, the *capital* will be disregarded for the purposes of the Assessment Regulations. That was what was decided by Judge Taylor in *Firth* at p 319. It is not challenged by the local authority, which is why the local authority confines its claim to income. If a fund is a Schedule 4 para 19 fund administered by the court, the *income* will likewise be disregarded for the purposes of the Assessment Regulations. But if a fund is a Schedule 4 para 10 trust, the *income* will not be disregarded but will on the contrary be taken into account in assessing the resident's means for the purposes of the Assessment Regulations.

24 I interpolate to comment that thus far my analysis corresponds precisely with that of Stanley Burnton J in *Bell*. Thus far I have reached precisely the same conclusions as he did: see, in particular, *Bell* paras [38], [44], [46], [55] and [56]. Nor, thus far, do I understand there to be any significant difference between counsel.

25 The problem, of course, arises because in my judgment, and I did not understand anyone to challenge this, a sum of capital administered by the court in such a manner as seemingly to bring Schedule 4 para 19 into play will necessarily also be the funds of a trust for the purposes of Schedule 4 para 10. I say this because in my judgment Mr Commissioner Heald was correct in holding on 31 August 1995 in *CIS/368/94* that the word "trust" in Schedule 10 para 12 of the Income Support Regulations

> "should be understood in simple terms, used to cover the situation where the legal estate of property is in one person, but the beneficial estate is in another person."

He gave as an example of such a trust, funds held by the Court of Protection. His decision has been referred to with approval both by Pill LJ (with whom Jonathan Parker LJ and the President agreed) in para [13] of his judgment in *Beattie v Secretary of State for Social Security* (2001) April 9 and by Stanley Burnton J in *Bell* at para [47]. I agree.

26 How then is the seeming conflict - I do not in fact accept that there is any such conflict - between paras 19 and 10 to be resolved in a case where, as here as in *Bell*, the relevant fund falls within both the para 19 and the para 10 description?

27 In an attempt to elucidate that question counsel sought to identify, a priori as it seemed to me, reasons why, they said, policies in the legislation which they claimed to be able to perceive supported their respective contentions. Thus Mr Hytner, supported by Mr Morrow, placed emphasis upon the shortfall that a claimant like Mr Ryan, who receives only 80% of the full value of his claim, would suffer if the local authority's argument was correct and if, in consequence, his (reduced) damages were exposed to the (full) cost of accommodation. Mr Edis, for his part, placed emphasis on the submission that the cost of care necessitated by a tort should be paid for by the tortfeasor and not from public funds. He said that in cases of doubt as to statutory construction the court should seek a construction which gives effect to what he said was the general policy of the law that the consequences of a tort are paid for by the tortfeasor.

28 Like Stanley Burnton J in *Bell* at paras [18]-[20] I do not find much, if indeed any, assistance from this approach. In the first place, and for reasons I shall explain in due course, I do not, at the end of the day, find myself in any doubt as to the proper construction of the Assessment Regulations. Recognising that I have had the benefit of his judgment, which contributes powerfully, if I may say so, to an understanding of these tortuous provisions, and recognising also that I may have had the benefit of more detailed and searching submissions from counsel than he did, I have to say that I do not share Stanley Burnton J's difficulty in determining the effect of the Regulations, nor do I agree with him that their correct interpretation is obscure (see *Bell* at paras [20] and [41]).

29 Secondly, and in any event, I would respectfully agree with what Sir Ralph Gibson said in *Chief Adjudication Officer v Palfrey* (1995) CAT 77/95 in relation to Schedule 10 to the Income Support Regulations:

> "For my part, I have found it impossible to perceive any consistent policy for the disregarding of capital assets set out in the 43 paragraphs of Schedule 10 by reference to which any clear assistance can be derived upon the meaning of paragraph 5. It is apparent from the print of the regulations provided to us that the relevant form of the Schedule is the result of amendments, by deletion and addition, made by some 15 separate Statutory Instruments in the years 1988 to 1993. The nature of the subject-matter of the regulations, and of this Schedule in particular drew serious difficulties in achieving a just uniformity of decision throughout the administration of income-related benefits and, no doubt,

such difficulties are most speedily solved by additional specific provisions."

30 As Mr Morrow pointed out, the approach to what is and what is not taken into account has developed on a piecemeal basis, exemplified by the fact that very recently two further items added to the list of disregards have been payments to former prisoners of war of the Japanese and compensation payments to persons suffering from variant Creutzfeld-Jacob disease.

31 In a further attempt to elucidate the question, and partly at my prompting, counsel explored the history of the relevant provisions in the Assessment Regulations, in particular Schedule 4 paras 10 and 19, and the corresponding provisions in the Income Support Regulations. So far as relevant for present purposes that history can be summarised as follows:

(1) The original provision was that in Schedule 10 para 12 of the Income Support Regulations. Moreover in its original form, enacted in *The Income Support (General) Regulations 1987, SI 1987 No 1967*, with effect from 11 April 1988, the disregard in para 12 was limited to a period of two years (save where for certain purposes it was necessary to have regard to the capital of a child, in which case there was no limit of time). It should be noted that both reg 48(4) and para Schedule 9 para 22(1) - corresponding to what would subsequently emerge as reg 22(4) and Schedule 3 para 14(1) of the Assessment Regulations - included para 12 amongst the list of excepted cases: cf paragraphs [19] and [20] above.

(2) With effect from 1 October 1990 Schedule 10 para 12 was amended by reg 11(c) of *The Income Support (General) Amendment No 3 Regulations 1990, SI 1990 No 1776*, so as to remove the two year time limit. Ever since then para 12 has been in its current form.

(3) With effect from 1 April 1993 *The National Assistance (Assessment of Resources) Regulations 1992, SI 1992 No 2977*, came into force. In its original form Schedule 4 contained only para 10 and not para 19. It should be noted that both reg 22(4) and Schedule 3 para 14(1) included para 10 amongst the list of excepted cases.

(4) With effect from 3 October 1994 para 44(a) was inserted in Schedule 10 of the Income Support Regulations by reg 33(b) of *The Income-related Benefits Schemes (Miscellaneous Amendments) (No 5) Regulations 1994, SI 1994 No 2139*. As originally enacted para 44(a) included the words "under the age of 18" between the words "person" and "in", so that the disregard applied only to children and not to adults under disability. No corresponding amendment was made to the Assessment Regulations. Nor, significantly, was any amendment made so as to include para 44(a) amongst the list of excepted cases either in reg 48(4) or in Schedule 9 para 22(1).

(5) On 31 August 1995, as we have seen, Mr Commissioner Heald gave his decision in *CIS/368/94* as to the meaning of the word "trust" in Schedule 10 para

12 of the Income Support Regulations. As Stanley Burnton J pointed out in *Bell* at para [47] the October 1994 amendment to the Income Support Regulations was not in force at the date relevant to Mr Commissioner Heald's decision.

(6) With effect from October 1997 para 44(a) was amended by regs 7(9)(a) and 7(10)(e) of *The Income-related Benefits and Jobseeker's Allowance (Amendment) (No 2) Regulations 1997, SI 1997 No 2197* by the omission of the words "under the age of 18," thus extending the disregard to certain adults under disability. Ever since then para 44(a) has been in its current form.

(7) With effect from 6 April 1998 para 19 was inserted in Schedule 4 of the Assessment Regulations by reg 3 of *The National Assistance (Assessment of Resources) (Amendment) Regulations 1998, SI 1998 No 497*. The effect of this was to incorporate in the Assessment Regulations Schedule 10 para 44(a) of the Income Support Regulations, as it had been amended in October 1997. Significantly, no amendment was made so as to include para 44(a) amongst the list of excepted cases in either reg 22(4) or Schedule 3 para 14(1).

32 Mr Edis, in his supplementary skeleton argument dated 17 July 2001 sought to place considerable reliance upon the form in which Schedule 10 para 12 of the Income Support Regulations was originally enacted. I do not think that his argument can support the weight he seeks to place upon it, even assuming, that is, that his analysis of the original effect of para 12 is correct. In fact, Mr Morrow in his supplementary skeleton argument dated 21 July 2001 has put forward compelling reasons, which I need not summarise, for doubting whether Mr Edis's analysis is correct.

33 During the course of argument there was also a certain amount of speculation as to what lay behind the successive changes described above as having taken place with effect from 1 October 1990, 3 October 1994 and October 1997. Speculation is what it remains. It does not particularly assist me.

34 The critical point which emerges from the history, as it seems to me, is that identified by Stanley Burnton J in *Bell* at para [47] when, referring to the amendment of the Income Support Regulations with effect from October 1994 by the insertion of para 44(a) in Schedule 10, he said:

> "I can see no purpose in the amendment ... and the distinction it apparently makes between capital disregarded under paragraph 12 and that disregarded under paragraph 44 (see regulation 48(4)) unless it was intended to distinguish between the generality of personal injury trusts and those administered by the Court. In other words, what is within the smaller class (paragraph 44) is not within the larger class (paragraph 12). The same considerations apply to the [Assessment] Regulations. In other words, effect should be given to the omission of references to paragraph 19 of the [Assessment] Regulations and paragraph 44 of the [Income Support] Regulations in regulation 22(4) of the former and regulation 48(4) of the [Income Support] Regulations."

I agree.

35 As I pointed out in paragraph [25] above, a sum of capital administered by the court in such a manner as seemingly to bring Schedule 4 para 19 into play will necessarily also be the funds of a trust for the purposes of Schedule 4 para 10. It follows from this that unless para 19 operates in the way in which Stanley Burnton J held that it did, it is devoid of practical effect and its insertion in the Assessment Regulations in 1998 achieved nothing. That, whilst not inconceivable, is not a conclusion to which one readily comes. Mr Edis in effect accepts this. For he suggests that para 19 is to be regarded as an "avoidance of doubt" provision or even as "surplusage and of no effect". I can see absolutely nothing, either in the legislative history or in the language of the relevant provisions, to support this view. The contrary conclusion - that which commended itself to Stanley Burnton J - involves no violence to the language either of para 10 or of para 19 and makes perfectly good sense. In my judgment, it is a conclusion which gives a natural and sensible meaning to the words of both provisions. I do not accept Mr Edis's submission that there are two or more possible constructions of para 19. Properly construed in the light of the overall history and scheme of the Assessment Regulations para 19 has, in my judgment, a clear and simple meaning.

36 Moreover, and in this I differ perhaps from Stanley Burnton J in *Bell* at para [43], I have no difficulty in detecting in this reading of the two provisions an entirely rational policy, namely that whilst the general class of personal injury claimants whose funds are for whatever reason held in trust (and they will not necessarily be persons under disability: see, for example, *Allen v Distillers Co (Biochemicals) Ltd* [1974] QB 384) should be required to make their trust income available to meet the cost of their accommodation, those who are under disability (whether disability resulting from non-age or disability resulting from mental disorder) and whose funds are accordingly being managed by the court (whether the High Court or the Court of Protection) should have their trust income wholly disregarded for this purpose. In saying that this is an entirely rational policy, I am not disputing that some other policy might have been equally rational. Nor am I making any assertion as to what precisely the draftsman or the Secretary of State actually had in mind as the policy they were seeking to achieve.

37 The difficulty of Mr Edis's position is exemplified by his further submission - almost inevitable in the circumstances - that the omission of reference in reg 22(4) and Schedule 3 para 14(1) of the Assessment Regulations to Schedule 4 para 19 (and the corresponding omission of reference in reg 48(4) and Schedule 9 para 22(1) to Schedule 10 para 44(a) of the Income Support Regulations) is "pointless and illogical" or due to what he variously described as "oversight" or "error", even "obvious error". I can detect no error. As a matter of construction the different provisions in paras 10 and 19 fit perfectly well together and make perfectly good sense. Moreover, if there really was some error it is, as Mr Hytner and Mr Morrow observed, strange that the error - which on Mr Edis's argument must first have crept in to the Income Support Regulations in October 1994 - was not corrected on any of the numerous subsequent occasions when either the

Income Support and/or the Assessment Regulations were being amended, not least in April 1998 when para 19 was inserted in Schedule 4 of the Assessment Regulations.

38 Mr Edis sought to escape from what he characterised as the "absurdity" of the Regulations as they stand by praying in aid the canons of construction to be found explained or applied in such cases as *Inland Revenue Commissioners v McGuckian* [1997] 1 WLR 991, *Wadey v Surrey County Council* [2000] 1 WLR 820, *Macniven (HMIT) v Westmoreland Investments Ltd [2001] UKHL 6* [2001] 2 WLR 377 and *R (Wardle) v Crown Court at Leeds [2001] UKHL 12* [2001] 2 WLR 865. Since I do not accept his premiss that there is absurdity I need say no more about this part of Mr Edis's submissions.

39 I conclude therefore that the Assessment Regulations are to be construed as Mr Hytner and Mr Morrow submit. I cannot accept Mr Edis's submissions to the contrary, carefully and elegantly constructed as they were.

40 In the result I have come to a clear conclusion as to the meaning and effect of para 19. I am reassured, however, by the fact that my conclusion is precisely the same as that expressed both by Mr Commissioner Powell on 12 July 2000 in *CIS/4037/1999* (a decision referred to without, so far as I can see, any sign of disapproval by Pill LJ in *Beattie* at para [13]) and by Stanley Burnton J in *Bell*.

41 Before leaving the case I should briefly refer to one other matter that was canvassed in front of me. Mr Edis placed reliance upon the Secretary of State's guidance as issued to local authorities and contained in the successive versions of the Charges for Residential Accommodation Guide (CRAG), in particular LAC(99)9 and LAC(2001)10. That is guidance to which section 7 of the Local Authority Social Services Act 1970 applies. But, as Mr Hytner points out, section 7 requires the local authority to act "under" this guidance when exercising any "discretion" conferred by any relevant enactment. Here the local authority, as Mr Edis readily accepts, is not exercising any discretion at all. Section 26 of the 1948 Act imposes duties on the local authority and its duty here is simply to apply Schedule 4 of the Assessment Regulations in accordance with its legally correct meaning. Nothing which may or may not be contained in CRAG can alter the meaning of Schedule 4 or affect the local authority's duty. For that reason I do not propose to take up time considering Mr Edis's submissions in relation to CRAG.

42 I commented in paragraph [5] above about the drafting of these Regulations. I should like to associate myself with everything said by Stanley Burnton J on this topic in *Bell* at para [64].

43 Accordingly, subject to any further submissions from counsel, I shall make an order in the following terms:

> UPON HEARING Leading Counsel for the Claimant Gerard Ryan (hereinafter referred to as the First Claimant), Leading Counsel for the

Defendant Liverpool Health Authority and Leading and junior Counsel for Liverpool City Council (hereinafter referred to as the Second Claimant)

BY CONSENT IT IS ORDERED that:

1 There be permission to Liverpool City Council to be joined as Second Claimant.

2 There be permission for the First Claimant to amend his statement of case and schedule of loss, time for serving the amended statement of case being extended until 28 days after judgment on the specific issue or determination of any appeal in respect thereof.

3 There be permission to the Defendant to amend its statement of case and counter-schedule within 28 days thereafter.

4 The Court do determine the following specific issue namely

(a) Is the Second Claimant entitled to a declaration that it is required to take into account payments of income from capital administered by the Court of Protection in consequence of the First Claimant's settlement of his claim for personal injury when assessing his liability to contribute towards the cost of his residential accommodation?

or, alternatively,

(c) Are the First Claimant and the Defendant entitled to a declaration that the Second Claimant is not entitled to take into account payments of income from capital administered by the Court of Protection in consequence of the First Claimant's settlement of his claim for personal injury when assessing his liability to contribute towards the cost of his residential accommodation?

AND the Court having heard argument on the specific issue referred to in paragraph 4 above determines it as follows namely that the First Claimant and the Defendant are entitled to a declaration that AND THIS COURT DOTH DECLARE that the Second Claimant is not entitled to take into account payments of income from capital administered by the Court of Protection in consequence of the First Claimant's settlement of his claim for personal injury when assessing his liability to contribute towards the cost of his residential accommodation

AND IT IS ORDERED that the Second Claimant do pay to the First

Claimant and the Defendant (i) their costs of and occasioned by the application of the Second Claimant dated 20 February 2001 for permission to be joined as a party and (ii) their costs of the determination of the said specific issue (including the costs of the hearing on 10 and 11 July 2001) such costs if not agreed to be assessed (in the case of the First Claimant in accordance with Regulation 107 of the Civil Legal Aid (General) Regulations 1989)

AND BY CONSENT IT IS FURTHER ORDERED that the Second Claimant have permission to appeal against so much of this order as is not expressed to have been made by consent.