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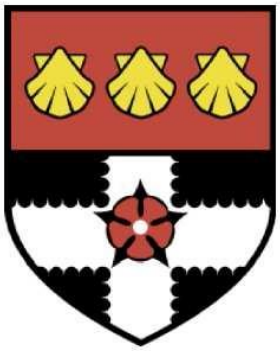

Who Cares for the Carers?

An analysis of the rights and remedies of informal carers under English law and an account of how these might be extended by original legislation

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School of Law

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DECLARATION

I confirm that this is my own work and the use of all material from other sources has been properly and fully acknowledged.

No part of this work has been published prior to its submission.

I declare that the original thesis comprised 94,379 words. The revised length of this thesis, including the major revisions recommended to me, is now 125,068 words. This word count excludes any indexes of legislation and case law, the bibliography and any bibliographical material, and explanations of that material, contained within the footnotes. It also excludes the appendix to this work which has been separately packaged.

Ian F. Johnson

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ABSTRACT

Human longevity in England and Wales has increased markedly in the past 50 years. But this increase has come at some very significant financial and social cost. More and more of us are having to care for our elderly parents ourselves. Careers are either put on hold or lost altogether; family incomes are much reduced; and, leisure time is lost, never to be recovered. All this care is administered without any legal entitlement to any compensation or reward. Given that the need for informal social care will rise yet further in the next few decades as the 'baby boomer' generation moves into old age, what can be done for this legion of family carers who hold our social care system together? Many writers have attempted to highlight this growing problem, but few, if any, have produced any viable solutions to what is an impending social crisis.

This thesis investigates how English law might respond to 'the longevity conundrum'. Through the concerted analysis of existing material, it explores, but ultimately discards, the proposal that informal carers should have the right to apply for financial provision under existing family provision legislation. It, similarly, refutes claims that informal carers might have a remedy under the law relating to unjust enrichment or through the imposition of a constructive trust on the care-receiver's estate. Instead, it proposes – and seeks to justify – a legislative solution in the form of a mediated 'family care contract'. Such a contract would not be a mere private affair. In practice, state funding for informal carers would need to underpin these arrangements, but, ultimately, that funding could be recovered from the private property (principally, housing) wealth that is a feature of our modern society, and the thesis then proposes how this might be done. At this point, research was undertaken through the use of semi-structured interviews to ascertain whether this process might find support from informal or 'family' carers. Although that research revealed an almost universal desire for change to our existing social care system for the elderly, there was little consensus over how such reforms should be funded and less what these reforms might look like. Some reflection was undertaken and comparisons were draw with certain other countries who had successfully introduced such reforms before it was concluded that public support for such reforms is unnecessary given that elsewhere these reforms have been driven by the ruling elite.

LEGISLATION

UK Legislation

The Administration of Estates Act 1925;

The Care Act 2014;

The Care and Support (Assessment) Regulations 2014;

The Care and Support (Eligibility Criteria)) Regulations 2014;

The Care and Support (Charging and Assessment of Resources) Regulations 2014;

The Children Act 1989;

The Forfeiture Act 1982;

The Inheritance (Family Provision) Act 1938;

The Inheritance and Trustees' Powers Act 2014;

The Inheritance (Provision for Family and Dependants) Act 1975;

The Inheritance and Trustees' Powers Act 2014;

The Health Services and Public Health Act 1968;

The Health and Social Care Act 2008;

The Law of Property Act 1925;

The Law of Property (Miscellaneous Provisions) Act 1989;

The Matrimonial Causes Act 1973;

The Mental Capacity Act 2005;

The National Assistance Act 1946;

The Offences Against the Person Act 1861;

Australian Legislation

The New South Wales Succession Act 2006;

The Succession Amendment (Family Provision) Act 2008;

New Zealand Legislation

Law Reform (Testamentary Promises) Act 1949 (New Zealand);

US Legislation

(755 ILCS 5/) the Illinois Probate Act of 1975.

CASE LAW

UK Case Law

Amalgamated Property Co. v Texas Bank [1982] QB 84;

Ames v Jones [2016] WL 04772447, 19th August 2016, County Court (Central London);

Re Andrews [1955] 3 All E R 248;

In re B deceased (a.k.a. Bouette v Rose) [2000] WLR 662;

Baines v Hedger [2008] EWHC 1587 (Ch.);

Balfour v Balfour [1919] 2 KB 571;

Bannigan v Frost [2009] EWHC 2276 (Ch.);

Re Basham [1986] 1 WLR 1498;

Bradbury v Taylor [2012] EWCA Civ. 1208;

Campbell v Griffin [2001] WTLR 981;

In re Callaghan deceased [1985] Fam. 1;

Re Christie deceased [1979] Ch. 168;

Christofides v Seddon [2014] WTLR 215;

Crabbe v Arun DC [1976] Ch. 179;

Cobbe v Yeoman's Row Management Ltd. [2008] 1 WLR 1752;

Re Cook (1956) 106 LJ 466;

Re Coventry deceased [1980] Ch. 46;

In Re Creeney, Creeney v Smyth [1984] N.I. 397;

Cunningham v Harrison [1973] QB 942;

Davies v Davies and Others [2015] EWHC 1384, [2016] EWCA Civ. 463;

Dellal v Dellal and Others [2015] EWHC 907;

Dillwyn v Llewellyn (1862) 4 De G. F. & J. 517;

Re Dennis [1981] 2 All E R 140;

Dillon v Public Trustee of New Zealand [1941] AC 294;

Donnelly v Joyce [1974] 1 QB 454;

Dowding v Matchmove Ltd [2017] 1 WLR 749;

Espinosa v Bourke [1999] 3 FCR 76, [1999] 2 FLR 747;

Eves v Eves [1975] 1 WLR 1338;

Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32;

Re Garland deceased; Garland v Morris [2007] EWHC 2 (Ch.);

Gillet v Holt [2001] Ch. 210;

Gold v Curtis [2005] WTLR 673;

In Re Gonin deceased [1979] Ch. 16;

Re Goodchild [1997] 1 WLR 1216;

Greasley v Cooke [1980] 1 WLR 1306;

Re Hancock (deceased) [1998] 2 FLR 346;

Herbert v Doyle [2008] EWHC 1950 (Ch.);

Hunt v Severs [1994] 2 AC 350;

Illot v Mitson [2011] EWCA Civ. 346, [2011] EWCA Civ. 346; [2012] 2 FCR 547; and, [2015] EWCA Civ. 346;

Illot v The Blue Cross and Others [2017] UKSC 17;

JT Developments v Quinn (1990) 62 P & C R 33;

James v Thomas [2007] EWHC 1212 (Ch.);

Re Jennings deceased [1993] EWCA Civ. 10; [1994] 1 FLR 536;

Jennings v Rice [2003] 1 P & C R 8;

Jeffery v Jeffery [2013] WTLR 1509; [2013] EWHC 1942 (Ch.);

Jelley v Iliffe [1981] Fam 128;

John v George (1995) 71 P & C R 375;

Jones v Kernott [2011] UKSC 53; [2012] 1 AC 776;

Jones v Padavatton [1969] 1 WLR 328;

Joyce v Rigioli [2004] EWCA Civ. 79;

Kinnane v Mackie-Conteh [2005] EWCA Civ. 45;

Lambert v Lambert [2003] 1 FLR 139;

Re Land deceased [2007] 1 All E R 324.

In Re Leach [1986] Ch. 226;

Lissimore v Downing [2003] 2 FLR 308;

Lloyd's Bank plc v Rosset [1991] 1 AC 107;

Lothian v Dickson and Webb [2014] WL 7255179 (High Court, Leeds);

Markou and Another v Goodwin and Others [2013] EWHC 4570 (Ch.);

In the Estate of McGarrell deceased [1983] 8 N.I.J.B.;

Re Kathleen McKernan deceased [2007] N.I. Ch. 6;

Merritt v Merritt [1970] 1 WLR 1211;

Myers v Myers [2004] EWHC 1944 (Fam.);

Re Nahajec (deceased) [2017] WTLR 1071; [2017] EW Misc. 11 (CC);

Ottey v Grundy [2003] EWCA Civ. 1176;

Parker v Clark [1960] 1 WLR 286;

Pascoe v Turner [1979] 1 WLR 431;

Re Pearce (deceased) [1998] 2 FLR 705;

Poole v Everall [2016] EWHC 2126 (Ch.); [2016] WTLR 1621;

Re Pearson-Gregory (1957) The Times, 11th October;

Powell v Benney [2007] EWCA Civ. 1283;

P v Cheshire West and Cheshire Council [2014] UKSC 19;

R v Dica [2004] 2 Cr. App. R. 28;

Riggs v Lloyds Bank plc (1992) 27 November, Court of Appeal (unreported);

Re Rowlands deceased [1984] FLR 813;

Schaefer v Schuhmann [1972] AC 572;

Schomberg v Taylor [2013] WTLR 1413; [2013] EWHC 2269;

Re Scott-Kilvert deceased, Robinson v Bird [2003] 2 All E R (D) 190;

Secretary of State for Work & Pensions v Deane [2011] 1 WLR 743;

In the Estate of Gertrude Stanley, 10th July 2014, High Court (unreported);

Sledmore v Dalby (1996) 72 P & C R 196;

Re the Estate of Julie Spalding deceased [2014] All E R (D) 73 (Mar);

Suggitt v Suggitt [2012] EWCA Civ. 1140;

Re Sylvester [1941] Ch. 87;

Synge v Synge [1894] 1 QB 466;

Taylor's Fashions v Liverpool Victoria Trustees [1982] QB 133;

Thompson v Foy [2010] 1 P & C R 16;

Thorner v Major [2009] UKHL 18;

Uglow v Uglow [2004] WTLR 1183;

Watts v Storey (1983) 134 NLJ 631;

Wayling v Jones (1995) 69 P & C R 170;

Williams v Lawrence [2011] WTLR 1455;

Williams v Johns [1988] 2 FLR 475;

Wright v Waters [2014] EWHC 3614 (Ch.); [2015] WTLR 353;

In Re Wilkinson deceased [1977] 3 WLR 514.

European Case Law

Case C-411/10 and C-493/10, R (NS) v Secretary of State for the Home Department [2013] QB 102

New Zealand Case Law

Re Welch [1990] 3 NZLR 1

US Case Law

Feliciano v Rosemar Silver Co., 514 N.E. 2d 1095, 1097 (1987);

Harris v Quinn, US Court of Appeals for the Seventh Circuit, January 21, 2014;

In re the Estate of Irene Hale, Illinois Supreme Court, June 30, 2008;

In re Estate of Willie Jolliff, Illinois Supreme Court, May 23, 2002;

In re Estate of Mary Elizabeth Riordan, Illinois Court of Appeal, July 23, 2004;

In re Estate of Rex B Lower, Illinois Court of Appeal, May 12, 2006;

In re Estate of Sofia Gebis, a disabled person, Illinois Court of Appeal, 18 March, 1999.

Canadian Case Law

Clarkson v McCrossen Estate (1995) 122 DLR (4^{th}) 239;

Skibinski v Community Living British Columbia and another [2010] BCSC 1500 (Supreme Court of British Columbia).

CHAPTER ONE

INVESTING IN OUR FUTURE

1.1 INTRODUCTION

As things stand, those in England and Wales who dedicate themselves to the care of an elderly,[1] disabled,[2] parent or other remoter relative, often incurring significant financial hardship and emotional suffering in doing so, have no right in law to any form of compensation, reward or any other significant financial incentive in return for their efforts.[3] Any real commitment on the part of an 'informal carer'[4] to a long-term, intensive social care programme for someone who needs ministering to in this way will usually come at a price. Careers will be sacrificed, opportunities for emotional happiness with others will be turned down, serious economic disadvantage may well result and, in many instances, lives will be put 'on-hold' while this much-needed care is delivered. Some may say that such compensation or rewards are solely matters for the care-receiver.[5] Yet, in reality, there may

[1] In this thesis, 'elderly' is defined as over 65 years of age. This definition is consistent with the definition of 'elderly population' adopted by the OECD – see: https://data.oecd.org/pop/elderly-population.htm (accessed: 06/09/17). As a result of increased longevity in the developed world in the late twentieth and early twenty-first centuries, the term 'old elderly' has now been coined to describe those in excess of 85 years of age.

[2] Regrettably, increasing old age often brings with it the inability to perform vital daily tasks. When it does, an elderly person often needs help in the form of social care. In this thesis, the phrase 'elderly disabled' is used to refer to elderly people who are unable to perform two or more ADLs (activities of daily living).

[3] This thesis uses the words 'compensate' and 'reward' interchangeably to describe the obligation on a parent to make financial recompense to a child who has devoted a significant period of time to their care and support in the parent's latter years.

[4] The term 'informal carer' is used to describe anyone who provides social care to another on a gratuitous basis – see: the definitions of 'carer' and 'care-receiver' discussed in chapter one, section 1.2.1, in Brian Sloan, *Informal Carers and Private Law*, (Hart, 2013). 'Informal carers' are also known as 'family carers' and these two terms will be used interchangeably throughout this work.

[5] For example, see: J. C. Tate, 'Caregiving and the Case for Testamentary Freedom', *University of California, Davis,* Vol. 42: 129;

be many reasons why a parent, or indeed remoter relative,[6] omits to make significant financial provision for an informal carer. Some people choose to die intestate because they are unable to contemplate their own mortality by making a will.[7] Some will also die leaving a will that provides for their several children in equal measure without any regard to what one child had done for them over and above anything done by that child's siblings. That may be because the will was made sometime before care was needed and the care-receiver simply never found the time to amend that will. It may be because the care-receiver was too ill, lacking the necessary testamentary capacity to make a new will that would acknowledge what the informal care had done for him/her. It may be because the care-receiver cannot assess the value of care that has been provided and wishes their children to 'sort that matter out' between them. Sometimes, an elderly parent has died leaving a will which has made no financial provision at all for an adult child who has provided a significant amount of care for them in the latter stages of their life, giving other reasons why they have decided not to make any financial provision (or, at least, financial provision which acknowledges the sacrifices that have been made) for the child, or other remoter relative, who has cared for them for many years.[8] Life, for those on the receiving end of such decisions, will seldom be seen as 'fair'.

Indeed, whichever way these events have unfolded for an adult child who may have provided this informal nursing care over many years, he/she is often left to start anew. For some, this has meant seeking employment in circumstances where they have been out of the workplace for some time whilst caring for their now deceased parent. For others who were living in their parent's home whilst providing care, it has meant looking for alternative accommodation in addition to a new job. In some instances, these 'informal carers' have given up their friends, their careers and even their own homes in order to care for an elderly parent. In the absence of a right in English law to any form of compensation, reward or other form of financial provision in return for this caring, one is left with a

[6] This thesis refers to the adult child carer of an elderly, disabled parent, but the relationship could equally be a nephew or niece caring for an elderly, disabled uncle or aunt if the uncle or aunt has not married and/or has not had any children.

[7] See: The Administration of Estates Act 1925, ss. 46 and 47. Intestacy, of course, leads to an equal division of the care-receiver's assets between their children if they die without leaving a surviving spouse and this fails to acknowledge what one child may have done for the parent (such as sacrificing much to care for the elderly, disabled parent) over and above what other children may have done.

[8] See: *Espinosa v Bourke* [1999] 2 FLR 747, where the claimant had given up her job at her father's request and had provided accommodation and care for him over a number of years, in circumstances where he was plainly in need of such care, only to be 'disinherited' by her father when he disapproved of the life-style that she was leading. The author was junior counsel for the claimant in this case.

deep sense of injustice over the way in which these people have been treated. Yet, in practice, our social care system depends almost entirely on their continuing willingness to make these sacrifices.

This social care system referred to is, of course, the English, and to a lesser degree, the Welsh social care system. Remarkably, the provision of social care by the state in the UK is divided on national grounds. Spending in England continues to fall well behind spending in Wales and in Scotland. In May 2019, the BBC reported that an analysis produced by the Health Foundation showed that spending in England on social care for the elderly and disabled amounted to £310 per annum. Yet, in Wales the same figure was £414 per person per annum and in Scotland it was £445 with personal care provided free to everyone assessed as being entitled to such care. In fact, the same analysis shows that, in England, spending per head of the population actually fell by somewhere between 8% and 10% between 2010-11 and 2016-17 once inflation was taken into account notwithstanding an increase in the longevity of the elderly over the same period.[9] If the increase in the general population during this period is taken into account, that fall has been calculated at 13.5 %; and, if the relative rise in the age of the population is also inserted into this equation, the decrease in spending is greater still.[10] So, it is England that appears to bear the greatest burden in relation to social care, and it is in England where the projected rise in the need for such care will hit hardest.[11]

Unfortunately, there is little sign that this under-provision will be arrested in the foreseeable future. Against the background of a decade of austerity in public spending and tax-cuts for other less-needy sections of society,[12] what we, as a nation, are spending on social care represents as little as

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[9] See: https://www.bbc.co.uk/news/health-48438132 (accessed 08/01/20) which puts the figure at 10% and Institute of Fiscal Studies, Briefing Note BN200 Public Spending on Adult Social Care in England - https://www.ifs.org.uk/uploads/publications/bns/BN200.pdf (accessed: 08/05/18) which puts the same figure at 8%.

[10] See also: Adult Social Care Funding (England), House of Commons briefing paper number CBP07903, 23 October 2017, p. 11 et seq. - http://researchbriefings.files.parliament.uk/documents/CBP-7903/CBP-7903.pdf which confirms this trend (accessed: 30/12/17);

[11] Wittenberg, Raphael, Pickard, Linda, Comas-Herrera, Adelina, Davies, Bleddyn and Darton, Robin (2001) *Demand for long-term care for older people in England to 2031.* Health Statistics Quarterly (12). pp. 5-17. Projections suggest that England will see a 60% increase in the numbers of people aged 65 and over between 1996 and 2031, and an 88& increase in the numbers of people aged over 85 in the same period.

[12] Corporation Tax, for example, has fallen from some 28% in 2010-11 to 19% in 2017-18 and will further fall to a rate of 17% by April 2020. – https://www.gov.uk/government/publications/corporation-tax-to-17-in-2020/corporation-tax-to-17-in-2020 (accessed: 30/12/17). Alongside this, the introduction of the main residence nil rate band for inheritance tax, is set to cost the exchequer some £2.63 billion between 2017 and 2021 – https://www.gov.uk/government/publications/inheritance-tax-main-residence-nil-rate-band-and-the-existing-nil-rate-band/inheritance-tax-main-residence-nil-rate-band-and-the-existing-nil-rate-band (accessed: 08/05/18).

approximately 1% of our GDP, with the result that the number of people aged over 65 who access publicly funded social care has fallen by at least 26 per cent over the past six years.[13] Yet, in practice, this makes little sense; the older we get as a generation, the more we need social care. It is now estimated that between 2015 and 2025, the number of people aged 65 years and older in the UK will increase by 19.4% from 10·4 million to 12.4 million;[14] and, that rise is set to continue at the same rate for at least another ten years beyond 2025.[15]

In reality, increased life expectancy and greater numbers of elderly will surely result in a significant increase in demand for social care. Already, research by Age UK in 2016 has indicated that some 1.2 million older people in England were not receiving the social care they need – an increase of 48% from 2010.[16] Moving forward, more recent research funded by the British Heart Foundation indicates that, between 2015 and 2025, the number of people living with a disability will increase by 25% from 2.25 million to 2.81 million. Over the same period, total life expectancy at the age of 65 years will increase by 1.7 years, from 20.1 years to 21.8 years. Disability-free life expectancy at the age of 65 years will increase by 1 year from 15.4 years to 16.4 years. However, life expectancy with disability will increase even more in relative terms, with an increase of roughly 15%.[17] What does this all mean? In simple terms, Maria Guzman-Castillo et al. claim that, '[t]he number of older people with care needs will expand by 25% by 2025, mainly reflecting population ageing rather than an increase in prevalence of disability. Lifespans will increase further in the next decade, but a quarter of life expectancy at age 65 years will involve disability.'[18]

Recent minor increases in UK Government spending will surely do very little to ensure that the projected increase in demand for social care will be met. At present, the UK Government spends some £58.55 billion on health and social care for the elderly, taking into account the funding for the NHS that is spent on the elderly and the money used for attendance allowance. Yet, the so-called 'precept'

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[13] https://www.kingsfund.org.uk/publications/autumn-statement-2016 (accessed: 09/01/18).

[14] Maria Guzman-Castillo et al., Forecasted trends in disability and life expectancy in England and Wales up to 2025: a modelling study, www.thelancet.com/public-health Vol 2 July 2017 file:///G:/Lancet%20article.pdf (accessed: 30/12/17)

[15] http://www.bbc.co.uk/news/health-38292363 (accessed: 30/12/17)

[16] Adult Social Care Funding (England), House of Commons briefing paper number CBP07903, 23 October 2017, p. 15 - http://researchbriefings.files.parliament.uk/documents/CBP-7903/CBP-7903.pdf (accessed: 30/12/17).

[17] fn.14, *supra*.

[18] Ibid. at p. 1.

– the ability of local authorities to increase council tax by up to 2% to raise money for social care costs – raised only £383 million, even though most local councils took up the option of increasing council tax rates. An improved Better Care Fund is set to provide additional social care funds of around £1.4 billion per annum between 2017/18 and 2019/20. And, finally, a new Adult Social Care Support Grant is expected to provide £240 million to local authorities in 2017/18. Yet, in real terms this is only a small fraction of the present cost of providing social care for the elderly, not to mention those who need that care but are unable to persuade their respective local authorities to meet that need. Notwithstanding this increased expenditure, 1.2m older people with care needs will continue to get no help at all, another 1.5m must rely on family and friends and an estimated 500,000 will need to pay for their own care.[19] Clearly, the burden on family and friends to provide informal social care for the disabled elderly can only increase in the coming years - what with increased longevity, medical progress and rising care costs - and that increase is likely to be very significant indeed.

In England and Wales, there is another division that also helps to force the care of the elderly into the hands of their immediate family and this is the distinction between health care and social care.[20] Since the introduction of the National Health Service ('NHS') in 1948, health care has been provided 'free at source', but social care has not.[21] Indeed, the two regimes are 'based on fundamentally different philosophical, organisational funding and eligibility requirements'.[22] Many have argued for the abolition of this distinction.[23] Yet, it remains, with over 90% of our social care is supplied by organisations – profit-making organisations – who lie outside of the State. The result is that it is estimated that there are one million people with social care needs who are not receiving any support at all because they cannot afford to pay for such care.[24] Many more must rely on their immediate

[19] fn.14, *supra*.

[20] As John Coggon remarks in his work, *What Makes Health Public?* (Cambridge University Press, 2012) at p. 2: '… conceptions of health are necessarily value-laden'. Historically, government policy has drawn a marked distinction between health care and social care. That distinction, it is submitted, is unsustainable. The need for social care is a product of old age; and, old age is a context of health.

[21] See: http://www.nhshistory.net/shorthistory.htm (accessed: 19/10/17).

[22] See: Beresford, Slasberg and Clements, From Dementia Tax to a Solution for Social Care, *Soundings*, Number 68, Spring 2018, pp. 78-93 (16)

[23] For example, Jonathan Herring, *Caring and the Law*, (Hart Publishing, 2013) pp. 137-8. Indeed, in the article referred at fn. 22 *supra*, Professors Beresford and Clements raise the question whether medicating someone is social care or health care.

[24] *Ibid*. at p. 79.

family for such support. In fact, notwithstanding a significant increase in the elderly population in England and Wales over the past 30 years, the number of people who are supported by the social care system has fallen from 2 million in 1992 to just 1.3 million today.[25] The gap has, of course, been bridged by informal caring but only at a significant cost to those who have to provide that care.

That said, our society also remains committed – it seems – to the nurture and continuing care of its members, but particularly the elderly and infirm.[26] And, many more people are now living much longer lives than those in preceding generations. What will be the consequences of this new-found longevity? Who is going to care for this increasingly older generation? How are the costs of this care going to be met? The financial crises of the late twentieth and early twenty-first centuries have cast grave doubts over the idea that 'the welfare state' can continue to provide for its members 'from the cradle to the grave'.[27] Indeed, more recent events have only served to show that those in, and those seeking, power in this country seem to be deeply divided over the question of social care for the disabled elderly.[28] These phenomena raise some very searching questions. If society is going to continue to be heavily reliant on informal carers to provide the care that an increasingly older generation will need, should it not encourage them in their devotions by the provision of some form of financial incentives in return for the commitments that many of them will need to make? Can English law be adapted to give informal carers a right to if not full compensation but perhaps some form of financial acknowledgement of the work they do? If English law as it stands cannot be adapted, might legislation provide the answer? If so, what form would that legislation take? Whom would it affect and how? What machinery would be needed in order to ensure that an elderly, disabled parent is cared for by an adult child (or remoter relation) in an appropriate manner? From these thoughts, the idea for the present thesis was born.

In these circumstances, this chapter begins exploring the extent of the concerns voiced by those who are actively looking into the challenges that increasing longevity in an ageing population will bring. And, one must acknowledge, here, that the developed world as a whole must find a solution to these

[25] *Ibid*. p. 84.

[26] This commitment can be seen in the establishment, and continuance, of the National Health Service and in the provision of the State Pension to those (presently) over 65 years of age, as well as the limited availability of social care funding.

[27] http://www.nationalarchives.gov.uk/pathways/citizenship/brave_new_world/welfare.htm (accessed: 06/09/17).

[28] https://www.kingsfund.org.uk/publications/articles/political-crisis-nhs (accessed: 05/03/20).

problems not merely England and Wales, albeit those solutions may differ from nation to nation.[29] In essence, the process lays bare a future where any continuing economic prosperity depends on finding answers to what is later described as 'the longevity conundrum'. It then ends by looking at the methodology of the research that that underpins this thesis together with other solutions that have been put forward to the threat posed by the 'demographic time bomb' that some believe now awaits us.[30] Chapter two (which takes the form of a literature review) begins by analysing the work of a number of prominent academic and social commentators who have expressed considerable disquiet in recent years over the plight of the elderly and what their future might hold. In essence, this analysis is intended to demonstrate how the ideas generated in the final chapters of this thesis build upon, and add to, existing thinking on the subject. In a similar vein, the second half of this chapter will investigate the role of various actors – the State, the family and society itself – in either providing or encouraging the provision of social care for the disabled elderly, establishing the moral case for action to further encourage the caring of adult children for their parents. Chapter three takes a broader look at how the elderly, disabled function within our society. It serves to highlight the difficulties that surround dealing with this section of society, difficulties that will need to be addressed by anyone seeking a solution to the challenge that lies ahead. Chapters four and five will then consider whether English law can be easily adapted in some way in order to provide financial recompense for the work that informal carers do. Here, the focus is on our family provision legislation, and the twin concepts of estoppel and undue enrichment as potential alternative remedies for the informal carer. And, in chapter six, one particular proposal will be presented, and its practicality assessed, in an effort to show how English law might need to change in order to provide this body of people with what many proponents of social justice would describe as their 'just entitlement'. That particular proposal is then reviewed in chapter seven, the concluding chapter in this work.

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[29] In 1960, less than one person in ten in the developed world was over 65 years of age. By 2030, that figure will have risen to almost one in four – source: OECD (1996). The term 'the developed world' denotes a group of 23 countries comprising the membership of the Organisation for Economic Co-Operation and Development (OECD) from 1973 – 1993. In the UK, life expectancy is expected to rise to the late 80s by 2030 – https://www.nhs.uk/news/medical-practice/uk-life-expectancy-expected-to-rise-to-late-80s-by-2030/ (accessed: 19/11/17).

[30] See: fn. 20, *supra*, at p. 84. See further: Pat Thane, Social Histories of Old Age and Aging, *Journal of Social History* (Vol. 37, issue 1), Sept. 2003, OUP, which charts the increase in the percentage of the population of England that is over 60 years of age from 6% in the nineteenth century to 18% at the end of the twentieth century. With the progress of medical science, improved diets and an understanding of the benefits of exercise this rise – which must be placed alongside the rise in the country's population from 53 million in 1960 to a projected figure of over 70 million in 2026 (see: https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/articles/overviewoftheukpopulation/mar2017 (accessed: 10/01/20)) – is set to continue sharply the deeper one goes into the twenty-first century.

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1.2 CENTRAL CONCERNS

Those living in the developed world in the latter half of the twentieth century – and, now, in the first two decades of the twenty-first century – have experienced something of a cataclysmic event.

> "Global life expectancies have grown more over the last fifty years than over the previous five thousand. Perhaps two-thirds of all the people who have ever lived to the age of 65 are alive today."[31]

In a matter of a little more than half a century those of us who are fortunate to reside in these parts are now anticipating living a good deal longer than our forebears did a mere 50 to 60 years ago.[32] Closer to home, the numbers of people in the UK aged 65 and over are projected to rise by almost 50% (48.7%) in the next 20 years to something over 16 million.[33] Today, a man aged 65 who is living in the UK can expect to live to the age of 86, and by 2050 this expectation will have risen to 91;[34] similarly, a woman aged 65 who is living in the UK can expect to live to the age of 89, while her counterpart aged 45 can expect to live to the age of 91.5.[35] The most significant increases in life

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[31] Peter G. Peterson, *Gray Dawn: How the Coming Age Wave Will Transform America and the World*, (Barnes and Noble, 1999).

[32] Between 1960 and 2010, life expectancy in England and Wales increased by 10 years for men and by 8 years for women. In 2010, the most common (modal) age of death in England and Wales was 85 years for men and 89 years for women; see: the Office for National Statistics - http://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/deaths/articles/mortalityinenglandandwales/2012-12-17 (accessed: 05/11/16).

[33] At present, there are some 10 million people over 65 in the UK, with 1.5 million of those over 85. These figures are expected to rise sharply in the coming years – see: http://www.bbc.co.uk/news/health-18610954 (accessed: 13/11/16). By 2020, in the UK as a whole, people over 50 years of age will comprise almost a third of the workforce and almost one half of the total adult population; see: 'Improving Opportunities for Older People' - https://www.gov.uk/Government/policies/improving-opportunities-for-older-people (accessed: 06/09/17).

[34] See: https://www.nhs.uk/news/medical-practice/uk-life-expectancy-expected-to-rise-to-late-80s-by-2030/ (accessed: 04/09/17).

[35] The gap between the average life expectancy of men and women is falling and could equalize as early as 2030 – http://www.ilcuk.org.uk/images/uploads/publication-pdfs/Tomorrows_World_-_The_Future_of_Ageing_in_the_UK.pdf (accessed: 27/03/18).

expectancy may be found in the 'oldest old', those aged 85 years and above. In mid-2016, there were some 1.6 million people aged 85 and over living in the UK; yet, by mid-2041 this figure is projected to double to 3.2 million.[36] Where will the funding for the social care needs of these elderly come from? By 2020, so the UK Office for National Statistics predicts, people over 50 will comprise almost a third (32%) of the workforce and almost one half (47%) the adult population of the UK.[37] And, by 2021 there are set to be more over-65s than under 16s in the UK.[38] In light of these statistics, a number of respected institutions have voiced serious concern over the ability of the country to provide the social care that its ageing population will need in the next few decades.[39] Indeed, there is now some real anxiety that projected figures significantly under-estimate life expectancy. One commentator has recently claimed that '[l]ife expectancy is an average … if you take the average number, one in ten of us should budget living for ten years longer.'[40]

These statistics are also reflected on the other side of the Atlantic. In the United States, individuals who are 65 years of age and over presently make up around 12 to 13 per cent of the population. However, it is predicted that this figure will rise to approximately 20 per cent by 2030.[41] By 2050, those aged over 65 will represent some 88.5 million; and, those over the age of 85 will triple from 5.7 million (in 2010) to 19 million in 2050.[42] Again, there are grave concerns over the ability of the country to cope with an ageing population.[43]

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[36] The Office of National Statistics, 2016, at: https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationprojections/bulletins/nationalpopulationprojections/2016basedstatisticalbulletin#a-growing-number-of-older-people (accessed: 13/06/18).

[37] 'Improving Opportunities for Older People' - https://www.gov.uk/Government/policies/improving-opportunities-for-older-people (accessed: 10/09/13).

[38] See: The Office for National Statistics, *Social Trends*, 2008.

[39] The Institute of Fiscal Studies, 'UK health and social care spending', - https://www.ifs.org.uk/uploads/publications/budgets/gb2017/gb2017ch5.pdf (accessed: 16/11/17).

[40] *Ibid.* at p. 17, referring to an observation made by Steven Baxter, a partner with Hymans Robertson LLP, investment consultants and actuaries.

[41] These figures are taken from information supplied by the Federal Interagency forum on Aging-Related Statistics, Older Americans 2000: Key Indicators of Well-Being, app. A, table 1B, and cited in Peggie R. Smith, 'Elder Care, Gender and Work: The Work Family Issue of the 21st Century', 25 *Berkeley Journal of Employment & Labor Law*, 351 (2004), at p. 352.

[42] Thomas P. Gallanis and Josephine Gittler, 'Family Caregiving and the Law of Succession: A Proposal', 45 *University of Michigan Journal of Law Reform*, p. 761 (2012) at http://ssrncom/abstract=2194412 (accessed: 12/06/18).

[43] *Ibid.*

Similar trends can be identified in Europe. In the EU-28, the median age of its citizens increased by 4.3 years between 2001 and 2016.[44] In Italy and Germany, for example, there are approximately three people of working age for every person over the age of 65; however, far more seriously, it is predicted that by 2030 the ratio of working taxpayers to non-working pensioners in these two countries will be as low as one to one.[45] On the back of these and other similar statistics, the EU has warned that the age pyramid across the EU-28 is being transformed by low birth rates and higher life expectancy.[46] In other words, the proportion of citizens of working age is shrinking, while the number of those who are retired is expanding; and, in these circumstances, the burden on those of working age to provide for the health and care services will increase markedly in the next few years.[47]

It is this expanding, and increasingly needy,[48] section of our society that is the central concern of this thesis. How is society going to provide for the demands of the disabled elderly when those demands are growing and the working population who will be asked to meet those demands is diminishing?[49] In the media, stories abound over the numbers of care workers who leave their jobs each year.[50] Now, with clear indications from the UK Government that immigration will be severely reduced following the country's departure from the European Union, questions are beginning to be raised in regard to how the UK's public sector might meet the present level of demand for social care, never mind the

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[44] http://ec.europa.eu/eurostat/statistics-explained/index.php/Population_structure_and_ageing (accessed: 07/09/17). The median age of citizens living in the 28 states ('the EU-28') comprising the EU rose from 38.3 years to 42.6 years between 2001 and 2012.

[45] fn. 44, *supra*, p. 14.

[46] http://ec.europa.eu/eurostat/statistics-explained/index.php/Population_structure_and_ageing (accessed: 19/11/17).

[47] fn. 41, *supra*.

[48] fn. 42, *supra*, at p. 763.

[49] In fact, this country has already reached a point where there are more people over state pension age than there are children; see: 'Later Life in the United Kingdom', published by Age UK in September 2015, at p. 3 – available at: http://www.ageuk.org.uk/Documents/EN-GB/Factsheets/Later_Life_UK_factsheet.pdf?dtrk=true (accessed 27/ 09/15).

[50] 'The state of the adult social care sector and workforce in England', published by Skills for Care (2015), at http://www.skillsforcare.org.uk/Document-library/NMDS-SC,-workforce-intelligence-and-innovation/NMDS-SC/State-of-2014-ENGLAND-WEB-FINAL.pdf which puts the figure at 300,000 per year, some 25.4% of the workforce (accessed: 16/11/17).

projected increase in demand that puts the number of disabled elderly who will require social care by 2025 as high as 2.8 million.[51]

How demanding might the disabled elderly be? Counter-arguments have suggested that the demands of this section of society are being over-stated.[52] With the recent increase in the numbers of elderly people has come, it is claimed, an increase in the health and well-being of this ever-growing group. This means, so they say, that the 'old-age dependency ratio', which has governed political thinking on future social policy as it affects the elderly, and which predicts that the elderly will become a growing burden on society, is outmoded and unreliable. Spiyker and McInnes develop these ideas in an article in *The British Medical Journal* published on 12 November 2013. If the life expectancy of the general population is growing, so they argue, we should expect people to remain healthier and economically productive for longer. In other words, '… rising life expectancy makes these older people "younger," healthier, and fitter than their peers in earlier cohorts.'[53] The suggestion is therefore that, when considering social policy issues relating to later life, attention should be focused on not on those over the age of 65, but on those within 15 years of the average life expectancy figures for our society at any given time.

On one level, the point is well made. If one is considering the levels of state expenditure that may be required in treating the elderly in society in the next few decades, the fact that such treatment is likely to be needed later in life than it was in previous generations is clearly a relevant consideration. In fact, one might say that the recent pushing back of the age at which the state pension may be drawn is an implicit acknowledgement of this trend. Nevertheless, Spiyker and McInnes make no real predictions about the levels of disability this section of society will encounter and the cost of treating the same.[54] Indeed, it is all too apparent that people age in different ways, some rapidly, some slowly, and those who do age rapidly will feel the effects of ageing as soon as, if not earlier than, their parents. In fact,

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[51] This is a projected increase of 25% on the figure for 2015 for those elderly in need of care – https://www.newscientist.com/article/2132521-think-the-uk-has-a-social-care-crisis-now-just-wait-until-2025/

[52] J. Spiyker and J. McInnes, 'Ageing Population: The Time-Bomb That Isn't', *British Medical Journal,* 16 November 2013, at p. 1 *et seq*.

[53] *Ibid.* at p. 2.

[54] Indeed, Spiyker and McInnes go on to note that the present picture appears to be a complex one, and appear to contradict their headline message in doing so, where they say: 'Age specific disability rates seem to be falling, yet recently born generations have a worse risk factor profile than older ones. For example, current obesity trends may have a big effect on public health through related diseases such as diabetes. Ageing related diseases like osteoarthritis are predicted to increase and start at a younger age. This may not only result in an increased risk of cardiovascular and other chronic diseases, it also suggests that the ageing process can speed up as well as slow down, with obvious implications for public health policy' – *ibid.* at p. 6.

logic surely dictates that greater numbers of disabled elderly are bound to put a greater burden on the public purse in comparison with their forebears, particularly where the numbers of those of working age are falling.[55] What is more, the projected increase in numbers of 'old elderly', who have a far greater propensity for needing social care, only reinforces the conclusion that the financial cost of providing social care for the disabled elderly, and the manpower that is needed to service that care, is set to rise markedly in the next decade and beyond.[56]

In these circumstances, the rationale that underpins our continuing focus on those over the age of 65 remains.[57] Spiyker and McInnes are not suggesting that the demand for care will no longer be there. Indeed, the rapid increase in demand on adult social services in England and Wales in the past 10 – 20 years is already well-documented.[58] And, it remains the case that research still suggests that around three-quarters of elderly people will develop a social care need at some point in their lives.[59]

Other more recent studies paint a much bleaker picture. Foremost of these is a paper in *The Lancet* published in July 2017 in which ten leading doctors predict that, '… between 2015 and 2025, the number of people aged 65 years and older will increase by 19.4% from 10.4 million to 12.4 million and

[55] And, of course, life expectancy has risen much faster than the state pension age.

[56] On a general level, life expectancy in England is projected to continue increasing; with life expectancy at birth for females projected to be 85.1 years by 2026 and 86.6 years by 2036. Males are also projected to live longer, increasing to 82.1 years by 2026 and 83.7 years by 2036 – see: https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/articles/overviewoftheukpopulation/july2017 (accessed: 10/01/20).

[57] This postponement of the need for social care may not be confined to care for physical disabilities; in fact the prognosis is improving for disabilities caused by mental states such as Alzheimer's disease. Recent research published on 19 April 2016 by the University of Cambridge indicates that the UK has seen a 20% fall in the incidence of dementia over the past two decades, mainly in men, as a result of greater awareness of how lifestyle affects mental as well as physical health, yet there are still approximately 210,000 new cases of dementia per year in the UK – https://www.alzheimers.org.uk/site/scripts/news_article.php?newsID=2590 (accessed: 28/04/16)

[58] This is acknowledged in two recent BBC news items on adult social care for the elderly by Alison Holt and Nick Triggle, one at http://www.bbc.co.uk/news/health-31001151 (accessed: 07/09/17), 'In the past 10 years, the number of people aged 65 and over in England has increased by 1.4 million, a 17% rise. Many of them will be enjoying fit and active later years, but there has also been a 17% increase in people reaching their 80th birthday. They are more likely to be living with complicated conditions that mean they need support.' (Alison Holt), and the other at http://www.bbc.co.uk/news/health-31015807 (accessed: 07/09/17), 'Spending on care for people aged 65 and over has fallen by a fifth in England over the last 10 years, an analysis by the BBC shows. The research - based on official data - showed £1,188 was being spent in 2003-4 per person over the age of 65. By 2013-14 that had fallen to £951 once inflation is taken account - a drop of 20% - prompting experts to warn that vulnerable people were being failed' (Nick Triggle).

[59] http://www.bbc.co.uk/news/health-18610954 (accessed: 07/09/17).

the number living with disability will increase by 25% from 2.25 million to 2.81 million'.[60] On the basis of this data, coupled with their findings on the impact of the most common age-related conditions on the disabled elderly as a section of society, the authors go on to demand a more wide-ranging response from government:

> 'In the context of the rapid and continuing rise in the number of older dependent people in the UK, the government needs to give urgent consideration to options for more cost-effective health and social care provision in all its forms. First, national capacity for institutional care needs to increase. Second, informal and home care requires stronger policy support, for example by means of tax allowances or cash benefits. Affected individuals and their families pay an estimated 40% of the national cost of long-term care from income and savings.[27] Notably, the disadvantage of older people on lower incomes unable to live independently will increase if the shortage of caregivers and the precarious state of institutional and domiciliary care provision is not addressed.'[61]

This is perhaps a more realistic portrayal of what the future holds. What we clearly have in store is growing section of society with ever-increasing social care needs set against a picture of successive governments intent on following policies of economic austerity when it comes to public sector spending. Indeed, Sir Michael Marmot, Director of the Institute of Health Equity at University College London has warned that the rise in life expectancy rates in the UK has begun to slow and that government austerity measures may be to blame.[62]

If we accept that the elderly as a group include those most likely to be in need of social care, and that a significant portion of this group are unlikely to earn sufficient income,[63] or have sufficient accessible

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[60] http://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(17)30091-9/fulltext (accessed: 19/11/17).

[61] *Ibid*.

[62] http://www.bmj.com/content/358/bmj.j3473 (accessed: 19/11/17)

[63] In 2012, nearly 10% of people aged 65+ said they are having difficulty or struggling to manage their income – 'Later Life in the United Kingdom', published by Age UK in September 2015, at p. 3 – available at: http://www.ageuk.org.uk/Documents/EN-GB/Factsheets/Later_Life_UK_factsheet.pdf?dtrk=true (accessed 27/ 09/15).

savings,[64] to pay for that care over the latter part of their 'extended' lifetimes,[65] then who is to bear the costs of this care? Of course, some people within this group will fund their own social care through a combination of income, whether from remaining in work or from private pensions or investments, and capital, whether in the form of savings or other property that can be realised by sale.[66] Wherever this money is to come from, significant sums are likely to be involved.[67].

In the UK, successive governments have provided some encouragement for those beyond the age of 65 to continue to be income-producing by the fairly recent removal of 'the default retirement age'.[68] However, this has been off-set by the recent projected increase in the state pension age to 66 and the anticipated further increase of this age to 67 by 2028.[69] Those who are planning for, and looking forward to, giving-up work altogether as they move into their sixth decade, are now considering 'phased-retirement' or undertaking part-time work in order to bridge the gap between their

[64] 20% of people aged 60+ in Great Britain (2.8 million people) owe money. 7% (nearly 1 million) have outstanding mortgage debt, 12% (nearly 1.7 million) owe money on credit cards, and 3% (about 400,000) have a bank loan; see: 'Later Life in the United Kingdom', *ibid.* at p. 20.

[65] 'On average, life expectancy at birth increased across all local areas in England and Wales by 1.5 years for males and 1.1 year for females between 2006–08 and 2011–13' –'Later Life in the United Kingdom', *ibid.* at p. 6.

[66] This can be done by 'trading down' one's home.

[67] One pressure that an increasingly ageing population will bring is a greater demand for state pensions, particularly in circumstances where private pensions have been under-funded due to a general failure to appreciate the effects of increasing longevity. For the Channel 4 television programme, 'Dispatches', shown in 2015, actuaries estimated that in order to meet 'average' living costs whilst in retirement a person over the age of 65 would need an income of £17,800 per annum over a twenty year period and that this would require a 'pension pot' of at least £300,000 which was described as 'out of reach for many of us' - http://www.channel4.com/programmes/dispatches/ (accessed: 14/07/15).

[68] According to information published by the UK Government in October 2014: 'Nearly a quarter of a million more people aged 65 and over [had] opted to stay in work since the default retirement age … was abolished on 1 October 2011. As at [October 2014], there were 1,103,000 workers aged 65 and over in work compared to 874,000 in the quarter October to December 2011 – an increase of 229,000' – https://www.gov.uk/Government/news/older-peoples-day-1-million-in-work-over-65-3-years-since-end-of-default-retirement-age (accessed: 27/09/15). Nevertheless, this has come at a price as, up until April 2013, those over 65 were entitled to a larger personal allowance for income tax than the rest of society, but that has now been lost, something that, together with the rise in the age at which one is entitled to receive one's State pension, is perhaps indicative of measures that have been introduced to combat the costs of this rise in life expectation mentioned earlier - http://www.bbc.co.uk/news/business-17463473 (accessed 27/09/15).

[69] From December 2018, 'the age at which an individual becomes entitled to receive their 'state pension' will start to increase for both men and women to reach 66 by October 2020. The Government is planning further increases, which will raise the state pension age from 66 to 67 between 2026 and 2028', see: http://www.ageuk.org.uk/money-matters/pensions/changes-to-state-pension-age/ (accessed 11/07/15).

anticipated retirement age and the date of their actual retirement.[70] For the elderly over the age of 65, whose financial resources cannot bear those costs, much of that burden is placed on the shoulders of the spouse or children of those elderly who are in need of care.[71] And, indeed, the continuing devotion of adult children to the welfare of their elderly parents is one of the most significant features of the social care system presently in place in England and Wales. Recent figures suggest that the burden of providing such care is almost equally split between the care-receiver's spouse or partner and the care-receiver's adult children.[72]

The provision of informal social care is also something over which emotions often run deep. Consider, for a moment, the following observation on adult children caring for their older relatives in this country at the turn of the twenty-first century:

> " … it is … unfair that … a son or daughter is caring for their elderly relatives and parents in the family home, and, perhaps foregoing part of their own lives for a number of years … the elderly person may get so infirm that it is no longer possible for the carer to work. Having put in all that time and energy, not only do they not get thanked for it, but if they are not actually thrown out of the house that the elderly person owned, a charge is made on it and they are, in effect, penalised for … taking on the Government's role, the major caring role for that time."[73]

The maker of this statement clearly feels that the burden placed on informal carers is a heavy one; and, one which often appears to go unrewarded. Here, the talk is of unrequited personal sacrifice and, ultimately, of social injustice. And, the blame for this situation is then placed firmly at the feet of 'the Government'.

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[70] In recent studies, 'phased-retirement was been found to be better for the well-being of employees approaching retirement age' – http://www.hrmagazine.co.uk/article-details/phased-retirement-better-for-wellbeing (accessed: 07/09/17).

[71] Norman Daniels, *Am I my Parents' Keeper?* (OUP, 1998) p. 79, where the author notes that, 'About 80 percent of long-term care in our society is provided by families to their elderly relatives.' There is no reason to believe that the figure is any different over this side of the Atlantic.

[72] L. Pickard, 'A Growing Care Gap? The supply of unpaid care for older people by their adult children in England to 2032', *Ageing and Society,* April 2014, at p. 2 – in fact, the figures related by Pickard indicate that slightly more disabled elderly receive care from the adult children rather than their spouse.

[73] 'With Respect to Old Age: Long Term Care – Rights and Responsibilities', a Royal Commission Report on Long Term Care, March 1999, parag. 8.23.

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1.3 THE CONTINUING ROLE OF GOVERNMENT

As noted earlier, in the UK there is a marked distinction between health care, on the one hand, and social care, on the other, albeit that the boundaries between these two forms of care have been known to be somewhat indistinct and confusing.[74] Health care is free at source, and that source is the NHS. The only charges are those levied for prescriptions (medicines), and many people are exempt from these charges.[75] In somewhat stark contrast, social care – care in washing, dressing, bathing, feeding, assistance in using toilet facilities and the like – is not freely provided. In fact, the social care that is provided by the State is provided by local authorities and not central government; and, here, it is both means-tested[76] and, where available, heavily-rationed.[77] In fact, some local authorities in England in Wales are currently only meeting social care costs where the applicant's care needs are assessed as 'critical'. Elsewhere, the majority of local authorities will only cover those costs where these needs are assessed as 'substantial'; only rarely is there any further provision.[78]

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[74] 'Vulnerable Elderly Forced to Pay for Medical Care', BBC News Online, 28 September 2010 - http://www.bbc.co.uk/news/health-11429779 (accessed: 16/11/17).

[75] Exemptions include those over 60, those under 16, those 16-18 and in full time education, in-patients in hospital, those with long-term medical conditions and who are in need of treatment, those on State benefits and those on low incomes who get help paying the prescription charges - http://www.nhs.uk/nhsengland/Healthcosts/pages/Prescriptioncosts.aspx (accessed: 05/11/16).

[76] http://www.bbc.co.uk/news/health-18610954 (accessed: 05/11/16) People needing help at home have to pay for their own care if they have savings of more than £23,250. Where they have savings of £14,250 or more but less than £23,250, they are required to contribute to social care costs. When a person needs full-time residential care, the value of their home may also be taken into account.

[77] http://www.publicfinance.co.uk/feature/2016/10/care-conundrum (accessed: 05/11/16) and http://news.bbc.co.uk/1/hi/uk/7394362.stm (accessed: 05/11/16).

[78] Councils currently assess the needs of people needing care as either 'critical', 'substantial', 'moderate' or 'low'. But there is little consistency across the categories and many councils provide support only for people with 'substantial' care needs with a few restricting eligibility to the 'critical'. Studies have shown that in 2013: (i) the vast majority, 130, had a threshold at substantial; (ii) only three councils provided social care to people falling in to all the bands; (iii) 16 provided care to those with moderate needs and above; and (iv) three councils only provided care for those with critical needs – https://www.gov.uk/government/news/social-care-users-will-be-guaranteed-a-minimum-level-of-council-help-under-new-plans (accessed: 13/11/16)

In England and Wales the vast majority of those who are most regularly provided with domiciliary care receive that care from informal carers, principally their spouse or their adult children.[79] Of those who receive informal social care from an adult child or spouse, slightly more disabled elderly receive such care from their children.[80] Moreover, the English social care system's reliance on adult children caring for their elderly, disabled parents will continue notwithstanding the passing of the Care Act 2014, which followed the UK Government's acceptance of many of the proposals set out in the Dilnot Report.[81] Indeed, where the care-recipient's social care needs are already being provided for by a carer, there is no duty for their local authority to do anything more.[82] In contrast, where someone is assessed to be in need of social care and has no carer, if the person so assessed asks for care and the eligibility conditions are satisfied, his/her local authority is now under a duty to provide that care.[83] If the means of a care recipient are assessed to be in excess of the means-test threshold,[84] the local authority has a power to charge for such services.[85] In other words, those people who fall outside the means-test that is presently in place, and are not being cared for by a carer, are expected to pay for their own social care – at least where their need for the same is not attributable to illness and consequently treatable through the NHS. In very broad terms, this is the social care system presently in place in England and Wales, and it has been widely acknowledged that the system is heavily dependent on the provision of care by informal carers.[86]

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[79] In England, approximately 1.4 million older people living at home with significant care needs receive unpaid care and, of these, 85% receive that care from either an adult child or their spouse – Linda Pickard *et al.,* 'Mapping the Future of Family Care: The receipt of informal care by older people with disabilities in England to 2032', *Social Policy and Society,* Vol. 11, 4, at pp. 533-45.

[80] fn. 72, *supra*, p. 2.

[81] 'Fairer Care Funding: The Report of the Commission on Funding of Care and Support' (July 2011), commonly known as 'the Dilnot Report'.

[82] The Care Act 2014, s. 18(7).

[83] The eligibility conditions: 1, 2 and 3 set out at *ibid*, s. 18(2)-(4).

[84] This currently stands at £23,250 for capital. If your savings are above this limit, you will be charged the full cost of your care. If your available capital is below this sum, but above £14,250, you must contribute £1 for every £250 above this limit. If your savings are below this bottom limit, your contribution will be nil. There are also provisions in regard to income, but these will only bite where the care-receiver has a significant income over and above their state pension.

[85] The Care Act 2014, s. 14(1)(a) and (b) and s. 18(1)-(4).

[86] The House of Commons, Communities and Local Government Committee on Adult Social Care, Ninth Report, 2016-17, parag. 105, at p. 44 - https://publications.parliament.uk/pa/cm201617/cmselect/cmcomloc/1103/1103.pdf (accessed: 26/04/18).

To a large extent, this system is a product of history. Through the ages, the medical profession has always treated 'the sick and the lame', but often no more. Conventionally, physical disability in old age has never been regarded as 'sickness'; indeed, there is presently no known cure (beyond the replacement of a hip or knee) for the immobility and the decline in mental capacity that often accompanies extreme old age. In England and Wales, it has long been accepted that there is only so much that the medical profession can be expected to do, and the provision of social care has always been something beyond that limit, whether for doctors or for specialist nurses. In simple terms, providing social care has traditionally been thought of as merely doing for someone else what most others can do for themselves. And, in an industrial society driven by capitalist values, there has been a stigma attached – at least from Victorian times – to those 'unable to stand on their own two feet'.[87] As a result, such people have often had to endure a life of poverty and shame; and, those who are left to care for them appear to have been tainted by the misery that society has inflicted on those in need of such care.

Can the distinction between health care and social care be justified in any significant way? It is said that health care involves 'the treatment, control or prevention of a disease, illness, injury or disability', and the care or aftercare of a person with needs that relate to one or more of these conditions.[88] Social care, on the other hand, is focused on providing assistance with activities of daily living, and other incidental benefits which allow the care-recipient to play a more meaningful role in society.[89] Stated thus, the distinction seems fairly clear. Yet, the deeper one looks, the more that distinction becomes blurred.[90] At a basic level, health care alleviates or at least manages 'suffering'. Yet, the elderly suffer with their disabilities as much as anyone else. If the task of government is to respond to the legitimate concerns and needs of its citizens, the distinction appears to be anomalous and, for that reason, unsustainable.[91]

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[87] The stigma of poverty is still very-much with us in twenty-first century Britain – http://www.poverty.ac.uk/tags/stigma (accessed: 02/05/18).

[88] The National Framework for NHS Continuing Healthcare, Practice Guidance Notes, at p. 51, para. 2.1, - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/213137/National-Framework-for-NHS-CHC-NHS-FNC-Nov-2012.pdf (accessed: 25/06/18).

[89] *Ibid*, at parag. 2.2.

[90] *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213, where the Court of Appeal dismissed an appeal against an earlier judgment granting a claimants' application for judicial review of her local health authority's decision to characterise her continuing care as a tetraplegic as 'social care'.

[91] See: chapter three, section 3.2, *infra*.

Whether one agrees with this or not, the social care system that has been in place for the past eighty years and more has not been able to escape its origins. Indeed, there is a strong consensus across the country that, if it was ever 'fit for purpose', that system is now broken.[92] Yet, there is no clear idea how it might be mended, nor is there any unified vision of how our social care system should look in the future. In January 2018, Jeremy Hunt became the Secretary of State for Health and Social Care, when the brief for social care was added to his existing portfolio.[93] Since then, senior backbenchers are reported to have signed a cross-party letter to the Prime Minister urging her to establish a parliamentary commission into the future of health care, and she has responded by promising to devise a long-term plan for the funding of the health service.[94] Lord Darzi's interim report for the Institute of Public Policy Research, published in April 2018, suggests that the NHS requires £50 billion additional funds by 2030, and the report is said to have the backing of many senior Conservative and Labour MPs.[95]

Since the community reforms of the early 1990s, the UK Government has consistently promoted the care of the elderly at home by informal carers – often the adult children of those who are being cared for – as a better alternative to institutionalised care.[96] In 2014, the UK National Audit Office estimated that the value of social care provided informally – i.e. without payment – in England, in the year 2011, was some £55 billion.[97] While the public purse has, undoubtedly, benefited from this approach, it is these adult carers as a group who have had to bear the real cost. In the 1980s and early 1990s, the cost of long-term accommodation of the elderly in care homes (residential and nursing) largely fell on the tax-payer.[98] At this point in time, the availability of social security funding for those entering care

[92] 'The State of Social Care in Great Britain in 2016', published by Leonard Cheshire (reg. charity) http://cdn.basw.co.uk/upload/basw_55214-6.pdf (accessed: 24/07/17) and '10 Charts that show what's gone wrong with social care', BBC News, - http://www.bbc.co.uk/news/health-39043387 (accessed: 24/07/17).

[93] Since writing, the post has now been passed to Matt Hancock MP.

[94] https://www.express.co.uk/news/uk/936902/NHS-crisis-theresa-may-funding-revolt-34-mps-sign-letter-urging-action and www.bbc.co.uk/news/uk-politics-43558878 (accessed: 26/04/18)

[95] http://www.bbc.co.uk/news/health-43898963 and https://www.ippr.org/files/2018-04/1524670994_lord-darzi-review-interim-report.pdf (accessed: 26/04/18).

[96] The White Paper *Caring for People: Community Care in the next Decade and Beyond*, 1989.

[97] National Audit Office, Report by the Comptroller and Auditor General, 'Adult Social Care in England: An Overview', 13th March 2014, at p. 4.

[98] Until the coming into force of the NHS and Community Care Act 1990 ('the NHSCCA') in 1993, private residential and nursing home care could be paid for by the DHSS from uncapped 'supplementary benefit' payments. This effectively ceased with the introduction of the NHSCCA which reinforced the distinction between

homes was widespread and this funding was available without any form of 'needs assessment' taking place.[99] Nevertheless, with the rapid increase in life expectancy that was seen in the latter part of the twentieth century, and the difficult financial climate of the late 1980s and early 1990s,[100] it was quickly apparent to those on both sides of the political spectrum that this cost was simply too much for the ordinary tax-payer to bear.[101] In fact, it has recently been estimated that the UK Government needs to spend another £9 billion in England alone in order to cover the social care costs for those already within in the established critical and substantial needs categories.[102]

In regard to the funding of social care, it is interesting to note that, in 2011, the average length of stay in a UK care home was computed at 801 days.[103] Indeed, the fact that this figure has been falling over the past twenty years or so can be seen as a testament to the success of the UK Government's policy to encourage the disabled elderly to remain in their own homes, or to take up residence with their children, in the face of the inability of the state purse to fund care home costs for this growing section of society. In short, the longer a disabled elderly person is cared for at home, the shorter is his or her stay in a care home. Care homes also appear to be faring poorly under UK Government policy. In May 2016, the BBC news service reported that more than a quarter of care homes in the UK were in danger of going out of business within three years.[104] The financial pressures under which care homes operate come from many sources,[105] but a significant feature is the complaint that the fees provided to

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health and social care, placed the responsibility for funding such social care arrangements squarely onto the shoulders of Local Government and provided them with a limited budget in order to do so.

[99] The Kings Fund, *'Paying for Social Care Beyond Dilnot'*, R. Humphries, May 2013, at p. 5.

[100] This was something which saw the NHS on the verge of bankruptcy in 1987.

[101] fn. 72, *supra*, p. 3.

[102] This figure comes from the King's Fund which has estimated that a further injection of £9 billion pounds is needed immediately simply to meet the present demand for social care for those with substantial or critical needs, which represents a 50% increase on current costs – http://www.independent.co.uk/life-style/health-and-families/health-news/raise-taxes-to-give-free-social-care-to-elderly-and-chronically-ill-says-think-tank-9709805.html (accessed: 05/11/16); and, see: the earlier conclusions of the Barker Commission (established by the King's Fund to look at the future of health and social care in England): https://www.healthinsurancedaily.com/health-insurance/incoming/article447981.ece (accessed: 05/11/16).

[103] J. Forder and J-L Fernandez, '*Length of Stay in Care Homes*', (2011), a report commissioned by BUPA Care Services, PSSRU Discussion Paper 2769, Canterbury, p. 3.

[104] http://www.bbc.co.uk/news/uk-36200855 (accessed 11/05/2016).

[105] These pressures include the new national living wage and the return that investors demand from their investment. Much of this investment is reported to come from private equity firms and US real estate companies, *ibid*.

operators by local authorities for residents for whom they are responsible are often insufficient to meet the cost of providing that care.[106] In the event that the threatened closure of a significant portion of the care homes comes to pass, this will throw a considerably greater burden on to the shoulders of those who must care for the disabled elderly. But, what, then, is this care and who provides it?

Care is something that is provided to all of us at some stage of our lives; often, it is provided at several stages – invariably in childhood and commonly at the end of life stage. Care delivered outside the medical profession is described as 'social care'. And, 'adult social care' has been defined in English legislation as including '… all forms of personal care and other practical assistance for individuals who by reason of age, illness, disability, pregnancy, childbirth, dependence on alcohol or drugs, or other similar circumstances, are in need of such care or assistance'.[107] Another significant feature of care is that it involves labour on the part of the carer,[108] often skilled, but commonly undervalued.[109] It is the provision of 'adult social care' to the disabled elderly that is the central focus of this thesis; nothing herein should, therefore, be taken as applying to the care of children or adults who are disabled, physically or mentally, but who are under the age of 65. Defined in the terms set out in section 9(3), it is anticipated that 'adult social care for the disabled elderly' would exclude items such as 'companionship' as the need for such help is not specific to the disabled elderly. The provision of adult social care in the home of the care recipient makes the service provided one of 'domiciliary care'.

In light of recent austerity, pressure is undoubtedly mounting on a system that relies so heavily on informal care by adult children of working-age. Fewer people are now receiving publicly-funded care than in 2008.[110] Despite this, the numbers that make up the section of the population aged 85 years

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[106] Support for this comes from John Stowbridge, the managing director of Avery Health Care Group, which operates 47 care homes across England - http://www.bbc.co.uk/news/uk-36200855 (accessed: 11/05/2016).

[107] The Health and Social Care Act 2008, s. 9(3), This definition was also adopted in the Health and Social Care Act 2012, s. 65(4)(a). Interestingly, the Law Commission's Report on Adult Social Care (Report 326, Law Commission, 2011) was reluctant to adopt this definition, suggesting that the only practical, albeit rather unhelpful, way of defining 'adult social care' was to say that it was '… the care and support provided by local social services authorities pursuant to their responsibilities towards adults who needed extra support' – parag. 1.5.

[108] This is acknowledged by Virginia Held in her book, *The Ethics of Care – Personal, Political and Global* (OUP, 2006) at p. 30, where she remarks that: 'A seemingly easy distinction to make is between care as the activity of taking care of someone and the mere 'caring about' of how we feel about certain issues … care involves work and the expenditure of energy on the part of the person doing the caring'.

[109] 'Caring activities are devalued, underpaid and disproportionately occupied by the relatively powerless in society', Joan Tronto, cited in Virginia Held, *The Ethics of Care – Personal, Political and Global* (OUP, 2006) p. 18.

[110] The King's Fund, '*Paying for Social Care beyond Dilnot',* fn. 99, *supra*, p. 8.

and over have increased by more than 20%.[111] And, over the past decade, the number of those providing unpaid care of 50 hours or more per week has increased by some 26%.[112] More often than not, this burden has fallen on women;[113] and this burden is increasing with increasing age.[114] The long-term prognosis for this sizeable section of society is bleak. Projections indicate that the numbers of elderly people living at home in England with some form of dependency will increase from a figure of 2.1 million in 1996 to some 3.4 million in 2031 if one assumes that age-specific dependency rates remain unchanged.[115] While it may be that some of this pressure will be released due to rising life expectancy rates in elderly males,[116] it is still predicted that the numbers of adult children providing informal unpaid care to older parents will increase from approximately 675,000 in 2007 to over one million in 2032.[117] Much of this will be down to what is likely to be a sharp rise in the numbers of older disabled elderly people, i.e. those aged 75 and more, who are, as a class, projected to increase by some 85% between 2007 and 2032. Of this increase, it is further projected that 200,000 of these would have to be 'working age' adults if supply is going to continue to meet demand. If our social care system could be funded properly, this demand could be met by the commercial sector, provided, of course, that the market is able to supply sufficient numbers of care workers following the country's departure from the EU. Yet, at present, that funding seems to be well out-of-reach and the further burden that this will place on informal carers seems to be inevitable. Where are these informal carers going to come from? In fact, the demand for unpaid care from adult children is predicted to exceed supply as early as 2017 and this informal, unpaid 'care gap' is set to increase significantly from that point on.[118]

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[111] *Ibid*. p. 9.

[112] *Ibid*. at p. 9.

[113] In 2011, there were 5.41 million people who provided unpaid care in England. Of these, there were around 3.12 million females (58%) and around 2.29 million males (42%) providing unpaid care, representing 11.8% of the total female population and 8.9% of the total male population in England – see: http://www.ons.gov.uk/ons/rel/census/2011-census/detailed-characteristics-for-local-authorities-in-england-and-wales/sty-unpaid-care.html (accessed: 30/4/14).

[114] Those aged 50 to 64 provide the most care and this was also the age group with the greatest gender inequality with 24% of women aged 50 to 64 providing unpaid care, compared with 17% of men in the same age group – *Ibid*. fn. 37.

[115] Linda Pickard et al, 'Relying on Informal Care in the New Century?', Informal care for elderly people to 2031', *Ageing and Society, 20(6),* 756.

[116] See: fn. 99, *supra*, p. 2; and, *ibid*. p. 761.

[117] See: fn. 99, *supra*, p. 15.

[118] *Ibid.* at p. 19. See also: the BBC News website at http://www.bbc.co.uk/news/health-34841592 which, on the 17th November 2015, reported that: 'There will be a shortage of nearly 200,000 care-workers in the UK

If supply is to keep pace with demand, this can only be achieved, it seems, at some significant financial cost. Back in 2007, a report by Liverpool Victoria Friendly Society put that cost at some £21 billion per annum. Surveying over 2,000 adults, the report disclosed that adult children who care for their elderly parents provide, on average, more than 33 hours per month of unpaid care;[119] and, so the argument goes, this time and energy is productivity which is lost to the national economy. Indeed, current data demonstrates a clear link between the provision of unpaid social care, on the one hand, and the provider's withdrawal from the labour market on the other.[120] Moreover, as we move further into the twenty-first century, there is considerable doubt whether this 'care gap' will ever be bridged as the propensity of adult children to provide unpaid social care for their elderly parents is relatively uncertain as things presently stand.[121] Indeed, what society has seen in recent times is the rise of 'the sandwich generation';[122] in short, in addition to maintaining themselves one section of society is being called upon to pay for not only the care of their disabled parents but also some part of the costs of a university education for their own children.[123] This section of society is now said to be 'sacrificing [their own] retirement prospects' to care for their elderly parents, falling into debt and cutting back expenditure on essential items in order to do so.[124] In the words of Helena Herklots, the Chief Executive of Carers UK, 'Caring has always been part of life, but demographic change means that today's families face very different pressures than previous generations.'[125]

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within the next five years, according to a study from the charity 'Independent Age' and the International Longevity Centre. The report says that plans to curb the number of lower-paid migrant workers, along with the squeeze on care funding, will make it difficult to recruit enough staff' (accessed 19/11/15).

[119] http://www.privatehealth.co.uk/news/september-2007/elderly-get-21-billion-of-unpaid-care-220/ - (accessed: 30/6/14).

[120] D. King and L. Pickard, 'When is a carer's employment at risk? Longitudinal analysis of unpaid care and employment in midlife in England', *Health and Social Care in the Community (2013), 21 (3),* pp. 303 - 314 – and, this burden is likely, again, to fall on women as the main care-providers.

[121] See: fn. 72, *supra*, at p. 20.

[122] In 1981, Dorothy A. Miller coined the term "sandwich generation" to signify people caring for aging parents while supporting their own children – https://www.retiredhealthchoices.com/index.php/tag/sandwich-generation/ (accessed: 23/12/ 14).

[123] While Higher Education fees are, for the most part, covered by 'the student loan', wealthier parents are expected to make a significant contribution to the accommodation and living costs of their children while they take their under-graduate courses.

[124] Carers UK, Caring and Family Finances Inquiry (full report) (2014) at http://www.carersuk.org/for-professionals/policy/policy-library/caring-family-finances-inquiry (accessed: 08/09/17).

[125] http://www.telegraph.co.uk/news/health/elder/10615380/Baby-boomers-sacrificing-retirement-prospects-to-care-for-surviving-parents.html (accessed: 08/09/17).

Although GDP for England is predicted to rise over the next fifteen to twenty years,[126] it seems impractical to expect the rising costs of social care for these disabled elderly to be paid for entirely by the public purse. In reality, such costs are likely to far outstrip any money that can be comfortably raised for this purpose from general taxation.[127] Unpalatable as it may seem, the UK Government is likely, therefore, to place even greater store by the care and support adult children are able to offer their parents.[128] Such care is often regarded as not only more cost-effective, as it reduces demands on central funds, but it is also considered to be significantly more efficient, as certain 'care activities', such as shopping, making meals, washing and cleaning, etc., may well contain incidental benefits for the carer, particularly if he/she is living with the care-receiver; what is more, the carer will commonly know what the care-receiver needs and will therefore be able to target his/her care more efficiently.[129] If, at one point, the perception was that the younger generation was no longer caring for their parents, in the words of Norman Daniels, '… sociologists have [now] debunked [that] myth'.[130] Yet, notwithstanding the benefits that such care may bring for both the care-receiver and society, English law, whether private or public, still appears to afford adult children little by way of financial recompense in return for what they do.

Thus far, the focus of this initial section of this work has been on social care provided to the disabled elderly by their adult children. However, it must be acknowledged that not everyone who lives into their 'third age'[131] will have adult children who are able to provide that care. Some will, of course, be

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[126] The predicted growth in GDP of 2.25% per annum made by the Treasury in 2000 has largely been borne out by the performance of the UK economy in the years since the turn of the century – see: H.M. Treasury: Building Long-Term Prosperity for All, Pre-Budget Report; November 2000*,* H.M. Treasury, London 2000; Wittenberg, R. et al, '*Demand for Long Term Care for Older People in England to 2031'*, Health Statistics Quarterly, Winter 2001; and, see http://www.theguardian.com/news/datablog/2009/nov/25/gdp-uk-1948-growth-economy (accessed: 14/05/2014) which reports an average growth in UK GDP of 2.06% per annum since 2000.

[127] See: chapter 2, *infra*, for a more extensive discussion of this issue.

[128] Again, the picture is very similar over the other side of the Atlantic where it is estimated that 22.5 million people presently care for an elderly person; by 2020, this is expected to rise to some 40 per cent of the national workforce – Martha Lyn Craver, *Growing Demand for Elder Care Benefits*, Kiplinger Business Forecasts, May 29, 2002, cited in Peggie R. Smith, 'Elder Care, Gender and Work: The Work Family Issue of the 21st Century'*,* 25 *Berkeley J. Emp. & Lab. Law* 351 (2004) at p. 352.

[129] D. A. Wolff, 'The Family as Provider of Long-Term Care: Efficiency, Equity and Externalities', *J. Aging Health 1999: 11,* at p. 360.

[130] See: fn. 71, *supra,* at pp. 36-37, where the author also notes that the care offered to the elderly by their children is, '… usually a type, quantity and quality of care that the public sector is unlikely to ever provide a substitute for'.

[131] 'Third Age is an emerging life stage, running roughly from ages 50 to 75, made possible by our longer life expectancy' – http://www.midlifeunlimited.com/page.cfm?page=35 (accessed: 18/10/16).

married or cohabiting with a partner. And, it has already been acknowledged that this section of society already supply almost half of the social care needs of the disabled elderly as a group;[132] indeed, in many instances elderly couples (whether married or not) will share their respective social care burdens, each one helping the other. In the absence of care from their children, they – and, of course, those elderly without either partners or children – are likely to represent an increasing burden on the public purse, which in turn must provide for their social care needs of those who need such assistance.

Statistics indicate that, in 2012, there were some 580,000 people aged between 65 and 74 who were without children to care for them in their old age.[133] This figure is set to increase to more than one million by the year 2030.[134] And, of course, there are those aged 75 and over who are also without children and therefore dependent on the State for social care insofar as they are unable to meet the cost of such care from their own resources. The Office of National Statistics has indicated that, in 2017, there were as many as 3.8 million people aged 65 and over living alone in the UK.[135] By 2030, it has been estimated by the Institute of Public Policy Research that there will be some two million people in the UK over the age of 65 and without children.[136] How the needs of this group – the childless disabled elderly – will be met is not directly addressed in this thesis and much further research will be required if any meaningful proposals are to be formulated. Notwithstanding this, the final chapter of this thesis does acknowledge that there is little or no reason not to extend the proposals made therein to friends and neighbours who might be persuaded to take on the burden of caring for this group. Moreover, any solution one might find to the issue of adult children caring for their elderly disabled parents may well free up public funds that may be directed towards those who do not have adult children to care for them in their old age.[137]

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[132] *Ibid.* at p. 15.

[133] The Office for National Statistics, Statistical Bulletin: Families and Households 2017, (released: 8 November 2017).

[134] The Institute for Public Policy Research's report, 'The Condition of Britain, The Generation Strain: Collective Solutions to Care in an Ageing Society,' April 2014, p. 14.

[135] https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2017 (accessed: 15/03/18).

[136] See: http://www.bbc.co.uk/news/health-43898963 and https://www.ippr.org/files/2018-04/1524670994_lord-darzi-review-interim-report.pdf (accessed: 26/04/18).

[137] Institute of Fiscal Studies, Briefing Note BN200 Public Spending on Adult Social Care in England - https://www.ifs.org.uk/uploads/publications/bns/BN200.pdf (accessed: 08/05/18). See also: Adult Social Care Funding (England), House of Commons briefing paper number CBP07903, 23 October 2017, p. 11 et seq. - http://researchbriefings.files.parliament.uk/documents/CBP-7903/CBP-7903.pdf which confirms this trend (accessed: 30/12/17);

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1.4 CULTURAL NUANCES

While the whole of the developed world must find an answer to the challenges thrown up by an ageing population and their need for social care, as a consequence of cultural and ideological differences a solution to 'the longevity conundrum' adopted by one country may be in stark contrast to one fashioned by another. Research has shown that there are marked divisions between the UK, on the one hand, and Japan, on the other, in the way in which each society looks at the relationship between social care and inheritance.[138] Until the late 1940's, Japan's laws of succession provided that only the eldest male child would inherit the family home, but that was accompanied by a deep-rooted moral responsibility to care for his parents in their old age, a task usually delegated to his wife. Although these succession laws have since been repealed, and latterly replaced with a scheme of compulsory insurance as a means of meeting the social care costs of the elderly, this tradition still lives on in many divisions of Japanese society.[139] Compare this with how the UK population looks at inheritance and social care. Here, research has established that there is no real link between the two.[140] In times past, UK testators – perhaps as a consequence of shorter lifespans than their Japanese counterparts – have passed down family wealth to their children somewhat earlier in their lives and 'inheritance' was therefore seen as a means of setting a child up in life rather than something that came with reciprocal obligations towards the donor. In modern-day UK, testators – even though they are largely free to choose which child should inherit – tend to favour equality of distribution of wealth as between their children, often leaving the children as a group to sort out the question of compensating a child who has provided social care to the testator rather than to tackle that question themselves.[141]

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[138] See: Misa Izuhara, *Housing, Care and Inheritance* (Routledge, 2009).

[139] *Ibid.* at pp. 110-112. Moreover, even where modern inheritance laws have provided for an equal distribution of wealth between the children it is not uncommon in Japanese society for daughters to 'voluntarily' give up their share in a deceased parent's estate in favour of her 'senior' male sibling who has cared for that parent and will continue to care for the surviving parent, *ibid*. at p. 101.

[140] *Ibid.* at p. 114. And, see further: Misa Izuhara, 'Negotiating Family Support? The Generational Contract between Long-Term Care and Inheritance', *Journal of Social Policy* 33(04):649 – 665, October 2004.

[141] *Ibid.* at p. 119; and see: Brian Sloan, 'Testamentary Freedom and Caring Adult offspring in England & Wales and Ireland, a chapter in *The Future of Family Property in Europe*, Katharina Boele-Woelki, Jo Miles and Jens M. Scherpe (eds), (Intersentia, 2011).

This cultural and ideological divide is also reflected on mainland Europe.[142] In northern Europe, children tend to leave the family home as soon as they achieve sufficient economic autonomy and once this happens parental support is significantly reduced; yet, in southern Europe parents will often maintain their children much longer with several generations living in the same household and children providing care to their parents as and when such care is required.[143] If we look somewhat closer into how different countries in northern Europe have approached the care of the elderly, disabled citizens and are, presently, dealing with this 'problem' we can see even more marked divisions from one nation to the next. In Sweden, where twenty per cent of its inhabitants have already reached 65, and where this figure is projected to rise to twenty three per cent in the next twenty years or so, most elderly social care is funded by local municipalities with the aid of government grants. Some charges are levied where the recipient has the income to pay for these services, but there is a financial cap on their liability to contribute to the cost of their own social care, calculated on a monthly basis.[144] Overall, the level of provision is considered to be generous and almost wholly funded by the tax system.[145]

In most other northern European countries, the family is expected to do more to provide the elderly, disabled with the social care that they need. In England and Wales, the introduction of 'direct payments', where the needs of an elderly, disabled care-receiver are assessed by his/her local authority, and a budget for the costs of this care is calculated where the recipient qualifies for such provision, has attempted to put a lid on such spending. Here, the Government has declared direct payments to be its '… preferred mechanism for personalised care and support [as such payments] provide independence, choice and control by enabling people to commission their own care and support in order to meet their eligible needs',[146] and has explained that the use of direct payments made to adult service users '... is designed to be used flexibly and innovatively and there should be no unreasonable restriction placed on the use of the payment, as long as it is being used to meet eligible

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[142] Giuseppe A. Micheli, 'Two Strong Families in Southern Europe? Re-Examining the Geography of Kinship Regimes Stemming from the Reciprocity Mechanisms between Generations', *European Journal of Population*, Vol. 28, No. 1 (February, 2012), pp. 17-38.

[143] *Ibid*. at pp. 23-24.

[144] See: https://sweden.se/society/elderly-care-in-sweden/ (accessed: 19/01/20).

[145] *Ibid*. Statistics show that in 2014 only 4% of social care costs for the elderly in Sweden were funded by the recipients of such care.

[146] Paragraph 12.3 of the draft Care and Support Statutory Guidance issued under the Care Act 2014 by the Department of Health, June 2014.

care and support needs.[147] That said, regulations also provide that direct payments cannot be used to purchase care services from a close family member living in the same household, except in exceptional circumstances.[148]

This is in stark contrast to the position in some other north European states. In the Netherlands, for example, those who require care services and who opt to receive direct payments in lieu of state-provided care are permitted to use these payments to pay relatives to perform these services regardless of whether they are living in the same household as the care recipient.[149] There are conditions that must be satisfied before the care recipient can engage someone living in the same household as a carer. In order to be eligible to receive these direct payments from care recipients, household members (including partners) must show that the caring duties that they have performed on an informal basis 'overstrain' them; if they are able to do so, they can be paid for the care they provide through the use, by the care recipient, of these direct payments under a formal contract, if the care recipient can justify their engagement.[150] In this way, family members can become 'care workers', albeit without subsidiary employment rights such as sickness and holiday pay.[151] In Germany, where the provision of care services are funded through hypothecated social insurance contributions from employers and employees which are fixed by Federal Law, those who require care services may either receive these services from a provider organisation or take a lower value cash allowance and arrange their care informally, i.e. paying relatives to provide the care they need.[152] Typically, the lower cash value allowance is a little over one half of the commercial cost of these services.[153]

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[147] *Ibid.* at parag. 12.35 – 12.36.

[148] The NHS suggests that the use of direct payments in this manner may be permitted where only the family member could fulfil the role of care provider due to '… religious reasons, language difficulties or specific health problems' and perhaps other reasons, which it does not specify but which it does acknowledge may exist. The Care and Support (Direct Payments) Regulations 2014 do permit local authorities a general discretion to give prior consent to pay a close family member living in the same household in return for providing management and/or administrative support to the direct payment holder.

[149] E. Grootegoed, 'Relatives as paid care-givers: how family carers experience payments for care', (2010) *Ageing and Society,* 30, pp. 467-489.

[150] Although 5% of the annual direct payments budget may now be used to pay family members living in the same household as care recipients without this justification - *ibid*. at p. 487.

[151] *Ibid*. at p. 470.

[152] C. Glendinning, *et al.,* 'Funding long-term care for older people: lessons from other countries', (2004), The Joseph Rowntree Foundation.

[153] J. Keefe *et al.,* 'Financial payments for family carers: policy approaches and debates', in A. Martin-Matthews and J. Phillips (eds.), *Ageing at the inter-section of work and home life: Blurring the boundaries*, (New York, Lawrence Eribaum, 2008) at pp. 185-206.

Against these distinctive cultural and ideological backgrounds, it is therefore unlikely that a solution to the on-going care of the disabled elderly in England and Wales is going to be the same as the answer to the 'longevity conundrum' that is adopted in some of its European neighbours, still less, say China or Japan. Moreover, the need for a solution is urgent. Research indicates that burden on the care-recipient's family to provide whatever social care in needed has grown very significantly since the early years of the twenty-first century.[154] Indeed, evidence suggests that it will grow further as time moves on with suggestions that we will be facing a sizeable 'care gap' before very long,[155] and the problems associated with this 'care-gap' are not confined to England and Wales. Fertility rates across Europe and North America are dropping. The elderly constitute an ever-growing proportion of society; yet, the number of tax-payers in these countries is shrinking.[156] And, there is little, if any, evidence that this will change in years to come. In the USA, in most of mainland Europe, and in China and Japan, the only concerted help for the elderly, disabled community is often their immediate family with the State providing only the most basic of safety-nets should the family be unable or unwilling to become involved.[157] In these circumstances, there is a clear need for a new vision for the provision of social care for the elderly, not only in England and Wales, but across the whole of the developed world.

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[154] Since 2001, the growth in the number of carers has outstripped population growth by 16.5% and the number of people providing 20-49 hours of care a week has increased by 43%, Carers UK, Valuing Carers (2015) - https://www.carersuk.org/for-professionals/policy/policy-library/valuing-carers-2015 (accessed: 26/04/18).

[155] See: The House of Commons, Communities and Local Government Committee on Adult Social Care, Ninth Report, 2016-17, parag. 104, p. 44, reporting the evidence given to it by Dr. Linda Pickard.

[156] Joelle Long, 'Caring by Contract', a chapter in *The Future of Family Property in Europe,* Katharina Boele-Woelki, Jo Miles and Jens M. Scherpe (eds), (Intersentia, 2011). And, see: Martha A. Fineman., 'Responsibility, Family and the Limits of Equality: An American Perspective', in C. Lund, H. Keating and J. Bridgeman (eds), *Taking Responsibility, Law and the Changing Family,* (Ashgate, 2011).

[157] A. Hashimoto 'Aging in Japan', at https://www.pittmag.pitt.edu/sep94/s94classes.html (accessed: 22/02/17) and F. Russo, 'Caring for Aging Parents: Should there be a law?' - http://healthland.time.com/2013/07/22/caring-for-aging-parents-should-there-be-a-law/ (accessed: 22/02/17).

1.5 INITIAL CONCLUSIONS

Rarely does a month pass without the question of the future of 'social care for the elderly' making another appearance in the UK media. At the time of writing, the latest suggestion, coming on this occasion from the Resolution Foundation, proposes that a tax – in the form of increased national insurance contributions – should be levied on the over-40s in an effort to raise the funds that are so sorely needed to maintain our social care system.[158] The funding of the UK social care system is, of course, a matter that is entirely separate from the solutions proposed in this thesis. Those solutions are only intended to be partial ones. Care and carers will be needed by those who do not have adult children – or, indeed, any other relatives or friends – who might be on hand to offer their services. Their needs have to be met in some form or another. The solutions that appear later in this thesis must go hand-in-hand with other recommendations for change in order that any new social care system can be built on firm foundations. The suggestion for a new hypothecated tax – already described as another 'dementia tax' – has the distinct disadvantage of taxing those who are already having to bear the financial burden of caring for their elderly parents, the 40-65 year olds that already form 'the bank of mum and dad', sometimes re-mortgaging their own homes in order to pay for their children's University education. Of course, in almost any proposal for funding there will be winners and losers.

In the solutions proposed in this thesis, it is 'the family inheritance' that is under attack. Those who feel that family 'property wealth' should be capable of being handed down from one generation to another may not take kindly to the idea that, under the proposals set out in this thesis, this property wealth may need to be mortgaged to the State in order to pay for the costs of the owner's social care. But, that consequence may be avoided by those who are to inherit providing the required social care themselves or perhaps paying others to do so. What will fund the proposed scheme – at least in the more affluent parts of the country – will be the untaxed increase in property wealth from which many of the elderly (and, those who will shortly fall into this category) have benefited. Public money will need to support the scheme before what is paid out in social care costs can be recovered from this property wealth. And, that will require a degree of 'quantitative easing', through the purchase, or even the creation, of gilts and the like, out of which central government will be able to raise the funds necessary to pay informal carers something that might resemble a 'living wage'. Yet, what will result is a fairer, more meritocratic society, where wealth is not simply handed down from generation to generation, but earnt by one generation caring for its predecessors.

[158] https://www.resolutionfoundation.org/app/uploads/2018/05/A-New-Generational-Contract-Full-PDF.pdf (accessed: 02/07/18).

There will be those who will fall outside the proposals that are to be put forward. Those disabled elderly who have no adult children, friends or family who either wish or are able to provide them with domiciliary care will need to rely on commercial care market, if they are able to do so, to meet their social care needs or else look to the State to provide them with the care they need, albeit that the costs of such care would be recoverable by the State from their estate on death. Where they are not financially able to pay for the costs of their social care, the State must provide that care, and do so at a level that is far higher it does at present. Society, through its agent the State, is morally responsible for meeting the legitimate needs of its members.[159] And, what could be more of a legitimate need than the maintenance of one's dignity and general health in old age?

However, in light of the differences in approach to the problem in hand perhaps the first point to consider is whether there is any legal or moral obligation on a care-receiver to compensate or reward one or more of his/her adult children for any informally-provided social care that may have been administered by him/her/them to their elderly, disabled parent over what may be a protracted period of time and which may have involved considerable sacrifice on their part?[160] This is a wide-ranging concern that has produced a significant amount of published literature over recent years. Its subject matter has attracted not only legal and moral philosophers but also many others besides. While the review that follows can only capture the basic ideas that have been put forward on this and other related issues, it does, nevertheless, serve to focus our attention clearly and distinctively on what lies ahead.

In an ageing world, care is our future. And, we must invest in that future now or we will see it slip from our hands.

[159] See: chapter two*, infra*.

[160] For the moment, the focus of this thesis is on the claims of adult children on their parents for the provision of such care. Chapter six, *infra*, will consider whether what is proposed for adult children might be expanded to include other informal carers who deliver similar degrees and amounts of social care to the disabled elderly.

CHAPTER TWO

LITERATURE REVIEW AND METHODOLOGY

2.1 LITERATURE REVIEW

The central concern of this thesis has attracted the thoughts of an array of academic writers in recent years, from moral philosophers to health economists and political agitators of many creeds. Although the inquiry set out in later in this chapter broadens out and considers how several of the leading strands of ethical theory might respond to the proposition that adult child carers should receive greater financial incentives for the work they do in caring for their elderly, disabled parents, the initial part of this review largely focusses on the response of legal academics. Foremost in this category of authors over on this side of the Atlantic are Brian Sloan and Jonathan Herring.

In his monograph, *Informal Carers and Private Law*,[161] Sloan considers the scope for the development of private law remedies in England and Wales which might be used to generate financial compensation for those who provide social care for elderly relatives on an informal basis. While presenting the reader with an insightful analysis of how such claims might be framed in various diverse areas of the law, such as proprietary estoppel, testamentary promises, unjust enrichment and the inheritance family provision legislation, together with a measured and thought-provoking review of the hurdles that litigants must jump in order to be successful in those claims, Sloan provides the reader with what is largely a dispassionate account of how informal carer claims have been considered by the courts. His intent is not to provide the reader with solutions, but rather to identify, explain and rationalise the difficulties that may face carers in attempting to place their claims within the framework of existing English law.[162]

[161] See: Brian Sloan, *Informal Carers and Private Law*, (Hart, 2013).

[162] *Ibid.* at p. 245.

Perhaps the one instance where Sloan does attempt to consider the future development of such law appears in section 5.3.5 under the title: 'A 'Carer' Category for England and Wales?'[163] Here, Sloan floats the idea that informal carers might one day become a separate category of claimants under the Inheritance (Provision for Family and Dependants) Act 1975 ('the 1975 Act') through their addition to the list that appears in section 1(1). In doing so, he acknowledges that this would produce a category of claimant that is diametrically opposed to most other categories. Save for the two spousal categories, all others seem to be based on some form of financial dependency on the deceased or on some other type of financial need which arises out of the applicant's particular financial circumstances.[164] In most cases, a typical informal carer will have had an entirely different relationship with the deceased, one in which they have expended much time and money to the advantage of the deceased but have received little or nothing in financial terms in return for what they have done.[165] Why they have received nothing from the care-receiver is, of course, open to many explanations. It may be that the deceased's wealth was locked up in investments that were difficult to realise during his or her lifetime or indeed after his/her death as a result of the claims of others on that wealth.[166] Equally, it may be that that the deceased feels that it is the duty of his/her children to look after their parent in their old age. Or, it may be that the deceased felt that it was up to his children to agree what was 'fair' for the caring child to receive over and above what his/her siblings would be entitled to.

For his part, Sloan does not entirely dismiss this idea of a new category of applicant, a 'carer category',[167] but he does accept that, for the time being, it is unlikely to be taken any further.[168] To Sloan, this is a matter of regret given the more enlightened approaches adopted in New South Wales and elsewhere.[169] In the event, Sloan concludes that: 'Even if a 'carer' category were introduced in

[163] *Ibid. See:* section 5.3.5. 'A Carer Category for England and Wales?' at pp. 172 *et seq*.

[164] See: the analysis set forth in chapter 4, *infra*.

[165] See: the analysis provided in section 1.1 and in the following paragraph.

[166] And, this difficulty may be as much emotional as practical – see: Lorna Fox Mahoney, *'Home Equity and Ageing Owners'*, (Hart, 2012), in particular, chapter 5, 'Housing as Home: Ageing in Place', at pp. 125-138.

[167] And, he also acknowledges that the idea is not entirely original to him by referring to the hints that Kerridge has given to a possible reform of the 1975 Act by the addition of a carer's category in R. Kerridge, in *Parry and Kerridge: The Law of Succession,* 12th edition, (Sweet & Maxwell, 2009), section 8-79 *et seq.* where the author does not overtly suggest the creation of a 'carer's category' but does contrast the virtues of those who have cared for the deceased with what he describes as 'lame duck' applicants.

[168] See: The Law Commission, Intestacy and Family Provision Claims on Death, (Law Com No. 331, 2011) at [6.92], which rejected such a proposal.

[169] See: chapter 4, *infra*.

England and Wales, the link with a need for future maintenance would probably remain.'[170] In itself, this causes further difficulties as, in what Sloan describes as 'pure carer' cases, such a need may be absent, at least in financial terms. Claimants outside the spousal categories also have their claims limited to 'maintenance'[171] which, although widely interpreted by the courts, is not assessed through concepts such as 'compensation', 'deserving' or 'reward' but through the medium of 'need'. As Sloan acknowledges,[172] claims made by adult children under the 1975 Act seem to rest solely on this basis and are tempered by the observation made by a number of senior judges that able-bodied adult children should look not to their parents but to themselves when it comes to satisfying such need.[173]

Sloan then examines comparable legislation in New South Wales as a way in which to resolve the financial claims of informal carers on the estates of their now deceased parents and finds that 'The balanced approach [exemplified in that legislation] between those who provide care and cannot demonstrate the need and those who do not provide care but have the need has much to commend it.'[174] His final conclusion seems to be that the creation of a 'carer category' in the 1975 Act is, arguably, the way forward for carers' claims, albeit perhaps an imperfect one.[175] If such a provision were to be introduced, this should obviate, he suggests, the need for informal carers to consider other ways in which their claims might be brought, such as on the basis of unjust enrichment or proprietary estoppel.[176] But, would it? If carers' claims are to be limited by the concept of maintenance,[177] these carers might well consider other ways in which to frame their claims. Moreover, the potential availability of these other claims, and the difficulties inherent in the assessment of any award under the 1975 Act, which is heavily dependent on findings of fact and the exercise of judicial discretion,[178]

[170] See: fn. 161, *supra*, at p. 174.

[171] See: the 1975 Act, at s. 1(3).

[172] See: fn. 161, *supra*, at p. 176.

[173] Oliver J in *Re Coventry* [1980] Ch. 461 at p. 475.

[174] See: fn. 161, *supra*, p. 203.

[175] *Ibid*. at p. 205.

[176] Sloan describes his proposal as 'a modest compromise between public and private provision' thereby suggesting that he continues to see the State playing a significant role in the provision of financial and perhaps other incentives for informal carers – *ibid*. p. 147.

[177] Sloan acknowledges this, *ibid*. at p. 174.

[178] Under the umbrella of 'judicial discretion', something which involves judges making 'value judgments' on the quality of the evidence which are notoriously difficult to overturn on appeal.

would only serve to encourage litigation and, ultimately, to tear apart families who may be at odds over the merits and financial value of such claims.[179] It is perhaps unfortunate that, while contemplating (in his words) '… the potential need for a fundamental change',[180] Sloan neglects to consider what impact the amendment of the 1975 Act to permit claims by informal carers might have on family relationships already under strain by the loss of a senior patriarchal or matriarchal figure.

Sloan also considers alternative avenues along which a carer might tread in order to secure some form of financial benefit in return for time and labour expended in caring for an elderly, infirm parent or relative. Absent a specific promise of reward by the care-receiver, English law, it seems, does nothing for the informal carer. In these circumstances, the English law of unjust enrichment is dealt with in a fairly perfunctory manner. Sloan's focus is more on the more enlightened Canadian approach to claims of this nature. Also absent is any prolonged consideration of *inter vivos* claims by informal carers under English law. Instead, Sloan turns his attention to Australian models, specifically registration-based schemes where the courts are given wide powers to make financial adjustment orders where there is a breakdown of a registered 'caring relationship'. These are, of course, difficult areas. Yet, even schemes that provide only a *post mortem* remedy for informal carers from the estate of the care-receiver must grapple with the fact that, in the absence of any secured rights over the deceased's property, a carer may find their claim defeated by the care-receiver giving away, or otherwise disposing of, his/her property before their death and leaving him/her with nothing against which to make their claim. *Inter vivos* dealings cannot therefore be ignored entirely. In this respect, Scotland has adopted a more distinctive approach to this problem where there is an inter vivos breakdown of the relationship between the informal carer and the care-receiver, who are cohabiting as if they are husband and wife, with the introduction of a more wide-ranging set of remedies on the breakdown of non-marital relationships.[181]

In putting these ideas forward, Sloan presents us with a case for providing a financial remedy for informal carers without first considering the initial question: 'Is there a filial obligation to care for one's parents?' If such a duty exists, then, 'What is the nature, if any, of this responsibility?'. Moreover, 'Does anyone have a right to expect anything in return for 'doing their duty?' Questions such as these are simply not explored. What is more, apart from floating the idea of a carer category, or,

[179] See: The Daily Mail, 31st December 1998, which contains an *ex post facto* article on the consequences of the litigation in *Espinosa v Bourke* [1999] 2 FLR 747.

[180] See: fn. 161, *supra*, at p. 202.

[181] See: The Family Law (Scotland) Act 2006.

alternatively, some form of unjust enrichment claim, Sloan does little to indicate what a viable remedy might be. Nor, does he consider a case for making some form of financial support available during the caring period.

Jonathan Herring takes a more expansive look at society's response to the problems of providing care for the elderly and infirm in his 2013 work, *Caring and the Law*.[182] For Herring, 'care' is inescapable – 'Everyone cares. Everyone is cared for.'[183] His task is not to consider whether informal caring should be encouraged through the provision of financial incentives to provide such care. Instead, Herring lays before the reader a comprehensive account of how English Law deals with informal carers without commenting on whether that dealing is just and appropriate in today's society.[184] One aim that Herring makes explicit is his intention to explore how 'an ethic of care' approach might be applied to generate legal rights and obligations for both the informal carer and the care-recipient.[185] In doing so, he explores the theoretical foundations for the imposition of such rights and obligations which, in his eyes, should be accompanied by a more wide-ranging remodelling of law and society that will put caring at the centre of almost all we do.

In saying this, Herring attempts to contrast prevailing neo-liberal themes of liberty, autonomy and independence with the more pluralist approach of care ethicists and communitarians and, having done this, proceeds to rationalise these seemingly diverse approaches by introducing a discussion centred on 'relational autonomy'.[186] He makes the point (it seems) that individual autonomy will never provide an answer to society's ills because it is essentially 'anti-society'. There, he claims, is the fallacy in the idea of 'liberalism' as a guide for one's 'life-plan'. We live in a society that demands that we undertake relationships with others. Therefore, we need to take others into account. And, 'obligations that flow from those relationships [must be] given due weight'.[187] In these circumstances, '… the starting-point for relational autonomy is not the free unencumbered self, but rather a person who is integrated into a network of relationships' and thus '[t]hese relationships and the obligations and

[182] See: Jonathan Herring, *Caring and the Law*, (Hart Publishing, 2013).

[183] *Ibid.* at p. 1.

[184] In fact, Herring often makes his own views on this subject known to the reader – *ibid.* pp. 64-68 and again pp. 319-320.

[185] *Ibid.* at p. 5.

[186] *Ibid.* at pp. 71-74.

[187] *Ibid.* at p. 72.

restrictions on choice that flow from them are constitutive of autonomy, rather than being seen as restrictive of it.'[188]

What Herring fails to explore is whether there is any specific obligation on adult children to provide social care for their elderly disabled parents or whether there is a corresponding duty of any sort on care-recipients to pay for that care even where it is given on a voluntary basis. Indeed, it was never his aim to do so. After making observations on the nature and ethics of care, he continues by providing the reader with a detailed account of what little the State does for informal carers and how their claims are treated under general law. That is the pattern to which the book conforms.[189] There is no concerted plan for dealing with the difficulties that an ageing population will bring for society, merely an observation that the State should do more.

So, where does one turn in order to explore the series of questions that have just been raised? At the close of the twentieth century, two American authors made a notable contribution to this quest, Norman Daniels[190] and Jane English.[191] Yet, the views of each have come in for some concerted criticism too.[192] In essence, both Daniels and English claim that adult children do not owe any obligation to their parents whether to look after them in their old age or otherwise. For Daniels, this conclusion is simply part of a wider theory of health and intergenerational justice that draws, serendipitously, (as Daniels himself puts it)[193] on the writings of John Rawls.[194] One of the foundations of modern liberal theory – and Rawls is firmly in the vanguard of this movement – is the principle of 'fair equality of opportunity' in terms of one's ability to access positions of authority and/or financial benefit.[195] Those who care for elderly disabled parents, it is argued, are denied this 'fair equality of

[188] *Ibid.* at p. 73.

[189] Indeed, the book, *Caring and the Law*, can be seen as an expansion of chapter four of Herring's early work, *Older People in Law and Society,* (OUP, 2009).

[190] Norman Daniels, *Am I my Parents' Keeper?* (OUP, 1998).

[191] Jane English, 'What do Grown Children Owe their Parents?' found in Nancy S. Jecker, *Aging and Ethics: Philosophical Problems in Gerontology,* (Springer, 1991), at pp. 147-154.

[192] Paul J. Kelleher, 'Real and Alleged Problems for Daniels's Account of Health Justice', *Journal of Medicine & Philosophy,* 38(4) (2013): 388-399.

[193] N. Daniels (2001) Justice, Health, and Health Care, *The American Journal of Bioethics*, 1, pp. 2-16.

[194] John Rawls, *A Theory of Justice* (OUP, 1972).

[195] Rawls describes this as 'Equality of fair opportunity' – i.e. that 'all should have a fair chance to attain [these offices]', *ibid*. at p. 73.

opportunity'. Daniels demands that 'positive social measures' be implemented in an attempt to compensate for any lack of such opportunity that is not one's own fault.[196] And, he justifies these 'positive social measures' – for example, providing social care for the elderly and infirm – on the basis that treating people differently at different stages of their life is not treating people unequally. This is so, he argues, because we all go through each of these stages of life, if we are fortunate enough to do so, and all may therefore claim to benefit from the resources available at each stage equally.[197] How, one must ask, does this allow us to respond to the various questions that were raised earlier? If the State is responsible for the provision of this social care because this is one of the consequences of a just allocation of resources over one's lifetime, then (so the argument goes) surely anyone who undertakes these responsibilities in place of the State is surely entitled to financial compensation, or at least provision of some description, for doing so? This is clearly supported by arguments made in other quarters that the State should take responsibility for the provision of social care for the elderly; in more recent times, these arguments have been put forward by writers such as Martha Fineman and Maxine Eichner.[198] Indeed, similar conclusions have been drawn by Amartya Sen and Martha Nussbaum in promoting the 'capability approach' to questions of justice and ethics.[199]

Of course, it is relatively easy to put the obligation to provide all the social care that any elderly disabled person needs onto the broad shoulders of the State, but the costs will inevitably come from the public purse and is likely, without more, to result in much higher rates of general taxation.[200] This begs the question: 'Should those who can afford to pay for their own social care be able to claim the cost from the State?'. If not, should those who provide informal social care on a voluntary basis be able to claim financial provision from the care-receiver for their time, skill and labour in circumstances where the care-receiver would otherwise have needed to pay for that care him/herself? To all intents and purposes, these are practical questions that neither Sloan nor Herring contemplate in their

[196] See: fn. 190, *supra*, at pp. 2-3.

[197] This forms the basis of the idea of the prudential allocation of resources over a person's lifetime that is championed by Daniels in *Am I my Parents' Keeper?* (OUP, 1998)

[198] Maxine Eichner, 'Dependency and the Liberal Polity: On Martha Fineman's The Autonomy Myth', (2005) *California Law Review,* Vol. 93, issue 4, article 6, - http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1296&context=californialawreview (accessed: 02/06/16), where Eichner puts forward a view of how the State should intervene that contrasts with that of Fineman but, nevertheless, firmly advocates State intervention.

[199] See: Amartya Sen, *The Idea of Justice*, (Penguin Books, 2009), and Martha Nussbaum, *Creating Capabilities, The Human Development Approach*, (Harvard University Press, 2011).

[200] Compare the rate of personal taxation in Sweden which currently (2019-20) stands at 57.2%.

published works. Nevertheless, they remain highly significant for both legislators and the general public.

At one point, the UK Government attempted to address these and other related issues in an effort to provide the country with a clearly defined approach to social care for the elderly in the form of the Care Act 2014.[201] However, following representations by local government, made principally on financial grounds, the implementation of most of the significant parts of this Act for present purposes, including the cap on social care costs, was, at least initially, postponed until 2020.[202] Now, there is every indication that these provisions will never be brought into force.[203] Indeed, it seems that the UK Government's approach to the challenges that the Care Act 2014 was designed to meet has already changed, for the Conservative Party's manifesto for the 2017 election proposed not a ceiling or cap on social care costs but what the manifesto described as 'a capital floor', such that all those who have to pay social care costs would be able to retain assets to the value of £100,000.[204] In practice, any momentum for reform appears to have slowed and, in reality, new solutions need to be found.

Two writers who have contemplated where these solutions might lie in England and Wales are Sarah Nield and Mika Oldham.[205] In the first of her two publications in this field, Nield looks at the enforcement of testamentary promises in England and Wales and contrasts the country's formality-laden approach with the more enlightened philosophy adopted in New Zealand under its Law Reform (Testamentary Promises) Act 1947 (as amended). In a precursor to the more extensive work later performed by Sloan, Nield considers how English courts have sought to enforce specific testamentary promises through the law of contract and estoppel, concluding that, 'It is … disappointing that the courts continue to favour testamentary freedom, or fickleness, over the morality of taking advantage of the services and trust of others.'[206] In her second published contribution to this debate, Nield

[201] See: ss. 15 and 16.

[202] See: chapter 3, *infra*.

[203] N. Triggle, N. 'Is the Cap on Care Costs Doomed?', BBC News - http://www.bbc.co.uk/news/health-33624728 (accessed: 02/06/16).

[204] The Conservative Party Manifesto, 2017, p. 65.

[205] Sarah Nield, "If you look after me, I will leave you my estate" : The enforcement of testamentary promises in England and New Zealand, *Legal Studies*, 2000, Vol. 20, Issue 1, pp. 85-103, and 'Testamentary Promises: a Test Bed for Legal Frameworks of Unpaid Caregiving', *Northern Ireland Legal Quarterly*, 2007, Vol, 58, Issue 3, pp. 287-306; and, see also: Mika Oldham, 'Financial Obligations within the Family – Aspects of Intergenerational Maintenance and Succession in England and France', 60 [2001] *Cambridge Law Journal*, pp. 128-177.

[206] Sarah Nield, "If you look after me, I will leave you my estate": The enforcement of testamentary promises in England and New Zealand, *Legal Studies*, 2000, Vol. 20, Issue 1, pp. 85-103, at p. 93.

considers exactly how far the law of contract, the law of equitable estoppel and the law of restitution in England and Wales might go to meet 'the objective of economic recognition of unpaid care.'[207] In each case, an informal carer's claim for financial recompense is limited by the nature and extent of the testamentary promise if, indeed, any such promise is made, and ultimately that marks the boundaries of the legislative solution adopted in New Zealand. In truth, Nield's second article largely represents an expansion of the points made in the first and makes little headway towards identifying a practical solution for informal carers, save possibly those to whom specific promises of recompense have been made. Nevertheless, it does contain an important observation on how a solution to what she accepts as the 'legitimate policy objective' of rewarding informal care-giving, namely, that a statutory response to the problem '… tends to cut through the moral tensions presented by balancing the exploitation of carers against the certainty often demanded in dealings with property and freedom of testamentary disposition.'[208]

For her part, Mika Oldham starts with the premise that State provision of social care for the disabled elderly will never be adequate; the financial burden of such care – a burden that we are only now fully appreciating – is not one that the public purse can possibly bear, nor, indeed, does society wish to shoulder the burden of these costs.[209] While, at one level, this is a sad indictment of our modern society that many on the left would be anxious to reject, yet it also represents a pragmatic acknowledgment of how individual aspiration has largely overtaken collective loyalties since the dawn of the Thatcher Government in the 1980s. Oldham therefore proposes a form of public and private partnership in the provision of social care for those in 'the third age'. This partnership would be one in which a form of 'successional priority' is conferred on all informal carers as a means of rewarding them for the sacrifices that they have undertaken in providing care to another member of the family. In support of this proposal, Oldham maintains that:

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[207] Sarah Nield, 'Testamentary Promises: a Test Bed for Legal Frameworks of Unpaid Caregiving', *Northern Ireland Legal Quarterly*, 2007, Vol, 58, Issue 3, pp. 287-306, at p. 288.

[208] *Ibid.* at p. 298. And see: Mika Oldham, 'Financial Obligations within the Family – Aspects of Intergenerational Maintenance and Succession in England and France', 60 [2001] *Cambridge Law Journal*, pp. 128-177.

[209] As Mika Oldham states: 'Under classical welfare socialism, access to benefits is the right of every citizen, benefits are allocated on the basis of need, not wealth, and are funded out of general taxation. But, if the wider community is not able – or, more accurately, not prepared – to shoulder the entire financial burden of guaranteeing a reasonable standard of care and quality of life for our older citizens, the simple question becomes, whose responsibility is it?' See: *Ibid*. at pp. 130-131.

> 'Under such a scheme, any family member who maintains or cares for an elderly relative would be given a right to eventual compensation out of the estate of that relative, such right to take priority over distribution to other successors.
>
> This proposal is novel and its adoption would involve a radical departure from the underlying philosophy of the law of succession and its central principle of absolute freedom testation. Significant inroads into that basic philosophy have already been made, however, with the statutory creation of judicial discretion to vary the express wishes of testators in the context of family provision.'[210]

Whether such a scheme is 'novel' is open to dispute. Legislation along these lines was first introduced in Illinois as long ago as 1988.[211] Nor, indeed, might this proposal be regarded as 'a radical departure' from the concept of absolute freedom of testation if claims by carers under legislation are regarded as claims for the recovery of a debt. Still, Oldham's conclusions represent a significant jumping-off point for an analysis of the issues that this thesis seeks to resolve. And, indeed, the proposals put forward in chapter six largely represent a modification of the ideas that she puts forward, albeit a significant one.

Several American academics have put forward similar lines of thought. Frances Foster has suggested that a behaviour-based approach should be taken to succession law, linking inheritance rights to a beneficiary's conduct towards the deceased.[212] In this way, informal carers would be rewarded for their care of the deceased. These suggestions reflect recent changes to the law of inheritance in China. These changes give Chinese courts a broad discretion to readjust the distribution of a deceased's estate on intestacy – but, curiously, not where the deceased dies testate – in order to recognise contributions to the deceased's welfare made by family members, relatives by marriage and even friends and neighbours.[213] Thomas Gallanis and Josephine Gittler prefer to see greater certainty and propose that a family member who has cared for a deceased should be entitled to an elective share

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[210] *Ibid.* at p. 173.

[211] Ill. Pub. Act 85-1417 (effective Jan., 1, 1989) amending (755 ILCS 5/) the Illinois Probate Act of 1975, which is further discussed in chapter six, *infra*.

[212] Frances H. Foster, Linking Support with Inheritance: A New Model from China, (1999) *Wisconsin Law Review*, 1199.

[213] Frances H. Foster, 'The Dark Side of Trusts: Challenges to Chinese Inheritance Law', 2 *Washington University Global Studies Law Review* 151 (2003) p. 159 *et seq*. This leaves the philosophical basis of such legislation open to considerable doubt. Why should a carer's entitlement to recompense be dependent on whether or not the care-receiver has made a will?

of the deceased's estate in much the same way as many US statutes provide for the deceased's spouse's ability to take an elective share in the event that the deceased's will fails to make adequate provision for his or her.[214] For her part, Heather M. Fossen Forrest proposes rolling-out the Illinois Probate Act, section 18-1.1, across other US states, but at the same time removing the restrictions inherent in the section that prevent many worthy claimants from succeeding in their statutory custodial claims.[215] One common thread to all of these suggested reforms is that the solution needs to be a legislative one. Claims based on quasi-contract and/or unjust enrichment require judicial intervention that goes well beyond what can be expected of the judiciary in common law jurisdictions.[216]

Another common thread is that compensation for informal carers should come from the estates of care-receivers. The private law right that these academic commentators wish to introduce is a claim against those estates which can only be enforced after the care-receiver has passed away. Regrettably, these proposals fail to acknowledge that informal carers suffer financial hardship during the caring period; allowing recovery only after the care-receiver's death may be for some too little and for others too late.[217] What this thesis therefore proposes is a public-private partnership where the State takes on the burden for providing compensation for informal care-giving during the caring period but is able to recover what is paid out as a debt from the deceased care-receiver's estate after they have passed away.[218] In essence, the solution is designed to tap into much of the property wealth of the country but without putting the continuing ability to occupy that property as one's home at risk. It requires substantial public funding, but this is funding that may be recovered by taxation at a later date. The detailed provisions of the care contract are for the carer and the care-receiver. But, the design is that this will be a rolling, mediated contract built to suit the two parties, but ultimately under the control of the court. Of course, one can never properly evaluate a proposed solution before one sees the

[214] See: Thomas Gallanis and Josephine Gittler, Family Caregiving and the Law of Succession: A Proposal, 45 University of Michigan Journal of Law Reform, (2012) p. 761.

[215] Heather M. Fossen Forrest, Loosening the Wrapping on the Sandwich Generation: Private Compensation for Family Caregivers', 63 Louisiana Law Review, (2003) p. 381.

[216] *Ibid.* at p. 382. This claim will be tested in chapter five, *infra*.

[217] This would be so if the estate is unable to support a financial claim that is co-extensive with the level of care provided by the informal carer. Moreover, the author is here reminded of a case from his own practice where a greater part of the care administered to a care-receiver over a ten year period was provided by the would-be claimant's wife, but, tragically, she died of cancer and year or two before the care-receiver eventually passed away.

[218] See: chapter six, *infra*.

detail of what is being put forward. However, before that point is reached, it is necessary to consider: (i) whether the present State subsidies that are available for informal carers are adequate; (ii) whether informal carers should be entitled – on the basis of moral arguments – to payment for the work they do; and, if so, (iii) whether that payment might be made available through amendments to the present law of England and Wales rather than through more radical statutory intervention. It is only once these issues are resolved that one can begin to look more carefully at any legislative proposals for the solutions that are being advanced. In these circumstances, items (i) – (iii) above provide the focus of the following four chapters of this three before the proposed solutions are formulated in chapter six.

Yet, before we begin this journey, we need to consider where the moral responsibility for the provision of such social care really lies. It is only when it has been established that the State bears some, if not all, of this responsibility that we can justify placing some, or all, of the burden of meeting the costs of this care onto the State.

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2.2 WHO IS RESPONSIBLE FOR THE PROVISION OF SOCIAL CARE?

In February 2016, the Channel 4 television programme, 'Dispatches' indicated that there are widely-held reservations in our society concerning the extent to which we can expect the State to be involved.[219] Some 49.1% of people surveyed for that programme said that the UK Government should be more responsible for meeting the social care needs of the disabled elderly in our society. On its face, that appears to leave a bare majority holding the view that either the present system is acceptable or that there are others who must do more. On the basis of this data, society seems peculiarly divided on this issue.

So, what of the UK Government's position in this debate? Over the past decade, support for the wholesale reform of the social care system has rather waxed and waned depending on the priorities of the government of the day. But, in essence, its preference seems to be for some form of partnership between the State, on the one hand, and the care-recipient's family on the other. One can see this

[219] http://www.channel4.com/programmes/dispatches/episode-guide/series-10 ('Pensions and the Price of Growing Old') (accessed: 02/05/16).

most readily in a statement made by Norman Lamb as the Health Minister in the Coalition Government of 2010-2015:

> 'The truth is that the Government has an absolute responsibility to ensure that older people get the care that they need so that they can grow old in dignity and respect, and it means that we have to fund the carers that are available to look after those people. … Part of it will be the families' responsibility. We all, of course, take responsibility for our loved ones but the State is there to ensure that the State works effectively and people get the support they need, but also to provide support where family isn't available and where people wouldn't otherwise get the care they need.'[220]

The statement 'We all take responsibility for our loved ones …' indicates that the speaker's position is that such responsibility is both 'natural' and 'expected'. In other words, everyone is obligated by some form of shared moral code to step in and provide care whenever one's parents need that care; and, therefore, whether one is called upon to provide that care is simply one of the vicissitudes of life, some are lucky that their parents either do not need that care or can pay for it themselves and others are not.[221] Nevertheless, the question arises: 'Is this a fair reflection of how such responsibility is, or should be, allocated in regard to the provision of social care for our disabled elderly?' Or, is there a more just approach to be had?

In some countries, the obligation to provide care for one's parents is a legal one. In France *l'obligation alimentaire* imposes a legal duty on every citizen to support his/her family members who are in immediate financial need. This obligation is based on both ties of blood and ties of marriage. Under French law, the duty to support direct ascendants is without limit, so one is obligated in law to support not only one's parents but also one's grandparents and great-grandparents, but only to the extent that that their parents are unable to provide the necessary support. The obligation is further qualified by the principle that one's primary duty is to support one's spouse and one's children and their support must take priority over any obligation to support more distant relations. Given that the obligation, as enshrined in the *Code Civil, livre 1, chaptaire V*, also extends to the family of one's spouse, the French courts have also recognised a 'natural' obligation to assist any siblings who may be in immediate

[220] 15th October 2012.

[221] In short, it is just another element of the social inequality which is tolerated in modern England and Wales.

financial need.[222] Now, the idea that one is under a financial obligation to provide care for one's parents, grandparents, great-grandparents, and one's siblings, still less one's in-laws and their parents, grandparents and great-grandparents is very harsh on the sensibilities of someone who has been brought up in the common law tradition,[223] but the notion also needs to be considered in light of the succession rights of children in French law that guarantee that a portion of a parent's estate will pass to them on the parent's demise.[224] Elsewhere in Europe, public acceptance, if not support, for such 'forced inheritance' seems to be relatively strong. To date, European governments in general have not sought to interfere with the allocation of the 'compulsory share' of a testator's estate to his/her children on which the obligation to care for one's parents is based.[225] In Italy, a recent attempt to do – based on the equivalent of a private members' bill claiming that any interference with testamentary freedom was unconstitutional – was short-lived.[226] That said, if the compulsory share is sacrosanct across Europe, this does not necessarily mean that carers must go unrewarded. In Germany, for example, legislation has intervened in the form of a law in force from 1 January 2010 which allows descendants who have cared for a deceased to recover the expenses which were incurred in providing that care from the other beneficiaries of the deceased's estate before that estate is distributed.[227]

The German approach is also reflected in approximately one half of the various states across the US in relation to the estates of former residents of state mental institutions.[228] Typically, statute will

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[222] Mika Oldham, 'Financial Obligations within the Family – Aspects of Intergenerational Maintenance and Succession in England and France', *Cambridge Law Journal,* 60 [2001], pp. 128-177, p. 144.

[223] That said, in the US approximately one half of all States have some form of filial support legislation – K. C. Pearson, Filial Support Laws in the Modern Era: Domestic and International Comparison of Enforcement Practices for Laws Requiring Adult Children to Support Indigent Parents, (2013) 20 *Elder L. J.* 269.

[224] See: fn. 222, *supra,* p. 150. It is also possible that the payer may be able to recover any payment made in the performance of this legal duty from the estate of the deceased relative once that relative has passed on. Although French legal tradition is against such a claim, a decision of the *Cour de Cassation* in 1994 permitted a son to claim an indemnity from his parents' estate for the sums that he had paid out for their maintenance on the basis of unjust enrichment principles in circumstances where the parents, although aged and infirm, were not in immediate financial need.

[225] M. Anderson and E. Arroyo i Amayeulas, *The Law of Succession: Testamentary Freedom: European Perspectives*, (Europa Law Publishing, 2011), chapter 5*,* p. 92, which contains an edited version of the paper referred to in the following footnote.

[227] Antoni Vaquer, Freedom of Testation, Compulsory Share and Disinheritance Based on Lack of Family Relationship, published: Nov 18, 2010, and found at ssrn.com/abstract=1711338 – the author is a Professor of Private Law at the University of Lleida.

[228] M. B. Kapp, 'Residents of State Mental Institutions and their Money (Or the State Giveth and the State Taketh Away)'*,* (1978) *Journal of Psychiatry and the Law,* 6(3): pp. 287-305, referred to in N. Daniels, *Am I my Parents' Keeper',* (OUP, 1998) p. 23.

authorise the recovery of some costs incurred in the care of the deceased from those who might be described as 'responsible relatives'. Who falls into this category in any given instance is a matter for the courts; yet, in all such cases, the question remains: 'Why should one person be 'responsible' for the care of another?' If any person who is held to be a 'responsible relative' is entitled to a significant financial benefit from the deceased's estate, then some form of moral – if not a legal – argument may well arise that they should pay. After all, the deceased's estate has been enhanced because these costs were not paid by him/her during his/her lifetime. If those costs should properly have been paid by the deceased, it is unjust (so the argument goes) that his/her beneficiaries should enjoy the deceased's estate free from this obligation and be enriched by the deceased's failure to pay. These arguments are not uncommon in common law jurisdictions, based – as they are – on principles of unjust enrichment.[229] On the other hand, if a relative does not benefit from the deceased's estate, why should they be 'responsible' for the costs of the deceased's care? This leads us to ask: 'Is there a moral obligation on adult children to care for their elderly, disabled parents when those parents are in need of care?'

In the UK, public opinion on the moral responsibility of adult children to care for their elderly, disabled parents seems confused. In the OASIS survey of 2003 only 47% of UK participants said that children should make sacrifices for their parents, and even then it was unclear whether these sacrifices should amount to providing social care for one's parents. If there was a publicly recognised duty to provide this care, one would expect that a clear and perhaps overwhelming majority of people would recognise that duty. What that duty might entail is, of course, a matter of debate. Similarly, only 41% of UK participants felt that elderly parents should be able to rely on their children for support. This was markedly the lowest figure under this category of all the countries surveyed – the participants in the same survey in Germany, Spain, Israel and Norway all felt that parents were entitled to rely on their children to a much greater degree. This is significant. It demonstrates that nations must design their own support services for their disabled elderly; in other words, there is no global response that is right for all. Some 31% of all participants in the survey felt that adult children should live close to their parents. That falls well short of any consensus that adult children must always be on hand to administer the social care that their parents might need in their old age. However, 76% of these participants felt that adult children should give practical or emotional help to their parents. Perhaps, therefore, it is only this lesser degree of care, or less costly type of care, that is really what adult

[229] See: chapter five, *infra*.

children can be expected to give.[230] From this evidence, Jonathan Herring concludes that '… normative limits in filial obligation can, essentially, be defined as lying where, in the words of Aboderin,[231] 'providing support begins to exceed an adult child's capacity to do so without jeopardising their conjugal family's present needs or their ability to service their welfare in the future''.[232] In a legal context, this surely makes the drawing of the line beyond which one can be forced to contribute in some measure to the welfare of one's parents, and below which one has no responsibility to do so, a truly impossible task.

In his highly influential essay on justice across the generations, Norman Daniels concludes that there is no historical evidence of 'family caring' as a 'social norm' in Western society, and he goes on to present parental care-giving as something in the nature of a gift, albeit one made for a number of often diverse reasons.[233] Jane English agrees, concluding that the duties of grown children to their parents are like those of friends to one another; they are the natural consequence of the love and respect felt by a child for his/her parents, and not something that arises out of the parents' earlier sacrifices in bringing up their children.[234] In sum, these reasons characterise parental care-giving as something that is done as much for the good of parents as their children, with parents getting an emotional return on their physical and financial investment in bringing up their children from 'seeing a job well done' or, at least, seeing their 'project' completed however it turns out. As Daniels points out, 'If I choose to give to charity, the recipients of this charity have no reciprocal obligation to give to me simply because I have given to them.' In this way, parental care is characterised as a 'pure gift'.[235]

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[230] The OASIS study is based on a survey taken across five different countries with some 1,200 participants from each country. See: Ariela Lowenstein and Svein Olaf Daartland, Filial norms and comparative support in a cross-national context: evidence from the OASIS study, *Ageing and Society*, 26, 2006, pp. 203-223.

[231] I. Aboderin, 'Conditionality' and 'Limits' of Filial Obligation, Working Paper Number WP205, (Oxford Institute of Ageing, 2006) - https://www.ageing.ox.ac.uk/download/97 (accessed: 31/12/17).

[232] Jonathan Herring, 'Together forever? The Rights and Responsibilities of Adult Children and their Parents, chapter three in *Responsibility, Law and the Family*, by Jo Bridgeman, Heather Keating and Craig Lind, (eds) (Routledge. 2016) p. 41.

[233] See: fn. 190. at pp. 23-30.

[234] Note, Jane English's argument that parents do 'good things' for their children because it makes their own lives meaningful not because there is any expectation of something in return – J. English, *What Do Grown Children Owe their Parents?,* a chapter in Nancy Jecker (ed.) *Ageing and Ethics*, (Humana Press, 1992) p. 147 *et seq.*

[235] Fritz de Lange, 'Honour thy father and mother', What do Grown Children Owe their Parents?' who describes the obligation to care for the disabled, elderly as one that is one that is carried by the whole community not merely the parents' adult children – see: http://ngtt.journals.ac.za/pub/article/view/349/454 (accessed: 20/08/18).

This reasoning is also accepted by many commentators on this side of the Atlantic. Jonathan Herring, for one, reaches a similar conclusion, when he acknowledges that '… unless an adult child has specifically undertaken an obligation to care for their parent there is no duty to rescue [the parent from his/her predicament]'.[236] In doing so, he firmly rejects the idea that there is a responsibility to care for one's parents because they have cared for you as an infant. Such care is, in reality, impossible to measure. Yet, if such a duty existed, surely the duty to care for one's parents would have to depend on the degree and/or extent of the care they had lavished on you. That, in turn, would suggest that the more that a parent spends on a child's upbringing, the greater the responsibility of the child to care for that parent. Even those who claim the existence of a duty to care for one's parents would struggle to justify such an arbitrary response to a claim for filial support. In practice such notions do not serve society well because those parents who have spent the most are often those who have had the most to spend. Yet, it is these parents who are most likely to be able to afford to pay for their own social care, and therefore have no need of the obligation that is said to exist. In the UK, there is, of course, a legal obligation to care for one's children until they reach their majority and this obligation must, to some small extent, qualify these statements that parental care-giving should be seen as a gift;[237] perhaps, therefore, the 'gift' is one of life, but, in making that gift, the donor also takes on a legal obligation to care for his/her child until that child is of full age. Yet, that cannot justify an obligation to care for one's parents; in the former there is something of a choice, yet in the latter there is none.

Some people claim that caring for our parents is merely the way in which we should all honour and respect our parents.[238] Honouring and respecting one's parents is all well and good, but it is still not clear that these virtues should manifest themselves in a duty to supply an appropriate degree of social care to one's parents should the need arise. Why should the payment of money on the social care that is required for one's parents be seen as a *necessary* expression of gratitude or honour? In practice,

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[236] See: fn.182, *supra*, p. 46.

[237] The Children Act 1989, s. (1), imposes 'parental responsibility' on the mother and father of a child who were married to each at the time of the child's birth; 'parental responsibility' is then defined as, '… all the duties, rights, powers, responsibility and authority which by law a parent of a child has in relation to the child and his property', something which includes their statutory duty not only to maintain the child but also to provide that child with full-time education until the age of 16.

[238] For an argument based upon the traditional Confucian view of the nature of filial obligations, see: James Wang, ''The Confucian Filial Obligation and Care for Aged Parents" - http://www.bu.edu/wcp/Papers/Comp/CompWang.htm (accessed: 24/05/16).

this expenditure would depend, more often, on the adult child's ability to pay for, or his/her ability to labour in the provision of, care rather than the performance of any moral duty to his/her parents. For others, the care of a parent can be seen as the manifestation of the 'special bond' that exists between a parent and child. Yet, with many dysfunctional families there is no such 'special bond'. Some have described care as a 'special good' that only parents and children can supply.[239] But, in reality, that does not stand up to scrutiny either. There is nothing 'special' about the money that an adult child might choose to spend on the care of his/her parents; and, equally, there is nothing 'special' about the labour that they can provide. 'Care specialists' are in a position to provide a better and more efficient service; they have the knowledge and expertise to do so. In these circumstances, Maria Stuifenberg and Johannes Van Delden have chosen to describe this 'special good obligation' as a duty to care *about* one's parents and not *for* one's parents.[240]

In any event, parenting a child is something that is radically different, in many ways, from caring for one's elderly parents. As Peggie R. Smith notes:

> 'Research indicates, for example, that relative to child care, elder care involves more unanticipated caregiving situations, is more complicated to manage, and causes greater levels of stress for the care provider. These and other differences call into question the extent to which worker-family initiatives, premised on child care, are appropriate for thinking about how to help workers cope with elder-care related concerns.'[241]

Quite simply, children and child care can be planned for, while care for elderly, disabled parents generally cannot. Indeed, there is often no 'free choice' in the decision to care for one's elderly disabled parents: in many countries, the State does not provide that care and therefore the family must, and the only question is: who?[242] Moreover, as one goes through the process of child care,

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[239] Simon Keller, Four Theories of Filial Duty, *The Philosophical Quarterly,* Vol. 56. No, 223 (Blackwell Publishing, 2006); and, see the critique of this view advanced by Victor Garcia-Belaunde in 'Is there a problem with the 'special goods theory' of filial duty?', Canberra, November 2009, - https://www.academia.edu/4802182/Is_there_a_problem_with_the_spcial_goods_theory_of_filial_duty (accessed: 21/08/18).

[240] Maria C. Stuifenberg and Johannes J. M. Van Delden, Filial Obligations to elderly parents: a duty to care? *Med. Health Care and Philos*. (2011) 14:63-71.

[241] Peggie R. Smith, 'Elder Care, Gender and Work: The Work-Family Issue of the 21st Century', *25 Berkeley J. Emp. & Lab Law*, 351 (2004) at p. 354.

[242] Nicole Buonocore Porter, 'Why Care About Caregivers? Using Communitarian Theory to Justify Protection of 'Real' Workers', (2010) 58 *Kansas Law Review* 355, p. 386.

obligations usually become lighter and easier to manage, yet caring for one's elderly disabled parent or parents does not; in fact, parents tend to become more needy with time.[243] Children go off to school and, with this, there is a short respite from the hourly caring that a parent (usually the mother) has given their young offspring since birth; in contrast, the health of the disabled elderly parent will naturally decline, more intensive, time-consuming, emotionally demanding, care will be required and the process will only end with the death of the parent or parents in question.[244] Until that event occurs, caring for a disabled, elderly parent often has a serious, adverse effect on the carer's career, his/her financial circumstances, his/her lifestyle and lifestyle choices, and the lives of his/her close family.[245]

Why, in these circumstances, should adult children be responsible for the care of their parents? Having undertaken a review of cultural traditions in the West and beyond, Daniels maintains that there is no moral basis for imposing such an obligation. He opens his analysis by remarking that: 'Duties and obligations generally impose specific burdens. They have limits that allow us to say when they have been discharged. Filial obligations should be no exception'.[246] Yet, when these so-called obligations are closely examined, Daniels discovers that there are no specific burdens. He, therefore, concludes by saying:

> 'Those who do believe they owe their parents extensive care may insist that others who do not believe are immoral shirkers of duty. Those who do not believe that they have such obligations will resist believers trying to impose obligations through legal sanctions ….
> …. The diversity of cultural traditions, which frustrated the Traditionalist, may well explain some of the diversity in current beliefs. Similarly, the absence of well-established moral foundations for filial obligations also explains the variety of views. Whatever the explanation, this diversity is a fact of our social life and not likely to disappear.' [247]

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[243] *Ibid*. at pp. 365-366. This is the subject of the data analysis carried out in chapter seven, *infra*.

[244] *Ibid*. at p. 366.

[245] *Ibid*. at pp. 366-372.

[246] See: fn.178, *supra*, p. 23.

[247] *Ibid.* at pp. 34-35.

Of course, there is a powerful argument here to the effect that that, absent those specific burdens over which there is universal agreement – and, in fact, there may be no burden or burdens on which all are agreed – there is no moral obligation to care for one's parents.[248] Indeed, given the increasingly-common patterns of modern 'family life' that separate families (or what one might describe, outside the institution of marriage, as 'quasi-family units') geographically and fragment them through separation and divorce, there seems little prospect of any return to the traditionalists' view of family and family responsibilities which now seem to be distant echoes from a by-gone age.[249]

In any event, do parents commonly reward those of their adult children who make sacrifices to care for them in their old age? In *Wills, Inheritance and Families*,[250] Finch *et al.* acknowledge that the search for data to support a conclusion on this issue cannot lie in the care-receiver's last will. Of its very nature, a will only operates 'post-death'. Most wills contain no explanation of why gifts are made; more still contain no explanation why the testator refuses to make a gift or, in our case, provide a particular person with financial compensation in recognition of services rendered. Indeed, even where there is a will which contains no such gift, but one is aware that care has been provided, it is still impossible to conclude that this is a case where compensation has been denied for the testator may have rewarded the carer through the making of life-time gifts. In short, any picture that a care-receiver's will may paint, even when considered together with other records, such as the receipt of carer's benefits by an adult child of the deceased, is likely to be substantially incomplete.

There are occasions recorded in reported case law where a deceased has, quite deliberately, failed to make financial provision for his/her informal carer and an adult child's care of their aged parent has gone unrewarded.[251] Nevertheless, in the absence of specific data on the propensity of parents not to compensate their adult children for the care that they have received from them, one might sensibly

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[248] Even Christ's 'Parable of the Prodigal Son' is liable to divide modern public opinion on whether the father should have welcomed the return of the prodigal son, as he did, with a feast, new clothes, new shoes and a ring, when the prodigal son had spent the past few years squandering the inheritance that he had previously demanded from his father, when convention required him to wait until his father's death before making any such demands. To some, the prodigal son is a wastrel who is undeserving of any further attention from his father, and their reaction is very much the reaction of the older son to his brother's return – Luke 15: 11-32.

[249] This is so even in China where adult children have become geographically separated from their parents – http://www.msn.com/en-gb/news/loneliness/he-was-one-of-millions-of-chinese-seniors-growing-old-alone-so-he-put-himself-up-for-adoption/ar-AAwFL58?ocid=ientp (accessed: 21/05/18).

[250] J. Finch et al, *'Wills, Inheritance and Families'*, (OUP, 1996) p. 68.

[251] *Espinosa v Bourke* [1999] 1 FLR 747; [1999] 3 FCR 76 - the second plank of the claimant's claim in *Espinosa* was really a 'dependency claim' and the claimant's final award was calculated, not on the value of the care she provided, but on the degree of this dependency.

ask, 'In what situations might even the most well-meaning of parents fail to make provision for their offspring who have provided them with social care?' The most obvious instance of such failure is a parent who does not make a will. The law of intestacy makes no distinction between those who may have cared for the deceased and those who have not ;[252] moreover, the Inheritance (Provision for Family and Dependants) Act 1975 ('the 1975 Act') does not, without more, entitle an informal carer to provision over and above what he/she may be entitled to under the intestacy of his/her parent. In these circumstances, the very failure to make a will can produce what many would see as a significant injustice.[253] What the informal carer receives is just the same as his/her siblings have received and cannot therefore be described as 'compensation for caring'. The second is the parent who leaves a will but that will was made sometime before the care in question was provided. It goes without saying that such wills will regularly fail to compensate the care provider for what he/she has done for the deceased through what might be many years of self-sacrifice. The third illustration is the case of the parent who cannot bring him/herself to do anything other than to treat his/her children equally because they have concerns about their ability to do make the 'right' judgment over the degree of further provision that should be given to the carer child. Of perhaps equal concern in such situations is what their children may think of them when they are gone should they make such a decision which does not satisfy all of them. There may well be a propensity in such circumstances to shrug one's shoulders and say: 'The children will sort it out between them after I've gone'. But, do they? Most contentious probate litigation is a consequence of the inability of the deceased's children to agree the distribution of their parent's estate; indeed, a similar remark can be made in relation to what may well be a majority of 1975 Act claims. A fourth situation is where the parent is incapable of making a will through lack of testamentary capacity. While, in these circumstances, a statutory will may be made for a patient,[254] such wills do not commonly reward the meritorious conduct of adult children who act as carers. The obligation to reward such activities is not yet part of the psyche of the English judiciary.

In the absence of specific rights in a deceased parent care-receiver's estate which acknowledge the financial hardship that has, in many instances, been suffered as a result of the sacrifices made caring for the parent is it not time for such rights to be granted if we wish to encourage such caring? And,

[252] See: The Administration of Estates Act 1925, ss. 46 and 47.

[253] The author has recently been informed of a case where a person, who was informally adopted as a child, stayed with their adopted parents, while the natural children of these parents went out into the world and made their fortunes. When the survivor of these parents died without leaving a will, intestacy law dictated that their estate was to be divided equally between the natural children and the informally adopted child received nothing despite dedicating herself to the care of her adoptive parents in their later years.

[254] The Mental Capacity Act 2005, s. 18(1)(i).

given the growing need of social care for the disabled elderly, adult children should be encouraged to care for their parents. If that encouragement is to be given, what form should it take? Should it be through the acquisition of some form of general right to financial compensation from their deceased parent's estate? Or, should they acquire proprietary rights in assets that are preserved from sale by the sacrifices made by them in caring for their elderly disabled parents in circumstances where those assets would otherwise be sold to pay for care and care-related costs? Could the 1975 Act be amended to provide informal carers with a right to make a claim under that Act, and, if so, how would such a claim be judged? Similarly, might the law of unjust enrichment be developed to assist claims of this nature? These are some of the ideas that will be developed in the following two chapters of this thesis before a solution is finally proposed to 'the longevity conundrum'.

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2.3 METHODOLOGY

At one level, this thesis is concerned with what the law is, if only to lay bare its defects. To this extent, the approach that is adopted is a doctrinal one. And, it concludes, as one might expect, with proposals for reform which are born of the analysis of the black-letter law research that appears in chapters four and five. That said, the analysis that is presented throughout the thesis is a value-laden one.[255] And the proposals for reform that are presented are based on a concept of social justice that is firmly grounded in what might be simply described as a shared responsibility to help people who are unable to help themselves. The alleviation of suffering in our disabled elderly is therefore treated as a public 'good', something that needs to be part of a political solution to an issue which is, most decidedly, a public one.[256] Nevertheless, the claims made in this thesis are not dependent on any adherence to any particular, defined set of standards or rules. Even where our existing laws are put under the microscope, the examination that is undertaken in this thesis goes beyond a mere search for mere

[255] As John Coggon remarks in his work, *What Makes Health Public?* (Cambridge University Press, 2012) at p. 2: '… conceptions of health are necessarily value-laden'. Historically, government policy has drawn a marked distinction between health care and social care. That distinction, it is submitted, is unsustainable. The need for social care is a product of old age; and, old age is a context of health.

[256] *Ibid.* at p. 9.

internal consistency, rationality and coherence. Instead, the inquiry leans more towards matters such as orientation, moral evaluation and efficacy.

So, at another level, the approach to the task in hand may be characterised as one that is grounded in critical theory. It challenges existing legal and societal norms– in particular, the common law's approach to the concept of testamentary freedom and society's reliance on the family unit in the provision of informal social care to the disabled elderly – and seeks to provide answers that will ameliorate a good deal of the injustice that surrounds the provision of informal social care to the disabled elderly in England and Wales.[257] As such, it goes beyond the mere accumulation of knowledge, and seeks social transformation in the form of a 'new deal for carers'. In acknowledging that these answers will require a significant change in the public perception of the relationship between society and the disabled elderly, this thesis will be considered by many to be overtly political in nature; and, indeed, at its heart, it strikes at the hegemony that presently defines how social care is provided to those who are unable to meet the financial demands of its continuing cost in the market place. Yet, it is also confined by reality and pragmatism. With this in mind, it looks to reform the existing system for social care in England and Wales, proposing evolution and not revolution.

In addition to an overtly doctrinal, but critical approach, this thesis also relies on some comparative law analysis in order to underpin its conclusions. Where the task is to discover the existence of a proprietary right, or indeed rights of an equitable nature, the value such an approach is self-evident.[258] Research of this nature enlightens the reader and leaves him/her all the better-informed as a potential reformer of the law. This course of action also necessitates the use of comparative law research tools. The greater longevity in humankind that has characterised the end of the twentieth and beginning of the twenty-first centuries is not limited to these shores, but is the product of medical and environmental advances that reach across the globe. How other jurisdictions are reacting to what may be characterised as 'the longevity crisis' is, therefore, of immense interest to the modern researcher.[259] Functionalist comparative law is seen as 'factual', focussing on events and their effects, and, 'grounded in society', such that its objects must be understood in light of their functional relation

[257] Kerry E. Howell, *an Introduction to the Philosophy of Methodology* (Sage, 2013) at pp. 76-77.

[258] This is acknowledged by Martin Dixon in 'A Doctrinal Approach to Property Law Scholarship', which forms chapter 1 in Susan Bright and Sarah Blandy, '*Researching Property Law*' (Palgrave McMillan, 2016) at pp. 1 – 10, but, in particular, at p. 7.

[259] D. I. Kiekbaev, 'Comparative Law: Method, Science or Educational Discipline?', *European Journal of Comparative Law*, Vol. 7.3, September 2003.

to society.[260] Consequentially, this comparative study is seen as evaluative in nature.[261] In a similar way to doctrinal research, it may 'provide material for the legislator' as well as being 'an instrument of interpretation' and 'of significance for the supranational unification of law'.[262] Seen in this light, the comparative method is very well-suited to the tasks that are set for chapter six of this thesis as it may help to avoid the mistakes of the past made by legislators in other jurisdictions who are trying to find answers to the same set of problems.[263]

Finally, chapter seven this work comprises an analytical study of the responses of twenty-one informal, family carers to a series of questions put to them by the author, in the form of a semi-structured interview, on their experiences of caring, the value of family caring, the merits and demerits of our existing social care system and their thoughts on how this system might be reformed and further funded given that the numbers of those who will be in need of such care is likely to increase markedly in the not too distant future. With the support of this data, the author then attempts to draw some meaningful conclusions which in combination with the other reforms suggested earlier in this work, will point the way forwards towards a better, more efficient and more humane social care system for England and Wales as a whole.

In summary, the methodology adopted in this thesis might be described as 'diverse', a synthesis of approaches fashioned towards a particular end. That is not entirely unconventional. Different methodologies may be used to advance a single hypothesis and may support each other in achieving that given aim. The reader may wish to judge the success of this approach.

As regards the scope of this thesis, while its premises are plainly directed towards the protection of adult children who render caring services on an informal basis to their elderly, disabled parents – which is a premise that other authors on this subject have repeatedly clung on to[264] – it is expressly

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[260] R. Michaels, 'The Functional Method of Comparative Law', taken from, 'M. Reimann and R. Zimmermann, *'The Oxford Handbook of Comparative Law'* (OUP, 2006)*,* p. 339 et seq.

[261] See: fn. 259, *supra*.

[262] K. Zeigert and H. Hotz, *'Introduction to Comparative Law'* (Pearson Publishing, 1998) at p. 32. Although whether the latter aim is achieved through comparative study has been doubted - see: R. Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law', *American Journal of Comparative Law*, Vol. 39, No. 1, pp. 1-34 at p. 2, where he claims*:* '… history provides no evidence that uniformity is achieved through comparative legal study'.

[263] Peter de Cruz, *Comparative Law in a Changing World,* 3rd edition, (Routledge Cavendish, 2007) at p. 222 et seq.

[264] Mika Oldham, 'Financial Obligations within the Family – Aspects of Intergenerational Maintenance and Succession in England and France', [2001] *Cambridge Law Journal*, pp. 128-177.

acknowledged in chapter six that the remedies that are put forward to protect adult children who deliver this care can equally be developed to accommodate informal care that is administered by those who have no blood ties to the care-receiver. Significant, here, would be the development of some form of registration for the carer so that he/she is acknowledged as the primary carer over and above members of the care-receiver's family.[265] With this in mind, all references to adult children as informal carers should not be seen as limiting the relief that is proposed for this section of society at the close of this thesis. There is little, good reason why friends and neighbours cannot take on a long-term informal caring role and receive the same benefits as adult children would do under any proposed scheme.[266] Similarly, the suggested reforms are not dependent on the ability of central government to recover any sums that may be paid to an informal carer from the estate of the care-receiver in the form of state benefits. If the care-receiver owns their own residential property, the proposal is that central government will take a charge over that property in order to secure the recovery of these payments, but if no such property exists, no such charge can be taken. In this event, the repayment of any sums advanced to an informal carer will form a debt recoverable from the care-receiver's estate, and measures will need to be put in place in order to prevent people avoiding this payment; but, if the care-receiver's estate does not have the resources to repay that debt, the debt will have to be written-off as simply the price that society must pay in order to maintain an effective and just 'informal care system'.

[265] And the further development of an appeal system so that members of the care-receiver's family could appeal this registration where they believe it to be wrong, would also be a useful addition to any proposals for the resolution of society's growing need for the work done by informal carers.

[266] Although, some form of negotiated contract and registration would be needed in order to allow the care-receiver's adult children to consider the impact of this care on their own expectations in relation to their parent's estate on his/her death, and strict control mechanisms would need to be in place in order to avoid non-family carers from abusing their position as carers and exploiting an elderly and vulnerable care -receiver.

CHAPTER THREE

CARE – THE STATUTORY FRAMEWORKS

3.1 INTRODUCTION

The provision of social care introduces both the care-giver and the care-receiver to a number of different statutory regimes. The purpose of this chapter is to identify and explain these regimes and to analyse their potential impact on the informal care-giving relationship with which this thesis is concerned. The object of this exercise is to better understand not only the regulations that confine and restrict that relationship but also what assistance is available from third parties to sustain and develop that relationship.

'Care' comes in various forms. One form of care that is closely related to social care is health care. In England and Wales health care is provided free at source by the National Health Service ('NHS') while social care is not.[267] Instead, the statutory obligation to provide social care lies on local authorities, but that obligation is a qualified one. Where a care-recipient's social care needs are already being provided for by a carer, there is no duty for the local authority to do anything.[268] Where someone is assessed to be in need of social care and has no carer, if the person so assessed asks for care and the eligibility conditions are satisfied, local authorities now have a duty to provide that care if that person is resident in their locality.[269] If the means of a care recipient are assessed to be in excess of the means-test

[267] Of course, that statement is a very broad one. There have been, and will continue to be, many instances where social care has been provided without charge because the recipient has no means to pay for such a service; equally, the prescription charges that many people have to pay for the provision of medicines on the NHS give the lie to the claim that all health care treatment is free.[267] Nevertheless, on a general level the observation is valid.

[268] See: The Care Act 2014, s. 18(7).

[269] The eligibility conditions: 1, 2 and 3 set out at *ibid*, s. 18(2)-(4).

threshold,[270] the local authority has a power to charge for such services.[271] In other words, those people who fall outside the means-test that is presently in place, and are not being cared for by a carer, are expected to pay for their own social care - at least where their need for the same is not attributable to illness and consequently treatable on the NHS. The distinction between treatment on the NHS and the provision of social care is thus a very stark one and somewhat difficult to justify. It is said that, on the one hand, health care involves 'the treatment, control or prevention of a disease, illness, injury or disability', and the care or aftercare of a person with needs that relate to one or more of these conditions.[272] In contrast, social care is more focused on providing assistance with activities of daily living, and other incidental benefits which allow the care-recipient to play a more meaningful role in society.[273] Stated thus, the distinction seems fairly clear. Yet, the deeper one looks, the more that distinction becomes blurred.[274] At a basic level, health care alleviates, or at least manages, 'suffering'. Yet, the elderly suffer with their disabilities as much as anyone else. If the task of government is to respond to the legitimate concerns and needs of its citizens, the distinction appears to be anomalous and perhaps, in the long-term, unsustainable.[275]

The social care system that we now have in England and Wales is largely a product of history. While the medical profession has always treated the 'sick and the lame', physical disability in old age has never been regarded as an illness if only because (beyond the replacement of a hip or a knee) there is no known cure for the immobility and decline in one's mental faculties that often accompanies more advanced old age. This has now left the provision of social care largely in the hands of those outside that profession. And, given that social care has traditionally been thought of as merely doing for

[270] This currently stands at £23,250 for capital. If your savings are above this limit, you will be charged the full cost of your care. If your available capital is below this sum, but above £14,250, you must contribute £1 for every £250 above this limit. If your savings are below this bottom limit, your contribution will be nil. There are also provisions in regard to income, but these will only bite where the care-receiver has a significant income over and above their state pension.

[271] The Care Act 2014, s. 14(1)(a) and (b) and s. 18(1)-(4).

[272] The National Framework for NHS Continuing Healthcare, Practice Guidance Notes, at p. 51, para. 2.1, - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/213137/National-Framework-for-NHS-CHC-NHS-FNC-Nov-2012.pdf (accessed: 25/06/18).

[273] *Ibid*, at parag. 2.2.

[274] *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213, where the Court of Appeal dismissed an appeal against an earlier judgment granting a claimants' application for judicial review of her local health authority's decision to characterise her continuing care as a tetraplegic as 'social care'.

[275] See: section 3.2, *infra*.

someone else what most others can do for themselves, those who work in this industry have been left undervalued and often forgotten, particularly where much of the work is provided gratuitously by families and friends. That is the social care system presently in place in England and Wales, and it has been widely acknowledged that the system is heavily dependent on the provision of care by informal carers.[276] Moreover, there is now a strong consensus across the country that, if it was ever 'fit for purpose', that system is now broken.[277] Yet, there is no clear idea how it might be mended, nor is there any unified vision of, or even any broad measure of agreement over, how our social care system should look either in the immediate future or beyond.

How to fund a viable social care system is clearly a crucial issue in the on-going debate over the future of such a system. For the most part, the burden of providing social care in England and Wales has fallen almost exclusively on the care-recipient's family. Indeed, until the obligation to provide such care was abolished in 1948 that burden was, at least theoretically, a legal one.[278] Although that legal obligation is now only a moral one, research indicates that this burden has grown very significantly since the early years of the twenty-first century.[279] And, indeed, evidence suggests that it will grow further as time moves on with suggestions that we will be facing a sizeable 'care gap' before very long.[280] These problems are not confined to England and Wales. Across the globe, younger members of the family – often the wives of eldest sons – have provided social care for their elderly relatives and have done so with considerable personal sacrifice on their part.[281] And, there is little, if any, evidence that this will change as time marches on. In the USA, in Europe, and in China and Japan, the only concerted help

[276] See: The House of Commons, Communities and Local Government Committee on Adult Social Care, Ninth Report, 2016-17, parag. 105, at p. 44 - https://publications.parliament.uk/pa/cm201617/cmselect/cmcomloc/1103/1103.pdf (accessed: 26/04/18).

[277] 'The State of Social Care in Great Britain in 2016', published by Leonard Cheshire (reg. charity) http://cdn.basw.co.uk/upload/basw_55214-6.pdf (accessed: 24/07/17) and '10 Charts that show what's gone wrong with social care', BBC News, - http://www.bbc.co.uk/news/health-39043387 (accessed: 24/07/17).

[278] See: S. 1 of the National Assistance Act 1948 which abolished the old Poor Law obligation which required sons to support their parents and grandparents throughout their lifetimes; daughters had the same obligation but could avoid it by marrying.

[279] Since 2001, the growth in the number of carers has outstripped population growth by 16.5% and the number of people providing 20-49 hours of care a week has increased by 43%, Carers UK, Valuing Carers (2015) - https://www.carersuk.org/for-professionals/policy/policy-library/valuing-carers-2015 (accessed: 26/04/18).

[280] See: fn. 276, *supra*, at parag. 104, p. 44.

[281] Martha A. Fineman., 'Responsibility, Family and the Limits of Equality: An American Perspective', in C. Lund, H. Keating and J. Bridgeman (eds), *Taking Responsibility, Law and the Changing Family,* (Ashgate, 2011).

for the elderly, disabled community is their immediate family with the State providing only the most basic of safety-nets should the family be unable or unwilling to become involved.[282] In these circumstances, there is a clear need for a new vision for the provision of social care for the elderly, not only in England and Wales, but across the developed world.

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3.2 SOCIAL CARE IN ENGLAND AND WALES

The creation of the NHS in July 1948 very much confirmed the idea that health care is a legitimate concern of the State.[283] Hence, the NHS is largely funded by general taxation.[284] In contrast, social care is funded either by local authorities or by the care-receiver; and, in an age where central funding for local authorities has been regularly declining, and the opportunities for such authorities to raise income locally has been severely restricted, the money spent on the provision of social care has been diminishing notwithstanding that more and more elderly are now in need of such provision.[285] In these circumstances, successive governments have come under increasing pressure to reform the social care

[282] A. Hashimoto 'Aging in Japan', at https://www.pittmag.pitt.edu/sep94/s94classes.html (accessed: 22/02/17) and F. Russo, Caring for Aging Parents: Should there be a law?' - http://healthland.time.com/2013/07/22/caring-for-aging-parents-should-there-be-a-law/ (accessed: 22/02/17).

[283] Is public health a proper concern of the State or should one's health be a matter of personal choice? If personal choice is unrestricted, to what degree should the burden of that choice be borne by the general public? These are, in essence, philosophical issues on which there has been considerable debate in the late twentieth and early twenty-first centuries. And, of course, arguments have been advanced in support of a 'just minimum of health care' as a basic human right – 'a special social good' whose absence operates to deny 'fair equality of opportunity' to those who suffer from illness and disease. See: Lawrence O. Costin and Madison Powers, 'What Does Social Justice Require for the Public's Health?' Public Health Ethics and Policy Imperatives, *Health Affairs,* vol. 25, no. 4, (2006) at p. 1053 *et seq*. And, see also: Norman Daniels, *Just Health*, (Cambridge University Press, 2012). A summary of Daniels' arguments can be found in his article, Justice, Health and Health Care, - https://muse.jhu.edu/article/178853 (accessed: 04/09/18). Those arguments support the idea that 'compensation for caring' should be available because the caring process denies the carer 'fair equality of opportunity' in regard to access to jobs, offices and the like.

[284] See: https://www.kingsfund.org.uk/projects/nhs-in-a-nutshell/how-nhs-funded (accessed: 02/02/20).

[285] See: https://www.ifs.org.uk/publications/8879 (accessed: 02/02/20).

system. Perhaps the most significant development of the early part of the twentieth-century was the decision of the Coalition Government to set up the Commission on Funding of Care and Support in 2010, now known as 'the Dilnot Commission'. The Dilnot Commission recommended, inter alia, the capping of an individual's social care costs at a figure of no more than £50,000 so that, once this sum had been paid, the State would pick up pay the balance of those costs.[286] Although it did not accept the level of the cap, the Coalition Government's response was to very largely adopt the principles of the funding model that the Dilnot Commission had put forward – i.e. capped institutionalised social care costs, an extended means test for those without the necessary capital reserves to pay the capped sum and a universal system of deferred payments for any residential care that might be needed.[287]

In February 2013, the Coalition Government formally introduced its long-promised raft of social care reforms by promising to bring in a 'capped care model' from April 2017 onwards. One month later, in the March budget, this date was brought forward to 2016 and the maximum sum that any individual would be asked to pay towards the funding of his/her social care needs was set at £72,000. In March 2014, this Bill became law and was set to come into force in April 2015. The cap on care costs was due to be brought into force a year later. In the event, the introduction of phase two of the Care Act 2014 was postponed. On 17 July 2015, just two months after the 2015 General Election, the new Conservative administration announced its decision to delay the implementation of phase two until April 2020. Phase two includes not only the much-vaunted cap on care costs but also the proposed changes to capital limits for savings that would have resulted in a more generous means-test for those who are entitled to receive state support for the funding of their social care.[288] In addition, the new Conservative Government also postponed, until April 2020, the proposed duty on local authorities to meet the needs of self-funding occupants of care homes at their request – albeit, in such circumstances, the local authority involved would have the right to recoup those costs by levying charges on the self-funder in question. The main reasons that were provided for this delay were two-fold.[289] Firstly, the cost of introducing such provisions was considered to be too high in the present economic climate; and, secondly, the Government further referred to the lack of products presently

[286] See: https://www.kingsfund.org.uk/sites/default/files/field/field_publication_summary/social-care-funding-paper-may13.pdf (accessed: 02/02/20).

[287] *Ibid.*

[288] This would have increased the upper capital limit for support from £23,250 to £118,000 for care home residents whose property is included in the means test and from £23,250 to £27,000 in all other cases.

[289] These reasons appear in the UK Government's written statements to the House of Lords and to the House of Commons made on the 17th and 20th July 2015 in response to a letter from the Local Government Association asking for a delay in the implementation of the policy behind the Care Act 2014.

available in the private insurance market that would encourage people to protect themselves against the future costs of their own social care and thereby limit the exposure of the State to fund the reforms that the Care Act 2014 was to introduce.

In the publicity that heralded the arrival of the Care Act 2014, it was estimated that the financial limits on care costs that were due to be introduced by this Act would have benefited some 80,000 people.[290] Yet, whether these benefits would accrue to those in most need of them remains open to doubt.[291] In any event, whether the proposed cap on social care costs will ever be introduced must now be called into question.[292] In order to bring the proposed reforms into force, the UK Government would have to find some £6 billion over the next five years and commit to spending in the region of £2.4 billion on social care costs in 2024/25.[293] In these circumstances, while the postponement of phase two will have disappointed many,[294] this decision received a cautious welcome from many diverse sources, such as Care England[295] and Carers UK,[296] on the one hand, and the Local Government Association,[297] on the other. In fact, the absence of any real outcry over the delay in the implementation of phase two of the

[290]See: www.gov.uk/Government/uploads/system/uploads/attachment_date/file/400757/2903104_Care_Act_Consultation_Accessible_All.pdf (accessed: 30/06/14).

[291] N. Hopkins and E. Laurie, 'Social Citizenship, Housing Wealth and the Cost of Social Care: Is the Care Act 2014 'Fair''? *Modern Law Review* (2015) 78(1) pp. 112-139.

[292] Nick Triggle: 'Is the Cap on Care Costs Doomed?' at http://www.bbc.co.uk/news/health-33624728 (accessed: 16/11/17).

[293] Carers UK: 'Delayed implementation of Care Act phase two', Policy Briefing, August 2015, at p.7.

[294] In particular, because this policy had been part of the Conservative Party's election manifesto in 2010 and again in 2015.

[295] M. Green, CEO of Care England was reported as saying, '[We] must now, once and for all, use this time to develop a long-term and sustainable funding solution for social care. If the government refuses to address the issue of funding, we will have a care system in crisis and the NHS unable to cope with the pressure.' – See also: BBC News, 'Care Costs Cap delayed until 2020' - http://www.bbc.co.uk/news/health-33552279 (accessed: 26/05/16).

[296] Carers UK: 'Delayed implementation of Care Act phase two', Policy Briefing, August 2015, at pp. 6-7.

[297] The first call to implement a delay in the bringing-in of the cap came from the Local Government Association (the 'LGA'). In early July 2014, the LGA suggested that the reforms in phase two should be delayed and the £6 billion which would be saved by doing so should be injected into the present adult social care system in an effort to keep it afloat - 'Adult Social Care Funding: 2014 State of the Nation Report', by the Local Government Association's Association of Directors of Adult Social Services, October 2014, - see: http://www.local.gov.uk/documents/10180/5854661/Adult+social+care+funding+2014+State+of+the+nation+report/e32866fa-d512-4e77-9961-8861d2d93238 (accessed: 26/05/16).

Act may reflect not only growing doubts over the economic practicalities of the scheme but also its overall 'fairness' as an instrument of social justice.[298]

Whether any 'justice' can be delivered to care-receivers in perhaps one thing; whether such justice will ever be provided for informal carers is quite another. As things stand, the UK Government makes some small provision for informal carers in the form of a 'carer's allowance'.[299] The word 'allowance' is an ill-judged description of such a payment.[300] It rather suggests that the payer is getting nothing in return for what is being paid out; that, in turn, seems to indicate that there is no moral or other obligation on the State to pay for what is being provided. In fact, that is how the word 'allowance' is used elsewhere in the UK benefits system, as if it corresponds to what we give our children and dependants so they may learn how to manage money or to provide themselves with a few 'home comforts' where these are not supplied directly by the head of the household.[301] Unfortunately, the description, 'carer's allowance', only serves to exemplify the way in which informal carers are – and have always been – treated by successive governments. While these governments have often been quick to heap praise on informal carers for the work that they do, they have also consistently disavowed any responsibility for paying – or even providing significant financial encouragement – for the supply of social care to the disabled elderly across the board.[302] In fact, one can see how the 'carer's allowance' is thought of at government level when one realises that, once a carer is entitled

[298] Indeed, as Nicholas Hopkins and Emma Laurie were quick to note, the implementation of the 'cap' on social care costs that is contained in the Care Act 2014 would operate '… to reinforce the expectation of leaving housing wealth as an inheritance which perpetuates inequalities across generations. (See: fn. *supra*) In other words, the proposed 'cap' enables an individual's housing wealth to be protected against the dissipation of that wealth that would result from any requirement that it be used to pay for that individual's social care costs (which is required under the present system) thereby enabling those who have such wealth to pass it on to their children or other relations on their death. Put in these terms, the so-called 'fairness' of the Care Act 2014 is called into question as something that is contrary to the modern conception of 'social citizenship', which is at one point connected with the provision of basic services and benefits by the welfare stare which are designed to be accessed by the poorest in society, and, at the opposite end of the spectrum, with a more equal distribution of wealth across that society. (See: pp. 113 and 118)

[299] https://www.gov.uk/carers-allowance (accessed: 16/11/17).

[300] Some may regard it as demeaning.

[301] Cf. the 'Jobseeker's Allowance', 'Attendance Allowance' and even 'the Marriage Allowance' in our Income Tax system.

[302] The UK Government's 'position' is that the 'carer's allowance' is not intended as a wage and therefore no comparison with, say, 'the national living wage' would be a fair comparison – see: HM Government, Carers at the Heart of the 21st Century Families and Communities, (The Stationery Office, 2008) - .https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136492/carers_at_the_heart_of_21_century_families.pdf (accessed: 11/11/17). This thesis will contend that this position is unjustifiable.

to a state pension on reaching pension age, the sum he/she receives for the 'carer's allowance' is likely to diminish given the means-tested nature of the payment, yet the demands of the work remain the same.[303]

Notwithstanding this, the UK Government continues to seek the support of family units in order to deliver the social care that many elderly citizens so desperately need.[304] Tomorrow's social care for the elderly is set to continue, it seems, as a form of partnership between public and private provision.[305] This was the position adopted by the Coalition Government in 2012. And, it remains, it would appear, the position of the present Government too.[306] Despite increasing recognition of the seriousness of this issue,[307] and some small attempts in recent years to introduce additional funding for local authorities in order that they might better perform their statutory duties in regard to the provision of social care,[308] the idea of a partnership between the family and the State in an effort to meet the challenge that an ageing population is being touted by many, particularly in the centre and on the right of our political spectrum, as the only viable solution.[309] And, it is the family that is expected to play the dominant role in this partnership.

Partnerships are, of course, consensual arrangements. Yet, if care is not provided by the care-receiver's immediate family, the absence of a properly-funded social care system has meant, and will

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[303] See: The House of Commons, Communities and Local Government Committee on Adult Social Care, Ninth Report, 2016-17, fn. 197, *supra*, parag. 119, p. 48.

[304] David Mowatt, Care Minister in the Conservative Government in 2017, reported at https://www.theguardian.com/society/2017/jan/31/take-care-of-your-elderly-mothers-and-fathers-says-tory-minister and http://www.telegraph.co.uk/news/2017/01/31/parents-responsible-care-elderlymothers-fathers-much-children/ (accessed: 25/07/17).

[305] Jeremy Hunt, Health Minister in the Conservative Government in 2015, - https://www.gov.uk/government/speeches/personal-responsibility (accessed: 25/07/17).

[306] There seems to be no significant change of the Government's position on social care in the wake of the last general election in December 2019; the partnership theme remains.

[307] Whether this has been reflected in government circles is another matter. Between 2010 and 2016 social care funding in England alone diminished by some £4.6 billion; see: the Association of Directors of Adult Social Services' Budget Survey, 2016 - https://www.adass.org.uk/adass-budget-survey-2016-full-report (accessed: 27/07/17).

[308] See: the introduction of the 'adult social care precept' in the Budget Statement of Autumn 2015 which allowed local authorities to raise council tax charges by 2% to fund adult social care in their area and the 'Improved Better Care Fund' in the same Budget Statement which is designed to 'incentivise and transform the integration of health and social care services' – http://researchbriefings.files.parliament.uk/documents/CBP-7903/CBP-7903.pdf (accessed: 27/07/17).

[309] http://www.conservativehome.com/platform/2017/05/loanna-morrison-social-care-should-really-become-family-care.html (accessed: 21/08/18).

continue to mean, that some of our disabled elderly will suffer real hardship and deprivation. That only increases the pressure on families to provide that care at their own expense.[310] As a society in control of its Government through our democratic processes, the very least we should demand is that it provides such social care as may be required by the disabled elderly to any would-be service user who is unable to pay for such services from their own resources. Where recipients are able to pay for their own social care, new initiatives are needed to encourage them to do so without imposing financial burdens on them that are unfair when compared with those whose needs must be met directly. Nevertheless, before we can take a look at what might be done for all those in need of care, we must consider what is presently being done for informal carers. It is only to the extent that what is being falls short of satisfying the demands of social justice in the twenty-first century that a case may be made for the reform of the existing social care system.

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3.3 SOCIAL CARE IN THE PRESENT DAY – THE CARER'S LOT

In many respects, the Care Act 2014 has kept faith with the existing process of delivering social care in England and Wales by reinforcing the two main pillars of the existing system, 'the assessment' and 'the personal budget'. Service users will continue to be assessed on the appearance of their needs without regard, at first, to their financial resources or to any assistance that they might already receive from informal carers.[311] In this context, a carer is defined as an adult who provides or intends to provide care for another adult.[312] This 'carer-blind' assessment of needs will produce the service user's 'personal budget' which can generate a cash payment from the local authority to either the service user or a family member or friend who will manage that payment on their behalf.[313] While for some

[310] That is to say, expense in terms of the care-giver's time and labour but also 'at the expense' of the care-giver's career prospects and mental well-being.

[311] See: The Care Act 2014, s. 9.

[312] *Ibid*. s. 10(11), which makes it clear that care includes the provision of practical or emotional support.

[313] See: section 2.5, *infra*.

this presents the service user with a freedom to purchase whatever he or she most desires from the market, to many others a service user's needs are 'commodified' and 'depersonalised'.[314]

Concurrently with this service users' assessment, local authorities must now carry out a carer's assessment in order to measure the impact of any informal social care that is being provided by the carer on the well-being of the service user and on the outcomes that the informal carer wishes to achieve.[315] That assessment will look to see what support might be offered by the local authority to satisfy these outcomes.[316] In carrying out this assessment, the local authority is required to have regard to whether the carer works or wishes to work and whether the carer is participating in education, training or recreation, or wishes to do so; and, it must involve the carer and the service user in the assessment.[317] This unrestricted duty on local authorities to carry out a carer's assessment is new.[318] And, the assessment must take place regardless of the carer's need for support and without regard to their financial resources or those of the service user.[319] Thus far, the introduction of these support measures seems to be 'good news' for informal carers whatever their situation may be.

Regrettably, this may not be the case across the board. These assessments are not, in themselves, 'gateways' to the provision of care services by local authorities. Once these assessments have been carried out, and the local authority has found that there is a need for either care or support on the part of an adult would-be service user, it must then decide whether any of his/her needs satisfy 'the

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[314] As Lucy Series and Luke Clements remark: 'The process by which 'need' is commodified (as opposed to the response to that 'need') is generally referred to as 'personalisation' and the price put on that need, as a 'personal budget. If a personal budget consists of a cash payment to the disabled or elderly person (or family member / friend on their behalf) then this, at law is 'direct payment.' – L. Series and L. Clements, 'Putting the Cart before the Horse: Resource Allocation Systems and Community Care'*, Journal of Social and Welfare Law 35(2),* pp. 207-226 at p. 210.

[315] The duty on local authorities to carry out a carer's assessment is new; and, the assessment must take place regardless of the carer's need for support and without regard to their financial resources or those of the service user. Local authorities have had power to carry out such assessment since 2000, but have never been under a duty to assess the needs of carers.

[316] The Care Act 2014, s. 10, and, in particular, s. 10(5).

[317] *Ibid*. at s. 10(5), (6) and (7)

[318] Local authorities have had power to carry out such an assessment since 2000, but have never been under a duty to assess the needs of carers save in very limited circumstances. These circumstances were where the carer in question provides or intends to provide a substantial amount of care on a regular basis for the relevant person and asks for or requests an assessment pursuant to the Carers (Recognition and Services) Act 1995, s. 1(1), or the Carers and Disabled Children Act 2000, s. 1.

[319] The Care Act 2014, s.10 (4).

eligibility criteria' applicable to service-users.[320] Similarly, where some of the carer's needs meet the eligibility criteria for carers' support following the making of a carer's assessment, the local authority is under a like duty.[321] A carer will meet the eligibility criteria applicable to carers if his/her needs arise as a consequence of providing care for an adult and the effect of those needs is that the carer is unable to provide some of the care that is necessary or the effect of the carer's needs is that the carer's physical or mental health is deteriorating or the carer is unable to achieve certain specified outcomes and, as a consequence, there is, or is likely to be, once again, a significant impact on the carer's well-being. If some of the carer's needs meet the eligibility criteria, all that the local authority is required to do at this point is to 'consider what could be done to meet those needs'.[322]

S. 20(1) of the Care Act 2014 then imposes a duty on local authorities to meet a carer's need for support.[323] Having made a determination of needs under s. 13(1), a local authority must meet a carer's needs for support, where the carer is caring for an adult needing care in its area,[324] if it has found the existence of needs that meet the eligibility criteria. These needs are to be met either by the provision of support to the carer or through the provision of care and support to the adult needing care. Again, there are similar conditions that must be met in regard to the adult service user and carer's financial resources in order to trigger the duty of meet the carer's need for support;[325] and, local authorities are able to charge for the services that they provide if these financial conditions are not satisfied. If there is no duty on a local authority to meet a carer's needs, the local authority is given a power to do

[320] See: The Care Act 2014, s. 13(1) and (7). Under the Care and Support (Eligibility Criteria) Regulations 2014, (which came into force on the 1st April 2015) a service user's needs will only meet the criteria if they are caused by a physical or mental impairment or illness and will result in the service user being unable to achieve a 'specified outcome' with the result that there is, or is likely to be, a significant impact on the adult service user's well-being.[320] In this event, the local authority must consider what can be done to meet these needs.

[321] See: The Care Act 2014, s. 13(4).

[322] The Care Act 2014, s. 13(4)(a).

[323] This is similar in form to the duty placed on a local authority to meet the needs for care and support of adults that are 'ordinarily resident in its area' - ibid. s. 18(1).

[324] Whether the adult service user in question is in need is determined, inter alia, by reference to 'the financial condition' - The Care Act 2014, s. 18(2).

[325] *Ibid*., s. 20(1)(b) and (c) and (2) – (5), ibid.; these provisions are a little more complex than the s. 18 provisions given the existence, here, of both the adult service user and the carer.

so.[326] There is also a similar power for local authorities to meet the needs of adult service users where there is no duty on them to act.[327]

One of the steps that a local authority must take where it is required to meet an adult service user' or carer's needs or where, in the absence of a duty to do so, it decides to exercise its power to meet those needs is to prepare a care plan, or alternatively a care and support plan, as the case may be;[328] another such step is the preparation of an independent personal budget for the adult service user.[329] Amongst other things, a support plan for carers will specify the needs that have been identified following the completion of the carer's assessment, specify to what extent those needs meet the eligibility criteria, specify the needs that the local authority will meet and how it proposes to meet them, and provide the carer with advice and information on what can be done to meet or reduce those needs and what can be done to prevent or delay the development of needs for care and support for the adult service user and/or support for the carer in the future.[330] Unfortunately, and rather perversely, these demands are proving to be too costly for local authorities who are increasingly starved of funds by Central Government. In fact, it has been observed that there is a clear disincentive for local authorities to identify carers and to carry out an assessment of their needs.[331]

Although these new duties and powers are in some ways extensive, and include a raft of 'overarching duties' which local authorities must comply with in the delivery of care and support services to those in their locality,[332] on closer inspection one can see, once again, the 'safety-net approach' in operation.

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[326] *Ibid*. at s. 20(6)

[327] *Ibid.* at s. 19(1)

[328] *Ibid.* at s. 24(1)(a)

[329] *Ibid.* s. 24(3) and, see: ibid. s. 26(1), for the definition of 'personal budget'.

[330] *Ibid.* s. 25(1)

[331] See: The House of Commons, Communities and Local Government Committee on Adult Social Care, Ninth Report, 2016-17, parag. 108, p. 45, noting the evidence of Councillor Rory Palmer, the Deputy City Mayor and Lead Member for Adult Social Care at Leicester City Council, - https://publications.parliament.uk/pa/cm201617/cmselect/cmcomloc/1103/1103.pdf (accessed: 29/04/18).

[332] These duties on local authorities comprise: 'the well-being principle' (a duty to promote the well-being of service users and carers and to take their views, wishes, feelings and beliefs into account when doing so); a duty to 'prevent reduce and delay needs for care and support' in its area; a duty to exercise its functions by integrating care and support provision with health provision and health-related services where that is in the best interests of service users or carers with needs; a duty to provide information and advice relating to care and support provided by the authority to both service users and carers; a duty to promote diversity and quality in the provision of care and support services in its area, including the promotion of 'the efficient and effective operation of a market' for those services; and, a general duty to co-operate with its service providers in carrying out its functions under the Act.

The State is only prepared to step in when there is a danger of family support failing in some degree. In these circumstances, while informal carers can expect to receive some incidental benefit from these changes, their overall impact on 'the carer's lot' remains uncertain. That the Care Act 2014 represents only the first steps towards the provision of an 'effective safety-net', and nothing more, for the disabled elderly who will be in need of social care in the years to come is most keenly emphasised by a report from the King's Fund which centres on the funding of such social care as we move further into the twenty-first century.[333] In essence, the 2014 report from the King's Fund considers the economic challenges that the Care Act 2014 will bring and explores some of the solutions to these challenges from a Central Government standpoint.[334] As the authors of this report note, the £72,000 cap on lifetime costs of social care provided by the State applies only to 'eligible needs' – in other words, needs that a local authority assesses are 'necessary' (which is likely to depend on the resources available to a local authority as much as anything else) - for a particular applicant.[335] The report further concludes that what is 'necessary' is likely to correspond to the demands of those with 'critical needs' or 'substantial needs', which represent the two most serious categories in the four recognised categories of care that local authorities use in order to determine whether or not they should pay for such care.[336] There is, therefore, still a very significant need for adult children to continue to involve themselves in the care of their disabled elderly parents.[337] What is more, as noted earlier, that need is projected to grow, not diminish.[338] And, with that need, there remains the question: should the provision of such social care be incentivised to the extent that adult children have the legal right to recover some or all of the costs expended by them (including the value of their labour) in providing

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[333] K. Barker, 'A New Settlement for Health and Social Care: A Final Report', the King's Fund, 2014, which at page ix of its introduction, States that the estimates presented in that report suggest that an additional £3 billion will be needed initially to make social care free for those regarded as having critical or substantial needs and that this figure will rise to £ 5 billion by 2025.

[334] It is interesting to consider that, as noted in the 2014 report, the Local Government Association has calculated that there will be a £1.9 billion shortfall in local authority budgets for the cost of adult social care as at the end of the next financial year – *ibid*. at p. 17.

[335] *Ibid*. at p. 3;

[336] *Ibid.* at p. 3;

[337] As noted at p. 2 of the 2014 report: 'Population projections suggest that the numbers of older people needing care will continue to grow significantly – the number of people aged over 80 is expected to double to 6 million by 2037' – and it is this section of society that will be most in need of social care; yet, as noted at page 4 of the 2014 report: 'Only around half of the social care spending goes on those aged over 65'. This more than demonstrates the very significant role played by informal carers in the English social care system;

[338] See, generally: chapter 1, section 1, *supra*.

that social care for an elderly parent from the parent's estate at his or her death? Without this incentivisation, it would seem that the funding of social care for the elderly will continue to be an intractable problem for the UK Government for many years to come at a time when pressure on the social care system continues to increase exponentially.

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3.4 PAYING FOR THE COST OF SOCIAL CARE – DIRECT PAYMENTS

Where the Care Act 2014 may have some small impact on 'the carer's lot' is in relation to the use that adult service users might be able to make of 'direct payments'. Such payments have been in use in the context of adult and social care in England and Wales since the mid-1990s; and, the UK Government has declared direct payments to be its, '… preferred mechanism for personalised care and support [as such payments] provide independence, choice and control by enabling people to commission their own care and support in order to meet their eligible needs'.[339] At paragraphs 12.35 – 12.36 of the Care and Support Statutory Guidance issued under the Care Act 2014, the Government has explained that the use of direct payments made to adult service users, '... is designed to be used flexibly and innovatively and there should be no unreasonable restriction placed on the use of the payment, as long as it is being used to meet eligible care and support needs.[340] Having said this, the Government has held true to one of its main principles in regard to adult social care, namely, that these direct payments cannot be used to purchase care services from a close family member living in the same household, except in exceptional circumstances.[341] While holding true to this idea, the Care and Support (Direct Payments) Regulations 2014 do permit local authorities a general discretion to give

[339] Paragraph 12.3 of the draft Care and Support Statutory Guidance issued under the Care Act 2014 by the Department of Health, June 2014.

[340] *Ibid*. at parag. 12.35.

[341] This was the position under the previous 2009 Direct Payment Regulations.

prior consent to pay a close family member living in the same household in return for providing management and/or administrative support to the direct payment holder.[342]

What 'exceptional circumstances' might merit direct payments being used to pay a close family member living in the same household as the adult service user for the provision of care services? The NHS suggests[343] that the use of direct payments in this manner may be permitted where only the family member could fulfil the role of care provider due to '… religious reasons, language difficulties or specific health problems' and perhaps other reasons, which it does not specify but which it does acknowledge may exist.[344] Permission to use direct payments in this way is firmly in the hands of the local authority making the payment. And, in practice, this power is only used, it seems, in the rarest of circumstances.

Other European states take a different approach. In the Netherlands, for example, those who require care services and who opt to receive direct payments in lieu of state-provided care are permitted to use these payments to pay relatives to perform these services regardless of whether they are living in the same household as the care recipient.[345] There are conditions that must be satisfied before the care recipient can engage someone living in the same household as a carer. In order to be eligible to receive these direct payments from care recipients, household members (including partners) must show that the caring duties that they have performed on an informal basis 'overstrain' them; if they are able to do so, they can be paid for the care they provide through the use, by the care recipient, of these direct payments under a formal contract, if the care recipient can justify their engagement.[346] In this way, family members, in the Netherlands, can become 'care workers', albeit without subsidiary employment rights such as sickness and holiday pay.[347] In Germany, where the provision of care services are funded through hypothecated social insurance contributions from employers and employees which are fixed by Federal Law, those who require care services may either receive these

[342] See: fn. 339, *supra*, at parag. 12.36.

[343] http://www.nhs.uk/CarersDirect/guide/practicalsupport/pages /DirectPayments.aspx (accessed: 02/07/2014).

[344] *Ibid*.

[345] E. Grootegoed, 'Relatives as paid care-givers: how family carers experience payments for care', (2010) *Ageing and Society, 30*, pp. 467-489.

[346] Although 5% of the annual direct payments budget may now be used to pay family members living in the same household as care recipients without this justification - *ibid.* at p. 487.

[347] *Ibid*. at p. 470.

services from a provider organisation or take a lower value cash allowance and arrange their care informally, i.e. paying relatives to provide the care they need.[348] [349] Typically, the lower cash value allowance is a little over one half of the commercial cost of these services.[350]

In some respects, it is disappointing that in enacting the Care Act 2014 the UK Government has not chosen to follow the path followed by our European neighbours. That said, it must be acknowledged that State provision of financial support for carers, whether provided directly or indirectly, has provoked a good deal of philosophical and even moral debate.[351] Should the state provide such support? Is such support the best way of supporting carers financially? Is such support in the best interest of care-receivers? There is some feeling abroad that state provision of financial support for carers*, '…* can entrap women into caregiving roles by offering financial support in place of other care options'.[352] While some initial research in Canada has only concluded that, '… financial support policies [can be] but one approach to the development of a supportive community policy',[353] and that 'a more complex and comprehensive framework for sorting through these layers [i.e. the support options available in each case] is needed in order to develop responsive polices',[354] other research in the Netherlands, albeit limited in scope, has produced a much more favourable response, with interviewees describing the introduction of cash payments as 'positive and motivating'[355] and researchers concluding that '… payments for care help to create a situation of balanced give-and-take, particularly in very demanding and intense long-term care relationships'.[356]

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[348] C. Glendinning, et al. 'Funding long-term care for older people: lessons from other countries', (2004), The Joseph Rowntree Foundation.

[349] J. Keefe, et al. 'Financial payments for family carers: policy approaches and debates', in A. Martin-Matthews and J. Phillips (eds.), *Ageing at the inter-section of work and home life: Blurring the boundaries*, (New York, Lawrence Eribaum, 2008) at pp. 185-206.

[350] *Ibid*. at p. 200.

[351] Jean C. Blaser, 'The Case Against Paid Family Caregivers: Ethical and Practical Issues', in M. Holstein P. and Mitzson (eds.), *Ethics in Community-Based Elder Care*, (Springer Publishing Company, 2001).

[352] See: fn. 349, *supra*.

[353] J. Keefe and B. Rajnovich, 'To Pay or Not to Pay: Examining Underlying Principles in the Debate on Financial Support for Caregivers', *Canadian Journal on Ageing,* 26, pp. 77-89, p. 86.

[354] *Ibid*. at p. 87.

[355] See: fn. 345, *supra,* p. 483.

[356] See: *Ibid*. at p. 485.

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3.5 PAYING FOR THE COST OF SOCIAL CARE – THE 'CARER'S ALLOWANCE' AND 'CARER'S BENEFIT'

While the support that can follow a carer's assessment may provide some small relief for informal carers, in ordinary circumstances this relief will not be financial in nature. It is therefore necessary to look at what financial provision is presently available for carers. In essence, this relief can be found in 'the carer's allowance' and 'the carer's benefit'.

The modern-day 'carer's allowance' is derived from s. 70 of the Social Security Contributions and Benefits Act 1992 and the various statutory regulations made thereunder.[357] At the time of writing in March 2020, this allowance stands at £66.15 per week or, on average, almost £300 per month.[358] The benefit is payable to those who look after others who have 'substantial care needs'[359] but there are many qualifying conditions that a claimant must satisfy before being entitled to this payment and, if a claimant is paid the carer's allowance, such payment may affect the state benefits to which the care recipient is entitled.[360] These restrictions are in place because 'carer's allowance' is seen as an income-

[357] Latterly, these include the Social Security (Disability Living Allowance, Attendance Allowance and Carer's Allowance) (Miscellaneous Amendment) Regulations 2011 and the Social Security (Disability Living Allowance, Attendance Allowance and Carer's Allowance) (Amendment) Regulations 2013.

[358] https://www.gov.uk/carers-allowance (accessed: 11/11/17). There are approximately six million carers in the UK. However, huge numbers don't claim. Benefits charity Elizabeth Finn Care estimates 300,000 people who are eligible do not claim carer's allowance.

[359] https://www.gov.uk/government/news/social-care-users-will-be-guaranteed-a-minimum-level-of-council-help-under-new-plans which explains that the latest draft regulations pitch the new eligibility criteria under at the equivalent of 'substantial' under the old four-fold needs assessment for the provision of social care used by local authorities over the past few years – see also: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/209595/National_Eligibility_Criteria_-_discussion_document.pdf (both accessed: 30/05/16).

[360] If a care recipient is paid 'severe disability premium' with any of the following benefits, namely, (1) income-based job seeker's allowance; (2) income support; (3) employment and support allowance; (4) pension credit; or, (5) housing benefit, and a claimant makes a successful claim for 'carer's allowance', then the care recipient's severe disability premium will stop and any council tax reduction that they may be entitled to could be affected – www.gov.uk/carers-allowance/what-youll-get (accessed: 06/02/15).

replacement benefit and not a payment for services rendered; under the over-lapping benefit rule a claimant is not permitted to claim two income-replacement benefits.[361] There is also a residence qualification that needs to be satisfied before this benefit can be paid.[362] Added to this, there are also a number of exclusions. In particular, claimants must be earning less than £102 per week (net of tax, care costs and 50% of one's pension contributions) from any other employment that they might be undertaking and must not be in full-time education or studying for 21 hours or more each week. What is more, payment of the carer's allowance may be restricted if a claimant is entitled to and claims other benefits listed at https://www.gov.uk/carers-allowance/eligability. Finally, as the carer's allowance is a seen as an income-replacement benefit, the care recipient's financial situation must be such that he/she is unable to pay a commercial rate for his/her care. Therefore, in order for the claimant to receive the carer's allowance, the care recipient must receive one of the following benefits: (i) the personal independence payment daily living component; (ii) the disability living allowance (at the middle or highest care rate); (iii) attendance allowance; (iv) constant attendance allowance at or above the normal maximum ate with an industrial injuries disablement benefit at basic (full day) rate with a was disablement pension; or (v) an armed forces independence payment. In these circumstances, carer's allowance cannot be seen as a payment for services rendered by an individual in place of the State, but as an income supplement for those who would, otherwise, be unable to provide care for others on account of their own straightened circumstances. Mercifully, for many carers, the Welfare Reform Act 2012 made no impact on the 'carer's allowance' which now lies outside the universal credit system.

In order to claim carer's allowance a claimant must, of course, deliver 'substantial and regular care' to someone who is in need of such care. This phrase, 'substantial and regular care', has no statutory definition. However, the Department of Health in its guidance notes advises not only that a wide interpretation be given to the phrase 'substantial' but also that any interpretation of this requirement should have a subjective as well as objective element and should be concerned, primarily, with the impact that the caring role has on the carer; in addition, the word 'regular' should be interpreted, so say these guidance notes, as meaning merely 'on-going' and nothing more.[363] Moreover, carer's

[361] Although, if this is the reason why a claimant cannot claim carer's allowance' he/she will have an 'underlying entitlement' to carer's allowance, which means that he/she could receive the carer's premium in any jobseeker's allowance or income support to which he/she is entitled or the 'extra support for carers' payment within any pension credit he/she may receive.

[362] Claimants must have spent two of the last three years resident in Britain.

[363] See: Luke Clements and Pauline Thompson, *Community Care and the Law*, (LAG, 2011), paragraphs 16.14 and 16.15.

allowance is only payable where someone is providing at least 35 hours of otherwise unpaid care to a person receiving a relevant disability benefit.[364] Given these stringent restrictions, the take-up of carer's allowance has been very limited. Carers UK estimate that over 300,000 of carers fail to claim their statutory entitlement to benefits.[365]

Carers' benefit is an additional state benefit and is payable where the person cared for is entitled to a particular state benefit such as Incapacity Benefit. Entitlement to the benefit is a complex affair. It is estimated that approximately £740 million in Carer's Benefit goes unclaimed each year. Carer's Credit is available where a person gives up employment to care for a child and is designed to mitigate the negative impact on the carer's pension that follows from the loss of his or her job. A Carer's Grant is available to allow a carer to take advantage of respite services and a reduction in Council Tax can also be claimed.

All of this provision is, of course, valuable. Yet, no one could possibly pretend that it is nearly enough. What carers often lose by caring for others over a protracted period of time are their very dreams and aspirations. In many respects, no amount of financial or other provision can replace this loss. But, that is no excuse for inaction. Those who sacrifice their lives to provide this care should be revered and celebrated. On one level this needs to be reflected in the availability of social care services that can be accessed by informal carers, some at no charge, and others at perhaps some small cost. And, here the evidence seems to be that the level of service that is provided is extremely low and often non-existent.[366] On another level, this needs to be through the proper provision of a range of easily accessible 'financial incentives' for the work that is done by informal carers, work that is essential now, and work that will become even more valuable in the future. And, this is plainly absent from our present system.

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[364] https://www.gov.uk/carers-allowance/eligibility and https://www.carersuk.org/help-and-advice/financial-support/help-with-benefits/carers-allowance (both accessed: 30/05/16).

[365] Carers UK, *'Carers Missing Millions'*, Carers UK, 2010, at https://www.carersuk.org/news-and-campaigns/news/carers-missing-millions (accessed: 16/11/17).

[366] See, in particular, the sections entitled 'services for carers' and 'social care services' at pp. 122-130 in J. Herring, *Caring and the Law*, (2013, Hart) for a full account of the problems faced by those attempting to access these services.

3.6 MENTAL CAPACITY AND SAFEGURDING THE ELDERLY

The elderly are often seen as 'vulnerable'. Vulnerable people are susceptible to abuse largely because they rely on others. And, the disabled elderly in our society place considerable reliance on those who provide their social care. Any form of threat to withdraw that care by an informal carer would ordinarily place untold pressure on any member of this class to adhere to whatever demands were attached to that threat. And, there are many reported instances where an elderly, disabled care-receiver has succumbed to such demands. But, informal carers too are vulnerable. Although one might claim that informal carers provide care on a purely voluntary basis, and are therefore entitled to 'walk away' at any time, in reality the ties of kinship, of love, of moral duty, and the like, make abandoning the care of an elderly, disabled relative an extremely difficult and often impractical option. Such a crisis commonly occurs at particular 'pressure points'. One such point is the loss (or perceived loss) of the care-receiver's capacity to make ordinary day-to-day decisions about their accommodation and continuing welfare. In this event, these decisions must be made by someone acting on behalf of the care-receiver.[367] Similarly with decisions concerning the care-receiver's financial affairs – for example, the realisation of a significant investment or the sale of the care-receiver's home – these decisions will need to be made on behalf of a care-receiver who lacks capacity. If the person who must make these decisions is the care-receiver's informal carer, he/she will quickly find that they must engage with certain statutory rules and procedures which have the potential to impact, quite significantly, on the caring process.[368]

Herring describes the significance of capacity thus, 'One of the most fundamental distinctions in the law is drawn between people with capacity and those without'.[369] Yet, this distinction is far from clear, nor is capacity an 'all or nothing thing'.[370] Rather, there are differing levels of capacity. A person who

[367] If the care-receiver has had the foresight to make a Lasting Power of Attorney in relation to his/her financial and/or health care affairs, this can be straightforward; otherwise, an application to the Court of Protection will be required for the appointment of a Deputy for the care-receiver.

[368] These decisions will fall to be made by the care-receiver's attorney, appointed under a lasting (or enduring) power of attorney or by the care-receiver's deputy if appointed by the Court of Application where no such power of attorney has been signed by the care-receiver prior to his/her loss of capacity.

[369] Jonathan Herring, *Vulnerable Adults and the Law*, (OUP, 2016) at p. 45.

[370] *Ibid*. at p. 56.

has capacity to do one thing may not have the capacity to do another.[371] As life expectancy increases, capacity is set to become an issue in more and more disputes and differences over the provision of care for, and safeguarding of, the elderly as a whole. In England and Wales, questions of capacity in relation to given acts are determined under the Mental Capacity Act 2005, ('the 2005 Act') applying the provisions of that Act together with the Code of Practice relating thereto issued by the Lord Chancellor.[372] Capacity is therefore 'act and time specific'. Whether an individual has capacity to do an act depends on what that act is and at what point in time the assessment of capacity is made; capacity fluctuates, particularly with the older elderly.

As someone who has assumed responsibility for a care-receiver's day-to-day care, an informal carer is placed in what many would describe as 'an unenviable position'. They face the question, 'Does the care-receiver have capacity to make a particular decision on a particular day?' 'If the answer is 'yes', they must ask, 'How can I assist them in the making of that decision?'[373] If not, they must ask, 'How can I obtain the care-receiver's input into the decision which I must then make on their behalf and in their 'best interests''.[374] Fortunately, the full rigour of the law is not visited on Informal carers in such difficult circumstances. Informal carers are not required, by law, to have regard to the letter of the Code of Practice, but are merely advised to follow its guidance in so far as they are aware of it and what it says.[375] In addition, chapter 6 of the 2005 Act attempts to provide some protection for those who provide care on an informal basis.[376]

The 2005 Act begins with a presumption of capacity, thereby shifting the legal burden of proof onto the shoulders of anyone who alleges that such capacity was not present at a particular moment in time. Informal carers can therefore allow a care-receiver to make a decision themselves and act upon

[371] For instance, the capacity to make a will is far more demanding of one's mental faculties than the capacity to make small gift. On the other hand, if one is intending to give away the whole, or a substantial part of one's estate, with concomitant effect on one's will, the capacity to make this gift is as demanding as the capacity to make a will – see: *Re Beaney* [1978] 1 WLR 770.

[372] This legislation replaces Part 7 of the Mental Health Act 1983. The existing Code of Practice is in the process of being revised with the call for evidence for the revision being closed on the 7th March 2019. At the time of writing, the revision has yet to be published.

[373] The existing Code of Practice simply says that, 'It is up to the people who are caring / supporting an individual to consider how to best support him / her in making the decision that needs to be taken in particular cases. In all cases, it is important to find the most effective way of communicating with this individual.'

[374] See: Mental Capacity Act 2005, Code of Conduct, parag. 5.2.1 at p. 75.

[375] *Ibid*. at p. 92 *et seq*.

[376] And, in any event, there are no specific sanctions for a failure to comply with the Code of Practice.

it, unless they know, or should be aware, that the care-receiver has no capacity to make that decision.[377] In essence, capacity is determined using a two-stage test. Firstly, 'Does the person in question have an impairment of the mind or brain or is there some sort of disturbance affecting the way their mind or brain works?' If so, then, 'Does that impairment mean that the person is unable to make the decision in question at the time it needs to be made?'[378] In assessing the care-receiver, the assessor should ask the following questions, 'Does the person [in question] have a general understanding of what decision they need to make and why they need to make it?' 'Do they understand the likely consequences of making or not making this decision?' and 'Can they understand and process information about the decision and can they use it to help them make that decision?'[379] Regardless of the answers to these questions, section 5 of the 2005 Act allows informal carers to carry out certain tasks without fear of liability,[380] provided that they have reasonable grounds for believing that the actions they take are in the care-receiver's best interests.[381] One of these tasks is the spending of money on goods and services for the person who lacks capacity. If these goods or services are 'necessary' for the person in question having regard to the standard of living that they enjoyed when they had capacity, then any expenditure of the that person's money on these goods and services will be covered by the protection afforded by the 2005 Act, provided that the expenditure does not conflict with a previous decision made by the care-receiver's attorney or deputy in regard to such expenditure.[382] Similarly, any expenditure of the carer's own money on these goods and services will be recoverable from the care-receiver's attorney or deputy provided that proof of payment can be produced and subject to the proviso set out in the foregoing sentence.

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[377] See: Mental Capacity Act 2005, Code of Conduct, parag. 6.6 at p. 95.

[378] *Ibid*. at p. 44 *et seq.*

[379] These questions reflect the statutory provisions on a person's ability to make a decision which provide as follows: 'A person is unable to make a decision if they cannot: (1) understand [relevant] information about the decision to be made, (2) retain that information in their mind, (3) use or weigh that information as part of the decision-making process, or (4) communicate that decision …..' (See: s. 3(1) of the 2005 Act).

[380] 'If a person ("D") does an act in connection with the care or treatment of another person ("P"), the act is one to which [the] section applies if — (a) before doing the act, D takes reasonable steps to establish whether P lacks capacity in relation to the matter in question, and (b) when doing the act, D reasonably believes—(i) that P lacks capacity in relation to the matter, and (ii) that it will be in P's best interests for the act to be done. [In that event,] D does not incur any liability in relation to the act that he would not have incurred if P—(a) had had capacity to consent in relation to the matter, and (b) had consented to D's doing the act.' (See: s. 5(1) and (2) of the 2005 Act).

[381] See: Mental Capacity Act 2005, Code of Practice, parag. 6.32.

[382] This statutory protection under section 7 is, in essence, based on the common law doctrine of necessity - see: *Re F (Mental Patient: Sterilization)* [1990] 2 AC 1.

Nevertheless, this protection from liability does have its limits and informal carers need to have regard to these limits where the care-receiver has lost capacity. Section 6 of the 2005 Act details certain 'key areas' where the protection is denied if the acts in question involve an inappropriate use of restraint on a person who lacks capacity or where that person is otherwise deprived of their liberty.[383] In essence, any restraint of a person who lacks capacity will not be a protected act unless the person acting reasonably believes that the restraint is necessary to prevent harm to the person who lacks capacity and amount and type of restraint and the period of time during which it lasts must be a proportionate response to the likelihood and seriousness of harm.[384]

In its terms, section 6 makes a distinction between the restriction of a person's liberty and the deprivation of a person's liberty and that distinction is a fine one. Indeed, the European Court of Human Rights has described this distinction as 'one of degree or intensity, not one of nature or substance'.[385] Any action that amounts to a deprivation of liberty and is not protected is unlawful unless prior formal authorisation has been sought and obtained.[386] What actions amount to a deprivation of liberty?[387] There is no exhaustive list of such actions. Nevertheless, there is what has been described as 'the acid test' which is applied to determine whether a person has been deprived of their liberty, and this comprises two questions: (a) is the person in question subject to continuous supervision and control, and (b) is he/she free to leave such supervision and control?[388] In practice, the latter question is judged not on whether the person in question wishes to leave but on how those who support him/her would react if they did want to leave. As things stand, these 'deprivation of liberty safeguards' only apply to those care-receivers who are in a care home, nursing home or hospital.[389] Were it otherwise, some very difficult questions might arise. For example, would locking the house up at night whilst the carer and the care-receiver are, or should be, in bed asleep be a

[383] See: section 6(4) of the 2005 Act. The term 'deprived of liberty' is defined in article 5(1) of the European Convention of Human Rights.

[384] See: Mental Capacity Act 2015, Code of Practice, parag. 6.41.

[385] See: HL v The United Kingdom (App. No. 45508/99), judgment 5 Oct, 2004, parag. 89. (Also known as 'the Bournewood case'.)

[386] This will be from the Court of Protection.

[387] The Deprivation of Liberty Safeguards were introduced as an amendment to the Mental Capacity Act 2005.

[388] The 'acid test' is taken from P v Cheshire West & Chester Council; P & Q v Surrey County Council [2014] UKSC 19.

[389] In fact, these 'deprivation of liberty safeguards' are due to be replaced by the 'liberty protection safeguards' which will come into force sometime in 2020 following the passing of the Mental Capacity (Amendment) Act 2019.

deprivation of liberty? Here, the locking of the house is surely designed to prevent others from getting in. But, if the care-receiver is physically unable to circumvent these locks – because, for example, the keys have been placed out of their reach – is this a deprivation of their liberty?[390] On the other hand, a care-receiver who is locked away in a room in a building which is under the control of their informal carer may still take advantage of the law against false imprisonment. Of course, in this event the care-receiver may well require the assistance of a third party in order to have recourse to that law. And, this illustrates the degree of vulnerability to which elderly, disabled care-receivers are subject.

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3.7 ACTING ON BEHALF OF A CARE-RECEIVER WHO LACKS CAPACITY

The day-to-day process of informal caring may not be strictly controlled, but acting on behalf of a care-receiver who lacks capacity to act is closely regulated under English law. There are two paths to regulation. Firstly, if the care-receiver has had sufficient foresight to execute a lasting power of attorney,[391] once the care-receiver has lost capacity his/her attorney has authority to act on his/her behalf. In many instances, the attorney is the informal carer, although there is no necessary connection between the two activities, merely some forethought on the part of the care-receiver.[392] Under the 2005 Act, there are two varieties of these lasting powers of attorney, one for healthcare and welfare decisions, the other for property and financial matters. The powers are quite separate. And, the care-receiver may appoint different attorneys, and indeed more than one attorney, for

[390] Similarly, is the use of medication to calm the care-receiver, even where it has been prescribed by a doctor, a deprivation of liberty, particularly where the care-receiver has indicated an unwillingness to take this medication, but it is nevertheless forced upon them? While such medication may be said to be for the care-receiver's 'own good' is it still depriving them of their liberty to be without that medication and to go freely about their business as they might wish?

[391] Lasting Powers of Attorney replaced Enduring Powers of Attorney in October 2007.

[392] The Government's own web pages provide some very useful information on the decisions that need to be taken on the execution of a lasting power of attorney – see: https://www.gov.uk/power-of-attorney (accessed: 28/11/19).

each.[393] In acting on behalf of donees of these powers, all such attorneys are bound by the 2005 Act and its Code of Practice, and the authority given to them requires them to act in the donor's best interests at all times. In the event that they do not, and their action is continuing, an attorney may be restrained by injunction from continuing to act contrary to this requirement by the Court of Protection on an application by a third party. In addition, a property and financial affairs attorney must keep an up-to-date set of accounts setting out what he/she has done with the donor's property and assets during the course of his/her appointment and retain their own monies quite separate from those of the donor. Once executed by the donor, whose execution must be independently witnessed,[394] these lasting powers of attorney should be registered with the Court of Protection.[395] In the event of a significant mismanagement of the care-receiver's affairs on the part of the attorney, he/she may be found guilty of 'abuse of position' under s. 4 of the Fraud Act 2006.[396]

In practice, the limits of an attorney's authority are dictated by the power that appoints them to their office. A property and financial affairs attorney has the power to make decisions on behalf of a donor who lacks capacity in regard to matters such as buying, selling and maintaining property, paying a mortgage, investing money, collecting state benefits and paying bills (such as utility bills, council tax, and the like). A healthcare and welfare attorney will make decisions relating to where the donor might live, what medical care is appropriate for the donor to receive, what diet the donor should be given, who the donor may see and when and what form of social activities the donor might engage in.[397] These latter-mentioned powers can also specify whether or not the donee is able to make decisions concerning life-saving treatment for the donor.[398] Whether or not such authority is provided for all healthcare professionals who are aware of the power 'must consult the attorney and seek his/her

[393] Paid carers should never be appointed as attorneys for fear of a conflict of interest in the event that a decision needs to be made whether or not the care-receiver needs to go into nursing home accommodation or the like.

[394] The witness must also certify that the donor understands the purpose of the lasting power of attorney ('LPA') and that no undue pressure has been used to persuade the donor to make the LPA.

[395] The present cost of registration is £82 for each power that is registered.

[396] See: *R v TJC* [2015] EWCA Crim. 1276.

[397] Neither form of attorney can makes decisions about an attorney cannot make decisions about consenting to marriage or a civil partnership, consenting to a decree of divorce (or civil partnership dissolution) based on 2 years' separation, or consenting to sex.

[398] Health and welfare attorneys cannot make decisions where the donor has capacity to decide, where the donor has made an advanced decision to refuse treatment, where the attorney has not been given power to consent to or refuse life-sustaining treatment and where the donor has been detained under the Mental Health Act 1983 (see: ss. 11(7) and 28 of the 2005 Act).

consent in the same way as they would with a patient who had the capacity to consent'.[399] This produces a response system which is more flexible than any advance directive such as those contained in 'living wills'. In the event that there is a disagreement between those treating the donor of the power and the attorney an application will need to be made to the Court of Protection for directions as outlined below.

If no such powers of attorney exists, adults who lack capacity may be the subject of a 'best interests meeting' where members of his/her family, informal carers and medical personnel consult on aspects of the care-receiver's immediate care needs. But, this will be a 'needs only' meeting, and in the event that long-term and more serious decisions are necessary an application to the Court of Protection will be required. The Court of Protection determines questions of capacity and makes decisions affecting those who lack capacity where no one has been appointed to act on such a person's behalf or where there is disagreement over what course of action to follow.[400] In addition, it will appoint a deputy or deputies to act on the care-receiver's behalf in making the day-to-day decisions that need to be made in circumstances where there is no such conflict. Where necessary, it will also decide questions about the validity of lasting powers of attorney. Before the Court of Protection releases an order for the appointment of a deputy it will require the deputy to put in place a security bond, the level of which will be set by the court and which will depend on the extent and value of the care-receiver's assets, his/her income and his/her outgoings, and the deputy's level of experience of holding such a position. An annual payment is usually payable from the care-receiver's own funds in order to secure this bond; occasionally, if the risks are small because the value of the care-receiver's income and property is limited, a one-off payment may suffice. The aim of these bonds is to insure the care-receiver's assets against any misdemeanours by the appointed deputy. As a method of protecting the care-receiver against financial abuse, they do, of course have their place, but, in reality, the opportunity for such abuse is always there whether or not a deputy has been appointed. Indeed, donees of powers of attorney have similar opportunities to take advantage of the authority that has been given to them and any regulation of their activities is largely *ex post facto*, but, at least here, the donor care-receiver has chosen who their attorney might be and has decided to trust the named individual or individuals

[399] Mental Capacity Act 2015, Code of Practice, paragraph 6.16.

[400] This disagreement might be amongst family members or between family members and medical personal (e.g. NHS trusts) or the local authority responsible for the care of the care-receiver.

with a set of wide-ranging powers which, when applicable, can govern almost every aspect of their daily lives.[401]

In these circumstances, donees of lasting powers of attorney are given a real say in both the clinical treatment of a donor care-receiver and significant authority over decisions that need to be made regarding the donor's daily welfare. This imposes considerable responsibility on them, often leading to high stress and anxiety levels. Whether the donor has discussed what he/she would like to happen in the event of the donee having to make these difficult decisions is another matter. Lasting powers of attorney are regularly executed where the donor is 'on the edge' of capacity and the need for execution is urgent. Indeed, there is no separate, formal test to determine whether or not someone has the capacity to execute a lasting power of attorney.[402] What is more, these powers are also seen as 'all-or-nothing' documents, so much so that, once a power has been executed and registered, the donee assumes complete authority over the donor's life.[403] A person's 'best interests' is not an easy matter to assess whether for clinicians or attorneys.

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3.8 THE JUDICIAL APPROACH TO SAFEGUARDING

For many years, the judiciary has shown a marked reluctance to allow carers who are not members of the care-receiver's close family to secure any form of significant financial advantage from their relationship with those for whom they have cared. Indeed, that reluctance is most clearly apparent in

[401] Of course, as every decision which needs to be made is task specific, it may well be that the donor of such a power is capable of making some decisions but not others. In these circumstances, the donee of the power needs to establish that the donor lacks capacity for each decision that he/she needs to take on their behalf before that decision is made. Where the donee takes the view that the donor is able to make a decision, the consequence is that the donee must permit the donor to make decisions that are, in fact, unwise.

[402] That said, there was judicial guidance in regard to whether or not someone had the capacity to execute an enduring power of attorney, which may be used to resolve this issue.

[403] Curtice, Katuwawela and McCollum, Lasting powers of attorney: implications for clinicians*, Advances in psychiatric treatment* (2012), vol. 18, pp. 205-212, at 211.

relation to paid carers. In fact, the courts have employed a number of devices over the years to prevent paid carers securing excessive financial benefits from their relationship with the care-receiver. In *Re Davey*,[404] the court went as far as to make a statutory will in order to defeat the claim of a male nurse who was employed by, and who had married the care-receiver in, a nursing home in which the care-receiver, who was 92 and mentally infirm, was residing. Nevertheless, there also appears to be some judicial acceptance that many people act as informal carers in concert with professional / paid carers in an effort to not only improve the care-receiver's quality of life but also in an effort to reduce the burden of care costs on the care-receiver's estate. Indeed, the Office of Public Guardian has recently acknowledged this, and the entitlement of informal carers to be paid for the work they do by the care-receiver's attorney, using the care-receiver's estate to meet such cost.[405] In turn, this was referred to with approval by the court in the recent case of *Re HH*,[406] with the proviso, of course, that such payments represent a significant saving on the cost of professional care and fairly reflect the input of the informal carer who must provide care that is reasonably needed, of a reasonable standard and is affordable by the care-receiver having regard to his/her age, resources and life expectancy.[407] If an informal carer is provided with such payments during the care-receiver's lifetime, this would naturally preclude any claim to further financial reward following the care-receiver's death, unless that claim was based on some form of agreement or estoppel. Instead, this thesis focusses on situations where there is no agreement between care-receiver, or his/her attorney or deputy acting on their behalf, and the informal carer in regard to the provision of social care, but where there has been significant sacrifice on the part of the carer in providing such care.

In regard to such situations, most of the contests that take place in the courts take place after the death of the care-receiver and, in the absence of any statutory provision as hereinafter suggested, relate to the care-receiver's will. In *Poole v Everall*[408] the rather sceptical approach of the courts towards benefits received by professional carers was acknowledged by the solicitor who was acting,

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[404] [1981] 1 WLR 164; see also: *In Re Stott deceased* [1980] WLR 246, where the court refused to strike out a challenge to the validity of a will made in favour of the nursing home proprietor in whose property the testatrix was residing when she made the will in question made on the basis that the allegations which were made to support a plea want of knowledge and approval were, in fact, a disguised plea of undue influence. The nursing home was the same nursing home that employed the male nurse in *Re Davey*.

[405] https://www.gov.uk/government/publications/public-guardian-practice-note-family-care-payments/pn2-family-care-payments-web-version

[406] [2018] EWCOP 13

[407] See: *Re HC* [2015] EWCOP 29 and *Public Guardian v CC* [2015] EWCOP 29.

[408] [2016] EWHC 2126 (Ch.)

prior to the deceased's death, as his deputy,[409] and who was advising him in regard to the preparation of his will.[410] When the deceased executed his last will, which left the bulk of his estate to his professional carer, and then subsequently passed away, the validity of that will was challenged by the deceased's remaining family. In the event, the circumstances surrounding the preparation of that will, the role that the professional carer played in putting the will together, the radical departure made by that will from the terms of earlier wills, and the extent of the benefit received by the professional carer from what was a substantial estate, persuaded the trial judge that he bore the burden of proof that the will had been made with the 'knowledge and approval' of the deceased. On the evidence before the court, the professional carer was unable to discharge this burden and the will was therefore declared invalid.

Nevertheless, it is always possible that the court will support the claims of paid care-receivers where there is clear evidence that the care-receiver intended them to benefit and that the care-receiver's decision to confer that benefit on them was a full, free and informed one. This can be seen in the case of *Carapeto v Good*[411] where the Carapetos, who had been engaged for many years as the deceased's housekeeper, chauffer and, ultimately, her carers, successfully resisted a claim made by the deceased's nephews for the court to declare invalid a will that contained a substantial residuary gift in their favour on the basis of their undue influence. Here, there was evidence going back many years that the deceased intended to confirm a significant benefit on the Carapetos at her death in return for what they had done, and were continuing to do, for her. For this reason, and in the absence of any direct evidence of undue influence, the court was unable to infer that the will had been procured on this basis.

Perhaps in contrast to this, the court's attitude to informal carers, and their entitlement under the care-receiver's will, has very much depended on the circumstances of each case. A significant factor here seems to be the quality of the relationship that the deceased care-receiver had with his/her family and any previous expression of testamentary intent on the part of the care-receiver to confer benefits on those who have ultimately been excluded from his/her last will. Where that relationship

[409] Initially, the solicitor was appointed as the deceased's receiver but, following the commencement of the MCA 2005, he became his finance and property deputy under that Act.

[410] The solicitor expressed caution over the deceased's proposals to make gifts to his professional carer at regular intervals, doubtless, due to the fiduciary relationship that would have existed in law between the pair and the extent of the influence that the professional carer might have over the deceased, who was described as a 'suggestible' individual as a result of the brain injuries that he had suffered in a motor bike accident earlier in his life.

[411] See: [2002] EWHC 640; [2002] EWCA Civ. 944.

was strong, and there is a will-making pattern in favour of those who have been subsequently excluded, the courts have treated the evidence of informal carers with caution, demanding convincing evidence that the deceased's last will was made when he/she possessed a 'sound, disposing mind and memory', knew and approved of its contents, and was free from any improper influence on the part of his/her carers. Yet, where such relationship was weak, and where the informal carer had expended a great deal of their own time and labour looking after the deceased on an entirely voluntary basis, the courts have defended the deceased's right to make provision for them even on a generous basis and notwithstanding that the same has been at the expense of the deceased's family.

The second of these propositions is supported by the case of *Perrins v Holland, In re Perrins deceased*[412] where the Court of Appeal upheld a decision made at first instance that a will in which the deceased had given his entire estate to his carer in preference to his son was valid on the basis that the deceased had testamentary capacity at the time he gave instructions for the preparation of that will and, when executing the same knew that he was executing a will for which he had given prior instructions, even though at that point he had ceased to have testamentary capacity.[413] The deceased's decision to leave his estate to his carer was clearly a rational one given that there was a romantic attachment between them, that they were cohabiting together in the deceased's bungalow and that the bungalow was the only significant asset in the deceased's estate. Indeed, this approach is most recently illustrated by the case of *Walters v Smee*.[414] Here, Mr and Mrs Walters, who had been the deceased's carers for a good many years, and who had been named as the principal beneficiaries of the deceased's will made in 1998, challenged a will that had been made by the deceased just a month before her death in October 2004. That will removed Mr and Mrs Walters as beneficiaries of the deceased's estate and replaced them with two of her long-standing friends, Mr and Mrs Smee. On the evidence, this appears to have come about in consequence of certain misapprehensions – which the judge also characterised as 'delusions' – on the part of the deceased as to Mr Walters activities in or about her property. As a result, the court found that the deceased did not have testamentary capacity when she made the 2004 will, and declared in favour of the earlier 1998 will that benefited Mr and Mrs Walters.

[412] [2009] EWHC 1945; [2010] EWCA Civ. 840.

[413] Such a will is valid under the rule in *Parker v Felgate* (1883) 8 PD 171, the rule being expressly approved in that case.

[414] [2008] EWHC 2029 (Ch.)

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3.9 CONCLUSION

In providing social care to a parent or remoter relation an informal carer is subject to a raft of laws and related regulations that are not easy to navigate and which represent substantial traps for the unwary, who often have little, if any, experience in dealing with such matters. All of this must be dealt with in circumstances where the care that needs to be given may be demanding on their time and on their resources. Yet, under our present system, they are largely left to fend for both themselves and the care-receiver as best they can. While the focus of this thesis is on the financial need of informal carers, the contents of this chapter amply demonstrate that advice and support is also required elsewhere, from the execution and registration of powers of attorney, where such powers are needed,[415] to making claims for benefits such as 'attendance allowance' and negotiating continuing health care assessments with the local NHS, and everything in between. At present, the only real assistance that is provided for informal carers is available through the various charitable organisations that are active in this area. This surely needs to change as society gets more and more reliant on the work that informal carers do.

Governments can find money where it is desperately needed as recent health crises show. The provision of support to informal carers is one of those instances where not only does society need the work they do but it is also just and right that society should support such people by whatever means are required.

[415] The costs of registering each lasting power of attorney - and in most cases people will need two – is £82 per power. Of course, in many instances those who need to execute these powers will also need legal advice on their meaning and impact which will be substantially in excess of this figure for each power.

CHAPTER FOUR

CARERS' CLAIMS UNDER THE INHERITANCE

(PROVISION FOR FAMILY AND DEPENDANTS) ACT 1975

4.1 INTRODUCTION

In the face of a valid will that fails to provide an informal carer with 'reasonable financial provision' from the estate of a care-receiver parent, and absent any claim for relief founded on the doctrine of proprietary estoppel,[416] or some other remedy grounded in quasi-contract, the only method of securing such financial provision, or additional financial provision,[417] for an adult child who has cared for that parent over what may have been a protracted period of time is through a claim made under the Inheritance (Provision for Family and Dependants) Act 1975 ('the 1975 Act'). Leaving aside the question of inheritance and other taxes due to the State,[418] the payment of the deceased's debts, funeral and administration expenses, and the effect of public policy,[419] the 1975 Act currently

[416] This potential cause of action for adult child informal carers is further considered in chapter five, *infra.*

[417] This recognises that some demands for compensation made by adult child carers will be made where the carer has been given the same provision under a deceased parent's will or intestacy that has been bestowed on a non-caring sibling; in short, no recognition is accorded to the child that has sacrificed their time, energy, personal lives and even careers to provide the care that the deceased required. This point is further illustrated in section 4.4, *infra*, in a case taken from the author's legal practice.

[418] It is, of course, arguable whether any tax arising on death – inheritance tax, capital gains tax, or any other – represents an impingement on testamentary freedom. Such taxes – the burden of which typically falls on the testator's residuary estate – are taken into account before the distribution of a testator's estate in accordance with his/her will and, therefore, seldom affect the destination of property comprised in the estate, but more the amount received by, in most cases, the residuary beneficiaries.

[419] Under 'public policy' one can also group conditions in wills that are void for other diverse reasons – see: *Theobald on Wills*, 15th ed. (Sweet & Maxwell, 1993), chapter 45, and *Williams on Wills*, 6th ed. (Butterworths, 1987), chapter 40.

represents the only significant limitation on the concept of testamentary freedom in England and Wales. As Lord Hughes JSC has recently acknowledged in the only case under the 1975 Act or any predecessor legislation to go before the highest court in the land, '… English law recognises the freedom of individuals to dispose of their assets by will after their death in whatever manner they wish'.[420]

Set against this concept of 'freedom of testation', the 1975 Act provides at least the prospect of a remedy for spouses, cohabitees, children and dependants alike, where the deceased has failed to make reasonable financial provision for any one or more of them on his/her death. The remedy is a discretionary one. At present, although the categories of applicant who may make a claim under the 1975 Act include the children of the deceased,[421] there is no separate 'carer category'. Similarly, the factors that influence the exercise of the court's discretion do not include any reference to the care that has been administered by an adult child carer, or anyone else, or the effect that the same has had on their lives, and the lives of the members of their family, over the course of the caring period.[422] If the 1975 Act provides a remedy for informal carers, it is only because they are entitled to relief on some other grounds, such as their own straightened financial circumstances or their financial dependency on their now deceased parent. In these circumstances, the 1975 Act can only ever operate as an arbitrary, and substantially incomplete, remedy for anyone who, on an informal basis, has undertaken significant financial, emotional and time-consuming sacrifices in order to care for a now deceased parent.[423]

One way in which a remedy might be provided for adult child carers who have devoted themselves to caring for an elderly, disabled, parent is to amend the 1975 Act so that such persons are clearly identified as a distinct category of applicant. In this way, an adult child carer could claim reasonable financial provision from the estate of their parent when he/she passes away and thus be afforded some form of monetary recognition of the hardship that they have had to endure throughout the

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[420] *Ilott v The Blue Cross and others (on appeal from Illot v Mitson (No. 2)),* [2017] UKSC 17; [2018] A.C. 545 at [1].

[421] 'Children' includes those who are treated by the deceased as members of his/her family – see: section 1(1)(d) of the 1975 Act for the full definition of this expanded category.

[422] See: Jonathan Herring, *Caring and the Law*, (Hart, 2013), p. 38 *et seq*.

[423] Where adult child carers can bring themselves within any other category of claimant, they may, of course, have a remedy, but the care that they have administered is not a factor that is taken into account in the determination of that claim. In these circumstances, a different approach to the meeting of claims by adult child carers will be proposed in chapter six, *infra*.

caring process. This is a suggestion that is 'floated' by Brian Sloan in his book, *Informal Carers and Private Law*.[424] To some extent, it is also a solution that is already in place in New South Wales.[425] Would this be an acceptable solution for adult child carers in England and Wales who believe that they should be entitled to financial recompense for their caring? And, if it would be, is it practical to amend the 1975 Act to allow adult child carers, or indeed any other category of informal carer, to make a claim for an award under that Act? In the event of the legislature acceding to the idea that adult child carers should be permitted to make such a claim, these are questions that will need to be carefully considered before any final decision in made. In this chapter, it will be argued that any solution in the form of a simple amendment to the 1975 Act to allow informal carers to make a claim for 'reasonable financial provision' from the estate of a deceased care-receiver would be difficult to sustain in the face of existing public opinion and, in any event, even if acted upon, would not provide adult children, or any other 'family carers', with a clear and practical solution to their present predicament. Instead, such claims would tend to bring yet greater uncertainty in the administration of a deceased's estate, more litigation in order to resolve that uncertainty and perhaps greater family disunity in circumstances where the deceased's relatives are struggling to cope with their loss. In practice, what is needed in an effort to meet these claims is to recognise their validity and to provide answers in the form of original legislation.

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4.2 INHERITANCE FAMILY PROVISION CLAIMS, A CARERS' CATEGORY AND TESTAMENTARY FREEDOM

In the eyes of some members of the public, the 1975 Act forms a very real, albeit limited, restriction on the freedom of individuals to dispose of their accumulated wealth on their death. Evidence in support of this statement is readily apparent in the reaction of the press to the decision of the Court

[424] B. Sloan, *Informal Carers and Private Law*, (Hart, 2013), p. 172, section 5.3.5. '*A Carer Category for England and Wales?*'

[425] See: chapter six, section 6.1, *infra*.

of Appeal in the case of *Ilott v Mitson* in 2012.[426] What is more, Baroness Hale explicitly acknowledges this support in her speech in the Supreme Court in *Illot v The Blue Cross and Others (on appeal from Illot v Mitson (No. 2))* [2017] UKSC 17 at para. [53]. Indeed, Oliver J's statement in *Re Coventry deceased*[427] that, "[s]ubject to the courts powers under the [1975] Act and to fiscal demands, an Englishman still remains at liberty at his death to dispose of his own property in whatever way he pleases …",[428] appears to be the starting-point for many senior judges in their consideration of any claim that appears to contradict a valid will.[429] And, elsewhere, several notable academics and practitioners have continued to acknowledge the centrality of the concept of testamentary freedom in the law of England and Wales.[430] In these circumstances, not only are there are no laws of automatic succession or what is known as 'forced heirship'[431] in English Law, none appear to be wanted, at least outside of a spouse's obligation to support his/or widow or widower, and even here the discretionary regime now encapsulated in the 1975 Act has always been the preferred option.[432]

With these points in mind, we must accept that a substantial body of public opinion is likely to be against any further erosion of the concept of freedom of testation and, with that, the introduction of yet another category of applicant who may make a claim for financial provision against the estate of

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[426] See, for example: The Daily Telegraph's treatment of the 2015 decision of the Court of Appeal in *Illot v Mitson* [2015] EWCA Civ. 797 at https://www.dailymail.co.uk/news/article-3176258/Daughter-written-mother-s-bitter-letter-eloped-37-years-ago-awarded-160-000.html which carried the headline 'Judges say that you will can be ignored' (accessed: 24/01/19).

[427] See: [1980] Ch. 461.

[428] *Ibid.* at p. 473.

[429] See: Nourse and Henry LJJ in *Re Jennings deceased* [1993] EWCA Civ. 10; Mummery LJ in *Hawes v Burgess* [2013] EWCA Civ. 94; and, of course, Lord Hughes SCJ in *Ilott v The Blue Cross and others* (on appeal from *Illot v Mitson (No. 2)*), [2017] UKSC 17; [2018] A.C. 545 at [1] et. seq.

[430] See, for example: (Professor) Rebecca Probert, Exeter University, who describes testamentary freedom as '… a core principle of English law', in her book chapter, Disquieting Thoughts: Who Will Benefit When We Are Gone? B. Häcker and C. Mitchell (eds.), *Current Issues in Succession Law* (Oxford: Hart; 2016), pp 31-49, and, Andrew Francis, barrister, who describes testamentary freedom as '[a]t the heart of the law of England and Wales …' in A. Francis, *Inheritance Act Claims: Law, Practice and Procedure*, (2006, Butterworths), 1[3].

[431] Forced succession' – the common name for the family succession rights that one sees in continental Europe – is said to 'convert private property at death into family property', thereby serving 'to protect and maintain the family as a social unit', see: Marius J. de Waal, 'Comparative Succession Law', fn. 15, *supra*.

[432] *First Report on Family Property: A New Approach (1973) Law Com. No. 61*. This option has been preferred since the passing of the Inheritance (Family Provision) Act 1938.

a deceased that will run contrary to the provisions of his/her will.[433] It may therefore be useful to consider the idea of testamentary freedom in its historical and social context in an effort to gauge the extent of the influence that it continues to exert.

The origins of the English courts' statutory jurisdiction to make financial provision from the estates of deceased persons for those found to be entitled to the same dates back to the Inheritance (Family Provision) Act 1938 ('the 1938 Act'). In the years leading up to the passing of the 1938 Act, there was a good deal of opposition to its appearance on our statute books; and, the notion of 'testamentary freedom' was the real driving-force behind this opposition. Although, historically, complete freedom of testation has rather waxed and waned in England and Wales, its modern appearance is of relatively recent origin.[434] For the twenty-first century observer, it marks the move from 'agrarian and proto-industrial collectivism' to the 'individualism' and 'self-determination' of the modern era.[435] That said, even where this freedom was restricted, those restrictions did not take the shape of the 'forced heirship' provisions so confining of testators that one finds in continental Europe. And, therefore, to dismiss testamentary freedom as an anomaly as some authors have attempted to do would be do the concept something of a disservice.[436]

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[433] See: R. Schaul-Yoder, British Inheritance Legislation: Discretionary Distribution at Death, 8 *B.C. Int'l & Comp. L. Rev* 205 (1985), http://lawdigitalcommons.bc.edu/iclr/vol8/iss1/8 (accessed: 22/12/16) and O. Henry, If You Will It, It Is No Dream: Balancing Public Policy and Testamentary Freedom, *6 Nw. J. L. & Soc. Policy. 215 (2011)* at http://scholarlycommons.law.northwestern.edu/njlsp/vol6/iss1/6 (accessed: 10/09/19).

[434] Some commentators date 'complete freedom of testation' in England and Wales to the passing of the Mortmain and Charitable Uses Act 1891 (see: Michael Alberry, *The Inheritance (Family Provision) Act 1938*, (Sweet & Maxwell, 1950) and Roger Kerridge, *Parry and Kerridge: The Law of Succession*, 12th ed., (Sweet & Maxwell, 2009), at para. 8-01); others take a more practical approach and date that freedom from the passing of the Dower Act 1833 (see: Andrew Borkowski, *Textbook on Succession*, 2nd ed., (OUP, 2002), at p. 258).

[435] See: Ronald Chester, *Inheritance, Wealth and Society* (Indiana University Press, 1982) cited by Rosalind Croucher in How Free is Free? Testamentary Freedom and the Battle between 'Family' and 'Property', [2012] *Au J Leg Phil* 7; (2013) 37 *Austl. J Leg Phil* 9.

[436] See: Michael Albery, *The Inheritance (Family Provision) Act 1938*, (Sweet & Maxwell, 1950), p. 1, where he says: "The protection of rights of the family as an essential unit in society is a primary concern of most systems of law. Complete freedom of testation, as enjoyed under English law for a brief period of 47 years, is therefore by the standards of contemporary jurisprudence an anomaly." And, see further: R. Schaul-Yoder, British Inheritance Legislation: Discretionary Distribution at Death, 8 *B.C. Int'l & Comp. L. Rev* 205 (1985), where he observes, "The noted nineteenth-century legal sociologist Max Weber could find 'evidence of complete or almost complete substantive freedom of testation' only twice in history - in England and in the Republic of Rome." Historians will note that one of the most notable instances of the exercise of testamentary freedom occurred when Julius Caesar appointed Octavian (Augustus Caesar) as his heir, an event which, in due course, contributed to the fall of the Roman Republic, a protracted civil war which saw the deaths of Pompey, Mark Anthony and Cleopatra, amongst others, and eventually led to the establishment of what was to become the tyranny of the Roman Empire – see: Andrew Borkowski and Paul du Plessis; Textbook on Roman Law, 3rd ed., (Oxford, OUP, 2005) at p. 208.

Indeed, in a modern 'rights-based culture' where the list of one's personal rights includes the right to hold, and therefore dispose of, one's property, testamentary freedom is but a manifestation of a fundamental right that many of us take for granted.[437] And this includes, in the words of Mummery LJ in *Hawes v Burgess*[438] the right to make a will in terms which are '… hurtful, ungrateful or unfair to those whose legitimate expectations of testamentary benefit are disappointed.'[439]

Yet, it was not always thus. At one point in our history, a man's ability to dispose of his personal estate on his death in England and Wales to whomsoever he wished was restricted by his legal obligations to his widow and children. However, through early post-Medieval times these rights of inheritance gradually disappeared across the length and breadth of the country and were only finally lost altogether in 1725.[440] As for real property, this was almost exclusively kept 'within the family' either by law or custom. Although the Tenures Abolition Act 1660 meant that all land held in fee simple became devisable, most privately-owned land in England was held not in fee simple but on an entail within a family settlement and could not therefore be devised by will.[441] If a man held freehold land outside such a settlement, it was subject to his widow's rights of dower,[442] and these rights continued until the passing of the Dower Act 1833.[443] In every-day practice, therefore, the idea of testamentary freedom in England and Wales, at least before the 18th century, was hardly a deep-rooted national

[437] Protocol 1, Article 1, of the Convention for the Protection of Human Rights and Fundamental Freedoms. In *Ubbi v Ubbi* [2018] EWHC 1396 (Ch.), Master Shuman, at [60] describes such a right as 'fundamental'.

[438] [2013] EWCA Civ. 94

[439] *Ibid.* at [14]

[440] For some time following the Norman Conquest, it was possible for a man (women were not permitted, at that time, to hold realty) to dispose of both his real and personal property by will. Initially, he was restricted to devising only a portion of his personalty; his widow and children had rights to a fixed share of personalty, but the extent of these shares differed across the country. In time, these restrictions disappeared. As for the right to dispose of reality, most testators failed to exercise this so-called freedom. By the social conventions of the time, the testator's legitimate off-spring had 'birth-rights' which society recognised even if a testator did not. In any event, during the twelfth and thirteenth centuries the King's Court acted to prohibit testamentary gifts of land. From that point on, land passed outside a testator's will under local custom, usually primogeniture. And, this situation continued down to the sixteenth century – see, generally: Charles Harpum *et al*., *Megarry & Wade's, The Modern Law of Real Property*, 7th edition, (OUP, 2008), 14-002, *et seq.* and J. Dainow, Limitations on Testamentary Freedom in England, *25 Cornell L. Q.* 337 (1939-1940) p. 337.

[441] C. Harpum *et al*. , *Megarry & Wade's, The Modern Law of Real Property*, ibid. parag.s 3-070 – 3-083.

[442] That is to say, the right of a widow to a life interest in one-third of the freehold estates of her husband of which he was seised during the marriage and which his issue were capable of inheriting, but excepting any such estates held as a joint tenant with another – R. D. Oughton, ed., *Tyler's Family Provision*, 3rd edition, (Butterworths, 1997) p. 5.

[443] For a more detailed and precise account of the history of dower, and the means by which a widow's rights could be circumvented, see: *Tyler's Family Provision*, *ibid.* p. 5.

concept. And, even where it did exist, it was limited to little more than one's everyday possessions, for the vast majority of citizens had little else.[444]

As an emotive force,[445] freedom of testation appears to originate in post-industrial Victorian England.[446] At the time, it was, doubtless, a useful social construct. The threat of 'disinheritance' allowed the Victorian *paterfamilias* some degree of control over the younger generation, using it as an incentive to encourage their sons and heirs to greater industry.[447] Yet, in modern times, the need for such control has very largely gone. In Victorian England, wills made by wealthy testators of full capacity were made when one's mortality was something to consider and act upon even in early middle age. In 1837, when Queen Victoria came to the throne, life expectancy for a man of 60 was a mere nine years.[448] Now, in twenty-first century England, life expectancy at the age of 60 is another 24 years.[449] As a result, nowadays one's last will and testament is commonly made much later in life. A will made nine years before a testator's death in twenty-first century England is far less likely to exhort one's children to work harder to ensure their prosperity in later life for these children are, in most instances, already in middle age, with careers and families to drive their lives forwards, not the distant threat of 'disinheritance'. Of course, some testators may still attempt to exert some 'dead hand control' over the younger generation in this way. Yet, the older one gets, the less dependent one is on one's parents and any expected or hoped-for 'inheritance'. Indeed, the average age at which most of us inherit our surviving parent's estate has recently been estimated at 61.[450] Rather than

[444] In any event, it was an idea that had no relevance for the vast majority of people in this country from the 18th century right through to the latter half of the 20th century because, almost invariably, they died intestate.

[445] Sloan describes the principle as 'an important one in the common law world' – B. Sloan, The Concept of Coupledom in Succession Law, *Camb. Law J.,* 70 [2011], pp. 623-648 at p. 624. And, in similar vein, Lawrence Friedman speaks of testamentary freedom as 'a characteristically modern idea – it was and is rare in simpler societies; but it is a leading principle in the United States and in most western countries' – D. B. Kelly, Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications, (2013), *Scholarly Works, Paper 950, Notre Dame Law School*, quoting Freidman from *The Law of Succession in Social Perspective*, a chapter in E. C. Halbach, Jnr. (ed.), *Death, Taxes and Family Property* (St. Paul. West. Pub. Co., 1977).

[446] But, its birth was in the intellectual tradition that came out of 'the Glorious Revolution' in 1688 and in the writings of John Locke, J. S. Mill and Jeremy Bentham – see: Rosalind Croucher, fn. 435, *supra*.

[447] *Ibid.*

[448] http://www.jbending.org.uk/stats3.htm (accessed: 01/06/18).

[449] http://www.helpage.org/global-agewatch/population-ageing-data/life-expectancy-at-60/; see also: https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/lifeexpectancies/bulletins/nationallifetablesunitedkingdom/20132015#life-expectancy-at-older-ages (both accessed: 01/06/18).

[450] Laura Gardiner, *The Million Dollar Be-question: Inheritances, gifts and their implications for generational living standards*, published by The Resolution Foundation, December 2017, at https://www.resolutionfoundation.org/app/uploads/2017/12/Inheritance.pdf (accessed: 02.07/2019).

'setting a child up in life', inheritances are now more likely to provide for the recipient's social care costs in later life (and, maybe all the more valuable for it, given that these costs need to be met from somewhere). In these circumstances, the use of a will to exercise authority over one's children, or alternately to give them a 'start in life', is now very largely something from the dim and distant past, a creature of Victorian melodrama rather than a reality of modern-day Britain.

Nevertheless, there is still one clear and solid foundation for our devotion to testamentary freedom. In short, ''If there are no restrictions on what one can do with one's property during life, why should those restrictions exist at death?' While the question is a simple one, the proposition on which it is based is not entirely accurate. There are, of course, legal obligations in life to provide financial support for one's spouse and for one's children during their minority. Indeed, if taken literally, the idea of testamentary freedom would also reject the idea that part of one's wealth may be taxed at death. Yet, such tax has existed in the form of estate duty/death duty/capital transfer tax/ inheritance tax since 1796, and seems to have a measure of public acceptance if not support. In fact, there are powerful arguments in favour of this form of taxation,[451] including its retention as a general measure to correct inequality in wealth.[452] That said, whatever the merits of these arguments, for our purposes the significant point for present purposes is that a deceased person does not have absolute control over his wealth at his/her death due to the need to pay inheritance tax and other costs and expenses consequent on his/her demise.[453] Together, these can be simply described as 'paying one's debts or dues' (whether private or to the nation). And, that, it is submitted, provides us with something of a 'clue' as to how any rights that might be given to adult child carers to make a claim for some form of financial provision from their deceased parent care-receiver's estate ought to be couched.

The concept of testamentary freedom is also held dear across the other side of the Atlantic too.[454] And, here, some people have argued long and hard in its favour. In a lengthy and passionate piece of

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[451] See: commentaries in newspapers and periodicals such as *The New Statesman* (Stuart White) - http://www.newstatesman.com/politics/2008/04/inheritance-tax-stuart-white, (accessed: 18/12/16); *The Guardian* (Will Hutton) - https://www.theguardian.com/commentisfree/2007/oct/07/comment.inheritancetax, (accessed: 18/12/16); and *The Spectator* (Irwin Stelzer) - http://www.spectator.co.uk/2007/10/listen-to-adam-smith-inheritance-tax-is-good/ (accessed: 18/12/16).

[452] *The Economist* at http://www.economist.com/node/10024733 (accessed: 18/12/16) where it is claimed that: 'Winston Churchill put the argument succinctly in 1924 when he argued that the tax was "a certain corrective against the development of a race of idle rich".'

[453] And, the need to pay inheritance tax is growing and will grow significantly into the next decade or so – see: http://www.telegraph.co.uk/finance/budget/11484331/Number-of-Britons-paying-inheritance-tax-to-almost-double-by-2020.html (accessed: 01/01/17).

[454] See: O. Henry, *If You Will It, It Is No Dream: Balancing Public Policy and Testamentary Freedom*, 6 Nw. J. L. & Soc.

writing, Joshua Tate maintains that freedom of testation is defensible because it allows elderly care-receivers to reward family members who have provided care.[455] In short, Tate claims that a competent testator, rather than a court or the legislature, is in the best position to decide how much care each person has provided and to reward caregivers accordingly.[456] While *inter vivos* arrangements for the provision of such care are to be encouraged, this is very much a counsel of perfection. Such freedom may produce 'just results' in some cases, particularly where the care-receiver remains capable of making such discerning judgements and acting upon them by making a will shortly before their death. Sadly, this is not always the case. There are many reasons why an elderly, disabled care-receiver may not be able to make a sound judgement concerning the care which they have received from family members. Similarly, there may be many reasons why this same person may choose not to make that decision, preferring to leave it to the family to 'sort these matters out after they have gone'.[457] Indeed, 'treating children equally' is a powerful mantra for many parents. Leaving one's estate to one's children in equal shares demonstrates that one has equal love and respect for them all.[458] And, it may also be 'the easy way out' because then there is no need to make any attempt to value the care that one has received.[459]

Gallanis and Gittler agree that, in the absence of empirical data to support Tate's views, what they describe as 'the traditional American approach to the law of succession' is not an approach that is best suited to promote family care-giving.[460] Recognising that there are weighty arguments to be put in favour of encouraging such care-giving in the United States, they propose that carers should be able to receive a share of the deceased care-receiver's estate in much the same way in which, in some

Policy, 215 (2011) at http://scholarlycommons.law.northwestern.edu/njlsp/vol6/iss1/6 (accessed: 01/01/17).

[455] See: fn. 5, *supra*.

[456] And, therefore, he says, law reform should concentrate on strengthening testamentary freedom rather than reducing it; instead, any reforms should ensure that care-givers are adequately compensated in cases of intestacy, not in cases where the deceased has died testate.

[457] There is research that supports this which can be found in Misa Izuhara's book, *Housing, Care and Maintenance*, (Routledge, 2009) at p. 119.

[458] *Ibid*. at p. 114.

[459] One only has to read the illustration from practice referred to later in this chapter to realise that testamentary freedom cannot always be relied upon to produce a 'just result'.

[460] Thomas P Gallanis and Josephine Gittler, Family Caregiving and the Law of Succession: A Proposal, *45 U. Michigan Journal of Law Reform* 761 (2012) available at http://ssrncom/abstract=2194412 (accessed: 12/06/18).

states, a surviving spouse has an elective share of that estate which is protected by statute.[461] In this manner, they argue in favour of further restrictions on testamentary freedom. Indeed, it is interesting to note that arguments against testamentary freedom are gathering pace even in what is now the spiritual home of such freedom as a way of responding to the perceived need to provide social care for the elderly on an increasing basis as society begins to age at an increasing rate.[462] While 'an elective share for carers' is an interesting solution, it seems to have little connection, if any, to the quality or degree of care that has been provided in each case. In many instances, carer X will provide a significantly greater amount of care at a far higher standard in return for a one-quarter share of a modest estate valued at, say, £200,000, than carer Y will provide to his/her parent in return for a one-quarter share of an estate valued at £4 million. In these circumstances, the remedy bound-up in the idea of an elective share would lead to arbitrary results that have little or no connection with the need to 'do justice' to the claims of informal carers. Moreover, one must also have considerable doubts as to whether such a solution is at all compatible with the discretionary powers given to our courts under the 1975 Act such that it would be impossible for the two regimes to exist side-by-side.[463] With this in mind, the 'elective share' idea in its unrestricted form can only be rejected and we must continue to look for a more efficient, effective and just solution.

Despite the protestations of many of those with right-wing political affiliations, the arguments in favour of a wholly unrestricted form of testamentary freedom remain unconvincing. As we know, these arguments did not hold sway back in 1938. At that point, it was the view of our law-makers that a deceased should not be free to leave either his/her spouse without 'reasonable financial provision'. Indeed, the failure of a deceased to recognise that their wealth was often a product of sacrifices made by their spouse and family as much as themselves was considered to be morally wrong. That observation is, of course, at its strongest when considered in relation to claims made by spouses. Indeed, it has been cited in some quarters as the principal reason why the standard of financial provision is all the greater for spouses.[464] In the parent-child relationship, such matters are not so obvious. While there is, in law, an obligation to provide financial support for one's minor children, that

[461] For example: New York and Florida.

[462] See: Frances H Foster., Linking Support and Inheritance: A New Model from China, 1999, *Wis. L. Rev.* 1199, 1202 (1999); Heather M. Fossen Forrest, Loosening the Wrapper on the Sandwich Generation,: Private Compensation for Family Caregivers, 63 *Louisiana Law Review* (2003) p. 381 and Frances H. Foster, Toward a Behaviour-Based Model of Inheritance: The Chinese Experiment, *U.C. Davis Law Review* 77 (1998).

[463] See: sections 4.4 and 4.5, *infra*.

[464] Of course, the same claim may be made by cohabitants, but they are not entitled to a higher standard of provision.

obligation does not ordinarily continue beyond their majority.[465] Save for this, English law does not recognise any family property regime that extends to children. That does not, in itself, weaken the claims of adult children who have cared for their deceased parents. Instead, it is suggested that what these arguments against 'forced heirship' show is that an adult child needs to advance something more than the mere existence of a parent-child relationship in order to either maintain a successful claim under the 1975 Act or be deserving of financial provision from their deceased parent's estate through some other route.[466]

Of course, if an adult child has cared for his/her parent over a significant period of time, and even more so where that adult child has suffered some form of detriment in doing so, that 'something more' will be readily apparent. Whether this would be sufficient in the minds of the judiciary and/or the general public to persuade either of them that testamentary freedom should be sacrificed on the altar of judicial discretion to admit yet another restriction on testamentary freedom is perhaps another matter. But, do 'testamentary freedom' and 'judicial discretion' really need to be engaged here?

The author suggests not. In fact, the solution that is proposed for adult child carers is that whatever is due to an adult child carer as some form of statutorily recognised financial incentive for the care that they have provided to their parent care-receiver is due as a debt, incurred in the lifetime of the parent care-receiver, but payable after their death.[467] Few people would suggest that a deceased person's debts should not be enforceable against their estate following that person's death. Viewed in this way, the proposals to reward adult child carers set out in chapter six should not be seen as a restriction on an individual's testamentary freedom. Moreover, if, as will be suggested in this chapter, the adult child carer and the parent care-receiver are able to contract out of this debt – i.e. to make a legally binding agreement in which the adult child carer freely acknowledges that that they have no claim under statute or otherwise in return for the caring that they have undertaken thus far, or, indeed, will undertake in the future – the suggestion that treating such claims as a debt is even less likely to be

[465] See: *Re Goodchild* [1997] 1 WLR 1216. This fails to recognise that a young adult will often be in need of financial support for their post-secondary school education and/or training. And, there is some effort to redress this in the 1975 Act itself, which can be said to acknowledge this moral obligation - the 1975 Act, s. 3(3).

[466] See: Rebecca Probert, 'Family and Other Animals', (2017) *L. Q. R*. 550 at 554.

[467] With the government lending money to informal carers on the security of these rights in the meantime – see: chapter six, i*nfra*.

considered an imposition on testamentary freedom.[468] Indeed, the 'contracting-out' and 'the family care contract' solutions put forward in chapter six, far from being a further restriction on an individual's freedom of testamentary disposition, have the considerable merit of engaging the care-receiver in the process of deciding who should bear the financial burden of the care that he will receive.[469]

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4.3 THE INHERITANCE (PROVISION FOR FAMILY AND DEPENDANTS) ACT 1975 IN OUTLINE

The 1975 Act came into force on the 1st April 1976 and replaced the 1938 Act in full.[470] Under the 1975 Act, as subsequently amended, spouses, civil partners, former spouses and civil partners (who have not entered into a subsequent marriage or civil partnership), cohabitants,[471] children of the deceased, any person who has been treated by the deceased as a child of the family of the deceased,[472] and any other person not otherwise entitled to make a claim, but who was being maintained wholly or partly by the deceased immediately before his death, may make a claim for reasonable financial provision from the deceased's estate on the basis that the deceased's will, or the operation of the law relating to intestacy as it affects the deceased's estate, or a combination of both, fails to make such provision

[468] Mika Oldham, Financial Obligations within the Family: Aspects of Intergenerational Maintenance and Succession in England and France, *Camb. L.J.* Vol 60, No. 1 (Mar. 2001) pp. 128-177 at p. 173 *et seq.*

[469] D. B. Kelly, Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications, (2013), *Scholarly Works, Paper 950, Notre Dame Law School*, in which the writer argues forcefully in favour of an ex ante perspective in considering whether or not to impose restrictions on testamentary freedom as opposed to ex post considerations and uses these arguments largely to support the idea of 'dead hand control' (or control from the grave) which is at the heart of US law of trusts and succession. It is submitted that the solutions proposed in chapter six will satisfy both the ex-ante and the ex post perspectives on testamentary freedom.

[470] The long title of the 1975 Act describes the Act as making 'fresh provisions' empowering courts to make financial awards in favour designated persons out of the estate of a deceased person.

[471] Cohabitants are defined as persons who, during the whole of the two-year period ending immediately before the deceased's death, were living in the same household as the deceased, as the husband or wife or as a civil partner of the deceased – the 1975 Act, s. 1(1A), as amended.

[472] This definition was recently amended by the Inheritance and Trustees' Powers Act 2014, s. 6 and schedule 2.

for him/her. Although the court has a discretion whether or not to make an award in the applicant's favour and, if so, what form that award should take, such discretion is strictly controlled by the contents of the legislation. Section 3(1)-(6) set out the factors to which the court must have regard in the exercise of this discretion at each of the two stages through which an application must pass if it is to be successful.[473] At each stage, the court is required to consider these factors in determining whether the applicant has been successful in making out his/her case, and in considering the nature of the award, if any, to make in their favour.[474]

It has long been accepted that every application under the 1975 Act involves two distinct issues, namely, (i) whether reasonable financial provision has been made for the applicant, and (ii) what, if any, provision should now be made for the applicant if no such provision has been made.[475] Although regularly engaged by judges and practitioners alike, this 'two-stage test' as it has become known has recently come under a little criticism in the highest of circles. In *Illot v The Blue Cross and others*[476] Lord Hughes JSC observed that '… in many cases, exactly the same conclusions will answer the question whether reasonable financial provision has been made for the claimant and identify what that financial provision should be.' This remark appears to have been made largely to discourage lower courts from splitting the hearing of a 1975 Act claim into two distinct parts, thereby increasing costs and permitting respondents 'two bites at the cherry'.[477] Whether there should be a 'two-stage test' or merely one, it is nevertheless evident that trial judges are able to take something of 'a broad brush approach' to claims made under the 1975 Act and that appellate courts should be slow to interfere

[473] These stages are, firstly, that the claimant must show that the deceased's will, or the law relating to intestacy, or a combination of both, failed to make 'reasonable financial provision' for him/her in all the circumstances of the case (stage one) and, secondly, that the court should exercise that discretion and make an appropriate award in his/her favour (stage two).

[474] These factors include the financial resources of the applicant, and of any other applicants and of the beneficiaries of the estate, the deceased's obligations and responsibilities to the applicant, and to any other applicants and to the beneficiaries of the estate, the nature and size of the estate, the physical and mental disabilities of the applicant, other applicants and beneficiaries, and 'any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant.' – See: the 1975 Act, s. 3(1) (a)-(g).

[475] Goff LJ in In *Re Coventry* [1980] Ch. 461 at 487 refers to the stages as comprising two distinct questions, describing the first as a 'value judgment' and the second as a matter of the court's discretion.

[476] See: [2017] UKSC 17 at [23]-[24].

[477] In the first hearing, the respondents will often claim that reasonable financial provision has been made for the applicant, and thus seek the dismissal of the claim, and, if unsuccessful, may then claim, at the second hearing, that, in the exercise of the court's discretion, the applicant should get nothing. In the author's experience this seems to be a relatively new departure

with their decisions, and may not do so simply because, had they been sitting hearing the evidence, they would have come to a different conclusion.[478]

Indeed, case law shows that a not inconsiderable difference of approach by the courts where the applicant is on the one hand a surviving spouse, or civil partner, and where the applicant falls into one of the other categories of claimant set out in s. 1(1). To a large part, this is dictated by the terms of the 1975 Act. In the case of spouses and civil partners who fall into section 1(1)(a),[479] the words 'reasonable financial provision' are defined as 'such financial provision as it would be reasonable in all the circumstances for a spouse or civil partner to receive, whether or not that provision is required for the applicant's maintenance'.[480] In all other cases, these words mean 'such financial provision as it would be reasonable in all the circumstances for the applicant to receive for his maintenance'.[481] There are, therefore, two different standards applicable to claims under the Act – 'the spousal standard', which is applied to surviving spouses, civil partners and former spouses and civil partners who have not remarried,[482] and 'the maintenance standard' which applies to all other claimants, including adult child claimants. Although not covered by the 'spousal standard', recent case law appears to suggest that the courts are now much more sympathetic to claims made by cohabitees of long-standing than other applicants, and are prepared to set aside the demands of testamentary freedom in order to ensure that they are properly provided for, thereby reflecting society's views of what is commonly known as 'common law marriage'.[483] However, elsewhere, the courts seem to be rallying around the

[478] See: Lord Hughes SCJ at [2017] UKSC 17 at [24].

[479] Save where the marriage of the deceased was subject of a decree of judicial separation and at the date of death the decree was in force and the separation was continuing. In that event, the claimant is treated as a claimant whose claim is limited in the same way as all other claimants.

[480] The 1975 Act, s. 1(2) (a).

[481] *Ibid*.; 'maintenance' has been defined as 'payments which will directly or indirectly enable the applicant in the future to discharge the cost of his daily living at whatever standard of living is appropriate to him' – *Re Dennis* [1981] 2 All E R 140 at 145 per Browne-Wilkinson J. While, in *Re Wynford Hodge deceased* [2018] EWHC 688, (a cohabitant case) this was interpreted so as to include the outright transfer of a house to a claimant, the likelihood of such an award in favour of an adult child is remote.

[482] If the deceased and his former spouse/civil partner have been though ancillary relief proceedings following the divorce, the ancillary relief order will often contain a provision prohibiting the surviving spouse/civil partner from making a claim under the 1975 Act against the estate of his former spouse; see: the 1975 Act, s. 15(1).

[483] See: Sir Geoffrey Vos LC, giving the judgment of the Court of Appeal, in *Lewis v Warner* [2017] EWCA Civ. 2182; *Thompson v Raggett, Re Hodge's Estate* [2018] EWHC 688 (Ch.), [2018] WTLR 1027, and *Banfield v Campbell* [2018] EWHC 1943 (Ch.), [2018] WTLR 781.

concept of testamentary freedom with increasing regularity.[484] And, in practice, this 'maintenance standard restriction' significantly limits the provision that can be made for adult children, effectively precluding, it is suggested, the award of substantial financial provision for caring services rendered before the deceased's death.[485]

In considering claims made under the 1975 Act, the court takes an objective approach. The question for the court is: 'Does the deceased's will or the operation of the law relating to intestacy on the deceased's estate, or a combination of the two, make reasonable financial provision for the deceased?' It is not: 'Has the deceased acted reasonably in making the provision (if any) that has been made?' 'Reasonableness' is not judged as if the court is looking through the eyes of the deceased; it is, therefore, not the task of the court to make some form of moral judgment on the provision that has been made by the deceased.[486] In fact, the question whether or not reasonable financial provision has been made by the deceased for the claimant is judged not at the date on which the deceased made his/her will, if he/she has made a will, nor, indeed, as at the date of the deceased's death, but at the date of the trial of the claim.[487]

In practice, much will turn in applications under the 1975 Act on the weight the trial judge gives to 'the section 3 factors'. That depends on his/her interpretation of the evidence that is presented at the hearing of the claim. And, this will require the trial judge to make certain findings of fact on that evidence in order to either admit the claim or reject it. As a result, it is easy to see how many applications under the 1975 Act have 'turned on their own facts' and many commentators have acknowledged that this makes advising on the merits of an inheritance family provision claim difficult for practitioners.[488] In addition, it is also difficult to succeed on an appeal under the Act.[489] Once permission to appeal has been granted, the appellant will face the burden of establishing before the appellate court that the decision at first instance was 'wrong' in law or in fact or that the exercise of

[484] See, for example: *Wellesley v Earl Cowley* [2019] EWHC 11 (Ch.)

[485] This will be further considered in section 4.4, *infra*.

[486] See: *Re Hancock* [1998] 2 FLR 346.

[487] The 1975 Act, s. 3(5).

[488] A. Francis, *'Inheritance Act Claims: Law, Practice and Procedure'*, (Jordans, 2006) at 8[9].

[489] *Ibid*. 15[40] observing that, '… appeals are difficult to win … The question will be whether the decision below was wrong in the sense that the way in which the judge exercised his discretion cannot be supported. It is difficult to show that this was the case on most appeals.'

the court's discretion is one that 'cannot be supported'.[490] In circumstances where the exercise of the court's discretion by the trial judge is very much a 'value judgement',[491] the appellate court will need to determine that no reasonable judge could have exercised his or her discretion in the manner that he/she has.[492]

Under section 4 all applications under the Act must be made within six months from the date on which a grant of representation was first taken out in respect of the deceased's estate. There is a judicial discretion to extend this period in an appropriate case and case law exists as a guide to the exercise of that discretion. That matter apart, the claim is decided at a full trial on the evidence before the court.[493] Given the breadth of the issues and circumstances that might need to be addressed by the evidence, it is not uncommon for trials to take up several days of court time.[494] That, of course, adds to their expense. Those who have sacrificed much in order to care for an elderly, disabled parent over many months, if not years, will often struggle to pay the legal costs involved in making such a claim. What is more, solicitors are often very wary of taking such claims on a 'no win, no fee' basis where the outcome of such claims are so difficult to predict. This is likely to leave carers having to fund claims of this nature out of their own resources. In many cases, the financial hardship that they have suffered in caring for the deceased will have left them without the ability to make such a claim, if, indeed, there is any basis for the same in their particular circumstances.

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[490] *Ibid*. at 15[40]

[491] Sir Nicholas Wall P in *Illot v Mitson* [2011] EWCA Civ. 346 at paragraph [25] referring to *Re Coventry deceased* [1980] Ch. 461 where Goff LJ (at 487A-B) and Geoffrey Lane LJ at 492-4 both acknowledged that the court's decision at stage one of the process is a 'value judgment' or a 'qualitative decision'.

[492] See: fn. 488, *supra,* 15[40].

[493] Applications under the 1975 Act come under CPR Part 57 which provide for certain evidence to be put before the court in writing – see: CPR 57.16 (3).

[494] In addition, the appeals process can take several years, witness the appeals in *Illot v Mitson*, *supra*.

4.4 ADULT CHILD APPLICATIONS – OBLIGATIONS, RESPONSIBILITIES AND CARE

In the list of factors that the court is required to take into account under the 1975 Act are '… any obligations and responsibilities which the deceased had towards any applicant …'.[495] In the realm of informal care-giving, this begs the question: could an adult child carer successfully contend that their now deceased parent was under an obligation to make financial provision, or enhanced financial provision, for him/her in order to either acknowledge the extent of the care that the adult child had provided for them in the later stages of their life or to recognise the degree of sacrifice that the adult child had undertaken in order to provide that care? At present, the question remains unanswered. Nevertheless, there are some judicial statements that appear to lend some considerable support to this idea. In *Re Coventry deceased*[496] Oliver J accepted that had the claimant established, on the evidence, that he had given up work '… and disabled himself from earning an adequate living in order to devote himself to the [deceased] …' this would have been a significant factor in his favour.[497] And, in *Re Jennings deceased*,[498] Henry LJ more explicitly acknowledged that '… some undischarged responsibilities from the past may still be current for instance a child of the deceased might have given up a university place to nurse the deceased though his long last illness and now wishes to take up that place. The moral obligation there would be both current and clear.'[499] On their face, these statements clearly reinforce the suggestion that a successful claim could be made by an adult child carer against the estate of a deceased parent care-receiver under the 1975 Act, at least in the particular circumstances envisaged by Oliver J and by Henry LJ.

Sitting aside Henry LJ, Nourse LJ, for his part, suggested that the obligations and responsibilities referred to in paragraph (d) should, ordinarily, be confined to those that were weighing upon the

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[495] See: section 3(1)(d) of the 1975 Act which also goes on to include 'any obligations and responsibilities which the deceased had … to any beneficiary of …. [his/her] estate', and therefore demands that the court should balance the applicant's claim against the claims of any beneficiaries to who the deceased also owed an obligation or responsibility.

[496] [1980] Ch. 461

[497] See: page 477 – this is also reflected in the decision of Arnold J in *In Re Wilkinson deceased* [1977] 3 WLR 514, to award financial provision for the claimant, where the claimant agreed to give up her employment at her sister's request, to go and live with the sister and to take care of her where the sister suffered from arthritis.

[498] [1993] EWCA Civ. 10: [1994] Ch. 286.

[499] See: Henry LJ in *Re Jennings deceased*, *Ibid*, at p. 21.

deceased immediately before his death.[500] And, therefore, any obligations and/or responsibilities that may have existed at some earlier point in time, but not at the deceased's death, may, it seems, be treated as having dissipated, even though the deceased may never have met the same during his lifetime.[501] In many respects, this is an unhelpful statement, and one that seems to have arisen solely in order to justify the refusal of the Court of Appeal to endorse the provision that had been made for the applicant at the trial of that case. If care has been provided without reward for a significant period of time, the obligation to make financial provision for the informal carer should not dissipate over time. If care provided for a period of, say, five years immediately before the care-receiver's death creates an 'obligation' within the meaning of paragraph (d), the care provided for the same period should create the same obligation even though that care was provided over 10 years before the deceased's death. This may be increasingly relevant if advances in medical science mean that life may be prolonged beyond the time where 'ordinary care' is sufficient for an elderly, disabled parent, and the care-receiver has to enter a nursing home in order to get the specialist nursing care that they need. The care that an adult child has provided to an elderly, disabled parent through the care-receiver's 80s should be valued in the same way whether or not the care-receiver subsequently spent 10 years in a specialist nursing home before passing away at the age of 100 or died peacefully in their own home at the age of 90. The 'key' to a finding that such an obligation exists should focus more on the effect of the provision of care on the care-provider and their family. Did the provision of care cause the carer (and/or the carer and their family) to suffer hardship? That seems to be more the question at the back of the minds of both Oliver J and Henry LJ.

The idea that obligations dissipate over time is therefore a troubling one. Having said this, there may be an already established exception to what Nourse LJ described as this 'general rule' which may, in turn, suggest that further exceptions could be admitted.[502] There are a number of reported cases where the claimant had worked in the deceased's business for a considerable period of time receiving little or no pay but expecting to receive an 'inheritance' in the form of a share in that business on the

[500] See: *Re Jennings deceased* [1993] EWCA Civ. 10, per Nourse LJ, who described the obligations relied upon as 'long spent and … incapable of founding a claim against … [the deceased] immediately before his death.'

[501] See: *Re Jennings deceased*, *ibid*. where the court at first instance (Wall J.) had found that the deceased had failed '… to honour his moral and financial obligations to the [claimant] during … [his] minority' (per Nourse LJ) and, on that basis, had made an award in the claimant's favour in the sum of £40,000, from an estate of approximately £300,000. This judgment was overturned on appeal. Nourse LJ, with whom the other members of the Court of Appeal agreed, took the view that, 'An Act intended to facilitate the making of reasonable financial provision cannot have been intended to revive defunct obligations and responsibilities as a basis for making it.'

[502] See: Nourse LJ in *Re Jennings deceased*, *ibid*. at p. 16.

deceased's death.[503] In the case of *Re Abram (deceased)*[504], the claimant had worked for some eighteen years in the family business on a very low wage expecting that one day the business would be his. In the event, once the claimant was married with children, he had to leave the family business and go into partnership with someone else because he was unable to support his family on the wage that he was earning in the family business.[505] And, again, in the case of *Re Pearce (deceased)*[506], the claimant had worked on the family farm without pay from the age of 7 to the age of 16 and had been told that the farm would be his one day by his father, the deceased, but, on attaining the age of 16, he decided to leave working on the farm and seek employment elsewhere, given that the deceased could not pay him.[507] On the particular facts of these cases, there was no proprietary estoppel claim that could be advanced on behalf of the claimant,[508] but the court was nevertheless content to hold in each case that the obligation and responsibility on the deceased to provide for the claimant was still current given the circumstances in which the claimant left the deceased's employment.[509]

Similar circumstances occurred in *Espinosa v Bourke*,[510] where the father's promise to leave his wife's share of a share portfolio to their daughter, the claimant, was not enforceable via a proprietary estoppel claim as the promise had never been made to the daughter, but to the mother, and, in any event, the daughter never relied on that promise thereafter. In each instance, the award in favour of the claimant was justifiable on the basis that the deceased's estate had been enriched by either the work done by the claimant or, in the latter case, the value of the mother's share in the share portfolio which would never have fallen into the deceased's estate had the promise not been given. And, it may be, therefore, that a form of 'unjust enrichment' can justify this exception to the idea that obligations

[503] See, for example: *In Re Creeney, Creeney v Smith* [1984] N.I. 397.

[504] [1996] 2 FLR 379

[505] In the event, the court awarded provision for the claimant in light of the moral obligation that weighed on deceased arising from the work that the claimant had undertaken in the family business in the expectation that it would be his.

[506] [1998] 2 FLR 705

[507] Again, in the circumstances of this case, the court awarded financial provision to the claimant based on the moral obligation created by the substantial work that the claimant had done on the family farm as a boy, including the making of improvements to buildings and farmland and the carrying out of general 'farming duties'.

[508] For such claims generally, see: chapter five *infra*.

[509] The court attached no blame to the claimant in either case for seeking employment elsewhere.

[510] [1999] 2 FLR 747

dissipate over time. In the case of claims made by informal carers, this 'unjust enrichment' could be found in the fact that the care-receiver's estate is all the more valuable because he/she has not had to buy-in care on a commercial basis because it was provided free of charge by the informal carer.

Indeed, if 'unjust enrichment' justifies an exception to the 'dissipation rule', then, logically, it should lend considerable support to the claim that the provision of care in itself creates an 'obligation' to make provision for the adult child informal carer as, in the vast majority, if not all, cases, the provision of such care on a gratuitous basis will result in some form of financial saving on the part of the care-receiver. However, there are instances in reported case law where judicial attitudes to the provision of care have been a good deal more ambivalent. One such case is *Re Rowlands deceased*.[511] Here, there were two claimants. The first claimant was the deceased's widow, aged 90, who had been married to the deceased for some 18 years, but who had been separated from him for the past 43 years. The second claimant was the deceased's daughter, who was in her 60s, and had looked after her bed-ridden mother in a small cottage that was owned jointly by herself and her father, the deceased. Both claimants were in very poor financial circumstances. The deceased was a Welsh hill farmer. He had spent his life farming land that he held jointly with the widow and one of his sons. In his will, after making a few small bequests, the deceased devised and bequeathed the residue of his estate, including his interest in the farm, to his two remaining sons (one son had died in tragic circumstances in his youth) and left his widow and daughter nothing at all. At first instance, Anthony Lincoln J. upheld the widow's claim and gave her a lump sum of £3,000 from an estate of just short of £100,000. He was satisfied that the deceased owed some 'small moral obligation' to his widow (despite the long period of separation) in light of the length of their marriage before separation, her age and her infirmity; in particular, he went on, the deceased had an obligation to see that her accommodation (which he partly owned) was 'habitable and reasonably modern'. That obligation was found to have been discharged in part, but not in whole, by charging the widow what was described by the judge as 'an absurdly low rent of £13 per annum'. No obligation appears to have arisen from the care that the widow had taken in bringing up the family while she and deceased were together. As regards the daughter, who had based her case at trial partly on the fact that she had been left to discharge what was, she claimed, the deceased's burden of caring for her mother in her mother's old age,[512] and partly on her and her husband's straightened financial circumstances, Anthony Lincoln J

[511] [1984] FLR 813

[512] The lack of any significant provision for the widow was also a blow for the daughter as she would have no significant expectations from the estate of her mother on her mother's death to recompense her for the care that she had bestowed on her for the past few years,

simply dismissed that claim and left her to pay her own costs. In answer to the first part of the daughter's claim, the judge found that, 'the daughter had a moral obligation to look after her mother'[513] and therefore refused to attach any value to what she had done. In answer to the second, he found that the daughter and her husband had received the advantage of the low rent charged to the widow (because they were living with and caring for her) which enabled the pair to amass some small savings (while spending some of their small income caring for the widow). On appeal, the Court of Appeal refused to intervene stating that the trial judge had gone through 'the weighing process' that is required by the Act in respect of both claims[514] and the value judgments that had been made by the judge were not, in the words of later cases, 'plainly wrong'. In many respects, the treatment of these two claims by a judge of the Family Division must be regarded as particularly 'harsh'. Little provision was made for the widow, notwithstanding that the deceased had the advantage of using her share in the farm for his own farming business for many years, and no provision was made for the daughter despite the fact that she had been left to care for her mother without the support that should have been forthcoming from her father and she and her husband had been providing that care on a very low income and with little capital to fall back on.[515] Indeed, what is of perhaps greater concern is that Anthony Lincoln J appeared to find that a daughter is under a moral duty to look after her mother and the daughter in this case could not, therefore, rely on the fact that she had discharged her own moral obligation in support of her case notwithstanding that she had been left to do so by the failure of the deceased to provide that support.[516]

[513] [1984] FLR 813 at page 819

[514] That is, both the mother's and the daughter's claims.

[515] This is a case where the daughter's financial circumstances, perilous although they were, were ignored by the court. The almost inescapable inference that one draws from reading the judgment handed down in this case is that the judge did not believe that, in the circumstances of the case, the deceased had any obligation to maintain his daughter, and therefore her claim had to fail. This is diametrically opposed to the subsequent approach of the Court of Appeal in *Illot v Mitson* [2011] EWCA Civ. 346 and subsequently at [2015] EWCA Civ. 797 where the court found no obligation on the deceased to maintain her daughter, the claimant, but looked only to her financial circumstances to determine whether she was entitled to an award under the 1975 Act.

[516] Anthony Lincoln J's judgment in *Re Rowlands deceased* [1984] FLR 813 is almost exclusively focussed on the question whether the deceased owed any obligation to support either his widow, the first claimant, or his daughter, the second claimant. It may be that the lengthy separation between the widow and the deceased, and the fact that the daughter had largely taken her mother's side in that separation, in his mind, begged the question: 'Does a married man have any obligation to support a wife that has walked out in him?' And, that focussed his mind on the question of obligation rather than the financial circumstances of each claimant. After considering the widow's claim and finding that the deceased was under a moral obligation to make financial provision in her favour on his death, Anthony Lincoln then considered the daughter's claim and said this: 'As for [the daughter] it is said that she, for her part, really discharged the testator's the testator's obligations for him by looking after her own mother. I do not agree. She discharged her own obligations to her own mother. I do not see that the testator owed her any obligation of support, once she had moved off to marriage and to

In *Riggs v Lloyds Bank plc (unreported)*[517] the Court of Appeal refused to make an award to a daughter who had cared for, and helped, her deceased father throughout her adult life[518] in circumstances where she had adduced no clear evidence of any need for maintenance.[519] This conclusion was drawn notwithstanding the observation by the trial judge that the daughter and her husband lived 'not much above subsistence level'.[520] Indeed, this was a case where the award made at first instance to the daughter by the trial judge was overturned on appeal. The trial judge had found that the deceased was under an obligation to provide for his daughter in light of her financial needs, the obligations that he had to his son[521] and his daughter (and, unfortunately, these were not further defined by the trial judge but could well have included an obligation that flowed from the care provided by the daughter to her father) and the size and nature of the deceased's estate. The Court of Appeal allowed the son's appeal, with Dillon LJ, who gave the leading judgment, stating that he could, '… see no circumstances … for awarding any sum for maintenance to the plaintiff [daughter] on the basis of the case put forward …', and that it was, '… not right to use the Act to award her a legacy'.[522] Once again, the Court of Appeal refused to find that there was any 'care obligation', i.e. an obligation arising on a deceased parent to make financial provision to an adult child who had cared for him or her as 'compensation' or 'reward' for providing that care notwithstanding that the provision of care by the plaintiff had clearly caused a great deal of hardship to her and her husband over the years.[523]

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bringing up a family of her own. It seems to me that that event put an end to the responsibility for maintenance.' Plainly, the Court of Appeal in *Illot v Mitson* [2011] EWCA Civ. 346 and subsequently at [2015] EWCA Civ. 797 would not agree with these propositions.

[517] But, reported in Oughton, R. D. (Ed.), *Tyler's Financial Provision*, 3rd edition, (Butterworths, 1997) at pp. 632-639 et seq. which contains the complete judgment of Dillon LJ with whom Butler-Sloss and Simon Browne LJJs agreed.

[518] Per Dillon LJ, *Tyler Financial Provision*, *ibid.* at p.635.

[519] The claimant daughter's counsel had, apparently, opened her case at trial by acknowledging that the plaintiff and her husband were not necessitous but living within their means – see: Per Dillon LJ, *Tyler Financial Provision*, ibid. at p. 635.

[520] *Ibid.* at p. 635.

[521] The son was the residuary beneficiary of his father's will and was defending the claim by his sister for provision from his father's estate.

[522] See: fn. 518, *supra*, at p. 638.

[523] This seems to fly in the face of Parliamentary debates that preceded the passing of the 1975 Act. Indeed, *Tyler's Family Provision*, 3rd edition, Oughton R. D. ed., (Butterworths, 1997) at p. 233, records that: 'The debates in both Houses of Parliament on the 1975 Act demonstrated the concern of MPs and peers for children, particularly daughters, who sacrifice much to care for aged or infirm relatives'.

Indeed, the provision of care for a deceased has also been relied upon by claimants in other reported cases under the predecessor Act, the 1938 Act, but with no evident beneficial consequences. In both *Re Cook*[524] and *Re Andrews*[525] the court declined to say that the provision of care had created an obligation on the deceased to make provision for the claimant. Whether these cases were decided on the basis that the care provided was simply not sufficient in the eyes of the court to create such an obligation is difficult to say from the reports of these cases. And, it may be that the decision in *Riggs v Lloyds Bank plc (unreported)*[526] on the 1975 Act can be considered on the same basis. Indeed, while the decision in *Re Christie deceased*[527] was extensively criticised following the Court of Appeal decision in *Re Coventry deceased*[528] only a year or so later, one observation made by Mr Vivian Price QC sitting as a deputy judge of the High Court in this case that has been cited with approval is that acts of 'natural affection between a son and his mother, on the one hand, and a daughter and her mother, on the other' are matters to which the court should attach no importance in considering applications under the 1975 Act.[529] In order to take into account the care that has been afforded by an adult child claimant the courts appear to demand something more than mere 'filial services';[530] and, it may be that the courts expect some degree of care to be rendered in return for little, or no, compensation provided by the parent care-receiver. This also seems to be the position presently taken by the Law Commission.[531]

One further example of this may be seen in the case of *Espinosa v Bourke*.[532] Here, the claimant had given up her job at her elderly father's request and taken him into her home in order to care for him. She provided that care over a seven year period, albeit that she was away in Spain for much of the

[524] (1956) 106 LJ 466

[525] [1955] 3 All E R 248

[526] See: fn. 517, *supra*.

[527] [1979] Ch. 168

[528] [1980] Ch. 461

[529] In the words of Vivian Price QC in *Re Christie*, an example of such acts that a court would disregard would be 'acts of maintenance and odd jobs around the house' – [1979] Ch. 168 at 175.

[530] See: *Re Pearson-Gregory* (1957) The Times, 11th October, where Roxburgh J makes a similar distinction.

[531] The author of Tyler's Family Provision (ibid.) had previously observed, at pp. 29-30, '[Yet] in the case of children caring for aged or infirm parents is virtually ignored by the Law Commission in its two reports; this omission must cast doubt on the Commission's understanding of the realities of family provision legislation.'.

[532] [1999] 2 FLR 747; [1999] 3 FCR 76; the author was counsel for the claimant in this case and junior counsel in the claimant's subsequent appeal.

final year of her father's life. In the event, the claimant put her case, on appeal, on two separate bases. One basis on which that case was put was that the father, who was, of course, the deceased, was under an obligation to provide for the claimant as a result of the promise that he made to the claimant's mother that he would ensure that the mother's interest in a share portfolio, jointly held by them prior to the mother's death, would pass on his death to the claimant;[533] and, the second basis on which the claimant put her case was that she had taken her father into her house and cared for him, giving up her job at his request in order to do so, for the last seven years of his life.[534] At first instance, Johnson J found that the deceased had an obligation to make financial provision for the claimant, but that he had repaid the claimant for the care that he had received from her through the payment of £16,000 towards the discharge of a mortgage that the claimant had over her property, and by meeting the costs of the construction of a small conservatory and the refurbishment of the kitchen at that property, over that seven year period.[535] In these circumstances, Buxton LJ, on appeal, found that, '[t]he effect of the judge's findings is that the testator [the deceased] properly remunerated the [claimant] for and acknowledged the care that he had received, bearing in mind in particular what he had found to be the displeasing to the [deceased] circumstances of the

[533] See: Buxton LJ at p. 93f.

[534] As to the caring obligation (as it was characterised by Buxton LJ), see: Butler-Sloss LJ at p. 86e, who found that: 'The appellant was, at the time of the death, of the deceased, wholly dependent on him. She had given up any prospect of work, however little it had been in the past, when she assumed full-time care of her father. She received a housekeeping allowance from him, a state carer's allowance for caring for him and a small sum from [her son] when he was working. At his death, she lost all those sources of income, and had none to take their place', thereby conflating the caring obligation with the claimant's dependency on the deceased. Aldous LJ in the same case agreed with the approach of Butler-Sloss LJ and the result it gave. Buxton LJ, on the other hand, seems to have taken a different approach – see: p. 93g.

[535] This brought the father's expenditure to a total of around £23,000, but (as was remarked in the Court of Appeal) some of that expenditure was for his own benefit as he, in particular, enjoyed sitting in the conservatory in order to read. To value some seven years of care and sacrifice in the sum of £23,000 seems to have provided the claimant with very little return for her labour.

household.'[536] That, with respect, is to greatly undervalue the claimant's care of the deceased,[537] given over a lengthy period of time, particularly where it was coupled with the giving up of paid employment at the deceased's request.[538] And, it shows that some members of the judiciary are reluctant to value care provided by members of the care-receiver's family on a 'realistic' basis, on the basis, one assumes, that they believe that there is some form of familial obligation to provide that care.

With this in mind, any claim that the provision of care automatically generates an 'obligation' to make financial provision for the carer clearly requires a good deal of further qualification. Indeed, one qualification that is readily apparent on the face of *Riggs v Lloyds Bank plc (unreported)* is the clear indication that, unless the applicant can provide evidence of a 'need' for maintenance, the court will not make any further provision for him/her. Absence of need on the part of an adult child applicant whose application is based on the care that he/she as provided for the deceased will result in the dismissal of that claim regardless of the extent of the care provided or the effect the provision of that care has had on the applicant themselves or their family.

One inference that one might, therefore, draw from these decisions is that the courts are very reluctant to make any award in favour of an applicant under the 1975 Act simply on the basis that the applicant had provided the deceased with what one might describe as 'mere care', and this appears to be so, whatever the length of time over which this care was provided, however intensive that care was in terms of its provision, and whatever it cost the applicant, as the carer, to provide it. Outside of these 'mere care' cases, there have been some judicial pronouncements and perhaps fewer judicial

[536] The 'displeasing circumstances of the household' to which Buxton LJ referred were the fact that the claimant had spent some seven months or so in Spain with a Spanish fisherman who was considerably younger than her and had brought him back to the UK a few months before the deceased's death to live with her at the property. No doubt, the testator was unhappy with his daughter's choice of paramour, but, to find that he, the deceased, had rightly come to the conclusion that he had discharged the obligation that flowed from the claimant's care by making the payments that he had already made to the claimant, and that he was correct to do so, introduces, with all due respect to Buxton LJ, a subjective element into the decision-making process. It is not whether the deceased believes that he was being reasonable in doing what he did – which was, in this case, to make no provision for the claimant – or whether the court agrees with him, but whether the deceased's will or the law relating to intestacy (or a combination of both) had the effect of failing to make reasonable provision for the claimant looked at on an objective basis.

[537] And, given that the claimant was in receipt of a carer's allowance for the deceased, she had clearly demonstrated to the authorities that the deceased, who was elderly and very frail, needed that care.

[538] This was how Butler-Sloss LJ seemed to consider the matter of care – i.e. that it had been provided selflessly and at some cost to the claimant over a significant period of time – and that, accordingly, the provision of care was a factor that the court was entitled to give weight to in the exercise that s. 3(1) of the 1975 Act required the court to perform.

decisions that indicate that the provision of social care by a claimant to a deceased parent might be significant in some narrowly defined circumstances.

While it is clear from the words of Oliver J and Henry LJ referred to earlier, and from other judicial statements,[539] that the provision of informal care may allow an adult child carer who is in need of financial provision to make a successful claim against the estate of the care-receiver, in reality there are significant difficulties inherent in such claims that make the same both fragile and very difficult to predict. In fact, such are the obstacles raised by these 'difficulties' – either individually or collectively – that it quickly becomes apparent that any reform of the 1975 Act as a means of providing relief for informal carers is far from a workable solution. In *Inheritance Claims: Law, Practice and Procedure*, the author, Andrew Francis, describes these difficulties as largely the product of two features of such claims: first, 'the maintenance test', and, secondly, the objective nature of the approach to any 1975 Act claim that the court is required to follow which, of course, excludes all subjective questions of 'morality'.[540] However, in practice, these 'difficulties' go somewhat deeper.

In referring to 'the maintenance test', Francis uses this description in its widest sense to include the requirement that a claimant must establish a 'need for maintenance'. And, indeed, this approach has now been confirmed at the highest level by Lord Hughes JSC in *Illot v The Blue Cross and Others*.[541] Curiously, there is nothing in the 1975 Act that requires a non-spousal applicant to establish a 'need for maintenance' as a pre-condition to making a successful claim under that Act.[542] This appears to be mere 'judicial gloss'. That said, it is gloss that is based on some attractive logic; 'If you do not need 'maintenance', why should the court make provision for it?' If this is the correct interpretation to put on the word 'maintenance', then this seems to make the amendment of the 1975 Act to include a 'carers' category' something of a ''false dawn' for carers. Many informal carers will not need

[539] See, for example: *In re Callaghan deceased* [1985] Fam. 1 per Booth J and *In Re Leach* [1986] Ch. 226 per Slade LJ.

[540] See: Francis, A. *'Inheritance Act Claims: Law, Practice and Procedure'*, (Jordans, 2006) at 7[12], paragraph (7).

[541] [2017] UKSC 17 at [19), where Lord Hughes JSC states: '… all cases which are limited to maintenance … will turn largely on the asserted needs of the claimant …. need for maintenance rather than for anything else ….) is a **necessary** [my emphasis] but not a sufficient condition for an order. [However,] [n]eed, plus the relevant relationship to qualify the claimant, is not always enough.'

[542] As noted earlier, section 1(1) simply provides that applications under the Act are made 'on the ground that the disposition of the deceased's estate …. is not such as to make reasonable financial provision for the applicant', and (2)(b) states that 'reasonable financial provision' for non-spousal applicants means '…. such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance.'

'maintenance' because – as their parents are living longer – they are at a stage in life where they are able to maintain, and have been maintaining, themselves, at least in financial terms and perhaps with a modicum of difficulty, but nevertheless that is where they are. What they have lost during the caring period are 'opportunities' – opportunities for advancement in their careers, opportunities to earn more, opportunities to enjoy life with their families outside the four walls in which they have been confined during the caring period. Financial provision can acknowledge the hardship associated with these lost opportunities, but that is nothing to do with the concept of 'maintenance'. And, in the absence of a 'need for maintenance' an adult child informal carer's claim will fail notwithstanding that it might otherwise have secure foundations, such as the existence of a moral obligation on the deceased to make such provision for the claimant, which is plainly relevant under s. 3(1)(d).[543]

As for the second point that Francis makes, the judiciary have been keen to emphasise in recent years that the question raised by the 1975 Act is not whether the deceased has acted reasonably in excluding, or making inadequate provision for, the applicant, but whether the provision that has been made, or lack of it, has produced what can be described as 'a reasonable result'.[544] In other words, the exclusion of all 'questions of morality' prevents the judge from asking, 'Is it reasonable for the deceased to have failed to make adequate financial provision for the applicant given the years of unstinting care that he/she has administered to the deceased?', and granting the applicant relief on that basis. In practice, an applicant's claim can only succeed if, (i) it is based on some form of 'need for maintenance', and (ii) if the weighing up of the section 3 factors indicates that the claim should be successful. Indeed, this is amply borne out by reported cases where an applicant has only succeeded not on the basis of the care that he/she has provided but very largely because his/her financial circumstances, coupled with other circumstances, dictate that it is unreasonable not to make provision for him/her.[545]

Care has been a somewhat minor, and on other occasions insignificant, factor in a small number of other 1975 Act claims; in these cases, more unusual factors seem to have been material in raising the

[543] This can be seen in the recent case of *Ames v Jones,* 2016 WL 04772447, 19th August 2016, County Court (Central London), where an application by an adult daughter failed where she had 'failed to discharge the burden of proving her current a future needs'. Similarly, in *Christofides v Seddon* [2014] WTLR 215, the adult son claimant, who was described as having very considerable needs (a need for care and a need for accommodation), failed in his claim for greater financial provision from his mother's estate because he could not show that the financial provision that had been made for him (which was an equal provision with the three beneficiary defendants and which amount to approximately £125,000) failed to discharge any obligation that the mother had to him to make further provision for him.

[544] See: Lord Hughes JSC in *Illot v The Blue Cross* [2017] UKSC 17 at [16]-[17].

[545] See: for example, *Espinosa v Bourke* [1999] 2 FLR 747.

obligation on a deceased to make provision for the applicant in that case. In *Re Callaghan*[546] the applicant and his wife cared for the deceased for approximately four months or so. The applicant was a 'child of the family'. In the event, Booth J found that the deceased's obligations and responsibilities to the applicant[547] were greater that those to his sisters (the beneficiaries of the deceased's Will) and awarded the applicant the sum of £15,000. However, the key factor in this decision was that a significant part of the deceased's estate was derived from the applicant's mother, not that the applicant had cared for the deceased.[548] It is also interesting in light of *Riggs v Lloyds Bank plc* that the applicant failed to establish any particular need for provision as his financial circumstances were compared with those of his three sisters and were held to be comparable. Nevertheless, the applicant would be permitted to buy his local authority-owned house (which he rented) in return for the payment of the sum of £13,000 and therefore that was his 'need'. In short, he needed accommodation for his maintenance and therefore a capital sum to purchase that accommodation without a mortgage was the award that was made to him by the court, even though the applicant was not 'needy'.[549] A similar result was reached in the case of *Re Leach*.[550] Here, the applicant had been caring for her father for around nine months after the death of his wife, the applicant's mother, before the father went to reside with the deceased. The father then made a will in favour of the deceased and he also married her. When the father died his estate went to the deceased, but when she died her estate went to her children by a former relationship and the applicant was not provided for. On her application for an award out of the deceased's estate, the court held that the deceased was under a 'moral obligation'

[546] [1985] Fam 1

[547] Which Booth J described as 'very considerable indeed' and liken them to 'the obligations of a widowed parent to a dutiful and responsible only child'. Of course, the applicant was not 'an only child' vis-à-vis the deceased; there were three sisters (who were, in fact, half-sisters). What Booth J seems to be saying is that, as regards the part of the deceased's estate that was derived from the applicant's mother, the obligations on the deceased to the applicant in relation to that part of the estate were similar to the obligations on a widowed parent to a dutiful only child. Of course, at this point other courts would argue that no obligation arises from being merely a dutiful child.

[548] The house in which the deceased lived was originally in the name of the applicant's mother. The applicant was a child of his mother, not by the deceased but by a prior relationship. After the deceased and the applicant's mother married, the applicant's mother put this house into joint names. On the mother's death intestate, the house passed to the deceased absolutely.

[549] In the event, the award was £15,000 – i.e. £13,000 and a further £2,000 for 'unforeseen emergencies'.

[550] [1985] 3 WLR 213; [1986] Ch. 226

to make provision for the applicant because her estate was derived in part from the applicant's father's estate.[551]

Notwithstanding that an element of care had been present in both *Re Callaghan* and in *Re Leach*, it would appear that in neither case was it deemed to be significant set against other more weighty factors such as 'the source of the estate'. Although not referred to at all in the 'section 3 factors', 'source of the estate' can also be used to explain the case of *Espinosa v Bourke* referred to earlier.[552] Indeed, this itinerant factor could be used, in somewhat wider terms, to explain the case of *In re B deceased*.[553] Here, the deceased was born severely handicapped as a result of medical negligence and required constant care. She was awarded the sum of £250,000 in damages in an action against her local health authority and her affairs, including the administration of a trust fund comprising this award of damages, was placed in the hands of the Court of Protection. The deceased lived with and was cared for by her mother, the claimant. In due course, a bungalow as purchased for their joint use and occupation, with the mother providing one-quarter of the purchase price and the trust fund providing the balance. In these circumstances, this three-quarter share was held in trust for the deceased and, when she died, it passed, under the law relating to intestacy, in equal shares to the mother and the deceased's father who had ceased to cohabit with the mother shortly after the deceased's birth. After the deceased's death, the mother commenced proceedings under the 1975 Act seeking an order against the father's share in the bungalow. The mother could only maintain this claim if she was dependent on the deceased. She was not a claimant who fell into any other category listed in section 1(1) of the 1975 Act. But, she was, of course, a carer who provided her care of the deceased on an informal, full-time basis.[554] The father applied to strike out the mother's claim on the basis that the deceased had not assumed responsibility for the mother's maintenance.[555] What is more, so his counsel's arguments continued, the mother was not in a position of dependency on the

[551] This was supported by evidence of the wishes of the applicant's father in relation to his share of the property that was jointly owned by him and the deceased. His statement that he wanted the applicant to have the benefit of this share following the deceased's death placed the deceased under a 'moral obligation' to the applicant on the basis that she had encouraged the applicant to think that she would therefore receive a substantial amount of money on the deceased's death.

[552] [1999] 2 FLR 747 where part of the estate was derived from the claimant's mother and only came to the claimant's father with an obligation that it should be handed over to the claimant on the father's death.

[553] See: [2000] Ch. 662. The case is also known as *Bouette v Rose* in some reports.

[554] See: Robert Walker LJ at [2000] Ch. 662 at 666G.

[555] This is something that the court is directed to consider on applicants where the claimant claims to have been maintained by the deceased within the meaning of s. 1(1) and (3) by virtue of s. 3(4) of the 1975 Act.

deceased, but vice versa.[556] In the event, the Court of Appeal was persuaded that an assumption of responsibility for the mother's maintenance could, on the evidence, be inferred from the fact that she was, albeit together with the deceased, being maintained by the income from the fund and that the deceased's share of the bungalow met her, the mother's, need for accommodation, and that this maintenance was substantial and not outweighed by or equal to the maintenance of the deceased by the mother such that it might be said that the mother's maintenance of the deceased was provided for 'full valuable consideration' within the meaning of section 1(3) of the 1975 Act.[557] Plainly, the Court of Appeal was keen to preserve the claim of such a meritorious claimant. And, the case was hailed as a break-through for carers at the time.[558] Yet, time has shown that the decision in *In re B deceased* was a decision on its own facts. Indeed, recent cases, albeit largely on the issue of whether a deceased who had made a will out in favour of a carer, had the capacity to do so and whether he/she knew and approved of the contents of that will, indicate that the courts take a very cautious approach to claims made by carers, given that the care-receiver may be in a vulnerable position *vis-a-vis* the carer.[559]

In summary, the response of the judiciary to the provision of care by a claimant to the deceased has been, at best, inconsistent and, at worst, lacking any clear rationale. What is more, the relative unpredictability of first instance decisions made under the 1975 Act, and the reluctance of any appeal court to overturn those decisions, is now compounded by the fact that these first instance decisions are regularly heard by High Court Masters, District Judges (at either High Court or County Court level),[560] or County Court Judges whose decisions are not, ordinarily, reported, notwithstanding that significant sums of money are often involved.[561] This 'one bite at the cherry' approach can leave a

[556] See: [2000] Ch. 662 at 665E-G.

[557] The effect of s. 1(3) of the 1975 Act is to exclude claims by dependents where such persons were being maintained by the deceased for full valuable consideration. This would, for example, exclude claims by resident housekeepers who were dependent on the deceased for accommodation but were remunerated for their services.

[558] See, for example: Bridge, S., For love or money? Dependent carers and family provision, 2000, *Camb. L J.* at p. 248.

[559] See: *Poole v Everall* [2016] EWHC 2126 (Ch.); [2016] W.T.L.R. 1621; compare: *Re the Estate of Julie Spalding deceased* [2014] All E R (D) 73 (Mar) where the deceased was cared for by her son and, so the evidence went, promised to leave her bungalow to him on her death as compensation for his services. She did so, but, later, fell out with him as a result of developing a personality disorder and made a number of wills in favour of others. Here, it was held that the son's claim succeeded in the face of evidence that the deceased did not have the capacity to make the later wills.

[560] The High Court and the County Court now have concurrent jurisdiction in all applications under the 1975 Act, see: s. 25 of the County Courts Act 1984.

[561] The reporting of the first instance decisions in *Illot v Mitson* [2011] EWCA Civ. 346 and *Myers v Myers* [2004] EWHC Fam 1944 seems to have been exceptional. *Myers* can certainly be classed as a 'big money' case. The

bitter taste. In practice, the relative unpredictability of first instance decisions is very much a product of the 'weighing up' approach that the courts have adopted when considering the factors set out in section 3(1) of the Act. Weight needs to be attached to these factors when placed in the judicial scales that will need to tip in favour of the application if the claimant is to be successful and what weight is to be attached to each factor is heavily dependent on both the trial judge's interpretation of the evidence before the court and his/her understanding of the content and purpose of the 1975 Act. As can be seen in the following section, the simple inclusion of a 'carer's category' and even a 'carer's factor' – i.e. a 'section 3 factor' that explicitly requires a court to take into account any care that has been administered by a claimant to the deceased as a factor in the claimant's favour on an application under the 1975 Act – will not always result in the treatment of carer's claims with the justice that they deserve.

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4.5 SHOULD A CARER'S CATEGORY BE INTRODUCED?

In some quarters, it has been suggested England and Wales might introduce a 'carer's category'[562] into the 1975 Act in order to enable informal carers who have not received reasonable financial provision from the deceased on his/her death to apply to the courts for such an award. To some extent, this has already been attempted elsewhere. In New South Wales, the Succession Act 2006 enables those in a 'close personal relationship' to bring a claim for a 'family provision order' under that Act.[563] According

estate in this case was valued at £8 million. The claimant was a child by the deceased's first marriage. The deceased had a particularly difficult relationship with her and was concerned to prevent her making a claim against his estate after his death.

[562] See: Sloan, B., *Informal Carers and Private Law*, (Hart, 2013), at p. 172, section 5.3.5. 'A Carer Category for England and Wales?'

[563] The Succession Amendment (Family Provision) Act 2008 for New South Wales amended the Succession Act 2006 for that state by introducing a new family provision regime in place of the New South Wales Family Provision Act 1982. See, generally: Lawrence, C., *Family Provision Claims in New South at Wales* - http://www.ebc44.com/wp-content/uploads/Family_Provision_Claims_in_New_South_Wales_-25022016.pdf (accessed: 03/01/17). It is interesting to note that family provision statutes in Australia generally have come in for some considerable criticism in recent years – see, for example: - http://www.changefpa.com.au/ (accessed: 03/01/17).

to the New South Wales Law Reform Commission, the rationale for the amendment was to provide a remedy for those who suffer detriment as a result of the care and support they provide to another without receiving payment for the same.[564] The basis for giving financial provision to those applicants who can bring themselves within the 'close personal relationship' category is therefore 'compensation'; the legislature in New South Wales has explicitly recognised that informal carers should be able to obtain 'compensation' for the work that they have done, albeit that the award made to them is not necessarily linked to the value of that work or the loss that they have suffered as a consequence of performing the same, but is at the discretion of the court.[565] Section 3(3) and (4) of the New South Wales Succession Act 2006 as amended defines the term "close personal relationship" as a relationship (other than a marriage or a de facto relationship) 'between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care',[566] but not for some form of fee or reward and not where the care and support is provided on behalf of another person or some form of government or beneficial organisation. While this is plainly a positive step forward for informal carers in New South Wales, the introduction of such a new category of applicant in England and Wales would not be without difficulty.

In the vast majority of cases, the relationship between a care-giver and care-receiver will be a 'close and personal one'. The relationship is often one of inter-dependence.[567] One can certainly see this in the caring that is present between many elderly spouses or cohabitants. Yet, it is also there in most parent and adult child caring relationships too. A 'carer's category' in the list of those who are able to make an application under the 1975 Act would thus enable an adult child[568] who has cared for their now deceased parent to seek financial provision (or further financial provision) from the care-receiver. But, in what circumstances might such an application be made under our existing law?

If the adult child applicant was financially dependent on the deceased, there would be a secure basis under the present law for such an application. If, for example, the adult child had 'returned home' to care for their elderly mother or father that dependency might be reflected in their reliance on 'free

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[564] See: New South Wales Law Reform Commission, *Relationships,* (Report No. 113, 2006) [3.21].

[565] See: Sloan, B., *Informal Carers and Private Law*, (Hart, 2013), p. 167 et seq.

[566] These are the words used in s. 3(3) of New South Wales Succession Act 2006 as amended.

[567] See: Herring, J., *Caring and the Law*, (Hart, 2013), at p. 59 et seq.

[568] Or some other eligible claimant – see: the introduction to this thesis and chapter six, section 6.1. infra.

accommodation' in the family home. It might also be reflected in the fact that the deceased had been paying the household bills. Until the passing of the Inheritance and Trustees' Powers Act 2014, the counter-argument to an application made on this basis was that the relationship between the care-giver and care-receiver in these circumstances was one where 'full valuable consideration' had been given on each side; in other words, the care-giver had received rent free accommodation in return for his or her care.[569] Now, section 6 and schedule 2 to this Act together provide that a person is to be treated as being maintained by the deceased (either wholly or partly, as the case may be) only if the deceased was making a substantial contribution in money or money's worth towards the reasonable needs of that person, other than a contribution made for full valuable consideration pursuant to an arrangement of a commercial nature.[570] The words 'commercial nature' are here intended to convey the idea that the courts should only exclude applications by claimants who are dependent on the deceased where the dependency has been created by an arrangement of the nature of a commercial bargain between the deceased and the claimant; so, for example, in the case of a freely-negotiated bargain where the claimant was specifically engaged by the deceased as a housekeeper whose obligations included the provision of social care in return for the provision of, for example, free board and lodging in the deceased's home, the housekeeper would be precluded from making an application under the 1975 Act, but a member of the deceased's family who was living at the deceased's home in order to provide that care and was thereby receiving free accommodation and free board (because the deceased was paying the household expenses in full), but in circumstances where there was no negotiated bargain underpinning this relationship, would not be so precluded.

Outside of this 'dependency situation', the prospects of an adult child making a successful application under the 1975 Act as it presently stands are less clear. In practice, the amendment set out in section 6 and schedule 2 of the Inheritance and Trustees' Powers Act 2014 has failed to deal with what is a far more common situation, particularly where the care-receiver is more elderly than they might have been in a similar situation only thirty or forty years earlier, which, of course, is the product of the increased longevity in our elderly population that we have experienced over the same period.[571] In

[569] See: *Jelley v Iliffe* [1981] Fam 128.

[570] This is introduced into the 1975 Act by amending s. 1(3) so that it now reads: "For the purposes of subsection (1)(e) above, a person is to be treated as being maintained by the deceased (either wholly or partly, as the case may be) only if the deceased was making a substantial contribution in money or money's worth towards the reasonable needs of that person, other than a contribution made for full valuable consideration pursuant to an arrangement of a commercial nature."

[571] See: chapter one, supra. As mentioned in chapter one, there is a good deal of concern in government circles and in the media over whether those in 'middle age' are healthy enough to support their elderly, disabled parents in the foreseeable future. Unless these health issues are addressed, the burden on the health and

other words, it is more likely now that the elderly parent will go and live with his/her adult child simply because that child is more advanced in years than might have been the case thirty or forty years ago. He or she will have already made their way in the world; they will have a home, a career and very often a family. Indeed, sometimes that family will have already grown-up and left home, leaving 'spare accommodation' which the elderly parent can therefore occupy; if the adult child is more affluent maybe a 'granny flat' will be provided. In many cases, the care-receiver will therefore have the benefit of accommodation in that home, the outgoings (which have been paid for by the adult child)[572] that ensures his/her comfortable occupation of the same and the care that the adult child has provided. In such a situation, the dependency is not of the adult child on the parent care-receiver, but in the other direction.

Equally, the section and the accompanying schedule do not deal with the situation where the adult child carer has not been 'left without a penny' under his/her elderly parent's will or intestacy, but has been left precisely the same provision as his/her brothers and sisters. In these circumstances, the adult child carer has been financially provided for but not compensated for the financial loss that they will, in many cases, have suffered in providing care to their now deceased parent. In other words, although provision is made, there is an imbalance of provision as between a sibling who has cared for an elderly parent and one or more other siblings who have not. In receiving such provision, the caring sibling has been provided for and, given that reasonable financial provision for children is tied to 'the maintenance standard', he/she may not be in need of any further provision. Yet, as between the siblings, the caring sibling has not been treated 'fairly' by the care-receiving parent. Existing case law under the 1975 Act firmly indicates that such carers in each of these two situations will not, without more, receive further provision because, in the much-quoted words of Oliver J in *Re Coventry deceased*,[573] '[i]t is not the purpose of the Act to provide legacies or rewards for meritorious conduct.'[574]

The self-sacrifice associated with informal caring is, of course, meritorious conduct *par excellence*. These people are often placed in an invidious situation. On the one hand, they have an elderly,

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social services in England and Wales is likely to increase more rapidly than previously anticipated – see: http://www.bbc.co.uk/news/health-38402655 (accessed: 03/01/17).

[572] On some occasions, the elderly parent care-receiver might make a small contribution from his/her state pension.

[573] [1980] Ch. 461

[574] Ibid. at p. 474

disabled parent who desperately needs the care that only they can provide; yet, on the other they have their own lives, their careers and often the demands of their own families to consider. One case from the author's legal practice painfully reveals the dilemma faced by would-be claimants who may have cared for an elderly, disabled parent over a protracted period of time. Here, in consequence of his mother's rapidly deteriorating health, E and his wife, W, agreed that they would sell their home and move in with E's mother, J, in order to care for her in her final years. Following the sale of E and W's house in 1999, E and W were left with approximately £25,000, being the equity in this property. Much of this money was then used to pay for alterations made to J's property, so that J could use the same more conveniently, together with the costs associated with the general repair and redecoration of that property. None of these works increased the value of J's property in any degree. In the meantime, J's health was now so poor that the care that she needed was intensive, so much so that it was described by E as '24 hour care, 7 days a week', and included toileting, clothing, changing beds, washing, cooking meals and providing companionship as and when needed. In reality, much of the burden of this care fell on W,[575] as E was working during the day in his own business.

Tragically, W died of cancer in 2000, but J, still in poor health, survived her. At this point, a friend and neighbour kindly took over the daily care of J without reward, while E preformed 'night-time duties'. In the event, J continued living at the property, cared for by E and the neighbour, until 2003 when a place was found for her in a local care home; she died a year later. In her will, which was made many years earlier, J's estate, after some incidental bequests of little value, was left between E and his brother, N, in equal shares. In the event, J's estate comprised little more than the value of her house; nevertheless, given the rise in house prices in the latter part of the decade, this provided E with something against which he could make a claim for further financial provision, particularly as he had spent a significant amount of his own money converting that property to J's use, and, of course, he had provided a significant degree of care for her in her final years.

Following the making of the claim by E in correspondence, N refused to accept anything less than half the proceeds of sale of the property as his entitlement under J's will. Indeed, in insisting that the property should be sold, he was prepared to make his brother homeless, which only served to add to E's misery. At that point, E considered making a claim against J's estate under the 1975 Act, but, after careful consideration, he felt that it was too much of a risk to do so.[576] In this case, E was a businessman

[575] That the caring burden will usually fall on a woman is noted in chapter one, *supra*. In this case, E did spend many hours sitting with and providing care for his mother in the evenings and therefore his personal contribution to the care that she received should not be undervalued.

[576] E was not entitled to public funding in support of his claim on financial grounds.

with his own business; he was not financially dependent on the deceased in any way, he was not now in need of accommodation, since he was in a stable relationship, cohabiting with the neighbour and friend who had looked after the deceased at home in her final years, and he was, in any event, in receipt of half of the net value of her estate. What is more, he plainly had no claim for a share in the net proceeds of sale of the house on either a resulting or constructive trust basis. In these circumstances, the claim would have been heavily dependent on the courts accepting the proposition that a deceased who is in receipt of significant care from a claimant is under an 'obligation' to make financial provision for the claimant carer that in some way recognises the provision of that care and/or compensates him/her for the time and/or money spent in providing the same; and, as indicated earlier, that has, to date, never been a position that the English courts have chosen to adopt.[577]

In essence, the risks that E felt were too great to surmount provide us with some of the reasons why the introduction of a carer's category will not enable justice to be done, and for someone in E's situation to receive the compensation which he surely deserved, in cases such as this.[578] Yet, as indicated at the close of the last section, there are other reasons too. For example, if an adult child carer was to die before his/her claim is adjudicated on by a court, the claim would cease because claims under the 1975 Act do not survive for the benefit of the claimant's estate. Of course, on the present state of the law, a care-giver in such a situation can never be compensated, and one might well say that, in events such as these, 'justice' is impossible. If a complete remedy is to be provided, it can only be provided by legislation which makes *inter vivos* provision for the carer; that is to say, some form of financial provision for the carer while the care-receiver is still alive. This point will be explored further in chapter six. But, this matter apart, even if a carer who predeceases a care-receiver cannot be compensated, their family can. Denying that remedy to the carer's family creates injustice, particularly when one considers that the effect of caring for an elderly relative is often felt outside the carer. In many cases where the carer is the filling in the sandwich generation, the carer's family – their husband, wife, daughter(s) and son(s) – suffer as well. Yet, there is no compensation for such suffering under the 1975 Act.

At the close of the previous section, it was contended that there are indeed other reasons why the inclusion of a 'carer's category' and even a 'carer's factor' will not provide informal carers with a

[577] In fact, as will be maintained in chapter six, the courts will need to go further than this in some cases if justice is to be achieved and say that this obligation overrides other factors, such as financial circumstances.

[578] Indeed, this story has many of the echoes surrounding the observation set out at the beginning of chapter one; echoes of unrequited personal sacrifice on the part not only of E, but also W (who passed away in the course of providing care for J), and, indeed, the neighbour, both of whom received nothing.

remedy that produces what one might describe as 'just results' across the board. One such reason – which links in with the observations made and the end of the foregoing paragraph – is that, under section 3(5) of the 1975 Act, the time for adjudicating such claim made under the Act is the date on which those claims are heard by the court. This emphasises that, in considering such claims, the court is looking forward and nothing more. In short, the court seeks to alleviate future need not to compensate a claimant for what has gone before. In some cases, this can have a positive dimension, such as in the case of *Re Hancocks deceased*[579] where the court was able to do justice as a result of being able to take into account a 'windfall' that the deceased's estate had received between the date of his death and the date of the hearing of a claim for reasonable financial provision made by his adult daughter. Yet, for adult child carers, who perhaps have found a way back into paid employment after many years out-of-work caring for the deceased,[580] having the court consider their claim at that point and not as at the deceased's death might well be a disadvantage, particularly if their financial situation has improved since that time.[581] In this situation, the court will not compensate them for the 'lost years of suffering' but will look to their financial circumstances at the date of trial in order to determine whether they are in need of an award or what that award should be.[582]

For similar reason, it has been held that a claimant's claim under the 1975 Act will die with him/her and cannot be maintained by his/her estate.[583] The 1975 Act looks to provide for the claimant's future needs, not to afford compensation for his/her past good deeds. And, for that reason too, the suffering

[579] [1998] 2 FLR346 (CA)

[580] And, this may be at a level far lower that the level at which they worked prior to having to give up their job in order to care for the deceased; nevertheless, going back to work will almost always count against them because it will either remove or reduce their need for maintenance from the deceased's estate.

[581] In *Espinosa v Bourke* [1998] 2 FLR 747, the claimant's financial situation had changed, but, thankfully for the claimant, the Court of Appeal was unable to say whether it had changed for the better or the worse. In *Espinosa*, the claimant, who had lost the financial support that her father had been providing her, had decided to sell the house in which they had been living and invest the proceeds of sale in the purchase of a business in an effort to provide herself with an income. In so doing, she had exchanged the certainty of having 'a roof over her head' (which she had as a result of her father, the deceased, discharging the small mortgage that the claimant had retained on the property which she owned) for the uncertainty of a business which could either succeed or fail. The purchase of the business had been arranged with the benefit of a loan from the claimant's bankers. If that loan were to be called in at any point, the claimant would lose not only her business but also her residential accommodation as that accommodation comprised a small flat above the shop from which the business was conducted.

[582] This is emphasised in the next section, section 4.5, where 'need' is considered to be the primary determining factor of all non-spouse applications for reasonable financial provision under *the 1975 Act*.

[583] See: *Re Bramwell* [1988] 2 FLR 263.

experienced by the would-be claimant's family – which can be considerable as we saw in E's case above – is simply ignored.

Nevertheless, these are perhaps minor points when set against the primary reason why adult child carers will never receive a sufficient financial incentive for what may be many years of caring for an elderly, disabled parent which is that all awards for non-spouse applicants are limited to provision for their 'maintenance' and nothing more. Therefore, the court's focus, perhaps inevitably given the language of the 1975 Act, is on how a claimant was being maintained before the deceased's death, for it is that death and nothing more that has brought about the claim. As we saw in section 4.2 above, the rationale that underlies both the Inheritance (Family Provision) Act 1938 and its successor the 1975 Act[584] is that it provides a 'safety-net' for those who have been left in financial difficulties as a result of the death of the deceased. Save for the surviving spouse, the primary duty on the court is to ensure that these people – who otherwise qualify for an award under the 1975 Act – are provided with 'maintenance'[585] from the estate of the deceased in so far as that estate will allow. Where there is no evidence that there is any need for maintenance, the claim will not succeed.[586] And, as we have seen, this is a particular problem where the adult child carer has cared for their elderly disabled parent in the child's, own home. In essence, 'maintenance' claims made under the 1975 Act are often in two parts, one for accommodation, and the other for income. If the caring is done in the adult child's own home, there will be no accommodation claim. Any claim for 'maintenance' will not compensate the carer for the loss which they have suffered during the caring process which will often be far more extensive than limits to which the courts have been prepared to go in providing maintenance. Indeed, where the courts have been prepared to interpret 'maintenance' in a liberal and progressive manner, and to provide a claimant with a house in which his/her body and soul can be maintained,[587] this will be of no practical benefit for those adult child carers, of which there are many, who will already have

[584] The 1975 Act is an Act that makes 'fresh provisions for empowering the court to make orders for the making out of the estate of a deceased person of provision for the spouse, child, child of the family or dependant of that person; and for matters connected therewith' (long title).

[585] See: s. 1(2)(b) of the 1975 Act.

[586] See: *Riggs v Lloyds Bank plc* (unreported) 27th November 1992, Court of Appeal.

[587] See: *Illot v Mitson* [2015] EWCA Civ. 797, where the award comprised, inter alia, the sum of £143,000 which was needed by the claimant to purchase her home in which she was a tenant of the local authority. Given that an application by an adult child under *the 1975 Act* is one where he/she can only ever receive an award for his/her maintenance, it is unclear why the Court of Appeal made such an award in the claimant's favour in preference to an order which would require the property in question to be purchased and thereafter held on trust by the claimant for her life with remainder to the charities otherwise entitled under the residuary gift contained in the deceased's will, such that the charities would, at least, benefit from the proceeds of sale of this property once the claimant had passed away.

such accommodation. In these circumstances, the only claim will be for 'income maintenance'. And, where the child is of full working age, perhaps with qualifications, the most that the claim may be for is for income while the adult child is looking for work. What is more, as we have seen, even this will be lost where the adult child finds suitable employment before his/her claim is heard.

In our list of reasons why the addition of a carer's category to the 1975 Act will not provide most adult child carers with a remedy is yet another difficulty that will sometimes arise with competing siblings. This is that 'the primacy of need' will often dictate that the carer will lose out in competition with those whose financial needs are extensive. Consider the case where an ailing, elderly parent goes to live with sibling X, because sibling X has had a successful career, has acquired a large house and is therefore able to accommodate them in their own home, rather than sibling Y who has been less successful in life and who remains in smaller, rented accommodation. Sibling X may have spent many years caring form their elderly, disabled parent. He/she may have had to give up the prospect of advancement in their career. On some occasions, he/she may have even been forced to give up a well-paid job altogether in order to care for their parent. How would their application for 'reasonable financial provision' be considered in circumstances where, after the parent's death, there is no real evidence of any need for such provision because their prospects are, nevertheless, even after years of sacrifice on their part, significantly better than sibling Y's prospects? The answer is that sibling X's claim would not fare well in the absence of need because need has now become the primary reason for making an award under the 1975 Act and where need cannot be established no award will be made. While a more extensive analysis of the leading case law must await the following section of this chapter, it suffices to say, for the moment, that this analysis indicates that, unless the deceased's estate is a large one, any award, in these circumstances, is very likely to be made in favour of the sibling whose financial circumstances, including their prospects of improving their present situation, suggest that they are in need of financial provision. And, where the estate is not a large one, the effect of this will be to preclude any provision being made for the carer. In these circumstances, the rewarding of 'lame ducks'[588] at the expense of those who deserve compensation will cause an injustice in the eyes of many people, but that injustice is dictated by how the courts have interpreted the 1975

[588] The phrase 'lame duck' is used by Roger Kerridge in Kerridge, R., *Parry and Kerridge: The Law of Succession*, 12th edition, (Sweet & Maxwell, 2009) at paragraph 8-62 who expresses the opinion that the 'the problem with 'lame duck' cases is the potential unfairness towards children, such as the son in Re Jennings [1994] Ch. 286 who, having led virtuous lives, are then treated less generously than their prodigal brothers and sisters'. This is a view with which the author would agree. And, it represents one of the planks on which the argument which is put forward in this thesis that a more just solution to the conundrum of obtaining compensation for adult children who care for their elderly, disabled parents is that the compensation should be treated as a debt. If it is not so treated, an adult child carer is likely to lose out to a profligate sibling who has not cared for the parent in question but who has now fallen on hard times financially due their profligacy.

Act. And, this provides yet another reason why the search for a remedy must now head off in a different direction, a direction that acknowledges the provision of care over a significant period of time as a debt that must be repaid on the care-receiver's death.

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4.6 THE CONTINUING FOCUS ON DEPENDANCY AND NEED

If an adult child claimant has no disability,[589] there is only one factor in the list of general factors set out in section 3(1) of the 1975 Act, that focusses the court's attention on the claimant's and his/her individual circumstances, and that is general factor (a), 'the financial resources and financial needs which the [claimant] has or is likely to have in the foreseeable future.' Unless the adult child claimant wishes to assert that the deceased was under some form of obligation or had a responsibility to make financial provision for him/her,[590] there is no need to adduce any further evidence in support of his/her application. While Oliver J in *Re Coventry deceased*[591] once stated that '… it cannot be enough to say 'here is a son of the deceased; he is in necessitous circumstances; there is property of the deceased which could be made available to assist him but which is not available if the deceased's dispositions stand; therefore those dispositions do not make reasonable provision for the applicant.' There must, as it seems to me, be established some form of moral claim by the applicant to be maintained by the deceased…'[592] some courts have, periodically, made substantial awards in favour of adult child applicants solely on the basis of financial need.[593] Section 3(1)(g) does, of course, refer to, 'any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant'. But, unless the claimant's conduct has created an obligation to make provision for him/her, it is unlikely to be significant unless it has a negative effect on the

[589] And, s. 3(1)(f) of the 1975 Act is thereby irrelevant.

[590] Which is relevant under s. 3(1)(d) *the 1975 Act*.

[591] [1980] Ch. 461

[592]See: [1980] Ch. 461 per Oliver J at page 475.

[593] Reference here can be made to what are known as the 'big money' cases such as *Gold v Curtis* [2005] WTLR 673 and *Myers v Myers* [2004] EWHC 1944 (Fam.).

application, whereupon the claimant will have no interest in adducing evidence as to his/her conduct save, of course, to rebut any evidence adduced by those who oppose the claim.[594]

In any event, at least until very recently,[595] it has long been said by the courts that conduct – whether of the claimant, the deceased or anyone else – is not considered to be, in most cases, a factor that carries any great weight with the court, unless it is of a particularly striking nature and may, therefore, justify a failure to make provision, or further provision, for the claimant.[596] Even the conviction of the claimant for the manslaughter of the deceased in the case of *Re Land deceased*[597] did not preclude the court making an award in the claimant's favour. Moreover, in *Re Jennings deceased*[598] Nourse LJ declared that, if conduct is relied upon in support of a claim for reasonable financial provision under the 1975 Act, but that conduct has not created an obligation or responsibility on the deceased, relevant under paragraph (d), to make provision for the claimant it 'cannot be prayed in aid under a general provision such as paragraph (g)'.[599]

If conduct is of little, or of very limited relevance in most cases, and the claimant's case is not based on an assertion that the deceased had some form of obligation or responsibility to make provision for him/her, what therefore has an able-bodied claimant to put before the court other than his/her evidence of need? Evidence (if any) relevant to the general factors listed in section 3(1), paragraphs (b) and (c), will be adduced by other parties to the litigation. The deceased's personal representatives will adduce evidence of the 'size and nature of the net estate of the deceased' under paragraph (e). In many cases, therefore, there is little else for a claimant to say in support of his/her application and, therefore, unless those who oppose the application wish to adduce evidence going to the other general factors listed in section 3(1), the focus of the court will be on the claimant's financial

[594] See: Oughton R. D. ed., *Tyler's Family Provision*, 3rd edition, (Butterworths, 1997) at pp. 252-3 '…while 'meritorious conduct' by an adult child will not in itself justify an award of provision, misconduct is capable of preventing an otherwise justified claim from succeeding.'

[595] See: section 4.7 *infra*.

[596] The detailed examination of the parties' conduct towards each other has been described as 'distasteful' in the context of ancillary relief proceedings on divorce – see: *Lambert v Lambert* [2003] 1 FLR 139 – and must therefore be equally distasteful if attempted in the course of an application under *the 1975 Act* –see: Francis, A., *Inheritance Act Claims: Law, Practice and Procedure*, (Jordans, 2006) at paragraph 7[15] footnote 4.

[597] See: [2007] 1 All E R 324.

[598]See: [1994] 1 FLR 536.

[599] See: *Re Jennings deceased* [1994] 1 FLR 536 at 543B, 550D-E.

circumstances. In recent years, this has created what might be described as 'the primacy of need' as the main feature of most, if not all, adult child claims made under the 1975 Act.

One case which illustrates this is the decision in *Ilott v Mitson*.[600] Here, an adult daughter claimed that her mother's will had not made reasonable financial provision for her. In fact, her mother had left most of her estate to charity and had made no provision whatsoever for her daughter, who was aged 43 at her mother's death and living in 'straightened circumstances'. The relationship between the mother and daughter throughout the daughter's adult life had been a difficult one. When she was just 17 years of age, the daughter formed a relationship with a young man of whom the mother strongly disapproved. In the event, the daughter, still aged 17, moved out of her mother's house and went live with this man at his parents' house. Five years later, they married, but the mother was not invited to, nor informed of, the wedding. In fact, there had been no contact between mother and daughter over these five years. During the following years, there were three attempts at reconciliation, but none were successful. The first was instigated by the daughter and it did last for about a year. Yet, the relationship between the mother and the daughter's husband was problematic throughout and ended with the mother reporting the husband's behaviour to the police. The second and third attempts followed two chance or accidental meetings. There was an exchange of correspondence following each meeting, but on each occasion the attempted reconciliation came to nought, principally, it seems, due to the intransigence of the mother.[601] Following the breakdown of the final attempt, the mother executed her last will, together with a letter of wishes, in April 2002.[602] She then informed her daughter of what she had done. The letter of wishes stated that her executors should defend any claim made by her daughter under the Act on the grounds that she had hardly seen her daughter over the years following her daughter's departure and that the daughter was not financially dependent on

[600] See: [2011] EWCA Civ. 346; [2012] 2 FCR 547(CA (Civ. Div.)) and [2015] EWCA Civ. 346; [2012] 2 FLR 170 (CA (Civ. Div.) This case eventually went to the Supreme Court as *Ilott v The Blue Cross and Others*, and is reported at [2017] UKSC 17.

[601] These facts are related because general factor (g) invites the court to consider the conduct of the applicant towards the deceased and, inferentially, vice- versa.

[602] This was not the first will that had the effect of excluding the daughter. There was an earlier will in March 1984 which had the same effect.

her but had chosen to make her own way in the world.[603] Instead of providing for her daughter, who was her only child, the mother's will left the bulk of her estate to charity.[604]

As for the daughter's financial circumstances, at hearing of her claim for financial provision under the 1975 Act, the daughter lived with her husband, and the youngest four of their five children, in accommodation that was rented from the local authority and situate in a remote village in Hertfordshire. The daughter had not been in employment since the birth of her eldest child. Indeed, most of their family income was derived from state benefits.[605] At first instance, before District Judge Million, the daughter made a claim and was awarded the sum of £50,000 from an estate of £486,000. On appeal, before Eleanor King J., this decision was overturned. The daughter then appealed from that decision and the Court of Appeal held that the appeal from the first instance decision had been wrongly decided. What is more, as the daughter had lodged a cross appeal on quantum, which had been wrongly dismissed by Eleanor King J., once the decision from this judge allowing the executors' appeal was rescinded, the daughter was entitled to be heard on the cross appeal. The Court of Appeal then remitted the daughter's appeal to the High Court. In the event, that cross appeal was successful and, in July 2015, the daughter was awarded the sum of £164,000 as reasonable financial provision from her mother's estate by a second Court of Appeal.[606] The burden of this increased award was carried by the mother's residuary bequest in favour of charity, and therefore several of the charities appealed this decision to the Supreme Court. In the event, the Supreme Court overturned the decision of the second Court of Appeal on the quantum of the daughter's award, and reinstated the original award made by District Judge Million.

Was the decision in *Illot v Mitson* on liability really based on need alone? Given that the claimant was an adult child, District Judge Million should have begun with the proposition put forward by Oliver J in *Re Coventry deceased* set out in the opening paragraph of this section and subsequently adopted by members of the Court of Appeal in the same case. Indeed, this starting-point appears to have been accepted by Sir Nicholas Wall P. in his assertion that, '… necessitous circumstances cannot in

[603] The mother had no spouse for whom she might have made provision. Her husband, the daughter's father, had died while the daughter was a child.

[604] In fact, there was no evidence before the court that the mother had any connection with these charities during her lifetime or had any particular affiliation with their objects – see: Sir Nicolas Wall P. at parag. 1 of his judgment, reported at [2011] EWCA Civ. 346.

[605] On the first appeal before Eleanor King J, the court was informed that 75% of the family income was derived from state benefits – see: Eleanor King J., parag. 31, of her judgment, reported at [2009] EWHC Civ3114 (Fam.).
[606] On appeal before Arden, Ryder LJJ and Sir Colin Rimer, reported at [2015] EWCA Civ. 797.

themselves be the reason to alter the testator's dispositions.'[607] In these circumstances, in the words of Sir John Knox in *Re Hancocks deceased*,[608] '… there must be some reason for the court to decide that the scales fall in favour of the conclusion that there has been a failure to make reasonable financial provision'. What, therefore, was the reason for the courts' conclusion in *Illot v Mitson* that the mother's will did not make reasonable financial provision for the daughter?[609]

On closer analysis, the Court of Appeal struggled to lay their hands on any such reason. Sir Nicholas Wall P appeared to rely on District Judge Million's finding that it was reasonable for the daughter to remain at home in circumstances where she still had two children of school age (11 and 16) and that, even if she did find paid work outside the home, she would be likely to remain in some financial need for her earnings would only be able to support her 'to a limited extent', in order to reach the conclusion that there was something beyond the daughter's mere financial need to tips the scales in favour of the application. Having related these findings in an effort to support District Judge Million's conclusion that the mother's will had not made reasonable financial provision for the daughter, he concluded that, 'these factors can either be viewed as elements in the discretion exercised by the District Judge or as section 3 factors.'[610] Yet, in reality, these findings cannot be separated from the daughter's financial need. The daughter's financial need was greater *because* she decided to stay at home while she still had children of school age.[611] And, that need would have continued to exist had she gone out to work because the daughter would have struggled to find work that provided her with

[607] Parag. [33] of his judgment in *Illot v Mitson* [2011] EWCA Civ. 346, quoting from Butler-Sloss LJ in *Espinosa v Bourke* [1999] 3 FCR 76; [1999] 2 FLR 747.

[608] See: [1998] 2 FLR 346.

[609] Roger Kerridge and A.H.R. Brierley ask substantially the same question in the latest edition of Parry and Kerridge: The Law of Succession (13th ed., 2016, Sweet & Maxwell). On the matter of the Court of Appeal's decision on liability, the authors say: 'The case is a good example of one where the daughter was competing with charities who themselves had no particular call on the testatrix's bounty. But what is not clear … is what was really the basis on which this daughter succeeded, above and beyond the fact that she was a daughter, and was in need.' (parag. 8-62 at p. 213) The analysis of the Court of Appeal's decision which follows substantiates, and rationalises, this opinion.

[610] See: paragraph [57] of his judgment in *Illot v Mitson* [2011] EWCA Civ. 346.

[611] Reasonably so in the eyes of District Judge Million, although he did add that he considered that it would also be 'reasonable for the claimant to attempt to support herself by some paid work in the course of the next few years' – see: paragraphs [76] and [77] of his judgment, an extract from which is annexed to the report of the 2015 appeal in the Court of Appeal. None of the Court of Appeal appeared to demur from these findings. Indeed, Arden LJ referred specifically to this finding as a 'value judgment' and concluded that, in reaching it, the District Judge could not be said to be 'plainly wrong' – see: paragraph [67] of her judgment in in *Illot v Mitson* [2011] EWCA Civ. 346.

even a modest income.[612] These are nothing more than explanations of the reasons underlying the daughter's financial need, both present and future. They cannot be explained as separate factors that have some relevance under section 3(1)(g).

Arden LJ was also concerned to justify District Judge Million's conclusion that the mother's will did not make reasonable financial provision for the daughter. In her view, the District Judge reached his conclusion on a combination of, 'the … [daughter's] financial circumstances, the size of the estate, the absence of countervailing demands for financial help from the testatrix and the unreasonable conduct of the [mother] towards … [the] daughter', which meant, in her words, '… that reasonable financial provision had not been made for the … [daughter]'.[613] These factors, she stated, '… outweighed other factors, such as the … [daughter's] own conduct towards the testatrix.'[614] So, in Arden LJ's opinion, there were other factors that had weight in that case, namely, the size of the estate and the mother's unreasonable conduct[615] - factors over and above the daughter's financial need - that meant that a court was able to reach the conclusion that the mother's will had not made reasonable financial provision for the daughter.[616] Yet, on further analysis this is also unconvincing. Firstly, any reliance on 'the size of the estate'[617] alone in order to justify an award is tantamount to saying that there is one law for large estates and another for small estates, and such a proposition would surely be impossible to justify on any logical basis.[618] And, indeed, one must ask, 'where does that leave those of us with estates of 'modest size'? Secondly, 'conduct' – although present in paragraph (g) as a factor that the court must take into account – has never been accorded any significant weight in past cases.[619] Indeed,

[612] She had no qualifications and given that she lived in a remote village and would have had to rely on public transport to get her to and from any job that she might obtain – see: Black LJ at paragraph [78] of her judgment in *Illot v Mitson* [2011] EWCA Civ. 346.

[613] See: Arden LJ in *Illot v Mitson* [2011] EWCA Civ. 346 at paragraph [66].

[614] Ibid. at paragraph [66]

[615] Arden LJ's reference to '… the absence of countervailing demands for financial help from the testatrix' as a factor that should have any weight in this or any other application under *the 1975 Act* is very difficult to fathom – see: paragraph [66].

[616] At paragraph [69] of her judgement, Arden LJ states: 'The financial circumstances of the appellant need to be considered against all the other factors in the case. It is in that sense that need alone is not enough.'

[617] Which is a section 3 factor – but one must remember that these factors must be taken into account in the first and second stages of an application – and the size of the estate is plainly relevant to the second stage.

[618] See: *Myers v Myers* [2004] EWHC 1944 (Fam), referred to at the end of this section.

[619] See: Francis, A., *Inheritance Act Claims: Law, Practice and Procedure*, (Jordans, 2006) at paragraph 7[15] where the author warns that: 'In most cases conduct is not only irrelevant, but also often unhelpful to the party putting it forward, boring and wasteful of costs.' He then asserts that conduct is only relevant (i) where it

in this case, District Judge Million found that there was some element of fault on each side in regard to who was responsible for the estrangement between the mother and the daughter.[620] In these circumstances, the conduct of the mother alone could not surely justify a departure from the principle related in *Re Coventry deceased* referred to at the beginning of this section.[621] Despite this, Arden LJ concluded that, '[t]he financial circumstances of the … [daughter] need to be considered against all other factors in the case. It is in that sense that need alone is not enough.'[622] Yet, on this analysis, these 'other factors' must be of little, if any, significance. They could not, in themselves, justify an award in the daughter's favour, if need alone would have been insufficient for the court to find in her favour. And, indeed, if these 'other factors' are merely 'conduct' (which they seem to be) unless such conduct has created, in the words of Nourse LJ in *Re Jennings deceased* referred to earlier, '… an obligation or responsibility on the deceased, relevant under paragraph (d), to make provision for the claimant', such conduct cannot be relied upon in favour of the application by bringing it in under section 3(1)(g). Yet, this is precisely what Arden LJ seems to do.

The third member of the Court of Appeal, Black LJ, gives us a little more of the daughter's circumstances in paragraph [78] of her judgment, but her judgment is particularly unhelpful when it comes to discerning what the factors took this case beyond the applications based on mere financial need which were referred to by Oliver J. She appeared troubled that District Judge Million considered the reasonableness of the mother's conduct rather than the reasonableness of the result produced by the mother's will, and rightly so.[623] But, in the event, she was content to find that there was enough

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is of a striking nature, (ii) where it is relevant to the deceased's obligations and responsibilities, and (iii) where it sheds light on why a provision (if any) falls short of what is reasonable financial provision. The 'key' to conduct seems to be: 'Does it affect the determination of what is reasonable financial provision for a claimant at either stage one or two?' If it does, it is relevant; if it doesn't, it is not. It is submitted that there will be few instances of conduct that satisfy this test.

[620] See: Arden LJ at paragraph [22] of her judgment in *Illot v Mitson* [2015] EWCA Civ.797.

[621] Notwithstanding what is stated at fn. 277 supra, one recent case where conduct did assume some importance is *Wright v Waters* [2014] EWHC 3614 (Ch.); [2015] WTLR 353, where the claimant's need was said to have been outweighed by her conduct (She had, it seems, written to the deceased, her mother, wishing her dead, and she had refused to return a sum of £10,000 which she had invested on the mother's behalf – an extreme case?).

[622] See: Arden LJ in *Illot v Mitson* [2011] EWCA Civ. 346 at paragraph [69].

[623] See: Black LJ in *Illot v Mitson* [2011] EWCA Civ. 346 at paragraph [80]. She was 'troubled' because, as she says, paragraph 64 of his judgment [in which he appears to have set out some of his reasons for deciding that the mother's will did not make reasonable financial provision for the daughter] the District Judge considers the reasonableness of the mother's conduct and not whether a reasonable result was produced by the mother's will. This represents a significant flaw in the District Judge's reasoning. S. 3(1)(g) of *the 1975 Act* specifically requires the court to have regard to 'the conduct of the applicant' in determining in whether reasonable financial provision has been made for him/her. And, it is fairly easy, it is suggested, to make a judgment as to

in the District Judge's judgment to conclude that he had taken into account the section 3 factors in this case.[624] She then described the paragraphs of the District Judge's judgment that she relies upon in support of this conclusion as '… draw[ing] on the findings that the District Judge had made about the history and the … [daughter's] personal and financial circumstances in the preceding part of his judgment.'[625] Yet, the 'history' of the dispute between mother and daughter that caused the rift between them concerns nothing more than their conduct towards one another, which has already been considered. And, as stated earlier, the daughter's personal circumstances are wholly wrapped up in her financial circumstances, which have, again, already been considered. In *Illot v Mitson* the daughter did not suffer from any physical or mental disability.[626] In fact, there were no 'personal circumstances' beyond the daughter's financial need that fell to be considered; all of the circumstances that were considered were circumstances that created that need. In short, the conclusion that *Illot v Mitson* contains a new approach to applications made by adult children is inescapable; despite the observations made by Oliver J in *Re Coventry deceased*, observations that were approved in many subsequent cases, the daughter's application succeeded purely on the basis of financial need, albeit in circumstances where the estate was large enough to support an award and in circumstances where there were no 'competing beneficiaries'.[627]

Of course, in some respects, it is not the decision of the Court of Appeal in *Illot v Mitson* in 2012 that is either unusual or exceptional, but the manner of its arrival in the list of appeals. In *Illot v Mitson* the Court of Appeal was faced with an appeal on an appeal. And, their collective view that Eleanor King J's ruling that District Judge Million's judgment at first instance could not stand for the reasons that she gave is perfectly justifiable. Eleanor King J clearly erred in manner in which she dealt with the

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whether a reasonable result has been reached in each case bearing in mind the conduct of a claimant towards the deceased. This is one of those 'value judgments' that a court of first instance must reach. While the words of s. 3(1)(g) do continue 'or any other person', it is not so easy to reach a conclusion that an unreasonable result has been reached due to the conduct of the deceased towards the claimant. Surely, the only conduct that is relevant here is the deceased making the will in the form in which it was made – i.e. failing to make reasonable financial provision for the claimant? Any other conduct on the deceased's part has not produced the unreasonable result which the court is being asked to remedy.

[624] In particular, Black LJ refers to paragraphs 48 – 63 of that judgment – see: Black LJ in *Illot v Mitson* [2011] EWCA Civ. 346 at parag. [84].

[625] See: Black LJ, *ibid*. at parag. [84].

[626] Which are relevant under s. 3(1)(f) of *the 1975 Act*.

[627] The charities that were together entitled to the mother's residuary estate under her will were not competing with the daughter in the sense that the court was required to take into account their financial circumstances pursuant to s. 3(1)(c) of *the 1975 Act.*

decision of District Judge Million on appeal. And, as regards that first instance judgment, the Court of Appeal was unable to say that it was 'plainly wrong'.[628] Indeed, the 'plainly wrong' test has made first instance decisions under the 1975 Act very difficult to overturn on appeal.[629] The disappointment one feels when reading the 2012 Court of Appeal judgments in *Illot v Mitson* is that none of those judgments adequately address counsel's submission that, absent some other reason, the court cannot interfere with the dispositions made by the mother's will merely because the daughter is in necessitous circumstances. This observation, made by Oliver J in *Re Coventry deceased*,[630] is repeated in *Re Jennings deceased*[631] and, again, in *Espinosa v Bourke*,[632] and has been followed in many other cases.[633] Indeed, in *Re Garland deceased*[634] Michael Furness QC sitting as a deputy judge of the High Court in 2007, on reviewing the evidence in that case, was able to come to the conclusion that, '[t]here is no doubt that the claimant lives in very difficult financial circumstances … So far as the claimant's needs, she has a need for a higher income …' and '… that need is a powerful factor in her favour'. Nevertheless, he felt unable to overturn the testator's testamentary dispositions on that basis alone, where the claimant was 'in good health and able to work'. Here, 'the estrangement between herself and her father [the testator] and the fact that she [the claimant] ha[d] already had the benefit her mother's estate [were] factors which count[ed] against her.' And, notwithstanding that the value of the mother's estate was only £33,000 compared with the testator's estate which was valued at just under £300,000, and the beneficiary against whom she was competing (her sister) was living in fairly comfortable circumstances, the judge, having noted the case law referred to above, dismissed the claimant's claim. Yet, the decision of the Court of Appeal in 2012 in *Illot v Mitson* flies directly in the face of the sentiments expressed in this body of case law. And, it is, therefore, regrettable that, in the

[628] Arden LJ – the Court of Appeal only interferes where the Judge proceeded on the basis of the wrong principle or it is satisfied that the Judge has reached a conclusion which is plainly wrong – see parag. [62].

[629] See: CPR 1998, r. 52.11(3)(a). In practice, this requires one or more of the following: an error of law, an error of fact, or an error in the exercise of the court's discretion. Given that errors of law or fact are fairly rare, the question is often whether the way in which the trial judge exercised his/her discretion can be supported. And, if the trial judge has considered, and weighed in the balance, all of the 'section 3 factors' in exercising his/her discretion, there is no real basis on which an appellate court can interfere with his/her final decision whether it agrees with it or not.

[630] [1980] Ch. 475

[631] See: Nourse LJ at [1994] Ch. 295E-G.

[632] [1999] 2 FLR 747

[633] Including, *Re Dennis deceased* [1981] 2 All E R 140, per Browne-Wilkinson J, *Williams v Johns* [1988] 2 FLR 475, per Micklem J, and *Re Goodchild deceased* [1996] 1 WLR 694, Court of Appeal.

[634] [2007] EWHC 2 (Ch.)

2012 hearing in *Illot v Mitson*, the Court of Appeal passed by an opportunity to clarify the law in relation to the sufficiency of need alone to found an award in favour of an adult child under the 1975 Act, preferring to focus on whether Eleanor King J's reasons for overturning the judgment of District Judge Million were proper ones rather than whether the decision of District Judge Million was a sound one on the state of the present law.

Why is this significant in relation to a possible amendment of the 1975 Act to allow claims made by informal carers merely on the basis of their caring? It is this. If financial need alone can support a claim by an adult child for reasonable financial provision from their late parent's estate, then claims made by informal carers are likely to be defeated when in competition with claims of this nature. Some informal carers will be unable to establish any financial need. Yet, in the absence of such need, there seems to be little reason to find in their favour. To date, all successful adult child applications under the 1975 Act in England and Wales have relied, to some extent or another, on financial need. And, such applications which were otherwise meritorious on their face, have failed in the absence of any evidence that established that the claimant or claimants were in financial need.[635]

In fact, this is not the first time that an application which seems to have been based on what some might regard as need alone has succeeded. In *Gold v Curtis*,[636] the claimant, an adult son, who was suffered from depression and who had a dependant adult daughter with a mental disability, contended that his income was not sufficient to maintain a reasonable standard of living and was awarded £250,000 out of his late mother's estate, which was valued at some £870,000. The mother's will made no provision for her son. Instead, she had left the bulk of her estate to her daughter, who was aged 60, divorced, with no children, and who was someone had already had assets of £1.1 million as a result of that divorce.[637] The mother had explained in her will that she did not wish her son to benefit from her estate as he had already received 'enough' (which is the way she put it)[638] from his parents and he had become 'estranged during the last few years' (again, her words).[639] On the evidence, the 'enough' referred to by the mother was a total of £1,800, part of which had been given, and part loaned, but not repaid, approximately 20 years earlier. In the event, the judge – Master Bowman – found that the estrangement had been caused by the mother's dominating character; and,

[635] See: *Riggs v Lloyds Bank plc*, Court of Appeal (Civil Division), 27 November 1992.

[636] [2005] WTLR 673

[637] Some part of the facts of this case are taken from an article by Edward Hewitt*, Estrangements and the 1975 Act*, [2015] P.C.B. 172.

[638] *Ibid*. at p. 173

indeed, at the time of her death, there was evidence that the relationship had been repaired, at least to some degree, following a stroke suffered by the mother. On the application of the general factors set out in s. 3(1) of the 1975 Act, but particularly the son's poor financial circumstances, the depressive illness from which he was suffering, his dependent child's mental disability and the daughter's very favourable financial situation, the Master made a substantial award to the claimant. This, of course, was a very different situation to that faced by the Court of Appeal in *Illot v Mitson.*[640] And, the factual matrix against which each application for such an award is made will often be very different.

Here, there were at least two 'additional factors': one was that the reasons given by the mother for not making provision for her son were poor. In circumstances where her estate was approaching £900,000, the mother's statement that the son had already received 'enough', through the payment of £1,800 many years earlier, represented a rather distorted view of what had happened in the distant past. Moreover, this view may well have been influenced by her opinion that it was he who had been responsible for their estrangement at the time the will was made, an estrangement that had not continued up until the mother's death, but which had been repaired in some degree, although this was not reflected in her will.[641] Yet, should these factors be seen to be factors that support the making of an award under the 1975 Act? If the court makes a judgment on whether the reasons given by the deceased for not making an award are unreasonable, that seems to be turning a negative into a positive. This seems to be very near to saying that, 'if your reasons are judged to be false, we will ensure that reasonable provision is made for the claimant'. If that is the case, it may be preferable not to give reasons at all. If you go to your grave without attempting to justify your testamentary dispositions, how can anyone sensibly question them?

The second factor that carried some weight in this case was the comparative affluence of the only other competing claimant on the mother's bounty. The court is required to take into account the beneficiaries' financial circumstances under s. 3(1)(c) and Master Bowman may well have concluded that she was not in any financial need now nor would she be in such need in the future. Of course, the lack of any competing claimants[642] cannot easily be seen as a 'positive reason' for making an award in favour of an adult child claimant who is seeking financial provision from the estate of a deceased parent. If it were, then, without more, most claimants who have no competing siblings would be well-

[640] [2011] EWCA Civ. 346 and [2015] EWCA Civ. 797

[641] And, having suffered a stroke some months before her death, it may be that the mother had not been in any real position to consider making a new will.

[642] Whether under s.3(1)(b) or (c) of the 1975 Act.

placed to receive an award from their parent's estate should they choose to make an application. At the first stage of the reasoning process that the court must adopt in considering applications under the 1975 Act, the absence of competing claimants and competing beneficiaries is more of a negative reason; that is to say, where there is no one who falls into either of these two categories, there is no reason under s. 3(1)(b) and (c) not to make an award. That will not determine an application in the claimant's favour because, as we have seen, the courts have insisted that there needs to be factors that weigh positively in the 'judicial scales' in favour of the making of an award, and this factor is most often 'financial need'. It may also have been the case that the size of the estate also influenced the court to make an award in this case. Yet, once again, that ought perhaps to be treated as negative reason; that is to say that, where the estate is large, there is no reason not to make an award, but there still needs to be something in the positive side of the scales for the court to act in the claimant's favour.

In this light, it may therefore be wrong to see *Gold v Curtis*[643] as a case that was determined on financial need alone. And, if this correct, this puts *Illot v Mitson* more out on a limb than we first thought. Another English decision that appears to be based on need alone is *Myers v Myers*.[644] This was a 'big money case' where the deceased's estate was valued at something in excess of £8 million. The claimant was an adult child of the deceased by his first marriage. The deceased's will left the whole of his very substantial estate to his widow and the family of his second marriage. The deceased had a difficult relationship with the claimant and had put shares into trust for her in an effort to prevent her making a claim against his estate after his death. He also left correspondence which stated that, in his view, he had made adequate provision for her during his lifetime. The claimant had substantial debts and an income of only £70 per week and therefore it was clear that she had real financial need, but, apart from that need, there was little else that she could pray in aid of her application. Nevertheless, further financial provision was made for in the form of an award of £275,000 which was to be held on trust to provide her with accommodation and a further £86,000 to enable her to furnish this property, discharge some of her debts and purchase health insurance. Of course, the size and nature of the deceased estate are relevant factors. But, as has already been remarked, the size of the deceased's estate alone cannot justify an award in the claimant's favour in circumstances where no such award

[643] [2005] WTLR 673

[644] [2004] EWHC 1944 (Fam)

would have been made if the estate were smaller. And, in these circumstances, *Myers v Myers* also seems to fly in the face of the principles laid down by Oliver J in *Re Coventry deceased*.[645]

Scant regard has also been paid to these principles in Northern Ireland where the courts have sought to apply the Inheritance (Provision for Family and Dependants) (Northern Ireland) Order 1979, SI 1979/924, which effectively enacts the 1975 Act as part of the law applicable in the province. In *the Estate of McGarrell deceased*[646] the claimant, who was in difficult financial circumstances, was able to obtain an award of (by agreement between the parties on quantum not on liability) one-quarter of what appears to be a relatively small estate (but whose value is not given in the report of the case), having established a moral claim on that estate 'arising in part from her having done housework for her father [the deceased] over many years in excess of the housework for which she was paid, but arising principally from the fact that she did look after her father in difficult circumstances for a period of about nine months'.[647] On the review of the case law under the 1975 Act that appears above, it is difficult to see that the provision of care for such a short period of time could ever give rise, in English law, to an obligation to make financial provision for a claimant under that Act. The claimant in *Re Coventry deceased* looked after his father, the deceased, in a similar fashion, but no obligation to make financial provision was thereby created. In fact, in *Re Coventry deceased* there was a significant dependency of the claimant on his father, given that his father, the deceased, owned the property in which they were both living such that the claimant was dependent on his father for the maintenance of 'a roof over his head'. In contrast, in *the Estate of McGarrell deceased* it was the claimant who had taken the deceased into her home for the nine months to which Hutton J refers before eventually arranging for the deceased to move into a nursing home, and therefore no 'dependency claim' was advanced. Nevertheless, an award was made in the claimant's favour in *the Estate of McGarrell deceased*, but not in *Re Coventry deceased*. The subsequent Northern Ireland cases of *In Re Creeney, Creeney v Smyth*[648] and *Re Kathleen McKernan deceased*[649] are also viewed as instances in which the courts in this province have been generous in their application of the Northern Ireland equivalent of the 1975 Act, but, on reflection, the former case can be supported as a case where the deceased was under a significant obligation to make provision for the claimant having encouraged him to believe that he would inherit the deceased's business over a considerable period of time in which he worked

[645] [1980] Ch. 461

[646] [1983] 8 NIJB

[647] Per Hutton J, at page 13 of his judgment in the Estate of McGarrell [1983] 8 NIJB

[648] [1984] N.I. 397

[649] [2007] N.I. Ch. 6

in that business on a low wage, and the latter case can be supported as a case where there was a high degree of dependency by the claimant on the deceased for accommodation. In these circumstances, this case law does little to help us overall.

In summary, the observations made by the Court of Appeal in the trilogy of appeals under *the 1975 Act* in 1998, in *Re Pearce deceased*, *Re Hancocks deceased* and *Espinosa v Bourke* that there is no pre-condition that an adult child claimant must satisfy, whether in the form of a 'moral obligation' or 'special circumstances', or otherwise, that give rise to an obligation or responsibility on the deceased to make reasonable financial provision for the claimant, with which the claimant has failed to comply, while undoubtedly correct, have, it seems, paved the way for subsequent courts to determine claims by 'lame duck' adult child claimants on the basis of financial need alone. And, the courts are now, following *Gold v Curtis*, *Myers v Myers* and now *Ilott v Mitson*, increasingly willing to determine applications under the 1975 Act on this basis. In contrast, there is no inclination, it seems, for the courts to determine such claims on the basis of 'obligation' alone; there must always be a need for provision. This has a number of consequences for adult child carers who wish to make a claim for compensation on the estate of a now deceased parent. Firstly, their claim will always be subject to the obligation on the deceased's estate to provide for the financial need of any other applicant or any beneficiary because financial need alone can justify the estate being used in such a manner. And, secondly, their claim will be dismissed, notwithstanding everything that they have done for the deceased over what may have been a protracted period of time, unless they, themselves, can establish financial need or some form of dependency on the deceased. It is submitted that this position is wholly unsatisfactory in terms of a policy which seeks to encourage adult children to care for an elderly, disabled parent at home. And, it is also unsatisfactory as a position that will deliver 'justice' in a majority of cases. With these observations in mind, it is time for a fresh approach to the problem that was identified in chapter one of this thesis.

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4.7 ILOTT IN THE SUPREME COURT – MORE QUESTIONS THAN ANSWERS

When *Ilott v The Blue Cross and Others*[650] arrived in the Supreme Court in late 2016 it was the first occasion on which any claim under the 1975 Act or its predecessor had been before the highest court in the land. That said, the decision that the Supreme Court was asked to make in order to determine Mrs. Ilott's appeal was a limited one: 'Was the Court of Appeal correct in overturning District Judge Million's decision on quantum?'[651] In the event, its answer was 'no'. It held that the District Judge had correctly directed himself on the law to be applied to that decision and had correctly applied that law. Indeed, in what appears to be a thinly-veiled attempt to discourage appeals in future 1975 Act claims, whether on liability or quantum, Lord Hughes JSC, giving the leading speech on a panel of seven, remarked: 'The Act plainly requires a broad-brush approach from the judges to very variable personal and family circumstances. There can be nothing wrong in such cases with the judge simply setting out the facts as he finds them and then addressing both questions under the Act without repeating them'.[652] And, that, it decided, is what District Judge Million had done at the trial, albeit the two questions had not been separately dealt with in his judgment.

Notwithstanding that the issues before the Supreme Court were narrow, Lord Hughes and Baroness Hale JJSC did offer some general observations on the 1975 Act which are helpful if only up to a point. The dictum that has been seized upon by many commentators in this regard is Lord Hughes' reiteration of the principle of testamentary freedom, and with that the importance that is to be attributed to the deceased's wishes. Unfortunately, the significance of these wishes – or what 'weight' is to be attached

[650] See: [2017] UKSC 17; [2018] AC 545. This case was, of course, *Ilott v Mitson*, in all earlier hearings before the lower courts.

[651] When *Ilott v Mitson*, later to become, *Ilott v The Blue Cross and Others*, came before District Judge Million for trial he decided, firstly, that the late Mrs. Jackson failed to make reasonable financial provision for her daughter, Mrs Ilott, and, secondly, that she, Mrs. Ilott, was therefore entitled to an award of £50,000 out of the late Mrs. Jackson's estate as 'reasonable financial provision' under section 2 of the 1975 Act. Mrs. Ilott appealed the second element of that decision. And, this duly prompted the residuary beneficiaries of the late Mrs. Jackson's will to appeal the first element. Both the appeal and the cross-appeal came before Eleanor King J and, quite sensibly, she dealt with the cross-appeal first. As the residuary beneficiaries succeeded before Eleanor King J, the question raised on the appeal did not arise. Mrs. Ilott, on the other hand, was not content with that decision and appealed the dismissal of her appeal and the success of the cross-appeal to the Court of Appeal. In the event, the Court of Appeal held that District Judge Million was correct in the approach that he adopted to the first issue before him and that Eleanor King J was wrong in deciding otherwise. That left Mrs. Ilott's appeal on the issue of quantum still to be decided. That appeal was heard by Parker J who upheld District Judge Million's initial award of £50,000 in Mrs. Ilott's favour. But, his decision was then appealed by Mrs. Ilott to the Court of Appeal who upheld that appeal and substituted a much higher award (a minimum of £143,000). The residuary beneficiaries then appealed that decision on quantum to the Supreme Court who upheld that appeal and restored the original decision of District Judge Million awarding Mrs. Ilott £50,000.

[652] [2017] UKSC at [24]

to them in the balancing process that the court must undertake in answering the questions raised by an application under the 1975 Act – was not further explained.[653]

In their submissions, counsel for Mrs. Ilott had suggested that '[i]n exercising the jurisdiction the court is not confined to interfering with the deceased's testamentary provisions as little as possible.'[654] Indeed, a deceased – whether setting out his/her testamentary intentions in a will or simply deciding not to make a will and to allow his/her estate to be distributed in accordance with the law relating to intestacy – cannot thereby defeat the operation of statute and fail to make reasonable financial provision for someone who is otherwise entitled to such provision. That said, it is difficult to sensibly claim that whatever relationship that existed between the applicant and the deceased before the deceased's death can be ignored altogether.[655] Every application will have a unique set of circumstances accompanying it. Yet, that is, of course, the difficulty here. In *Ilott v The Blue Cross*[656] Baroness Hale JSC complained that parliament has given no guidance to the courts on how the courts should exercise their discretion under the 1975 Act on applications for reasonable financial provision by adult children. But, inflexible rules make bad law. It is therefore difficult to conceive of any such indications, should Parliament give them, which would give greater 'justice' to adult child applications, save for what is proposed later in this thesis. In fact, greater certainty would run the risk of greater injustice. Yet, if there is little certainty, this only increases litigation as more and more adult children in difficult financial circumstances fancy their chances of success, much like Mrs. Ilott.

Indeed, one of the most troublesome aspects of *Ilott's case*, which comes out of the speech of Baroness Hale JSC, is that, in her mind, had District Judge Million arrived at either one of two other radically different – in fact, polar opposite – conclusions on the evidence before him he would have been acting entirely within the discretion given to him under statute, and, more significantly, neither decision would have been appealable on their merits. This leaves would-be adult child litigants and their advisers with little idea whether they might be successful or not, yet clear that in all likelihood

[653] Lord Hughes JSC at [47] stated, 'It was not correct to say of the wishes of the deceased that because Parliament has provided for claims by those qualified under section 1 it follows that that by itself strikes the balance between testamentary wishes and such claims: para. 51 (iv). It is not the case that once there is a qualified claimant and a demonstrated need for maintenance, the testator's wishes cease to be of any weight. They may of course be overridden, but they are part of the circumstances of the case and fall to be assessed in the round together with all other relevant factors.'

[654] [2018] AC 545 at 555

[655] Even the conviction of the applicant for the manslaughter of the deceased in *Re Land deceased* [2007] 1 WLR 1009 did not prevent the court from making an award in the applicant's favour.

[656] [2017] UKSC at [66]

they would have only 'one bite at the cherry'. One recent and potentially significant development – although it was not referred to in the Supreme Court - is the diminution of the size of the estate available to children and the increase of the entitlement of the surviving spouse under the rules relating to intestacy under the Inheritance and Trustees Powers Act 2014.[657] This might yet be interpreted as an indication by Parliament that the expectations of adult children should be lowered and that should be reflected in fewer successful applications under the 1975 Act by this class of applicant.

Another inescapable consequence of the courts' collective approach in *Ilott v The Blue Cross and Others* is that more and more applications under the 1975 Act may well fall to be determined on questions of 'conduct'. While it is true that paragraph (g) in section 3(1) of the Act requires the court to have regard to 'any other matter, including the conduct of the applicant or any other person which in the circumstances of the case the court may consider relevant', judges in past cases have positively discouraged litigants and their advisers from regaling the court with evidence of what the deceased or anyone else said or did, if only because the deceased cannot be heard in response to this evidence.[658] Yet, in *Ilott v The Blue Cross and Others* conduct was to the fore. Indeed, Lord Hughes JSC referred to the lack of contact between the deceased and Mrs. Ilott as 'one of the two dominant factors in the case'.[659] But, every estrangement will have a cause and this begs the question: 'Who was at fault for causing the estrangement?' In *Ilott v The Blue Cross and Others*, the evidence quite clearly suggested that it was the deceased. Yet, it would, the only evidence that the court had on this point was Mrs. Ilott's. The court never heard the deceased's side of this story. That, indeed, is the difficulty in determining any allegations of conduct, particularly in cases where the applicant and the deceased were estranged at the date of the deceased's death. Often, the cause of such estrangement is a private matter between the deceased and the applicant. However, the applicant is very unlikely to admit responsibility for such an event, and therefore it is only where the deceased has made the cause public

[657] If the deceased is survived by a spouse and children or other issue, the surviving spouse will receive all personal chattels and a statutory legacy of £250,000 plus an absolute interest in one half of the residue of the estate above that statutory amount. Before these changes, the surviving spouse was only entitled to a life interest in one half of the residue.

[658] In *Lambert v Lambert* [2002] EWCA Civ. 1685, [2003] 1 FLR 139, the Court of Appeal referred to the 'marking' of the performance of the parties to a failed marriage as 'distasteful'. By analogy, any examination of the conduct of the applicant and the deceased towards each other must also be 'distasteful' – unless, perhaps, that conduct is of a particular striking nature, such as where there is a history of violence on the part of the applicant towards the deceased as in *Re Snoek* [1983] Fam. Law 18, or where it affects the 'obligations and responsibilities' of the deceased towards the applicant.

[659] At paragraph [35].

that the court will ever hear two sides of the same story.[660] Doubtless this lies behind the reluctance of courts in the past to attach any great weight to allegations of conduct. And, consistent with this approach the courts have also paid little attention over the years to conduct which the applicant might rely on to enhance his/her application.[661] Yet, the Supreme Court in *Ilott v The Blue Cross and Others* seems to encourage would-be litigants to adduce evidence of conduct. Indeed, in *Ilott v The Blue Cross and Others* Lord Hughes SCJ went on to contrast Mrs Ilott's application with a case where (in his words) '… a child of the deceased had remained exceptionally and confidentially close to her mother throughout, had supported and nurtured her in her old age at some cost in time and money to herself, and had been promised that she would be looked after in her will'. In doing so, Lord Hughes as clearly suggesting that such factors – which are all 'conduct' whether by the deceased or claimant – might provide greater reason why an adult child might expect to be provided for in his/her parent's will. And, from that proposition, if such provision were not made, that an adult child who could demonstrate such conduct would – if he/she could also demonstrate 'need' – have significant prospects of maintaining a successful claim under the 1975 Act.

But, does *Ilott v The Blue Cross and Others* now suggest that this will all be forgotten and that families will be encouraged 'to wash their dirty linen in public' because this is now how these applications will, in the future, be fought? As regards cases that have been heard post-*Ilott*, conduct appears to be of increasing relevance. In *Nahajec v Fowle*[662] the applicant was a victim (or so she portrayed herself) of a separation between her mother and the deceased (who was her father) which occurred when she was but 11 years of age. Her evidence was that, at that point, the deceased simply cut himself off from his children (who had remained with their mother) until she, the applicant, had re-kindled the relationship for a couple of years before the deceased disapproved of a boyfriend that she was then seeing and once more ceased contact with her. The applicant's case was therefore that the absence of any relationship between her and the deceased at the deceased's death was entirely the deceased's 'fault' and in these circumstances he could not cite their estrangement as justifying his failure to make reasonable financial provision for her. And, the applicant qualified for such provision, so she said, on other grounds, principally her financial circumstances. In the event, the court awarded her £30,000 from an estate of £265,710, which had been left to one of the deceased's close friends under his will. If the lack of contact between the deceased and the claimant was one of the 'dominant factors' in

[660] This happened most recently in the case of *Wellesley v Wellesley* [2019] EWHC 11 (Ch.), *infra*.

[661] See: Nourse LJ in *Re Jennings deceased* [1994] Ch. 286 at 296.

[662] [2017] WTLR 1071

Ilott's case, then it had to be so in *Nahajec v Fowle* and the court had to have regard to the conduct of the parties in determining the cause of this estrangement.

If dirty linen is to be washed in public, the deceased can, of course, always set this in motion. One interesting post-*Ilott* case, where the deceased had made his views about the applicant known to the rest of his family, and the court was therefore able to hear both sides of the 'estrangement story' was *Wellesley v Wellesley*.[663] Here, the applicant relied on her straightened financial circumstances, the size of her father's estate (£1.3 million), her disability and the more serious disability of her son, whom she was obligated in law to support as significant factors that merited an award in her favour. The respondents relied on the applicant's conduct towards the deceased as disentitling her to any such award. In particular, so they claimed, that conduct led to a 35-year estrangement between the deceased and the applicant and this entirely justified the relatively small financial provision that had been made for the applicant in the deceased's will (£20,000). After hearing all of the evidence presented to him, the District Judge who tried the claim agreed with the respondents and dismissed the application. In other words, the applicant failed solely, it seems, as a result of her conduct towards the deceased (the 7th Earl Cowley), which amounted to a wholesale rejection of the deceased's aristocratic lifestyle and values, when she was in her early twenties. In the opinion of the District Judge this outweighed all combined weight of all other factors in the case.

Wellesley v Wellesley was clearly a case that was solely decided on conduct. But, the same could be said of the earlier case of *Wright v Waters*.[664] Here, the events that led to the estrangement between the deceased and the applicant also played a pivotal role. The claimant maintained that the 'fault' for such estrangement lay with the deceased. And, it seems inescapable that some conduct on the deceased's part must have led to the claimant writing and sending a letter to the deceased effectively disowning her. That letter led to 9 years of estrangement that only ended with the deceased's death. Notwithstanding that, at the date of the trial, the applicant was wheel-chair bound, in poor health and in necessitous financial circumstances, the Judge concluded that, 'When I take into account all the section 3 factors may value judgment is that [the applicant's] conduct outweighs all of the factors in her favour.'[665] In *Wright v Waters* what the applicant had said in the vital letter had been particularly hurtful and many of us might easily conclude that the applicant had thereby 'burnt her bridges' and with that any prospect of benefiting under the deceased's will. But, this is very close to saying that the

[663] [2019] EWHC 11 (Ch.)

[664] [2014] EWHC 3614 (Ch.)

[665] See: H. H. Judge Behrens' judgment at parag. [101].

deceased had acted entirely reasonably in leaving the applicant without any provision and that, of course, is not the test. And, the same might be said of the District Judge's approach in *Wellesley v Wellesley*. Indeed, perhaps the only objective element in these two decisions is that it was not how the deceased viewed the conduct of the applicant, but how the court looked at that conduct. It just happened that the court agreed with the deceased in each case. Yet, that is not the same as asking, 'Has the deceased's will made reasonable financial provision for the deceased in the circumstances that exist at the date of the trial?' That is the test that must be applied.

In light of these observations, a forceful case can be made to suggest that far from adding some clarity to adult child applications the Supreme Court has only 'muddied the waters' in *Ilott v The Blue Cross and Others*. Having been raised with the idea that conduct would have only exceptional relevance in applications under the 1975 Act, litigants and their advisers must now search for evidence that will cast either the deceased or the applicant in a poor light depending on which side of the fence they find themselves on. What weight the trial judge will attribute to such conduct is almost impossible to predict. What regard may be had to the deceased's wishes is difficult to say.[666] And, given the limited reporting of decisions of District Judges on 1975 Act applications, which is where all such applications must now start, there is little prospect of any coherent and consistent jurisprudence on the treatment of these factors on adult child applications. What is more, the positive discouragement of appeals under the 1975 Act that is plainly evident on the face of Lord Hughes JSC's remarks is hardly likely to resolve this lacunae; nor, it is suggested, is there any real likelihood of parliament responding to Baroness Hale JSC's plea for assistance in such a matter.

For all of these reasons,[667] it appears abundantly clear that the 1975 Act is not a suitable vehicle for applications by adult child informal carers for financial provision to recognise the hardship and sacrifice that they have had to undergo to provide care for a now deceased parent and that, if, on policy grounds, something should be done for this growing body of people, whose efforts cannot continue to be ignored, that must now be provided for by original legislation.

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[666] In the recent case of *Thompson v Raggett* [2018] EWHC 688 (Civ.); [2018] WTLR 1027 the deceased, who had cohabited with the applicant for some 42 years attempted to justify his failure to make any provision for her, including any right to reside in the property in which they were living together, but which he owned, by referring to his distrust of her children, claiming that she had sufficient financial resources of her own and by claiming that she would in any event need to move into a nursing home following his death because he was her only carer. In the event, these wishes were ignored by the court and provision was granted.

[667] In summary, these include the uncertainty relating to the relevance and weight attributable to 'conduct' (both of the applicant and the deceased), the weight attributable to the deceased's testamentary intentions and wishes, the lack of clarity in statute and in case law in regard to how adult child applications should be considered by the courts, and the difficulties that appellants face in successfully appealing first instance decisions under the 1975 Act.

CHAPTER FIVE

ALTERNATIVE PATHWAYS: PROPRIETARY AND NON-PROPRIETARY CLAIMS

5.1 INTRODUCTION

A claim under the Inheritance (Provision for Family and Dependants) Act 1975 ('the 1975 Act') is a non-proprietary claim. If successful, these claims are satisfied through an award determined by the court following the exercise of its discretion, and that process includes the determination of where the burden of such an award should lie.[668] As we have seen over the course of the last chapter, a claim made under the 1975 Act is a *post mortem* claim, made against the deceased care-receiver's net estate. This renders a claimant particularly vulnerable. Any claim under the 1975 Act may be defeated, not on its merits but merely through what one might describe as 'circumstances entirely outside the claimant's control', such as claims by creditors and claims by other 1975 Act claimants. In this event, a carer claimant may well find themselves without a remedy notwithstanding that their sacrifices, made perhaps over many years, may have preserved the value of the care-receiver's estate in order that it is able to meet those other claims.[669]

With this in mind, it is necessary to consider whether there are any alternative pathways available to an informal carer who might be seeking financial compensation for their caring. In particular, we need look at whether, and in what circumstances, English courts might entertain proprietary claims by informal carers. The value of these claims is clear. Not only will the asset onto which the proprietary

[668] The 1975 Act, s. 2(4).

[669] If the deceased's estate is insolvent, no award can be made; if the net estate is small, that is a significant factor against the making of an award.

claim fixes be unavailable to meet the claims of the care-receiver's creditors, but it will also be unavailable to the care-receiver should he/she wish to dispose of that asset under his/her will or allow it to pass under the law relating to intestacy. Moreover, if the care-receiver decides to dispose of the asset during his/her lifetime, the claimant carer can always make an application for an injunction restraining such an act. On its face, a proprietary claim has the capacity to bring a good deal more certainty to an informal carer's present or future right to compensation for the care that he/she may have already provided under some form of bargain that he/she has made with the care-receiver.

In most cases, the asset onto which this proprietary claim will fix will be the care-receiver's home. For those fortunate enough to own their own home, this is commonly the most valuable asset in a care-receiver's estate.[670] In circumstances where the care-receiver is being cared for at home and the proprietary claim is consensual in nature,[671] any rights that a carer may have acquired will, almost certainly, be unenforceable against the property whilst the care-receiver is still resident therein. In some situations, the property in question is jointly owned with the care-receiver's surviving spouse. In this event, if a consensual proprietary claim exists, the agreement or understanding on which it is based is likely to postpone the enforcement of such a claim until the spouse's death or at least until he/she takes up permanent residence in a nursing or care home. Nevertheless, these proprietary claims often introduce difficult questions. What precisely was promised by the care-receiver? Was the care-receiver simply making a statement of present testamentary intent that might be changed at his/her whim at some later date? Or, was the commitment made by the care-receiver, on which the carer has subsequently acted, something that gives the carer rights that can be enforced against the care-receiver and/or the asset that has been the subject of the promise? Such promises are, of course, almost invariably conditional ones, such that the carer is obliged to care for the care-receiver in order to secure the asset that was promised to him/her. Did the carer fulfil that obligation? If not, why was the promise to care for the care-receiver not fulfilled? Was it due to the breakdown in the relationship between the two parties? Or was there a material change in the life of the carer that meant that he/she was unable to provide the necessary care? Or was it as a result of a need for the care-receiver to sell the asset that was the subject of the promise in order to pay for more intensive health-related care or to meet some other unforeseen emergency?

[670] http://www.dailymail.co.uk/news/article-2574038/Average-British-person-net-worth-147-134-0-01-cent-David-Beckham.html (accessed: 15/06/17)

[671] As it would be where it is based on proprietary estoppel, a contract to make a will in a particular form or on a common intention constructive trust.

The analysis of the potential claims that might be made by an informal carer that is presented in this chapter – whether of a proprietary or non-proprietary nature – will demonstrate that all such claims are entirely dependent on their own particular circumstances. In this event, is it wholly impractical to amend or expand existing legal principles of English law in order to provide informal carers with alternative means of seeking redress should a care-receiver fail to reward their efforts in caring for him/her through appropriate provision in his/her will. No one amendment, or series of amendments, could possibly cover all of the circumstances that might relate to a carer's claim so as to allow that claim to succeed whatever the carer and care-receiver's respective situations. Moreover, even if sufficient provision is made for an informal carer in a care-receiver's will, that provision is liable to be defeated by competing claims as related earlier in this introduction. And, in any event, such provision is only *post mortem* and does not provide any significant benefit to an informal carer during the caring period when it may well be most needed.[672] With these points in mind, it will be submitted that a much more radical proposal for the reform of the present system is needed. And, this is the proposal presented in chapter six of this thesis. Nevertheless, in an effort to demonstrate the validity of this conclusion, we must now consider the nature of these alternative claims and the weaknesses that are readily apparent in each of them.

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5.2 CONTRACTS RELATING TO WILLS AND THE CLAIMS OF INFORMAL CARERS

One approach an informal carer might take is to attempt to enforce a contract in which the care-receiver has promised to confer some benefit on the carer under the care-receiver's will in return for the carer providing care to the care-receiver for the remainder of the care-receiver's lifetime.[673]

[672] In fact, any testamentary gift will automatically fail (i.e. lapse) as a consequence of the legatee predeceasing the testator (unless any substitutionary provision takes effect), so that, if an informal carer's rights are *post mortem* rights they are always such to the condition that he/she must first survive the care-receiver.

[673] S. Nield, 'If you look after me, I will leave you my estate': The enforcement of testamentary promises in England and New Zealand, (2000) *Legal Studies,* Vol. 20, issue 1, pp. 85-103; and, S. Nield, Testamentary Promises: A test bed for legal frameworks of unpaid caregiving, (2007) *N. I. Legal Quarterly*, Vol. 58, issue 3, pp. 287-306.

Logically, these contract-based claims should provide an informal carer with a readily-obtainable remedy in the form of the subject matter of the agreed bequest. Yet, in practice, such claims are rare. Indeed, even when made, they are notoriously difficult to prove in the absence of any written record of the contract in question. Given that the testimony of the care-receiver is not available to set alongside the evidence of the claimant, to either refute or support the carer's case, such claims are commonly treated with a good deal of circumspection by the courts.[674]

Another aspect of what is perhaps the same approach is that members of a family often act out of 'natural love and affection' for each other. In the eyes of some, this explains the care of a parent for their child; and, it can - depending on the circumstances – explain some care that is provided by an adult child to their elderly parent or parents. The act of an adult child calling in to see their aged mother and/or father on their way home from work, bringing some 'food shopping' with them, collected at the parents' request, and perhaps cooking a meal for them, is 'care' but not necessarily care where there is any expectation of reward.[675] In these circumstances, there is said to be 'no intention to create legal relations' between the two parties. Nevertheless, there is clearly a line to be drawn here in terms of the commitment of the adult child to the provision of care, what that care consists of and the effect of providing such care on the daily lives of the carer and the care-receiver. The activities of the adult child described above cannot be placed in the same category as the care provided by an adult child who has had to leave their job, to return to their parents' home and administer intensive social care on a 24 hour basis. The 'line to be drawn' should not dependent on 'expectation', but on 'justice'. Yet, in reality, legal principle seems to draw no real distinction between these two sets of circumstances.[676]

A third aspect of the 'problem' of enforcing arrangements that may have been made between an adult child carer and their elderly parent in relation to the provision of care is how to interpret what the elderly parent may have said. A statement made by a parent at the outset of the 'care arrangements' to the effect that the child would have the parent's house 'when they're gone' may be interpreted as

[674] Walton J in *In Re Gonin deceased* [1979] Ch. 16 at p. 32. Another reason why such actions are not commonly brought is, of course, that, when one is dealing with agreements made within a family, there is a natural inclination against such agreements being intended to be binding in law. But, see: *Parker v Clark* [1960] 1 WLR 286.

[675] As Sarah Neild says, fn. 673, *supra*, *Legal Studies*, Vol. 20, issue 1, 85 at p. 87: 'The line between the care that might be expected between relatives and friends and the consideration or detriment required to support an agreement or representation is often difficult to draw.'

[676] Neither the degree of sacrifice, nor the amount of care, nor the affect that caring has on the life of the carer have any impact on the success or failure of the claim – *Re Gonin* [1979] Ch. 16.

a mere statement of testamentary intention and not one that is intended to have any legal consequences. Once again, this is probably another way of looking at the need for 'contractual intention', but it does serve to emphasise that it is now surely common knowledge that a will needs to be in writing, and that it can be revoked and replaced by a new will at a later date.[677] In these circumstances, any carer who provides care on the basis of an oral promise alone has no certain expectation of receiving what has been promised to him/her, and they may well appreciate this, but be willing to take the risk that they may end up receiving nothing for their pains.

These considerations apart, it is plain from reported case law that the terms of any contractual bargain must be clear before those terms can be enforced.[678] There is no suggestion that the courts are prepared to infer such terms, particularly where care is provided by a member of the care-receiver's family. Equally, and perhaps more significantly, the care-receiver, as the offeror, must make a statement that was intended to bring about a legally binding contract once it is accepted.[679] If that intention is not present and the statement is a mere indication of future intention, albeit made with a view to influencing the recipient of the statement, then no contract will exist.[680]

Of course, any testamentary disposition ought to comply with s. 9 of the Wills Act 1837, but contracts to leave property by will seem to operate outside and perhaps despite this section.[681] In addition, where such contracts comprise a promise to dispose of land, the contract is subject to s. 2(1)-(3) of the Law of Property (Miscellaneous Provisions) Act 1989, and will need to be made by a document in writing, containing all the terms which have been agreed between the parties to the contract, and be signed by each party or by their duly appointed agent. Given the extent of the informal social care that is required in many instances, and that the main asset in the estates of most care-receivers is their

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[677] J. Mee, 'The Limits of Proprietary Estoppel: Thorner v Major', (2009) 21 *Child and Family Law Quarterly* 367. Even if the statement is interpreted as a promise that is to take effect before the death of the care-receiver, say, on the removal of the care-receiver into sheltered accommodation or into a care home, that introduces the question of whether the requirements of s. 2, Law of Property (Miscellaneous Provisions) Act 1989 have been met.

[678] The author of *Theobald on Wills*, 15th edition, suggests that, from 1950 'or thereabouts' onwards the courts 'seem more willing to give contractual effect to agreements between family members relating to will', see pp. 96-97.

[679] See: *Parker v Clark [*1960] 1 WLR 286; *Schaefer v Schuhmann* [1972] AC 572.

[680] *Theobald on Wills*, 15th edition, Sweet & Maxwell, at p. 97

[681] See: Mummery LJ in *Uglow v Uglow* [2004] WTLR 1183: 'The testator's assurance that he will leave specific property to a person by will may … become irrevocable as a result of the other's detrimental reliance on the assurance, even though the testator's power of testamentary disposition to which the assurance is linked is inherently irrevocable.'

home, the vast majority of these claims for the enforcement of such contracts will be caught by these provisions. And, the consequence of this is that such claims are more commonly put on the basis of trust or estoppel.[682]

Finally, where a 'contract to leave property by will' has been established on the evidence, the court is simply left to put the contractual bargain into effect. There is no discretion to exercise. The claimant is entitled to what has been promised to him/her. In some respects, this may serve to explain the courts' reluctance to find that such a bargain has been made. The court has no flexibility when it comes to the relief that it must grant on proof of the claimant's claim. And, bargains of this nature that remove the most valuable asset in a care-receiver's estate from the operation of his/her will or the law relating to intestacy may well have a significant effect on the ability of others to make a claim against the care-receiver's estate.

Notwithstanding these observations, if there is, indeed, a clear commitment by a parent to give their property to an adult child in return for care services to be provided by that child, then there is no reason why such a contractual promise should not be enforced.[683] In modern society, many people might well balk at making long-term, life-affecting commitments to each other, particularly ones affecting the ownership of one's home.[684] Equally, property owners usually are well aware that property transactions require the observance of legal formalities, and there may be a marked reluctance for care-receivers who own property to involve lawyers in their affairs where the other party is one of their own children. In simple terms, contracts to make wills – whether or not involving a substantial asset such as the care-receiver's home – are seldom made.

In two articles that are directed towards looking at contracts to make wills as part of a 'solution' for informal carers, Sarah Neild has looked carefully at the benefits that might be given to informal carers by the introduction into England of legislation along the lines of New Zealand's Law Reform

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[682] See: fn. 680, *supra*, at p. 100.

[683] See: *Dillon v Public Trustee of New Zealand* [1941] AC 294, recognising the enforceability of such contracts but also the jurisdiction of the court under New Zealand's family provision legislation to make an award that comprises part of the subject matter of the contract.

[684] Since the repeal of the Law of Property Act 1925, s. 40(2), the question whether oral contracts for the disposition of land are still enforceable through the continuing operation of the concept of 'part performance', albeit now operating as part of the doctrine of proprietary estoppel, has been the subject matter of much debate. The recent case of *Dowding v Matchmove Ltd* [2017] 1 WLR 749 would seem to come down firmly in support of the conclusion that part performance of such contracts, as a means of enforcing them in the absence of writing, is alive and well. Whether acts typically done by an adult child in caring for his/her elderly parents would ever be considered to be acts of part performance is, of course, another matter entirely. See also: *Synge v Synge* [1894] 1 QB 466.

(Testamentary Promises) Act 1949 as amended.[685] Section 3 of that Act is headed: 'Estate of a deceased person liable to remunerate persons for work done under promise of testamentary provision'. Its effect is to dispense with the difficulties surrounding the proof of contracts to leave property by wills. If a care-receiver, for example, makes a promise of something in return for the care services that he/she expects to receive from an adult child, and that promise is then acted on by the adult child by the provision of care, the court can award the adult child carer a reasonable sum from the care-receiver's estate having regard to the value of what was promised, the value of the services rendered and the other matters listed in that section. While this is a real step forward, there are a number of difficulties left unresolved. The Act depends on the making of a promise of reward; without such a promise, there is no claim. Moreover, the promise must be a testamentary one; promises of financial or other reward during the care-receiver's lifetime do not qualify. What is more, any services that are relied upon by a claimant in support of his/her claim must go beyond 'the natural incidents and consequences of life within a close family group'.[686] And, further, in valuing these services, the court must also take into account '… the amount of the estate, and the nature and amounts of the claims of other persons in respect of the estate, whether as creditors, beneficiaries, wife, husband, civil union partner, children, next-of-kin, or otherwise'.[687] In any event, a claim under this Act is a claim against the testator care-receiver's estate; it is not a claim against any property that may have been the subject matter of a promise. If the testator care-receiver wishes to dispose of the subject matter of the promise during his/her lifetime, they may, and in doing so they may leave the carer without any form of redress. Equally, if the testator wishes to incur greater obligations to others, he may do so, and may in doing so leave the carer without any recompense for the caring that he/she has provided.

In short, there are real constraints to this legislation, so much so that any answer to the issues that now concern us must surely be sought elsewhere. That said, there are some lessons that can be learnt from the New Zealand experience, and one such lesson is that any intervention in this area of law must be a statutory one. As Nield concludes in her second article:

> 'The issues presented by unpaid care giving press the boundaries of accepted contractual, equitable and restitutionary principles and make a statutory response an attractive solution. … A statutory response also tends to cut through the moral tensions presented by balancing the exploitation of carers against the certainty often demanded in dealings with property and

[685] See: fn. 673, *supra*.

[686] Per Lord Cooke in *Re Welch* [1990] 3 NZLR 1 at p. 7.

[687] Law Reform (Testamentary Promises) Act 1949 (New Zealand), s. 3.

freedom of testamentary disposition. But perhaps most significantly statute provides a societal endorsement of policy.'

And, of course, that statutory response will be further explored in chapter six of this thesis.

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5.3 PROPRIETARY ESTOPPEL

Another more frequently deployed option that may be available to some informal carers is the doctrine of proprietary estoppel. This may be used to make good any representation that the care-receiver might have made to the effect that the informal carer would have an interest in a certain property or in the care-receiver's estate should care be provided by him/her notwithstanding the absence of any contract for the same. While, on its face, this may seem to be an attractive way forward for some carers, the doctrine lacks any real consistency in its application to claims of this nature; and, of course, it is restricted to situations where assurances of present or future rights in property have been made by the care-receiver to the informal carer. It cannot be used in situations where nothing has been said between care-receiver and informal carer even if the degree of care provided and the sacrifices made by the carer have been substantial, if not life-changing.[688]

Given the restrictions on the operation of the doctrine, proprietary estoppel has been, and must remain, no more than a supplement to other more universal and concrete rights for informal carers. Indeed, if any programme of reform is to be provided with the teeth it needs to encourage informal carers to give of their lives for the benefit of others, it may well be that proprietary estoppel will seldom be called upon save perhaps in the clearest of circumstances where a plain and unequivocal representation has been made and was intended to be relied upon.

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[688] In these circumstances it is further argued that the doctrine operates unjustly as between informal carers and should therefore be rejected as a solution to the present issue.

5.3.1 Uncertainties and Other Issues

In many ways, a contract to make a will and the doctrine of proprietary estoppel run parallel to each other. In each case, there is some form of assurance by one party which encourages the other to believe that compensation will be given, and care is then provided on that basis with the carer relying on the encouragement provided by the care-receiver.[689] Brian Sloan has already done much work in analysing these two alternative claims from the view of the informal carer. In *Informal Carers and Private Law*,[690] he acknowledges that the courts' attitude to proprietary estoppel claims in particular '… have changed in recent years and there is now increasing judicial recognition of the importance of the doctrine for … [informal] carers.'[691] Nevertheless, the success of any claim made by an informal carer under the doctrine rests firmly on some form of clear and specific encouragement provided by the care-receiver that the informal carer either has or will receive on the care-receiver's death a right or interest in an asset or assets in the care-receiver's estate.[692] While the extent of this required encouragement is unclear,[693] it must nevertheless be clearly and distinctly proved.[694] As yet, the courts have been unwilling to draw inferences in the absence of clear representations that compensation in some form or other will be forthcoming in return for care-giving. What is more, the informal carer must also prove that he/she relied on the encouragement contained in these specific representations in providing care to the care-receiver and incurred detriment in doing so. The initial part of this observation begs the question, 'Would the carer have provided the care that was lavished on the care-receiver without the promise of financial reward?'[695] The second introduces a further issue where the

[689] Ben McFarland and Sir Philip Sales, Promises, detriment, and liability: lessons from proprietary estoppel, (2015) *LQR* 610, where the authors describe the principle as 'the promise-detriment principle'; and, see further: *Thorner v Major* [2009] UKHL 18.

[690] Brian Sloan, *Informal Carers and Private Law*, (Hart, 2013),

[691] *Ibid.* at p. 30.

[692] See: Lord Scott in *Cobbe v Yeoman's Row Management Ltd.* [2008] 1 WLR 1752.

[693] *Davies v Davies* [2016] EWCA Civ. 463 where, at [41] of his judgment, Lewison LJ accepts the proposition put forward by the respondents' counsel, that in such cases '… there might be sliding scale by which the clearer the expectation, the greater the detriment and the longer the passage of time during which the expectation was reasonably held, the greater would be the weight that should be given to the expectation' that the claimant has been encouraged to believe the defendant would in due course fulfil.

[694] *Thorner v Major* [2009] UKHL 18, where Lord Scott seems to require proof of a representation or assurance which is 'sufficiently clear and unequivocal' [15] but Lord Walker merely requires the relevant assurance to be 'clear enough' [56].

[695] The promise in question need not be the sole inducement for the conduct of the claimant - *Amalgamated Property Co. v Texas Bank* [1982] QB 84 per Robert Goff J at p. 10; and, moreover, once the claimant has proved that the promise or assurance was made the burden of proof then moves to the defendant to show

carer receives some form of benefit from the care-receiver, for example, the provision of accommodation and/or the payment of some of the carer's living expenses.[696] Here, one must ask, 'Is the carer really acting to their detriment in providing care?' If he/she is not, then no claim can be made. What is more, if 'unconscionability' is a separate component of the doctrine of proprietary estoppel, this penultimate requirement may provide yet another stumbling-block for informal carers. If the provision of care is by adult children to their elderly, disabled relatives is nevertheless seen as a filial duty, the question that some may ask is, 'How can it be unconscionable to fail to provide a person with compensation or reward in circumstances all that such a person is doing is his/her duty?' And, finally, even if an informal carer is able to prove that all the required elements of a successful proprietary estoppel claim are present, one issue that remains is, 'What is an appropriate remedy for an informal carer in these circumstances?' Should that remedy be based upon what the care-receiver has promised to give the carer or on the degree of detriment suffered by the claimant in caring for the care-receiver?

In recent times, a number of commentators have observed that the law of proprietary estoppel is far from clear.[697] Sadly, this is all too true. The doctrine of proprietary estoppel lacks the clarity and precision that is needed to deliver certainty and justice to those who have been encouraged to believe that they have, or will obtain, rights in property that presently belongs to another. Nor does it offer any significant assistance to those who may have preserved the value of another's property by their unselfish acts but without any such encouragement. As a mechanism through which any informal carer may obtain compensation for their acts of caring, proprietary estoppel operates unevenly and, therefore, unjustly; it allows some claims but disallows others of fairly equal merit.[698]

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that the claimant did not reply on the promise or assurance but was motivated to act for different reasons – *Wayling v Jones* (1995) 69 P & C R 170.

[696] One benefit is, of course, the carer's allowance.

[697] For example, 'The law on estoppel is unclear.' – see: M. Balen, and C. Knowles, 'Failure to estop: rationalising proprietary estoppel using failure of basis', (2011) *Conv.* 176. Ben McFarlane and Sir Philip Sales open their article, 'Promises, detriment, and liability: lessons from proprietary estoppel', (2015) *L.Q.R.* 610 with two observations, firstly, 'that there is some uncertainty as to whether equitable estoppel can provide a cause of action where a promise on which a claimant relies does not relate to any specific property owned, or about to be owned, by the defendant', and, secondly, that [at least in England and Australia] '… there is a lack of clarity as to the basis on which a court should satisfy a successful proprietary estoppel claim'.

[698] Compare: *Bannigan v Frost* [2009] EWHC 2276 (Ch.) and *Bradbury v Taylor* [2012] EWCA Civ. 1208 with *Suggitt v Suggitt* [2012] EWCA Civ. 1140 and *Davies v Davies* [2016] EWCA Civ. 463.

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5.3.2 Basic Ingredients

In essence, the doctrine of proprietary estoppel is based on a rule of evidence that prevents a landowner from asserting his/her legal rights in relation to a 'certain parcel of land'.[699] Controversially, the concept has been extended from a 'certain parcel of land' to a more uncertain area of land, parts of which may have been sold off since the encouragement that the claimant was to have rights in the land was first given,[700] and even to the estate of the landowner who has made the assurance that the claimant was to be given that estate (whatever it might comprise) on his/her death. For present purposes, it suffices to say that a plea of proprietary estoppel is founded on three common features: an encouragement by the owner of an asset or assets that another person (the recipient of the encouragement) has, or will have, a right or interest in that assets or assets,[701] some form of 'detrimental reliance' on the part of the recipient of that encouragement,[702] and, finally, the unconscionable refusal of the property owner to grant that right or interest and thereby satisfy the expectation that has been encouraged. In carer cases, the most demanding of these three features is likely to be the first. What can the carer identify as the event or events, instigated by the care-receiver, which encouraged him/her to believe that he/she would receive compensation for their caring? And, moreover, what was the form of the compensation that the care-receiver encouraged the carer to believe that he/she would obtain should care be provided? Clearly, claims of this nature are fact-

[699] See: Lord Scott in *Cobbe v Yeoman's Row Management* [2008] UKHL 55 at parag. [14]; and, see: *Dillwyn v Llewellyn* (1862) 4 De G. F. & J. 517.

[700] See: *Thorner v Major* [2009] UKHL 18: [2009] 1 WLR 776.

[701] The 'trigger' for proprietary estoppel cases has variously been described as an 'assurance', 'promise', or 'representation', but preference here is for the word 'encouragement', which is used by the author of Snell's Equity, in his 'classic' description of the doctrine, which arises where 'one (A) is encouraged to act to his detriment by the representations or encouragement of another (O) so that it would be unconscionable for O to insist on his strict legal rights' - Snell's Equity, 29th edition, P. Baker and P. J St. John Langan (eds) at pp. 573-574. Indeed, 'encouragement' is the word used by Oliver J in *Taylor's Fashions v Liverpool Victoria Trustees* [1982] QB 133 in his application of the doctrine in its modern form, at p. 158.

[702] While it must be reasonable for the claimant to rely on the landowner's encouragement in acting to his/her detriment, the precise formulation of this requirement is a matter of considerable debate. Is it necessary for the claimant to establish that the landowner intended him to rely on the encouragement (see: Lord Denning MR in *Crabbe v Arun DC* [1976] Ch. 179 at 188) or is the matter considered through the eyes of a third party such that the landowner's conduct that encouraged the claimant must be 'reasonably … understood as intended to be taken seriously as an assurance which could be relied upon' (see: *Thorner v Major [*2009] UKHL 18: [2009] 1 WLR 776 per Lord Hoffman at [85]).

specific. Evidence of what was said and of the context in which the relevant statement or statements were made will be of the utmost significance. And, while it is still possible for the doctrine of proprietary estoppel to operate in circumstances where no representation is made by the landowner but both parties act in relation to each other on a common assumption,[703] there seems to be little room for any such 'automatic' common assumption to arise in carer cases given that care is readily provided by some without the thought of any reward.

Carers who wish to rely on proprietary estoppel must therefore be ready to establish that an assurance was made that some reward would be given to them in return for the care that they were expected to bestow and that care was provided on that basis. With this in mind, the case authorities would seem to suggest that where some form of 'bargain' is reached, so that care is provided in return for a right or interest in property, whether specific or general in nature, a claim based on the doctrine of proprietary estoppel will often carry with it a much greater prospect of success than situations where no such accord or understanding has been reached.[704] In other words, where no such arrangement can be established, connecting the giving of care to some specific form of reward, the courts have been markedly reluctant to assist a claimant no matter how meritorious his/her claim might otherwise appear.[705]

Indeed, what has troubled some judges is that, by implication, many assurances that the recipient will inherit either a specified property or the deceased's estate as a whole are conditional because, as Geraldine Andrews QC (sitting as a judge of the High Court) acknowledges in *Bannigan v Frost*[706] '… the circumstances of the representor, or his or her relationship with the representee, or both, may change and bring about a change of intentions on the part of the representor'.[707] The example that follows is a pertinent one. What if the owner of the main asset in the estate, over which the proprietary estoppel claim otherwise operates, finds himself having to sell that asset in order to provide for his care in his old age? Of course, the parties to the informal arrangement will not necessarily envisage this event. Their minds are focussed on the informal carer providing the care that

[703] See: *John v George* (1995) 71 P & C R 375.

[704] See: Ben McFarland and Sir Philip Sales, fn. 709, *supra*, where the authors identify this class of case as one where 'the assurances and reliance had a consensual character not far short of a contract'. These cases are also referred to by Lewison LJ as 'quasi-bargain' cases in *Davies v Davies* [2016] EWCA Civ. 463, paragraph [43].

[705] See: *Lissimore v Downing* [2003] 2 FLR 308.

[706] [2009] EWHC 2276

[707] *Ibid.* at paragraph [14]

is needed in the care-receiver's home until the care-receiver's death. But, what if, sometime in the future, the care-receiver requires specialist care? Another example illustrates the same difficulty but from the carer's side. What if the relationship between the care-receiver and the carer breaks down and cannot be retrieved? Or, indeed, what if the carer meets someone, forms a relationship with them and, as a result of this new found commitment, decides that they can no longer provide the care that they had once promised?[708]

As regards the first situation, as a promise to supply personal services the carer's undertaking to provide care cannot be enforced by specific performance even if it were part of a contract. And, therefore, as a result of this lack of 'mutuality', it would be difficult indeed for any court to disallow the sale of property in order to raise the funds needed for specialist care. One cannot have a 'bargain' that is only enforceable on one side. As for the second situation, here, the question of 'fault' raises its ugly head. Whose 'fault' is it that the initial 'bargain' can no longer be carried into effect? This was an issue that was raised in *Ottey v Grundy.*[709] In the event, the court rejected the submission that Miss Ottey should be denied relief on the basis that she was at fault for the breakdown in her relationship with Mr Grundy and had not therefore fulfilled her side of the bargain in caring for Mr. Grundy up until the point of his death. In short, it concluded that there was no 'fault' on Miss Ottey's part. Nevertheless, this does serve to illustrate that there are real difficulties in using the doctrine of proprietary estoppel as a vehicle for a rights-based' approach to compensation for informal carers. The doctrine simply does not take account of what might be described as 'unforeseen circumstances.'

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5.3.3 The Bargain

Proprietary estoppel is necessarily based on some form of 'bargain' between the land-owner and the recipient of his/her encouragement. In what have been referred to as 'domestic' cases,[710] this bargain

[708] Walton J in *In Re Gonin deceased* [1979] Ch. 16 at p. 32.

[709] [2003] EWCA Civ. 1176

[710] Whether a case is 'domestic' or 'commercial' seems to depend on the nature of the parties' dealings and not the nature of the property over which the claim is made – per Bean J in *Whittaker v Kinnear* [2011] EWHC 1479.

need not be explicit. In *Thorner v Major*,[711] the House of Lords found a bargain in the somewhat oblique statements made by two taciturn individuals,[712] but the bargain was nevertheless there. If this requirement is applied to informal carers, one can quickly see that the doctrine produces a very uneven and in many ways a very unjust response. Where the elderly care-receiver has the foresight to organise his/her affairs in times where their capacity to make a bargain is full, binding arrangements can be made in relation to their future care. Unfortunately, for some carers, the ability of the parties to enter into any clearly understood bargain is simply not practical. For example, it may be that the care-receiver needs intensive social care as a matter of urgency. It may be that their mental, physical and emotional health is rapidly diminishing and their decision-making capacity is being adversely affected; it may be that they are fighting against losing their independence, anxious about their own future and its limitations. In short, for a variety reasons a care-receiver may be in no real position to make any such bargain. For their part, the carer is not inclined to make the situation facing the care-receiver even more traumatic than it already is. And, in these circumstances, no bargain is made. Yet, care is provided. If we speak of 'justice', there would seem to be no less a reason why an informal carer in this situation should not be treated in the same way as an informal carer who has made a specific bargain for the provision of care.

Notwithstanding the observations made by Lord Scott in *Cobbe v Yeoman's Row Management Ltd*[713] that estoppel rights must relate to some form of present and certain interest in land or other chattels or choses in action,[714] cases both before and since *Cobbe* have proceeded on the basis that someone who encourages another to reasonably believe that he/she will receive the whole or part of the promisor's estate may bind their estate such that their personal representative will be unable to deny the other's claim.[715] Indeed, it now seems accepted practice that claims based on proprietary estoppel can be made against estates as it can against specific property that might be part of an estate.[716] If nothing else, this is a sensible, pragmatic response. It would seem illogical and perverse for the courts to distinguish between a case where an informal carer has been assured that he would receive the

[711] [2009] UKHL 18: [2009] 1 WLR 776.

[712] See: Lord Walker at parag. [59].

[713] [2008] UKHL 55

[714] See: Lord Scott in *Cobbe v Yeoman's Row Management* [2008] UKHL 55 at parag.s. [14] and [18] – [22].

[715] *Re Basham* [1986] 1 WLR 1498, *Wayling v Jones* (1993) 69 P & C R 170, and *Gillet v Holt* [2001] Ch. 210, pre-*Cobbe*, and *Thorner v Major [*2009] UKHL 18, post-*Cobbe*.

[716] See: *Re Basham* ibid, *Jennings v Rice* [2003] 1 P & C R 8, and *Gillett v Holt, ibid*.

care-receiver's home on the care-receiver's death and a case where an informal carer has been promised the care-receiver's estate, in particular where that estate comprises little more than the care-receiver's home.

One element in proprietary estoppel claims that has been problematic at times is the concept of 'encouragement'. In some respects, modern courts have attempted to inject a measure of clarity into this concept.[717] In particular, they have been consistent in their demand for proof of encouragement that relates to a right or interest in the property over which the claimant is making his/her claim.[718] Vague assertions will not carry any weight.[719] What is more, silence alone cannot be interpreted as 'encouragement'. Indeed, in most carer cases it is easier to conclude that silence is positive discouragement for, in these circumstances, the carer surely has no expectation of anything. In short, the absence of any discussion as to whether (or not) a carer claimant is to have any interest in the care-receiver's property or their estate will invariably be fatal to any claim based on proprietary estoppel.[720] That said, there are still some 'difficult areas'. Depending on the context of the discussions that have taken place, there is no clear indication from the courts as to what needs to be said concerning the claimant's present or future rights in the property over which the claim is subsequently made.[721] Indeed, in the 'domestic' context, all we have is Lord Walker's well-known statement that the assurances that encourage the claimant in his or her belief need to be 'clear enough'.[722] In addition, there is a certain conviction on the part of some judges that the assurances that are made – vague though they might be – must be intended by the landowner to be relied upon.[723] Others are content to take an objective view on this point and say that, if an ordinary man would have interpreted

[717] See: *Thorner v Major* [2009] UKHL 18; *Yeoman's Row Management v Cobbe* [2008] UKHL 55.

[718] See: *Yeoman's Row Management v Cobbe, ibid.*

[719] See: *Layton v Martin* [1986] 2 FLR 227, where the promise was of 'financial security' after the landowner's death, something that was simply too vague to be enforceable through proprietary estoppel.

[720] See: *James v Thomas* [2007] EWHC 1212 and *Williams v Lawrence* [2011] WTLR 1455.

[721] Indeed, in *Thompson v Foy* [2010] 1 P & C R 16 Lewison J. was able to make a finding or proprietary estoppel where no witness could point to a conversation where any representation was made, yet he still found that the understanding on which the claim was based could only have arisen as a result of something said by the landowners.

[722] See: *Thorner v Major* [2009] UKHL 18 per Lord Walker at parag. [56].

[723] *Crabb v Arun DC* [1976] Ch. 179 at 188, per Denning MR, and *JT Developments v Quinn* (1990) 62 P & C R 33 at 46.

what the landowner has said as an assurance of present or future proprietary rights that is an assurance on which the claimant was, and is, entitled to rely.[724]

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5.3.4 Carers' Cases

Where the assurance or encouragement is clear, certain and continuing, and the claimant can establish that he/she acted to his/her detriment on that encouragement, the courts have acceded to claims made by carers based on proprietary estoppel. In *Lothian v Dixon*,[725] the claimants were able to rely on an assurance that '… if they … came and stayed at the [testatrix's] Hotel up to her death on a full time basis to look after her during her final illness, she, in return, would leave them her entire estate on her death.'[726] The claimants fulfilled the conditions of the bargain. Indeed, the testatrix gave instructions for a new will to be drawn up in these terms but passed away before she could execute it. In these circumstances, the judge had little difficulty concluding that the minimum equity to do justice to the claimants was to accede to their claim for the whole estate. In *Jennings v Rice*,[727] the claimant was entitled to relief in the form of an award of £200,000, where he had cared for his employer, the now deceased landowner, over a protracted period of time in reliance on her promise that the property that she occupied would one day be his. The representation that the property would pass to the claimant on the landowner's death was not enforced, but at least the claimant was provided for in the form of a substantial sum. Whether this sum represents the 'minimum equity' that was needed to do justice to the claimant's claim or a sum that represented the value of his services on a *quantum meruit* basis is, on the other hand, unclear.

[724] See: *Thorner v Major* [2009] UKHL 18, per Lord Hoffman at [5] and Lord Neuberger at [85]. Attempting to rationalise these statements, it may be that the approach should be a subjective one, but that if, on an objective view, a reasonable man would have been encouraged to believe that he/she would have rights in the property in the question at some future time, the burden of proof shifts to the defendant to establish that, in the circumstances of the case, the claimant was not, in fact, encouraged to hold this belief.

[725] [2014] WL 7255179

[726] *Ibid*.at paragraph [8].

[727] [2003] 1 P & C R 8

Nevertheless, for some carers, claims of this nature do not work out so well. In *Powell v Benney*,[728] the claimant carers '… purchased food and cooked for [deceased landowner]; when he was ill they helped him obtain medical attention; they provided him with money.'[729] In return, the landowner informed one of the claimants that he was going to leave certain properties to them. At trial, the claimants maintained that they relied on this promise in organising their future lives, and in their relationship with the landowner. And, indeed, the landowner did make some attempt to comply with his promise. However, in the event, he failed to make a valid will in the claimants' favour and therefore, following his death, the claimants made their claim against these properties on the basis of proprietary estoppel. The claim failed. On closer inspection, there was no 'bargain' that was ever made between the parties. The deceased landowner had never specified what the claimants must do in return for the two properties. There was no causal link between the detriment that they alleged that they had suffered and the assurance made by the land owner. And, in these circumstances, the landowner's promise was not binding on his estate in proprietary estoppel.[730] Indeed, the case of *Powell v Benney* so clearly demonstrates the need for some form of 'bargain' in informal care situations that is now seems almost impossible for a carer to maintain a claim based on proprietary estoppel without clear evidence of what was being promised in return for care.[731] This throws the representations that encouraged the claimant in his/her belief into sharp focus. And, the proof of claims made by informal carers relying on the doctrine of proprietary estoppel may prove all the more difficult in the future.

Where claimant carers have successfully negotiated the hurdle of establishing the necessary assurance or encouragement, they have found it a little easier to establish the second requirement of a successful proprietary estoppel claim, 'detrimental reliance'. In particular, the provision of unpaid services by the claimant in the home of the defendant or deceased may be described as a 'classic' example of detriment.[732] This is, of course, a very apt description of what an informal carer is doing in providing care. And, therefore, as Sloan has remarked, '… the mere fact that care has been provided

[728] [2007] EWCA Civ. 1283

[729] See: *Ibid.* at paragraph [5] of the judgment of Sir Peter Gibson (with which Richards and Lloyd L.JJ agreed).

[730] In the event, the claimants were awarded £20,000 as compensation for the detriment that they had suffered.

[731] This seems to run counter to the remarks of Oliver J in *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133 to the effect that there is no requirement that the representation should be formulated in terms of a proprietary interest (or, perhaps a defined interest in the representor's estate).

[732] *Greasley v Cooke* [1980] 1 WLR 1306

usually means that some detriment has been incurred.'[733] This has been acknowledged by Robert Walker LJ, once in *Campbell v Griffin*,[734] where he remarked that:

> 'The court can take judicial notice that a live-in carer looking after a couple as frail as Mr. and Mrs. Ainscough [the land owners] would expect to be paid a very substantial wage in addition to free board and lodging and would expected to be reimbursed for all out of pocket expenditure … Mr. Campbell [the carer who had been promised a life interest in the land owners property] must in my judgment have been suffering and accepting detriment in his devoted care of the Ainscoughs.'[735]

And, again, in *Jennings v Rice*,[736] where he observed that:

> '…in many cases the detriment [suffered by the claimant] may be even more difficult to quantify than the claimant's expectations … [Indeed] the detriment of an ever increasing burden of care for an elderly person, and having to be subservient to his or her moods and wishes, is very difficult to quantify in money terms.' [737]

Nevertheless, detriment must be both 'pleaded and proved'.[738] And, when proved, it must also be weighed in the balance with any benefits that the claimant may have received. In *Watts v Storey*[739] the defendant (who was resisting a claim for possession based on a plea of proprietary estoppel) had moved from Leeds to Nottingham, had undertaken responsibility for a number of outgoings at the premises that he was occupying, had incurred additional expense in relation to the move and had helped the landowner, his grandmother, to move her belongings to the Isle of Wight in order that she could be near her son. Yet, on the facts, such acts were held to be insufficient detriment for the purposes of a claim in proprietary estoppel. Here, the defendant had received rent free

[733] fn. 690, *supra*, at p. 53

[734] [2001] EWHC Civ. 990

[735] See: Robert Walker LJ in *Campbell v Griffin* [2001] EWCA Civ. 990, at paragraph [24]. In so doing, Robert Walker LJ was expressly following his fellow members of the Court of Appeal in *Wayling v Jones* (1995) 69 P & C R 170.

[736] [2003] 1 P & C R 8

[737] See: *Ibid.* at parag. [51]

[738] Per Robert Walker LJ in: *Gillett v Holt* [2001] Ch. 210.

[739] (1983) 134 NLJ 631

accommodation in the property that he was occupying, and this outweighed the acts of detriment on which he had chosen to rely.[740]

The requirement that the claimant must rely on the assurance or encouragement establishes the causal connection necessary for the success of the claim.[741] The claimant's detriment must be caused by his (reasonable) reliance on the land owner's assurances. Where the claimant is able to establish on the evidence that an assurance has been made and that he has acted to his detriment in circumstances that give rise to the inference that he/she relied on the assurance, reliance is inferred.[742] And, at this point, the burden of proof will shift to the landowner or, if deceased, his/her personal representatives, to demonstrate that there was no such reliance on the facts of the case.[743] These principles are nicely illustrated in the case of *Ottey v Grundy*.[744] Here, the initial promise was clear and was helpfully set out by the deceased in a letter of intent in which he directed his solicitors that the claimant was to have a life interest in a houseboat and an absolute interest in an apartment in the event of his death. The trial judge found that a copy of this letter had been given to the claimant, that the claimant had relied on it in staying in the relationship that she had with the deceased and caring for him, and that the care that she had lavished on the deceased was sufficient 'detriment' for the purpose of the claimant's proprietary estoppel claim. Nevertheless, the claimant did not secure a life interest in the houseboat, nor did she obtain any form of interest in the apartment per se.[745] Instead, she was awarded, firstly, the sum of £50,000 in satisfaction of her claim against the houseboat and, secondly, a further £50,000 in the event that the apartment could not be transferred to her. While these awards may not have any significant effect on the relief obtained by the claimant following the success of her proprietary estoppel claim, this does serve to show that the eventual outcome of such cases is very much in the court's discretion.

In summary, the courts have largely adopted a flexible approach on questions relating to both detriment and reliance, readily inferring detriment where caring services are provided and refusing to disallow claims where there may be 'mixed motives' for providing care. Sloan describes the courts'

[740] See: *Sledmore v Dalby* (1996) 72 P & C R 196, to the same effect.

[741] See: Robert Walker LJ in *Campbell v Griffin* [2001] EWCA Civ. 990, at paragraph [19].

[742] For at this point any oral evidence by the claimant that he relied on the assurance is purely self-serving and therefore meaningless.

[743] *Greasley v Cook* [1980] 1 WLR 1306

[744] [2003] EWCA Civ. 1176

[745] The houseboat was owned by a limited company of which the deceased was a director and shareholder.

approach to these requirements as 'pragmatic and sympathetic to the plight of the carer',[746] and it is difficult to disagree. Nevertheless, more substantial challenges for informal carers appear in relation to the two outstanding demands of the doctrine of proprietary estoppel, 'unconscionability' and the discretionary nature of the relief that may be available on proof of the claim.

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5.3.5 Unconscionability and carers

If all the elements of proprietary estoppel may be said to interact with each other, so much so that it is sometimes difficult, if not unwise, to attempt to separate them from each other,[747] the element that is the 'overarching' one is unconscionability.[748] In this respect, a distinction has been drawn between unconscionability of dealings - which focuses on the relationship between the landowner and the claimant - and unconscionability of outcome - which looks at the situation that is presented to the court and asks whether the result is 'unacceptable to the conscience of equity'.[749] The second approach is much broader than the first. In our 'carer cases', where the assurance relates to the provision of a right or interest in property after the care-recipient's death, the enquiry will usually be made in the light of the provisions of the care-receiver's will and in light of the claims made by others on his/her estate. As Mummery LJ acknowledges in *Uglow v Uglow*,[750] whenever courts are given the task of determining a claim based on proprietary estoppel where a person has made a will (or not made a will so that his/her estate passes under the law of intestacy) so that specific property, is given to one person but he/she has previously created the expectation in another person that the other will

[746] See: fn. 690, *supra,* at p. 52.

[747] It is clear that aspects of one element will often have a significant impact on how a court considers another element.

[748] Lord Walker in *Cobbe v Yeoman's Row Management* [2008] UKHL 55 at paragraph [92] describes unconscionability as playing '… a very important part in the doctrine of equitable estoppel, unifying and confirming, as it were, the other elements.'

[749] fn. 690, *supra*, p. 22, referring to an analysis of unconscionability presented by K. Gray and S.F. Gray in *Elements of Land Law*, 5th edition, (OUP, 2009) and developed by Kevin Gray, in the chapter entitled 'Property in Common Law Systems', in Van Der Valt, A.J., and Van Maanen, G.E., (eds.) *Property Law on the Threshold of the 21st Century* (MAKLU, 1996).

[750] [2003] EWCA Civ. 1176

inherit that property, the inquiry as to whether that conduct is unconscionable must a broad one. Yet, the broader this inquiry the less its outcome can be accurately predicted.[751] And, this has repercussions not only for lawyers but also for their clients who will be naturally wary of undertaking litigation where the outcome is so uncertain given the predisposition of the courts to order that the costs of any such proceedings, which may well be substantial, should be paid by the loser.[752]

Indeed, unlike many neighbour and one-off commercial transaction cases where the doctrine has been invoked,[753] the provision of care over a protracted period of time brings with it its own 'life problems'. Consider, for a moment, a situation where a carer may have devoted many years to the care of another, and perhaps sacrificed his/her career, on the faith of a promise of an interest or rights in the property of the other on that person's death. When the promise was made the parties doubtless envisaged that care would continue until the care-receiver's death. But, what if there comes a time when more intensive health-related care is needed outside the care-receiver's home and payment is required for this treatment that can only be raised by the sale of the property in question? Would the care-receiver be acting unconscionably if he/she sold the property in question in order to pay for his/her care thereby resiling from his/her promise to transfer the property to the carer on his/her death? Would it make any difference to the outcome of the claim if the carer had retained his/her previous home (which he/she occupied before leaving to care for the care-receiver on the faith of the above-related promise) and would not therefore be left homeless as a result of the sale of the care-receiver's property?

The outcome for these questions is almost impossible to predict as each would surely depend on the facts of each case. *Sledmore v Dalby*[754] does much to illustrate this. Here, the occupier of certain property, Dalby, had been induced to believe that he would be entitled to live in that property for the rest of his life. As a result, he spent considerable sums on the maintenance and improvement of that property. The encouragement came from Dalby's father-in-law who was one of the joint owners of the property and was made at a time when Dalby had recently become unemployed. This event, coupled with the illness of Dalby's wife, who was the landowner's daughter, meant that Dalby and his family had the advantage of living in the property rent-free for what turned out to be over 18 years.

[751] The 'broad approach' has its origins in the modern formulation of the doctrine of proprietary estoppel by Oliver J in *Taylor's Fashions v Liverpool Victoria Trustees Co. Limited* [1982] QB 133 at p. 225.

[752] CPR 1998, rule 44.2(2).

[753] See: *Joyce v Rigioli* [2004] EWCA Civ. 79 (neighbour) and *Herbert v Doyle* [2008] EWHC 1950 (commercial).

[754] (1996) 72 P & C R 196

In the event, Dalby's wife died, and so did his father-in-law, Mr. Sledmore. The claim came about because Dalby's mother-in-law, Mrs. Sledmore, wanted to recover the property for her own use as she was at risk of losing the property in which she was presently living. On appeal, the court decided that it was not unconscionable for the mother-in-law to do this, and that the need for proportionality between the detriment suffered and the relief claimed meant that the equity that had originally risen in Dalby's favour had been satisfied by the period of rent-free accommodation. On this basis, the mother-in-law succeeded in her claim for possession of the property. Now, who could predict the unfortunate series of events that followed Mr Sledmore's encouragement? But, that is the type of issue that may well arise in situations where representations are acted on over a long period of time. And, this is exactly what happens in carer cases. Care is provided over a significant period of time, the parties' respective situations change with the passing of time and the courts – which are ill-equipped to do so - are left to pick over the pieces when the parties cannot resolve their differences between them. The result is that the operation of the concept of unconscionability is wholly unpredictable; and, this is a poor basis for doing justice to the claims of informal carers.

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5.3.6 Remedies

Of similar concern to carers might be the remedy, if any, which might be waiting for them even if they manage to prove their case in proprietary estoppel. Here, there appear to be two distinct approaches taken by the courts to the selection of remedies when a proprietary estoppel claim is established. One approach is to fulfil the expectation created by the encouragement;[755] the other is to compensate the claimant for the detriment suffered in reliance on the encouragement.[756] Given that different consequences may result from the selection of 'the appropriate remedy' by the courts, it is necessary to look into the principles on which relief is granted. Consider the case *of Jennings v Rice,*[757] referred

[755] *Pascoe v Turner* [1979] 1 WLR 431, where the 'minimum equity to do justice' was to 'perfect the imperfect gift' and order the claimant to transfer the property to the defendant in fee simple; and, *Griffiths v Williams* (1977) 248 EG 947, where the encouragement was of a life interest, and this was fulfilled by the direction that the defendant should be granted a long lease determinable on her death.

[756] Gravells describes these losses suffered by claimants as 'expectation loss' and 'reliance loss' – N. P. Gravells, *Land Law*, 4th edition, (Sweet & Maxwell, 2010), at p. 565.

[757] [2002] EWCA Civ. 159

to earlier. Here, the claimant worked for the deceased, an elderly lady, as a part-time gardener. In time, his hours and responsibilities increased beyond mere gardening, and he eventually became the deceased's carer, even staying overnight at the property.[758] At one point, there came a time when the deceased ceased paying the claimant. And, when he raised this matter with her, the claimant was given the assurance that 'this will all be yours one day', something he took to mean his employer's house and furniture.[759] The trial judge took the view that the award of the whole estate (£1,285,000), and indeed the award of the house and furniture (£435,000), would each be out of proportion to the detriment suffered by claimant in working and caring for the deceased. In the event, the trial judge awarded the claimant £200,000 from the deceased's estate as 'the minimum necessary to satisfy the equity', which was, rather peculiarly,[760] based on the cost to the deceased of buying in the claimant's services on a commercial basis.[761] The award was upheld on appeal with Aldous LJ concluding that '… the judge was right to conclude that the award must be proportionate'.[762] *Jennings v Rice* was therefore a case where the claimant was denied not only what he expected to receive but also what the deceased had represented to him that he would get; in short, the 'bargain' that had been made was left wholly unfulfilled. The trial judge seems to have justified this by finding that, '… the terms of the offer were too vague and imprecise to amount to a contract.'[763] Yet, that seems to be a strange form of 'justice'. Where someone is promised either one thing or another (i.e. either the deceased's house or her whole estate) in return for what he is asked to do, he performs the obligations requested of him and is then paid less than half of the value of the lesser of what was promised to him.

[758] The elderly lady, Mrs Royle, is described in the judgment of Aldous LJ as 'increasingly incapacitated with arthritis and leg ulcers' (paragraph [5]). Aldous LJ also found that Mr Jennings 'ran errands for [her], collected her prescriptions, helped her to dress and go to the toilet, made sure that she had food and drink available and did some work in the garden.' [paragraph [7])

[759] In point of fact, it was contended that the words in question either referred to the whole of the land owner's estate or her house and furniture. And, the trial judge found as a fact that 'Mr Jennings believed that he was going to receive all or part of the Mrs Royle's property on her death' (see: Aldous LJ at paragraph [11] of his judgment). But, the minimum he expected was the house and furniture (see: paragraph [15]).

[760] It is said that is 'rather peculiar' because the cost of such services to the deceased is nothing to do with the detriment that was suffered by the claimant which included being away from his wife whilst he stayed with the deceased overnight.

[761] Paragraph [15] of the judgment of Aldous LJ – which is a reference to Scarman LJ's comment in *Crabb v Arun District Council* [1976] Ch. 179, 'the minimum equity to do justice to the plaintiff' (at page 198).

[762] Paragraph [38] of his judgment

[763] See: paragraph [10] of Aldous LJ's judgment.

In other cases where proprietary estoppel has been successfully pleaded, the claimant has been afforded his/her full expectations.[764] Indeed, it has been remarked that 'the outcome in most proprietary estoppel cases is the fulfilment of expectations *in specie'*.[765] The difficulty is determining when the court will favour an expectation approach and when it will favour a compensatory approach to satisfying the equity that arises when a plea of proprietary estoppel succeeds. Indeed, this has led one leading authority on English Land Law to remark that, '[t]he history of proprietary estoppel is marked by an ambivalence as to whether the proper role of the estoppel doctrine is to give effect to the expectations of entitlement engendered by the parties' dealings or merely to protect against the detrimental consequences caused when these expectations are undermined by an uncontentious insistence upon legal rights.'[766]

One approach to resolving this difficulty is to attempt to rationalise reported cases in an effort to bring some predictability to determining what relief should be granted by the courts. And, one categorisation that has been suggested is to separate successful proprietary estoppel cases into 'bargain cases' and 'non-bargain' cases.[767] In *Jennings v Rice*[768] Robert Walker LJ suggested that the expectation-based measure of relief is of most relevance where the landowner's assurances and the claimant's reliance on those assurances have, '… a consensual character falling not far short of an enforceable contract.'[769] In such cases, the claimant's expectation will ordinarily 'have been defined with reasonable clarity.'[770] In contrast, in 'non-bargain' cases the court has a more flexible discretion and will often favour a compensation-based approach. At one level, this is good news for informal carers. In many cases, the bargain will be clear – 'If you care for me, then on my death the house is yours'. But, this only serves to disguise a number of problems. If a bargain such as this is made, and unforeseen to both parties, the landowner dies much earlier than anticipated, perhaps as a result of an accident rather than any health-related problem, the award of the house would clearly be disproportionate to the detriment suffered by the claimant.

[764] *Pascoe v Turner* [1979] 1 WLR 431

[765] A. Robertson, 'The Reliance Basis of Proprietary Estoppel Remedies', [2008] *Conv.* 295 at p. 295.

[766] K. Gray and S.F. Gray, *Elements of Land Law,* 5th edition, (OUP, 2009), paragraph 9.2.97.

[767] See, for example, *ibid*. paragraphs 9.2.102 and 9.2.103.

[768] [2003] 1 P & C R 8

[769] *Ibid.* at [45].

[770] *Ibid*.

If any case illustrates the need for statutory intervention in relation to informal carers, it is the case of *In Re Gonin, Deceased*.[771] Here, the claimant, Miss Gonin, an unmarried daughter, was living with the parents at the outbreak of the Second World War. Her two sisters had already married; but, at 29 years of age, she was still single. In the course of the following year, the claimant obtained a position with the Air Ministry, which involved being billeted in lodgings away from home. Free from the constraints of home-life, she met a young man and became engaged, but her fiancé was later killed in action. She took his death badly. At her parents' request in 1944, the claimant obtained a compassionate release from her post at the Ministry and returned home in order to care for them. Her evidence – which was accepted – was that her parents made her a proposition, namely, that '… if she would come back home and care for them for the length of their days, she could have [their] house and its contents.'[772] The claimant duly fulfilled this request, living at home, undertaking the domestic duties that needed to be done and otherwise caring for her parents from sometime in 1944 until her mother's death in November 1968.

At that point, the claimant was 58 years of age and had devoted the past 24 years to caring for her elderly parents. Regrettably, for the claimant, she failed to pursue her claims against her mother's estate with any vigour. In the event, her claim under the 1975 Act was dismissed; it was two and a half years out of time and the court refused her application to extend the time for making that application. In the absence of any writing to support what her parents had said concerning the destination of the family home, she also made a claim under the doctrine of part performance.[773] That claim failed too. The acts of part performance on which the claimant relied were not exclusively referable to a contract under which the house would be hers.[774] In the event, all that the claimant recovered was the contents of the house – i.e. the furniture – which was of very limited value and certainly no 'compensation' for 24 years of care given to her parents. Section 40 of the Law of Property Act 1925 was, of course, abolished by the Law of Property (Miscellaneous Provisions) Act 1989 ('the 1989 Act') and replaced with the more stringent requirement, 'that any contract for the sale or other disposition of an interest in land can only be made in writing'[775] must be duly 'signed by or on behalf of each party'.[776] Had the

[771] [1979] Ch. 16

[772] *Ibid*. at p. 22

[773] The Law of Property Act 1925, s. 40(2).

[774] Indeed, Walton J found that '… there was never any intention on [the mother's] part to make an immediate gift of any description of the land.' – see: p. 34.

[775] The Law of Property (Miscellaneous Provisions) Act 1989, s. 2(1).

[776] *Ibid*. at s. 2(3)

claimant in *In Re Gonin, Deceased* made her claim based on events since September 1989, it seems reasonably clear that she would not have been able to satisfy the demands of s. 2(1)-(3) of the 1989 Act. Whether the claimant may have fared better relying on the doctrine of part performance is a more difficult question. Certainly, a claim based on some form of constructive trust would appear to be doomed to failure.[777] But, a claim based on proprietary estoppel might well have been more productive.[778] That said, that this assertion is shrouded in uncertainty lends considerable support to the claim that the doctrine of proprietary estoppel is unable to bring 'just results' with any degree of uniformity. On this basis, it seems entirely reasonable to reject the doctrine of proprietary estoppel as one that might possibly afford the answer to claims for compensation made by informal carers.

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5.4 CONSTRUCTIVE TRUSTS AND CARERS' CLAIMS

Before moving on to consider the application of restitutionary principles to carers' claims, it is necessary to say a brief word about the constructive trust as a remedy. In *Cobbe v Yeoman's Row Management Ltd.* Lord Scott opined that, '[i]t is impossible to prescribe exhaustively the circumstances sufficient to create a constructive trust …'.[779] And, case law amply demonstrates that a constructive trust has been imposed as a remedy in a variety of different situations. In one such situation, the constructive trust that arises is entirely dependent on the parties' common intention. These trusts are usually born out of an 'agreement, assurance or understanding' that the non-landowning party is to have a beneficial interest in the property in question.[780] That party then acts to their detriment in reliance on that common intention. However, the cause of action is only complete

[777] See: section 5.5, *infra*.

[778] This is, of course, speculative. While there was some clear encouragement given to the claimant, whether she would have been found to have suffered detriment by returning home to live with and care for her parents in the 1960s / 1970s is another matter. In the eyes of perhaps many judges at that time, 'women's work' in looking after the house and administering 'general care' to elderly parents was not highly valued and the rent-free accommodation that the claimant had in return may have negatived any idea that she suffered any detriment in returning home.

[779] See: Lord Scott in *Cobbe v Yeoman's Row Management* [2008] UKHL 55 at [30].

[780] See: *Lloyd's Bank plc v Rosset* [1991] 1 AC 107 per Lord Bridge at p. 132 F.

once the other party acts unconscionably by denying the existence of that common intention.[781] These 'category one' common intention constructive trusts[782] do have some potential significance in relation to the claims of informal carers. And, it is therefore useful to consider whether a claimant carer might be able to use a constructive trust claim in preference to a proprietary estoppel claim as a means of obtaining compensation for the caring that they may have delivered.

On many levels, these category one constructive trusts are almost indistinguishable from claims based on the doctrine of proprietary estoppel. Indeed, in *Thorner v Major*,[783] Lord Scott went on to say that it was easier and more conducive to principle to consider claims where promises have been made of a future interest in, or right over, property as constructive trust claims rather than claims rooted in proprietary estoppel.[784] Notwithstanding this, the other members of the House of Lords preferred to decide that case on the basis of proprietary estoppel rather than constructive trust principles, and subsequent reported cases have largely followed this line. Academics too have rejected Lord Scott's approach.[785] Is the difference between a category one constructive trust and proprietary estoppel therefore mere nomenclature? Or is the distinction between the two concepts more far-reaching?

In *Lloyd's Bank plc v Rosset*,[786] Lord Bridge specifically refers to common intention constructive trusts as being founded on evidence of discussions between the parties in an effort to distinguish them from category two common intention constructive trusts which are based on inferences drawn in the absence of such discussions.[787] In contrast, proprietary estoppel needs no such basis.[788] What is more, a plea of proprietary estoppel can be made, and may succeed, in cases where there is no intention on the part of the landowner that the claimant should have an interest in or right over his/her land.[789]

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[781] Arden LJ in *Suggitt v Suggitt* [2012] EWCA Civ. 1140 at paragraph [41].

[782] These are the constructive trusts described by Lord Bridge in *Lloyd's Bank plc v Rosset* [1991] 1 AC 107 at p. 132 E - H.

[783] [2009] UKHL 18; [2009] 1 WLR 776

[784] *Ibid*. at paragraph [20]

[785] M. Dixon, 'More moves in constructive trusts and estoppel', (2017), *Conv.* 89.

[786] [1991] 1 AC 107

[787] *Ibid.* p. 133

[788] See: *Kinnane v Mackie-Conteh* [2005] EWCA Civ. 45, per Neuberger LJ.

[789] *Eves v Eves* [1975] 1 WLR 1338 – here, the landowner's reason for not putting the claimant's name on the legal title was that she was too young. At trial, the landowner admitted that this pretext was only an excuse. Notwithstanding the absence of common intention, the claimant succeeded on the basis that the defendant landowner held the property in question on a constructive trust and she was a beneficiary of that trust.

Proof of common intention is therefore avoided. The assurances of the care-receiver are thus taken at face value.

Moreover, when it comes to relief, constructive trusts in general are far less flexible than the many remedies available to the court on proof of a claim in proprietary estoppel. Constructive trusts are imposed over certain property and arise at the point the claimant acts on the assurances of the landowner in relation to that property.[790] Proprietary estoppel claims, on the other hand, are claims that - whilst arising as soon as the unconscionable conduct is complete - are only satisfied at the discretion of the court.[791] Applying constructive trust principles to the case of *Sledmore v Dalby*,[792] Mr Dalby should have been successful; he plainly acted to his detriment in reliance on assurances made by Mr. Sledmore that he should be able to occupy the property in question as long as he wished. In the case of *Jennings v Rice*,[793] Mr. Jennings, the gardener, should have received a share in his employer's property and not a lump sum of £200,000 from her estate. If his claim was really a constructive trust claim, an award of this nature can only be justified on the basis that the constructive trust claim failed, but he succeeded in his alternative restitutionary claim calculated on the basis of a *quantum meruit*.

Indeed, the introduction of constructive trust principles into a carer's claim for compensation would seem to undermine the claim altogether. As Simone Wong observes, constructive trust claims respond to 'the solid tug of money'.[794] In these circumstances, 'domestic services' – particularly those, she argues, that are commonly provided by women – are not seen by the judiciary as 'money equivalent'; in particular, English courts have consistently refused to see any connection between the provision of these services and the acquisition of rights in or over property. And, in the eyes of some judges, caring is a 'domestic service' *par excellence*.

If a category one common intention constructive trust is a poor substitute for a plea of proprietary estoppel, a claimant carer would fare no better relying on a category two constructive trust. These are

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[790] A. J. Oakley, *Constructive Trusts*, 3rd edition, (Sweet & Maxwell, 1996), p. 5, where he notes that, '… in the absence of any judicial order to the contrary, a constructive trust will take effect from the moment at which the conduct which has given rise to its imposition occurs.'

[791] S. Gardner, 'the Remedial Discretion in Proprietary Estoppel Again', (2006), 122 *LQR* 492 at p. 512.

[792] (1996) 72 P & C R 196

[793] [2003] 1 P & C R 1

[794] S. Wong, 'Constructive trusts over the family home: lessons to be learned from other Commonwealth jurisdictions?' (1998) *Legal Studies*, Vol 18(3), pp 369 – 390.

based on the claimant making a substantial contribution to the purchase, or to the value,[795] of property that is vested in another in circumstances where the court can draw the inference that there was a common intention that the claimant would receive a benefit from his/her contributions in the form of an interest in the property in question. In informal caring situations where the care-receiver is living at home, the property has, almost invariably, already been acquired. Moreover, there is no design to add value to that property. Here, the focus of the relationship is between the adult child and care-receiver is the continuing care that his/her elderly parent needs in order to live out the rest of their days. Similar remarks apply to the situation where the care-receiver receives care in carer's own home.

There are, of course, other situations where the court may impose a constructive trust as a remedy for unconscionable or fraudulent conduct. Yet, it would be a rare case where such intent could be established in an informal caring situation. One can little imagine elderly care-receivers having the intent to defraud their carers. Of course, in some situations words of encouragement may be uttered without the intention of giving these words any final effect. But, again, if a plea of proprietary estoppel is raised, an informal carer may simply rely on what was said without the need to establish any specific intent.

With all of these points in mind, it is submitted that constructive trust principles have nothing material to add to informal carer claims made using the principles of proprietary estoppel. An informal carer has nothing to gain by framing his case so that he/she claims to be a beneficiary under a constructive trust rather than attempting to rely on the doctrine of proprietary estoppel.[796]

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[795] *Jones v Kernott* [2012] 1AC 776

[796] See: fn. 795, *supra*, p. 92.

5.5 UNJUST ENRICHMENT AND CARERS' CLAIMS

Some commentators claim that the doctrine of proprietary estoppel can be explained by elements of the law of unjust enrichment.[797] The proponents of this claim contend that where a claimant incurs a detriment on the faith of the defendant landowner's assurance that has or will have some property right in the defendant's land, and the defendant landowner subsequently fails to make good that assurance, the basis on which the claimant has conferred a benefit on the defendant has failed and the claimant is therefore entitled to have that detriment reversed.[798] Yet, in truth, this explanation fails to justify a number of established categories of case law where proprietary estoppel claims have been successful. And, in any event, it only provides support for a compensation-based remedy and not for the many instances in which the courts have chosen to fulfil the expectations raised by the defendant landowner's assurance. Nevertheless, this analysis does serve to lay bare the limitations of unjust enrichment in English law. In some jurisdictions successful claims have been made by informal carers for the recovery of compensation for care-giving using the concept of unjust enrichment.[799] But, in the absence of a radical reappraisal of the law of restitution, an English law unjust enrichment-based recovery system which can provide justice for all informal carers seems to be far out of reach.[800]

The English law of unjust enrichment rests on three foundations. Firstly, the defendant must have been enriched by the receipt of a benefit; secondly, that benefit must have been supplied at the expense of the claimant; and, thirdly, in the circumstances of the case, it must be unjust to allow the defendant to retain that benefit.[801] If all three issues admit of a positive response, and there is no defence otherwise available to the defendant,[802] the defendant has been unjustly enriched at the claimant's expense. Stated thus, the doctrine appears to be of wide application. Yet, in practice, English courts have interpreted the jurisdiction rather narrowly. At its most simple, there are two

[797] See: M. Balen and C. Knowles, fn. 697, *supra*.

[798] Ibid. at p. 176, where the authors argue that if the claimant has conferred the benefit conditionally, and the condition fails and this failure is down to the defendant, the defendant is under a duty to reverse the claimant's 'conditionally-incurred detriment'.

[799] See: in particular, Canada - *Clarkson v McCrossen Estate* (1995) 122 DLR (4th) 239 and *Skibinski v Community Living British Columbia* (2010) BCSC 1500. .

[800] See: fn. 690, *supra*, at p. 128.

[801] Lord Goff and G. Jones, *The Law of Restitution*, (Sweet & Maxwell, 1998) at p. 15

[802] There are a number of recognised defences available against a claim of unjust enrichment, such as 'change of position', 'bona fide purchase',' laches', etc. – *ibid*. Part III, pp. 817 – 864.

distinct categories of unjust enrichment.[803] In the absence of wrongdoing - which is the first category - English law will provide a restitutionary remedy where the defendant has obtained a benefit from the claimant which he/she did not intend to confer on a gratuitous basis, provided that '… it is against conscience that the defendant should keep [that benefit]'.[804] If informal carers are able to bring claims for compensation against the estates of those who have benefitted from their care, as things presently stand they will need to fit their cases into this second category.

'Benefit' includes services.[805] Where the defendant has requested the services that the claimant subsequently provides, knowing that the claimant expects to be paid for those services, the defendant will normally be liable to pay for those services in quasi-contract. In the context of informal care-giving, if a care-receiver knows that an adult child who is intending to provide care services expects to be paid for those services, and nevertheless requests the provision of care services from that adult child, there appears to be no reason why the care-receiver should not be held liable to pay the adult child for the care that has been provided on a *quantum meruit* basis. On the other hand, where the care-receiver knows of no such expectation when these care services are first provided, even if the adult child expects payment in return for those services, there is no claim in unjust enrichment unless and until the care-receiver subsequently knows of this expectation and then fails to reject the services.[806]

While many informal carers might hope for some form of 'reward' for their devotion to caring for an elderly parent, it is surely far less common for an informal carer to have a 'real' expectation of receiving compensation for the care they are about to provide. That expectation can only arise from discussions between care-receiver and informal carer, in much the same way as a type one constructive trust can only arise from such discussions. In those discussions, the care-receiver will have either encouraged or discouraged the expectation of reward. If the care-receiver has encouraged such expectation, the informal carer is likely to be able to rely on existing proprietary estoppel / constructive trust principles and the formulation of a claim based on unjust enrichment is unlikely to further advance his/her claim. If, on the other hand, the necessary expectation has been discouraged,

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[803] G. McMeel, *The Modern Law of Restitution*, (Blackstone Press, 2000) at p. 4.

[804] See: *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, per Lord Wright at p. 61.

[805] See: fn. 801, *supra,* pp. 18 – 22. Not all services are benefits for the purpose of the law of unjust enrichment. Initially, the common law concluded that only services that had been requested could qualify. Now, it is argued that this category should be expanded to include all services that have been freely accepted by the defendant in circumstances where the defendant should, as a reasonable man, have known that the claimant expected payment for those services.

[806] Under the doctrine of free acceptance – *ibid.* p. 18

the claim will fail for want of any expectation of reward. In an emergency situation, it may be possible to recover what one spends on the care of another, but such situations appear to be restricted to those where one cannot obtain the instructions of the care-receiver and there is a clear need for immediate expenditure. But again, that is far removed from caring for someone over a protracted period where there is a clear opportunity to engage the services of others in performing whatever caring services might be needed.[807]

Moreover, the claimant carer's case fails to improve if it is put on the basis of failure of consideration rather than free acceptance. Is the care supplied by an informal carer really provided on a conditional basis, i.e. on condition that compensation is provided in return for the care-giving on the care-receiver's death? Given that such care is often provided over a long period, there is ample opportunity, in most cases, for that condition to be made known to the care-receiver. Yet, in the very nature of these claims, no agreement has ever been reached between carer and care-receiver over the basis on which care is provided and the parties' personal circumstances militate against the implication of a contract. Indeed, it is for this reason that most claimants pray in aid the doctrine of proprietary estoppel in support of their claim for proprietary estoppel will operate where no contract was ever intended.

Even where a claimant can show that he/she has bestowed a benefit on the care-receiver, and that the care-receiver has been enriched at the claimant's expense as a result, the claimant carer must also establish that it is unjust for the care-receiver not to pay for those services. One counter-argument that a claimant carer must deal with in this situation is inherent in the 'expectation' already referred to. Mere expectation is not the same as right to compensation or reward. It carries with it a risk that the expectation may not be met. If someone 'gambles' on compensation being provided gratuitously on an *ex post facto* basis, and no such reward is forthcoming, haven't they merely gambled and lost? The law of unjust enrichment does not exist as a form of an insurance against such losses. There is no injustice *per se* in allowing someone to lose a bet merely because you have the ability to enable them to win that bet. But, as already stated, it is at least doubtful whether many informal carers act on the basis of expectation in any event. And, in the absence of expectation, it is difficult to put a finger on the unjust factor in a typical caring situation on the present state of the law. In short, while the acts of the claimant carer may have enriched the adult parent's estate because that estate has not needed to buy-in the services of a commercial carer, that does not make the failure of the care-receiver to compensate the carer 'unjust' in circumstances where care is freely given.

[807] Similar restrictions appear in the law relating to agency of necessity.

In Canada, the law of unjust enrichment has followed a different path. In *Clarkson v McCrossen*,[808] an informal carer was able to claim against the estate of her stepfather under unjust enrichment in circumstances where she had cared for both him and her mother whose estate he had inherited. The stepfather's estate had been enriched by the claimant's services in providing this care, and that enrichment was unjust given her legitimate expectation that she would inherit the family home and needed to be disgorged. It matter not that no contract was ever intended by the parties. In *Skibinski v Community Living British Columbia,*[809] the claimant, a professional carer, had looked after a disabled woman for over three years after she had been discharged from the care of her mother in circumstances where it was accepted that the defendant was under a legal obligation to provide that care. She subsequently succeeded in her claim for 'fair reward compensation' for the value of her care against the defendant public authority on the basis that the defendant had been enriched in that it had not met the costs of the disabled woman's care over that period. The defendant's defence of 'officious intervention' failed on the facts; the services rendered by the claimant in this case were 'necessitous'.[810]

Law reformers will often seize on the law of another comparable jurisdiction and ask, 'Why can't the reforms made in that country be imported into our own?' However, one 'positive development' in one jurisdiction should not be the sole reason for the wholesale reform of existing law in the other. Chris Hunt, in particular, has argued very persuasively against the proposition that the English law of unjust enrichment should follow the Canadian model.[811] He claims that the Canadian law of unjust enrichment is confused which, in turn, leads to much injustice. Canadian courts will sometimes decide these cases on the grounds of 'absence of basis' – which is the civilian approach to 'unjustified enrichment' – while other courts determine these claims on the basis that it is up to the claimant to demonstrate that there is a positive ground for the reversal of the defendant's enrichment – which is the common law approach.[812] The 'problem' here, he says, is that, '… [a] list of reasons for reversing

[808] (1995) 122 DLR (4th) 239

[809] (2010) BCSC 1500

[810] *Ibid.* at paragraphs [207] and [299] of the judgment of N. Brown, J

[811] Chris D. L. Hunt, Unjust Enrichment Understood as Absence of Basis: A Critical Evaluation with Lessons from Canada, (2009) *Oxford U Comparative Law Forum* 6, which can be found at ouclf.iuscomp.org.

[812] Yet, Peter Birks has claimed that the demand for unjust factors and absence of basis are 'two entirely different methods' of determining whether an enrichment is unjust and these approaches 'cannot be mixed or merged' – P. Birks, *Unjust Enrichment*, 2nd edition, (OUP, 2005), chapter 5.

enrichments will look very different from a list of reasons for keeping them'.[813] The result is 'a troubled jurisprudence' where practitioners have little idea how one court will approach an unjust enrichment claim in comparison with another. Moreover, the two reported cases that appear to have unlocked remedies for Canadian carers are very different from the typical care situation that we have been discussing, i.e. where nothing is said about future inheritance rights but care is nevertheless provided on an extensive basis. In *Clarkson,* '… both her mother and step-father had consistently told [the claimant] … that upon their death the family home would be hers.' That would seem to suggest that a claim on the basis of proprietary estoppel would have been the claimant's way forward in English courts. And, in *Skibinski* the court was entertaining a claim by a professional carer who, as the defendant always knew, expected payment for her services; and, of course, in that case the defendant was legally obliged to provide the care that the claimant, in fact, provided.

Before abandoning the idea of developing the English law of unjust enrichment as a remedy for informal carers, it might be useful to look at an area of law where the English courts do admit claims made by informal carers albeit in a round-about sort of way. In *Cunningham v Harrison*[814] the Court of Appeal held that the claimant was entitled, inter alia, to compensation, as a result of his injuries in a road traffic accident caused by the defendant's negligence, to cover the costs of the care that he had received from his wife, which he would then hold on trust for her.[815] The claimant's wife was not a professional carer; in fact, she was unemployed at the date on which she began to care for her husband. Nevertheless, she was entitled to remuneration for her services. The decision can be seen as a policy one. People do care for one another on a voluntary basis. In *Cunningham*, the claimant was doubtless fortunate to have his wife care for him. But, that intervention did not discharge the defendant's obligation to compensate the claimant. In the later case of *Hunt v Severs*[816] the House of Lords held that a claimant could recover the reasonable value of services rendered gratuitously by a member of the family, but not where the carer was himself the tortfeasor. While the claimant carer is provided for in such arrangements, it is curious that the carer cannot force the care-receiver to sue for the costs of his/her care. However, where the claimant does sue, his/her ability to recover for the cost of informal care services does not depend on the existence of a contract between the claimant

[813] See: fn. 811, *supra*, at p. 4. Hunt's conclusion is that 'adopting an absence of basis in England would be a grave mistake'.

[814] [1973] QB 942

[815] In fact, the damages payable included not only a sum representing past care but also a sum representing future care.

[816] [1994] 2 AC 350

and his/her carer. The care-receiver's moral obligation to pay for the care services that are rendered to him/her justifies (it seems) the care-receiver's ability to recover these costs from the tortfeasor (or his/her insurer) in damages.[817]

Simone Degeling has analysed the carer's claim on unjust enrichment principles in such cases as these in an effort to determine whether carers might be said to have proprietary rights in the trust fund that has been established for their benefit.[818] Her conclusion is that the inference that the care-receiver knows that caring services provided by his/her family are not being offered gratuitously, and must therefore be paid for, is a difficult one to draw on the facts, even where these services extend beyond what may be regarded as 'a normal incident to family life or friendship'.[819] What is more, she says, '... only in relation to those cases containing a promise to pay are we able confidently to say that free acceptance demonstrates enrichment' and therefore '… in the balance of cases in [her] study, free acceptance does not assist in demonstrating an enrichment' for the purposes of a claim in unjust enrichment. Therefore, an 'unjust enrichment factor' must be established and this must either be a non-voluntary transfer or a policy factor.[820] In continuing her analysis, Degeling rightly dismisses any arguments that informal care is provided on a non-voluntary basis and claims that a carer's right to participate in any fund established for the care of a victim from an award of damages on account of a tortfeasor's negligence is a matter of policy.[821] This analysis is sound. A tortfeasor cannot sensibly be heard to argue that he/she should pay less by way of damages because someone else has taken over the care of his/her victim on a gratuitous basis. In our situation, we are not, of course, speaking of this situation - a situation caused by the wrongdoing of another – but of an experience that may befall many of us in our later years, the need for care due to old age and the infirmities that accompany this condition. Nevertheless, the conclusion that a legal right can properly arise out of policy alone is a useful one.

In *Hunt v Severs* trusts, the policy out of which such trusts were born was judge-made. But, as the judiciary has often acknowledged, such policy has other perhaps more legitimate origins in the words and deeds of Parliament. In these circumstances, it seems unwise to sit back and wait for a judicial

[817] *Donnelly v Joyce* [1974] 1 QB 454 initially disavowed any such moral obligation.

[818] S. Degeling, *Restitutionary Rights to Share in Damages: Carers' Claims*, (Cambridge University Press, 2003), pp. 57-58.

[819] *Ibid.* p. 57

[820] *Ibid*. pp. 72-73

[821] Degeling describes this as the policy against accumulation.

remedy that may never arrive. Howsoever these claims are framed – whether in proprietary estoppel, under the law relating to constructive trusts or under the law relating to unjust enrichment – there is no universal remedy for informal carers in English law. Parliament must therefore grasp the nettle and act. In the final chapter of this thesis, consideration will be given to how Parliament might shape a policy of encouraging compensation to be given to informal carers by care-receivers and how it might provide for the giving of that compensation outside of any voluntary arrangement that might be made between the two parties.

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CHAPTER SIX

'FAMILY CARE CONTRACTS'

6.1 INTRODUCTION

At present, those who pay for their own social care by meeting the costs of their own care home accommodation are paying substantially in excess of the market rate for what they receive.[822] Local authorities are the largest single purchasers of care home accommodation in most parts of the country. As a result of cuts in national expenditure on local government, local authorities have had to attempt to save costs by negotiating lower prices for the care home places that they finance. Given their purchasing power, care home providers have largely been forced to comply with their demands and to seek cross-subsidisation from their own self-funding residents. Indeed, a recent survey by Liang Buisson has concluded that the average fee rate paid by local authorities is now 'significantly below the floor' of its modelled fair price band for care home accommodation.[823] The practical result of this is that, as care home costs increase, the need for adult children to organise and provide for the care of their elderly disabled parents themselves in an effort to 'protect their inheritance' will also grow. But, as we have seen, that 'inheritance' is precarious. Unlike their counterparts in France and elsewhere on the continent, adult children have no entrenched rights in relation to their parents' estates. Similarly, in contrast to their opposite numbers in Germany, adult children in England and Wales have no right to the reimbursement of any costs that they might expend in caring for their elderly disabled parents. Nor, indeed, do they have any legal claim for the costs of the time and labour that they expend in delivering that social care.

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[822] Laing Buisson, Care of Older People: UK Market Report , 27th edition, at p. 204, referred to in 'The Care Home Market (England)', House of Commons briefing paper number 07463, 20 February 2017 - file:///G:/the%20care%20home%20market.pdf (accessed: 30/12/17)

[823] *Ibid.*

With these thoughts in mind, this chapter sets out to consider what can be done on a practical level to encourage adult children to care for their elderly disabled parents, so that adult children carers are not seriously disadvantaged in financial terms by having to administer the care that their elderly disabled parents require. Of course, some parents will not have the property wealth with which to encourage the provision of such care. And, it is here that the State's resources must be focussed.[824] Yet, given that the UK, together with the rest of the Western world, is moving into a time in which people of all backgrounds, rich and poor, are living very much longer than they were only less than a century ago, and given that publicly-funded other benefits and services, such as State pensions and the NHS, will inevitably have to shoulder some of the financial burden that will follow, we cannot surely expect to rely on the public purse alone to meet the rise in social care costs that will accompany this trend. With these thoughts in mind, a solution that unlocks the property wealth that is now in the hands of the majority of our elderly – given the rise in the value of residential properties over the past thirty years or so – must be a credible one. Yet, it may not be the only solution that is needed. In practice, it may be that, given the extent of the funding that is required, some form of hypothecated tax will need to be put in place alongside the scheme that is proposed. Nevertheless, the unlocking of wealth that exists in our property-owning democracy is still the most viable solution. The balance of this chapter will focus on how this unlocking process might be achieved.

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6.2 PROPERTY WEALTH IN ENGLAND AND WALES

Perhaps one of the most notable features of life in the late twentieth and early twenty-first centuries in England and Wales is how quickly the general public has become a mass property-owning democracy. Margaret Thatcher's idea of the 'ordinary man' having 'a stake in society' by acquiring some form of saleable interest in their own homes led to the purchase of some two million local authority properties by 'council tenants' following the introduction of the 'right to buy' legislation contained in the Housing Act 1980.[825] What is more, the last twenty-five years or so has been characterised by significant rises in residential property prices across the country, albeit the sharpest rises have been experienced in the London and the south-east. In fact, the UK's net property wealth

[824] This is further discussed in section 6.2 *infra*.

[825] http://www.bbc.co.uk/news/business-22077190 (accessed: 09/01/18)

has recently been estimated at some £4,379 billion.[826] In 2006, the same figure stood at a mere £2,644 billion.[827] Over the same period the number of privately-owned homes grew by 9% from 21.5 million to 23.4 million.[828] As a result, the average rise in net property worth across the country between 2006 and 2016 has now been put at £147,000;[829] and, of course, this increase is very largely untaxed wealth.

Again, using 2016 figures, pensioners alone have been said to be sitting on £926 billion of this property wealth.[830] In some quarters it has been suggested that this property wealth should be unlocked to pay for the social care that this section of society will, almost undoubtedly, require as they gradually move into 'older old age'.[831] One mechanism that could be deployed by the elderly themselves without any interference from or involvement of anyone else is the funding of their own social care through the use of 'equity release schemes'. Yet, this has not happened. At present, equity release is rarely used to fund the costs of social care.[832] There are essentially three reasons behind this. Firstly, there is a widely-held belief that this care should be publically-funded. The State provides health care and, therefore, it should also provide social care. The two services overlap; in each case, some form of 'nursing' by skilled personnel is the most effective way of providing such care. And, in any event, the distinction between the two services – if, indeed, there is a clear distinction - is not always appreciated by the general public.[833] The dominant idea here is one of 'deserving'. Many elderly people feel that they deserve State-funded social care; after all, they have paid their income tax and national insurance contributions over many years, and this money should be there to pay for their social care as well as their health care. Secondly, the elderly generation, mostly conservative in nature if not also in politics, feel that their own property wealth is theirs to pass on to the next generation if they should so choose. The fruits of their labour are represented by the market value of their property – the home in which

[826] http://www.lloydsbankinggroup.com/Media/Press-Releases/press-releases-2017/lloyds-bank/uk-household-wealth-rises-to-over-10-trillion/ (accessed: 10/01/18)

[827] *Ibid.*

[828] *Ibid.*

[829] *Ibid.*

[830] *Ibid.*

[831] Polly Toynbee: https://www.theguardian.com/commentisfree/2017/may/18/theresa-may-social-care-lottery-tory-manifesto (accessed: 22/02/18)

[832] The Smith Institute, Making the most of equity release: perspectives from key players, chapter six, 'Meeting social care needs', p. 52 - https://smithinstitutethinktank.files.wordpress.com/2014/11/making-the-most-of-equity-release.pdf (accessed: 11/01/18)

[833] See: chapter 1, section 1.3, *supra*.

they live. Their gift to the next generation is to give them a better life than the one they have experienced. And, in most cases, the elderly are only able do this through the transfer of their property wealth on death.[834] Finally, due to the complexities of the present system for determining when an elderly person is entitled to publicly-funded social care, equity release is unlikely to suitable in the majority of cases for meeting residential care costs. When an elderly person moves into a residential care home, the value of their property will be taken into account for the purpose of calculating the value of their assets, and they will be liable for care home fees until their assets are worth less than £23,250.[835] Most equity release schemes will provide for the sale of the property in question when the owner permanently vacates the same.[836] Therefore, an elderly person will often find that they are unable to both hold on to their homes and at the same time to use the value of that home to pay for their own residential care costs. Similarly, equity release is not really suitable for the purpose of meeting domiciliary care costs where social care is provided on a commercial basis. As the home is disregarded for the purpose of calculating whether the care recipient is entitled to domiciliary care, he/she will ordinarily pay the costs of such care out of their 'free capital' first. And, of course, once this capital – i.e. the care recipient's non-housing assets – has been depleted to £23,250 or less, their local authority will pay the costs of their care provided, of course, that they satisfy the criteria that their local authority operates – i.e. their care needs are, in most cases, either substantial or critical.[837] Those who fall below this standard will find that they must meet their own care costs, seek the help of their friends or family or do without care. As the system presently stands, it is perhaps only this group of elderly - i.e. those with low or moderate care needs but who have no help from friends or family - who need to unlock the capital that is available in their homes to meet their social care costs.

This brief analysis strongly suggests that the principal capital asset available in the estates of some 21 million elderly who either need or are likely to need social care now or in the foreseeable future is put

[834] Transfers of wealth between generations are, of course, subject to Inheritance Tax, subject to the operation of the nil rate band and the residential nil rate band.

[835] Department of Health, Local Authority Circular, LAC(DH) (2017) 1 - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/590707/LAC_DH__2017_1.pdf (accessed: 24/02/18). Claimants having capital of less than £23,250 in value are required to pay £1 for every £250 of their savings between £14, 250 and £23,250. And, all claimants must contribute the whole of their income towards their fees save for any personal expenses allowance to which they may be entitled.

[836] As provided for by the SHIP (Safe Homes Income Plans) Code of Conduct which is followed by the sellers of 90% (by volume) of equity release products sold in Britain – Lorna Fox O'Mahony, *Home Equity and Ageing Owners: Between Risk and Regulation,* (Hart, 2012) at p. 271.

[837] Around 80% of local authorities will only cover care costs where the care recipient's need is assessed as either substantial or critical.

to little or no use in the provision of such care. At a time when the funding of social care in England and Wales is already in crisis, and the future for its funding by the State is open to doubt given the likely increase in the need for such care as people live longer, a radical re-think of how we might use housing equity to provide for the care of our disabled elderly is surely required. This thesis has previously established the premise that merely leaving the care recipient to reward those family members who have spent their time caring for him/her may too often lead to injustice where their moral claims for recompense are either not recognised or acted on by the care recipient. As we have seen, family members who provide this informal care - on what is, at present, a voluntary basis - do not even have the ability to recover the costs of providing this care let alone compensation for their time and labour. In circumstances where the need for families to provide social care for their elderly disabled relatives can only grow, as the general public begins to live longer, the system that we have in England and Wales is more of a disincentive to provide care for one's parents and remoter family members. Yet, government policy ought to be encouraging the provision of this care. Indeed, given the evidence that there is likely to be a shortage of professional caretakers in the not too distant future, which will place an even greater burden on the family to take on the burden of care for an elderly disabled relative,[838] the need for a system that will compensate family carers for their emotional, physical and financial sacrifices in providing that care is becoming increasingly more obvious.

Some of our elderly will not, of course, have the property wealth to make any financial provision for a care-giver, yet they will still have a need for social care. Statistics show that, for the year 2013-14, only 78.6% of 65-74 year olds and 75.6% of 75+ year olds owned their own homes.[839] In whatever future is to come, as the population of the country grows ever-older, and economically less-productive, the State's resources will need to be concentrated on this section of the community. Here, there will be a continuing need for social care, but no housing wealth from which to recoup any expenditure on that need. In the US the rate at which the elderly have been filing for bankruptcy has increased markedly over recent years. In almost one-half of these cases, debtors cited medical problems as a cause of their financial difficulties; and, medical bills were listed as significant debts in a similar number

[838] http://www.communitycare.co.uk/2016/11/08/quality-residential-nursing-care-hit-staff-shortages/ (accessed: 24/02/18).

[839] The English Housing Survey, 2013-14, relied upon by the Office of National Statistics in UK Perspectives 2016: Housing and home ownership in the UK, - https://www.ons.gov.uk/peoplepopulationandcommunity/housing/articles/ukperspectives2016housingandhomeownershipintheuk/2016-05-25 (accessed: 08/05/18).

of instances.[840] In England and Wales, the NHS should take care of these medical needs; and, social care costs that cannot be met from the care-receiver's own resources must be met by his/her local authority.[841] But, in order that the whole of the burden should not fall onto the shoulders of the wage-earning population, there is a clear need for a system that taps into the property wealth of those care-receivers who have that wealth. Much as this may seem, by some, to be a flaw in any proposed new social care system, that same flaw, if it can be described as such, is also present in our existing NHS which treats everyone regardless of whether or not they have paid any national insurance contributions. In short, this is the price that must be paid for this and any other 'safety-net solution'.

What social care system can we now put in place of our existing regime? Firstly, Informal carers need to be treated by both government and society with the respect and dignity that their work deserves. This demands a significant increase in the Carer's Allowance which should be paid as a wage in all situations where informal carers cannot go out to work themselves in consequence of having to provide for the care-receiver's care needs. Similarly, where informal carers are able to hold down a job notwithstanding their caring responsibilities, they should receive an income supplement that acknowledges the work they do. And, in each case, these payments should come from central funds. Yet, the introduction of these proposals must be properly costed and adequately funded. Secondly, the work of informal carers needs to be incentivised where it can. The enhanced Carer's Allowance referred to above will not compensate informal carers at the market rate for the care they give. Informal carers need to be given guaranteed rights of inheritance in return for the care they deliver. These inheritance rights may arise either through agreement between the carer and care-receiver or through rights given to informal carers under statute. In the next few sections of this chapter, it is proposed to look at how a scheme that would fulfil these two requirements might be funded, principally through a combination of guaranteed payments from the estates of care-receivers on their respective death and advances made by the UK Government to informal carers during the caring period but made on the security of a charge against the properties of care-receivers. But, first, it is useful to look at home some of these proposals have manifested themselves in one particular part of the Western world, namely, Illinois.

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[840] Jennifer B Herzog, '"The Diamond-Studded Wheelchair": The Health Aid Exemption in Bankruptcy and its Application to the Elderly Debtor,' *Elder Law Journal*, 2004, pp. 385-415 at 388-9. - https://theelderlawjournal.com/wp-content/uploads/2015/02/Herzog.pdf (accessed: 08/05/18).

[841] See: The Care Act 2014, s. 18(1).

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6.3 LESSONS FROM ILLINOIS

Section 18-1.1 of the Illinois Probate Act of 1975 states that any defined family member who 'dedicates' him/herself '… to the care of the disabled person by living with and personally caring for the disabled person for at least three years shall be entitled to a claim against the estate upon the death of the disabled person.' Such a claim is based on '… the nature and extent of the [disabled] person's disability and, at the minimum but subject to the extent of the assets available, [that claim] shall be in the amounts set out below:

1. 100% disability, $180,000
2. 75% disability, $135,000
3. 50% disability, $ 90,000
4. 25% disability, $ 45,000.'[842]

Section 18 – 1.1 further contains a list of factors that the court must take into consideration in determining whether or not to reduce the amount awarded to the claimant below these specified sums; but, subject to these matters, someone who has personally cared for a disabled person for at least three years, dedicating his/her life to that task, is entitled to recompense from that person's estate in these stated sums on the care-receiver's death. What is more, this award is to be '… in addition to any other claim, including without limitation a reasonable claim for nursing and other care.'[843]

Section 18 – 1.1 appears in the Illinois Probate Act by way of an amendment which came into force on the 1st January 1989. It seems to have a chequered history.[844] The amendment in question was initially added to a bill which proposed some greater but unconnected amendments to the Act by the Illinois Senate. After being accepted by both the Illinois Senate and its House of Representatives, it was vetoed by the then State Governor, who expressed concern that proposed amendments in the form

[842] The initial sums were lower, but were increased in 2008. The court has a discretion to award higher figures and will ordinarily do so where the caring period has been greater than the statutory minimum of three years.

[843] See: Section 18-1.1 of the Illinois Probate Act of 1975.

[844] Mariam L. Hafezi Qualman, Illinois Does Not Care About Caregivers as Evidenced by the Ineffective and Exclusionary Custodial Claims Statute of the Probate Act, *Northern Illinois University Law Review Online*, 2010, Vol 1, pp. 68-95.

of section 18 – 1.1 were 'inequitable' and 'unworkable'. Despite this, the veto was subsequently overridden and the amendments became law.[845] Despite overwhelming majorities in both the Senate and the House in favour of the amendment, the section has come in for a good deal of criticism.[846] In particular, the Act contains no definition of 'disabled person' or its various 'degrees of disability'. It demands that claimants must have cared for the disabled person 'for at least three years' and must have 'dedicated' their lives to such care. And, finally, it requires claimants to be members of the close family of the care-receiver, so that any other remoter relation, friend or neighbour is unable to make a claim notwithstanding that they may have administered the same or perhaps an even greater degree of care to the care-recipient compared with the care administered by a close family member to another cared-for individual.[847] While the drafting of the Act can be justifiably criticised, it is submitted that the premise on which the Act is based is sound. That premise is that informal carers are deserving of financial compensation from the estate of the care-receiver for '… the emotional stress of caretaking as well as the costs from lost opportunities due to the undertaking of caring for a disabled family member.'[848] In the words of the Illinois Supreme Court, section 18 – 1.1 of the Illinois Probate Act 1975 '… serves the legislative goal of encouraging immediate family members to commit themselves to disabled relatives.'[849] As such, the Act is an important recognition of the disadvantages that an informal carer must ordinarily embrace when he or she resolves to care for another individual who needs such care. Moreover, the legislation is supported at 'ground level' by the establishment of the Illinois Department of Aging which has set up many care-giver resource centres to provide services and information to informal carers.[850]

Regrettably, the Act is far too restrictive in nature. But that does not, of course, mean that its original purpose or rationale is invalid. Research has suggested that the failure of informal carers to make use of the Act is likely to be due to the low number of those who qualify as persons able to make a claim

[845] Curiously, much of the debate on the bill in the Senate seems to relate to the recovery of money by parents on account of caring for a disabled child, presumably where a fund had been set up for the child following the accident which caused his/her disability.

[846] See: fn. 844, *supra*, pp. 70-73 and pp. 81-91.

[847] See: *In re Estate of Jolliff*, 771 N.E. 2.d 346 (Ill. 2002) where the claim that the section was 'unconstitutional' on the basis, inter alia, that it violated due process (on the basis that it assumed the extent of any claimants' losses rather than assessing them) and equal protection (because it favoured some classes of claimant and rejected others) was rejected on appeal.

[848] See: fn. 844, *supra,* p. 76.

[849] *Ibid.* p. 81

[850] *Ibid.* p. 79

given the requirements that the claimant must have lived with the care-receiver, must have provided at least three years' care and must have 'dedicated' themselves to the provision of such care, rather than any other, more weighty factors.[851] As we have seen, there is a clear need for some sort of equivalent, but more effective, provision in England and Wales for the same policy goal, and need for that goal, is as much apparent here as it is in Illinois.[852]

Encouraging family care-giving would also have some common reciprocal benefits and would serve to promote many of the qualities that communitarians and care ethicists hold dear: honour and gratitude, indebtedness and reciprocity, loyalty and interdependence. While some of these benefits could well result from enforced filial responsibility laws, such as those on the continent or in some parts of the US,[853] these laws run the considerable risk of pitting family members against each other – parent against child, sibling against sibling – when it comes to the enforcement of those laws.[854] And, indeed, it seems particularly harsh to place a legal responsibility on the younger generation to care for their parents, where that younger generation is commonly not so young themselves (often 50 – 65 years of age) and likely to be supporting their own children, if they have had them later in life as many professional women do, either financially (by the payment of some of the costs associated with obtaining a University education) or physically (through looking after grandchildren). Even where the care-giving generation is younger (some 35-50 years of age), the chances are that they will have a sizeable mortgage to pay (and, if at the beginning of this age-bracket, they may have only been able to climb onto the property ladder in recent years), their own young children to look after and their own careers to make. With these points in mind, it seems particularly unjust to put the caring burden on young or even middle-aged adult children when the real unused wealth in a family is more likely to be locked up in the home of the care-receiver.

The Illinois statute provides for a limited transfer of wealth as compensation for care-giving after the death of the care-receiver. Yet, a more radical idea would be to unlock the capital that is there in the care-receiver's home during the period of care-giving so that informal carers can receive some form

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[851] *Ibid.* pp. 88-89

[852] According to the Illinois Department on Aging '[o]ne in four households (25%) [takes] on the role of providing care to older family members and friends' and some '[e]ighty-five percent (85%) of all long term care services are provided by unpaid caregivers.' – *ibid.* at p. 77.

[853] In fact, these statutes are very seldom used in practice – Katie Wise, Caring for Our Parents in an Aging World: Sharing Public and Private Responsibility for the Elderly, (2001) *NYUJ Legislation and Public Policy*, Vol, 5, pp. 563-598 at p. 573-4, available at http://www.nyujlpp.org/wp-content/uploads/2012/11/Katie-Wise-Caring-for-our-Parents-in-an-Aging-World-Sharing-Responsibility-for-the-Elderly.pdf) (accessed: 24/02/18).

[854] *Ibid*. p. 575

of financial provision while care is being administered. How may this best be done? The following section of this chapter looks at 'equity release' as a method of unlocking wealth that is presently tied up in property. This potential solution to the issue of how social care costs might be funded has been around for some time but has not proved popular for reasons that were explained earlier. Nevertheless, a public funded alternative which would provide an income for informal carers during the caring period could well be the answer to the problems that this and the next generation now face in relation to the funding of social care. This theme then is explored in the final sections of this chapter.

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6.4 EQUITY RELEASE

Equity release schemes have been available to consumers in the UK since 1965. In 1972, a lifetime mortgage known as a 'home income plan', which permitted the release of capital for the purpose of purchasing an annuity, was introduced onto the market.[855] Problems beset the industry when providers encouraged many thousands of retired people to take out plans with variable interest rates. These products were sold on the basis that rises in house prices (then a feature of the UK housing market) would always outstrip mortgage interest rates. Retirees were encouraged to purchase stock-market related investment bonds with the capital that they released in order to supplement their income. But, market returns on these bonds fell, interest rates soared and many elderly people who had purchased these products found themselves in severe financial difficulties. As a result, 'equity release' gained something of a bad name.[856]

Gradually, the market for equity release schemes recovered, principally through regulation. Providers of such schemes largely signed up to the Equity Release Council (or their predecessor) whose code of practice provided a number of guarantees to customers, such as the right to remain living in the property (which was subject to the scheme) as their main residence and the 'no negative equity guarantee', which guaranteed that customers would never owe more than the market value of the property. While some providers withdrew from the market following the 'credit crunch' of 2007-08,

[855] Lorna Fox O'Mahony, *Home Equity and Ageing Owners: Between Risk and Regulation*, (Hart, 2012) p. 269.

[856] https://www.mortgagestrategy.co.uk/issues/28-january-2002/history-of-the-equity-release-market/ (accessed: 18/01/18).

the market for equity release schemes now seems much more stable; and, indeed, the forecast for that market is buoyant with reports that equity release has become the fastest growing segment of the mortgage market in terms of customer numbers.[857]

There are two main types of equity release schemes on the UK market: home reversions and lifetime mortgages. The lifetime mortgage comes in a number of different varieties. A 'roll-up mortgage' will allow a homeowner to obtain a loan (which is charged on his/her property) either as one lump sum or in smaller sums which may be drawn down at any time. Fixed or variable interest is charged on this loan. But, unlike an ordinary domestic mortgage, that interest is only paid when the property is sold, which may be when the homeowner dies or moves into a residential care home on a permanent basis. Interest rates are high in order to compensate the lender for their inability to recover the loan for what might be many years. At the time of writing, *the Telegraph* reports that the average annual percentage rate for new lifetime mortgages is 5.35%, but that rate has dropped from 6.55% only three years ago as a result of increasing competition.[858] The disadvantage of these products in comparison with conventional mortgages is that, because interest is accruing and no regular payments are being made, interest is compounded. For example, *the Telegraph* reports one instance where a loan of £36,000 was taken out in 2000 at a rate of 8.25% and secured by a lifetime mortgage now requires a payment of £103,000 in order to discharge that debt.[859] Of course, it may be that the mortgaged property will have increased in value in the meantime, so that in times of rising house prices these schemes will still appear attractive. On the other hand, many may still consider such a scheme to be prohibitively expensive.

In contrast to a 'roll-up mortgage', a 'fixed-repayment mortgage' is a scheme which allows a homeowner to borrow a lump sum with the sum that is to be repaid, when the property on which the loan is secured is sold or transferred, being agreed at the outset. This agreed sum will be substantially more than the sum borrowed and will be dependent on such matters as the borrower's age and life expectancy. Such mortgages are very much a gamble on the part of the mortgagor. If the homeowner dies within a short while of taking out a 'fixed-repayment mortgage', then his/her beneficiaries will be all the poorer for the fixed sum will have been calculated with reference to the homeowner's life

[857] https://www.whatmortgage.co.uk/news/equity-release-now-fastest-growing-segment-mortgage-market/ (accessed: 18/01/18).

[858] http://www.telegraph.co.uk/finance/personalfinance/borrowing/mortgages/10307625/The-equity-release-industry-secret-that-could-save-you-thousands.html 17th January 2017 (accessed: 18/01/18). This can be compared with a fixed rate of 2.95% for a loan repayable over ten years which was available in November 2017.

[859] *Ibid.*

expectancy at the date on which the mortgage is taken out. Equity release schemes such as this therefore have the capacity to ruin the legacy that one is able to leave the next generation and accordingly one's reputation with that generation. In the eyes of many, that seems to be a significant disadvantage of the 'fixed-repayment mortgage'.

The home reversion scheme is significantly different from a lifetime mortgage. Here, a lender will purchase either part or the whole of the property in question for an 'agreed sum'. The homeowner can take that sum either in one lump sum or as regular instalments. In return, the lender grants the homeowner a lease at a nominal or peppercorn rent which allows him/her to occupy the property until they die or vacate the same on a permanent basis. The lender can only sell the mortgaged property on either of these two events. The 'agreed sum' will be far lower that the market value of the property, or part of that property, and will, again, reflect the inability of the lender to recover the loan for what may turn out to be many years. With any of these schemes, withdrawing a significant lump will ordinarily affect any means-tested benefits that the borrower might otherwise be entitled to, such as pension credits.[860] Some local authorities have attempted to signpost some equity release schemes which are designed to release small amounts on a regular basis (largely flexible lifetime mortgages) that would not have any adverse effect on the borrower's entitlement to state benefits, but the up-take seems to have been small.[861] Alongside the home reversion plan is a very similar product known as a 'sale-and-rent-back transaction' which only differs from the former scheme in the nature of the contractual arrangement for the borrower's future occupation of the property.[862] Here, the terms of the advance that is secured on the property and the rent payable under the lease back are negotiable.[863]

How attractive are these equity release schemes for the purpose of raising money for social care in later life? This thesis focusses on those disabled elderly who have adult children who are willing and able to provide the necessary care that they require at home. In such cases, parents could use equity release schemes in order to pay their children to care for them. Yet, in reality, this is rarely done, for equity release is perceived as both expensive and risk-laden. The 'middleman' - in the form of the

[860] https://www.gov.uk/pension-credit (accessed: 18/01/18).

[861] Lord German (ed.) *Making the Most of Equity Release: perspectives from key players*, (2012) published by the Smith Institute; in particular, chapter two, Rachel Terry, *Asset-Rich: Income Poor*, at pp 17-25 at p. 25, - https://smithinstitutethinktank.files.wordpress.com/2014/11/making-the-most-of-equity-release.pdf (accessed 24/02/18).

[862] See: fn. 855, *supra*, p. 284.

[863] *Ibid.* at p. 293

lender - exacts a high price for the initial loan or draw-down facility with interest rates at least twice those available for 'standard mortgages'. In practice, the disabled elderly rely on the goodwill of their adult children to provide the informal care that they require without any legal obligation to pay for that care either while it is being provided or after their death. Yet, as we have seen, this goodwill may be abused. What is needed is a mechanism that will allow for equity release as a means of funding the social care costs of the disabled elderly but without the inherent disadvantages and risks that accompany existing equity release schemes.

This is where the UK Government can 'bridge the gap' so to speak. At present, equity release interest rates benefit the lending institutions; and, such rates are dictated by the market. If the UK Government was to provide a scheme – a draw-down loan scheme – under which it would make funds available for elderly parents to pay their adult children for their social care, or even pay these adult children directly, and in return take an interest-free charge on the parent's property to cover the sums that it was prepared to make available at any one time, it could at once provide the incentive needed for adult children to continue to provide this care and to earn a 'living wage' while doing so. Of course, the value of the parents' property - as a gift to the next generation - would diminish as a result of the charge, but the money that would be made available as a consequence of a scheme such as this would go to those who were providing the care. Elderly parents would be unlikely to object to one or more of their children having part of their inheritance in advance in return for providing this care. What is more, there would be no 'middleman' making capital out of such a scheme as this. And, if the funds available for social care through a scheme such as this carried no interest, but were simply recoverable from the care-receiver's estate on their death, there would be no risk of any market fluctuations, such as those seen in the 1980s and 1990s, destroying the scheme.

One could argue that a scheme such as this would be costly for the UK Government. Once introduced, the State would have to pay adult children to provide social care that, as things presently stand, is provided by these carers largely free of charge to the public purse. But, the UK Government would, of course, have security for what it chose to make available to these carers in the form of the charge taken on the care-receiver's property; in terms of balancing the country's books, the scheme would initially be fairly neutral.[864] It is only as and when unrecoverable debts are written off that the costs of the scheme would show up on the country's balance sheet. And, given that the government would

[864] One consequence of the proposed charge on the care-receiver's residential property would be that Government revenue from Inheritance Tax ('IHT') would fall as more estates would fall into the nil rate band. This would require some re-thinking of this form of tax with the introduction of, say, a 20% band on the value of a deceased's person's estate between £100,000 and £325,000. This would bring IHT in line with a proposed floor for social care costs at the first of these two figures.

be taking what might reasonably be termed 'gilt-edged security' for much of what would be paid out, it would only be in circumstances where the care-receiver had no property on which to secure any advances that the government might make for his/her care, that the scheme would cost the public purse anything at all. The UK is already familiar with a scheme such as this; indeed, the payment of tuition fees in higher education is funded in much the same manner. The costs of providing loans for tuition fees do not show up in the country's 'public accounts' unless and until they are written off and, under the present legislation governing these tuition loans, that will not be for some 30 years after the loan is made.[865] While the UK Government would have rather less control over the writing-off of loans made to cover care costs, which must be linked to the care-receiver's death, such a scheme is surely an attractive way of incentivising the provision of domiciliary care for those in need of the same by their adult children.

What is more, in practice, the UK Government is in a position to implement such a scheme, without the assistance of a third party, because it has its own sovereign currency. In short, it is able to manufacture its own money; albeit, in modern times, this may simply be figures on an electronic ledger. Indeed, a scheme of this nature is just the sort of social engineering that a government with control of its own money supply ought to be undertaking.[866] Of course, the scheme has its weaknesses. Those elderly who live in rented properties would be unable to provide security for any monies advanced to pay for their care. But, in practice, that should not mean that they should fall outside the scheme altogether. If any money is advanced to pay their social care costs, that money would remain a debt, recoverable from their estate. Should the debt not be recovered in the usual way, only then would it be written off. Those elderly who reside in properties whose values are low may see the whole of 'brick and mortar savings' disappear in social care costs with nothing to leave to their friends and relatives on their death. But, here, a 'protected element' of their estate of, say, £75,000 - £100,000, against which the Government could not claim, should leave them with something to pass on to the next generation, friends or neighbours. And, their care would continue to be funded notwithstanding the absence of security for any monies that needed to be advanced. Anti-avoidance provisions would also be needed. One would need to prevent people giving away the value of their estate during their lifetimes in order to escape the costs of their care being recovered from their estates on death. Claw-back provisions would be necessary allowing the UK Government to recover against the donees of any such money or assets. Perhaps, more significantly, legislation would be needed restricting the amount of money that could be released to homeowners under equity release

[865] https://www.bbc.co.uk/news/education-45474557 (accessed: 12/09/18).

[866] *Ibid*; in particular, Richard Murphy*: The Joy of Tax*, (Penguin / Random House, 2015).

schemes for any money so released would not be available to fund the homeowner's social care needs. In addition, legislation might be needed to prevent people spending money, at least in part, that would be generated by 'trading-down' either as they began to approach, or during, their retirement. There are, indeed, some difficult issues to resolve before the proposed scheme can be implemented. Yet, similar anti-avoidance provisions are contained in the Inheritance (Provision for Family and Dependants) Act 1975, and these appear to work well in practice. One item that the UK Government would need to carefully consider before such a scheme was introduced was whether the government charge over the care-receiver's home to meet social care costs would diminish the value of the property in question for Inheritance Tax purposes. If it did, this might well lead to a significant loss of revenue from such a tax as more estates would fall into the present nil rate band. That said, the present UK Government were prepared to sustain such a loss in revenue when it introduced the residential nil rate band in April 2017. And, therefore, a paring-back of the nil rate band to, say, £250,000, and the introduction of a sliding-scale for the rate at which inheritance tax is charged, may provide the practical answer to any such loss in revenue.

What would this scheme look like in practice? As the adult child carer would now be working for reward, it is suggested that a care contract would need to be put in place in order that the social care needed is closely defined and the sums payable for that care are clearly set out. Given that the deteriorating health of the care-receiver may add to the burden of the social care that is needed in any given case, the contract needs to be reviewable at regular intervals. At one level, there is room for these contracts to be freely negotiated. But, in realty, what is required, it is further submitted, is a default contract much along the lines of the Illinois Probate Statute of 1975 in order to enable those adult children who provide social care without first entering into a social care contract with the care-receiver – and, in practice, there may be many reasons why no contract is agreed[867] - to be able to claim some form of financial recompense for the care they have provided. It is also anticipated that a default contract of this nature would do much to determine the terms of any *inter vivos* social care contract that may be entered into.

With this in mind, the following section of this chapter investigates how these social care contracts might be entered into and what protection ought to be put in place in order to ensure that the two contracting parties – the elderly disabled care-recipient and the adult child carer – have equality of bargaining power and responsibilities under these contracts. Later sections will then consider how a

[867] This includes circumstances where the care-receiver does not have the mental capacity to make a contract. That is why, any scheme such as that proposed in this thesis must always have either a default contract or a mechanism for the courts to make a contract on behalf of a person who does not have capacity to act on his/her own behalf.

'family care contract' – as these social care agreements will now be called – can be supported by local authorities, the courts and, ultimately, by Central Government in providing a solution to increasing demands for social care provision amongst our elderly community.

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6.5 FAMILY CARE CONTRACTS

As we have seen, the Illinois Probate Act of 1975, section 18 -1.1, introduces a form of *ex post facto* statutory care contract into the relationship between an elderly disabled parent care-receiver and their adult child informal carer. This is, of course, no ordinary contract. In particular, there is no *consensus ad idem* on the details of any care arrangements that need to be undertaken or, indeed, on the consideration that is to be paid in return for these services. Nevertheless, the statute puts in place a form of default, quasi-contractual claim under which a claimant can seek payment from the estate of someone for whom they have cared in the form of a given sum of money; in other words, financial compensation is automatically payable in return for the care that has been received, provided that the requirements of the Act are otherwise satisfied.[868]

Understandings are part of the very lifeblood of all social interaction in society. When unsaid they become wholly dependent on the trust that one party reposes in the other. The law finds it difficult to enforce obligations that might be said to arise under arrangements of this nature. If an understanding is unsaid, there is ample room for disagreement over whether there was, indeed, any such understanding or, if there was, the terms of that understanding. In some areas of the law, obligations have been imposed out of defined sets of circumstances whether or not any understanding was ever reached.[869] But, in most instances, the courts are reluctant to interfere. The result is that these obligations become moral, and not legal.

[868] Although such compensation is described here as 'automatic', the courts in Illinois are able to either reduce or increase the sum payable from the estate of a deceased care-receiver from the figures set forth in the Act. In particular, the Act states that '… a court may reduce a[n] [statutory custodial claim] amount to the extent that the living arrangements [as between carer and care-receiver] were intended to and did in fact also provide a physical or financial benefit to the claimant', and then goes on to list other factors that might further influence the exercise of this discretion.

[869] The law of fiduciary obligations is but one example of judicial intervention of this nature.

In these circumstances, any 'family care contract' must therefore be rendered certain from its inception. If an informal carer is going to be entitled by law to some form of payment in return for rendering an agreed set of services to the care-receiver, anyone who might be asked to determine whether these services were, indeed, rendered in order to authorise such a payment needs to know what these agreed set of services were, how regularly they needed to be administered and, if this is in dispute, whether they were administered. In practice, this knowledge can only be safely gleaned from a well-defined, written agreement; in fact, the words 'agreed' and 'defined' in the foregoing sentence plainly demonstrate the need for what the law recognises as a 'contract in writing' between the carer and the care-receiver.

The State has a duty to protect its citizens and to further their collective interests.[870] The instigation and promotion of a 'family care contract' would seem to fall under either head given the challenges that increasing longevity will bring to our society over the next thirty years and more. While it would not be appropriate in this thesis to look at the possible terms of such a contract – for they would surely be heavily dependent on each individual care-receiver's needs – it is appropriate to consider how the creation of these family care contacts would need to be underpinned. It is submitted that, in practice, two particular requirements would be essential to the instigation of a workable 'family care contract'. Firstly, there needs to be a registration and 'policing' system for all such contracts. This registration would have to be compulsory and the registration authority would need to be the care-receiver's local authority, the body that carries overall statutory responsibility for satisfying the social care needs of the disabled elderly in their area. Such a system already exists in a number of Australian states and appears to work well, albeit in a slightly different context.[871] In fact, systems such as this also exist in other areas of UK local authority practice, for example, in relation to children in care. With this in mind, the development of a registration and policing system operated by local authorities as part of their statutory obligations relating to the provision of social care appears to be readily achievable. Secondly, each family care contract needs to be carefully negotiated and then set down in writing before it is registered. This presents something of a challenge. In some instances, there will be a marked imbalance of bargaining power between the informal carer and the care-receiver; and, indeed, in perhaps the majority of these cases, the 'power' will be with the care-receiver rather than the carer because the carer feels that he or she has a moral duty to provide the care that the care-

[870] See: chapter three, *supra*.

[871] These registration systems are designed to facilitate the survivor of the relationship obtaining superannuation and inheritance benefits on the death of the first to die rather than providing a means by which one party to the relationship might obtain compensation for care services that are rendered in the course of the registered relationship.

receiver needs whatever the terms that might be proposed. What is needed is a neutral third party who can orchestrate the making of these family care contracts. It is therefore proposed that each family care contract must be mediated by a qualified mediator who will be able to counter-balance any inequality in bargaining-power between the two sides through techniques that are now becoming more widely understood with the rise in the use of 'deal mediation'.

The registration of 'family care contracts' would bring both certainty and accountability. On the one hand, there would be an easily accessible record of the parties who had entered into such a contract, that a family care contract had been made in regard to a given care-receiver and the terms of such a contract .[872] And, on the other hand, the care-receiver's local authority, who would be subject to a statutory duty to oversee the operation of the 'family care contract', would know the precise terms that had been agreed between the parties, which would help in any assessment of whether the care-receiver's needs were being met on a periodic review of his/her social care situation.

The availability of a registration scheme which records either 'close personal relationships' or 'de facto relationships' is now common across almost all Australian states.[873] Such schemes exist for many reasons. For our purposes, it matters not why the scheme is in place: it is the very existence of such schemes and their operation that is significant. In New South Wales, 'close personal relationships' of dependency and interdependency may be registered where the parties live together and one or of the parties provides domestic support and personal care to the other, regardless of whether or not the parties are related to each other.[874] Under the scheme proposed in this chapter, the registration of these family care contracts would be a condition precedent to their enforceability both against the estate of the care-receiver after his/her death and against the care-receiver *inter vivos* or, more likely,

[872] The terms of any governing legislation would need to state that there could only be one family care contract per care-receiver.

[873] The only Australian states that do not have any such registration system at the time of writing are the Northern Territory and Western Australia - R. Graycar and J. Millbank, From Functional Family to Spinster Sisters: Australia's Distinctive Path to Relationship Recognition, Wash. U. Jo. of Law and Policy, 121, (2007), vol. 4. Issue 1, at pp. 170 et seq. - file:///G:/Journal%20of%20Law%20and%20Policy%20%20Australia%20registration%20of%20personal%20relationships.pdf (accessed: 04/02/18)

[874] The New South Wales' Property (Relationships) Act 1984, as amended, s. 5; and, A. Head, The Legal Recognition of Close Personal Relationships in New South Wales: A Case for Reform, *Flinders Law Journal*, (2011), pp. 53 et. seq. at file:///G:/NSW%20close%20personal%20relationships%20-%20article.pdf (accessed: 04/02/18),

the State in regard to the availability of the enhanced benefits for carers proposed in section 6.4 above.[875]

As for the scheme itself, it is proposed that the informal carer and care-receiver would enter into a 'family care contract' for a defined period of time under which the informal carer would undertake to provide the care-receiver with a set of social care services as therein defined in return for which the informal carer would be paid an agreed sum at periodic intervals during the continuation of the contract. Such a contract would be reviewable by the care-receiver's local authority on a biannual basis. If the informal carer is not providing the agreed services as provided for by the family care contract or if the care-receiver's circumstances have changed such that he/she requires a higher level of care than the informal carer is able or willing to undertake, the local authority would have *locus standi* to apply to the court for the termination of the family care contract whereupon it would be under a statutory duty to implement alternative measures to satisfy the care-receiver's need for care. In return for the provision of social care to the care-receiver, the informal carer would be entitled to claim a given sum as agreed under the 'family care contract' from the State.[876] And, for its part, the State would be entitled to reclaim any moneys so paid over (without interest) from the care-receiver under the statutory charge that would be created by the registration of the family care contract.

How does the Illinois Probate Act of 1975 assist us in the introduction of such a scheme? The legislation that would need to be introduced in order to set up such a scheme would introduce a default care contract on similar lines to that introduced by the Illinois Act. Such a provision would allow those who had provided social care services to a now deceased person without having made, or, if made, without having registered, a 'family care contract' to claim compensation for the skill and labour expended in providing such care from the deceased's estate as provided by the legislation. In this way, legislation would create a base-line for the rate at which the charges for informal social care in a negotiated 'family care contract' would be set. Should a scheme such as this be introduced, it is anticipated that these charges would be fairly low in much the same way as the compensation provided for in the Illinois Probate Act of 1975 is low in comparison with the cost of such care on the open market. This would encourage the parties concerned to make and register their own 'family care contracts' rather than to rely on the default contract set by the State.[877]

[875] In particular, those benefits that were made available in return for a statutory charge on the care-receiver's home – see: section 6.7 i*nfra*.

[876] In practice, there would need to be financial limits placed on the sums that could be claimed from the State.

[877] Although, of course, the greater encouragement would lie in the availability of enhanced State benefits.

Of course, the crucial feature of the proposed scheme is the 'family care contract' itself. As noted earlier, it is essential to the nature of this scheme that the parties negotiate a 'fair price' for the provision of the social care services described in the contract; one party should not be permitted to use his/her position, or indeed the other party's situation, to exploit the other party in any way. It is therefore proposed that these 'family care contracts' should be mediated; in other words, they should be negotiated and agreed before a mediator whose task would be to ensure that no party is exploiting the other.

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6.6 THE MEDIATION PROCESS

The conventional process that precedes the formation of a typical commercial contract is not really appropriate for the making of a 'family care contract'. Ordinarily, carers and care-receivers are not bargaining at arm's length. Each party has an 'attachment' to the other; and, that attachment is often born of a lifetime of 'history' between them. In any given situation there will, almost invariably, be many factors that will influence an understanding of what the caring process might entail: the care-receiver's needs, the time that the carer can devote to the caring process, the moral responsibility felt by the carer to provide for the care-receiver, the respective financial positions of each party. And, each one may have a significant impact on any agreement or arrangement that might be reached between the two parties.

There is, of course, a well-recognised presumption that 'family agreements' are not intended to have contractual effect. And, in practice, this presumption needs to be displaced by evidence to the contrary.[878] However, formal 'mediated' care contracts which are then registered with the care-receiver's local authority should, ordinarily be sufficient to displace this presumption.[879] Indeed, in Illinois there is support available from the legal professions for the making of private 'family care-giving contracts' which are considered to be legal binding on both sides.[880]

[878] See: *Jones v Padavatton* [1969] 1 WLR 328.

[879] See: *Merritt v Merritt* [1970] 1 WLR 1211, where the reduction of the agreement into writing, signed by the parties, was evidence of the parties' intention to be bound by the same.

[880] Kerry R. Peck, Creating Effective Agreements for Payment of Family Caregivers, *Bifocal: Journal of the ABA Commission on Law and Aging*, vol. 37, issue 3, (2016) -

In the conventional mediation process, a neutral third party assists those in dispute to resolve their differences by reaching a mutually acceptable solution which is then recorded in writing by the mediator and signed by the parties. In doing so, the mediator attempts to identify the parties' shared needs and interests, to allow the parties to talk constructively to each other through the person of the mediator and to work with them to find mutually acceptable proposals for the settlement of their differences. In this way, the focus of any mediation is not on the rights and liabilities of the parties, but on their respective needs and interests; in short, mediation is a future-focussed process.[881] And, of course, that is precisely what the intended informal carer and care-receiver require where caring arrangements are being discussed: to follow a process that sees the parties' future needs and interests as paramount. Here, mediators have the skills that both informal carers and care-receivers need in order to enter into a 'workable arrangement' over the future provision of care for the care-receiver.

While, conventionally, mediation is seen as an 'alternative dispute resolution process', the modern concept of mediation now embraces 'deal mediation'; here, the 'deal' between two parties is not confined to the resolution of a dispute but has moved on to the creation of contractual agreements between parties who have no history of working together.[882] Salacuse has described the role of mediation in such instances as covering what he describes as 'deal-making, deal-managing and deal mending'.[883] And, he concludes that, '… [i]f one defines a mediator broadly as a third person who helps the parties negotiate an agreement, then their use in deal-making is fairly extensive.'[884] While we may be familiar with mediation in relation to the last of these items, this analysis emphasises that the use of mediation to facilitate the making of a long-term, workable agreement operates elsewhere. And,

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https://www.americanbar.org/publications/bifocal.vol_37/issue_3_february2016/creating-effective-caregiver-agreements.html (accessed: 17/09/18); and, K. Gabriel Heiser, Personal Care Agreements: A Must for Caregiver Compensation and Medicaid Planning - https://www.agingcare.com/Articles/personal-care-agreements-compensate-family-caregivers-181562.htm (accessed: 17/09/18); see: https://www.agingcare.com/documents/personal_care_agreement-AgingCare.pdf (accessed: 17/09/18), for a precedent of such an agreement.

[881] This passage is adapted from the author's own description of mediation in advertising an international mediation conference at Liverpool Hope University in February 2015.

[882] Manon A. Schoneville and Kenneth H Fox, 'Moving beyond 'Just' a Deal, and Bad Deal or no Deal: How a Deal-Facilitator Engaged by the Parties as 'Counsel to the Deal' Can Help Them Improve the Quality and Sustainability of the Outcome', chapter 5 in Arnold Ingen-Housz, *ADR in Business: Practice and Issues Across Countries and Cultures*, vol. II, (Kluwer Law International, 2011) at pp. 81-116, and, in particular, section 3, 'Deal-Facilitation: Mediation without a dispute (or negotiation with a mediator)'.

[883] Jeswald W. Salacuse, 'Mediation in International Business', in J. Bercovitch (ed.), *Studies in International Mediation*, Palgrave Macmillan, 2002, pp. 213-227.

[884] *Ibid.*

in the case of family care contracts, it is this 'deal-making' and 'deal-managing' that will surely be more significant than the traditional mediator's role of 'deal-mending'.

Why mediation? The mediation process is designed not only to assist parties to make a deal, but to make the 'right' deal, and that will often be heavily dependent on what has gone before as much as what will need to be done in the future. Confidentiality is the essence of mediation; each party is safe in the knowledge that what they say to the mediator in private will not be communicated to the other party without their permission; and, much may need to be said about what has gone before. Within this process, mediators are experts in 'managing the transfer of information'.[885] Within the conventional mediation process, it is this exchange of information that is often the key to achieving a workable agreement between the parties. Once the parties' needs and interests are explored – and, in many cases, this will involve communicating those needs and interests to the other party in a controlled manner through the mediator – their initial adversarial positions are often abandoned. Although there may be no dispute to resolve where informal carer and care-receiver are about to enter into a family care contract, the parties' respective needs and interests have to be considered and provided for. The care-receiver may value his or her bridge-playing afternoons at the local community centre but may be too afraid to mention such a need in case the informal carer misinterprets this as a form of social rejection. Equally, the informal carer may put a high price on his or her annual summer holiday in foreign climes but is too worried to raise this matter in case the care-receiver rejects the idea of a couple of weeks respite care in a local care home because they fear that this might lead to a more permanent arrangement. In practice, mediators can bridge these gaps. Where the conveying of such information might lead to conflict and mistrust, a skilful mediator will find a way of raising concerns in a positive and forward-thinking manner.

Mediators also possess other skill-sets that will undoubtedly assist the making of a 'family care contract'. Mediators are able to soak up any emotion that might otherwise prevent the parties – informal carer and care-receiver – from making a clear and 'workable' family care contract. Moreover, on receiving information imparted to them in confidence, they are able to weigh up whether progress – in terms of moving the parties towards an agreement – might be achieved in trading that information. Indeed, if information is to be traded, the mediator can assist in determining what information should be shared and on what basis that sharing should take place. What is more, mediators are able to encourage the parties to move from what may be, at least initially, a willingness

[885] Scott R. Peppet, 'Contract Formation in Imperfect Markets: Should we use Mediators in Deals?', (2004) *Ohio State Journal on Dispute Resolution,* vol. 19, pp. 283-367 at p. 292.

to make 'unobservable concessions'[886] towards the making of practical and timely proposals in relation to the caring process and everything that surrounds the same. Indeed, possibly the most important feature of that process in the scheme of these proposed family care contracts will be to obscure the fact that the parties are negotiating for that is, conventionally, seen as an element of 'dispute resolution'; most informal carers and care-receivers will, ordinarily, be anxious to avoid connecting what they are doing with 'dispute resolution'.

At its heart, mediation is a future-focussed process, whether or not it involves the resolution of a dispute. That is also the focus of 'family care contracts'. In seeking agreement, the parties need to come to an arrangement that foresees future difficulties and provides mechanisms for their resolution. The mediator's commonly-used 'what if ...' question provides the lens through which any proposals need to be considered. And, in reaching any agreement on the delivery of the envisaged service those involved in mediation must travel through it at their own pace.[887] Mediation, after all, is entirely voluntary in nature; a party's journey through the process is his/her own and cannot be determined by others. And, that is why, for a process that may well be a delicate one in some cases, the proposed 'family care contract' should be mediated from its inception through to its conclusion.[888] Finally, mediators have the ability to take any steps that might be necessary to protect any would-be carer or care-receiver that might be vulnerable to abuse and to ensure that any power imbalance that may exist as between the parties, and which might stand in the way of such a 'family care contract' being made, is equalised as far as it can be.

What is said above is predicated on the success of the mediation process as a way of either resolving conflict or, more pertinently, securing an agreement in a no-conflict situation where the two parties have, in part, conflicting interests. Yet, how does one measure 'success'? Those who claim that mediation is a success often point to outcomes: mediation is successful because it achieves an outcome or a set of outcomes. Here, 'success' is measured from the mediator's point of view: the conflict has been resolved or the deal has been done. On the other hand, if the success of mediation is measured from the participants' point of view, the issue becomes much more complex. In this instance, one must deal with 'satisfaction levels' and how to measure the same. Here, one might ask, 'Was each party satisfied with the process of the mediation?' and 'Was each party satisfied with the

[886] *Ibid.* p. 295

[887] Freddie Strasser and Paul Randolph, *Mediation: A Psychological Insight into Conflict Resolution*, (Continuum, 2004), referencing, in particular, the work of Carl Rogers, p. 13.

[888] Of course, some 'family care contract' will only be terminated by the death of the care-receiver. Here, 'through to its conclusion' should be taken as a reference to the renewal of such contracts.

outcome of the mediation?' Appling a Likert-style rating to the measurement of each party's satisfaction with both the process and the outcome of the mediation may well produce an answer from which it is nigh impossible to measure its success on any objective basis. And, indeed, mediations in different contexts are susceptible to other ways of measuring success. In the resolution of neighbour disputes through mediation for example, one could choose to measure success by assessing the likelihood of the parties speaking constructively to each other in the future. Scholars have long-wrestled with the problem of how to measure the success of mediation. Studies have taken place in the field of international conflict resolution,[889] in relation to disputes in the construction industry,[890] and, indeed, in the realm of family mediation,[891] but with differing approaches and results. Of course, the mediated family care contract that is proposed is a significantly different beast in comparison with an agreement that attempts to resolve a dispute in any of these fields. Deal mediation cannot be easily compared with conflict resolution. Any reservations one has over the success of mediation in resolving disputes cannot be justifiably transferred to the process of arriving at an agreement in a no-conflict situation where each party is intent on reaching some form of accord. What is more, a family care contract is a rolling-agreement and may be periodically reviewed by the parties not a once-and-for-all solution that may be re-evaluated as a 'bad deal' as time marches on.

Of perhaps greater substance – at least at first sight - as an argument against the introduction of the family care contract is the gender-bias that has attached to the provision of social care to members of the older generation with a family. Wherever one seems to go in the modern world that burden falls disproportionally on women. Will the promise of greater income in the form of an enhanced carer's allowance and the promise of capital when the care-receiver dies through the family care contract place additional pressure on women to provide for the social care needs of an elderly disabled relative regardless of whether that relative is her blood-relation or one of her husband/partner's parents or relatives? We have already seen that this question has supposedly proved problematic to legislators

[889] Juan Carlo Munevar, A New Framework for the Evaluation of Mediation Success, [2005] *Brussels Journal of International Studies*, pp. 70 et seq. - https://www.kent.ac.uk/brussels/documents/journal/2005/Juan%20Camilo%20Munevar%20-%20A%20New%20Framework%20for%20the%20Evaluation%20of%20Mediation%20Success.pdf (accessed: 10/05/18).

[890] Douglas A. Henderson, Mediation Success: An Empirical Analysis, *Ohio State Journal on Dispute Resolution*, Vol. 11:1, 1996, - https://kb.osu.edu/dspace/bitstream/handle/1811/79731/OSJDR_V11N1_105.pdf?sequence=1 (accessed: 10/05/18).

[891] Janet Smithson, Anne Barlow, Rosemary Hunter and Jan Ewing, 'The 'child's best interests' as an argumentative resource in family mediation sessions', *Discourse Studies,* 2015, Vol. 17(5) 609-623.

in Japan.[892] That said, there is no empirical data that demonstrates that paying cash incentives to women to provide social care would have resulted in an increase in pressure of women to care for elderly relatives given that in Japanese society that pressure is already present in a marked degree. Indeed, at this juncture one could well advance the argument that attaching a monetary value to care work such as this would, in practice, make the work more appealing to men given their perceived need to be seen as 'bread-winners' within the family. Similarly, one might, here, advance the claim that, given that women are already under pressure to provide whatever social care work that is needed because they are perceived to be better at it than men, they might as well be paid for that work if they are to do it in any event. What is surely needed is not to deny payment to whomsoever takes on the burden of providing social care within a family but to change society's perception that caring is 'women's work' and not men's.

Mediation is a tried and tested resource. It may not be the panacea for all ills, but it is a well-developed, collaborative process. Within the scheme that is presently being put forward, the proposed 'family care contract' would not only be created through mediation it would also be managed through mediation. And, in practice, this would be the key to its success. The contract would evolve according to the needs of the care-receiver and according to the desire and ability of the informal carer to meet those needs. Where the care-receiver's need for care increases other family members, friends or neighbours may be brought into the 'family care contract' in an effort to provide for that need; where such people are unable or unwilling to assist, the 'family care contract' may be adapted to take into account the care that will be delivered by professional carers. On a regular, periodic review of the 'family care contract' – which will be a mediated review – the mediator will, where necessary, be able to bring these other family members, friends and neighbours into the conversation. Initially, notice of an intending review would be served on the care-receiver's spouse and all his/her adult children. If a need for an increased level of care is identified, and the care-receiver's existing registered informal carer is not willing or able to provide that care, or wishes to opt out of the caring process altogether, the mediation in which the care-receiver's needs are being addressed can always be adjourned for a short period in order to facilitate this expanded conversation. Mediation is entirely flexible; it exists to meet the parties' needs, not those of the mediator or any other person or institution. Of course, given the vulnerability of the care-receiver and his/her need for care, 'family care contracts' will require some form of regulation. In practice, this must be the

[892] See: chapter 2, section 2.5 *supra*.

province of local authorities and the courts. The following section attempts to identify their respective roles in this process.

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6.7 THE ROLE OF LOCAL AUTHORITIES AND THE COURTS

If it is to succeed in the role that it is to be given, a 'family care contract' needs the support of the care-receiver's local authority and, ultimately, the courts. Local authorities are already heavily involved in the process of delivering social care to the community which they serve. Once a needs assessment has identified an eligible need for social care the care-receiver's local authority must meet that need.[893] In doing so, the local authority will draw up a care and support plan which details how this need is to be satisfied. But, if this need is already being satisfied by an informal carer or carers that is as far as the local authority has to go.[894] Where a need is not being met, the local authority must either provide or arrange for the provision of services that will meet the need. Unless the local authority already provide a service that will meet this need free of charge, a financial assessment will then be carried out in order to determine whether the adult care-receiver must pay for the services or make a contribution to their cost.[895]

All this is, indeed, valuable work without which the present social care system could not function. And, if 'family care contracts' are introduced, local authorities will need to carry an even greater burden of responsibility. Firstly, they will need to operate a registration system for these contracts. If a care assessment reveals that a need for care and support is already being met by an informal carer or carers, a local authority should be under a duty to inform both carer(s) and care-receiver:

[893] The Care Act 2014, ss. 9 and 13(1), and chapter two, section 2.4, *supra*.

[894] *Ibid,* s. 18(7).

[895] *Ibid,* s. 17.

(i) that the courts have the power to make financial provision for an informal carer from the estate of the care-receiver following the care-receiver's death in accordance with the legislation that is proposed in this thesis;

(ii) that the parties may make a 'family care contract' which will override and replace that entitlement to financial provision, so that the ultimate cost to the care-receiver for the care which is to be provided by the informal carer will be a matter for agreement rather than assessment by the courts;

(iii) that, if a 'family care contract' is made, the informal carer will be entitled to additional financial support during the caring process which will be provided by Central Government to the extent agreed by the parties (subject to a maximum limit), albeit that financial support may be recouped from the care-receiver's estate through the imposition of a charge on the care-receiver's home, although a sale of that home would not be implemented until after the care-receiver's death or on the earlier sale of the property.[896]

If the parties decide to enter into a 'family care contract', the local authority would make a recommendation in relation to the needs of the care-receiver and would assess the weekly cost of meeting those needs. That cost assessment would form a guide for both the mediator and the parties in relation to the task of agreeing the cost of the informal care that would be covered by that contract. The parties would then be referred to mediation. And, one hopes, that mediation would produce a 'family care contract', duly signed by the parties, under which the services which are to be provided by the informal carer and the cost of these services to the care-receiver are clearly stated. The 'family care contract' would then be registered with the local authority. Once registered, a 'family care contract' should be open to public inspection. In this way, anyone who may be interested in the care-receiver's welfare will be able to inspect the register in order to ascertain whether such a contract has been registered and to determine whether the principal terms of the contract are being implemented. In the event, that he/she considers that the terms of social care service are not being provided for in accordance with the 'family care contract', he/she should be able to request the care-receiver's local

[896] The legislation would also contain provisions (i) for the transfer of any charge that is taken by the UK Government to secure the payment of a 'carer's wage' during the caring process from one property to another in case the care-receiver wishes to move into, for example, sheltered accommodation instead of a nursing home as he/she grows older and more infirm, (ii) postponing the enforcement of the charge until after the death of the care-receiver's spouse if he/she is living at the property / has a beneficial interest therein at the date of the care-receiver's death.

authority to investigate and, if necessary, to use its powers to review the operation of the 'family care contract' that is presently in place.[897]

Secondly, local authorities would need to oversee the carrying through of these 'family care contracts'. In doing so, local authorities would have the power to refer any breach of the terms of such contracts to the courts. And, in turn, the courts would have the power to suspend or terminate these contracts.[898] Of course, the parties may provide that their 'family care contract' is time, or even event, limited. On the expiry of the agreed time, or on the happening of the agreed event, the local authority would then have the power to undertake a further needs assessment and to re-start the process that took place before the 'family care contract' was made. In addition to this, local authorities would have the power to undertake a periodic review of all registered family care contracts in order to determine (a) whether the care-receiver's needs have changed since the' family care contract' was made, and (b) whether the care-receiver's needs as set out in the 'family care contract' were being met by the informal care that was being provided. In the event that the care-receiver's needs have changed, the local authority would have to reassess how those needs might be met and open up a discussion with the informal carer as to whether he/she was prepared and able to meet those needs. In these circumstances, the existing 'family care contract' would be terminated and replaced with a new agreement relating to the provision of social care for the care-receiver.[899] If the parties were not prepared, or able, to do this, the courts would have the power to terminate the existing 'family care contract'. In the event that the local authority's review of an existing 'family care contract' determined that the care-receiver's needs as detailed in that contract were not being met, then, again, the local authority would have the power to refer the contract to the court for termination if it so determined.

What is set out above in relation to the role of local authorities in the performance of these 'family care contracts' has already substantially introduced the role of the courts in relation to these contracts. As regards the operation of a 'family care contract' during the lifetime of the care-receiver, the courts would need to be on hand in order to resolve any disputes between: the care-receiver and

[897] Some details in relation to 'family care contracts' might be excluded from the register; for example, the amount payable to the informal carer in return for the services that he/she is obliged to perform.

[898] The courts would not have the power to enforce these contracts by injunction.

[899] This new agreement would be reached through the same process as the earlier contract.

the informal carer;[900] the local authority and the informal carer;[901] the informal carer and any 'interested party';[902] and, the informal carer and Central Government.[903]

Of course, such disputes should only come before the courts where they could not be resolved through a form of alternative dispute resolution, principally, mediation. And, indeed, it is submitted that mediation should be compulsory, such that the parties would only have a right to take their dispute to the courts in the event that mediation failed to resolve that dispute. As regards, the role of the courts following the care-receiver's death, the courts would need to be on hand to resolve any dispute between: (a) the informal carer and the UK Government;[904] and, (b) any claimant who makes a claim against the care-receiver's estate under the default contract contained in the legislation that is now proposed.[905] One hopes that a body of jurisprudence would be quickly evolved in order to assist the resolution of such disputes out of court. And, it may be that guidelines in regard to the exercise of the court's jurisdiction under this legislation might be incorporated in the legislation itself.

In addition, the courts would have jurisdiction over the operation of the 'default contract' along similar lines to those in the Illinois Probate Act of 1975, section 18 – 1.1. That Act does provide the Illinois courts with some discretion not only in admitting claims made under the section in question but also in fixing the sums payable by the state of the care-receiver if the claim is successful. Some measure of discretion is entirely appropriate. That said, the legislation to be introduced in England and Wales

[900] It is envisaged that such disputes, if any, would largely centre on the level of service provided by the informal carer. In practice, the local authority would be involved before any such dispute was referred to the courts, and therefore the courts might only be needed in the event that the local authority refused to act and mediation had failed to resolve the dispute.

[901] Such a dispute might take place on the completion of a local authority review of the 'family care contract' in question which determined that the informal carer was either not providing the social care that the care-receiver required or that the care-receiver's needs had changed and the informal carer was unable to provide for those needs.

[902] Here, an 'interested party' would include an adult child of the care-receiver who was not providing care services under the 'family care contract' then in place, but who was concerned that such services were not being performed and/or that the care-receiver's welfare needs were not being met. In the event of any contention that the care-receiver's welfare needs were not being met, the local authority might also need to be a party to any application that the 'interested party' should choose to make.

[903] Such a dispute might, for example, centre on the informal carer's entitlement to be paid a 'carer's wage' as provided for under the legislation that sets up these 'family care contracts'.

[904] Such dispute would ordinarily be confined to any unpaid 'carer's wage' and the informal carer's entitlement to the same.

[905] The identity of the respondent to any such application would be a matter for the courts in similar vein to applications under the Inheritance (Provision for Family and Dependants) Act 1975.

should encourage the avoidance of litigation between any informal carer who does not have the benefit of a 'family care contract', and who must therefore resort to the statutory claim, and those who represent the deceased care-receiver's estate and/or the residuary beneficiaries. In practice, this should be done by following the lead presented by the Illinois Probate Act of 1975 and fixing a specific sum as the annual stipend for informal carers which is dependent on the type of caring work they have had to perform. In fixing the limits of a 'statutory custodial claim' under the Act (which can then be surpassed at the court's discretion) section 18 – 1.1 bases its figures on the extent of the care-receiver's 'disability'. It is proposed that any such legislation in England and Wales should adopt the categories already in place in determining whether an elderly disabled person is eligible for local authority care services, namely, 'critical', 'substantial', moderate' and 'low'.[906] In this way, use may be made of the local authority's needs assessment in determining the level of care that has been provided; in effect, there will be a rebuttable presumption that any informal carer will have provided care services that are commensurate with the care-receiver's needs as assessed by the needs assessment. If an informal carer wished to contend that the courts should exercise their discretion to award him/her a sum greater than that provided by the proposed legislation, then he/she would have to show that, in reality, the care-receiver's needs were more substantial than the local authority needs assessment disclosed and that he/she provided for those needs at that greater level. Similarly, it would be open for the care-receiver's personal representatives and/or his/her residuary beneficiaries to claim that the informal carer should receive a lower award because, in practice, they did not provide care services at the level required by the local authority's needs assessment.

Any sum claimed by an informal carer under this proposed legislation would also be calculated by reference to the length of time during which care services were provided by the claimant. As it stands, the Illinois Probate Act of 1975 requires a claimant to have provided care services to the care-receiver for 'at least 3 years'.[907] This has been recognised as one of the Act's major limitations and failings.[908] Indeed, it is proposed that the legislation, if adopted in England and Wales, should reduce this requirement to one year and give the courts a discretion to admit claims of less than one year, in particular where the claimant has expended money in adapting his/her own property to cope with the care-receiver's needs and has where the claimant has given up his/her job in order to care for the care-receiver. It is also proposed that the figures set by any legislation that may be introduced are

[906] https://www.gov.uk/government/news/social-care-users-will-be-guaranteed-a-minimum-level-of-council-help-under-new-plans (accessed: 25/02/18).

[907] The Illinois Probate Act of 1975, section 18 – 1.1.

[908] fn. 844, *supra*, p. 84

'low', that is to say, significantly below the market rate for such care services as may have been rendered by the informal carer. It is not suggested that informal carers should be paid a 'market rate' for the services that they perform, merely that they should receive some compensation for what they do in the form of a regular 'carer's payment' provided by Central Government which is underpinned by a statutory charge on the care-receiver's property. One cannot equate what informal carers do with what commercially provided care services achieve because informal carers will receive reciprocal benefits from the caring process.[909] But, they should receive, or be entitled to claim, a sum that acknowledges the value of their work in the context of our modern society and the challenges that it now faces.[910]

It is not practically possible to draft the proposed legislation within the confines of this thesis. Consideration would need to be given to levels of remuneration, the calculation of such remuneration, minimum care service delivery periods, anti-avoidance provisions, the introduction of a statutory limitation period for claims, what to do in instances where one has more than one claimant and the extent of any discretion given to the courts to step outside these provisions. That is a task for a good deal of additional research and much further thought. For the moment, all we can do is to pull some conclusions together and consider where the proposals outlined in this thesis might be taken from this point on.

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6.8 JUSTIFYING AND EXPANDING THE PROPOSED SYSTEM

Throughout this thesis, reference has been made to adult children caring for their elderly, disabled parents and, more recently, to the making of 'family care contracts' between adult child informal carers and their parents as care-receivers. Arrangements such as these, it is submitted, are essential for meeting the social care needs of not only the present generation of disabled elderly, but also the needs of future generations of this growing section of society. Yet, in practice, there is no overwhelming argument in favour of confining such 'family care contracts' to adult children as informal carers and their parents as care-receivers. If there is a concern that those elderly and disabled

[909] See: Jonathan Herring, *Caring and the Law,* (Hart, 2013) at p. 59 et seq.

[910] See: *Ibid.* at p. 106, citing the views and work of Maxine Eichner on this subject in M. Eichner, *The Supportive State*, (OUP, 2010).

who are in need of social care might be exploited by people outside their immediate family,[911] the registration system proposed should provide a sufficient safeguard against this possibility. In fact, the registration of these contracts and their supervision by the relevant local authority should allow other more remote members of the family to offer their services as informal carers and to enter into 'family care contracts' where the more immediate members of the care-receiver's family are unable to do so. Similarly, there is no such reason why friends and neighbours should not be able to enter into these 'family care contracts' where the care-receiver's adult children, if any, cannot do so. While adult children should be given first option to enter into such contracts, if and when the same are needed, remoter members of the care-receiver's family, friends and neighbours should be given the same opportunities where adult children are unable to help. On this basis, the 'family care contract' is, of course, misnamed. Its reach can extend well beyond families. In fact, in time these contracts may develop into 'care unit contracts' with participants forming care units within which the caring process can take place.

The very existence of the proposed 'family care contract' would surely encourage the general public to acknowledge the existence of social care needs on the part of the elderly and the roles and responsibilities of both the family, care-receivers and society at large, in the provision of those needs. Much further thought is needed. But, there will be a good deal of benefit to be reaped by society at large if such a regime is introduced. People are relational beings. Many of us measure the success of our lives by the relationships we form and sustain. The proposed 'family care contract' will encourage these relationships. Informal carers will learn much from them; indeed, such contracts may provide an opportunity in some instances for younger people to be paid carers – albeit operating outside the commercial world – acquiring, on the one hand, valuable social and care-providing skills, and, on the other, the respect and appreciation of an older generation.

Given that the State will need to facilitate, promote and protect these 'family care contracts', the proposals set out in this chapter will involve the State in a greater degree of social engineering than some would like. Wealth taxes might need to be introduced in order to provide the social care that those without property will undoubtedly need. The right to dispose of one's property wealth as and when one wishes to do so may have to be curtailed. But, the State must surely react to repel any perceived threat to the protection and well-being of its citizens. And, the likelihood that the increased longevity of its citizens will be accompanied by greater suffering - perhaps as much as a quarter of one's lifespan at the age of 65 - is such a threat. Indeed, in ideological terms, the solution that has

[911] Who may seek to provide a level of service that fails to meet the care-receiver's needs in order to gain the financial rewards that proposed scheme will bring.

been put forward might be regarded as part of an enhanced social contract, one that is specifically designed to meet the needs of twenty-first century citizens.

CHAPTER SEVEN

THE THOUGHTS OF FAMILY CARERS AND FINAL CONCLUSIONS

7.1 INTRODUCTION

At the very beginning of this thesis, a series of difficult questions were posed in relation to the effect of what has been a remarkable sociological phenomenon in England and Wales in the latter part of the twentieth, and in the early years of the twenty-first, centuries, namely, the marked increase in the average human lifespan of many of its inhabitants. Of particular concern was the question of how to meet the social care needs of the disabled elderly in society. Is the meeting of these needs something for which the State must be held responsible or should the care burden carried by this section of society fall on the shoulders of members of the care-receiver's family? Empirical data clearly shows that the significance of this question will grow markedly in the next two decades.[912] Unless action is taken, there is a real risk that our existing social care system will be unable to meet these ever increasing needs.

Against this background, this thesis went on to consider the extent of the State benefits presently afforded to informal carers who now bear the burden of caring for our disabled elderly. Whether these informal carers are the spouses of those in need of care or their adult children, their friends or neighbours, it is clear that, in financial terms, any State provision that is available for these people is extremely poor. In practical terms, informal carers are given very little in return for what they do. State benefits are at a level that may fairly be described as 'minimal' given the degree of care that is often needed and the effect that it has on the carer's ability to pursue their own career ambitions and provide for the needs of their own family.[913] In reality, these benefits are seen as 'supplements' to

[912] See: chapter one, section 1.3, *supra*.

[913] See: chapter two, *supra*.

existing incomes, yet the State requires these family carers to work at least 35 hours caring for another before the carer's allowance' becomes payable and then there are other conditions that a claimant may be unable to meet. What is more, in the absence of specific enforceable promises, these informal carers are not entitled to any recompense from the care-receiver notwithstanding that care may have extensive and may have been delivered over a considerable period of time; in fact, without more, they are unable to reclaim any financial expenditure they might have incurred in providing this care to the care-receiver.[914]

At its heart, this thesis is a work on law reform. If the case for law reform is made out in the opening three chapters of this thesis – which, it is submitted, it is – the next issue to consider is how that reform might be achieved. The ideas for this thesis were born of the author's work in practice on applications made under the Inheritance (Provision for Family and Dependants) Act 1975 ('the 1975 Act'). This Act – and its predecessor Act, the Inheritance (Family Provision) Act 1938 – were never designed to accommodate claims for reasonable financial provision made by informal carers. Had that been the case, one would have seen these people identified as persons who are able to make a claim in s. 1(1) of the 1975 Act. But, might the 1975 Act be easily amended to include informal carers amongst the categories of applicants who are entitled to bring a case before the courts for an award under this Act? The analysis set out in chapter four clearly suggests not. Not only would the essence of such a claim – the idea of compensation or reward for services rendered – be diametrically opposed to the way in which all other claimants must put their claims, namely, on the basis of dependency and need, and would, therefore, lack the philosophical foundations on which these other claims have been built as exceptions to the much-vaunted principle of freedom of testation, but claims made by informal carers would also compete with these other claims and be liable to be defeated by them. And, in any event, the prevailing judicial attitude to such claims seems to vacillate between mild concern for the plight of such carers and complete indifference born of a feeling that such carers are merely fulfilling a moral obligation that they have to the care-receiver to provide such care.

In light of these findings, due consideration was given in chapter five to whether the law relating to proprietary estoppel, constructive trusts or, perhaps more feasibly, unjust enrichment might be adapted to provide theoretical support for claims made by informal carers. However, it is clear that the first two of these 'alternative pathways' require some form of 'communicated understanding' between the informal carer and his/her care-receiver. And, this seems incompatible with the notion of an obligation on the part of the care-receiver, or even the State, to compensate the care-giver for

[914] See: chapter three, section 3.3, *supra*.

services rendered which, in essence, is born of public policy rather than some form of express, implied or even imputed agreement.[915] With this, attention was focussed on the doctrine of unjust enrichment as a means through which informal carers might receive compensation for the care afforded to care-receivers, but, again, the philosophical foundation for such claims, as presently recognised in English Law, would seem to be against the use of the doctrine for these ends. If public policy suggests that all informal carers should be able to make a claim for financial redress for the rendering of care services, the success or failure of such a claim cannot be dependent on whether or not they had any expectation of receiving a reward for what they were doing.

With these initial conclusions in mind, the task set was then to seek the collective thoughts and views of a group of family carers through a series of semi-structured interviews which sought to focus on their experiences of caring and how these experiences might provide us with a body of information on which any final conclusions might be drawn. Once this had been completed, this thesis could finally returned to the questions raised at its very outset, 'Who is going to care for our disabled elderly in the coming decades? And, how, if at all, are the costs of providing such care to be met?'

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7.2. INTERVIEWS WITH INFORMAL OR 'FAMILY' CARERS

The data which is drawn upon in this chapter is taken from a series of individual, semi-structured interviews with 21 informal or 'family' carers conducted between late September 2020 and early April 2021.[916] The aim of this project was to collect and review the personal experiences of the various participants in caring for elderly and infirm members of their families, particularly, but not confined to, their parents. The questions raised during these interviews were grouped around seven distinct themes. For the most part, these themes related to issues that were explored earlier in this work, not to confirm or verify what was stated therein, but to expand upon and, where necessary, to bring life and colour to what has thus far been presented as a set of cold, hard facts.

The coding frame that was used for these interviews was designed to facilitate an exploration of the main, substantive element of this thesis, namely, what society can do in order to encourage family

[915] See: chapter five, *supra*.

[916] From this point on the rest of this chapter will use the term 'family' carers rather than 'informal' carers as this proved to be more easily understood by the interviewees who took part in this part of the project.

caring in an age where families are becoming more and more fragmented, emotionally and geographically. The personal experiences of the various participants in this project were diverse and, of course, unique.[917] While there was no concerted effort to sample a representative cross-section of society in pursuing this project, the responses of these volunteers touched upon many of the difficulties experienced by all those who have called upon to care for elderly and infirm, parents and relatives in the modern day and age. And the challenges that these participants faced, and for some are still facing, are illustrative of those faced by many others in our society whatever their situation might be.

Initial attempts to structure the project around a number of local charitable or not-for-profit organisations working with family carers were quickly abandoned with the onset of the global pandemic in early 2020 and the introduction of the country's first national lockdown. In the event, volunteers for these interviews were largely collected through word-of-mouth. Nonetheless, the accounts provided by the participants of their experiences of family caring were not only vibrant and colourful, but also informative and often highly thought-provoking. Indeed, as the questions raised in the interviews were not confined to the personal experiences in providing care for an elderly parent or relative, but also asked for their individual views and opinions on a wide range of issues considered earlier in this work, including the merits of the social care system that we have in this country, the role of government in the process of providing care for the elderly infirm and the funding of such a system into the future. These views and opinions have much intrinsic value. As one participant put it, they, and all others like them were 'the silent majority, plodding around, beavering away, doing the work and not complaining.'[918] But their voices deserve to be heard and acted upon. No attempt to reform of our social care system would have any value or direction without listening to these family carers and deriving lessons from their own personal experiences of caring and the sacrifices that have had to make for their loved ones.

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[917] On three occasions, interviews were held with two sisters who were both engaged in caring for the same family member – Mrs. E.F and Mrs. F.G. (caring for their aunt), Mrs. A.B. and Mrs. M.N. (caring for their father) and Miss H.I. and Miss O.P. (caring for their mother) but, given the uniqueness of these experiences it was felt that this was entirely justifiable.

[918] Mrs. S.T. (at page 6 of her transcript).

7.2.1 Theme One: A Family Carer's Experiences of Commercial and Local Authority-Sponsored Social Care.

'Care in the community' is now, and has been for the past 35 years or so, the favoured government approach to the provision of social care for the elderly. To a large extent, this is also the approach that is favoured by the elderly themselves and their families appear content to support this wish in so far as they are able to do so. Domiciliary care is provided by care 'agencies' either engaged on a private basis or through the local authority who will provide two weeks' free care through these agencies while the elderly person who is in need of care is being assessed for local authority funding. These commercial organisations will often be called upon to provide three or four visits per day from professional social care staff to help an elderly, infirm care-receiver to get up in the morning, to prepare their lunch and to put them to bed in the evenings, with an optional fourth visit sometime in the afternoon depending on the extent of care needed and in particular the recipient's need for prescription medicines which they are unable to administer themselves. If the care-receiver's income and/or capital resources are below the prescribed limits, these services will be provided by the local authority free of charge beyond the initial two week period, but, in practice, this seems very rare indeed and many are left to meet the fees and charges levied by these organisations at their usual commercial rates. For the most part, these professional carers are seen as essential to the system through which social care for the elderly infirm is provided at home for family carers in employment have other duties and obligations to keep and, in many instances, the need to earn an income with which they must support their own younger families. In this way, family carers will often 'fill in the gaps' and be more heavily involved in the caring process in the early evenings, through the night and at weekends where they are more available. Of course, on some occasions these family carers will themselves be retired and able to take a more hands-on approach to caring, perhaps taking the care-receiver into their own homes and being with them on a 24/7 basis.[919] Whichever approach is adopted, the demands of caring often seem to be heavy and very-much life-changing for the care provider.

As regards the provision of professional care by these care agencies, there appears to be a widely-held view that professional care workers are both underpaid and overworked by the organisations that employ them, with some resentment directed at their employers for taking the profit available in the provision of these services for themselves and putting little into the process in return. In some cases, appointments which should have involved the provision of one hour of care have lasted little more

[919] For example, in the case of Mrs. I.J.

than 30-40 minutes (or sometimes much less) with a significant part of this time devoted to the filling-in of forms and records by the care worker rather than the provision of care. Shorter visits scheduled for 30 minutes seem to last little more than 15-20 minutes. The common explanation for this was that care workers were given schedules that were simply too tight for them to maintain. They needed to leave early and/or arrive late and, on either occasion, reduce the time given over to providing social care for the care recipient because they needed to get to their next appointment. On some occasions, where a care worker was unavailable to meet a scheduled appointment through illness or the like, either no cover was provided or another care worker arrived unacceptably late. In many cases, this presented the family carer with a crisis to resolve because the care-receiver simply could not be left alone, yet the family carer felt the need to get to work and do the job that they were being paid to do. For the most part, their employers seem to have accepted that family carers cannot always get to work 'on time' and have been flexible enough to accommodate their needs; but this, in turn, has left some family carers uncertain over what action their employer might take in the future and has instilled in them a lack of security in their employment that they would otherwise have had.

These observations were reflected in many of the interviews undertaken for this project, but were perhaps most keenly felt in the observations of Mrs. M.N, Mrs. Q.R. and Mrs. U.V. At page 4 of her transcript, in response to the questions whether her elderly father could have coped by looking after himself, Mrs. M.N., a solicitor by profession, replied:

> "I don't think so. No, because I think with the carers coming in, it started off three times a day and then went to four times a day, that still wasn't enough for him because they were only calling in for 15 minutes. Although you're paying for half an hour, you find that you get about 15 minutes and the other 15 minutes its them either travelling to you from the last client or travelling from you to the next client or what have you. So, even if you had an hour slot, which he did used to have, I think, once a week, he wasn't getting an hour's care. In that hour he might have been getting 45 minutes or something and it just wasn't enough interaction, I don't think for him. He wanted someone there more often. And so that's why we got to the stage where we felt it's either got to be full time live-in care or move into a nursing home."

Mrs. E.F., who was staying overnight with her elderly aunt in her aunt's home in order to care for her during the evenings and overnight while holding down a job as a primary school teacher, in circumstances where the aunt was suffering from vascular dementia, described a dilemma which she was regularly faced with thus (at pages 1-2 of her transcript):

> "…. once we started looking after Sheila, we would be taking turns, the four siblings of moving into the house and living there effectively for a week. So it had a very big impact. You know, we had to make arrangements for the children. We had to make arrangements for getting into work. We had to make arrangements for carers. Sometimes carers wouldn't turn up for, you know, for whatever reason. So it was just much more of a military operation really to, sort of, run our lives. And it was very, very disruptive to be honest and actually quite stressful too because of the nature of Sheila's condition."

Other participants described their experiences of buying in commercial social care with a little less detachment and a good deal more negativity. Mrs. Q.R., at page 5 of her transcript, said this:

> "…. I did go through a phase of paying for domiciliary care at home, but my mum had this 'going out all the time', so you know, it was a waste of money. And carers were screwing her over anyway, because what would happen is that they wouldn't write anything down properly, they were supposed to do certain tasks for things, they left her unmedicated, yeah, and they'd write 'no care required'. I sued one care firm and completely won, and was vindicated, because the neighbour said, 'they'll come in, they'll be in there two minutes and they'll leave'."

Indeed, some participants took the decision not to engage any such commercial care organisation to provide the care that was needed.[920] In particular, Mrs. U.V. managed to arrange for social care to be provided for her father privately albeit on a commercial basis by advertising for carers in a local paper. At page 5 of her transcript, she described the taking of this decision in the following manner:

> "Well, I really do feel that, in some ways, that we ought to be ploughing some proper money into adult social care. There was no way was I going to go for the social services' free package, where you've got these people that come in for half an hour, they spend their time giving them tablets, form filling, to me that ….. I just didn't want anything to do with that. Even though it was free for a fortnight or whatever, I said 'no', I'm sorry my dad deserves better. I want him to form an attachment with people. I don't just want four faces coming throughout the day and putting a microwave meal in for him. I don't need that. I do feel that all that side of things needs massively looking at, so that there is profit. I mean some people are in it because it's money, even though it's poorly paid. Other people are in it because they genuinely care about the people in their charge, and you know I think the government really need to look at, you know, investing money because we have an elderly population. I'm not saying that care homes are the answer either, because I think a lot of people can be neglected in care

[920] For example, Mrs. I.J., Miss H.I. and Mrs. U.V.

> homes. Where possible, people should be able to stay in their own homes. And I mean, probably for what it costs us, it would be as much as putting dad in a care home anyway, and yet we're getting these wonderful ladies that provide this round the clock care at probably the same amount of money."

The social care package arranged privately by Mrs. U.V. appears to have provided her elderly father with some 20 hours of social care attendance every day, with Mrs. U.V. providing a break for the carers for around four hours each afternoon. While it was costly, she clearly felt that this arrangement provided significantly more care and at a higher level than was available from commercial care organisations or, indeed, what would have been available to her father in a nursing home.

Some participants felt that the provision of professional care through daily visits simply did not suit their elderly parent because the visits were scheduled at inconvenient times. And, of course, no organisation providing social care on a commercial basis can easily accommodate a demand from number of care recipients 'on their books' for a visit at precisely the same time of day. Not every care-receiver can be awakened at say 8 am, washed, dressed and fed and put to bed at say 9 am following much the same process. This, and it's effect, was acknowledged by Mr. T.U. at page 6 of his transcript:

> "So it was determined that he [Mr. T.U.'s father] needed that level of care and, he didn't have a lot of capital, but they both …. my mum was a teacher and my dad was a civil servant and had decent pensions. So, they had to … they didn't pay the full whack, but they paid what was deemed to be affordable. So we thought that it would be better, with our help, for them to organise totally private care rather than local authority based care because we were in the hands of the local authority determining what were, particularly for my mother, unsuitable times. As I said earlier, my dad was accepting of anything, he was just grateful for the care he got. But I think they could have had a more normal life if they could have been put to bed a little later, if dad was put to bed in the last slot about half eight, nine o'clock, rather than half seven and it's finished then. But they couldn't have afforded that. We were prepared to help pay for the private care but they never thought that it was necessary. They didn't want to do that. So, they were totally dependent on these wonderful carers who came four times a day."

Happily, this particular view of what these professional carers did for Mr. T.U.'s father seems to be much more positive than most other participants' opinions on their experience of working with professional carers. One must suppose that, in practice, standards of care must vary up and down the country.

One matter of particular comment was the pressure that some family carers were exposed to from social workers and/or nursing staff to facilitate the return of an elderly member of the family to their own home following a spell in hospital. Mrs. F.G. had this experience and relates it at page 6 of her transcript:

> "When Sheila was due to leave hospital, and we were discussing the alternatives for her, the social worker was very, very keen for her to return to her home which was completely unsuitable. And I assume this is generally what people are persuaded to do because it saves so much money, even though Sheila was funding herself. I don't know whether she was aware of that at that stage. But, you know, it would have been completely inappropriate for her to return to a large house with poor facilities, really, which hadn't been updated. So you know I said there's sometimes I think that it's money we're thinking about rather than the person and their needs in terms of the Government I mean."

At this point in the process a decision needs to be made as to whether an elderly person can return home, but in this case the pressure to enable the aunt to return to her usual environment, with the family providing care at increasing levels of demand as a result of the care recipient's ongoing dementia, seems to have been considerable.[921] In the event, the aunt was placed in a nursing home, which appears to have been much the better decision in regard to her overall quality of life. As Mrs. V.W. put it at page 3 of her transcript:

> "I think the level of care in, as you put it, sheltered accommodation was much better. I think it encouraged her to eat a little bit more. It had a nice ….. well, they call it restaurant, but it's a bit more of a cafeteria which was open throughout the day, which was, I think it was subsidized in some ways, it was fairly inexpensive. And she'd often go and have a lunch there and have a bit of a chat with people. So I think it was a social side of it that helped. And she still didn't really engage very much with the carers is coming in, but she would …. within the facility she had her own little flat with one bedroom, a small kitchen. But the residence had separate laundry rooms and they also had a bathing facility, because the room that she had had a shower, a bathroom and a shower. …. And, she was much happier there. We'd been sort of prompting her for a couple of years to consider it. And she kept saying 'no, no, no'. But I think she eventually realised that she did actually need a little bit more. And my feeling is that, if she had actually gone into that facility earlier, she probably would have been happier, and I

[921] In Mrs. F.G's case she was one of four joint owners of the property, which was occupied by the aunt, a property which was 'the family home', but which could not be sold because the aunt was in occupation.

> think she would have lived for longer, because I don't think she'd have health problems, lose quite as much weight and get as frail."

'Care in the community' is clearly an approach which is driven by cost as much as anything else. As such, it places a considerable burden on family carers. Nursing and other residential homes do seem to have had something of a 'bad press' in the latter part of the twentieth century and this may have contributed to a common desire amongst the elderly that they would try to live at home as long as they possibly could, with the responsibility for providing the support which was necessary for this to take place being placed firmly on the shoulders of their family, often without any regard to the effect that this would have on their lives, their careers and aspirations. As Mrs. D.E. put it, at pages 1-2 of her transcript, in respect of caring for her mother who is now living with her and her husband:

> "….. we don't feel as free as we did, I suppose, and that's one of the main things. It also means that in the daytime. I don't, I can't, just go out without considering her and what she might be doing or what she might need doing or, yeah, I am not as free as I might have been so retirement for me has not been … it's just, like taking on another job in a way, and that's probably what it means. And it's not that I don't … I obviously want to help her. But, yeah, it has come at a cost for me and John in that John and I don't have as much privacy or as much time to ourselves. In fact, you know, we don't get very much time to ourselves at all really. So that's the biggest cost, I think, and the change to our life."

As we continue to live longer, more and more of us will experience the effect of having to care for elderly parents and relatives perhaps late in their careers, perhaps early in their retirement, but certainly at a time where they will also require considerable support in order to fulfil this much needed task.

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7.2.2 Theme Two: The Commitment of Family Carers

The choice to care for an elderly parent or relative represents a significant commitment for many family carers. It frequently involves the giving up of time where they would otherwise be giving themselves the space needed to wind-down from their often stressful jobs; it interferes with their social life, it prevents them from going away for weekends or on holiday, it affects their relationships

with other family members, often young children who need their mother or father. The elderly who are housebound due to an infirmity need company; and this is a recurring theme in the accounts many family carers, namely, that their parent craved company and they were expected to provide it come what may.

At page 2 of her transcript, Mrs. E.F. described her experiences of caring for her elderly aunt in the following way:

> "Initially we all lived in as a family because it was a big house. And so we would all be there. But actually what we decided subsequently, as a family, was that I would go on my own to look after Sheila and that Keith, my husband, and the children would carry on living their lives as normal during the week because, you know, the children would get a bus to school and it would be a particular route that was paid for, you know, and all that kind of stuff and my husband had to leave for work very early. So, so, actually it was so disruptive to have the children living at the house for that week, we decided that we would, sort of, live separate lives for that week, which was difficult for two small children. And in some ways it was respite for me, actually, to be away from them. But actually, in reality, it was, it was difficult because, you know, children, young children, need their mother, really, to sort of run around after them. And just as an emotional support. So I felt really torn."

One can see in this the 'sandwich generation' referred to earlier in this work. Those of us in middle age torn between caring for one's family, on the one hand, and caring for one's parent or relative on the other.

But, in many ways the effect of caring is so very different; it depends very much on one's own circumstances, the circumstances of the care-receiver and the circumstances of other members of the family, siblings and the like, some of whom are not able to share the caring responsibilities, others who do not want to do so. At the tender age of 36, Miss H.I. found herself looking after her mother who began to suffer from dementia following a minor stroke. The effect that this one event has had on her life has been quite considerable; four years down the line, she is still caring, but there is little or no end in sight. At page 2 of her transcript, she described the aftermath of this event in the following way:

> "And she's never been able to be left on her own from that point, and obviously, it was very tough. For the first few months because we were both in this position, you know, it was unprecedented to us. We didn't …. I didn't know how to deal with that. Poor mum was

> frustrated and didn't know what was happening. And then I did have to say to my sisters and my brothers, there's no way this is 24 seven, I can't do this. 'You're going to have to, we're going to have to, figure out some sort of plan to look after her', and it was done. Katie lived in London. She said she was going to come home anyway. Maybe not for another five years or so, but she said, I'll sell up and I'll come back and she did and that's what happened. And we're still here."

Having to cope with dementia in an elderly parent or relative is particularly stressful and demanding. But, because we are living longer, dementia in the older elderly is becoming increasingly common; and this, in turn, is having a greater and more prevalent effect on the lives of their children and other relatives who have chosen to care for them. This is particularly acute for those with demanding jobs. Mrs. F.G. recounts how, as a primary school teacher, she was having to balance the demands of her job with caring for her aunt. At page 2 of her transcript she recalls:

> "So a typical work day would be, well, often to be woken in the night because she had developed no concept of time (period). So she'd often get up in the middle of the night, basically, and start kind of either getting dressed, having a wash or emptying her cupboards. So, then you'd have to go and kind of stop her doing that, which she always, which she was never happy about. She always used to kind of fight you, kind of, from interfering and then, and then, I'd have to get ready for work. I would have a shower and then get myself ready for work, get Jacob up and ready to leave the house as well, because during the day he'd be going to college, and then we'd leave about half past seven. Because I'm a teacher and I like to get to work by eight and the carer would be coming at eight but you had to give Sheila strict instructions not to move from her room or her bed, which she didn't really understand, and I just used to hope that she hadn't got up and tried to get herself up. Normally, I mean sometimes, I used to find her in bed with a slippers on so she obviously have tried to get up. Also, she'd have quite a lot of what you might have to clean up … if she had any urinating accidents during the night."

But, demanding jobs or not, the effect of caring is often very considerable, so much so that some carers feel that the caring process is stealing their very lives from underneath them. In answer to a question concerning how the need to care for her mother has affected her life, Miss O.P. described this event, at page 1 of her transcript, thus:

> "Well yes, it's changed out of all recognition. You know, I used to go to work, have a life and now, well now, we're looking after ….. well she can't be left alone. So how people do it on

> their own is beyond me. So, basically, I'm here all day. Caro(line) obviously lives here. And that's what we do. We sit and watch the telly. I've read a lot of books. I tell my mother endlessly that, yes, it is her house. So, yeah, that's it, really. Nothing particularly exciting."

In practice, the caring responsibilities will regularly fall on daughters rather than sons, although there are, of course, always exceptions. On occasions, geography – the very fact that one lives near to one's elderly and infirm parent – will play a significant role on the allocation of this caring burden; on other occasions, it's the demanding nature, and perhaps even the earning power, of the job that one sibling has but not another that determines that the other will undertake the care for an elderly parent. But, more often than not, it is daughters who feel the need to 'step into the breach' and it is therefore unsurprising that the sample from which the present data is drawn contained 17 interviews with female family carers but only four with male family carers, and even then the work undertaken by daughters was noticeably different from that undertaken by sons. At page 1 of her transcript, Mrs. Q.R. recalls how circumstances seemed to dictate how she was the one who had to undertake the care of her mother:

> "My life's been, or the course of my life's been, influenced by a number of events, one being that I lived away from home and was doing a master's degree and my mum had, or was diagnosed with, breast cancer. And I'd got a job to go to in London, I was going to go live down there. Anyway, my mum was diagnosed with breast cancer, and the first weekend after she had a lumpectomy, and she was at Christie's, came home, my dad dropped dead. So, basically, I came home because it was a week before the finals of my master's. I sat my exams, and then I left and I came home, and it was expected that I would look after her and nurse her. So, I sort of ripped up my plans of what I was going to do and I came home to live, because I have three brothers, a twin and two other brothers. …. We kind of got drawn into …. that that was another influencing factor coming back from the South, because my brothers lived away and I had to take over the care, and my mum became increasingly problematic because, as it progressed, I kept fighting with the doctors, because they said it was just natural aging, and I said it's not natural aging, because my mum would do things like she turned night into day, repeat things, her personality changed, she went from being somebody who's quite gentle, strong to being angry, often accusatory, telling you things, repeating herself, just a personality transformation. She was diagnosed, after I kept forcing the diagnosis, with Lewy body dementia."

Even when living some distance away, daughters seem to be expected to help with the process of caring for an elderly parent, keeping them company and in contact with their family. At page 2 of her transcript, Mrs S.T. recalls the process of coming up to do this whilst bringing up three small children:

> "I used to come up every six weeks or so, every half term and what have you, and bring the children to distract her. Obviously, she loved that. But they found it very, very hard. It was very hard on them because it wasn't nana anymore. And she would do things that they thought were funny which were actually quite dangerous and what have you, so it became very difficult for them, our sons. As Matthew got older he understood more. He took it on board much more easily and actually would care for her in a really appropriate way which was really good."

And, at page 3 of her transcript, Mrs. G.H. explained the difficulties with which she was faced when deciding what to do with her life in order to accommodate the fact that she was expected to care for her parents in their old age.

> "…. well I was living a 30 minute journey away from them. We then had to leave that because we rent, obviously because we don't know how long we will be here or anything. Um, we had to move out of there because the landlord was selling, so we've managed .. we've moved closer to them. I'm about a 10 to 15 minute drive away from them now, but it has meant that our rent has doubled."

Other participants described making much longer journeys by car in order to care for an elderly parent, with one describing a round trip of up to three hours.[922]

At one point during these interviews each participant was asked how they thought their elderly parent might have coped without the intervention of either themselves or anyone else to provide the care that was required in an effort to get their parent through the problems with which they were faced. Almost without exception, the answer was that they would have had to be moved into a care home, that they would have had to have had live-in care from professional carers or they would simply have passed away much earlier than they did.[923] The work of these family carers was therefore

[922] For example, Mrs. Q.R., Mrs. V.W. and Mr. L.M (with the latter having the round trip of up to three hours).

[923] For example, Mr. C.D. (at page 1 of his transcript), Mrs. D.E (at page 3 of her transcript) Mrs. F.G. (at page 2 of her transcript), Mrs. G.H (at page 3 of her transcript), Mrs. M.N (at page 4 of her transcript), Mrs. N.O. (at page 3 of her transcript), Miss O.P. (at page 3 of her transcript) and Mrs. R.S. (at page 3 of her transcript). The cost of live-in care from professional carers was seen as an option that was, financially, out of reach of all

seen – at least through their eyes – as essential to the continuing well-being of their elderly parents either in physical or in financial terms and often in both. And, yes, some participants did acknowledge that this work did serve to protect any inheritance that was expected to come their way,[924] but overall that was rarely mentioned as a fact that precipitated their decision to care for their elderly parent or parents. More common was simply that it had to be done and, if they did not care for their parent(s) or relative, then 'no one else would'.[925]

That latter comment was often made in such a way that it called into question what the government's role in caring for the elderly, infirm should be. Interestingly, it was also felt by many that they, these family carers, were engaged in work that ultimately the government bore some real responsibility for and a good deal of disappointment was expressed with the performance of government in supporting family carers either financially or physically through some form of support network that involved the assistance of social workers and/or health workers depending on the nature of their parent or relative's difficulties. These particular issues will now be further developed in the following section of this work.

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7.2.3 The Role of Government in the Care of the Elderly

The U.K. Government's approach to the issue of care for the elderly infirm – that of 'care in the community' – has been mentioned earlier on in this chapter. And, indeed, the very extent of the changes that this approach has brought with it, changes to the lives of not only the elderly themselves, but also their children, their friends and even their neighbours, can be seen in the observation made by Mrs. J.K., a practice nurse, at page 4 of her transcript:

> "Something that's just struck me while you were mentioning that – finances I'm not very good on but – my job is, as I have said, a practice nurse. I go out and give the 'flu vaccinations to

participants who had given any thought to that possibility, even where their parent or parents would be paying for such cost.

[924] See: Mrs. G.H. at page 3 of her transcript.

[925] See: Mr. C.D. at page 1 of his transcript.

people living alone – I know this is slightly off the track but 20 years ago I had about a dozen house-bound patients to go and visit, quite a lot in nursing homes, but when I trained 30 years ago the hospitals were full of elderly people, geriatric wards abounded. This year my list has been 175 patients, house-bound people and a lot of them, I don't know how many, but nearly all of them have got carers. A lot of them have paid carers going in three or four times a day. And I am aware that those numbers have increased because now, because those particular patients, 20 or 30 years ago, would have either been in a hospital then or in a nursing home. So that the community care has got a lot better. But, of course, there are a lot of people who are caring for their relatives who are not being remunerated enough. But the numbers …. when I looked and realised just how many I'd done this year I thought, 'it's quite astounding'."

Given that so many people seem to be involved in the provision of domiciliary care for each elderly person who has chosen to live out their days in their own homes, it seems surely inescapable that the U.K. Government must take a significant degree of responsibility for supporting those who are involved in this process, particularly those who are not being rewarded for what they do on a commercial basis.

This was emphasised time and time again by those who participated in these interviews. Take, for example, Mr. L.M., someone who has worked in metal health in the NHS at some point in his life, who, at page 6 of his transcript, was constrained to make this observation:

" …. there's always this assumption that there's someone else, a family member, to care and support this individual who's elderly and unwell. And that's often not the case. And, you know, just attending hospital appointments, things like that. You know, there came a stage where he [my father] wasn't able to drive and 'how does he get to these appointments?' And the expectation is, is that there will always be someone you know a family member to go with him, be with him, spend time with him while that was happening. Well there isn't. I can't keep taking time off work and driving hundreds of miles do stuff like that and likewise with other things. So I think the State, for want of a better word, makes assumptions that people always have somebody else to look after, to look out for them, and that isn't the case. And I think with society as it's changing there's less going to be less of that around. I mean, just take myself and my wife. We don't have any children so when we get older and infirm, probably not too far away, you know, quite frankly. We don't have anyone to sort of rely on in terms of that, and, you know, whoever passes away first, it will be the other one, all on their own, to do these things for themselves. It's okay when you've got your mental and physical faculties

around you. That's not too bad. But when you do get old and infirm, and so on, who have you got to call upon?"

So, the need for support from government agencies, centrally and locally, is surely going to increase as the years pass. As a society we are growing older, and the older we get the more we need social care and support. Equally, families are becoming more disconnected, whether geographically or through divorce or separation, and this produces further difficulties in the provision of family care. And what, indeed, is the alternative to family care? In the absence of family care, the elderly who cannot care for themselves become in need of institutional care which, in the absence of sufficient financial resources to meet the cost of such care themselves, local government must pay for.

At page 2 of her transcript, Mrs. F.G. makes the case for government support for family carers:

> "Well, I think, … I think they [the government] should play a more supportive role and a more supportive role in a way for the carers because, you know, people have got to give up their jobs, as a lot of people do, and save the government a lot of money. In doing that, …. [family] carers …. should get some kind of compensation and also, you know, the care homes to a certain degree should be funded to a certain level. And rather than the expectation that people who get dementia really should pay for all their own care, because you know what concerns us now, with our aunt, is that if she runs out of money, what will happen? And I'm aware that, if that had does happen, then it becomes a responsibility to a certain degree for relatives to pay for care which obviously we couldn't afford. And she might then have to move out of where she is."

> "I think there's a real sort of dependence on family members to look after the vulnerable members of their family and I get that. And I know that that is part and parcel of being a member of a family and, you know, looking after a relative who you love, I get that. But I think there just needs to be more help, you know, because it you know it's a lot to take on."

At page 4 of her transcript, Miss. H.I. gave us perhaps one of the most telling of these observations, which reflected on not only the U.K. Government but also ourselves as a society:

> 'Yes, I do think they [the government] have a responsibility for the older generation as a whole and the care system, which I think is just, you know. You look at some other countries, where they really take care of their older generation, you know, you've got China and Japan and India, you know, and there the families really come together and they really are well

> looked after and I feel it looks very different over here and there are a lot of older people who are just left."

So, there are, indeed, real challenges that the U.K. Government has yet to meet. The main complaints seem to be that the process of claiming benefits is too bureaucratic, that the financial support for family carers, once a claim is made, is woefully inadequate and there are too few people to provide specialist support on the ground when that support is most needed.[926] Nor, indeed, have local authorities escaped such criticism,[927] although, in the main, the complaints raised against this arm of government where markedly less virulent given perhaps the wider understanding of the financial constraints that they work under.

For her part, Mrs. Q.R. was perhaps the most vocal of those dissatisfied with the performance of both arms of government, but what she felt about their performance was plainly reflected in the comments of her fellow participants. At page 7 of her transcript, in answer to the question what she believes the role of government in the care of the elderly is, she says this:

> "They are a disgrace because, as you know, each government's kicked it into the long grass, I mean I'm probably best placed because I deal with this every day. This week I've dealt with that many cases to do with social care where, because of the pandemic, this week a local care home private provider has put their prices by 20% because they're passing on to the self-funding, the cost of PPE and the cost of paying the national living minimum wage. So they've increased it [their charges] by 20%, it's unsustainable, because people go through ….. effectively the typical person can expect to go through about 50 to 60,000 [pounds] a year in a care home. So you quickly run out of money. Local authorities pay a lot less, it's very unfair because there's no incentive for having your own house or saving for social care because the person next to you is getting paid by the local authority, whereas you're paying for them, because you're subsidizing them, it doesn't mean you get a better room or better service. And the Government …. there's got to be, because it is unsustainable, because what they argue about, the big thing is, it's all bollocks this, you know, we look at the person, they don't, they look at you as a financial asset and local authorities don't look at your need, all that they look at is, 'where can we place you the cheapest'."

[926] See: Mrs. E.F. (at page 4 of her transcript), Mr. L.M. (at page 6 of his transcript), Mrs. M.N. (at page 3 of her transcript), Mr. P.Q. (at page 3 of his transcript) and Mrs. V.W. (at page 5 of her transcript).

[927] See: the views of Mrs. Q.R. recounted below.

By way of summary therefore all participants appeared to believe that there was a role for government to play in the care of the elderly and the vast majority of them felt that the responsibility to provide this care lay firmly at their door. What is more, the participants' views of the performance of government in the provision of such care was an entirely negative one. And, indeed, some express concern for their own future in such a system, so poorly has that system performed, in their eyes, up to this point in their lives. In short, most participants were of the opinion that the social care system was in dire need of radical reform and that reform needed to come quickly for the sake of all those wrapped up in that system and dependent on the same.

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7.2.4 The Effect of Family Caring on Employment

In marked contrast to what participants were saying about the performance of government in the delivery of social care, many felt that their employers had been generous in allowing them time away from their duties in order to deal with the problems associated with family caring. Employers were praised for their willingness to be flexible with employees who were caring for family members in relation to their time-keeping, their need to take their elderly parents or relatives to hospital appointments and their desire to take paid leave at short notice if some sort of emergency associated with their caring obligations required that they should be absent from their work.[928] As regards the demands of caring for an elderly parent or relative, some participants had to give up work altogether.[929] Others admitted that these demands did have an effect on their ability to do full-time work and as a result some 'went part-time'.[930] Others, with some regret, acknowledged that it was difficult to hold down a permanent job and care for their elderly parent or parents and, for that reason, had been constrained to refuse offers of full-time employment or to turn down additional work when it was on offer.[931] One participant, the youngest, expressed particular concern for her

[928] For example, in the case of Mrs. M.N. (at page 3 of her transcript).

[929] Miss O.P. (at page 1 of her transcript).

[930] Mrs. D.E. (noted at page 4 of her transcript).

[931] Mrs. G.H. (at page 1 of her transcript) and Mrs. J.K. (at page 3 of her transcript).

employment prospects when her days of caring for her mother eventually come to an end.[932] These casualties of the need to care are clear illustrations of the effect that family caring can have on one's prospects of employment, or on the nature of one's employment if carried on in concert with caring, and on one's career aspirations as a whole.

That said, other participants, perhaps as a result of where they were in their lives, that is to say, older, approaching, or having arrived at, their retirement, accepted that the need to care for an elderly parent or relative had little or no effect on their employment or their employment prospects.[933] Perhaps one benefit therefore of the extension of life expectancy levels over the later part of the twentieth and the early years of the twenty-first centuries has been the ability of adult children to care for their elderly parents and relatives because they themselves have reached retirement age or at least a point in their lives where they could move to part-time work without the need to spend their hard-earned money on their children, their mortgages and the like. Of course, that may not have been what those who were approaching, or have now reached, such a milestone thought their life in retirement was going to be like some twenty years ago. But, this – the fact that more adult children are now in a position to care for their elderly parents than there were say 50 years ago – is hardly a justification for leaving the task wholly in their hands. Indeed, one thread that runs through the accounts of all those whose employment and/or career prospects have suffered through having to care for an elderly parent(s) or relative is the lack of support from government to enable them to either continue in work or to build a new career after their time caring for a loved one has come to an end.

While employers were, indeed, praised for their flexibility, some participants expressed a little concern that their future prospects of advancement in their employment might be affected by their need to go to their employers and ask for 'time off'. At page 4 of her transcript, Mrs. E.F. – who was 'furloughed' very early in the global pandemic of 2020-1 and has yet to resume full-time employment – expressed her concerns thus:

> "Yes. So I work full time for …. luckily, it's a flexible arrangement, really. But I mean, you know, it's full time. I work full time, you know, 35 …. sorry, five days a week. And you know, it's nine to five really but there is a real flexibility there and I'm so lucky with my employer, but it was getting to the point where I, kind of, didn't want to be, you know, I didn't want to be taking

[932] Miss H.I. (at page 5 of her transcript)

[933] For example, Mrs. A.B. (at page 3 of her transcript), Mrs. B.C. (at page 3 of her transcript), Mr. C.D. (at page 1 of his transcript) and Mrs. I.J (at page 3 of her transcript).

advantage of that situation. …. But I think that, sort of, because I was able to do stuff and take Sheila to activities, I think probably I did possibly more than, more than other people, because I could, because the flexibility was there and I think probably, in terms of my employer, I was probably treading a bit of a fine line."

Others have felt unable to take up full-time employment due to their caring responsibilities even though opportunities have come their way. At page 3 of her transcript, Mrs. G.H. explains her particular dilemma:

> "I couldn't stay in full time teaching because you can't take time off as a teacher, you know, I can't say 'My mum's got a hospital appointment, I need to go'. And I mean I could be earning three times what I'm earning now, if I was in teaching. So yeah, I'm earning much less because of the lack of, possibly, commitment to a job that I can offer, you know. I mean I've been offered teaching. I do supply teaching to fill the gaps in the translation [work] and I've been offered full time posts, but I just can't take it, you know. Or even part time when they say well you know maybe do part-time. But if one of my parents is ill, I have to go and look after to them because the other one can't cope. So, yeah, I would say, I'm at least …. the best I'm doing is earning a third of what I'd be earning in teaching."

But, perhaps the most keen affected by the need to care for an elderly parent was Miss H.I., the youngest of the participants in the project. At page 5 of her transcript, she gives her account of how caring has affected her life and reflects on a future without any real job prospects or, indeed, any idea of when she might be able to search for employment given her present situation.

> "So I worked for Merseyside Police. I was a police community support officer for about six years. And I was doing that because it's a way to get into the police force as a constable. So I'd done that for six years. And then, you know, we all make mistakes, decided to go down South. It didn't work out, so my plan was to come back, go and get any job and reapply for the police. And it just didn't happen.
>
> I mean, I talked about it to my sisters. I said, you know, relatively recently, you know, they're taking on. Should I apply again? But, I just thought, I couldn't. There's absolutely no way, unless we put her into a home which we just don't want to do, and she doesn't need to be in one yet. So that was the plan, it was to go back into the police.

> And my worry, when all this is over, and you know, I could be doing this for ….. it's already coming up to four years. I'm going to be pretty unemployable after this because I, you know, well you've seen my use on a computer. I'm useless now. And, you know, I can feel my own brain, like melting, you know what I mean. Sometimes my memory is terrible just because I'm just not, I'm not using, I'm not training it. What I will say is 'This is harder work than I've ever done in any job'. But that, that is a worry, what I'm going to do afterwards, basically."

Yet, it would not be impossible for government to introduce training schemes for those in Miss H.I.'s situation, in early middle age with no job and no real prospects of future employment, and to provide respite care in order that they might attend such schemes. Such training might be tied to the provision of support for family carers who wish to undertake work in the form of sessional or supply teaching in the case of Mrs. G.H. or by way of work as a special constable in the case of Miss H.I. so that they might be in a position to take up employment once their time caring is done. The giving up of employment often has a very serious consequences for family carers over what may prove to be a significant period of their lives, consequences that extend well beyond their time spent caring, and this needs to be addressed in any future plans for the much-needed, wholescale reform of our social care system.

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7.2.5 Carer's Allowance and Other State Benefits

Although heavily involved in the caring process, very few participants were able to claim carer's allowance as a result of the heavy restrictions surrounding the availability of this benefit. By far the most commonly claimed state benefit was attendance allowance. But this benefit is one which is payable directly to the care-receiver as a consequence of an assessment of their needs and the participants in our study rarely derived any advantage from such a payment unless they happened to hold a power of attorney in regard to their parent's financial affairs whereupon it might be used to buy in additional or respite care.

When asked about the restrictions on the availability of carer's allowance, the various participants in the project spoke as one. These restrictions were far too rigid and, in any event, wholly unfair.[934] The requirement that each applicant for carer's allowance should need to undertake at least 35 hours of care each week was regarded as far too high. There were a number of calls for the government to introduce a sliding scale which would have permitted some payment to be made to those doing upwards of 15 - 16 hours a week caring for an elderly parent or relative.[935] Similarly, the condition which dictates that carer's allowance cannot be claimed by anyone who already earns more than £123 per week was also regarded as unfair. Indeed, the very idea that carer's allowance only operates as a 'top-up' for those who are caring while also unable to earn or on a very low wage from part-time work was wholly repugnant to many participants. And, even when payable, the figure of £67.50 per week as the maximum sum that can be claimed by way of carer's allowance was regarded by many with complete abhorrence, regarding it as a token payment wholly unconnected with what it takes just to live in the modern day and age.

In these circumstances, calls to increase the availability and the amount of carer's allowance were heard from all quarters. Some participants expressed a desire that it should be set at the level of 'the minimum wage';[936] others recognised that this might be too much for the government to be able to meet, but still demanded that it should be increased markedly from its present level. All felt that it should be more widely available.

As we saw earlier, there are other indeed other restrictions on what can be done with the personal budget paid to a care-receiver, namely, that, unless particular religious or other similar circumstances dictate, no part of this personal budget can be used to pay family carers for the work they do. Again, this was regarded as not only unfair but inappropriate given that most elderly parents and relatives would rather be cared for by their children or at least members of their family. Money received by a care-receiver for their care should be capable of being paid to relatives in return for the care that they provide if that is what the care-receiver wished to do.

The justification advanced for increasing the availability and amount of carer's allowance was often that the family carer was performing a role that would other need to be performed by professional

[934] See, for example: Mrs. A.B. (at page 5 of her transcript), Mrs. B.C. (at page 4 of her transcript), Mr. C.D. (at page 3 of his transcript) and Mrs. F.G. (at page 4 of her transcript). Indeed, this pattern runs right through the accounts of all those interviewed as part of this project.

[935] See, for example Mrs. A.B. (at pages 4-5 of her transcript) and Mrs. J.K. (at page 4 of her transcript).

[936] See, for example Mrs. A.B. (at pages 4-5 of her transcript)

carers and, where the care recipient did not have the means to pay for private social care, that they were saving the government considerable expense by caring for their elderly parent or relative who would otherwise be in a nursing home. Perhaps typical of this was the opinion expressed by Mrs. B.C. at page 4 of her transcript in response to whether she felt the conditions attached to the availability of carer's allowance were 'fair':

> "That's like a full time job. Thirty five hours is a full time job. And that's, you know, if you're going to spend 35 hours you need, you know, a decent salary, but you're not going to, you know, get it being a carer …. so a small, yes some, some recompense would be, would be ideal because it's only the likes of the family members that are keeping my mother out of the care home and hospital beds, leaving space for other people who don't have family."

Miss H.I., who claims and is paid carer's allowance, said this (at page 4 of her transcript) recognising that, in practice, there may have to be some limits on the amount that government can pay out in the form of this benefit:

> " …. although it's not a huge amount of money, you know, I get 67 pounds a week from the Government. But my personal opinion and, you know, there isn't just this huge pot of money and they can't say, 'You look after your mum and here is, you know, a normal wage that you would get if you were working'. I suppose sometimes I think of it because I'm doing it and …. I've lost my train of thought now …. and sometimes I think 'They pay, yes, well, it's 67 pounds week.' But I'm taking the pressure off care that she would have to have if I wasn't here, if that makes sense.
>
> So, it costs …. it's much more cost effective for them to pay me 60 odd, … you know a measly amount, for me to look after her, because if I wasn't here, and Kate wasn't here, it would cost them a lot more to look after her. Yeah. She'd have to be in a home."

Indeed, in some quarters, although there was unqualified support for an increase in the availability of carer's allowance, there was a recognition that the benefit should continue to be means-tested in some way. At page 5 of his transcript, Mr. P.Q., a retired academic, volunteered this opinion on the subject of carer's allowance:

> "I think it should be more widely available. I think, as many of these things, there is and needs to be a sensible means testing for it. And I mean we regard ourselves, you know, we're not fantastically wealthy but we're okay. …. I was the main bread earner but, in terms of, if I had

to give up, the difference between the salary I was on what you get is pathetic. And I think there should be some recognition that actually caring takes place not just for 35 hours a week, it may be a lot longer. And it may be a lot shorter. But the short term does have a significant cost, and you know it may well be that you end up working four days a week, not five days a week."

Perhaps the views of the vast majority, if not all, of the participants in relation to the availability and extent of carer's allowance and what the government's aims should be if it were to decide to support the vast army of family carers in doing a job that is vital in today's society was most eloquently summed up in the words of Mrs. U.V. at page 7 of her transcript in addressing, firstly, the earnings restriction that has been placed on the availability of carer's allowance:

"I mean 123 pounds is nothing really is it? So I do feel that those people who aren't financially able to, you know ….. well what would I say? I just feel that the people that are on very low incomes or this is their full time job they should be paid a decent living wage, I do, for caring for an elderly …. and keeping them out of the hospital or out of a care home, you know, because it's demanding work ….

…. caring for an elderly person is demanding on every level, every level, and they, …. and people should be rewarded or given a decent amount of money in order that they do that for a fellow human being."

And, perhaps the final word in this section should go to Mrs. V.W. who offered this view on the earnings restriction that forms the gateway to any claim for carer's allowance and, later, the amount payable for this benefit. At page 8 of her transcript, Mrs. V.W. said this:

"I do think you should be able to engage in your own job, regardless of how much income you get, that's your full time, paid job. If you're still putting in hours of caring, and you are caring, I still think you should be in receipt of the carer's allowance if you feel that you have these expenses and you need it. I can see it could get tricky because people might say, well, you need a full time carer, therefore you've got to be doing the 35 hours or, if you don't need full time care, why are we paying 35 hours? So maybe there has to be a bit more flexibility in the actual minimum amount of hours. You know, it could be two hours a day, somebody's going in in the morning and in the evening, but I don't really think somebody's income should be taken into account because that's almost a separate job. ….

> …. I do think it should be at least a minimum wage, because if it is somebody full time job, 35 hours a week, which you would be doing in a paid job, you're doing probably 35-36 hours plus a week. I don't really think you should be paid less than somebody that you would bring in from outside, that would be paid at least that hourly rate."

So, there are indeed significant challenges ahead for any government who seeks to reform the way in which family carers are treated and at this point it may be appropriate to consider just how this might be done.

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7.2.6. Funding Social Care into the Future

With ever-increasing numbers of elderly infirm in society, the government will need to work out how the provision of social care can be funded into the short to medium term future and beyond. There have been many suggestions made in regard to how this might be done, from the government recovering any sums that it has paid out in regard to the care of an individual from that individual's estate on his/her death to a flat rate tax on the estates of all members of society when they pass away whether they have received care or not. Interestingly, when asked about this, there was no real consensus amongst the participants in this project in regard to how social care should be funded into the future. In fact, there was some little support for all possible solutions, from continuing to place the burden on general taxation through to the introduction of a separate insurance, much like our existing national insurance, that would be devoted to the funding of social care.

For the most part, the idea of a flat rate tax, known in some quarters as a 'dementia tax', was the most objectionable solution,[937] but even this had some support.[938] Placing the financial burden of providing social care on the public purse in the form of an increase in general taxation or an increase in national insurance was a solution that found favour with some.[939] But, perhaps the most popular

[937] See, for example: Mrs. B.C. (at page 6 of her transcript), Mrs. I.J. (at page 7 of her transcript) and Mrs. J.K. (at page 6 of her transcript).

[938] See, for example: Miss H.I. (at page 8 of her transcript) and Miss O.P. (at page 4 of her transcript).

[939] See, for example: Mrs. A.B. (at pages 6-7 of her transcript) and Mrs. D.E. (at page 6 of her transcript)

solution from those who expressed a preference was the idea of some form of separate insurance fund dedicated to the provision of social care much as is done in Japan.[940] Yet, even here, there seemed to be an implicit acceptance that such a solution has really come too late; if such a scheme were implemented now, the younger generations would be paying for the care of the elderly as they would be the ones who would be paying into the scheme out of their earnings while the elderly would not.

One particular question that was put to all participants was whether they might support what was described to them as 'the Illinois solution'. This relates to the ability of adult children who had been caring for an elderly parent to make a claim for payment for their services from the elderly parent's estate once the parent had died if certain conditions were met. If such a claim is accepted by the courts, judges would have a discretion to award a payment out of the deceased parent's estate and this would depend on factors such as the extent of the care that was, and the period of time over which the care had been, provided. While some participants could see the 'fairness' of such a solution, most took a pragmatic approach and suggested that, in practice, this would only serve to divide the family at a time when the family should be pulling together following the loss of a loved one. On the whole, it is fair to say that the 'Illinois solution' did not find favour with those interviewed as part of this project.[941]

One more popular form of provision for family carers while they were undertaking the caring process was the provision of 'tax breaks' or other 'tax incentives'.[942] Yet, such a solution would only seem to be useful if there were other members of the family earning sufficient to pay such tax. And, in these circumstances, other participants favoured some form of means-testing if additional funds were to be raised separately from general taxation.[943]

Some 'difficulties' were also mentioned in regard to future funding, from the burden that any change in funding might bring to the younger generation to the lack of any incentives to save for one's old age and, in particular, to put money aside for future social costs given that, if one didn't save, the

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[940] See, for example: Mrs. Q.R. (at page 11 of her transcript), Mrs. S.T. (at page 7 of her transcript) and Mrs. N.O. (at page 6 of her transcript).

[941] See, for example: Mrs. E.F. (at page 7 of her transcript), Mrs. G.H. (at page 6 of her transcript), Mrs. M.N. (at page 6 of her transcript), Mrs. N.O. (at page 5 of her transcript) and Mrs. S.T. (at page 6 of her transcript).

[942] See, for example: Mrs. G.H. (at page 6 of her transcript) and Mr. T.U. (at page 11 of his transcript).

[943] See, for example: Mr. P.Q. (at page 7 of his transcript).

State would step in and provide much the same care as one would get if one were self-funding that care. This brought the focus of these discussions around, once more, to what solution might be regarded as the 'fairest solution'. Yet, here, self-interest seemed to play a large part in those discussions, for what is 'fair' tends, for most of us, to be a rather subjective concept.[944]

At page 6 of her transcript, Mrs. N.O. makes a very valuable contribution to these discussions, particularly in light of recent events, in the form of the global pandemic, which have hit the younger generations hard:

> "In general, taxation hits everybody equally. But, it's going, it's largely falling on the younger generation, isn't it? And a younger generation, I mean, I would say from the 50s up, if not even 60s up, who are going to be less well off, than the persons who are being cared for and I think that's it. I don't feel it's fair to put too much more taxation on the 20s, 30s, 40s, 50s, because of their financial situation at present, I don't …. It's quite alarming actually to think that say whatever it was, 25,000 or 15,000 pounds would be taken from everybody's estate because there'll be quite a lot of people who, this it wouldn't make a dent at all and there'd be all the people who wouldn't have done that amount of money.
>
> So it, I think, whichever way you look at that, that's not particularly fair. That's not an answer at all, is it? I suppose, I mean I would feel perhaps, if people could afford it, we ought all to be paying into a fund which does support care when we're older, a bit like an insurance. But that would have to be started probably these days when you're about 20. I mean, when you think about the astronomical costs, which it's going to be. Honestly, like everybody else, I don't have any ideas about this. Once you ask these questions are posed and suggestions may which I've never thought of, I mean they are quite frightening".

In this passage there is, indeed, an implicit acknowledgement that every solution will have its detractors for there is no solution that is going to be fair to everyone. In these circumstances, perhaps some form of mixed solution might be the one that finds most favour. This was the solution favoured by Mr. T.U. who, at page 11 of his transcript, said this:

> "So the idea that everybody should pay for their own care is obviously one view but the state has the problem, I presume, that it can't afford to pay for everyone's care going forward. I

[944] See, for example: Mrs. I.J. (at page 7 of her transcript, '…. people should make their own provision and if they haven't … they should get minimal assistance.').

think that a mixed delivery of care costing makes sense, building in some sort of compulsory insurance if that were feasible. But, at the moment, the state doesn't help until you get down to about £23,500 isn't it? I think that people should be reassured that they can keep a lot more, that the state should pick up a lot more of the cost without going that low, but I do think that some sort of compulsory insurance should be on the table so as to be part of the mixture."

The iniquities of the present system which forces the elderly to pay for their own social care until their own capital resources are depleted to less than £23,250 was a common source of complaint amongst participants. It was widely thought that this removed any real incentive to save for one's old age. It was also felt that this was wholly unfair to those who had worked hard throughout their lives in order to accumulate wealth with a view to passing this on to the younger generation.

This, indeed, was a particular source of anger and resentment across almost all, if not all, of the participants, and it was voiced, in particular, by V.W. at pages 9 and 10 of her transcript:

" …. it's your monthly income if you've worked, you know, for a pension and you've paid into a pension, you paid into that pension so that you can have a nicer quality of life, and so you can have those little sort of extras later on in life, and I think it's a little bit unfair that, if you've done that, and you need to pay for care or facilities, your pensions really are taken away straight away, they're just part of your income and they say all right we'll have that. I think that's a little bit unfair, I think, maybe it could be staged in some way that you that you still had a little bit of a benefit from actually making those contributions even if it was half or something.

….

You know, so, if somebody wanted to stay in their own house, but had to pay for care, I don't think the person who owns the house would like it, because they probably think, 'This is my home and I want it to go to my children, I want it to, you know, go down the generations'. For lack of anything better at the moment, I do think, if you get all the care that you need, but it means that you've got the money to distribute, I suppose, in a way, it's sort of unfair, but I don't know where they get all the money from if they didn't actually do that. If you've got the money to pay for your care, I suppose, in a way, you should pay for it. But I do think the thresholds for what people would have left and also on the way that people's pensions really

are raided, I think that needs to be looked at to make it a bit fairer for people that have put in bigger contributions."

And, this was further acknowledged by other participants. Perhaps the final word should come from Mrs. Q.R. made this and other valuable points at page 12 of her transcript:

> "And yeah why should people lose all their savings till it gets down to £23,250, whereas other people get it for free. There's a complete inequality between certain people getting a lot more from the State, and they may be people who've never saved, always had everyone providing for them, so what's the incentive for people who've worked all their lives being prudent, you know done the right thing, but then it comes to the time when they need some help from the State and the State effectively says, right we're going to take everything from you. And what we give people in care is ridiculous, because they give you something like 20 pounds a week allowance, they say, yeah that's what you've got. It's demeaning, so I do think that it needs to be radically overhauled and there's got to be either a ceiling which says, right, after the first £100,000 it's picked up by the State or we pay some type of tax out of our wages, and that goes towards an insurance policy for social care and that everybody recognizes that from an early age, that you're paying something you know pound a week or whatever towards it, but I don't think that …. it's not sustainable and particularly with how it's going up, the amount that it's costing for care, I mean who could afford 1500 pounds a week, because does it cost 1500 pounds a week look up someone, when you look what they're paying, the carers where the hell is that money going to?"

So, the clear message from all participants is that the present social care system is iniquitous on almost every count. However, the real difficulty is, 'What should replace it?' This is the challenge that future governments face. However, no recent government has been willing to face that challenge. The funding of social care in this country has been a political football which the main parties have been content (in the words of Mrs. Q.R.) to 'kick into the long grass' merely because they have not been able to find a solution that will have almost universal support. Yet, most funding solutions seem to have their advantages over the present system, at least in the eyes of the participants in this project. And, in these circumstances, the main parties are seen to be perpetuating a system which, for many, is simply indefensible.

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7.2.7. The Value of Caring

There seems to be little doubt that family caring is highly valued not only by the care recipients in each family that carers for their elderly loved ones but also across society as a whole. Indeed, there were a number of instances in the interviews where friends and neighbours had rallied around providing support for family carers, sometimes gratuitously, sometimes on the basis of some small payment, but that support was often there.[945] Nevertheless, what also comes out of these interviews is that many family carers felt that there was little alternative but to step in and care for their elderly parents or relatives. In the words of Mr. C.D., at page 1 of his transcript, responding to the question, 'how did you become to be your mother's carer?':

> "It was to do with her dementia which we were aware of,… was developing. She started repeating things a lot and she wasn't quite the person she was. And part of this was she got more and more obstinate in a way that she didn't ever used to be. And basically she refused to accept there was anything the matter with her. And she would not accept care from anybody at all. And the only way we could do it was by a member of the family doing jobs for her, which she perceived as just helping in a family way, and then eventually we got one or two friends whom we actually paid to go and do some of the caring and they were they were just her friends and she would accept that. So it was a bit of a Hobson's choice really, you know, we had to do it or nobody would."

Many participants mentioned the onset of dementia as the reason why they had to begin caring for an elderly parent or relative. Erratic behaviour brought on a feeling that it was no longer viable to leave the carer receiver on his or her own; a feeling that before too long he or she would seriously injure themselves if they were not cared for by the family.[946] Such behaviour was often accompanied by obstinacy on the part of the elderly parent or relative, some became somewhat less and less inclined to seek the company of others or help in relation to their condition from outsiders. At page 3 of her transcript, Mrs. N.O., in response to a question that asked her to consider how her mother would have coped with life had she not been there to care for her, recalls how 'difficult' her mother became in her old age:

[945] See, for example: Mr. C.D (at page 1 of his transcript), Mrs. Q.R. (at page 8 of her transcript) and Mrs. V.W. (at page 6 of her transcript).

[946] See, for example, Mrs. F.G (at page 2 of her transcript), Mrs. N.O (at page 3 of her transcript) and Mrs. U.V. (at page 5 of her transcript).

> "I can't imagine, because she didn't like many people and she didn't accept help from many people. And, I don't think she might have even had an alarm if I hadn't insisted on that. So I suppose she could have fallen and be left there and nobody would have ever known. I don't know. Her neighbours, she antagonized both of her neighbours, so I don't suppose they, they weren't the sort of people who would check in on her each day or anything like that."

For some, the fact that there seemed, and still seems, to be no viable alternative to family care has left them feeling 'exploited' by a situation which they can do little or nothing about. At page 3 of her transcript, in response to a question that asked her whether the State or society values family carers, Miss O.P. puts her feelings thus:

> "No, not really. Like, whoever makes these decisions, come and live here for a week and see …. and live on your 67 pounds, you know. If the Government had to look after her …. because, if it wasn't for us, I mean, she would have to be in a home. And, you know, it is beyond me how people pay these astronomical amounts, five or 6000 pounds a month. How many people …. It's just beyond me. It fills me with horror, the thought of getting to that stage, absolute horror, you know."

For quite a significant cross-section of participants putting their elderly parent or relative in a home was simply not considered a viable alternative to family care, whether because of the very expense of doing so or the knowledge that the care-receiver would object, that is to say, fight such a process and place the 'blame' (i.e. hold the interviewee responsible for being in a care home, where they did not wish to be) fairly and squarely on the participant. For others, keeping their elderly parent or parents out of a care home was seen as a 'good thing' perhaps as a result of the 'bad press' that some care homes have received over the years. In a way which was perhaps typical of this view, Mrs. R.S., at page 3 of her transcript described what she was doing for her parents in the following way in response to the question how she thought her mother might have coped without her help and the help provided by her siblings:

> "She would have gone into full time care. It was as simple as that.
>
> **…**

"We kept her at home 12 months and it just got to the stage where, because of the dementia, she opened front door and she would invite everyone in for a cup of tea (laughs) which is not good, really, you know."

So, being at home in an environment with which they were very familiar with family around them, was seen as something that was not only desirable from the care-receiver's point of view but also what many family carers wanted for their elderly parent or relative. But, it was also clear from the interviewees, almost across the board, that they wanted, and expected, more help from the government in providing this care. As Mrs. E.F. puts it, at page 6 of her transcript:

"I just think, you know, I just think, I think there's a real sort of dependence on family members to look after the vulnerable members of their family and I get that. And I know that that is part and parcel of being a member of a family and, you know, looking after a relative who you love, I get that. But I think there just needs to be more help, you know, because it you know it's a lot to take on."

And, again at page 8 of her transcript:

"I just think, I think that if somebody has worked really hard all their lives and have accumulated money, then I don't know. It's a really, really difficult one, isn't it, because I do have a kind of, I think the State should support people who've worked hard, paid national insurance or, for whatever reason, even if they haven't been able to work, I think people …. I think, because we live in the kind of country that we live in, people deserve to be cared for."

In fact, almost all of the participants who expressed an opinion on this subject felt that the State did not value what they did as family carers in any real degree at all. At page 5 of his transcript, Mr. P.Q. (in fact, a retired professor) felt that the problems associated with the provision of social care were endemic and the government's response, whether at a local or national level, was ill-thought through:

"I think the whole aspect of care is badly thought through by government. We only just see on the Wirral, for instance, the number of care homes which have diminished, and the reasons for why for that and it's taken over by people who think it's a money making exercise, if it can't make the money claimed, it closes.

And if they don't fill in the documents correctly, as we found out from my mother in law, the home gets closed anyway. It's not meeting the standards when in fact every person who had

got a mother or a father in that particular home said they were being really well looked after, but they still got shut by the Council. So I think you've got, right the way through, there is you know real empathy with people who do the caring and the people who are being cared for."

This was echoed in a perhaps more forthright manner by Mrs. Q.R. at page 11 of her transcript:

"I still think there's a lot of lip service [paid] to social care. Effectively, your family members, your most precious person, and yet how we value carers, paying them on the worst terms and wages possible, and that's …. I find it disgusting."

So, it could be said that, until the State begins to properly value professional care workers, it is hardly likely to be able to give proper value to family carers at least until popular opinion is mobilised in their support. Could the government's handling of the Covid-19 pandemic be the catalyst for this? At page 5 of her transcript, Mrs. A.B. believes that it might well be, yet she still expressed some doubts whether it will. In response to the question whether she thinks that the government value care work, she says this:

"No, I don't, I don't think so. Although, with all the Covid crisis, I think it's become more … it's more in the spotlight, isn't it? And I think that it is more valued now than pre-Covid.

But I don't really think that's affected the amount of pay that carers get particularly has it yet. Anyway, I don't know whether it will do in the future."

What therefore does the future hold for family carers? At page 6 of her transcript, in response to the question whether she thinks that the government value carers, Mrs. R.S. paints a rather bleak picture:

"I don't think they do. I don't think they realise. You just do it because it's your mum or your dad don't you?

….

I don't get think the government understand the situation that, you know, when your mum has a stroke your whole world changes. You know I can remember when my mum and …. You used to dread the phone call going in the evening in case ….. They don't understand. They don't understand.

….

Do you think that the next generation will care? They will not. They are a different generation to us."

All of which means, if true, that root and branch reforms are needed now from the top down if we, the baby boomer generation, are going to find any help in our old age from our families and loved ones.

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7.2.8. Initial Conclusions on the Project

While a number of conclusions on the project will be voiced in the following main section of this work, one observation that might usefully be made here is that there are perhaps many family carers out there who do not yet classify themselves as carers. At page 3 of her transcript, Mrs. D E. relates an experience that she had fairly recently, yet before having this experience she never really thought that what she was doing for her mother was 'caring':

"Yeah, I did have to do some looking after … you see, I didn't see … this is the funny thing …. I didn't see it as caring because she lived with us and it's been a gradual process, if you see what I mean, and I've never considered it as caring. I've just considered it as mum living with us and it's gradually become …. it's morphed, if you like, into becoming a caring role, I think, without me realizing it. And because I went …. you, perhaps, you don't want anecdotes …. but I went to the doctors for the flu' jab, and the nurse said, 'Oh, why are you here?' And I said, 'Well, I think it's because although I'm not old enough to have … I wasn't old enough to have a flu jab ….' And so she said, 'Oh, is it because of your mum and I said, yeah.. So she said, 'Oh, so you're her carer.' So I said, 'No, I'm not a carer. She lives with us.' And she just laughed, like a drain, and said, 'No, you're her carer'."

So, if this is a common experience, there are, in fact, a great deal more family carers out there than those who actually appreciate that they are caring for an elderly parent or relative and who therefore regard themselves as carers.[947]

[947] Indeed, one can see this in the transcript of the interview with Mrs. I.J. where it would seem that, as she did not need to do 'hands on care 24 seven' she had difficulty in regarding herself as her parents 'carer' notwithstanding that she and her husband had put an alarm in just in case one of her parents, who were living with them in another wing of their house, had a fall and notwithstanding that she then went on to describe doing many tasks for her parents every day, such as putting her mother's hearing aids in, washing and drying her mother's hair, cleaning for them, doing their laundry, doing their ironing, providing a meal for them every other day, and bathing her mother twice a week (see pages 2-3 of that transcript).

As regards the conclusions that might be drawn from the project that were particular to the project itself, it is fair to say that the experiences of all participants in the project quite clearly demonstrated that caring for one's parents and relatives in their old age and in circumstances where they are unable, or would at least struggle, to care for themselves is a very difficult and demanding job.[948] Similarly, many participants felt the way in which care agencies deal with those in their care was very poor, with few getting the treatment that they were paying for as a result of care workers having such tight schedules to work for. Most, if not all, interviewees expressed significant frustration, if not exasperation, with the commitment, or lack of it, from government, particularly central government, to the care of the elderly. In particular, the lack of support from the government in the form of state benefits was almost universal expressed as was a general concern that government had no real idea on how to either construct a social care system that was fair and could meet the needs of society or how to fund such a system. Yet, everyone felt that caring for one's elderly parents and relatives was valuable work, work that simply had to be done, but that in reality they were receiving little or no thanks for what they were doing, save perhaps from the care-receiver themselves.

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7.3 REFLECTIONS UPON 'THE DIFFICULTIES OF REFORM'

As noted earlier, the lack of any form of consensus in regard to the question of how social care for the elderly and infirm might be funded into the short to medium term future was one of the most striking findings to come out of the project referred to in the preceding section. And, ultimately, if any wholesale change in the way in which our social care system serves the elderly in our society is going to come about, the question of its funding needs to be resolved before any such reforms are put in place. While social care for the elderly has been something of a 'political football' in recent years, there has been little momentum for any real change in policy. Indeed, the 'elderly to non-elderly spending ratio' ('ENSR') of UK governments over the past 50 years or so has been remarkably low when compared with many other European States, Australia and Japan. Even the United States – which lacks any clear, concerted state-orientated elderly care policy –plainly outspends the UK in this

[948] Miss H.I. described it as the most difficult job she had ever done, adding that she had been in the police in such a way as to indicate that caring is a more difficult task than police work (see: page 6 pf her transcript).

regard.[949] In fact, in the words of Martha Ozawa and Yung Soo Lee, while 'most rich countries, including the United States, spend more on the elderly than on children … [a] few countries, such as …. the United Kingdom …. exhibit an apparent preference for children over the elderly in their tax and transfer systems.'[950] In these circumstances, it is perhaps unsurprising that no consensus on how to fund future social care programmes for the elderly was apparent across those who participated in the aforementioned project. Until relatively recently, there has been little on-going public debate in the in England and Wales, or indeed in the UK as a whole, on this topic, although there are some signs that this may be about to change.[951]

It is interesting to ask ourselves why our social care system is where it is, with no coherent plan for the future. We are, of course, an island race. Self-sufficiency is part of our national psyche. Not only must the nation be self-sufficient but its citizens must also 'stand on their own two feet'. Our politics is largely based on individualism not collectivism. In his 2012 monograph, *Political Institutions and Elderly Care Policy*,[952] Takeshi Hieda provides the reader with a carefully-developed theory of how Japan, Sweden and the United States have developed their existing social care policies as they affect the elderly by connecting this development with the political institutions and constitutions of these respective countries. In Japan, the burden of funding elderly social care is carried by an insurance programme that was first introduced in 2000; in Sweden, the relatively generous provision that is presently in place for the care of the elderly was a product of post-war thinking that was developed in the 1960s and 1970s. The common factor in these two countries over the latter part of the twentieth century was the relative dominance of one political party across the latter half of the twentieth century. In Sweden, this enabled policy makers to respond to a demographic that was ageing much more quickly than in most other Western countries.[953] As a result, Sweden's comparatively generous

[949] See: Julia Lynch: The Age Orientation of Social Policy Regimes in OECD Countries, (2001) *Journal of Social Policy*, *vol. 30(3),* pp 411-436.

[950] See: Martha Osawa and Yung Soo Lee: Generational Inequity in Social Spending: The United States in Comparative Perspective, (2011) *International Social Work,* vol. 56(2), pp 162-179. The research set out in this paper establishes that, across the years covered by the project, i.e. 1991-2005, amongst the larger spenders on old age benefits were France, Germany and Italy and the small spenders included the United States, the UK and Canada.

[951] The Liberal Democrats are now putting social care for the elderly at the forefront of their more recent political campaigns – see: 2019 Liberal Democrat Manifesto (libdems.org.uk) – https://www.libdems.org.uk/plan.

[952] Takeshi Hieda, *Political Institutions and Elderly Care Policy*, (2012, Palgrave Macmillan).

[953] In Sweden, over 65s already accounted for more than 8% of the total population of the country at the turn of the 20th century due to mass emigration, predominantly by the young. By 2005, those over 84 years of age accounted for 2.5% of the total population – *Ibid*. at p. 187.

elder care policy can be seen as an elite-driven process, responding to the depopulation of rural areas and the feminization of the work force. But, what enabled such a policy to be introduced so effectively, according to Hieda, was Sweden's political and social system. This was a system that was a product of a society in which there were no social cleavages, a large degree of decentralization and a good deal of consensus politics.[954] In a way, Japan, post-1945, had a similar political regime that was based on party-lines with multi-member polling districts and a single non-transferable vote for each member of the electorate. In order to become elected, politicians had to 'tow the party line' and therefore social policy was almost wholly generated by the ruling Liberal Democratic Party, at least until the political crisis of 1989.[955] At this point, Japan too had a rapidly ageing population similar in intensity to that of Sweden and a response was clearly needed. That response came in the form of a national insurance-based system that required, and still requires, all citizens over 40 years of age to pay insurance premiums into a social insurance scheme which then allows anyone over the age of 65 to access care services with subsidies paid for by the scheme which are dependent on the level of care needed. In essence, the introduction of this scheme was a product of an alliance between 'welfare bureaucrats and political parties supported by urban constituencies'.[956] But, again, the 'social care revolution' was helped by the country's social and political system.

Hieda contrasts Sweden and Japan's social care policy with that of the United States, where (so he finds) elder care is, and always has been, peripheral to health care and is essentially a product of 'inconspicuous and incremental changes', which have largely been brought about by individualistic political competition.[957] The checks and balances in the U.S. constitution have produced a system where policy-making decisions in relation to universal social care services for the elderly are 'less likely to flourish' which has led to each federal programme for such services having 'distinct eligibility criteria, programme structures, covered services and financing methods'.[958] What therefore might this mean for any prospect of reforming the social care system for the elderly that we have in England and Wales? One can immediately see many parallels between the United States and England and Wales that help to explain the systems of social care for the elderly that are presently in place in the two countries. Immigration, in both instances, has slowed the ageing of the citizenry of each country. The politics of the two countries is fractured with 'the right' winning out at one election only to be

[954] fn. 952 at p. 69.

[955] fn. 952 at p. 91.

[956] fn. 952 at p. 137.

[957] fn. 952 at p. 140.

[958] fn. 952 at p. 151.

replaced by 'the left' in the next. Consensus politics is rare. Social cleavages exist on both sides of the Atlantic. Public and private interest groups help to drive policy-making even at the highest levels of government. Yet, in the UK there is now some evidence of a shared understanding that a significant measure of reform of our elderly social care policy is needed, and is needed quickly. All three national political parties have begun to place this reform at the forefront of their respective manifestos. Having said this, one then returns to the apparent lack of consensus over what these reforms should look like and how they should be funded. The disparity of opinions that were clearly evident in the responses given to questions concerning the nature and funding of such reforms in the interviews referred to earlier in this chapter clearly demonstrate that there is something of a policy vacuum in this area. But that is the essence of this thesis, that is to say, to generate ideas – such as the 'family care contract' – that will help to fill that vacuum and incentivise the provision of social care for the elderly by their families.

Another factor that is born out by both the responses to these questions in the aforementioned interviews and earlier research carried out in both the EU and in Japan which is referred to by Hieda in *Political Institutions and Elderly Care Policy* is that people will only choose social care solutions that they are familiar with.[959] In Japan, for example, there was marked change in the responses of those who participated in a survey carried out in 1995, and again in 2003 following the introduction of the social care insurance scheme referred to earlier, to the question: 'Given that you became frail or had dementia and required care, if you are taken care of at home, which form of care would you want?' The more widespread introduction of professional care – or 'formal care' as it was described in the survey – in the year 2000, with the coming of social care insurance, saw attitudes to such care completely reverse. Less than half the numbers of those who said that they would prefer informal social care from their families over social care delivered by professionals gave the same response in the later survey. And the numbers of those who said that they would prefer to receive wholly formal or professional care in 1995 had doubled by the time of the second survey in 2003.[960] It is therefore very much for policy-makers to generate solutions. And, in turn, this would seem to support a series of compatible policies that would take care of the needs of all those concerned with the provision of informal social care for the elderly. The 'family care contract' referred to earlier is just one of those potential solutions.

[959] fn. 952 at pp. 190-192. Such research is also supported by Steinmo's research on tax policies in Steinmo, S. (1993) *Taxation and democracy: Swedish, British and American approaches to the financing of the modern state*: Yale University Press.

[960] fn. 952 at p. 192.

And the 'family care contract' will provide a solution for some. Imagine 'M', who is aged 86 and a widow, has an estate which is worth £450,000, but most of this comprises the house in which she lives which is perhaps a little too big for her needs. Imagine that she needs care, she struggles with dressing and washing, she cannot make her own meals, she has difficulty is getting about save with the use of a walking frame. If M goes into a care home, and sells the house in order to self-fund her the cost of her care (which she will have to do), the proceeds of sale of the house will disappear in care home fees at the rate of some £60,000 per year.[961] Within seven years or so, M's estate will have been dissipated to the point where she would be entitled to receive financial support from her local authority for the costs of her care. Imagine that M has one child, a daughter, 'X', who is recently divorced and living alone, and is happy for M to come and live with her. However, if she does, X will struggle to hold down a job and care for M. If M and X enter into a 'family care contract' under which X is entitled to draw £25,000 per year in government subsidies in return for caring for M, albeit on condition that this money is recoverable from M's estate when M passes away, then X will be able to care for her mother and live comfortably (but far from extravagantly) while doing so. Imagine that this is done and that X cares for M for the next five years before M then passes away. Assuming that there is no increase or decrease in the value of M's estate in the meantime (and M will have been drawing her old age pension to cover her needs), under the terms of the 'family care contract' the government will be able to reclaim the £125,000 paid to X over the five years in which she has been caring for M. That reduces the value of M's estate to £325,000 and no inheritance tax is paid because that is the level at which the nil rate band operates. As M's only child, X then takes the whole of that estate under M's will. At that point, X will have received (i) £125,000 in the form of government payments over the past five years, and (ii) £325,000 from M's estate (total, £450,000). Without such a 'family care contract' in place, and on the basis of our present social care and taxation regimes, (a) X will have struggled, financially, over the past five years, entitled perhaps to only £67.50 per week by way of carer's allowance (£3,510 per year), and (b) when M dies the excess of her estate over the nil rate band of £325,000 will be subject to inheritance tax at 40%, which means that X will only receive £400,000 from her mother's estate and not the full £450,000.

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[961] This figure is taken from the annual cost of care in nursing homes in Shropshire in 2020-21, which perhaps presents us with a figure that is typical across much of the country. See also Laing Buisson's 'Care of Older People UK Market Report', 31st edition 2020, which is referenced at Paying for care and what care-home fees cost (accessed: 17/04/21).

7.3 FINAL CONCLUSIONS

If English Law is going to be called upon to help to resolve the questions that were posed at the outset of this project, it can only do so through new legislation. Existing law cannot be adapted for this purpose. As for this new legislation, much can be learnt from the attempts made by legislators in Illinois to deal with what has been recognised as a global phenomenon. Admittedly, the provision made for informal or family carers by s. 18 – 1.1 of the Illinois Probate Act of 1975, as amended, has not been entirely, or perhaps even partly, successfully, hamstrung - as it is - by conditions that many carers have found themselves unable to satisfy. Nevertheless, the claims that have been successful under that Act do demonstrate what legislation can do for informal carers, given what we might call 'the right conditions' – i.e. conditions that most genuine informal carers are able to satisfy and which are fair and reasonable as between the carer and the beneficiaries of the care-receiver's estate who would be asked to bear the costs of such care.

And, indeed, it is important to recognise, at this juncture, that there is another philosophical basis for the claims of informal carers for financial redress, albeit not one out of which one can, without more, frame a cause of action in English courts, namely, that the care-receiver's estate has been preserved for the beneficiaries because it has not been required to carry the burden of buying-in care services at commercial rates due to the provision of care by the informal carer 'without charge'. In short, public policy can justify the proposed statutory intervention on the basis of 'need' – we, as a society, need a social care system that provides for our disabled elderly – but can also support that intervention on this notion of 'unjustified enrichment' – the care-receiver's estate is only available to the beneficiaries as a result of the free provision of care by the carer.

So, in light of this, we now ask ourselves, once again, 'Who is going to care for our disabled elderly in the coming decades?' The answer put forward in chapter six of this thesis is 'anyone and yet everyone'. While the solution that has been advanced is described as a 'family care contract' – because the vast majority of those who will enter into these contracts with the care-receiver are the care-receiver's adult children – the suggested registration system for these contracts will allow anyone to put themselves forward as someone's informal carer if they are willing to take on the demands for care that have been identified by the care-receiver's care assessment. Of course, if a care-receiver's adult child wishes to take on this burden, the care-receiver must choose with whom to make the proposed 'family care contract'. And, where the care-receiver is incapable of making such a decision through want of decision-making capacity, that decision may have to be taken by the care-receiver's attorney

or, ultimately, the courts. The 'family care contract' would be mediated as indicated in chapter six and would be periodically open to review and renewal, again through the mediation process. And, as we have seen, control mechanisms would be put in place which would allow local authorities – as those ultimately responsible for the provision of social care to those in their community – and the courts to intervene and bring the 'family care contract' to an end where circumstances warrant it.

The series of twenty-one interviews that took place with informal or family carers, and which were analysed earlier in this final chapter provide clear evidence of the unsatisfactory status of the existing social care system and its need for reform. All too often the care visits provided by care agencies are referred to as little more than 'fleeting' with no time for the companionship that the elderly infirm often crave in order to bring warmth and meaning to their lives. Those elderly who are under the care of their families are indeed fortunate, in the main, to have such regular human contact. And the commitment of family carers who look after their needs is often great. Any support that government provides for these carers is plainly inadequate and goes unappreciated by the few who are entitled to receive it. Clearly, a significant degree of reform is required to the existing social care system. But, more than anything else, those family members who are involved in the caring process need certainty and clarity over the support that they are entitled to both financial and emotional. The availability, and financial value, of the benefits available from the State obviously need to be increased, and substantially so, in order for family carers to feel that the true worth of what they do is fully appreciated by society as a whole.

At this point, it may not be entirely clear why 'everyone' will care for our disabled elderly under the proposed legislation. Everyone will support the provision that will be made for informal carers through greatly enhanced carer's benefits (which will need to be re-named) because, at least in the short term, the money that Central Government will inject into the economy through the provision of such payments may well affect the real value of their income and savings. But, that – if, indeed, this is a consequence of what has been suggested – is a price that society must surely pay to meet a 'problem' (i.e. the continuing provision of social care for the disabled, elderly) that is, ultimately, society's responsibility and no one else's.[962] And, indeed, these remarks provide us with the basis of the answer to the second question raised at the outset of this investigation, 'How are the costs of providing such care to be met?' The costs of such care will be met by 'government money' created by Central Government on the back of the security provided by charging the properties owned by care-receivers with the costs of what it advances to informal carers for the care services that they are obliged to provide under any 'family care contract' that they might have entered into. Even where there is no

[962] See: chapter three, section 3.3, s*upra*.

such security available, the costs of care will still be a debt recoverable from the care-receiver's estate on his/her death. In this way, any 'balance of payments' issue will only arise as and when these debts are written off as irrecoverable.

In essence, what is being proposed is a social care system that is largely funded through recourse to the untaxed wealth that is presently locked away within our housing market. The solutions that have been advanced – i.e. the funding of these proposals, the creation of 'family care contracts' through mediation, and the scaffolding that will be required to make such ideas 'work' in the real world – build upon, and – it is submitted – significantly progress, ideas that were initially put forward by others, but which were perhaps underdeveloped until now.[963] Much further work on these proposals is still required. And, in practice, these suggestions may only be part of the solution. For instance, one can certainly foresee that a hypothecated income tax, whether local or national, could be applied in addition to these proposals to fund what is an extensive shortfall. Moreover, whether what is proposed is a 'one-solution-for-all' is, of course, another matter entirely. Other countries, particularly those where general levels of taxation are much higher than in England and Wales and State-funding for social care is commonplace, may look to deal with 'the longevity conundrum' in different ways, using more distinctive measures. There does not appear to be any 'one-size-fits-all' solution.

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7.5 FURTHER RESEARCH AND REFINEMENT

Clearly, a householder's ability to deal with the home that he/she owns in any way they choose represents something of a challenge to the present proposals. A similar difficulty exists where an individual attempts to avoid his/her estate carrying significant Inheritance Tax liability by giving that home away before his/her death. Here, 'the seven-year rule' – under which gifts made within seven years of death are liable to such tax – and the 'reservation of benefit rules' – which are designed to prevent a householder giving away his/her property but continuing to receive the benefit of it – have largely curtailed the misuse of the right to dispose of one's own property during one's lifetime in order to avoid tax which becomes payable on one's death. Regulations will need to be enacted that will have the effect of preventing homeowners from borrowing on the security or otherwise releasing more than a given share of the equity in one's home through the use of equity release schemes or by

[963] Principally the work of Simone Wong as referred to in section 1.4 of chapter one of this thesis.

'trading-down' in an effort to generate funds that would ordinarily be dissipated. Similarly, the charging of one's personal debts on one's property as a way of diminishing what will be available to the Government as security for any moneys paid out to adult children or any other person in return for the provision of social care will need to be regulated in some way. Here, giving the Government priority over other creditors in regard to the recovery of such moneys from the deceased care-receiver's estate, much as the legislation in Illinois purports to do, may provide an answer.

One particular area of work that needs yet to be done is on the effect of funding care services from the public purse in that money will flood into the economy from the 'carer's payment' – i.e. the former carer's allowance – that will come from Central Government funds. Some of this money will be recouped from the statutory charge that will secure some of what needs to be paid out by central government in order to fund what is proposed, but a significant part of these funds may not be recovered because either (i) they are paid to informal carers who are caring for care-receivers who do not own their homes, or (ii) the cost of the care provided by these informal carers exceeds the value of the care-receiver's home. That, of course, is the financial cost of this element of social justice. But, it is a price that must be paid in order to secure the future of the present generation of elderly disabled and what lies ahead for those who will take their place as the twenty-first century unwinds. The earlier analysis of the quantitative-easing process that took place in the UK only a few short years ago is designed to demonstrate that western governments can undertake social engineering projects by creating and distributing wealth without adversely affecting their national economies.[964] And, the findings that followed the concerted exploration of modern ideas relating to the roles of family members, society and the State strongly suggest that is, indeed, the State that is now obligated to take action to meet the demands that increasing longevity will bring.[965]

As time moves on the proportion of elderly in our population grows ever larger. Already, family carers save the UK economy some £132 billion per annum, with over 1.3 million people across the UK providing over 50 hours of informal care each week and still many more a little less.[966] But, the demands that will be made on this section of our society will only grow; and, the suffering of these informal carers can only increase unless action is taken at the highest levels of society. This thesis lays bare the challenge that is facing modern society as it seeks to cope with an increasingly elderly population; it analyses the moral responsibilities that surround the meeting of that challenge; it rejects

[964] See: chapter two, *supra.*

[965] See: chapter three, *supra*.

[966] https://www.carersuk.org/news-and-campaigns/press-releases/facts-and-figures (accessed: 04/10/18).

the suggestion that the present law might be amended in order provide some inconsistent and arbitrary form of provision for informal carers; and, finally, it proposes a radical new solution to the demands that an elderly population with ever more burdensome social care needs will make on society as we move further into the present century.

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