

THE LAW ON HOMELESSNESS

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This book was written in 1996 and published in 1997 immediately after the enactment of the Housing Act 1996. It was intended to be both a guide for practitioners meeting, as many practitioners do, the law relating to homelessness in a hurry in the course of a busy high street legal practice. The law relating to homeless people deals with their criminal liabilities and their liabilities in tort, as well as with their position under housing law: that was what I sought to cover in this book.

I had first encountered homeless people as a student walking up the Strand in London and then latterly in volunteering for The Big Issue, a remarkable undertaking, which allowed me to advise homeless vendors on alternate Saturday mornings in their meetings in the crypt of St Martin in the Fields and to write about the overlap between law and the homeless in their magazine. This book grew out of that involvement.

The book itself was required by the publishers to be of a maximum length and was produced by means of a novel production process – which my remarkable editor Karen negotiated with many late nights and astonishing good humour in the circumstances. In the future I want to return to this topic in a more socio-legal way.

What follows here is the material you would find in the first 15 pages or so of the book which gives you a flavour of my role in the project, if not much of the detailed analysis of the legislation and the case law which makes up the book.

“Poor naked wretches, wheresoe’er you are,
That bide the pelting of this pitiless storm,
How shall your houseless heads and unfed sides,
Your loop’d and window’d raggedness, defend you
From seasons such as these? O, I have ta’en
Too little care of this! Take physic pomp;
Expose thyself to feel what wretches feel ...”

*- King Lear
Act III Scene IV*

The homeless: “the people you step on when you leave the opera.”

*- Sir George Young, Minister for Housing,
Today, 29 June 1991*

“... popular dreads were assigned to open and shared space rather than the mythic sanctuary of the home. It was assumed that danger lived in the public places, not in the private domain ... Home may be a frightening prison to a battered woman.”

- Beatrix Campbell
Goliath, Britain's Dangerous Places
Methuen 1993, p.168

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Preface.....

This book is dedicated to a 16-year old girl I found huddled in a sleeping bag on Little Argyll Street in London's West End. She had been abused, dropped out of a school for the educationally-challenged, became addicted to heroin, then dependent on methadone and strong lager, and raped. For all the Channel 4 documentaries, for all the magazine exposes, for all the copies of the Big Issue you buy on the street, nothing can bring home the misery of homelessness like opening yourself up to people who are living it.

“The Law on Homelessness” is partly about people like her. However, it is more generally concerned with the 122,660 households accepted as homeless by local authorities in 1994. The tens of thousands of families living in uninhabitable accommodation. The book is written for lawyers and advisors - but the subject matter concerns ordinary citizens and is, lamentably, all around us. So, the homeless people covered by this book are not simply those living in cardboard boxes on our main streets, eating scraps of other people's take-away dinners. It is about thousands of families living in appalling poverty in substandard housing in Britain in the 1990's.

While homelessness is about the contentious area of poverty, it is also one of the most frequently litigated areas of housing law. Importantly, for many legal advisors reading this book, it will deal with those clients who want to leave their current accommodation to be housed by local authorities; with those seeking to structure the break-up of a relationship; with those who are either elderly or teen-aged seeking shelter from their vulnerabilities; and for the care-in-the-community patients coping with a strange and frightening world. Understanding the statutory and common law rules on homelessness in this regard are vital to their life-choices at these critical times.

The structure of the book is as follows. The introduction considers the scale of homelessness in the English law jurisdiction and takes an historical view of the law dealing with homeless people since medieval times. The central thesis of this discussion is that attitudes to the indigent poor which were present in the Middle Ages, Victorian England and the Depression of the 1930's, are still identifiable in the common law of the 1990's.

The first substantive law section sets out to explain in outline the structure of Part VII of the Housing Act 1996 and the new Code of Guidance dealing with the law affecting homeless people. The next group of chapters considers procedural issues like making applications to local authorities, the right to notification of decisions and the means of challenging those decisions. The bulk of the text then considers in detail the statutory tests for deciding whether or not a person is homeless and then whether such a person is entitled to be accommodated permanently or temporarily by a local authority.

The last few chapters aim to complete the consideration of the law as it affects homeless people by considering the related issues of criminal sanctions against squatters and travellers; the civil law on adverse possession of land; and the means by which vacant possession of land is recovered from occupants. The central purpose, then, is to provide a

survey of all of the law which affects people becoming homeless, people once they are homeless, and people seeking to be re-housed.

The approach I have taken with the new statutory provisions in the Housing Act 1996 is that much of the old caselaw will still be of some effect in interpreting the new statutory material. Therefore, the old caselaw is considered in detail, together with discussions of important new decisions like *Awua*, *Begum*, *Ben-al-Mabrouk* and *Mansoor*. However, the aim of this book is to go beyond the simple housing legislation and to deal with the full range of law dealing with homeless people. Therefore, there is some analysis of the relevant criminal law and an introduction to the law on adverse possession of land. All mistakes, omissions and infelicities of expression are entirely the fault of the author. The law is, to the best of my knowledge, correct as at January 1997.

In a civilised, mature democracy we can have little claim to success or communal self-worth while we allow hundreds of people to sleep on the pavements of our cities, thousands of families to live in uninhabitable conditions, and tens of thousands of children to grow up in excruciating poverty. It is often easy to reduce this blight to polemic or to economics, what is difficult is to accept it as an all-too-common human crisis lived out daily in our country. This is not a polemical text but its author does have a strongly-held belief that among our priorities as a society must be the restoration of some dignity and hope to those who suffer at the breaking-wheel of housing poverty.

There are many people who deserve my thanks in the preparation of this book. I am particularly grateful to those at my publishers who have supported me from the start with kind words and kind deeds. I also wish to express a debt of thanks to those working in the area who have allowed me a little closer to the work they do: in particular the people on the Big Issue who first blooded me in this field. My family have been, as ever, an inestimable support simply by being there and listening to me. But most of all, I would like to thank those homeless people who have shared a little of their lives with me on our mean streets. I thank them for connecting in me the prose in this subject with the passion in us all.

Alastair Hudson
1st January 1997
2 Paper Buildings
Temple

Introduction.....

1-1 There is a sense in which a writer feels a need to apologise in starting a legal text with discussion of sociology and statistics. However, homelessness is not an ordinary legal subject and therefore an empirical introduction to the area is important. Its jurisprudential underpinnings and legal treatment cannot be separated from its social context. Understanding the human drama involved with homelessness is a necessity. In

comprehending the law in this area, there is also a need to place it in its historical and political context before the reason for a number of the statutory provisions becomes clear.

1-2 The starting point is the human dilemma which presents itself to every housing lawyer. The subject matter of the law on homelessness is not visible to society at large. Nor is the intensity of its suffering apparent to many who make legal decisions in this area. homelessness. As Robert Wilson puts it in *The Dispossessed*:-

“the true poverty opera takes place in the tiny rooms of council flats and houses. You have to get inside to see how bad it is. It is conducted in privacy.”

Street homelessness is clearly the obvious symptom of the disease of homelessness. In terms of statutory regulation and local authority responsibility, the bulk of the problem is hidden from public view. At the time of the census in 1991, there were in excess of 2,400 people sleeping rough in the United Kingdom, using pavements as a pillow. There is clearly a fundamental ethical issue for us all in allowing these lives to be thrown away, in allowing teenagers to risk everything huddled in doorways with small dogs.

The Scale of the Problem

1-3 Street homelessness does not constitute the full extent of the problem. In the context of the law on homelessness, the street homeless are a numerically small part of the total problem. The term “homeless” also covers those living in accommodation which is not suitable for human habitation at all, or not suitable for the specific needs of the individual concerned. The full extent of the crisis is to be found in the cramped single rooms in bed-and-breakfast accommodation, infested with vermin and damp, that contain whole families.

1-4 In 1994, local authorities accepted 122,660 households as being homeless on the terms of the legislation. The housing charity Shelter estimates that number to be closer to 2 million households. Therefore, there is a sizeable proportion of the population in housing which is considered to be uninhabitable or unsuitable for their occupation. Of these people, 30% reported their accommodation was infested with vermin; 90% did not know of any procedures for escape in event of fire; and 14 out of 15 mattresses did not satisfy British safety standards.

1-5 As Robert Wilson puts in “*The Dispossessed*”:-

“The homeless endure a harsh reality of social insecurity. The isolation of homelessness is hard to describe adequately ... The indigent live in a dimension remote from the one in which we live. The world is different for the homeless. It is cold, wet, dangerous, lonely and marginal. It bears little resemblance to late twentieth-century life as lived by most people in western Europe ... Perhaps homelessness is the single aspect of poverty that fiction tackles best. The revealed truth of fiction is sometimes a stronger truth than a fact too outrageous fully to

comprehend. It is easy to see indigence as a phenomenon entirely removed from our own circumstances.”

1-6 The necessary role of the lawyer in these circumstances is “to expose ourselves to feel what wretches feel” as Lear suggests. The legislation lays down restrictive categories of person who are entitled to accommodation or assistance. The approach of the courts in interpreting this legislation has been to make those categories even narrower than literal readings of the statute would suggest. The issue becomes difficult for over-stretched local authorities who are working with limited resources. The attitude of the legal system to the homeless appears to be founded in a long tradition of considering the homeless to be an inherently troublesome and marginal class of people.

The history of the law dealing with the homeless

1-7 It is a fact of our society’s approach to the homeless that they are a phenomenon removed from “real life” as lived by most of our society. That mind-set is identifiable in much of the caselaw in this area and in the Parliamentary debates about the housing legislation. There is a stream of thought which runs from the Poor Law of 1530 through to the decisions of the Supreme Court in 1995: that is, that the indigent poor do not have a stake in our society and not deserving of any special favours from it.

Street homelessness

1-8 Homeless people have been hounded since the days of the medieval poor law. The ancient legislation, and even that of the nineteenth century, referred to them as “rogues and vagabonds”. The Poor Law passed in 1530 aimed to licence begging and to “outlaw vagabondage by the imposition of severe punishments”. The medieval Poor Laws were used in part to organise casual labour in agricultural communities and provide occasional subsistence living for the poor. The responsibility for controlling such people was placed on their local parishes. The penalties for unlicensed begging and homelessness were criminal punishments.

1-9 The New Poor Law of the nineteenth century continued to deal with the issue of homelessness as primarily a criminal matter. The workhouses brought to life in Dickens’ *Oliver Twist*, and his own experiences of debtors’ prisons, were the reality of the treatment of the poor by the law. The spirit of Christian utilitarianism, and the enforced links between the homeless and the parishes from which they came originally, were key features of the treatment of the indigent poor. Such organised, if harsh, benevolence has been replaced by the hostels and pavements of today. There is still a reliance on good works and charity running drop-in centres and soup kitchens, to deal with the most obvious symptoms of a crisis in the social provision of accommodation and subsistence levels of income.

1-10 In his biography “Dickens”, Peter Ackroyd considers the novelist’s approach to the New Poor Law as presented in his serialised novels and other writings at the time¹:-

“What after all was the Poor Law doing? It was tearing families apart, by consigning sexes to different quarters within the same workhouse, and with the abolition of the “search for father” clause, it constituted the total disregard of the need of family life among the poor and the needy ... it is possible to see why the New Poor Law provoked in Dickens angry memories of his own deprivation, of his own separation from his family, and his own obsessive comparison of the need for food with the need for love ... Given the fact that the twin pre-occupations of the urban middle class were the fear of disease and the fear of theft, and that both of these were thought literally to spread in a miasma from the rookeries and the courts of the poor, it is important to note that Dickens was living alongside one of the most squalid areas in the whole metropolis.”

1-11 The Benthamite New Poor Law was seen as a punishment of the poor for being poor. As part of this social mood, the Vagrancy Act of 1824 was enacted “For the punishment of idle and disorderly Persons, and rogues and vagabonds, in that part of Great Britain called England”. A disorderly person was defined in s.3 as including “every person .. placing himself in any public place ... to beg or gather alms”. Section 4 empowered to the courts to sentence “incorrigible rogues” in this context to imprisonment or hard labour. Thus, the poorer you were, the greater the punishment you faced.

1-12 This statute was re-enacted in the 1935 Vagrancy Act. The criminal offences were extended to cover those “... wandering abroad or lodging in any barn or outhouse” where they fail to give “... a good account of themselves ...” and who are considered to be “rogues and vagabonds”. The purpose of the statute was to criminalise those who were simply homeless, as well as those who begged.

1-13 It is important to note that the 1824 Act had been introduced at the time of enormous social unrest with the reformist agitation of groups like the Chartists and the utilitarian zeal of the Benthamites. Street-level agitation caused by the new poor in the new industrial towns was the heart of the problem. Incarcerating people begging on the street therefore fitted the pattern of combating street-level activity with physical force. Similarly, the 1935 Vagrancy Act was enacted during the Great Depression at a time of agitation and profound economic hardship. Criminalising and marginalising those who are most poor has established itself as a feature of British history at times of social upheaval and economic difficulty.

Uninhabitable accommodation

1-14 There is a long history of sub-standard accommodation in Britain. The Industrial Revolution brought agricultural workers into towns from poor accommodation in rural

¹ *Dickens*, Peter Ackroyd, Minerva, at p. 232 et seq.

areas to poor, disease-ridden and cramped accommodation in towns. As E.P. Thompson explains in “The Making of the English Working Class”²:-

“... the houses themselves were better than those which many immigrants from the countryside had been accustomed. But as the new industrial towns grew old, so problems of water supply, sanitation, over-crowding, and use of homes for industrial occupations, multiplied, until we arrive at the appalling conditions revealed by the housing and sanitary inquiries of the 1840’s.”

1-15 The problem of people living in accommodation which was sub-standard was not dealt with by legal remedy until the creation of the Welfare State by the post-war Attlee administration. The “houseless heads” of the indigent poor were the object of early legislation. It was a later development when it was recognised that the poor live in-doors as well as out-of-doors.

1-16 The 1948 National Assistance Act was introduced to provide accommodation for those in urgent need where their need for housing was a result of unforeseen circumstances. The Act was the first piece of legislation to see homelessness as something other than a criminal issue rather than being a purely criminal matter, as with the Poor Laws and the Vagrancy Acts. However, as Moroney and Goodwin point out³:

“Whilst this offered improved options for homeless people and caused a shift in attitudes away from regarding homelessness as a criminal matter, it still failed to acknowledge homelessness as primarily a housing issue.”

The modern legislation

1-17 It was the 1977 Housing (Homeless Persons) Act (“the 1977 Act”) which confronted the deeper significance of the problem. The stated purpose of the legislation was to “change the outdated concept that homelessness was a social work problem and to place it clearly in the sphere of housing.”⁴ However, the final form of the Act was considered by many Parliamentarians and others who applauded its aims as an inadequate piece of legislation for the problem which pandered too much to the local authority lobby. However, the legislation was enacted in the teeth of the general belief that those who would rely on the legislation were simply scroungers in any event.

1-18 One of the underlying concerns of the law affecting homeless people is the need to discourage people from becoming homeless. This attitude was shown by the castigation of beggars in the earlier legislation. The Industrial Revolution marked the development of a trend towards considering the resources implications of providing an across-the-board poverty-relief system. The code dealing with “intentional homelessness” (chapter 12

² Penguin, as reprinted 1991, p.352.

³ “Homelessness - A Good Practice Guide”; Shelter 1992, p.21.

⁴ Stephen Ross MP, *Hansard* 898-899, 18.2.77.

below) was introduced to the statute during its process through Parliament to ensure that people could not choose to leave accommodation which they did not like and insist upon being re-housed. Further, the categories of people eligible for aid has been restricted to those in “priority need” (as discussed in chapter 10 below).

1-19 The continued reactionary treatment of homeless people is demonstrated in the attitudes of MP’s in the late twentieth century. For example, Ronald Bell, former MP for Beaconsfield, speaking in the house about the 1977 Act.⁵ In his view the restricted purpose of that legislation should be to provide that:

“... There must be two clearly defined categories of accommodation: healthy but uncomfortable accommodation for the bad cases, and other accommodation for people who are not so blameworthy ...”

We are thrown back to notions of the “undeserving poor” once again. The disturbing fact of the law on homelessness is that such attitudes are not confined to blather of backwoodsmen in the House of Commons but also underpin judicial decisions in cases like *Pulhofer*.

The impact of the Pulhofer decision

1-20 The speech of Lord Brightman in *Pulhofer v. Hillingdon BC*⁶ was central to the development of the law relating to homeless people. His lordship took the view that it was not a priority expressed within the legislation that local authorities be required to find accommodation for homeless people which reached a standard of reasonableness. He conceded that there would be situations in which some shelter could not be termed “accommodation”. The example given was Diogenes’ tub. This might afford basic shelter but it did not rise to the level of something which could be described as “accommodation”.

1-21 The law was altered after this decision to ensure that the requirement of suitability was included in the legislation. However, *Pulhofer* remains a seminal decision affecting the subsequent caselaw. It is seminal not because it represents current law but because the policy pronouncements which it makes still represent the underlying attitude of much of the caselaw concerning the homelessness legislation.

1-22 Broadly there are two schools of thought expressed in the cases: the permissive and restrictive schools. The first school identifies the obligation imposed on a local authority by the legislation as being the duty to provide appropriate housing for the homeless. The second school considers that the legislation as not requiring the homeless to be housed at all - rather, they are to be merely assisted in some way by the local authorities. Underlying the view of the second school is the stated conviction that local authorities are

⁵ *Hansard* 944, 18.2.77.

⁶ [1986] AC 484.

dealing with scarce resources and that the legislation should therefore be given restrictive interpretation.

1-23 Consequently, the circumstances in which the homeless are entitled to be housed are greatly restricted by the literal interpretation given to the provisions in cases like Pulhofer. The position for the legal advisor of applicants is that it is often difficult to manoeuvre through the complicated net of provisions. The effect of Pulhofer continues even after legislation was introduced specifically to dilute its impact. For the restrictive school of thought, suitability was an issue for the local authority. The legislation was designed as a safety net for the needy and not as a counsel of perfection.

1-24 The issue of the suitability of accommodation has therefore become the battleground between permissive and restrictive constructions of the homelessness legislation. The 1977 Act did not specify any quality of accommodation. Some of the early decisions, principally those of Lord Denning, sought to read in standards of appropriateness. Under these readings, local authorities would be required to live up to a spirit identified in the legislation that homeless people are to be housed wherever circumstances require it.

1-25 The applicants in Pulhofer were a married couple with two young children who were provided with accommodation in a bed-and-breakfast guest house by the respondent local authority. The authority had provided them with "... occupation of one room at the guest house containing a double and a single bed, a baby's cradle, dressing table, pram and steriliser unit. There were three bathrooms in the guest house, the total capacity of the guest house being 36 people or thereabouts. The applicants were in consequence compelled to eat out and to use a launderette for washing their own and the children's clothing. This expense absorbed most of their state benefit of £78 a week."

1-26 Lord Brightman found, with the unanimous support of the House of Lords, that the concept of reasonableness was not to be read into the legislation in cases such as this to require the local authority to provide "suitable" accommodation.

1-27 In Lord Brightman's view, the 1977 Act is an Act which saves the homeless from a lack of any help rather than imposing an obligation on local authorities to house them. While the Act has the word "housing" in its short title (as with the 1996 Act) "it is not an act which imposes any duty on a local authority to house the homeless", in the words of Lord Brightman. Rather the Act was intended "to assist persons who are homeless, not an Act to provide them with homes." Lord Brightman was concerned, inter alia, that in the immediate wake of the introduction of the new legislation, the local authorities would not have had the time to increase the size of their housing stock to meet demand.

1-28 Significantly the purpose of the legislation, in Lord Brightman's opinion, is that it "is intended to provide for the homeless a lifeline of last resort; not to enable them to make inroads into the local authority's waiting lists for applicants." The local authority are required to "balance the priority needs of the homeless on the one hand, and the legitimate aspirations of those of their housing waiting list on the other hand".

1-29 The homeless are therefore categorised by Lord Brightman as the “undeserving poor”. There are not identified as having “legitimate aspirations” of their own to be housed. The homeless do not have equal rights to other citizens for consideration in housing terms. On the one hand, there are those with legitimate aspirations, and on the other hand there are the homeless who impliedly lack such legitimacy.

1-30 The recent House of Lords decision in *Awua v. Brent LBC*⁷, in the speech of Lord Hoffmann, explicitly approves much of what is said in *Pulhofer*. Lord Hoffmann distinguished between the time for which accommodation was offered and the quality of the accommodation that was offered. With reference to the time for which accommodation was offered, he held that it need be neither permanent nor settled, provided that it was accommodation. Further, he conceded that even though the legislation introduced after *Pulhofer* had reversed the issue whether the authority was required to provide suitable accommodation but that the underlying approach of *Pulhofer* was nevertheless correct.

1-31 It would, of course, have been possible for Lord Hoffmann to hold to the contrary: that accommodation could not be suitable where it was only offered for a short period of time. Lord Hoffmann’s decision means that accommodation which is made available for only a short time will be more likely to be considered suitable because the applicant need only occupy it for a short while. The opposite view is that the homeless applicant needs some secure accommodation and therefore the authority should not be allowed to avoid its obligations by offering only short term accommodation. In this writer’s opinion, *Awua* continues a judicial tradition in the higher courts of seeking to limit the utility of the accommodation which must be provided to the applicant.

1-32 The decision of the Court of Appeal in *Ben-el-Mabrouk*⁸ does suggest that the courts will take a broad view of what constitutes a rational decision in this area by an authority. Where the authority has great housing demands made of it, it appears that the courts are accepting that these general circumstances will govern the question whether or not accommodation is suitable. Therefore, the court is entitled to consider the broader housing requirements of the authority and its area in deciding whether or not accommodation is suitable.

1-33 This test appears to mirror the approach taken in *Pulhofer* that the court may be concerned about the impact on local authority housing stocks of any decision that is made. The question of whether or not the authority has been rational in its decision making in this context, might therefore be governed by the broader exigencies of the housing management function. This is a movement away from the erection of an objective standard of what will and will not be suitable accommodation in the circumstances. Consequently, the ability of the applicant to assert that accommodation is unsuitable will be reduced in an area where there is great pressure for public sector housing.

⁷ [1995] 3 All ER 493.

⁸ (1995) 27 HLR 564.

1-34 Lord Hoffmann identified as “inconvenient”⁹ the result that *Pulhofer* required applicants to put themselves onto the street before they would be homeless because unsuitability of accommodation was not ground enough to make them homeless.

1-35 Further Lord Brightman in *Pulhofer* considered that those people who were contending that they were homeless should only be allowed to commence judicial proceedings in “exceptional cases”. This was at a time when judicial review was the only remedy available to applicants - as set out in Chapter 7. This statement constituted the effective withdrawal of the ability of many people to access their rights under the homelessness legislation in many circumstances. It is hoped that the new appeals procedure introduced in the 1996 Act will enable applicants to question decisions without the complication of judicial review proceedings and without needing to cross the bridge erected in the way of access to those court remedies.

1-36 The attitude presented in these leading judicial opinions does not, in this writer’s opinion, represent an appropriate response to the homelessness problem either in the context of the homelessness legislation or at all. The “houseless heads and unfed sides” of the modern poor are a real concern for the legal system as well as the politicians. Restrictive interpretations of the legislation, do not give effect to the underlying purpose of the legislation, nor do they constitute an answer to the greater social problems of homelessness.

⁹ at p.497.