

## National Health Service & Local Authority responsibilities for continuing healthcare and social care services

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## NHS & LA Responsibilities

### Background

- 1999 Coughlan – continuing healthcare responsibilities
- 2004 Sowden & Crookdake – local authority responsibilities
- Who pays?
- What do they pay for?



## The Sowden Case

- The legal question identified by the Court of Appeal was:
  - The effect upon the liability of tortfeasors in personal injury cases of the duty upon local authorities under Section 21 of the National Assistance Act 1948



## The Sowden Case

- The judge is entitled to hold on appropriate evidence that state provision for care and accommodation can meet the needs of a claimant.
- Such a provision, supported by evidence, can be augmented by the tortfeasor to meet the reasonable needs of a claimant.
- The approach is to compare what a claimant reasonably requires with what a local authority is likely to provide.



## Crookdake

- The Court is entitled to find that local authority provision would not meet the reasonable requirements of a claimant.
- Pill LJ found that “While claimants, and those advising them, must be expected to co-operate with local authorities discharging their statutory duties, they claim in the action that to which they believe the claimant is entitled, there is no legal burden on them first to disprove that statutory provision will be adequate – (Paragraph 63).
- It is the responsibility of the Defendants to demonstrate Statutory Provision.



## NHS & LA Responsibilities

Statutory obligations and guidance is multi-faceted and complex. The following Acts and Regulations apply:

- 1948 National Assistance Act
- 1968 Health Services and Public Health Act
- 1970 Chronically Sick & Disabled Persons Act
- 1970 Local Authority and Social Services Act
- 1977 NHS Act
- 1983 Mental Health Act
- 1983 Health and Social Services and Social Security Adjudications Act
- 1985 Housing Act



## NHS & LA Responsibilities

- 1986 Disabled Persons (services, consultation & representation) Act
- 1989 Children's Act
- 1990 NHS & Community Care Act
- 1992 National Assistance Assessment of Resources Regulations
- 1993 Health & Social Services and Social Security Act
- 1999 The Health Act
- 2000 Care Standards Act
- 2001 National Assistance (Residential Accommodation) (Disregarding of Resources) (England) Regulations



## NHS & LA Responsibilities

- 2003 Health & Social Care (Community Health & Standards) Act
- 2003 Community Care, Services for Carers and Children's Services (Direct Payments) Regulations England
- 2003 Community Care (Delayed Discharges) Act
- 2004 Community Care Assessment Directions
- 2005 Mental Capacity Act ( implementation date 2007)
- A myriad of Local Authority and National Health Service circulars and guidance



## Issues To Be Considered

- General principles
- What care will the Local Authority provide?
- What care will the Health Authority provide?
- What accommodation will the Local Authority provide?
- Is it means tested and how?



## Local Authority Provision of Care



## Local Authority and NHS responsibilities section 47 1990 NHS and Community Care Act

- Where it appears to a Local Authority that any person for whom they may provide or arrange for the provision of community care services may be in need of any such services, the authority -
    - (a) Shall carry out an assessment of his needs for those services
    - (b) Having regard to the results of that assessment, shall then decide whether his needs call for the provision by them of any such services
  - At no time in this initial assessment process will the financial situation of a person be taken into account \*
- \* R v. Berkshire CC ex parte P I CCLR 143  
\* R v. Bristol CC ex parte Penfold (1998) 1 CCLR 315



## Section 47 Assessment

- If at any time during the assessment of the needs of any person with regards to the previous slides, it appears to a Local Authority -
  - The client could be the responsibility of the National Health Service.
  - He might have housing needs
  - the local authority shall notify the relevant district health authority or local housing authority and invite them to assist



## Disabled Persons (Services, Consultation & Representation) Act 1986

- Section 4 imposes a duty on local authorities when requested to do so by:
  - i. A disabled person
  - ii. His authorised representative
  - iii. Any person who provides care for him in the circumstances mentioned in section 8( non paid carers)to decide whether the needs of a disabled person can be met by services provided in accordance with Section 2 (1) of the Chronically Sick & Disabled Persons Act 1970.
- Section 2 of the Chronically Sick & Disabled Persons Act 1970 imposes a duty on local authorities to assess the individual needs of everyone who falls within Section 29 of the National Assistance Act 1948. These are, effectively domiciliary social services.



## Assessment of Children Children's Act 1989

- Assessments are authorised under Part III - Schedule II.
- Where it appears to a local authority that a child within their area is in need, the authority may assess his needs for the purposes of this Act at the same time as any assessment of his needs is made under -
  - (a) the (1970 C.44) Chronically Sick & Disabled Persons Act 1970.
  - (b) the (1981 C.60) Education Act 1981
  - (c) the (1986 C.C3) Disabled Persons (Services, Consultation & Representation) Act 1986 or -
  - (d) any other enactment



## Children's Act 1989

- Section 17 of the Children's Act obliges Local Authorities to adopt a multidisciplinary approach to the provision of services for children and young people.
- This includes bringing in to the assessment process the National Health Service and the Local Education Authority and Local Housing Authority if required.



## Fair Access to Care Services Guidance

- LAC 2002/13
- Mandatory Under Section 7(1) Local Authority Social Services Act 1970
- Local Authorities to set out eligibility criteria into four bands

Bands are as follows:

- Critical
- Substantial
- Moderate
- Low



## Fair Access to Care Services Guidance

- Local Authorities can take their resources into account when determining which of the four bands they will fund.
- Most Local Authorities will fund the critical and substantial bands.
- Decision to withdraw funding in either band can take place at any time, e.g., North Yorkshire.



## National Health Service Provision of Care



## NHS Responsibilities for Continuing Care

The NHS is responsible for arranging and funding a range of services to meet the needs of people requiring continuing physical or mental health care.

- Primary health care
- Assessments involving doctors and registered nurses
- Rehabilitation and recovery
- Respite health care
- Community health care
- Community health services
- Specialist health care support
- Healthcare equipment
- Palliative care, and
- Specialist transport services



## NHS Continuing Care Guidance

- Practice guidance can be found in
  - a. Health Service Circular 2001/015
  - b. Health Service Circular 2003/006
  - c. NHS Funded Nursing Care Practice Guide and Workbook 2001
- The circulars specify that only NHS nursing care practice guidance is to be used in determining continuing nursing care needs.



## Care Assessments

- The assessment process provides for a multi-disciplinary approach to determine an individual's needs, be they instigated from -
  - a hospital discharge.
  - A direct approach to the local authority by the claimant
  - any other means that a local authority becomes aware that a person may be in need of services.
- Section 47 (5) authorises local authorities to make immediate provision for care without carrying out an assessment in the opinion of the local authority the condition of a person is such that he requires services as a matter of urgency.



## The Assessment Process (Adults)

- The Assessment Process is part of the discharge procedure.
- Health Authorities have continuing healthcare obligations under the National Health Service Act 1977 and the National Health Services Responsibilities Directions 2004.
- Directions extend to any person aged 18.
- The NHS is obliged to inform a Local Authority if it believes the client's needs are social rather than health related.
- Directions ensure that health authorities should not require a Local Authority to provide services beyond the scope of Section 21 of the National Assistance Act 1948 or Social Care Services under Section 47 of the 1990 NHS Community Care Act.



## The Joint Assessment Process (Adults aged 18-65)

- Individual professionals are responsible for the assessment of each particular area of need
- NHS bodies and local authorities have a duty to co-operate to secure and maintain health and welfare for people in England and Wales (Section 22 of the 1977 National Health Service Act).



## The Single Assessment Process (Adults aged 65 or over)

- The National Service Framework for Older People implemented in April 2002 guidance issued to Councils with social services responsibilities under Section 7 (1) 1 of the Local Authorities and Social Services Act 1970. The purpose of the Single Assessment Process (SAP) is to promote better care services and outcomes and more effective use of professional resources.
- Professionals from either the NHS or Local Authorities can legitimately carry out a full overview assessment (Section 31 of the Health Act 1999 or Section 13 of the Local Government Act 1972).



## The Single Assessment Process (Children)

- Local authorities are obliged under the Children's Act 1989 to adopt a multi-disciplinary approach in any event.
- Adults, carers, parents and advocates should be kept fully in the loop when discussing a child's care needs.



## NHS Discharge and Complaints Procedure

- Where NHS wishes to discharge a patient into the community, local authorities are to be made aware and the appropriate Assessment Process carried out dependant on age. The NHS is required to give notice to social services under Section 2 (2) National Health Service Act 1977.
- NHS are obliged to inform the patient that if he is dissatisfied with the decision with his needs for continuing care, he may apply for a review of the decision pursuant to Paragraph 4 (3) of the Continuing Care (National Health Service) Responsibility Directions 2004.
- Complaints are dealt with under the National Health Services (Complaints) Regulations 2004.
- Complaints to be addressed to the Primary Care Trust in first instance with the final arbiter, the Health Service Ombudsman.



## Local Authority Complaints Procedure

- New regulations were due to come into force from April 2005
- Complaints currently investigated 'independently' by Local Authority
- Post April 2005 - Commission for Social Care Inspection takes over
- Regulations are to be confirmed by Statutory Instrument
- Review process still taking place
- Mandatory under Section 7 - Local Authority and Social Services Act 1970



## Local Authority Complaints Procedure

- Pre April 2005 Complaints Procedures 1990
- No time limit for complaints
- Post April 2005 Social Services Complaints Regulations 2005
- Time limited complaints to one year
- Local multi staged dispute resolution in first instance
- Final Arbiter Local Government Ombudsman



## Section 21 - National Assistance Act 1948 (as amended by the 1990 NHS & Community Care Act)

### ACCOMMODATION - Part III

- Section 21 imposes a duty on local authorities to provide residential accommodation for -
  - Persons who by reason of age, infirmity or any other circumstances are in need of care and attention which is not otherwise available to them.
  - Section 21 (II) in exercise of their duty, a local authority shall have regard to the welfare of all persons for whom accommodation is provided, and in particular, to the need for providing accommodation of different descriptions suited to different descriptions of such persons as are mentioned in the above section.

This is of particular importance in terms of choice of accommodation.



## Section 29 - National Assistance Act 1948 (as amended by the 1990 NHS & Community Care Act)

### Non-Residential and Domiciliary Social Services:

- Section 29 provides the power for Local Authorities to provide non-residential and domiciliary social services.
- Section 21 services have to be charged for whereas Section 29 services can be charged on a discretionary basis.



## Section 29 – National Assistance Act 1948 (as amended by the 1990 NHS & Community Care Act)

- Where a Local Authority decides to charge for a Section 29 service, the Charging Regulations and Guidelines (CRAG), which governs the financial assessment of a Section 21 service, must be followed as a minimum when assessing for a Section 29 service.
- This guidance is laid out under Fairer Charging Policies for homecare and other non-residential social services issued by the Department of Health in September 2003.
- Homecare services have to be assessed using the capital guidelines as provided by the CRAG and as directed by paragraph 57 of Fairer Charging Guidance. This guidance has been repeated in various Local Authority Circulars the most recent being LAC 2005(7).



## Community Care Assessment Directions 2004

- The directions provide for the full involvement of individuals, carers and advocates in both assessment of need and care planning in general.
- The regulations give individuals the right to enter into more expensive accommodation than they would otherwise have been offered, in certain circumstances.
- Individuals, carers and advocates should be aware that local authorities should accept a general presumption in favour of individuals exercising reasonable choice and preference.



## Community Care Assessment Directions 2004

- Section 26 (3a) of the National Assistance Act 1948 requires the agreement of all parties in terms of accommodation. Individuals should not be refused preferred accommodation without a full explanation from a Council in writing.
- A Council should arrange for care in an individual's preferred accommodation subject to four main considerations - \*
  - Suitability of accommodation.
  - Cost.
  - Availability.
  - Terms and conditions.

\* Section 54 Health & Social Care Act 2001  
\* Local Authority Circular (20) 2004



## Community Care Assessment Directions 2004

### COSTS

- Local authorities can refer to their usual costs when conducting assessments, however, usual costs must be 'usual' for a particular level of disability, i.e. they cannot simply apply a standard charge for accommodation for all levels of disability.
- Third party top-ups are acceptable, however, it is not possible for an individual (except in very limited circumstances) to provide the top-up, nor is it possible for Receivers or the Court directly to provide top-ups.



## Local Authority ability to take into account own resources

- Applies to all care and accommodation assessments
- Local Authority can take into account own resources on 'how' to meet needs
- Cannot take into account 'whether' to meet needs\*
- Individual tenacity and good advice paramount when negotiating with Local Authorities

\* Batantu v London Brough of Islington 11/2000



## Cash or Care? The Right to Direct Payments



## Direct Payments

- The Crookdake & Sowden cases make it clear that what a local authority is obliged to provide could well be different than that which the tortfeasor might be responsible for.
- Many Claimants therefore would wish to obtain the cash value of the care package that the local authority is obligated to provide and purchase a private package of care, possibly with the assistance of a third party top up.
- Direct Payments guidance was issued under Statutory Instrument SI 2003/762. The guidance was written to reflect the changes introduced chiefly by Section 57 of the Health & Social Care Act 2001, Section 17a of the Children's Act 1989 and the Community Carers, Services for Carers & Children's Services Direct Payments Regulations 2003. The Community Care (Direct Payments Act 1996) was revoked.



## Direct Payments

- The guidance applies to the following -
  - Community Care Services within the meaning of Section 46 of the NHS & Community Care Act 1990.
  - A Service under Section 2 of the Carers & Disabled Children's Act 2000.
  - A service which local authorities may provide under Section 17 of the 1989 Children's Act. Local authorities are under an obligation to make direct payments to eligible individuals and their carers who request such payment and are encouraged to promote direct payments wherever possible.



## Direct Payments & The National Health Service

- The National Health Service is under no obligation to make direct payments.
- Section 31 of the Health Act 1999 encourages the NHS and local authorities to provide services under a pooled budget or partnership arrangement.
- A forthcoming Green Paper seeks to obligate health authorities and local authorities to establish care trusts to enable the delivery of community care, social and healthcare services more efficiently.
- Local authorities are specifically excluded by Section 49 of the Social Care Act 2001 from providing nursing services, however, the NHS can delegate any of its functions to the local authority (SI 2000/617) by using pooled budgets to enable the local authority to purchase nursing care.



## Direct Payments & The National Health Service

- Indirect Direct Payments are available to suitable third parties, i.e. voluntary organisation, not for profit organisation, User Independent Trust.



## Direct Payments

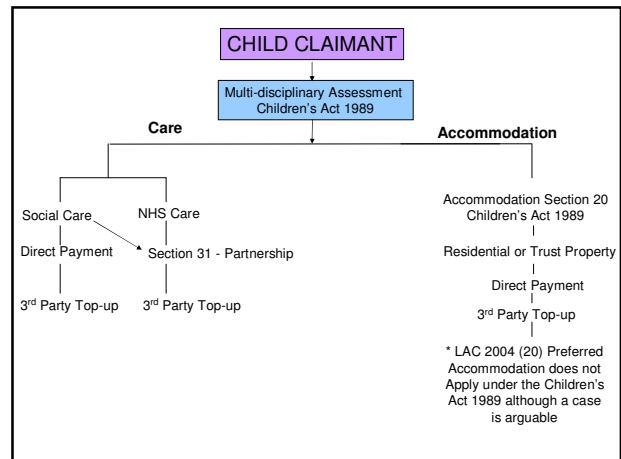
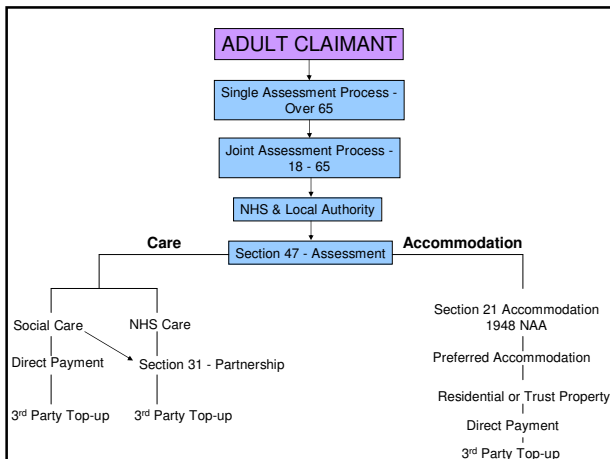
- The following groups of people may be eligible to receive direct payments -
  - Adults
  - Young persons between the ages of 16 and 18 years
  - A person with responsibility for a child
  - A Receiver
  - Carers aged 16 or over



## Close Relatives

- Unless a Council is satisfied that it is necessary to meet satisfactorily a person's need, a council may not allow clients to use direct payments to secure services from a spouse, husband or wife, partner, or a close relative who lives in the same household as the direct payment recipient.
- The restriction applies where the relationship between the two people is primarily personal rather than contractual. For example, if the people concerned would be living together in any event.






## Means Testing

NHS Care


- There is no means assessment for NHS Care
- Free at the point of need



## Means Testing

Local authority care and Accommodation Residential or domiciliary


- Capital limits when entitlement is affected
  - England from £12,500 to £20,500
  - Scotland from £12,000 to £19,500
  - Wales from £14,750 to £21,000



## Means Testing


- Capital held "in" court or in a personal injury trust is disregarded and any income thereon if used for purposes other than which benefits are paid for
- The same disregard applies to periodical payments
- Capital held by a receiver and or by a solicitor\* for a claimant, therefore being considered "out" of court, including interim payments is **not** disregarded.

\* unless under the Statutory Charge under the Legal Aid provisions



## Independent Living Funds

- Lower Capital Threshold of £11,500
- Upper Capital Threshold of £18,500
- Thresholds apply per claiming unit as per income support
- A Discretionary Government Agency





## Legal Issues

### Post Settlement

- What has the claimant got to lose?
- Need to maximise entitlement
- Sowden
  - Receivers must maximise entitlement
- Potentially high level of financial support
- No recoupment



## Legal Issues

### Pre Settlement

Claimant is already in the system

- Can the claimant be forced to accept NHS/LA services?
- Can the defendants take credit for current and future entitlement?
- Quality and quantity of provision issues
  - Crookdake
- Does “top up” work?
  - Sowden
- Entitlement only if award is disregarded
  - Can the claimant be forced to have PI Trust?
  - Monies “in” or “out” of Court
- Impact on interim payment applications?



## Legal Issues

### Pre Settlement

Claimant not already in the system

- Can the defendants force the claimant into the system?
- Is the level of care/accommodation sufficient to meet tortfeasor obligations?
- Does “top up” work?
- Can it be forced on the claimant?
- If care/accommodation rejected by the claimant, would this impact upon the claim?
- Can the defendants find out?
- Is it an issue to be raised at interim payment application?



## Legal Issues

- In private law proceedings, it is for the Court to determine what the claimant's reasonable requirements are.
- A local authority must make arrangements to meet a claimant's assessed needs, but may do so in a variety of different ways. If a local authority decides to meet a claimant's needs in a certain way, that conclusion can only be attacked on public law grounds, i.e. rationality disproportionality or not complying with the regulations.
- This means there will be cases where a local authority's assessment is perfectly lawful but that its offer of care will not conform to what a Court feels is reasonable for a claimant.



## Summary

- Professionals need to consider –
  - When should assessments take place – pre or post settlement?
  - Provision of care services. Care / health services should be agreed.
  - Case managers should be involved to negotiate agreed provision.
  - Reviews should be carried out when and as necessary.



## HELP!

- You need to know, based upon your claimant's individual and peculiar needs, what he is entitled to.
- You may need to take steps to secure entitlement:
  - Receivership; and/or
  - Personal Injury Trust.
- Challenging decisions of the local authority and NHS.
- Analysis of present entitlement.
- Analysis of assumed future entitlement.
- Implementation of maximum benefit for your claimant (pre or post settlement)

