NHS Responsibilities for Community Care in Wales

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Key issues

1. **An area regulated by the law;**
2. **The law gives only a general 'steer' as to where the boundary lies;**
3. **Accordingly decisions of the court and Ombudsmen important - the '*benchmark cases*';**

Legal regulation

Example

s206 (1) NHS (W) Act 2006 (interpretation)
"illness" includes mental disorder and any injury or disability requiring medical or dental treatment or nursing,

s1(2) Mental Health Act 1983
"mental disorder" means any disorder or disability of the mind;

Legal Duties

SSW-b Act 2014	NHS (W) Act 2006
Clash of Acts Both create duties elderly ill and disabled people	
Social care	v Nursing care

Legal limit of social care

There is a 'limit to social care' under the SSW-b Act 2014

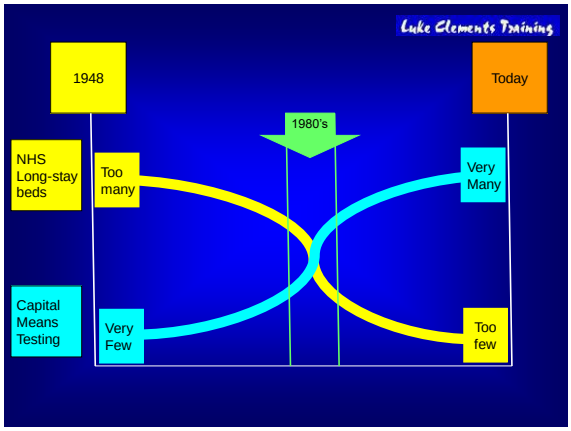
If the person has needs above a certain level (the *Coughlan* criteria)

- It is unlawful for social services to fund their care
- All their health and social care needs have to be funded by the NHS

An identical legal limit existed under the National Assistance Act 1948 s21

s47 SS & Well-being (Wales) Act 2014

- A LA may not meet a person's needs for care and support… unless doing so would be incidental or ancillary to doing something else to meet needs under those sections.



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Leeds Ombudsman case 1994

- **incontinent and unable to walk, communicate or feed himself: a kidney tumour, cataracts and occasional epileptic fits, for which he received drug treatment.**
- **had reached the stage where active treatment was no longer required but that he was still in need of substantial nursing care, which could not be provided at home and which would continue to be needed for the rest of his life**

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Leeds Ombudsman case 1994

Leeds Health Authority accepted all my recommendations, which were that they should make an *ex gratia* payment to the complainant for the nursing home costs which she had incurred; that the man's future nursing care should be provided at the expense of the NHS … ;

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Leeds Ombudsman case 1994

- Stable
- Substantial low level nursing
- No need for specialist input
- Adequately cared for in ordinary nursing home

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Leeds Ombudsman case 1994

Government Response

- HA's to prepare CC statements
- If in the light of the guidance, some HA's are found to have reduced their capacity to secure continuing care too far – as clearly happened in the case dealt with by the Health Service Commissioner – then they will have to take action to close the gap

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NHS Guidance

Statutes eg NHS Act 2006	Court cases eg *Coughlan*
Regulations / directions	
Guidance	

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Coughlan (1999)

- **She is tetraplegic;**
- **doubly incontinent,**
- **requiring regular catheterisation;**
- **partially paralysed in the respiratory tract,**
- **with consequent difficulty in breathing; and**
- **subject not only to the attendant problems of immobility but to recurrent headaches caused by an associated neurological condition**

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Coughlan (1999)

The distinction between those services which can and cannot be so provided is one of degree which in a borderline case will depend on a careful appraisal of the facts of the individual case. However, as a very general indication as to where the line is to be drawn, it can be said that if the nursing services are:

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Coughlan (1999)

(1) merely incidental or ancillary to the provision of the accommodation which a local authority is under a duty to provide to the category of persons to whom section 21 refers and

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Coughlan (1999)

(2) of a nature which it can be expected that an authority whose primary responsibility is to provide social services can be expected to provide,

Then they can be provided (by SS).

The Quantity / Quality test

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IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
Royal Courts of Justice
Date: 16 July 1999

R. v .NORTH AND EAST DEVON HEALTH AUTHORITY
- Respondent

Ex parte PAMELA COUGHLAN
- Applicant

- **SECRETARY OF STATE FOR HEALTH**
- Intervener

- **and**
- **ROYAL COLLEGE OF NURSING**

118. …. . Miss Coughlan needed services of a wholly different category.

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Wigan Patient 2003

- **Several strokes**
- **No speech or comprehension**
- **Unable to swallow**
- **PEG fed**

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Wigan Patient 2003

I cannot see that any authority could reasonably conclude that her need for nursing care was merely incidental or ancillary to the provision of accommodation or of a nature one could expect Social Services to provide. It seems clear to me that she, like Miss Coughlan, needed services of a wholly different kind.

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Pointon 2004

- Advanced dementia, (ie 'some of the severe behavioural problems, which had characterised his illness during its earlier stage, had now diminished');
- Behaviour still challenging;
- Unable to look after himself;
- His wife cared for him at home.

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Pointon 2004

- Mrs Pointon 'giving highly personalised care with a high level of skill ... nursing care equal if not superior to that that Mr Pointon would receive in a dementia ward'
- Complaint upheld: assessors had focused on acute care' rather than assessing the 'psychological needs of patients with illnesses such as dementia' (para 39)
- Severe psychological problems and the special skills required to nurse someone with dementia

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R (T, D & B) v Haringey LBC (2005)

- Disabled child
- Tracheostomy (a tube in the throat) which needed, suctioning about three times a night.
- "It is quite common now for children who have tracheostomies to be discharged from hospital and cared for at home (para 5)
- Great Ormond Street Hospital provides training for parents in how to manage those requirements at home; the Claimant mother has been trained fully in those areas" (para 7)

R (T, D & B) v Haringey LBC (2005)

Mother argued that the respite care should be funded by social services and not the NHS.

Mr Justice Ouseley (para 61) (citing *Coughlan*)

- the provisions of the Children Act are not to be regarded in general as reducing or replacing the important public obligations … set out in the 1977 NHS Act. I do not see that the impact there of section 21(8) of the NAA 1948 means that the principles enunciated were peculiar to that Act"

But now s47 SS&W-bA 2014 (and explicit)

NHS Continuing Care & Young People

Children's services retain responsibility for safeguarding /associated social work functions:

- helping parents with the emotional problems of caring for disabled children;
- providing carer support services ie services delivered solely to the parents / siblings;
- giving information
- signposting.

Free nursing care (RNCC)

s47 SS & Well-being (W) Act 2014

R (Grogan) v. Bexley NHS CT (2006)
Must consider eligibility for NHS CC
before any discussion about FNC

R (Grogan) v. Bexley NHS Care Trust (2006)

all nursing care (including RNCC) [must be] … merely (a) incidental or ancillary to the provision of the [social care] … and (b) of a nature which …. it could have been expected that [a LA] could have been expected to provide (para 66)

R (Grogan) v. Bexley NHS Care Trust (2006)

particularly when it is remembered that the focus of *Coughlan* was on nursing care and the decision of the Court of Appeal was that the care she needed was well outside the limits of what could be lawfully provided by a local authority …

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National Framework for NHS Continuing Care

England 2007 – revised July 2009

Wales August 2010 revised 2014

Decision support Tool

11 different care domains

Categories –

Priority, severe, high, medium, low and none

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2014 Framework

2.10 When an individual … is eligible for CHC, the NHS has responsibility for funding the full package of health and social care.

Where the individual is living at home, this does not include the cost of accommodation, food or general household support

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2014 DST (p49)

Continuing NHS Healthcare

A complete package of ongoing care arranged and funded solely by the NHS, where it has been assessed that the individual's primary need is a health need.

It can be provided in any setting. Where a person lives in their own home, it means that the NHS funds all the care that is required to meet their assessed health and social care needs.

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2014 Framework

3.118 The principles and process set out in this Framework should be implemented for all adults who require assessment for CHC, irrespective of their client group/diagnosis.

3.122 The reasons given for a decision on eligibility should not be based on the use or not of NHS employed staff to provide care; the need for/presence of "specialist staff" in care delivery or any other input related (rather than needs-related) rationale.

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2014 Framework

3.122 The reasons given for a decision on eligibility should not be based on the use or not of NHS employed staff to provide care; the need for/presence of "specialist staff" in care delivery or any other input related (rather than needs-related) rationale.

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2014 Framework

3.61 The decision-making rationale should not marginalise a need just because it is successfully managed; well-managed needs are still needs.

Only where successful management of a healthcare need has permanently reduced or removed an ongoing need, such that the active management of this need is reduced or no longer required, will this have a bearing on CHC eligibility.

2014 Framework

3.72 Determination of eligibility must be based on assessed need and must be independent of budgetary constraint. LHBs must ensure therefore that there is a clear split between the MDT function and confirmation of their conclusions, and the commissioning of the services required to deliver the care plan.

3.73 Only in exceptional circumstances and for clearly articulated reasons should the LHB not accept the MDTs expert advice on CHC eligibility.

Panel requiring additional evidence

- Missing NHS evidence
  - *Early escalation of dispute process*
- Evidence of 'well managed' (establishing a negative)
- Evidence from family
- Evidence out of date
- Immaterial evidence (ie bureaucratic pointlessness)
- The Panel '*trying to avoid making a decision*' .

Welsh Ombudsman Report
Carmarthenshire LHB 2009 No. 200800779.

2014 Framework

3.75 Quality assurance processes should not … lead to delay in providing the individual with the support they need and LHBs should consider employing a stream-lined process for non-contentious cases.

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2014 Framework

4.6 The CHC package to be provided is that which the LHB assesses is appropriate for the individual's health and personal care needs. LHBs are encouraged to consider the LAs assessment or its contribution to a joint assessment as these will be important in identifying the individual's needs and, in some cases, the options available for meeting them.

What the NHS funds is up to it – within the limits of public law reasonableness *R (S) v Dudley PCT (2009)*

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Screening for CHC assessment

No equivalent to English 'checklist'

5.37 If outcome of contact assessment is that a referral for a full consideration for CHC is unnecessary, the decision and the reasons should be communicated clearly to the individual, and their carers or representatives where appropriate, recorded in the individual's notes.

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2014 Framework

Checklist

3.34 The use of a … checklist is not mandated in this Framework. [but] … there may be specific circumstances where such a tool may be useful. eg, care home residents whose condition has changed and earlier than planned review may be required, or to provide a structured rationale where the MDT believes a complex care package is clearly not required.

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2014 Framework

Checklist

3.35 … where a checklist is employed, the NHS CHC Checklist developed … England should be used

3.36 … the Checklist must not replace professional judgement or dialogue with the individual /their family/representative.

3.37 it should be completed by at least two practitioners, including a LA representative.

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2014 Framework

Fast track assessments

3.84 … individuals with a rapidly deteriorating condition who may be entering a terminal phase will require 'fast tracking' for immediate provision of CHC so that they can be supported in their preferred place of care without waiting for the full CHC eligibility process to be completed.

… LHBs should aim to complete the process within two days.

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2014 Framework

Fast track assessments

3.84 … There will also be cases, other than end of life care e.g. a catastrophic event where professional judgement indicates that the individual has evidently developed a primary health need, where LHBs should also consider applying fast track assessment.

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2014 Framework

Fast track assessments

3.86 FTAs should be completed by an appropriate clinician who should give the reasons why the… the conditions requiring a fast track decision to be made.

'Appropriate clinicians' are those who are … responsible for an individual's diagnosis, treatment or care who are registered nurses or medical practitioners.

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2014 Framework

Fast track assessments

3.88 The completed FTA should be supported by a prognosis. However, strict time limits that base eligibility on some specified expected length of life remaining should not be imposed. It is the responsibility of the assessor to make a decision based on the relevant facts of the case.

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2014 Framework

Fast track assessments

3.89 … FTAs should be accepted and actioned immediately by the LHB. Disputes about the fast track process should be resolved outside of the care delivery

3.90 No individual who has been identified through the fast track process should have their care package removed without their eligibility being reviewed in accordance with the review process …

Ordinary care homes

'there is nothing within the regulatory framework, which would prevent a person in receipt of NHS continuing healthcare remaining within a Care Home (Personal Care)'.

Department of Health (2008) Joint Statement re: NHS Continuing Healthcare Funding for End of Life Care within Care Homes 15 August 2008. London, DoH.

[DST] What it's NOT

- **An another assessment**
- **A decision MAKING tool**
- **Suitable for every individual's situation**
- **A substitute for professional judgement**

DoH Resource pack: Introduction Module 1: slide 19

Framework 2014

Framework 3.121

It is emphasised that the DST must be used in context. It cannot and should not replace professional judgement on whether the totality of an individual's needs demonstrate the four key characteristics of a primary health need. It simply supports MDTs to demonstrate that they have implemented a rational and consistent approach to their advice.

DST 2014 (page 3)

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It is acknowledged that this DST is not without its critics and that no tool will be perfect.

As we stress throughout the 2014 Framework … this DST must be used in context. It cannot and should not replace professional judgement on whether the totality of an individual's needs demonstrate the four key characteristics of a primary health need.

DST 2014 (page 3)

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It simply supports MDTs to demonstrate that they have implemented a rational and consistent approach to their decision-making.

The DST must only be used in conjunction with the guidance in the 2014 Framework

Decision Support Tool

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10. A clear recommendation of eligibility for CHC would be expected:

- one priority;
- two severe's.

If however there is:

- One severe + needs in a number of other domains.
- A number of domains with high and/or moderate needs

this 'may' indicate a primary health need

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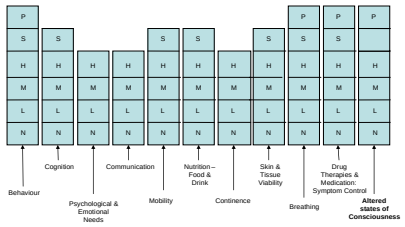

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Who decides?

Who decides what?

NHS CC

•The panel decides – ie primarily an NHS decision;

The limits of social care

- The local authority decides.

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Who decides?

If patient disagrees

- seeks review & then appeals to Ombudsman

If local authority or NHS disagrees

- they must invoke their dispute procedures

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LA / LHB dispute process

Framework 5.2
In the first instance, where the MDT is unable to reach a consensus view on CHC eligibility, they should escalate the dispute to the appropriate manager and access peer review from within, or outside of, their LHB.

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LA / LHB dispute process

5.4 If mature partnership discussion … has failed to achieve a consensus view, the formal dispute process will need to be initiated. LHBs and LAs should have in place locally agreed procedures/protocols for dealing with any formal disputes about eligibility for CHC and/or apportionment of funding in jointly funded care packages.

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LA / LHB dispute process

5.5 Disputes must not delay the provision of care and the protocol should make clear how funding will be provided pending the resolution of the dispute. … This should include agreement on how funding will be provided during the dispute, and arrangements for reimbursement to the relevant organisations once the dispute is resolved.

LA / LHB dispute process

5.6 All stages of disputes procedures will normally be completed within two weeks. All stages will be appropriately documented. Gives an example at www.cciss.org.uk/example-policies-documents

Level 1 ~ local resolution
Level 2 ~ senior officers from SS & NHS
Level 3 ~ Director of Social Services and the Chief Executive of the LHB

S117 Mental Health Act 1983

Patients detained under:
- s3 MHA 1983 or
- MHA 1983's criminal provisions.

On discharge entitled to s117 MHA 1983 after care services
1. Free
2. Joint NHS / SS

S117 Mental Health Act 1983

Patients entitled to s117 unlikely to be eligible for NHS CC
- unless distinct non-mental health care need

Framework
3.97… s117 individual 'may also have additional needs which are not related to their mental disorder eg … receiving services under s117 and develops separate physical needs e.g. following a stroke, which may then trigger the need to consider NHS continuing healthcare.

S117 Mental Health Act 1983

Framework 3.94
LHBs & LAs should develop protocols to help determine their respective s117 responsibilities

S117 Mental Health Act 1983

Look to custom and practice

s117 patients have historically been taken to 'panel'
Presumably to answer the question:

- "but for entitlement to s117 would this person have been eligible for NHS CC?"

If 'Yes' then custom and practice has been that NHS funds 100% of the costs ie "100% s117 funded"

Carers

WAG Advice

- Social services have a duty to undertake carers assessments of people entitled to NHS CC funding and
- A power to provide carer's services

BUT NB

- Respite / short break care is not a carers service

Children's NHS Continuing care

- Draft Guidance issued by WAG for consultation in December 2011;
- In *R (T, D & B) v Haringey LBC* Ouseley J considered adult regime applied with equal force to children;
- Arguable that CA 1989 provides greater obligations as it is silent concerning nursing (cf NAA 1948 s261A);
- Frequently tripartite funding
- Another major transition problem for disabled children;
- Unlikely to attract any litigation

Learning disabilities and NHS CC

- illness ~ s206(1) NHS (W) Act 2006 includes 'mental disorder' within the MHA 1983

SS Work & Pensions v. Slavin (2011)

- 30 yr old severe LD (Fragile X Syndrome);
- residential care home (not a nursing home);
- Challenging behaviour requiring continuous supervision 1:1 and sometimes 2:1;
- Staff trained to meet the needs of residents but did not have any medical or nursing qualifications;
- C of A held his LD meant fell within NHS Acts & that:
  his healthcare needs qualify him for an NHS-funded residential placement at a care home where he is provided with the specialist care he requires by reason of his illness (para 52).

Learning disabilities and NHS CC

Framework

3.119 … The question is not whether learning disability is a health need, but rather whether the individual concerned, whatever client group he or she may come from, has a primary health need'.

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Joint funding

If there is an upper limit to social care packages – is it lawful for a the NHS / SS to enter into a joint funding arrangement for someone considered to be at (or near) this upper limit?

The Court of Appeal in *Coughlan* held that it was:

> Either a proper division needs to be drawn (we are not saying that it has to be exact) or the Health Service has to take the whole responsibility. TheLA cannot meet the costs of services which are not its responsibility because of the terms of section 21 (8) of the 1948 Act.

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NHS & Direct Payments

Framework 4.46 - 4.50

- … if an individual has existing DP arrangements, these should continue wherever and for as long as possible within a tailored joint package of care.
- It is currently unlawful for Direct Payments to be used to purchase health care which the NHS is responsible ..
- Where an individual whose care was arranged via DPs becomes eligible for CHC funding, the LHB must work with them in a spirit of co-production.

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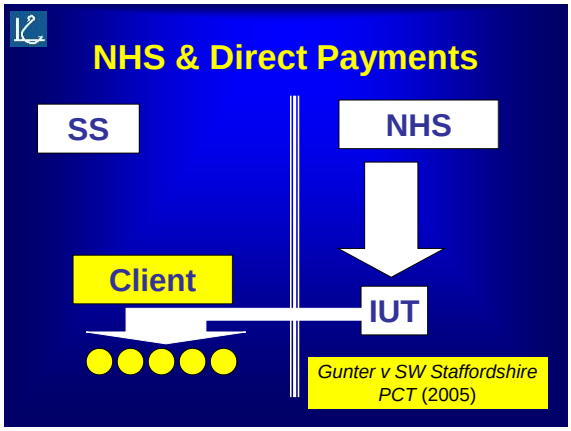
NHS & Direct Payments

- Although DPs will no longer be applicable … this should not mean that the individual loses their voice, choice and control over their daily lives. Every effort should be made to maintain continuity of the personnel delivering the care, where the individual wishes this to be the case.
- An individual in receipt of DP retains the right to refuse to consent to CHC assessment and /or care package …
- In such cases, partner agencies must work together with the individual and their family/carers to ensure that the risks are fully understood and mitigated as far as possible.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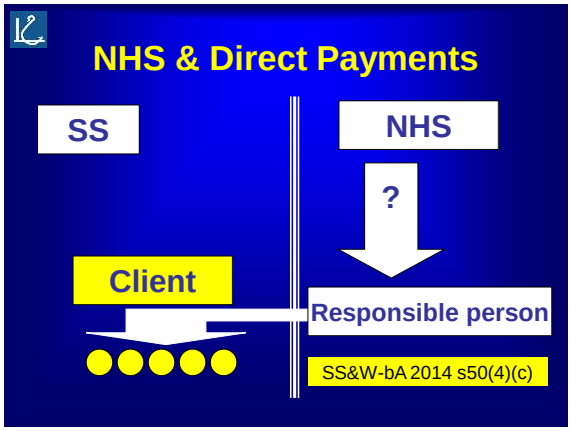
Gunter v SW Staffordshire PCT (2005)


NHS & Direct Payments
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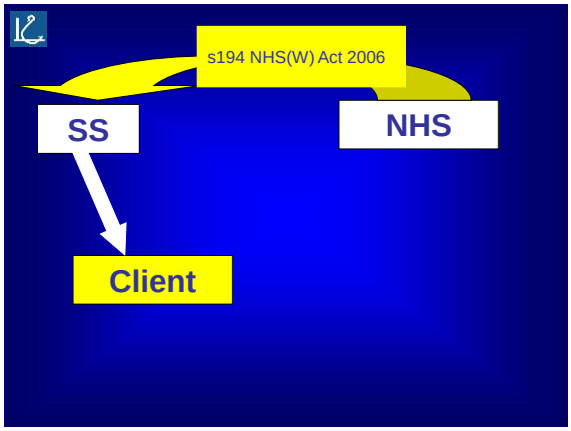
SS&W-bA 2014 s50(4)(c)


s194 NHS(W) Act 2006
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NHS
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