

**NHS Continuing Care:
the legal limits of social care responsibilities
for children & young people**

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1

Children Act 1989 s29

Recoupment of costs

(1) Where a local authority provide any service under section 17 or 18, other than advice, guidance or counselling, they may recover from a person specified in subsection (4) such charge for the service as they consider reasonable.

...

(4) The persons are—

- (a) where the service is provided for a child under sixteen, each of his parents;
- (b) where it is provided for a child who has reached the age of sixteen, the child himself; and
- (c) where it is provided for a member of the child's family, that member

2

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*';

3

Legal regulation

Example

s275(1) NHS 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;

4

Legal duties

Pre-14.10.1991

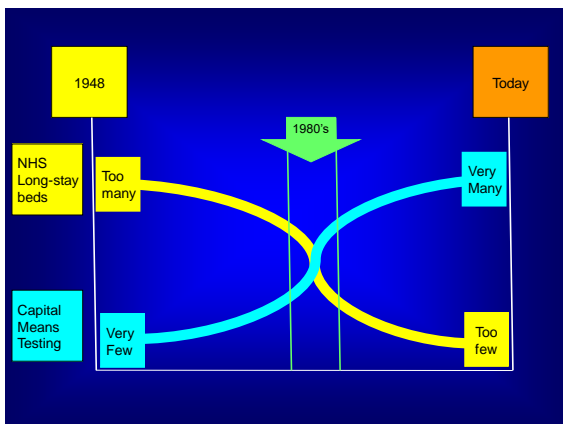
- Cradle to Grave Healthcare right
- Everyone entitled to NHS CHC funding

Post-14.10.1991

- Healthcare right only for adults???
- NHS CHC funding is age dependant???

- **Children Bill 1988-89** ~ No mention of any change to NHS entitlement in debates
- **NHS CHC Guidance until 2010** did not specify any difference in entitlement

5



6

Leeds Ombudsman case 1994

NHS CHC Guidance

- The first guidance on NHS CHC issued in 1995 applied to adults and children alike
- No separate guidance was issued for children until 2010

7

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

8

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:

9

Coughlan (1999)

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

10

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

11

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.

12

NHS Guidance

Statutes

eg NHS Act 2006

Court cases

eg *Coughlan*

Regulations / directions

Framework Guidance

Decision Support Tool

13

Pointon 2004

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

14

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

15

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)

16

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 [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"

17

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

The night sitting service required:

- *a trained carer (not a qualified nurse): someone (like the mother) who 'could be trained to carry out tracheal suction and would need to awaken the mother if she couldn't quickly clear the tube'. (para 16).*

Issue 1. Not who does it but what they are doing:

Issue 2. Is this really relevant once a YP is about the limits of social care?

18

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

- although on a broad interpretation of s17(1) of the Children Act 1989 'to safeguard and promote the welfare of children by providing a range and level of services appropriate to' could cover what are essentially medical needs – but 'such an interpretation would turn the social services authority into a substitute or additional NHS for children'.

19

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

- That would be ... an impermissibly wide interpretation, creating obligations on a social services authority which are far too broad in the context of other statutory bodies and provisions covering the needs of children' (para 68).

20

R (Juttla) v Herts Valleys CCG (2018)

- CCG wanted to close a nurse-led respite unit for disabled children
- The fact that the care was provided in order to give the parents respite was not the issue;
- Nor was the fact that much of the care could, in theory, be delivered by trained social care staff
- Relying on the *Haringey* (2005) judgment the court had 'no doubt' that the services provided by the facility were health services.

21

R (JP) v NHS Croydon CCG (2020)

CCG argued that the Localism Act 2011 s1 empowers councils to provide medical care;

Mostyn J held that it was:

- inconceivable that section 1 could be used to usurp decisions reposed in the NHS

that this would drive

- a coach and horses through very carefully delineated frontiers of competence and function between the NHS on the one hand and local authorities on the other.

22

National Framework for NHS Continuing Care

Adult Framework

- 2007 - revised 2009, 2012 & 2018

Children & YP

- 2010 revised 2016: 'non-statutory guidance'
R (JP) v NHS Croydon CCG [2020] para 43

Decision Support Tool (for children)

- 10 named care domains

23

2016 C&YP Framework

Fails to:

- explain what NHS Continuing care is;
- explain what the consequences (in terms of NHS responsibilities) that follow when someone is held to be eligible;
- explain key principles – ie those detailed in the adult guidance (and also contained in the 2010 guidance)

24

2016 C&YP Framework

R (JP) v NHS Croydon CCG [2020] para 11

- If a child scores one severe mark or three high marks he or she will be designated as “eligible” for continuing care. But such a designation does not answer the question of how much continuing care. Conversely, a failure to score one severe mark or three high marks does not shut out a child from all care, continuing or otherwise.

25

2018 [adults] Framework

65 The reasons given for a decision on eligibility should not be based on the:

- individual's diagnosis
- setting of care;
- ability of the care provider to manage care;
- use (or not) of NHS employed staff to provide care;
- need for/presence of ‘specialist staff’ in care delivery;
- fact that the need is well managed;
- existence of other NHS-funded care; or
- any other input-related (rather than needs-related) rationale.

26

Framework for Children & YP 2016

The assessment process

Health dominated – in contrast to the adult assessment process that is undertaken by a multi-disciplinary team (MDT) which includes a social care professional.

Assessment is led by a children & YP's health assessor ‘nominated by the CCG, who will draw on the advice of other professionals ...’ (para 7)

27

Framework for Children & YP 2016

The outcome of the assessment is 'a recommendation from the assessor as to whether or not the child or young person has continuing care needs' (para 8)

If so there is then a 'multi-agency forum or panel' that decides as to whether the child or young person has a CC need (para 10).

If the LA disagree it is able to challenge this through a disputes process

28

Framework for Children & YP 2016

Para 15 it states:

- Children with complex needs may not only need support from health services. They may also have special educational needs, and need support from social care.

29

Framework for Children & YP 2016

'Support'

'support' must mean:

- helping their family with the emotional problems of caring for a disabled children,
- providing carer's assessments,
- addressing any safeguarding concerns
- complying with the LAC regulations and
- the guidance where a child is in residential care .

30

Health social services interface

Once a child or YP is held to be eligible for NHS CC then all their health and social care services needs are the responsibility of the NHS.

This does not mean that social services 'walk away' as clearly they will continue to have 'support' responsibilities – ie non-service provisions responsibilities.

31

Accommodated children

- Looked after children have the same rights to NHS CC funding as any other child.
- LA required to provide funding (and supervision) for a foster parent etc and for the cost of any social care accommodation (CA 1989 s20) but the NHS duty to provide services applies as with any other child.
- LA responsible for ensuring the child has an IRO (CA 1989 s25) & complies with its obligations under the LAC regs

32

[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

33

NHS v Education overlaps

No 'Coughlan' type legal rule relating to education / NHS
Accordingly all children and YP eligible for NHS CC will have separate needs for education.
Children and Families Act 2014 s42(3) places unprecedented duties on health bodies in relation to children with an EHC plan.

34

NHS v Education overlaps

Section 42(3)
Any health care support specified in a children or YP's EHC Plan must be provided

ie that it is a specifically enforceable duty to provide.

35

Three options

1. Status quo
2. Apply the adult criteria;
ie if you are above the limits of social care – all your health and all your social care needs fall to be funded by the CCG
3. A middle way – funding determined not by who you are but what you are doing

36

Who decides?

NHS CC

- The panel decides – ie primarily an NHS decision;

The limits of social care

- The local authority decides.

37

CCG v LA Disputes

92. CCGs & LAs should agree a local dispute resolution process to resolve cases where there is a dispute ... over a child or YPs CC needs and/or over responsibility for the funding of a package of CC in a robust and timely manner.

93. Disputes should not delay the provision of the care package, and the arrangements should be clear on how funding will be provided pending resolution ... and arrangements for reimbursement to the agencies involved once the dispute is resolved.

38

CCG v LA Disputes

93. Given the requirement on CCGs and local authorities to have, as part of their joint arrangements for SEND, arrangements for resolving disputes, it would be sensible for such arrangements to also cover disputes relating to continuing care.

39

Duty to cooperate

S27 Children Act 1989

- (1) Where it appears to a LA that any authority mentioned in subsection (3) could, by taking any specified action, help in the exercise of any of their functions under this Part, they may request the help of that other authority specifying the action in question.
- (2) An authority whose help is so requested shall comply with the request if it is compatible with their own statutory or other duties and obligations and does not unduly prejudice the discharge of any of their functions.

40

Co-operation

If a CCG fails to comply a local authority – the authority can request NHS England to 'direct' the CCGs to take appropriate action

s14Z21 NHS A 2006

Local authorities can require a CCG member (ie its CEO) to appear in front of a Health Scrutiny Panel

reg 27(1) Local Authority (Public, Health and Wellbeing Boards and Health Scrutiny) Regulations 2013 SI 218

41

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

42

S117 Mental Health Act 1983

Patients entitled to s117 unlikely to be eligible for NHS CC

- unless distinct non-mental health care need

s117 patients can be taken to 'panel' - to answer the question:

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

If 'Yes' then NHS should fund 100% of the MHA 1983 costs - ie "100% s117 funded"

43

Parent carers

Duty to assess PC 'on the appearance of need'

- A PC is an adult 'who provides or intends to provide care for a disabled child for whom the adult has parental responsibility'
- The PC assessment must have regard to the well-being of the PC;
- "well-being" has same meaning as in Care Act 2014.
- LAs must identify the extent to which there are PCs within their area who have needs for support

s97 C & F Act 2014 amends Children Act 1989 (s17ZD)

44

Parent carers

2019 ombudsman report.

- A YP with a number of severe symptoms and related health conditions'
- Parents under intense physical / mental strain - argued that the assessment flawed as their needs had not been taken into account.
- CCG stated: the 'DST domains do not score parental wellbeing as part of the eligibility criteria'.

The ombudsman disagreed

- The Framework's refers to the need for an holistic assessment of YP and their family.

Central Bedfordshire Council (no 16 002 323)

45

Carers

2018 Adults Framework para 326

- When a CCG is supporting a home-based package where the involvement of a family member or friend is an integral part of the care plan, it should agree with the carer the level of support they will provide.
- It should also undertake an assessment of the carer's ability to continue to care, satisfying themselves that the responsibilities on the carer are appropriate and sustainable, and establish whether there is an 'appearance of need for support', which would mean that the carer should be referred for a carer's assessment ...
