WHO SHOULD FUND LONG TERM NURSING CARE?

SHOULD IT BE THE NHS?

A GUIDE TO NHS CONTINUING HEALTH CARE FUNDING

WHO SHOULD FUND LONG-TERM NURSING CARE?

SHOULD IT BE THE NHS ?

THE BACKGROUND

The funding of long-term nursing care is largely met by individuals themselves or, when their capital has diminished to a certain level (in England £23,250.00 and in Wales £22,000.00), by a mixture of their own income, Local Authority money and the "free" nursing care contribution (Registered Nurse Care Contribution - RNCC) provided by the government with the intention of covering the cost of registered nurse care for the patient.

In England: **RNCC from 1 October 2007 (one band only)**	**From 1 April 2010 - £108.70 per week. Those already in the High Band will receive £149.60/week subject to any change in their status**
In Wales: **RNCC**	**From April 2010 £120.55 per week if you receive any care from a registered nurse**

If the Local Authority is involved in any way, the patient is means tested. If the National Health Service (NHS) is responsible it pays EVERYTHING. It is exactly the same as if the patient is in hospital. No account is taken of their assets and private income but some benefits, such as Attendance Allowance, will cease after 28 days (this will happen in a care home but NOT if the person is receiving their care in their own home)

EXAMPLE

Mrs Brown (a sick lady who has PRIMARY HEALTH needs) goes into Cherry Tree Nursing Home. The fees are £700.00 per week. She owns a house worth £300,000.00 and has savings and investments of £250,000.00. She is self-funding but receives towards her care the High Band Registered Nurse Care Contribution (RNCC) of £149.60 (under the transitional provisions) and the higher rate of attendance allowance £71.40. She pays net £483.35 per week - £25,134.20 EACH YEAR. Mrs Brown gets advice from a specialist solicitor and a successful claim is made for NHS Continuing health care funding

Mrs Brown's attendance allowance ceases after 28 days BUT the nursing home fees are paid directly by the NHS and Mrs Brown retains her house and ALL her savings and income. She pays NOTHING EACH YEAR because she is a patient of the NHS. She has a refund for any fees already paid.

The Welfare State intended that all sick people should be cared for in hospital, but in the 1980s there were massive closures of Cottage and Geriatric hospitals and long-stay wards. In the 1990s the Local Authorities/Social Services, through their social workers, were given the role of placing people in nursing homes and funding them, if necessary, after means testing. The principle of completely FREE nursing care of sick people, including the elderly, was largely forgotten.

THE WAY BACK

A 1999 Court of Appeal case, R v North and East Devon Health Authority ex parte Coughlan, indicated that the FULL COST OF ALL LONG TERM CARE for those who have a PRIMARY HEALTH NEED should be met by the NHS. The Local Authorities/Social Services were only empowered to means test and fund those whose nursing needs were Incidental or Ancillary to their need for accommodation.

The Court of Appeal considered that Pamela Coughlan's nursing needs were in a "wholly different category" from those which should be provided for by Local Authorities/Social Services, and therefore should be funded by the NHS. Pamela Coughlan, is not old. She had been injured in a road traffic accident, and is tetraplegic. She retains partial use of her arms via her shoulder muscles. She is doubly incontinent. She suffers from headaches, necessitating intervention to effect an immediate position change.

She requires: -

- **assistance with feeding**
- **transfers from bed to wheelchair**
- **a special pressure-sore mattress**
- **turning at 2-4 hourly intervals at night to avoid pressure sores**
- **intermittent catheterisation and occasional help with breathing**
- **no regular medication other than sennacot and suppositories**

She is able to:

- **enjoy social activities and be driven to see friends**
- **be mobile with an electric wheelchair**
- **select her own clothing and menu. Vary and manage her own diet. She has plenty of reading matter, compact discs, plus radio and TV receivers.**

In February 2003 the HEALTH SERVICE OMBUDSMAN (HSO) for England delivered an influential report to Parliament on the subject of long-term nursing care, which recommended that Health Authorities should actively find people who had been funding their own care, or had been funded by the Local Authority/Social services, any time from April 1996 onwards. These peoples' cases should be re-considered and, if they should have been fully funded, they, or their estate if they had died, should be recompensed for the amount that they had paid.

Each of the former 28 Strategic Health Authorities (SHAs) was allowed to have its own eligibility criteria to decide whose long-term health needs would be funded in its area. The SHAs have now become 10, but the previous eligibility criteria remained in place until 1 October 2007 when the NATIONAL FRAMEWORK on NHS Continuing Health Care was implemented.

The criteria for funding long-term nursing care used by the North and East Devon Health Authority (where Pamela Coughlan lived) were found to be unlawful by the Court of Appeal and, even though many sets of criteria were amended, there were those which were still far too restrictive in the light of the Coughlan case, the HSO report and the guidance issued by the Department of Health, (which itself has been criticised by the HSO). One of these WAS Shropshire and Staffordshire. The HSO was so concerned about these criteria that in April and again in June 2005 they visited the SHA and Shropshire Primary Care Trust to discuss the criteria and the processes being followed. Much injustice to patients and their families has happened here and has yet to be rectified.

THE GROGAN CASE

In January 2006 the High Court heard a challenge on behalf of Mrs Grogan, a patient in a Nursing Home, to the eligibility criteria used by Bexley Care Trust.

The Judge found that: -

- **Professionals had been led to believe that if a person's needs could be met within the RNCC bands, then they were not eligible for fully funded NHS care.**
- **The eligibility criteria in the area where Mrs Grogan lives were "fatally flawed" i.e. unlawful because: -**
  - **The Heath Authority had not set out the Coughlan "PRIMARY NEEDS TEST" or the LIMITS of Social Services responsibilities in full and**
  - **The Heath Authority had linked fully funded NHS Care eligibility to the RNCC bands.**

The Judge stressed: -

- **Any person whose needs are the <u>SAME</u> as, or <u>EXCEEDED</u> those of Ms Coughlan should be entitled to fully funded NHS care.**
- **It was the NEEDS of the patient rather than the actual qualification of the person undertaking the nursing care which should dictate who should fund the service.**
- **The Health Agency (for example, the PCT) should look at the TOTALITY of the person's needs to see whether that person had a primary need for health care.**
- **The Local Authority should also look carefully at the TOTALITY of the person's needs before accepting the responsibility and means testing because they might actually be the responsibility of the NHS and legally <u>BEYOND</u> the scope of the Local Authority. i.e. the nursing needs of a person might be MORE than INCIDENTAL or ANCILLARY to their need for accommodation.**

New guidance was issued by the Department of Health on 3 March 2006 to SHAs advising them to review their eligibility criteria and the processes in use following the Grogan case. Once the criteria and all processes were amended they should <u>REVIEW</u> patients who may have been <u>WRONGLY</u> denied NHS Continuing Health Care Funding, since April 1996. The criteria of the Shropshire & Staffordshire SHA were amended in June 2006.

The National Framework has been implemented on 1 October 2007. This is a document of principles and processes to be followed throughout England. The 10 key principles are:

1. **Access to assessment for NHS Continuing Healthcare and provision of that care should be fair, consistent and free from discrimination on the grounds of race, disability, gender, age, sexual orientation, religion or belief.**

2. **The process of assessment and decision-making should be person centred.**

3. **Eligibility for NHS Continuing Health care is based on the individual's assessed health needs and not a diagnosis.**

4. **Consideration of eligibility for NHS Continuing Healthcare should always precede any decision about NHS funded nursing care.**

5. **When carrying out an assessment for NHS Continuing Healthcare and NHS funded nursing care the potential for further rehabilitation and regaining independence should always be considered.**

6. **Eligibility for NHS Continuing Healthcare is not determined or influenced by the setting where the care is provided or by the characteristics of the person/s who delivers that care.**

7 **Financial issues should not be considered as part of the decision about an individual's eligibility for NHS Continuing Healthcare.**

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

9 **The evidence and decision making process should be accurately and fully recorded using suitable models that are already in place. Decisions and rationales relating to eligibility should be transparent from the outset – for individuals, carers, family and staff.**

10 **Eligibility for NHS Continuing Healthcare may change and regular reviews are built into the process. Individuals and their families need to be clear about this from the outset.**

There are assessment tools which must be used nationally – see www.dh.gov.uk.
It is against this framework and using these nationally approved assessment tools that the needs of a patients at any time from April 1996 should be reviewed, if they have not previously been assessed.

A letter of 31 July 2007 from the Chief Executive of the NHS David Nicholson to all health bodies suggests that there should be a "closing of the door" to all claims for the period April 1996 – April 2004. This is on the basis of a local "Public Awareness" campaign. In the absence of such a campaign this "attempted closure" would be open to challenge by judicial review. There was NO evidence of the necessary campaign by Shropshire PCT and our view is that retrospective claims back to April 1996 must be accepted.

THE PRACTICAL CONSEQUENCES

Do you think that you, or your relative, are (or were) entitled to COMPLETELY free NHS-funded nursing care (Continuing Health Care Funding)?

Are you/were you:

- **sick and in need of long-term nursing care?**
- **in hospital, about to be discharged?**
- **in a nursing home, paying or making a contribution towards your own care?**
- **in a residential home needing a high level of care or about to be transferred to a nursing home because your primary need is now for nursing?**
- **sick and at home with long-term needs?**

If ANY of the above apply to you (or your relative), and your PRIMARY need is for heath care i.e. your nursing needs are not merely incidental or ancillary to your need for accommodation, the decisions in the Coughlan & Grogan cases, the Health Service Ombudsman's report and the National

Framework support the view that the NHS should be funding the WHOLE of your care FREE in a nursing home, a residential home, a hospice, or your own home.

IF YOU ARE IN A NURSING HOME, RESIDENTIAL HOME OR AT HOME:

Ask for a written assessment/re-assessment of ALL your health and social care needs and a review of your case by the Primary Care Trust (in England) or Local Health Board (in Wales) where you are being nursed.

- **Do your needs match or exceed those of Pam Coughlan?**
- **If the decision is that your needs do not meet the standard set by the new National Framework you should apply for a review of the decision if the process is flawed or you believe your needs do meet the standard set by the National Framework**
- **If the review is not successful an Independent Review Panel should be convened by the SHA at which you and/your family and representative should be able to put forward your views**
- **If not successful, take your case to the Health Service Ombudsman.**

NB. Nursing homes and Residential Homes are now called Care Homes registered for nursing or residential care. In this handout we have largely used the former descriptions

IF YOU HAD A SICK RELATIVE WHO DIED SINCE APRIL 1996 WHO WAS PAYING ENTIRELY OR PARTLY FOR THEIR OWN CARE:

You can make a claim on behalf of their estate for reimbursement of the money incorrectly paid.

The steps are similar to those set out above but it is wise to have advice BEFORE starting on the process.

IF YOU ARE IN HOSPITAL:

Ask the **Discharge Liaison Nurse** for a written assessment of your continuing healthcare needs. Government (Department of Health) Directions are in force which should ensure that you have this assessment **BEFORE** leaving hospital to go to a care home or for intensive care in your own home, and **BEFORE** you have an assessment for the Registered Nurse Care Contribution.

- If it is considered that you do not meet the standard set out in the National Framework, and
  - you believe you do, or
  - the process was not carried out properly,

  ask for a review, which should be completed within fourteen days
- If you are still unsuccessful, ask for an independent review panel
- You should remain a patient of the NHS till these matters are resolved. However, it is not wise for a sick elderly person to remain in hospital (MRSA and other hospital acquired infections may exacerbate the situation)
- If you go from hospital to a care home, or to your own home with an intensive healthcare package, **your claim will continue and be retrospective**.
- If, sadly, you die at any point during this process, **your estate** can still pursue the claim on behalf of those whom you wish to benefit following your death.

Wace Morgan, for many years, have been working on behalf of clients, or their relatives, with PRIMARY HEALTH NEEDS wrongly charged for their long term care. We have recovered over ONE AND A HALF MILLION pounds for them, but realise that there are many more patients, some of whom have died, who should have been fully funded.

Our view is that the whole period from April 1996 to date is open for review despite the attempt to "close the door" for the period April 1996 – April 2004.

We can offer an initial free telephone conversation to advise if you (or the estate of a relative who has died) have a realistic claim.

There is a choice of payment for work done and we are, subject to initial discussions and review of the case, prepared to offer a Contingency fee agreement, which means that there are NO costs UNLESS there is a reimbursement of fees to the individual or to their estate.

This handout has been prepared by:

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PLEASE CONTACT:

Mrs Liz Holdsworth — **for training, talks or workshops**

and either

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