NHS Legal Framework Webinar Series

Masterclass on NHS Continuing Care for Adults and Children

Wednesday 9 July 2025

The recording may be accessed **here**.

LANDMARK CHAMBERS

Your speakers for today

David Lock KC (Chair)

Welcome and Introduction

Fiona Scolding KC

CCC Funding Issues

Samantha Broadfoot KC

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Introduction

Focus on 3 Topics:

1. PI settlements & CHC
2. Care by relatives
3. Home care vs care homes

I. PI Settlements and CHC funding

PI Claims: General and Special Damages

- General Damages:

- Subjective, non-economic impacts of the injury, such as pain, suffering, emotional distress, and loss of enjoyment of life

- Usually a lump sum

- Special Damages:

- Seeks to compensates for the specific, calculable financial losses directly resulting from the injury

- E.g. Medical expenses, social care costs, lost wages, cost of rehab / therapy, home modifications needed.

Special Damages (cont)

- Lump sum
- PPO

Advantages of PPO

- More manageable sums
- No risk of running out if victim lives longer than expected
- Tax advantages

Issue

- CHC is not means-tested

→ PI award does not bar CHC claim

- Moral concerns but legally allowed
- Double recovery does happen in practice

Legal Framework

• NHS Act 2006:

- s1(4): NHS services free unless charges permitted
- s1I: ICBs must arrange provision of services
- s3: an ICB "must arrange for the provision of the following to such extent as it considers necessary to meet the reasonable requirements of the people for whom it has responsibility… (i) such other services or facilities for… the care of persons suffering from illness and the after-care of person who have suffered from illness as the board considers are appropriate as part of the health service…."

- s275: Illness defined broadly as including any disorder or disability of the mind and any injury or disability requiring medical or dental treatment or nursing

Determining eligibility:

- The Care NHS Commissioning Board and CCG (Responsibilities and Standing Rules) Regulations 2012 (“RSR”) in particular r.21 and

- The National Framework for NHS CHC and NHS-funded Nursing Care – revise 2022

Eligibility process

Rule 21 of the RSR Regs:

Duty to assess where it appears to that body that

“there may be a need for such care”

Rule 21(6):

If a relevant body decides that a person has a primary health need in accordance with paragraph (5)(b), it must also decide that that person is eligible for NHS Continuing Healthcare

Entitlement

Can the ICB then lawfully consider that the provision of CHC is 'not necessary to meet the injured party's reasonable requirements' by reason of their special damages award?

NO - *Booker v NHS Oldham* [2010] EWHC 2593 (Admin)

Anomalies are for Parliament to resolve:

- *Crofton v NHS Litigation Authority* [2007] EWCA Civ 71;

- *Forbes v Quinn* [2011] NIQB 24;

Solutions short of legislative amendment?

- *S*pecific power under s2B of the Damages Act 1996?
- Distinguish *Booker?*
- Terms of settlement agreements

II. Care provided by relatives

National Framework:

- Well-managed needs are still needs.
- Only where the successful management of a healthcare need has permanently reduced or removed an ongoing need will this have a bearing on NHS Continuing Healthcare eligibility. §§162-165. Also PG23
- Distinction between ‘well-managed needs’ which are still needs and ‘well-controlled needs’ which are those conditions which are well-controlled by medication or other routine care or support: §166

Reconciling the approach

Better approach:

- To discount routine care and support gratuitously provided by family members from a person's "needs".
- See by analogy the approach taken to accommodation needs.
- May be particularly important when ascertaining whether remaining needs should be provided in a residential care home or at home.
- Reminder NF is not a directive though must be taken into account - *Whapples*

III. Home Care Packages or transfer to a care home?

- Bespoke “hospital at home for one” → can be prohibitively expensive.
- Economies of scale not applicable at home
- How to manage patient’s desire to receive care at home?

Guidance

National Framework:

- Take into account cost and preferences: §197
- Cannot ask for a contribution to make up the difference

But routine support by spouse, relatives and even friends might mean that support can be provided at home because the need (and therefore cost) is lowered, eg overnight by spouse.

See also Practice notes 45 and 46 and *Gunter*.

CCC Funding Issues

Fiona Scolding KC

Introduction

Focus on 3 Topics:

1. When is someone eligible for a CCC assessment and what about gatekeeping of eligibility assessments?

2. Decision making re packages of care and disputes .

3. FTT appeals/cross overs.

I. CCC eligibility

Unlike adult CHC, Children's CCC is part and parcel of a package of care for social services, education and health (unlike adults, where social care services will be included in the CHC package if eligible).

Whilst the existence of CCC is predicated upon s3 of the NHS Act 2006 but its operation is different to adult CHC.

Specific National Framework for Children and Young People's Continuing Care Guidance.

Only applies to those 18 and under (so does not replicate the transitional arrangements under the Care Act 2014 and the 19-25 provision of the CFA 2014 in respect of EHCP)

CCC Eligibility (2)

“ A continuing care package will be required when a child or young person has needs [NB health needs] arising from disability accident or illness that cannot be met by existing universal or specialist services alone”.

First issue

- What about health provision that meets SEN – s21(5) of the CFA 2014?
- What about health provision that meets s17 CA 1989/s2 CSDPA 1970 care?

Getting an assessment

Paragraph 55 of the CCC guidance stresses assessment if

“may have needs that require additional health services”

Legally that threshold is low – may is a fairly low test.

Must be fully documented (paragraph 63 of the CC guidance) : can be a paper based assessment to see if a child should proceed.

What happens if there is gatekeeping at this stage?

(a) Is the threshold put too high

(b) Are services meant to be available which in reality don’t exist and/or are not practicable?

Managing disputes at the threshold stage

- Responsibility is that of the ICB, not the other services (social care/education)
- Is there a working dispute resolution service (CCC guidance identifies there should be one: how is that used, and does it even exist????)
- Creation of true tri partite dispute resolution
- If social care/education – encouraging parents (and LA if corporate parent /child is LAC) to use the appeal mechanism?

2. CCC and CFA 2014

CCC guidance (and s28 of the CFA 2014 and the SEN Code of Practice) recommend running the EHCP/CCC processes together and to work out how the CCC process fits into the EHC plan to create a coherent package of care.

But the ICB assessment is separate to the EHC process , and should be undertaken by a children's health assessor (although the guidance makes it clear that the local authority should be involved/engaged and the health assessor can lead on behalf of both bodies – question – how is that worked out practically? (para 68 – 78 of the guidance sets out collation different sources and nature of the assessor).

Need for co-operation during assessment

CCC assessment identifies that the assessment process is holistic:

(a) Preference of children/young person/family (which corresponds with section A of the EHC plan)

(b) Collation of holistic assessments including for social care – health needs of other family members and environment where the child lives

(c) Reports from health, social care and education, including risk assessments (healthcare and otherwise)

(d) The DST (but recognises may be needs which fall outside DST).

NB: the DST is not the only tool to be used (cf adult CHC)

Disputes

(a) How do you resolve disputes as to (a) the level of need in the DST, the assessments or overall decision?

(b) CCC decisions should be taken by a “multi agency forum or panel ” (paragraph 22)

(c) No guidance in CCC guidance as to how to work together (save for discussion about the need for dispute resolution (paragraphs 92 and 93)

(d) Who gets the ultimate say? Should there be a balance? What happens if there is not agreement?

(e) Whilst there is a requirement for such resolution, not real details of them – so how would this work?

Possible dispute resolution

(1) Need to have a policy /practice (many organisations do not, or it has never been formalised)

(2) Director/Director discussions.

(3) Chief exec discussions? (may not be needed)

(4) Independent evaluation? By whom? Neighbouring ICB? Independent expert (if so who and who pays?) – can ICB delegate that decision? (under the NHS Act? Does this only apply if jointly commissioned package s26 CFA 2014/s75 NHS Act 2006). Could you have a recommendation but then ICB/LA make decision?

(5) Funding pending outcome of dispute.

EHC plan/residential settings

S26 of the CFA 2014 – need for joint commissioning arrangements for those who have SEN (but this is general duty, not specific individual duty)

(a) Who decides and how does one decide if a residential placement is needed?

(b) Who funds what?

(c) NB: consider powers of FTT re: recommendations for health and social care cf orders for education

(d) LA cannot fund medical care for children (R(T) v Haringey BC [2005] EHWC 2235, summarised at Annex C of the CCC guidance), i.e. not funding services delivered by a registered nurse/s22 of the CA (although not directly applicable, useful pointer).

S75/s26 joint pooling/commissioning

Considerable overlap between what is health/social care/education

In particular re challenging behaviour

Emotional needs

Communication

NB: don't forget the different duties between the bodies. Health (discretionary/target duty s3). But provision-free.

Social services (mandatory duty if under s2 CSDPA 1970/otherwise discretionary duty with resources). Provision can be charged for.

Education (mandatory if trains or educates)

EHC Plans

S42 – healthcare provision set out ; the responsible commissioning body must arrange the healthcare provision – that would include any CCC identified in section G . Reg 12(2) of the SEN Regs 2014 provides that the healthcare provision in part G must be agreed.

S42 – if special educational provision, then must be provided by the LA (even if use the ICB/community services/social services to provide the service) .

Both mandatory duties.

FTT appeals

(a) Recommendations – duty on health (and social care) to consider the recommendation (Regs 4-7 of the SEN (Recommendation Power) Regs 2017 as amended. .

(b) Where a child has a need for health and social care services which goes beyond universal services, ICB and LA are sole decision makers about the extent of services and not subject to an appeal to the FTT (NHS West Berkshire CCG v FTT [2019] UKUT 44 at 90 – 96).

(c) Nursing care is not special educational provision (Bradford MBC v A [1992] and East Sussex v KC [2017] UKUT 273 but see East Sussex v JC [2018] UKUT 81

(d) SEP can however be not simply exclusively educational – see LB Bromley v SENT [1999] ELR 260

Thank you

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