NHS AND LOCAL AUTHORITY RESPONSIBILITIES FOR CONTINUING HEALTHCARE AND SOCIAL CARE SERVICES

In the recent past, there has been a number of high profile court cases raising significant issues that personal injury lawyers need to grapple with when considering what care and accommodation provision is available for claimants, by statutory obligation, through the National Health Service (NHS) and Local Authorities.

The much publicised Coughlan case (R v North and East Devon Health Authority ex parte Pamela Coughlan EWCA 1871 1999) dealt with health service responsibility for continuing nursing care. More recently, Eagle v Chambers (EWCA Civ 1033 2004) emphasised that it is up to defendants to raise arguments and prove that, where the resources required to provide care are not available outside the NHS and they form part of a privately funded care regime being provided to a claimant, the defendant should not have to meet that particular element of cost. Similar arguments may also be raised where a claimant is likely to use NHS facilities and not privately funded services (see Woodrup v. Nicol (1993) and Lim Poh Choo v. Camden and Islington Area Health Authority 1980).

The recent Sowden and Crookdake cases (EWCA Civ 1370 2004) relate to care services that are being, or might be, provided to claimants by a Local Authority.

These cases raise many issues for claimants and defendants alike and can be split into two areas:

Pre-Settlement

Looking at a claimant who is already in the system, i.e. he has already been assessed for continuing nursing care and/or social care services, the following questions need to be addressed:

- Can the claimant be forced to accept NHS and Local Authority provision?
- Can defendants take credit for current and future entitlement?
- Is the level of care/accommodation sufficient to meet tortfeasor obligations?
- Does the 'topping-up' of Local Authority provision work in practice?
- If a claimant is only entitled to Local Authority services if any award of damages is to be disregarded, can a claimant be forced to have a personal injury trust?
- Are personal injury damages held on behalf of Patients always considered to be 'in court'?
- What happens if the claimant presently has, or will have in the future, non personal injury derived assets?
- What are the implications for an interim payment application?

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For a claimant who has not been assessed for care services, some of the questions are different.

- Can the defendant force the claimant into the system, for example, by way of a judicial review or whistle blowing?
- Is the level of care/accommodation sufficient to meet tortfeasor obligations?
- Does the 'topping-up' of Local Authority provision work in practice?
- Can a defendant force a claimant to accept an offer of statutory provision and would the rejection by a claimant of statutory provision impact upon the claim?
- Can the defendants find out?
- Is it an issue likely to be raised at interim payment application?

Post-Settlement

The issues here are somewhat less complex.

- What has the claimant got to lose by claiming Local Authority or NHS support?
- Is the claimant obliged to maximise entitlement to statutory support especially where there is contributory negligence?
- If there is a Receiver involved, is there a legal responsibility to maximise a claimant's benefit position?

The answers to the above questions must be put into the context that neither the Local Authority nor the NHS has the power to recoup from the claimant.

The Background

The statutory obligations that apply to the NHS and Local Authorities have evolved over many years and are complex and multi-faceted. Listed below are the principal Acts and Regulations that apply although practitioners may note with some dismay that this list is not exhaustive:

- 1948 National Assistance Act;
- 1970 Local Authorities Act;
- 1970 Chronically Sick & Disabled Persons Act ;
- 1977 NHS Act;
- 1983 Mental Health Act;
- 1985 Housing Act;
- 1986 Disabled Persons (Services, Consultation and Representation) Act ;
- 1989 Children Act;
- 1990 NHS & Community Care Act;
- 1992 National Assistance Assessment of Resource Regulations;

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- 1993 Health & Social Services and Social Security Act;
- 1999 Health Act;
- 2000 Care Standards Act;
- 2001 National Assistance (Residential Accommodation) (Disregarding of Resources) (England) Regulations;
- 2001 Health & Social Care Act;
- 2003 Health & Social Care (Community Health & Standards) Act;
- 2003 Community Care, Services for Carers and Children's Services (Direct Payments) Regulations England;
- 2004 Community Care Assessment Directions; and
- A host of Local Authority and NHS Circulars & Guidance.

Issues to be considered

Practitioners will need to have a general understanding of the Acts of Parliament and statutory guidance under which Local Authorities and NHS bodies deliver services.

- What care services will a Local Authority provide?
- What accommodation would the Local Authority provide?
- What continuing health care services would the Health Authority provide?
- Are services means-tested and how?
- Is there any ceiling on the cost of care and accommodation?
- Can a claimant exercise any choice in the selection and delivery of services?

Local Authority Provision of Care

The Local Authority is obliged by Section 47 of the 1990 NHS & Community Care Act to provide services:

> *"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 service, the authority –*
>
> *a) Shall carry out an assessment of his needs for those services*
> *b) Having regard to the result of that assessment, shall then decide whether his needs call for provision by them of any such services"*

At no time during this initial assessment process must the financial situation of the person being assessed be taken into account (P, R v Royal Berkshire CC EWHC Admin 25 1996 and Penfold v Bristol CC EWCA Civ 1367 1997).

Practitioners should be aware that many Local Authorities do not understand their own regulations and obligations.

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This can lead to the Local Authority taking advantage of naive claimants and their advisers, who do not themselves fully understand the regulations, by giving the impression that a Local Authority does not have to carry out a Section 47 assessment if it becomes aware, by whatever means, of a claimant's financial resources prior to such an assessment being carried out.

Whilst an assessment is being carried out under Section 47, if a Local Authority discovers that the person is disabled then an Authority –

a) Shall proceed to make such a decision as to the services he requires as mentioned in Section 4 of the (1986 C.33) Disabled Persons (Services, Consultation & Representation) Act 1986 without his requesting them to do so under that section; and
b) Shall inform him that they will be doing so and advise him of his rights under the Act.

The Local Authority is also obliged to call in other bodies, such as the Strategic Health Authority or Local Housing Authority, and invite them to assist if, during the assessment, it appears to a Local Authority –

- That there may be a need for provision to that person by such Strategic Health Authorities may be determined in accordance with regulations of any services under the NHS Act 1997; or
- That there may be a need for the provision to him of any services which fall within the functions of the Local Housing Authority (within the meaning of the 1985 Housing Act which is not the Local Authority carrying out the assessment).

Having discovered that person is disabled, then a Local Authority has an obligation under Section 4 of the Disabled Persons (Services, Consultation & Representation) Act 1986 to provide 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. To qualify for services under Section 29 (1) of the 1948 National Assistance Act, a person must be:

- Aged 18 or over.
- Blind, deaf or dumb or suffers from mental disorder of any description, any other person aged 18 or over who is substantially permanently handicapped by illness, injury, congenital deformity or such other disabilities as may be described by the minister.

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- The definition of a 'disabled person' should be interpreted in this context to mean people over 18 years of permanent and substantial disability such as a learning disability, physical disability, sensory impairment, mental health difficulties, chronic illness or any combination of these.

Local Authorities are required to give a wide interpretation to the term 'substantial' and are to take full account of individual's circumstances, adopting a flexible interpretation to the term 'permanent' in cases where they are uncertain of the duration of the condition being assessed.

Claimants who are disabled within the terms of this definition are not obliged to register with their Local Authority, however, access to the assessment process and services are not dependent on an individual registering. This gives rise to issues regarding whistle blowing by anonymous third parties.

Children

The care, health and general welfare needs of children are assessed under The Children Act 1989, 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 the Act at the same time as any assessment of his needs 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.

Section 17 of The Children Act 1989 states that every Local Authority –

- Shall facilitate the provision by others (including particular voluntary organisations) and services that the Authority has the power to provide by virtue of this Section – Section 18, 20, 23 or 24 and may make such arrangement as they see fit for any person to act on their behalf in the provision of any such service.

In general, Local Authorities are obliged to adopt multi-disciplinary approaches to the provision and assessment of services for children and young people.

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Care Assessments

As the above demonstrates, the assessment process provides for a multi-disciplinary approach to determine an individual's needs. The assessment process can be instigated by:

- A hospital discharge.
- An approach to the Local Authority by an individual claimant or by a third party, authorised by the claimant and his advisers or otherwise.
- 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 if in the opinion of the Local Authority the condition of the person is such that he requires services as a matter of urgency.

The latter point is an important one insofar as Local Authorities must make speedy and immediate provision for people in need and cannot use the fact that they believe that there are resources available to a person in need to deny them provision. In other words, if a claimant were to be paying for services out of his own resources he had received by way of an interim payment, transferring capital into a personal injury trust, as encouraged by the law, would mean that such funds would be immediately disregarded and a Local Authority would be obliged to met its obligations with immediate effect.

I would suggest that adopting such an approach is likely to act somewhat as a "red rag to a bull", however it would seem the Local Authority would have no option other than to meet the need.

Fair Access to Care Services

Local Authority Circular (2002) 13, Fair Access to Care Services, sets out the framework that Local Authorities must use to make decisions regarding eligibility for social care services. Councils may provide community care services to individuals with need arising from physical, sensory, learning or cognitive disabilities and impairments, or those with mental health difficulties. Councils' responsibilities to provide such services are set out in:

- The National Assistance Act 1948.
- Health Services & Public Health Act 1968.
- Chronically Sick & Disabled Persons Act 1970.
- The NHS Act 1977.
- The Mental Health Act 1983.
- Disabled Persons (Services, Consultation & Representation) Act 1986.

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The guidance is issued under Section 7 (1) Local Authority Social Services Act 1970 and as such, is binding on the Local Authority. The guidance sets out that a Local Authority should set eligibility criteria in four bands:

- Critical.
- Substantial.
- Moderate.
- Low.

In constructing and using the eligibility criteria and also in determining eligibility for individuals, Councils should prioritise needs that have immediate and longer term critical consequence for independence, ahead of needs with substantial consequences.

In setting their eligibility criteria, Councils should also take account of their resources, local expectations, and local costs. Councils should take account of agreements with the NHS, including those covering transfers of care and hospital discharge. They should also take account of other agreements with other agencies as well as other local and national factors.

NHS RESPONSIBILITIES

The NHS is responsible for arranging and funding a range of services to meet the needs of people who require continuing physical or mental health care. The range of service which the NHS is expected to arrange and fund to meet the needs of their population either at home, in a nursing or a residential nursing home includes:

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

Guidance with regard to these responsibilities can be found in Health Service Circular 2001/015, Health Service Circular 2003/006 and in the 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.

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The NHS Continuing Health Care Assessment process can be split into three distinct categories: Children; Adults and Adults aged 65 or over.

Children

Where a child is in need of continuing health care services, the Health Authority will bring in as part of the discharge process the Local Authority Social Services department who will then discharge their duties under The Children Act 1989. The NHS will provide and fund any element of the care package regarding the provision provided by a registered nurse.
Adults, carers, parents and advocates are to be kept fully in the loop when discussing a child's care needs.

Adults

The assessment process is part of hospital discharge procedure. NHS hospitals have continuing healthcare obligations under The National Health Act 1977 and NHS's Responsibilities Directions 2004. These directions extend to any person aged 18 or over with physical or mental health needs which have arisen as a result of a disability, accident or illness.

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 the Social Care Services under Section 47 of the 1990 NHS & Community Care Act. This means that a Local Authority is forbidden by statute to provide services that require the input of a registered general nurse.

Adults aged 65 or over

The National Services Framework for Older People was implemented in April 2002 and guidance was issued to Councils with Social Services responsibilities under Section 7 (1) 1 of the Local Authorities Social Services Act 1970. The purpose of the Single Assessment Process is to promote better care service and outcomes and more effective use of effective resources.

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 NHS Act). Professionals from either the NHS or Local Authority can legitimately carry out a full overview assessment of a person's needs (Section 31 of The Health Act 1999 and Section 13 of The Local Government Act 1972).

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Adults aged 18 to 65

The responsibilities of the statutory bodies are similar to the Single Assessment Process for adults aged over 65 but individual professionals are responsible for the assessment of each particular area of need.

When assessing any continuing nursing care need, it is important to note that only NHS nursing care practice guidance is to be used in determining continuing nursing care needs, i.e. a Local Authority is not able to determine such a need. Guidance was issued to NHS bodies and Local Authorities under The Health Service Circular 2003/006 and Local Authority Circular 2003/07 – Continuing Health Services Directions & Guidance on NHS Funded Nursing Care.

Professionals are reminded again that what the NHS and Local Authority might provide by means of services is not the same as that which a tortfeasor might be expected to provide. It is therefore crucial that the 'envelope' of both Local Authority and NHS provision be fully explored to ensure that optimum agreed services are obtained.

Complaints Procedures

Advocates should be aware of NHS complaints procedures should they wish to challenge the services a client is offered on discharge from hospital. Where the NHS wishes to discharge a patient into the community, Local Authorities are to be made aware and the appropriate assessment process carried out depending on age. The NHS is required to give notice to Social Services under Section 2 (2) of the NHS Act 1977.

The NHS are obliged to inform the patient that if he is dissatisfied with the decision of his assessed needs for continuing care, he may apply for a review of the decision pursuant to Paragraph 4 (3) of the Continuing Care (NHS Responsibilities) Directions 2004 prior to being discharged.

Therefore, the patient or his representative would make a complaint to the relevant Primary Care Trust. The complaint is then dealt with under the NHS (Complaints) Regulations 2004. Guidance has been issued with regard to how any complaint should be handled, with the final arbiter being the Health Service Ombudsman.

Practitioners should be aware that it is likely that there will be a time limit imposed after which a complaint cannot be brought. The time limit is likely to be six months from when the matter, which is the subject of the complaint, is brought or six months from the date on which any matter, which is the subject of a complaint, came to the notice of the complainant.

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However, there are discretionary powers to investigate claims made after the expiry of the time periods explained above.

<u>The Local Authority complaints procedure</u>

New regulations come into force from April 2005. Local Authorities currently investigate complaints against them internally, but 'independently'! Post April 2005, the Commission for Social Care Inspection takes over. Regulations are to be introduced early in 2005 by Statutory Instrument and will be mandatory under Section 7 of The Local Authority & Social Services Act 1970.

Practitioners should be aware that, as with a Health Authority complaint, it is likely that there will be a time limit imposed after which a complaint cannot be brought. However, the time limit is likely to be one year from when the matter, which is the subject of the complaint, is brought or one year from the date on which any matter, which is the subject of a complaint, came to the notice of the complainant.

Again, there are discretionary powers to investigate claims made after the expiry of the abovementioned time periods.

Furthermore, it is important to note that a complaint with regard to a child is made under the Children Act 1989 and is dealt with differently than for an adult.

The complaints procedure is extensive and is beyond the scope of this article.

LOCAL AUTHORITY PROVISION OF ACCOMMODATION

Local Authorities are obliged to provide accommodation under Section 21 of The National Assistance Act 1948 (as amended by the 1990 NHS & Community Care Act) 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 should have regard to the welfare of all persons for whom accommodation is provided, and in particular, to the need of providing accommodation of different descriptions suited to different descriptions of such persons as are mentioned in the above section.

The above point is of particular importance in terms of choice of accommodation.

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Community Care Assessment Directions 2004

The directions provide for a full involvement of individuals, carers and advocates in both the assessment of need and care planning in general. Regulations give individuals the right to enter into more expensive accommodation that a Local Authority would otherwise have to provide 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.

Section 26 (3a) of The National Assistance Act 1948 requires the agreement of all parties in terms of acceptable accommodation. Individuals should not be refused preferred accommodation without a full explanation from the Council in writing. A Council should arrange for care to be provided in the individuals preferred accommodation subject to four main considerations:

1. Suitability of accommodation.
2. The cost.
3. Availability.
4. Terms and conditions that such accommodation is available on.

With regards to issues of cost, a Local Authority must refer to their usual cost when conducting assessments. However, usual cost must mean usual for a particular level of disability, i.e. a Local Authority cannot simply apply a blanket charge for accommodation and then apply that charge to all levels of need and disability.

Third party top-ups to enable clients to enter accommodation that is more expensive than that which a Local Authority might provide are acceptable. However, it is not possible for an individual (except in very limited circumstances) to provide the top-up. Presently, Receivers or a court may not provide a top-up, but Trustees may. It is important for practitioners to note that a Local Authority may not infer or suggest a top-up or that it is normal for relatives to provide such top-ups.

It would appear that a certain planning opportunity exists in terms of accommodation. Many practitioners would agree that the most appropriate place for care to be delivered to a claimant is in their own home. Indeed the Community Care Act in general, makes that assumption. It is important to note that a Local Authority can only provide accommodation where such accommodation is managed by an individual or organisation registered under Part II of the Care Standards Act 2000. Clearly, clients' own homes would not satisfy this requirement.

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However, if a suitable property is purchased by a Personal Injury Trust as a trust investment and made available to the claimant/Local Authority at the discretion of the trustees and the property is managed by a professional case manager authorised under The Care Standards Act 2000, then it would appear that the Local Authority could make a payment towards the cost of providing that accommodation.

The amount of such a contribution would depend upon a number of factors including:

1. The amount that the trustees might seek from the Local Authority; and
2. The 'usual' cost assessment as adjudged by the Local Authority.

It would appear that the main considerations would be met. The accommodation purchased and adapted for the claimant's specific needs by a Personal Injury Trust is suitable, available, within cost and can be contracted for under an Authority's normal terms and conditions.

Local Authorities are able to take their own resources into account when assessing accommodation needs. However, a Local Authority can only take its resources into account in terms of how to meet the need and cannot take into account whether or not to meet a need. Individual tenacity and good advice is paramount therefore when negotiating with Local Authorities (ex parte Penfold1998 ICCLR 315 and ex parte M1999 2CCLR 185 and ex parte Tammmadge1998 ICCLR 581).

Cash or Care – The Right to Direct Payments

As mentioned repeatedly in this article, what a Local Authority might provide and what a tortfeasor might be responsible for are likely to be different. Many claimants, therefore, might wish to obtain the cash value of the care package that the Local Authority is obligated to provide and to use the cash to purchase a private package of care, possibly with the assistance of a third party top-up.

Local Authorities are obliged to make direct payments available under statutory guidance issued by SI 2003/762. The guidance was issued to reflect the changes introduced chiefly by Section 57 of the Health & Social Care Act 2001, Section 17a of The Children Act 1989 and The Community Carers, Services for Carers and Children's Services Direct Payments Regulations 2003. Community Care (Direct Payments Act 1996) Act 1996 was revoked. The direct payments 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 Act 2000.

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- A service that Local Authorities may provide under Section 17 of the 1989 Children 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. The principle reason behind direct payments is that the government accept that the best person to choose who provides the services is the individual himself.

The NHS, however, is under no obligation to make direct payments. However, 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 is to be published which will obligate Health Authorities and Local Authorities to establish separate Care Trusts to enable the delivery of services provided in the community for social and health service needs more efficiently. Indeed, the NHS is currently recruiting 3,000 Community Matrons (case managers) to implement and manage delivery of services in the community more effectively.

As mentioned earlier in the article, 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 a Local Authority to act as lead manager to purchase nursing and social care services.

The following groups of people may be eligible to receive direct payments:

- Adults.
- Young persons between the ages of 16-18.
- A person with responsibility for a child.
- A receiver.
- Carers aged 16 or over.

It is not normally possible for a close relative to be paid for providing services by way of a direct payment unless a Council is satisfied that it is necessary to meet satisfactorily a person's needs. A 'close relative' means a spouse, husband or wife, partner or close relative who normally lives in the same household as the direct payments recipient. This restriction applies where the relationship between two people is primarily personal than contractual, for example, if the people concerned would be living together in any event.

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Means Testing

The NHS continuing care provision is free at the point of need. Local Authority care and accommodation, be it for residential or domiciliary services, is means tested. The following Capital thresholds apply:

England – lower threshold	£12,500
England – upper threshold	£20,500
Scotland – lower threshold	£12,000
Scotland – upper threshold	£19,500
Wales – lower threshold	£14,750
Wales – upper threshold	£21,000

Claimants with assessable capital in excess of the threshold receive no financial assistance. Claimants with capital in the "tariff zone" between the lower and upper thresholds are required to make a contribution at the rate of £1 per week per £250 of capital or part thereof. The income of a claimant is taken into account and a Local Authority is obliged to use the Income Support entitlement of that individual plus an uplift of 25% and to disregard any element of the Disability Living Allowance mobility and care components that are actually being spent on the individual's need when assessing the level contribution an individual might be required to make.

Spouses/Partners Income & Capital & Joint

Under the National Assistance Act 1948, a Local Authority has no power to assess a couple according to their joint resources. Each person entering residential care should be assessed according to their individual needs. However, under Section 42 of the National Assistance Act 1948, the liability of a married person to maintain their spouse should be considered in each case. I understand that the Government is shortly to repeal Section 42.

Local Authorities should attempt to identify cases where the potential resident is the main recipient of a couple's income and where the assessment of the resident's financial contribution could result in a substantial reduction in the amount of income remaining for the spouse at home.

In such cases, the Local Authority should increase the resident's personal expense allowance in order to leave enough income for them to continue supporting their partner at home. This is particularly likely where the spouse entering care is in receipt of a private pension.

Joint capital will be assessed on a 50/50 basis unless it can be proved otherwise.

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Capital held in court or in a Personal Injury Trust is disregarded and any income provided by periodical payments or derived from disregarded capital is also disregarded if used for a purpose other than which benefits are paid (SI 2002/2442 ISGR 1987 and SI2002/2531 NAAR 1992).

However, capital held by a Receiver or by a solicitor for a claimant, not in the name of 'Accountant General', is deemed to be out of court and is not disregarded (unless the Statutory Charge under the Legal Aid provisions apply, as the capital is deemed to have a nil value).

Summary

Professionals need to consider the following:

- When should care assessments take place – pre or post settlement?
- Is the claimant solely in control of this decision?
- It is most likely, given hospital discharge procedures, many claimants will already be in the "system" when they present at your offices.
- Social Care and continuing health services should be provided on an agreed basis. It is better to reach agreement rather than challenge a decision under a complaints procedure.
- Case managers should be involved to negotiate agreed provision and reviews should be carried out as and when necessary.
- An analysis of individual benefit entitlement, both present and possible future entitlement, needs to be carried out.
- How should the accommodation issue be addressed?
- Should direct payments be considered?
- Is a Personal Injury Trust required?

Litigation Uncertainties

In light of the Court of Appeal decision in Sowden, the matter has been passed back to the High Court Judge for further consideration of the following points:

- Can a claimant recover all of his future care from the defendant, even where the Local Authority and Health Authority have an obligation to provide for his assessed needs?
- Is the burden of proof on the defendant to prove that the claimant will always have his presently assessed needs met, either in part or in full, in the future by way of statutory funding?
- Assuming that the Local Authority and Health Authority obligations have been reasonably assessed as being at a lower level of need than that which the tortfeasor might be responsible for, is the defendant only liable for the difference?

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- If so, will top-up work in practice?
- Can the courts be satisfied that the claimant will always meet the criteria to be entitled to the services?
- Can the courts force claimants with capacity to have a Personal Injury Trust?

It is interesting to note the comments of The Honourable Mr Justice Leveson in the matter of Damien Tinsley v. Jaidip Sarkar (2005 EWHC 192(QB)) in his judgement dated 18th February 2005, in which he stated:

> *"... I am prepared to confess that, although I will dutifully apply my view of the law to the facts of any case (and I do not apologise for advancing the arguments in Firth), I am one of those judges to whom Longmore LJ was referring in Sowden v. Lodge (supra) at paragraph 92 when he said:*
>
> > *"Some judges also have an instinctive feeling that if no award for care is made at all, on the basis that it will be provided free by local authorities, the defendant and his insurers will have received an undeserved windfall."."*

I understand that the decision reached in this case to disregard statutory assistance has been appealed.

We can all only hope that these issues will become clearer in the near future.

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