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NHFA Alert – Grogan Case Opens Door For Free NHS Continuing Care

A High Court Judge has ruled that criteria used to assess for fully funded nursing care are totally flawed and all too many older people are left wondering whether they should pay or not. This case has wide implications for older people in nursing homes and their families and highlights the similarity between eligibility criteria for an assessed NHS Registered Nursing Care Contribution (RNCC) worth £129 per week and eligibility to NHS fully funded continuing care which could be costing £500 or more per week. The challenge to Bexley NHS Care Trust was as a result of their refusal to provide fully funded NHS care for Maureen Grogan and only pay her nursing costs (RNCC).

Preempting this decision, at the end of November 2005, the Department of Health issued guidance to all health authorities to ensure that all care home residents who are also recipients of high band RNCC have been correctly considered against eligibility for fully funded NHS continuing care. It emphasized that the continuing care assessment should look at the totality of an individual's healthcare needs whilst the RNCC only looks at determining the required registered nurse's input to the care package. In assessing eligibility criteria the health authorities were reminded that it is the nature, intensity, complexity or unpredictability (or a combination of these) of the health care needs which trigger full funding – not the setting nor who delivers the care.

Mrs. Grogan is a 65 year old, suffering from 'deteriorating' multi sclerosis, dependant odema with the risk of ulcers breaking out, double incontinence, has 'nil' mobility and is a wheelchair user requiring two people to transfer her, together with some cognitive impairment.

NHFA Care Fee Advisers will be reviewing their clients who are receiving the high band RNCC to ascertain if they could be eligible to fully funded NHS Care.

Philip Spiers, Managing Director of NHFA Care Fees Advice says, "The importance of this ruling cannot be over emphasized. We urge families with loved ones suffering from all sorts of long-term conditions motor neuron, Alzheimer's and Parkinson's disease for example, to take notice and if their care needs are primarily healthcare needs then to seek an immediate review for eligibility to continuing care. Particularly as in many conditions deterioration occurs in the later stages and healthcare needs become more intensive

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Notes for Editors:

DH Guidance -

http://www.dh.gov.uk/PublicationsAndStatistics/LettersAndCirculars/DearColleagueLetters/DearColleagueLettersArticle/fs/en?CONTENT_ID=4125309&chk=Ny7JYR

NHS Continuing Care the History - In 1995 the Department of Health (DH) issued the first national guidance to 95 health authorities requiring them to develop their own local eligibility criteria for continuing care. This resulted in wide variances between each health authority and made free NHS continuing care a postcode lottery. Highlighting this, in 1999 the Court of Appeal ruled in the case of Pamela Coughlan that the eligibility criteria used by her health authority in trying to transfer the responsibility of her care to social services was far too restrictive and that local authorities could only provide nursing care if it were merely incidental or ancillary to the provision of accommodation which they have a duty to provide. Therefore, if a person's care needs are primarily health care needs then the cost of providing it, in any setting, should be borne by the NHS, if their needs are for social care then this can be means tested and charged for.

Following this case, in 2001 the DH issued new guidance requiring the 95 health authorities to agree with local authorities a joint eligibility criteria for both continuing care and social care.

Then, to add to the confusion the Health and Social Care Act 2001 introduced '*Free Nursing Care*' for residents of nursing homes from October 2001. However, it wasn't free nursing care but a Registered Nursing Care Contribution (RNCC), more a banded token financial contribution towards the cost of nursing. The eligibility criteria for, particularly the higher band contribution, is so similar to the criteria for fully funded continuing care it is difficult to determine which is applicable. Furthermore, few people benefited from this extra money because it was paid direct to the nursing homes and many simply put up their fees by the same amount.

In April 2002 the 95 health authorities were replaced by 28 strategic health authorities (SHAs) who then took over the responsibility of ensuring just one set of criteria applied to each of the PCTs in their areas.

In Feb 2003 a Health Service Ombudsman's Report – 'NHS funding for Long Term Care' brought to the forefront the results of an investigation into complaints about eligibility criteria used by health Authorities between 1996 and 2001. The Ombudsman found the complaints were justified and several authorities had been using over restrictive eligibility criteria not in line with DH guidance or the Coughlan judgement. It highlighted – regional variances of eligibility throughout the NHS, lack of transparency on how decisions were made and recommended a need for well defined national eligibility criteria.

In April 2005 the Health Select Committee Report on NHS continuing care found very much as the NHS Ombudsman that the present eligibility criteria was unclear and flawed it recommended that Government should issue a '*national*' eligibility criteria to be adopted by all SHAs which would take account of psychological and mental health needs as well as physical health.

In July 2005 the Government Responded to the HSC report stating that the new *national* eligibility criteria will be drafted to take account of psychological and mental health needs as well as physical, be Coughlan compliant and based on current legal requirements. This to ensure the needs of people with, for example, dementia are considered on the same basis as those with physical needs. The framework of the new criteria will also address the implementation issues that have arose around the interaction between the RNCC bands and continuing care.

All this sound like eventually something constructive is about to happen to ease the burden of paying for care and straighten out some of the chaos. However, the minister in delivering his response to the Select Committee's report reiterated that Government does not believe that making personal care free for everyone is the best use of limited resources. Making personal care free for everyone would cost an estimated £8.4 billion over the lifetime of this Parliament (assumed to be 2005–08).

In the meantime, in response to the Ombudsman's report in 2003, the DH ordered all SHA's to review their eligibility criteria to make it compliant with guidance and the Coughlan judgement, identify cases wrongly assessed since 1996, undertake retrospective reviews and provide recompense for those who wrongly paid for their care. At March 2005 according to DH figures, nearly 12,000 retrospective reviews had been carried out, with 20% of these resulting in partial or total NHS funding for the patient. The DH has stated that the NHS expects to pay a total of £180 million in restitution.

In conducting their reviews the SHAs have relied strongly on a proactive public requesting a review as a result of media publicity of the affair, No automatic reviews have been carried out for those people who were partly funded by the local authorities and wrongly contributed their income towards care costs and there are probably many more, since deceased, where families do not have the where with all to make the challenge. The question must be asked - who has been missed? And what should be the real cost of restitution especially when you look at homes sold unnecessarily during a time of high property inflation.

Continuing care criteria applies to but a few; the majority of people moving into care homes are subjected to the means test and other rules which, because of inadequate local authority funding, misinterpretations of rules by care professionals and sheer lack of clarity, are often misapplied.