
# WHO SHOULD FUND LONG TERM NURSING CARE? SHOULD IT BE THE NHS?

## A GUIDE TO NHS CONTINUING HEALTH CARE FUNDING

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# 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 and Wales £50,000 (residential care) / £24,000 (care at home)), by a mixture of their own income, Local Authority funding and the NHS Funded Nursing Care (FNC) contribution (in England £183.92pw (standard rate) / £253.02pw (those already in receipt of the higher rate) and Wales £179.97pw.**

**If the Local Authority is involved in any way, the patient is means tested. If the National Health Service (NHS) is solely responsible it should cover the cost of EVERYTHING that that patient requires to meet their care needs. It is the same as if the patient is in hospital. No account should be taken of their assets and private income but it is worth noting that 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 very poorly lady, who clearly has PRIMARY HEALTH needs (due to the nature of her needs and which are considered complex to manage), goes into Cherry Tree Nursing Home (based in England). The gross fees are £900 per week. She owns a house worth £300,000 and has savings and investments of £250,000.**

**At first she is self-funding her care costs but receives NHS FNC (£183.92pw) and the higher rate of Attendance Allowance (£89.15pw) towards this. She pays net £626.93pw out of her income and savings.**

**Mrs Brown gets advice from a specialist solicitor and a successful claim is made for "NHS CONTINUING HEALTHCARE FUNDING" (CHC funding).**

**As a result 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 also receives a refund for fees already paid, which are also subject to a small interest payment.**

**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, 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 – THE COUGHLAN CASE

**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 were only empowered to means test and fund those whose nursing needs were Incidental or Ancillary to their need for the kind of accommodation which Social Services could be expected to provide.**

**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 her care should be fully funded by the NHS.**

**Pamela Coughlan, is not old. She had been injured in a road traffic accident, and is tetraplegic. When she was found eligible she had partial use of her arms via her shoulder muscles. She was doubly incontinent, and suffered from headaches, necessitating intervention to effect an immediate position change.**

**She required: -**

- **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 was 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 had plenty of reading matter, listened to compact discs and radio and watched TV.**

**In February 2003 the PARLIAMENTARY & HEALTH SERVICE OMBUDSMAN (P&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, any time from April 1996 onwards. These peoples' cases should have been re-considered and, if found eligible, they, or their estate if they had died, should be recompensed for the amount that they had paid.**

**Each of the former 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. This remained in place until 1 October 2007 when the NATIONAL FRAMEWORK on NHS Continuing Health Care was implemented, due to concerns regarding the "postcode lottery".**

**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 P&HSO report and the guidance issued by the Department of Health, (which itself has been criticised by the P&HSO).**

**The P&HSO was so concerned about the criteria in Shropshire and Staffordshire, among other places, that in April and again in June 2005 they visited the Health Authorities to discuss the criteria and the processes being followed. MUCH INJUSTICE TO PATIENTS AND THEIR FAMILIES HAS HAPPENED HERE and we have been able to help many families with retrospective claims.**

## 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 (*R v Bexley NHS Care Trust (1) South East London Strategic Health Authority (2) Secretary of State for Health*).**

**The Judge found that: -**

- **Professionals had been led to believe that if a person's needs could be met within the criteria for the Nursing Contribution then they were not eligible for fully funded NHS continuing healthcare.**
- **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 Nursing Contribution criteria.**

**The Judge stressed: -**

- **Any person whose needs are the SAME as, or EXCEED 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, now Clinical Commissioning Groups – "CCGs") 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 BEYOND 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 that Social Services would usually be expected to provide).**

**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 REVIEW patients who may have been WRONGLY denied NHS Continuing Health Care Funding, since April 1996. The criteria of the Shropshire & Staffordshire SHA were amended in June 2006.**

## THE NATIONAL FRAMEWORK

**IN ENGLAND - A National Framework was implemented on 1 October 2007. This contains principles and processes to be followed throughout England. The guidance was later revised in November 2012 (following the implementation of the *Health & Social Care Act 2012*, where "Primary Care Trusts" were abolished and replaced with "Clinical Commissioning Groups") and more recently in October 2018 (to include changes made by the *Care Act 2014*) by the Department of Health and amended Assessment Tools issued, which must be used nationally – see www.dh.gov.uk for more information.**

**"Cut off" dates were also introduced in 2012 to limit the period of time to be considered for a Retrospective Review. At the present time consideration can only be given as far back as April 2012.**

**IN WALES - A National Framework was implemented by the Welsh Assembly from 16 August 2010 and was also later revised in June 2014. It is similar to that of England but has a few notable differences, for instance Wales does not have a Fast Track Tool or Checklist Tool. Please see http://www.wales.nhs.uk/continuingnhshealthcare for more information.**

**"Cut off" dates were also introduced in 2014 to limit the period of time to be considered for a Retrospective Review. At the present time consideration can only be given as far back as one year from the date the review is requested.**

**CHARACTERISTICS OF ELIGIBILITY – in both England and Wales certain characteristics of need, and their impact on the care required to manage them are used by those deciding eligibility help determine whether the 'quality' or 'quantity' of care required is more than the limit of the Local Authority's responsibilities, which are:**

- **NATURE: the type of needs, and the overall effect of those needs on the individual, including the type ('quality') of the interventions required to manage them;**
- **INTENSITY: both the extent ('quantity') and severity (degree) of the needs, including the need for sustained care ('continuity');**
- **COMPLEXITY: how the needs arise and interact to increase the skill needed to monitor and manage the care;**
- **UNPREDICTABILITY: the degree to which needs fluctuate, creating difficulty in managing needs; and the level of risk to the person's health if adequate and timely care is not**

**provided.**

**Each of these characteristics may, in combination or alone, demonstrate a PRIMARY HEALTH NEED, because of the quality and/or quantity of care required to meet the individual's needs.**

**CHANGES TO CONTINUING HEALTHCARE IN LIGHT OF COVID 19:**

**The duty of CCGs to assess individuals for CHC eligibility was suspended in March 2020 by the Coronavirus Act 2020, however there is now a reintroduction of NHS CHC, following the Dept of Health & Social Care's Guidance issued on 1 September.**

**This acknowledges that, in the absence of proper assessments taking place relating to a person's long term needs, it is reasonable to expect the statutory bodies to continue to fully fund their care.**

**Whilst the above provides some reassurance, given the crisis we are facing, the reality remains that many individuals will still be faced with many complex funding issues relating to their ongoing care, following the outcome of the assessment and decision-making process.**

**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 MILLIONS of pounds for them, but realise that there are many more patients, some of whom have died, who should have been fully funded.**

## For more information or to arrange an appointment please contact our Elderly Client & Care Funding Team on 01743 280 100