

healthcare update

NHS 'never events': List to be expanded



The requirement to report 'never events' was implemented in April 2009 having been introduced in Lord Darzi's 2008 report *High Quality Care for All*. Here, Jonathan Heap highlights the new additions to the list of reportable events.

A 'never event' is defined as:

"A serious, largely preventable patient safety incident which should not occur if the available preventative measures have been implemented by healthcare providers."

Eight events were chosen to test the initiative and were monitored over a 12 month period, with compulsory reporting to the National Reporting and Learning System (NRLS) at the National Patient Safety Agency (NPSA). All were considered to have the potential to cause serious harm or death to patients, with sufficient guidance already in existence to the extent that all should be preventable. In other words, all were considered to be inexcusable.

111 separate events were reported, by far the most common being wrong-site surgery, which represented 51% of occurrences.

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Welcome

Whilst there is a pause on anticipated reforms, there is still much to be excited about in the healthcare market at present. Within this newsletter, we have included a cross-section of articles which focus on many of these issues.

There are not only structural changes taking place in the NHS; Hill Dickinson's health team is also going through some change. After nearly 40 years of practice, we have recently bid a fond farewell to Tony Gibbons, whom a lot of you will know well. Following Tony's departure, Mike McKenna has relocated to the Liverpool office, and Andrew Craggs has transferred to the Manchester office to head up the region's NHSLA team.

The year so far has been busy in terms of events, with many more scheduled for the rest of the year - including acute trusts forums, NHS estates seminars and mental health training. We will be exhibiting at a brand new commissioning event in London aimed at GPs and GP consortia, 15-16 June 2011, and will once again be exhibiting at the NHS Confederation Conference and Exhibition in Manchester, 6-8 July 2011.

To enquire about attending these events, to sign up to our eshots and bulletins, or for more information about our training and events activities, please contact Sophie West via sophie.west@hilldickinson.com

We hope you enjoy the latest Hill Dickinson healthcare update.

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The NPSA reported on their findings in October 2010 (www.nrls.npsa.nhs.uk/nevevents) and, following a consultation, the list of reportable errors will be substantially expanded. The expanded list will include :

- | | |
|---|---|
| 1. Wrong site surgery (existing) | 13. Suicide using non-collapsible rails (existing) |
| 2. Wrong implant/ prosthesis (new) | 14. Escape of a transferred prisoner (existing) |
| 3. Retained foreign object post-operation (existing) | 15. Falls from unrestricted windows (new) |
| 4. Wrongly prepared high-risk injectable medication (new) | 16. Entrapment in bedrails (new) |
| 5. Maladministration of potassium-containing solutions (modified) | 17. Transfusion of ABO-incompatible blood components (new) |
| 6. Wrong route administration of chemotherapy (existing) | 18. Transplantation of ABO or HLA-incompatible organs (new) |
| 7. Wrong route administration of oral/enteral treatment (new) | 19. Misplaced naso- or oro-gastric tubes (modified) |
| 8. Intravenous administration of epidural medication (new) | 20. Wrong gas administered (new) |
| 9. Maladministration of insulin (new) | 21. Failure to monitor and respond to oxygen saturation (new) |
| 10. Overdose of midazolam during conscious sedation (new) | 22. Air embolism (new) |
| 11. Opioid overdose of an opioid-naive patient (new) | 23. Misidentification of patients (new) |
| 12. Inappropriate administration of daily oral methotrexate (new) | 24. Severe scalding of patients (new) |
| | 25. Maternal death due to post partum haemorrhage after elective caesarean section (modified) |

In addition to the patient safety priority, there is a cost issue here too. From the research carried out to date, it was estimated that each reported event costs the taxpayer an average of £35,000 a year, in terms of the additional care costs attributable to the error and any treatment of its consequences.

A planned development is to allow commissioners the power to withhold payment where care falls short of an acceptable standard. It has been suggested that any cost recovery on the part of the commissioner be capped, but that this is a matter for commissioners and providers to determine at local level. Contractual arrangements will need to reflect this. Clearly, this is likely to present a challenge to commissioners and providers alike.

From a litigation perspective, there would appear to be little doubt that occurrence of a 'never event' is likely to represent a breach of the duty of care. Providers will therefore need to ensure that risk management procedures are suitably robust to prevent these incidents from occurring, wherever possible.

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DNAR – the law: part two

In the last edition, Joanna Crichton considered the law relating to DNAR decisions for patients lacking capacity. In this edition, she turns to decision making for patients who have capacity.

Patients with capacity

Patients who have capacity to make decisions about their medical treatment should invariably be involved in discussions about DNAR. Although a DNAR order is a decision not to provide treatment (i.e. consent is not legally required) it should be on very rare occasions that DNAR decisions are made without the patient's explicit and informed consent. The only exception might be where the patient has specifically asked to be kept out of such discussions. However, it is imperative that the patient is given sufficient information so that they understand that by 'opting out' of the decision making process it will be for the clinical team to decide at what point it is appropriate to make a DNAR order. Effectively, that the patient will lose their say about life and death decisions which affect them. In practice, this could mean that they are not resuscitated in a situation where they would perhaps have wanted to be, but are not in a position to request it.

It is crucially important that these initial overview discussions with the patient are carefully recorded, so that it is clear that they are making an informed decision to 'opt out' of the DNAR decision making process. The clinical team should revisit these discussions with the patient if there is a significant change in circumstances. If there is any doubt about the patient's wishes, or how they should be applied in practice, legal advice should be sought.

In all other cases, the discussion about whether to attempt CPR should be approached in a sensitive way, and should not be avoided because it may be difficult for clinical staff, or to avoid 'upsetting' the patient.

Some patients who have capacity require that CPR is given, even though the clinical staff feel that it would be unsuccessful or inappropriate. This is a difficult situation for clinicians. Patients cannot legally demand treatment that is not clinically indicated.

The Cardiopulmonary Resuscitation Council Guidance states that "if patients still ask that no DNAR order decision be made, this should usually be respected. If patients subsequently suffer cardiac or respiratory arrest, further clinical decisions should be made in accordance with the advice in these guidelines. These difficult decisions are a potential source of confusion. Doctors cannot be required to give treatment contrary to their clinical judgement, but should be willing to consider and discuss patients' wishes to receive treatment, even if it offers only a very small chance of success or benefit. Where attempting CPR has a reasonable chance of successfully re-starting the heart and breathing for a sustained period, and patients have decided that the quality of life that can reasonably be expected is acceptable to them, their wish for CPR should be respected."¹

Advance decisions

Patients with capacity may make an advance decision to refuse CPR. An adult (aged over 18) can make a legally binding advance decision to refuse treatment. A decision specifying that a particular treatment should be given (as opposed to being withdrawn or not given) is not binding. If the individual has made a valid and applicable advance decision to refuse CPR, then this should be respected. To establish whether an advance decision is valid and applicable, healthcare professionals must try to find out if the person:

- has done anything that clearly goes against their advance decision;
- has withdrawn their decision;
- has subsequently conferred the power to make that decision on an attorney; or
- would have changed their decision if they had known more about the current circumstances.

Advance decisions to refuse life-sustaining treatment must conform to certain legal requirements in order to be valid, under the Mental Capacity Act 2005 (MCA). It must:

- be in writing;
- be signed by the patient, or if they are unable to sign themselves, by someone signing on their behalf, at their request, and in their presence;
- be witnessed; and
- include a statement specifying that the decision will apply even if life is at risk.

These requirements apply to advance decisions made since 1 October 2007. If a patient made an advance decision to refuse CPR prior to that date, there are transitional provisions which may apply to make some advance decisions valid, even if they do not fulfil all of the requirements of the MCA. They must, however, be in writing, and the patient must not have had capacity in relation to the particular treatment decision since 1 October 2007. If there is any doubt about the validity of an advance decision, advice should be sought

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¹Decisions relating to Cardiopulmonary resuscitation, A joint statement from the British Medical Association, the Resuscitation Council (UK) and the Royal College of Nursing. ('The Resuscitation Council Guidance')

Accept no substitutes - expert-shopping is back in the news

Jonathan Heap explores recent decisions around selecting experts.

[Ricky Edwards-Tubb -v- JD Wetherspoon Plc \[2011\] EWCA Civ 136](#)

Court of Appeal, 25 February 2011

This decision confirms and, arguably, extends the principle that, where a party seeks to replace one of its medical experts, the court will ordinarily require disclosure of the original expert's report as a condition of allowing the new one in.

The facts

The claimant, Mr Edwards-Tubb, was involved in a fall at work in October 2005, following which he claimed that he suffered from chronic whole-body pain; which had a grave effect upon his life. His employers admitted liability for the accident, but causation and quantum remained in dispute.

In a letter before action, his solicitors proposed three medical experts, one of whom, Mr Jackson, was instructed to report. However, when proceedings were served, they were accompanied instead by a report from a different orthopaedic expert, Mr Khan.

The defendants issued an application for disclosure of Mr Jackson's report, as a condition of the court granting permission for the claimant to rely upon Mr Khan's evidence. The application was allowed by a district judge, however, following a challenge on the part of the claimant's solicitors, the case made its way to the Court of Appeal.

Substituting experts - when and how

It was accepted that Mr Jackson's report was a privileged document and that there was no automatic duty on the part of the claimant to disclose it. It was also accepted by both parties that, where the court has already given permission to a party to rely upon a named expert, its permission is also required to abandon that expert and to rely upon a different one in his or her place. The earlier decision of [Beck -v- MOD](#) [2003] confirmed that where the court was persuaded to allow this, it would routinely compel the party to disclose the report of the expert in whom they have lost confidence.

The rationale of this safeguard is to prevent expert-shopping and to ensure the court has available to it all of the expert evidence on the issues in dispute.

The difference in the present case is that both experts had been instructed before proceedings were issued and before the court had made any case management directions. The claimant argued, therefore, that there was no order to vary and no new permission was required.

The Court of Appeal rejected this attempt to draw a distinction between substitutions made before or after proceedings are issued. In delivering the leading judgment, Lord Justice Hughes favoured a 'cards on the table' approach. Referring to the previous decision in [Vasilou](#) [2005], he emphasised the overriding principle that:

"Expert shopping is undesirable and, wherever possible, the court will use its powers to prevent it".

Accordingly, the claimant was given permission to rely upon Mr Khan, but only on the condition that he disclose Mr Jackson's report if he wanted to proceed with the new expert. Whilst he indicated that reports obtained at the very outset of investigations may be considered 'private', once the letter of claim stage was reached and the steps envisaged by the pre-action protocol were taken, any report obtained from that point would potentially become disclosable.

Comment

This is an interesting decision and a useful weapon in ensuring that a claimant is obliged to produce any unfavourable reports, even those obtained at a pre-action stage. The ruling also envisaged that parties would be obliged to confirm whether any earlier reports had been obtained, whereas to date, there has been no specific obligation to do so.

The decision does, however, emphasise the importance of selecting the right experts in the first place, bearing in mind the risk that the opinion sought may end up before the trial judge, whether we like it or not.

It is worth noting that this case, and the other judgments referred to in it, all concerned quantum reports, and whilst no distinction was drawn, it may be arguable that liability evidence obtained pre-action should be treated differently. I suspect this is not the last we hear of this issue.

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Disclosure in cyber space

Gill Lloyd examines the new rules on 'e-disclosure' - Practice Direction CPR PD 31B

The term 'e-disclosure' has most litigants quaking in their boots, wondering where and how to start the search for electronically stored information (ESI) for the purpose of disclosure. However, in this modern age, where even our grandparents are surfing the net, there is no escaping our increasing reliance on PCs, laptops, and mobile telephones; none more so than in the business world, where there has been a gradual move to the paperless ideal.

The courts have been forced to embrace technology, and lawyers are now expected to be able to assist their clients to access, identify, preserve, download, use and disclose ESI in a focussed and cost-effective fashion.

In his detailed review of civil procedure, Lord Justice Jackson recommended that e-disclosure should be a necessary

training topic for solicitors, barristers and judges. He also emphasised the need to bring into force the (then draft) Practice Direction on e-disclosure, submitted to the Civil Procedure Rule Committee by Senior Master Whitaker's Working Party.

Change has now arrived, as the new practice direction, CPR PD 31B, with accompanying 'e-disclosure questionnaire', was brought into force on 1 October 2010. This article examines what the new rules mean and how they will affect NHS trusts during the disclosure process.

Practice Direction 31B - Disclosure of electronic documents

The purpose of the new Practice Direction is to "encourage and assist

the parties to reach agreement in relation to the disclosure of Electronic Documents in a proportionate and cost-effective manner." The rules aim to ensure that parties collaborate and use technology to make disclosure a streamlined process.

Impetus for change

Under existing Civil Procedure Rule 31, parties are required to provide 'standard disclosure', unless the court or the parties agree otherwise, thus requiring disclosure of those documents upon which they intend to rely, or which adversely affect their own case or support/adversely affect another's case. However, before the introduction of the new practice direction, there was no specific guidance regarding how and where to start the search for electronic documents.

Faced with an abundance of ESI, the process of e-disclosure was often cumbersome and very rarely efficient, as exemplified in the case of Earles -v- Barclays Bank [2009] EWHC 2500 Mercantile, 8 October 2009. During the litigation, the bank's solicitors decided that it was not proportionate to disclose email and telephone records, in a case concerning the management of the claimant's accounts. Although the bank was ultimately the successful party, they were awarded just 25% of their costs, because the judge found that the records were relevant, and if disclosed, proceedings might have been avoided.



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Such was the pressing need for change, that even before its official adoption, the Draft Practice Direction was utilised by Senior Master Whitaker when he directed the defendant in the case of Goodale -v- The Ministry of Justice (Opiate Dependent Prisoners Group Litigation) 2009, to answer the draft e-questionnaire. The Ministry of Justice had argued that the disclosure of electronic documents relating to the treatment of prisoners over a ten year period was disproportionate. However, although collation was potentially onerous, the documents were likely to be relevant, and so Master Whitaker guided the parties through the disclosure process; setting the scope of the searches with reference to the draft questionnaire.

Applicability

The new Practice Direction applies to all multi-track cases (over £25,000 in damages) where proceedings have been commenced on or after 1 October 2010. The court also has discretion to apply it to other cases, which are, for example, more heavily reliant on electronic documents.

Preservation of documents

In accordance with paragraph 7, as soon as litigation is contemplated, lawyers must notify their clients of the need to preserve disclosable documents, including ESI. This is not a new duty, but is a warning that in the case of ESI, affirmative action may be required to prevent deletion, which can occur in the normal course of business, for example, in accordance with an internal document retention policy.

Trusts need to be aware of their duty to take active steps to prevent deletion of potentially relevant ESI (to prevent adverse inferences being drawn) if a document has been deleted after litigation has been contemplated.

Collaboration

The main emphasis of the new practice direction is to encourage collaboration between the parties, so that before the first case management conference, they have set out the matters on which they agree and disagree about electronic disclosure. To assist, in paragraphs 10 to 19 of the Practice Direction, the parties are encouraged to answer, and (if deemed appropriate) exchange a voluntary questionnaire, with information regarding their ESI.

Paragraphs 20 to 27 of the Practice Direction sets out that parties must conduct a 'reasonable' search for documents, taking into account the number of documents involved, the nature and complexity of the proceedings, the ease and expense of retrieval and the significance of the documents.

The parties should consider and set an appropriate scope for the search, decide how data will be preserved, and stored, and in what format it will be exchanged; they should agree as to the basis for apportioning the costs involved. Tools and techniques to reduce the burden and cost must also be considered, and the e-questionnaire gives guidance on this, asking parties to give consideration to:

- limiting disclosure by category, dates or custodians of documents;
- the use of a staged approach whereby disclosure can be initially limited to certain categories, to be expanded if necessary;
- agreeing software tools, keyword searches and other types of automated search;
- how to identify and redact privileged documents; and
- geographical location of servers and other hardware and storage devices.

Where there is disagreement between the parties regarding disclosure, or if their agreement is found by the court to be insufficient, an order may be made compelling exchange of part or all of the e-questionnaire, which must be verified by a statement of truth. The court will then determine the issue at a separate hearing if necessary.

Be prepared

Since the introduction of the new rules, there is a real need for parties to discuss the relevance of ESI as early as possible during the litigation process. Litigants need to be aware of the importance of ESI, where it is stored and how it can be retrieved; and to request IT support where necessary.

Collaboration with the other party at the outset is paramount, and must take place well in advance of the first case management conference. Where there is a mass of information, parties need to consider a staged approach, determining what will be reasonable and proportionate in the particular circumstances, with reference to the e-questionnaire where appropriate.

Overall, at a time where we are becoming ever more reliant on computers and databases to make life easier in the office, we need to be aware that the information generated daily may be disclosable in a future litigious process, and steps need to be taken by trusts to ensure that they are equipped to deal with e-disclosure in the way now demanded by the court.

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Potential costs consequences in grossly exaggerated claims

Here, Gill Lloyd examines the case of [London Tara Hotel Limited -v- Kensington Close Hotel Limited](#) [2011] EWHC 29 (Ch)

In this case, the defendant (K) was successful in securing the dismissal of an application by the claimant (L), for an injunction restraining K from using a private service road. As the successful party, K sought their costs against L.

The court held that, in appropriate circumstances, the presentation of a grossly-inflated claim by a claimant may amount to conduct which would justify the assessment of the defendant's costs on the indemnity basis. The judge examined the criteria for this.

The indemnity principle

When assessing costs on the indemnity basis, the payee is given the benefit of the doubt in relation to the reasonableness of their costs, both in amount and how they were incurred. There is also no requirement to prove that the costs were proportionate to the matters in issue. The difference between costs assessed on the standard basis and indemnity basis can be summarised as follows:

Standard costs	Only costs which are proportionate to the matters in issue are recoverable	Uncertainly regarding the reasonableness of costs will be resolved in favour of the paying party
Indemnity costs	No	Uncertainly regarding the reasonableness of costs will be resolved in favour of the receiving party

In deciding whether it is appropriate to apply indemnity costs, the court will have regard to the conduct of the parties, with reference to the guidelines set out in Civil Procedure Rule (CPR) 44.3.

CPR Rule 44.3

(5) *The conduct of the parties includes;*

(a) *Conduct before and during proceedings;*

(b) *Whether it was reasonable to pursue or contest a particular issue;*

(c) *The manner in which the case or an issue has been pursued or defended;*

(d) *If a successful claimant (in whole or part) exaggerated his claim.*

During assessment, K requested that the costs that they had incurred during two separate and specific periods within the course of the litigation should be awarded on the indemnity basis. The periods are outlined below:

1. During a time when the damages claimed were said to be 'enormously exaggerated'

During the course of the proceedings, L intimated that they were claiming a notional licence fee of 'several million pounds per annum' and later, in answer to K's Part 18 Request for further information, quantified damages at £21.2 million to the end of 2009. This was substantially reduced at a later stage to just £887,280, when L served an amended response to the Part 18 Request.

K submitted that, having been initially faced with such a hugely exaggerated claim, they were forced to leave no stone unturned, and as such, their costs should not be subject to the test of proportionality.

The court deprecated exaggerated claims, but could find no justification for indemnity costs in this case. Although the original basis for L's claim was said to be misconceived, their actions did not constitute unreasonable conduct, beyond that which would be considered 'the norm' in a hard fought case. As the test for proportionality takes into account the amount of damages claimed, this would be recognised during the assessment of K's costs on the standard basis for this period.

2. Following the rejection of the defendant's reasonable Part 36 offer of settlement

Before the trial, K put forward a settlement offer, which would allow L a contractual licence over the disputed land at a reasonable rent. The offer was rejected and the outcome for K at trial was significantly better, as they had succeeded in establishing a prescriptive right of way. As a consequence, they

sought indemnity costs from the last date that their offer could have been accepted by L, by reference to CPR 36.14(1)(a).

The court noted that the offer was not a true Part 36 offer, as K had sought to limit L's costs. However, consideration was given to the offer in accordance with the explanatory note to CPR 36.14, which requires that the court consider any offers made to settle the claim, when it comes to deciding what order to make in relation to costs.

Applying the case of [Excelsior Commercial & Industrial Holdings Ltd -v- Salisbury Hamer Aspden & Johnson \(Costs\)](#) (2002) EWCA Civ 879, the judge noted that the mere fact that a defendant's offer had been bettered would not automatically lead to an order for costs on an indemnity basis. There would need to be a conduct issue sufficient to justify such order.

In this case, the judge could find nothing exceptional about the nature of the exchanges between the parties. The offer by K was noted to have been made at a very late stage and provoked a counter-proposal from L. As the case had been vigorously contested throughout, the judge did not consider it appropriate to penalise the claimant by making an order for indemnity costs.

Implications for future cases

Although the court did not consider indemnity costs to be appropriate in this case, it is clear that claims for defendants' costs assessed on this basis may be awarded in certain circumstances. This judgment suggests that an award may be made where:

- there have been significant conduct issues in relation to the exchanges between the parties throughout the course of the litigation;
- an early offer has been made which has been unreasonably rejected with no reasonable counter offer made; or
- justice cannot be served by assessment on the standard basis.

We wait with interest for further direction from the court as to precisely which cases will qualify.

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Stay on the road by stepping back in time

Here, Derek Millard-Smith dispenses invaluable advice on how to avoid totting up points on your licence.

Whatever your opinion of Thatcher may be, possibly one of her most positive contributions to legislation was Section 35 of the 1988 Road Traffic Act, better known as the 'totting up provisions', which allowed day-to-day drivers peace of mind when it came to driving offences. However, successive governments' war on the driver, coupled with technological advances has so diluted the spirit and intention of the law, that it is no longer the worst drivers who find themselves most likely to face a six month totting ban, rather, those drivers who cover the highest mileage.

What does totting up mean?

Penalty points for the majority of driving offences expire three years from the date the offence was committed. You are liable for disqualification for at least six months if 12 or more penalty points tot up on your licence within a three year period.

Intention of the law

In 1988 there were:

1. more traffic police;
2. no fixed or mobile speed cameras;
3. no traffic light or bus lane cameras;
4. no number plate recognition cameras; and
5. no mobile phones.

In 1988, to tot up 12 penalty points within three years, you had to have been stopped on up to four occasions by police officers who, when stopping you, decided that due to the quality of your driving, they would not exercise their discretion to issue a warning, but instead, summon you to court and disqualify you for six months. Removing genuinely dangerous drivers from the road is undeniably a good thing.

Case study

Today, the most unfortunate and commonly experienced scenario involves driving past the same camera four times on four different days, intending to adhere to the speed limit, but incorrectly believing the limit to be higher than it is. For example, 'fictional Jane', a company sales director, has

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been driving for 30 years accident-free and covers 40,000 miles a year. She is an experienced and safe driver. Jane is relocated to an unfamiliar area to set up a new office, requiring her to commute each day into a built-up area along a dual carriageway, where there is no risk to other road users or pedestrians. Each day, she reduces her speed to 40 mph as she nears the city, honestly believing 40 mph to be the speed limit, which unknown to her, is 30 mph. Jane therefore commits four minor speeding offences in four days, but at 40 mph, is too fast for speed awareness course eligibility. Before she realises her mistake via a notice of intended prosecution (NIP) for the first offence, she has committed all four offences and finds herself at risk of a six month ban. The law was not designed to disqualify drivers like Jane, but annually, thousands of motorists now find themselves in a similar position facing a totting disqualification. Those who cover a high mileage are statistically at much greater risk of unintentionally activating driving offence detection devices than those who drive just a few thousand miles a year, along familiar routes.

Solution

Can we change the law? This has yet to happen, and some commentators have argued that the revenue generated by fixed penalties and court fines for minor speeding offences has prevented recent governments from amending the totting up provisions to bring them back in line with their original intention, i.e. increasing the number of points required to tot up (or decreasing the three year period). However, the current Government cuts have included a 50% reduction to the road safety budget and surprisingly, the main victims in many areas have been speed cameras, due to them not being financially self-sufficient!

Whilst the law remains unchanged and the majority of cameras remain, the five point survival guide below will take you back in time, ensuring that the loss of discretion through modern technology does not cause you to unintentionally face a six month ban:

1. Use sat nav speed limit and camera alerts.

Most satellite navigation systems include these features which are designed with road safety in mind, since speed cameras have to be located, by law, in accident hotspots. If you don't have a satellite navigation system, most smart phones now have sat nav applications with these features that are relatively inexpensive. Being advised by the system of the correct speed limit and what the limit is when approaching a camera will avoid unnecessary points.

2. Use a hands-free phone kit with a cradle for your phone

Road safety statistics indicate that, even when using hands-free kits, drivers are less aware of the road when on the phone. The best advice here is to turn off your phone and never make or receive phone calls whilst driving. However, in the event of a driver using a phone, the handset cannot be held in the driver's hand, even when the vehicle is stationary at lights etc. Placing your phone in a cradle and linking it to a hands-free kit when getting in the car will avoid those three points for "just the one important call".

3. Always stop on amber

Few people are aware that the law requires you to stop at an amber traffic light 'unless it is unsafe to do so'. If you have continued driving through the lights on amber and a small part of your car is behind the stop line when the lights change to red, this could cause the traffic light camera to be activated. This results in three penalty points. If you take this on board and adapt your driving accordingly, you will never pick up unnecessary points.

4. Use cruise control particularly in road works

Many modern cars have cruise control, and using this feature properly can significantly reduce inadvertently exceeding the speed limit and collecting 3 more penalty points. Temporary motorway road works can seem intolerably slow, particularly at night, and speed limits applied in these circumstances will not activate your sat nav alerts. Selecting cruise control at the correct speed means that you don't risk three points by simply driving at similar speeds to the traffic around you.

5. Slow down

The pace of life is now faster than in 1988 - also due, in part, to technological advances. Plan your meetings at different locations with sufficient time in-between, to ensure you don't feel pressured to speed. If you are going to be late, stop the car, phone ahead, or reschedule; better to arrive alive than not at all.

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Judicial review in the ‘Building Schools for the Future’ case – the implications

The ruling by Mr Justice Holman on 11 February 2011 in the case of R (on the application of Luton Borough Council and Others) -v- Secretary of State for Education (2011) EWHC 217(Admin), has ramifications across many sectors, including healthcare as Nicola Loadsman outlines in this article.

In 2003, the Department for Education (DfE) launched a national programme, Building Schools for the Future (BSF), which aimed to rebuild or refurbish every secondary school in England over a 15 year period from 2005 to 2020. By July 2010, 181 schools had benefited from BSF funding, with a further 735 in the pipeline.

On 12 May 2010, the new coalition Government was formed. On 5 July 2010, the new Secretary of State for Education, Mr Michael Gove MP, announced in the House of Commons that the BSF programme would come to an end; with certain projects in the pipeline going ahead and others stopped. This decision was part of the government-wide review of the spending commitments agreed by the previous Government since 1 January 2010. Mr Gove set a cut-off point for projects which would cease to be publicly funded: if a particular project had obtained Outline Business Case approval after 1 January 2010, but had not reached Final Business Case approval by 5 July 2010, that project would be stopped. The six claimant local authorities; Luton, Nottingham, Waltham Forest, Newham, Kent and Sandwell, had projects in the pipeline which were stopped or cancelled. The claimants sought to challenge the decision of the Secretary of State and the way in which the decision had been reached. Their grounds of challenge were as follows:

- The decision as a whole was irrational.
- The Secretary of State had unlawfully fettered his discretion under the Education Act 2002, by adopting a rules-based approach.
- The decision breached substantive legitimate expectations of each claimant.
- The decision making process breached a legitimate procedural expectation of consultation - the claimants were not consulted before the decision was taken.
- The Secretary of State failed to discharge statutory duties under the equality legislation.

On the claimants' grounds, Mr Justice Holman made the following judgment:

1. Rationality

The judge was clear that the decision was not open to legal challenge on the discrete ground of irrationality. He cited the case of Cordant Group PLC -v- Secretary of State for Business Innovation and Skills [2010] EWHC 3442(Admin): “[The court] must not allow itself to become an umpire of a social and economic controversy that has been settled by due political process”. The decision was not irrational. It set a clear cut-off point of 1 January 2010, which reflected government-wide policy. It helped to achieve that policy by making very

large savings.

2. Discretion

Section 14 of the Education Act 2002 provided the Secretary of State with a broad discretionary power to “give or make arrangements for the giving of financial assistance to any person” for the “provision of education”. The claimants submitted that in exercising that discretion, the Secretary of State should not have fettered it by adopting or applying such a rigid rule based approach. The judge accepted that if the Secretary were to have considered all the schools under the BSF pipeline on a school-by-school basis, that approach would have been unacceptably time consuming, potentially subjective and unfair. There was a need for general principles. Each case could be considered in light of those principles, but not so that these automatically determined the outcome. There could be no objection to that, provided that the authorities were always willing to listen to someone with something new to say.

3. Substantive legitimate expectation

For such an expectation to exist, there must be a commitment or promise to a certain course of action. That promise must be clear, unambiguous and devoid of relevant quantification. In those circumstances, the decision-

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maker must consider and give reasons for renegeing on that promise. Whilst the claimants argued that the OBC approval caused them to have a legitimate expectation that funding would go ahead, the various letters and documents issued contained references to words such as “subject to future spending decisions”. The fact that a general election would take place was well known. There could be no legitimate expectation that the new government would continue with the previous Government’s policies and assurances; without the kind of binding commitment that FBC approval contained. The judge found that neither the OBC approvals nor any other document went so far as to create a substantive legitimate expectation that any given project would definitely proceed. There was, therefore, no failure by the Secretary of State to consider the fact that he was making a decision in breach of a promise or legitimate expectation because there was no such promise or expectation.

4. Procedural legitimate expectation and the duty to consult

The judge referred to the fact that the law recognises a discrete form of procedural legitimate expectation which may raise the duty on the decision maker to consult before taking the step or decision. A duty to consult will arise where the impact of the decision on potentially affected persons is “pressing and focussed”. Where this is the case, the change cannot lawfully be made without prior consultation.

The judge found that the way in which the Secretary of State abruptly stopped the projects concerned without prior consultation was so unfair as to amount to an abuse of power. The department and/or the PFS had been in continuous and intensive dialogue with each of the claimants over many years, and the consultation process would not have been unduly time-consuming; there were only seven local authorities which were in the claimants’ position. The scale of the proposed expenditure was also a factor in the need for consultation. There was no overriding public interest which precluded any consultation or justified the lack of it. The decision-making process was therefore unlawful.

5. The equality duties challenge

The judge referred to the duties under Section 76a of the Sex Discrimination Act 1975, Section 71 of the Race Relations Act 1976 and Section 49a of the Disability Discrimination Act 1995.

The judge found that the Secretary of State’s approach was too generalised and did not discharge the relevant statutory equality duties, which should have been carried out with “rigour and an open mind”. There was no express announcement that he had had regard to statutory needs and duties under the legislation, nor any record of these. Whilst there was an equality impact assessment, this was only done after the decision had been made and announced. The Secretary of State was aware that a number of BSF projects related to special schools and that newly-built schools were likely to produce facilities more accessible to the disabled.

A number were also situated in areas where there were significant populations of ethnic minority pupils. If the Secretary of State had consulted with the local authorities, they would have been able to highlight their special equality considerations to him. The decision making process was unlawful because of the failure to discharge the relevant statutory equality duties.

Conclusion and potential impact

The Secretary of State has been asked to give each authority a reasonable opportunity to make representations and to reconsider his decision for the claimants’ projects with an open mind.

Whilst in terms of BSF, this decision will have a limited impact, the principles which come out within the judgment should be borne in mind when spending cuts or policy decisions are being made. Although the courts are reluctant to become involved in macro decisions unless there are exceptional circumstances, careful consideration must be given when making such decisions, to the right to consultation and the need to consider the equality duties (including the new unified duty under the Equality Act 2010) before any decision is made and carried out.

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Overpayments and mistaken payments - all is not lost: part two

In the November 2010 edition of healthcare update, Philip Sheard, an associate in our commercial litigation team, looked at the defence of change of position which a recipient may raise to a restitution claim, for repayment of an overpayment or mistaken payment. Here, he looks at the alternative defence of equitable estoppel, which a recipient may also try to rely on.

Equitable estoppel

The general principle behind an equitable estoppel defence is that a payer is to be 'estopped' or prevented from pursuing a claim for repayment where it would be inequitable or unfair to do so.

However, the defence is difficult for a recipient to satisfy, and just because a payer has made a mistake in making payment does not mean a recipient is entitled to retain the payment. To succeed with the defence, a recipient must satisfy three criteria which are examined below:

1. Breach of duty of care/misrepresentation

A recipient must show that the payer was under a duty to provide accurate information and, in breach, gave inaccurate information or that in some way there was an unequivocal misrepresentation of fact which the payer was responsible for.

2. Belief

A recipient must show that the inaccurate information or misrepresentation led him to believe that he was entitled to treat the money as his own.

3. Change of position

A recipient must also show that because of his belief, he has changed his position in such a way that it is inequitable to require him or her to repay the money. The main examples of what will not be a change of position are the same as those set out in part one of this article. However, where a recipient has used the money to enhance his standard of living as opposed to maintain it, the court may consider that to be a change of position.

The burden of proof of a change of position rests with the recipient, and the court will consider whether it is, in all the circumstances, unconscionable for a recipient to retain all or part of the payment. A recipient is, therefore, by no means guaranteed to be successful in an attempt to retain an overpayment or mistaken payment.

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Dealing with dilapidations

Dilapidations can come as a nasty surprise at the end of a commercial lease. The main focus of tenants and landlords when negotiating terms for a new lease is on the financial payments that will be made throughout the lease term; such as rent, service charge, etc. Here, Lawford Martin highlights how often, the parties do not realise that failure to understand and deal with dilapidations correctly from the outset can have serious financial implications.

Dilapidations are essentially the breach of repairing/decorating obligations within the lease. A claim for dilapidations is made by the landlord (generally shortly before or after the lease term expires) who carries out a survey of disrepair at the property and then serves a schedule of dilapidations on the tenant, detailing the extent of disrepair and either the works that should be carried out by the tenant or (more usually) the amount required by the landlord to remedy such disrepair.

A dilapidations schedule offers much scope for disagreement between the parties, so the parties involved in such a claim are always urged to follow the Property Litigation Association Pre-Action Protocol. Although not compulsory, it is strongly advised that parties use the protocol. In the event of litigation, the courts will consider whether it has been used and will often look unfavourably on the party refusing to comply with it. The protocol can be found on the property litigation association website: <http://www.pla.org.uk/>

The tenant must respond to the schedule within a reasonable time (what 'a reasonable time' is varies from case to case, but it is generally not more than 56 days). The landlord and the tenant (or their advisors) are then encouraged to meet within 28 days of the tenant's response to review the schedule and agree as many items of dispute as possible.

Tactics

The approach taken in issuing or responding to a dilapidations claim can be crucial and the following considerations should be made:

Where you are the tenant

- Review the lease and all associated documents from the outset as the correct interpretation of repair/decoration obligations will be vital in negotiating the claim. It is important to seek legal advice before the lease is even granted as the wording of such clauses will determine how onerous they are. Ensuring that a repair clause is in fact favourable to you is often the first line of defence.
- Is there a schedule of condition? Many tenants do not consider obtaining a schedule of condition before their lease is granted, but this will accurately record the original condition of the property and reduce disputes.
- Instruct a surveyor jointly with the landlord to do a joint inspection - this will cut down on costs, as you will not have to obtain your own separate survey, and it will also avoid having to argue later when the dilapidations schedule is served on you.

The landlord may serve the schedule some time after you leave the property, so it is always useful to approach them and urge them to instruct a joint surveyor before the end of the term. You can then potentially offer to carry out the works yourself, if this seems to be more cost effective.

- Towards the end of a lease, try to find out what the landlord's intentions are for the building.

By virtue of Section 18 of the Landlord and Tenant Act 1927, the landlord cannot claim for breaches of repair where it intends to redevelop or demolish the property. The landlord's surveyor should have already taken into account the landlord's intentions (in accordance with the protocol) however; it is always prudent to check that your surveyor is also looking for evidence of this.

- Note that by virtue of Section 18, the landlord cannot claim disrepair costs that exceed the difference between:
 - a) the market value of the property where it is restored to good condition; or
 - b) the market value of the property if it is left in its current state.
- If you have already received a claim which is high and seems disproportionate, it will generally be cost effective to instruct an expert surveyor to negotiate for you (we can recommend).

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Where you are the landlord

- Review the lease and all associated documents from the outset (including schedules of condition as referred to above)
- Consider both yours and the tenant's future intentions for the property and plan your approach to the dilapidations claim:
 - Do you want to re-let as soon as possible or retain the tenant? If the former applies, you may want to consider serving the dilapidations schedule before the end of the term so that the tenant can repair the property before the term ends. Please note, if the lease is not contracted out of Sections 24 to 28 of the Landlord and Tenant Act 1954, the tenant will have security of tenure and has a right to request a similar new lease on expiry of the term, and if they are faced with a large claim, they may decide to remain at the property a little longer to put off dealing with the repairs straight away!
 - If, alternatively, you want to retain the tenant, you could try to use the schedule as a bargaining tool. For example, you could agree that they will only have to pay for 70% of the dilapidations in return for accepting a new lease.
 - Do you want to retain control of the works yourself thus strengthening your ability to recover the costs of the same? If so, you may want to serve the schedule after the term has ended.

The above is only a brief summary of this often contentious and complex area. If you would like more information concerning this particular subject, or you are a landlord or tenant requiring commercial property advice, please contact:

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