

September 2008

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Healthcare Update



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Welcome

Welcome to the September edition of the Healthcare Bulletin.

There is a wide variety of articles featured in this edition including practical "basics" guides to the Data Protection Act, providing evidence at inquests and making admissions of liability.

For those litigation Claims Handlers reading this, the Ninth Edition of the JSB Guidelines was published earlier this month and we would recommend purchasing a copy of this to ensure your quantum valuations are not too low!

Finally, we would like to thank the many clients who attended our recent Clinical Negligence Training Day and the Inquests Seminar. Our next two events are the Primary Care Contracting seminar in Liverpool on 1 October 2008 and the Prison Healthcare seminar on 22 October 2008. Please contact healthevents@hilldickinson.com for further details.

We hope that you enjoy reading the articles produced by the members of the Practice Group.

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Freedom of Information Act Model Publication Schemes - Are you ready for January 2009?

Every public body required to comply with the Freedom of Information Act 2000 ("the Act") must, under section 19 of the Act, have in place an approved publication scheme which sets out the information which will be routinely available to members of the public.

The approval for all current schemes (which commenced on 1 January 2005 when the Act came into force) expires on 31 December 2008, and as such all public bodies are required to put in place a new approved publication scheme as from 1 January 2009.

As a result of the Publication Scheme Development and Maintenance Initiative the Information Commissioner ("ICO") has introduced and approved a model publication scheme that it is encouraging all public sector organisations to adopt.

Authorities must produce a guide to the specific information they hold and which is contained within any of the scheme's seven classes. Guidance issued by the ICO states that information should be easily identified and accessed by the general public.

The ICO has issued guidance on what should be included in an authority's publication scheme for the following groups:

- Health bodies in England;
- Health bodies in Wales;
- Community Health Councils in Wales;
- Health bodies in Northern Ireland;
- Health and Social Services Councils in Northern Ireland.

For health bodies, the kind of information that should be set out includes (among other things):

- Where the body fits into the structure of the NHS;
- Organisational structure;
- Contact details for public facing departments, for example, complaints, information governance;
- Details of senior staff and management board members;
- Annual statements of accounts, budgets and variance reports;
- Staff pay and grading structures;
- Minutes of meetings and supporting papers.

Failure to ensure that an approved publication scheme is in place in time for 1 January 2009 will render a public authority in breach of the Act.

The ICO has also recently published guidance urging public authorities to become 'more transparent' by routinely publishing minutes and agendas of meetings. The guidance sets out that the following should be routinely published:

- Minutes and agendas of public meetings;
- Documents required to be made public pursuant to other legislation;
- Minutes of senior level policy and strategy meetings i.e. board meetings;
- Any background minutes referred to in the agenda or minutes.

The guidance also sets out that the following do not need to be published:

- Any information which would be exempt under the Act or the Environmental Information Regulations;
- Any personal information, disclosure of which would breach the Data Protection Act;
- Minutes of meetings held more than 3 years ago;
- Lower-level internal meetings of less interest to the public.

It should be noted that there is no automatic exemption under the Freedom of Information Act that minutes and agendas do not have to be disclosed because the meeting was held in private, though there may be exemptions under the Act that apply to some or all of the document (for instance, if the minutes consist solely of advice given by legal advisors, they may be exempt by reason of being protected by legal professional privilege). If you are in any doubt as to whether a particular set of minutes or an agenda should be disclosed, we suggest seeking expert advice.

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Data Protection- What is it all about?

The Data Protection Act 1998 (“the Act”) is a piece of legislation that affects every business, company and organisation in the UK, including all NHS Trusts. The Act has its roots in the Data Protection Act 1984 and European legislation.

The aim and purpose of the Act is to protect ‘personal data’, that is, information that relates to and identifies a living individual. It is a complex piece of legislation, and it has been relatively high profile in recent months, but the basic tenets of the Act (the definitions and principles) are relatively simple and form a large part of the structure of the Act.

The Act can get more than its fair share of bad press, sometimes being used to refuse access to data where access could or should in fact be allowed. I am sure we can all relate a frustrating tale of being unable to access our own or a close relative’s data due to the ‘Data Protection Act!’ However, without the Act, there would be nothing to stop both scrupulous and unscrupulous companies and individuals using, selling and changing our data for whatever purpose they wished.

Definitions

The definitions set out in the Act are fundamental to the way it is interpreted. The Act only applies to ‘personal data’ which is ‘data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual’. Data includes data held both electronically and manually (i.e. in hard copy).

The Act then goes on to define ‘sensitive personal data’ as personal data consisting of information as to:

- Racial or ethnic origin of the data subject;
- Political opinions;
- Religious beliefs or other beliefs of a similar nature;
- Whether he or she is a member of a trade union;
- Physical or mental health or condition;
- Sexual life;
- The commission or alleged commission by him of any offence; or
- Any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any Court in such proceedings.

‘Processing’ (which is one of the key definitions in the Act) means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including:

- Organisation, adaptation or alteration of the information or data,
- Retrieval, consultation or use of the information or data,
- Disclosure of the information or data by transmission, dissemination or otherwise making available, or
- Alignment, combination, blocking, erasure or destruction of the information or data.

Principles

There are 8 Principles in the Act, which set out the way in which personal data must be handled by ‘data controllers’ (organisations who control the way personal data is processed), these are set out in the box below.

These principles form the ‘backbone’ of the Act and all processing must be undertaken in accordance with them.

Principle 1

Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless:

- At least one of the conditions in Schedule 2 is met, and
- In the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

Principle 2

Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.

Principle 3

Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.

Principle 4

Personal data shall be accurate and, where necessary, kept up to date.

Principle 5

Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.

Principle 6

Personal data shall be processed in accordance with the rights of data subjects under this Act.

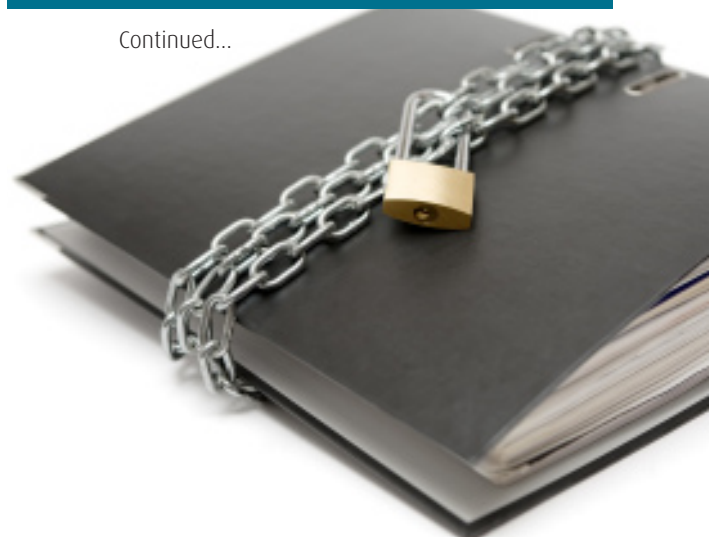
Principle 7

Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.

Principle 8

Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.

Continued...



Healthcare Focus

Examples:

- Trusts must keep patient records up to date and act on any information they receive that patient data has changed or is inaccurate (Principle 4)
- Trusts must make sure that all data they hold is secure; password protection and encryption on computers might be appropriate, as might locks on doors to file and archive rooms; patient records should be destroyed securely; only those with a need to access patient data should be given access (Principle 7)
- Employee data should only be kept for as long as necessary to deal with any residual issues (e.g. the risk of a Tribunal claim, health and safety issues) after the individual has left the Trust's employment (Principle 5)
- Only such data as is necessary to treat a patient should be collected and held by the Trust (Principle 3)
- Trusts must respond to subject access requests for information from 'data subjects' within the time periods set out (Principle 6)

Other provisions

The Act provides a right for any individual to make a 'subject access request' of any data controller who holds data about him or her. The request must be in writing and must set out the information the individual wishes to receive. The individual is entitled to know what information is held about them, what it is used for, who it may be given to, and to have that data communicated to him in an 'intelligible form'.

The data controller can request a fee of up to £10 for complying with the request, and once it has received the request and the fee required, it must respond 'promptly' and has a maximum of 40 days to do so.

Many organisations have one person or a team of people whose role it is to ensure compliance with these requests. The Act sets out a number of exemptions from this right of access, one of which is if the data also refers to a third party whose interests must be weighed against those of the individual making the request. A detailed understanding of these exemptions is important to ensure compliance with the Act.

Enforcement

The Act includes criminal sanctions, with prosecution being the ultimate penalty for non-compliance (though a civil claim for damages can also follow a breach of the Act if damage and distress has been caused). Organisations can be fined and be subject to enforcement orders, and individuals can also be the subject of prosecutions if they have individually breached the Act. The Information Commissioner has traditionally taken an 'educational' stance on the matter, seeking to ensure compliance rather than prosecute, however he has made it known that he will enforce the provisions of the Act if necessary, and he issues a report each year setting out the successful prosecutions brought.

More information

The Information Commissioner's website www.ico.gov.uk has a lot of useful guidance and codes of practice, as well as details of the Commissioner's helplines.

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PROVIDING EVIDENCE TO INQUESTS – A BACK TO BASICS GUIDE

Understandably, when a healthcare professional is asked to provide a witness statement for the Coroner or to provide oral evidence at an inquest, this may seem a daunting task. This article goes back to basics to provide an overview of an inquest and provides some tips on giving evidence as part of that process.

Inquests – the basics

An inquest is held whenever there has been a violent or an unnatural death, a sudden death of unknown causes or a death whilst detained in custody. This is an inquiry held in public with a particular aim, which is laid down in Rule 36 Coroners Rules 1984, simply as:

- The proceedings and evidence at an inquest shall be directed solely to ascertaining the following matters, namely:
 - Who the deceased was;
 - How, when and where the deceased came by his death; and
 - The particulars required to register the death.
- Neither the Coroner nor the jury shall express any opinion on any other matters.

An inquest is not a trial – it is not designed to allocate blame and there are no Claimants or Defendants; no "sides" at all.

An inquest is held in public and there may be members of the press and the public present. The family and other interested

persons may also be present. The role of all those present is to assist the Coroner to establish what actually happened. The Coroner may also be sitting with a jury if the deceased died whilst detained in custody, when Article 2 of the European Convention of Human Rights, the so called "Right to Life" (as incorporated into English Law by the Human Rights Act 1998) applies, or when it is in the public interest to do so.

Drafting statements for the Coroner

In order to assist an inquest in its fact finding process, you may be asked to provide a witness statement. A witness statement for an inquest should:

- Set out your full name, current role, professional qualifications, experience and work address. If you now hold a different role to the role that you held at the time in question, that previous role should be stated, including the dates that position was held.
- State clearly whether the statement was made solely on the basis of your recollection of events, review of medical records or both.
- "Tell the story" from your first through to your last involvement in the case, in chronological order.
- Be factual as opposed to expressing an opinion on what happened. It should focus on what you saw, heard or did.
- Refer to relevant entries in the medical records.
- Use full sentences and appropriate punctuation.
- Have numbered paragraphs.
- Explain any medical terms and abbreviations used, for example, what acronyms stand for and what a specific condition or treatment entails.
- Provide explanations as to why a particular course of action was taken e.g. why a particular drug was administered in this situation.
- Be signed and dated.

Continued...

Healthcare Focus

Oral evidence at an Inquest

If you are asked to provide oral evidence in an inquest, you will first be required to swear an oath or make an affirmation as to the truth of the evidence you are about to give.

You will then be taken through your statement by the Coroner, or the Coroner may ask you to read your statement to the Court. You may then be asked questions. These may be asked by the Coroner, followed by interested persons. Interested persons might ask questions themselves or ask them through their legal representatives if they have instructed any. If a legal representative for the Trust is present, they may then ask you questions to clarify your evidence.

Prior to giving evidence, you should familiarise yourself with the evidence given in your witness statement.

You should listen carefully to the questions asked. You can ask for the question to be repeated or request clarification of what is being asked if you need to do so. You should take your time to answer – it is perfectly acceptable to take a moment before you reply. If you are unsure, you can ask to refer to relevant documents. If you do not know the answer, it is perfectly acceptable to say so.

When answering, you should speak slowly and clearly, directing answers to the Coroner or, if there is one, to the jury. Answers should be concise and relevant. They should also be factual and honest. If you are asked to give an opinion, you should be careful to remain within your area of expertise.

It is useful to have an awareness of tactics that may be used when being questioned. For example, a lawyer might ask you the same question a number of times, perhaps in slightly different ways. You should not be deterred by this. Lawyers may also try leaving long silences after you have provided your answer. Do not allow this to pressure you to 'babble' to fill the gap!

After your evidence is complete, the Coroner will formally release you. You can then either leave the Court or you can choose to remain and listen to the remainder of the inquest. At the conclusion of the inquest, the Coroner will sum up the evidence and state his conclusions, including the verdict. If a jury is involved, once the Coroner has summed up the evidence he will give the jury directions as to how they should conduct their deliberations. The jury will then retire to consider the matter before returning their verdict. Possible verdicts might include accidental death, natural causes or an open verdict. It is also possible for a 'narrative' verdict to be given, which is a paragraph describing what has happened.

Conclusion

If you are called to be a witness at an inquest, try not to be apprehensive. You should remember that an inquest has a limited jurisdiction and is non adversarial in nature. As stated above, the purpose of an inquest is simply to determine who the deceased was, how, when and where they came about their death with the explicit aim of registering the death. Witnesses are simply there to assist the Coroner in their fact finding role and explain what happened.

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RESPONSE TO CHALLENGE TO LEGAL POSITION UPON ASSISTED SUICIDE

In our January bulletin, we indicated that a legal challenge had been raised by Debbie Purdy from Bradford, a woman suffering from a progressive form of Multiple Sclerosis. She was seeking for her husband to be allowed to accompany her to the Dignitas Clinic in Zurich to allow a medically assisted suicide to occur free from any threat of criminal prosecution. Whilst the Director of Public Prosecutions, Sir Ken Macdonald, has stated there is no policy on assisted suicide and it would be beyond his powers to grant immunity from prosecution, as anticipated, the request has prompted further consideration of the law as it currently stands.

Lord Justice Latham has ruled that "without wishing to give Ms Purdy any optimism her arguments will ultimately succeed," there was an arguable case which should proceed to a full hearing.

Ms. Purdy's lawyers had argued that the Director of Public Prosecutions acted illegally by failing to provide guidance upon request, with Lord Justice Latham's response providing an opportunity to revisit and review the arguments raised officially.

At present, assisting another to commit suicide can constitute an offence under Section 2(1) of the Suicide Act 1961, which confirms that anyone who aids the suicide of another can be imprisoned for up to 14 years. The decision as to whether to prosecute in individual cases is at the discretion of the DPP.

The hearing is set for October 2008 and we will let you know the outcome.

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THE IMPORTANCE OF ENSURING THE CONFIDENTIALITY OF MEDICAL RECORDS “FROM START TO FINNISH”

In 1987, the Applicant began to regularly visit a polyclinic for infectious diseases at a public hospital as she had been diagnosed as HIV positive. Between 1989 and 1994, she worked on a fixed-term contract as a nurse at a polyclinic for eye diseases in the same public hospital.

At that time, any member of hospital staff could access the patient register which contained details of patients’ medical conditions and their treatments. In 1992, the Applicant began to suspect that her colleagues knew about her condition as they made hints and remarks about her HIV infection. She informed the doctor treating her and the register was amended so that only the treating clinic’s personnel could access their patient’s records. In addition, the Applicant was registered under a false name. Clearly, however, the damage had already been done.

In 1995, the Applicant changed her job. On 25 November 1996, the Applicant complained to the County Administrative Board (“CAB”) and asked it to examine who had accessed her patient records. Upon request, the hospital responded with a statement that it was not possible to trace who had accessed a patient’s records as their data system only recorded the five working units who had most recently consulted a patient’s records. The system did not show the particular individual who had consulted the records. The system also deleted the limited information it did hold once the records were returned to the hospital’s archives. The CAB confirmed that, “patient records must be duly protected against unauthorised processing, use, destruction, amendment and theft,” and that it must make “sure that requisite patient data are only given to the personnel participating in the treatment of the patient.” However, due to the lack of information on who had accessed the Applicant’s data, the CAB could not rule on whether there had been unauthorised access to it.

Subsequently, the public hospital amended its systems so that it was able to identify any person who accessed a patient’s records.

The Applicant began civil proceedings against the relevant district health authority which was responsible for the public hospital’s patient register for damages in respect of this failure to protect her patient records. However, this claim failed on the basis that she could not provide firm evidence that her patient records had been unlawfully consulted. She was unsuccessful on appeal to the Court of Appeal which, although finding her a reliable and credible witness, was also not satisfied that there was firm evidence of any unlawful consultation. She requested leave to appeal in the Supreme Court but was refused.

She therefore appealed to the European Court of Human Rights on the basis that the hospital concerned was a public hospital and the Respondent State (Finland) was responsible for it. She claimed that, amongst other things, the hospital’s failure to protect her patient records from unauthorised access violated the Respondent state’s obligation to secure respect for her private life, in accordance with Article 8 of the European Convention on Human Rights.

Her appeal was upheld by the European Court of Human Rights. It held that protection of personal data, particularly medical data, was of fundamental importance to a person’s enjoyment of their Article 8 right to respect for private life. This was crucial to both the person’s privacy but also to preserve confidence in the medical profession and in health services in general. This was especially when dealing with the sensitive issues surrounding HIV infection. States had to provide appropriate safeguards to prevent such communication or disclosure of personal medical data. These safeguards then had to be implemented in practice. Whilst Finland had appropriate laws to prevent such unlawful access to personal data, the public hospital had failed to implement them with no justification and consequently breached the Applicant’s Article 8 rights.

The Court also noted that the reason why the Applicant lost her civil action was due to the deficiencies in the public hospital’s systems. If the hospital had tighter systems which recorded access to records, the Applicant would not have been disadvantaged as she would have been able to prove who had accessed them unlawfully. The Court also acknowledged that the fact the public hospital had not complied with the Respondent state’s legal requirements for data protection had not been given due consideration by the Courts in the Applicant’s civil action.

The Applicant was awarded reimbursement for the EUR 5,771.80 which she had had to pay out in the earlier civil proceedings, EUR 20,000 in costs / expenses and a sum of EUR 8,000 in respect of the damage she suffered by the failure to adequately secure her patient record against the risk of unauthorised access.

Comment

This case confirms the importance of maintaining the confidentiality of patient records and the need to have appropriate systems in place to record who consults these records and ensure that such consultations are appropriately restricted to those who have a legitimate interest in seeing them, such as for treatment purposes. This is underlined by the fact that this Applicant was awarded a sum of EUR 8,000 to acknowledge the damage suffered by the failure to prevent unauthorised access to her patient records.

The case also recognises that whilst states may have legislation, such as the Data Protection Act 1998, in place to protect the confidentiality and use of data, this will be futile without effective implementation of it in practice.

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ORGAN DONATION - OPT IN OR OPT OUT?

The 18th Annual National Transplant Week took place this year between 6 and 13 July 2008. National Transplant Week is an annual week organised by "Transplant in Mind" whose objectives are "to promote a wider knowledge and understanding of the needs of patients on transplant waiting lists and to co-operate with other organisations and statutory bodies with a view to improving the supply of donated organs" (taken from the Transplant in Mind website). National Transplant week seeks to increase public awareness of the need for organ donors and encourage members of the public to join the NHS Organ Donor Register.

The issue of organ donation is an emotive one especially for those whose family members or friends have been affected by either being a donor or recipient, or by dying before an organ became available. Personally I have known two people who have required organ donations. One was fortunate enough to receive a new set of lungs who, without the generosity of a stranger, would have had his life tragically cut short. The other was not so lucky and died before a heart became available.

The first heart transplant in the United Kingdom took place on 3 May 1968 at the National Heart Hospital in Marylebone in London. By December 2007 5,228 heart transplants alone had been carried out in the United Kingdom. This however does not compare to the number of people awaiting organ transplants.

Less than 3,000 transplants are carried out each year and this is due primarily to the current system in place for donating organs.

Legislation

The current system for donating organs is governed by the Human Tissue Act 2004 covering England, Wales and Northern Ireland and the Human Tissues (Scotland) Act 2006 which covers Scotland. These laws repealed the 1961 Human Tissues Act which was the original Act introduced when transplantation was in its infancy. These Acts set out the laws in place for the removal of organs from people after their death.

Both Human Tissue Acts state that if a person has, whilst alive and competent, given consent for some or all of their organs or tissues to be donated following his or her death (either by joining the NHS Organ Donor Register or by some other means) then that consent is sufficient for the donation to go ahead. Once consent is established relatives or other "relevant people" should be advised of the fact and encouraged to respect the deceased's wishes. They will have no legal right to veto or overrule them.

If there is no record of the deceased's wishes, the medical staff will approach the relatives or other "relevant people" to establish any known wishes of the deceased. If these are not known and the deceased has nominated a person to deal with the use of their body after death, consent can be given by that person.

If neither of those situations apply, consent to donate can be given by someone in a "qualifying relationship" immediately before the death of the deceased person.

Currently a total of 14.9 million people (around 24% of the population) are on the Organ Donor Register. This, however, is not enough to meet demand and due to the serious shortage of organ donors and consequent waiting lists for transplant operations in the UK it is often suggested that the current system is in need of review.

One suggestion which is advocated by various transplant organisations, many transplant surgeons and some patients groups and politicians is moving to a system of "presumed consent". Presumed consent is a system whereby a person's organs would automatically be available for transplant unless that individual had opted out of the National Register or a family member objected.

A system under review

In recognition of the complex issues surrounding the consent to organ donation, the UK Secretary of the State for Health, Alan Johnson, asked the Organ Donation Task Force to assess the possible impact of a change to "presumed consent" and the acceptability of such a change for the UK.

The Task Force made 14 recommendations which focused on the need to invest significantly in the infrastructure of organ donation. These recommendations, which were accepted by UK Ministers on 16 January 2008, including ways of tackling the backlog of organs required by doubling the number of transplant coordinators in the NHS to 200 and providing training to them centrally rather than by individual Trusts. Dedicated organ retrieval teams available 24 hours a day would also be established to work closely with the critical care teams in hospital.

The aim of these recommendations is to increase organ donation by 50% in the UK within 5 years. Additionally £11m has been made available for 2008/09 with further funding agreed for subsequent years.

The system of presumed consent in which everyone is a potential donor was also being considered although not adopted by the Taskforce. This system is currently employed in some countries across Europe.

In Austria there is a "hard" opt out system where if someone has not opted out then their organs can be donated regardless of the wishes of the family. In contrast Spain operates a "soft" opt out system where relatives' views are sought where an individual has not opted out.

The system in Spain seems to work quite successfully and is likely to be a better model than the Austrian system for adopting in the UK. In Spain, there are 35 organ donors for every million people in its population. That is three times the UK rate. This system had seen a change from the early 1990s where there was a 30% refusal rate, to a 15% refusal rate in January 2008.

The introduction of the system of "presumed consent" has its critics. One fear is that people will not get around to registering their objection (or opting out) and the subsequent expectation that organ donation should take place could lead to unnecessary distress to relatives and widespread adverse publicity. Presumed consent would in essence turn what is seen as a donation into an action by default.

Supporters of such a system's introduction to the UK believe that establishing an automatic right to take organs when the donor has not expressed wishes to the contrary would lead to a significant increase in the number of potential donors. This would also relieve families of the burden of making such difficult decisions at a traumatic time.

The issue of whether organ donation should be "opt in" or "opt out" is likely to cause much controversy and discussion and therefore it may be some time before a system of "presumed consent" is accepted by UK Ministers.

Whatever you may think as to whether opting in or opting out is the right way to go there are a number of people who despite wanting to donate their organs either fail to join the NHS Organ Donor Register or discuss their wishes with their family members and close relatives.

If you are interested in donating your organs do not wait to do so before it becomes too late! Either talk to your family to let them know your intentions or preferably join the NHS Organ Donor Register.

You can do this either by contacting 0845 600 400 or go to www.uktransplant.org.uk

COMPETITIVE TENDERING: EQUAL TREATMENT IS NOT ENOUGH

In this edition, we continue to explore some of the issues of the moment which arise in the context of competitive tendering processes of the type likely to be undertaken by NHS Trusts, whether for clinical services or for “harder” services, such as facilities management.

On 7 July this year, the High Court handed down a judgment which sends out a salutary message to anyone engaged in the evaluation of competitive tenders. The complainant was a property management company, and in the dock was the London Borough of Newham. The case reveals a catalogue of mistakes on the part of the Borough; the attempts the Borough made to justify its approach to the tender evaluation were rejected, with the Court directing some fairly sharp criticism at the process overall.

Perhaps the clearest message the case sends out is that all the mistakes made were avoidable. What follows is a description of each mistake, a note on the message each one sends out, and (at the end of this note) a word on evaluation criteria generally - including some points which must always be borne in mind when formulating a set of criteria on which to base a contract award decision.

The Newham mistakes and the lessons to be learnt

Mistake 1 - The contracts in question (there were two) were for property management and related services. The Borough had decided to evaluate tenders through a set of headline criteria. However, it had also decided to apply a set of sub-criteria, but had failed to disclose these (or their weightings) in the tender documents. The property company claimed that it would have taken a different approach to its bid if the Borough had chosen to make the disclosures. The Borough claimed that doing so would not have affected the eventual outcome.

The truth is that whether or not disclosing the criteria would have affected the actual bid outcome is irrelevant: bidders need to be aware of all the elements which will be taken into account in deciding the best bid. Not only this; bidders must also be able to gauge the relative importance of each of the criteria. In other words, it is not merely a case of disclosing the criteria, but also their relative weightings. Failure to do so in advance of bid preparation means that bidders will be unable to focus on areas which are considered the most important. This requirement is unequivocal.

Mistake 2 - The Borough next mistakenly expected bidders to be able to work out for themselves which factors were going to be more important to the Borough in the assessment of the bids. Again, the Court rejected this.

The message here is that there is no exception of this sort to the requirement to disclose weightings. The reason why the requirement exists is to make sure that bidders will not have to second-guess the level of importance placed on the various criteria.

Mistake 3 - Bizarrely, the way in which the Borough applied its criteria meant that, even when a tender fully complied with the required specification, it did not earn full marks.

The Court’s message here is that, to comply with the requirement for transparency to which all public procurements must adhere, tenders which full comply with the specification should receive full marks, unless there is wording within the tender documents which clearly states otherwise. The Borough claims that the documents did state otherwise; the Court, poring over the wording of the tender instructions, disagreed.

Mistake 4 - The Borough tried to argue that the sub-criteria need not have been disclosed because they were not sub-criteria at all, but were instead merely statements of the methodology for the evaluation of bids against the main criteria.

Again, the Court disagreed. Unfortunately for the Borough, substance always prevails over form. Even though the Borough might have called them method statements, they were more than that: they were factors which the Borough was to weigh up so as to form its decision as to the winning bid. They were therefore sub-criteria, and (as we have seen above) should have been disclosed.

The overriding message

It appears that the Borough was aware, in constructing the procurement methodology, that it was required to treat all bidders equally. This requirement is generally well-known. However, equal treatment by itself is not enough. The equal treatment requirement brings with it an obligation to maintain transparency in the construction and subsequent operation of any procurement process. It is perhaps worth bearing in mind that there are a few “cardinal rules” around the formulation and use of the evaluation criteria, and it would be useful to summarise these below:

- As the Newham case described above shows, all evaluation criteria, and any sub-criteria, must now have relative weightings assigned to them and must be disclosed to bidders in advance of bid preparation.
- All award criteria have to be linked to the sub-matter of the contract. So if a Trust, for example, is procuring waste disposal services and wishes to ensure that the waste is disposed of in an environmentally friendly way, it can use criteria to gauge this but cannot, for example, judge a bidder according to how that bidder might happen to dispose of its own office waste. Clearly, that is not linked to the services being procured.
- All evaluation criteria must be worded in a way which will enable all bidders to interpret them in the same way: they must not mean different things to different people.
- The choice or weighting of criteria which is aimed at favouring particular bidders is (naturally) prohibited.
- The criteria need not be such that a direct economic benefit accrues to the awarding authority from the fulfilment of them. So for example, a Trust may choose criteria which, if they are fulfilled, are designed to benefit patients rather than the Trust itself – but all criteria must nevertheless be aimed at identifying the most advantageous offer by enabling a decision to be taken on the basis of qualitative and quantitative factors (which may of course vary according to the contract in question).

As a final word, it is always worth treating “pass/fail” criteria with caution: one should never risk shooting down the entire bid as a result of a marginal failure against a pass/fail criterion. Another useful practical exercise is to subject the criteria, once formulated, to a “dummy run” – literally by trying them out against a dummy bid (or maybe a bid from a similar past project).

'Bit on the side!'

Rebecca Long-Bailey examines the ambiguous and murky underworld of side letters in light of the recent decision made in Transview Properties Ltd -v- City Site Properties Limited.

What is a side letter?

From a commercial property perspective, side letters are widely used although not highly regarded. Care must always be taken if the use of a side letter is to be considered.

Section 2 of the Law of Property (Misc Provisions) Act 1989 is the main starting point when it comes to ascertaining whether a side letter is enforceable or not. The section provides that a contract for the sale or other disposition in land must be made in writing, incorporating all of the agreed terms in one document. The terms may be incorporated in a document either by being set out in it or by reference to some other document and the document incorporating the terms must be signed on or behalf of each party to the contract.

There are three types of side letter currently used by the industry:

1. Comfort letters - these are designed to offer reassurance to another party where it is not intended that a legally enforceable obligation is created. As a matter of good practice such a letter should always state that no legally binding obligation is to be created.
2. Side letters to contracts - these side letters are used to make a last minute alteration to a contract where it is not convenient to amend the main document. Case law such as McCausland -v- Duncan Lawrie Ltd (1996) has shown however that this form of side letter is difficult to enforce and it is more prudent to amend the principal contract before exchange even it proves more time consuming in the short term. In the McCausland case it was held that an exchange of letters between solicitors did not amount to an effective variation of the contract.
3. Side letters to Leases - these are used to grant obligations, rights or concessions that will be specific to the original parties although it is also common to have a side letter that will bind future successors in the event that a last minute alteration needs to be made to a Lease where it is not convenient to amend the final copy. Please note however by virtue of the Landlord and Tenant (Covenants) Act 1995 any obligation assumed by a Landlord via a side letter (if the Lease is post 31 December 95) will remain with that Landlord until it is released even if it tries to state in the side letter that the provisions only apply whilst the Landlord owns the reversion.

How enforceable are side letters?

The Transview case concerned the absence of an overage abatement clause (the terms of which were disputed) from an agreement for sale. It was argued by the purchaser that the clause had originally been incorporated into the agreement but was removed towards the end of negotiations without the purchaser's knowledge. A side letter was subsequently produced by the seller regarding the overage abatement but this was not delivered directly to the purchaser, and the purchaser argued that they had accidentally exchanged contracts and completed the transaction without noticing that the clause had been removed. The Court found that on the evidence of the negotiations, the purchaser had wanted the overage abatement provision to be

contained in a side letter because its main lender was not aware of the possible abatement, and it would have revealed to its main lender that the seller's parent company had also made a loan to it. The provision had probably been included in the draft sale agreement by mistake and its removal had been communicated to the buyer in a conscientious manner, with the amendments and deletions marked on the draft. Further to this there was no evidence that any side letter had been properly executed in accordance with section 2 of the Law of Property (Misc Provisions) Act 1989 referred to above. Accordingly, the purchaser had failed to prove its case on the balance of probabilities, and was not entitled to rectification of the sale agreement.

The case, although not clear cut, illustrates the problem of trying to incorporate essential terms in side letters with the danger being that the precise nature of a side letter is far from clear and can be interpreted by the parties to best suit their own interests. Even more worrying is when the essential terms are deliberately and intentionally included in an undisclosed side letter thus deceiving another party as to the true intention of the agreement they have entered into.

The Transview case is not the first case of its kind and it will not be the last. Case law throughout the past two decades has shown however that Courts will generally always err on the side of caution in determining the enforceability of a side letter. In a nutshell: if the intentions of the side letter are not clear and/or conflict with the relevant agreement the approach taken is usually that if it was that important and reflected the true intentions of the parties it would have been in the agreement in the first place.

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Letters of Intent Explained

A Letter of Intent is often used by employers to get a contractor to commence limited works on site prior to the execution of the formal contract. The purpose of the letter is to get the contractor to start work whilst not creating any legal liability for the future works should the building contract not be concluded. In 2006, a number of cases have highlighted the risks to consultants, developers and contractors in using letters of intent. Michael Woolley from Hill Dickinson's Construction Team reviews the impact of these cases.

The case of Cunningham –v- Collett and Farmer [2006] included a claim of negligence by the employer against its appointed firm of architects for advising the employer to utilise a letter of intent. The Court expressed concern at the widespread use of letters of intent because the parties involved forget the importance of getting the contract document signed and then, when a dispute arises, in the absence of a full contract, the result is confusion and acrimony.

Judge Coulson set out the circumstances in which a letter of intent can be appropriate as:

- the contract workscope and the price are either agreed or there is a clear mechanism in place for such workscope and price to be agreed;
- the contract terms are (or are very likely to be) agreed;
- the start and finish dates and the contract programme are broadly agreed;
- there are good reasons to start work in advance of the finalisation of all the contract documents.

The case is an apt reminder that letters of intent should not be used without careful consideration and where suggested by consultants, that they have properly advised the developer of the risks associated with their use.

The case of ERDC Group –v- Brunel University [2006] considered ERDC's entitlement to payment and the university's rights of putting right and completing works where work had been carried out under letters of intent. The majority of the works were carried out under letters of intent issued by Brunel. During the period covered by these letters ERDC made applications for payment based on the Contract Sum Analysis included in the draft contract and in accordance with JCT valuation rules. When Brunel presented

a contract for execution ERDC refused to sign and said it would only continue with the works if valued on a quantum meruit basis. Instead the parties agreed that ERDC should leave the site before the works were completed. ERDC claimed there was no contract and that it was entitled to payment on a costs plus basis. Brunel counterclaimed that it was entitled to the costs of putting right or completing some of ERDC's works.

The Court held that in the periods covered by the letters of intent the parties had a clear intention to create legal relations, there was no uncertainty preventing each letter being a contract (with each letter superseding the previous one) and therefore each letter was a limited contract pending conclusion of the full contract of works. Accordingly, the work carried out in the period covered by the letters was to be valued as if carried out under the contract contemplated by the last letter, not on a quantum meruit basis.

Brunel had accepted that the work done after the expiry of the letters of intent were to be valued on a quantum meruit basis but submitted that the assessment should be based on the ERDC tender rates and prices and not on the costs plus basis contended by ERDC.

In considering the counterclaim the Court held that when valuing ERDC's works the benefit of the works to Brunel had to be assessed overall. This meant that works not completed or not to standard which affected the overall works would have to be reflected in the valuation but the value of ERDC's work could not be reduced to the extent it was a negative value.

The case of Skanska Rashleigh Weatherfoil –v- Somerfield Stores Limited [2006] concerned the interpretation of a letter of intent. In August 2000 Somerfield sent Skanska an appointment letter marked 'subject to contract' enclosing a draft facilities management agreement ("FMA"). The letter stated "whilst we are negotiating the terms of the agreement, you will provide the services under the terms of the contract." The period of the temporary agreement was extended and then Skanska continued to provide services beyond this point. A dispute then arose about payment.

The Court of Appeal held that to interpret the contract required giving the words of the August letter their natural or primary meaning and construing them in their overall context. The Court held that the draft FMA was incorporated into the August letter and only the terms in the FMA that were inconsistent with the August letter were not incorporated into the temporary agreement.

Whilst the main issue of this case was the interpretation of the terms of the August letter, it serves as an example of the importance of correct drafting of letters of intent and the risk they can entail.

All of the above cases demonstrate some of the practical risks of using letters of intent including the risk that the letter does not limit liability to the extent envisaged, is not appropriate in the circumstances, if not carefully drafted can create uncertainty as to the terms of the agreement and may in some circumstances allow work to be valued using quantum meruit rather than the contractual mechanism. All these risks can affect employers and contractors' rights and therefore particular care should be taken when drafting these documents. The use of such letters often gives rise to litigation that a fully drawn up contract would avoid.

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Litigation Focus

CASE REVIEW: ANTHONY GOWER- SMITH -V- HAMPSHIRE COUNTY COUNCIL “A STEP [LADDER] TOO FAR?”

“Simply unbelievable”

“Could we please, just once, have a story about a compensation claim that was turned down?”

“Another travesty for common sense”

Some of the comments made following the decision to award damages to Anthony Edward Gower-Smith, the school caretaker, who fell from his stepladder whilst taking down a school display in Hampshire in 2004.

Why did the case get such national press coverage and why did it strike a chord with so many people leading to the comments above? Have the Judges gone mad?

Not yet, it would appear, given the decision which illustrates how tough the law is for employers when dealing with ‘work equipment’ and the training of employees to use work equipment, however simple the equipment may be to operate.

Facts

Mr Gower-Smith was a 73 year-old school caretaker who was asked to take down a school display at a Hampshire school. He was provided with a stepladder and received training on how to use it. He removed the display using the stepladder but then remounted it to remove staples that had been left in the wall. Whilst doing this, the stepladder wobbled and he fell, suffered fractures to his skull, broke his cheekbone and injured his right kidney. He sued his employers, Hampshire County Council.

The law

The case concerned how to interpret Regulation 9(1) of the Provision and Use of Work Equipment Regulations 1998 which provides that:

“Every employer shall ensure that all persons who use work equipment have received adequate training for the purposes of Health & Safety, including training in the methods which may be adopted when using the work equipment, any risks which such use may entail, and precautions to be taken.”

Mr Recorder Moger QC found as follows:

- It was not disputed by either party that training was needed on stepladders as was adequate to protect Mr Gower-Smith from risks inherent in their use.
- One of the risks was that the stepladders would become unstable and could overturn if not used, wherever possible, at right angles to the work being carried out.
- The fact that stepladders are everyday objects of which most people have some experience makes careful training of the less obvious risks associated with their use more rather than less important.

- The training of the Claimant was inadequate as greater detail, with greater clarity and an explanation of the mechanism of overturning the ladders should have been given to Mr Gower-Smith but was not.
- Mr Gower-Smith came away from his stepladder training without having taken an understanding of the risk and the precautions required and the necessity to avoid it.
- Therefore his training was deficient and, notwithstanding his self-confidence and readiness to trust in his own judgment, his lack of training was responsible for him failing to put the ladder through the door at right angles to assist his work.
- Primary liability was found against the Council.
- The Claimant himself was found 25% contributory negligent.

Summary

The case illustrates the importance of training employees in the use of their work equipment, however simple that work equipment may be considered by the employer. The PUWER Regulations do not reflect a position of ‘no fault’ liability but nevertheless represent a high hurdle to overcome in showing proper training has taken place for employees in their use of ‘work equipment’ and that it has been effective.

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Material Contributions to the Risk of Injury

In a number of cases over recent years, ending with Fairchild -v- Glenhaven Funeral Services Ltd [2005], an exception to the usual “but for” causation test was established. It had been contended that the exception would not apply in clinical negligence cases. However, in July 2008, the Court of Appeal ruled firmly that it does.

Claims Handlers may now see increasing references to allegedly negligent treatment having “contributed to the risk” of an injury occurring.

Background

Ordinarily, in order to succeed, it is necessary for a Claimant to demonstrate that they have suffered an injury as a consequence of a negligent action, which would not have occurred “but for” that negligence.

Fairchild concerned a claim brought by a mesothelioma sufferer. Various employers were found to have negligently exposed the Claimant to asbestos fibres, although in fact only one fibre would have actually caused his disease. However, due to “the inadequacies of medical science”, it was not possible to determine which of the employers was responsible for the injury.

The House of Lords determined to introduce an exception to the ordinary “but for” causation test. In accordance with that exception, liability could be established against anyone who had [materially] “contributed to the risk”.

The Clinical Negligence context

It had been contended that Fairchild was restricted to the context of industrial diseases and could not, therefore, be extrapolated into the area of clinical negligence.

An important decision was considered to be Wilsher -v- Essex Area Health Authority [1988], where similar arguments to those in Fairchild had been advanced before the House of Lords, albeit some years earlier. The infant Claimant received an excessive concentration of oxygen and suffered an injury resulting in blindness. However, medical evidence demonstrated that there were four other distinct, potential causes for the condition.

It was determined that because there were multiple possible causes of the injury, rather than one cause but multiple contributions, the claim failed.

Bailey -v- The Ministry of Defence and Another

Judgment in this case was handed down by the Court of Appeal on 27 July 2008.

The facts concern a patient who was admitted to the Royal Haslar Hospital (owned by the Ministry of Defence) for treatment of a gall stone. There was a great deal of bleeding during the procedure and she developed renal failure and acute pancreatitis.

Following aggressive treatment she began to recover slowly. However, when started on free oral fluids, she became nauseated and vomited. She aspirated her vomit and deteriorated. Three hours later she suffered a cardiac arrest and associated brain damage.

There were a number of grounds of appeal, but insofar as the principles are of general application, it was argued that there had been a lack of appropriate care, which, in all the circumstances, had led to the Claimant being ill and weak. That weakness, it was suggested, had “caused or materially contributed to” an inability to prevent herself aspirating her vomit.

The Defendant argued that the Claimant’s pancreatitis (which did not arise as a result of any negligence) was the most likely cause of her vomiting and could have been a cause in its own right, of her inability to protect her airway. It was said, therefore, that the Claimant could not demonstrate that “but for” the alleged negligence, the injury would have been avoided.

The Court of Appeal addressed the issue as to whether or not the exception to the ordinary rules of causation could apply. It was concluded as follows:

- There is no distinction to be drawn between medical negligence cases and others;
- If the injury would have occurred in any event as a result of other negligent or non-negligent causes, the claim will fail;
- If the evidence demonstrates that “but for” the contribution of the negligent act, the injury would probably not have occurred, the claim will succeed;
- If medical science cannot establish the probability that “but for” an act of negligence the injury would not have happened, but can establish that the contribution of the negligent cause was more than negligible, the claim will succeed.

Conclusion

In Bailey there were a number of causes acting so as to create weakness. That weakness led to the aspiration and, ultimately, the cardiac arrest and brain injury. Medical science was unable to determine which of the possible causes was definitive in weakening the Claimant so that she aspirated, but the negligent contribution was felt to be more than negligible. Accordingly the claim succeeded.

The Wilsher decision was distinguished. Therefore, it will still be important to determine whether a case concerns possible different causes of an injury, or just different contributions to the same cause. If there are multiple causes, it will not be sufficient for a Claimant to demonstrate simply that an act of negligence contributed to the risk of injury.

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CLAIMANT ABLE TO RECOVER LOSS OF EARNINGS FROM TORTFEASOR FOLLOWING INTERVENING CRIMINAL ACT

Psychiatric and psychological injuries feature more and more in claims and often the Claimant's physical injuries are minor in comparison. The effects of the psychiatric injury can result in far reaching consequences as illustrated in the recent Court of Appeal decision of Gray v Thames Trains Ltd (1) Network Rail Infrastructure Ltd (2) (2008).

Mr. Gray was injured in the Ladbroke Grove rail crash in 1999. He suffered minor physical injuries but also developed a severe Post Traumatic Stress Disorder (PTSD), causing him to undergo a significant personality change. In 2001, he stabbed a stranger to death and pleaded guilty to manslaughter on the grounds of diminished responsibility. He was ordered to be detained in hospital under the Mental Health Act 1983.

Mr. Gray brought a claim for personal injuries against the train companies responsible for the rail crash. The rail companies admitted negligence in causing the rail crash and further accepted that Mr. Gray's injuries, including the PTSD, were caused by the Defendants' negligence. The Defendants accepted responsibility to pay Mr. Gray's loss of earnings (he had been unable to remain in full time employment since the train crash) but only up to the date of the manslaughter on the basis that any claim after this date was based on a criminal act and as a matter of public policy should not be allowed. At first instance, the trial Judge agreed and made no award for any loss of earnings after the date of the manslaughter. Mr. Gray appealed.

The Court of Appeal found that public policy would not defeat the claim unless the claim was inextricably bound up with or linked with the criminal conduct. On the facts the Court of Appeal found that the Claimant had suffered a loss of earnings both before and after the manslaughter as a result of the admitted negligence and the loss was not inextricably bound up with the manslaughter. The Court of Appeal noted that the Defendants could argue that the manslaughter and imprisonment amounted to a break in the chain of causation but the only expert psychiatric evidence produced from the Claimant (the Defendants decided not to rely on their psychiatric evidence) took the view that but for the PTSD, Mr. Gray would not have committed the manslaughter.

Mr. Gray's appeal was allowed although the Court of Appeal also indicated that there was 'much to be said for the conclusion that there was contributory fault on the part of the Claimant here'. The issue of contributory fault had not previously been considered and this issue was therefore referred to the lower court to determine.

This is an interesting case on both its facts and given that Mr Gray's subsequent criminal conduct did not prevent him from recovering (in principle at least) loss of earnings after his detention. This decision follows the recent House of Lords decision in Corr v IBC Vehicles Ltd (February 2008) when depression caused by an accident at work resulted in Mr. Corr committing suicide. His widow was allowed to recover compensation from her husband's former employers as the suicide was a foreseeable consequence of the depression caused by the initial accident. Mr. Gray's case also illustrates that the consequences of psychiatric injury can be devastating.

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Changes to the Civil Procedure Rules – Are You Being Served?

After a public consultation on the procedural rules regarding the service of Court documents which was conducted last year by the Ministry of Justice, the Civil Procedure (Amendment) Rules 2008 will come into force on 1 October 2008. The Consultation sought views on a number of possible changes to CPR Part 6, which governs the service of Court documents, in particular, the Claim Form.

What do the new Rules say?

There is a new CPR Part 6, which emphasises the new Rules on serving the Claim Form. The main issues are:

- The Claimant must include in the Claim Form an address at which the Defendant may be served, including a full postcode.
- The new Rules emphasise the importance of service of the Claim Form on a Solicitor, where either the Trust or the NHSLA has given in writing the business address of a Panel Solicitor as an address at which the Trust may be served with the Claim Form, or a Solicitor acting on the Trust's behalf has notified the Claimant in writing that he or she is instructed to accept service of the Claim Form on the Trust's behalf. In these circumstances, the Claim Form must be served upon the Solicitor rather than the Trust (CPR Rule 6.7).
- A Claim Form is deemed to be served on the second business day after dispatch by whatever means of dispatching.
- The Court may make an Order permitting service by an alternative method or an alternative place of business where there appears good reason to authorise this. This permission can be given retrospectively.

- CPR Part 7.5 and 7.6 have been re-written to clarify the Rules about the time period within which a Claim Form must be served. There has been considerable case law over the years which has established that the Claim Form must be served within 4 months of the date of issue of the Claim Form.

The new CPR Part 7.5 states that the Claimant must dispatch the Claim Form before 12 midnight on the calendar day 4 months after the date of issue of the Claim Form. The methods of service are:

Method of Service	Step Required
First Class post, DX or other service which provides for delivery on the next business day.	Posting or collection by the relevant service provider.
Hand delivery	Delivering the Claim Form to the relevant place.
Fax	Completing the transmission of the fax.
Email	Sending the Email.

Therefore, the Claimant's Solicitors must now only dispatch the Claim Form within 4 months of issue, making service valid even if has not been received by the Trust within that time.

The rationale behind this latter change was because the Civil Procedure Rules Committee wanted to give certainty to the Claimant and thought this would cause little detriment to Defendants.

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Acting as an Expert Witness – new guidance from the GMC

Some of you reading this will be expert witnesses and others will instruct experts. Katie Donne reviews the latest guidance issued by the GMC in relation to your role and obligations, over and above those imposed by Part 35 of the Civil Procedure Rules. This guidance is also relevant to those giving evidence at inquests.

The case of Roy Meadows has recently brought the role of expert witnesses to the attention of the media and the public at large. Whilst the Courts remain the judge of fact, it is not uncommon to rely upon the assistance of an expert in the relevant field to provide a technical opinion. This is particularly the case with clinical negligence litigation.

The GMC has recently devised its own guidance for doctors who act as expert witnesses. This guidance covers the following key areas:

The role of the expert witness

Honesty is the best policy! Expert witnesses must act honestly in every way and have an honest belief in the truth of their opinion. The expert's duty is to the Court and not to the lawyer who instructs them.

Giving expert advice and evidence

Experts should restrict themselves to giving advice only within the field of their own competence. If there is a range of medical opinion in relation to a particular issue, the expert must be able to explain this range of opinion and provide clear reasons as to their own conclusions on a particular point. Any limitation to providing expert evidence such as poor instruction or inability to examine the Claimant must be stated. Opinion should, where possible, be provided in plain English. This section also reminds experts of their duty not to discriminate on the basis of age, colour, culture, disability, ethnic or national origin, gender, lifestyle, marital or parental status, race, religion or beliefs, sexual orientation or social or economic status.

Keeping up to date

The expert must keep up to date with medical developments in their own field. Experts must also stay up to date with the law and procedure.

Information security and disclosure

Experts must be aware of the principles of the Data Protection Act. They must ensure that appropriate consent for disclosure of medical records has been obtained. They are also warned not to pass on any personal data to third parties without there either being an order of the Court, appropriate consent or where there is some other duty imposed by the law to do so.

Conflict of interest

Experts are reminded that if there is any matter that gives rise to a potential conflict of interests, such as prior involvement or personal interest, this must be declared to the Court who will decide whether that expert may continue to act.

It is hoped that this guidance will provide assistance to expert witnesses and consistency to the litigation process.

Further information about this topic can be found at www.gmc-uk.org/guidance. For further information about expert witnesses generally, please visit www.academy-experts.org

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Litigation Focus

HOLDING YOUR HANDS UP - CONSIDERING ADMISSIONS OF LIABILITY AND WHEN TO MAKE THEM

It is important to be clear as to what it is that is being drafted and the wording which should be employed in making any concession on behalf of a party to proceedings – particularly in light of Court indications regarding the extent to which parties are bound by prior admissions made.

When to make one?

Admissions may be made before or after the commencement of proceedings.

Ideally an admission should be made as soon as reasonably practical – if possible, following investigation within the Pre-Action Protocol period to avoid unnecessary costs regarding investigation of liability issues being incurred by the Claimant's Solicitors. Caution should, however, be exercised to ensure it is appropriate to make an admission to ensure breach of duty is clearly established prior to putting pen to paper.

Formal admissions are, of course, capable of being made within Court documentation such as a Defence or a Reply to a Part 18 Request for Further Information. Indeed, if a pleading fails to respond directly to an allegation within the Claimant's Particulars of Claim or provide a denial, the fact is considered as having been admitted legally!

Pre-Action admission status

Caselaw confirms pre-action admissions may be withdrawn unless:

- It can be shown that the Defendant has acted in bad faith;
- A fair Trial would not be possible.

The burden is therefore on the Claimant to prove prejudice will be caused as a result of the withdrawal of the admission. Such prejudice may be argued to have been caused:

- As a result of failure to collect witness evidence from potential witnesses upon liability issues or the circumstances of an incident;
- Destruction of evidence;
- Witnesses having been lost or died;
- Difficulty in obtaining funding as a consequence of a new defence.

If any detriment is insubstantial, and the admission was ill-conceived, permission may be granted to resile from the original admission to allow for a case to be determined on the basis of the real issues in dispute.

In the event of a pre-action agreement between the parties upon apportionment of liability i.e. a specific percentage split having been agreed, this will be held to be binding as constituting a compromise (Burden -v- Harrods). Effectively, it was considered that liability had been compromised; both sides had given consideration, with a contract having been formed.

CPR timescales

Civil Procedure Rules confirm the time period for making an admission (post service of proceedings) within Rule 14.2 as:

- If served with a Claim Form stating Particulars of Claim are to follow, 14 days after service of the Particulars of Claim;
- In other cases, 14 days after service of the Claim Form.

What should an admission contain?

It is important for admissions to be specific in their wording. Not all admissions are admissions of liability i.e. full, unrestricted admissions. Reference should be made to admission of breach of duty as opposed to liability, with specific reference to causation, contributory negligence or contribution proceedings. It is appropriate to reserve the Trust's position on these issues, if necessary or where relevant. If there is any doubt regarding the required wording of an admission, seek legal advice.

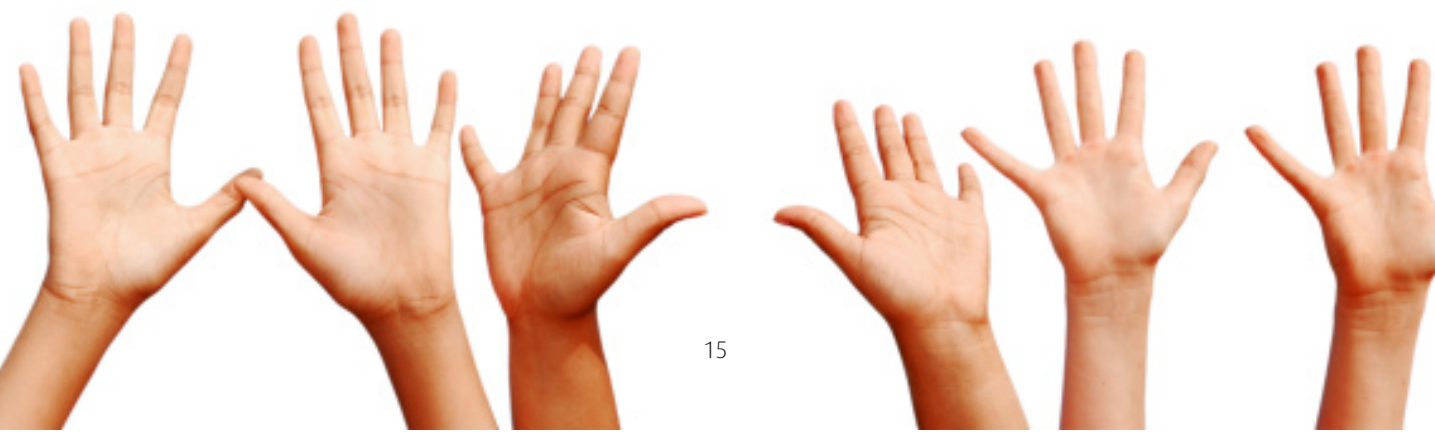
Fast Track cases – a final thought

For cases falling within the Fast Track i.e. where the likely value is more than £1,000.00 in relation to personal injury but less than £15,000.00 in total for General and Special Damages, there remains a presumption that an admission of liability is binding. Paragraph 3.9 of the Pre-Action Protocol for Personal Injury claims provides specifically that:

“Where liability is admitted the presumption is that the Defendant will be bound by the said admission for all claims with a total value of up to £15,000.00.”

Presumably, the message to parties is the importance of clarity and ensuring any admission is incapable of misinterpretation, whether wilfully or otherwise. Where reference is made to contentious issues, with confirmation these remain in dispute, reliance can be placed upon the explanation provided. Don't be afraid to spell things out in black and white!

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LITIGATION UPDATE

This issue's Litigation Update contains a number of interesting cases:

A -v- Iorworth Hoare – July 2008 – limitation period disappplied

The Court exercised its discretion under the Limitation Act 1980 to exclude the 3 year time limit in respect of a serious sexual assault. The Defendant was convicted of seriously assaulting the Claimant and was sentenced to life imprisonment.

However, some 16 years after the initial attack, the Defendant won £7 million on the lottery. The Claimant had been prevented from commencing proceedings at the time of the attack due to the Defendant's impecuniosity as he was serving a life sentence for the assault. The High Court held that the current case contained particularly exceptional circumstances and there was no danger of a floodgate of civil litigants seeking to get around applicable limitation periods by relying on a Defendant's impecuniosity. It does however perhaps show increasing reluctance by the Court to deny a claim on a limitation point.

Chantelle Peters (by her Litigation Friend) -v- (1) East Midlands Strategic Health Authority, (2) T Halstead (Defendants) and Nottingham City Council (Part 20 Defendant) – May 2008 – both the Health Authority and the Local Authority were liable to a patient for future care costs

Ms Peters had been born with congenital rubella syndrome as a result of the Health Authority's admitted negligence, which had left her gravely disabled. She had been taken into care and was living in a private care home for seriously handicapped young people. The High Court held that where a patient had been left gravely handicapped as a result of the negligence of a Health Authority but the Local Authority (Council) also had a statutory obligation under the National Assistance Act 1948 Section 21 to provide for the costs of her care in a private care home, both the Health Authority and the Local Authority were liable to the patient for the future costs of her care. In making any assessment of the Claimant's capital for the purposes of determining her liability to reimburse the Local Authority for the cost of her residential accommodation and care, the whole amount to be awarded to her in the claim against the Health Authority was to be disregarded. The Claimant would have no other assets and therefore the Council could not lawfully seek any reimbursement for the costs of her accommodation and care. In light of the high cost of keeping the Claimant at the level of care to which she had become accustomed, it was highly unlikely that she would be accommodated in an equivalent care home for life if she remained funded by the Council. The Health Authority therefore failed to establish that the Claimant's reasonable need for

care in the future would be provided by the Council. The only way to ensure that the Claimant received such care in the future was for her to be self-funding and the Health Authority was therefore liable to pay for her past and future care costs. It was correct that the Claimant could not recover for the same loss twice (i.e. the possibility of double-recovery) but she claimed that she did not wish to be dependant on overstretched public resources and was therefore able to recover her loss from the Health Authority rather than the Council (High Court).

Arnup -v- M W White Ltd – May 2008 – all benefits as a result of death to be left out of account in assessment of damages

Mrs Arnup's husband had been killed in the course of his employment with M W White Ltd. She brought a claim under the Fatal Accidents Act 1976 and M W White Ltd sought to deduct from her claim for damages the sums paid firstly under an Employee Benefit Trust and secondly under a Death in Service Benefit Scheme. It was held that the benefits which came to Mrs Arnup were a result of the death and were to be disregarded. Benefits including benefits in kind which accrued as a result of the death and any other kind of benefit which might not yet have been identified were to be disregarded. Parliament's clear intention had been to continue and complete the trend towards disregarding receipt so as to ensure that all benefits coming to a dependant as a result of the death were to be left out of account (Court of Appeal).

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QUANTUM UPDATE

There have been very few reported settlements in the recent months but the following will hopefully be of assistance when valuing general damages in claims:

John Matthew Hartley -v- M J McCarthy Ltd – 2008 – head and shoulder injuries

A 58 year old man was a pedestrian involved in a road traffic accident. He sustained a fractured skull, right clavicle, scapula and ribs. He also suffered a head injury with ongoing deficits in mental flexibility and antero-grade memory. He had difficulty with tasks involving multi-tasking such as preparing a meal. The effects of the orthopaedic fractures meant that he struggled to reach above shoulder height but he was able to return to manual work on a part-time basis 5 months post-incident and full-time work approximately 12 months later. General Damages were awarded of £45,000 (out of Court settlement).

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THE FUTURE OF PERSONAL INJURY CLAIMS EXPLAINED

On 21 July 2008, the Government published its long awaited response to its consultation Paper entitled "Case Track Limits and the Claims Process for Personal Injury Claims". Richard Baker explains the outcome.

Case track limits

After a defence has been filed, the Court allocates the claim to a 'Track' depending on a number of issues but predominantly the anticipated value of the claim. At the present time, in personal injury claims, there are three tracks – the Small Claims Track (claims worth less than £1,000), the Fast Track (for claims worth less than £15,000 but more than £1,000 for the PI element) and the Multi Track (for claims where the damages are likely to exceed £15,000).

As part of the consultation process the Government considered whether to retain the Small Claims Track limit of £1,000, a level it has been at since 1996 with no inflationary increase. This is a contentious issue as for cases allocated to the Small Claims Track, it is often uneconomical to instruct solicitors as costs often exceed damages recovered. It was argued by organisations such as the Association of Personal Injury Lawyers that any increase in the Small Claims Track limit would reduce access to justice for Claimants and accordingly the Government has decided to retain the limit at £1,000.

The Government has, however, decided to increase the upper damages limit level for Fast Track claims from £15,000 to £25,000. This should allow greater flexibility for the Court when considering relatively straightforward matters which in the past were allocated to the Multi Track simply because they were valued at around the £20,000 limit.

Claims process

It is agreed by all involved in dealing with personal injury claims that the current process can often be time consuming and expensive, especially for relatively simple matters. As a result the Government has stated that changes will be made. However, at this stage, the new process will only apply to Road Traffic Accident claims. Now before those who deal with employers and public liability matters stop reading, the government has indicated that a similar process may apply to such claims in the future!

The new process at this stage is designed to deal with only the most straightforward of claims. Any case which has a potential value that exceeds £10,000 will not be included, nor will any claim where issues of Contributory Negligence or Causation are raised. Such matters will 'leave' the new process as soon as such issues are raised. However, it is suggested that once those issues are resolved, the case could return to be dealt with under the new process

It is intended that the new process will commence by way of 'Claim Notification Form'. This will replace the current Letter of Claim and should be sent to the Defendant's insurer within five days of the Claimant's solicitor gathering all the required information to complete the form. This will include sufficient information for the Defendant to commence investigations.



It is suggested that insurers should have one central email address for personal injury claims which should prevent any delay in notification of a claim. Insurers will then have 15 working days in which to respond on liability with no extensions of time being allowed.

If liability is admitted, the Claimant's solicitor will obtain a medical report which, once checked by the Claimant for factual errors, should be sent to the Defendant's insurers. A Schedule of Special Damages and an offer of settlement should also be sent with the report and will be referred to as the 'Settlement Pack'.

The Defendant's insurer can either accept the offer or make their proposals, with a period of 20 working days being allowed for negotiation of damages. If settlement is achieved then the matter concludes. However, if agreement cannot be reached the claim will be referred to a District Judge who will assess damages at a hearing. The matter can be dealt with on paper if both sides agree. The assessment is made on the basis of the evidence available, however, where further evidence is required, directions can be given.

Once damages have been resolved, fixed costs will be paid. It is not known at what level these costs will be set. Fixed costs have been used for RTA claims in the current process since 2003 and the Government has announced the establishment of the Advisory Committee on Civil Costs. The Committee's remit will include the provision of advice as to what level fixed costs should be set and, interestingly, whether such costs will include the cost of referral fees. Such fees, which are generally paid to Claims Management Companies for acquiring the claim, are not included in the current system.

Comment

The retention of the Small Claims Track limit at £1,000 was expected given the level of concern that whilst Claimants could potentially lose legal representation in low value claims, a large defendant/insurance company could continue to instruct solicitors to defend claims. This could have placed a Claimant at a disadvantage and may have resulted in Claimants settling matters at an undervalue or even not pursuing genuine claims. It is not clear when the new process will come into force.

The main reason why the new process is restricted to RTA matters appears to be the difficulties that defendants in EL/PL matters would face in completing investigations within 15 working days. However, there is a good chance that if the new process does work as intended, the system may be extended to include such claims. It is therefore essential that defendants and insurers prepare themselves for the likelihood of it happening. Systems should be put in place sooner rather than later which will allow claims to be investigated and responded to quickly.

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About Hill Dickinson

Hill Dickinson offers a comprehensive range of legal services from offices in Liverpool, Manchester, London and Chester, and its associated firm Hill Dickinson International has offices in London and Greece. Collectively the firms have over 150 partners and a complement of more than 1000 staff.

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