

healthcare update



Whistleblowing – a recent Court of Appeal decision

In the case of *NHS Manchester -v- Fecitt and Others*, the Court of Appeal ruled that employers are not vicariously liable for employees who victimise whistleblowers.

Caroline Shafar, an associate in our Manchester employment team, successfully represented NHS Manchester in the Court of Appeal. In this article, she explains the decision and the implications for employers.

The legislation

Mrs Fecitt and her colleagues, Mrs Hughes and Mrs Woodcock (the claimants), were registered nurses working for NHS Manchester at the Wythenshawe walk-in centre. They expressed concerns to their line manager regarding the truth of a

colleague's claims about the extent of his qualifications. These complaints amounted to a protected disclosure.

The trust investigated and found that he had not lied about his qualifications. The individual admitted that he had exaggerated his qualifications, apologised for his conduct, and

confirmed that he would not do it again. The trust decided to take no further action.

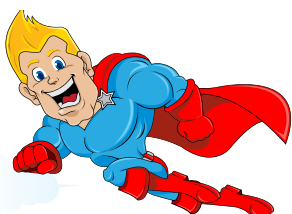
The claimants were not satisfied, and pursued their concerns further with the management. This caused dissatisfaction amongst their colleagues who considered that the

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Welcome

NHS reforms appear to be in the news on a daily basis. The House of Lords certainly appear to be keeping busy. They have voted in favour of the Health and Social Care Bill proceeding to the next stage of the Parliamentary process, which is presently being amended at the committee stage.

The proposed withdrawal of Legal Aid led to 54 peers contributing to a debate on the proposed legislative changes, with many considering that the NHS would lose valuable patient safety improvement opportunities and that less claims would be investigated if clinical negligence was removed from the scope of Legal Aid – a view shared by Lord Justice Jackson. These two pieces of legislation are likely to dominate the headlines this year.

Many thanks to those of you who attended our recent clinical negligence training day in Manchester. We discussed the inter-relationship between complaints and claims and there was a lively debate regarding the role of the Parliamentary and Health Services Ombudsman. If you wish to receive the slides from the day, please contact Sophie West (sophie.west@hilldickinson.com).

The Ombudsman’s annual report is vital reading. There are an increasing number of complaints from patients being removed from GP lists, and 46% of the complaints are against acute providers. The most common reasons cited by complainants about complaint handling are poor explanations and no acknowledgement of mistakes.

Finally, we take this opportunity to wish you all a happy and prosperous new year. We look forward to seeing you at our events which we will be running throughout the year in Liverpool, Manchester, Sheffield and the Midlands.

Andrew Craggs
Partner

Rebecca Fitzpatrick
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Associate

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claimants were subjecting the individual to a 'witch hunt'. The workforce became divided into three groups: those supporting the claimants, those supporting their colleague and those who did not wish to take a side.

The claimants lodged a formal whistleblowing complaint and the individual was suspended. He became extremely distraught and threatened to commit suicide. The trust again concluded that as the individual had acknowledged his wrong-doing, and given assurances that his conduct would not be repeated, the issue should not be taken any further.

The individual then lodged a bullying and harassment complaint against Mrs Fecitt. Mrs Fecitt was found not guilty of allegations of bullying and harassment, but questions were raised about her management style.

The claimants alleged that they were subjected to detrimental treatment by their colleagues in the walk-in centre. Senior management at the trust investigated and were concerned about the dysfunctional effect these events were having on staff, and tried to encourage the staff to work professionally with each other. The atmosphere in the walk-in centre deteriorated significantly. An internal report criticised the management for not taking a robust enough response to the claimants' complaints.

The claimants lodged formal grievances, and by the time of the employment tribunal hearing, only Mrs Hughes' grievances had been determined. The conclusion was that, after she had blown the whistle, Mrs Hughes had been subjected to treatment that resulted in her being isolated and prejudiced. It also concluded that management could have done more to prevent this.

Subsequently, senior management removed Mrs Fecitt and Mrs Woodcock from the Wythenshawe walk-in centre and they were redeployed elsewhere.

At about the same time, the trust stopped offering shifts to Mrs Hughes, who was a bank worker.

At the employment tribunal, the claimants brought a claim that they had suffered detriments on the grounds that they had made a protected disclosure.

The Employment Tribunal decision

The Employment Tribunal concluded that the trust did not subject the claimants to a detriment, on the grounds that they had made a protected disclosure. Rather, they said that the trust's actions were the 'only feasible way' of resolving the dysfunctional state of the walk-in centre.

The Employment Appeal Tribunal (EAT) decision

The EAT's decision overturned the established legal authorities on the test for causation under Section 47B. The EAT accepted the claimants' submissions that the test should be the same as that used in discrimination victimisation cases. Therefore, according to the EAT, an employer has to satisfy a tribunal that on the balance of probabilities, the adverse treatment afforded to the claimant was 'in no sense whatsoever' on the grounds that the claimant had made a protected disclosure. The EAT went further and considered that it was bound by the decision of the Court of Appeal in *Igen -v- Wong*, which is the leading case on the standard of proof in discrimination cases. Although the EAT acknowledged that the whistle-blowing legislation is domestic law and not emanating from EU Directive (as in the case of discrimination legislation), it considered that the same approach should be adopted.

On the issue of vicarious liability, the EAT determined that existing authorities bound them to maintain that an employer is vicariously liable for acts of victimisation by its employees.

The EAT concluded that the case should be reheard in the employment tribunal, possibly because it did not feel that the Tribunal had properly addressed the issues.

The Court of Appeal decision

The Court of Appeal overturned the EAT's decision on vicarious liability, holding that the established case law was wrongly decided. Unlike cases of discrimination, where employees can be personally liable for their acts of victimisation, there is no provision in the Employment Regulations Act making it unlawful for workers to victimise whistleblowers. In other words, an individual cannot sue their colleague for victimising them. In light of this, the Court of Appeal concluded that an employer cannot be vicariously liable for the acts of its employees.

As for the test on causation, this ultimately did not need to be decided by the Court of Appeal: the court held that the Employment Tribunal's decision showed that the court was satisfied that the reasons the trust gave for acting the way it did were genuine, and the issue of the protected disclosure did not influence the trust's decision. Therefore, there was nothing in the Employment Tribunal's decision that was inconsistent with the standard of proof set out by the EAT. The Court of Appeal did go on to comment on the test for causation, but those comments are 'obiter', meaning that they are not strictly binding. But given that the leading judgment in the case has been given by Lord Justice Elias, one of the most senior employment judges, his comments are likely to be referred to in forthcoming decisions as instructive and persuasive.

Lord Justice Elias agreed that *Igen -v- Wong* was not strictly applicable, because it was a decision based on the interpretation of EU Directives. He accepted that the principle underpinning the EU Directives - that unlawful discriminatory considerations should not be tolerated and ought not

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to have any influence on an employer's decision - should equally apply in the context of protecting whistleblowers. However, he did not go as far as the EAT in applying *Igen -v- Wong*, and in his judgment, Lord Justice Elias' view was that Section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower.

Comments

The Court of Appeal's decision creates an anomaly between the standard of proof in cases where an employee has been dismissed and claims that the sole or principal reason for the dismissal is the protected disclosure, and staff who claim that they have been subjected to a detriment. A greater level of protection has been given to those who claim a detriment compared to those who are dismissed, making it easier for employees to bring claims that they have suffered a detriment, but making it more difficult when they have been dismissed.

Hope for employers

Public Concern at Work (PCAW), a charity that supports whistleblowers, intervened in the Court of Appeal. Lord Justice Elias expressly rejected PCAW's contention that an employer should be liable to the employee, even where they have acted for a reason wholly unconnected with the protected disclosure.

It will always be the case that an employer will have to establish the reason why they have taken the action that an employee complains about or not take any action. An employment tribunal will analyse an employer's explanation with a 'sceptical eye'. Lord Justice Elias rejected the claimant's argument that a dysfunctional situation could never provide lawful explanation for why an employer acted in the way it did. Furthermore, Lord Justice Elias recognised that it might be impossible not to adversely treat a whistleblower in a situation such as in this case, where arguably, contending parties

both claimed to be whistleblowers. It does not follow that those who blow the whistle first are the ones who deserve the fullest protection from any detriments. Lord Justice Elias went further and acknowledged that it may not always be possible to resolve the issues in the workplace by moving those people who are unsympathetic to the whistleblowers, because of the needs of the business.

The Court of Appeal supported the Employment Tribunal's decision that 'it is not sufficient in the Tribunal's judgment, to establish liability on the respondent simply because management either did not do as much as it could have done, was or simply unsuccessful in its attempt to resolve matters. However hard management might try, there are sometimes situations that arise in the workforce, following a protected disclosure having been made, which are extremely difficult to control and prevent'.

Despite this acknowledgement, employers should not turn a blind eye to this type of situation. Employers should always be mindful of their contractual obligation to maintain a relationship of trust and confidence with its employees, and an employer could still be vicariously liable for the acts of its employees under other legislation such as the Protection from Harassment Act.

Call for review

Following this decision, PCAW has now called for a Government review of the legislation to ensure that whistleblowers are protected in situations such as those which arose in this case. It is concerned that if an employer does not do enough to protect staff from retaliation, then workers may stay silent rather than blowing the whistle in the public interest.

The Government recently announced that a pledge requiring NHS organisations to support whistleblowers would be added to the NHS Constitution from 2012.

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The Multi-track Code: deciphered

'By all accounts, the Multi-track Code, which has been piloted since July 2008, is proving successful. I support the aims of the Code and welcome the progress that has been made in that regard'. Lord Justice Jackson, Review of Civil Litigation Costs. October 2011

Mike McKenna, Member of FOIL's (Forum of Insurance Lawyers) Sector Focus Group on Rehabilitation, brings us up-to-date with the Multi-track Code.

A few years ago, a number of people within the insurance industry thought that there was a better way of dealing with higher-value personal injury claims (over £250,000) and sat down to come up with a way to deal with such cases outside the court process.

The Code was designed to help the parties involved resolve liability early; putting a system in place that meets the reasonable needs of the injured claimant and works towards settling the case, by narrowing the potential issues before either settlement meeting or trial.

Isn't that, I hear you say, what all processes to resolve personal injury cases, including the court process, aspire to?

Well, the Code seeks to create a new environment for case planning, encouraging changes in behaviour on both sides, and works in parallel with the Civil Procedure Rules. The Code does not change the law, which still requires a claimant to prove his case, and any failure to comply with the Code should not be taken into account by the court when considering the parties' conduct.

The Code was drafted in July 2008, followed by an invitation to claimant lawyers and insurance companies alike to volunteer appropriate cases for a pilot scheme which could be used to determine whether the Multi-track Code worked and was worthwhile pursuing.

In October 2011, The Law Society hosted a joint review meeting of APIL

(Association of Personal Injury Lawyers) and FOIL for participants and selected stakeholders, to see how the pilot has progressed. Those attending were invited to provide feedback on the pilot and to discuss how the Code might look in the future. Feedback was largely positive. Cases managed under the Code have been conducted in a collaborative way between claimant lawyers, defendant lawyers and insurers, resulting in swifter conclusions. Lord Justice Jackson attended the meeting and showed great support for the Code, even expressing a desire to place it on a more formal footing. The steering group (made up of interested stakeholders) will meet to decide upon how best to move the scheme forward, and will no doubt have such comment to the forefront of their minds.

Some findings highlighted by the pilot scheme:

- There are 85 cases within the pilot scheme.
- Nearly 80% of the cases road traffic, 15% employers' liability and 7% public liability.
- Clinical negligence cases have thus far been excluded from the pilot scheme.
- Over 50% of the cases in the pilot were brain injuries, 16% spinal injuries and 15% multiple or complex Orthopaedic cases.
- Evidence of prompt dialogue to investigate liability.
- Evidence of early discussion to agree care regimes, accommodation, equipment and/or rehabilitation.
- Appropriate early interim payments made on damages and costs.
- There has been much evidence of commitment by all parties to obtain and disclose all relevant information promptly.

- There has been commitment to obtain evidence, avoid duplication of effort and costs and share evidence earlier.
- Commitment to early interim payment of disbursements and costs once liability has been resolved.

Some comments from those involved:

'The Code is assisting greatly in establishing a dialogue which in turn assists the defendant insurer to gather information and reserve accurately'.

'It has been a very helpful tool for cases between £500,000 and £5,000,000'.

Next steps

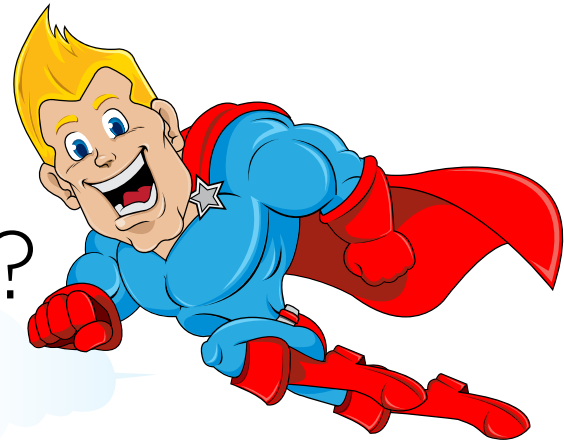
It was hoped that the pilot would attract more than 85 cases, but despite that, most present for the review meeting, including LJ Jackson, considered the position to be 'win - win' for both sides. Many claimants feel that the pilot has provided easier access to file handlers who are better equipped to deal with these types of claims, which helps them to progress more smoothly and at greater speed. Insurers also clearly felt that cases within the Code had made good progress.

Some apprehension remains that the behavioural concept embodied in the Code still needs wider publicity and appreciation, but the majority of participants fully support the Code and what it aims to achieve.

All now await the steering committee's next move, but they have support at the highest level within the judiciary to move the Code forward.

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Incredible? Or just 'not credible'?



Assessing witnesses of fact

Contested legal actions often turn on questions of fact. An assessment must therefore be made concerning the credibility of evidence to be given by key factual witnesses. Richard Hackett, an assistant solicitor in our Liverpool NHSLA team, takes a closer look at this process.

There have been two judgments during the last few months in which the courts have taken the opportunity to provide some general guidance on weighing up the evidence of factual witnesses. Neither was a clinical negligence case, but the principles are the same irrespective of the subject matter.

The first of these two cases was in May 2011 when the Court of Appeal – in *Re Mumtaz Properties* – made the following observations:

- In considering whether to accept the evidence of a witness, the judge should not decide merely by reference to the impression made in the witness-box. Body language, tone of voice and similar factors may be taken into account. However there is more to it than assessing the person's demeanour.
- The judge should also consider the availability of other independent evidence to support the witness. This may be particularly important in cases where the witness is from a culture or way of life with which

the judge may not be familiar.

- Contemporaneous written documentation is of 'the very greatest importance in assessing credibility'. It can be significant where it is present and the oral evidence can then be checked against it, but also if written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, and that the party adducing oral evidence is responsible for its non-production, then the documentation may be conspicuous by its absence and the judge may be able to draw inferences.
- People, such as company directors, who have conducted corporate affairs with a high degree of informality, cannot seek to avoid liability or to be judged by some lower standard than that which applies to other directors; simply because the necessary documentation is not available.

In July 2011, in a case called *Favor Easy Management*, the High Court independently reviewed the same area of law and reached conclusions in remarkably similar terms. However, Mr Justice Norris considered two further points:

- A court should give thought to the existence of witnesses from whom it might have heard but did not. In other words, a judge might draw adverse inferences from the absence of a witness who a party might be expected to have called.

- Some lies are of greater significance than others. Quite apart from the 'misrecollection', a witness might lie for other 'innocent reasons' such as a misguided effort to bolster the truth or to conceal disreputable conduct unrelated to the wrong.

Comment

The Court of Appeal's observations in *Re Mumtaz Properties* are especially apt in the context of clinical negligence cases and record-keeping by healthcare staff.

Guidance from the courts is always worth keeping in mind but, on the other hand, the points set out in this article should not be applied in too formulaic a manner. Failure to comply with them would not necessarily provide strong grounds for an appeal. As Lady Justice Arden confirmed, an appellate court should treat the trial judge as having had a special advantage in seeing the witnesses give their evidence.

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Huge claim reduced by 90% on assessment of damages

Richard Hackett, an assistant solicitor in our Liverpool NHSLA team, reviews the May 2011 decision in *Johnson -v- Le Roux Fourie*

The treatment

The claimant's career had been extremely successful and, according to the facts outlined in this judgment, she and her husband had developed a new business in 2001 supplying SAP software systems. By 2003, their business had grown rapidly. Its turnover in that year exceeded £3 million.

Midway through 2003, at the age of 42, the claimant decided to take a two-month sabbatical: she felt 'burnt out' and wished to spend some time with her son. She also consulted the defendant, a plastic surgeon, regarding the possibility of minor cosmetic surgery to her nose and to remove dark circles under her eyes. Apparently, he suggested more radical surgery including replacement of pre-existing breast implants and a facelift. The surgery was carried out shortly afterwards.

The outcome

The claimant suffered complications of the surgery. In particular, she sustained damage to the right facial nerve. Despite corrective surgery, she was left with permanent nerve injury, giving rise to spontaneous facial movements, which caused an abnormal grimacing effect. The outcome of the breast surgery was also unsatisfactory, resulting in some disfigurement. Also, the claimant developed a depressive disorder of moderate severity. She was still suffering symptoms of anxiety and depression when the case came to trial and, although her condition was expected to improve to some extent with treatment and resolution

of the claim, a complete recovery was considered unlikely.

General damages

In assessing general damages, the judge referred to Chapters 3 (A) and 7 (B) of the Judicial Studies Board (JSB) guidelines. The judge accepted the claimant's contention that the case fell within the 'Severe' category of psychiatric damage (for which the guidelines suggest a bracket of £36,000 to £76,000). He declined to say into which category of facial disfigurement he thought the case belonged. The guideline maximum is £31,750, except in a case of very severe scarring.

The judge confirmed that, whilst it was helpful to consider the guidelines as to both facial disfigurement and psychiatric injury, they were so closely-related that separate assessment would be inappropriate. He awarded general damages of £80,000.

Loss of earnings

As for the loss of earnings, the claimant argued that, by reason of her injuries, she lost confidence and was no longer able to front the business. She adopted a 'back room' role and employed others to be responsible for business development. Without her personal involvement, however, contracts were lost and the business collapsed. According to her case, its rapid growth would have continued if she had carried on leading the company and turnover would probably have increased to £170 million by 2013. On that basis, she claimed loss of earnings amounting to £66 million.

The defendant contended that the claimant was hopelessly over-optimistic regarding the prospects of the business, and the evidence was more consistent with an annual turnover

in the range from £10 million to £25 million. However, the defendant argued that, given the speculative nature of the claim, this was not an appropriate case for assessing loss of earnings on a multiplicand/multiplier basis, but a lump sum should be awarded, i.e. the type of assessment approved in the 1993 case of *Blamire -v- South Cumbria HA*.

The judge was unwilling to adopt a *Blamire* approach, but considered that the claimant's projections were unrealistic. He made a finding that the business would probably have grown to an annual turnover of £25 million. Citing the 1995 Court of Appeal ruling in *Allied Maples Group Ltd -v- Simmons & Simmons*, however, he discounted this figure to £20 million to reflect the risk of the business failing to achieve such turnover. He made the further finding that a turnover of £20 million would have yielded an annual income of £800,000 for the claimant. He assessed loss of earnings at £6.05 million.

Comment

The claimant may be very disappointed by the outcome of her claim. The court assessed damages at a total of £6.19 million, but she had claimed £66 million for loss of earnings alone.

Arguably, however, this judgment was quite generous toward the claimant. Her business had only been running for a couple of years at the time of the negligent treatment and, having regard to the unfavourable economic conditions prevailing more recently, the judge seems to have given her the benefit of the doubt in concluding that annual turnover would have increased to £25 million and in applying a discount of just 25% for the risk of failure.

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Do not resuscitate orders: who decides?

Joanna Crichton, assistant solicitor in our mental health and social care team, brings us up-to-date on developments in this highly-emotive and controversial area of the law.

Over the summer months, do not attempt resuscitation (DNAR) orders hit the press once again, after a man took legal action against Addenbrooke's Hospital following his wife's death.

Mrs Tracey was suffering from terminal lung cancer, but was admitted to Addenbrookes after breaking her neck in a car accident. Mr Tracey claims that doctors placed a DNAR order in her notes without first seeking her consent. The DNAR order was removed after it

came to light and she objected, only to be subsequently reinstated a few days later without her consent or any discussion with her.

The NHS trust disputes the version of events given by the Tracey family, and deny that they have acted unlawfully under the Human Rights Act 1998. The family have been granted permission to mount a judicial review claim against the trust, and the outcome is awaited with interest.

Another family spoke out after a DNAR order was placed in their elderly mother's notes without asking the family, and one family member claimed nurses "watched" her mother die during her final hours.

In October, the *Telegraph* reported: 'Elderly patients condemned to early death by secret use of do not resuscitate orders'.

Although some of this reaction can perhaps be attributed to the sort of sensationalism that sells newspapers, coupled with misunderstanding of the law on the part of journalists and families alike, it is clear that in many cases, DNAR orders are being placed in patients' notes without their knowledge, and without consultation with family members.

Spot checks by the Care Quality Commission (CQC) earlier this year raised concerns in a number of hospitals. In one ward, 30% of patients

whose notes contained a DNAR order had not been informed of the decision, nor had their relatives. A junior doctor at another hospital acknowledged that they “tend not to discuss” such decisions with families. In another trust, blank DNAR orders were placed on medical notes by clerical staff, causing confusion as to whether or not they should apply to individual patients.

Mrs Tracey’s family have called for a national policy on DNAR orders; nevertheless, the law is already clear on the position.

DNAR orders are treatment decisions like any other. They should rarely, if ever, be placed on patients’ medical records without consultation with them, or their family. Only where a patient has capacity and has specifically requested that doctors do not involve them in such decision-making, would it be appropriate to place DNAR orders in a patient’s medical records, without discussing it with them first. In all other cases, discussions should take place with a patient who has capacity concerning such an order, before one is invoked. If the patient does not wish a DNAR order to be implemented, their wishes should be respected, except in extreme cases where the provision of further resuscitation is deemed unethical. In all such cases, legal advice should be sought before the DNAR order is imposed, and an application to court may be necessary. Where a patient has capacity, there is no legal requirement to also consult with or notify their family members about a DNAR order, but it would be good practice to do so, unless the patient themselves requested otherwise.

If the patient lacks capacity to make a DNAR decision, the Mental Capacity Act 2005 (MCA) applies to the decision, meaning that it should be made in their best interests. The MCA sets out a checklist of factors to consider when coming to a best interests decision, including a requirement to consult with family members and anyone else involved in caring for the patient. This

means that family members should be consulted about DNAR decisions unless it is genuinely inappropriate or impracticable to do so.

Trusts should ensure that their DNAR policies comply with the current legislation and that staff are aware of the requirement to consult about the decision, in all but the rarest of circumstances. Good record-keeping, as ever, is critical to record the fact that such discussions have taken place, or to record the reasons why consultation was deemed to be inappropriate.

At the other end of the spectrum are those people who firmly believe that they should not be resuscitated. An 81-year-old woman appeared on national television recently, proudly displaying the tattoo on her chest reading ‘Do not resuscitate’. She has obviously gone to a lot of trouble (and pain) to make her wishes known, but unfortunately, this tattoo is not legally binding. The MCA also contains the law about advance decisions (where a patient can make a competent decision to refuse treatment in the future, at a time when they are no longer capable of making such a decision). In order to be legally binding, advance decisions to refuse life-sustaining treatment must:

- be in writing;
- be signed by the person, or in their presence (and with their agreement) if they are unable to sign it themselves;
- be witnessed; and
- contain a specific statement which indicates that the refusal of treatment is to apply even if their life is at risk.

Advance decisions must also be made at the time a person has capacity to make that decision. In cases of uncertainty, medical staff will be protected from liability for ignoring the advance decision if they have a reasonable and honest belief that an advance decision is not valid.

When people have very firm views but fail to put their wishes in a way which is legally binding, great difficulty and

legal uncertainty is caused. The case of *W-v-M and S and A NHS Primary Care Trust* [2011] EWHC 2443 (Fam) showed that, where a woman had expressed firm views to her family that she would not wish to be kept alive in a near vegetative state, but had not put those views in a binding advance decision, the court would act in favour of preserving life.

Trusts should consider how they can assist patients to make legally binding advance decisions where they are aware that they hold such views. We have always advised trusts to have a clear policy for staff to follow in this regard and that it is preferable, if at all possible, for the clinical staff treating the patient not to be actively involved with helping the patient draft the decision, for two reasons: firstly, to avoid any later suggestion (perhaps by family members suspicious of staff motives) that the patient was put under undue pressure or influence to make the advance decision, and secondly, to avoid staff being called to give evidence in legal proceedings where there are disputes about the validity of the advance decision.

It may be that the patient advice and liaison team could carry out this role, i.e directing the patient to sources of legal guidance/forms and putting them in touch with relevant charities for further assistance, where appropriate, for example, The Alzheimer’s Society. By offering this basic assistance to patients who may wish to make advance decisions, NHS trusts may avoid the situation of having to apply to court for a declaration on best interests, where the validity of the advance decision is in doubt, with all of the legal costs that this would involve.

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To mediate or not to mediate: that is the question



Mediation: A means of resolving disputes between two or more parties; a form of alternative dispute resolution.

As well as being considered in litigation claims, mediation is also used to resolve many commercial disputes as Helen Rooney, a partner in our Manchester commercial litigation team, explains.

A more informal process than litigation, mediation involves the appointment of a mediator, who facilitates discussions between the parties and assists them to negotiate their own settlement. Mediation has a structure, timetable and dynamics which ordinary negotiation lacks. Such a process has long played its part in resolving disputes and can take place before litigation commences or in conjunction with court proceedings, in an attempt to avoid litigating a dispute to its conclusion.

The courts have emphasised the importance of considering mediation in the litigation process. The Civil Procedure Rules, which govern court process, provide the court with case management powers to encourage the parties to use an alternative dispute resolution procedure, of which mediation is one, if it considers it appropriate; and to facilitate the use of such procedure. The court also has the express power to place

proceedings on hold to enable some form of alternative dispute resolution to take place.

A more consensual and collaborative approach can be beneficial. Gone are the days when a dispute would undoubtedly end up in the courts with a full trial at the end. Most importantly, the use of mediation should not be seen as a sign of weakness. Quite the contrary, it is a sensible and commercial way of resolving disputes.

Litigation can be high-risk, expensive, time consuming, emotionally draining and unpredictable. Mediation has several advantages.

- **Speed:** Once the parties have agreed to proceed to mediation, then subject to availability of the parties and the mediator, the mediation itself can be arranged fairly quickly. Generally, a mediation will last one day.

- **Cost:** Whilst there are legal costs associated with mediation, due to the fact that mediation is generally a speedier process than litigation, the costs are less. The mediator's fees are generally divided equally between the parties.
- **Client control:** With a referral to mediation, the client has more control over when and where that mediation takes place. In the courts, the parties are obliged to comply with the court timetable. If the proceedings are stayed to allow mediation, or some other form of alternative dispute resolution to take place, then there can be time pressures if only a short stay is allowed. The courts are generally amenable to extending the stay for a further period.
- **Flexibility:** There is greater flexibility with mediation. The parties are not bound by the strict timetables which can envelop a case going through the courts. More importantly

"To jaw-jaw is
always better
than to war-war"

Winston Churchill



perhaps, at mediation, the parties are able to agree terms which may be outside of the court's remit but which mean that, in some instances, the all important relationship between the parties is maintained.

- **Privacy:** Litigation is generally a public event, but mediation is a private affair. The parties can agree that any terms of settlement remain confidential between the parties.

Only once the parties have signed a formal agreement will terms of settlement be achieved. Any settlement agreement signed by the parties will be binding on them and can be enforced. There is no right of appeal from a mediation.

Parties can be penalised in costs if they refuse to mediate, unless they can show good reason. The courts have taken this to include, amongst other things:

- that the nature of the case reasonably prevents it from being suitable for mediation;
- the merits of the case are such that there are no reasonable prospects of a mediation being successful;
- the parties have made other attempts at settlement, for example, by the making of offers;
- the cost of mediation will be too high; or
- the trial may be delayed by mediation.

Mediation and other forms of alternative dispute resolution work best when they are utilised early in the proceedings, or even pre-litigation, before the parties' positions are greatly polarised and costs become an issue in themselves. Such procedures can introduce an extra layer of cost and generate more documentation, but compare the former to the costs of a fully-contested trial, and the latter with the substantive pleadings

and other documents which are inevitably required within a strict court timetable.

Mediation is, of course, not appropriate in all cases, but a party should not be prevented from pursuing action for fear that they will end up embroiled in the intricacies of the legal system. There are alternatives.

We have trained mediators within the firm and we are happy to discuss training requirements or mediation workshops with you.

And, as Winston Churchill said: "To jaw-jaw is always better than to war-war."

[Helen Rooney](#)

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The finer details of the Information Commissioner's new powers

On 6 April 2010, the Information Commissioner received much anticipated new power, under the Criminal Justice and Immigration Act 2008, to impose monetary penalties on those who commit serious breaches of the Data Protection Act 1998. Shelley Thomas, partner in our commerce and technology team, discusses what this means.

Prior to April 2010, the Commissioner's powers were limited, and the Information Commissioner felt that in order to effectively police and regulate compliance with the Act, he required greater powers. Therefore, under sections 55A and 55B of the Data Protection Act 1998 (as amended), the Commissioner may now issue a monetary penalty notice against a data controller who has committed a serious breach of the Act, up to a maximum penalty of £500,000.

S55A of the Data Protection Act 1998

S55A says that:

(1) The Commissioner may serve a data controller with a monetary penalty notice if the Commissioner is satisfied that:

(a) there has been a serious contravention of section 4(4) by the data controller;

(b) the contravention was of a kind likely to cause substantial damage or substantial distress; and

(2) the contravention was deliberate; or

(3) the data controller

(a) knew or ought to have known

(i) that there was a risk that the contravention would occur, and

(ii) that such a contravention would be of a kind likely to cause substantial damage or substantial distress, but;

(b) failed to take reasonable steps to

prevent the contravention.

- There is a prescribed procedure for issuing a notice of intent, and providing time for data controllers to make representations on the proposed amount of the penalty before the monetary penalty notice is issued.

Guidance

The Commissioner has said that the underlying aim of the power to impose monetary penalties is to promote compliance with the Act and that a monetary penalty will only be imposed in the most serious situations. In order to assist data controllers in assessing what constitutes 'the most serious situations', the Commissioner has issued guidance documents and a Data Protection Regulatory Action Policy.

The guidance sets out lists of factors that would make the imposition of a monetary penalty more or less likely. For instance, the nature of the personal data concerned, and the duration and extent of the contravention, together with the number of individuals actually or potentially affected, will all be considered when considering the

seriousness of the contravention.

A deliberate contravention (as appears was the case with the Consulting Association) is more likely to lead to a monetary penalty than accidental contravention, though a series of accidental breaches, or a serious breach which occurred as a result of a cavalier approach to data security, is still likely to be treated as justifying a monetary penalty.

Monetary penalties

The Information Commissioner's Office (ICO), under the new powers, has imposed a number of monetary penalties and the notices provide guidance on how the Commissioner may view the circumstances of a particular breach.

Surrey County Council

One of the Council's adult social care teams received an email asking them to populate a Microsoft Excel spreadsheet with data, regarding the support needs of adult social care service users. Much of the information requested was of the kind that would be classified as sensitive personal data under the Data Protection Act, being data relating to physical or mental health. One of the individuals carrying out the task was deputising for another member of the team, and whilst she was aware of the sensitive nature of the information and had received advice from a colleague, she was unfamiliar with Excel and had limited experience of computers, having not attended all appropriate IT training.

When returning the completed spreadsheet to an internal colleague, the team member erroneously copied the email to a global email distribution list consisting of 361 transportation companies (comprising taxi and cab hire and coach and mini bus firms) used by the Council.

Various steps were taken to report the breach to both the data subjects and the Commissioner, and to take action to ensure that the breach did not occur again. However, a second and third breach occurred when one of the Council's employees erroneously emailed the minutes of a strategy discussion to a newsletter distribution group, and a locum family support worker sent a checklist and referral form to the incorrect internal email group.

The Commissioner indicated that he intended to impose a penalty of £120,000, as he was satisfied that there had been a serious contravention of Principle 7 of the Data Protection Act (the obligation to take appropriate technical and organisational measures against unauthorised processing of personal data). He deemed that the contravention was of a kind likely to cause substantial distress, and that the Council ought to have known that there was a risk that the contravention would occur, failing to take reasonable steps to prevent it.

Calculating the penalty for the first breach

In calculating the amount of the penalty for the first breach, the Commissioner said that the following aggravating and mitigating factors had been taken into account:

Aggravating

- The fact that there had been multiple, similar breaches
- The number of individuals involved and the number of recipients
- The data was sensitive, personal and confidential
- The likelihood of substantial distress to vulnerable data subjects
- The lack of appropriate IT training and support
- The fact that the Council had the resources to pay up

to the maximum monetary penalty without causing it undue financial hardship

Mitigating

- Although the attachment was not encrypted, the sensitivity of the data and the email was obvious
- Several attempts were made to prevent further dissemination of the email and attachment
- The information in the spreadsheet was reduced to the minimum necessary to complete the task
- The breach was voluntarily reported to the Commissioner and the Council was fully cooperative with the Commissioner's office
- The individuals affected were notified about the breach
- Substantial remedial action had been taken
- The liability to pay the monetary penalty will fall on the public purse

A4E Limited ('A4E')

This case concerned a lost, unencrypted laptop. A4E Limited was contracted by the Legal Services Commission to operate Community Legal Advice Centres in Hull and Leicester, and has contracts with other public sector organisations. Under the contract, A4E was required to provide various reports containing statistics and other data.

One of A4E's employees had been issued with a laptop on the understanding that it would be used for home working. The employee loaded personal data onto the laptop in order to work at home; the only security was password protection.

The employee was the victim of a burglary and the laptop was stolen and not recovered.

The laptop held 24,000 clients' records, some of which contained sensitive personal data including the

client's criminal record, ethnic origin and health details. Although A4E had initiated a programme of encryption and port control access, the laptop was scheduled to be encrypted at a later date.

The Monetary penalty

The Commissioner served a notice indicating that he intended to issue a monetary penalty on the Council of £60,000 as he was satisfied that the requirements to do so (as set out in the Surrey County Council example) had been met, and the following aggravating and mitigating factors had been taken into account in calculating the monetary penalty:

Aggravating

- Even though a risk assessment had been carried out, the laptop was unencrypted, despite the employee working at home without remote access to the central secure server
- No security devices were provided to home workers and the laptop was only password protected
- A large amount of sensitive data was lost, and a significant number of data subjects (3200) had made contact after being informed of the loss
- The decode key to some of the sensitive personal data was held on the same laptop
- The laptop had not been recovered, and logs showed that an unauthorised attempt had been made to access the data
- The contravention was serious because of the sensitive nature of some of the data

Mitigating

- There had been no similar prior breach by A4E that the Commissioner was aware of
- A risk assessment had been carried out
- The loss was reported within four hours and an internal investigation began the same day
- The data was unlikely, on its own, to be capable of use for fraudulent purposes
- The breach was voluntarily reported to the Commissioner
- A4E was fully cooperative with the Commissioner during the investigations
- A4E wrote to all of the data subjects affected by the breach and set up a freephone helpline to provide advice
- Substantial remedial action had been taken

Data protection: good practice with great importance

The factors that the Commissioner looks at when determining whether to impose a monetary penalty, and how much that penalty should be, are to a large extent common sense. For instance, although a breach is inadvertent, rather than deliberate, this does not automatically result in not levying a monetary penalty. It will be a factor taken into consideration.

The Commissioner will also look carefully at the steps taken, and the policies put in place by the data controller, both prior to the breach

and afterwards. Although under no obligation to report a breach to the Commissioner, rapid notification of the breach will stand in a data controller's favour, as will rapid notification to the data subjects whose data has been compromised.

It is interesting to note that the Commissioner has said that he will not seek to cause an organisation excessive financial hardship. However, being a public authority could mean suffering greater penalties than private sector counterparts for a similar breach, since public sector organisations generally have greater resources to call on than some companies in the private sector. Though it is seen as a mitigating factor that the monetary penalty will come from the public, the public authority's wherewithal can be (as can be seen from the Surrey County Council case) an aggravating factor.

The Commissioner is very keen to emphasise that compliance with Data Protection law should not be seen as an extra obligation, but should be seen as an integral part of good business practice. Given that breaches can lead not only to monetary penalties, but a significant loss of confidence (both internally and externally) and bad publicity, it is critical that organisations recognise their responsibilities and put in place appropriate procedures to avoid breaches of the Act.

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The importance of estate planning

The importance of estate planning and keeping arrangements under regular review cannot be overstated, as Sean Williams, a partner in our Manchester private client team, explains.

Any review should cover the following matters:

- The need for a will and its terms
- Benefits of maintaining a personal assets log
- Ownership of any joint property
- Potential Inheritance Tax (IHT) liability
- Terms of any life insurance and pension contracts
- Advantages of granting a power of attorney

Problems caused by intestacy

On the death of a person who has not made a will, their estate passes under the laws of intestacy. For most people it is inadvisable to rely on the laws of intestacy. For example, in the case of a married couple with children, the intestacy rules may not automatically pass the entire estate of a deceased spouse to the surviving spouse. In higher value estates, the children will receive part of the estate outright at the age of 18. In these circumstances, the operation of the intestacy rules will also increase the amount of IHT payable. In the absence of a will, responsibility for administering the estate will be granted to anyone who is entitled to part of it. This may not be the person best placed to administer the estate.

Appointment of executors, trustees and guardians

It is much better to choose the person (the executor) who will be responsible for administering the estate. The choice of executor can be important, particularly where tax planning or trusts are involved. In some circumstances it is appropriate to appoint a professional executor. Property can be held on trust by trustees rather than passing to the beneficiaries outright. Trustees will need to be appointed for any ongoing trust. A parent of minor children can also provide for the appointment of a guardian.

Terms of the will

The terms of a will may be quite simple, such as an outright gift to a spouse. In other cases it is appropriate to put in place more complicated arrangements. Where the value

of the estate exceeds £325,000, IHT may be an issue. It may be possible to reduce the amount of IHT payable, through for example, the use of a trust. Other situations can also require more complicated wills. A good example would be the will of a parent who does not wish their child to inherit capital at a relatively young age. In those circumstances, capital may be held on the terms of a trust which benefits the child, but does not give them the freedom to spend the capital. This is an effective way to protect wealth.

A will should state the administrative powers which the executors and trustees are to have as the statutory administrative powers are limited.

Consideration should be given to maintaining an assets log. These are of great assistance to executors.

Joint property

Joint property may pass automatically to the other joint owner/s. Steps can be taken to prevent this where that is not the desired outcome. Advice should be taken on the rules which apply to property held in joint names.

Inheritance Tax

The headline rate of IHT is 40%. There are various reliefs and exemptions, some of which are very valuable. Transfers between spouses are exempt. Some business assets (such as shares in a trading company) qualify for 100% relief.

Depending on the value of any lifetime gifts made in the seven years prior to their death, individuals can transfer up to £325,000 at the time of their death without triggering an IHT liability. A married couple can transfer a total of £650,000 (2 x £325,000) without any IHT liability, as the first spouse to die can now pass the benefit of their allowance to the survivor.

It is also possible to significantly reduce the potential IHT payable on a person's estate through lifetime gifts. Provided the donor survives the gift for seven years outright, gifts are not liable to IHT.

Some investment products can help to reduce any potential IHT liability. For example, shares in most companies listed on the alternative investment market are not liable to IHT once they have been held for two years.

Anybody whose assets exceed £325,000 should take advice on the operation of IHT and particularly the best way to maximise the benefit of any available reliefs and exemptions.

Life insurance

Life insurance can be a cost-effective way of providing for the IHT potentially payable on gifts. Any life insurance contracts should normally be held in trust so that the benefits pass free of IHT. Benefits held in trust are paid directly to the trustees.

Pension death-in-service benefits

It is important to understand the nature of any benefits potentially payable under the terms of a pension scheme. In most cases, any death-in-service benefits are paid at the discretion of the scheme administrator and will not form part of the member's estate. Therefore, the member should ensure that the administrator has instructions as to who should receive any benefits. There is an advantage in any potential benefits being held on flexible trusts.

Powers of Attorney

Most people do not complete powers of attorney until they are approaching old age. However, anybody could find themselves incapacitated as a result of illness or an accident at any time. Therefore it is prudent for all adults to consider putting in place Lasting Powers of Attorney.

There are two types of Lasting Power of Attorney. One gives a third party the power to deal with the financial affairs of the person granting the power (the donor). The other, known as a health and welfare power, allows a third party to make personal (rather than financial) decisions for the donor.

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Down the drain

Rebecca Wakefield, an assistant solicitor in our Liverpool healthcare team, considers the implications of the automatic adoption of most private drains and sewers from 1 October 2011

Government proposals to bring private sewers and lateral drains into public ownership became law on 1 July 2011. The term 'private sewer' refers to any sewer which is on private land but which serves more than one property. A 'lateral drain' is a drain serving a single property but which is outside that property's boundary - it will join into either the public sewer or a private sewer.

Approximately 200,000 km of drains and sewers currently owned and maintained by the people whose properties they serve will become maintainable by the statutory water and sewerage companies, at the general public's expense. United Utilities has estimated that the length of the wastewater network it manages in the North West of England will increase by 75%.

The transfer of ownership happened automatically, overnight on 1 October 2011, without the owners of the drains and sewers having to take any action and without any requirement to bring the private drain or sewer up to adoptable standard. The water and sewerage companies were required to give customers two months' notice of the transfer and many readers will have received such notice during the summer.

Responsibility

Prior to the transfer, each property owner was responsible for drain serving their own property and (jointly with the other properties it serves), the section of private sewer to which each drain connects until it reaches the public sewer (usually under the adopted highway). From now on, property owners will only be responsible for the section of drain within the property's boundary. From the point where the drain leaves the boundary, the responsibility for maintenance will pass to the water and sewerage company, as will responsibility for all private sewers.

The change will mean that when there is a blockage outside their boundary,

or in a shared sewer, property owners do not need to organise and contribute to the cost of fixing the problem or making a claim on their buildings insurance because the statutory water and sewerage companies will undertake the repair, in the same way that they maintain the public sewerage system. Homeowners will still be responsible for organising and paying to fix the drain within their boundary.

The costs incurred by the statutory water and sewerage companies will be spread across all bill payers in England and Wales through increased sewerage charges.

Large estates

For residential property owners, there should be few concerns with the proposals and it will make life easier when problems arise.

However, in the case of large multi-let estates, the question of whether or not the sewers will transfer will depend on whether the estate is classed as a 'single curtilage'. Government guidance published by the Department for Environment, Food and Rural Affairs (Defra) suggests that the following types of properties with multiple



>>> occupiers but a single freehold owner will generally be considered to compromise a single curtilage, so that private drainage within the freehold boundary will not usually be adopted under the new rules:

- hospitals
- office buildings
- business and industrial parks
- schools and universities
- airports, stations and ports
- residential apartment blocks

There will be issues for some property owners, for example, developers who have sold parts of a site. The developer may have granted or reserved rights to use and to connect into sewers, or maybe 'lift and shift' provisions for new sewers.

If these sites are not exempt as a single curtilage and the sewers are adopted, then the rights will become obsolete. The developer will have to seek the water company's permission to connect into, build over or move sewers, and may find that the water company will undertake the work at the developer's expense.

Ofwat (The Water Services Regulation Authority) has produced guidance on the transfer of private drains and sewers which suggests that appeals against adoption based on grounds relating to reduced development potential and/or any adverse effect on the value of the land are unlikely to succeed.

Looking forward

The new law only applies to private sewers and lateral drains which existed on 1 July 2011.

Where private sewers are created after 1 July 2011, the private sewers will only be adopted as public sewers by agreement under section 104 of the Water Industry Act 1991. This means that if the owners wish the private sewers to be adopted, they may have to bring the private sewers up to adoptable standard at their own expense, or alternatively, they will have to agree arrangements with the other users of the sewer for sharing and maintenance; as was the case before the regulations were created.

The Government intends that for most future developments, sewers

will have to be built to adoptable standards and be adopted on completion of the development, unless otherwise agreed by the water and sewerage company. Developers will also need to consider whether they still need to reserve or grant rights relating to shared sewers.

Private sewers that connect into private pumping stations, cess pits or septic tanks are not affected by the change. Private pumping stations and their associated sewers are expected to be adopted progressively up to October 2016.

Anything else?

At the time of the transfer in October, the extent of the assets to transfer will not have been identified or mapped to any significant degree. Prospective purchasers and tenants will need to make enquiries to establish whether a transfer has occurred, as the water and drainage search result may not be comprehensive.

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Patient choice: not an end in itself?

The Cooperation and Competition Panel (CCP) continues to produce a steady stream of decisions which broach some of the most difficult issues associated with the development of the NHS as a managed market of competing providers. In this article, David Hill, an associate in our Liverpool healthcare team and Mark Fitzgibbon, a partner in our Manchester commerce and technology team consider the CCP's recent report into patient choice of elective care providers.

In December 2010, the Department of Health and Monitor requested that the CCP undertake a review of the operation of the 'Any Willing Provider' model for the provision of routine elective care. An interim assessment was published in February 2011, with a final report following in July. It is only now, in mid-November 2011, that the DofH has publicly accepted the findings of the report. However, the length of time the DofH has taken to respond to the report should not be taken as an indication that the DofH does not see the promotion of patient choice as a key objective for the NHS. The Secretary of State has been unequivocal in his condemnation of measures which serve to restrict patient choice, with Sky News claiming that NHS bosses who failed to promote patient choice would be sacked.

By contrast, the CCP report itself could be said to take a more nuanced approach. It makes clear that the interests of patients and taxpayers are the drivers behind the Principles and Rules for Cooperation and Competition, rather than competition being an end in itself. Having said that, in most circumstances, those interests will best be met by promoting patient choice of provider. This is on the basis that competition between providers within

the context of a fixed tariff structure should serve to drive up the quality of care.

However, the CCP acknowledges that there will be rare occasions when the interests of patients and taxpayers may in fact best be protected by certain limitations on untrammelled competition. The CCP refers to two commonly-cited examples:

- First, there is the 'house of cards' scenario, where a reduction in the volume of a service delivered by a provider (e.g. orthopaedics) will have a significant effect on the ability of that provider to continue to offer a wider range of services, some of which may be of critical importance locally (e.g. trauma care).
- Secondly, a reduction in the volume of activity which a provider undertakes may have a bearing on its ability to meet its obligations to train clinical staff, due to an insufficient volume of 'basic' procedures.

The CCP acknowledges that both of these scenarios may occur in practice and could be seen as contrary to the interests of patients and taxpayers. The CCP therefore states that it is not seeking a 'blanket ban' on practices which may restrict patient choice because of 'the possibility that there may be offsetting benefits of sufficient magnitude in certain circumstances'.

The apparent pragmatism of the CCP may come as a surprise to those who see the future of the NHS as a dog-eat-dog marketplace. However, this merely serves to confirm that the CCP will take a similar approach to other regulators charged with promoting competition, subject to overriding public interest considerations. European Union competition law, for example, permits deviations from usual principles of competition where this is necessary in the public interest. Even the United States, the supposed home of

free market economics, adopts a 'rule of reason' under its competition law regime, which considers the intentions and motivations underlying measures which may restrict competition.

Under the terms of its constitution, the NHS is committed to providing 'a comprehensive service, available to all'. The CCP's stance perhaps indicates a willingness to ensure that the application of competition to the NHS does not have the effect of undermining this principle where, for example, unbridled competition might drive a provider of essential services out of business and lead to reduced access for patients.

However, having held out the prospect of a relaxation of competition in certain circumstances, the CCP goes on to say that it has not yet seen a convincingly argued case in support of such an approach. Providers and/or commissioners seeking to relax the normal rules on patient choice will therefore face an uphill battle. The CCP encourages those considering a restriction on competition to approach it for 'informal advice'. We would suggest that such informal approaches should be carefully-reasoned and supported by compelling evidence if they are not to be dismissed out of hand by the CCP. It is also clear that any restriction on patient choice and competition must be applied in a transparent manner.

The principle of competition remains at the heart of the Government's plans for the NHS. However, those who feel themselves to be at the sharp end of competition can at least draw some comfort from the fact that the CCP would appear to be willing to give overriding public interest arguments a fair hearing.

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Deaths in custody: are you prepared?

Section 2 (1) (d) of the Corporate Manslaughter and Corporate Homicide Act 2004 is now in force. Joanna Trewin examines what this means for organisations providing offender healthcare.

What does this mean?

This section introduced a specific duty of care applicable to those organisations providing healthcare to those:

- detained at a custodial institution or in a custody area at a court or police station;
- detained at a removal centre or short-term holding facility;
- being transported in a vehicle, or being held in any premises, in pursuance of prison escort arrangements or immigration escort arrangements;
- living in secure accommodation in which he has been placed; and
- who are a detained patient (under the provisions of the Mental Health Act 1983).

Organisations providing healthcare services to such patients will be found guilty of corporate manslaughter if the way in which the organisation's activities are managed or organised causes a death and this amounts to a gross breach of the duty of care. A significant degree of the failing must take place at senior management level, although this could reach to, for example, healthcare managers, or ward managers within mental health units; basically anyone taking significant decisions about the management of the organisation.

When?

Much of the Act came into force in 2008, but the implementation of this section was delayed to allow the prison service and similar organisations time to prepare. The new duty applies to those responsible for prisoners in police custody or in prison, as well as those detained under the Mental Health Act 1983.

It came into force on 1 September 2011 and applies to any deaths after that date. It is not retrospective.

What steps do I need to take?

Organisations responsible for providing healthcare to those detained either under the Mental Health Act 1983 or within the criminal justice system should be aware that the Corporate Manslaughter and Corporate Homicide Act now specifically applies to them.

Top ten hints and tips to ensure your organisation is ready for the change:

1. Robust health and safety policies and procedures are important
2. It is crucial that compliance with those policies is robustly audited
3. Any areas of non-compliance should be addressed
4. Does your organisation learn lessons and monitor near misses?
5. What is the quality of your staff training?
6. Is there a culture of safety within your organisation?
7. Do you address poor performance?
8. Is your whistle blowing procedure robust?
9. Do you have effective procedures and arrangements in place to deal with any criminal investigations?
10. Are senior managers aware of their responsibilities?

Clinical negligence in Morgan and Morgan: who was at fault?

Joanna Trewin, partner in our Manchester health team, looks closely at the legal accountability of the Ministry of Justice and The Crown for the acts and omissions of the NHS in Morgan and Morgan -v- (1) Ministry of Justice; and (2) The Crown [2010] EWHC 2248 (QB).

Facts

This case concerned a claim for damages in relation to alleged clinical negligence by a prison healthcare team. It was argued that medical staff failed to carry out an adequate risk assessment, resulting in the suicide of a man in January 2005 whilst in prison.

As well as the proceedings in relation to the healthcare team, a claim was also brought by the deceased's mother and fiancée for compensation under the Human Rights Act 1998 (HRA) against the Ministry of Justice and the Crown. It was alleged that they ought to be held responsible for the acts and omissions of the prison NHS healthcare team and this was considered by the court as a preliminary issue, with a lead judgment from Mr Justice Supperstone. Three areas were considered:

1. Do the MOJ/Crown owe a non-delegable duty of care for relevant acts and omissions of NHS healthcare teams, and if so to what extent?

It was held that, as the NHS is a 'non-Crown' body by virtue of the National Health Service Act 1977, the Crown (or the MOJ) cannot be held responsible for its acts or omissions, as to impose such a duty would not be just, fair and reasonable.

2. Is the Crown a 'public authority' for the purposes of the HRA?

It was found that the HRA did not include provision for the Crown to be sued under it, and subsequent case law, preventing proceedings against the Crown, was followed.

3. Capacity of the claimants to bring claims under the HRA

In particular, there was a discussion of the claimants' ability to satisfy the 'victim' test and it was agreed that a fiancée and mother could be capable of being a victim. Consideration was given to whether their relationship with the deceased had resulted in them suffering 'gravely' as a result of violations, with them being 'personally concerned' by them.

Summary

In this case, it will come as no surprise that the court confirmed that it is the NHS who has legal accountability for healthcare provided in prisons and not the MOJ or the Crown!

However, claims against healthcare teams could become tricky where the members of the healthcare team against whom allegations are made, are employed by differing NHS organisations (for example, an acute trust, a mental health trust and a community trust) and, whilst becoming increasingly rare, some healthcare professionals are still employed by the Prison Service.

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