

Neutral Citation Number: [2010] EWHC 2593 (Admin)

Case No: CO/9781/2010

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Manchester Civil Justice Centre  
1 Bridge Street West  
Manchester  
M3 3FX

Draft Circulation Date:21/10/2010

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**Before:**

**HIS HONOUR JUDGE PELLING QC**  
**SITTING AS A JUDGE OF THE HIGH COURT**

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**Between:**

**R (ON THE APPLICATION OF)**  
**ALYSON BOOKER**

**Claimant**

**- and -**

**NHS OLDHAM**

**Defendant**

**-and-**

**DIRECT LINE INSURANCE PLC**

**Interested**  
**Party**

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**Mr Stephen Cragg** (instructed by Potter Rees) for the Claimant  
**Mr Stephen Knafler QC** (instructed by Hempsons) for the Defendant  
**Mr Winston Hunter QC** (instructed by DWF) for the Interested Party

Hearing dates: 6-7 October 2010  
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**Approved Judgment**

HH Judge Pelling QC:

## **Introduction**

1. The Claimant, who is aged 19, having been born on 17 May 1991, is a ventilator dependent tetraplegic as the result of injuries sustained in a road traffic accident that occurred on 6 January 2001 when she was nine years old. The Claimant brought proceedings in relation to the accident which were settled on 20 October 2009 on terms which were approved by Irwin J that included an agreement by the defendant to those proceedings to provide periodic payments starting from 15 December 2011 to enable the Claimant to fund privately the provision of her continuing health and social care needs. With knowledge of the terms of that order, the Defendant to these proceedings ("the PCT") decided that it would not provide care for the Claimant beyond 1 September 2010, later extended to 1 October 2010, on the basis that she had no reasonable requirement for the provision of such care beyond that date by reason of the terms of the settlement of her injury claim which I set out in more detail below.
2. This is the hearing of the Claimant's application for judicial review of the decision by the PCT to withdraw nursing and social care from the Claimant with effect from 1 October 2010. Permission was granted to bring these proceedings on 22 September 2010 subject to the proviso that consideration of whether permission to apply for judicial review ought to be refused on the ground of delay in making the application would be deferred to be considered at the substantive hearing.

## **Factual Background**

3. The Claimant commenced proceedings against Ms Suzanne Taylor ("the injury claim defendant") in the Queen's Bench Division, at Manchester District Registry ("the injury claim") in which the injury claim defendant was represented by DWF the solicitors who act in these proceedings on behalf of the Interested Party, Direct Line Insurance Plc who are Ms Taylor's motor accident insurers. Liability was not disputed by the injury claim defendant and the Claim proceeded to trial in relation to quantum only.
4. In summary, the consent order provided that the Claimant was to receive a lump sum payment of £2,950,000 and periodical payments commencing on 15 December 2011 in the annual sum of £247,500. As part of the Order, the injury claim defendant, the Interested Party and the Claimant each entered into a number of binding undertakings. These undertakings were designed to eliminate the possibility of a double recovery by the Claimant in the event that she continued to be cared for by the PCT after the 15 December 2011, and to facilitate the commencement of periodical payments from 15 December 2011 and the provision of care for the Claimant prior to that date in the event that such care was not provided by the PCT. With this last point in mind, the Claimant agreed to use her best endeavours to maintain the NHS funded care team in place during the period down to 15 December 2011 and in turn the Interested Party agreed that if, notwithstanding the Claimant's reasonable endeavours, the NHS provided care package was removed or reduced, the Interested Party would indemnify the Claimant in respect of the cost of providing replacement care.

5. In relation to the period prior to 15 December 2011, the terms attached to the consent order provided at paragraph 12 that:

"For the period from 15 December, 2009 to 14 December 2011 inclusive, Direct Line Insurance Plc will make payments to the Claimant only insofar as the same are required by the terms of the indemnity as more fully set out in Schedule 2 hereto and shall be under no obligation to make any periodical payment."

The settlement agreement recognised that the Claimant had been assessed by the PCT using the Decision - Support Tool for NHS Continuing Healthcare as requiring the support of two carers providing 24-hour support seven days each week from the date when the Claimant reached the age of 18 years and the parental obligation to provide care ceased. The risk of the PCT failing to provide such care was addressed by paragraph 1.3 of Schedule 2 to the settlement agreement, which provided that:

"In the event that the PCT fails to provide two full-time carers covering 24 hours per day for the entire period up to 15 December 2011, then by the undertaking and indemnity hereafter provided, the Defendant agrees to indemnify the Claimant in respect of the reasonable cost to the Claimant of replacing the hours of care lost by reason of the failure of the PCT to provide care as aforesaid."

The injury claim defendant undertook that:

"... in the event that the level of PCT provided care falls below that identified in paragraph 1.1 above, and the Claimant replaces that care by privately funded carers, then the Claimant shall be entitled to a payment from the Defendant of the sum required to supplement the care provided by the PCT to be measured by reference to the hourly rate paid by the Claimant in order to replace the shortfall in the PCT provided care subject to an annual cap of £247,500."

However, the undertaking was subject to the following qualifications:

"...

2. In order to facilitate such agreement, the Claimant shall, if requested, provide reasonable evidence of the withdrawal of or reduction in the PCT provided care and the fact of and cost incurred or likely to be incurred in replacement of the same.

3. Upon being provided with and being satisfied as to such evidence the defendant shall make and continue to make payment of the sum required to replace the said PCT care.

4. Any payment by the defendant in respect of such care shall continue for so long as the replacement care is in place and paid for by the Claimant save that any such liability under this undertaking shall cease on 14 December 2011."

I refer to these undertakings as the “safety net undertakings” hereafter. Cross undertakings were given by the Claimant to the following effect:

"The Claimant hereby undertakes that she will exercise reasonable endeavours to secure and/or maintain the provision of care relating to the period prior to 15 December 2011 by the PCT to meet her assessed needs as set out in paragraph 1.1 above. For the avoidance of doubt the said undertaking shall include, and the Claimant agrees to:

1. Co-operate with the PCT in all respects reasonably necessary to ensure the provision or continuation of any statutory funding, including but not limited to participation in any assessments that may be required in order to determine the Claimant's continuing eligibility for such statutory funding;
  2. Participate in any internal complaint and to take such other reasonable steps in connection with any complaint or other action relating to the Claimant's entitlement to receive statutory funding, any actual or threatened reduction of the same or any material change in the manner of its provision where such change likely to affect the level of any such funding;
  3. Lend her name to any action brought where such action is reasonably required to discharge the obligation to use reasonable endeavours and where the same is reasonably brought to the purpose of resolving any dispute or determining an issue relating to his entitlement to statutory funding;
  4. And hereby provides authority and gives any consent necessary in order to allow Direct Line Insurance Plc to communicate with the PCT to obtain access to such documents and other records as are held by the PCT relating to the Claimant that may be relevant to the Claimant's entitlement to or continuation of statutory funding."
6. The pre-settlement positions adopted by the parties to the injury claim in relation to the future provision of care were set out in the Claimant's schedule of loss and the injury claim defendant's counter-schedule of loss filed in injury claim proceedings. The Claimant's position had been that provision for privately funded care ought to be made from the date of judgment or settlement - see pages 2 and 23 of the Claimant's schedule. The injury claim defendant's position, as set out on page 17 of the counter-schedule, was that the Claimant had received all her care from the PCT pursuant to the PCT's statutory duties and that on the balance of probability the Claimant would continue to utilise a PCT provided and funded package and thus that no award for future care ought to be made.
  7. On 8 September 2009, HH Judge Holman sitting as a judge of the High Court gave permission to the parties to the injury claim to obtain from the PCT a statement as to (i) the Claimant's current care regime and (ii) any changes that it was intended to implement to that regime. The parties wrote to the PCT with a view to obtaining the

evidence that Judge Holman had given the parties permission to adduce. This resulted in a letter from Hempsons, the PCT's solicitors, dated 29 September 2009 under cover of which a statement from Ms Anita Rolfe, a senior official of the PCT, was supplied. In so far as is material for present purposes, the letter said:

"You will see that the PCT takes the view that the Claimant has made an election to seek privately funded community care. We take the view that she is fully entitled to do so pursuant to Section 2(4) of the Law Reform (Personal Injuries) Act 1948, as explained by the Court of Appeal in *Eagle v. Chambers* [2004] EWCA Civ 1033. ... As an election has been made in this case ... the primary role of the PCT is to work with the new care provider to be chosen by the Claimant. We appreciate that this may be seen by the parties to this action, in particular by the defendant as a change of approach and one where the parties may wish to consider the consequences carefully with their leading counsel. ... If these matters are in dispute (and we hope that this is not the case) we are anxious to avoid a situation where the trial of the quantum issues in this case should be adjourned so that the matters are considered in the administrative court."

In her statement, Ms Rolfe said:

"...

4. The NHS is not a means tested service and is provided to patients on the basis of their medical needs without reference to their financial position. However, it is an inevitable fact of the NHS that the resources we have available to us are unable to meet all the needs of all of our patients and the PCT has an absolute statutory duty to break even financially each year.

...

9. ... the PCT accepts that [the Claimant] has made ... an election and therefore is seeking to have her care provided privately following the court hearing.

10. The PCT accepts that patients are entitled to seek private community care and this seems appropriate in this case because the comprehensive nature of the care package which can be funded through a personal injury award is far more extensive than could be afforded under the NHS. ...

11. As a matter of principle, once a patient has made an election and is awarded damages on the basis that care is to be provided on a private basis, the PCT does not consider that such a person has a "reasonable requirement" for continuing healthcare."

Thus, at that stage, the PCT recognised that a Claimant ceased to have a reasonable requirement for continuing healthcare only if he or she was awarded damages on the

basis that care was to be funded on a private basis on the assumption that a privately funded care scheme would be instituted from the date of judgment or settlement. No consideration had apparently been given at that stage to a case where it was agreed or judgment was given by reference to an assumption that a privately funded scheme would commence from some later date. There is no reason to suppose that the PCT were aware at that stage that settlement in the terms eventually agreed was a possibility.

8. On 15 October 2009, the PCT's solicitors wrote to the Claimant's then solicitors again in these terms:

"... it appears to us that it is possible that both [the Claimant] and the [Interested Party] do not appreciate the position of the PCT in this case. ... The PCT considers that [the Claimant] has made an election to seek privately funded continuing care and has asked that damages be assessed in her favour on this basis.

...

Where a person in [the Claimant's] position has made an election to seek privately funded continuing care under Section 2(4) Of the Law Reform (Personal Injuries) Act 1948, as Ms Rolfe's witness statement explained, the PCT considers that such a person has no "reasonable requirement" for the NHS to provide such care. This is care which Ms Booker is entitled to claim within the personal injury action on a private basis to be funded by the insurers. She has made such a claim in this case. We therefore cannot see that it can be seriously argued that she has a "reasonable requirement" that the NHS provide her with such care in the future. ... Our client's concern is to ensure that there is a proper allocation of resources to the patients who most need NHS services. It follows that once an election has been made under Section 2(4) and judgment has been achieved against a solvent insurer who has an absolute responsibility to meet this liability, the PCT considers that it is fully entitled to take the position that such a person has no "reasonable requirement" for the NHS to provide such care. ... Whatever the terms of the final agreement, which is not a matter for the PCT, the PCT will withdraw NHS continuing care from Ms Booker in accordance with the above timetable. We trust that this will mean that there is a smooth transition to privately funded care. We confirm that the PCT intends to continue with the present level of support during the handover period."

It was accepted that future care would have to be provided over a reasonable handover period which the PCT's solicitors considered should be completed by 1 April 2010. This letter apparently went further than what had gone before because of the indication that care would be withdrawn (subject to a properly organised handover arrangement) "... [W]hatever the terms of the final agreement, which is not a matter for the PCT". It was not explained how this was said to be consistent with the earlier reference in the letter to judgment having been achieved "... against a solvent insurer who has an absolute responsibility to meet this liability" not least because judgment is

never obtained against an insurer in these circumstances. The not very clear implication of what was being said suggested that care could properly be withdrawn as long as a judgment was obtained, or a settlement agreement was concluded, by a injury claim claimant against or with a fully insured injury claim defendant irrespective of the terms of the judgment or settlement agreement..

9. On 3 November 2009, the PCT's solicitors were sent a copy of the order made in the injury claim - see Bundle, page 199. Thus from that date the PCT knew or is to be taken as knowing the terms of the settlement agreement.
10. On 29 January 2010, a letter was sent to the PCT's solicitors jointly by the Claimant's then solicitors and the solicitors acting for the Interested Party. In that letter, it was observed that the Claimant's claim had been compromised on terms that envisaged that the PCT would provide care down to 15 December 2011 and confirmation was sought that the threat to withdraw services prior to that date was withdrawn. This letter contemplated that in the event that the threat was not withdrawn a complaint would be made to the Health Service Ombudsman. On 17 February 2010, the defendant's solicitors responded. In the letter of response, it was accepted that the PCT would not withdraw care services until a safe handover could be achieved, that was expected to take between four and nine months and therefore:

"There is ... no end date for the withdrawal of services."

11. There matters rested until, on 7 June 2010, the PCT's solicitors wrote to the Claimant's solicitors in these terms:

"Your client will be aware that our clients are actively engaged with your client and her family to put the private package of care into place as soon as possible. Your client made an election to seek privately funded continuing care and asked for the damages to be assessed in her favour on this basis. She and her family continue to inform the PCT that they wish the care package to be in place as soon as possible and although there has been some slippage in the transitional provision, our clients are likely to be in a position to handover at the latest by 1 September 2010.

During the transition there has been considerable work for our clients and additional cost...

We will be obliged if as a matter of urgency you would confirm the following

1. As soon as the care package is agreed, be it on 1 September 2010 or earlier, funds will be available.
2. Thereafter the appointed case manager will be responsible on behalf of your client for the safe provision of competent care and will address any deficits that arise.

3. You on behalf of your client will ensure the additional costs referred to above will be satisfied by prompt payment of contemporaneous invoices, any outstanding amounts to be satisfied by 1 September 2010."

It is apparent from this letter that the wish of the PCT as at the date of that letter was to withdraw services from 1 September, 2010 at the latest. In my judgment it was at this stage that a reviewable decision could first arguably be said to have been taken that justified the commencement of judicial review proceedings. On the assumption that this is correct, proceedings were in the end commenced on 15 September 2010, some eight days outside the three month period referred to in CPR 54.5(1)(b).

12. Prior to the issue of these proceedings, there was correspondence between the parties that is relevant to the PCT submission that no extension of time ought to be granted to the Claimant for the commencement of these proceedings.
13. On 7 July 2010, the Claimant sent a pre-action protocol letter to the PCT's solicitors. That letter made express reference to the letter of 7 June 2010 referred to above. That letter also stated that:

"We wrote to you on 5 July 2010, pointing out the transfer to a private package at this time was premature, and enclosing the 2009 order, which made it clear that there can be no issue of double recovery at this stage. We asked for assurances that the provision of services by Oldham PCT would be continued, and that a second carer would be appointed to meet our client's needs. We asked for reimbursement of the cost of providing services to date, such services should have been provided by the PCT. We have not received a reply.

Our client has not "elected" to seek to have her care provided privately as described in your letter of 7 June 2010. She did not ask to have her damages assessed in her favour on that basis, as further described by you. Our client settled her claim for damages in the terms set out in the order that you have seen which does not provide for the payment of periodical payments ... for paying for services until 15 December 2011.

In the circumstances, it is our client's case that the PCT's position that our client does not have a "reasonable requirement" for continuing healthcare on the basis that she has "elected" to make private provision, is irrational and unlawful if services are withdrawn prior to the date when it has been agreed that periodical payments will be paid.

14. Compliance with the pre-action protocol is not in itself a justification for delay in the commencement of proceedings. However, on 13 July 2010, the PCT's solicitors wrote to the Claimant's solicitors indicating an intention to reply to the Claimant's pre-action protocol letter and suggesting that the commencement of proceedings before 20<sup>th</sup> July 2010 would be premature. However, in the end, the PCT's solicitors

responded substantively by letter dated 15 July 2010 which included the statement that:

“We are however giving you notice that the PCT will not be prepared to fund the care package after 1 October 2010. If it has not been possible to recruit and train all the staff needed to deliver care to [the Claimant] by that date the PCT will arrange for the existing staff to be available to be hired on a contract basis for a short period. [The Claimant] can then claim the cost of that back from insurers under the indemnity provided in the settlement agreement.”

### **The Extension of Time Issue**

15. The PCT contended originally that the decision to withdraw care services was taken on or about 29 September 2009, that proceedings should have been commenced within three months of that date, that there was no good reason to extend time beyond the expiry of that period and in consequence these proceedings should be dismissed or the giving of permission to commence these proceedings ought to be withdrawn. I am entirely satisfied that neither of these courses is appropriate and to the extent that it is necessary to do so, I ought to extend the Claimant's time to commence these proceedings down to 15 September 2010 being the date when they were commenced.

16. CPR 54.5 provides as follows:

"(1) the claim form must be filed:

(a) Promptly; and

(b) In any event not later than three months after the grounds to make the claim first arose."

I do not accept the proposition that time started to run in this case on 29 September 2009. No decision to withdraw care from a particular date had been taken as at that date. It was submitted that this was no longer the case once a care plan had been agreed as it was on 15 December 2009 because from that date it was clear that the PCT would withdraw care with effect from September 2010. I do not accept that to be a sustainable proposition given the terms of the correspondence and in particular the terms of the letter of 17 February 2010, the relevant part of which is set out above. In the end it was submitted on behalf of the PCT that time started to run from 7 June 2010 so that on any view these proceedings were commenced some eight days out of time. I accept this submission and indeed it was at least implicitly accepted on behalf the Claimant. However, I consider that it is appropriate to extend time for the commencement of these proceedings by eight days for the following reasons.

17. First, I consider the letter of 15 July 2010, with its suggestion that it would be premature to commence proceedings prior to 20 July 2010, to be fatal to any other suggestion. I say this because it is it cannot credibly be submitted either that any actual prejudice had been suffered or good administration adversely affected by any delay prior to the date of that letter or that any would be suffered thereafter down to the 20 July. If the contrary was the case then the suggestion that it would be

premature to commence proceedings prior to 20 July 2010 could not and would not have been made. Secondly the Claimant was entitled to take that assertion at face value. On any view therefore the statement would provide an objectively good reason for delaying the commencement of proceedings down to the date when the substantive response to the pre action protocol letter was received. Thirdly, there is no evidence of any prejudice being suffered by the PCT either after 20 July 2010 or at all. The most that could be said is that the PCT has incurred costs after 1 October 2010 that might have been avoided if proceedings have been started earlier. However, such an assertion is not maintainable in the circumstances of this case because my Order giving permission records an undertaking by the Claimant that:

"... if this claim is unsuccessful or until further order, to reimburse the [PCT] reasonable cost of providing a care package from 1 October, 2010."

It is not apparent to me what detriment to good administration logically could have occurred as a result of the delay that has occurred. However, the overwhelming point, which in my judgment leads to the conclusion that time ought to be extended in the circumstances of this case, is that the public interest requires that this application be determined on its merits. I say this because if the PCT is correct then the impact on public finances is likely to be substantial and the effect on the conduct of catastrophic injury litigation is likely to be significant as well. In the result therefore I extend time to the commencement of these proceedings down to 15 September 2010 being the date when in fact they were commenced. I now turn to the substance of the Claim.

### **Statutory Framework Relevant To The Substantive Issues**

18. By Section 2 of the Healthcare Act 2009, the PCT is required to “...*have regard to the NHS Constitution for England*”. Section 1 of the Constitution sets out the principles that guide the NHS. Paragraph 1 provides:

"The NHS provides a comprehensive Service, available to all irrespective of gender, race, disability, age, sexual orientation, religion or belief."

Paragraph 2 within the same section 1 provides that:

"Access to NHS services is based on clinical need, not an individual's ability to pay. NHS services are free of charge, except in limited circumstances sanctioned by parliament.

Section 2 of the Constitution contains a summary of the rights of those entitled to services from the NHS. Those rights include:

"Access To Health Services:

You have the right to receive NHS services free of charge, apart from certain limited exceptions sanctioned by parliament.

You have the right to access NHS services. You will not be refused access on unreasonable grounds."

19. It is common ground that the relevant duties are those set out in Sections 1 to 3 of the National Health Service Act 2006, which are to the following effect:

“ **1. Secretary of State's duty to promote health service**

(1) The Secretary of State must continue the promotion in England of a comprehensive health service designed to secure improvement:

- (a) in the physical and mental health of the people of England, and
- (b) in the prevention, diagnosis and treatment of illness stop

(2) The Secretary of State must for that purpose provide or secure the provision of services in accordance with this Act.

(3) The services so provided must be free of charge except in so far as the making and recovery of charges is expressly provided for by or under any enactment, when ever passed.

**2. Secretary of State's general power**

(1) The Secretary of State may:

- (a) provide such services as he considers appropriate for the purpose of discharging any duty imposed on him by this Act, and
- (b) do anything out of which is calculated to facilitate, or is conducive or incidental to, the discharge of such a duty.

...

**3. Secretary of State's duty as to provision of certain services**

(1) The Secretary of State must provide throughout England, to such extent as it considers necessary to meet all reasonable requirements:

- (a) hospital accommodation
- (b) other accommodation for the purpose of any service provided under this act and
- (c) medical, dental, ophthalmic, nursing and ambulance services,
- (d) such other services or facilities for the care of pregnant women, women who are breastfeeding and young children as he considers appropriate as part of the health service, and
- (e) such other services or facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons

who have suffered from illness as he considers appropriate as part of the health service

(f) such other services or facilities as are required for the diagnosis and treatment of illness. ”

The duties set out in Sections 1 and 3 of the 2006 Act are executed on behalf of the Secretary of State by Primary Care Trusts including the PCT pursuant to Section 7 of the 2006 Act and the NHS (Functions Of Strategic Health Authorities and Primary Care Trusts and Administrative Arrangements (England)) Regulations 2002.

20. Section 2 (4) of the Law Reform (Personal Injuries) Act 1948 (as amended) provides that:

“ (4) in an action for damages for personal injuries (including any such action arising out of contract), there shall be disregarded, in determining the reasonableness of any expenses, the possibility of avoiding those expenses or part of them by taking advantage of facilities available under the National Health Service Act 2006 ”

### **The Parties Respective Submissions On the Main Substantive Issue**

21. The PCT's case is that the sole obligation of the PCT exercising the functions of the Secretary of State under Section 3 of the 2006 Act is to provide services to the Claimant pursuant to Section 3(1)(e) only to the extent that it considers it is necessary to meet all her reasonable requirements and that the PCT was entitled to conclude that the Claimant did not have a reasonable requirement given the terms of the settlement agreement and having regard to the resources available and the absolute duty of the PCT to break even financially. It was further submitted that the position was in principle exactly the same irrespective of whether an agreement had been reached with the injury claim defendant for the immediate provision of continuing care on a private basis or, as here, for provision of continuing care on a private basis from a fixed future date alternatively in that event where there are undertakings given by the injury claim defendant and her insurer to the effect of the safety net undertakings. In any of these cases it was submitted that the PCT would be entitled to conclude that there was no reasonable continuing requirement for future care from the date the agreement was concluded and irrespective of the date when it was contemplated that privately funded continuing care would commence. It was further submitted that absent a conclusion that the decision reached was an irrational one, the court would never quash a decision not to provide health care services that was reached taking into account cost or other demands. The principal authority relied upon in support of these contentions was R (Rogers) - v - Swindon NHS Primary Care Trust [2006] EWCA Civ. 392 [2006] 1 WLR 2649 where at paragraph 58 and 77, Sir Anthony Clarke MR said:

"58. ... this case would be very different if the PCT had decided that as a matter of policy it would adopt the Secretary of State's guidance that applications should not be refused solely on the grounds of cost but that, as a hard-pressed authority with many competing demands of its budget, it could not disregard financial restraints and that it would have regard both to those restraints and

to the particular circumstances of the individual patient in deciding whether or not to fund Herceptin treatment in a particular case. In such a case it would be very difficult, if not impossible to say that such a policy was arbitrary or irrational.

...

77. We see nothing arbitrary or irrational about that approach. It could properly involve a decision by a trust which was subject to financial constraints and which decided that it could not fund all the patients who applied for funding for the Herceptin treatment, to make the difficult choice to fund treatment for a woman with, say, a disabled child and not for a woman in difference personal circumstances."

This led to the submission on behalf of the PCT in this case that it was rationally entitled to decide not to provide continuing care other than transitional care by reference to the factors identified by Ms Rolfe in paragraph 4 of her statement in these proceedings. It was further submitted that in considering the rationality issue, this was one of those cases where legislation had made the PCT a judge of fact and thus it was the duty of the court not to interfere unless it was "... *obvious that the public body consciously or unconsciously is acting perversely*" – see Puhlhofer - v - London Borough of Hillingdon [1986] AC 484 at 518 B – F. In the result, it was submitted, that there was no proper basis for concluding that the decision of the PCT was irrational and on the contrary it was a decision that was entirely reasonable having regard in particular to what was described as the "*tortfeasor pays*" principle.

22. The Claimant's case, which is supported by the Interested Party, is that the PCT has proceeded on the factually misconceived basis that she was entitled to fund her care privately from the date of the Consent Order when in fact she has agreed to settle her personal injuries claim against the injury claim defendant only on the basis that privately funded care would commence from 15 December 2011. It was submitted that it was not open to the PCT to dictate how and when a third party would provide a privately funded care package. If and to the extent that the PCT claimed to be entitled to have regard to the safety net undertakings that too was misconceived because it contradicted the very principle that Ms Rolfe had identified in paragraph 4 of her witness statement as a guiding principle namely that the "... *NHS is not a means tested service and is provided to patients on the basis of their medical needs without reference to their financial position*" and ignored in particular the parts of the NHS Constitution mentioned above and s.1(3) of the 2006 Act. In those circumstances, having assessed the Claimant as needing a certain level of future care, it was unlawful for the PCT then to withdraw that service prior to 15 December 2011. Section 2 (4) of the Law Reform (Personal Injuries) Act 1948 is irrelevant for present purposes because it applies only to regulate the position as between an injury claim claimant and an injury claim defendant and requires only that a defendant to an injury claim cannot use the availability of NHS services to avoid liability for the payment for care on a private basis.

## Discussion

23. Section 1 (1) and (2) of the 2006 Act together establish as a target duty the provision of a comprehensive health service free to all at the point of delivery. However, Section 3 creates an enforceable duty to provide care facilities for those who are ill or have suffered illness subject to the qualification that the secretary of state or the PCT as his delegate need not provide such services where he or it does not consider they are reasonably required or would be necessary to meet a reasonable requirement -- see R - v - North and East Devon Health Authority ex parte Coughlan [2001] QB 213 per Lord Woolf MR at 230 D. It was submitted on behalf of the PCT that it was or ought to be common ground that individual treatment decisions were to be made on the basis of the principles set out in section 3 of the 2003 Act. I am content to proceed on the basis suggested on behalf of the PCT without deciding this point since the approach advocated by the PCT cannot in the end prejudice the position of the Claimant. However, even accepting that this is as the correct approach, I am not able to accept that the decision taken by the PCT in this case was one that was lawful or rational. My reasons for reaching that conclusion are set out below.
24. The Secretary of State's policy for the provision of NHS continuing healthcare is set out in the National Framework Document dated July 2009. There is nothing within that document that supports the conclusion that the PCT was entitled to refuse continuing healthcare provision on the basis adopted here. Whilst the availability of privately funded healthcare is nowhere specifically mentioned, in paragraph 46 it is stated that:

"Eligibility for NHS continuing healthcare is based on an individual's assessed health needs. The diagnosis of a particular disease or condition is not in itself a determinant of eligibility for NHS continuing healthcare."

and at paragraph 47 it is said that:

"... the decision-making rationale should not marginalise a need just because it is successfully managed: well-managed needs are still needs. Only where the successful management of the healthcare need has permanently reduced or removed an ongoing need will this have a bearing on NHS continuing healthcare eligibility."

At paragraph 49 of the National Framework Document it is said that the reasons given for a decision on eligibility should not be based on either the fact that the need is well-managed or on any other "*input - related (rather than needs - related) rationale*". At paragraph 100 of the policy document, under the heading "*Provision*" it is said that:

"Where a person qualifies for NHS continuing healthcare, the package to be provided is that which the PCT assesses is appropriate for the individual's needs".

This approach is entirely consistent with paragraph 2 of section 1 of the NHS constitution set out above. It is also consistent with the summary of rights set out in section 2 of the Constitution also set out above.

25. It was submitted on behalf of the PCT that the decision not to continue providing care for the Claimant was not made by reference to the ability of the Claimant to pay but rather by reference to her decision to receive continuing care on a private basis. The PCT consider that it is entitled to draw a distinction between someone who has the means to pay for care privately and someone such as the Claimant in these proceedings who has recovered damages for personal injury. I am not persuaded that the distinction is at all as clear as the PCT maintains or that it forms a sound basis for arriving at the conclusion that has been reached in this case. A Claimant who is successful in recovering damages is entitled to do with the damages as he or she pleases. It is for this reason that the Interested Party insisted upon the inclusion within the settlement agreement of anti-double recovery provisions. On that basis there is no clear distinction that can be drawn by a PCT in the position of this PCT between a person who is independently wealthy or is insured in relation to medical expenses and someone who has sufficient means to provide for his or her care privately by reason of what has been recovered in damages. In each of these cases, to refuse treatment by reference to the means of the patient would in my judgment be contrary to the principle identified by Ms Rolfe in her witness statement that the "... NHS is not a means tested service and is provided to patients on the basis of their medical needs without reference to their financial position." It is contrary to the principle set out in s.1(3) of the 2006 Act and could not have been arrived at if regard had been had to the provisions of the NHS Constitution to which I have referred above.
26. In my judgment the attempt to rely upon the "*tortfeasor pays*" principle was misplaced. It is worth noting at the outset that technically it is not the tortfeasor that will be paying for care if the PCT is right but the Claimant, who will probably be entitled to recover her outlay from the injury claim defendant or her insurers by reference to the safety net undertakings. Conventionally, the "*tortfeasor pays*" principle is one that applies to the assessment of damages claimed by Claimants in personal injury litigation. Hitherto, it has had no place to play in determining whether care that someone in the position of the Claimant is otherwise eligible to receive from the NHS should be withheld. The true "*tortfeasor pays*" principle is that which was identified in Peters - v - East Midlands SHA (2009) EWCA Civ 145 [2010] QB 48. Those proceedings were concerned with a claim for negligence against the East Midlands SHA. The SHA argued that since the Claimant had a statutory right to have her care and accommodation provided by the local authority, she could not recover the costs of providing such care privately. That submission failed before both the trial judge and the Court of Appeal. The principle is that set out at paragraph 53 to 54 the Court of Appeal's judgment:

"... we can see no reason in policy or principle which requires us to hold that a Claimant who wishes to opt for self-funding and damages in preference to reliance on the statutory obligations of a public authority should not be entitled to do so as a matter of right. The Claimant has suffered loss which has been caused by the wrongdoing of the defendants. She is entitled to have that loss made good, so far as this is possible, by the provision of accommodation and care. There is no dispute as to what that should be on the council currently arranges for its provision ... The

only issue is whether the defendant wrongdoers or the council and the PCT should pay for it in the future.

It is difficult to see on what basis the present case can in principle be distinguished from the case where a Claimant has a right of action against more than one wrongdoer or a case ... where a Claimant has a right of action against the wrongdoer and an innocent party. ... In our judgment the present case should be treated in the same way. It is true that in the present case the Claimant's right against the council is the statutory right to receive accommodation and care. But the fact that there is a statutory right in the Claimant to have his or her loss made good in kind, rather than by payment of compensation, is not a sufficient reason for treating the cases differently.”

The origin of these principles is Section 2(4) of the Law Reform (Personal Injury) Act 1948 as amended as is apparent from Eagle - v - Chambers (No.2) [2004] EWCA Civ. 1033 [2004] 1 WLR 3081 where the Court of Appeal accepted as accurate the statement that:

"The authorities establish that the Act is to be regarded as preventing a tortfeasor from raising an argument that because facilities are available on the NHS it is unreasonable to allow the higher costs of obtaining goods and services privately ... The question therefore becomes one of fact: who will provide the services. If the answer is that the Claimant will purchase goods and services privately then it is no answer that the Claimant could obtain them under the auspices of the NHS more cheaply. If the facts establish that the Claimant will obtain goods and services freely under the auspices of the NHS then the cost of obtaining them privately will not be allowed ... the question is never "are the services available on the NHS" it can only be "are the services available on the NHS and am I satisfied they will actually be provided to the Claimant: thus obviating the need to purchase them privately" these are not matters of theoretical concern to a judge: in each case must be satisfied that the Claimant will actually get the relevant service from the NHS."

27. There is no authority however that supports the proposition that the NHS is entitled to rely upon this doctrine as a basis for avoiding the provision of services to a person who would otherwise be eligible to receive them. This led the PCT to submit that it was nonetheless entitled to decide as it did since no statute precluded the NHS from taking into account what the PCT calls the “*tortfeasor pays*” principle in deciding either that it was not necessary to provide future healthcare for the Claimant or that the Claimant did not have a reasonable requirement for future healthcare provision applying the reasoning set out in paragraph 24 of the judgment in Coughlan (ante). In support of this proposition, the defendant relied on the statement of principle in paragraph 35 of the judgment of Laws LJ in R (Khatun) - v - Newham London Borough Council [2004] EWCA Civ. 55 [2005] QB 37 that:

"... where a statute conferring discretionary power provides no lexicon of the matters to be treated as relevant by the decision maker, then it is for the decision-makers eight and not the court to conclude what is relevant subject only to Wednesbury review."

In my judgment this reasoning does not lead to the conclusion for which the PCT contends. First, in deciding whether a service is reasonably required or is necessary to meet a reasonable requirement, the PCT is bound to have regard to the duties imposed by Section 1 of the 2006 Act - see paragraph 24 to 26 of Lord Wolfe's judgment in Coughlan (ante). It follows that the PCT must have regard to the target duty to provide a comprehensive service free at the point of delivery. Secondly in reaching a decision the PCT is bound to have regard to the NHS Constitution for the reasons already set out above. It is therefore bound to have regard to the principle that access to NHS services is based on clinical need not on an individual's ability to pay and that a person who is otherwise eligible for treatment is entitled to receive it free of charge. Thirdly in my judgment in reaching a decision in a case such as this, the PCT is bound to have regard to and indeed to carry into effect the policy set out in the national framework document. This document established the national policy to be applied in deciding on eligibility for future healthcare. Paragraph 47 and 49 of the framework document in particular cannot support the notion that a person should not be treated as eligible by reference to the ability of the person concerned to access funding for such care from another source. Indeed, paragraph 49 of the framework document plainly contradicts such an approach. The reality is that this Claimant's need for continuing healthcare will only be removed for so long as a private package has been successfully established and implemented. Unless and until that has occurred, the principle set out in paragraph 47 of the framework document cannot apply.

28. The PCT placed heavy reliance on the statement of principle to be found in the passage from R (Rogers) (ante) that I have set out above. However, it is important to note that what was actually decided in that case. There the PCT had adopted a policy of providing the treatment concerned (the provision of an un-licensed drug) without regard to cost but only in exceptional circumstances. The Court of Appeal decided that the policy was irrational because once financial considerations had been ruled out the personal characteristics of a particular patient not based on healthcare needs were irrelevant and the only relevant considerations were the clinical needs of the patient concerned.
29. Here there is nothing within the framework document that suggests that financial considerations are relevant to the provision of future healthcare of the type now being considered. There does not appear to be any general policy operated either by the NHS at national level or by this PCT not to provide such healthcare to someone otherwise eligible to receive it because they could have but have not claimed it from a tortfeasor. As far as I can tell, the decision taken in this case was a particular decision taken in relation to a particular individual initially at any rate on the basis of a misconception as to the facts. This is not a case where the PCT has decided that a particular form of treatment cannot be provided to anyone because it is low on the list of priorities nor is it a case where the PCT has decided that it cannot afford to provide care for everyone who is otherwise eligible to receive it because it does not have the funds to do so. The reality is that the PCT has decided to refuse treatment, even though it is common ground that the Claimant is eligible to receive it, because she has

a means of funding a privately provided care package. In my judgment that is wholly different to the situation being considered in R (Rogers) (ante) in the passages that I have referred to earlier in this judgment because this is not a case where the PCT allege that funds are not available to provide the care required to all who are eligible to receive it. Rather it is alleged that if the costs of providing future healthcare to the Claimant were avoided, the funds saved could be deployed for other purposes.

30. Ultimately the only basis for refusing treatment to this Claimant but not to another is the presumed ability of this Claimant to recover the costs of paying for her care herself by reference to an indemnity to be obtained pursuant to the safety net undertakings. In my judgment that was not a position it could lawfully or rationally adopt. As the Master of the Rolls observed in R (Rogers) (ante):

"Mr Havers was naturally asked to give examples of personal circumstances which might justify funding one woman rather than another within the eligible group. ... The only positive example he gave was that of a woman with a child with a life limiting condition. For our part, we cannot see how that fact can possibly justify providing funding for that woman but not another when each falls within the eligible group and there are available funds for both. After all once financial considerations are ruled out, and it has been decided not to rely on NICE without exception, then the only concern which the PCT can have both relate to the legitimate clinical needs of the patient. The non-medical personal situation of a particular patient cannot in the circumstances be relevant to the question whether Herceptin prescribed by the patient's condition should be funded for the benefit of the patient. Where the clinical needs are equal, and resources are not an issue, discrimination between patients in the same eligible group cannot be justified on the base of personal characteristics not based on healthcare."

31. Whilst I have come to the conclusion that the PCT's decision in this case was unlawful for the reasons set out above, nothing I have said should be taken as expressing either an express or implied view as to the social and economic expediency of requiring a tortfeasor or his insurer to pay for the services that have been or will have to be provided by the NHS or other state funded bodies. As Dyson LJ observed in Crofton - v - National Health Service Litigation Authority [2007] EWCA Civ. 71 [2007] 1 WLR 923 at paragraph 87-89:

"... there is much to be said to the view that the tortfeasor should pay, and that the state should be relieved of the burden of funding the care of the victims of torts and that its hard-pressed resources should be concentrated on the care of those who are not the victims of torts. ... It does not seem right, particularly where the care costs are very large, that they should be met from the public purse rather than borne by the tortfeasor. ... To satisfy the "instinctive feeling" a change in the law would be necessary.

Such a change raises what is essentially a political question and, therefore, a matter for Parliament. ... Part 3 of the Health and Social Care (Community Health and Standards) Act 2003 (which

came into force in January 2007) provides that any person who has made a compensation payment in respect of an injury to another person would be liable to pay relevant NHS charges for treatment and ambulance services provided to that person. This legislation does not affect the assessment of damages as between the Claimant and the tortfeasor. We do not know whether this legislation signals a general change in the attitude of the legislature to the responsibilities of tortfeasors to pay for the costs presently imposed upon the public purse. We say only that we can see no good policy reason why the care costs in a case such as this should fall upon the public purse. We can see no good policy reason why damages which are about to be awarded specifically for the provision of care to the Claimant, needed only as a result of the tort, should be reduced, thereby shifting the burden from the tortfeasor to the public purse. We recognise that the mechanism by which these ends could be achieved with justice might be complex and difficult. But, as we say, these policies are a matter for Parliament."

If the state is to be relieved of the cost of caring for the victims of torts then the remedy lies in primary legislation which permits that cost to be recovered by the NHS or its constituent bodies direct from the insurers of the tortfeasor concerned rather than by individual decision-making of the sort that has occurred in this case. The logic of this is obvious: Aside from the risk of different approaches being adopted by different PCTs, decisions such as that under consideration in this case are likely to have a number of startling consequences. First it is likely that no claimant in the position of the Claimant could safely conclude settlement with such a tortfeasor other than on terms that future care was privately funded and so funded from the date of settlement without the prior consent to the terms of settlement of the PCT concerned (or its statutory replacement). That would necessitate involving the PCT concerned in any settlement negotiations and may mean that any dispute between such a Claimant (possibly but not certainly supported by the insurer of the tortfeasor concerned) and the PCT concerned would have to be resolved - presumably ultimately by judicial review proceedings - before a settlement could be concluded or concluded unconditionally. Such an approach would be likely to add significantly both to the delay in resolving such cases and to the cost of resolving them. If and to the extent that the safety net undertakings make a difference to the outcome then insurers would refuse to provide such undertakings which would expose a claimant in the position of this Claimant to great risk in the event that, for whatever reason, future care was not provided by the PCT concerned or its statutory replacement. In the result, if the PCT is correct in the submissions it makes in this case, the likely result will be cost, delay and uncertainty for the profoundly injured as they seek to recover compensation for catastrophic injuries for which by definition they have no responsibility and the possible creation of risk to the future healthcare needs of such people.

### **The Level of Care Issue**

32. As I have said already on more than one occasion in the course of this judgment, the Claimant has been assessed in accordance with the framework document as being eligible for the future healthcare and for care from two carers 24 hours a day seven

days a week. It is common ground that the defendant has not always provided such care. Paragraph 100 of the framework document provides that: *"where a person qualifies for NHS continuing healthcare, the package to be provided is that which the PCT assesses is appropriate to the individual's needs"*. In those circumstances, the Claimant submits that it is unlawful for the PCT to fail to provide care at the level which it has assessed is required by the Claimant. In my judgment there is no real answer to this point.

33. It was observed in the skeleton submission filed on behalf of the PCT that the answer to this question is ultimately dependent on whether the PCT was entitled in law to reach the decision it had reached in relation to the main issue already considered. In my judgment the Claimant was entitled to receive the level of future healthcare she had been assessed as eligible to receive unless it could be said that the shortfall was being provided by others. That qualification was not met by the fulfilling of care needs by the Claimant's mother otherwise than as a result of a free choice made by the Claimant. Likewise, I can see no proper basis for failing to provide consumables at any rate prior to 15 December, 2011.

### **Remedies**

34. The remedies sought by the Claimant in the Detailed Statement of Facts and Grounds were first a quashing order quashing the decision by the defendant to withdraw services and a mandatory order to ensure that services were provided that met the Claimant's assessed needs. However, at the conclusion of the hearing, all parties asked me to leave a period between the delivery of this judgment to the parties in draft and its hand down so as to facilitate a discussion between the parties concerning amongst other things the appropriate remedies. Accordingly I stand over until the hand down hearing the formulation of the appropriate relief having regard to the conclusions I have reached in this judgment.

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