Weightmans

Healthcare
March 2010

Welcome to the March edition of the Weightmans' healthcare newsletter. This edition covers data protection, inquests, healthcare litigation, construction law, commissioning, mental health, employment, ethics, commercial dispute resolution and commercial law. I hope that whatever your role in the NHS you will find something of interest here.

I am always keen to have your feedback on the healthcare newsletter and suggestions on how we might improve it. I am particularly keen to have your suggestions for future articles so please do let me have your comments.

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Weightmans news

We were delighted to be appointed by the North West Collaborative Commercial Agency (NWCCA) to be on the panel in all nine lots for which we applied. We are on the panels for Healthcare Law, NHS Governance and Public Law, Primary Care Services, Mental Health Law, Employment Law, Contract and Commercial, Property, Construction and IT/e-commerce. This comes on the back of recent appointments by NHS Warwickshire, Wrightington, Wigan and Leigh NHS Foundation Trust and the hubs in the Midlands (HPC), London (LPP) and the South East Coast hub.

Weightmans has strengthened its offering in the South by recruiting Emma Galland to work alongside Kiran Bhogal and her team. The employment team in the North West has been boosted by the recruitment of Kevin McKenna.

Upcoming training

Claims forum

We are holding our ever popular claims forum for claims and complaints managers in the Manchester office on 16 March. To book a place, please e-mail Georgina Rowley at georgina.rowley@weightmans.com. The forum is a great networking event for those involved in complaints and claims, and we will be providing information and training on inquests, costs, data protection, complaints, to mention a few subjects.

Healthcare events programme – Inquests & Incidents

There is a much greater need for a fuller and more in-depth understanding of the remit of the coroner in light of the Human Rights legislation and the proposed coronial reforms.

This seminar will focus on the latest legal developments and the proposed reforms with an emphasis on practical guidance and tips from experienced litigators on key areas,

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including the overlap with serious untoward incidents and the use/disclosure of information gathered.

The seminars will take place on the following dates at various venues:

11 March – Jurys Inn, Birmingham City Centre
18 March – Weightmans London office

For more information and to register your interest, see our website:
http://www.weightmans.com/news_and_events/events/healthcare_events_programme_-2.aspx

Healthcare events programme – Mental Capacity Act
This seminar will consider the latest decisions and guidance about the Mental Capacity Act, as well as deal with the DoLS, where the first case has just been heard. The seminars will take place on the following dates:

25 March – Weightmans Manchester office
22 April – Jurys Inn, Birmingham City Centre
28 April – Weightmans London office

For more information and to register your interest, see our website:
http://www.weightmans.com/news_and_events/events/healthcare_events_programme_-3.aspx

Health and Safety essentials in the healthcare sector
This course has been specifically designed to help managers and supervisors understand their H&S responsibilities and implement safe working practices and procedures within areas under their control. Taking place on 27 May 2010 in the India Buildings, Liverpool, this one day course aims to help delegates acquire an understanding of the statutory obligations placed on individuals and organisations by focussing on the key, non-clinical issues facing the healthcare sector. For further information, see the following link:
http://www.weightmans.com/docs/Healthcare%20flyer%20%20May%202010.doc

Proposed 'mock trial' seminar for the healthcare sector
Weightmans' regulatory service is proposing to host an event later this year with a specific healthcare theme that will follow a case study of a fatality in a healthcare establishment. The event would consist of a one day workshop, exploring in a 'real' court environment, how evidence is gathered and charges are brought against a healthcare trust.

If you would be interested in attending such a seminar or would like further information, please contact nick Wilson on nick.wilson@weightmans.com

Articles

Data Protection

The ICO's powers increase! – Laura Hale reports on the Information Commissioner's new power to issue assessment notices and reports that this will give his officers the ability to lawfully enter buildings in order to inspect documents and to interview staff who are data processors.

Inquests

Fit for a Jury? – Georgina Rowley considers the case of **Lewis v HM Coroner for Mid and North Shropshire** in which the Court of Appeal was asked to decide whether a coroner's Article 2 duty to carry out a full investigation into a

death in custody was properly met when matters that could have contributed to the death were not put before the jury.

A case law digest – Kiran Bhogal provides a summary of recent cases of interest to those dealing with coroner's inquests.

Litigation

Bad news for the District General? – Richard Jolly discusses the surprising implications of the Court's decision in **Laura May v Lancashire Teaching Hospitals NHS Trust** which highlights the difficulties faced by NHS trusts when juggling their increasingly scarce resources and the potential ramifications of resource based decision making.

Construction Law

I'm not an expert, get me out of here – Paul Donnelly offers advice to those facing construction disputes. In our first construction article Paul tells you how identifying the nature of your witnesses at the outset, may help the course of your litigation run smoothly.

Commissioning

A revised framework for Continuing Care – A brief "newsflash" on the recently published amendments to the national framework for Continuing Care.

Issue in Haste Repent at Leisure – Georgina Rowley reports on the case of **R (S) v Hampshire County Council**, where she comments that the case acts as a reminder to those claimants involved in commissioning disputes with public bodies, that judicial review proceedings really are a remedy of last resort.

Mental Health

Harder to get – David Hewitt examines the case of **Johnston v the Chief Constable of Merseyside** and comments that those seeking to bring claims under the Mental Health Act now have a bigger hurdle to clear as the case suggests that they must prove that their claim has a real prospect of success.

Employment Law

When is a contract not a contract? – Mari Griffith from our employment law team reports on the case of **Shrewsbury and Telford Hospital NHS Trust v Lairikyengbam** where a locum consultant sought damages for unfair dismissal although his contract was ultra vires, as he had not been appointed in accordance with the requirements of the Appointment of Consultants Regulations 1996. The Employment Appeals Tribunal decided in this case that, although the contract was void at law, the appellant could recover damages under the Employment Rights Act.

Human Rights

The Law doesn't always recognise transsexuals – David Hewitt's article on the decision in **R (AB) v Secretary of State for Justice and the Governor of Manchester Prison** where a prisoner's right to be treated as a woman and to be accommodated in a women's prison where she held a gender recognition certificate was confirmed by the High Court. David asks whether the decision should really be hailed as a victory for the recognition of the Article 8 rights of transsexuals who have yet to undergo gender realignment surgery.

Commercial Dispute Resolution

Bad news for business debtors – Sarah O'Driscoll from Weightmans' Commercial Dispute Resolution team provides a full case report on **Fitzroy Robinson Ltd v Mentmore Towers Ltd** a case concerning the amount to be awarded for late payment of a commercial debt.

Commercial Law

Remaining compliant – Lynne Rathbone undertakes a whistle stop tour of the new Monitor Compliance Framework which will be introduced in April this year and sets out its implications for NHS Foundation Trusts.

Data Protection

The ICO's powers increase!

In November 2009, the Information Commissioner's Office ('the ICO') revealed that of the 711 organisations who reported security breaches to the ICO over the past two years, 209 were NHS bodies. In this context it is perhaps not surprising that the Information Commissioner is about to get further powers to ensure that the NHS, and other public authorities, handle personal data appropriately.

The Coroners and Justice Act 2009 received Royal Assent on 12 November 2009 and makes provision for 'Assessment Notices'. Although a commencement date is yet to be announced, it is important to be aware of the new provisions which will form sections 41A-C of the Data Protection Act 1998.

An Assessment Notice can require a data controller to do a number of things including:

- permitting the Commissioner (or his staff) to enter any specified premises
- directing the Commissioner to documents on the premises of a specified description
- assisting the Commissioner view any information of a specified description that is capable of being viewed on the premises
- providing copies of documents for the Commissioner
- permitting the Commissioner to inspect or examine any documents or information
- permitting the Commissioner to observe the processing of personal data
- making available for interview those people who process personal data for the data controller

Assessment Notices can be served on data controllers where they are a public authority, which will include NHS Organisations.

An Assessment Report will confirm whether the data controller is complying with the data protection principles and if not, will set out any recommendations to ensure compliance.

The Commissioner is to prepare a code of practice as to the manner in which he will carry out his functions with regard to Assessment Notices. At present, both further information on the Code of Practice and the commencement date are awaited.

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Editor's note
These new powers may be strengthened further following the Ministry of Justice's consultation on the levels of fines that could be imposed upon those who commit serious breaches of the DPA. The consultation ended in December and recommendations are awaited. It is thought that the consultation may support the imposition of severe financial penalties (up to £500,000) for the most serious offenders.

Inquests

Information fit for a Jury?

R on the Application of Lewis v HM Coroner for Mid and North Shropshire

In this case, the Court of Appeal was asked to consider whether a coroner's duty to carry out an Article 2 inquest was properly met when matters that could have contributed to a death in custody were not put to a jury for consideration prior to a verdict being delivered.

The deceased was a young man who had been sentenced to a term of imprisonment at a young offender's institute for robbery. He had a history of self harm which was apparently overlooked by the authorities when his pre-sentence report was prepared. After sentencing he threatened to harm himself and the probation service warned the prison authorities that he was at risk. Consequently he was reviewed by a registered mental nurse and by a GP in prison. At that time he was not considered to be at risk of self harm but rather a risk to a cell mate. As a result of this assessment he was placed in a single cell. No attempt was made to refer him to a psychiatrist.

Prior to his death he was found by the prison authorities to be in a distressed state and was attempting self harm. He was placed on night watch, with directions being given that he should be visited by a prison officer three times during the night. In spite of these measures, the deceased hung himself in his cell. Evidence was given at the inquest that a prison officer saw the deceased hanging in his cell but did not enter to cut him down. The officer had not received suicide prevention training, did not possess a specialist piece of equipment designed to cut down a person hanging from a ligature without causing them further harm and although the prison officer put out a call for assistance when he discovered the deceased, he did not use the appropriate call code and, consequently, urgent assistance was not given to the deceased. It was not known whether these factors contributed to his death.

An inquest was opened. The coroner set out to investigate a number of matters including: the nature of the information passed to the prison service about the deceased's pre existing vulnerability to self harming behaviour, the care he received in prison, the initial clinical assessment that was carried out and which resulted in the deceased being housed in a single cell, the procedure used inside the prison in respect of prisoners who had been identified as being at risk of self harm, the action taken by the prison officer on discovery of the deceased in his cell and the deceased's mental health and how this was managed.

A jury was sworn in and the coroner put a number of questions, relating to these matters to the jury, but notably did not ask the jury to consider the actions of the prison officer when the deceased was found hanging from the ligature.

Following the inquest, the deceased's father made an application for a judicial review on the basis that the coroner had made an error in law by failing to ask the jury to consider this matter even though there was no conclusive evidence that the prison officer's action (or inaction) had caused or contributed to the death. It was argued that the coroner's failure to put these matters to the jury was in breach of his duty to carry out a full and diligent investigation into the death as required by Article 2.

In its judgment, the Court of Appeal summarised the purpose of Article 2 in relation to deaths in custody, as being one intended to ensure that an administrative framework exists to protect the right to life, and to ensure that shortcomings in the systems employed by the state are highlighted and remedied and that officials who bore responsibility in particular cases were identified. The ECHR was not prescriptive in respect of how those purposes were to be achieved. In relation to coronial law, the Court had established (in **Middleton**) that the duty under the Coroner's Act to investigate how the deceased came by his death should be read as meaning "by what means and in what circumstances."

The applicant argued that the coroner was under a duty to direct the jury to consider the relevant circumstances of the death in order to fulfil the procedural requirements imposed by Article 2. He argued that it did not need to be established that the prison officer's actions and omissions *were* a probable cause of death or even a contributory cause of death, as long as they were capable of being so.

It was held that Rule 43 of the Coroner's Rules exists to canvas matters which may be risks and which should be addressed by relevant authorities in order to prevent future deaths. Coroners have a wide scope to comment on failures in a system in order to prevent deaths. Failure to report such matters under Rule 43 may amount to a breach of a coroner's duty but as Rule 43 exists, Article 2 does not impose an additional duty on a jury to consider possible and not probable causes of death.

Coroners have discretion as to the matters they refer to in their Rule 43 correspondence at the conclusion of an inquest. The coroner in this case had written an extensive Rule 43 letter to the Home Office and to the particular Young Offender's Institute in which the deceased had been detained at the time of his death, but had not addressed the issue of the role played by the prison officer after the deceased hung himself. The Court stated that although Rule 43 does not oblige the coroner to report *all* matters touched upon at an inquest that give rise to a risk of death, circumstances, particularly in light of the Article 2 obligation, might be such that the failure to report on a systemic failing via a Rule 43 letter constituted a breach of the Article 2 duty. It is likely that, as a consequence of this judgment, coroners will be particularly vigilant to raise all matters in their Rule 43 correspondence revealed in evidence as matters to be addressed in order to prevent the recurrence of similar fatalities.

It should also be noted that in Paragraph 7 of Schedule 5 to the Coroners and Justice Act 2009 the coroner will, in future, be under a *duty* to report any such matters, and the subject of Rule 43 reports will no longer be left to his/her discretion.

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Inquests

A case law digest - Coronial Law

Not only will 2009 be remembered as "the year" that paved the way for the first major reform of the coronial system for over 100 years, it will also be remembered for the number of cases that came before the Courts, for clarification on the roles and powers of Coroners and Juries alike. In this case digest we review the cases and outcomes which should of interest.

R (on the application of Butler) v HM Coroner for the Black Country District - 21 January 2010
Whilst a coroner's powers as to the scope of investigation during an inquest were wide, they were not unlimited. Where a forthcoming inquest was to be in the "traditional" style, involving consideration of the means by which the deceased came to his death, rather than issues of accountability or responsibility for the death, the coroner had adopted an unlawfully wide approach in indicating that evidence from police officers and health and safety evidence should be adduced and that a verdict of unlawful killing could properly be left to the jury.

R (on the application of P) v HM Coroner for the District of Avon - 18 December 2009
Where a coroner had directed the jury as to the availability of two short form verdicts and a narrative verdict, a failure to direct the jury expressly that a narrative summary could be appended to a short form verdict had rendered the summing up materially defective because the jury had effectively been disabled from fulfilling the purposes referred to in **R (on the application of Amin (Imtiaz)) v Secretary of State for the Home Department** (2003) UKHL 51, (2004) 1 AC 653.

Comment: The case is a reminder that the coroner's first task is "to decide how best, in a particular case, to elicit the jury's conclusion on the central issue or issues." Furthermore, that since the case of Middleton, there had been no legal impediment to a verdict of either suicide or accident having a narrative appended to it.

R (on the application of Dowler) v HM Coroner for North London - 6 November 2009
It was appropriate, pursuant to the Coroners Act 1988 s.13, for a coroner's inquest to be quashed and for a new inquest to be held before a different coroner where a number of breaches of the Coroners Rules 1984 had occurred, and where criticisms of a general practitioner made by the coroner meant that it was inappropriate for the same coroner to hear the new inquest.

R (on the application of Farah) v HM Coroner for Southampton & New Forest District of Hampshire - 3 July 2009
The court considered the right of a coroner to express opinions on matters not relating to the circumstances in which a deceased person had died and it gave guidance on a court's jurisdiction to declare such comments unlawful.

A coroner sitting without a jury was entitled to give a verdict and a judgment dealing with the stipulated issues of who the deceased was, how, when and by what means, in what circumstances and where the deceased came by his death. Whilst the court had jurisdiction to declare comments made by a coroner unlawful, the power was to be used sparingly and comments which did not relate to any of the stipulated issues in any way, were matters of opinion and were sufficiently unfairly critical and offensive to any party as to justify the intervention of the courts.

Comment: There is therefore a remedy in the event of gratuitous and offensive comments being made by a coroner.

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R (on the application of Ralph Allen) v HM Coroner for Inner North London & Camden & Islington Mental Health Trust & Social Care NHS Foundation Trust - 25 June 2009
An investigation under the European Convention on Human Rights 1950 art.2 was triggered where the death of a mental health patient who had been detained by the state raised issues as to whether the medical authorities had failed in their obligation to take general measures to save her from dying and whether the death was caused by a breach of the operational obligations to take steps to save the patient from death. In the circumstances, the investigation into the death undertaken by a coroner could not be criticised.

Comment: The court considered that the Article "was not only engaged in cases where there were fundamental failures that caused the condition itself that caused the death."

R (on the application of Ahmed) v HM Coroner South East & Cumbria - 11 June 2009
A coroner had been entitled not to disclose material prior to an inquest into the death of a 17 year old girl when there was an ongoing criminal investigation. Although it would have been preferable for a degree of disclosure to have been made, it was a matter of discretion for the coroner.

Comment: The Judge also commented that, had a sensible request (for disclosure) been made, the coroner would have given real consideration to releasing whatever material seemed appropriate, but no such request was made, and is worth keeping in mind when requests advance disclosure of material are made.

R (on the application of Christine O'Connor) v HM Coroner for Avon - 7 May 2009
A coroner had proceeded on a material misdirection of the law in viewing the test for unlawful killing to be objective and for considering the defence of insanity as not relevant to his verdict. Further, with regard to insanity, the differences between a coroner's inquest and a criminal trial necessitated a different standard of proof. Insanity, properly raised, had to be disproved to the criminal standard to sustain a verdict of unlawful killing.

Comment: The case is useful authority when looking at the test to be applied for a verdict of unlawful killing to be returned. The Court held that a coroner's verdict of unlawful killing necessarily predicated a finding equivalent to that required for a conviction of at least manslaughter in a criminal trial. A conclusion of unlawful killing could not be reached unless the coroner was so satisfied to the criminal standard of proof. The differences between coroner's inquest and a criminal trial necessitated different standards of proof.

The case is also useful reminder that in an inquest there are no parties, indictments, prosecution, defence or trial and the procedure at an inquest did not accord a would-be defendant the safeguards that he would have at a criminal trial.

Roach v Home Office - 25 February 2010
Costs of attendance at an inquest were capable of being recoverable as costs incidental to subsequent civil proceedings.

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Litigation

Bad news for the District General?

Richard Jolly asks whether the courts have inadvertently given support to the Government's desire to establish specialist centres within the NHS.

The terribly sad case of **Laura May v Lancashire Teaching Hospitals NHS Trust** reported in December 2009 has shone light upon the difficult decisions faced by all NHS trusts when deciding how to allocate their budgets, the considerations they should take into account and the courts' support for a move towards more specialist clinical centres.

It is a case where the NHS Trust decided not to invest in specialist equipment, but where, as a consequence the NHS has been left with a judgment against it with damages and costs ten times higher than the cost of the equipment the Trust decided it could not afford to provide to the claimant.

Facts

Laura was just 10 years old when she was diagnosed as suffering from a severe convex idiopathic thoracic scoliosis of her spine. In February 2005 a consultant orthopaedic surgeon performed an operation to try to achieve some correction of the curvature to her spine and to prevent the progression of a significant deformity. He used the mehdian method, operating from the posterior position with Laura lying on her front. The operation involved improving the angle of the spine by the use of pedicle screws, hooks and rods. The spine was manipulated to achieve correction.

Sadly, when the operation was over Laura was paraplegic. She had lost the movement in her body and limbs below the level of the sixth thoracic vertebra, T6, in her spine. The court was asked to consider whether the consultant carried out the operation negligently and whether such negligence caused Laura's paraplegia.

The court heard evidence from expert consultant orthopaedic surgeons and consultant radiologists for both parties. The experts could not agree on whether the operation was carried out negligently or on the cause of the paraplegia.

The judge was in a very difficult position but after hearing all the evidence concluded that, on the balance of probabilities, the damage to Laura's spinal cord was caused by a pedicle screw piercing the dura and compressing the spinal cord. The judge went on to find that the consultant was negligent in that, having regard to the gravity of the consequences for the patient following a misplaced screw, he failed to use both lateral *and* anterior/posterior imaging during the placement of the pedicle screw.

The consultant admitted that he performed only five or six scoliosis operations a year. He recognised that inserting pedicle screws was increasingly difficult. He therefore used fluoroscopy whilst placing the pedicle screw. As it was, the lateral imaging could only show the depth of the screw. Anterior/posterior imaging would have shown the lateral position of the screw. Whilst it was acknowledged that some surgeons do not use any imaging during the placement of screws this was where they were particularly skilled and experienced. In this case, the consultant was not that experienced and therefore should have used anterior/posterior imaging in addition to lateral imaging. The use of bi-plain imaging during the preparation and the placement of the pedicle screw would have been likely to have prevented its misplacement and the piercing of the dura and the resulting compression of the spinal cord.

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Commentary
What is particularly interesting about this judgement is that the court went on to find that the Trust (not the consultant) was negligent for failing to provide Spinal Cord Monitoring ("SCM"). The benefit of SCM is that it provides continuous assessment of the function of the spine so that if there is any compromise suspected or detected the surgeon can investigate.

The consultant admitted in cross examination that he had been asking for SCM equipment to be provided. He alleged that he had written twice to his colleagues in neurophysiology asking for this.

The evidence from the experts was that this Trust was probably the only unit in England which did not use spinal cord monitoring in 2005. It meant that applying the *Bolam* test the judge was able to find that the defendant Trust fell below a reasonable standard of care in failing to provide SCM for use in the operation on the claimant. If it had been provided, it was clear that the consultant would have used it. In those circumstances he would have discovered far sooner that the dura had been accidently pierced and taken action to prevent any permanent damage.

In her judgment the judge quoted from a paper produced by one of the defendant's expert's and felt that this was particularly relevant:

> "The cost of monitoring is fully justified, as compared with the financial implications of even a single case of post-operative paraplegia, to say nothing of the human cost to the patient and family".

This quote sums up the situation perfectly. It is a dilemma faced by NHS trusts on a daily basis. In a perfect world every NHS trust would have the best and the most up to date equipment. Clearly, that is not possible. In this case the Trust's decision not to purchase any SCM equipment had devastating consequences for Laura and it is clear from the judgment that this case badly affected the clinicians involved.

It is beyond dispute that money in the NHS is only going to get tighter. We know that trusts will be expected to achieve 10-15% savings in real terms over the next three years or so. The government insists that these savings should not be at the expense of the quality or the patient's experience. It seems inevitable that more and more trusts will be faced with the type of decision faced by this Trust. The money coming into the NHS can only be spread so far. It seems inevitable that in such circumstances some patients will suffer adverse consequences that might otherwise have been avoided. What this case demonstrates is that a lack of resources is not necessarily a defence. In the future trusts may have to justify their decisions on how they use their limited resources in court.

Be aware though that whilst the court may have sympathy for the NHS's predicament, it will not absolve the NHS of any responsibility should an adverse outcome result from a resources decision. On the contrary, trusts will have to re-evaluate whether they are exposing patients to unnecessary risks by undertaking certain procedures using only the equipment available to them in circumstances where there might be another local trust better equipped to perform the surgery. Although consent was not raised as an issue by Laura's legal team it is arguable that in the future, when obtaining consent to a particular procedure, a treating consultant will have to point out to patients that a neighbouring trust is better equipped to perform a particular procedure, since surgery there may be a less risky and so a better alternative to the one the patient is faced with at the consultant's trust.

Many district general hospitals do presently provide a wide range of clinical procedures to patients, but in many cases there is just not the volume of patients with complex needs to justify specialist equipment being made available in such centres and thus to make this viable or as safe as possible for patients. Patients are becoming increasingly frustrated about the services offered, with a service they believe to be too often centred

on the needs of the providers rather than those of the patients. It is therefore believed that giving patients choices, through reforms to encourage plurality of provision, will create a genuine level playing field between competing providers and will build a more specialised and more responsive healthcare system. The impact of these reforms has yet to be seen; indeed the NHS constitution only came into effect on January 19 this year. Under the constitution all NHS organisations will be legally obliged to take account of the rights and pledges set out in the NHS Constitution. Among other things, the NHS Constitution gives patients the legal rights to: access NHS services; choose where they receive their care; be treated with dignity and respect; and receive drugs and treatments approved by the National Institute for Clinical Excellence.

What is certain is that patients' aspirations and expectations are rising, and as a result the traditional ways of delivering NHS care are beginning to be challenged. This judgment may inadvertently have given fresh impetus to the government's desire for specialist centres. It raises the possibility of district general hospitals having to decline to offer certain types of surgery for fear of litigation. If so, do district general hospitals have a long term future in their present guise?

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Construction Law

I'm not an expert, get me out of here

The expression "vagaries of litigation" can cover a multitude of matters. There are many things which can go wrong in a court case and turn a strong case into an ultimately unsuccessful one. The most frequent is that a witness can fail to come up to proof. A point of law can go against you. A document can take on a significance that could not have been envisaged at the pre-trial stage.

There are certain steps which can be taken to seek to limit or restrict the effect of such matters and some might seem so obvious as not to require stating. One such obvious step is to properly identify your expert witness. Whilst an expert's opinion might not be fully in support of your case, it will have no probative value at all if the expert is not an expert in the filed in which expert evidence is required.

It seems obvious that if you require expert evidence on mechanical and electrical engineering matters you do not instruct a quantity surveyor to give such evidence. Equally, you would not instruct an architect to give evidence on structural engineering matters. An expert must clearly be expert in the field in which he or she is giving expert evidence. It might be supposed that an expert would simply not seek to take on a case where he or she did not have the necessary expertise.

However, whether this is due to tougher economic conditions or not, there are some worrying recent reports of experts being appointed to prepare reports and give evidence in circumstances where they were simply not qualified to give the evidence required. That can, of course, be fatal to a party's case and raise interesting potential questions as to an expert's immunity from suit. It is difficult to know whether the reports are purely apocryphal or anecdotal. Whilst many such reports may seem almost comical, the damage that can be caused to a party's case by failing to appoint an expert with the appropriate expertise is no laughing matter and brings discredit upon the legal system in the eyes of the users of the system, business and the public.

The risk of appointing an expert who does not have the necessary expertise is clearly reduced by appointing an expert of whom you and/or your client have previous experience of providing expert evidence in a particular field. Further, it is possible to "take up references" on experts by contacting those for whom they have worked in the past and Counsel may have had previous experience of the expert.

However, there is a risk of an expert having too much experience of giving expert evidence on the basis that expert undertakes so much expert witness work that he or she becomes what is known as a "professional expert". The credibility of experts has been attacked on many occasions on the basis that they have lost touch with the practices of the field in which they are giving evidence. This is on the basis that they have been acting exclusively as an expert for such a long period that they are in fact no longer an expert in their field. It is important to confirm with your prospective expert that he or she still carries out work in the operational field of their expertise.

There also remains the risk that parties will retain a "hired gun" as an expert to act not as expert should but as advocate for a stated case and position. In circumstances where fewer cases are not proceeding to a full trial, the risk of parties retaining such an expert is greatly increased, as parties believe that the potential risk of putting such an expert in the box is offset by the potential advantages gained in the performance of the expert in the pre-trial stage.

An expert's duties are to the tribunal and not to the party instructing the expert. Judges and arbitrators (and adjudicators) are more than sufficiently experienced to identify whether an expert has the relevant expertise and/or is acting as an advocate rather than an expert. The best advice must be to appoint an expert who is experienced in the relevant field and understands and will comply with his or her obligations to the tribunal. Indeed, if an expert does not make this expressly clear at the commencement of the retainer, there might be some cause for concern.

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This article first appeared in Building Magazine on 15 January 2010.

Commissioning

A revised framework for Continuing Care

The Department of Health has published a revised National Framework for NHS Continuing Care and NHS Funded Nursing Care. In common with its predecessor, the framework should ensure that commissioners take a consistent approach to continuing healthcare nationally. Now that NHS care is provided in the context of world class commissioning and emphasis is placed on services that maximise an individual's control over their own care package and reflect their personal preferences, it is hoped that disputes over commissioned care will diminish. Where service users have previously been in receipt of direct payments from local authorities the potential for dispute is still strong, but the NHS is running a pilot programme in respect of personal health budgets and Gill Ayling, the Department's Deputy Director of Social Care Local Government and Care Partnerships stresses in her letter to NHS Trusts introducing the revised framework, that even where services are to be commissioned in areas outside those of the approved pilot emphasis is to be placed on person centred commissioning to avoid the perennial problems which typically arise where there is a change in the responsible commissioner.

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Issue in Haste Repent at Leisure

R on the Application of S v Hampshire CC

S is a child with Asperger's syndrome and has severe behavioural problems. Hampshire County Council carried out an assessment of his needs in 2008. The assessment was the subject of a complaint by S's mother, dealt with under the Council's complaints procedure. S was re-assessed by the Council in 2009. Following the assessment the Council resolved to provide certain services to S. S's mother disagreed with the assessment and the decision made by the Council about the level of service S required. On this occasion she did not bring her concerns to the attention of the Council through its complaints procedure but instead instructed solicitors to apply for a judicial review of the Council's decision.

Three remedies were sought: a declaration that the Council's Criteria for Services for Disabled Children were discriminatory and in breach of the Disability Discrimination Act, Sections 19-21 inclusive, as they discriminated against children/young adults with severe mental health disorders; an order setting aside the decision contained in the Council's assessment of S's needs that no services were required; and a declaration that the failure to provide services to S was irrational and unlawful.

The applicant claimed that the Council was in breach of its statutory duty under s 17 of the Children Act 1989 and that its 2009 assessment of S did not conform to mandatory guidance and that the 2009 assessment was discriminatory because it treated those with average or above average intelligence with mental health disorders which are severe and profound less favourably than those of below average intelligence. The applicant alleged that the Council had failed to have regard to mandatory guidance, namely the Children Act Policy Guidance, and the Children Act Guidelines 2000 Framework for Assessing Children in Need and their Families. In particular it was said that the Council's core assessment did not identify all S's known needs, it understated his severe mental health needs and was irrational. It was alleged that the Council has failed to identify an appropriate care plan or to consider what services were required to meet S's needs, which was unlawful. The applicant also alleged that the Council's decision was procedurally unfair as the relevant criteria were not disclosed to S's mother, and more generally, that there had been a failure to provide appropriate services to S when he was at home with his mother and not at his residential school.

The Council denied the allegations of irrationality and unfairness, it also argued that the applicant had an adequate alternative remedy available to her, namely the Council's complaints procedure, and she should have utilised this before embarking upon judicial review proceedings. It was noted that the pre action protocol for judicial review claims had not been complied with, no letter before claim had been served and there had been some delay in issuing the application.

Permission for J.R. was refused. It was held that the Council's assessment of S's needs were not outside the range of reasonable conclusions available to it. When looking at the assessment process used by the Council the judge stated that in such cases, the Court's role is not as a decision maker, it is not for the court to decide on the merits of a particular assessment. The only question the court should ask is whether a reasonable decision maker could have come to the conclusion reached by the decision maker in that particular case.

The judge concluded that S's mother had an alternative remedy available to her, namely the Council's complaint procedure, and that she should have utilised that remedy prior to making her application, as judicial review is a remedy of last resort. The judge also commented that the fact that there was a complete failure to comply with the pre action protocol and no attempt made to avoid litigation would in itself warrant a peremptory refusal of permission.

Cases such as these are a typical feature of NHS and local authority health and social care provision. It is usual for emotions to run high in such cases and, over recent years, judicial review applications have been increasingly utilised to challenge the clinical assessments made of service users' needs. This case illustrates that those who are reluctant to engage with the process prescribed by individual health bodies and local authorities, and who threaten to expose a clinical decision to judicial scrutiny rather than engage with an organisation's appeals process or complaint procedure where the outcome of a such an assessment does not accord with their own views, may be at risk. The judge's comments on compliance with the pre action protocol are particularly noteworthy given the propensity of some litigants to issue proceedings without warning.

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Mental Health

Harder to get?

Some mental health claims will now be easier to defend, writes David Hewitt, and correspondingly harder to bring.

Where he says he is the victim of acts performed under the Mental Health Act, anyone wanting to claim damages will now face a more difficult task. That is the result of an interlocutory decision in **Johnston v The Chief Constable of Merseyside Police** [2009] EWHC 2969 (QB), which concerned a proposed claim by a man who had been apprehended by the police.

In January 2006, Mr Johnston, who has a history of mental health problems, was at a property on Merseyside. An occupier of the property became concerned about his behaviour and summoned an ambulance. In accordance with usual practice, the police attended as well. Mr Johnston acknowledged that he had needed medical help, but said he had not wanted the police to be called.

On the basis of the witness statements and other evidence, there is a profound conflict between the parties as to what happened next. It appears to be common ground, however, that Mr Johnston was sprayed with CS gas and sustained severe blistering to the skin on his face, left ear and chest. He was detained, put in handcuffs and taken to hospital, but he was not subsequently charged with any criminal offence.

Mr Johnston alleges that these acts amounted to false imprisonment and assault. The Chief Constable, however, claims they were covered by section 136 of the Mental Health Act 1983 (MHA), which applies where someone who appears to be suffering from mental disorder is found in a public place, and permits a constable to take that person to a place of safety. Under section 139(2), no claim concerning the use of MHA powers may proceed without the permission of the High Court. The Chief Constable argued that Mr Johnston should be denied such permission.

The test

The leading authority on permission claims of this kind is still **Winch v Jones** [1986] 1 QB 296, in which Sir John Donaldson, MR said, "The issue is whether, on material evidence immediately available to the court, [...] [the claim] deserves the fuller investigation which will be possible if [it] is allowed to proceed." Subsequently, the House of Lords said that by this test, "the threshold for obtaining leave under section 139(2) has been set at a

very unexacting level [...] an applicant with an arguable case will be granted leave" (**Seal v Chief Constable of South Wales Police** [2007] UKHL 31, per Lord Bingham at [20]).

For the Chief Constable, it was argued that, 25 years on, the **Winch v Jones** test should be tightened. It was noted that the Civil Procedure Rules now provide, amongst other things, that summary judgment may be given where a claimant "has no real prospect" of success (rule 24.2(a)(i)).

Notwithstanding the changes wrought by the CPR, the judge, Mr Justice Coulson said "it would be wrong to modify in any significant way" the **Winch v Jones** test. (See [12]) He went on, however, to permit himself one modification, noting that it would be "absurd" for a court to grant permission under section 139 where, had it asked itself the "CPR Part 24 question", it would have concluded that the proposed claim had no real prospect of success (See [13]). For that reason, the judge said the CPR question should indeed be asked upon any claim under the MHA (See [14]).

In fact, Coulson J concluded that the Mr Johnston's proposed claim did have a real prospect of success, and he therefore granted the necessary permission under section 139 (the proceedings also included a limitation point, which, again, was decided in the claimant's favour).

SJ takeaway

- The rules have changed where the police or a local authority is alleged to have abused its powers under the Mental Health Act
- A claimant will need permission to proceed, and he will now have to show that he has a real prospect of success
- This is a more stringent test, although it was satisfied on the facts of this case
- The change is perhaps more significant than the judge in this case was prepared to admit
- Permission is not required for similar claims made against the Secretary of State or the NHS

It isn't every potential defendant whose position will be strengthened by this decision. For esoteric, historical reasons, no permission has ever been required for proceedings concerning the acts or omissions of the Secretary of State or the NHS under the MHA. (MHA, section 139(4)) Where a claim relates to the use of section 136, however, or to the initial decision to detain a patient in hospital, this case will make a difference.

The **Winch v Jones** test for permission under section 139 has not been displaced. In fact, it is now considerably tighter, with a potential claimant having to show that his case is not merely arguable, but that it has a real chance of success. That is a palpable change, whose effect might well be to forestall claims that would otherwise have proceeded all the way to trial. And plainly, therefore, the change is a good deal more 'significant' than the judge was prepared to allow in Mr Johnson's case.

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Employment

When is a contract not a contract?

In **Shrewsbury & Telford Hospital NHS Trust v Dr Lairikyengbam** (UKEAT/499/08) the EAT was asked to consider the decision of the Employment Tribunal ("ET") as to whether a locum consultant employed by the Respondent NHS Trust could claim unfair dismissal, despite the Trust's contention that Dr L's contract of employment was ultra vires on the grounds that his appointment failed to comply with the National Health Service (Appointment of Consultants) Regulations 1996 ("the 1996 Regulations"). Reversing the decision of the ET, the EAT held that the contract of employment was unenforceable. Consultant's appointments of less than 12 months are exempt under the 1996 Regulations. By extending the contract beyond the 12 month maximum, the 1996 Regulations applied. The Trust failed to comply with the 1996 Regulations in making appointment, rendering the appointment void as it was made outside the scope of the Trust's powers.

Facts

Dr L was appointed by the Trust as a locum Consultant Cardiologist in May 2003 for an initial fixed term of 6 months pending the permanent appointment of a Consultant for the position. Dr L's fixed contract was extended by a series of further fixed term contracts up until his dismissal in March 2007 following the Trust's decision to cease the employment of locums in positions pending permanent appointment. Dr L unsuccessfully applied for the permanent position. The Trust offered Dr L an enhanced contractual redundancy payment but subsequently refused to make the payment on the basis that Dr L's contract of employment was void. Dr L brought a claim for unfair dismissal.

Law

The Trust argued that Dr L could not have been unfairly dismissed as his employment was void on the grounds that his appointment breached the Regulations governing the NHS's power to appoint consultants. The Trust had failed to establish an Advisory Appointments Committee (AAC) to approve Dr L's appointment as required by Regulation 9(1). The only way in which a Trust may avoid compliance with the 1996 Regulations is if the appointment is deemed exempt under Regulation 5. In this case, Dr L's fixed term contract had been extended several times exceeding the 12 month maximum for an "exempt appointment". Any employment contract subsisting after an initial period of 12 months would be ultra vires unless wholly compliant with the 1996 Regulations.

ET decision

Relying on the distinction in **Rolled Steel Ltd v British Steel Corporation** [1986] 1 Ch 246 the ET decided that Dr L's appointment was an act done within the Trust's capacity as oppose to an act in excess or abuse of its powers, therefore not ultra vires. In addition, the ET held that whether or not the contract was ultra vires in relation to the 1996 Regulations, Dr L was still an employee within the meaning of s230(1) of the Employment Rights Act 1996 ("ERA") on the grounds that his first fixed term contract was continually renewed until his dismissal.

Having established an alternative employment relationship the ET went on to draw a distinction between the post of locum consultant, which Dr L had previously held, and the substantive role of permanent consultant. As the Trust had decided they would no longer employ locums in this "holding role" the Claimant's post had effectively been made redundant within the meaning of s139(1) of the ERA 1996 Act, therefore he had been unfairly dismissed on the grounds of redundancy and was entitled to a contractual redundancy payment.

EAT decision

On Appeal, it was held that the ET had erred in its decision that the Claimant's contract was not ultra vires. Considering the more recent decision in **Rose Gibb v Maidstone and Tunbridge Wells** [2009] EWHC 862 (QB) (in

which an excessively generous compromise agreement was held to be ultra vires), the EAT held that, as a public body, the Trust's general power to appoint staff had been circumscribed by the 1996 Regulations. Dr L's employment post May 2004 was void by virtue of the Trust's failure to adhere to the 1996 Regulations and submit the appointment to an advisory committee as soon as the term exceeded the 12 month maximum.

The EAT held that any contracts subsisting at the end of the initial 12 months, were ultra vires but acknowledged the practical problem of former public body employees continuing to work under ultra vires contracts. The EAT turned to the Court of Appeal's judgement in **Eastbourne BC v Foster (No.1)** ([2001] EWCA Civ 1091) for guidance as to whether an employment relationship may be implied based on parties' conduct even where the contract itself may be ultra vires. In **Foster**, the Court of Appeal held that despite the fact that a compromise agreement was ultra vires, reality provided that the conduct of the parties thereafter could not be ignored and was sufficient to imply the relationship and status of employment to Mr Foster.

It was not in dispute that the parties had performed all responsibility and liabilities amounting to a relationship of employment. Dr L's appointment itself was not prohibited. Overturning the ET's decision, the EAT held that any contracts after the initial 12 months were ultra vires based on the failure to comply with the 1996 Regulations, nevertheless the EAT upheld that employee status could be inferred consequently Dr L was to be treated as an employee under the Employment Rights Act 1996 providing him with a right to bring proceedings for unfair dismissal. The Appeal Tribunal held that it was not in a position to make further judgement as to whether the dismissal was unfair or not on the evidence, remitting this issue to be determined by a different tribunal.

In relation to redundancy, the EAT held that the ET had erred in its finding that Dr L's position as a locum was different to that of the permanent consultant who would be appointed to take over the role as previously held by Dr L. Dr L was no longer entitled to a contractual redundancy payment on account of the fact that the ET's decision on redundancy was perverse. Once more the EAT was unable to substitute the ET's decision and therefore the issue of redundancy was left to be determined by another tribunal.

Comment

The EAT's inference of an implied employment relationship under an ultra vires contract is relatively novel and may be subject to further appeal. By adopting the realistic approach in **Foster**, where the conduct of the parties and the facts of the individual case warrant so, a relationship of employment may be inferred thus potentially preventing public authorities from relying on the argument that a person does not have a the status of an employee on the sole ground that the contract of employment is ultra vires. Each case will be analysed on its facts providing scope for tribunals to find that an ultra vires contract is insufficient in itself to negate the entirety of the alleged employee's relationship with that body. Coupled with reluctance of the courts and tribunals to leave claimants without effective remedies, this means that NHS Trust must take extra care when appointing, reviewing and terminating locum consultant contracts, especially in view of the potential costs of contractual redundancy pay.

Mari Griffiths
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Human Rights

The law doesn't always recognise transsexuals

A recent High Court decision has been hailed as a significant advance for transsexuals. The judge said their autonomy and dignity were now unassailable, and he ordered that the claimant, a male-to-female transsexual who is currently in custody, be transferred to a female prison so as to qualify for gender reassignment surgery (**R (AB) v Secretary of State for Justice and The Governor of Manchester Prison** [2009] EWHC 2220 Admin).

But is this case quite the victory it seems?
The claimant, AB, is keen to have her penis removed, but the hospital concerned says it will not perform surgery until she has lived as a woman inside a women's prison. The judge said that in those circumstances, to deny transfer would infringe AB's private life and so breach both Article 8 of the ECHR and the common law. It would deny her rights that even imprisonment could not remove. Too little attention had been paid to the effects of keeping her in a man's prison, and to the fact that she would have to be segregated from other prisoners.

The hospital's stipulation was perhaps surprising, given that AB has a gender recognition certificate, proving that she has lived as a woman for at least two years. The Gender Recognition Act says that certificate makes AB female "for all purposes". Now, it seems, we must read that as "all purposes bar one".

The judge acknowledged the Act but said, "The actual physical characteristics of a post-certificate, but pre-operative, female may remain relevant for some purposes". The prison authorities were, in short, entitled to take account of the continued existence of AB's penis. But doesn't that contradict the Act?

In fact, the obstacles placed in AB's way gave her something to kick against, and it would have been interesting if her case were somewhat more direct; if, for example, she had sought transfer merely because the law now regarded her as a woman. There are only two situations in which women can be imprisoned in facilities intended for men, and this case had neither of them. At the moment, when we look at the phrase 'for all purposes', we have to ask, what does 'all' really mean?

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Commercial Dispute Resolution

Bad news for business debtors

Good news for businesses seeking to recover late payments and statutory interest!

Fitzroy Robinson Limited v Mentmore Towers Limited [2009] EWHC 3365 (TCC) was a late payment of a commercial debt case in which various issues were to be decided including; what proportion of fees the claimant was entitled to following the defendants' suspension of the contracts between them and issues surrounding any related interest. The parties agreed that interest was due to be paid but the following issues were in dispute:

1. What principal sums should attract interest;

2. Which statutory provision applies; and
3. How should the interest be assessed; in particular:
    a) the period over which the interest should be calculated; and
    b) the rate of interest that should be applied.

This case involved three defendants (property owners and developers) who had contracts with the claimant architects to develop properties. The parties had agreed a lump sum fee for the contracts which was broken down into monthly instalments.

The defendants suspended the contracts on the 24 December 2007. Under the terms of the contracts the claimant was entitled to “a fair proportion of the fee” for any of the services properly performed up to and including the date of termination or suspension, having regard to the instalments schedule set out in a schedule to the payments already made to the claimant under the contracts.

The claimant made a claim for payment of fees. It was held that the defendants were in breach of contract in failing to pay the instalments when they fell due, and that the claimant was entitled to interest on the unpaid sums.

The Court had to look at what was “a fair proportion of the fee”. The claimant tried to argue that it should be based on the number of hours worked but, unusually for construction contracts that is not what the contracts provided for. It was not a time based entitlement. Nor was there any provision in the contracts for any entitlement to the claimant for additional fees if the services took longer than envisaged. It was the claimant’s risk under the contracts. There was no hourly rate agreed in the contracts so it was not appropriate to calculate the “fair proportion” solely based on time. Added to this the claimant did not plead any specific facts/incidents that could have justified a time based calculation at the trial.

The Judge decided the fairest method for calculating a “fair proportion of the fee” would be to calculate the percentage of work completed and where a work stage was incomplete at the time the contract was suspended, a fair proportion of the services completed could be assessed. Therefore the percentage completion of the RIBA work stages was deemed the appropriate contractual basis for assessment. Percentage completion was eventually agreed by the parties on day 2 of the hearing and the Court calculated that the sum due and owing was £550,218.00 plus interest and VAT.

With regard to the interest due to be paid, the claimant’s entitlement under the contracts altered over time. Under the contracts the claimant was entitled to monthly instalments. The defendants didn’t give notice of any proposed adjustments so the payments were due and payable when they fell due before the suspension on 24 December 2007. As a result of the defendants’ breach of contract for not paying those instalments, the claimant was entitled to interest on the unpaid sums. The sums due under the fair proportion claim were less that the original sums due by the way of instalment and although the Defendants accepted the claimant was entitled to interest on the judgment £550,218.00, it was their position that the claimant was not entitled to interest on the additional sum of the unpaid instalments.

The Court then considered the statutory regime for interest. S35A(i) The Supreme Court Act 1981 (Now the Senior Courts Act 1981) provides for simple interest at such a rate as the court may think fit on any/all of the judgment given.

In certain circumstances, under the Late Payment of Commercial Debts Act 1998, the Court may award interest on commercial debts regardless of whether or not those debts are included in a subsequent judgment sum if:

1. the contract is caught by S2 of the Act; and

2. the debt is a qualifying debt in accordance with S3 of the Act.

Further, the Court must consider S4 which sets out the period for which statutory interest would run and S5 which allows for the remission of the period and/or time of interest where the interest of justice requires because of the conduct of the supplier.

The defendants accepted that the judgment debt assessed at £550,218.00 is a qualifying debt under the 1998 Act and therefore attracts interest under the Act. However, the defendants tried to claim the instalments were not a qualifying debt under the 1998 Act and therefore no interest was recoverable for the additional sum being the difference between the judgment debt and the unpaid instalments.

In the original judgment it was decided that interest was due on the additional sum. It was held that the instalments were qualifying debts under S3 such that the claimant's entitlement to statutory interest operated as an implied term of the contract pursuant to S1 of the Act.

The instalments were precisely identified on a monthly basis and due pursuant to express terms of the contract. They were not S11 advance payments because the amount was paid a month in arrears not in advance.

The point made in the judgment was that just because some part of a contractual instalment due *might* contain an element of work not yet performed does not mean that a claim for interest under the Act would fail. Since most of the instalments payable under commercial contracts may include an element of advance payment this would substantially defeat the purpose of the Act.

So the claimant was compensated by way of interest on the higher sum (represented by the difference between the unpaid instalments and the judgment sum) up to the 30th day after the contract was suspended (there was a clause in the contract providing for a 30 day notice period to suspend). They were also compensated by way of interest on the £550,218.00 actually due to them from that date onwards.

So there were two amounts due under the 1998 Act:

1. the total of the sums due by way of unpaid instalments under the contracts for which interest is payable from the date that the particular instalment should have been paid, until 23 January 2008 (which was 30 days after the work was suspended); and
2. the sum due under the contracts which was the judgment of £550,218.00, on which interest was payable from 23 January 2008.

The relevant rate of interest applied was 8% as provided for in S4 of the 1998 Act.

A court may only alter the period or time of interest where S5 of the 1998 Act is applicable. S5 of the 1998 Act applies where by reason of any conduct of the supplier, the interests of justice require remission of period or time.

The Court also referred to the previous case of **Ruttle Plant Hire Ltd v Secretary of State for Environment** [2009] EWCA Civ 97 in which the Court of Appeal held that when considering what is in the interest of justice:

> "...Questions such as the high rate of interest under the Act were irrelevant: what matters is the conduct of the supplier, and whether the conduct merits remission."

It is clear that the percentage of interest is not affected by S5 of the 1998 Act and therefore it can be assumed that the court will apply a rate of 8% interest over the base rate on commercial debts where the 1998 Act is the relevant Act. The 8% interest rate is set by The Late Payment of Commercial Debts (Rate of Interest) (No. 3) Order 2002.

Historically interest rates tend to be reduced by the courts, for example Part 36 offers attract an interest rate of up to 10%, but this percentage rate tends to be substantially reduced by the Court. Further, the rate of interest usually claimed under the Senior Courts Act 1981 is 8% but the Courts have a wide discretion as to what percentage rate to apply unlike under the 1998 Act.

Comment

This case is good news for companies who are involved in litigation with a commercial client due to late payment of a commercial debt, particularly in the current economic climate. Companies can be confident that an interest rate of 8% will be applied to commercial debts which can substantially increase the sum of money recovered.

If you want to include interest in your claim for a late payment of a commercial debt then the Court recommends using the following wording:

> "The claimant claims interest under the Late Payment of Commercial Debts (Interest) Act 1998 at the rate of [the reference rate for the six month period in which your debt became late (the official dealing rate of the Bank of England on either 30th June or 31st December + 8%] from [the date when interest started to run] to [the date you are issuing the claim] in the sum of £[put in the amount] and continuing at the same rate up to the date of judgment or earlier payment at the daily rate of [enter the daily rate of interest]."

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Commercial Law

Remaining compliant

As we know, NHS Foundation Trusts ("FTs") are authorised and monitored by Monitor, as opposed to the Department of Health. However, whilst it may be true that FTs have a greater degree of freedom than other NHS Trusts, they could also be said to have a higher degree of accountability as well. The Boards of FTs must be satisfied that they are meeting their ongoing financial and governance obligations and that they are operating at all times within the terms of the FTs' authorisation.

The Compliance Framework, first published by Monitor in March 2005 and updated annually thereafter, provides necessary guidance by way of a regulatory framework within which Boards of FTs can operate in a bid to ensure such compliance.

Updates being proposed to the Compliance Framework this year are more significant than in previous years and include both matters that require clarification and those which may result in changes to the way in which Monitor undertakes regulation of FTs going forward. The consultation on the proposed amendments was published by Monitor on 17 December 2009 and the deadline for responses was 26 February 2010; the results

of the consultation have not been published at the date of this article but should soon be made available given that the amended Compliance Framework for 2010/11 is expected to be published by 1 April 2010.

The proposals set out in the consultation fall into two main categories: (i) Governance and risk ratings (including, amongst other things, the introduction from 1 April 2010 of the Care Quality Commission's ("CQC") enhanced registration requirements); and (ii) Finance and risk ratings, some of the key provisions of which are discussed further below.

Governance and risk ratings
It is proposed that the structure for rating governance risk be redesigned. According to Monitor, the intention behind the proposed redesign is to more closely monitor and flag up more efficiently any escalation of risk that is heading towards being a potentially significant breach of the terms of authorisation of a FT.

In order to do that, Monitor proposes to increase the number of governance risk ratings from 3 to 4 categories, splitting the existing amber category into amber/red and amber/green, to give greater clarity and to enable emerging risks to be assessed more effectively.

The proposed Compliance Framework requires full and ongoing registration of all FTs with the CQC from 1 April 2010; failure to do so will be classed as a significant breach by the FT of its authorisation. Monitor is also proposing to include the maintenance of CQC registration within the governance risk rating, as well as including the self certification of mandatory services within overall governance risk ratings (instead of the separate rating as at present).

Although in light of recent events there may be a need for Monitor to carefully consider its compliance requirements, there may also be some valid concerns that the adjustments may increase the risk of FTs being rated red for governance, even possibly due to underperformance in just a couple of areas; one such potential concern being that, for any target that is missed in consecutive quarters, its weighting will be doubled meaning that consistent under-performance in just one area could potentially result in a red rating from that one area of failure alone.

There is also a very strong emphasis in the consultation on the Accident & Emergency four hour waiting time target ("A&E Target"), which includes suggested revised scoring for breaches of the A&E Target. The revised scoring for breaches of the A&E Target could result in a requirement to attend a formal regulatory meeting with Monitor and potentially to the FT being rated red for governance risk.

Other regulatory matters
Major joint ventures: In 2009/10, Monitor published specific requirements for those FTs wishing to participate in Academic Health Science Centres and Monitor is now proposing to extend that to major joint ventures that the FT may wish to enter into and to incorporate that into the Compliance Framework. Further, FTs will require formal written approval from Monitor that the requirements of the Compliance Framework have been met prior to entering into any legally binding contract that relates to a material investment. There will be 'triggers' and 'financial conditions' attached to these requirements which will be detailed in the Compliance Framework should this approach be adopted.

Major investments: it is proposed that it will become an explicit requirement for Monitor to confirm that an FT has complied with the requirements of the Compliance Framework before it enters into any 'major' investments (being those deemed both 'significant' and 'material' as set out in the Compliance Framework).

Specific legal requirements: Although the authorisation of all FTs contains a requirement that the FT is compliant with all relevant laws, Monitor now wishes to formalise that by including two self-certifications in

respect of specific legal obligations in the amended Compliance Framework. Specifically, an FT will have to self certify as part of its annual plan that it has in place processes and procedures that will enable it to comply with the medical practitioner licensing and revalidation obligations, and also that it will have regard to the NHS Constitution.

Finance risk ratings ("FRR")
Monitor is proposing a new set of financial alert indicators that will trigger an informal meeting with Monitor in the hope that this will identify potential future risks earlier. Monitor will also expect to receive certification from each FT that it expects to deliver an FRR of at least 3 over the next twelve months. If the FT then fails to do so, Monitor will require reasons for the failure and a plan to rectify the situation.

There is also a new requirement for FTs to provide an updated forecast during the year so as to refresh the annual plan with the objective of improved planning and earlier identification of risks. Additionally, the calculation of FRRs to be derived from consolidated financial information, including for instance the accounts of charities and other investments and subsidiaries where these meet the tests to be consolidated under International Financial Reporting Standards (namely where the FT has control or influence). There is a particular concern about how this may adversely impact the operation of such charities, however it is possible that, where there are material cash balances in the consolidated financial position which are not freely available to a FT for its own purposes, these can be adjusted for the purposes of the liquidity metric within the calculation of FRRs.

Clarifications
Monitor has set out certain points for clarification to the existing Compliance Framework, although they do not form part of the consultation, including clarification of the calculations of thresholds for "material" and "significant" transactions and additional quarterly reporting requirements of the breakdown of planned and actual capital expenditure between maintenance, replacement and new build.

Monitor may also need to make further changes where such changes are required as a result of the outcome of the judicial review on the private patient cap and the potential impact of the implementation of the Health Act 2009.

Conclusion
The core principles behind the Compliance Framework remain the same but there are some significant changes and additions that FTs will have to take note of and abide by should they be implemented by Monitor in due course.

Monitor appears to be strengthening its monitoring of clinical and financial risk due to the harsh economic times in which FTs are currently operating which, of course, means that there will be certain more stringent obligations to be met by FTs, as well as some new restrictions to which they will have to adapt going forward.

On a more positive note, Boards of Governors and Directors of FTs may in fact benefit from such additional guidance when striving to satisfy the often arduous governance obligations owed by them to the FT.

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This update does not attempt to provide a full analysis of those matters with which it deals and is provided for general information purposes only and is not intended to constitute legal advice and should not be treated as a substitute for legal advice.

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