

The Coughlan Case

Pamela Coughlan's case clarified the law regarding NHS Continuing Healthcare Challenging injustice can be hard. Challenging injustice when you're severely disabled, like Pamela Coughlan, required extraordinary courage and determination. Her legal victory in securing NHS Continuing Healthcare for herself has helped thousands of families with elderly relatives to also find the courage to fight for what they're entitled to – and force the NHS to provide free care. Many families are still fighting that battle and still face many obstacles. However, thanks to Pamela Coughlan they can refer to the 'Coughlan test' in their legal argument for the entitlement to care fees.

Pamela Coughlan's case

In the 1970s Pamela Coughlan was paralysed after a road accident and needed full-time care. She had severe physical disabilities including partial paralysis of her respiratory tract. At the same time, however, she could still speak coherently and with mental clarity, use an electric wheelchair by herself, use a computer with voice technology, and eat and drink with some assistance.

Her care was financed by the NHS until, in the 1990s, the East Devon Health Authority transferred responsibility for her care to Social Services. By reclassifying her needs as 'social' care rather than 'health' care, this meant she would now be means-tested and have to pay for her own long-term care. She pursued a case against the NHS to secure NHS Continuing Healthcare, fighting it in the High Court. It took two years and, in 1999 after an unsuccessful appeal by the then Labour government, she finally won a landmark case in the Court of Appeal (The judgment applies to England and Wales.)

Unlawful NHS decisions

The Court agreed that the actions of the local authority had been unfair and that the NHS had not followed its own guidance. It stated that the NHS had reneged on its promise to provide long-term care, used inconsistent eligibility criteria and had consequently made unlawful decisions.

Nursing care responsibility

The key question was whether nursing care for a chronically ill patient can lawfully be provided by the local authority as 'social' care (means-tested) or whether it must be provided free of charge in law by the NHS. In court the judge ruled that both general and specialist nursing care were the sole responsibility of the NHS. However, the Court of Appeal subsequently found that the local authority *can* provide some nursing care, but only when...“...the nursing services are merely (i) incidental or ancillary to the provision of the accommodation which a local authority is under a duty to provide and (ii) of a nature which it can be expected that an authority whose primary responsibility is to provide social services can be expected to provide.”

In Pamela Coughlan's case, however, the Court of Appeal ruled that her nursing care was the responsibility of the NHS, not the local authority. The Court also raised the issue of people with needs that are chronic yet stable – as opposed to people with acute conditions. The NHS should address chronic yet stable needs as part of a Continuing Healthcare assessment process. The NHS should also not assume that just because a need is 'stable' it is automatically the responsibility of the local authority.

The 'Coughlan test'

Pamela Coughlan's needs were greater than those for which the local authority could be expected to provide care. As a result she was eligible for NHS Continuing Healthcare. The ruling also indicated that it would therefore be logical that anyone with needs the same as or greater than Pamela Coughlan should also be eligible for NHS Continuing Healthcare. This became known as the 'Coughlan Test'. The case clarified the law regarding fully-funded NHS Continuing Healthcare. The Court of Appeal stated that...

“...where the primary need is a health need, then the responsibility is that of the NHS, even when the individual has been placed in a home by a local authority.” Continuing Care assessors will often say that the Coughlan case is 'old' and therefore doesn't count anymore. They also often say that the rulings in this case are no longer relevant. Both statements are incorrect.

Primary Health Need Approach

The judgment also concluded that the 'vast majority' of people in care homes should have their care fees NHS funded, and that only if someone's health care needs are 'incidental' to their overall care needs should the responsibility be passed to Social Services. This is now known as the 'Primary Health Need Approach' and it is applied in all assessments for NHS Continuing Healthcare. It came about in 2007 as a direct result of the Coughlan case. However, there is no definition in law of a Primary Health Need. It means that a culture has developed where NHS

funding assessors seem to apply their own subjective interpretation of the guidelines onto funding decisions. The result is that many tens of thousands of people are still illegally charged for healthcare and nursing care in the UK.

National Framework for Continuing Healthcare.

The guidelines in question are known as The National Framework for NHS Continuing Healthcare. Introduced in 2007 and revised in 2012, they were supposed to streamline the Continuing Healthcare eligibility criteria nationally. However, there is a legal argument that suggests if Pamela Coughlan's needs were measured against this National Framework, she would be found ineligible for NHS funding. This indicates that the National Framework itself could well be illegal.

The law, however, is clear: Pamela Coughlan does qualify for NHS Continuing Healthcare.

What does NHS Continuing Care cover?

It covers 100% of care fees for people who need full-time care primarily for health reasons, i.e. they have a Primary Health Need. It's available whether you're in a care home, in your own home, in a hospice or somewhere else.

- If you're in a care home, NHS Continuing Healthcare covers all care fees, including the costs of accommodation.
- If you're receiving full time care at home, Continuing Healthcare covers all nursing care plus personal care (bathing, dressing, etc.) plus any household costs directly related to care needs.

It doesn't matter whether you're in a residential home or a nursing home, the same rules apply: It's about your health needs first, not where you live or how much money you have. The landmark Coughlan case, reinforced the difference between health needs and social care needs.

The 'National Framework'

Prior to 2007 each Health Authority had its own eligibility criteria for Continuing Healthcare. The result was a 'postcode lottery', great confusion and thousands of complaints to the Health Service Ombudsman. In 2007 the Department of Health introduced a new 'National Framework' for England, with the aim of providing a consistent single assessment process for everyone. Most (but not all) of these National Framework guidelines apply to Wales as well. This National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care defines NHS Continuing Healthcare as follows:

"NHS continuing healthcare means a package of ongoing care that is arranged and funded solely by the NHS where the individual has been found to have a 'primary health need'... Such care is provided to an individual aged 18 or over to meet needs that have arisen as a result of disability, accident or illness. ...Eligibility for NHS continuing healthcare places no limits on the settings in which the package of support can be offered or on the type of service delivery."

NHS Continuing Healthcare funding is available for full time care at home as well as in a care home. Financial means-testing should never be part of the decision-making process about eligibility for NHS Continuing Healthcare. Budgetary considerations should also not influence eligibility decisions. It's about your health needs only.

One of the sticking points in many assessments for NHS Continuing Healthcare is the difference between a 'health' need and a 'social' need. Many case histories indicate that health needs are sometimes played down in assessments and described as 'social care' needs – but this means the person needing care is more likely to be means tested. If health needs are wrongly defined as social care needs, this could also put the local authority in an unlawful position.

Assessment tools are used with what many families feel are punitive eligibility criteria that seem to be designed to make it very difficult to qualify for NHS funding. It's vital to keep the Coughlan case in mind and the local authority legal limit.

Eligibility for NHS Continuing Care.

The Decision Support Tool records health and care needs in 11 different categories, called care 'domains'. These are: Behaviour, Cognition, Psychological & Emotional needs, Communication, Mobility, Nutrition, Continence, Skin, Breathing, Drugs/Symptom Control, Altered States of Consciousness and (in the full assessment) a 12th domain: Other significant care needs.

Each domain is given a score. The page references showing the overall scores you need at each stage **here**. If you have high enough scores in the full assessment you will qualify for Continuing Care funding. The assessors also consider the nature, complexity, intensity and unpredictability of all health needs – and this is where many families feel things can get very subjective.

Many families say their experiences with Continuing Healthcare report that the assessment process was not open or transparent and that the guidelines were not always followed. There are many pitfalls to be aware of – and many points to argue to get a fair outcome. Free care becomes less care becomes careless.