

## NHS recovery of charges

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*In this article the author considers the Personal Injuries (NHS Charges)(Amounts)(Scotland) Regulations 2006 (SSI 2006/588), which are due to come into force on 29 January 2007.*

### Introduction

Those conducting personal injury cases will be well acquainted with the operation of the recoupment of benefit scheme under the Social Security (Recovery of Benefits) Act 1997 (commonly known as 'CRU recoupment') and the recovery of NHS charges in respect of road traffic accidents under the Road Traffic (NHS Charges) Act 1999. The justification for the schemes was the view of the government (and that included successive Conservative and Labour administrations) that just as an injured person who has suffered by reason of another's negligence should be paid compensation, so too the taxpayer who ultimately bears the costs of the benefits or charges paid out should be able to recoup them from the responsible person.

Whatever the justification for such schemes they have been remarkably successful in recouping large amounts for the taxpayer. This has been done at little cost to the government. The taxpayer has also managed to realise such recoupment without sharing in any of the risks of litigation which are all still borne by the parties.

### Details of the new recoupment scheme

The success of these schemes has led to the expansion of the principle of "recoupment" to cover NHS treatment given to injured persons where an injury is sustained in any accident and not just a road traffic one. The new scheme is contained in Westminster legislation, namely Pt 3 of the Health and Social Care (Community Health and Standards) Act 2003. There are also regulations, namely the Personal Injuries (NHS Charges)(Amounts)(Scotland) Regulations 2006. The relevant sections in the Act for NHS recovery and the regulations are to apply to any injury occurring on or after 29 January 2007; see reg 1(3) of the regulations and s 169 of the 2003 Act repealing the Road Traffic (NHS Charges) Act 1999.

The starting point of the scheme will be where a compensation payment is made to an injured person in consequence of any injury. Injury includes physical or psychological injury

(s 150(1)(a) of the 2003 Act). It does not however include a disease unless the disease is attributable to the injury suffered by the injured person (s 150(5) and (6)). The scheme will therefore not cover the cost of treatment in consequence of industrial diseases. There are also exemptions listed in Sch 10 to the 2003 Act, most notably payments made in fatal cases in respect of liability arising by virtue of s 1 of the Damages (Scotland) Act 1976 (Sch 10, para 7). Payments made to an injured person by an insurer under the terms of any contract of insurance are also exempt (Sch 10, para 4(1)). The charges to be recovered will be where the injured person has received treatment at a health service hospital and/or been provided with NHS ambulance services (s 150(1)(b)(i), (ii) and (iii)). If therefore someone has attended upon their GP only then no charges can be recovered.

The mechanism of recovery for NHS charges centres, as with CRU, around the certificate specifying the amount of the charge to be recouped. There are provisions dealing with providing information, review, appeals to the Appeals Tribunal and ultimately appeal to the Social Security Commissioner on the basis that the decision was erroneous on a point of law.

There is one important difference from the CRU and RTA recoupment schemes. There will be scope to reduce the NHS charges to the extent of any reduction by way of contributory negligence. However, practitioners will require to ensure that they meet the requirements of the Act to justify such a reduction. It will not just be a simple matter of referring to an exchange of letters or oral agreement at the door of the court. It will be necessary to have an executed joint minute which specifies the following: (1) that the action has been settled extra judicially; (2) that the damages have been reduced to reflect the injured person's share of responsibility for the injury in question; and (3) the specific amount or proportion by which they are to be so reduced (s 153 (3)(d) and (e)). Given that the reduction will only be effective by means of a joint minute it seems that in a case which is to settle but which has not been litigated a friendly action may still nevertheless be necessary to give effect to a joint minute.

There will of course be the few cases which have gone to judgment where the judgment itself will be sufficient. If there is such a joint minute or judgment then it will be compulsory on the Scottish Minister to review the certificate (s 156). In the regulations there are also provisions for apportionment as between compensators (regs 5(1), (2) and (3)). Here what is

required is "sufficient evidence" but it is not clear what precisely that means. No doubt those acting for compensators will ensure that any agreement between them is clear, unambiguous and in writing before seeking an apportionment of the charges.

There are also interestingly provisions for waiver of a payment by the Scottish Minister where that might produce hardship (s 157(4) and (5)). There have been cases where the CRU recoupment has not been pursued, for example where a compensator is uninsured.

The actual amounts to be recouped are contained in the statutory instrument (reg 2(1)). There is £159 for each occasion on which the injured person was provided with NHS ambulance services. There is then £505 when the person attended hospital but was not admitted and £620 for each day or part day of admission (not counting the day of discharge). The maximum amount which can be charged is £37,100 (reg 2(4)). There is no scope for set off of charges for treatment against analogous heads of claim as with the CRU.

Unlike the CRU recovery of benefits scheme where the benefits are recouped into the Treasury pot, NHS charges will go back to the responsible body for the health service hospital

which provided the treatment in the first place (s 162 of the 2003 Act). That has a certain virtue in that the resources are going to where the demand, for example in accident and emergency, in the NHS is greatest. It is not clear who is actually to administer the scheme for the Scottish Minister but it is likely to be the existing CRU Unit.

### Conclusions

The Act and the regulations, as with other schemes, have, however, little regard for the impact on the practice of personal injury itself. There is some concession on the question of contributory negligence but there still remains the risk of litigation and the discounts inherent in a compromise settlement. Given the absence of a main player, i.e. the taxpayer, who cannot compromise on a large amount of NHS charges, that may militate against resolution of a case. Court rules will no doubt require to be reviewed and in any event the courts recognise the requirements from elsewhere on parties. Furthermore, practitioners will again require to review their systems, advise clients, and also absorb the hidden cost for parties in effectively taking on most of the burden of administration of the system.

## NEWS

### Appreciation

**Norman J Adamson, CB, QC**  
**Born: 29 September 1933 in Glasgow.**  
**Died: 9 December 2006 in Farnham.**

Norman Joseph Adamson, who died recently, was born in Glasgow in 1930. Educated at Hillhead High School and Glasgow University from which he graduated M.A. with honours in philosophy and economics followed by LL.B., he chose, instead of taking an active part in the family licensed business, to pursue a career in the law and he served an apprenticeship with the Glasgow solicitors, Wright, Johnston & Mackenzie. During National Service he was appointed as the Scottish representative in the London office of Army Legal Aid (Civil) (UK) where boots and battledress sat ill with the sedentary task of advising soldiers on their legal problems. After demobilisation he was admitted to the Scottish bar in 1957 and to Grays Inn two

years later. Norman took an early interest in politics where he was active in the Scottish Young Conservatives and contributed to a number of policy pamphlets and he twice stood for Parliament in the Maryhill constituency of his native Glasgow. He practised at the bar for some years but his philosophical ability to see both sides of every question was perhaps at odds with our adversarial system and he sought pastures new.

After serving briefly as an Honorary Sheriff Substitute he found his metier in 1965 in the Lord Advocates Department. Based in London but serving the Scottish legal system, the small band of lawyers in that department had two distinct tasks. First, to assist the Scottish Law Officers — the Lord Advocate and the Solicitor General for Scotland — in providing the Government with legal advice on Scottish affairs and on the Scottish elements in UK affairs; and, second, to draft legislation. Although disparate, those jobs required high