

THE ADMINISTRATIVE DECISIONS (REVIEW) (GUERNSEY) LAW, 1986 (“the Law”)

Complaint of Mr. R. Brooks against the Health and Social Services Department (“HSSD”)

BACKGROUND FORMALITIES

Mr. Brooks made application to the Chief Executive of the States of Guernsey on 12th. March 2012 under Section 1 of the Law for the matter described in the next section to be reviewed by a Review Board. The Chief Executive enquired into the matter in accordance with the provisions of Section 2 of the Law and satisfied himself that the matter complained of was within the jurisdiction of a Review Board. Accordingly, he requested the Chairman of the Panel of members constituted under the Law to appoint a Review Board to enquire into the complaint.

The Chairman of the Panel appointed himself (Mr. R. A. Perrot, Deputy), Mr. M. Fallaize, Deputy and Mr. A. M. J. Courtney, Dean of Saint Saviour’s Douzaine as members of the Review Board. Mr. Perrot chaired the Board.

The Review Board hearing took place on 20th. November 2012 in the Reading Room at Les Cotils Christian Centre, Saint Peter Port. It began at 1000 hours and finished at 1645 hours. Mr. Brooks represented himself, accompanied by his wife. The Department was represented by its Minister, Dr. Hunter Adam and he was accompanied by Mr. Richard Evans (Director of Corporate Services HSSD) and Mr. Ed. Freestone (Assistant Director, Policy, HSSD).

In order to give each one coherence the following two narratives (the complaint and its background and the HSSD response) are compilations of the oral representations of the parties on the day, their responses to questioning by each other and the Review Board and, where relevant, the documentation submitted by each party in support of their cases and the additional documentation bespoken by the Board.

COMPLAINT AND ITS HISTORY

Mr. Brooks’s complaint, in short, was that the HSSD had refused to pay his medical and travelling expenses in respect of a surgical procedure undergone by him in London in March 2011.

His narrative began in 2008. During a cruise in the Mediterranean in September of that year he fell ill, most particularly manifested by blackouts. The medical team on board the ship diagnosed a heart condition and as a result he was flown to London for emergency treatment. He was treated by a consultant cardiologist – Dr. Paul Curry- who implanted a pacemaker. The costs of the medical evacuation and treatment were borne by insurers under the terms of a holiday insurance policy. Surgery took place on 16th. September 2008 and Mr. Brooks was given a check-up by Dr. Curry on 25th. September. He (Dr. Curry) duly reported to Dr Malcolm Chamberlain (Mr. Brooks’s G.P.) by letter dated 25th September, writing that Mr. Brooks was very well, that the pacemaker battery had a life of up to nine years and that ...” the leads are excellent”. [The relevance of the reference to “leads” will become apparent in a few paragraphs.] He went on to write that the pacemaker needed to be checked every year.

A check was carried out on the pacemaker in January 2010 without any problem being detected. Mr. Brooks again attended a pacemaker check appointment on January 19th. 2011, as a consequence of his receiving a letter from the HSSD dated 23rd. December 2010. In 2010 he had been examined by a Mrs. Janine Burgess, an employee of the DHSS, but on this occasion he was seen by a Mr. Andrew Norman, from Jersey. Mr. Norman identified the "top" or atrial lead of the two pacemaker leads as having failed, in October 2010. He went on to say that the pacemaker would function on one lead only. He isolated the upper lead completely and re-programmed the pacemaker. He also said that there was no need to change the lead and that Mr. Brooks would not need a check-up until the next annual one due in 2012. During a subsequent telephone conversation on 31st. January 2011 Mr. Norman told Mr. Brooks that the upper "chamber" lead was more likely to slip because the chamber was smooth but that the lower chamber was rougher and more likely to grip better. There had been no reports of manufacturing problems.

Dr. Chamberlain received a report from Mr. Norman, and he subsequently tried to speak to Dr. Dean Patterson, the consultant cardiologist at the Medical Specialist Group, without success. He then sent a copy of the report to Dr. Curry, mentioning that there had been some worry about the atrial lead. Dr Curry telephoned Mr. Brooks on 21st. February saying that he would like to re-programme the top lead. He followed that up with a letter to Dr. Chamberlain dated 23rd. February 2011, repeating his wish to re-programme the pacemaker and possibly reposition the atrial lead.

Mr. Brooks therefore arranged to go to London and he was examined by Dr. Curry on 14th. March 2011. (At that stage he regarded himself as a private patient, in no particular danger, who was in a position to combine a family stay with his daughter with a visit to Dr. Curry. He said that he had not intended to make any claim under the secondary care scheme if the visit had been "benign" – for example if Dr. Curry had had to give a "minor tweak" to the pacemaker.) Chest x-rays taken that day revealed that the atrial lead had disrupted completely and that the lower or ventricular lead was crushed. Mr. Brooks was in a condition of sufficient danger (by the potential complete disruption of the ventricular lead) that he was told not to raise his arm above the shoulder and not to travel back to Guernsey. Although the Board hasn't been able to corroborate this from the documents produced, Dr. Chamberlain quoted Dr. Curry and his colleague Dr. Jaswinder Gill as saying that "the ventricular wire was hanging on its last thread". The damage had been caused by abrasion from the site of the setting joint of a broken left clavicle. It was decided that the leads had to be extracted and the pacemaker re-implanted with new leads, as a matter of urgency. Specialist equipment was required, which was only available at St. Thomas's Hospital, where Dr. Gill practised. In the interim, Mr. Brooks was allowed to stay with his daughter in London. Apparently, Drs. Curry and Gill were fortified in that view as Mr. Brooks would be under the supervision of his wife and would be living in the near vicinity of a hospital. The surgery was successfully carried out on 21st March 2011. The total costs incurred by Mr. Brooks amounted to £9,903.20. There was some saving in that Dr. Gill said that he would prepare equipment for all eventualities, but would ensure that Mr. Brooks was only charged for equipment used.

When Mr. Brooks realised that his life was in danger, he formed the view that the pacemaker check was defective and that the realisation that a lead had failed should have prompted a recommendation that x-rays be taken immediately. Furthermore, he felt that it was wrong for Mr. Norman to tell him that a further check was not necessary until the regular check-up in 2012. As a consequence he felt that he was entitled to be reimbursed his expenses, because if his condition had been correctly diagnosed by x-ray in Guernsey he would have been referred anyway for treatment at St. Thomas's hospital, with which the HSSD had a referral arrangement.

Dr. Chamberlain wrote to Dr. Patterson on 8th. April 2011, explaining what had happened and suggesting of Mr. Brooks ... "that he merits being covered under the reciprocal health arrangements made for cardiology with the UK". Dr. Patterson replied on 22nd. June 2011 and said this:

"I have identified 2 areas of concern here.

- Firstly, I think that there was an inappropriate hasty decision taken in rushing him over to see Paul Curry without first discussing with The Medical Specialist Group or myself. This has led to him receiving a large bill This is unfortunate and could have been avoided had you/he gone through the contract referral to St. Thomas'
- The second issue is, of course, the actual follow up of patients with pacemakers in Guernsey and dealing with the complications or queries. Mr Brooks was followed up by the Jersey pacemaker service who identified a problem but did not arrange a chest x-ray or write to anyone explaining the problem. Clearly, things should have been communicated better. This service has been identified by Janine Burgess (our pacing physiologist currently on sick leave) and me as being less than satisfactory. We raised our concerns to Jan Coleman (Manager for Adult Services in the PEH) at a meeting in November 2009 to discuss many such similar incidents and I proposed a business plan to manage the problem.

I have copied this letter to Jan Coleman and Bill Langley, who helps manage cardiology, Trish de la Mare (PEH Patient Safety Advisor) and Cathy de Carteret (Senior Manager Off-Island & Visiting Services). I have also copied to them the report which I generated in November 2009.

Unfortunately the visiting service, from Jersey, is, of course, not contracted and the whole area is currently under review at my urgent request. The visiting service from Jersey is also unable to meet the minimum requirements set out by HRUK (I have attached their latest guidance summarising this).

In the medium term, we are hoping to implement a visiting and remote telemetry based pacemaker service from Southampton University Hospitals NHS Trust. I will take this opportunity to reiterate that this is an urgent matter that needs to be dealt with without delay."

Mr. Brooks wrote to the Minister on 26th. September 2011, asking for reimbursement of his costs. The Minister wrote a substantive reply on 8th. November 2011, declining to reimburse the costs claimed. He said this:

" I note that Dr. Chamberlain referred you to Dr. Curry who arranged to see you. However, to be treated under the Specialist Health Insurance Scheme (SHIS), a patient must be referred to a NHS provider with whom the DHSS has a contract by a specialist from the Medical Specialist Group. GP's are not able to refer off island under the Scheme and any patient referred direct by a GP will be as a private patient and liable for the costs incurred.

Unfortunately, as you were referred off island by your GP this falls outside the provisions of the SHIS and I regret that it is, therefore, not possible to reimburse you for the costs incurred."

Mr. Brooks then issued a petty debt summons which was subsequently withdrawn, after it was mooted by the judge that a review board might be a more appropriate forum for his claim.

Mr. Brooks told the Board that pacemaker checks were now carried out by Southampton Hospital.

THE HSSD RESPONSE

The Department's case was straightforward and was as set out in the Minister's letter to Mr. Brooks dated 8th. November 2011. The cost of off-island treatment could not be claimed unless the patient had been referred by a Medical Specialist Group specialist to an NHS provider with which the HSSD had a contract.

The Minister referred the Board to Billet D'Etat XIII of 1995 at paragraph 26. That paragraph said that specifically excluded from the scheme was treatment outside Guernsey or Alderney with the exception of a specialist escorting a patient to the U.K. or Jersey.[That reference was not appropriate, because, clearly, *some* treatment off-island is indeed paid for by the DHSS. Of relevance is paragraph 23 which states that specialist treatment under contracts which the Board of Health (now the HSSD) has with U.K. health authorities will continue.] The Board referred the Minister to Billet D'Etat VI of 1992. On page 273, at paragraph 30(e) of the policy letter of the then Board of Health outlining the proposed health care scheme, it was stated that the scheme would cover the costs of certain treatment not available in Guernsey. Access to specified hospitals in the U.K. would be allowed under the terms of the scheme following referral by local specialists, or in certain circumstances by GPs. The Minister was asked what were those circumstances. He said that they would include, for example, facial reconstructive surgery.

The Minister expressed considerable concern that the correct formalities be observed in respect of off-island treatment. It would not be acceptable or good governance for patients to elect to be treated at hospitals where HSSD did not have a contract and still expect to be refunded under the scheme. The HSSD would be open to requests for payments for unproven treatments or procedures and to scales of charges which were not acceptable.

The Minister made the point that although Dr. Chamberlain had tried to contact Dr. Patterson in respect of the pacemaker report, when it was realised by him that Dr. Patterson was not immediately available Dr. Chamberlain did not appear to have requested that another consultant review Mr. Brooks or offer advice. Furthermore it was for Dr. Chamberlain to recommend that an x-ray be taken of Mr. Brooks. If, in the light of that, a consultant from the Medical Specialist Group had so recommended, Mr. Brooks would have been referred for treatment to Guy's and St. Thomas's NHS Foundation Trust under the Specialist Health Insurance Scheme. He accepted that had Mrs. Janine Burgess not been away on sick leave, she would have had more knowledge and could have suggested an x-ray and spoken to a physician.

Dr. Adam referred the Board particularly to the letter from Dr. Chamberlain to Dr. Patterson dated 25th. July 2011, in which Dr. Chamberlain said that "I told him in very straight and plain language that I could not guarantee that he would have his costs covered by the States Social Security". It was therefore the view of the Department that Mr. Brooks was aware that his costs might not be covered and no further check seemed to have been made by Mr. Brooks or Dr. Chamberlain. The Department could not itself give Mr. Brooks any warning because, of course, it knew nothing of the matter until Mr. Brooks made his claim in a letter to the Minister dated 26th. September 2011.

The Minister said that it was wrong for Mr. Brooks to have made a claim for his travel costs. Travel costs were reimbursed, if they were due, by the Social Security Department under the provisions of its leaflet 58.

The Minister conceded that if, having discovered the condition of Mr. Brooks after Dr. Curry had examined his x-rays, a call had been made to the Medical Specialist Group or the Department by or on behalf of Mr. Brooks, he might well have been referred to the "Exceptional Care Panel" which could have referred Mr. Brooks for treatment to Guy's and St. Thomas's under the health scheme. He also conceded that he was not aware of any factual or legal impediment preventing the HSSD from reimbursing Mr. Brooks, other than that formalities had not been observed.

The Minister said that it was not appropriate for him to give a view as to whether Mr. Norman had been negligent. Mr. Norman still came to the Island. No action had been taken in respect of what had happened to Mr. Brooks and no changes in procedure had been made in respect of Mr. Norman's work. The general system now in place had changed, anyway, in that pacemakers were checked under the new arrangement with Southampton Hospital, although some patients could choose to go to Jersey for a check-up by the jersey pacemaker service .

REVIEW BOARD FINDING

It is not completely clear to the layman what the procedure is when a person is to be able to claim for specialist treatment in the U.K. Although the protocols will be known to local medical practitioners, a patient would probably look no further than the leaflet issued by the HSSD [leaflet 2] which states that not covered by the scheme is "Private specialist care provided by a specialist not under contract to the States". The Board was of the view that there was room for improvement in what is contained in the leaflet, which ought to make the full reference procedure clear beyond doubt.

In the case of Mr. Brooks, it was clear that he knew that his consultation with Dr. Curry would most probably not be covered by the scheme, because Dr. Chamberlain had told him so. That was of no especial concern to Mr. Brooks because, as he had told the Board, he was content to spend some time with his family in London and at that stage he had no great cause for concern in respect of his health. The danger in which he found himself was only realised when Dr. Curry had examined the x-rays which had been taken. That, in Mr. Brooks's mind, changed the position retrospectively, because he regarded the pacemaker service which he had received as having been defective. Furthermore, he was anyway treated by the same group of hospitals as would have treated him had all the correct formalities been followed.

The role of the Jersey pacemaker service seems to have raised some doubts in the mind of Dr. Patterson, because he said in his letter to Dr. Chamberlain dated 22nd. June 2011 that "...it was not contracted".

Whatever may have been the view of Dr. Patterson, the Board regards the specialist health scheme to be a "compact" between the States of Guernsey and its residents as set out in the relevant Billets d'Etat in the 1990s. The States provide the service through the agency of its contractor the Medical Specialist Group and , irrespective of where the pacemaker check-up service sits within that framework, the service is just that – a service provided under what the Board calls that compact, for which the States, through the HSSD, must accept responsibility. There was something of a shock experienced during the course of the enquiry when Mr. Brooks asked the Minister, baldly, whether the Minister thought that Mr. Norman had been negligent. The Minister declined to answer. The Board has sympathy with the Minister's position, because to anyone with even a brushing

experience with the law the idea of negligence is a highly technical term within the law of tort, and one enters that legal minefield at one's peril. Had Mr. Brooks put the question more moderately – say by asking whether the Minister thought that the check was unsatisfactory- he would have been very hard-pressed other than to agree. Indeed, Dr. Patterson –as a representative of the HSSD's medical contractor - had himself said in his letter to Dr. Chamberlain of 22nd. June 2011 that things should have been communicated better and that the service generally had been identified as less than satisfactory. The general concern had been expressed to the HSSD as long before as November 2009, and the Board cannot but express surprise that it wasn't until some time after events concerning Mr. Brooks that a different system of pacemaker checks was adopted. In the Board's view it was incumbent on the HSSD immediately after being alerted to the problem in November 2009 to put in place a protocol so as to ensure that in the event of a pacemaker technician having the slightest doubt about the results of a check a report was sent forthwith both to the GP concerned and to the relevant specialist within the Medical Specialist Group. Although in Mr. Brooks's case, the receipt of a report by the GP did not automatically result in an x-ray being requested [in his letter to Dr. Curry dated 7th. February 2011 enclosing a copy of Mr. Norman's report Dr. Chamberlain said "I assume nothing else needs to be done at the present time"] because (the Board supposes) Dr. Chamberlain was not a heart specialist, the Board feels confident in assuming that an x-ray would have been demanded by Dr. Patterson had he received a copy of the report. The upshot was that safeguards were not robust enough, a sentiment with which the Minister did not disagree.

As the Minister conceded, if the Medical Specialist Group had been informed by telephone of Mr. Brooks's condition at the time of his examination by Dr. Curry, he would have been swept up in the health scheme and treated in the very hospital where he was actually treated, but at a lower cost – because of the contractual arrangements in place between Guernsey and Guy's and St. Thomas's at that time. [It wasn't very long after Mr. Brooks's treatment that the contract was brought to an end.]

The Board has sympathy with the position taken by the HSSD. It was very anxious not to let a precedent be created. It needs to be assured of a proper filtering system so that only qualifying cases are referred outside the Island and then only to hospitals with which it has arrangements. That said, Mr. Brooks's case turns upon its own facts. It is unlikely that the unfortunate turn of events will be repeated. Furthermore, given that the same hospital would have been used if Mr. Brooks had followed all formalities, albeit at a reduced price, the Board has concluded that the HSSD has in this case been too keen to focus on form rather than substance.

In the Board's view, Mr. Brooks was let down by the pacemaker check for which the DHSS must accept responsibility. It wasn't good enough for Mr. Brooks to be told that no further check was required for another year. Proper safeguards should have been built into the system so that an x-ray was generated. That said, It would be wrong for the Board to ignore the fact that Mr. Brooks's own GP didn't persist in trying to discuss the pacemaker report with Dr. Patterson. Balanced against that, it was to Dr. Chamberlain's great credit that he sent a copy of the report to Dr. Curry. Had that not been done, the result could have been disastrous.

In the opinion of the Board the refusal of the HSSD to reimburse Mr. Brooks could not have been made by a reasonable body of people after proper consideration of all the facts and thus falls within the provisions of Section 7 (3) (e) of the Law.

The Board's conclusion is that the HSSD should reimburse Mr. Brooks for his medical expenses incurred in London – but on the basis of the costs which would have been incurred by the scheme had the correct reference procedure been followed, so that a reference would have been made to Guy's and St. Thomas's under the contractual arrangement in place with the HSSD. The Board also

concludes that Mr. Brooks's travelling costs should also be reimbursed in respect of the visit to London in March 2011. Although such a claim should have been made pursuant to the terms of Social Security Grant Leaflet 58 (whereby details relating to Mr. Brooks should have been sent to the Health Benefits Section by Mr. Brooks's Specialist or G.P.) the Board realises that the HSSD and the Social Security Department are simply two parts of a greater whole – i.e. the States of Guernsey - and it seems unlikely that an appropriate money transfer cannot be made between those Departments.

The Board requests the Department to reconsider the matter accordingly.

POSTSCRIPT 1.

As a preliminary issue prior to the hearing the Chairman of the Board arranged for Mr. Brooks and the HSSD to be informed that a consultant in his Advocates' firm had acted for the Medical Specialist Group during the period in the early 1990s when the health care contract was being negotiated with the Board of Health, and enquired whether either party wished to raise any objection to his involvement in the review on the ground of conflict. He informed them that he had not been involved personally in the matter and not seen the health service contract prior to the review papers being received. Both parties confirmed that they had no such objection.

POSTSCRIPT 2.

A review is an enquiry, not a court case. The Board proceeded to hear this complaint and arrived at its conclusions by taking at face value any statement by a party which went unchallenged by the other party. A number of individuals were referred to during the course of the parties' presentations, who were not present to counter or otherwise correct any perceived wrongful assertions relating to them. Clearly, it was and is not for the Board to hold itself out as arriving at any legal finding of fact in respect of such individuals.

5th December 2012

R. A. Perrot.

.....

M. Fallaize.

.....

A. M. J. Courtney.

.....