

June 2004

Human Rights

Resuscitation of a Disabled Child

HEALTH LAW
REVIEW

The European Court of Human Rights has ruled on the legal steps that should be taken where there is a dispute about the treatment of a child between the medical practitioners and a parent.

In *Glass -v- The United Kingdom*, the court was faced with unusual facts. DG was born in 1986 and is physically and mentally disabled. He lived with his mother and required considerable care from her and from health professionals from time to time.

In July 1998 he required treatment for an upper respiratory tract obstruction for which he was admitted to a NHS hospital. In the course of his treatment and in the knowledge that he might die, the paediatricians took the view that he required diamorphine to alleviate his distress and possibly assist his breathing. A decision was made that he would not be resuscitated in the event that he arrested.

There was a factual dispute about whether his mother had agreed with the treatment course in the past but, in the event, it was plain that she did not agree to the administration of diamorphine when the decision was made to administer it. Her wishes were overridden, diamorphine was administered and DG recovered.

The judgment

The case was argued under Article 8 of the Convention on Human Rights which provides:-

- “1. Everyone has the right to respect for his private and family life ...
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ...”

The European Court of Human Rights (ECHR) concluded that:-

- The decision to impose treatment on DG in defiance of his mother’s objections gave rise to an interference with DG’s right to respect for his private life and in particular his right to physical integrity.
- In the circumstances, the onus was on the NHS Trust to take the initiative by bringing the matter before the court.
- There was a breach of Article 8.
- Compensation of EUR 10,000 was awarded to DG and his mother.

Background

The issues had previously been before the English courts. The mother had made an application for Judicial Review to the High Court which was dismissed by Mr. Justice Scott Baker. The mother appealed and the Court of Appeal dismissed the appeal saying:-
“Where there is conflict of a grave nature about the medical treatment of a child, the desirable way forward is to bring the matter before the Court. In that way the particular problem will be given an answer which reflects the view of the Court as to the best interests of the child, taking into account the natural concerns and responsibilities of the parent, the views of the doctors, and advice from the Official Solicitor and others. The answer given in relation to a particular problem dealing with a particular set of circumstances is a much better answer than an answer given in advance.”

Lessons to be learned

Some practical lessons may be learned. There was no dispute that a NHS Trust was a public

Continued overleaf

Human Rights continued

body. However, a General Practitioner making decisions on life preserving or life threatening NHS treatment may also be challenged in the courts under Article 8 on the ground that he is a “public body” when making such decisions.

Secondly, in describing the regulatory framework in the United Kingdom, the ECHR found that it “*prioritises the requirement of parental consent and, save in emergency situations, requires doctors to seek the intervention of the Courts in the event of parental objection*”. In describing matters in that way the ECHR may have attributed greater weight to the wishes of a parent than has been generally understood by the English courts.

Thirdly, it is plain, if it was not plain before, that those responsible for administering treatment in these circumstances must take the initiative and make an application to the court so that the court

balances the competing interests and decides whether it is in the child’s best interests to have the treatment proposed or not.

Fourthly, the ECHR was not impressed with the claim that the treatment was urgent and necessary, and such that an application could not first have been made to the court, when the possibility of dispute had been foreseen by the doctors.

Finally, the facts pre-dated the introduction of the Human Rights Act 1998. However, the decision does not represent a radically different approach to that which would be taken by a domestic court adjudicating on the issue in accordance with established legal principles.

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Inquests

The House of Lords has recently reviewed the requirements of verdicts in inquests in the light of the *Human Rights Act 1998*, (HRA) in the case of *R (on the application of Middleton) v West Somerset Coroner [2004]*. Article 2 of the HRA protects the right to life and imposes on the state substantive obligations to establish a framework of laws, precautions, procedures and means of enforcement which would, to the greatest extent reasonably practical, protect life.

The obligation for the state to ensure a properly independent investigation is carried out where any of the substantive obligations may have been violated is also imposed by Article 2. The House of Lords considered whether the existing procedures to return verdicts under the jurisdiction of the Coroner’s Court provided sufficient investigation of a death involving or possibly involving a violation of Article 2.

The background to the case was the death of Mr Middleton who had killed himself while serving a prison sentence. In the inquest into his death the jury delivered a verdict of suicide but were not allowed, due to restrictions imposed by the Coroners Rules, to add publicly that failings in the system had contributed to his death. The deceased’s wife had sought an order that the jury’s findings be publicly recorded.

Lord Bingham, delivering the court’s judgment, expressed the view that a verdict of an inquest jury which did not express the jury’s conclusion on a major issue canvassed in the evidence given at the inquest could not meet the expectations of the deceased’s family or next of kin who themselves had legitimate interests in the investigation into the death. The court indicated that “*an inquest ought ordinarily to culminate in an expression, however brief, of the jury’s conclusion on the disputed factual issues at the heart of the case*”.

Inquests continued

The Coroners Rules require juries to set out in writing who the deceased was and how, when and where he came by his death, but do not allow the jury to express an opinion on any other matter. The court held that a broad interpretation of “how” the deceased came to his death accorded with the HRA and in order to comply with the requirements of Article 2, juries should now determine “in what circumstances” the deceased had died as well as “by what means”. This opens the doors for juries to express a view on disputed factual issues raised in the inquest.

Conclusions

- Juries can now return narrative verdicts which might identify individual or systematic failings, whilst remaining bound by the rules that the verdict should not reach a finding of criminal or civil liability in respect of any named person. The court cautioned against using words such as “neglect” or “carelessness”.
- The Coroner’s powers to make recommendations of precautions to prevent repetition of any event that has come to light as a result of the inquest is not altered other than any recommendations made can now be stated publicly.
- Although this case specifically relates to a death in custody, it will be interesting to see the implications of the judgment for the conduct of inquests generally. All parties represented at an inquest will now be required to ensure a full examination of the evidence surrounding the death is undertaken and it is more likely that it will be necessary to make detailed submissions regarding the circumstances leading up to the death of patients who have died in NHS hospitals (or private hospitals where the patient has been placed by the local authority), whether or not they are detained under the Mental Health Act.

Our experience since the ruling of the House of Lords is that inquests are now more likely to take the form of a thorough investigation into all the circumstances leading to the death, although much will depend on the discretion of individual coroners.

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Our inquest services

RadcliffesLeBrasseur has developed a specific service to advise clients on inquests. We attend inquests to represent our NHS and private clients and members of professional protection organisations, providing the advocacy services ourselves.



Paul Thomson,
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Mediation at a Crossroads

It seems likely that mediation is going to have an increasingly prominent role in clinical negligence claims. The Department for Constitutional Affairs (DCA) plans to make mediation much more difficult to ignore and this includes the way mediation is treated in clinical negligence claims. However, a recent ruling may limit the impact of mediation.

The DCA has implemented a number of mediation pilots and schemes and is sponsoring a major research project to evaluate the best model for the interaction between mediation and the courts. Once the research is completed, the DCA seems likely to adopt the most successful model and roll it out nationally.

Central London County Court scheme

The Central London County Court (CLCC) mediation scheme was established on 1 April 2004 by a new practice direction to Part 26 (case management) of the Civil Procedure Rules. The practice direction applies only to the CLCC and goes further than ever before in empowering the court to encourage mediation.

Some types of claim will be excluded from the scheme including those suitable for the small claims track, and those where one of the parties is a child, a patient, or is exempt from payment of court fees. However, a large number of clinical negligence claims are likely to qualify. The scheme will run until 31 March 2005 and will see the CLCC serving "notices of referral to mediation" on litigants with allocation questionnaires at random.

A party who receives a notice will find their claim referred to mediation and will be required to file and serve a reply within 14 days stating: -

- whether they agree or object to mediation
- if they object, their reasons for doing so
- if they agree, specifying dates within the next three months when they would be able to attend a mediation

According to the practice direction, if one or more of the parties objects the District Judge may order the claim: -

- to proceed in the usual way with the completion of allocation questionnaires
- to be listed for a hearing of the objections to mediation
- to be stayed with mediation to proceed regardless

It seems, however, that the new practice direction may now have to be amended in light of the judgment handed down by the Court of Appeal on 11 May 2004 in *Halsey v Milton Keynes General NHS Trust and Steel v Joy and Halliday*. The Court ruled that to compel a party to enter mediation may be a breach of Article 6 of the European Convention of Human Rights (right of access to a court) and that the most a court can do is *encourage* mediation. Encouragement is likely to take the form of recording the reasons for refusing mediation on the Court file and an adverse costs order if the trial judge subsequently feels that the refusal was unreasonable.

Other schemes

There are a number of other schemes in operation including a mediation advice service based at Manchester County Court which commenced on 21 April 2004. There is also an information leaflet scheme involving 28 courts which started in October 2003.

These pilots are in addition to the court based mediation schemes which have been running for a number of years at Central London, Birmingham, Exeter, Guildford and more recently in South and West Wales.

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