

DLS NEWS

DLS

Directorate
of Legal
Services

PRACTITIONERS IN LAW TO THE NORTHERN IRELAND HEALTH AND SOCIAL SERVICES SECTOR

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Welcome to the latest edition of DLS News.

The Directorate of Legal Services obtained re-accreditation of its Lexcel and ISO 9001 quality awards in December 2005. The re-accreditations are valid for 3 years subject to annual assessments. They confirm again the high quality of the service delivered by the Directorate and reflect the commitment and sheer hard work of its staff in attaining those standards.

It must be remembered that to obtain these awards, the Directorate's processes and procedures are thoroughly scrutinised and checked by independent, objective auditors, namely SGS Yarsley, Management Consultants. Their audit report was very positive and in particular the report highlighted more 'examples of good practice' than 'opportunities for improvement'.

Congratulations to all staff for such a positive outcome.

Three new permanent Solicitors have commenced employment with the Directorate this term, namely Martina Gillen, Anthony Gilmore and Avril Frizell, joining the Medical Negligence, General Litigation and Family Law Sections respectively. In addition Claire Quinn has joined as a Locum in Conveyancing. All have much to contribute to the Directorate.

I can also confirm that Wendy Beggs has been appointed Assistant Director, following Hilary Wells' elevation to Master at the High Court. Wendy is a very experienced Solicitor, who joined the Directorate in 1999. She will lead the Family Law, Employment Law and Conveyancing sections and will contribute hugely to the future success of the Directorate.

Alphy Maginness
Director of Legal Services

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EMERGENCY PROTECTION ORDER APPLICATIONS AND HUMAN RIGHTS

On 7th December 2005 Judgment was delivered by Mr. Meehan RM sitting at Omagh Family Proceedings Court in the case of **A Trust v M**. This was an application brought by parents to discharge an Emergency Protection Order, which had been granted in favour of the Trust a few days previously at an ex-parte hearing before a Lay Magistrate sitting outside normal court hours. On the facts of the particular case, the parents were successful and the EPO was discharged.

Whilst a decision of a Magistrate's Court would not by itself be binding, the judgment contains a useful digest of recent decisions from the English High Court and was subsequently treated with approval at a recent meeting of this the Children Order Advisory Group. The judgment is worth considering in detail therefore, when considering the necessity for an Emergency Protection Order, especially one at an out of hours setting.

The issue is essentially the Human Rights of the other parties involved and their right to a fair hearing, which is very difficult to achieve at a hearing before a lay panel member at which the Trust only is in attendance. Relying on the decision of the English High Court in **X Council v B**, (amongst others), Mr Meehan commenced his judgment by stating,

"An application for an Emergency Protection Order (an "EPO"), whereby children may be removed immediately from their home, is perhaps the most serious kind of application which any Magistrate may be called upon to decide."

It is against this background that the remainder of the judgment was delivered. In considering whether or not an EPO should be sought it is

best to remember the seriousness with which the courts will treat these applications. Essentially applications before lay panel members (ex-parte applications) are going to be the subject of considerable scrutiny to see if they are necessary. This means that wherever possible an application for an EPO should be dealt with if there is any opportunity to have some of these cases dealt with during a normal Family Proceedings Court or where the Resident Magistrate is otherwise sitting.

It is essential that the parents and, if relevant, the child should be advised of their right to obtain legal advice and that they should be advised of the time and venue of any application for an Emergency Protection Order. Obviously no application for an EPO should be initiated without recourse to this Directorate who can endeavour to contact other legal representatives. Thus it would be of considerable assistance if at the time of negotiating with the parents of a child information could be obtained from them as to the identity of their Solicitors otherwise the parents themselves should be informed of the Trust's intention to make application for the Order.

A Guardian Ad Litem is to be appointed at the earliest opportunity to represent the interest of the child. There will be no Guardian, obviously, at the Hearing of an ex-parte Emergency Protection Order out of hours but there is no reason why, should there be a subsequent application for an extension of the Order, the Guardian cannot be in attendance at that Hearing. If it is necessary in the future for a Social Worker to attend a lay panel application, the Social Worker should remind the lay panel member to formally appoint a

Guardian Ad Litem. Unfortunately Court forms are not up to date in this regard although this will be changing in the future.

Obviously the least interventionist approach is to be taken in these cases and evidence in support of an application for an Emergency Protection Order must be "full, detailed, precise and compelling" and should show the imminent risk of significant harm. Furthermore the harm entailed must be capable of precise definition so you will have to specify exactly what harm you would believe a child would be at risk of should the application not be successful. You may be asked what efforts have been made to obtain a voluntary agreement even as a "holding position" pending a full hearing of an Interim Care Order application

One issue which the Court will consider particularly relevant is the length of time the situation has been going on for and whether there is any difference in the risk that the child, for example, was at risk of suffering yesterday and that which requires an urgent application to be made today. Consideration should in these circumstances be given to making an application for an Interim Care Order at short notice instead. This approach corresponds with the underlying theme of the judgment which is to ensure "in the new Human Rights-based environment in which all public bodies now operate, Trusts.....[must show] that all reasonable efforts have been made to involve any known legal representative on the parents' part unless it can be shown to be inappropriate for the parents to have knowledge of the proceedings prior to an order being obtained"

Terry Brady
Solicitor

DISCLOSURE IN THE FAMILY PROCEEDINGS COURT

IN THE MATTER OF AN APPLICATION BY THE OFFICIAL SOLICITOR ON BEHALF OF N AND R FOR JUDICIAL REVIEW (December 2005)

Introduction

The background facts to this recent Judicial Review were as follows: the two children N and R were subjects of Interim Care Orders granted in the Family Proceedings Court. The respondent mother was seeking discovery, from the Guardian Ad Litem (GAL), of copies of written records/notes/minutes of conversations held by the GAL with the respondent mother. There was a conflict between the GAL and the mother about a particular conversation, the contended issue being that the GAL had represented to the Resident Magistrate that the mother had told her that she and her husband were presenting as a couple. The Mother denied this however, maintaining that she presented as a sole carer. The Resident Magistrate granted an Order of Disclosure against the GAL partly on the basis that the mother had a mild learning disability and had no records of the meetings.

ARGUMENTS ON BEHALF OF...

The Resident Magistrate (RM).

The RM contended that his decision was based solely on the principles of the Right to a Fair Trial under Article 6 of the European Convention on Human Rights (ECHR) and not on the Family Proceedings Court Rules. In submissions it was argued that the same rules should apply equally within the Family Proceedings Court (FPC), Family Care Centres (FCC) and High Court. Whilst accepted that the Rules did not permit the RM to make such orders, it was argued that this effectively

meant that the court had to rely on the *goodwill of the GAL* to disclose any relevant material. Such documents were said not to be of any less importance in the FPC than in the higher courts.

The Applicant

The Applicant argued that the Magistrate had no statutory power to make such an order unlike in the County Court or High Court. The Rules of the Family Proceedings Court simply do not include a power to order discovery. In relation to the Human Rights issues it was put forward that Article 6 (Right to a Fair Trial) did not impose the same obligations in all cases.

Various cases had been cited by the RM suggesting that local authorities and GALs should be increasingly willing to exhibit their reports and, in particular, for the GAL to disclose contemporaneous notes when asked for by the other parties. In response, the Applicant argued that the cases cited only related to FCC and High Court cases and not those dealt with by the FPC.

The Mother

The Mother's submission were based on a 'best interests' foundation, arguing that it was not in the best interests of the children for the GAL to avoid disclosing the notes of the conversations. Indeed, it was further stated that if the FPC did not have the mechanisms for ordering disclosure then it would become necessary to transfer cases to a higher court.

Judge's Ruling

- The Resident Magistrate had no jurisdiction to make the Order for Disclosure.

The essential reasons for this being:

1. The legislation was clear that, by the absence of such a provision, Magistrates in the Family Proceedings Court do not have authority to make an Order for Disclosure.
2. Even under Human Rights provisions it was not possible or even necessary to develop an interpretation which would allow a Magistrate to make such an Order. In particular, the Right to a Fair Trial does not necessarily require uniformity of procedure.
3. Whilst the Rules permit the courts to give, vary or revoke directions for the conduct of proceedings, this was never intended to include a direction for disclosure.



Anthony Gilmore, Solicitor, who recently joined the practice

4. The statutory obligation for the GAL to provide *‘the court with such other assistance’* did not extend to disclosure. The Rules permitted a party to question the GAL about evidence tendered by him/her to the court. This in itself affords protection as they can be asked to produce a note or record if it proves to be relevant.

OBSERVATIONS AND BEST PRACTICE

Whilst this ruling upholds that a Resident Magistrate cannot give an Order for Disclosure in the Family Proceedings Court, regard should be had to the Children Order Advisory Committee – Best Practice Guidance. In particular, section 6

provides for disclosure in public law proceedings, which charges Community Trusts with a positive obligation to ensure clarity and openness in presenting their applications. Key discoverable documentation includes:

- (i) Copies of LAC Review documentation
- (ii) Copies of Child Protection Case Conference minutes and decisions
- (iii) Copies of Contact sheets where supervised
- (iv) Copies of Significant Interview Sheets or written recordings of significant incidents.

It is worthwhile at this juncture to emphasise that Discovery is an ongoing obligation and as such,

documents should be forwarded to this Directorate as soon as possible. Moreover, each document should ***clearly*** display:

- The date of the document/report
- The author’s name and position/title
- Page numbers where appropriate
- The title of the document
- Where photocopies are provided, each copy should be legible, single-sided and in an appropriate format
- All reports ***must*** be signed by the author

Sean Hamilton
Apprentice Solicitor

Human Rights Act 1998

Training for Social Work staff

Many Social Workers [and indeed other professionals] have expressed concerns about the implications of the Human Rights Act 1998 in relation to their work with Children and Families. This issue continues to arise in many of the cases Trust staff are dealing with and has lead to challenges being put forward by parents. As a result, staff have indicated the need for more training.

Following the AR and Connor judgments, the Directorate of Legal Services provided a number of workshops for Senior Managers about the implications of the Act and the associated relevant judgments. However, operational staff did not have the same opportunity to review this material and so Marian Hall [Professional Liaison Officer] from the Directorate has now written a half day presentation aimed at staff working more directly with children and families to try and explore this area further and hopefully help to quality assure the work already being done by Trusts. She feels that the presentation will be of particular use and interest to Social Workers, Senior Social Workers, Assistant Principal Social Workers and particularly Chairs of Case Conferences and LAC reviews.

The main areas she will address will be:

- Implications for practitioners re updating practice to be Human Rights compliant

- Impact of the Human Rights Act on other legislation.
- Convention Rights and Freedoms.
- Key Articles – Article 5 Right to liberty and Security
Article 6 Right to a fair Trial
Article 8 Right to respect for private and Family life.
- Relevant Court Decisions
- Summary of key themes in Human Rights

Marian can be commissioned to provide the training at a facility within your Trust /Board area. Some Boards have already arranged for her to do this but the opportunity is available to others who have not heard about this and who feel it may be of interest and use to their staff.

Marian continues to work between DLS and Down Lisburn Trust where she is a Children’s Services Manager responsible for Adoption and Fostering and therefore very in touch with the issues arising in this work.

Anyone interested should feel free to contact Marian at DLS to discuss this further.

Owen Nicholson
Business Manager

Civil Partnerships: Relevant Considerations within the Health Service

Same sex couples across the UK have been able to have their relationships legally recognised since December of last year.

The Civil Partnership Act 2004 came into force on 5th December 2005. Section 1(1) defines a Civil Partnership as a relationship between two people of the same sex, which is formed when they register as civil partners of each other. This includes Northern Ireland, which played host to the first of these ceremonies. Civil partnership is a new legal status which permits same-sex couples to enjoy many of the rights and responsibilities which those who are married enjoy, such as rights to a survivor's pension or rights under inheritance laws. However, it also comes with responsibilities, for example the obligation to maintain the other civil partner and any children of the family. This article aims to serve as a rough guide to doctors, social workers, employers within the Health Service, and so forth, as a guide to the relevant implications of the new status of civil partnership.

There are several effects on family relationships. Some civil partners may have children from a previous relationship. Under the new legislation, a civil partner will become the step-parent of his or her civil partner's children. This does not in itself confer legal parental responsibility for a step-child on the step-parent. To acquire such parental responsibility in relation to the other civil partner's children, the step-parent will have to apply to a court for a parental responsibility order. Decisions regarding the child which the step-parent can then make may include decisions about medical treatment.

The civil partner will be able to apply for residence and contact orders in relation to the other civil partner's children. The new legislation provides that those traditional descriptions of family relationships such as 'mother-in-law', 'brother-in-law', 'step-daughter' and so forth will apply to relationships resulting from civil partnerships. At present, adoption law in Northern Ireland does not permit the adoption of children by same sex couples. A wide ranging review of adoption law and services is currently being carried out by the Department of Health, Social Services and Public Safety with new legislation on these issues expected by 2006/07.

The Civil Partnership Act 2004 has amended the Family Homes and Domestic Violence Order 1998 and gives to civil partners, former civil partners and other same-sex cohabiting couples, the same protection from domestic violence currently afforded to spouses, former spouses and other opposite sex cohabiting couples. Remedies available include non-molestation orders, occupation orders,

exclusion requirements attached to interim care or emergency protection orders, and orders for transfer of certain tenancies.

Within the Health Service, health care professionals are advised that civil partners of patients should be accorded the same degree of consideration in decision-making as a spouse. Civil partners should in general be considered the 'next-of-kin' of each other.

Civil partnerships have made some impact on employment rights. The civil partner of a person with a child under six or a disabled child under 18 may be able to take advantage of the right to request flexible working arrangements from his or her employer. The Employment Rights booklet ER36: Flexible Working – A guide for employers and employees contains more information on this. The civil partner of the birth mother or adoptive parent of a child will be able to receive statutory paternity pay and take statutory paternity leave in respect of that child. The other civil partner will be entitled to statutory maternity pay or statutory adoption



Michael Carson and Grit Scheithauer, Legal Assistants

pay and leave, in the normal way. A civil partner will be considered an appropriate person in relation to a deceased employee for the purposes of any tribunal proceedings arising under the Employment Rights (Northern Ireland) Order 1996 eg unfair dismissal, redundancy payments. An appropriate person may institute or continue such tribunal proceedings on behalf of the estate of the deceased employee, and will be appointed by the Industrial Tribunal. Civil partners will be treated the same in relation to workplace benefits, and will be entitled to a survivor's pension from their civil partner's public service pension scheme which currently

pays survivor benefits to widows and widowers.

A large amount of legislation and miscellaneous subordinate legislation has now been amended, inserting the words 'civil partnership' beside 'marriage', and 'civil partner' beside 'spouse'. Same sex partnerships are just one of the many changes which reflect our

modern day society and an increase in liberal thinking, equality and rights. It is up to all professions, not just the Health and Public Services, to be mindful of such changes and to accord with such new legislation.

Kieran Harkin
Apprentice Solicitor

- The Civil Partnership Act 2004 can be found at www.opsi.gov.uk
- Further information on the review of adoption law is available at: www.dhsspsni.gov.uk/childcare/adoption-strategy.asp
- For more information on civil partnership for employers go to: www.acas.org.uk

RECOVERY OF NURSING COSTS – A SIGNIFICANT RECENT DEVELOPMENT

1. In a recent High Court case, the Directorate of Legal Services, by relying on certain little known and infrequently utilised statutory provisions, secured a significant success for one of its clients, the Ulster Community and Hospital Health and Social Services Trust ("*the Trust*"). The outcome of the litigation was that the Trust secured a financial benefit of some £55,000.
2. The background was as follows. In April 1996, William Joseph Heron ("*the victim*") was subjected to a vicious assault outside his home. As a result, he sustained severe facial and head injuries, rendering him seriously and permanently disabled, to the extent that he required continuing nursing care, being incapable of independent existence. The Trust was responsible for his

care and arranged for his placement in two separate residential homes. During the periods in question the victim was entitled to Income Support, which was used to offset the cost to the Trust of his care and accommodation. The Trust discharged the balance of the charges due to the residential home.

3. The victim exercised his right to bring a statutory application for criminal injuries compensation, under the Criminal Injuries (Compensation) (NI) Order 1988. Compensation was determined in the amount of £100,000 for personal injuries, pain and suffering. This amount contained no element in respect of pecuniary loss or expense. The County Court duly approved settlement of the victim's claim in these terms. However, this did not represent

the final determination of his claim for compensation, since the Trust had notified him of its intention to recover care costs of some £55,000. The first question which then arose was whether this represented a pecuniary loss to the victim which could be incorporated in his claim for compensation against the Secretary of State. The next question was whether the Trust could establish any legal entitlement to recover these costs directly from the victim - and indirectly from the Secretary of State.

4. In the County Court, the Trust, which was permitted to intervene, was successful. Effectively, therefore, the total compensation decreed payable to the victim was some £155,000, of which £55,000 was payable to the Trust. The Secretary of State appealed.

5. In the High Court, the judge resolved these issues by reference to the relevant provisions of the Health and Personal Social Services (NI) Order 1972 (*“the 1972 Order”*). The scheme of this legislation is that there exists, per Article 98(1), a general principle that services provided under the aegis of the NHS are free of charge. However, this principle is qualified by the important words *“... except where any provision contained in or made under this Order expressly provides for the making and recovery of charges”*. While the global statutory duties to provide health services, personal social services and pharmaceutical services are imposed on the Department of Health and Public Safety (*“the Department”*), these duties ultimately devolve on Boards and Trusts by an elaborate chain of subsequent statutory provisions, both primary and secondary. One of the specific statutory duties, belonging to the realm of personal social services, is to provide assistance in the form of residential or other accommodation. This can include private sector facilities. Where accommodation of this kind is provided, the legislation - in Article 15(4) - creates the possibility of recovery of charges. Article 15 must be considered in conjunction with Article 36, which creates a specific recovery regime. It is also necessary to consider, in this context, the Health and Personal Social Services (Assessment of Resources) Regulations (NI) 1993, which make provision for assessing the financial ability of a resident to pay for accommodation provided under Article 15 of the 1972 Order.
6. In finding in favour of the Trust, the judge accepted the contention that Article 36(3) of the 1972 Order imposes **a duty** on the Department/Trust to recover the costs from the individual beneficiary and **a concomitant duty** on the part of the latter to refund them. By virtue of the various statutory provisions mentioned above, it is open to the individual beneficiary to satisfy the Department/Trust that he or she is unable to make a full refund, in which event an assessment of ability to pay is undertaken, with a view to determining the appropriate lesser sum.
7. An important aspect of the judge’s reasoning and conclusions was the clear distinction between statutory criminal injury compensation (on the one hand) and an award of common law damages for personal injuries (on the other). The latter is to be disregarded under the Assessment of Resources Regulations. However, the judge concluded that criminal injuries compensation is **not** embraced by the statutory phrase *“an award of damages for a personal injury”*. In resolving this issue, the judge observed that an award of damages for personal injuries is *“... an award made in consequence of a conclusion by a court that the defendant has breached the legal rights of the plaintiff. Compensation under the Criminal Injuries Order or under the new scheme does not fit within that concept.”* This is the central conclusion in the judgment, which had two material legal consequences. The first is that the Trust was **obliged** to pursue the victim for recovery of the costs of £55,000. The second is that the victim, in turn, was also **obliged** to incorporate this in his claim for criminal injuries compensation.
8. In thus concluding, the judge acknowledged that there was something of an anomaly, having regard to the differing statutory regimes in vogue in England and Northern Ireland. He questioned whether this was intentional or inadvertent. He observed, with some justification, that *“... there appears to be little logic in treating an award of compensation for personal injuries arising from a criminal injury differently from an award of damages for the purposes of the relevant Regulations”*. Having discussed this, he commented that *“... a question of policy arises as to where the burden of the cost should fall”* and that this is a matter *“... essentially for policymakers and not for the court”*. His central conclusion is encapsulated in the following pithy sentence:-
“The Applicant is entitled and bound to include in his [claim for] compensation the care costs”.
9. In this litigation, the relevant statutory provisions were tested and construed by the court for the first time. There is no doubt that where questions touching on the distribution and use of public monies are concerned, substantial policy issues arise. However, the decision in the present case has established a clear precedent for other, comparable cases. It will doubtless be of interest to Trusts and Boards who increasingly find themselves shorn of vital resources in the daily struggle to perform their statutory duties and functions.

Bernard McCloskey, QC

THE STEP PROCESS PURSUANT TO ARTICLE 131 OF THE CHILDREN (NI) ORDER 1995

1. Part XI of the Children (NI) Order 1995 sets out guidelines for the registration of child minders and providers of day care. Volume 2 of the Guidance and Regulations issued by the Department is also frequently used. While the Guidance and Regulations is not law nevertheless if an issue arises and the Trust has not followed the Guidance and Regulations then the Trust may be held accountable for that lapse.
2. A Certificate of Registration is issued pursuant to Article 127 of the 1995 Order.
3. A registration application may be refused pursuant to Article 124 of the 1995 Order.
4. When registering either for childminding or day care provision the Trust may impose requirements that are considered reasonable and appropriate to safeguard the welfare of the children pursuant to Articles 125 and 126 respectively of the 1995 Order.
5. If a Certificate of Registration is granted but the Applicant does not agree with the requirements imposed then the Applicant ought to discuss the disagreement with the Trust and the Trust ought to have internal procedures to deal with such disagreements. If the Applicant continues to be in disagreement then the Applicant may issue a Judicial Review to show that the Trust has been unreasonable, unfair and has not taken into consideration all relevant issues during its decision making process. While the Trust is not a judicial body nevertheless it ought to respect the Applicants right to a fair Hearing during its process. Moreover the Trust may avert a possible Judicial Review situation if it issues a Step pursuant to Article 131(1)(E) on the grounds that it is refusing any application to vary or remove any such requirement which the Applicant considers unreasonable and inappropriate. That will then take the Applicant's grievance through the Step process.
6. If the provider breaches a requirement for either childminding or day care then the Trust can either take action pursuant to
 - (i) Article 129 of the 1995 Order to cancel the registration or other action in an emergency situation,
 - (ii) Proceed by the Step process pursuant to Article 131 of the 1995 Order
 - (iii) To issue an Enforcement Notice pursuant to Article 132 (4) of the 1995 Order? In a childminding situation or
 - (iv) To issue criminal proceedings directly against a day care provider pursuant to Article 132 (1) of the 1995 Order if that person is not registered.
 - (v) To issue criminal proceedings against either a childminder or a day care provider contrary to Articles 132(8) and (9) ie contravenes a requirement or continues to so act once disqualified.
7. Should the Trust decide –
 - (i) To refuse an application under Article 118
 - (ii) Cancel any such registration
 - (iii) Refuse consent under Article 122
 - (iv) Impose, remove or vary a requirement under Articles 125 or 126 or
 - (v) Refuse to grant any application for the variation or removal of any such requirements.

then the Trust is to send to the Applicant or registered person a notice in writing of the Trust's intention to issue the Step.
8. The Step ought to be clear, precise and give reasons why



Kieran Harkin, Apprentice Solicitor

the Trust has issued the Step, and to state its statutory basis for issuing such a Step. The Step Notice ought to be as full and as detailed as is possible. It should also inform the Applicant/registered person of their right to appeal the decision and also to seek legal advice.

9. The Applicant/registered person then has 14 days from the date which he/she receives the Notice to lodge an objection to the Step being taken. The Trust will have to prove the date when the person received the Step Notice.
10. The Trust will have to convene a Panel to hear the objection as soon as possible given that the person's business or potential business is being affected by such a Notice.
11. The objection can be made by either the Applicant/registered owner or by a representative. This does not necessarily mean a Solicitor or a Barrister.
12. The Objection Panel has to take fully into account all the representations made by the Applicant/registered owner and to give a fair and reasonable opportunity to that person to present its case. The Panel may also make available the Trust personnel who made the decision to take the Step for the purposes of reasonable questioning by the Applicant/registered owner/representative. It is a matter for the chairperson of the Objections Panel to explain at the beginning to the parties the procedure to be adopted at the Panel bearing in mind that the Panel has to offer a fair Hearing.
13. The Panel makes the decision and forwards that decision in

writing together with the reasons for the decision to the Trust and Applicant.

14. The Trust then convenes a meeting after the Panel has forwarded its written decision to decide whether or not to proceed with the Step. The Trust will fully consider the decision of the Panel and will then write to the Applicant/registered owner of its decision and to set out the reasons for confirmation. If in the unusual situation where the Panel has made a decision but the Trust decides to go against that decision then the Trust will have to state in its letter to the Applicant why the Trust has departed from the Panels view.
15. The Applicant/registered person may then consider taking the Trust to Court if he/she feels aggrieved by the Trust's decision.
16. The decision of the Court is final unless an Appeal is entered.
17. If the Step is taken against a person whose application for registration has been refused then no certificate will be issued until the Step process has been finalised. Moreover if the Trust has decided to cancel a registration then that certificate will continue until such time as the step process has been completed. See Article 131 (10) of the 1995 Order.
18. If the Applicant/registered owner does not take advantage of the 14 day period to lodge an objection then the Trust at the expiration of that 14 day period should hold a meeting to decide whether or not to proceed with the Step and ought to write to the Applicant/registered owner of its decision in writing. At that



Valerie Anderson, Legal Assistant

stage the Step process will be completed. If a person provides either day care or childminding without registration then the processes at Article 132 of the 1995 Order will be relevant.

Since the provisions of Article 132 of the 1995 Order suggest a criminal process then the Trust should adhere to the guidelines of the Police And Criminal Evidence Code of Practice insofar as is relevant to the Trust, and bearing in mind the Trust is not a police agency. Any investigations or inquires which may lead to a prosecution pursuant to Article 132 of the 1995 Order should attract such practices as the caution being administered prior to any statement being taken by the Trust whether that is in written or verbal form. Legal advice from DLS should always be sought especially in these situations. Trusts should also be aware of the defences to such offences such as "without reasonable excuse" and "having reasonable grounds for believing" the person employed or in proximity was neither unfit nor disqualified.

This Directorate can provide Training in regard to the above issues.

Brian Greenway
Solicitor

Confidentiality, medical advice and the young person (under 16)

In the Judicial Review of Regina (Axon) -v- Secretary of Estate for Health (January 23 2006), Mr Justice Silber, found that guidelines concerning a young persons right to confidentiality when seeking advice and treatment on contraception and abortion did not infringe parental rights under Article 8 of the European Convention of Human Rights. The said Article states;

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There should 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 in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The declarations that were sought by Ms Sue Axon were that;

- A doctor was under no obligation to keep confidential such advice and treatment which he proposed to provide in respect of contraception, sexually transmitted infections and abortion to a child aged under 16 and must therefore not provide such advice and treatment without the parents' knowledge, unless to do so would or might

prejudice the child's physical or mental health so that it was in the child's best interests not to do so, alternatively, that was his duty concerning his advice and treatment in respect of abortion.

- A document published by the Secretary of State for Health, entitled *Best Practice Guidance for Doctors and Other Health Professionals on the Provision of Advice and Treatment to Young People Under 16 on Contraception, Sexual and Reproductive Health* in July 2004, was unlawful.

The Family Planning Association appeared as intervener.

The Secretary of State and the Family Planning Association maintained that a medical professional could provide advice and treatment on sexual matters for young people without the knowledge or consent of their parents provided that the conditions laid down by the House of Lords in *Gillick -v- West Norfolk and Wisbech ([1986] 1 AC 112)* had been complied with.

The application raised a tension between two important principles:

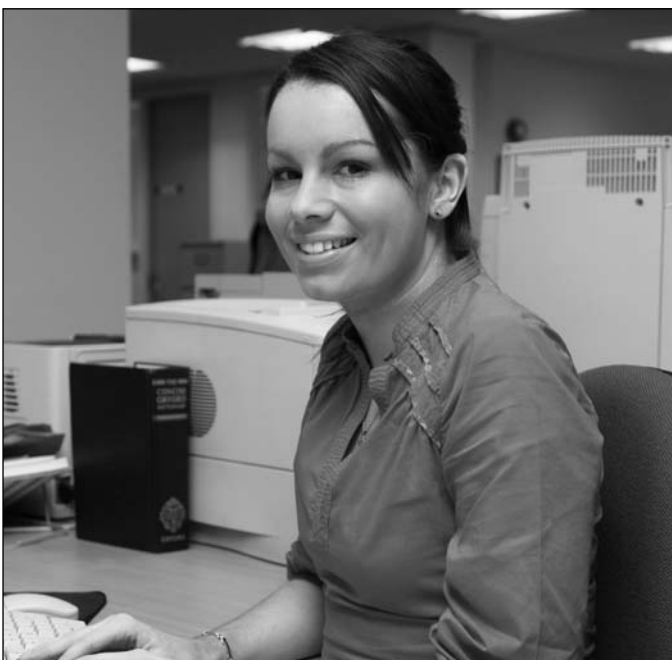
- First, that a competent young person under 16 who was able to understand all aspects of advice and its consequences was an autonomous person entitled to make decisions about his or her own health and entitled to confidentiality.
- Second, that a parent had a responsibility for that young person's health and moral welfare with the consequence that he or she should be informed if a medical professional was considering providing advice and treatment to the young person.

1. Factual advice and treatment for contraception.

Gillick was determinative on the issue of whether giving that advice and treatment to a girl under 16 without her parents' consent infringed the parents' rights. That case held that under certain circumstances it did not.

As far as proposed advice and treatment for contraception and sexually transmitted diseases were concerned, the *Gillick* case impliedly rejected the submission that a medical professional was obliged to inform the young person's parents about proposed advice on contraception. The applicant's contentions on that issue were inconsistent with *Gillick*.

Furthermore the type of advice being given deserved the highest degree of confidentiality and that



Emma McCabe, Legal Assistant

undermined the existence of a duty of disclosure on the part of a medical professional.

In addition, great weight was now attached to the rights of the child under the United Kingdom's ratification in December 1991 of the United Nations Convention on the Rights of the Child 1989 and the incorporation of Article 8 of the Human Rights Convention in the Human Rights Act 1998. Those rights could only be overridden for a powerful reason.

The applicant's argument that proposed advice and treatment should not be confidential except where the child's physical or mental health is prejudiced, could not be justified on any basis.

As far as proposed advice and treatment for abortion was concerned, that treatment involved invasive and irreversible surgical procedure with potentially serious risks, and consequential side effects. The treatment also involved non-medical issues, such as moral, ethical, religious and cultural issues.

Although those distinctions could be made between advice and treatment for contraception and sexually transmitted diseases on the one hand and abortion on the other, which gave rise to more serious and complex issues, the guidelines set out in *Gillick* were appropriate as guidance in respect of all sexual matters once they were adapted to cover such matters.

That was because the majority in *Gillick* did not indicate that their conclusions were dependent on the nature of the treatment proposed but the guidelines were of general application to all forms of medical advice and treatment. As far as the actual provision of treatment and advice for sexually transmitted diseases and abortion was concerned, the same considerations applied as with proposed advice and treatment.

Thus according to *Gillick*, the parental right to know about and determine whether or not their child below the age of 16 would have medical treatment terminated if and when the child achieved a sufficient understanding and intelligence to enable him or her to understand fully what was proposed. The solution depended on what was best for the welfare of the particular child.

Furthermore the Court considered submissions from the Family Planning Association and was particularly persuaded by evidence that the lack of confidentiality (ie if a doctor informed parents of the proposed advice or treatment relating to the young person) might well deter young people from seeking advice and treatment on contraception, sexually transmitted diseases and abortion and this would have undesirable consequences. The Court concluded there is therefore a public interest in the maintenance of confidences which is not outweighed by some other countervailing public interest which favours disclosure.

2. The Department's Guidance

The guidance provided that "a doctor or health professional was able to provide contraception, sexual and reproductive health advice and treatment, without parental knowledge or consent to a young person under 16, provided that:-

1. She/he understands the advice provided and its implications.
2. Her/his physical or mental health would otherwise be likely to suffer and so provision of advice or treatment is in their best interest.

The *Guidance* explained that it was the initial duty of the medical professional to seek to persuade the young person to consult the parent. The *Guidance* also stated that it was good practice for the *Gillick* guidelines to be followed.

Mr Justice Silber said that there was nothing in the *Guidance* which caused it to be unlawful nor did it infringe the Article 8 rights of the parents of the young person. Since the *Guidance* provided that confidential treatment and advice could be given only when the young person understood the advice and its implications, there was nothing there which interfered with the parents' Article 8 rights.

Even if the court considered that the parents' Article 8 rights were interfered with, the *Guidance* fell within the derogation of Article 8.2 in that it was in accordance with the law and necessary in a democratic society for the protection of health or for the protection of the rights of others.

Furthermore, it was proportionate. That was because, inter alia, there was evidence that failure to provide confidentiality discouraged young people from seeking medical advice with all the consequential detrimental effects to the protection of health in society.

The medical professional was therefore entitled to provide medical advice and treatment on sexual matters without the parents' knowledge or consent provided he or she was satisfied of the following:-

1. That the young person, although under 16, understood all aspects of the advice in the light of Lord Scarman's comment in *Gillick*, that he or she had to have sufficient maturity to understand what was involved, that understanding included all relevant matters and was not limited to family and moral aspects as well as all possible adverse consequences which might follow from the advice.
2. That the medical professional could not persuade the young person to inform his or her parents to allow the medical professional to inform the parents that their child was seeking advice and/or

treatment on sexual matters. As stated in the *Guidance*, where the young person could not be persuaded to involve a parent, every effort should be made to persuade the young person to help find another adult, such as another family member or a specialist youth worker, to provide support to the young person.

3. That in any case in which the issue was whether the medical professional should advise on or treat in respect of contraception and sexually transmissible diseases, the young person was very likely to begin or to continue having sexual intercourse with or without contraceptive treatment or treatment for a sexually transmissible illness.
4. That unless the young person received advice and treatment on the relevant sexual matters, his or her physical or mental health or both were likely to suffer. In considering that requirement, the medical professional had to take into account all aspects of the young person's health.
5. That the best interests of the young person required him or her to receive advice and treatment on sexual matters without parental consent or notification. Those guidelines were not to be regarded as a licence for doctors to disregard the

wishes of the parent. The guidelines were to be strictly observed and, if not, the medical professional concerned would expect to be disciplined by his or her professional bodies.

The Judge emphasised that these guidelines (as in **Gillick**) are;

“not to be regarded as a licence for doctors to disregard the wishes of parents on this matter whenever they find it convenient to do so. Any doctor who behaves in such a way would be failing to discharge his professional responsibilities, and I would accordingly expect him to be disciplined by his/her professional body accordingly”.

It must be remembered that the law on abortion in Northern Ireland is very different from Great Britain; the Abortion Act 1967 does not apply in Northern Ireland and to carry out a termination here remains unlawful unless performed to prevent 'real and serious' adverse effect on the mental or physical health of the mother or to preserve the life of the mother.

Ann Cassidy
Solicitor

Employment Legislation Update Seminar

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For further details contact:
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The Human Tissue Act 2004

The Human Tissue Act 2004 (HTA) is an important piece of legislation that owes its origins to the controversy surrounding the retained organs of deceased infants. In Northern Ireland the Human Organs Inquiry was established under the Chairmanship of John O'Hara QC and one of the principal recommendations of his report was the repeal of the Human Tissue Act (Northern Ireland) 1962 and the creation of new legislation. An equivalent Inquiry was established in Great Britain which also recommended new legislation.

1. The Human Tissue Authority

Parts of the HTA are already in force: in particular the Human Tissue Authority was established in April 2005 under Section 13 of the Act. This Authority has regulatory responsibility and inter alia it will consider:

- removal of any relevant material from a human body.
- use of the body of a deceased person.
- storage of the body of a deceased person or relevant material from a human body.
- disposal of relevant material.
- the carrying out of an anatomical examination
- the making of a post-mortem examination

In addition the Authority will prepare Codes of Practice, due to be published in April 2006, and will grant licences from 1 September 2006.

NB. 'Relevant material' is defined at Section 53 as material other than gametes which consists of or includes human cells: this includes human organs and other tissue. They do not include embryos outside the human body or hair and nail from the body of a living person.

2. Appropriate Consent

The HTA introduces a new regime of appropriate consent in relation to:

- (a) the use, removal and storage of any relevant material (ie. human organs and other tissue) from the body of a deceased person;
- (b) the storage or use of the body of a deceased person for the purpose of anatomical examination;
- (c) the storage or use of relevant material which has come from a human body (for purposes of research, transplantation or public display).

(i) Children

Under Section 2, where the individual is a child and is alive, appropriate consent means his consent, but if he is not competent to deal with the issue of consent or fails to do so, appropriate consent means the consent of a person who has parental responsibility.

Where the child concerned has died and the activity involves storage or use for the purpose of public display or anatomical examination, appropriate consent means his (the child's) consent *in writing*.

Where the child has died and the activity is *not* public display nor anatomical examination, appropriate consent means his consent if in force immediately before death, or if not so in force, means the consent of a person who had parental responsibility immediately before death or, where no person had parental responsibility, the consent of a person who stood in a 'qualifying relationship' to him at that time.

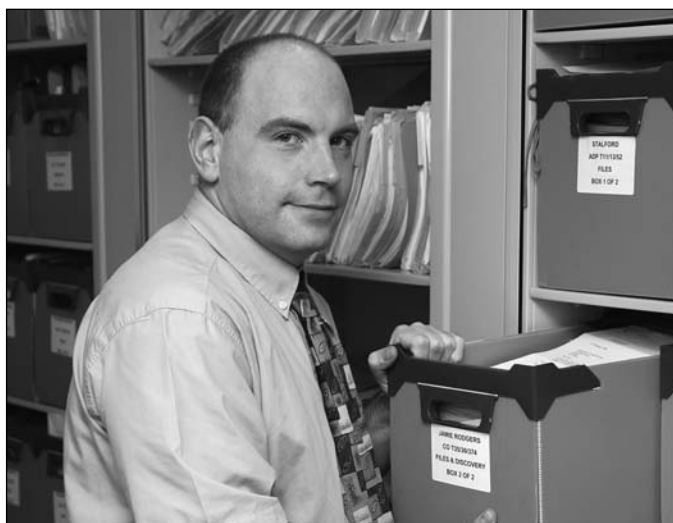
(See Para. (iii) below for an explanation of 'qualifying relationship'.)

NB. The same requirements for consent in writing that apply to adults (see below) apply to children.

(ii) Adults

Where the person concerned is alive appropriate consent means his consent per Section 3(2).

Where the person concerned has died and the activity involves storage or use for the purpose of public display or anatomical examination, appropriate consent means consent *in writing*.



Colin Martin, Legal Assistant

Where the person concerned has died and the activity is not public display nor anatomical examination, appropriate consent means his consent if in force immediately before his death, or if not so in force and he has appointed a person or persons under Section 4 (See below – nominated representatives) to deal with the issue of consent after his death in relation to the activity, consent means the consent given under that appointment.

If no such nominated representative has been appointed, consent is required from the person who stood in a 'qualifying relationship' immediately before death.

A person may provide consent in writing, provided the consent is signed by the person concerned in the presence of at least one witness who attests the signature, or it is signed at the direction of the person concerned in his presence and in the presence of at least one witness who attests the signature, or the consent is contained in the will of person concerned.

(iii) Qualifying Relationships

Under Section 27 'qualifying relationships' are ranked in the following order:-

- (a) spouse or partner
- (b) parent or child
- (c) brother or sister
- (d) grandparent or grandchild
- (e) child of a person falling with paragraph (c)
- (f) stepfather or stepmother
- (g) half-brother or half-sister
- (h) friend of longstanding

NB. the ranking above *must* be followed, so, for example, the healthcare professional cannot seek lawful consent from a parent or child, if a spouse or partner is living.

If the relationship of two or more persons is accorded equal highest ranking (eg. three brothers or sisters), it is sufficient to obtain the consent of any one of them per Section 27(7).

It should also be noted that a person's qualifying relationship shall be left out of account if he does not wish to deal with the issue of consent, he is not able to deal with that issue, or it is not reasonably practicable to communicate with him within the time available if consent in relation to the activity is to be acted on.

(iv) Nominated Representatives

An adult may appoint one or more persons to represent him after his death in relation to issues of

consent, under Section 4. An appointment may be general or limited to consent in relation to such one or more activities as may be specified in the appointment. An appointment may be made orally or in writing; an oral appointment is only valid if made in the presence of at least two witnesses present at the same time.

A written appointment is only valid if a) it is signed by the person making it in the presence of at least one witness who attests the signature or b) it is signed at the direction of the person making it, in his presence and in the presence of at least one witness who attests the signature, or c) it is contained in the will of the person making it.

It is expected that those sections of the HTA relating to appropriate consent will be implemented on 1 September 2006. It is recommended that all healthcare professionals and managers make themselves familiar with these new rules.

3. Offences

The Act also introduces criminal offences, eg if a person carries out an activity without appropriate consent (Section 5(1)), carries out an activity on a deceased body and the death has not been registered (Section 5(5)), or the Death Certificate has not been signed (Section 5(3)).

A person guilty of such offences shall be liable to a fine and/or a term of imprisonment not exceeding three years.

Under Section 31 a person commits an offence if he has possession of a former anatomical specimen and the specimen is not on premises in respect of which a storage licence is in force. Again a person guilty of such an offence is liable to a fine and/or a term of imprisonment not exceeding three years.

The Act also outlaws trafficking in human material for transplantation, and advertising or seeking to supply any controlled material for reward, ie any material consisting of human cells and is intended to be used for the purpose of transplantation.

This is only a brief overview of some of the most important features of the Act, which is a significant piece of legislation. It aims to regularize the position in relation to retained organs and provide a statutory framework for the removal, storage and use of human material. Healthcare professionals and managers should familiarise themselves with this legislation.

Alphy Maginness
Director of Legal Services

ASSESSMENT OF THE CHILD, NOT THERAPY FOR THE PARENT

In Kent County Council –v- G & Others (FC) the House of Lords looked at the extent of the Court’s power under section 38(6) of the Children Act 1989 (the equivalent of Article 57(6) of the Children Order 1995) to give directions for the “medical or psychiatric examination or other assessment of the child”.

The facts of this case were that the mother had her first child, John in September 1996 when she was aged 17. The relationship with John’s father, Leslie did not last long. She had another child, Richard in December 1998. Richard died 6 months later of multiple non-accidental injuries. Care proceedings were brought to protect her first child, John. The Court could not decide which of Richard’s parents was responsible for his death. A care Order was made and John was placed with his father, Leslie. The mother subsequently had another child, Ellie in May 2003. Because of the history, the local authority initiated care proceedings. Their care plan at the time was for adoption. However the authority agreed to a 6 to 8 week period of residential assessment at the Cassell Hospital in Richmond Surrey and this was directed by the Court in June 2003. A further 6 to 8 week assessment was directed in August 2003. This was opposed by the local authority. Following the assessment the Cassel strongly recommended rehabilitation with intensive psychotherapy for the mother in a residential setting in the Cassel for a further 6-9 month period. The local authority were unwilling to fund for a further period at the Cassel. The Judge, Johnson J held he had no power to direct that the local social services authority fund

a further period of in-patient assessment because he stated what was proposed “falls very clearly on the side of therapy rather than assessment”. This decision was appealed to the Court of Appeal.

The Court of Appeal allowed the Appeal stating the question was not whether what was proposed was assessment or therapy. Rather the question should be “can what is sought be broadly classified as an assessment to enable the Court to obtain information necessary for its own decision?”

The residential assessment in Cassel took place with the family leaving Cassel in April 2004 to live in their own home with a package of monitoring, therapy and support. At the final Hearing of the care proceedings in July 2004, no order was made.

The cost to the local authority of the family’s stay at the Cassel was £200,000 and the decision the Court of Appeal was appealed to

the House of Lords as a matter of principle.

In allowing the Appeal, The House of Lords held that to come within Section 38(6) the proposed assessment must be an assessment of the child. The main focus must be on the child. In this case the main focus of the proposed residential assessment was not on Ellie, but on her mother. It was to assess Ellie’s mothers capacity for beneficial response to the psychotherapeutic treatment she was to receive.

Lord Scott of Foscote referred to the Court of Appeal decision in re. D (Jurisdiction: Programme of Assessment or Therapy) where Thorpe L J stated that a programme which was substantially therapeutic would not fall within section 38(6) even if it involved some element of assessment. The House of Lords concluded that the main purpose of the proposed programme in the Cassel was therapy for the mother in order to



Wendy Beggs, Assistant Director

give her the opportunity to change and therefore become a safe carer for Ellie. It was held that even though this work would be valuable and influential in helping the Court to decide whether a Care Order should be made, it did not come within Section 38(6)

The House of Lords asked the question - "Was Section 38(6) really intended to enable the Court to place the local authority under an

obligation to fund a residential programme for the parents and child extending for many months?" It was indicated to the Court that the Legal Services Commission will not fund any element of treatment, therapy or training within a programme of assessment. It was argued before the Court that to safeguard Ellie and her parents rights under Article 8 of the European Convention on Human Rights that the local authority was

under a positive obligation to provide Ellie's mother with the proposed therapeutic and assessment programme at Cassel Hospital in order to provide Ellie and her family with the best chance of a family life. The House of Lords concluded "There is no Article 8 right to be made a better parent at public expense."

Wendy Beggs
Assistant Director

MENTAL HEALTH ORDER 1986 – HOSPITAL ORDERS

The Crown Court or a Magistrates Court may under Article 44 of the Mental Health Order 1986 order the hospital admission of a person convicted of an imprisonable offence (a hospital order). The Court may also make an order restricting discharge from hospital either for a specified period or without a limit of time. The patient who is the subject of a hospital order has the status of a detained patient. The Court must be satisfied on the oral evidence of a part II doctor and the written or oral evidence of another medical practitioner that the convicted person is suffering from mental illness or severe mental impairment of a nature or degree which warrants detention in hospital for medical treatment.

The Court cannot make a Hospital Order unless the Trust which will be responsible for implementing the Order has been given the opportunity to make the representations to the Court. This enables Trusts to ensure that

proper arrangements can and will be made for the convicted person's admission and care.

Where there is no Order restricting discharge for a specified period or without limit of time, the patient detained under a hospital Order may be detained for up to six months beginning with the date of the Order. Thereafter the authority to detain must be renewed under Article 13. It is essential therefore, where a patient is detained subject to a hospital order without restriction, that Trusts have procedures in place for review of these cases to ensure the procedure for continued detention under Article 13 is followed, if appropriate.

Articles 5(4) & (5) of European Convention on Human Rights provides that "Everyone who is deprived of his liberty by detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided by a Court.... everyone who has been the victim of....

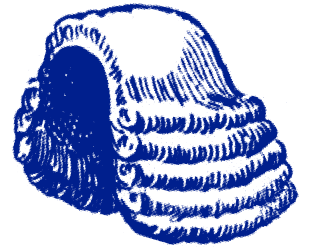
detention in contravention of the provisions of this article shall have an enforceable right to compensation." Therefore Trusts should be aware that failure to have proper procedures in place, could result in an action against the Trust by a patient for unlawful detention where the detention is continued following the expiration of the hospital order.

Wendy Beggs
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Joanne Fitzsimons, Legal Assistant

Counsel's Corner



MEDICAL LAW UPDATE

1. A survey of certain recent decisions of both domestic courts and the European Court of Human Rights confirms the sustained and growing impact of the Human Rights Act 1998 ("*HRA 1998*") and the European Convention on Human Rights and Fundamental Freedoms ("*the Convention*") in UK law.
2. The facts in *Glass -v- United Kingdom* [61827/00] were both remarkable and startling. At the centre of a bizarre dispute between a family and a hospital was an eleven-year-old boy, David Glass, who was born prematurely in 1986 suffering from hydroencephaly. He had severe physical and mental disabilities, requiring twenty-four hour care. He lived at home with his mother and sisters. The first seeds of a dramatic dispute materialised in July 1998 when David, then aged eleven years, was admitted to St. Mary's Hospital in Portsmouth. The purpose of his admission was the performance of an operation to alleviate an upper airway obstruction. Following the operation, his recovery was stormy. The doctors were of the opinion that he was dying and they considered that further intensive care would be inappropriate. This was followed by a heated meeting with family members, whereupon David was moved from Intensive Care to the hospital paediatric ward. There, a paediatrician who assessed David formed the opinion that while he would not survive his illness despite the doctors' efforts, these efforts would nonetheless continue. David's mother had expressed her opposition to the administering of morphine or any other medication to relieve distress. David was discharged from the hospital some weeks later, but was re-admitted quickly on account of respiratory infections. A major dispute between David's mother and a hospital doctor ensued. The doctor indicated that if David's heart were to stop and if death were considered inevitable, he would receive only morphine and "tender loving care". The hospital itself recognised the desirability of a further, independent medical opinion and the possibility of judicial guidance. The mother was persuaded to agree to the use of morphine in therapeutic doses. She further agreed that in the event of a crisis, full intubation and admission to an intensive therapy unit would be inappropriate.
3. A pattern of discharges from and re-admissions to hospital developed. On one particular date, doctors considered that David was lapsing into terminal respiratory failure and wanted to administer diamorphine (heroin). The mother objected to this, on the basis that it might depress David's respiratory function. The dispute with family members became so heated that the hospital summoned the police. At another stormy meeting, the hospital's Chief Executive directed the doctors to administer diamorphine, at which stage David's mother went to obtain advice. The family's opposition to diamorphine continued relentlessly. At one stage, tensions became so heightened that fighting occurred between the family and the doctors, requiring the paediatric ward to be evacuated and rendering two doctors unfit for duty. Following this, David was discharged from hospital again. One of the medical records made at that stage indicated that in the event of re-admission, active treatment should be confined to alleviation of pain, excluding resuscitation.
4. Arising out of the altercations, the hospital secured a court injunction preventing identified members of David's family from assaulting its staff or interfering with treatment and also restricting their entitlement to enter the hospital premises. Further, some of David's

relatives were charged with criminal offences (and were later convicted). David's mother brought an application for judicial review, challenging the legality of the treatment which he had received. In response, the hospital claimed that the "do not resuscitate" order in the records had lapsed. The court dismissed the judicial review application. The judge highlighted that the family's complaints about David's medical treatment raised contested factual issues that were unsuitable for the court's judicial review jurisdiction. The judge held further that the dispute between the parties had become academic and that it would be inappropriate for the court to attempt to adjudicate on any future dispute, on the ground of prematurity. The Court of Appeal refused permission to appeal: see the judgment at [1999] 2 FLR 905. In its judgment, three main points of guidance were given:

- (a) In cases of serious disagreement between the parents of a disabled child and hospital doctors, resort should be had to the High Court.
- (b) Where a child's interests are at stake, procedural objections have no merit.
- (c) Where a judge is considering whether a particular course of treatment is in the child's best interests, the views of the doctors concerned must be taken into account.

5. These sad, at times astonishing, events culminated in an application to the European Court wherein David's mother, on his behalf and on her own account, asserted a series of

infringements of the Convention. The only complaint held admissible was that made under Article 8. While this is the provision of the Convention which protects the right to respect for private and family life, one particular aspect of its sphere of operation is its protection of the right to physical and moral integrity, which embraces the right to refuse medical treatment. These notions of patient autonomy and self-determination are also embedded in the common law. When the European Court later delivered judgment, it declined to question the clinical judgment of the doctors about the seriousness of David's condition or the propriety of the treatment given and proposed. However, the Court concluded that since aspects of David's treatment had been implemented against his mother's wishes, this was an interference with David's right to physical and moral integrity under Article 8 of the Convention. The Court rejected the Respondent's contention that the interference had been "*necessary in a democratic society*" [Article 8/2]. The Court further considered that the relevant hospital trust had been under an onus to initiate legal proceedings seeking judicial resolution of the matters in dispute with the family. In particular, this step should have been taken at the stage when police intervention became necessary. The Trust was also faulted by the Court for its failure to respect the wishes of David's mother. One of the judges adverted to the "*disturbing and unbelievable fight*" which occurred at one stage of the dispute. The same judge also observed that "...

maternal instinct has had more weight than medical opinion". The Court concluded that there had been a violation of the rights of both David and his mother under Article 8. Damages and costs were awarded.

6. It is clearly implicit in the judgment that the European Court considered David's mother to be his legal proxy. The decision is also a reminder of the phenomenon of emergency applications to the High Court for declaratory guidance in the most acute and controversial cases. There have been several examples of these in Northern Ireland in recent years. Urgent litigation of this kind is not, of course, necessarily a panacea, bearing in mind the practical difficulties and shortcomings that can significantly afflict hastily convened judicial hearings. The facts of the *Glass* case also prompt reflection on the possible role of ADR in serious disputes between hospitals and families.
7. In *Vo -v- France* [53924/00] the European Court had to confront the issue of the legal status of the unborn child. The issue was considered of such importance that a Grand Chamber was constituted to deal with the case. The facts were, on any showing, tragic. Mrs. Vo, a Vietnamese lady resident in France, was pregnant and attended the local maternity clinic for antenatal assessment at twenty-four weeks. Coincidentally, another lady with the same surname was visiting the clinic for removal of a contraceptive device. To complicate matters, Mrs. Vo had poor command of the French language. She was

mistaken for the second lady and, in the events which ensued, her pregnancy was medically terminated. The doctor in question was charged with the offences of causing unintentional homicide to the foetus and causing inadvertent injury to Mrs. Vo. He was acquitted, on the ground that the foetus was not a “person” within the ambit of the relevant French Criminal Code. As a result, under French law, the loss of Mrs. Vo’s baby did not constitute unintentional homicide. She brought proceedings in Strasbourg, contending that French criminal law was in violation of Article 2 of the Convention, which protects the right to life of “everyone” or “toute personne”. The argument advanced was that the term “protects everyone” included the unborn child. In response, the French Government highlighted that when the Convention was initially ratified in 1950, virtually all of the Contracting States had some form of law permitting abortion. It was argued, secondly, that the language of Article 2 did not confer the protection claimed.

8. The European Court rejected Mrs. Vo’s application. The central passage in its judgment recites:

*“In the circumstances examined to date by the Convention institutions - that is, in the various laws on abortion - the unborn child is not regarded as a **person** directly protected by Article 2 of the Convention ...*

[Further] if the unborn do have a right to life, it is implicitly limited by the mother’s rights and interests”.

The Court further considered that each Member State was at

liberty, within its margin of appreciation, to decide in its domestic laws the date of commencement of the right to life. In adopting this approach, the Court highlighted the variety of laws and absence of consensus in the Contracting States. Moreover, in the Court’s view, there was no requirement that domestic law should make provision for a criminal offence to cover the tragedy which had occurred. Rather, it was sufficient for Mrs. Vo to have the ability to bring a civil action for damages in the French courts.

9. Informed practitioners will note, in passing, that the decision in *Vo -v- France* addresses directly the issue sidestepped by the Northern Ireland Court of Appeal in the *Family Planning Association* Judicial Review [2004] NICA 37-39.

10. Issues under both Article 5 and Article 8 of the Convention featured in the recent decision of the European Court in *Storck -v- Germany* [61603/00], where the substance of the Applicant’s complaint was that she had been placed in different psychiatric hospitals against her will, wrongly diagnosed and forced to take medication that had destroyed her physically and psychologically. She further claimed that the medication had caused her to develop a severe physical handicap (a post-poliomyelitis syndrome). During one particular period, when aged eighteen years, she had been placed in the locked ward of a private psychiatric institution for two years. She contended that this had infringed her rights under Article 5/1 of the Convention. The Court accepted her complaint, primarily on the

basis that she had not consented to this form of detention. Accordingly, a deprivation of her liberty within the meaning of Article 5/1 had occurred. Moreover, there had been no supervisory control by the State of the lawfulness of her detention. The Court further concluded that the Applicant’s rights under Article 8 had been violated, largely on account of the sustained resistance which she had offered to her detention in the clinic and the medications administered to her, sometimes forcibly. The Court emphasized that even a minor interference with the physical integrity of an individual impairs the right to respect for private life. Hence there was no need for the Applicant to establish that the offending treatment had been contra-indicated. The Court awarded her 75,000 euros plus costs.

11. In *Zmzenskay -v- Russia* [77785/01] the sad facts were that in the thirty-fifth week of the Applicant’s pregnancy, the embryo asphyxiated in her womb. The Applicant was unmarried, but had been living in a steady relationship. The effect of Russian law was that she was unable to register her partner’s paternity in respect of the stillbirth and to amend the child’s surname and patronymic name accordingly. Accordingly, the Applicant’s desire to give the stillborn child the name of her partner and bury him accordingly could not be realised. The European Court considered that this undoubtedly affected her “private life” within the ambit of Article 8. It concluded that the Russian laws whereby a legal presumption (that the Applicant’s separated husband was deemed to be the father)

was allowed to prevail over biological and social reality, disregarding the wishes of those concerned and conferring a benefit on no one, was incompatible with Article 8.

12. A health issue of a different kind arose recently in another Russian case. The European Court held - in *Fadeyeva -v- Russia* [55723/00] that a failure by the authorities to resettle a family living in a severely polluted area and to design or apply effective measures to reduce industrial pollution violated the family members' rights under Article 8. This was a reflection of earlier jurisprudence of the Court, establishing that where the adverse effects of environmental pollution attain a certain minimum level, a breach of Article 8 can occur. Although the State is considered to enjoy a wide margin of appreciation in the sphere of environmental practices, there had been a failure, in this instance, to strike a fair balance between the interests of the community at large (on the one hand) and the Applicant's effective enjoyment of her right to respect for home and private life. A unanimous finding of a violation of Article 8 was made.
13. Finally, there are two fairly topical recent decisions of the English courts worthy of note. The first, *Burke -v- GMC* [2005] EWCA.Civ.1003, concerned the familiar conundrum of withdrawal of medical treatment. In its judgment, the Court of Appeal held that the GMC guidance entitled "Withholding and withdrawing Life-Prolonging Treatment: Good Practice in Decision Making" is lawful. One of the issues addressed was the legal

effect of a so-called "advance directive" by the patient that he wished to receive artificial nutrition and hydration (ANH) by tube, in order to survive, in certain eventualities. The Court observed (dramatically) that any failure by a doctor to give effect to the patient's wishes in this respect would leave the doctor with no answer to a charge of murder. Furthermore, this would violate the patient's rights under Articles 3 and 8 of the Convention. An infringement of Article 3 would occur because the patient would be subjected to acute mental and physical suffering, while Article 8 would be contravened because of the flouting of the patient's dignity and autonomy. The Court further decided, in uncompromising terms, that if a doctor were to consciously withdraw life-prolonging treatment contrary to a patient's wishes, with ensuing death, that would constitute a violation of Article 2. Finally, the judgment highlighted the circumstances in which it could become necessary to seek the authority of the Court to withdrawal of ANH.

14. The implications of the exercise of the right to strike for the welfare of patients was an issue which arose in *Nottinghamshire City Council v- Unison* [2004] EWHC 893 (QB). The so-called "right to strike" entails compliance by the union concerned with the labyrinthine rules on balloting and notice contained in Sections 226-234 of the Trades Union and Labour Relations Act 1992. The main legal consequence of the lawful exercise of this "right" is immunity against liability in tort for action taken in contemplation or furtherance of

a trade dispute. How to balance this with Article 2 of the Convention, under which the State has a duty to protect life, which may require positive action? A rather unsatisfactory judgment ensued. The material facts were that the Council employed social workers who were obliged to assess mentally ill clients for admission to hospital under the Mental Health Act 1983, in the exercise of a statutory duty owed to the clients themselves. The social workers' union, Unison, following a pay dispute had obtained approval through a ballot for action entailing a refusal to perform this duty. The Council argued that this could have fatal consequences for clients, in seeking an interim injunction based on the tort of unlawful interference with a business. Adopting a narrow approach to the issues, the judge decided that the Council had not established that the withdrawal by social workers of this service would constitute an interference with the Council's business. The judge appeared particularly influenced by the consideration that this duty could be performed by persons other than the social workers.

This is a less than satisfactory decision, of comparatively limited ambit. There is clearly scope for revisiting and rearguing issues of this nature in future cases. The right to life is the most fundamental and sacred of all rights protected by HRA 1998 and appears rather devalued by this judgment.

Bernard McCloskey, QC