IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(MR JUSTICE THORPE)

FAFMF 94/1116/F

Royal Courts of Justice
Strand
London WC2

Tuesday, 29 November 1994

B e f o r e:

LORD JUSTICE NEILL
LORD JUSTICE HOFFMANN
LORD JUSTICE HENRY

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B

PLAINTIFF/APPELLANT

- v -

CROYDON HEALTH AUTHORITY

DEFENDANT/RESPONDENT

- - - - - -

(Handed down judgment by John Larking Verbatim Reporters,
Chancery House, Chancery Lane
London WC2 Tel: 071 404 7464
Official Shorthand Writers to the Court)

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MR. R GORDON and MR C BARLOW (Instructed by Messrs Scott-Moncrieff & Harbour, Brighton BN2 1SF) appeared on behalf of the Appellant

MR R FRANCIS QC and MR C JOHNSTON (Instructed by Messrs Capsticks, London SW15 2TT) appeared on behalf of the Respondent

MR G MURDOCK (Instructed by the Official Solicitor)

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J U D G M E N T
(**Handed down**)

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Tuesday, 29 November 1994

J U D G M E N T

HOFFMANN L.J: Ms B. is 24. As a child she was sexually abused, first by her grandfather and then by a man living as a lodger in her house. At the age of 20 she began to show serious symptoms of mental disorder. She was unable to resist trying to cause herself harm. At first this took the form of cutting or burning herself. In January 1991 she was admitted for the first time to a hospital for psychiatric assessment. The judge found that she suffered from a psychopathic disorder known as borderline personality disorder coupled with post-traumatic stress disorder. The symptoms include depression and a compulsion to self-harm. The latter stems from an irrationally low regard for her own person. The only known treatment is psychoanalytic psychotherapy.

On the 18th January 1993 Ms B. was compulsorily detained under section 3 of the Mental Health Act 1983. She was kept under surveillance and deprived of the means of cutting or burning herself. So her urge to punish herself found a new outlet. She virtually stopped eating. In the course of 1993 her weight fell to a dangerous level. In the summer she had three sessions of psychotherapy but the treatment was then stopped. One reason was that the psychotherapist was leaving.

But another was that she felt that the treatment should not be continued until she had regained some weight. A threat of feeding by naso-gastric tube resulted in a temporary improvement at the end of 1993 but by the end of May 1994 her weight was down to 32 kilos and the physician assessing her case gave her a life expectancy of two to three months. Once again, tube feeding was threatened.

On 12th June 1994 an application was made *ex parte* to Stuart-White J. for an injunction to restrain the Croydon Health Authority, which administers the hospital in which Ms B. is detained, from feeding her by tube without her consent. The judge granted the order which was continued *inter partes* by Cazalet J. until a full hearing. This took place before Thorpe J. at the end of June and beginning of July. Meanwhile, the crisis was averted because once more under threat of tube feeding, Ms B. had begun to eat again. But in case it should happen again, both the Authority and Ms B. wanted to know whether tube feeding would have been lawful. The judge held that it would and against that decision Ms B. appeals.

The general law is that an adult person of full mental capacity has the right to choose whether to eat or not. Even if the refusal to eat is tantamount to suicide, as in the case of a hunger strike, he cannot be compelled to eat or forcibly fed. On the other hand, if a person lacks the mental capacity to choose, by the common law the medical practitioner who has

him in his care may treat him (and by this I include the artificial administration of food) according to his clinical judgement of the patient's best interests. In addition, under section 63 of the Mental Health Act 1983 the consent of a patient liable to be detained under the Act is not required for ‘‘any mental treatment given to him for the mental disorder from which he is suffering.’’ The judge found that Ms B. did not lack capacity but that she could lawfully be fed without her consent under section 63.

There is a cross-appeal by the Health Authority against the finding on capacity, to which I shall return, but I first consider section 63. I have quoted the critical words, but the full text is as follows:

> The consent of a patient shall not be required for any medical treatment given to him for the mental disorder from which he is suffering, not being treatment falling within section 57 or 58 above, if the treatment is given by or under the direction of the responsible medical officer.

The argument before the judge centred on whether tube feeding could be called treatment for the mental disorder from which Ms B. was suffering. Before us, however, Mr Gordon Q.C. took a new point. He said that tube feeding fell within section 58 and was therefore altogether excluded from the scope of section 63. I do not think that there is anything in this. The relevant parts of section 58 read as follows:

> (1) This section applies to the following forms of medical treatment for mental disorder -
> ...
> (b) the administration of medicine to a patient by any means...at any time during a period for which he is liable to be detained as a patient to whom this Part of this Act applies if three months or more have elapsed since the first occasion in that period when medicine was administered to him by any means for this mental disorder.''

Mr Gordon says that food is a medicine. He draws our attention to the fact that some special foods (e.g. gluten-free rice cookies for coeliacs) may be obtained on prescription. In my view, however, this is not relevant to whether food is a medicine within the meaning of section 58. The section is concerned with medicines administered as treatment for mental disorder. The words ''by any means'' in the opening phrase show that one identifies a medicine by its chemical composition and not by whether it is administered to the patient through a tube down his throat or by being put before him on a plate. Even gluten-free rice cookies are not administered for mental disorder and in my judgment ordinary food in liquid form, such as would be used in tube feeding, is not a medicine within the meaning of section 58.

That brings one back to the question of whether tube feeding would have been treatment for the mental disorder from which Ms B. was suffering. My initial reaction was that it could not be. Ms B. suffers from a psychopathic disorder which, according to the evidence, is incapable of treatment

except by psychoanalytical psychotherapy. How can giving her food be treatment for that disorder ?

Mr Gordon says that it cannot. It may be a prerequisite to a treatment for mental disorder or it may be treatment for a consequence of the mental disorder, but it is not treatment of the disorder itself. He draws attention to section 3 of the Act, which specifies the grounds upon which a person suffering from a psychopathic disorder may be detained. It is not enough that the disorder must be ‘‘of a nature or degree which makes it appropriate for him to receive medical treatment in a hospital’’ (subsection (2)(a)). The proposed treatment must be ‘‘likely to alleviate or prevent a deterioration of his condition’’ (section (2)(b)) and it must be ‘‘necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment...’’ So Mr Gordon says that the patient cannot lawfully be detained unless the proposed treatment will alleviate or prevent a deterioration of his condition. No less should be required of the treatment which can be given without his consent under section 63.

This is a powerful submission. But I have come to the conclusion that it is too atomistic. It requires every individual element of the treatment being given to the patient to be directed to his mental condition. But in my view this test applies only to the treatment as a whole. Section 145(1)

gives a wide definition to the term ‘‘medical treatment.’’ It includes ‘‘nursing, care, habilitation and rehabilitation under medical supervision’’. So a range of acts ancillary to the core treatment fall within the definition. I accept that by virtue of section 3(2)(b) a patient with a psychopathic disorder cannot be detained unless the proposed treatment, taken as a whole, is ‘‘likely to alleviate or prevent a deterioration of his condition.’’ In my view, contrary to the submission of Mr Francis, ‘‘condition’’ in this paragraph means the mental disorder on grounds of which the application for his admission and detention has been made. It follows that if there was no proposed treatment for Ms B.'s psychopathic disorder, section 63 could not have been invoked to justify feeding her by naso-gastric tube. Indeed, it would not be lawful to detain her at all.

It does not however follow that every act which forms part of that treatment within the wide definition in section 145(1) must in itself be likely to alleviate or prevent a deterioration of that disorder. Nursing and care concurrent with the core treatment or as a necessary prerequisite to such treatment or to prevent the patient from causing harm to himself or to alleviate the consequences of the disorder are in my view all capable of being ancillary to a treatment calculated to alleviate or prevent a deterioration of the psychopathic disorder. It would seem to me strange if a

hospital could, without the patient's consent, give him treatment directed to alleviating a psychopathic disorder showing itself in suicidal tendencies, but not without such consent be able to treat the consequences of a suicide attempt. In my judgment the term ‘‘medical treatment...for the mental disorder’’ in section 63 includes such ancillary acts.

Mr Francis was, I think, right to draw our attention to section 62 as throwing some light upon the question. Sections 57 and 58 place special restrictions upon the use of particular ‘‘forms of medical treatment for mental disorder’’: surgical operations for destroying brain tissue or implanting hormones (section 57), electro-convulsive therapy and drugs (section 58). There are special procedures which must be followed before these treatments can be given. But section 62 says that in certain specified cases of emergency, these special rules need not be complied with. They include -

> ‘‘any treatment -
>
> (a) which is immediately necessary to save the patient's life; or
> (b) ...
> (c) which (not being irreversible or hazardous) is immediately necessary to alleviate serious suffering by the patient
> (d) which (not being irreversible or hazardous) is immediately necessary and represents the minimum interference necessary to prevent the patient from behaving violently or being a danger to himself or to others.

Mr Francis says, in my view rightly, that these emergency cases are not primarily concerned with a direct alleviation or the prevention of a deterioration of the mental disorder. The danger to the patient's life or the likelihood of serious suffering or the patient being a danger to himself or others are more likely to be the results of symptoms of the disorder. Nevertheless, the treatment of such symptoms is assumed by section 62 to be a ‘‘form of medical treatment for mental disorder’’, since otherwise it would not have come within sections 57 or 58 in the first place.

I therefore agree with Ewbank J. in *Re K.B. (A Patient)* (unreported, 28 January 1994) when he said of the tube-feeding of an anorexic -

> ‘‘relieving symptoms is just as much a part of treatment as relieving the underlying cause.’’

To similar effect is the judgment of Stuart-White J., quoted by Sir Stephen Brown P. in *Riverside Mental Health NHS Trust* v. *Fox* [1994] 1 FLR 614, 619. The case of *Re C.* [1994] 1 W.L.R. 290, in which a schizophrenic was held entitled to refuse treatment for gangrene, is distinguishable. The gangrene was entirely unconnected with the mental disorder.

Mr Gordon said that if the meaning of ‘‘medical treatment for mental disorder’’ was wide enough to include ancillary

forms of treatment, section 63 would involve a breach of the European Convention on Human Rights. He referred us to *Herczegfalvy* v. *Austria* (1992) 15 E.H.R.R. 437 in which the court said (at p. 485) that a measure constituting an interference with private life and therefore *prima facie* contrary to Article 8(1) (like involuntary tube feeding) can only be justified under Article 8(2) if, among the other requirements of that Article, its terms are sufficiently precise to enable the individual ‘‘to foresee its consequences for him.’’ This requirement is necessary to prevent such measures from being a source of arbitrary official power, contrary to the rule of law. In my judgment section 63 amply satisfies this test. There is no conceptual vagueness about the notion of treating the symptoms or consequences of a mental disorder, although naturally there will be borderline cases. But there is no question of an exercise of arbitrary power.

I therefore think that the judge was right and would dismiss the appeal. That makes it unnecessary to consider the cross-appeal against the judge's finding that Ms B. had capacity at common law. This is perhaps just as well, because I am bound to say that I have some difficulty with the judge's conclusion. Reading the letter which Ms B. wrote to the hospital at the end of March 1994 and the transcript of her evidence given before the judge on 23rd June 1994, I am as impressed as the judge was by her intelligence and self-awareness. It is however this very self-awareness and acute

self-analysis which leads me to doubt whether, at the critical time, she could be said to have made a true choice in refusing to eat. In her letter she said:

> My basic need is to be understood why I feel the need to punish myself and at present this is by not eating.

In evidence she said:

> Q. Are you being told that you may die if you are not tube fed ?
> A. ...They told me...that they were doing that to save my life.
>
> Q. Did you understand what they were telling you ?
> A. I found it difficult to believe because I felt quite well.
>
> Q. Yes. Did you want to die ?
> A. There are times when you feel so despondent and that you do not care whether you live or die but I think deep down I don't. I certainly didn't intend to lose weight. I didn't want to allow myself - I've always enjoyed my food so by denying myself something I endured it as a punishment, but it was never meant as a slow suicide attempt or anything like that.
>
> Q. Do you think you are running risks in what you are doing ?
> A. (Pause). I understand now that with severe loss of weight, as the weight just goes less and less, it does put stress on your heart and risk of heart attack. It is not always easy to believe when you are feeling quite fit really.
>
> Q. Looking at the matter today, do you appreciate that you are running some risks in what you are doing ?
> A. Today I understand why they wanted to tube feed me and I understand that my weight - I can accept that my weight was getting out of hand.
>
> Q. Yes.
> A. I understand that. As much as some days you just

> wouldn't - you're crying inside for help but you are so stuck in the routine and self-punishment and that, it's almost like a habit you can't break.
>
> Q. Yes.
> A. And sometimes you just want somebody to come and break it.
>
> Q. Yes; how ?
> A. I don't know how.

I find it hard to accept that someone who acknowledges that in refusing food at the critical time she did not appreciate the extent to which she was hazarding her life, was crying inside for help but unable to break out of the routine of punishing herself, could be said to be capable of making a true choice as to whether or not to eat. But having expressed this reservation, I find it unnecessary to say more. I would dismiss the appeal.

LORD JUSTICE HENRY: I agree.

LORD JUSTICE NEILL: I also agree.

I am satisfied that the words in section 63 of the Mental Health Act 1983 ‘‘... any medical treatment given to him for the mental disorder from which he is suffering ...’’ include treatment given to alleviate the symptoms of the disorder as well as treatment to remedy its underlying cause.

In the first place it seems to me that it would often be difficult in practice for those treating a patient to draw a clear distinction between procedures or parts of procedures which were designed to treat the disorder itself and those procedures or parts which were designed to treat its symptoms and sequelae. In my view the medical treatment has to be looked at as a whole, and this approach is reinforced by the wide definition of ‘‘medical treatment’’ in section 145(1) as including ‘‘nursing’’ and also ‘‘care, habilitation and rehabilitation under medical supervision.’’

In the second place I too find support for this construction of ‘‘medical treatment’’ in section 63 in the provisions relating to urgent treatment in section 62. Section 57 of the 1983 Act, which is concerned primarily with medical treatment which involves surgery on brain tissue, contains detailed provisions for the steps which have to be taken before such treatment can be administered. Similarly section 58 which is concerned with other specified forms of treatment and with

the administration of medicine where the medicine has been administered for a period in excess of three months, contains provisions for the steps to be taken before the treatment is given or continued as the case may be. It is against this background that one turns to section 62 which provide:

> ‘‘(1) Sections 57 and 58 above shall not apply to any treatment -
>
> (a) which is immediately necessary to save the patient's life; or
>
> (b) ...
>
> (c) which (not being irreversible or hazardous) is immediately necessary to alleviate serious suffering by the patient; or
>
> (d) which (not being irreversible or hazardous) is immediately necessary and represents the minimum of interference necessary to prevent the patient from behaving violently or being a danger to himself or to others.’’

It seems to me to be clear that section 62 contemplates treatment which is designed to deal with the symptoms of the disorder rather then the disorder itself. It follows therefore that as section 62 excepts urgent treatment from the regimes imposed by section 57 and 58 medical treatment in those sections includes treatment of symptoms as well as of causes.

In these circumstances I too would dismiss the appeal. It therefore becomes unnecessary to express any final conclusion about the cross appeal, though I share the doubts expressed by

Hoffmann L.J. as to the capacity of Ms B. at the relevant time.