

## *Treatment for Mental Disorder - another step backwards?*

Simon Foster\*

**R v Collins and Ashworth Hospital Authority ex parte Brady**

**Maurice Kay J Liverpool District Registry**

**(Judgment given 10th March 2000 - at time of going to print the decision is unreported.)**

Appearances: Mr Nigel Pleming QC and Ms Eleanor Grey (Reid Minty) for the Respondent; Mr Benet Hytner QC, Ms Philippa Kaufmann and Mr Robin Makin, solicitor advocate (E Rex Makin and Co) for the Applicant.

### **Introduction**

The case concerns the right of a psychiatric patient to choose to die by refusing intervention from the hospital. The Court considered the treatment provisions of Part IV of the Mental Health Act, capacity at common law and the legitimate interests of society in preserving life. However the notoriety of Mr Brady, and his own personality, meant that underlying the judgment were considerations of public policy as much as legal analysis.

### **The facts**

The Applicant, Ian Brady, was 62 years old at the date of the hearing. In 1966 he was sentenced to three concurrent terms of life imprisonment, for which the Secretary of State fixed a whole life tariff. Mr Brady accepts that he will never be released. In November 1985 he was transferred to the then Park Lane Hospital (now incorporated into Ashworth) under section 47 Mental Health Act 1983. In 1995 he was moved to Jade Ward, and restrictions were put on his freedom. By way of compensation he was granted the use of a personal computer and special visiting arrangements. However, following the publication of the Fallon Report<sup>1</sup> the computer was withdrawn and security for visitors was increased. In addition the Applicant began to fear a return to the prison system. On 18th June 1999 an automatic tribunal review confirmed that the Applicant was correctly detained in hospital.

In September 1999 the Acting Medical Director arranged a meeting to review security on Jade Ward. It was agreed that the Applicant should be moved as soon as possible to a more secure environment. On 30th September, while the Applicant was writing in his room, a six-person team entered in full riot gear without explanation, strip searched him and took him to a waiting van which transferred him to Lawrence Ward. The Applicant was under restraint for about fifty minutes, during which time he offered little or no resistance. His arm was injured, possibly

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Cm 4194 (1999) The Stationary Office.

1 The Report of the Committee of Inquiry into the

fractured, during the process. No-one told him why he had been moved; he feared he was being transferred to prison. The Applicant has never assaulted or offered physical resistance to staff, either in hospital or before that in prison.

The Applicant's response was to refuse food or sweetened drinks. He was on hunger strike continuously until the date of judgment. It is clear from his records that his initial purpose was to protest, not to starve himself to death; he had used hunger strikes as a tactic some years previously. At the end of October his new Responsible Medical Officer, Dr Collins, expressed the view that the clinical team should intervene to prevent deterioration in the Applicant's condition. On 29th October force-feeding commenced, by way of a naso-gastric tube. The Applicant did not consent to this but offered no resistance either. Dr Rix, a consultant forensic psychiatrist, offered a second opinion, but the Applicant refused to see him.

Professor Sines, who was appointed by Ashworth to consider the Applicant's complaints, reported on 30th November 1999. He was strongly critical of the move but decided that it had been correct to commence force feeding.

On 19th October and 3rd December 1999 and 17th February 2000 the Applicant was interviewed by Professor Maden, who had seen him several times before at the request of his solicitors. Following the 3rd December interview Professor Maden reported that the Applicant had thoughts of suicide, based on a rational argument that the regime to which he was subjected made his life intolerable. He could not say under what circumstances he would be prepared to end his protest.

The Applicant's application for judicial review sought to challenge "the continuing decision... to force feed the Applicant,... apparently made pursuant to section 63 of the Mental Health Act 1983." Permission to apply for judicial review was granted on 2nd February 2000 by Forbes J, who also directed that the psychiatrists should attend for cross-examination. The present judgment was given in open court.

### **The law**

Section 63 Mental Health Act 1983 (MHA): "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 under section 57 or 58 above, if the treatment is given by or under the direction of the responsible medical officer."

Section 145 MHA: 'medical treatment' includes "nursing, and also includes care, habilitation and rehabilitation under medical supervision."

Medical treatment has been given a particularly wide interpretation in cases of psychopathic (personality) disorder: *Reid v Secretary of State for Scotland*<sup>2</sup>. In *B v Croydon Health Authority*<sup>3</sup> Hoffman LJ stated: "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 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."

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2 (1999) 2 WLR 28 at 44

3 (1995) 1 All ER 683 at 687

### Precedent facts and ‘super-Wednesbury’

Mr Hytner QC, for the Applicant, submitted that the court had first to decide whether force feeding was **in fact** treatment ‘for the mental disorder from which he is suffering’. The fact that Dr Collins, the RMO, had reasonably believed it to be so was not the point, as this was a ‘precedent fact’ without which the treatment could not be covered by section 63: see *Khawaja v Secretary of State for the Home Department*<sup>4</sup>. The words ‘in the opinion of’ the RMO did not appear in the section and should not be implied into it. Any derogation from fundamental human rights should be construed strictly in favour of the Applicant: *Khawaja* (above) and *R v Secretary of State for the Home Department ex parte Simms and O’Brien*<sup>5</sup>. Moreover, the so-called ‘super-Wednesbury test’ in human rights cases applied as set out in *R v Ministry of Defence ex parte Smith*<sup>6</sup> (per Sir Thomas Bingham MR): ‘The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above.’

Mr Fleming QC, for the Respondent Authority, submitted that section 63 should be read in the context of Part IV of the Act as a whole. No question of precedent fact arose; the court’s role was limited to supervising the RMO on **Wednesbury** principles. In the same way section 62 spoke of treatment which ‘is immediately necessary to save the patient’s life’. If the court approached section 62 on a precedent fact basis it would seriously undermine the ability of healthcare professionals to take immediate, emergency steps to save life. Likewise, in *R v Mental Health Act Commission, ex parte X*<sup>7</sup> the court had held that a challenge under section 57 should be considered according to **Wednesbury** principles. In the present case, therefore, the court should not interfere with Dr Collins’ judgement unless it was irrational.

### The judgment

#### (i) Section 63

Maurice Kay J said that the psychiatrists agreed that the Applicant had a psychopathic or personality disorder. However, Professor Maden approached the matter on the basis that a person without the disorder could have made the same decision on rational grounds, while Dr Collins concluded that the decision to refuse food was caused by the personality disorder. The Applicant’s response to the move had been wholly disproportionate and it was “ridiculous not to look to the personality disorder for the explanation”. Dr Rix had come to a similar conclusion.

His Lordship had no doubt that the opinions of Dr Collins and Dr Rix were correct as to the part the personality disorder played in the hunger strike. He was therefore satisfied that Dr Collins’ approach to section 63 satisfied both the ‘precedent fact’ test and the ‘super-Wednesbury’ test. Section 63 was triggered because what arose was the need for medical treatment for the mental disorder from which the Applicant was suffering. The fact that a person without mental disorder could reach the same decision on a rational basis in similar circumstances did not avail the Applicant because he reached and persisted in his decision because of his personality disorder. At the commencement of the hunger strike his Lordship was satisfied that the Applicant’s intention was not to starve himself to death. While he could not reach a certain conclusion about the Applicant’s present intention, the likelihood was that he was playing the system.

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4 (1984) 1 AC 74

5 (1999) 3 WLR 328 at 341

6 (1996) QB 517 at 514

7 (1988) 9 BMLR 77

Mr Hytner had submitted that Dr Collins and his team had failed to take into account the quality of the particular life that was being preserved. That argument did not get off the ground, because the Applicant had not to this day told Dr Collins that his intention was to starve himself to death. Moreover, the Applicant was physically healthy and a significant amount of his 'impoverished' life resulted from his extremism in dealing with his circumstances and his uncompromising relationship with Ashworth. There was therefore no element of irrationality in Dr Collins' decision to force feed.

*(ii) Capacity*

The parties had also asked the judge to rule on the Defendants' second argument, that the Applicant lacked capacity to consent and that they had a duty at common law to act in his best interests. It was common ground that a mentally disordered patient might nevertheless have capacity, and that the test in *Re C*<sup>8</sup> applied. Dr Collins had reported that the Applicant had the intellectual ability to appreciate the risk of refusing food but that his ability to weigh the information was impaired by the emotions and perceptions he had at the time, which were related to his personality disorder. Dr Rix had agreed. Neither Dr Collins nor Dr Rix saw total incapacity, but rather incapacity in the area relating to his battle with the Ashworth authorities. Professor Maden, however, did not accept that the Applicant lacked capacity. Mr Hytner submitted that far more disordered minds had been held to retain capacity, for example in *Re C* (above).

His Lordship was satisfied on a balance of probabilities that, although he was a man of well above average intelligence, the Applicant had been incapacitated in relation to decisions about food refusal since 25th October. His doctors had therefore been empowered to supply medical treatment in his best interests. This was a matter of clinical judgement and subject to the test in *Bolam v Friern Hospital Management Committee*<sup>9</sup>.

*(iii) A duty to prevent suicide?*

Mr Fleming submitted that even if he retained capacity the Applicant's right of self-determination was not absolute. There was a public interest in preserving life, preventing suicide and maintaining the integrity of the medical profession. In *Secretary of State for the Home Department v Robb*<sup>10</sup>, which concerned a prisoner on hunger strike, Thorpe J had put forward the following principle: "...if an adult of sound mind refuses, however unreasonably, to consent to treatment or care by which his life would or might be prolonged, the doctors responsible for his care must give effect to his wishes even though they do not consider it to be in his best interest to do so". He had cited *Re T*<sup>11</sup>, *Airedale NHS Trust v Bland*<sup>12</sup> and the American case of *Thor v Superior Court*<sup>13</sup>. However, Mr Fleming submitted that Robb simply established that there was no duty to intervene and did not address the question of whether there was a **power** to do so. More recent cases had established that police and prison officers owed a prisoner a common law duty to take care to prevent him from committing suicide or causing himself harm (see for example *Reeves v Commissioner of Police*<sup>14</sup>).

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8 (1994) 1 WLR 290

9 (1957) 1 WLR 582

10 (1995) 1 All ER 677

11 (1992) 4 All ER 649

12 (1993) AC 789

13 (1993) 5 Cal. 4th 725

14 (1999) 3 WLR 363

The judge said that it would be somewhat odd if there was a duty to prevent suicide by an act, but not even a power to intervene to prevent self-destruction by starvation. He did not consider that, as a first instance judge, he had enough evidence to make a finding in this complex issue, but he did not believe that he would be constrained by authority from finding for the Respondents.

#### *(iv) Conclusion*

His Lordship was entirely satisfied that the decision to commence and continue force feeding was justified by reference to section 63 and that it was in all respects lawful, rational and fair. Even if section 63 had not applied it would still have been lawful because the Applicant had at all material times lacked capacity by reason of his disorder and the steps taken by the doctors were reasonably perceived to be in his best interests. The application was therefore dismissed.

#### **Costs**

Ms Grey, for the Respondent, asked for an order that the Applicant pay the Respondents' costs. As he was legally aided this should be in the form that determination of his liability should be postponed for such period as the Court saw fit. As Mr Brady used litigation as a tool, such an order would keep an eye on the possibility of settling for liability to costs orders.

Ms Kaufmann, for the Applicant, said that the Respondents had themselves welcomed the opportunity to have a Court determine the issue. She conceded that the proceedings were adversarial, but maintained that a public interest had been served by bringing the matter to Court. Mr Brady would have to seek the permission of the Court to commence proceedings which might result in a monetary award and obtain positive advice from his legal advisers before any such proceedings would be funded by the Legal Aid Board. It would be an improper denial of access to the Court to impose a costs order as a disincentive; the Court had mechanisms for dealing with frivolous applications.

Maurice Kay J said he would make the order for costs in the form sought by Ms Grey because it was the normal consequence of adversarial proceedings, and not for collateral purposes. He granted Legal Aid taxation and refused leave to appeal.

#### **Comment:**

It was predictable that Mr Brady would not succeed in this application. Even if he had not been the subject of such intense public interest, it is hard to imagine any judge permitting a healthy patient to take his own life by a positive act of will. Moreover, Mr Brady's approach to his detention made it likely that his hunger strike was a weapon against the hospital rather than a considered decision to kill himself. It is not therefore surprising that the judge took the view that his choice arose from his personality disorder and could therefore be overridden, both under section 63 and on the 'best interests' test at common law.

Nevertheless, there are worrying features of the judgment. Once again, Hoffman LJ's controversial dictum in *B v Croydon* is cited to justify **any** sort of medical intervention which doctors believe benefits the patient, whether physically or mentally. This goes far beyond what would be regarded, on an ordinary construction of section 63, as 'treatment for mental disorder'. Given the increased emphasis on self-determination by those with mental health problems and the prospect of human

rights challenges under Article 8, it is high time that the appellate courts looked at *B v Croydon* again.

In any event, Maurice Kay J seems to have omitted a crucial link in his judgment; the 'precedent fact' discussion does not address the point. Even if the hunger strike arose from Mr Brady's personality disorder, how can force feeding be regarded as treatment **for that condition**? If section 63 has any remaining meaning- other than 'the RMO can treat as he or she wishes'- there must surely be some connection between the treatment and alleviation of the condition. At least in *B v Croydon* the saving of life was an integral part of the treatment plan. It is not apparent from the judgment how Mr Brady's condition can be treated- but surely keeping someone alive, without more, cannot reasonably be construed as 'treatment for the mental disorder'? If it is, then *Re C* itself would have to be reconsidered.

There can be less argument with the judge's logic with regard to the incapacity issue. If Mr Brady was determined to risk his life to make a point he could reasonably be said to have not 'weighed' the treatment information. It might have been fairer if the case had been decided on this ground, rather than section 63.

The judge was probably wise to avoid ruling on the 'suicide' issue, since he did not need to do so. However, he went a considerable distance towards disagreeing with *Robb*. The fact that he did not comment upon *B v Croydon*, whether it was binding upon him or not, suggests that he was instinctively more sympathetic to intervention than self-determination- again, a public policy approach rather than a strictly legal one.

Finally, it is disappointing to see that the judge was prepared to make a costs order in a case so manifestly of public interest. This application did not simply challenge a particular decision; it raised fundamental issues of life and death upon which there was no directly applicable authority. At least he did not make the order as a deterrent to future court action, which he was invited to do. As Ms Kaufmann made clear, this would have impugned a fundamental human and Convention right of access to the Courts.