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Refusal of Treatment

Jehovah's Witness

Re T [1992] 4 ALL ER 649

Facts

- Jehovah's Witness patient (T) was in a car accident and drugged with narcotics for pain relief.
- While in hospital, T's mother came to visit and reminded her of her faith.
- T sought assurance from the nurses that she would not receive blood transfusions due to her faith.
- At this stage, T was 34 weeks pregnant and as a result of her injuries, she went into labour.
- The Doctor asked twice if T wanted blood transfusions, and was advised she would not need any after a C-section. She was informed of other, less effective methods.
- She signed a hospital refusal of blood transfusion form without reading it.
- Contrary to what was said in the form, she was not told that she may die without the blood transfusion.
- The baby was born and T's condition deteriorated.

Outcome: Treatment without consent is an assault.

Judgement

Issue 1. Did T have the capacity to consent?

- Unimpaired adult has right to choice of consent, even if the consequence is death. You must ask whether at the time the decision was made, they had the capacity commensurate with the gravity of the decision; i.e. the more serious the decision, the higher standard of evidence of capacity should be fulfilled.

Issue 2. What is the effect of the refusal form at common law?

- Signed consent form is worthless if they don't have capacity to consent, or effects not explained to patient, or if based on a false premise (T's sense of false security because the hospital staff did not sufficiently explain that the alternative methods were not as effective).
- Where a form has been signed, the scope and basis of refusal needs to be considered:
 - Was it intended to apply in these circumstances?
 - Was it based upon assumptions that have not been realised?
 - Was it vitiated if based on false assumptions?

Issue 3. What is the legal relevance of the influence of third parties?

- A treatment decision may be ineffective if the patient's will be overborn by another party (c.f. influence decision).
 - Will of the patient (strong or weak);
 - The intimacy of the relationship of the patient with the other party; and
 - The capacity to influence.

Malette v Shulman (1990) 67 DLR (4th) 321 (Ontario CA)

Facts

- Jehovah's Witness had a signed card in her purse stating she does not want a blood transfusion under any circumstance.
- A physician ignored the card and treated her.
- The Trial Judge awarded her \$20 K in damages for assault.
- Physician tried to rely on the principle in *Re T*, not satisfied that the signed refusal was made in the full knowledge of the circumstances she may find herself in. May have changed her religious beliefs, or that the card was signed under peer pressure or family pressure.

Outcome: Judgement for Jehovah's Witness

- The doctor was not free to disregard advanced refusal. This was the only way it was possible to give notice. Her instructions plainly contemplated the situation she was in. The doctor's job is not to question the reasonableness of her advanced directive.
- Common law recognition of an advance care directive refusing a particular type of medical treatment.

Mental Illness

Re C (adult: refusal of medical treatment) [1994] 1 All ER 819

Facts

- A 68-year-old mentally ill man (C) with chronic schizophrenia had a gang green leg.
- Experts assessed his chances of survival without amputation as 15%.
- C refused to receive amputation.
- The consultant psychiatrist said that he was not competent to consent to/refuse to consent to major medical treatment because of his persecutory and grand delusions that he was an amazing surgeon and they were trying to destroy his body.
- An application was made on C's behalf to the court for an injunction restraining the hospital from carrying out an amputation without C's express written consent.
- The hospital contended that C's capacity was impaired by his mental illness and that he had failed to appreciate the risk of death if the operation was not performed.

Outcome: Judgement for C

Judgement

Issue. Did the mental illness reduce C's capacity to sufficiently understand the nature, purpose and effects of the proffered medical treatment?

Thorpe J

- **The decision-making process:** "Although C's general capacity to make a decision had been impaired by schizophrenia, the evidence failed to establish that he lacked sufficient understanding of the nature, purpose and effects of the proposed treatment, but instead showed that he had [1] understood and retained the relevant treatment information, [2] believed it and [3] had arrived at a clear choice." [824b]
- Prima facie, every adult has the right and (rebuttable) capacity to decide whether or not he will accept medical treatment, even if refusal may risk permanent injury or premature death. It does not matter whether the reasons for refusal are irrational, unknown or non-existent (citing **Re T** per Lord Donaldson MR at 664) [824a].

Pregnant Women

Before birth, the mother's interests are put first:

St George's Healthcare NHS Trust v S; R v Collins & Ors, ex parte S [1998] 3 All ER 673

Facts

- A single 31-year-old woman (S) was 36 weeks pregnant.
- S was diagnosed with pre-eclampsia and admitted to hospital for an induced delivery.
- She understood the potential risks, but wanted the baby to be born naturally.
- S was seen by a social worker (C) and two doctors, but refused to accept their advice for early delivery.
- On C's application for mental illness, S was admitted to a psychiatric hospital under the *Mental Health Act*.

- S was then transferred to another hospital against her will.
- The hospital applied to the court for a declaration dispensing with her consent to treatment.
- Mistakenly being told that S had been in labour for 24 hours and it was an emergency, the judge granted the declaration and a C-section was performed after forceful sedation.
- S was returned to the psychiatric hospital and when the detention was terminated 2 days later under the Act, she discharged herself against medical advice.
- S appealed against the grant of the declaration dispensing with her consent to treatment and for judicial review.

Outcome: S's appeal allowed – the caesarean performed amounted to trespass, the detention until she discharged herself was unlawful.

Issue 1. Can a medical practitioner perform treatment without the patient's consent?

- “Even when his or her own life depends on receiving medical treatment, an adult of sound mind is entitled to refuse it.” [685e]
- Where the patient is capable of making a decision whether to permit treatment, and decides not to permit it, their decision must be obeyed. The absence of consent means the doctor loses immunity to perform treatment legally, even if the objection to treatment is contrary to the person's best interests (citing *Airedale NHS Trust v Bland*). [686c]
- Exception to the need for consent when the individual lacks capacity to make decisions about the treatment, such as when they are unconscious or suffering from a mental disability [686h].

Issue 2. Is the foetus an individual separate from the mother?

- The interests of the mother and foetus were not in conflict in the present case, as the procedure did not have a preference for the mother or unborn child's life.
- “[F]or practical purposes, the unborn child and its mother-to-be are bonded in a union separable only by birth...” Judicial intervention would ignore the fundamental human rights of a woman, being the right to bodily integrity, equality, privacy and dignity [690g].
- “[A]n unborn child is not a separate person from its mother. Its need for medical assistance does not prevail over her rights. She is entitled not to be forced to submit to an invasion of her body against her will, whether her own life or that of her unborn child depends on it. Her right is not reduce or diminished merely because her decision to exercise it may appear morally repugnant.” [692b]
- To forcefully remove the baby from the body of the mother without lawful justification is an infringement of the mother's autonomy [692b].

Issue 3. Was the admission under the *Mental Health Act* s 2 unlawful?

- “This Act cannot be deployed to achieve the detention of an individual against her will merely because her thinking process is unusual, even apparently bizarre and irrational, and contrary to the views of the overwhelming majority of the community at large.” [692d]
- A woman detained under the Act for mental disorder cannot be forced into medical procedures unconnected with her mental condition unless her capacity to consent to such treatment is diminished. [693g]
- Section 2(2)(a) requires there be a link between the detention and the mental disorder while s 2(2)(b) is concerned with the health and safety of the mother only and not the unborn child. Per s 2(2)(a), the application for admission failed to distinguish between the urgent need for S to be treated due to her pregnancy with the separate question of whether the mental disorder warranted her detention in hospital. If she had not been suffering from pre-eclampsia there is nothing to suggest an application for detention would have even been considered, let alone justified. Hence, even if s 2(2)(b) is satisfied, the cumulative grounds of s 2(2)(a) were not established and the admission was unlawful.

Key points from the case:

- The unborn child is not a separate legal person from its mother.
- The mother has complete personal autonomy, meaning as an adult of sound mind she has the right to consent or withhold consent to treatment, even where the decision may appear morally repugnant.
- Medical treatment performed on an individual detained under the *Mental Health Act* is only lawful where there is a connection between the mental condition and the treatment.

Re Elm [2006] NSWSC 1137

Facts

- Woman with HIV believed mistakenly that God had miraculously healed her.
- She stopped taking medication and her T-cell count had fallen while her viral count increased.
- When pregnant woman has HIV, transmission can be reduced by:
 1. C-section delivery
 2. Prophylactic treatment before birth by mother and after birth by child
 3. No breast feeding
- Hence, if mother had done the above, then risk of neo-transmission would have fallen to 10%.
- She did not take protease inhibitors, so her infectiousness increased substantially. She also refused a c-section and consent for her child to go on HIV treatment after birth. She also intended to breast feed. Thus, the risk of transmission went as high as 70%.
- The Director of the Neonatal Intensive Care at Westmead Hospital and Professor of Neonatology at USYD will have the responsibility for overseeing and authorising treatment and care for the child when born. The doctor is of the opinion that anti-HIV medication needs to be taken as a matter of urgency as soon as possible after birth to reduce the risk of serious damage to the baby's health.
- The Doctor has sought consent from the mother twice, but on both occasions, she refused.
- An application was brought to the court to obtain judicial advice as to whether the department and doctors may safely take a certain course of action in these difficult anticipated circumstances.

Outcome: Court made orders confirming the Director-General's authority to consent to treatment and prohibiting D from breastfeeding the child and removing the child from the hospital.

Judgement

Issue 1. Whether the Court can make a declaration that the intensive care unit is authorised to administer medical treatment under s 174 of the *Children And Young Persons (Care And Protection) Act 1998*?

- The authority conferred by s 174 to carry out treatment without consent depends on the opinion of the medical practitioner that it is "necessary, as a matter of urgency, ... to prevent serious damage to his or her health". Treatment upon birth appears urgent here and the continuation over four weeks is an essential part of the treatment that does not deprive the treatment's qualification as "a matter of urgency". However, the requisite opinion is one for the relevant medical practitioner to form, so the Court cannot make a declaration. The Doctor will need to deem the situation urgent [12-13].

Issue 2. Can the Director-General, upon assuming care and responsibility under s 44, give consent to medical treatment notwithstanding D's refusal to consent?

- Care and responsibility includes authority to consent to medical treatment, not involving surgery, on the advice of a medical practitioner. A person having care and responsibility under s 157 has so to the exclusion of those having parental responsibility from whom care responsibility has been removed. Hence, the Director-General's consent is a sufficient consent [17-18, 20].
- Each of 2 parents can authorise medical treatment, even if the other refuses – thus so long as 1 consents to treatment, it does not matter that the other refuses [19].