Bioethical Inquiry (2011) 8:7–12
DOI 10.1007/s11673-010-9276-9

Recent Developments

Cameron Stewart · Bill Madden · Tina Cockburn · John Coggon

Received: 22 November 2010 / Accepted: 25 November 2010 / Published online: 25 December 2010

Injunctions to Restrain Withdrawal of Life—Sustaining Treatment: *Slaveski v Austin Health* [2010] VSC 493

The Supreme Court of Victoria, Australia has ultimately refused an application to injunct the threatened withdrawal of life-sustaining treatment from an elderly male patient in intensive care. The patient had experienced a catastrophic brain stem haemorrhage, was unresponsive and dependant on ventilator support. The prospect of a meaningful neurological recovery was considered to be negligible and all the health care team agreed that, should he survive, he would remain in a "locked-in" state. The relationship between family members and the treatment team broke down at the suggestion that further treatment was no longer in the patient's best interests.

The initial application was brought in informal fashion before the court by the patient's son who had no legal representation and who appeared to struggle with stating his reasons for why the court should intervene. The judge organised for the hospital and other relatives of the patient to be contacted by the Prothonotary (a Supreme Court official). The Victorian Public Advocate was also contacted and requested to make inquiries. Once this occurred a legally qualified relative was also contacted by the patient's son but given the time limitations it was not possible for evidence to justify the imposition of an injunction. Ordinarily such application would only be successful where the applicants demonstrate that they have a legal or equitable right which would justify the injunction. Nevertheless Dixon J ordered a temporary injunction until the following day given the applicant was "legally unrepresented, irrational, most likely grief stricken, and plainly concerned for his own father". Nor was there any immediate need for the hospital to withdraw treatment or evidence that delay would cause significant negative impact on the patient.

C. Stewart (✉)
Sydney Law School, University of Sydney,
Sydney, NSW, Australia 2006
e-mail: Cameron.stewart@usyd.edu.au

B. Madden
School of Law, University of Western Sydney,
Sydney, NSW, Australia
e-mail: w.madden@uws.edu.au

T. Cockburn
School of Law, Queensland University of Technology,
Brisbane, Qld, Australia
e-mail: t.cockburn@qut.edu.au

J. Coggon
Centre for Social Ethics and Policy, and Institute
for Science, Ethics, and Innovation, School of Law,
University of Manchester,
Manchester, UK
e-mail: John.Coggon@manchester.ac.uk

When the matter returned to court the family requested a second opinion regarding the patient's prognosis. The hospital agreed to this proposal and organised for another specialist to act as an independent expert for the court. The matter resumed 7 days later and the evidence of that expert and that of the health care team were tended. All the evidence was in agreement about the prognosis of the patient.

On the question of jurisdiction, Dixon J found at [35] that the application clearly fell with the Supreme Court's *parens patriae* jurisdiction:

> In my view there is undoubted jurisdiction in this Court to act to protect the right of an unconscious person such as [the patient] to receive ordinary, reasonable and appropriate as opposed to extraordinary, excessively burdensome, intrusive or futile medical treatment, sustenance and support. What constitutes appropriate medical treatment in a given case is a medical matter in the first instance. Where there is doubt or serious dispute in this regard the Court has power to act to protect the life and the welfare of the unconscious person.

The court expert suggested that should the patient survive it might help the family members deal with their situation if the patient (should he survive) be placed on a tracheotomy and feeding gastronomy for a period of time. However the judge dismissed this idea finding, at [47], stating that:

> No medical practitioner suggested that this outcome could be regarded as safeguarding, securing or promoting, or preventing the deterioration in, the physical or mental health of [the patient].

On that basis the court found that it was not in the patient's best interests to extend the injunction and the hospital was free to continue with its place of treatment withdrawal.

While the case seems to mirror similar findings in Australian jurisdictions, such as *Messiah v South East Health* [2004] NSWSC 1061 or *Northridge v Central Sydney Area Health Service* (2000) 50 NSWLR 549, it illustrates the ability of the courts to deal with these difficult and emotional issues in an effective and efficient way. It is often said that the traditional court systems are costly and delay ridden but here the court was able to arrange for effective investigation, evidence gathering and decision-making on a highly charged issue within a week.

Cameron Stewart

Orders to Submit to Medical Procedures, Including Genetic Testing, in Litigation: Balancing the Rights

Two recent decisions, with contrasting outcomes, highlight the challenges faced by the courts in balancing the rights of stakeholders in the context of applications by defendants for orders requiring plaintiffs to undergo medical examinations, including tests or medical procedures, where it is argued that the results of such examinations are relevant to the litigation. Of interest is the arrival of a request for genetic testing in the context of litigation.

The decisions noted here both arose in the context of medical negligence claims. The relevant rules of court (Rule 23.4 of the *Uniform Civil Procedure Rules 2005* (NSW) and *Supreme Court (General Civil Procedure) Rules 2005* (Vic) SR No 148/2005, Rule 33.04(1)) were differently framed however the general effect was the same in both cases: the plaintiffs would be unable to further pursue their litigation if they did not comply with any orders made by the courts following the applications.

The first application was to require the plaintiff to submit to a blood sample for the purpose of specified genetic testing; the second was to require the plaintiff to be subjected to a transoesophageal echocardiogram to shed light on a possible heart abnormality. The court made the order sought in the first case but not the second.

KF by Her Tutor RF v Royal Alexandra Hospital for Children (Children's Hospital Westmead) [2010] NSWSC 891.

KF brought a claim against the Children's Hospital at Westmead (the hospital) and Dr Brian Kearney (the paediatrician), arising out of a treatment episode provided to KF when she was she was less than 1 year old. Having suffered a seizure, KF presented to the hospital and came under the care of the pediatrician. Some 6 weeks later, she was diagnosed with hypoglycaemia. The plaintiff's claim alleged a delay in making the diagnosis and she claimed damages for serious brain damage allegedly suffered as a result of that delay.

In the context of defending that claim, the pediatrician sought an order that the plaintiff (who was then aged 14 years) attend at a pathology collection service and provide a 15 ml blood sample. The precise tests proposed to be performed on the sample were specified as being a genetic analysis of ABCC8 and KCNJ11 genes, serum transferrin isoforms and high density SNP array comparative genomic hybridisation. These tests were to be conducted for the purposes of ascertaining: whether the diagnosed CHI had an identifiable genetic basis or was connected to a genetic disorder and whether the plaintiff suffered from genomic disorders which may explain her developmental and language disorder. KF refused to submit to the blood test, which led to the subject interlocutory application by the pediatrician for an order that she be required to do so.

Justice Johnson of the Supreme Court of New South Wales exercised his discretion to order that the plaintiff accede to the pediatrician's request, as the proposed testing had the "capacity to throw light on the issues in the proceedings": *KF By Her Tutor RF v Royal Alexandra Hospital for Children (Children's Hospital Westmead)* [2010] NSWSC 891 at [49]. This was because the application was not a "fishing expedition" as there was "more than a '*tittle of evidence'* to support it"—it was based upon more than a *"a bare allegation"* and was not *"essentially speculative in nature"* (at [49]).

Having determined that it was in the interests of justice to order testing, His Honour went on to consider whether it was appropriate to make the order sought after considering the "degree of intrusion and distress" which the testing may have brought about (at [60]). As the plaintiff had already undergone blood tests for other reasons from time to time, he found that the level of intrusion involved in taking a blood sample did not operate against the pediatrician on this application (at [60]).

As to the terms of the order, His Honour noted that it was appropriate to confine the examination undertaken to an examination relevant to the issues in the proceedings (at [62]). In this case the focus of the testing concerned the plaintiff's developmental and language disorder, which formed a significant part of the plaintiff's claim. Although expressed in a broad way, this was an appropriate order in the circumstances of the case (at [63]). Significantly, the Court emphasised that "the determination of this interlocutory application, in the particular circumstances of this case, ought not be taken to have broader consequences, on some hypothetical basis, in other proceedings" (at [63]).

Dikschei v Epworth Foundation [2010] VSC 435

Within a few weeks, a similar issue (albeit not involving genetic testing) came for determination by the Supreme Court of Victoria. The plaintiff Mrs Dikschei (aged 76 at the time of the application) brought a claim against the Epworth Hospital arising from a stroke she suffered. She alleged that the stroke was caused by a nurse squeezing her central venous catheter when placing antibiotic medication into that line, which created an air embolism that entered the right side of her heart and passed to the left side via a small defect known as a patent foramen ovale (PFO).

The plaintiff declined a request by the hospital that she undergo a procedure known as a transoesophageal echocardiogram (TOE) which involves an intravenous sedation, placing a probe into the mouth, down the throat and into the esophagus so as to enable an ultrasound visualisation of part of the heart (the atrium). The hospital argued that the TOE would clarify the existence of the PFO. Whilst it was rare for complications to arise in the course of a TOE, expert evidence for the plaintiff indicated that the procedure would not be definitive as in a small proportion of cases it may fail to demonstrate the presence of a PFO.

The Supreme Court of Victoria accepted that the plaintiff's unwillingness was not manufactured or irrational. Mukhtar As J found that "I think that the procedure will be distressing for her" (at [35]). Further, whilst His Honour considered that the risk of a major complication was minimal, the procedure was "a substantial assault involving discomfort and risk"(*Dikschei* at [36], citing *Aspinall v Sterling Mansell Ltd* [1981] 3 All ER 866). Perhaps most significantly, the preponderance of the medical opinions supported the causation argument put by the plaintiff even without the test having been performed (at [37]–[38]). Noting that the onus of proof would remain on the plaintiff (at [39]), the hospital's application was refused (at [40]).

Comment

In the interests of the due administration of justice and a fair trial, the courts have power to make orders

requiring plaintiffs to undergo a medical examination in cases where a person's physical or mental condition is relevant to the litigation. As noted by Justice Johnson in *Re KF* at [46]:

A party who is sued with these possible consequences (a very substantial damages award) is entitled to take reasonable steps in a proper case, including the use of court processes, to ensure that issues which may bear upon the determination of the proceedings are assessed, so that the trial Judge is in a position to determine the real issues in dispute in the proceedings.

Recent decisions have held that a medical examination for this purpose can extend to routine tests or procedures such as blood testing for examination by pathologists (*Rowlands v State of New South Wales* [2009] NSWCA 136); and genetic testing (*KF*); a non-invasive MRI scan which did not involve the administration of general anesthetic or a contrast dye (*Downing v Wein* (2005) VSC 134), but not to more invasive procedures such as a transoesophageal echocardiogram (*Dikschei*).

In *Schloendorff v Society of New York Hospital* 211 NY 125 (1914) at 129–130, Cardozo J said that "every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault." Accordingly, in determining whether it is appropriate to exercise its discretion to override a plaintiff's refusal to consent to a medical examination or procedure, and therefore interfere with a patient's right to bodily integrity or autonomy, the courts will carefully consider the degree of intrusion and distress which the testing might bring about in order to assess whether in the circumstances of the case this would amount to an unreasonable interference with the plaintiff's rights.

This will require a balancing of the plaintiff's interests in the preservation of his or her rights to bodily integrity and privacy against the defendant's right to a fair trial and to effectively defend claims by being better informed on an issue in the case such as causation.

The decided cases indicate that to minimise the infringement of the plaintiff's rights of bodily integrity, general orders for a range of tests will rarely be made. To minimise the invasion of privacy and confidentiality defendants will be limited to using the test results for the purpose specified in the order (*Hearne v Street* [2008] HCA 36; 235 CLR 125 at [96], [105]–[108]).

A framework for analysis was developed by Webster J in *Aspinall v Sterling Mansell Limited* [1981] 3 All ER 866, who focused on the degree of risk and discomfort involved in the procedure, and in particular interference with the right to bodily integrity. In the lowest category were those matters said to involve "only an invasion of privacy":

> For my part, I would only distinguish between the following examinations: first, an examination of which does not involve any serious technical assault, but involving only an invasion of privacy; second, an examination involving some technical assault, such as a palpation; third, an examination involving a substantial assault but without involving discomfort and risk; fourth, the same, that is to say a substantial assault, but involving discomfort and risk; and fifth, an examination involving risk of injury or to health. It seems to me that the weight of the reasonableness of the plaintiff's objections . . . must bear a very close correlation to the order in which I have listed those distinctions.

Given that genetic testing is only available due to contemporary scientific and medical progress, and the controversy concerning genetic testing and its possible uses (see for example the observations of Ipp JA in *Harriton v Stephens* [2004] NSWCA 93; 59 NSWLR 694 at 746–747 [338]–[347]), it may be that there are now degrees of scales of invasion of privacy and confidentiality of medical information which are of greater consequence than that which could have been contemplated in 1981 when Webster J made these observations. It may be that in future cases more careful analysis will be required as to the degree of discomfort and risk faced by the plaintiff as a consequence of not only interferences with bodily integrity, but also interferences with the plaintiff's right to privacy.

In addition, the framework suggested by Webster J does not take into account the rights of third parties who may be affected by such orders, particularly interferences with privacy and confidentiality in medical information. In *Essentially Yours: The Protection of Human Genetic Information in Australia* (Report 96; 2003), the Australian Law Reform

Commission considered the implications of genetic testing, and the anxieties about increased loss of privacy, potential for genetic discrimination and implications for parents, grandparents, siblings, children, and generations to come. As in other applications of genetic testing, its application in litigation will require the courts strike a balance between not only the individual plaintiffs and defendants, but their family members and society as a whole. As to what restrictions will be imposed on genetic testing in personal injury cases to protect the privacy and confidentiality of third parties, we await further litigation.

Bill Madden & Tina Cockburn

Find the Gap: Welfare Decision-Making on Behalf of "Autonomous Adults"

It has become a truism of law in England, as in many other jurisdictions, that so-called "autonomous adults"—adults who are not found to fail the legal test for mental capacity—are free to make self-regarding welfare decisions as they choose. Autonomous adults are presumed to be the best guardians of their own welfare, and it has generally been understood that the State only has a right to claim decision-making competence against adults' wishes in regard to treatments authorised under the Mental Health Acts 1983 and 2007. Some time ago the courts addressed a problematic lacuna in the legal framework: the case of adult patients who require an intervention but whose mental incapacity means consent is impossible (*In Re F (Mental Patient: Sterilisation)* [1989] 2 WLR 1025). Jurisdictions differ in their approaches to welfare interventions for incapacitated adults. In England, decisions are made on behalf of non-autonomous adults in their best interests, by appointed proxies, or in accordance with valid advance directives (Mental Capacity Act 2005).

From a bioethical perspective, the principle just described will seem relatively uncontentious. Non-autonomous patients should not suffer simply because they cannot consent: alternative paradigms and mechanisms rightly apply (note that this does not mean that in practice the right principles are always applied (Coggon 2007)). However, a recent series of cases has sought to address another supposed gap in the law, and this proves more controversial at the very level of principle. These cases concern autonomous adults whose welfare is of such concern that decision-making rights are anyway taken from them. The courts have sought to justify the principle by reference to the adults' vulnerability, and exercise their power through the High Court's inherent jurisdiction (Dunn et al. 2008). This jurisdiction has recently been extended in a case whose principle will be celebrated by some in bioethics and lamented by others (*A Local Authority* v. *DL & Ors* [2010] EWHC 2675 (Fam)).

The facts presented in *DL* were based purely on the submissions of the Local Authority, and are given by Sir Nicholas Wall P as follows:

> 3. [...] Mr and Mrs L are an elderly married couple. He is 85: she is 90. They live with their son, DL, (who is in his fifties) in a house which is owned by Mr L. Mrs L is physically disabled. She receives support by way of direct payments and twice daily visits from a care provider. However, the local authority accepts for the purpose of this hearing, that neither Mr nor Mrs L (nor, for that matter, DL) is incapable, for any reason, of managing their own affairs, and, in particular, both Mr and Mrs L appear capable of deciding what their relationship with their son should be and, in particular, whether he should continue to live under the same roof as themselves.
>
> 4. The problem arises because of DL's alleged conduct towards his parents, which is said to be aggressive, and which, on occasions, has resulted, it is said, in physical violence by DL towards his parents. The local authority, which is the claimant in the proceedings, has documented incidents going back to 2005 which, it says, chronicle DL's behaviour and which include physical assaults, verbal threats, controlling where and when his parents may move in the house, preventing them from leaving the house, and controlling who may visit them, including Mrs L's carers. There have also been, it says, consistent reports that DL is seeking to coerce Mr L into transferring the ownership of the house into DL's name and that he has also placed considerable pressure on both his parents to have Mrs L moved into a care home against her wishes.

The Local Authority, therefore, was concerned to protect Mr and Mrs L from DL's alleged wrongful

behaviour, and considered itself to be under a duty to do so regardless of their wishes. As the President noted:

> 7. [...] [T]he local authority wishes to take steps to protect Mr and Mrs L from DL. As to status; (1) it acknowledges that, on the information currently available to it and as I have already indicated, neither Mr nor Mrs L lacks the capacity to take proceedings on behalf of themselves or each other; (2) it recognises that Mrs L, in particular, wishes to preserve her relationship with DL and does not want any proceedings taken against him. She, it appears, is worried that if steps are taken to remove DL from the property he might at worst commit suicide or that, at best, she might lose contact with him. Furthermore, the local authority acknowledges that whilst Mr L is more critical of DL's behaviour, he, Mr L, would be unlikely to want to take steps in opposition to his wife's wishes.

The question for the judge to ask himself, therefore, was "whether or not I have jurisdiction on the application of the local authority to make orders against DL which are protective of Mr and Mrs L" (at [8]). If he had such jurisdiction, the Local Authority wished him to grant orders that would "restrain DL from acting unlawfully", rather than to exclude him from his parents' house.

As already noted, earlier jurisprudence has established the High Court's jurisdiction to fill the (supposed) lacuna left in regard to vulnerable but autonomous adults (see Dunn et al. 2008). Drawing from a decision of Munby J (*Re SA (Vulnerable Adult with capacity: Marriage)* [2005] EWHC 2942), which in Munby J's phrase concerned "the court's inherent protective jurisdiction", Wall P cites two paragraphs of Munby J's judgment:

> [76] [...] [T]he inherent jurisdiction is no longer correctly to be understood as confined to cases where a vulnerable adult is disabled by mental incapacity from making his own decision about the matter in hand and cases where an adult, although not mentally incapacitated, is unable to communicate his decision. The jurisdiction, in my judgment, extends to a wider class of vulnerable adults.
>
> [78] It would be unwise, and indeed inappropriate, for me even to attempt to define who might fall into this group in relation to whom the court can properly exercise its inherent jurisdiction. I disavow any such intention. It suffices for present purposes to say that, in my judgment, the authorities to which I have referred demonstrate that the inherent jurisdiction can be exercised in relation to a vulnerable adult who, even if not incapacitated by mental disorder or mental illness, is, or is reasonably believed to be, either: (i) under constraint; or (ii) subject to coercion or undue influence; or (iii) for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent.

Wall P considered the case of DL to be distinguishable from SA, requiring an *extension* to the inherent jurisdiction, but found nevertheless that SA provides the basis for the jurisdiction and went on to hold that he could and would exercise it to protect Mr and Mrs L. Similarly, he held that section 222 of the Local Government Act 1972 founds jurisdiction to grant the injunctive relief sought in the case, saying that the two bases of jurisdiction would "stand or fall together" (at [30]). The High Court therefore made, in Wall P's phrase (at [9]), a "non-molestation" order against DL, for his parents' protection.

John Coggon

References

Coggon, J. 2007. Varied and principled understandings of autonomy in English law: Justifiable inconsistency or blinkered moralism? *Health Care Analysis* 15(3): 235–255.

Dunn, M., I. Clare, and A. Holland. 2008. To empower or protect? Constructing the "vulnerable adult" in English law and public policy. *Legal Studies* 28(2): 234–253.