

Widening the ‘Bournewood Gap’?

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In re F (Adult: Court’s Jurisdiction)

Court of Appeal, 26 June 2000

The rights of a compliant, incapacitated adult could best be preserved by subjecting her to greater compulsion

Introduction

These proceedings were a sequel to the case reported as *Re F (Mental Health Act: Guardianship)*,¹ in which the Court of Appeal held that wardship proceedings were preferable to guardianship proceedings under section 7 of the Mental Health Act 1983 where there were concerns for the well-being of a seventeen-year-old girl who had a mental age of between five and eight years.²

Facts

The young woman who had been the subject of the previous case, Miss T, was now eighteen years-of-age, and the wardship jurisdiction had therefore become unavailable. Her parents had withdrawn their consent for her to reside in local authority accommodation and, following her father’s death, her mother had continued to seek T’s return home. Invoking the inherent jurisdiction of the High Court, the local authority had sought declarations, the effect of which would be to keep her in residential accommodation and to restrict contact with her mother and other members of her family. At first instance, Johnson J held on a preliminary issue that the High Court *did* enjoy the requisite jurisdiction, pursuant to RSC Order 15, rule 16, and gave the mother permission to appeal.

The Appeal

For the purposes only of the Appeal, and despite her mother’s contrary view, it was agreed that T lacked capacity to decide where her future home should be. Her mother sought to set aside the order of Johnson J and to strike out the claim of the local authority as disclosing no reasonable cause of action. The Official Solicitor appeared as guardian of T and sought an investigation of her best interests.

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2 A review of this case can be found elsewhere in this issue of the JMHL at p186.

1 [2000] 1 FLR 192.

Argument

The mother's counsel, Mr Richard Gordon, QC, argued that none of the three routes by which the local authority might obtain relief was applicable to this case. First, there was no statutory justification for granting what was in effect an immunity against liability: the extensive guardianship powers contained in the 1959 Mental Health Act had been circumscribed by the 1983 Act, and an order under the 1983 Act had in any case already been refused; the only other analogous powers - in section 135 of the 1983 Act or section 47 of the National Assistance Act 1948 - were of severely limited effect. Second, there was no possibility of wardship proceedings as T was now over 18 years-of-age. And third, the doctrine of necessity could not apply. It was this last submission that was to take up most of the Court's time.

Mr Gordon argued that the 1959 Act had ousted the High Court's former *parens patriae* jurisdiction, which had not been revived when the 1983 Act restricted the guardianship regime. Consequently, the Court's inherent jurisdiction was now severely limited in scope, and could only be used to make 'advisory declarations' such as those relating to medical issues such as sterilisation, caesarian section or hysterectomy. It would no longer cover 'coercive declarations', such as those sought in this case, which concerned long-term intervention without limit of time and without a clear view of the subject's future requirements.

For the local authority, Mr Nigel Fleming, QC argued that the doctrine of necessity would operate whenever decisions were made about the care and protection of an incapable adult, no matter that those decisions might be extremely trivial. As was demonstrated by the case of *R v Bournewood Community and Mental Health NHS Trust, ex parte L*,³ most such decisions were made by family members, or by medical or care staff, without recourse to the courts.

The Official Solicitor was represented by Mr Roger McCarthy, QC, who submitted that the Court was not constrained by the terms of the local authority's application, and might make a declaration in terms more suited to the facts as they emerged. Such a declaration need not, therefore, have a coercive effect. He sought an investigation, not only of T's capacity but also, should it prove appropriate, of her true wishes, and argued that it would be helpful if, whatever its decision on the merits of the appeal, the Court were to make findings of fact as to where her best interests would lie. There were other issues, such as T's right to association with her family, which might more appropriately be resolved at a substantive hearing.

Decision

The President of the Family Court, Dame Elizabeth Butler-Sloss, agreed with Mr Gordon both that there was no statutory authority for intervention by the local authority and that the possibility of wardship had now disappeared. She pointed out that without the doctrine of necessity, the court would be unable to regulate the future arrangements for T.

As far as necessity was concerned, she said that three questions must be answered:

1. *Do the present facts demonstrate a situation in which the doctrine of necessity might arise - that is to say a serious justiciable issue that requires resolution in the best interests of an adult without the mental capacity to decide for herself?*

T did not have the capacity to decide where she should live, and the respective views of her mother

3 [1999] AC 458

and the local authority on this point were irreconcilable. T's welfare was in dispute, and she was at such risk that if she were under 17 years-of-age she would probably have been made the subject of a care order. The President cited the judgment of Sir Thomas Bingham, MR in *Re S (Hospital Patient: Court's Jurisdiction)*,⁴ in which he reviewed the declaratory jurisdiction in respect of those persons who lacked the capacity to make decisions in their best interests. He said:

"The consequence of this inability is not that the treatment of patients is regarded by the courts as a matter of indifference, nor that patients are regarded as having no best interests. Instead, in cases of controversy and cases involving momentous and irrevocable decisions, the courts have treated as justiciable any genuine question as to what the best interests of a patient require or justify. In making these decisions the courts have recognised the desirability of informing those involved whether a proposed course of conduct will render them criminally or civilly liable; they have acknowledged their duty to act as a safeguard against malpractice, abuse and unjustified action; and they have recognised the desirability, in the last resort, of decisions being made by an impartial, independent tribunal."⁵

The President had no doubt that in this case there was a serious, justiciable issue which required a decision by the courts.

2. *Has recourse to the inherent jurisdiction been excluded by the statutory framework of the mental health legislation?*

As far as the guardianship provisions of the 1959 Mental Health Act were concerned, the President noted that they were:

"... neither comprehensive nor exhaustive and did not cover a multitude of every day activities in which decisions are made on behalf of a person unable to decide for him/herself."

The amendments introduced by the legislation of 1982 and 1983 - principally, the 1983 Mental Health Act - had done nothing to alter this position. Although the House of Lords had held that the common law could not be used to fill a vacuum in the statutory regime,⁶ the regime in question - which provided powers of detention - was intended to be exhaustive. However:

"... the English mental health legislation does not cover the day-to-day affairs of the mentally incapable adult and the doctrine of necessity may properly be invoked side by side with the statutory regime."

The President noted that in the *Bournemouth* case, the House of Lords had held that in relation to informal patients, the doctrine of necessity was preserved by section 131 of the 1983 Act. She cited the following words of Lord Goff of Chieveley:

"It was plainly the statutory intention that [patients who are admitted as informal patients under section 131(1) but lack the capacity to consent to such treatment or care] would indeed be cared for, and receive such treatment for their condition as might be prescribed for them in their best interests. Moreover the doctors in charge would, of course, owe a duty of care to such a patient in their care. Such treatment and care can, in my opinion, be justified on the basis of the common law doctrine of necessity, as to which see the decision of your Lordship's House

4 [1996] Fam 1

5 *Ibid.*, at page 18

6 *Black v Forsey* [1988] SC (HL) 28; the statutory regime in question was that created by the Mental Health (Scotland) Act 1984

in *Re F (Mental Patient: Sterilisation)*. It is not therefore necessary to find such justification in the statute itself, which is silent on the subject. It might, I imagine, be possible to discover an implication in the statute providing similar justification, but even assuming that to be right, it is difficult to imagine any different result would flow from such a statutory implication. For present purposes, therefore, I think it appropriate to base justification for treatment and care of such patients on the common law doctrine.”⁷

T’s mother had invested a faith in *Black v Forsey* that in the light of *Bournewood* was misplaced. The inherent jurisdiction of the High Court to grant declaratory relief had not been ousted by the 1983 Mental Health Act.

3. *If the doctrine of necessity is not excluded, does the problem arising on this appeal come within the established principles so as to give the court jurisdiction to hear the issue of T’s best interests and to grant declarations?*

The President noted that there was “an obvious gap in the framework of care for mentally incapacitated adults”, and that if the Court could not intervene, T “would be left at serious risk with no recourse to protection, other than the future possibility of the criminal law”. This, she felt, would represent “a serious injustice to T, who has rights which she is unable, herself, to protect”. The President then considered dicta in several authorities.

In *Re F (Mental Patient: Sterilisation)*,⁸ Lord Donaldson, MR had said:

“... the common law is the great safety net which lies behind all statute law and is capable of filling gaps left by that law, if and in so far as those gaps have to be filled in the interests of society as a whole. This process of using the common law to fill gaps is one of the most important duties of the judges.”

In *Re S*,⁹ the court had once again considered the patient’s best interests, and, according to the President, in *Bournewood*, Lord Goff himself had:

“... recognised ... that the concept of necessity had a role to play in all branches of the law where obligations existed and was therefore a concept of great importance.”

In *Re C (Mental Patient: Contact)*,¹⁰ which Bingham, MR had cited, the parents of an adult mentally incapacitated girl could not agree on contact with her mother. Eastham J held:

“... in an appropriate case, if the evidence bears out the proposition that access is for the benefit of the patient ... I see no reason at all why the court should not grant access by way of a declaration.”¹¹

These authorities were analogous to the present disagreement and, the President said, it was clear that if declarations were required to determine where T should live,

“... there is nothing in principle to inhibit a declaration that it was in her best interests that she should live in a local authority home and should not live anywhere else, nor, while she was in the home to regulate the arrangements for her care and as to with whom she might have contact ... I am clear that it is essential that T’s best interests should be considered by the High Court and that there is no impediment to the judge hearing the substantive issues involved in this case.”

7 [1999] AC 458, at page 485

10 [1993] 1 FLR. 940

8 [1990] 2 A.C. 1

11 *Ibid.*, at page 945

9 See footnote 4 above

However:

“The assumption of jurisdiction by the High Court on a case by case basis does not ... detract from the obvious need expressed by the Law Commission and by the Government for a well-structured and clearly defined framework of protection of vulnerable, mentally incapacitated adults ... Until Parliament puts in place that defined framework, the High Court will still be required to help out where there is no other practicable alternative.”

The President therefore indicated that she would dismiss the appeal.

Lord Justice Thorpe had delivered a judgment in the earlier appeal in this case. Citing the decisions in *Re A*¹² and *Re S (Adult Patient: Sterilisation)*,¹³ he argued that although they

“ ... establish the function of the court where jurisdiction is conceded, they offer no guide as to the extent of the jurisdiction when it is disputed.”

He suggested that it was with the case of *Re F (Mental Patient: Sterilisation)*¹⁴ that “the determination of the ambit of the jurisdiction commences”. There, Lord Goff had hinted that the Court’s inherent powers might be applied to wider purposes. He had said:

“When the state of affairs is permanent, or semi-permanent, action properly taken to preserve the life, health or well-being of the assisted person may well transcend such measures as surgical operation or substantial medical treatment and may extend to include such humdrum matters as routine medical or dental treatment, even simply care such as dressing and undressing and putting to bed.”¹⁵

In *Bournewood*, said Thorpe LJ, Lord Goff had acknowledged that the doctrine of necessity did not originate in *Re F*, but in various decisions from the eighteenth and nineteenth centuries.¹⁶ These and the more recent authorities showed that the common law doctrine was “not necessarily” ousted in the way the appellant had suggested. Thorpe LJ therefore concluded:

“It would in my opinion be a sad failure were the law to determine that Johnson J has no jurisdiction to investigate, and if necessary, to make declarations as to T’s best interests to ensure that the protection that she has received belatedly in her minority is not summarily withdrawn simply because she has attained the age of 18.”

It was precisely because guardianship regimes, whether statutory or inherent, might restrict the liberty of the individual that the 1983 Mental Health Act had reduced their scope, but:

“ ... it cannot follow that that reduction intended to benefit patients must operate consequentially to deny patients the protective aspects of guardianship which the common law is able to furnish through the application and, if necessary, the extension of declaratory relief justified by the common law doctrine of necessity.”

Thorpe LJ conceded that, taken at its most liberal extent, such a line of argument might be seen to restore the old *parens patriae* jurisdiction. However, he added: “I would not wish this judgment to be so understood.”

Because he felt that “we are breaking new ground on terrain which is partly constitutional”, Sedley LJ chose to add a few words of his own. For him, the “critical question” was whether the gap

12 [2000] 1 FCR 193

13 CA, 18 May 2000

14 See footnote 8 above

15 [1990] 2 A.C. 1, at p 76G

16 *Rex v Coate* (1772) Lofft. 73, per Lord Mansfield at p75; *Scott v Wakem* (1862) 3 F & F 328, per Bramwell B at p333; *Symm v Fraser* (1863) 3 F & F 859, 883 per Cockburn CJ

created when the 1983 Act limited the powers of guardians, “represents a legislative policy which the courts must respect or a lacuna which they may fill”. That it had been the intention of parliament to cut back the power of the state could be the appellant’s only case, for this would otherwise be “a strong case of necessity”, and further, if the alleged dangers were real, it would certainly be open to the court to

“ ... sanction not only the provision of local authority accommodation (which in any case needs no special permission) but the use of such moral or physical restriction as may be needed to keep T there and out of harm’s way.”

This last was apparent from *R v Bournewood Mental Health Trust, ex parte L*,¹⁷ in which Lord Goff had said:

“The concept of necessity has its role to play in all branches of our law of obligations - in contract ..., in tort ... in restitution ... and in our criminal law. It is therefore a concept of great importance.”¹⁸

And so, Sedley LJ concluded:

“I would accordingly not think it right to set prior limits to the applicability of the doctrine.”

Had this case come before the courts in the 1980s, shortly after parliament had circumscribed the guardianship role, the local authority would have faced a more difficult task. But times had changed. The 1981 White Paper had said:

“The guardian ... is given the powers that a father has over a child of 14. These powers are therefore very wide, as well as somewhat ill-defined, and out of keeping, in their paternalistic approach, with modern attitudes to the care of the mentally disordered.”¹⁹

However, this thinking had subsequently been revised: the Law Commission had remarked that post-1959 reforms had overlooked “the benign side of guardianship”, and that statute law had come to reflect “a single-minded view of personal guardianship as a method of restricting civil liberties rather than as a method of enhancing them”;²⁰ in consequence, ministers had now published a green paper which proposed legislation to give a court powers which include deciding where a person who lacks capacity is to live and what contact he or she should have with particular individuals.²¹ It was plain, Sedley LJ concluded:

“ ... that the legislative will which produced the very elements of 1983 Act with which we are concerned is no longer there ... What was once an eloquent silence has with the passage of time and events acquired the character of an uncovenanted gap in provision for the incapacitated.”

Sedley LJ took the view that it was essential also to consider the effect of the European Convention on Human Rights, because the right to liberty in Article 5 was engaged by the stance both of T’s mother and of the local authority. Article 5 (1) (e) would permit the state to restrict the personal freedom of persons of unsound mind, and the fact that it might only do so in accordance with a procedure prescribed by law:

“ ... does not mean that the common law cannot grow or shape itself to changing social conditions and perceptions: see *SW and CR v UK* (1996) 21 EHRR 363. It means that any such

17 See footnote 3 above

18 [1999] AC 458, at p490

19 Cmnd. 8405

20 1995, Report no. 231

21 Cm 4465

change must be principled and predictable. For the reasons set out in the two preceding judgments I consider that the development of the law which our decision represents passes both limbs of this test.”

Secondly, of course, any restriction must not breach the Article 8 right, which, as Sedley LJ reminded the Court, was to *respect* for family life, and not to the absolute enjoyment of such life. Furthermore, rather than being vested in either parent or child, such a right:

“ ... is as much an interest of society as of individual family members, and its principal purpose, at least where there are children, must be the safety and welfare of the child ... The purpose, in my view, is to assure within proper limits the entitlement of individuals to the benefit of what is benign and positive in family life. It is not to allow other individuals, however closely related and well-intentioned, to create or perpetuate situations which jeopardise their welfare.”

Sedley concluded:

“ One of the advantages of a declaratory remedy, and in particular of an interim declaration, is that the court itself can do much to close the so-called Bournemouth gap in the protection of those without capacity.”

Accordingly, the appeal was dismissed and leave to appeal to House of Lords refused.

Discussion

1. Widening the doctrine of necessity

Although plainly aware that it was supplementing the existing law, the Court was at pains to stress that in so doing, it was merely working an existing seam within the common law doctrine of necessity, a seam that had already found expression, for example, in the case of *Re C (Mental Patient: Contact)*.²² However, both the doctrine itself and the range of remedial options it carries are surely now much wider. And it is likely that the range of practitioners who might avail themselves of those options - which previously would have been restricted to various types of clinician - is also much wider: the judgment will endow upon social workers both fresh solutions and new responsibilities.

The boundaries of the new, expanded doctrine may perhaps be discerned from the words of Sedley LJ, who spoke of sanctioning “not only the provision of local authority accommodation ... but the use of such moral or physical restriction as may be needed to keep T there and out of harm’s way”; and also from the judgment in *Re F (Mental Patient: Sterilisation)*,²³ which Sedley LJ cited, in which Lord Goff spoke of interventions transcending the merely medical, and extending “to include such humdrum matters as routine medical or dental treatment, even simply care such as dressing and undressing and putting to bed”. These boundaries are capable of being very widely set, and may come to confound Lord Justice Thorpe’s insistence that his judgment should not be read as advocating the restoration of the old *parens patriae* jurisdiction.

2. Closing the Bournemouth gap?

As we have seen, Lord Justice Sedley advocated the use of declaratory relief to plug the so-called ‘Bournemouth gap’. Although it is unclear whether he saw this as the purpose of his judgment, such was certainly not its result. It was Lord Steyn who first located this particular gap. In giving far

²² See footnote 10 above

²³ See footnote 8 above

from unconditional support to their Lordships' judgment, he said:

"The general effect of the decision of the House is to leave compliant incapacitated patients without the safeguards enshrined in the 1983 Act. This is an unfortunate result ... The common law principle of necessity is a useful concept, but it contains none of the safeguards of the 1983 Act. It places effective and unqualified control in the hands of the hospital psychiatrist and other healthcare professionals ... [N]either *habeas corpus* nor judicial review are sufficient safeguards against misjudgements and professional lapses in the case of compliant, incapacitated patients."²⁴

Earlier, speaking of what might become "an indefensible gap in our mental health law", Lord Steyn had made the object of his concern very clear. He said that Parliament had:

"... devised the protective scheme of the 1983 Act as being necessary in order to guard amongst other things against misjudgement and lapses by the professionals involved in health care;"²⁵

and he added:

"If protection is necessary to guard against misjudgement and professional lapses, the confident contrary views of professionals ought not to prevail."²⁶

In Steyn's conception, the 'Bournewood gap' revealed the need for incapable, compliant patients to be protected *from*, not *by*, the professionals. Other judgments in *In re F (Adult: Court's Jurisdiction)* took the contrary view. When Lord Justice Thorpe mentioned *Bournewood*, it was to claim that,

"... in expressing his concerns, Lord Steyn recognised the width of the common law doctrine of necessity to which provision in the Code of Practice would have to yield."

Although the President clearly imagined that she was plugging a gap of some kind, it was not that of the *Bournewood* ilk. It seems, in fact, that what she had in mind was the void left - it may be said, deliberately so - when the guardianship provisions of the 1959 Act were reduced in size. Yet, despite many references to the judgment of the House of Lords in the *Bournewood* case, neither the President nor her brothers considered whether it might itself offer a complete solution to T's unfortunate situation. If *Bournewood* was insufficient, that could only be because of the local authority's desire to augment its power to confine Miss T with the power to restrict her social contacts. Yet, the Court of Appeal did not attempt either to distinguish the two powers or to consider whether the latter might be unprecedented within the doctrine of necessity and its use excessive.

As we have seen, the President spoke of "an obvious gap in the framework of care for mentally incapacitated people" which might leave T "at risk with no recourse to protection", despite the fact that "she has rights which she is herself unable to protect". It is clear, however, that the President did not believe that *all* of those rights were deserving of intervention by the Court, for one of the effects of her judgment would be to deprive T of her liberty and of the ability to associate with whomsoever she chose. Having identified this void in the statutory framework, she sought to plug it with the common law, the very medium in *Bournewood* in which that gap had first been located. Likewise, those to whom she chose to entrust the common law weapon were precisely those whose use of it Lord Steyn had tried to restrain.

Although this judgment will relate to persons who resemble the unfortunate Mr L, its principal effect will not be to give them greater rights, or even enhanced protections: rather, it will be to add to the stock of compulsions that might be brought to bear upon them; extending those compulsions beyond the hospital ward or day centre so as to control every facet of their contact with the modern world. As a result of *In re F (Adult: Court's Jurisdiction)*, the 'Bournewood gap' now yawns even wider.

24 [1999] AC 458, [ref]

26 *Ibid.*, [ref]

25 *Ibid.*, [ref]

3. The European Convention on Human Rights²⁷

Lord Justice Sedley expressed his confidence that the expansion of the doctrine of necessity in which he was complicit *would* comply with Article 5 of the ECHR. In so doing, he confirmed that he viewed the doctrine so expanded as a potential deprivation of the liberty of those to whom it was applied. However, his comments were confined to sub-section (1)(e) of the Article, and he made no reference to the requirement of Article 5(4), that:

“Everyone who is deprived of [her] liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of [her] detention shall be decided speedily by a court and [her] release ordered if the detention is not lawful”.

As has been already pointed out, this judgment creates no new rights: there are no new restraints upon the use of compulsion and no new tribunal to police them. Presumably, therefore, it was assumed that in cases falling within the expanded doctrine of necessity, the ‘Court’ that will satisfy Article 5(4) is the High Court. However, the inherent jurisdiction of the court may be - in fact, is most likely to be - invoked *before* there has been a deprivation of liberty. Will such a state of affairs be sufficient to satisfy Article 5(4)?

Likewise, it is surely conceivable that some future local authority will decide to forego an application to the Court and instead subject a compliant, incapable patient to compulsion without a prophylactic declaration. In those circumstances, the patient’s only remedy would presumably be an application for judicial review. Given the narrow scope of such proceedings, could the Administrative Court really be said in such circumstances to be determining “the lawfulness of [the patient’s] detention”, and not simply its bureaucratic compliance?

It is a further requirement of Article 5 - as interpreted by the *Winterwerp* decision - that a detention of the kind that Sedley LJ has implicitly conceded will occur under the expanded doctrine will only persist as long as the ‘unsoundness of mind’ by which it is purportedly justified.²⁸ If the subject of the new powers of compulsion wishes to assert that he is no longer labouring under such an unsoundness of mind, how might he do so? If only by means of an application for *habeas corpus* or judicial review, again, will the requirements of Article 5 be met? The existing authorities suggest that they will not.²⁹

Conclusion

The judgment in *In re F (Adult: Court’s Jurisdiction)* does not justify the claims that have been made for it. It does not widen the protections available for compliant, incapacitated patients, rather, it reduces them. In extending the use of compulsion away from the medical sphere and into areas of social and personal life, it widens even further the so-called ‘*Bournewood* gap’ and creates the possibility of successful challenge under the European Convention on Human Rights.

27 See also: John Hodgson, *Detention, Necessity, Common Law and the European Convention: Some Further Aspects of the Bournewood Case* [1999] 1 *Journal of Mental Health Law*, pp23-32 as to the general question of whether a purely common law construct such as the doctrine of necessity can ever be consistent with the ECHR

28 *Winterwerp v Netherlands* (1979) 2 EHRR 387

29 *X v United Kingdom* (1981) 4 EHRR 181, (1981) 1 BMLR 98 [*habeas corpus*]; *Kay v United Kingdom*, Application number 17821/91, Report of Commission, adopted 1 March 1994 [*judicial review*]