

Confidentiality and Patients' Rights

*Simon Foster**

R (on the application of Ann S) v Plymouth City Council and C (Interested party) [2002] EWCA Civ 388

Court of Appeal (26th March 2002) (Kennedy, Clarke and Hale LJ)

Introduction

In this case the Court of Appeal considered the proper balance between an incapacitated patient's right to confidentiality and the right of his nearest relative (s.26 Mental Health Act 1983) to sufficient information to exercise her role effectively. The court reviewed the common law principles and applied Article 8 of the European Convention. The judgment is to some extent limited to a nearest relative case, but the principles are of much wider application.

The facts

Mrs S was the mother of C, who was born in 1974 and thus was 27 at the date of hearing. She had brought him up alone. C had learning and behavioural difficulties, which received different diagnoses, and he had attended special schools. The diagnoses on record at the relevant time were avoidant personality disorder and learning disability. His mother wanted to look after him at home with appropriate support from health and social services, including periods of respite care and appropriate treatment for his learning and behavioural difficulties. His behaviour presented problems for her, and her neighbours, when he lived at home, but these were less noticeable in other settings. As C got older, the professional view was that it would be better if he were in a stable residential environment away from home.

In February 1998 a case conference concluded that guardianship should be pursued. C's consultant, Dr Morris, reported that he would be better placed in a small caring environment separate from his mother's home, maintaining social contact between C and his mother. This was discussed with his mother, who was also told that if she and C disagreed, social services could apply to court for her to be displaced as nearest relative. She asked for time to consult with Mencap, a major learning disability organisation.

In April 1998 C was admitted to hospital under section 2 MHA 1983. A short-term residential placement was arranged while discussions about guardianship continued. Eventually an application was made to displace C's mother as nearest relative (under section 29 MHA 1983). In July 1998 the mother signed a form to say that she did not object to guardianship, on the understanding that the application to displace her would be withdrawn. C was admitted to guardianship on 14th July 1998. Guardianship was renewed in January 1999, July 1999 and July 2000 (and was renewed again during these proceedings).

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Mrs S attended care planning meetings and received the minutes. However, she was shown none of the documentation upon which the guardianship or its renewal was based, other than very brief minutes relating to the first renewal in January 1999. At this time she had asked for access to C's files to assist with pursuing a formal complaint against social services, but this was refused. She made a complaint to the local government ombudsman but decided not to pursue it.

In March 2000 she wrote to the local authority again asking to see C's files. Her letter was countersigned by C himself. On 10th April 2000 the complaints officer replied that they did not regard C's consent as valid as he did not have the mental capacity to understand the implications of what was being asked. Since C could not consent to disclosure, 'I am afraid it is not legally possible for you to see them.'

Mrs S's solicitors wrote in July 2000, asking for access to the recommendations and reports leading to the guardianship and its renewal, and to C's social services files. The local authority solicitor replied: 'I can find no authority for me to disclose this information to Mrs S or to you as her solicitors. I find it illogical, if not ludicrous, that the nearest relative should not be entitled automatically to this information but without authority I do not see how it can be disclosed.' She agreed that the common law rules on confidentiality would apply but that she would have to seek further instructions on whether disclosure was in C's best interests.

Mrs S's solicitors renewed their request in August 2000. They pointed out that much emphasis had been put on C's wishes as to where he should live while denying his capacity to consent to disclosure. The local authority solicitor replied in October 2000 that C's doctor had confirmed that he did not have capacity to give informed consent to disclosure of his files. (The doctor confirmed this opinion in April 2001.) The solicitor agreed that the duty of confidentiality was not absolute and that the public interest in preserving confidences could be outweighed by some other public interest in disclosure. However, she did not think that sufficient reasons for disclosure existed in this case. 'Mrs S has been fully involved in the care planning process for C and is aware of all the professional opinions, the reasons for them and the reasons for all the decisions which have been made. The fact that Mrs S does not like those reasons is not, in my opinion, sufficient to outweigh this Authority's common law obligation not to disclose confidential information.' The mother's solicitors wrote again in October 2000, raising further arguments based on C's best interests and his right to family life, but the response was the same.

Mrs S's application for judicial review was lodged on 5th December 2000. The Official Solicitor was invited to act for C. An independent psychiatrist confirmed in July 2001 that C lacked capacity to consent to disclosure or to apply to a Mental Health Review Tribunal on his own behalf, so the Official Solicitor had not visited C or investigated his wishes and feelings about the present application. Shortly before the hearing the mother's solicitors wrote to clarify that their request was specifically aimed at finding out about the key decisions made by the authority which led to the guardianship and its renewal, and the evidence upon which these were based. The hearing took place in July 2001 before Maurice Kay J, with judgment reserved until September 2001. The judge dismissed Mrs. S's application. Permission to appeal was granted in October 2001.

The mother's solicitors identified two experts, a consultant psychiatrist and an independent social worker, to advise her on whether to exercise her power as nearest relative to discharge C from guardianship. They identified the records they would need to see: their lists were very similar but fell short of requiring access to the complete file.

By the time of the Court of Appeal hearing, the local authority had indicated their willingness to grant the experts such access as they might require. They would also allow the experts to decide what information to disclose to the mother in the course of giving their advice. However, they remained unwilling to disclose the information directly to the mother or her solicitors. This movement meant that the decision of the judge at first instance was not of great relevance to the issue now before the court.

The Law

Guardianship and displacement applications

The court reviewed the provisions of the Mental Health Act 1983 relating to guardianship, in particular the role of the nearest relative in relation to admission (s.11(1) & (4)) and discharge (s.23(2)). The court noted that guardianship under the 1959 Act had conferred 'all such powers as would be exercisable by them or him in relation to the patient if they or he were the father of the patient and the patient were under the age of fourteen years' (s.34(1)). By contrast, the 1983 Act restricted the guardian's powers to those which were essential to achieving its purpose. Giving or refusing consent to the disclosure of information was not among them.

Section 24 provides:

- '(1) For the purpose of advising as to the exercise by the nearest relative of a patient who is... subject to guardianship under this Part of this Act of any power to order his discharge, any registered medical practitioner authorised by or on behalf of the nearest relative of the patient may, at any reasonable time, visit the patient and examine him in private.
- (2) Any registered medical practitioner authorised for the purposes of subsection (1) to visit and examine a patient may require the production of and inspect any records relating to the detention or treatment of the patient in any hospital [or to any after-care services provided for the patient under section 117 below].'

Any sensible nearest relative who was unhappy about the decisions made by the professionals would seek such advice rather than rush to discharge the patient. However, funding for such independent advice might be difficult to secure. Moreover, section 24 only provides for a doctor to visit and examine the records, whereas social work judgements about guardianship might be as important if not more so; and it provides only for hospital and statutory after-care records to be seen. C was admitted briefly to hospital but under section 2 rather than section 3 so his care did not fall under section 117.

The county court has power to displace the nearest relative on the application of, among others, an approved social worker (s.29(1)) on four grounds (s.29(3)), of which the two most relevant are:

- '(c) that the nearest relative of the patient unreasonably objects to the making of... a guardianship application in respect of the patient; or
- (d) that the nearest relative of the patient has exercised without due regard to the welfare of the patient or the interests of the public his power to discharge the patient from... guardianship under this Part of this Act, or is likely to do so.'

The procedure for a displacement application is governed by County Court Rules, Order 49, rule 12. Rule 12(4) states:

‘On the hearing of the application the court may accept as evidence of the facts stated therein any report made by a medical practitioner and any report made in the course of his official duties by–

- (a) a probation officer; or
- (b) an officer of a local authority or of a voluntary organisation exercising statutory functions on behalf of a local authority; or
- (c) an officer of a hospital authority,

provided that the respondent shall be told the substance of any part of the report bearing on his fitness or conduct which the judge considers to be material for the fair determination of the application.’

By contrast, section 78(2) of the Mental Health Act 1983 (vires for mental health review tribunals) specifically allows provision to be made:

- ‘(h) for making available to any applicant, and to any patient in respect of whom an application is made to a tribunal, copies of any documents obtained by or furnished to the tribunal in connection with the application, and a statement of the substance of any oral information so obtained or furnished except where the tribunal considers it undesirable in the interests of the patient or for other special reasons.’

The Data Protection Act 1998

The Data Protection Act did not offer much assistance in this case. All the material requested was ‘personal data’, and so much of it as related to C’s ‘physical or mental health or condition’ was ‘sensitive personal data’ within the meaning of section 2(e). The processing of sensitive personal data is permitted where it is necessary in order to protect the vital interests of the data subject or another person in a case where consent cannot be given by, or on behalf of, the data subject (Sch.3, para 3); or for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings) or for the purpose of obtaining legal advice, or where it is otherwise necessary for the purposes of establishing, exercising or defending legal rights (para 6); or where it is necessary for the administration of justice, or for the exercise of any functions conferred on any person by or under an enactment (para 7). It was common ground that the Data Protection Act did not prevent the local authority from disclosing the information, but that it did not require the authority to do so.

The common law and the European Convention on Human Rights

The answer to the dilemma in this case must therefore turn upon the principles of the common law and the obligations of the local authority and the court under the Human Rights Act 1998. The position of the parties could be simply stated.

Mr Alan Maclean, on behalf of the authority, started from the proposition that this was confidential information which should not be disclosed without a very good reason. However, the authority were now content for the mother to see anything which her experts considered she should see. They justified this by extension of the purpose underlying sections 24(1) & (2) of the 1983 Act.

Mr Murray Hunt, on behalf of the mother, started from the proposition that the relevant interests should be balanced against each other. However, while C's interest in preserving confidentiality was purely theoretical given his lack of capacity, the mother was entitled to the information she required in order to seek legal and professional advice upon the exercise of her functions as nearest relative. This was part and parcel of her right of access to a court both at common law and under Article 6 of the European Convention, because the local authority had made it clear that they would apply to a county court should she seek to discharge her son from guardianship against their wishes. Mr Hunt acknowledged that this right must be qualified where there was a risk that disclosure would be harmful or damaging to C's health or welfare. There was no such suggestion in this case.

Miss Weeraratne, on behalf of the Official Solicitor acting for C, was mainly concerned that the court should not endorse an absolute right of any nearest relative to the disclosure of any information about a patient for which she asked. She drew a distinction between the documentation necessary to support the guardianship application and its renewal and the wider disclosure of social services files. She was however content with the disclosure to experts offered by the authority and content for the experts to disclose this material to the mother and her legal advisers.

The simple answer was that, both at common law and under the Human Rights Act, a balance had to be struck between the public and private interests in maintaining the confidentiality of this information, and the public and private interests in permitting, indeed requiring, its disclosure for certain purposes. There was no evidence from correspondence leading up to the first instance hearing that the local authority had made any attempt to strike that balance. They began from the proposition that they had no power to disclose the information at all. They no longer sought to justify that stance. The more difficult question was how that balance was now to be struck.

The judgment

Hale LJ gave the majority judgment of the court.

The common law obligation to keep a confidence was conceptually quite different from the statutory obligation to process data in accordance with the data protection principles and from the right to respect for private life enshrined in Article 8(1) of the European Convention on Human Rights, although there were overlaps. The local authority had assumed that all the material was covered by a common law obligation of confidence. They had not sought to claim any form of public interest immunity for it. Some of the material would indeed be confidential to C, for example medical reports and recommendations. Some might be confidential to other people, for example opinions shared at professionals' meetings. Some might not be confidential at all, such as straightforward descriptions of everyday life. For the sake of argument the court had assumed that most if not all of the information sought was covered by a common law obligation of confidence. Even where information was covered by an obligation of confidence, the breadth of that obligation depended upon the circumstances: see *W v Egdell* (1990) Ch 359, per Bingham LJ at 419c. If the information had been brought into existence for certain authorised purposes, it could be disclosed for those purposes. For example, the medical reports and recommendations had to be disclosed to the applicant approved social worker and to the local authority in order for them to fulfil their statutory functions. It was scarcely a large step to include the nearest relative within that loop.

Furthermore, as Bingham LJ observed, the decided cases very clearly established that duties of confidence were not absolute but liable to be overridden where there was held to be a stronger public interest in disclosure. The first example he gave was the public interest in the administration of justice. Professional confidence had frequently to be breached in the course of litigation. Hence the basic documents upon which the guardianship was founded, the application, the medical recommendations and the renewal reports, should be placed before a court hearing an application to displace the nearest relative. They would also have to be disclosed to a mental health review tribunal hearing an application made either by C or by his mother, should she be displaced as nearest relative.

In *B (A) v B (L) (Mental Health Patient)* (1980) 1 WLR 116, this court had held it sufficient to comply with CCR Order 49 rule 12(4) if medical reports were shown to the solicitor acting for the nearest relative. However, rule 12(4) clearly imposed a minimum obligation. It might imply that the court had power to withhold other relevant information from a party to the proceedings, but it certainly did not require the court to do so. The court had to comply with the rules of natural justice, which normally required that anything relevant to the court's decision be seen by both sides to the dispute: see *Re D (Adoption Reports: Confidentiality)* (1996) AC 593, per Lord Mustill at 615. The principle might be qualified if there were competing interests sufficient to outweigh it. In particular, where the proceedings concerned the welfare of a child or a patient, it might have to yield to the need to protect that person from harm or the risk of harm. However, that person also had an interest in the fairness of the trial and in having the material properly tested in court.

Those basic principles were reinforced by Article 6 and 8 of the European Convention on Human Rights. Although the right to a fair trial in Article 6 was absolute, the content of that right was not. Hence the right to see all the documents in a case might be outweighed by other considerations, but there must be a clear and proper public objective and the limitation must be proportionate to that objective. There were proper public objectives other than the protection of a child or patient from harm, but no such objective had been put forward in this case. In general, therefore, one would expect the disclosure of all the information put before the court in proceedings under section 29 unless there was a demonstrable risk of harm to the patient or others in so doing.

In principle, the approach of a court in a section 29 application should be no less open than that of a mental health review tribunal. The Mental Health Review Tribunal Rules 1983 permitted non-disclosure of documents to the applicant or patient, but only 'on the ground that its disclosure would adversely affect the health or welfare of the patient or others' (rules 6(4) and 12(2)). If the applicant was represented by a barrister, solicitor, doctor or other suitable person the document must be disclosed to him (rule 12(3)). It would be strange indeed if the practice governing disclosure in the county court were more restrictive than that in mental health review tribunals.

It was, of course, normally for the parties to decide what evidence or information to put before the court or tribunal. Applications under section 29 have to be dealt with quickly; resort to the normal process of disclosure would be impracticable. But where the interests of children or patients were concerned the courts had traditionally taken a more inquisitorial approach. The information sought by the experts instructed by the mother was exactly the sort of information which a court might properly expect to be put before it for the purpose of determining this dispute.

What, then, should be the authority's approach at this stage, before the matter had got to court? Clearly they were right to have gone as far as they had now gone. There was an obvious public and private interest in the mother having access to the best possible expert advice before she decided

whether or not to exercise her power of discharge. The professionals would be subject to the same duties of confidence as everyone else. Their advice would assist the mother in carrying out her statutory functions, but would also assist C in enabling decisions he could not make for himself to be properly scrutinised.

But should the mother and her lawyers also have access to the information sought by her experts? Mr Hunt relied on her right of access to a court, and the right of access to legal advice in order to exercise that right, contained in Article 6 of the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights, particularly *Golder v United Kingdom* (1975) 1 EHRR 524. The mother had been told that if she exercised her right to discharge C an application would be made to displace her. The two were part of the same process and it was unrealistic to regard them separately. In effect the mother was placed in a position where she was likely to have to justify her decision before a court.

Against this the local authority argued, first, that the proceedings before the county court were not 'the determination of her civil rights and obligations' (Article 6(1)). Her status as nearest relative was given her by statute and not by virtue of her actual relationship with the patient. Second, there was not yet, and might never be, any question of court proceedings. They would only arise if and when she decided to discharge C from guardianship, and even then it would depend on the professional judgements available to her and to the local authority at the time.

As to the first, it was plain that the common law also recognised a right of access to a court and access to legal advice for the purpose of exercising that right: see e.g. *Raymond v Honey* (1983) 1AC 1. The common law would protect the exercise of those rights irrespective of whether or not they would be classed as civil rights for the purpose of Article 6 (see *R v Secretary of State for the Home Department ex parte Saleem* (2001) 1 WLR 443). In any event, Article 6 did not prescribe or presume any particular content for civil rights, which was a matter for domestic law. Disputes between the state and the family about family relationships had long been regarded as falling within the ambit of Article 6 as well as Article 8: see e.g. *W v United Kingdom* (1977) 10 EHRR 29. Furthermore the dispute between the mother and the local authority about where C was to live might well have been resolved by way of a claim for a declaration in the Family Division as to what was in C's best interests (see e.g. *Re S (Hospital Patient: Court's Jurisdiction)* (1995) Fam 27). That would undoubtedly have fallen within Article 6. It was artificial to draw a distinction here.

In the same way it was artificial to draw a distinction between access to legal advice upon discharge and access to legal advice upon a displacement application. The two went hand in hand. The mother could not lose her dispute with the local authority about whether or not to discharge C without also losing her status as nearest relative, and the statute gave her no power to seek reinstatement. It was also very much in C's interests for her to have that advice at the earlier stage. If she was advised not to discharge him, the litigation might be avoided altogether. If she was advised to do so, then there must at least be a case which was worth putting before a court.

The Human Rights Act 1998 introduced a further dimension in Article 8. Both the mother and C had a right to respect for their family life. Not only was the mother C's closest relative in fact as well as in law, they had lived together all his life until shortly before he was placed under guardianship. It was of course true that replacing the mother as nearest relative would not change their actual relationship. But the right to respect for family life went deeper than that: the state was not permitted to interfere with that right unless it was (1) in accordance with the law, (2) in pursuit of a legitimate aim, and (3) proportionate to that aim. The protection of the health and welfare of

a young man who was unable to make decisions for himself must be a legitimate aim for this purpose. But irrespective of Article 6, the parent also had a right under Article 8 to be involved in the decision making process: see *W v United Kingdom*, above; *McMichael v United Kingdom* (1995) 20 EHRR 205; and most recently *TP and KM v United Kingdom* (2001) 2 FCR 289, para 72:

‘The court further recalls that whilst Article 8 contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8.’

Article 8 also conferred a right to respect for private life. Adults such as C had that right as much as anyone else. Indeed, many would think it more at risk, and therefore more worthy of respect by the authorities, if, because of their mental disabilities, they were unable to protect it for themselves. But both his and his mother’s right to respect for their family life under Article 8, and the mother’s right to a fair trial under Article 6, would constitute legitimate aims of interference with C’s right to respect for his private life, provided as always that the interference was proportionate.

Hence both the common law and the Convention required that a balance be struck between the various interests involved. C’s interests in protecting the confidentiality of personal information about himself must not be underestimated. It was all too easy for professionals and parents to regard children and incapacitated adults as having no independent interests of their own: objects rather than subjects. But the court was not concerned with the publication of information to the whole wide world. There was a clear distinction between disclosure to the media with a view to publication to all and sundry and disclosure in confidence to those with a proper interest in having the information in question. The court was concerned only with the latter. It would be different if C had the capacity to give or withhold consent to the disclosure: any objection from him would have to be weighed in the balance against the other interests, though as *W v Egdell* showed it would not be decisive. C also had an interest in being protected from a risk of harm to his health or welfare which would stem from disclosure; but it was important not to confuse a possible risk of harm to his health or welfare from being discharged from guardianship with a possible risk of harm from disclosing the information sought. As *Re D* showed, he also had an interest in decisions about his future being properly informed.

The balance would not lead in every case to the disclosure of all the information a relative might possibly want, still less to a fishing exercise amongst the local authority’s files. But in most cases it would lead to the disclosure of the basic statutory guardianship information. In this case it must also lead to the particular disclosure sought.

Her Ladyship therefore granted disclosure of the information required by the experts instructed by the mother to those experts and to the mother and her legal advisers.

Clarke LJ concurred.

Kennedy LJ delivered a minority judgment. Mr Hunt, for the mother, had said that if she exercised her right to discharge C an application would be made to displace her, the two were linked, and she needed to have proper access to legal advice before she set the process in action. It needed to be recognised that in reality any application to displace the mother could only succeed if it could be shown that she had acted irresponsibly; in other words that she had sought his discharge against the advice of her own expert advisers, who were being given access to all of the material they considered to be relevant, which was in fact all of the material she now wanted to see. He did not accept that the mother could not lose her dispute with the local authority without losing her status

as nearest relative. It all depended on whether, in the opinion of the court, she had acted irresponsibly in seeking his discharge.

His Lordship accepted and endorsed what Hale LJ had said as to Article 8, respect for family life, and about the need to find legitimate reasons for interfering with the right of a disadvantaged adult to have respect for his family life. It was precisely because he wished to safeguard that right so far as possible and for as long as possible without doing injustice to the mother that he would not at this stage be prepared to order disclosure of the material to anyone other than her expert advisers.

Appeal allowed with costs.

Comment:

This lengthy judgment usefully reviews the common law in relation to disclosure. To some extent it repeats and summarises the analysis in *W v Egdell*. However, it goes beyond *Egdell* in two respects. First, it explores the interrelationship between the common law and the European Convention. (Those who prepare court submissions should note that, once again, the Court of Appeal makes plain its preference to base its decision upon common law principles, using the Convention in support rather than as the lead.)

Second, the court seems to attach far higher importance to the subject's interest in preserving confidentiality than was apparent in *Egdell*. Hale LJ makes it plain that there must be very strong reasons for disclosure without informed consent, and even then it is to be limited to reports which would have been placed before a court; Social Services files are expressly not made available. Moreover, disclosure is expressly for the purpose of seeking legal advice prior to accessing a court, and not for wider circulation: such limited disclosure follows the principles applied in the European Court of Human Rights (see for example *Z v Finland* (1997) 25 EHRR 371).

Kennedy LJ goes further: he would not allow any disclosure to the mother at this stage, nor to her legal team, but only to her medical and social work advisers. It may be said that this implies a mistrust of the mother; on the face of it, however, it is reinforcing the high duty of confidence required on behalf of C himself.

This approach, while no doubt deriving in part from Hale LJ's personal interest in learning disability issues, also demonstrates a shift in attitude over the last ten years towards greater autonomy and self-determination of those with learning disabilities. It is a welcome counterbalance to the Government's deplorable drive towards requiring information-sharing without consent (see for example section 60 of the Health and Social Care Act 2001 and the consultation section of the draft Mental Health Bill). This is ostensibly for the benefit of the subject or the public, but (to this author at least) shows a lack of the respect for vulnerable adults which the court is so determined to uphold in the present case.

It should be remembered, however, that unlike C, the subject in *Egdell* was believed to be dangerous. While we may hope that judicial attitudes have generally become more enlightened since that case, it remains to be seen whether the court will be so keen to preserve confidentiality in a case where the individual lacking capacity is believed to be a risk to others.

Finally, it is interesting that in a judgment 19 pages long, the Data Protection Act 1998 merits a single paragraph. This is because, as Hale LJ explains, the Act added nothing to the argument. It is often assumed that the Data Protection Act has superseded the common law, so that its provisions

are all that count. However, as is apparent throughout the guidance issued by the Information Commissioner¹, the Act simply regulates how disclosure should take place, not when. In particular, processing of data must be 'lawful' under common law and statutory principles before the Act is engaged. Moreover, it provides a power to disclose, not a duty.

One point in the judgment may need slight correction. Hale LJ refers to the provision permitting disclosure of sensitive personal data 'in order to protect the *vital interests* of the data subject or another person, in a case where consent cannot be given by or on behalf of the data subject...' (Schedule 3 of the Act). However, this is misleading. The Information Commissioner 'considers that reliance on this condition may only be claimed where the processing is necessary for matters of life and death, for example the disclosure of a data subject's medical history ... after a serious road accident'². In other words, it does not permit the routine disclosure of confidential information to family members simply because the patient lacks capacity to consent to it – still less where she or he has capacity but refuses consent, unless there is a risk to others. On the other hand, the Information Commissioner does not make the law; and in the instant case disclosure can still be justified under one of the other grounds in Schedule 3 to the Act.

¹ See 'The Data Protection Act 1998- legal guidance' (Information Commissioner, December 2001)

² *Op cit*, page 13, paragraph 2

