

Consent to surgery on a mentally-handicapped adult

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On 27 February the House of Lords begins hearing the appeal in *F v West Berkshire Health Authority*, concerning consent to the sterilisation of a mentally-handicapped woman. This article considers the legal issues involved. A further article by the same author will discuss the result of the appeal. The author drafted the relevant provisions of the Mental Health Act 1959 (now re-enacted in the Mental Health Act 1983).

The case of *F v West Berkshire Health Authority* (below shortened to *Re F*) concerns the question whether, when an adult is incapable through mental deficiency of consenting to surgical treatment, this consent can be given vicariously. It raises juridical issues of importance and difficulty. Having been before the High Court and the Court of Appeal it now awaits the decision of the House of Lords. Both the High Court and the Court of Appeal held that consent to the operation should be given, but reached different conclusions as to the juridical basis for this. The present article will submit that the correct basis is of a different nature from those respectively adopted by the High Court and the Court of Appeal.

The facts

F, a woman of 36, is a voluntary patient at a mental hospital. Because of arrested development F's mental capacity is, and will remain, equivalent to that of a child aged four or five years. F has been allowed to form a sexual relationship with a male patient at the hospital. She gains satisfaction from this, and it is thought proper to allow it to continue. Even if the authorities terminated the relationship, the possibility could not be excluded that F might at some future time become pregnant by this or another man. F's condition precludes the effective use of contraceptives yet is such that for her to become pregnant would be disastrous. Accordingly it is agreed to be desirable that F should be sterilised by surgery likely to prove irreversible. F is mentally incapable of herself reaching a considered decision on whether or not this operation should be carried out. Can the decision be taken on her behalf? If so by whom, under what legal power, and by what procedure?

The consent rule

Under an established common law rule ("the consent rule") it is both tortious and criminal to perform acts such as surgical operations on the body of an adult without his or her consent, the tort or offence being that form of trespass to the person known as battery. (Instances where consent to physical injury, even if given, is ineffective on grounds of public policy are inapplicable in the circumstances of *Re F*.)

As respects *Re F*, the only relevant qualification to the consent rule so far recognised by the law ("the emergency exception") arises where in an emergency it is necessary to operate to save life, or counter a threat to life or health, and the patient is unconscious or otherwise unable to consent: *Wilson v Pringle* [1987] 1 QB 237, 252; *Marshall v Curry* [1933] 3 DLR (Canada) 261, 274-5. In his Court of Appeal judgment in *Re F Neill* LJ said that for the emergency exception to apply the treatment must (a) be necessary to meet the emergency, and (b) require to be carried out before the patient is sufficiently recovered to decide personally.

Rejecting implied consent as the basis of the emergency exception, Neill LJ considered its rationale to be that it is in the public interest (a) that an unconscious patient who requires treatment should be able to receive it, and (b) that those who give it should be free from any threat of an action for trespass to the person. (See further Bennion, *Statutory Interpretation* ss 289 and 352; All ER Rev 1987 pp 251-2.) Neill LJ considered it unnecessary to consider whether there might be circumstances when a doctor is entitled to give treatment to preserve the life of a patient who, while having the capacity to consent, elects not to do so.

The question raised in *Re F* is whether the consent rule is subject to a further qualification ("the incapacity exception"). Can the court give consent to surgery on behalf of an adult who is permanently disabled by mental incapacity from giving consent in person? (In the case of a minor the matter can be dealt with by invoking the prerogative power to make the patient a ward of court: *In re B* [1988] 1 AC 199.) When considering this question it is necessary to bear in mind the basic function of the court under English civil law, which is to determine a *lis* (see Bennion, *Statutory Interpretation* ss 19, 20 and 71).

The litigation in *Re F*

The litigation in *Re F* began with the issue of an originating summons in the Family Division of the High Court by F, acting by her mother as next friend. This was for a declaration under RSC Ord 15 r 16 that 'the sterilisation of the plaintiff would not amount to an unlawful act by reason only of the absence of the plaintiff's consent'. It also sought, additionally or in the alternative, the court's consent to F's sterilisation, such consent to be given either under the *parens patriae* jurisdiction or the court's inherent jurisdiction. The West Berkshire Health Authority, who are responsible for the hospital in which F is a voluntary patient, were named as defendants. In addition counsel instructed by the Official Solicitor appeared as *amicus curiae*. On 2 December 1988 the court made a declaration in the terms quoted above.

The Official Solicitor took the view that the issues raised by the court's decision, and by other similar decisions at first instance (see *In re X* (1987) *The Times* 4 June; *T v T* (1988) Fam 52), were of such importance that the matter should be considered by the Court of Appeal. Empowered to do so by a direction by the Lord Chancellor signed on 12 January 1989 under the Supreme Court Act 1981 s 90(3)(b), the Official Solicitor therefore appealed against the making of the declaration. On 3 February 1989 the Court of Appeal dismissed the appeal while indicating that for future cases a declaration should not be regarded as the appropriate remedy. Instead the court suggested that the Supreme Court Rule Committee should make a new rule under RSC Ord 80 laying down an appropriate procedure. Meanwhile a suggested interim procedure was set out in the judgment of Lord Donaldson MR and concurred in by Neill and Butler-Sloss LLJ.

Can consent be given by declaration?

Did the High Court have power to make in *Re F*, as it did, a declaration under RSC Ord 15 r 16 that 'the sterilisation of the plaintiff would not amount to an unlawful act by reason only of the absence of the plaintiff's consent'? It is submitted that it did not have this power. Rule 16 reads-

'No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.'

The court is given this power to make a declaration solely for the purpose of determining disputes concerning the existence or otherwise of a particular legal right. The essence of the jurisdiction is that the court is like a camera photographing the relevant legal terrain. It registers what exists, and declares what it finds. This is in no way a dynamic jurisdiction, permitting the court to intervene and take a decision that changes the legal terrain. As Clauson J said in *Nixon v Attorney-General* [1930] 1 Ch 566, 574-

'This Court has jurisdiction, in a proper case, to declare rights, and that jurisdiction, whether or not it exists apart from the rules of the Court, has now been dealt with by those rules, and there is an express provision in

the rules, enabling this Court to make a declaration of right, notwithstanding that no consequential relief is claimed. The declaration of right means in my opinion declaration of legal right, and I have no power to make any declaration, even if I desired to make one, except a declaration, as I read the rule, of a legal right.'

The person whose act is purported to be validated by the declaration in Re F is the surgeon who is to carry out the sterilisation operation. Even if the identity of that surgeon was known at the time the declaration was made by the court, which is unlikely, it cannot be said that at that time the surgeon had a legal right to perform the operation. Indeed the application for a declaration was made only because it was evident he did not have that right.

In making the declaration in Re F the court was following the decision in T v T [1988] Fam 52, where Wood J made a declaration in similar terms regarding the sterilisation and termination of pregnancy of a mentally-handicapped adult. The present author submitted at the time that this decision was unsound in law on the ground that-

'... a court has no power to grant a declaration that a doctor will not be liable for trespass if he operates on a patient without either her consent or the consent of a person legally authorised to give consent in respect of that patient. A judicial declaration can be made only in respect of a legal right, and no such right is known to the law. The judge has purported to create such a right solely by use of the declaration jurisdiction, which is plainly impermissible.' (Law Society's Guardian Gazette 26 August 1987, p 2327.)

This reasoning was accepted by the Court of Appeal in Re F. Lord Donaldson MR said he did not regard an application for a declaration as an appropriate procedure in such cases, adding: 'A declaration changes nothing. All that the court is being asked to do is to declare that, had a course of action been taken without resort to the court, it would have been lawful anyway'. Neill and Butler-Sloss LLJ concurred in this, the latter adding: 'A declaration cannot alter the existing position ... The court by a declaration alone cannot give approval'.

Can consent be given under procedure suggested by Court of Appeal?

It was to be expected that, since the Court of Appeal unanimously held that the declaration in Re F was ineffective and should not have been made, the court would have allowed the appeal against it brought by the Official Solicitor. Instead the court dismissed the appeal. The other two judges concurred in the following dictum by Lord Donaldson MR-

'As the procedure adopted in this case accorded with what at the time was thought to be appropriate and as the learned judge investigated the matter fully and reached a decision, the wisdom of which no one seeks to challenge, I would dismiss the appeal'.

This is remarkable confirmation of the continuing truth of the maxim that hard cases make bad law. Admittedly there is no express statutory requirement that appeals must be allowed by the Court of Appeal in circumstances such as these. It is submitted however that the court is by implication placed under the same duty as that imposed by the Appellate Jurisdiction Act 1876 s 4 in relation to the appellate functions of the House of Lords, namely to 'determine what of right, and according to the law and custom of this realm, ought to be done in the subject-matter of such appeal' (see Bennion, Statutory Interpretation pp 59-67). It is clear that a declaration such as was made by the High Court in Re F is contrary to law, and an appeal against it ought therefore to be allowed. An appellate court has no discretion on a point of this kind, and it is disturbing that the Court of Appeal behaved as if it had.

We are faced with the result that, as the matter now stands, a declaration which the Court of Appeal held to be ultra vires and ineffective was not overturned. But does it therefore have any legal effectiveness to protect a surgeon who might carry out the sterilisation of F? Fortunately this question will not it seems arise as a practical point. The operation has been deferred pending the decision of the House of Lords.

While awaiting that decision we may consider whether the alternative procedure suggested by the Court of Appeal for future such cases provides a satisfactory solution to the problem. In the long term, the court suggested that a new rule be made under RSC Ord 80. Pending this, it proposed adoption of a temporary procedure. We look at these suggestions in turn.

RSC Ord 80, which is entitled 'Disability', 'contains all the procedural rules dealing with persons under disability as parties to actions and other proceedings' (The Supreme Court Practice 1988 i 1192). The term 'person under disability' is defined by r 1 as a person who is an infant or a patient. A 'patient' is defined by r 1 as a person who, by reason of mental disorder within the meaning of the Mental Health Act 1983, is incapable of managing and administering his property and affairs. It is significant that this is the definition of 'patient' applying in Part VII only of that Act (which is concerned with the management of the property and affairs of mental patients), and is much narrower than the general definition of 'patient' contained in section 145(1). This gives the clue to the purpose of RSC Ord 80: in relation to mental patients it is solely concerned with the operation of Part VII of the 1983 Act. (It was introduced as RSC Ord 16B in 1961 to meet the requirements of the predecessor to Part VII, namely Part VIII of the 1959 Act.) As the Court of Appeal rejected the applicability of Part VII to the sort of problem raised by Re F (see below) it is puzzling that they should have thought an amendment to RSC Ord 80 would provide a solution.

In fact it is submitted that the Supreme Court Rule Committee have no power to amend RSC Ord 80 so as to enable the court to give consent in such cases as Re F. Rules of court can be made only for the purpose of 'regulating and prescribing the practice and procedure to be followed in the Supreme Court' (Supreme Court Act 1981 s 84(1)). The power to consent to what would otherwise be a criminal and tortious act is clearly a matter of substance, not procedure. It follows that the interim machinery purported to be laid down by the Court of Appeal under its inherent jurisdiction pending the proposed amendment of RSC Ord 80 must be invalid also.

Can consent be given under Mental Health Act 1983?

It is submitted that the Mental Health Act 1983 empowers the court to give consent in such cases as Re F, even though this contention was not put forward by counsel and was rejected by the Court of Appeal.

The 1983 Act is a consolidation Act, reproducing the Mental Health Act 1959 as amended. In order to test the present contention it is necessary to examine with care the design and framework of the 1959 Act, and the nature of certain amendments made to it.

The 1959 Act was described by its long title as an Act 'to repeal the Lunacy and Mental Treatment Acts 1890 to 1930, and the Mental Deficiency Acts 1913 to 1938, and to make fresh provision with respect to the treatment and care of mentally disordered persons and with respect to their property and affairs'. As the Minister of Health said when moving the second reading of the Bill, it swept away the old law and in its place put 'a new pattern - comprehensive, simpler to understand and apply, and in line with contemporary thinking and medical and social advance' (Parl Deb Commons, vol 598, col 704). The Act would certainly not have been 'comprehensive' had it failed to provide for consent to medical treatment carried out on patients mentally incapable of consenting personally.

The 1959 Act was divided into nine parts, dealing respectively with preliminary matters, local authority services, nursing and residential homes, compulsory admission to hospitals and guardianship, patients involved in crime, movement of patients within the United Kingdom and Channel Islands, secure institutions, management of the property and affairs of patients, and finally miscellaneous and general matters.

The key to understanding Part VIII of the 1959 Act (now Part VII of the 1983 Act) lies in the phrase 'property and affairs'. Property is defined by section 119(1) (now section 112 of the 1983 Act) as including any thing in action, and any interest in real or personal property. The term 'affairs' is not defined. On a purposive construction it should clearly be given the widest meaning, since otherwise some matters concerning a

mentally incapacitated patient would be unprovided for. This would be contrary to the whole tenor of the legislation, which exists precisely to make adequate provision for such persons. One of the meanings of 'affair' given by the OED is 'A thing that concerns any one; a concern, a matter'. Obviously the word 'affairs' was selected by the draftsman as the widest available term to cover whatever might arise to be dealt with in the life of an incapacitated patient. No reason has been or could be adduced for limiting its intended width.

A nominated judge or officer has power to act on behalf of a person under Part VII of the 1983 Act where, after considering medical evidence, he is satisfied that the person is incapable, by reason of mental disorder, of managing and administering his property and affairs, a condition that certainly applies in the case of F. The detailed powers are spelt out in sections 95 to 101 of the 1983 Act. Under section 95(1) the judge or officer may, with respect to the property and affairs of a patient, do or secure the doing of all such things as appear necessary or expedient for the maintenance or other benefit of the patient, and otherwise for administering the patient's affairs. The giving of consent to the sterilisation operation in the case of F is surely covered by these words. If there were any doubt, it is removed by the explicit reference in section 96(1)(k) to 'the exercise of any power (including a power to consent) vested in the patient, whether beneficially, or as guardian or trustee, or otherwise' (emphasis added). It is true that these provisions have a flavour of property, business and legality, but this is only because most matters on which decisions need to be taken on an incapacitated person's behalf are of this character. In any case a power to give consent to an act that would otherwise be tortious and criminal is undoubtedly one with legal connotations.

The 1959 Act did not expressly deal with consent to medical treatment. According to Review of the Mental Health Act 1959, Cmnd 7320, September 1978 ('the 1978 White Paper'), the Department of Health and Social Security took the view in relation to a detained patient that 'where the purpose of detention is treatment, the 1959 Act gives the Responsible Medical Officer implied authority to treat the patient in relation to his mental disorder, if necessary without the consent of the patient or any other person' (p 71). Since some uncertainty was felt on the matter, the 1978 White Paper contained proposals for legislation to spell out the statutory powers in such cases. These proposals were subsequently modified following public discussion, as described in Reform of Mental Health Legislation, Cmnd 8405, November 1981 ('the 1981 White Paper'). The modified proposals were enacted as Part VI, entitled 'Consent to Treatment', of the Mental Health (Amendment) Act 1982 (now Part IV of the 1983 Act).

Although Part VI was concerned only with treatment for the mental illness itself, two points concerning it are relevant to the Court of Appeal decision in *Re F*. First, as the 1978 and 1981 White Papers make clear, Parliament took very great care to dispense with patients' consent only where this was unavoidable, and to provide elaborate safeguards. Second, Parliament took a deliberate decision not to interfere with the previous position regarding medical treatment not directly concerned with the patient's mental illness. The 1978 White Paper stated explicitly that treatment not relating to the mental disorder should not be imposed on a detained patient without his consent, 'other than such treatment as is immediately necessary to preserve his life or health' (p 80). This reasoning would apply a fortiori to voluntary patients such as F. It supposes the existence of a power to consent on behalf of the patient in such circumstances and thus confirms the reasoning set out above regarding Part VII of the 1983 Act.

In *T v T* [1988] Fam 52, referred to above, Wood J held that Part VII did not empower the court to consent to surgery, citing a dictum of Ungood-Thomas J in *In re W (E E M)* [1971] 1 Ch 123, 143 that the corresponding provision of the 1959 Act covered 'all the property and all the affairs of the patient in all their aspects; but not ... the management or care of the patient's person'. It is submitted that if this dictum was intended to indicate that a patient's 'affairs' cannot include anything to do with her person it went too wide. For example a professional actress frequently enters into contracts concerning what she does with her person (which is an actress's chief resource). Matters arising out of such contracts must be included among her 'affairs'.

Can consent be given under *parens patriae* doctrine?

The 1959 Act was brought fully into force on 1 November 1960. Eleven days later the following notice appeared in The London Gazette (p 7631)-

'Having regard to the provision made in the Mental Health Act 1959 with respect to the management of the property and affairs of mentally disordered persons, The QUEEN has been pleased by Warrant under Her Majesty's Royal Sign Manual, bearing date the 1st instant, to revoke the Warrant under the Royal Sign Manual dated the 10th April 1956, entrusting the Lord Chancellor and certain other Judges of the Supreme Court of Judicature with jurisdiction respecting the care and commitment of the custody of persons of unsound mind and their estates.'

This confirms the argument above that the 1959 Act was intended to be comprehensive, thus leaving nothing on which prerogative powers in relation to mentally disordered persons could continue to operate. In *T v T* [1988] Fam 52, 58 Wood J expressed regret that the warrant had been thus revoked. He said-

'The facts of this case illustrate the usefulness and indeed, may I respectfully suggest, the necessity for a residual jurisdiction even when codification purports to cover every eventuality. The simplest remedy would be to issue a fresh warrant restoring this common law jurisdiction.'

If the argument above regarding Part VII of the 1983 Act is accepted by the House of Lords, there is no need for a residual jurisdiction. If the argument is rejected, that will demonstrate that the ambit of the legislation is narrower than the prerogative powers, which to that extent therefore remain extant. The remedy would then be to act on the suggestion of Wood J regarding the issue of a fresh warrant.

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