IN THE COURT OF PROTECTION
MANCHESTER DISTRICT REGISTRY

Case No. 12084253

Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Friday, 23rd March 2012

[2012] EWHC 885 (COP)

Before:

THE HONOURABLE MR JUSTICE PETER JACKSON

In the matter of:

Re: D

Counsel for the NHS Trust: MRS BUTLER-COLE

Counsel for the Official Solicitor: MR JOHNSTON QC

JUDGMENT APPROVED BY THE COURT

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JUDGMENT

1. THE JUDGE: This judgment is given in open court and is a public document. I have, however, made a reporting restriction order in this case as being necessary to protect the privacy of the patient, and of those who surround him and care for him.

2. The application concerns a 55-year-old man, to whom I will refer as "D", who is in a permanent vegetative state. It is made by the National Health Service Trust responsible for his care. The Trust seeks a declaration that it is lawful and in the best interests of D to withdraw active medical treatment, including specifically artificial nutrition and hydration, albeit that this will lead to D's death. The application is supported by D's family and friends, by all the medical staff who look after him, by the evidence of the expert witnesses who have reported and by the Official Solicitor on behalf of D himself.

3. The background is that over a year ago D developed a swelling in his thyroid gland which it was thought might be malignant. He underwent an operation in May 2011 which at first appeared to have been successful but further tests showed that another operation was necessary. This was performed on 25th July 2011. Unfortunately, it was found that the cancer had spread. Following the operation there were complications and in the course of a further procedure D suffered a cardiac arrest as a result of which he suffered severe and irreparable brain damage. He was treated, including with artificial nutrition and hydration, and for a time he required artificial ventilation.

4. After extensive tests, a meeting took place in September of all the concerned parties. It was then agreed that an application should be made to the Court of Protection for an order allowing the withdrawal of treatment. After necessary preparations, the application was made in December and it has been listed for hearing today.

5. For the reasons that I will explain, I am satisfied that D is in a vegetative state, with no prospect of recovery. In such circumstances, the law permits the withdrawal of treatment because it is futile and achieves nothing for the patient. This has been clear since the case of Tony Bland. However, the decision is one of such seriousness that the most careful enquiries have to be made.

6. D's condition is that he is in a hospital bed and totally dependent for his every need upon the care of others. In relation to sight, it has been established that visual stimuli are reaching the central nervous system but D does not track objects, respond to visual threat or explore his visual environment, all tasks that he would do if he were aware. With regard to hearing, his auditory pathway is intact, as shown by a blink response to sudden noise, but he demonstrates no auditory awareness, whether by localising sound, responding to oral command or showing any meaningful response to sounds.

7. In relation to the perception of pain, his withdrawal response to painful stimuli indicates that this information reaches the central nervous system but he does not show any awareness, for example by removing the source of the stimulus. So far as motor activity is concerned, the pathways appear to be intact, as movement can be seen in all four limbs, the face and the eyes, but there is no evidence of awareness. These conclusions were commented upon by Professor Derick Wade, a consultant in neurological rehabilitation. He drew attention to certain physical behaviours such as "frowning, clenching teeth, jerky movements, making noises," all of which he described as being purely reflexive.

8. There are a number of convincing sources of evidence about D's condition. The first relates to his underlying condition which is a severe hypoxic episode causing irreversible brain damage, damage of a severity that is in itself extremely likely to have led to unawareness. Next, since his operation in July, D has been under continuous observation in the normal course of being cared for and being visited. Nobody, despite the most anxious searching, has seen any sign of awareness. This is not just the medical staff who have come to know him well and are with him all the time, but friends and family who know him well from before.

9. There have then appropriately been two special studies that have been carried out to analyse observations on a continuous basis. Those are, firstly, the WHIM assessment, standing for Wessex Head Injury Matrix. This is a multi-user assessment that records the repeated observation of features associated with consciousness. It records systematically D's condition and behaviours at different times and was assiduously completed by the care staff over a period of three months between October 2011 and January 2012. The observations detected only the most minimal fluctuations at the most basic levels. They did not establish that D engaged in any meaningful responses or purposive actions whatever.

10. Next, an assessment under the SMART system was carried out by Miss Gill-Thwaites between 6th and 13th January. SMART, standing for Sensory Modality Assessment and Rehabilitation Technique, is an internationally recognised assessment, validated as a method of diagnosing levels of awareness and consciousness in a patient with profound brain damage. That assessment found no purposeful responses. D's behaviours were either reflexive or spontaneous and careful study produced a diagnosis consistent with a vegetative state, referred to by Miss Gill-Thwaites as a reflexive vegetative state.

11. These materials have been carefully studied, in particular by Professor Wade, whose report I have read and whose evidence I have heard. Professor Wade gives the opinion that D is completely unaware of himself or his environment. He is not in a minimally conscious state; he is in a permanent vegetative state. There is no evidence of any analysis by D of stimuli that reach his brain.

12. Professor Wade says this:

> "He will never recover to a situation where he can be aware of being alive and consequently I cannot see any benefit in remaining in this state where there is no prospect in future of him becoming aware. He has nothing to gain by living a long time, unaware."

13. Expanding on that in his evidence, Professor Wade said that in his view there would not be any recovery but, at its most cautious, the prospect of recovery was really, really low. He said that even if, very much against his expectation, there was any recovery whatever, it would be recovery at an absolutely minimal level, involving no more than a minute or so every month or so of awareness of the most basic kind. As will become apparent in a moment, that is not a life that D would want and, even if Professor Wade's expectations were confounded, it would not make any difference to the outcome or the decision.

14. Finally, D has recently been visited by an experienced member of the Official Solicitor's office who in his enquiries found nothing incompatible with the information from elsewhere.

15. There is in this case the most poignant evidence of what D would say if he were able. Faced with the prospect of surgery, which frightened him very much, he had discussions with friends and family and, in particular, with his sister-in-law, G, and on 26th April 2011 he gave her a signed letter which read as follows:

> "To whom it may concern: I authorise *[and then G's name and address]* to act on my behalf in the event of me being unable to make decisions for whatever reason. In particular, I authorise the above to liaise with the medical profession in making decisions regarding any further medical treatment. More specifically, I refuse any medical treatment of an invasive nature (including but not restrictive to placing a feeding tube in my stomach) if said procedure is only for the purpose of extending a reduced quality of life. By reduced quality of life, I mean one where my life would be one of a significantly reduced quality, with little or no hope of any meaningful recovery, where I would be in a nursing home/care home with little or no independence. Similarly, I would not want to be resuscitated if only to lead to a significantly reduced quality of life."

16. There were reasons, not just personal to D but associated also with his own family history, for him to have held these views. Unfortunately, they are views which cannot directly be acted upon in the current situation because they do not comply with the understandably strict requirements of the Mental Capacity Act 2005. Section 25 of that Act relates to advanced directives or living wills, of which this letter is an example, but the section imposes particular conditions before a living will can be effective to bring about the end of life. I will read section 25(5) and 25(6):

> "(5) An advanced decision is not applicable to life-sustaining treatment unless:
>
> (a) The decision is verified by a statement by P to the effect that it is to apply to that treatment even if life is at risk, and
>
> (b) The decision and statement comply with subsection (6);
>
> (6) A decision or statement complies with this subsection only if:
>
> (a) It is in writing;
>
> (b) It is signed by P or by another person in P's presence and by P's direction;
>
> (c) The signature is made or acknowledged by P in the presence of a witness; and
>
> (d) The witness signs it or acknowledges his signature in P's presence."

17. I recite that series of requirements, which proved of no assistance to D, in case it should make the requirements better understood for the benefit of others. Nevertheless, had there been anything to put in the balance against the other evidence, D's wishes would have carried very great weight with me. He was a very private man before his incapacity, who would have been horrified at the prospect of being kept alive in this condition, with the total loss of privacy that his dependency entails.

18. In summary, I find the evidence in this matter to be of a uniformly high quality and I accept it. It establishes that the options for D are to continue with active medical treatment with a life expectancy of one or two years, or to withdraw active medical treatment, in which case he will die in about 10 to 14 days, while receiving carefully planned palliative care. I am in no doubt that the latter option is the better one for D. I accept the reasons given by the Trust, which are as follows:

(a) He is in a permanent vegetative state;

(b) Continued medical treatment is of no benefit to him because it is futile;

(c) He is unaware of himself and his surroundings and receives no benefit from life;

(d) It is not what he would want;

(e) His treating clinicians, the experts, his family and friends consider it in his best interests; and

(f) The remainder of his life, following the withdrawal of treatment, and before death will be managed appropriately.

19. Although D's protracted last months have been overshadowed by his medical condition and its consequences, these months are not how he or those who know and love him would want him to be remembered. D is described as someone who was gentle and popular. Although recent events have been sad and stressful for everyone, everything I have read shows how highly D is regarded by those that know him. He has received and will continue to receive the most devoted nursing care. I refer to a recent interview between the Official Solicitor's representative and a ward sister. The sister said that she had no doubt over D's diagnosis and that all the staff she knew had accepted it. She mentioned that when D's future was discussed, there was a unanimous decision by staff that he should not be moved if his treatment was withdrawn. She said that the staff had become fond of him and that it would be harder for everyone if he left as they would want to know that he had been properly looked after until his death.

20. D's family and friends have spoken of him in the most loving way. They include his sister-in-law, G, his close friends, S and I, and his cousin, K. They believe that D should now be allowed to die with dignity and with as little suffering as possible. I agree. It is in his best interests and it is what he would want. I grant the declaration sought.

[Judgment ends]