

A **Court of Appeal guidelines**
R v Collins, Pathfinder Mental Health Services
NHS Trust and St George's Healthcare NHS Trust
ex p S

B Court of Appeal
Butler-Sloss, Judge and Robert Walker LJ
30 July 1998

C **Guidelines**

C We have now received written submissions from Mr Havers and Mr Gordon. We
understand that the applicant's solicitor has taken soundings from the Royal
College of Midwives, The Royal College of Nurses, The United Kingdom Central
Council for Nursing Midwifery and Health Visiting, The Law Society's Mental
D Health and Disability sub-committee, MIND, the Association for Improvements
in the Maternity Services, The National Childbirth Trust, The Maternity Alliance,
and The Association of Community Health Councils for England and Wales. We
further understand that Mr Havers received comment from the British Medical
Association, who in the available time has not any practical opportunity to carry
out a formal consultation process, and the Department of Health. We have also
E received a letter from the Head of Legal Services for the First Respondent confirm-
ing that no submissions in relation to the proposed Guidelines would be made 'as
they do not appear to impact upon the role of an approved social worker'.

In the light of these written submissions we have reconsidered the draft Guide-
lines set out at the end of the judgment which are now superseded.

F The case highlighted some major problems which could arise for hospital
authorities when a pregnant woman presented at hospital, the possible need
for Caesarean surgery was diagnosed, and there was serious doubt about
the patient's capacity to accept or decline treatment. To avoid any recurrence
of the unsatisfactory events recorded in this judgment, and after consultations
G with the President of the Family Division and the Official Solicitor, and in the light
of the written submissions from Mr Havers and Mr Gordon, we shall attempt to
repeat and expand the advice given in *Re: MB*. This advice also applies to any
cases involving capacity when surgical or invasive treatment may be needed by a
patient, whether female or male. References to 'she' and 'her' should be read
H accordingly. It also extends, where relevant, to medical practitioners and health
professionals generally as well as to hospital authorities.

The Guidelines depend on basic legal principles which we summarise:

- I (i) They have no application where the patient is competent to accept or
refuse treatment. In principle a patient may remain competent notwith-
standing detention under the Mental Health Act.
- J (ii) If the patient is competent and refuses consent to the treatment, an
application to the High Court for a declaration would be pointless. In this
situation the advice given to the patient should be recorded. For their
own protection hospital authorities should seek unequivocal assurances
from the patient (to be recorded in writing) that the refusal represents an
informed decision: that is, that she understands the nature of and
reasons for the proposed treatment, and the risks and likely prognosis
involved in the decision to refuse or accept it. If the patient is unwilling
K to sign a written indication of this refusal, this too should be noted in

writing. Such a written indication is merely a record for evidential purposes. It should not be confused with or regarded as a disclaimer.

- (iii) If the patient is incapable of giving or refusing consent, either in the long term or temporarily (eg due to unconsciousness), the patient must be cared for according to the authority's judgment of the patient's best interests. Where the patient has given an advance directive, before becoming incapable, treatment and care should normally be subject to the advance directive. However, if there is reason to doubt the reliability of the advance directive (for example it may sensibly be thought not to apply to the circumstances which have arisen) then an application for a declaration may be made.

Concern over capacity

- (iv) The authority should identify as soon as possible whether there is concern about a patient's competence to consent to or refuse treatment.
- (v) If the capacity of the patient is seriously in doubt it should be assessed as a matter of priority. In many such cases the patient's general practitioner or other responsible doctor may be sufficiently qualified to make the necessary assessment, but in serious or complex cases involving difficult issues about the future health and well-being or even the life of the patient, the issue of capacity should be examined by an independent psychiatrist, ideally one approved under section 12(2) of the Mental Health Act. If following this assessment there remains a serious doubt about the patient's competence, and the seriousness or complexity of the issues in the particular case may require the involvement of the court, the psychiatrist should further consider whether the patient is incapable by reason of mental disorder of managing her property or affairs. If so the patient may be unable to instruct a solicitor and will require a guardian ad litem in any court proceedings. The authority should seek legal advice as quickly as possible. If a declaration is to be sought the patient's solicitors should be informed immediately and if practicable they should have a proper opportunity to take instructions and apply for legal aid where necessary. Potential witnesses for the authority should be made aware of the criteria laid down in *Re: MB* and this case, together with any guidance issued by the Department of Health, and the British Medical Association.
- (vi) If the patient is unable to instruct solicitors, or is believed to be incapable of doing so, the authority or its legal advisers must notify the Official Solicitor and invite him to act as guardian ad litem. If the Official Solicitor agrees he will no doubt wish, if possible, to arrange for the patient to be interviewed to ascertain her wishes and to explore the reasons for any refusal of treatment. The Official Solicitor can be contacted through the Urgent Court Business Officer out of office hours on 0171 936 6000.

The hearing

- (vii) The hearing before the judge should be *inter partes*. As the order made in her absence will not be binding on the patient unless she is represented either by a guardian ad litem (if incapable of giving instructions) or (if capable) by counsel or solicitor, a declaration granted *ex parte* is of no assistance to the authority. Although the Official Solicitor will not act for a patient if she is capable of instructing a solicitor, the court may in any event call on the Official Solicitor (who has considerable expertise in these matters) to assist as an *amicus curiae*.

- A (viii) It is axiomatic that the judge must be provided with accurate and all the relevant information. This should include the reasons for the proposed treatment, the risks involved in the proposed treatment, and in not proceeding with it, whether any alternative treatment exists, and the reason, if ascertainable, why the patient is refusing the proposed treatment. The judge will need sufficient information to reach an informed conclusion about the patient's capacity, and, where it arises, the issue of best interest.
- B (ix) The precise terms of any order should be recorded and approved by the judge before its terms are transmitted to the authority. The patient should be accurately informed of the precise terms.
- C (x) Applicants for emergency orders from the High Court made without first issuing and serving the relevant applications and evidence in support have a duty to comply with the procedural requirements (and pay the court fees) as soon as possible after the urgency hearing.

D *Conclusion*

- There may be occasions when, assuming a serious question arises about the competence of the patient, the situation facing the authority may be so urgent and the consequences so desperate that it is impracticable to attempt to comply with these guidelines. The guidelines should be approached for what they are, that is, guidelines. Where delay may itself cause serious damage to the patient's health or put her life at risk then formulaic compliance with these guidelines would be inappropriate.
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