SMT Applications, CANH and when treatment is available

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Pre-*Aintree*

- ***In re F (Mental Patient: Sterilisation)*** [1990] 2 AC 1
  - Court had jurisdiction to consent to a sterilisation operation
  - General view was that obtaining declaration from the court consenting was a matter of good practice rather than legal necessity

- ***Airedale NHS Trust v Bland*** [1993] AC 789:
  - Artificial nutrition and hydration is ‘treatment’
  - Focus is on whether it is in the patient’s best interests to continue to give treatment, not whether it’s in the patient’s best interests to die
  - Approval of the court (then, Family Division of the High Court) should be sought in withdrawal of artificial nutrition and hydration; OS invited to ac; two medical opinions
  - Anticipation that over time, ‘a body of experience and practice will build up which will obviate the need for application in every case’

Pre-*Aintree*

- *AVS v A NHS Foundation Trust & Anor* [2011] EWCA Civ 7
  - No medical practitioner was ready and willing to provide treatment that his brother wished for him to have (treated for CJD)
  - Brother made application to the COP
  - Court of Appeal found that his application was 'doomed to failure'
  - Court does not decide hypothetical questions and doctors cannot be forced to give treatment
  - '*A declaration of the kind sought will not force the respondent hospital to provide treatment against their clinicians' clinical judgment. To use a declaration of the court to twist the arm of some other clinician, as yet unidentified, to carry out these procedures or to put pressure upon the Secretary of State to provide a hospital where these procedures may be undertaken is an abuse of the process of the court and should not be tolerated.*'

Aintree v James

[2013] UKSC 67

- COP has the power to make decisions the person could make
- Best interests analysis – patient's point of view
- Wishes and feelings of considerable importance
- A patient cannot demand that a doctor administer a treatment which the doctor thinks is adverse to the patient's needs
- 'Futile' treatment is that which is ineffective or of no benefit to the patient; a treatment may bring benefit even if has no effect on the underlying disease or disability

N v ACCG

[2017] UKSC 22

- Limitations of the powers of the COP
- COP's power did not include quasi-JR powers
- Can only make the decisions Ps could make for themselves if they had capacity
- While court has leeway to investigate the available options, 'it does not follow that the court is obliged to hold a hearing to resolve every dispute where it will serve no useful purpose to do so.' [39]
- '44. This was not a case in which the court did not have jurisdiction to continue with the planned hearing. It was a case in which the court did not have power to order the CCG to fund what the parents wanted. Nor did it have power to order the actual care providers to do that which they were unwilling or unable to do. In those circumstances, the court was entitled to conclude that, in the exercise of its case management powers, no useful purpose would be served by continuing the hearing.'

Practice Direction 9E

- Serious medical treatment definition
- Matters which should be brought before the court:
  a) *decisions about the proposed withholding or withdrawal of artificial nutrition and hydration from a person in a permanent vegetative state or a minimally conscious state;*
  b) *cases involving organ or bone marrow donation by a person who lacks capacity to consent; and*
  c) *cases involving non-therapeutic sterilisation of a person who lacks capacity to consent.*

An NHS Trust v Y

[2018] UKSC 46

- An application is not required to withdraw CANH where there is no dispute about best interests
- Situation had moved on since *Bland* and artificial nutrition and hydration was ‘a well-established feature of medical practice’
- Not required under the common law or ECHR
- CANH is not in a special category of life-sustaining medical treatment
- Diagnosis is not determinative for whether CANH is in a person’s best interests
- Process for decision-making outside of court
- If at the end of the process, ‘*it is apparent that the way forward is finely balanced, or there is a difference of medical opinion, or a lack of agreement to a proposed course of action from those with an interest in the patient’s welfare, a court application can and should be made.*’ [125]

Vice President's SMT Guidance

[2020] EWCOP 2

- Emphasises that it is 'guidance only'
- Anticipated that it may be superseded by an updated MCA Code of Practice
- Just because medical treatment is 'serious' does not mean that a COP application is necessarily required if there is agreement as to capacity and best interests
- Consideration should be given, and it is highly probable an application is appropriate where:
  - A decision is finely balanced or there is a difference of medical opinion
  - There is a lack of agreement on a proposed course of action from those with an interest in the person's welfare
  - There is a potential conflict of interest on the part of those involved in decision-making processes
- Where the matters above arise and the decision relates to the provision of life-sustaining treatment, an application to the COP must be made; this 'specifically includes the withdrawal or withholding of clinically assisted nutrition and hydration'
- Deprivations of liberty

Available options and courts

- Applications have proceeded in two formats:
  - Applications brought in the COP for declarations that it was in the best interests of the person for treatment to be stopped (cases have varied as to whether or not doctors are stating that they would be willing to continue to offer treatment); and
  - Applications for declaratory relief in the High Court that it is lawful for the treating clinicians to withdraw treatment