

THE INHERENT JURISDICTION AND SERIOUS MEDICAL TREATMENT

10 March 2022

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OUTLINE

- **E&F (Minors: Blood Transfusion) [2021] EWCA Civ 1888;**
- **E's Case**
- **F's Case**
- **The decision(s) of the Court of Appeal**
- **Emergency treatment**

E&F (Minors: Blood Transfusion) [2021]

EWCA Civ 1888

- The Facts in E

- E was 16; no concern that she lacked capacity
- E developed appendicitis; needed surgery
- Surgery carried a small (roughly 1:1000-1:2000) risk of having a haemorrhage requiring blood products
- If occurred, would likely develop very quickly
- Unclear pre-operatively what procedure would be used
- E consented to the appendicectomy
- E was a committed Jehovah's Witness, and had prepared a written statement refusing blood products under any circumstances.

E&F (Minors: Blood Transfusion) [2021]

EWCA Civ 1888

- The Facts in E

- Discussed at length with doctors, supported by her father and Liaison Committee member
- Other clinical risk: potential of rupture of appendix
- Clinicians had set a deadline at which time operation would proceed even in the absence of a court order
- Trust made neutral application the day after diagnosis in light of E's strongly-held views and risk to her if a serious complication could not be treated with blood products

E&F (Minors: Blood Transfusion) [2021]

EWCA Civ 1888

- E attended hearing supported by her father; no legal representation. E opposed the application; CAFCASS supported her being transfused if a severe bleed
- Order granted by Theis J after a short hearing; judgment weighing up risk to E and her opposition to blood products
- Order permitted blood products to be used if there 'significant blood loss' such that transfusion was clinically indicated. Trust recorded it would seek to avoid use of blood products if at all possible.
- Surgery proceeded approximately 1 hour later without complications; E was discharged home the next day.

E&F (Minors: Blood Transfusion) [2021] EWCA Civ 1888

The facts in F

- F was 17 years and 5 months at the time of the decision in the case;
- On 5 September, he lost control of his motorbike on a bend and came off into a field
- Two CT scans revealed grade 3 laceration involving a quarter to a third of his spleen
- The injury was of moderate severity
- For the remainder of his time in hospital he remained stable
- With this particular type of injury there can be primary of secondary bleeding

- Primary bleeding occurs at or shortly after the time of the injury- that did not happen in this case.
- Secondary bleeding may occur later, and particularly within a week or ten days, as a result of a clot loosening, leading to bleeding that can sometimes be catastrophic
- If this arises a number of treatments could be attempted, including radiology, the insertion of a coil embolism to stop the bleed, and the removal of the spleen altogether.
- A secondary bleed could be anything from a small re-bleed that is contained to a really quite catastrophic haemorrhage at an alarming rate
- F has been baptised as one of Jehovah's Witnesses and made it very clear **that he would object to the use of any blood products because** of his faith and his relationship with his 'God and creator.' F was supported in his view by his parents. There were no concerns that F lacked capacity.

- The 8.30pm on 6 September the Trust filed an out of hours application to the court for declarations that F was competent to refuse or consent to the receipt of blood and blood products but that, notwithstanding his objection and absence of parental consent, it was lawful and in his best interests for the doctors to provide blood and blood products in the event of an emergency arising from his injury.
- The matter was listed for substantive hearing on 7 September (having been adjourned after an OOO application overnight, to give F more time to respond)

- The court heard from Mr C (an expert instructed at short notice) and Mr M (consultant surgeon), there was substantial agreement between the two medics, in that:
 - F remained clinically stable and was now described in being in the window of secondary haemorrhage, with the current risk remaining at approximately 10% but decreasing every day and abating after some weeks
 - Mr M described a secondary haemorrhage as “anything from a small re-bleed that’s contained to a really catastrophic haemorrhage at an alarming rate”
 - If the latter occurred, F would need to be in surgery within 30 to 60 minutes

The court made the orders sought and declared that it was lawful and in F’s best interests for blood products to be provided in the event of an emergency arising from the injury, provided that all other reasonable treatment options have been considered and exhausted.

The Court of Appeal

- Both decisions were appealed, the court joined the appeals
- Permission was granted in respect of the following grounds:
 - **E's case**
 - The court was wrong to make an order permitting the use of blood products in the circumstances of the case;
 - The court's declaration that the appellant lacked capacity was legally flawed
 - **F's case**
 - The court applied the wrong legal approach to the circumstances of the case;
 - The court was wrong to make an order permitting the use of the blood products on the facts of the case.

The Court of Appeal

In both appeals, the court **refused permission** to appeal in relation to the following ground:

A capacitous minor has the exclusive right to decide her medical treatment. The Court of Appeal held that this:

- ‘...is a reiteration of the argument advanced in *Re X (No.2)*, [2021] EWHC 65 (Fam) and in *Teaching Hospitals NHS Trust v DV (A Child)* [2021] EWHC 1037 (Fam).’

Permission to appeal in those cases having already been **refused.**

The Judgment(s)

- The court dismissed the appeals and concluded that:
 - The inherent jurisdiction of the High Court is available in all cases concerning minors, namely persons under the age of 18. That has always been so, and any change must be a matter for Parliament
 - The inherent jurisdiction is a protective power and one of the court's central concerns will be to identify the risk in question. There is an important distinction between the risk *of* an event occurring (its probability) or the risk *from* the event occurring (its consequences).
 - The decision of a capacitous young person (under 18) is not determinative in so far as he or she is not, in law, the decision maker.
 - If a proper evaluation of the minor's welfare is properly carried out so as to arrive at a sound welfare decision, the court will not be acting incompatibly with Articles 2,3,8 of the ECHR.

The Judgment(s)

Judgment in E

- Real task for the court was to direct itself to the ‘transcendent factors’ of the child’s autonomy and preservation of life
- Apparent that Theis J treated E’s wishes as being of considerable importance
- Judgment acknowledged the low probability of a serious injury occurring
- No criticism of E’s participation being on a very tight timetable
- Do not accept order was unnecessary in Convention terms: if crisis had arisen, might have been necessary to save her life
- First instance court was ‘certainly not wrong’ to make the order it did

The Judgment(s)

Judgment in F

- The real question before the Court of Appeal was not whether the power exists but how it should be exercised
- The evidence of urgency justified the making of an immediate decision and the length of the order was reasonable, though undoubtedly felt to be burdensome by F
- The substance of the decision fully engaged with the two factors that lay at the heart of the matter;
- The Judge very fully considered F's beliefs and the significance of his own decision to refuse treatment
- The decision in F's case was one that the Judge was clearly entitled to reach and certainly cannot be characterised as having been wrong.

Emergency Powers

-Argued on behalf of the children in both cases that orders were unnecessary, as doctors would have had the power to treat E and F without their consent in the event of an 'emergency'

-Not fully considered by the Court of Appeal, but stated in obiter dicta:

Doctors undoubtedly have a power, and may have a duty, to act in an emergency to save life or prevent serious harm where a patient lacks capacity or cannot express a view, for example because of unconsciousness. However, we very much doubt that such a power exists in respect of treatment that has been foreseen and refused by a capacitous patient. It is doubtful whether such circumstances can properly be described as an emergency.

Emergency Powers

Bearing on when an application is required

- What would the patient consider a material risk: *Montgomery*
- For a young person of E and F's faith, even a small risk of blood transfusion would be material
- Emergency powers to treat without consent when there is no time to make an application to the court: *Gillick, G v Nottingham City Council*
- Potential human rights breach if a person is treated over their objections without an application to the court if it was possible: *Glass v United Kingdom*

Emergency Powers

- If there is a foreseeable need for treatment and time to make an application to the court safely, initiative should be taken to allow consideration by a court – not reliance on ‘emergency powers’
- Query Article 2 obligations, depending on circumstances: is there a failure to take a reasonable step to prevent loss of life?

Emergency Powers

- If there is a foreseeable need for treatment and time to make an application to the court safely, initiative should be taken to allow consideration by a court – not reliance on ‘emergency powers’

Emergency Powers

In E

- E admitted to hospital, being monitored
- On urgent list: surgery started approximately 1 hour after judgment
- Clinical view was that E was safe to wait through the afternoon for surgery under these conditions
- However, if judgment had not been given by 5:00PM, would have proceeded with the operation in any event

Emergency Powers

In F

- An OOO application was made at 8.30pm on 6 September, the court adjourned until the next day to allow F to prepare
- Both medical witnesses agreed that the risk of F suffering a primary haemorrhage overnight was low, less than 10%
- The court adjourned until 2pm the following day and the order recorded that it had been submitted on F's behalf that if a declaration was not made the clinicians would be able to treat him "using their emergency powers in the event of an emergency overnight".
- This assertion was repeated on behalf of F before the Court of Appeal.

Discussion