Case No. FAFMF/2000/0104/B1

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HONOURABLE MR. JUSTICE WALL

Royal Courts of Justice
Strand, London
WC2A 2LL

Thursday 18th May 2000

Before:

THE PRESIDENT

LORD JUSTICE THORPE
and
LORD JUSTICE MANCE

SL (by her litigation friend, the Official Solicitor) **Appellant**

-and-

SL (her mother) **Respondent**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

James Munby Q.C. and Miss Susan Harrison (instructed by the Official Solicitor of the Supreme Court) for the Appellant
David Harris Q.C. and **Miss Lesley Newton** (instructed by Widdows Mason, 20 King Street, Leigh, WN7 4LR) for the Respondent

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Judgment
As Approved by the Court

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THE PRESIDENT: Miss SL, (S), is a very attractive young woman of 29, born on the 24th June 1971. She has the misfortune to have been born with severe learning difficulties and is unable to live on her own in the community. She is incapable of managing her own affairs and lives with her mother, (Mrs L) who has cared devotedly for her since her birth. She has a younger sister of normal intelligence who is married with a family and an elder brother who also has the misfortune to suffer from severe learning disabilities. Since the death of her father, her brother has lived in sheltered accommodation provided by the local authority. Her mother is now about 55 and recognises that she cannot indefinitely care for S and that her daughter will have to go into accommodation similar to that provided for her son.

The mother therefore issued proceedings by way of originating summons asking the High Court to make a declaration in the following terms:

1. A declaration that the operation of sterilisation and/or hysterectomy proposed to be performed on S being in the existing circumstances in her best interests can lawfully be performed on her despite her inability to consent to it; and
2. An order that in the event of a material change in the existing circumstances occurring before the said operation has been performed any party shall have liberty to apply for such further or other declaration or order as may be just.

S has been represented by the Official Solicitor who opposed the application. The originating summons was heard by Wall J who gave judgment on the 24th January 2000. He granted the declaration sought for therapeutic purposes and gave permission to appeal.

His judgment has been reported as ***re SL (Adult Patient) (medical treatment)*** [2000] 1 FCR 361 and as ***re S (Sterilisation: Patient's Best Interests)*** [2000] 1 FLR 465. It is not therefore necessary to set out the facts and issues in any detail since they are carefully and comprehensively

presented by Wall J. Suffice it to say that S follows a regular routine in her mother`s home. She attends a day centre and a social club and enjoys physical activities including riding and swimming. She is not easy to care for. She has very limited speech and is prone to irritability and mood swings. There are two interrelated aspects of her care which have prompted the application by the mother. The first reason might be termed the social reason. As I have already said, S is an extremely attractive girl who is at present being cared for by her mother who keeps a close watch on her activities and supervises her. If she goes into a local authority home there is a risk that she might move unsupervised in mixed circles and might either form a close emotional attachment or be the victim of a sexual assault with the possibility of a pregnancy. The evidence before the judge was that she would not be able to understand the concept of pregnancy and would be totally unable to cope with a child. The judge said that it was agreed that a pregnancy would be disastrous for her and the whole process would be frightening and traumatic.

The second reason is therapeutic. The judge said:

> "S suffers from heavy menstrual bleeding which she does not understand, which causes her distress and with which she has great difficulty coping."

It was common ground that S did not have the capacity to give an informed consent to treatment of any kind, in particular for the proposed hysterectomy.

The two issues before the judge were therefore

1. whether it was in the best interests of S to be sterilised in order to avoid the risk of pregnancy and
2. whether it was in her best interests to undergo therapeutic treatment to eliminate her menstrual periods by way of laparoscopic

subtotal hysterectomy, which would have the incidental effect of sterilisation.

He heard evidence from the mother and other members of the family and from Dr E, a consultant psychiatrist, Dr K, a senior lecturer/honorary consultant in family planning, and Professor T, professor emeritus of obstetrics and gynaecology. On the first issue the judge came to the conclusion that it would be highly detrimental to S`s welfare to become pregnant. He said:

> "Although the point is finely balanced, I am satisfied on all the evidence that there is in this case an identifiable risk of pregnancy. On this point, I prefer the evidence of Dr K and Professor T to that of Dr E. I accept that in her mother`s day-to-day care the risk of pregnancy is remote; but that situation is shortly to change. The absence of her mother and the inevitably reduced level of supervision will increase her vulnerability to an exploitative relationship, as well as increasing the probability that she will seek affection from others………
> I have reached the clear view that it would not be in S`s interests to undergo sterilisation. Although there is a risk of pregnancy, the operation would not address the question of her menstruation. Moreover, there is another form of contraception available, the Mirena which, whilst it would require a general anaesthetic for its insertion, would have the likely beneficial side effect of reducing her menstrual flow. Sterilisation, accordingly, would protect S from pregnancy but would not otherwise benefit her. In balancing the risks of a surgical operation to sterilise S, the likely effect on S of having to undergo surgery, the risk of pregnancy and the benefits to be derived from sterilisation, the balance, in my judgment, comes down against sterilisation being in S`s interests."

Mr Munby QC for the Official Solicitor, who appeals on behalf of S on the second issue, doubts whether the judge was right, on the facts, to find an identifiable risk of pregnancy. I share his doubt but it is not necessary to consider it since the appeal does not turn on the issue of sterilisation as such.

I turn therefore to the second issue and the facts about the proposed therapeutic treatment. A laparoscopic sub-total hysterectomy was described by Professor T and set out in detail in the judgment of Wall J at page 473. In summary, it was described as major invasive surgery but far less severe than a total hysterectomy and there would be less complications and blood loss and faster recovery. The patient would be expected to leave hospital within three days or so.

The alternative treatment was to use a Mirena coil which, once inserted by general anaesthetic, would have the effect of significantly reducing the menstrual flow so that, after about three months, it would be minimal or stop altogether. The coil had an useful life, as a contraceptive device, of five years or so after which it would have to be replaced. It had the disadvantage that it might be dislodged and would then have to be reinserted.

The evidence before the judge on this part of the appeal was, on the one hand, the medical evidence of the three expert medical witnesses and, on the other hand, the non-medical evidence of the family and other carers about the adverse effects of her menstrual periods. The judge found that S had an obsession with cleanliness and bodily functions. Her menstrual cycle caused her distress. She regarded it as dirty. For example she was upset when she had a spot of blood on her skirt. The judge considered whether the mother and other witnesses were exaggerating for effect and said:

> "I am in no doubt at all that the descriptions given to me by Mrs L, CH and VC are accurate, and I accept their evidence that the quality of S`s life would be radically improved if her periods ceased. I am also of the view, given the unanimous evidence of the experts as to the disastrous effects on S of becoming pregnant, that her periods serve no purpose, and that it is in her interests for them to be brought to an end. The question, therefore, is how that should be achieved."

He also found that S had a phobia about hospitals dating from visiting her father in hospital before his death. Any treatment would require a general anaesthetic and a hospital visit that S would find distressing.

The alternatives that he considered were - first, the Mirena coil and second, surgery. Each replacement of the coil during her child-bearing period would require a general anaesthetic and, he found, would be

accompanied by distress for S. The mother took the view, which the judge accepted, that the major advantage of the hysterectomy was that it was a single procedure without the need for any further surgical intervention. He said:

> "In my judgment, S`s hospital phobia, and the need for all interventions to be by way of general anaesthetic is a powerful argument in favour of a once and for all procedure such as the laparoscopic subtotal hysterectomy."

I turn now to the medical evidence on this issue. The judge did not accept the evidence of Dr E, the consultant psychiatrist, about the adverse psychological effect of the hysterectomy operation on S. The Official Solicitor supported the concerns of Dr E, but the judge held

> "In my judgment, the likely effects of surgery on S are not such as to render it contrary to her interests if, on the other side of the equation, there are substantial benefits which will enhance the quality of her life."

The judge did accept the evidence of Dr K and found her to be an impressive witness. He summarised her evidence:

> "The Mirena coil was the first choice of Dr K. She told me that if she was treating S this is the treatment for which she would opt. It combined contraception with, effectively, likely elimination or (at the least) a substantial reduction in menstrual flow. It was not as invasive as a laparoscopic subtotal hysterectomy. As a general principle of good medical practice Dr K advised the least invasive procedure should be attempted first. She did not, however, rule out laparoscopic subtotal hysterectomy if the Mirena coil was not effective."

Professor T`s evidence was summarised by the judge:

> Professor T accepted the general principle that it was good medical practice to opt first for the least invasive procedure on the basis that a more invasive procedure could be undertaken subsequently if the first was not effective. He also accepted that hysterectomy was not justified as a primary contraceptive procedure in the absence of gynaecological pathology. At the same time, however, he said it was acknowledged by gynaecologists that if a mentally handicapped woman is to be sterilised, hysterectomy may be indicated if she is unable to cope with menstrual hygeine.
>
> Professor T regarded the case as 'finely balanced'. In his opinion the menstrual problem was more important than the contraceptive. Furthermore, in Prof T`s opinion S`s reaction to hospitals was important.
>
> S`s quality of life was being affected by her heavy periods. Therapeutic surgery was justified, although it would be reasonable to try something non-surgical first. It was a 'fine line', although it was logical to try the simpler thing first."

In the light of the opinions of Dr K and Professor T, Miss Newton for Mrs L, invited the judge, if he were against the claimant on the question of

immediate surgery, to adjourn the originating summons in order to have the Mirena coil fitted first and, if it proved ineffective, then to move to the laparoscopic subtotal hysterectomy. The judge decided

> "The invitation to adjourn is tempting if for no other reason because medical science in this field is moving so fast that some additional or alternative procedure to relieve S`s symptoms may become available shortly. But I have come to the clear view that this would not be the right course.
> I go back to the *Bolam* test. Whilst the preferred option for Dr K is the Mirena followed, if necessary, by laparoscopic subtotal hysterectomy, I did not understand either Dr K or Professor T to say that to move immediately to surgery was outside the *Bolam* test: in other words that in performing a laparoscopic subtotal hysterectomy operation a doctor would not be operating in accordance with a practice accepted at the time by a responsible body of medical opinion skilled in the particular form of treatment in question.
>
> I also remind myself that it is for the court to decide what is in the best interests of S. The medical advice the court receives is, of course, of the greatest importance-but it is that, namely advice. Plainly I could not declare lawful a course of action which ran counter to established medical ethics; but in my judgment the court is entitled to declare lawful a particular course of treatment if that treatment itself is proper and in the interests of the patient, even if it is not the doctor`s first choice."

Wall J decided that S required treatment for her periods that would result in their total cessation and that the risk of pregnancy should be wholly removed. He set out the disadvantages to a woman in the position of S of the Mirena coil, the insertion of which would require S to undergo a series of general anaesthetics throughout her child-bearing life. She would not have the comfort of her mother to prepare her or stay with her in hospital. He asked rhetorically:

> "Is it appropriate to expose S to a form of treatment which requires a series of general anaesthetics when the alternative is one operation for which her mother and family are available and which requires only a short stay in hospital?"

He took the view that the facts of ***re ZM and OS (Sterilisation: Patient's Best Interests)*** [2000] 1 FLR 523, bore a striking resemblance to the instant case and followed the decision of Bennett J. He held that the more invasive treatment was the preferred option but that the alternative Mirena coil was lawful although it did not fully meet S`s needs. He left it to Mrs L to discuss with the doctors which of the two methods should be adopted. He made the declarations sought by Mrs L, and gave leave to appeal. We heard submissions on the appeal and reserved our decision.

Mr Munby raised two main grounds of appeal. His first ground was that the decision of the judge was contrary to the expert medical evidence and did not have sufficient regard to the principle of *primum non nocere.* The second main ground asserted that the judge erred in law in his application of ***re F (Mental Patient: Sterilisation)*** [1990] 2 AC1 and in his approach to the ***Bolam*** test.

The first ground requires this Court to look at the weight given by the judge to the evidence. This is an exercise not lightly undertaken by an appellate court. I agree, however, with Mr Munby that it is necessary to do so in this appeal. The judge had clear advice, in particular from Dr K, an acknowledged expert in her field, as to the better course to follow. He did not accept that advice and it is necessary for this Court to look at the strength of that evidence, always bearing in mind the advantage uniquely given to the trial judge of seeing and hearing the witnesses.

There was in fact no medical evidence that S was suffering from abnormal menstrual bleeding. The judge asked Dr K whether a partial hysterectomy was outside the proper boundaries. She replied

> "Outside all bounds. It`s done for heavy periods. This is what this court is about isn`t it? This is a normal woman and we would not dream of doing it for a normal woman just because of socially unacceptable periods."

It is clear that Dr K was addressing the severity of the menstrual flow during the menstrual periods suffered by S. She used the word `normal` in the physical sense and did not relate it to the degree of cognitive ability of the patient. It appears that, most unusually, this experienced judge had misunderstood or misrecollected the answer Dr K gave to his question since in his judgment he said:

> "Dr K, who was an impressive witness, told me that, in her opinion, S`s periods, whilst heavy, were not outside normal limits, and that with a woman of normal intelligence no doctor would contemplate a hysterectomy as a means of treating the condition. I accept that evidence without hesitation. The crucial point, of course, is that S is not a woman of normal intelligence."

The judge`s failure to appreciate the point of that piece of evidence led him to give significantly less weight to the evidence of Dr K than it deserved.

The judge also failed to take sufficiently into account, in my view, the present state of medical research in this field. He referred to it briefly in deciding not to grant an adjournment. He did not, however, refer to this evidence elsewhere and thus failed to consider the information given by Dr K about the considerable strides being made in the field of contraception and therapeutic treatment. According to her, further options were shortly to be available, among which would be those suitable for S. She said

> "What I am looking forward to for S is that things will get better in the future, there are new things coming through, and I think in another five years it might be quite clearly better to give her something that will get rid of periods altogether, but I think you are better waiting."

In answer to the judge`s question whether her advice would be to go for the Mirena, she said:

> "A. In the short term and review as newer methods come along.
> Q. And review after a period of time, because you think procedures may improve, there may be a new technique and so on?
> A. I`m absolutely sure, they are improving all the while."

The judge did not refer, in his judgment, to these crucial answers. Once the judge accepted the evidence of Dr K, he did not then explain why he formed the clear view, that to try out the less intrusive method and wait to see the outcome of medical advances would clearly not be the right course. The clear advice of Dr K was that inserting a Mirena coil was the best answer they had available at the moment for S`s problems. She was wholly opposed to the more invasive surgery for the problems experienced by S, until, at least, the Mirena coil had been attempted and failed. There was a

reasonable chance that S would not be exposed to successive treatments during her child-bearing period. This evidence was highly relevant to the choice of procedures available for S and the option of a reasonable two step approach.

The evidence of Professor T recognised the current difficulties experienced by S and that it might be necessary to have the operation. He supported the evidence of Dr K as to the medical advances being made. He said several times that it would be appropriate to use the simpler, non-surgical method first before going on to a more major procedure. It was reasonable to try the simple measure first and if it did not work go on to surgery. His evidence supported the conclusions of Dr K.

Although the judge did not accept the evidence of Dr E on the psychological impact of an operation on S nor on the risk of pregnancy, there was another part of Dr E`s evidence that was not in dispute and to which the judge did not refer. Dr E was asked about the impact upon S`s life of her monthly periods. He said:

> "Well, the first is that her emotions change, and she, as mother says, becomes "nasty" to quote her, irritable and impatient. But she`s never been off her food or eaten excessively or had disturbances of sleep such as insomnia, and secondly, she`s never had clinical depression or been violent."

He was then asked if there was a risk that the continuance of S`s periods for another twenty years would have a damaging impact on her psychologically. His answer was:

> "No, if the periods were to continue as they have done for 14 years, I do not think that there would be a significant change in her mental state for the worse."

This was the only psychiatric evidence and was not challenged. It also supported the evidence of Dr K.

In ***re Z,*** (above) there was disagreement between the four medical experts called to give evidence. They gave conflicting opinions to Bennett J who relied upon a passage of Lord Goff of Chieveley in ***re F*** *(above)* at page 80, that experts were to be listened to with respect but their opinions must be weighed and judged by the court. Z was 19 years old with Down`s Syndrome. She had menstrual periods that were heavy, painful and irregular. Bennett J decided that the Mirena coil was not adequate for the need of Z to bring her periods to an end and that it was in the best interests of Z to undergo a laparoscopic subtotal hysterectomy and he made the declaration. A striking difference between ***re Z*** and the present case is that the medical opinion here was unanimous that the immediate preferred option was to insert the Mirena coil even though it might be necessary to have the more invasive procedure at a later stage. I agree, in principle, that the forensic medical evidence is given to assist the judge who must weigh the value of that evidence and make his own decision. I also agree with Wall J that `best interests` is wider in concept than medical considerations. In ***re A (medical treatment: male sterilisation)*** [2000] 1 FCR 193, at page 200, I said:

> "In my judgment best interests encompasses medical, emotional and all other welfare issues."

It therefore falls to the judge to decide whether to accept or reject the expert medical opinion that an operation is, or is not, in the best interests of a patient. The context in which Lord Goff of Chieveley, in ***re F,*** (above), warned of the need for special care and indicated the desirability of obtaining an independent, objective and authoritative view from the court was that of the protection of mentally incompetent women from over-zealous advocates of sterilisation, (see ***re D*** below). It does not necessarily support the contrary conclusion. It is relevant to remember that

the focus of judicial decisions has been to rein in excessive medical enthusiasm. A judge, of course, has a discretion to go beyond undue medical caution in an appropriate case. In the present case the judge heard evidence from a witness whom he found to be impressive and whose evidence was supported by the other medical evidence. The weight of that unanimous evidence appears to me to be impressive and it supported the less invasive method as the preferred option, at least in the first instance.

Was there any countervailing evidence of equal weight upon which the judge could rely to offset the medical evidence? Mr Harris QC for the mother has set out with care the evidence by and on behalf of the mother that demonstrates the difficulties experienced by S and by those who care so well for her. But the understandable concerns of a caring mother and the problems of dealing with S during her menstrual periods do not, on the facts of this case, tilt the balance towards major irreversible surgery for therapeutic reasons when they are unsupported by any gynaecological, psychological or other medical evidence. The judge appears to have accepted the evidence of the family and friends on these issues in preference to the expert evidence to the contrary in circumstances in which the significance he attached to that family evidence was disproportionate.

The judge is extremely experienced, in particular, in family-based medical matters, and I would be slow to disagree with him. In the present appeal, however, the weight of the evidence presented to him was so strongly one way that it is, unusually, the duty of the Court of Appeal to intervene.

There is a question of proportionality and in my judgment the remedy proposed by the judge is out of proportion at this stage to the problem to be solved. The patient has the right, if she cannot herself choose, not to

have drastic surgery imposed upon her unless or until it has been demonstrated that it is in her best interests. The decision also offends against the doctrine of *primum non nocere.* In my judgment the first ground of appeal raised by the Official Solicitor is made out and the decision of the judge cannot stand.

There were other minor points in the appeal, raised by Mr Munby, with which I do not feel it necessary to deal.

The second ground of appeal is stated in the Notice of Appeal as:

> "The learned judge erred in law and in his application of *re F,* when, wrongly relying on *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582, he
> (a) sought to justify his decision on the basis that neither of the experts had asserted that to move immediately to surgery was outside the *Bolam* test;
> (b) held
> (i) that both the fitting of a Mirena and surgery were in the existing circumstances lawful and, in effect,
> (ii) that it was for S`s mother to decide which procedure should be adopted."

This ground raises a question of law as to the correct approach of the court to the best interests of a patient without the mental capacity to consent to an operation and the relevance of the ***Bolam*** test to that judicial inquiry.

The starting point is the decision of the House of Lords in ***re F*** (above). In that case the need for the best interests test in cases of adult mental incapacity was first recognised and the procedure for a declaration in sterilisation cases put in place. The declaration sought in ***re F*** was that sterilisation was lawful for non-therapeutic reasons. The speeches in ***re F*** reflected the concern of the House of Lords that declarations should not be made as to the lawfulness of invasive treatment of patients who are

incapable of making decisions for themselves unless the treatment proposed passed the test of being treatment which was demonstrably in the best interests of the patient concerned. The decision of Heilbron J in ***re D (Minor)(Wardship:Sterilisation)*** [1976] Fam. 185, referred to in ***re F***, exposed the dangers of leaving such decisions to parents and the medical profession.

Lord Griffiths said at page 70:

> "I cannot agree that it is satisfactory to leave this grave decision with all its social implications in the hands of those having the care of the patient with only the expectation that they will have the wisdom to obtain a declaration of lawfulness before the operation is performed."

Lord Goff of Chieveley said at page 79:

> "…the operation of sterilisation should not be performed on an adult person who lacks the capacity to consent to it without first obtaining the opinion of the court that the operation is, in the circumstances, in the best interests of the person concerned, by seeking a declaration that the operation is lawful…..In my opinion that guidance should be sought in order to obtain an independent, objective and authoritative view on the lawfulness of the procedure in the particular circumstances of the relevant case …."

Lord Brandon of Oakbrook at page 68 considered that doctors should apply the ***Bolam*** test to their decision whether an operation was in the best interests of a patient. Lord Griffiths explained the relevance of the *Bolam* test at page 69:

> "Stated in legal terms the doctor who undertakes responsibility for the treatment of a mental patient who is incapable of giving consent to treatment must give the treatment that he considers to be in the best interests of his patient, and the standard of care required of the doctor will be that laid down in *Bolam v Friern Hospital Management Committee [*1957] 1 WLR 582."

In the case of an operation to sterilise, for other than therapeutic reasons, the decision to operate, since ***re F***, is generally one for the High Court. Since ***re F*** there has been a number of decisions in the High Court where an operation, which would have the effect of sterilisation, has been proposed to be performed upon a mentally incompetent female adult for therapeutic reasons, in connection with the menstrual cycle. ***Re GF (Medical Treatment)*** [1992] 1 FLR 293, was such a case where the application to sterilise a woman of 29 with a mental age of 5 was based on

excessively heavy menstrual bleeding and the unanimous conclusion of the general practitioner and two consultant gynaecologists was that the only practicable method of treating her condition was by performing a hysterectomy. There was, in the circumstances of that case, no less intrusive means of treating the condition. Sir Stephen Brown P made the declaration of lawfulness and indicated situations in which it would not be necessary to seek the approval of the High Court. He said at page 294:

> "In a case where the operation is necessary in order to treat the condition in question, it may be lawfully carried out even though it may have the incidental effect of sterilisation………I take the view that no application for leave to carry out such an operation need be made in cases where two medical practitioners are satisfied that the operation is (1) necessary for therapeutic purposes, (2) in the best interests of the patient, and (3) that there is no practicable, less intrusive means of treating the condition."

There are now two lines of cases, relating to those unable through mental disability to make their own decisions, where declarations have been made by the High Court, the first for non-therapeutic reasons and the second for treatment of the patient. In each type of case the doctor, it seems to me, has two duties. I said in ***re A*** (above), at page 200:

> "Another question which arises from the decision in *re F* is the relationship of best interests to the *Bolam* test. Doctors charged with the decisions about the future treatment of patients and whether such treatment would, in the cases of those lacking capacity to make their own decisions, be in their best interests, have to act at all times in accordance with a responsible and competent body of relevant professional opinion. That is the professional standard set for those who make such decisions. The doctor, acting to that required standard, has, in my view, a second duty, that is to say, he must act in the best interests of a mentally incapacitated patient. I do not consider that the two duties have been conflated into one requirement. To that extent I disagree with the passage in the Law Commission`s Report on Mental Incapacity (Law Com No 231) (1995) p43, para 3.26 and I prefer the alternative suggestion in footnote 40."

I would suggest that the starting point of any medical decision would be the principles enunciated in the ***Bolam*** test and that a doctor ought not to make any decision about a patient that does not fall within the broad spectrum of the ***Bolam*** test. The duty to act in accordance with responsible and competent professional opinion may give the doctor more than one option since there may well be more than one acceptable medical opinion. When the doctor moves on to consider the best interests of the patient he/she has to choose the best option, often from a range of options. As Mr

Munby has pointed out, the best interests test ought, logically, to give only one answer.

In these difficult cases where the medical profession seeks a declaration as to lawfulness of the proposed treatment, the judge, not the doctor, has the duty to decide whether such treatment *is* in the best interests of the patient. The judicial decision ought to provide the best answer not a range of alternative answers. There may, of course, be situations where the answer may not be obvious and alternatives may have to be tried. It is still at any one point the best option of that moment which should be chosen.

I recognise that there is distinguished judicial dicta to the contrary in the speech of Lord Browne-Wilkinson in ***Airedale NHS Trust v Bland*** [1993] AC 789 at page 884. The passage in his speech was not however followed by the other members of the House. Hale J in ***Re S (Hospital Patient: Court`s jurisdiction)*** [1995] Fam 26 at page 32 followed the same approach. She said that, in accordance with the *Bolam* test, it followed that a number of different courses may be lawful in any particular case. That may be so, but I do not read read ***re F*** (above), upon which she relied, as relieving the judge who is deciding the best interests of the patient from making a choice between the available options. I respectfully disagree with Lord Browne-Wilkinson and Hale J. I have had the opportunity to read Thorpe LJ`s judgment in draft and I agree with his analysis. As I have set out earlier in this judgment, the principle of best interests as applied by the court extends beyond the considerations set out in ***Bolam*** (above). The judicial decision will incorporate broader ethical, social, moral and welfare considerations.

In my judgment, the judge misapplied the Bolam test when he said:

> "I did not understand either Dr K or Prof T to say that to move immediately to surgery was outside the *Bolam* test: in other words that in performing a laparoscopic subtotal hysterectomy operation a doctor would not be operating in accordance with a practice accepted at the time by a responsible body of medical opinion skilled in the particular form of treatment in question."

The question, however, for the judge, was not was the proposed treatment within the range of acceptable opinion among competent and responsible practitioners, but was it in the best interests of S? The *Bolam* test was, in my view, irrelevant to the judicial decision, once the judge was satisfied that the range of options was within the range of acceptable opinion among competent and responsible practitioners. If it was not, I would hope a surgeon would not operate, even if a declaration *was* given by the court.

In my judgment Wall J was in error in his application of the *Bolam* test to his decision-making process and also in offering the mother the alternatives of the hysterectomy or the insertion of the Mirena coil. He had to declare the lawfulness of the surgical intervention in the context of such an operation being in his judgment in the best interests of the patient. To offer in his judgment the alternatives was not to decide which treatment was the better for S. If he had opted for the advice given by Dr K, it would, in my view have been within the best interests test to indicate that the less invasive procedure should be adopted first and if it failed it would be appropriate to return to the court to seek at that stage a declaration in respect of the proposed surgery.

I would just add that all three requirements set out by Sir Stephen Brown P in ***re GF*** *(above)* are necessary. The criteria ought to be cautiously interpreted and applied. Rightly, in my view, in the present case, it was considered appropriate to make the application for a declaration.

I have considerable sympathy for the mother in this case. She has the responsibility for her daughter and she is doing her best to make the best provision for S`s future having regard to the fact that she will not be able to look after her for much longer. The decision of this court will be disappointing for her but, since I have no doubt that the surgery is premature, I would allow the appeal and set aside the declarations and invite the medical advisers to insert the Mirena coil as has been recommended.

1. **LORD JUSTICE THORPE:** I have had the advantage of reading in draft the judgment of my lady, the President, and am in complete agreement with all that she has said.

2. However I do wish to express a clear view on the point of law raised by Mr Munby's second ground of appeal in the following terms:

> "The learned judge erred in law and in his application of In Re F (Mental Patient: Sterilisation) [1990] 2 AC 1 when, wrongly relying on Bolam v Friern Hospital Management Committee [1957] 1 WLR 582, he
> (a) sought to justify his decision on the basis that neither of the experts had asserted that to move immediately to surgery was outside the Bolam test:
> (b) held
> (i) that both the fitting of a Mirena and surgery were in the existing circumstances lawful and in effect
> (ii) that is was for S's mother to decide which procedure should be adopted."

3. The Bolam test was of course developed in order to enable courts to determine the boundaries of medical responsibility for treatment that has gone wrong, and usually disastrously wrong. So at first blush it would seem an unlikely import in determining the best interests of an adult too disabled to decide for him or herself. True the decision relates to whether or not the adult should receive medical treatment but that is not treatment already delivered but treatment prospectively available and the medical opinion under judicial review is likely to be

forensic rather than from a doctor as part of a treatment package. That said there can be no doubt that the speeches in Re F determined that the Bolam test is relevant to the judgment of the adult patient's best interests when dispute arises as to the advisability of medical treatment. But subsequently there has been some divergence of judicial opinion as to the extent of the contribution that the Bolam test makes to the determination of best interests.

4. Of course the issue that was decided in Re F was essentially the issue of jurisdiction rather than a review of best interests on the merits. But as I said recently in the case of Re A (Medical Treatment: Male Sterilisation) [2000] 1 FCR 193 the evaluation of best interests is akin to a welfare appraisal. For as Lord Goff had said in Re F at 83:

> ".... I can see little, if any, practical difference between seeking the court's approval under the parens patriae jurisdiction and seeking a declaration as to the lawfulness of the operation."

5. Subsequently the President, Sir Stephen Brown, in Re G (Adult Patient: Publicity) [1995] 2 FLR 528 at 530 said:

> "The jurisdiction is not strictly the exercise of a parens patriae jurisdiction but is similar to it and the speech of Lord Brandon in the case of Re F does in fact provide the foundation for that approach. Re F was a case of sterilisation not a case of a persistent vegetative state patient and to that extent it is in a different sphere of gravity. Nevertheless it is a case where a declaration in relation to the provision of certain medical treatment of an important nature was under consideration and it is clear that the result of the decision in Re F was that a case of this nature did give to the court a jurisdiction which has been referred to as patrimonial and not strictly parens patriae but similar in all practical respects to it."

6. It seems to me to be a distinction without a difference, by which I mean that the parens patriae jurisdiction is only the term of art for the wardship jurisdiction which is alternatively described as the inherent jurisdiction. That which is patrimonial is that which is inherited from the ancestral past. It therefore follows that whilst the decision in Re F signposted the inadvertent loss of the parens patriae jurisdiction in

relation to incompetent adults, the alternative jurisdiction which it established, the declaratory decree, was to be exercised upon the same basis, namely that relief would be granted if the welfare of the patient required it and equally refused if the welfare of the patient did not.

7. I would therefore accept Mr Munby's submission that in determining the welfare of the patient the Bolam test is applied only at the outset to ensure that the treatment proposed is recognised as proper by a responsible body of medical opinion skilled in delivering that particular treatment. That may be a necessary check in an exercise where it would be impossible to be over scrupulous. But I find it hard to imagine in practice a disputed trial before a judge of the Division in which a responsible party proposed for an incompetent patient a treatment that did not satisfy the Bolam test. In practice the dispute will generally require the court to choose between two or more possible treatments both or all of which comfortably pass the Bolam test. As most of us know from experience a patient contemplating treatment for a physical condition or illness is often offered a range of alternatives with counter-balancing advantages and disadvantages. One of the most important services provided by a consultant is to explain the available alternatives to the patient, particularly concentrating on those features of advantage and disadvantage most relevant to his needs and circumstances. In a developing relationship of confidence the consultant then guides the patient to make the choice that best suits his circumstances and personality. It is precisely because the patient is prevented by disability from that exchange that the judge must in certain circumstances either exercise the choice between alternative available treatments or perhaps refuse any form of treatment. In deciding what is best for the disabled patient the judge

must have regard to the patient's welfare as the paramount consideration. That embraces issues far wider than the medical. Indeed it would be undesirable and probably impossible to set bounds to what is relevant to a welfare determination. In my opinion Bolam has no contribution to make to this second and determinative stage of the judicial decision.

8. Mr Munby has quite rightly drawn attention to contrary dicta to be found in the speech of Lord Browne-Wilkinson in Airedale NHS Trust v Bland [1993] AC 789 at 884 and the judgment of Hale J in Re S (Hospital Patient: Court's Jurisdiction) [1995] Fam 26 at 32. However I accept his submission that the passage in the speech of Lord Browne-Wilkinson did not have general support and that such an approach has little practical attraction. Disputes as to the treatment of competent adults are only referred to the court in extreme cases that often generate much emotional distress for the family concerned. One of the important functions of the judge is to instil into the situation certainty and finality which the family may well have difficulty in adjusting to but which they can at least accept as the judgment of the appointed impartial authority. Equally it is the function of the judge to protect the medical professionals from the threat of criminal or civil proceedings as a consequence of the exercise of their best endeavours. It is simply not helpful for either the family or the doctors to be presented with a declaration that two or more possible treatments are lawful on the grounds that both or all satisfied the Bolam test. It is the judge's function to declare that treatment which is in the best interests of the patient and, as Mr Munby submits, only one treatment can be best.

9. This is not the approach adopted by Wall J. At page 468 in the FLR report he said:

> "As the case was the first of its kind involving the sterilisation of an adult as opposed to a minor, a substantial portion of the speeches in the House of Lords deal with the court's jurisdiction and the appropriate procedures to be followed. For present purposes, the principles to be derived from Re F and the subsequent cases can, I think, be summarised as follows:
>
> .... (5) The standard which the court should apply in deciding whether a proposed operation is or is not in the best interests of the patient is that laid down in Bolam v Friern Hospital Management Committee [1957] 1 WLR 582, namely that in performing the operation the doctor is operating in accordance with the practice accepted at the time by a responsible body of medical opinion skilled in the particular form of treatment in question;"

10. Then later at page 477 in explaining his conclusion he said:

> "I go back to the Bolam test. Whilst the preferred option for Dr K is the Mirena followed, if necessary, by laparoscopic sub-total hysterectomy, I did not understand either Dr K or Professor T to say that to move immediately to surgery was outside the Bolam test: in other words that in performing a laparoscopic sub-total hysterectomy operation the doctor would not be operating in accordance with the practice accepted at the time by a responsible body of medical opinion skilled in the particular form of treatment in question."

11. In so defining and applying the test to determine best interests I am of the opinion that the judge misdirected himself in law. Of course I am in no doubt that Mr Munby succeeds on his first ground, namely that the judge's conclusion was not open to him on the evidence. However I think it is important to state a clear view on the point of law raised by Mr Munby's second ground of appeal in view of the divergence demonstrated by this case, the case of Re S, to which I have already referred, and the unreported case of Re N-K (No 1233 of 1990) which Mr Munby was able to draw from his unrivalled reservoir of experience in this field.

12. During the course of his submissions Mr Munby expressed the Official Solicitor's reservations concerning the test set by the

President in the case of Re GF (Medical Treatment) [1992] 1 FLR 293 when he said:

> "I take the view that no application for leave to carry out [a sterilisation] operation need be made in cases where two medical practitioners are satisfied that the operation is: (1) necessary for therapeutic purposes, (2) in the best interests of the patient, and (3) that there is no practicable, less intrusive means of treating the condition."

13. First let it be said that the Official solicitor did not then seemingly dispute that formulation and nine years later Mr Munby did not suggest that the Official Solicitor had any evidence that the President's definition had produced difficulties or miscarriages of justice. The purpose of the President's ruling was to set a boundary to enable professionals to determine whether or not it was their responsibility to refer an issue concerning the treatment of an adult lacking capacity to the court for a ruling. In other words it seeks to define what is and what is not the business of the courts. Although this appeal does not raise that question directly we have heard argument on the point and I would wish to state this opinion. The President's test was necessarily expressed in broad terms. Anything so stated offers a margin to whoever interprets and applies it. In my opinion any interpretation and application should incline towards the strict and avoid the liberal. The courts are not overburdened with applications in this field. Indeed they are rare. In view of the importance of the subject, if a particular case lies anywhere near the boundary line it should be referred to the court by way of application for a declaration of lawfulness.

LORD JUSTICE MANCE: I agree with both of the judgments.

Order: It is Ordered

(1) that this appeal be allowed

(2) that paragraphs 2 3 and 4 of the Order of the Honourable Mr Justice Wall dated 24th January 2000 be set aside

(3) that in lieu thereof there be a declaration that despite her inability to consent to it the fitting of SL under general anaesthetic with the progestogen bearing intra uterine system known as Mirena is in the existing circumstances in her best interests and can lawfully be performed

(4) that in the event of a material change in the existing circumstances any party shall have liberty to apply for such further or other declaration or order as may be just

(5) that there be no order as to the costs of the appeal save that there be a legal aid detailed assessment of the respondent's costs.