



Neutral Citation Number: [2020] EWCOP 8

Case No: 13569492

IN THE COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/02/2020

Before :

THE HONOURABLE MR JUSTICE HAYDEN
VICE PRESIDENT OF THE COURT OF PROTECTION

Between :

**CARDIFF & VALE UNIVERSITY HEALTH
BOARD**

Applicant

- and -

P

Respondent

(By his litigation friend, CL)

Ms Claire Watson (instructed by Mr Hegarty at Legal and Risk, NHS Wales Shared Services Partnership.) for the **Applicant**

Hearing dates: 20 & 21 February 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE HAYDEN

This judgment was delivered in public. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Justice Hayden :

1. Yesterday, 20th February 2020, the Court of Protection (sitting in London) was contacted by court staff at the High Court in Cardiff because they were unable to find a judge who could hear an application pursued by the Cardiff and Vale University Local Health Board. Following sight of the papers, it struck me that the case had to be heard very quickly. In the end, we proceeded by way of a telephone hearing of the application, with the judge in court and counsel and the mother of the protected person, P, on the end of the telephone. There had not been sufficient notice of the application to enable the father (F) to attend.
2. P is a young man aged 17. He has a longstanding disability and he is described as severely autistic. He is unable to communicate either verbally or, for the most part, in any consistently effective way at all. He lives with his parents but he receives some respite care, particularly at the weekend, at a specialist establishment for people with learning difficulties.
3. In January 2019, P was given a CT scan under general anaesthetic in order that his dental state could be properly assessed. A plan had been made for him to walk into the clinical area and, if necessary, for restraint to be used. He walked part of the way with F, who is a mental health nurse, but then refused to go into the clinical room. The Strategies and Intervention Team, which manages people facing similar challenges to P and who sometimes exhibit their distress in aggressive behaviour, briefly restrained him on a bed for approximately two minutes in order that venous access could be gained and anaesthetic agents safely administered. F was able to calm P when he was restrained, and on waking P was relaxed and did not require any further restraint.
4. The examination that was undertaken revealed some tooth decay, but it also revealed that P has impacted wisdom teeth. The fact that they are impacted, as I understand it, does not mean that they are necessarily painful. They may remain impacted for many years and cause no pain, but sometimes they do, and quite commonly this arises in late teens and early twenties.
5. From around October 2019, and with increasing frequency, P has been observed by his parents violently to bang his head, sometimes banging his head against walls. The parents, of course, have the opportunity to see their son more than anybody else. Whilst he may not be able to communicate directly, by a whole raft of cues, many of which they will not be aware of, they have become intuitive to his needs. They believed that his behaviour was in response to dental pain.
6. It is clear that P lacks the capacity to consent to treatment or to understand the various issues involved. This is an obvious and inevitable consequence of his severe autism and significant learning disabilities.
7. It might seem, from the above account, that some dental assessment was required quickly and now as long ago as November or early December 2019. Plainly, it was. But the application was only made by the Health Board on 20th February 2020. The proposed inspection and/or treatment is not to take place until early March. For anybody who has had toothache, even delay between now and then looks like an eternity. But this young man, it seems, has been suffering, and significantly so, for nearly five months. This is little short of an outrage. It is indefensible.

8. What is most concerning is that the delay has occurred despite the fact that P is supported by parents who are vigilant to articulate his needs. F, I repeat, is a mental health nurse, and as such is particularly well-placed to act as an advocate on his son's behalf. P is also surrounded by professionals, who I do not for one moment doubt are committed to his treatment and care. Nonetheless, nothing has happened.
9. This morning I have been provided with a statement from the Lead Dentist. In consequence of my observations yesterday at the telephone hearing, a chronology has been prepared of the various decision-making stages in this case, and some attempt made to understand the scope and ambit of the delay that has occurred in securing effective intervention.
10. An additional complication arose in November when P was taken to the local A&E by his parents with an obvious bruise to his forehead. They believed that his behaviour was so markedly changed that they feared he had some sort of concussion and may have fractured his skull. It is, to my mind, self-evident that there was an urgent medical emergency that should have been investigated within hours or days, but in fact there has, as yet, been no CT scan at all. Because there were potentially two pathologies to consider, a variety of disciplines became involved. In December, a multi-disciplinary meeting was convened. The parents were becoming increasingly concerned, however, and had the sense that they were not being listened to sufficiently.
11. It is a lamentable situation. I am struck that this is the second time in the last few months when I have heard a case which reveals that a vulnerable person has fallen through the net the system tries to provide. Here, P has been permitted to suffer avoidably for many months. His needs, it requires to be said, have simply not been met. Recently, in **Sherwood Forest Hospitals NHS Foundation Trust and Another v H [2020] EWCOP 5**, I expressed my concern about the appalling consequences of delay in that case. This case is not of that magnitude, but it is right to say that it could easily have been if the parents' concerns relating to a skull fracture had been correct. Of course, we still do not know that they were incorrect, merely that there have been no urgent and obvious signs noted in the months that have passed. The philosophy of the Mental Capacity Act 2005 is to enable those who are vulnerable in consequence of incapacity to have equality of opportunity with their capacitous co-evals. Here, P's incapacity, his inability to communicate his distress, led to a failure to provide him with appropriate medical treatment.
12. Ms Watson, counsel on behalf of the Health Board, today makes it absolutely clear that, since the case was heard yesterday afternoon, a great deal of work has been done and a great deal of thought given to the circumstances that P now finds himself in. She tells me candidly that when it became necessary to analyse the chronology of the proceedings, the full force of the delay and its impact on P became inescapably obvious to the Cardiff and Vale University Local Health Board. They have made, properly in my view, no attempt at all to evade their responsibility. They offer P and his parents a profound apology, the sincerity of which I have absolutely no cause to question. Today, the Clinical Director of the Dental Hospital has attended at court. He inevitably knew nothing of the case until yesterday. He, too, through counsel, makes no effort to defend the delay. It is indefensible.
13. When Ms Watson drills down into the history of the case, in an attempt to understand why this has occurred, she comes to the very clear conclusion that it has arisen in

consequence of “insufficient collaborative cooperation”, to use her phrase, between the various disciplines required to identify P’s best medical interests. In other words, a failure to share information and a failure to work together effectively. The failings here do not arise as a result of lack of resources. Neither are they the result of pressure or volume of responsibility on any individual. It is, sadly, yet again, a situation in which there has been a fundamental failure to communicate effectively by those responsible for P’s care. This message has now been the conclusion of so many reviews, including serious case reviews, that it has become almost trite. There is no point identifying lessons to be learned if they are not, in fact, learned. Sharing information and effective communication is intrinsic to good medical practice. This is true generally but it requires heightened emphasis, if that is possible, in the context of the incapacitous, whose voice can easily and inadvertently go unheard.

14. None of this should distract from the continuing reality that there is a young 17-year-old boy, highly vulnerable, who has manifestly been in pain for months. It is proposed, because of his behaviours, that he will be given a CT scan to see if there is any underlying neurological cause. I have asked the Health Board, today, if they will consider, in their planning, whether an MRI scan might also be necessary, given that one was undertaken in 2019. I do not mean to convey, by this request, that I think an MRI scan is necessary. I have no idea. But I do want it to be considered in order that I am not met with a further application in the near future that such a scan be undertaken with the inevitable request for a general anaesthetic. Explicitly, I wish to minimise the frequency of any general anaesthetic.
15. Because of the various disciplines involved, and the circumstances in which these procedures will have to be undertaken, it will not now be practically possible to bring the process forward. And so P has a further period of pain to endure. Yesterday, I caused efforts to be made to see if it was at all possible to shorten that period. I am satisfied that the Health Board have done what they can to achieve that. I am equally satisfied that it is not going to be possible.
16. It is clear that the pain relief presently administered, which is limited to paracetamol and ibuprofen, is having some effect. But this morning P’s parents have told me that the deterioration in his behaviour has been so significant that they have had to avail themselves of an extra day of respite care. This has consequences, as they have appreciated. It has altered, as they put it, P’s “profile”. Their ambition for him is that, at 18 years of age, he might be able to obtain a place in a residential unit, which would provide some important opportunities for him. The relative containability of his behaviour throughout adolescence made that a reasonable prospect. But his parents are now very anxious that P’s present behaviour might create an impression of a more challenging youngster than they believe him to be and cause such units greater anxiety when considering any application on his behalf.
17. It is for that reason that I deliver this ex tempore judgment, a copy of which will be transcribed for P’s parents, so that those who are considering options for P in the future will know that his recent behaviour appears likely to have been triggered by a neglectful failure to address a dental/medical problem. It should not be regarded as a facet of his overall condition. If what I have said here is weakened in consequence of any CT scans or investigations, then it can, of course, be revisited. But the above is the position, as it appears to his parents today and which I consider to be a realistic evaluation.

18. I have made a number of declarations and orders which should be appended to this judgment.