CONSENT TO MEDICAL TREATMENT AND SURGICAL PROCEDURES

I am forced to begin with an apology. You see, I realize that I am expected to present a paper replete with profound legal concepts; bursting at the seams with complexity and dripping multi-syllabic wisdom at the turn of every page.

Unfortunately, such an effort is quite beyond me and, for this, as the Platters would say, "I Apologize."

What I can and will do is to give you my version of the answers to the medico-legal puzzle posed by today's topic in terms that I can understand - simple terms - with only the briefest outline of the legalistic reasoning behind those answers, and I will try to keep the quotes from decided cases as short as possible.

Okay, here we go.

Consent is the topic and I will deal with it by way of answering three questions, namely -

(1) Is consent needed for medical treatment and why;

(2) Can life saving treatment be administered against a patient's will; and

(3) How do you treat a patient who cannot consent and who has no next of kin who can.

Once a patient is of full age and not declared a lunatic, medical treatment without consent is impossible. Under our

criminal Statutes, any non-consensual contact with another individual is a trespass to the person or and can, in some instances, amount to an assault. Trespass to the person is actionable in the Civil Courts and so, in an extreme case, if you told a "patient" that you intended to administer medical treatment to which he objected, that patient could obtain an injunction preventing the treatment.

The matter is compounded when the basis for the refusal to be treated is a religious one. Then, a zealous Doctor, insistent on doing what he or she "knows" is best for the patient, will have set sail in dangerous seas, listing heavily to port, taking in gallons of deadly fluid called breach of Constitutional Rights.

But the intrepid practitioner has a way out, if the situation should become critical. Just as consent is an ironclad defence to a charge of, or suit for, assault (as is, for example, self defence and, in limited circumstances, action taken for the protection of property) so is suicide still a crime on our books, as difficult as it might be to arrest the offender.

More importantly, attempted suicide is very much a crime and every citizen, even a Doctor, has the right to prevent the commission of a crime if he can. Therefore, if you can document, scientifically or otherwise, that your intervention prevented a self inflicted death, you may proceed.

But, what is a self inflicted death? Proceed with caution and only in the clearest circumstances. I would suggest that death from any disease, including psychological disorder and the anorexia related afflictions, cannot be self inflicted.

If, however, for example, the police should rush in with a prisoner, cut down, while still alive, after an attempt to hang himself in his cell (the recommended course, I assure you, should you find yourself in one of those cells for an extended stay) and he croaks out a tremulous suggestion that you leave him alone to die in peace, if not quiet, you may ignore him.

Your problems may not end, however, with your blind obedience to a request, from a patient whose religion has convinced him that he is nearer his God than thee, not to inflict your expertise on his person. Remember that patient is bound to have relatives whose faith may not be so strong and who might be heard, subsequently (whilst having to settle your bill is a favoured moment), to mutter churlishly that you failed to exert yourself sufficiently, or at all, to postpone their loved one's flight to the hereafter.

Combine that festering discontent with an enthusiastic and predatory member of my own esteemed profession, armed with a signed agreement for a contingency fee, and you have a recipe for many sleepless nights, accompanied by endless migraine.

It is just as important to obtain a signed "Refusal of Treatment" form from that patient as it is to have a patient, anxious to succumb to your tender care, sign a consent.

Now for the difficult situation that many Doctors have expressed a view needs to be settled. A specific issue has been put before me, that is to say, "who can give consent in respect of the treatment required for the 'foetus in utero' or the new born infant, born of a minor?"

However, the issue is really a general one, applicable to all instances in which the patient cannot consent (e.g. patient is of unsound mind but not declared a lunatic and therefore no guardian or committee has been appointed; also, where the patient is in a coma and there is no next of kin).

In all these cases, an application may have to be made to the Court to have the relevant Authority (in the case of a minor, I suggest the Administrator General) appointed as Guardian for the purposes of authorizing medical treatment.

The gross inattention paid to this area of the Law by our local Legislators (you see, patients in a position to "benefit" from such Legislation cannot vote) makes it tiresomely difficult to construct a safe, simple and speedy method to deal with such medical emergencies, as they usually tend to be, in faithful obedience to Murphy's Law. Despite this, I believe it can be done.

To be fair, however, this is not a problem peculiar to Countries with Laws as backward and irrelevant as ours'. Even in the good old Motherland, with its proliferation of Law Reform Statutes and, particularly with the excellent piece of recent Legislation, **the Children Act 1989**, which provides that the equivalent of any of our Parish Councils be authorized to apply to the Court for an Order that a minor be placed in a particular place of medicine for treatment at the Council's discretion, there have been circumstances which still tie their medical and legal fraternity into knots.

Three specific instances fell to be determined by the Court of Appeal of the United Kingdom during 1989 and the 1990s. Mark you, since the invasion of that Court by Lord Denning many years ago, it has more resembled Sherwood Forest than a Hall of Justice and each successive Master of the Rolls, a Robin Hood, more intent on correcting perceived imbalances in the sociological firmament than in applying the Law. This time, the Court was, in each of the three recent instances, led by the same Robin, a Lord Justice with the impressive sounding title of Lord Donaldson of Lymington, Master of the Rolls, although, on each of the three occasions, his two merry men were different.

The first case really involved the issue of press freedom more than anything else, but I mention it to illustrate the way the graph of difficulty and mental torture for the Court began

quietly and progressed almost to the point of frustration and how that unusual progression has assisted us in our local dilemma.

In this case, a child had been removed from her foster parents because of allegations of sexual misconduct, made by the child to a social worker during a routine interview. Because the social worker had promised the child not to tell the foster parents of the allegations, no reason was given for removing the child. A newspaper heard of the story and interviewed the foster parents, who told what they knew. The local authority was warned that the story would be printed and obtained an injunction restraining publication.

In the Court of Appeal, the matter was treated with the usual Judicial restraint to which all common lawyers have become accustomed and almost with dispatch, as if it were a matter of small moment. In fact, the leader of the gang, the redoubtable Lord Donaldson graciously invited one of his merry men, one Butler-Sloss LJ, (who, in order to maintain my pretence at political correctness, in matters of gender, I should point out is a lady) to deliver the leading judgment.

Butler-Sloss LJ cheerfully and smoothly balanced the welfare of the child under their **Child Care Act 1980** (this decision was handed down on July 11, 1989, prior to the passage of the **Children Act**) and the freedom of the press and came down on the side of freedom of the press but not completely, as judges are wont to do when they can find no complex legal principle with

which to confuse the rest of us, and the paper was allowed to publish the story so long as no names or any information capable of being used to identify the parties was printed.

At that time, Lord Donaldson's views on children were expressed thus:-

> "*The family is essentially a private unit and this is particularly the case in relation to the children of the family. The accident that, usually through no fault of their own, outside agencies, whether the courts or local authorities, are called on to intrude into the family unit in the interests of the welfare of the children* ***should never of itself be allowed to deprive the children of the privacy which they should and would have enjoyed, but for that intrusion.***"

The added emphasis is mine.

The second case, which arrived on Lord Donaldson's desk two years' later, involved a very disturbed 15 year old girl confined, by Court Order, to an adolescent psychiatric unit and who, in her lucid moments, refused to be treated with antipsychotic drugs prescribed by the unit. The local authority, who had obtained the confinement and interim care orders in the first place and who were reluctant to authorise the treatment against the minor's will, commenced wardship proceedings and asked the Court to permit the unit to administer the anti-psychotic drugs whether or not the minor consented.

When the matter reached Lord Donaldson on appeal from the lower Court's grant of the application on the basis of a finding that the minor was mentally incapacitated and so incapable of consenting, clearly there was a problem. Everyone agreed that,

when the minor refused treatment, she was lucid and rational.

Lord Donaldson's clerk scrambled about for precedents and the prospects became even more bleak as it was discovered that, as recently as September 1990, Ward J, in a desperate attempt to save the life of a 15 year old boy refusing a blood transfusion on religious grounds, had expressly accepted that the old authorities barred the parents and the Court from interfering where the child had achieved sufficient intelligence and understanding to realize what was up and make up his own mind, but rescued the situation by finding that the boy had not yet achieved the requisite understanding.

Clearly, this family privacy thing was getting out of hand. Confining his merrymen to brief concurring judgments, Lord Donaldson took a firm hold of the wheel himself, banished the previous authorities to the legal limbo of being distinguished, and proclaimed that, in exercising its wardship jurisdiction, the Court had a power, unavailable to the natural parents, to override a minor's refusal of treatment whether the minor was competent or not.

In any event, Lord Donaldson proposed, as a salve to the supporters of precedent, because the minor's mind **fluctuated** (she was not **always** lucid) that would be, in law, a state of mind defined as incompetent and so the lower Court's permission to the unit would be upheld.

One of the bases used by Lord Donaldson for not following the previous decisions was that they involved a situation where the child was not a ward of the Court and so, the inability to interfere was due to the unavailability of the Court's wardship jurisdiction. He propounded:-

> "*The guidance afforded by the speeches in [a previous decision] needs, as always, to be considered in context. [Those] children were not wards of the court and the wardship jurisdiction of the court was not in issue.*"

He also casually threw in another avenue for doctors' protection in the form of a previously undocumented exception to the general Rule, using as authority for it that most trusty and reliable of Judge's safety blankets, the Doctrine of Necessity. Hear this:-

> "*It is trite law that in general a doctor is not entitled to treat a patient without the consent of someone who is authorised to give that consent. If he does so, he will be liable for trespass to the person and may be guilty of a criminal assault. This is subject to the necessary exception that in cases of emergency a doctor may treat a patient notwithstanding the absence of consent, if the patient is unconscious or otherwise incapable of giving or refusing consent and there is no one else sufficiently immediately available with authority to consent on behalf of the patient*"

And that, I suspect he felt sure as he went off to his tea and crumpets, was pretty bloody well that.

Imagine his consternation when, exactly one year later, in June 1992, the following conundrum appeared before him. A 16 year old girl, with the usual unhappy childhood history, suffered

badly from ánorexia nervosa. She refused medical advice to be admitted to hospital expressing a clear desire to remain where she was and cure herself when she felt in the mood.

The local authority applied, under the **Children Act,** for an order that the minor be removed to the hospital and treated, if necessary, against her will. Two apparently insurmountable problems contrived to disturb Lord Donaldson's afternoon tea. Firstly, it is the law in England, as it is here, that a minor who attains the age of 16 can give as effective a consent to medical treatment as any adult. Secondly, hoisted by his own petard, the minor was not a ward of the Court nor were wardship proceedings contemplated.

Worse, there was no time to cogitate as the minor's condition deteriorated so badly prior to the hearing of the Appeal that Lord Donaldson simply made an emergency Order that the child be hospitalised and said he would find a good reason later.

On July 10, when the reasons were handed down, all pretence at judicial restraint and respect for the family had been tossed through the window of exasperation and Lord Donaldson delivered himself, peremptorily, of the following gem:-

> *"Since there seems to be some doubt about the matter, it should be made clear that the High Court's inherent jurisdiction in relation to children - the parens patriae jurisdiction - is equally exercisable whether the child is or is not a ward of court."*

Since the Court's inherent jurisdiction over children is unlimited, the court can, in the child's own best interests, override the wishes of any child even one of sufficient intelligence and understanding to make an informed decision. This is now the Gospel according to Lord Donaldson and applicable as He shall think fit.

On a slightly irrelevant matter, I can't wait until the goodly Saint..., sorry Lord, Donaldson is asked to authorize an abortion against the wishes of a mentally competent 16 year old.

Anyway, therein lies the answer to our own medico-legal dilemma. Since we have no applicable legislation and no real Statute properly providing for anyone but a mother or father to be appointed as a guardian, we will be able, thanks to the intellectual contortions of Lord Donaldson, to rely on either the Doctrine of Necessity or the court's inherent jurisdiction to provide relief.

In situations where the treatment required can be properly termed as "emergency" proceed post haste without consent. However I once again suggest caution as, in my view, all cases that can wait, say, one day, cannot be termed as true emergencies. In such an event, you will have to rely on that most recognizable residue of our colonial experience, the system of the administration of Justice.

Since the only documented case of wardship proceedings in Jamaica of which I am aware occurred in 1871, I had better set out how I think it needs to be done, legally and practically.

On the legal side, an Originating Summons, ex-parte where there is no practical defendant other than the minor (who cannot be made a defendant without leave), must be filed requesting that the Administrator General be made the minor's guardian for the purposes of authorising medical treatment. Upon the filing of the Summons, the Administrator General will automatically be the guardian *ad litem*, that is to say, until the summons is disposed of. At this stage, the Administrator General will be able to give the necessary consents which, hopefully, will subsequently be confirmed by the court.

The summons should state the date of birth of the minor (proof of which will probably be required by the court) and the circumstances, including details of the minor's present whereabouts, should be sworn to in a supporting affidavit.

On the practical side, I think the Medical Association of Jamaica should arrange to confer with the relevant authorities (the Administrator General, the Attorney General - whose office will wish to have an opportunity to disagree with this presentation and who may have to be the guardian in the case of an application on behalf of an adult patient - and the Supreme Court Registrar, for starters) to ensure that everyone is on the

same page from a time before any crisis so that no more than, say 12 hours, need elapse before a legal consent can be obtained.

No doubt your lawyers will also be asked to prepare form documentation well in advance to be kept handy for swift action when the time comes.

Well, that's it, that's all. I hope I haven't left anything out. I have appended a bibliography for the eager beavers among you who may wish to check my sources.

Have fun and good luck.

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The decision of Ward J. in Re E (a minor), referred to at page 7 of this presentation, is unrepreported, but discussed by Lord Donaldson M.R. at [1991] 4 All. E.R. 180a