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This judgment was delivered in public but subject to a reporting restriction order. The judge has given leave for this version of the judgment to be published. Patricia and her family, as well as the treating clinicians, may not be identified by name or location. Their anonymity 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.

IN THE COURT OF PROTECTION
Neutral Citation number: [2023] EWCOP41 No. COP14028041

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 9 May 2023

Before:

MR JUSTICE MOOR

(In Private)

B E T W E E N :

(1) Z NHS Foundation Trust
(2) Y NHS Foundation Trust

Applicants

- and -

(1) Patricia
(2) X NHS Foundation Trust
(3) V NHS Integrated Care Board

Respondents

REPORTING RESTRICTIONS APPLY

MISS S ROPER KC (instructed by Kennedys Law LLP) appeared on behalf of the First Applicant.

MS K GOLLOP KC (instructed by Browne Jacobson LLP) appeared on behalf of the Second Applicant and the Second Respondent.

MS V BUTLER-COLE KC (instructed by Bindmans LLP) appeared on behalf of the First Respondent.

THE THIRD RESPONDENT did not appear and was not represented.

J U D G M E N T

(Via Microsoft Teams)

MR JUSTICE MOOR:

1 It is no secret that I have found the decision that I have had to take today to be extremely difficult. Indeed, I have changed my mind on a couple of occasions as I have been listening to the evidence.

2 I am concerned with Patricia, who was born in 1999 and is, therefore, twenty-three years of age. When she is well, she lives with her parents near B. In 2010, she had a diagnosis of anorexia nervosa which was the restricting type, not the bingeing type. Restricting means what it says. Her calorie intake was severely restricted until she got ill.

3 She has been admitted to numerous eating disorder units. One of the witnesses said that, in the thirteen years since her diagnosis, she had been at home for approximately eight months. I do not know if that is actually correct but, certainly, she has had very long periods indeed in various units. Some of these have been under compulsion under the Mental Health Act. Other admissions have been voluntary. It is also quite clear that she has, on occasions, had nasogastric feeding against her wishes under restraint. She tells me that she has found that incredibly distressing and stressful and I accept that that has been the case. Indeed, the evidence – save for one exception – is that, throughout the thirteen years of her treatment, none of the stays in all these various units have improved her position very much at all. Initially, they were doing no more than stabilising her weight. If she gained any weight, she lost it again as soon as she was discharged. More recently, the evidence is that she was actually reducing weight even whilst on these various units.

4 There was one occasion when she accepted nasogastric feeding on a consensual basis. That was in June 2022. It may have been that she did so because the alternative was compulsion

but I simply do not know. It was, however, a success. I understand that she agreed to it and she became a very different person. It was, of course, only successful because she agreed. It is a huge tragedy that, once that nasogastric feeding by consent stopped, the position deteriorated again significantly until, on 15 November 2022, there was a best interests meeting attended by everyone involved in her case.

5 I am told that the outcome of that meeting was unanimous. It was that it was in her best interests to be discharged from specialist eating disorder services; and to stop treatment on the basis that continuing treatment was more likely to be counterproductive. It was accepted that she would engage with doctors and, in particular, with her GP on her terms only. As I am told that the decision was unanimous, it must have included at least her father. Certainly, there was no suggestion in the meeting or during that process of any compulsory nasogastric feeding via restraint.

6 In an advanced statement at around the same time, she gave her own views. There is, of course, a dispute as to whether she had the capacity to do so, but the statement said that she preferred to be cared for at home; only to go to a hospital as a last resort; to have minimal medication in the least restrictive way; only to have nasogastric feeding if she consented, or if she was unconscious and it was absolutely life-saving. She made it clear that she did not want restraint; she did not want sedative medication other than to sleep; she did not want to be sectioned under the Mental Health Act; and she did not want to go to an eating disorders unit unless it was to save her life and get her back to a regular eating pattern or for respite care.

7 I do accept that there are some inconsistencies in relation to that advanced statement. It is clear in it that she wanted to live and that has, indeed, been the position throughout. It is a positive aspect of this case. But equally, the statement is somewhat inconsistent in the way

that it agrees to some nasogastric feeding, for example, if she is unconscious, by which time it might well be too late, and only if it is absolutely life-saving. Some of the witnesses before me today have suggested that the position has again been reached where nasogastric feeding by restraint would be needed for life-saving reasons.

8 In any event, on 12 December 2023, Z Trust (as I am going to call the First Applicants) made this application. The application is clear. It says that it is not in her best interests to receive life-saving treatment for her eating disorder save in specified circumstances. There was a plan A that everybody endorsed. The plan A was that she would go home and take control of her own destiny. It was thought that, although there might be perhaps only a relatively slim prospect of success, the prospect of success under Plan A was considerably greater than it would be as a result of compulsion. A statement of Dr B, dated 13 December 2022, makes that plain. Patricia would be admitted for life-saving treatments only if she wishes. The risk of dying was very high but it was important to give Patricia her autonomy and there was a small chance that this change of plan would actually improve things. This was the basis on which I heard the case initially earlier this year.

9 I directed a report to be obtained by the Official Solicitor from Professor Paul Robinson and, indeed, he reported to this court on 18 February 2023. He took the view that Patricia had capacity to litigate. That was accepted by all parties and, therefore, the Official Solicitor was discharged. He also repeated Patricia's wishes. He told me that she does not want to be saved forever as she has had enough of all of this. She told him that she did not want treatment forced upon her.

10 Professor Robinson agreed that a plan A discharge was the best option. He said there was no advantage to her remaining under the care of eating disorder clinics against her wishes and that plan C, which was the restraint plan, was "*so harsh that it would be extremely*

unpleasant for her, for her family and for clinical staff and was unlikely to work". The harm from force-feeding was potentially highly significant. It would cause distress, panic, self-harm and perhaps worse.

11 On 24 February 2023, I therefore discharged the Official Solicitor and I listed a hearing to consider whether or not Patricia had not just litigation capacity but also capacity as to her treatment decisions and, if necessary, to decide whether her advanced wishes were taken when she was capacitous or not. I also had to decide on the future, although everybody had assumed that it would be plan A. The hearing, in fact, was adjourned, I believe partially at Patricia's request. It had been listed on 19 April 2023 and it was adjourned to Monday 15 May 2023, originally before a different judge but now to be in front of me.

12 Patricia was, however, readmitted to what I am going to call "Y Trust", the second applicants, on 3 April 2023. She was discharged on 15 April 2023, as she said she would withdraw any compliance if she was not permitted to leave. She was, however, admitted again three days later, on 18 April 2023. On 27 April, I was told that she was in a very serious condition and, indeed, close to death. She was non-compliant and Z Trust took the view that she should be fed by nasogastric tube under restraint but it was accepted that it was a finely balanced decision.

13 On 1 May 2023, Y Trust made the application that I am currently dealing with. The Trust indicated that it was neutral as to the position at that stage. I was asked to decide whether it was in her best interests to receive feeding through a nasogastric tube under restraint on the basis that Patricia had indicated that she would resist, that it was a finely balanced decision. Indeed, I would have to consider what would be the impact on her mental health if nasogastric feeding was imposed upon her. The Trust did, however, note that she had previously spoken positively about nasogastric feeding after it had been done.

14 I heard the case twice last week. On the first occasion, on 2 May 2023, I had understood – wrongly as it transpired – that she was taking 1200 calories per day at that point. I remind myself that this was exactly one week ago from today. There was some confusion between myself and the advocates as to what exactly had been agreed but I have made it entirely clear that I accept that what Patricia had agreed at that point was to increase to 1300 calories per day in the next few days; maintain that for a few days; and, hopefully, then increase further. On that basis, I refused nasogastric feeding with restraint, but I gave liberty to apply.

15 An application was made to me on 5 May 2023. At that point, the reason was that it became clear that Patricia had not, in fact, been able to get to 1200 calories per day by that point. On the afternoon of 5 May, I heard Dr J give some very brief oral evidence. He told me that on 3 May, Patricia's intake had been 700 calories; on 4 May, it was 740; and on 5 May, it was 847. For the second time, I refused to approve nasogastric feeding under restraint and I did so on the basis that Patricia's intake was going in the right direction. I said that I would hear the case again this afternoon and see how the situation had moved forward over the weekend. I consider I was right to do that. To Patricia's considerable credit, she did very well over the long Bank Holiday weekend. I accept that on 6 May, her intake was still almost exactly the same, at 832 calories, but on 7 May, it became 1000 calories, and, yesterday, 8 May, she achieved the 1200 figure.

16 One might have expected that to be the end of the matter until the hearing before me next Monday. However, there was one very significant and concerning development, namely that various tests were done in relation to her liver function and it was clear that her liver function was not doing at all well. Indeed, it was extremely serious. Since Friday, it had deteriorated. The situation is worse when the figure for alanine transaminase increases.

That figure was 623 on 2 May, but had increased to 1497 yesterday, 8 May. I am told that the normal range is between 0 and 55. At over 1000, the worry is that the liver is failing, with the liver consuming its own cells. That was said to be a pre-death phase.

17 As a result, the doctors were seriously worried that Patricia would not live until 15 May and therefore the application was renewed. Indeed, having read the Position Statements carefully, I consider that, on this occasion, it was made with some support from Y Trust as well as continuing support from Z Trust.

18 Before I come to the evidence that I heard this morning, I want to just remind the court of what Patricia told me on the last occasion. She filed a position statement that indicated that she was extremely distressed by the thought of being force-fed and that she would fight it with everything that she could. She said, again, that this was a matter of enormous fear and terror to her, in a statement that she filed for the court this morning. She added that she considered that it was cruel and it was difficult to describe how terrified she is by it. She says she has had six episodes of forced-feeding over the years; that being force-fed is the worst thing that has ever happened to her as it made her feel suicidal; it involved agonising pain; and she considered it to be torture. She said that, if it was tried again, she would fight and she was, therefore, very scared of physical harm and genuinely fearful that the restraint would kill her. She said she will only recover of her own accord. She again repeated – and I accept it is slightly equivocal – that she only wants nasogastric feeding if she is unconscious and her BMI is below 11.5 and it is reasonably believed that she can regain consciousness to save her life. I have to say, the evidence that she has given me this afternoon has not been in quite those terms.

19 So I came to the hearing today and I have heard oral evidence from three separate doctors, all very eminent. It is right that all three of them ask me to approve nasogastric feeding with restraint.

20 First, I heard from Dr J. He told me that, in his view, there was nothing that the doctors could do about Patricia's liver because it is solely as a result of the low calorie intake and that the only way to solve the difficulty is an increased calorie intake. It directly results from her nutritional state and he says he is much more worried about the position between now and 15 May than he was before these readings emerged.

21 When he was cross-examined by Ms Butler-Cole KC, on behalf of Patricia, he said that he was very sorry Patricia is distressed. The Trust wants to maintain a good patient/doctor relationship but the doctors have very clear medical evidence and, if they do not follow it, her survival curve is very poor. He respects her position but there would be no safety net. She is much weaker. She has a very low level of strength. She walks with difficulty. She has the fitness of a patient of the age of ninety. He took the view that she was not likely to break her bones or cause physical damage to herself as a result of resisting restraint, but I accept Ms Butler-Cole's point that there has not been a risk assessment in that regard. He said the moral utility of what he suggests I should do is to give her a future.

22 I then heard from Professor Robinson. I take the view that his oral evidence was quite different to his report. He said that, when he said that she had a 5 per cent or less chance of recovery, he said that this was the chance of a complete recovery from her anorexia, but the chances of her improving to the point of living a life which is worth living is much better. He took the view that, if she was force-fed and brought back to life, as long as she then eats a certain amount, she may be able to maintain a BMI that is survivable and have a life that is not full but is worth having. He said: that "*if she was my patient, I would not allow her to*

die from anorexia. I would do whatever is necessary to bring her to the point where she can either enter treatment or be sent home, and that would include forced feeding and forced intravenous phosphate if that was necessary."

23 Under questions from Ms Butler-Cole, he effectively accepted that his position was that it would never be right to stop and that his view would always be that you should continue to treat and, if necessary, to force-feed. He justified this on the basis that she might be right about what gives her the best chance of a good life, but she might also be wrong. She has a partner and her partner is the anorexia which controls the other part of her mind and stops her carrying out her wishes. He considered that the rising liver function was very worrying and, if her liver eventually fails, that will be the end of the line for her. Again, I do accept that this evidence is correct. I am going to have to assess whether he is right in relation to forced-feeding.

24 Finally, I heard from Dr B. She accepted that, previously, she had not been in favour of forced-feeding but she told me that she had never seen Patricia so ill as she is now. She basically said, in summary, that she thought the reason why Patricia had improved her intake over the last week was because of this application and because she knows there is no choice anymore. She said that when Patricia agreed to the nasogastric feeding in May 2022, it was because she wanted to avoid a section and, after a few days, she was happy and she did not know why she had been resisting so much. Patricia said it was a bit unpleasant but not a big deal. But that, of course, was in circumstances where she was consenting to the feeding.

25 Dr B then told me that, in advance, Patricia had said she would resist and fight and never agree but, of course, she did in fact agree. Dr B added that, on this occasion, she thought that, if I authorised restraint, it was 50:50 as to whether or not, again, Patricia would agree

or fight. She took the view that it would be distressing for Patricia but that this was better than dying and that she could not see that there would be significant long-term psychological damage. She added that, if Patricia resists at first, she will then change when the nutrition gets into her brain.

26 When asked questions by Ms Butler-Cole on behalf of Patricia, she took the view that this should be the last time that the court ever even considers nasogastric feeding by restraint. She took the view that this was the last chance saloon; that Patricia should be got better; sent home under plan A; and then left to her own devices, in the hope that this would improve her health and her calorie intake and her whole approach to the matter.

27 She was asked about Dr P, a psychiatrist who, as I understand it, is currently away, possibly off sick, who had said that the whole matter of force-feeding was very high-risk. She answered that by saying that Dr J was very experienced but she agreed that they would need an expert risk assessment as to the likely consequences for Patricia of force-feeding against her wishes.

28 I then heard from Patricia and her father. They did not either affirm or swear on a holy book. They gave their evidence voluntarily to me but I have found the evidence extremely important in the decision that I have come to this afternoon. The first was Patricia's father. He told me – and I do not think Patricia was present when he told me this – that Patricia is very weak. He told me the thought of her being held down to be force-fed was terrifying, but he then added that the thought of her dying was even more terrifying. He said the huge anxiety for Patricia of this litigation and the threat of force-feeding was having a hugely detrimental impact on her. She gets very stressed and it was horrible to see how upset she was, although he wanted me to do what was for Patricia's overall good.

29 Then I heard from Patricia. She spoke very confidently, with great dignity, and in a way that, whether she has capacity or not, I consider is something that is very important to the decision that I have to take. She said that the only way she has increased her intake is that she has had the choice to do it. She decided to do it and, indeed, she had just gone and had her lunch. She said: "*the second that someone wants to impose something on me, I will down tools. People dealing with me recognise that. It makes very little sense, therefore, to make me act under compulsion. The best chance that I have is if we continue as we have been doing and I try to increase my intake voluntarily. I will work with the team*". She added that "*it is very much led by me*." She said it was very clear how distressing to her the alternative of force-feeding under restraint would be. She feared that she would have significant health issues in the short-term as a result of such force-feeding. She said one of the reasons she has deteriorated is this threat. She finds the whole thing incredibly distressing. She told me she would not accept any of it and that none of it would be safely delivered.

30 I asked her about the liver function tests and she said that it was a real worry for her, but she said that the situation was, she believed, caused because she had been taking only 800 calories per day, whereas she is now up to 1200. It may be that taking 800 calories was the precipitating factor. The difficulty that I have is that I fear that she may need to take more than 1200 calories per day very quickly to right the liver problem. She said she was not going to drop from 1200 per day and she would do everything she could to increase her intake and hopefully then improve. It has been very difficult for her. She said she would do it; she has done it so far; and she wants to do it for herself.

31 That is quite a long review of the evidence I have heard. Despite the pleadings and the very well-argued points made by Ms Butler-Cole, I am going to deal with this case today on the basis that, although Patricia has capacity to litigate, I am of the view that there is reasonable

cause for me to believe that she does not have capacity to take decisions as to her medical treatment. It may be that next Monday I will take a different view, but this afternoon I have not heard any expert evidence on this aspect and I am, therefore, going to deal with this case under s.48. That, of course, does not decide the matter.

32 I must deal with this case in what is in Patricia's best interests. I must, of course, consider Articles 3 and 8 of the European Convention on Human Rights and I accept that, although life is precious and preserving it is a very important goal of the court, it is not the only aspect of these cases and there is much that I must balance in coming to my conclusion.

33 I have been influenced by the fact that Patricia has done what she promised me that she would do. She has increased her intake up to 1200 calories per day. She has done that over a relatively short period, namely one week, during which time she has increased her intake by 50 per cent. That is to her huge credit and I pay proper regard to that. She wants to live and she is doing her very best. I think that she is going to need to increase her intake further. I very much hope that she will be able to do so. I hope that, when I hear this case on 15 May, she will have increased to 1600 calories per day, and possibly even more than that; in other words, another considerable increase. That, in my view, will give her the best chance of getting her liver working again and back to normal.

34 I have decided that I should not, therefore, direct that she is force-fed simply on the basis of her calorie intake. She has done what she said she would do and she is entitled to credit for that. The question then is whether I should authorise force-feeding on the basis that, if I do not, her liver function is likely to deteriorate even further. This is the issue that has caused me the greatest concern, because I recognise and accept that if I do not do so, she may not last until next Monday and she may die. That is something that I do not want to occur. That is why I have found this case so difficult and troubling but I have come to the conclusion

that it would not be right for me to direct force-feeding this afternoon. I remind myself that Dr B told me that, if I was to do it, it would only be one last attempt. I am very concerned that all I would be doing would be causing Patricia enormous distress, possibly physical harm and damage to achieve very little, perhaps a short-term improvement and then a long-term deterioration again. If this is going to work, Patricia has got to do it. Nobody else can do it other than Patricia. She has got to get her intake up. She has got to learn to deal with it herself without a judge in London telling her what to do. In the long-term, that is her only chance.

35 I also remind myself that I do not have a risk assessment that really deals with the issues that I would have to address if I was to direct force-feeding under compulsion. My real concern, given the history of this case, is the fact that compulsion has never worked in the long-term. Indeed, recently, it has not even worked in the short-term. Given the decision that was taken in November 2022, I have decided that it would not be right for me to direct the force-feeding of Patricia this afternoon. I have found this incredibly difficult because I recognise that it might have fatal consequences. That is not something that a judge ever wants. Patricia wants to live. This court wants her to live and she has told this court that she would wish to be treated if it was to save her life.

36 I am not going to force her but I am going to ask her to consider very carefully indeed my request to her to agree, as she did last summer, to nasogastric feeding by consent if her liver function deteriorates further. It would be such a tragedy, if all the hard work that she has put in over the past week, to get from 800 to 1200 calories per day, was to be wasted because of a failure of her liver. I am not going to force her, certainly not at this point. Obviously I may be asked to consider the position again next Monday, depending on what has happened between now and then, but I am not going to force her this afternoon. I am going to leave it to her strength and willpower to get her intake up but I do invite her to

consider authorising nasogastric feeding if her liver function deteriorates further to the point where she will die. I hope she will do so, given that I have trusted her; given that I have listened to her; and given that I have not imposed something on her that would be extremely distressing for her.

37 I will consider the matter further next Monday.

CERTIFICATE

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Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital