Neutral Citation Number: [2023] EWCA Civ 1092

Case No: CA-2023-001805

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
Mr Justice MacDonald
FD23P00419

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 September 2023

Before :

LORD JUSTICE PETER JACKSON
and
LADY JUSTICE ASPLIN

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St George's University Hospitals NHS Foundation Trust	**Applicant/ Respondent**
- and –	
Andy Casey (1) **Samantha Johnson (2)** **Christine Marie Casey (3)** **Joe Martin Casey (4)**	**Respondents/ Applicants**
- and –	
The Official Solicitor to the Senior Courts	**Advocate to the Court**

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James Bogle and **Paul Diamond** (instructed by direct access) for the **3rd and 4th Respondents/ 2nd and 3rd Applicants**
Bruno Quintavalle (instructed by direct access) for the **2nd Respondent/Applicant**
The 1st Respondent did not appear and was not represented
Abid Mahmood (instructed by **Bevan Brittan LLP**) for the **Applicant/Respondent Trust**
Claire Watson KC (instructed by the **Official Solicitor**) acting as **Advocate to the Court**

Hearing date: 27 September 2023

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Approved Judgment

This judgment was handed down at 5.30pm on 27 September 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Peter Jackson:

1. These are applications for permission to appeal in a case in which a young man's life has been tragically cut short. They arise from a declaration of death made by MacDonald J on 12 September 2023.

2. There are some limited restrictions on reporting. There is nothing to prevent the reporting of the names of the young man or his family, or of the Trust and the hospital concerned, but there is an order, which must be strictly observed, preventing the identification of the treating clinicians.

3. For this court to grant permission to appeal, it must be persuaded that an appeal would have a real prospect of success or that there is some other compelling reason for an appeal to be heard: CPR 52.6. If that test is not satisfied, permission must be refused.

4. I will give a short account of the background, which is much more fully set out in the judge's judgment.

5. Andy Casey was born in February 2003. On 9 July 2023, he was assaulted in a pub garden. He was punched on the right side of his head and fell to the ground, suffering a catastrophic injury to his brain and a minor spinal fracture at neck level. He was admitted to a specialist Neurointensive Care Unit where he was provided with organ support including invasive mechanical ventilation – in other words, he could not breathe for himself. After four days, his deteriorating and unresponsive condition led the hospital to suspect that his brain stem had died – in other words, that from a medical point of view he was sadly dead.

6. Throughout the time Mr Casey has been in hospital, a huge amount of care and commitment has been shown by the clinical staff and by members of his family and friends, who have been a regular presence at the hospital.

7. Modern intensive medicine keeps many people alive who would in past times have died. It does so by giving the body time to recover, wholly or in part. In some cases, this succeeds, but in others it does not. The question of whether someone has died is so important that a medical code of practice has been in place since the 1970s to provide scientifically rigorous criteria for confirming death, including in clinical settings where confirmation of death by brain stem testing is appropriate. The most recent version was issued by the Academy of Medical Royal Colleges in 2008. It includes these passages:

> "The brain stem controls all the essential functions that keep us alive, most importantly our consciousness/awareness, our ability to breathe and the regulation of our heart and blood pressure. Once the brain stem has died it cannot recover and no treatment can reverse this."
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> "When death has been diagnosed by the methods to be described, the patient is dead even though respiration and circulation can be artificially maintained successfully for a limited period of time. The appropriate course of action is then to consider withdrawal of mechanical respiratory support, the ethical justification for

> which has passed, and to allow the heart to stop. This imposes an unnecessary and distressing vigil on the relatives, partners and carers, who should be kept fully informed by the local care team of the diagnosis, the inevitable outcome and the likely sequence of events."

8. In the great majority of these sad cases, doctors and family members reach agreement about whether a patient has died. But where there is disagreement, an application may be made to court, and that is what happened here. The family did not agree to brain stem testing, and it was authorised by the Court of Protection on 16 July 2023.

9. On 16 July at 11.51 pm, brain stem testing was carried out in the form of the seven tests stipulated by the code of practice. It was carried out by a Consultant Neurointensivist in the presence of a second Consultant Neurointensivist and some family members. The test, similarly witnessed, was repeated at 12.17 am on 17 July by the second doctor. The result was that death was diagnosed by the first test and confirmed by the second test.

10. In normal circumstances, organ support would be withdrawn within 24, or at most 48, hours of such a diagnosis. However, the family considered that they were seeing signs that Mr Casey was not brain stem dead. They experienced and recorded hand movements that they thought were purposeful and they believed that he was breathing of his own initiative on occasions. The clinicians did not agree and considered that these movements were spinal cord reflexes of an expected kind and artefactual responses by the ventilator.

11. Because of the impasse, at the request of the family the hospital's Ethics Committee met on 26 July. It considered that there was no legal or ethical purpose in continuing organ-sustaining treatment and that it should be withdrawn. The next day, a mediation took place between the Trust and the family, with the family being represented by leading and junior counsel, but this did not lead to agreement.

12. During this period, the family sought the views of Dr Christopher Danbury, a respected Consultant in Intensive Care Medicine. He recommended performing a repeat CT scan, a CT angiography and an MRI scan of the brain, brain stem and cervical spine. He also advised that an EEG would also be useful. He considered that the performance of these additional tests would ensure that the family could be confident of the nature of the severity of the injury and the likely prognosis.

13. In parallel, the Trust also sought second opinions from internal neurosurgical specialists, Dr A and Dr B, in respect of Mr Casey's spinal injury. They advised that the minor spinal fracture sustained by Mr Casey was not relevant to the diagnosis of death. The Trust also approached an external expert with expertise in the diagnosis of death by neurological criteria, Dr E. He provided the clinical team with a national perspective on the clinical criteria and, more particularly, advice on the role of ancillary investigations in support of a diagnosis.

14. Although the Trust did not consider it to be clinically necessary, in order to provide the fullest confidence to the family, it undertook an MRI scan of the brain and spinal cord on 31 July. This revealed devastating changes in the brain leading to compression and irreversible injury of the brain stem, with the resulting irreversible

loss of the capacity for consciousness and breathing, and to extensive damage to Mr Casey's spinal cord. There was a loss of normal blood flow voids in the arteries that supply blood to the brain, implying that Mr Casey's brain is no longer receiving a blood supply, a state incompatible with brain function. The scan was considered by the doctors to support the diagnosis of death reached as a result of the brain stem testing.

15. The family sought further tests, which the clinical team again accommodated, hoping to resolve the matter by agreement rather than application to court. In line with Dr Danbury's suggestions, a CT angiography (CTA) was carried out on 1 August and an EEG test on 2 August. Dr S, one of the treating neurointensivists who spoke on behalf of all the treating clinicians, gave evidence that the CTA showed that blood clotting had filled the large arteries supplying the brain, so that there was no longer a means for blood to be delivered to Mr Casey's brain. This was an expected effect of the devastating global brain injury he had sustained. Dr S considered it a state incompatible with life and as unequivocally consistent with brain stem death. The EEG showed changes expected after death, with no discernible bioelectrical brain rhythms, and no changes during external stimulation. It again supported the clinical diagnosis of death.

16. In his evidence, Dr S explained that this level of testing, above and beyond the 2008 guidance in the code of practice, was highly exceptional. Instead of 24 to 48 hours of observation, eight weeks of intensive clinical observation had by then taken place. This testing established that it was not possible for movements witnessed by the family to be voluntary. There was no flow of blood to the brain, and the upper cervical cord showed such severe damage that there was no pathway for signals to be transmitted to the limbs. There was no response to painful stimulation, nor any basic brain stem reflexes of the kind that would be present in anyone capable of higher functions such as purposeful movement or thought.

17. The family was unable to accept this conclusion and proceedings were therefore issued by the Trust on 21 August seeking a declaration that Mr Casey had died on 16 July when irreversible cessation of brain stem function had been conclusively established, he having lost the essential characteristics necessary to the existence of a living person, namely a permanent and irreversible loss of consciousness and the irreversible loss of capacity to breathe. In these circumstances, it would be lawful for the Trust to cease all forms of medical intervention.

18. The hearing before the judge took place on 8 September. It was attended by a number of Mr Casey's family members and friends, whom the judge described as having conducted themselves with dignity during a difficult and distressing experience. The Trust was legally represented, as were Mr Casey's sister and brother. The Official Solicitor appeared as Advocate to the Court, having declined to act as litigation friend to Mr Casey on account of the medical diagnosis of death. The judge heard evidence from Dr S and from two of the family members. For understandable reasons, Mr Casey's mother did not feel able to attend the hearing and she was not then represented.

19. One of the preliminary matters considered by the judge was an application by the siblings for permission to instruct a neurologist, though no one had been identified. The judge declined to grant permission. He was satisfied that the instruction of an

expert neurologist was not reasonably required to determine the proceedings having regard to the nature and extent of the evidence already before the court and the issue that was before it.

20. Between paragraphs 36 and 61 of his judgment, the judge set out the law referring in particular to *Airedale NHS Trust v Bland* [1993] AC 789 ('*Bland*'). He also referred to a number of first instance decisions and the decisions of this court in *Re M (Declaration of Death of Child)* [2020] EWCA Civ 164, [2020] 4 WLR 52 ('*Re M*'), and *Barts Health NHS Trust v Dance & Battersbee* [2022] EWCA Civ 935, [2022] 4 WLR 83, [2023] 1 FLR 731 ('*Dance*'). He also considered arguments about whether Mr Casey, who had been joined as a party at the outset of the proceedings, required a litigation friend.

21. Based on the authorities, the judge reached a number of legal conclusions. He held that the legal test for confirming death in this country is to be found in brain stem testing conducted within the 2008 code of practice guidelines. Once death has been diagnosed in this manner, the question of best interests cannot arise. It is not necessary for the subject of the proceedings to be joined as a party or to have a litigation friend. Although Mr Casey had been a party to the proceedings without having a litigation friend, the requirement that he should have one was dispensed with under CPR 21.3(4).

22. The judge did not accept that the family's evidence cast doubt on the diagnosis of death. He accepted the explanation given by Dr S for the movements the family had observed. It was not physiologically possible for them to have been generated by Mr Casey's brain. Similarly, any observation that Mr Casey had taken a breath was a common artefactual effect of the ventilator. What the family was seeing were well-recognised base reflexes that can survive brain stem death. The judge accordingly made the declarations sought by the Trust.

23. On 14 September, the siblings lodged an appeal with this court and on 19 September Mr Casey's mother did so too. Their combined arguments have been presented by Mr Bogle, leading Mr Diamond, and by Mr Quintavalle. We have also received written submissions from Mr Mahmood for the Trust and from Ms Watson KC for the Official Solicitor. We are grateful to them all.

24. As a preliminary matter, we extend the mother's time for appealing. We also agreed to read some additional material provided on the morning of the hearing in order to decide whether it should be admitted in evidence. This took the form of a statement from the sister of Lewis Roberts, a young man who was incorrectly diagnosed with brain stem death, a video recording taken by the family yesterday in which Mr Casey is said to be making hand movements, and a further communication from a doctor that the family has identified and wishes to instruct to carry out testing. There is a written response to these matters by the Trust, including a short statement by Dr S about the first two. We have taken this material into account. I would admit the statement of Ms Roberts out of respect for her and for the family, even though it is doubtful whether it strictly meets the test for the admission of evidence on appeal. I would not admit the other material on the basis that it adds nothing to information that was already before the judge or this court.

25. The applicants essentially raise five grounds of appeal, which I summarise:

1) The proceedings were not fair because the judge refused to allow the family to instruct another expert.

2) The proceedings were not fair because Mr Casey was not represented by a litigation friend.

3) The judge was wrong in law to treat brain stem death as the legal test for death.

4) The judge was wrong in law to use the civil standard of proof when making a finding of death.

5) The judge was wrong in law not to have carried out a best interests assessment and thereby he effectively reversed the burden of proof.

26. I will take these arguments in turn, elaborated as they were in writing and in oral submissions by Mr Bogle and Mr Quintavalle. But before doing so, I want to assure the family that we understand their concern that the medical evidence accepted by the judge might not, despite all appearances, be reliable and that somehow Mr Casey might still be alive and able to make some kind of a recovery. Amid all the legal arguments, we have not lost sight of how much Mr Casey's family and friends care about him.

27. The judge refused the application for a further opinion to be commissioned. That was not surprising. Where a case of this nature needs to be adjourned to ensure fairness and thoroughness the court will ensure that happens: see, for example *A (A Child) (Withdrawal of Treatment: Legal Representation)* [2022] EWCA Civ 1221, [2023] 1 FLR 713. But even in a case of this gravity, the test for the admission of expert evidence is whether it is reasonably required to determine the proceedings: CPR 35.1. In this case, exhaustive investigations had taken place by the time of the trial, well beyond those required by the code of practice or considered necessary by the treating doctors. There was no plausible argument to suggest any gap in the evidence and, even if the test was whether further expert advice was necessary, the outcome would have been the same. The family had had the benefit of Dr Danbury's advice but did not seek to call him as a witness. Instead, they wanted someone else, but when the application was made, no one had been identified. This was not a request to be allowed to obtain a second opinion, as there had already been multiple opinions from within and outside the Trust. In reality, the application was made in the hope that something else would turn up. While this may be understandable, the judge was right to refuse the application. We are now asked, if we grant permission, to approve the appointment of the expert who has now been identified, but I would not do that for the reasons that I have just given.

28. The argument that Mr Casey required a litigation friend springs from the fact that he had been made a party at the outset of the proceedings but the Official Solicitor had then declined to act as litigation friend because she could not undertake that task in respect of a person who had apparently died. It is said that as CPR 21.2(1) provides that a protected party must have a litigation friend to conduct proceedings on their behalf, the absence of a litigation friend rendered the proceedings a nullity. It is argued that until the court has made a declaration of death, the assumption should be that the individual concerned is alive and must be represented. Reference is made to *Dance* at paragraph 44. Overall, it is argued that by making an assumption of death

before the issue has been decided by the court, the court has circumvented the important protections contained in the common law and in articles 2 and 6 European Convention on Human Rights. In effect, it is said, the court was prejudging the very issue it had to determine. Although it has the power to dispense with the requirement for a litigation friend, it should never do so in a case of this kind. I do not accept that there is any substance in this argument. The judge considered it at some length and concluded at paragraph 60 that it had not been necessary for Mr Casey to have been a party to the proceedings because of the state of the evidence when they were issued. I find no arguable error in his approach. The court must adjust to the realities of the individual case before it when making case management decisions and identifying the issues it has to decide. Here, the evidence that Mr Casey had died was so strong that it was reasonable for the judge to have taken the course that he did. The argument is in any case a purely formal one and there was no serious procedural error warranting intervention by this court. In reality, Mr Casey's position has been very fully protected by the extent of the investigations, the participation of his family and the surveillance of the Official Solicitor as Advocate to the Court: she would not have hesitated to point out any matters that needed to be more fully considered. The issue about the absence of a litigation friend therefore lacks substance and does not have the far-reaching implications that are suggested. I also consider the judge to have been right to distinguish the situation in *Dance*. That was a case where brain stem testing could not be carried out and the evidential picture that the court was facing when it considered the issue of representation was entirely different.

29. Next it is argued that the judge erred in making the brain stem test into a determinant of legal death and in holding that the function of the court was only to consider the results of the test and ascertain whether it was undertaken in accordance with the 2008 code of practice. He was wrong to say at paragraph 63 that he was bound by the decision in *Bland* or by the approach of this court in *Re M*. It is argued that, as there is no statutory definition of death, the judge was wrong to adopt brain stem death as if it were a legal definition. The correct approach is instead for the court to assess all the evidence of death in order to arrive at its determination. The applicants contend that they should be allowed to argue this issue in this court on a full appeal due to its novelty and importance. They refer to two instances in which brain stem testing was unreliable (*Re A* and the case of Mr Roberts). They also refer to the review of the 2008 code of practice that is currently being undertaken. They suggest that this court gave permission to appeal in *Re M* on this ground and on issues 4 and 5, although they did not have to be argued (it is not clear from the report whether permission to amend or permission to appeal was granted). In any event they do not accept that this court's decision in *Re M* is binding, or that it is properly to be treated as authority, because it was a permission to appeal decision that did not establish a new principle, despite the court certifying it as a decision that might be cited. I cannot accept the central argument under this ground. To my mind it makes no difference whether the observations of the House of Lords in *Bland* or of this court in *Re M* were strictly binding on the judge or on us. The fact is that the approach in those cases reflects a widely accepted consensus in this country for almost 50 years that brain stem death, correctly diagnosed, is the proper indicator of death in the legal sense. The contrary is not reasonably arguable at any level of court. I also note that, when pressed, the applicants were not able offer any alternative formulation, beyond saying that the problem will not arise in most cases. But for cases such as the present one, no alternative test was proposed. Furthermore, I do accept that on an application for a

declaration of death, the court must consider all the evidence, and not merely the evidence arising from brain stem testing. Here, the judge did not confine himself narrowly to the initial testing that had been undertaken. He paid careful attention to the extensive further testing and to the evidence given by the family before coming to his conclusion. Finally, every human endeavour involves the possibility of error. The fact that the conclusions from testing may have proved incorrect in one or more other cases underlines the need for the greatest care to be exercised. It does not lead to the conclusion that the basis upon which death is to be established is unsound. As to the review of the 2008 code of practice, there is no reason to believe that it has any significance for this case, a position confirmed during the proceedings before the judge in a communication from the consultant who is chairing the review. The evidence about Mr Roberts has to be considered in the very different context of his circumstances, in which he revived four days after his injury and following a head operation: the position of Mr Casey is sadly very different.

30. It is then argued that the judge should have applied a different standard of proof. The issue is so serious that the court should require proof of death beyond reasonable doubt. Reference is made to instances under domestic law (ASBOs, contempt) and in the Strasbourg court (burden on a state after a military operation of which only it had knowledge) where it is said that a 'beyond reasonable doubt' standard of proof is applicable. Failing that, it is said that any decision of this sort, if made on the civil standard of the balance of probabilities, must be arrived at after the most anxious scrutiny. I have no difficulty with the latter proposition, which is not so much a principle of law as a statement of the obvious. Any decision of this sort will be treated by everyone (families, clinicians, and if it has to become involved, the court) as a question of profound importance that requires anxious scrutiny. It is apparent from his painstaking judgement that this is exactly what the judge gave to this case. However, he was right to direct himself that the standard of proof is the balance of probabilities, even though in reality the evidence went well beyond that and would in my view have satisfied any standard of proof.

31. Finally, it is argued that a person cannot be treated as being dead at the outset of a hearing and that a best interests assessment should always be carried out to ensure that individuals are not denied essential legal protections, or at least that such an assessment should have been carried out in this case. The judge adopted the approach taken by this court in *Re M,* where Sir Andrew McFarlane P said this at paragraph 24:

> "In contrast to issues concerning the medical treatment of the living, whether they be children or adults who lack capacity, where the best interests of the individual will determine the outcome, where a person is dead, the question of best interests is, tragically, no longer relevant."

It is said that this should not be treated as binding. Once again, for the purpose of this application, it does not matter whether the statement is or is not binding because, in my view, it is plainly correct. Where the court after careful scrutiny accepts evidence of death following brain stem testing, there is no sensible basis upon which it could then carry out a best interests assessment. In contrast, where that evidence does not exist or might fail to withstand careful scrutiny (cf *Dance*) the court will not hesitate to address the question of best interests. If the position were to evolve during a

hearing, it is open to the court to adapt its approach accordingly. That, however, is not the case here.

32. Even assuming that permission to argue grounds 3-5 had been granted by this court in *Dance*, and that there had then not been any argument about them, I would not accept that this is a good reason for us to grant permission in the very different circumstances of the current application.

33. For these reasons, I conclude that none of the grounds of appeal is arguable and, for completeness, that there is no compelling legal reason for an appeal to be heard. The evidence before the judge that Mr Casey had died was complete, reliable and compelling. It overwhelmingly led to the conclusion that he was no longer alive and a declaration of death was the only decision the judge could properly have made. I recognise that this outcome is hard for Mr Casey's devoted family and friends, but I would refuse permission to appeal.

Lady Justice Asplin:

34. I agree with my Lord, Lord Justice Peter Jackson and would refuse permission to appeal for all the reasons he gives. For completeness, I should add that I too would admit the statement of Ms Roberts although it is very doubtful that the test for admission of fresh evidence on appeal is met. I too would not admit the most recent video evidence and the further email from a doctor whom the family would like to instruct, for the reasons given by my Lord, Lord Justice Peter Jackson.