Medicolegal

Going to law to get treatment

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With cuts in the National Health Service biting ever deeper patients kept waiting for treatment or denied it altogether have been resorting to the courts in desperation. Last month the parents of a 6 week old baby with a hole in his heart, David Barber, whose operation at Birmingham's Children's Hospital had been cancelled five times, sought judicial review in an attempt to have the operation expedited. On the day that the Court of Appeal turned down the application[1] baby David had his operation at last.

Only two weeks before David Barber's case hit the headlines Mrs Angela Tonge, a blind diabetic with end stage renal failure who had been refused dialysis, won emergency legal aid to take the same health authority, West Midlands, to court. Her case never got that far; on the day that legal aid was granted the Health Minister, Tony Newton, made an extra £250 000 available to the renal units in Birmingham.

Publicity combined with the threat of legal action and pressure from members of parliament rather than a court ruling got those patients the treatment they sought. But does the Court of Appeal's ruling in the Barber case close this route to other patients who suffer delays in or even denial of treatment?

Priority cases

This is not the first time that judicial review has been tried by patients complaining of delays in treatment. In 1979, also in the West Midlands region, after plans to extend the Good Hope District General Hospital in Sutton Coldfield were abandoned four patients who had been on a waiting list for orthopaedic surgery for years sought a declaration that the secretary of state, the area health authority, and the regional health authority had failed in their duty to provide a comprehensive health service under the National Health Service Act 1977.[2]

Section 3 of the act states: "It is the Secretary of State's duty to provide throughout England and Wales, to such extent as he considers necessary to meet all reasonable requirements, hospital accommodation; . . . medical, dental, nursing and ambulance services; . . . such facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as he considers are appropriate as part of the health service; and such other services as are required for the diagnosis and treatment of illness."

But Mr Justice Wien decided that it was a matter for the health authorities and the secretary of state, not the courts, to decide how funds should be allocated. The words "to such an extent as he considers necessary" gave the minister a clear discretion as to how he used his resources. When the case went to the Court of Appeal Lord Denning, Master of the Rolls, said that there had to be implied into section 3 the words "such as can be provided within the resources available."

In the Barber case the Court of Appeal, although affirming that the court could review the National Health Service's decisions, emphasised that the jurisdiction would be exercised extremely sparingly. Where a public body has a wide discretion, as has been given to the secretary of state under the National Health Service Act, the courts will normally intervene only if, on the face of it, the discretion has been exercised unreasonably, and even then the court has a judicial discretion. Unreasonableness is judged according to what has become known as the Wednesbury principle, laid down in a case in 1947.

What is unreasonableness?

Lord Greene, Master of the Rolls, explained the principle as follows: "A person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey these rules, he may truly be said, and often is said, to be acting unreasonably."

In the Barber case resources were finite, and the case was not an emergency. Doctors intended to operate once the baby's health showed signs of deteriorating. The Tonge case, however, was quite different and could well have produced a different result had it gone to court—a possibility that no doubt influenced the secretary of state's decision to find the cash (not new money but money plucked from the waiting list fund).

Mrs Tonge's case was a matter of life or death. By the time her treatment was approved the consultant who was looking after her estimated that she had at most 10 days to live. No factors were weighed up in denying her the treatment. The regional health authority simply handed down a ruling that no new patients were to be admitted to the renal unit at Queen Elizabeth Hospital, Birmingham, which had a projected overspend of £170 000. Other renal units had their own budgetary problems and could not take Mrs Tonge, who had been a patient at Queen Elizabeth Hospital for 20 years.

Nor was it a question of competing with other, possibly more deserving, patients for scarce dialysis machines. Mrs Tonge would have been treated at home by continuous ambulatory peritoneal dialysis, which uses a bag and has no capital costs. The treatment would cost only around £7000-£8000 a year, with the fluid (at £6000) being the main item of expenditure. It is certainly arguable that by laying down a blanket ban on any new patients the authority was not exercising its discretion reasonably in the allocation of admittedly limited resources. Such a ban might have meant, for instance, that a younger breadwinner with a large family would have been turned away while treatment continued to be offered to an elderly person with a much poorer quality of life. Judicial review may still provide a remedy for some few patients, particularly those with end stage renal failure who could benefit from dialysis but are denied it through lack of resources.

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References

1 In re Walker's application. Law report. *The Times* 1987;Nov 26:44 (cols 1-4).
2 R *v* Secretary of State for Social Services ex p Hincks. Unreported, Supreme Court Library (1981) 274.