

# The doctrine of judicial precedent with special reference to the cases concerning seriously ill new born infants.

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## Introduction

The doctrine of precedent will be illustrated by examination of the common law relating to seriously ill infants. Childhood illness is an emotive subject; that which constitutes a 'serious' illness is open to subjective interpretation but will be taken as one that is life-threatening, either immediately or over a more protracted time scale, but with the same inevitable outcome. 'Infancy' is medically defined as the first year of life while 'new born' relates to the first 24 hours of life. The discussion that follows need not be so constrained; where a case in *early childhood* contributes to the discussion it will be cited.

First, consideration will be given to the rules of precedent and its context within the wider system of U.K. law, E.U. law and the European Convention of Human Rights (ECHR).

## The doctrine of precedent

In deciding matters of common law, the judiciary look to previous cases to determine what the law is – the doctrine of *stare decisis* (Latin: to stand by things decided). Landmark cases set a precedent for subsequent determinations and are recorded in the form of law reports. Where similarity exists to the prevailing conditions the precedent may be *followed*; where there is little similarity the material facts of the case must be *distinguished* in order to set the precedent aside. The *ratio decidendi* is central to this process, for it identifies the material facts upon which the judgement is based and is indicative of the scope of application of the precedent to subsequent cases.

Judicial review according to precedent, along with statute, forms a binding legal authority. Persuasive authority includes *obiter dicta*, legal articles, legislative papers and decisions made in other jurisdictions. *Obiter dicta*, comments made 'in passing' during judicial review, are viewpoints on legal principle and are not constrained by the facts of the case. The more senior the judge, the more persuasive the *obiter* becomes.

*Stare decisis* can be applied 'vertically' whereby precedent established in a higher court is binding upon those of lower ranking according to the hierarchical, 'pyramidal', organisation of U.K. courts, thereby enabling them to *overrule* decisions made in previous cases. It follows that precedent set in the Supreme Court is binding upon all other courts. A higher court may *reverse* or *overturn* a decision made in a lower court in consideration of a particular case, if that earlier decision were found to be defective on a matter of law.

*Stare decisis* may also be applied ‘horizontally’ such that precedent set in one court is binding upon all other courts of similar ranking. Occasionally, higher courts (the Court of Appeal and the Supreme Court) may find an exceptional reason to depart from their own previous decisions.<sup>1,2</sup>

### **The sovereignty of Parliament**

Common law continually evolves through the doctrine of precedent, but it cannot override statute. Parliament is not bound by precedent so is unaffected by its own previous decisions or those of the courts. The exception is where UK statutory law is in conflict with EU law, in which case EU law must be observed<sup>3</sup>.

### **Convention rights**

The Human Right Act 1998<sup>4</sup> obliges the judiciary to interpret the common law such that it is in alignment with the ECHR<sup>5</sup>. Where there is debate over withholding life saving treatment, the child has a right to life under article 2; where treatment is non-consensual article 3 may be engaged, hence the importance of establishing next the law on consent.

### **Precedent and consent for the medical treatment of minors**

Under the Children Act 1989 the parents of a child have the right to consent to treatment on behalf of their child ‘for the purpose of safeguarding or promoting the child’s welfare’<sup>6</sup>. Only one parent need provide consent<sup>7</sup> but the law requires that parents should consult over broadly-defined ‘important’ treatment decisions<sup>8,9</sup>. Certain treatments are permitted only with the consent of the court, exercising its jurisdiction of *parens patriae*<sup>10,11</sup>. Where the parents and doctors disagree over what treatment is in the child’s best interests the court may be called upon to decide<sup>12</sup>. Occasionally the parents’ view may be upheld by the court to prevent treatment<sup>13</sup>.

If competent, that is to say fully understanding of the treatment and its consequences, a minor can consent to treatment as in *Gillick v West Norfolk and Wisbech AHA*<sup>14</sup>. Here the *obiter* of Lords Templeman and Scarman enable doctors to provide treatment without parental consent if that treatment would indisputably save the life of the child, where the opinion of the parents cannot be sought or where, if sought and refused, there is insufficient time to make the child a ward of court. This ‘defence of

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<sup>1</sup> *Young v Bristol Aeroplane Co. Ltd* [1944] 1 KB 718.

<sup>2</sup> *R v Howe* [1987] AC 417.

<sup>3</sup> European Communities Act 1972.

<sup>4</sup> Human Rights Act 1989.

<sup>5</sup> European Convention on Human Rights 1950.

<sup>6</sup> Children Act 1989, s3(5).

<sup>7</sup> Children Act 1989, s3(7).

<sup>8</sup> *Re J (A Minor) (Prohibited Steps Order: Circumcision)* [2000] 1 FLR 571.

<sup>9</sup> *Re C (Welfare of Child: Immunisation)* [2003] EWCA Civ 1148.

<sup>10</sup> *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1.

<sup>11</sup> *Re D (A Minor) (Wardship: Sterilisation)* [1976] 1 All E.R. 326.

<sup>12</sup> Family Proceedings Rules 1991 Order 1991 SI 1247.

<sup>13</sup> *Re T (A Minor) (Wardship: Medical Treatment)* [1997] 1 WLR 242.

<sup>14</sup> *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112.

necessity' makes lawful a blood transfusion to an incompetent child of a Jehova's Witness.<sup>15</sup>

### **The operation of precedent in cases of serious childhood illness**

In *Re B*<sup>16</sup> the question was whether or not to allow an operation to be performed for a bowel obstruction that would save the life of a newborn baby with Down's syndrome. The parents withheld consent in the understanding that the child was destined for a life of severe handicap. The child was made a ward of court and although the parents' wishes were initially respected, the operation was ordered to go ahead upon appeal.

Material to Lord Templeman's judgement was that both the life expectancy of the child and the degree of handicap were likely to be commensurate with that of any other child with Down's syndrome. However, he allowed for a different outcome in subsequent cases where:

'... the future is so uncertain and where the life of the child is so bound to be full of pain and suffering that the court might be driven to a different conclusion.'

In *Re B*, the *ratio* allowed a procedure against the parents' wishes to save a life, a precedent that was followed in *Re A*<sup>17</sup> where the difficult decision was made to order separation of conjoined twins, sacrificing the life of one twin to prevent the death of both. Also considered in *Re A* was the *ratio* in *Airedale NHS Trust v Bland*<sup>18</sup> as this provided the precedent for withdrawing life-sustaining treatment to a patient in a persistent vegetative state. Applied in *Re A*, this reflected the status of the non-viable twin in deliberately removing its life-sustaining twin.

Lord Templeman's *obiter* in *Re B* was considered in *Re J*<sup>19</sup> where the precedent was duly extended on the basis of the extreme disability that arose from prematurity. Here the *ratio* reflected the suffering that attends mechanical ventilation and deemed it lawful to withhold that treatment even if that meant that the child would inevitably die.

The facts of a further case, *National Health Service Trust v D*<sup>20</sup>, were so similar to those in *Re J* that it was a simple process, applying *Re J*, to determine the lawfulness of withholding respiratory support to prolong the life of a severely handicapped child.

Precedent in *Re J* was also considered in *An NHS Trust v MB*<sup>21</sup>. The *ratio* in this case made lawful the withholding of treatment intended to delay the inevitable premature death of a child with normal cognitive function suffering from spinal muscular atrophy. This did not include the respiratory support to which the child was accustomed. The judgment applied *Portsmouth NHS Trust v Wyatt*<sup>22</sup> where the court

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<sup>15</sup> *Re E (A Minor) (Wardship: Medical Treatment)* [1993] 1 FLR 386.

<sup>16</sup> *Re B (A Minor) (Wardship: Medical Treatment)* [1981] 1 WLR 1421.

<sup>17</sup> *Re A (Children) (Conjoined twin: surgical separation)* [2001] Fam 147.

<sup>18</sup> *Airedale NHS Trust v Bland* [1993] AC 789.

<sup>19</sup> *Re J (A Minor) (Wardship: Medical Treatment)* [1990] 3 All ER 930.

<sup>20</sup> *National Health Service Trust v D* [2000] 2 FLR 677.

<sup>21</sup> *An NHS Trust v MB* [2006] EWHC 507 (Fam).

<sup>22</sup> *Portsmouth NHS Trust v Wyatt* [2004] EWCA 2247 (Fam).

permitted doctors to withhold mechanical ventilation from a profoundly handicapped premature infant. Treatment to support life and palliate suffering was required to be given so long as that treatment was not itself a source of pain and suffering.

*An NHS Trust v MB* was distinguished from *Re C*<sup>23</sup>, involving a child with the same disease, where no available treatment could be held to alleviate suffering. Consequently the *ratio* made lawful the withholding of further mechanical ventilation once it had been withdrawn. Also distinguished was *Re C*<sup>24</sup>, a case of a baby brain-damaged through meningitis, where any treatment given could only be expected to exacerbate suffering.

The judgement in *An NHS Trust v MB* was considered in *Re B*<sup>25</sup> where Mr Justice Coleridge's *obiter* allowed the experts' report to form the basis of future decisions to withhold treatment 'where the medical definitions and situations which may arise in emergencies are not necessarily capable of complete contemplation.'

The facts material to subsequent cases, *Re K*<sup>26</sup> (concerning the withdrawal of tube feeding in a baby with myotonic dystrophy) and *Re L*<sup>27</sup> (concerning a baby with a severe disability due to trisomy 18), were sufficiently similar to those that went before them to allow the precedent that originated in *Re J*, and its derivations, to be applied.

## **Conclusion**

This series of cases illustrates not only how the rules of precedent operate, but how the cascade of precedent progressively modifies, or 'fine tunes', the common law to accommodate for small but significant variations in the material facts of successive cases. In so doing, the clarity and consistency of the law increases across the spectrum of situations to which it must be applied.

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<sup>23</sup> *Re C (A Minor) (Medical Treatment)* [1998] FLR 384.

<sup>24</sup> *Re C* [1996] 2 FLR 43.

<sup>25</sup> *Re B (A Child) (Medical Treatment)* [2008] EWHC 1996 (Fam).

<sup>26</sup> *Re K (A Child) (Withdrawal of Treatment)* [2006] EWHC 1007 (Fam).

<sup>27</sup> *Re L (A Child) (Medical Treatment: Benefit)* [2004] EWHC 2713 (Fam).

## **Table of Cases**

- A, Re (Children) (Conjoined twin: surgical separation)* [2001] Fam 147.  
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### **Table of Statutes**

Children Act 1989

s3(5).

s3(7).

European Communities Act 1972.

European Convention on Human Rights 1950.

Article 2

Article 3

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