

# Conflict Resolution and the Court of Protection

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Expert witness in *Aintree v James*  
Expert witness to HM Coroner in *Ferreira* case

# Decisions

- Few patients die on ICU unexpectedly
- 70% of patients who die on ICU have some form of limitation of treatment

Sprung, Charles L, Simon L Cohen, Peter Sjøkvist, Mario Baras, Hans-Henrik Bulow, Seppo Hovilehto, Didier Ledoux, et al. "End-of-Life Practices in European Intensive Care Units: The Ethicus Study." *JAMA* 290; no. 6 (August 13, 2003): 790–797. doi:10.1001/jama.290.6.790.

# Conflict

- 70% of ICU staff members have reported conflicts in intensive care – staff/staff and staff/family
- Families, ICU physicians and nurses report conflicts in up to 80% of patients requiring a treatment-limitation decision

Azoulay E et al "Prevalence and Factors of Intensive Care Unit Conflicts: The Conflicus Study."  
*American Journal of Respiratory and Critical Care Medicine* 180, no. 9 (2009): 853–60.

# Demanding treatment

Ultimately, however, a patient cannot demand that a doctor administer a treatment which the doctor considers is adverse to the patient's clinical needs.

R (on the application of Burke) v General Medical Council. [2005] EWCA 1003

# Demanding treatment

On an application under this Act, therefore, the court has no greater powers than the patient would have if he were of full capacity. The judge said: “A patient cannot order a doctor to give a particular form of treatment, although he may refuse it. The court’s position is no different”.

*Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67

# Colleague consultation

... there are cases where, despite a body of professional opinion sanctioning the defendant's conduct, the defendant can properly be held liable for negligence ...

*Bolitho v. City and Hackney Health Authority*, [1998] AC 232

COPD – Ventilator dependent >30days, no prospect of weaning  
GMC finding: Decision to withdraw treatment in the absence of adequate and appropriate consultation  
Found proved  
Struck off

# Best Interests

However, having weighed all these matters up, I have reached the clear conclusion that it would not be appropriate at this time to make the declarations that are sought, even though they have unanimous medical support and the backing of the Official Solicitor.

An NHS Trust v DJ & Ors [2012] EWHC 3524 (COP)

- (1) Although DJ's condition is in many respects grim, I am not persuaded that treatment would be futile or overly burdensome, or that there is no prospect of recovery.
- a) In DJ's case, the treatments in question cannot be said to be futile, based upon the evidence of their effect so far.
  - b) Nor can they be said to be futile in the sense that they could only return DJ to a quality of life that is not worth living.
  - c) Although the burdens of treatment are very great indeed, they have to be weighed against the benefits of a continued existence.
  - d) Nor can it be said that there is no prospect of recovery: recovery does not mean a return to full health, but the resumption of a quality of life that DJ would regard as worthwhile. The references, noted above, to a cure or a return to the former pleasures of life set the standard unduly high.

## More recently

I have concluded that it would not, at this stage, be right to grant the Health Board's application ...

In my judgement, deep suctioning has become, for the moment, delicately poised between what can properly be described as 'burdensome' and that which is 'overly burdensome'. In the absence of understanding RY's own views I believe the balance tips, for now, in favour of supporting life.

Abertawe Bro Morgannwg University Local Health Board v RY & Anor (Rev 1)  
[2017] EWCOP 2

Mr Chisholm prefaced his submissions by informing me that the nursing records reveal that there have been 4 clear days, consecutively, when deep suctioning has not been required. To this must be added a perceptible decline in the need for the procedure in the course of the last 2 weeks.

Low function MCS following out of hospital cardiac arrest. Over 7 months on ICU



## Most recently

It was a case in which the court did not have power to order the CCG to fund what the parents wanted. Nor did it have power to order the actual care providers to do that which they were unwilling or unable to do. In those circumstances, the court was entitled to conclude that, in the exercise of its case management powers, no useful purpose would be served by continuing the hearing.

N v ACCG and others [2017] UKSC 22

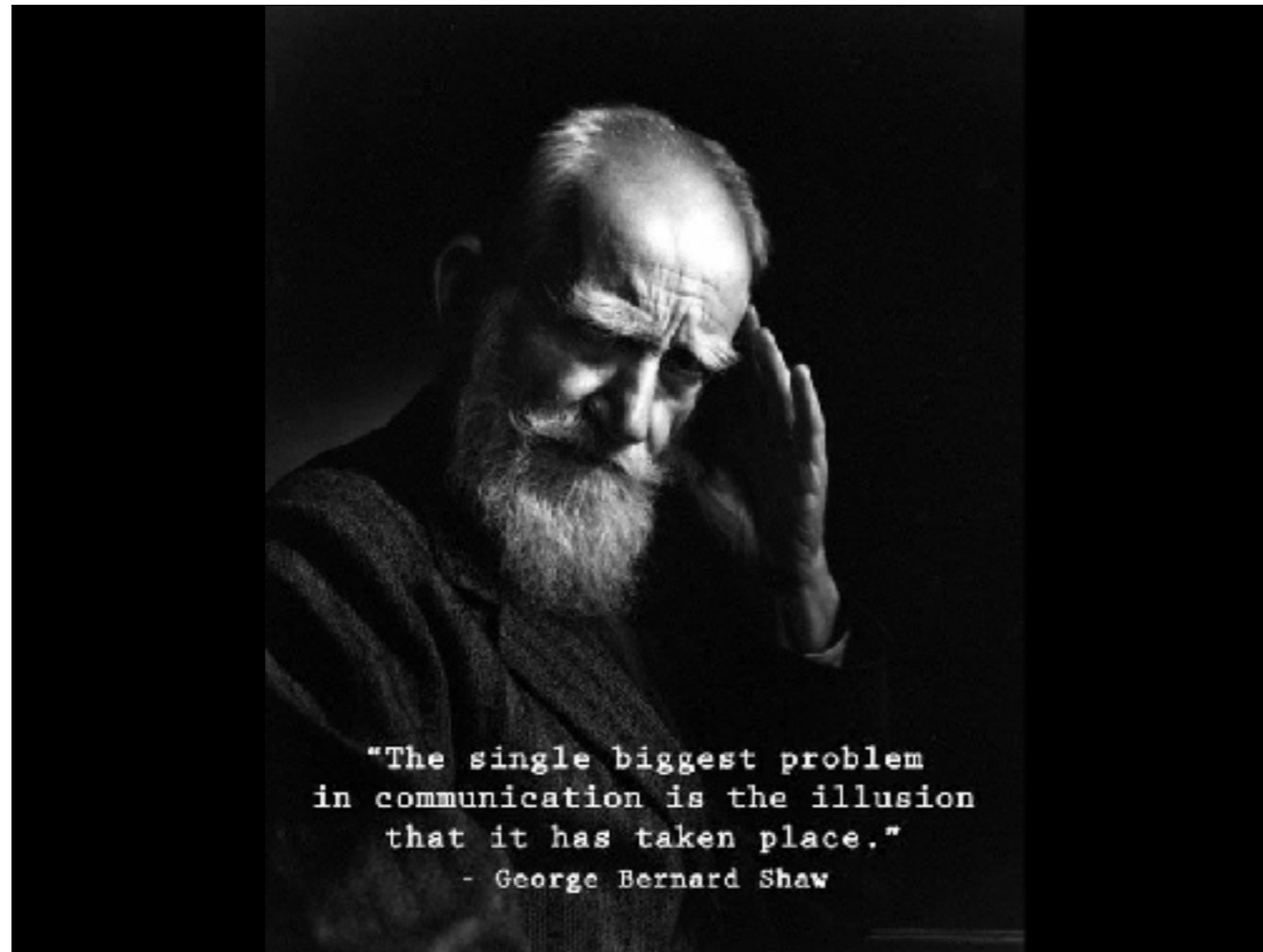
# Solutions

- Alternative Routes of Litigation
  - Judicial Review?
- Alternative Dispute Resolution
  - Mediation - Disputes in Intensive Care usually due to misunderstanding on both sides

# Mediation

The process by which someone tries to end a disagreement by helping the two sides talk.

In the shadow of the law



Personal anecdote about Croydon

# Learning from international experience

- The only 2 areas not considered to be appropriate for mediation are:
  - Whether an adult lacks capacity
  - Whether abuse has occurred.
- Premediation meetings are key
- Understanding of both of law and medicine by the mediator - Specialised training needed.
- Mandatory mediation should be limited to attending the mediation, not required participation.

# Learning from international experience

- Cost
  - COP can be £100k, Mediation ~£5k
- Time – Mediation is faster
- 60 – 90% settle without going to court
- 90% of participants found the experience useful

# Mediation in England

- Family and Employment - Required mediation.
- Nobody is required to settle, but they are required to commit time and often money to exploring the possibility.

# Mediation in England

- Encouraged to use ADR in Court forms and documents;
- Tick-box requirements that clients have, for example, been advised of the need to settle if possible and of the availability at ADR
- Costs sanctions being imposed after judgment in the relatively rare cases in which one party can establish that his opponent has unreasonably refused or failed to mediate.
- Courts' acknowledgement that litigation lawyers are now under a professional obligation to advise their clients of the availability and advantages of ADR.



# Healthcare Mediation in England

- NHS Resolution
- OPG mediation pilot
- Court of Protection pilot
- Parliamentary Ombudsman



# Consequences

Failed Mediation

Court of Protection decision

The day after!

What happens the day after the case is heard. Where is the judge .... The barristers? The solicitors? The family? The clinical team?

