

Doctors ‘use gagging orders to avoid critics’

Debate continues over hospital trusts' applications to judges for anonymity

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The family of Sudiksha Thirumalesh were unable to name her in public until last Friday, after she had died

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For the parents of Sudiksha Thirumalesh last Friday must have been bittersweet. Lawyers for the couple successfully overturned a court order that had prevented their daughter from being named in the media — but by that stage she had died and their campaign for her to be allowed to travel abroad for treatment of a rare condition had abruptly ended.

Thirumalesh's circumstances were painful for her and her family on a straightforward human level. She suffered from a rare genetic mitochondrial disease that caused chronic muscle weakness, loss of hearing, and damage to kidneys. Her condition required regular dialysis and other intensive care. But what made the case even more curious from a legal perspective is that unlike very young patients in several high-profile battles with doctors over treatment, Thirumalesh was an adult. And not only was she 19, but, according to her family, she remained conscious and capable of engaging with issues around her treatment and care.



Yet doctors at an NHS hospital trust, which still cannot be named, applied to a judge in the Court of Protection to have Thirumalesh declared lacking the capacity to instruct lawyers regarding her own medical condition. The judge granted an application from NHS managers for an anonymity order that did not simply bar naming of the doctors or hospital, but also gagged the parents from publicly referring to their daughter by name.

Some lawyers have sympathy for judges who are trying to walk a delicate line. Emma Spruce, a barrister at the chambers 4PB, says that the Thirumalesh case “reflects a wider debate across the spectrum of family law issues in relation to the extent to which private issues should be released into the public domain”. She says that the ruling is an example of the court seeking to strike the “very difficult balance between due public scrutiny and privacy for families in the court system”.

The Thirumalesh case is not alone. The Times is aware that within the past two months, NHS hospital managers at a London trust made a similar application regarding the treatment of another adult — and a gagging order was granted.

There are other examples. This year a judge in the Court of Protection imposed reporting restrictions in the case of the treatment of an adult who had an eating disorder. Such cases have triggered fears among some that the default position of senior NHS hospital administrators in difficult cases involving disputed treatment is becoming a kneejerk reach for lawyers.

Against the backdrop of the Lucy Letby convictions and concerns that NHS whistleblowers are being threatened and silenced, some suggest that doctors aim to take life-and-death decisions behind closed doors. “Reporting restrictions in the Court of Protection are legitimate when they protect the privacy of the patients and their families,” says Andrea Williams, chief executive of the Christian Legal Centre, which advised the Thirumalesh family. “In recent years, however, they have been extended to NHS hospitals and individual clinicians to protect them from criticism. This is an abuse of the system.”

The worries doctors have are understandable. In 2017 the treatment of 11-month-old Charlie Gard gripped the nation and doctors and staff at Great Ormond Street Hospital in London received death threats over their position that life-sustaining treatment should be removed. In 2018 protesters tried to storm Alder Hey Children's Hospital in Liverpool, where Alfie Evans, who was nearly two years old, was being treated for a similarly terminal condition.

Doctors and medical staff rightly fear that public emotion could turn into dangerous rage and they are turning to lawyers to protect themselves. But Williams argues that they are going too far. She says that gagging orders "come as standard in these cases", and that they are "in contravention of the principle of open justice".

Williams says that "exaggerated, misleading or untrue accounts of medical professionals being intimidated are brought out to seek to justify these orders. If doctors and judges insist on ending a life against the will of the patients rather than allowing them to seek alternative treatment, they should expect public scrutiny."

Some doctors also feel uneasy about the increasing use of gagging orders. Arun Bakshi, a retired consultant who is the co-founder of Our NHS Our Concern, which campaigns for a range of reforms to the health service, notes that the Thirumalesh case "is a very sad story", where it appeared "that there was a complete breakdown of trust between the two parties". Bakshi says that it is "important to note that the judge did agree with the clinicians' judgment that the patient was not capable of making a proper judgment", but he adds that "the fact that the breakdown had lasted for more than a year is disturbing. The attempt by the trust to gag the family did not surprise me; the culture of secrecy and gagging is used in other circumstances too."

For Williams, the issue is much wider than the legitimate concerns of doctors over protests. "The public trust in end-of-life care in the NHS will never be restored unless the responsible clinicians have the courage to justify their decisions to the public and to put their names to those decisions," she says.

The lawyer adds that "the more drastic the decision, the more important it is for a named trustworthy person to take responsibility for it. The person who makes the decision to withdraw treatment which leads to death cannot expect to hide behind the NHS."