How do the Courts View Clinical Ethics Committees?

By Emma Cave

Summary: A review of Westlaw cases referring to clinical ethics committees (CECs) reveals a growing expectation of CEC involvement in disputed and finely balanced cases involving the clinical management of both adults and children.

Background: Clinical Ethics Committees (CECs) have developed in trusts and hospitals in the UK to guide clinicians on cases, policy development and education. Recently, professional guidance has placed additional emphasis on the role of CECs in resolving disagreement (GMC 2020 para 92) and negotiating dilemmas in the COVID-19 pandemic (RCP 2020, BMA 2020). In a recent case (Re X (a child) [2020] [21]), the High Court emphasised the lack of guidance for CECs and variation in their function, raising questions as to the ways in which CECs are conceptualised by the courts.

Method: Westlaw UK holds a database of court cases. A literature search using fixed keywords "clinical ethics committee*" and "ethics committee*" revealed 22 sources referring to clinical (as opposed to research) ethics committees from judgments of the European Court of Human Rights and the courts of England and Wales. These sources were analysed.

Results: There are 5 categories of cases making reference to CECs:

1. **CEC involvement establishing the credential of experts**

6 cases ranging from 2008 – 2017 refer to the expertise of expert witnesses or panel members by reference to their role in an ethics committee.

2. **Noting the lack of CEC involvement**

Two cases in the early 2000s note the absence of CECs. The Court of Appeal in *Re A (Conjoined Twins)* [2000] EWCA Civ 254 found that conjoined twins could be separated notwithstanding that it would lead to the death of one twin, in circumstances where both would die if the operation was not performed. In a review of the medical literature, Brooke LJ noted that: 'It appears that in the United States of America proposals to separate conjoined twins may now be referred to hospitals' ethics committees, and not to a court, no doubt because of features of United States law that are different from English law.'

Ms B v An NHS Hospital Trust [2002] EWHC 429 (Fam) confirmed the right of adult patients with capacity to refuse life-sustaining treatment. Butler-Sloss P at [10] said: 'The Medical Director considered that there should be involvement from an ethics committee …. The Trust did not have an ethics committee and the Health Authority was unable to consider the problem.' As a result, the trust sought advice from outside sources.

Whilst the reports in both cases are factual, they acknowledge the potential for CECs to form an alternative or additional source of support for clinicians.

3. CECs advising clinicians in disputed cases involving adults

Between 1997 and 2020, six cases note the relevance of CEC advice in cases of dispute.

Four concern the lawfulness of assisted conception in novel situations. Of these, three noted the relevance of CEC advice to clinicians (*R v HFEA ex parte Blood* [1997] EWCA Civ 946, p 165; Secretary of State for the Home Department v Gavin Mellor [2000] EWHC Admin 385; *R (on the application of IM, MM) v Human Fertilisation and Embryology Authority)* [2015] EWHC 1706 (Admin)), and one noted the relevance of ethics committee advice to the fertility regulator (*The Queen on the Application of Quintavalle v Human Fertilisation and Embryology Authority* [2002] EWCA Civ 667, [101]).

Two further cases involved ethical issues relating to the treatment of adults: In *Newcastle upon Tyne Hospitals Foundation Trust v LM* [2014] EWHC 454 Peter Jackson J noted the consultation of the chair of a CEC by clinicians in the case of an adult Jehovah's Witness patient who was refusing the administration of blood products. And in *ABC v St George's Healthcare NHS Trust* [2020] EWHC 455 (QB), Yip J noted that a meeting of the St George's Clinical Ethics Committee considered whether confidential information should be disclosed to a family member against the wishes of the patient.

4. CECs advising clinicians in disputed cases involving children

Between 2014-2021, six cases referencing CEC involvement concern the treatment of children. Five of these involved Great Ormond Street Hospital for Children which pioneered the establishment of a clinical ethics service from 2000. Most of these cases simply note that ethics committee consideration was part of the process in trying to resolve disputes (eg *Great Ormond Street Hospital for Children Foundation NHS Trust v NO & KK v MK* [2017] EWHC 241 (Fam), [16]; *Re R* [2018] EWFC 28 Baker J [37]; *Gard v UK* (2017) 65 EHRR SE9 [6]).

Two cases are noteworthy. In *Re AA* [2014] EWHC 4861 (Fam) Mrs Justice King said: 'AA's case has been considered with the upmost care by the Ethics Committee … In my judgment the conclusion reached by the Ethics Committee and the courageous decision of her mother that it is no longer in AA's best interests to be hydrated, is undoubtedly correct and in her best interests.' [19], [21].

This case notes the value of CEC involvement, but it also blurs the boundary between CEC advisory function and a decision-making role, stating at [11] that 'A decision was reached at the Ethics Committee that, because of AA's intolerable and unmanageable pain, the time had come to stop giving AA nutrition; this decision was reached with the agreement of the mother and all the experts.'

In *Re X (A Child)* [2020] EWHC 1958 (Fam) too, as we have discussed elsewhere, the judgment seems to blur the boundary between advice to clinicians and a binding decision. Like *Re AA*, this judgment is positive about the potential for CEC involvement, but laments the lack of guidance, particularly around the involvement of parents in CEC meetings.

5. CECs safeguarding patient interests

Two cases recognise the relevance of CECs as a process by which the best interests of patients can be protected. One is a case from the European Court of Human Rights, *Lambert*

v France (2016) 62 EHRR 2, which noted the involvement and advice of a clinical ethics committee 'to overcome a problem or to resolve a conflict' [66], and as a safeguard when considering the withdrawal of treatment from an adult patient [25].

In England and Wales, Lieven J in *AB v CD* [2021] EWHC 741 (Fam) [110] noted that CECs form one of a number of safeguards used by clinicians in cases of doubt as to what course of action is in a patient's best interests.

Conclusion: Three overarching themes emerge. First, there is increasing reference to CECs in court cases describing processes to resolve finely balanced and disputed cases. Second, the most recent cases indicate the potential of CECs to advise clinicians making decisions on the best way to safeguard the best interests of patients. Third, there is a shift from a neutral description of processes to an expectation of CEC involvement in difficult cases, which has potential to generate impetus for additional support and structure of CECs in the NHS.