



JUDICIAL REVIEW AND HOW TO AVOID IT

Dawn Brathwaite - Partner



The right direction for legal advice,
wherever you are.

Profile



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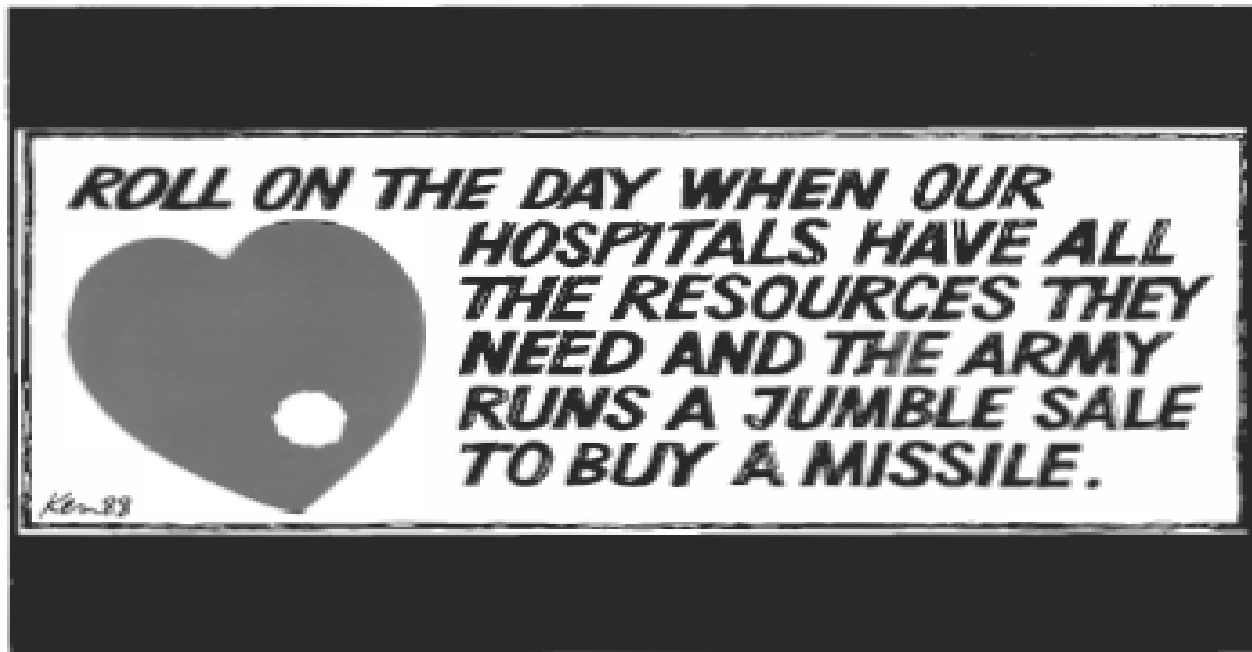
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Dawn is a Partner who joined Mills & Reeve in 2001. She specialises in dispute resolution. Dawn started her legal career in Trinidad, West Indies, doing a mixture of contentious and non-contentious work. She has extensive experience as a litigator, acting for claimants before joining Mills & Reeve doing defendant work. She has also expanded her work to do regulatory work and has substantial experience of judicial review claims. Dawn's recent work includes advising health bodies on a wide range of matters including confidentiality issues, consent to treatment (including obtaining court orders), continuing care and funding for unusual treatment. She was involved in the recent Lucentis Judicial Review claim. She also advises PCTs on Performers' List Management issues.

Judicial Review

- Mechanism to challenge decisions of public bodies
- Objective - to get public body to revisit decision
- Attracts media attention
- Pressure Group involvement (Specialist Claimant Firms)
- Costly

Where do we want to get to?



Judicial Review - Lawful Decision Making

- “.. it is appropriate for the court to subject the decision to refuse funding for the treatment (and thus in practice the treatment) to rigorous scrutiny”

R (on the application of Rogers) v. Swindon PCT [2006] EWCA Civ 392

[The Herceptin case]

- **NHS Act 2006**
 - Section 1
 - Section 3
 - Section 229

Judicial Review – Lawful Decision Making

- **Illegality**
- **Irrationality**
- **Procedural Impropriety**
- **Human Rights**

Judicial Review – Lawful Decision Making

- **Hincks**
- **Coughlan**
- **Fisher**
- **A,D and G**
- **B**

Judicial Review – What does this mean in practice?

- **A duty to give reasons:**
 - Must explain what is relevant,
 - ignore the irrelevant and
 - reach a reasonable decision

What does this mean in practice?

- **Have a policy**
- **Follow the policy**
- **The right body is constituted to take a decision**
 - It has all the relevant information
 - It has proper minutes of its deliberations
 - It reaches a decision
- **The PCT explains the real reasons for the decision.**

The impact of the ECHR in this area of law?

[That is right – virtually none]

Judicial Review – Impact of ECHR

- **Articles 2 and 8**
- **NW Lancashire**
- **Haringey PCT**
- **Pentiacova**

How to avoid JR?

- **Never say “No”**
- **If you are going to say “No” ensure that you:**
 - Get the process right: Decision taken in accordance with the policy.
 - Get the communication right: Letters to patient not just internal NHS issue.
 - Have a complete and defensible audit trail.
 - If JR threatened, seek legal advice early. Its cheaper to re-run the process than pay for a JR.

Procedural impropriety and Irrationality (1)

- **If you have a policy, follow it**
 - If you decide to deviate from it, explain why
- **If there is NICE or DH Guidance follow it**
 - If you decide to deviate from it, explain why
 - If it is a TAG you must follow it unless exempted
 - Cannot say No simply because no NICE Guidance

Procedural impropriety and Irrationality (2)

- **Interim Policy on drug**
 - Consider all relevant information available
 - Reconsider in light of new relevant information
- **If there is a requirement to consult – do so**
- **Blanket ban/Exceptional Circumstances**
- **Irrationality – there are no irrational judges but public bodies can be...**

Stages of Judicial Review

- **Letter Before Action**
 - Limited time to respond
 - Assess strength of case
 - Do not defend – indefensible
- **Permission/Interim Order**
 - Arguable case
 - Urgent relief
- **Full Hearing**

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