counselling to enable a badly distressed employee to get back to work''. Thus, the evaluation of conflicting psychiatric evidence is on any view within the jurisdiction of employment tribunals. There therefore seems to be no reason why Mr. Dunnachie should not have received compensation for the distress suffered because of the treatment that constituted his unfair dismissal.

JESSE ELVIN

TERMINATING CARE

IT could easily be one of *Emergency Room*'s most memorable episodes. A 12-year old child—let us call him David—is rushed to hospital. He is severely mentally and physically handicapped. For the third time in the last couple of months, he suffers acute respiratory failure. The doctors tell the child's mother that her son is dying, and that they need to administer diamorphine to him to ease his distress. The mother believes that the doctors are wrong and fears that the administration of diamorphine will compromise her son's chances of recovery. She strongly disagrees with the proposed course of treatment. Other members of the family accuse the doctors of covert euthanasia. A police officer is called in to monitor the dialogue between the hospital and the patient's family. She tells the family that if they try to move the patient, they will be arrested. Against the mother's wishes, diamorphine is administered to her son throughout the night. A "Do not resuscitate" (DNR) order is put into his notes without her knowledge or consent. In the morning, the doctors are pleased with the diamorphine's effects. The mother is horrified by them. She demands that the diamorphine be stopped. The doctors tell her that this is only possible if the family agrees not to disturb David, making no attempts to resuscitate or otherwise stimulate him on his supposed deathbed. Some members of the family "lose it" and attack the doctors. During the ensuing tumult, the mother successfully resuscitates her son, who seems to have stopped breathing. An evacuated children's ward, two injured doctors and several injured police officers later, the child has sufficiently recovered to be discharged into home care on that very day.

These are the "disturbing and unbelievable" (Judge Casadevall) facts of *Glass* v. *United Kingdom*, Application no. 61827/00, 9 March 2004, where the European Court of Human Rights found that David Glass's right to physical integrity, protected under Article 8 of the Convention as an aspect of his right to respect for

his private life, had been violated by the administration of diamorphine to him in the absence of prior consent. While taking no view on whether the administration of diamorphine to David despite her refusal to consent also engaged David's mother's right to respect for family life, the Court awarded David and his mother jointly 10,000 Euros as non-pecuniary damage (which incidentally raises the interesting and novel spectre of a compensatory award for a "secondary victim" of a human rights violation).

The outcome is clearly the most commendable aspect of the European Court's decision. After the English courts had shown themselves more than disinclined to pronounce on the lawfulness or unlawfulness of David's treatment, which they were invited to do in connection with Mrs. Glass's thwarted endeavours to get a ruling which would ensure that no drugs would on future occasions be administered to David without her consent (*R.* v. *Portsmouth Hospitals NHS Trust, ex parte Glass* [1999] 2 F.L.R. 905, at 909), it was high time for a judicial organ to declare that this was no way to treat either David or his mother. But the legal construction which the Court places on the case in order to produce this welcome outcome is of doubtful value for preventing instances of premature terminal care for severely handicapped patients recurring in the future. At the same time, the ruling has some important procedural implications for the future treatment of child patients.

The Court's reasoning focuses on the question whether the administration of diamorphine to David—an interference with David's physical integrity by the hospital, a public institution whose conduct is capable of engaging the responsibility of the UK government—was "in accordance with the law" and "necessary" in a democratic society for the protection of David's health. The Court accepts that the doctors at Portsmouth hospital pursued a legitimate aim in treating David with diamorphine, since the action they took "was intended, as a matter of clinical judgment, to serve [his] interests" (para. 77). The Court also confirms that the treatment was "in accordance with the law", since domestic law gives doctors emergency powers. But, in a rather surprising move, the Court then finds that the applicants' contention that domestic law failed to discharge its positive obligation to protect David's life by allowing the administration of diamorphine to him in the circumstances "in reality amounts to an assertion that ... the dispute between them and the hospital staff should have been referred to the courts and that the doctors treating the first applicant wrongly considered that they were faced with an emergency". According to the Court, this aspect falls to be dealt with under the "necessity" requirement of Article 8 para. 2 (para.

76). Considering that there was sufficient time for the hospital to get a court ruling prior to the administration of diamorphine to David, and that in view of the prolonged and increasingly confrontational discussions about the proper course of treatment for David, "the onus was on the Trust" to take this step (para. 79), the Court concludes that "the decision of the [hospital] authorities to override the second applicant's objection to the proposed treatment in the absence of authorisation by the court resulted in a breach of Article 8" (para. 83).

Contrary to what a recent commentary in *The Times Law Supplement* suggests, this case will not affect a doctor's competence to provide emergency care to minors in the face of parental refusal without applying for a court ruling first. However, it does make it clear that this competence is restricted to genuine emergencies. In practice, there may well be more occasions now where hospitals must make an application to the court. Such a move is expected whenever, as in the *Glass* case, there is real and continuing disagreement between parents and doctors about what kind of treatment is appropriate for the child. It is no longer open to the hospital to keep discussing with the parents what is to be done until the child's condition has deteriorated to a point where the hospital feels entitled to dispense with their consent, acting under emergency powers to do as it sees fit.

What makes the European Court's "solution" so unsatisfactory is rather the lingering suspicion that, if the hospital had sought prior court authorisation for the proposed course of treatment, the courts would almost certainly have authorised it. To pretend that the real issue in the case was that David had been given diamorphine without his mother's consent in a situation where emergency powers could not justify this step is legalistic shadow-boxing. The real issue, on which Judge Casadevall puts his finger in his brief but scathing separate opinion, is the appropriateness of a DNR-order combined with the administration of diamorphine to a child who was, as a subsequent letter from the hospital ominously put it, "dying, albeit that this is in the sense of terminally ill rather than immediate".

The case thus stirs up the muddy foundations of treatment choices for severely handicapped patients. The hospital never denied that they intended to put David under a regime that was meant to ease his death, not to maximise his lifespan. In this approach they persisted even after the events which formed the subject-matter of this case, writing to David's mother that "all we could offer [on future occasions] would be to make his remaining life as comfortable as possible and take no active steps to prolong life".

In the light of David's mind-boggling transfer from supposed deathbed to effective home care, it is forgivable to wonder whether the initial medical assessment of David's prospects might have been partly influenced by the view that his life was a pointless continuation of a burdensome existence. Is perhaps the truth behind what in retrospect appears to have been an obvious misdiagnosis that the doctors really thought poor David had the opportunity of a lifetime to end a miserable existence naturally, and should be allowed to make the most of it?

The European Court went out of its way to pretend that this was not the question. In its admissibility decision of 18 March 2003, it disallowed the complaint under Article 2 (the right to life). But the pressing issues this case raises will not be resolved unless the Court is willing to address the question of the weight that should be given, in the context of end-of-life decisions, to a severely handicapped child's interest in survival.

ANTJE PEDAIN

THE MEANING OF AN "AVAILABLE" FORUM

IN *Gheewala and others* v. *Hindocha and others* [2003] UKPC 77, [2003] All E.R. (D) 291, the Privy Council had to consider an aspect of the *Spiliada* test which is not often in dispute, namely, when an alternative forum is "available" to the claimant.

The litigation arose out of a complex family dispute as to the beneficial ownership of the Gheewala family fortune. Nine of the ten defendants were members of the Gheewala family. Some were resident in Kenya and some in England. The claimant, who was also a member of the family, brought a claim in Jersey alleging that the family property was held under a Hindu co-parcenary and seeking a partition and distribution of the property. The tenth defendant was a Jersey trust company alleged to hold family property. The claim was brought as of right against the Jersey company and the claimant obtained leave to serve the claim on the other defendants outside the jurisdiction. A number of the defendants immediately applied for a stay on the grounds of *forum non conveniens* on the basis that Kenya was the more appropriate forum for the hearing of the dispute. That stay was granted at first instance, was overturned by the Court of Appeal in Jersey and was eventually reinstated by the Privy Council.

Lord Goff formulated the first stage of his classic test in the *Spiliada* in the following terms: "the basic principle is that a stay