

Mental Capacity & Mental Health Law – A Short Introduction

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Introduction

- History of mental health legislation
- Confusion between mental disorder & lack of capacity
- Development of common law principles
- Basic principles of Mental Capacity Act 2005
- Some case law since October 2007

History lesson (no.1)

- 1339 - Parens patriae jurisdiction
- 1774 - Act for Regulating Private Madhouses
- 1815 - *'Parliamentary Inquiry into Madhouses'*
- 1828 - Madhouses Act
- 1845 - Lunacy Act (Lunacy Commission)
- 1890 - Lunacy Act (Office of the Master in Lunacy)
- 1947 - Master of Lunacy renamed as 'Court of Protection'
- MHA 1959 - replaced judicial certification with 'sectioning'; inserted Court of Protection; abolished parens patriae

DEFINITIONS

- *parens patriae* 'the ancient power derived from the royal prerogative *to make orders relating to the person*, as opposed to property and affairs, of people unable to look after themselves'
- **OLD CoP** = individual who was 'incapable, by reason of mental disorder, of managing and administering *his property and affairs*'.
- MHA 1959 = mental illness; arrested or incomplete development of mind; psychopathic disorder; any other disorder or disability of mind

Recipe for Confusion

- one statute existed with two purposes
- One part deals with the mental illness (and compulsory detention for treatment)
- One part deals with those who are unable to manage *property and affairs* by reason of mental disorder (and little else)(called the Court of Protection)
- No test for incapacity

History Lesson (no.2)

- 1989 Law Society Mental Health Sub-Committee drew attention to legal vacuum in respect of those who lacked capacity
- Law Commission made recommendations for statute (1995)
- 'There exists no wholly appropriate legal mechanism for examining whether or not W should be free to make her own decisions ... the 1959 Act was thought to have placed all the necessary features of the ancient prerogative jurisdiction on a statutory footing. Cases such as this have proved that judgment wrong and it is to be hoped that Parliament will before too long turn its attention to the matter once more' *Hale J Cambridgeshire CC v R (An Adult)* [1995] 1 FLR
- Mental Capacity Act 2005 (1st Oct. 2007)
- Removed Court of Protection from MHA 1983

What happened without the Mental Capacity Act?

- Mrs Justice Hale
- Mr Justice Munby
- Mr Justice Thorpe

- Development of common law in respect of capacity and range of powers of High Court, and subject matter of powers in respect of those who lacked capacity

Tests for Capacity

(Medical Treatment)

- Re C (Refusal of Medical Treatment) [1994] 1 FLR 31 (Thorpe J)
- 1: every adult has right to decide whether to accept medical treatment;
- 2: an adult may lack capacity;
- 3: if he does, then doctors must act in best interests
- 4: Capacity may be reduced, but not absent

Test for Capacity

(Medical Treatment)

- Has it been established that capacity is so reduced that there is insufficient understanding of nature, purpose and effect of treatment?
- Decision making process = (1) comprehending & retaining treatment information; (2) believing it; (3) weighing it in the balance to arrive at a choice.
- Established existence of jurisdiction for declaratory/injunctive relief

Test for Capacity

(General)

- Masterman-Lister v Brutton & Co [2004] 7 CCLR 5
- Issue of capacity to manage affairs (generally – not just medical treatment) a matter for judicial determination based on evidence
- Cannot be made administratively
- Definition of patient (via MHA 1983) not of much assistance
- Test of capacity must be subject specific
- [Note CPR 21 has been modified to refer to ‘protected party’ rather than ‘patient’]
- Burden of proof on person who asserts lack of capacity based on medical evidence
- Rashness or irresponsibility does not equal incapacity

Specific Areas of Concern

(but still no Mental Capacity Act)

- *Re S (Adult Patient) [2003] 1 FLR 292 (LA wished to remove adult son from care of father – Art. 8 – conflict to be decided in accordance with best interests of son – presumption that son better off with his family – Court could appoint third party as surrogate decision maker)*
- *Re S (Adult's Lack of Capacity) [2003] 2 FLR 1235 (adult daughter cared for by father – removed by LA – best interests of daughter – 4 questions to be asked (1) was mental incapacity established; (2) was there a serious justiciable issue relating to welfare?; (3) what was the issue?; (4) what were the factors which must be balanced in order to decide which course of action was in best interests of daughter?)*
- *M v B, A & S [2006] 1 FLR 117 (restriction on removal from jurisdiction of vulnerable adult for arranged marriage; lack of capacity to enter into a contract of marriage – best interests test to be applied; injunctive relief granted)*
- *Re Z [2005] 1 FLR 740 (removal of adult from UK to Switzerland for euthanasia)*

WHAT IS THE COURT OF PROTECTION?

- It is the statutory basis (MCA 2005) upon which decisions may be made on behalf of those who lack capacity
- It operates on the principles of the common law described so far
- It deals with all the subject areas described so far (eg financial; personal welfare; health care).

Basic Principles of Court of Protection

- To adjudicate on issue of capacity (unable to make a decision due to impairment/disturbance in functioning of mind or brain whether permanent or not) for those over the age of 16
- To make decisions if capacity is absent
- MCA 2005 supplemented by Code of Practice (296 pp) which has statutory force

Basic Principles of Court of Protection

- Cannot understand information
- Cannot retain information
- Cannot use information as part of process of making decision
- Cannot communicate decision (at all)
- Information includes consequences of either deciding one way or the other, or failing to make a decision (s.3)

Basic Principles of Court of Protection

- ‘To deal with decision making for adults (and children in a few cases) who may lack capacity to make specific decisions for themselves. The new Court of Protection replaces the old court of the same name , which only dealt with decisions about the property and financial affairs of people lacking capacity to manage their own affairs. As well as property and affairs, the new court also deals with serious decisions affecting health care and personal welfare matters. These were previously dealt with by the High Court under its inherent jurisdiction’ (Code of Practice para 8.1)
- A court of superior record able to establish precedent

Basic Principles of Court of Protection

- P must be assumed to have capacity unless established to the contrary
- P is not to be treated as unable to make a decision unless all practicable steps have been taken to help her to do so have been taken without success
- P is not to be treated as unable to make a decision merely because she makes and unwise decision
- An act done, or decision made, under the MCA 2005 for or on behalf of a person who lacks capacity must be done or made in his best interests
- Before the act is done or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way which is less restrictive of the person's rights and freedom of action
- Must not make a decision on basis of age, appearance, or condition or aspect of behaviour which might lead to an unjustified assumption
- Consider whether capacity will return, and if so when

Basic Principles

- If decision relates to cessation of life sustaining treatment, this must not be motivated by desire to bring about death
- Look at past and present wishes and feelings (including any written statements) to see if these provide an indication of what P would have wanted when capacity present
- Consider the beliefs and values of P when she had capacity
- Consult anyone named by P to be consulted on the relevant issue
- Consult anyone engaged in caring for the person or interested in her welfare

Powers of Court of Protection

- Declarations as to capacity; lawfulness of act or proposed act
- May appoint deputies in respect of personal welfare or property/affairs
- Powers of deputies should be as limited in scope and for as short a duration as possible
- Can make interim/emergency orders

Some Case Law 2010-2011

- Application by Local Authority that P lacked capacity to decide whether to use contraception; that it would be in P's best interests to have contraception; that it might be in her best interests for contraception to be administered by force;
- Declaration made as to lack of capacity as to issue of contraception
- No order made as to 'best interests'
- no evidence of risk to P by way of childbirth or removal of child
- further attempts to be made to enable P to make decision
- any step towards physical coercion with affinities to enforced sterilisation and social engineering would raise profound questions about state intervention in private and family life

Some Case Law 2010-2011

- Residential placement of P; placement broke down due to behaviour of father; not in best interests of P to live with either parent; father removed P to Israel.
- Injunctive relief as against father on basis that imperatives of P's best interests were to enable P to settle after abduction and to ensure her safety;
- purpose of injunctions not to punish but to ensure safety and happiness and family life with mother and sister (of which she had been deprived due to acts of father)
- Injunctive relief included prohibition on;
- removal from placement;
- direct contact;
- attending at or near premises of placement
- Obtaining a passport
- Approaching employees of owners of residential placement
- All concerns about placement to be raised via care co-ordinator
- Permission required from CoP for any future applications
- Restrictions on press coverage

Some Case Law 2010-2011

- Issue as to where P should live and what contact she should have with family members
- Declaration that P lacked capacity to decide on where she lived and with whom she should have contact
- Court should apply plain words of MCA 2005 to facts of case (and avoid references to pre-MCA 2005 authorities although such reference was not always otiose)
- If any one of the individual incapacities set out in s.3 were present then P lacked capacity

[2011] 1 FLR 594

Some Case Law 2010-2011

- Test for capacity to consent to sexual relations
- Did P have sufficient rudimentary knowledge of the specific sexual act and its sexual character?
- Did this knowledge enable P to decide whether to give or withhold consent?
- Such consent required:
 - (a) understanding and awareness of the mechanics of the sexual act;
 - (b) health risks
 - (c) sex between man and woman may lead to pregnancy

[2011] EWHC 101 (Fam)

Taking liberties

- Deprivation of Liberty Safeguards (Code of Practice)
- Applies to care home and hospitals (18 +)
- Role of state in safeguarding liberty of children & adults who fall outside DOLS
- (1) to investigate whether there is a deprivation of liberty;
- (2) if there is no deprivation of liberty to monitor if necessary;
- (3) if there is or may be a deprivation of liberty, to take reasonable and proportionate measures to end the situation;
- (4) if unable to do so, then assistance of Court may be required to determine whether there is a deprivation of liberty, and obtaining authorisation for such deprivation.

- [2010] EWHC 978 (Fam)

Deprivation of Liberty

- If deprived of liberty, access to Court required to determine lawfulness of detention (Art 5)
- Importance of right to liberty paramount and obligation of state to provide the facilities necessary for its effective exercise is absolute
- Is happiness relevant? (it is relevant to whether deprivation of liberty is in best interests of P, and consequently a necessary condition of it being lawful and thus not infringing Art 5)
- Objections to confinement highly relevant as to whether deprivation of liberty exists
- Medication relevant to deprivation of liberty (eg suppression of liberty to self expression)
- 'Normality' of living arrangements relevant to deprivation of liberty
- [2011] EWCA Civ 190 (28.2.11)

What Price Dignity?

- Keynote address by Lord Justice Munby (13 CCLR (2010) 305)
- CoP is a *protective regime ...public authorities should intervene only where there is a need*
- *The starting point should be the normal assumption that incapacitated adults will be better off if they live with a family rather than in an institution*
- *'human dignity is all the more important for people whose freedom of action and choice is curtailed...'*
(Baroness Hale of Richmond)

What Price Dignity?

- *The nearer to the borderline of incapacity, the more weight must in principle be attached to P's wishes and feelings*
- *The strength and consistency of the views*
- *The possible impact on P of knowledge that her wishes and feelings are not being given effect to*
- *The extent to which P's wishes and feelings are, or are not, rational, sensible, responsible and pragmatically capable of sensible implementation in the particular circumstances*
- *The extent to which P's wishes and feelings, if given effect to, can properly be accommodated within our overall assessment of what is in her best interests*

What Price Dignity?

- *All life involves risk, and the elderly and vulnerable are exposed to additional risks and to risks that they are less well equipped than others to cope with*
- *We must avoid the temptation always to put the physical health and safety of the elderly and the vulnerable before everything else*
- *Physical health and safety can sometimes be bought at too high a price in happiness and emotional welfare*
- *'L'enfer est plein des bonnes volontés ou desirs' (St Bernard of Clairvaux)*
- *What good is making someone safer if it merely makes them more miserable?*
- *Some residential placements may be 'safer' but if being removed from everything she has known and still wants has the effect that P simply loses the will to live, what 'good' is being achieved?*

READING LIST

Ashton, Gordon 'Court of Protection Practice' Jordans 2011

Hale, Brenda 'Mental Health Law' Sweet & Maxwell 2010

Mental Capacity Act 2005 'Code of Practice' (DCA 2007)

Mental Capacity Act 2005 'Deprivation of Liberty Safeguards'
(DCA 2008)

Assessment of Mental Capacity (Law Society/BMA) 3rd Ed
2010