

# Autonomy, capacity & internet/social media



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- Fundamental distinction in law: those with capacity and those without



- Notion of concept is key as it is pre-requisite to the right of bodily integrity and autonomy because of the restrictions a lack of capacity can impose:

*“It is established that the principle of self-determination requires that respect must be given to the wishes of the patient, so that, it can adult of sound mind refuses, however, unreasonably, to consent to treatment or care by which his life would or might be prolonged, the doctors responsible for this care must give effect to his wishes”,*

**Lord Goff in Bland**



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- Foundations are found in the works of Immanuel Kant & John Stuart Mills
  - The Categorical Imperative: self governance
    - Civil Liberty: freedom from coercion

*“Autonomy makes each of us responsible for shaping our own life according to some coherent and distinctive sense of character, conviction & interest... This view... focuses not on individual decisions one by one, but the place of each decision in a more general program or picture of life the agent is creating and constructing, a conception of character and achievement that must be allowed its own distinctive integrity”, Ronald Dworkin*



Why and how is this is all relevant:



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- If we consider autonomy to be of instrumental value, which content it sought to be,
- Then the test for determining relevant information under section 3(2) of the 2005 Act must be:
  - (a) Germane to the decision at hand,
  - (b) Relate to the bare basics of the decision, and
  - (c) Para. 4.16 of the Code: nature of the decision, why decision is needed and the likely effects of deciding one way or another or making no decision

Otherwise, we fall foul of the 2005 Act being incompatible with the ECHR.



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# Social Media & Capacity



Re A (Capacity: Social Media and Internet Use: Best Interests) [2019] EWCOP 2;

Re B (Capacity: Social Media: Care and Contact EWCOP 3



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In two linked judgments, Cobb J outlined the relevant, and irrelevant, information for the purposes of deciding whether a person has capacity to make decisions about internet and social media use.

The importance of the internet and social media...



The rise and development of the internet and social media networks over recent years has fundamentally reshaped the way we engage with each other, and as a society. Incalculable numbers of digital electronic devices – mobile phones, tablets, and computers – are engaged every second of every day, from all reaches of the globe, for communication, entertainment, education, relaxation, and/or for gathering information. There is an ever-growing number of social media ‘apps’ available for instant messaging and networking; among those most prominently referred to in these proceedings are Facebook, WhatsApp, Snapchat, Facetime, Skype, Instagram, and Twitter, all of which are relatively easy and cheap (even free) to use.



*The internet and associated social media networks are particularly important for people who have disabilities, and/or social communication problems. They enable ready access to information and recreation, and create communities for those who are otherwise restricted in leaving their homes. The internet and social media networks have generally served over the years to promote social inclusion, rather than exclusion; they offer disabled users opportunities and enhanced autonomy, they provide a means to express social identity, and they enable the learning of new skills, and the development of careers. The importance of creating and maintaining ready access for the disabled to electronic and digital technology is well-recognised, and needs no amplification in this judgment; it is indeed identified as a right within the United Nations Convention on the Rights of Persons with Disability (‘UNCRPD’).*



# Re B



- Miss B has a diagnosed learning disability and epilepsy and has considerable social care needs.
- Miss B currently lives with her parents and sibling and has occasional overnight respite care which she appears to enjoy, and some community support, she is somewhat socially isolated.
- The family home is said to be unkempt and dirty; Miss B spends much of her time watching television.
- She enjoys colouring in pictures (an activity which Cobb J observed whilst he chatted to her)



# Re B



- Miss B struggles to manage her personal care and hygiene.
- She is prone to confrontational behaviour when challenged, and can be physically aggressive.
- Miss B has been assessed as requiring support to maintain her safety when communicating with others; when she receives information which she does not want to hear, she often becomes dismissive, verbally aggressive and refuses to engage.



# Re B

- Miss B is wedded to her mobile phone and uses it to communicate via social media- Whatsapp, Facebook and Snapchat
- Her social media activity has over the last three years caused repeated concern to her adult social care workers.
- Miss B was known to send intimate photographs of herself, and to communicate her address and other personal information about herself, to meet strangers.
- She is very keen to be in a relationship with a male



- Miss B is known to search the internet for a boyfriend by typing in male forenames, and when men respond, she asks them directly whether they will be her boyfriend
- Once she has made a link with a potential mate, and they respond to her, she views them as a ‘friend’ and will quickly tell them that she loves them and wants to meet with them. She routinely ‘sex chats’ with males
- A number of safeguarding concerns followed as to the nature of the relationships that she formed online, with one relationship with a known sex offender causing particular concern



# The Issues



- Is the decision to access social media and the Internet a separate decision, e.g should it be assessed as a separate domain of decision making from decisions relating to care and contact;
- If the answer is yes, then what is the relevant information that a person will have to understand, use and weigh, retain and communicate.



# Separate decision

*“It seems to me that there are particular and unique characteristics of social media networking and internet use which distinguish it from other forms of contact and care; as I described above (see [4]), in the online environment there is significant scope for harassment, bullying, exposure to harmful content, sexual grooming, exploitation (in its many forms), encouragement of self-harm, access to dangerous individuals and/or information – all of which may not be so readily apparent if contact was in person. The use of the internet and the use of social media are inextricably linked; the internet is the communication platform on which social media operates. For present purposes, it does not make sense in my judgment to treat them as different things. It would, in my judgment, be impractical and unnecessary to assess capacity separately in relation to using the internet for social communications as to using it for entertainment, education, relaxation, and/or for gathering information.”*



# Relevant information



which P needs to be able to understand, retain, and use and weigh, is as follows under section 3(1)

- Information and images (including videos) which you share on the internet or through social media could be shared more widely, including with people you don't know, without you knowing or being able to stop it; 



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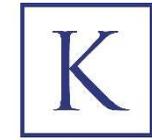


- It is possible to limit the sharing of personal information or images (and videos) by using 'privacy and location settings' on some internet and social media sites; [see paragraph below];

- *I do not envisage that the precise details or mechanisms of the privacy settings need to be understood but P should be capable of understanding that they exist, and be able to decide (with support) whether to apply them*

- X





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- If you place material or images (including videos) on social media sites which are rude or offensive, or share those images, other people might be upset or offended; [see paragraph below];
  - *rude or offensive’ – as these words may be easily understood by those with learning disabilities as including not only the insulting and abusive, but also the sexually explicit, indecent or pornographic;*
- ✘ Not relevant to B



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- Some people you meet or communicate with ('talk to') online, who you don't otherwise know, may not be who they say they are ('they may disguise, or lie about, themselves'); someone who calls themselves a 'friend' on social media may not be friendly;

- *that is to say, "sending on an email, offering on a file sharing platform, uploading to a site that other people have access to, and possessing with a view to distribute"*



- Some people you meet or communicate with ('talk to') on the internet or through social media, who you don't otherwise know, may pose a risk to you; they may lie to you, or exploit or take advantage of you sexually, financially, emotionally and/or physically; they may want to cause you harm;



- If you look at or share extremely rude or offensive images, messages or videos online you may get into trouble with the police, because you may have committed a crime; [see paragraph below].

- *Not intended to represent a statement of the criminal law, but is designed to reflect the importance, which a capacitous person would understand, of not searching for such material as it may have criminal content, and/or steering away from such material if accidentally encountered, rather than investigating further and/or disseminating such material. Relevant to general internet use rather than communications by social media, but it is relevant to social media use as well.*

✗ Not relevant to B



- The limbs are problematic (my view)
- Solved by considering 4 propositions:
  - Rationale:

*what amounts to RI requires an exploration of the socio-legal context especially given that the internet remains largely unregulated*



# 1. Access to the internet/social media is a significant right



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- UN Convention on the Rights of Persons with Disabilities:  
promote access to internet
  - Cerngiz v Turkey ECtHR 2015: practical means of exercising the rights of freedom of expression
- Academic research: those with intellectual disabilities benefit including
  - decreasing isolation,
  - promoting self-determination,
  - increasing opportunities to make and maintain relationship,
    - social identity, and
    - self confidence,

*Darren Chadwick, Caton and Chapman*



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## 2. There are unique risks



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- Professional Livingstone of LSE (context of children) said risks include (children)
  - (a) engagement in anti-social behaviour,
  - (b) uploading sexually inappropriate pictures/texts,
  - (c) negative online contact: personal information stolen,
  - (d) being bullied,
  - (e) being groomed and
  - (f) exposed to harmful manipulative content
- Home Office Task Form on Protection on the Internet: content risk, conduct risk and contact risk
- Chadwick, empirical research with those with LD, major risks included were being bullied, harassed and providing too much information



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### 3. No need to understand everything



- *Heart of England NHS Foundation Trust, Peter Jackson J (as he then was): broad general understanding of kind that it expected from the population, “We should not ask more of people whose capacity is questioned than those of whose capacity is undoubted” [25]*
- *LBL v. RYJ, Macur J: need to understand the salient details as otherwise would demand more than person of similar age/maturity and unchallenged capacity*



4. The right balance needs to be struck: preserve personal autonomy against the need to understand the unique risks

- Article 10: freedom of expression
- Article 8: development of identity and maintain/make relationships
- Empirical academic research about benefits
  - Common means of communication
    - Unique risks
- No overt regulation of the internet/social media



- 3 limb test suggested:



*“Mr Karim submitted to us, as he had before Cobb J, that it would be simpler and clearer to distil the relevant information for a decision about the use of social media into the following three limbs: (1) that information (in all its forms, whether a text, picture message or video, including all personal information) may be seen by the world at large if shared on a public account; (2) that, once the information is shared online, it is no longer in your control; and (3) that there is a possibility that a connection online may not be the same person as they identify themselves and could cause you harm.” [42] COA*



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# BUT.....

*“We see no particular advantage in Mr Karim’s tripartite formulation of the relevant information over Cobb J’s guideline. Whether the list or guideline of relevant information is shorter or longer, it is to **be treated and applied as no more than guidance to be adapted to the facts of the particular case....**”*



[note : residence: LBX/residence: “treated and applied no more than guidance, expanded or contracted or otherwise adapted to the facts of the particular case” [62]]

*the Local Authority, accepted that Cobb J’s guideline would be applied in that way in relation to the making of a final declaration concerning B under the MCA s.15. He confirmed that, if the facts are that B never has done, does not now do, does not intend to do in the future and is unlikely to do in the future the things mentioned in (iii) and (vi) of Cobb J’s list of relevant information, then those parts of the list will be irrelevant.” [44]*

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It has been suggested that:



- Fails to have regard to the reality that most assessors will apply all of the limbs without specific regard, in fact, that was done pre *Re B* in respect of residence for instance, LBX
- Fails to pair back the requirements to take account of the socio-legal analysis, and
- Fails to give regard to the personal autonomy of the disabled person
- Tripartite formulation accords with para. 4.16 of the Code



- Demonstrates that:



*“Instead of holding that autonomy is instrumentally valuable, medical ethicists should recognise that it is intrinsically valuable as a means of securing patient well-being, subjectively understood”* 2002, Right of Reproductive Rights

- Rather, we are developing:
  - (a) A protection driven jurisdiction, and
  - (b) Utopian society that does not exist for those capacity is undoubted

