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Is there a shift in the wind in the Court's approach to autonomy, capacity and best interests following the spate of recent cases?

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Overview

Currently applicable and modern approaches to autonomy, litigation capacity and capacity in general.

Autonomy and how it affects best interests decisions and its relationship with capacity [R v. Rebelo]

Attacking the need for precise evidence on difficult cases in relation to capacity

North East London NHS Foundation Trust v Beatrice (Rev1) [2023] EWCOP 17 (09 May 2023)

2 declarations sought (no declaration on treatment sought and that element adjourned).

[9] It is as if a figurative terrorist invaded and took occupation of part of her mind 36 years ago. Notwithstanding incessant counter-insurgency measures by Beatrice against this malign intruder, she declares she no longer has the strength or other mental resources to carry on the struggle, and is now ready to capitulate.

28. there is no doubt at all that Beatrice cannot weigh the information relevant to a decision about the options for her care and treatment. The weighing process requires her to recognise that into the scales go the stark fact that if she does not eat and hydrate normally, and very soon, she will die. I agree with Mr Sachdeva KC that for the purposes of the test there is nothing else to weigh. There are, pace Hedley J, no various, inter-relating, parts of the argument.

Capacity in the context this case: Mostyn J alone in his view: weighing the decision in issue synonymous with decision in context of litigation:

[39] I confess to finding the intellectual process which I should undertake under this formulation to be extremely difficult. I think it is being suggested that even though I have found that the anorexia has robbed Beatrice of the ability to weigh the relevant information she nonetheless may have the capacity to litigate that very issue because she has the facility to give completely unrealistic and objectively untenable instructions to her hypothetical lawyers. I do not accept that this is a valid or useful exercise for the purposes of the decision I have to make. I think the exercise is difficult enough without having to go down what I regard as an intellectual cul-de-sac.

Can this be right?

Article 13 – Access to justice

States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

Q, Re (Rev1) [2022] EWCOP 6 (24 February 2022)

[24] It is necessary to reiterate that the test remains that in *Masterman-Lister v Brutton & Co* *[2002] EWCA Civ 1889*; *[2003] 1 WLR 1511*, endorsed in *Dunhill v Burgin* *[2014] UKSC 18*; *[2014] 1 WLR 933*. The essence of those judgments is to confirm, unambiguously, that capacity to litigate is addressed by asking whether a party to proceedings is capable of instructing a legal advisor *"with sufficient clarity to enable P to understand the problem and to advise her appropriately"* and can *"understand and make decisions based upon, or otherwise give effect to, such advice as she may receive".* It follows that the issue of litigation will always fall to be determined in the context of the particular proceedings: *Sheffield City Council v E [2005] Fam 236.* None of this requires P to instruct his advisers in a particular way. Like any other litigant, in any sphere of law, he may instruct his lawyers in a way which might, objectively assessed, be regarded as contrary to the weight of the evidence.

Autonomy in clinical decisions?

'My central claim is that mental capacity law has been devised with a commitment to achieving patient-centred care; care that honours where possible the patient's own, reflectively endorsed values, whether or not she has decision making capacity. This position is consistent with dominant themes in medical ethics and law, and prevailing national and international discourses. I will demonstrate how, all things equal, if a patient's reflectively endorsed view on her interests is known, legally this should hold equal weight regardless of whether she has capacity or not'.

Coggon, J. (2016). Mental capacity law, autonomy, and best interests: An argument for conceptual and practical clarity in the Court of Protection. Medical Law Review, 24(3), 396-414. https://doi.org/10.1093/medlaw/fww034

Cambridge University Hospitals NHS Foundation Trust v RD [2022] EWCOP 47 (17.10.22)

Remember this?

It is no more meaningful to think of Mr B without his illnesses and idiosyncratic beliefs than it is to speak of an unmusical Mozart.

a conclusion that a person lacks decision-making capacity is not an 'off-switch' for his rights and freedoms.

Wye Valley NHS Trust v Mr B [2015] EWCOP 60 (Peter Jackson J)

A rare case of an adult who had capacity on occasion and was permitted to steer a course that would lead to their death. Autonomy *in extremis?*

The psychiatric evidence focused on Ms D's psychological need for autonomy. In the view of her consultant psychiatrist, the only realistic hope for a future was for Ms D to believe that she was in control of her own life. If she genuinely believed that nobody would intervene to prevent her from harming herself, she might choose not to remove the tracheostomy tube. The psychiatrist accepted that this hope might not be fulfilled, and the plan might lead to Ms D's death

- Savage v South Essex Partnership NHS Foundation Trust [2008] UKHL 74 and Nottinghamshire Healthcare NSH Trust v RC [2014] EWCOP 1317 applied
- Judicial scrutiny in life/death cases particularly acute
- Aintree University Hospitals NHS Foundation Trust v James and others [2013] UKSC 67, at [39], the best interests of the particular patient must be found in the person's welfare in the widest sense, and particularly consider what the outcome of treatment for the patient is likely to be, and the patient's attitude to the treatment.
- Implicitly reaffirming Hayden VP in LB Tower Hamlets v NB & AU [2019] EWCOP 27: '*…fundamental principle that the promotion of autonomous decision making is itself a facet of protection'.*

North Bristol NHS Trust v R [2023] EWCOP 5 (MacDonald J)

- A tension between the approach of the MCA to support a decision in relation to P's care (a minimal approach that narrowly defines what the relevant information is) against consent in the context of *Montgomery* etc. in common law negligence?
- Is a formal diagnosis required pursuant to s.2(1) MCA?

R, was a serving prisoner and did not want contact with her mother. Two previous children had been removed from her care. She had had continued deterioration in the growth of her baby, and a number of other complications, which the clinicians involved considered meant that only a Caesarean section was consistent with recommended safe obstetric practice in this case. R had not said that she did not want a Caesarean section, but the clinicians were concerned as to whether she had capacity to make the decision. One doctor considered that she had capacity to make decisions about her birth arrangements; none of the other clinicians agreed.

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44. … *a difficulty in this case has been in identifying whether R is suffering from an impairment of, or a disturbance, in the functioning of the mind or brain. In particular, in circumstances where those who have assessed R are (with the possible exception of Dr Q) agreed that her presentation suggests that the functioning of her mind is impaired, but where they have not been able to arrive at any formal diagnosis for a presentation variously described as "unusual" and "baffling", this case has given rise to the question of whether a formal diagnosis in respect of R is necessary in order for the terms of s.2(1) of the 2005 Act to be satisfied.*

43. The foregoing authorities now fall to be read in light of the judgment of the Supreme Court in A Local Authority v JB [2022] AC 1322. The Supreme Court held that in order to determine whether a person lacks capacity in relation to "a matter" for the purposes of s. 2(1) of the Mental Capacity Act 2005, the court must first identify the correct formulation of "the matter" in respect of which it is required to evaluate whether P is unable to make a decision. Once the correct formulation of "the matter" has been arrived at, it is then that the court moves to identify the "information relevant to the decision" under section 3(1) of the 2005 Act. That latter task falls, as recognised by Cobb J in Re DD, to be undertaken on the specific facts of the case. Once the information relevant to the decision has been identified, the question for the court is whether P is unable to make a decision in relation to the matter and, if so, whether that inability is because of an impairment of, or a disturbance, in the functioning of the mind or brain.

What was ‘the matter’: not as the OS suggested: “whether to carry her baby to the point of natural childbirth or to have the baby delivered earlier and, if so, whether to do so by induction or Caesarean section”, rather:

“What usefully be derived from the questions that might reasonably be anticipated upon a member of the population at large being told that their doctor is recommending an elective Caesarean section and being asked whether or not they consent to that course”.

6 questions then followed:

i) The reason why an elective Caesarean section is being proposed, including that it is the clinically recommended option in R's circumstances.

ii)What the procedure for an elective Caesarean involves, including where it will be performed and by whom; its duration, the extent of the incision; the levels of discomfort during and after the procedure; the availability of, effectiveness of and risks of anaesthesia and pain relief; and the length and completeness of recovery.

iii) The benefits and risks (including the risk of complications arising out of the procedure) to R of an elective Caesarean section.

iv) The benefits and risks to R's unborn child of an elective Caesarean section.

v) The benefits and risks to R of choosing instead to carry the baby to term followed by natural or induced labour.

vi) The benefits and risks to R's unborn baby of carrying the baby to term followed by natural or induced labour.

68. […] *Whilst on occasion R may be able to understand in a limited way the information conveyed to her regarding the matter on which a decision is required (as demonstrated, for example, by R being able to verbalise to Dr Jobson that a Caesarean section is cutting open her tummy to deliver the baby), she is unable to retain that information for long enough to be able to use or weigh the information and communicate a decision and, in the circumstances, is unable to make a decision about whether or not her baby should be delivered pre-term by elective Caesarean section.*

48. In the foregoing circumstances, a formal diagnosis may constitute powerful evidence informing the answer to the second cardinal element of the single test of capacity, namely whether any inability of R to make a decision in relation to the matter in issue is because of an impairment of, or a disturbance, in the functioning of the mind or brain. However, I am satisfied that the court is not precluded from reaching a conclusion on that question in the absence of a formal diagnosis or, to address Mr Lawson's original proposition, in the absence of the court being able to formulate precisely the underlying condition or conditions. The question for the court remains whether, on the evidence available to it, the inability to make a decision in relation to the matter is because of an impairment of, or a disturbance in the functioning of, the mind or brain.

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