East Lancs v PW – what does it mean?

Fiona Scolding QC

Landmark Chambers

fscolding@landmarkchambers.co.uk

Best interests decision making in action

- East Lancashire NHS Trust v PW [2019] EWCOP 10 (can be found on bailii – www.bailii.org)
- Medical treatment - when should you make an application – timings?
- What is someone's "best interests" in this context ?
- What is the distinction between a "will" and a "preference" (and how do you make that distinction) and how can it work in practice?

The background

- PW was 60 – he had paranoid schizophrenia (of long standing). He had lived in a care home- which had psychiatric facilities on site – for 3 years prior to the application (made in March 2019). He was placed there initially under a Community Treatment order and then subject to the DOLS safeguards under Schedule A1 of the MCA 2005 .

Background (2)

- PW is a diabetic.
- April 2016 – he had an emergency partial amputation of his left foot caused by sepsis – removing most of his toes and part of his ankle – related to diabetes foot infection (a common complication of diabetes). No authorisation was sought from COP as he was found to have capacity (unclear if that decision was correct) .
- Although it prevented PW's death, he still continued to have problems with this foot.

Background (3)

- July 2018: doctors recognised that PW was likely to need more extensive amputation (8 months before the application). There were four treatment possibilities:
- (a) Below knee amputation
- (b) Pin in his leg to secure the ankle
- (c) Antibiotics to manage the infections but no surgery
- (d) No treatment.
- His treating physician made a best interests assessment and decided that he lacked capacity to make decisions about the amputation.

Background (4)

- In July 2018, an IMCA was instructed to visit PW (there is no evidence of family engagement/involvement) and provided a report at that time (after having visited him four times) . No further assessment was done prior to the application and this is what he also said to the judge over the phone at Court.

PW's views

- PW views were:
- (a) He did not have diabetes and his leg was not infected.
- (b) He did not want the operation because he wanted to continue to walk .
- © He believed that his foot could be treated with antibiotics and that his toes could grow back.
- (d) He told the IMCA that he did not want to die as he was only 60.
- He was adamant about not wanting a below the knee amputation and would be angry and unhappy if the operation took place. He told 3 clinicians this at a meeting held on 31 July 2018 .

PW's views at the hearing

- PW did not attend the hearing (not well enough) but did speak to the judge and counsel for the OS on the telephone
- Was seen to be "articulate" and could repeat what he had been told.
- He believed that the GP could treat the infection with antibiotics.
- He did not accept that without the operation he may require a much more serious amputation and be more disabled in the long term.

The application

- No action was taken following July 2018 despite the meeting having agreed that an application to COP would be needed.
- In mid Feb 2019, PW attended hospital- his foot was deteriorating and becoming ulcerated. Doctor said foot was deteriorating and that below knee amputation was the only surgical option which could help him. Said that could not operate "without his full consent" (given his lack of capacity, is that even an issue?)
- Without this operation, if his ulcers spread he would require removal of the whole leg (which would be much more disabling)
- Leaving the infection was not an option as it could spread to other organs and lead to death .
- A pin in his ankle would not work .
- All options were discussed with PW and he refused them all.

The application (2)

- In mid Feb 2019, an application was prepared but not issued.
- On 12 March 2019, PW was admitted as an emergency : his infection was in his bone, and was showing resistance to antibiotics: there was a risk of infection spreading.

The issues – capacity

- It has been long established that people can refuse medical treatment even if it leads to their death , if they are capable of making decisions (*Re C: (1994): Aintree NHS Trust v James [2014] 1 AC 591*).
- The court looked at the presumption of capacity, the fact that capacity cannot be displaced simply because a decision is "unwise" or simply because of their age, appearance or condition (*s1(2), s1(4), s2(3) of the MCA 2005*) .
- But where someone lacks capacity, a decision has to be made in their best interests (s*1(5*)).
- In this case, the issue on capacity was straightforward and he lacked capacity.

Best interests – How does one assess PW's interest?

- Best interests involves considering "all relevant circumstances" including past and present wishes, beliefs and values of the person , and other factors (s4(6) of the MCA 2005).
- This includes not just physical health, but also psychological and social issues (*per Baroness Hale in Aintree [at 35*]).
- Must consider the outcome of the treatment, the impact on the person's life.
- Must stand in the shoes of the person to ask what his approach would be ?
- Must consult others who care for the person and their view of their approach to treatment.
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The judge's analysis

- Medical evidence was "overwhelming" that the amputation was needed and without it there would be significantly more debilitating operations required (or even death). Also post operative care plan in place to help PW .
- The judge gave significant weight to his wishes and feelings, considering that they had been consistently held and articulated.
- But PW did not understand the choices that he faces – he thinks that he can be cured by a mechanism which is not possible.
- And he did not want to die.
- Judge also said (tentatively) that did not consider that his opposition was as profound as other cases

Timing

Judge was very critical of timing of the application:

(a) Said that it could have been made in advance “on a precautionary basis”

(b) The emergency nature of it meant that the O. S. had no time to visit PW: also no time for IMCA to visit again.

(c) No time to instruct alternative experts.

Re-emphasised NHS Trust v G [2015] 1 WLR 1984 : A v CA [2016] EWCOP 51 (both of these were pregnancy related cases , but the same principles apply).

Practical thoughts about timing

- Encourage staff to take legal advice early.
- Where there is an impasse , do not let it be “parked”.
- Ethics committee?
- Need for urgency in issuing applications – time drag.
- Getting evidence from clinicians – may be easier to sit with them to do this – rather than an e-mail trail.
- Thinking about timings from the start.
- Be prepared to take the flak if this has not happened.
- Ideally, need at least 6 weeks to run the case to enable adequate instruction of experts, court timetable from issue.

Best interests analysis

- Lieven reached a different conclusion to Peter Jackson in the case of Wye Valley Trust v B [2015] EWCOP 60 as to whether or not it was in the person's best interests – that is predictable on the facts of each case.
- In the case of B: (a) He had strong religious beliefs (b) He wanted to die and so Peter Jackson made the decision that he should not have the operation.
- Cannot use the facts of one case and assume that a judge will make a similar decision – all decision making in this area is very fact and context dependent.

Wills and preferences – the UNCRPD

- The UN Convention on the Rights of the Disabled (ratified by the UK and therefore it must be assumed that the UK govt when making domestic law will act compatibly with it and should interpret domestic legislation in this context)
- Article 12(4) – dealing with equal recognition before the law – says:
- *"all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards……measures that relate to the exercise of legal capacity respect the rights, will and preferences of the person…..and are tailored to the person's circumstances….."*

”Will” and “preferences”

- George Smukler – an eminent psychiatrist and writer on coercion and treatment of those with mental health difficulties – see www.georgeszmukler.org has written about using these terms to assist us with making decisions.
- They are aimed at trying to work out if a person’s decision is “self determined” or “owned” by them.
- People’s beliefs and values influence their decisions: where that person has capacity, they are to be respected, even if they are unwise to the outside observer – under the MCA 2005 the person at the centre of the decision is to be considered with their own beliefs and values, not those imposed by others.

“Wills” and “preferences” (2)

- But someone’s beliefs and values may be rational to them, but to outsiders may not be rational (and so a court or clinicians have to make substantive judgements about the contents of their beliefs) – for example, in this case, that PW believed that he could get better through antibiotics alone: or someone with anorexia considering that the risks of dying through self starvation are to be taken as being thin is more important than living.
- Wills and preferences is a way of trying to evaluate and make judgements about someone’s beliefs in a ”sort of” objective manner .

Wills and preference (3)

- Smukler identifies that using the term will and preferences may help in the process of interpreting and trying to reach a decision about someone's capacity (or best interests) by looking deeply at their beliefs and values, not just in isolation, but looking at it in the wide context of their world view and values – for example – how consistent are these beliefs with their wider world view?
- Do they support the broader world view?
- Are the views amenable to revisions or argument?
- How stable are they over time? What past commitments have they lead to?
- How have they evolved?
- What is their culture meaning and rationality?

Wills and preference (4)

- Using the language of “will and preferences” may help the decision maker to understand and ascertain what is in their best interests.
- Often, there is a problem in someone’s ability to express these will and preferences when an important decision is to be made (particularly medical decisions).
- Or there may be doubt as to the “authenticity” of the expressed views when set against their previous expressed views, actions if they have been evidenced, and have shaped someone’s life choices.

Wills and preferences (5)

- The decision maker would then focus upon whether an apparently imprudent decision is in accordance with their "true" or "authentic" beliefs.
- Query whether in practice this is effectively the same as the investigation which should take place under s4(6)?
- Also query how this is to be ascertained in emergency situations?
- But when reaching these sorts of decisions, use of philosophy does assist, as we are essentially undertaking a metaphysical decision with practical consequences.

Thank you!