doughty street chambers

CASE LAW UPDATE
March 2025

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Re ZX [2024] EWCA Civ 1462

- Appeal against declaration by HHJ Burrows that ZX lacked capacity to engage in sexual relations- covered in our last session
- Adopted child made subject to care order in the context of sexually violent behaviour
- Application to the COP as he approached 18
- Dr Ince found he lacked capacity in all areas except engaging in sexual relations -changed his mind on being provided with a summary of Re ZZ (Capacity) [2024] EWCOP 21, and thought that had changed the law
- Declaration he lacked capacity to engage in sexual relations; OS appealed

The appeal- McFarlane P, Baker LJ, Andrews LJ

- The law has not been changed by any judgment post JB
- Not clear why the expert was sent briefing on ZZ and his misunderstanding undermined his evidence-Judge should have directed a further interview
- Pattern of offending behaviour did not of itself demonstrate inability to understand etc; and causative nexus not established

CT v London Borough of Lambeth & Anor [2025] EWCOP 6- Capacity and insight

- Appeal against order of HHJ Beckley making declarations that CT lacked capacity to conduct proceedings, make decisions about residence and care
- CT was in his 50s; head injury at 12 leading to epilepsy; long history of drinking and drug use. Psychiatric history of PTSD; suspected anti-social personality disorder; dysexecutive syndrome; polysubstance use.
- CT was in hospital, medically fit for discharge; under SA which was about to expire. BIA said he had capacity; acute Trust (Kings) disagreed. CT wanted to leave hospital and go back to the streets.
- COP ordered discharge to a care home; CT started a fire and was detained under s2. Remained informally. LA said he had capacity

CT v London Borough of Lambeth & Anor [2025] EWCOP 6- Capacity and insight [2]

- 2-day hearing: OS, LA and ISW said CT had capacity; Trust said he didn't.
- Judge included in list of 'relevant information':

  That [CT] has a number of mental impairments (personality disorders, dysexecutive syndrome secondary to brain injury as a child, polysubstance abuse and seizures, and cognitive impairment shown by ACE, FAB and MOC tests) and that those impairments lead to specific care needs and affect [CT's] decision-making in relation to physical care needs and residence'

  Appealed on basis that this was circular and that the judge failed to follow the JB guidance. These grounds were supported by Mind.

CT v London Borough of Lambeth & Anor [2025] EWCOP 6- Capacity and insight [3]

- Theis J allowed the appeal
- Judge set the bar too high by including CT's mental impairments in the relevant information; and this risked blurring the functional with diagnostic test. Stressed importance of not discriminating or 'pathologizing disagreements'
- Insight is a clinical concept, whereas decision making capacity is a legal concept- a person may be able to make a particular decision even if they are described as lacking insight into their general condition; and if insight is considered relevant; assessor must clearly explain what they mean and how it affects the criteria
- Compare with: **Thirulamesh Chellamal Hemachandran and another v Sudiksha Thirulamesh and another** [2024] EWCA Civ 896-2

Leicestershire County Council v P & Anor (Capacity: Anticipatory declaration) [2024] EWCOP 53 (T3)

- P had diagnosis of dissociative identity disorder (though expert suggested CPTSD more appropriate) and received support in own home. Several very serious incidents when she left her home/refused support/appeared to be victim of sexual assault; P was not always able to remember events.
- Expert concluded that P had capacity to conduct the proceedings, make decisions about residence, care, contact with others, internet and social media, use of her mobile phone and sexual relations, but periods when P loses capacity (when she dissociated) were discrete and easily identifiable

Leicestershire County Council v P & Anor [2] Should the court make an anticipatory declaration?

- Section 15(1)(a) and section 15(1) (c) **do** allow court to declare that a person has capacity now, but that they may lose it in future, at which time a contingent care plan will be lawful. Factors to consider:
  - Are there other ways of managing the situation eg s5, s6?
  - The need to avoid against 'overtly protective decisions
  - Whether it is sufficiently clear when P lacks capacity
- The judge declined to make an anticipatory declaration. It was uncertain when P lost capacity and there were other ways to protect her for example using s5 and s6.

Oldham MBC v KZ & Others [2024] EWCOP 72

- KZ was 20, was profoundly deaf and had been considered to have a learning disability. He had resided in a series of placements and the court had authorised the deprivation of his liberty.
- Independent psychiatrist assessed him as lacking capacity in all areas and having a borderline learning disability
- Placement expressed concern that assessment should have been supported by a Registered Sign Language interpreter with a relay interpreter
- When this was carried out KZ was found not to have a learning disability. KZ lacked capacity to conduct the proceedings but had capacity in all other areas.
- KZ did have language deprivation (because of prolonged deprivation of communication). This can operate as a *"functional learning disability"*
- It is an impairment for the purpose of the MCA (and a mental disorder for the MHA)

Oldham MBC v KZ & Others [2024] EWCOP 72-2

- Reminder of the need to ensure appropriate assessments about those with sensory impairments and to avoid confusing language deprivation with learning disability.
- Any mental capacity assessment of a deaf individual fluent in BSL should ideally be undertaken by an assessor who is suitably qualified to communicate at the relevant level of BSL. If that is not done, there should be a clear explanation why and what measures, if any, are proposed to be in place to manage that gap.
- The assessor should ideally have a background in understanding deafness and engaging with the deaf community. If they don't, there should be a clear explanation why they are undertaking the assessment without such knowledge.

Oldham MBC v KZ & Others [2024] EWCOP 72-3

- Court made an anticipatory declaration
- In *GSTT v SLAM and R* [2020] EWCOP 4 Hayden J was dealing with an obstetric case where the declaration sought related to a situation where P may lose capacity at a future date.
- Hayden J was clear that section 16 orders including DOL authorisations could **only** be made in relation to those who lack capacity
- Theis J accepted the argument that "it cannot have been the intention of parliament to exclude those in KZ's situation outside the safety net of the MCA 2005 in making anticipatory declarations authorising care arrangements which would amount to a deprivation of P's liberty.
- Does this erode the protections for those who have capacity?

North West London ICB v Royal Hospital for Neuro-disability and Another v XR [2024] EWCOP 66 ; NHS North West London Integrated Care Board v AB & Ors [2024] EWCOP 62; NHS South East London v JP and others [2025] EWCOP 8

Series of cases concerning patients at RHND

- Background context: criticism in by Hayden in *North West London CCG v GU* [2021] EWCOP 59 of RNH's failure to make a best interests decision in relation to GU who had been in PDOC since 2014

XR: North West London ICB v Royal Hospital for Neuro-disability and Another [2024] EWCOP 66

- XR suffered severe hypoxic ischaemic brain injury in 2017 at age 62; in PDOC since 2018.
- No decision-making *"due to lack of effective system"* at RNH
- *"Finely balanced"* as no visitors and little known of past wishes/feelings; IMCA unable to ascertain wishes
- Third party orders allowed OS to consider GP and health records: XR was isolated, had periods of homelessness, engaged inconsistently with MH services but consulted GP.
- *"Relatively rare"* case where not possible to ascertain wishes etc of P or of others; court concluded CANH was not in XR's best interests

XR: North West London ICB v Royal Hospital for Neuro-disability and Another [2024] EWCOP 66-2

- OS invited court to give guidance and add this to category of cases which should be brought to court
- Judge informed updates to PDOC Guidance under way so declined to BUT message that timetable for review should be published urgently; AND
- Need for clarity as to who is responsible for making enquiries/seeking records AND
- Powers of court to issue 3PDOs relevant to decision whether to apply to COP

NHS North West London Integrated Care Board v AB & Ors [2024] EWCOP 62

- AB suffered subarachnoid haemorrhage at 50 in 2015; in PDOC since then
- No formal best interests review till 2023 as there was *"simply a vacuum"*
- Unacceptable delay despite excellent physical care to AB
- Clear evidence that AB had little or no quality of life and suffered significant burdens which would intensify
- CANH not in her best interests

NHS North West London Integrated Care Board v AB & Ors [2024] EWCOP 62 -2

- Theis J reviewed actions taken at RNH- may have largest cohort of those in PDOC in country
- Extensive training, inception of 2-weekly CANH Implementation Group; protocols with ICB as to applications
- Structure process to reduce delay:
  - Best interest decision with consultation with those close to P and MDT
  - Second opinion from independent expert to confirm PDOC
  - Assurance process
  - Review by Exec Management Team and then referred to Ethics Committee

NHS South East London v JP and others [2025] EWCOP 4, 8

- JP had been in PDOC for 9 years after a cardiac arrest
- Strong evidence he would have hated to be in the condition he was
- His close family were all of the view he would not have wanted to continue receiving CANH; more distant relatives took a different view; some from a sense of duty or faith
- Judge was critical that RNH/ICB lost sight of JP because of ‘heightened sensitivity’ to the views of his family- dispute should have been a trigger to bring the case to court. ICBs should not be ‘passive bystander’.

Deputies and DPs: Lumb v NHS Humber and North Yorkshire ICB and another [2024] EWCOP 57

- DL appointed as deputy for P's property and affairs under a standard order, to manage P's direct payments for a Personal Health Budget (PHB), used to pay his parents who provided full time care, via a *"Managed Account"* provider.
- P had no other assets
- Key issues
- - Do DPs form part of P's estate?
- - Could a P and A deputy act as *'representative'* for purpose of DP's, when that role requires health-related decisions?
- - (and does that put a solicitor-deputy in an uninsurable position?)
- NB- Consent order in *Calderdale MBC v AB and Others (Order)* [2021] EWCOP 56- standard P and A order does not make the deputy a person authorized to request DPs under section 32(4) Care Act 2014

Lumb v NHS Humber and North Yorkshire ICB and another [2024] EWCOP 57-[2]

(i) Direct Payments for a PHB are part of P's *"….affairs*" even if they can only be spent in one way

(ii) A person without capacity who receives DP's must have a *'"representative*" (reg 5, NHS (DP) Regulations 2013). Reg 2 states that a deputy representative must have powers to make decisions on P's behalf *"in relation to matters in respect of which direct payments may be made".* This includes some decisions that are health related- see reg 8, and Guidance. NOT within powers of P and A deputyship

(iii) ICB could appoint a *"nominee"* but this is still outside standard authorisations of P and A deputy

(iv) Court COULD authorize a deputy to manage DPs- but may not need to and could appoint a case manager as *"representative".*

Any questions?

Dates for the diary:

- A Deep Dive into the Mental Health Bill- 16 May 2025, on the role of the Mental Health Tribunal - time TBC

DEPRIVATION OF LIBERTY

- Bury Metropolitan Borough Council v EM (by her litigation friend, the Official Solicitor) and others [2024] EWCOP 76

- Re PQ (Court authorised DOL: Representation during review period) [2024] EWCOP 41 (T3)

- West Sussex County Council v AB & Anor [2025] EWCA Civ 132

Bury Metropolitan Borough Council v EM

- **FACTS**
- 18 year old with diagnoses of ADHD and Autism Spectrum Disorder
- Longstanding concerns in respect of her mental health and self-injurious behaviours
- Proceedings brought under the Inherent Jurisdiction of the High Court to authorise restrictions at a placement that constituted a deprivation of EM's liberty

Bury Metropolitan Borough Council v EM

ISSUE

- Whether the court should grant the LA's application to withdraw its application to the Court of Protection and 'lift the DoLS?'

Bury Metropolitan Borough Council v EM

DECISION

- Judge emphasised the need for clarity in the use of terminology
- Defined being on a DoL or under a DoL as
- "*subject to an order (or authorisation) approving and authorising a care plan which allows the carer to use restrictions that amount to a deprivation of liberty in the best interests of P*" [51].

Bury Metropolitan Borough Council v EM

- Refused the application to withdraw the proceedings
- Approved the care plan amounting to a deprivation of liberty

Re PQ (Court authorised DOL: Representation during review period)

FACTS

- PQ – 23 year old woman with a learning disability
- Long running proceedings
- Final orders and declarations were made
    - PQ subject to a community DoL
    - No family member willing or able to act as r1.2 representative and the LA was not willing to fund a professional representative

Re PQ

ISSUE

- What arrangements should be put in place for PQ's participation and for reviewing the deprivation of liberty?

Re PQ

DECISION

- *" ….. there would be no compliance with Art 5(4) without the appointment of a representative, be it a Litigation Friend, an ALR, or a r1.2 representative,….. The likely need for representation for a P who is deprived of their liberty has been recognised not only in relation to the planned review of their deprivation of liberty but also during the whole of the review period. My conclusion also sits comfortably alongside the mandatory requirement for P to have a representative when deprived of their liberty in a hospital or care home under the DoLS regime.* ***In the present case, without some form of independent representation, PQ's Art 5 rights would be "theoretical and illusory" not "practical and effective***" [57]

Re PQ

Two options available to the court:

1. Retaining PQ as a party and the Official Solicitor as Litigation friend
2. Discharging the Official Solicitor as Litigation Friend but appointing an ALR. P's party status is irrelevant

- Poole J chose option 1

West Sussex County Council v AB & Anor

FACTS

- CD aged 17 years old (adopted child)
- Complex needs
- Residing at home with her adoptive mother subject to care package that amounted to a deprivation of liberty
- Family proceedings – CD was subject to an interim care order and a DOLs order made under the Inherent Jurisdiction
- Appeal against a final care order

West Sussex County Council v AB & Anor

DECISION

- Appeal was granted
- McFarlane J emphasised the fact that the court can continue to have continuing oversight of the care plan through the DoLS process which did not require a care order
- Contrast with *Re JR (Deprivation of Liberty: Care Order: Principles of Care)* [2024] EWHC 564

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COURT OF PROTECTION UPDATE 2025

ZIA NABI

NORTHAMPTON GENERAL HOSPITAL NHS TRUST V MERCER [2024] EWHC 2515 (KB)

- May 2024: over 12,000 people in hospital in England who no longer needed to be there
- Delays in putting in place a package of care at home or securing a short / long term placement
- Ms Mercer had been fit for discharge for 18 months but refused to leave

NORTHAMPTON GENERAL HOSPITAL NHS TRUST V MERCER [2024] EWHC 2515 (KB)

- Diagnoses of Autistic Spectrum Disorder and Emotionally Unstable Personality Disorder
- Wheelchair-dependent
- Required support with personal care and medication
- Before she was admitted to hospital for cellulitis had lived at a residential home
- Placement now found which hospital and Council believed would meet her needs: 24-care in a Supported Living placement

NORTHAMPTON GENERAL HOSPITAL NHS TRUST V MERCER [2024] EWHC 2515 (KB)

- Ms Mercer refused to move and wanted a placement in residential accommodation
- Hospital sought possession order
- First hearing adjourned – hospital had not provided all the necessary information.

What was required?

NORTHAMPTON GENERAL HOSPITAL NHS TRUST V MERCER [2024] EWHC 2515 (KB)

- People do not have the legislative right to remain in a hospital bed if they no longer require care in that setting.
- For patients and others who are actually *disruptive* , s.119 Criminal Justice and Immigration Act 2008 contains a criminal offence punishable by fine
- Duty under s.74 Care Act 2014 : where likely to require care and support following discharge, Trust must make discharge plans and take appropriate steps to involve patient and any carer.
- NHS England Guidance: Planning and implementation of discharge should respect an individual's choices and provide them with the maximum choice and control possible from suitable and available options.

NORTHAMPTON GENERAL HOSPITAL NHS TRUST V MERCER [2024] EWHC 2515 (KB)

Three groups

- Those assessed by the NHS as having a ‘primary health need’ eligible for ‘NHS Continuing Healthcare’ for whom the NHS is responsible and pays
- Those without a ‘primary health need’ but who need nursing care funded by the NHS with other care and accommodation arranged and funded by the patient or the local authority
- Where the patient requires no nursing and care is arranged and funded by the patient or local authority

NORTHAMPTON GENERAL HOSPITAL NHS TRUST V MERCER [2024] EWHC 2515 (KB)

- If the patient's care and accommodation will be the responsibility of the local authority and the patient objects to it, the hospital should involve that authority
- If impasse with a patient whose refusal to leave is not affected by a mental health or mental capacity issue, can evict
- A hospital bed or room – even if occupied long-term – is *probably* not a 'dwelling' requiring a court order for eviction
- Hospitals may prefer to obtain a High Court possession order or injunction
- Public law defences may be available, such as a failure by the hospital to have regard to national NHS guidance

NORTHAMPTON GENERAL HOSPITAL NHS TRUST V MERCER [2024] EWHC 2515 (KB)

- Human Rights Act: article 2: right to life; article 3: inhuman and degrading treatment; article 8: right to respect for private life; article 14: discrimination– all highly unlikely to apply

- Where refusal to leave may be affected by a mental health or mental capacity issue - NHS guidance, a capacity assessment should be carried out as part of the discharge planning process ("imperative")

NORTHAMPTON GENERAL HOSPITAL NHS TRUST V MERCER [2024] EWHC 2515 (KB)

- A patient may fall outside the scope of the MHA , also have capacity under the MCA to make all relevant decisions, yet still have a 'mental impairment with a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities' amounting to a disability under s.6 EqA
- Where refusal to leave may be affected by a mental health or mental capacity issue - NHS guidance, a capacity assessment should be carried out as part of the discharge planning process ("imperative")

NORTHAMPTON GENERAL HOSPITAL NHS TRUST V MERCER [2024] EWHC 2515 (KB)

- A hospital is a ‘service-provider’ under s.29 EqA , which can be liable for disability discrimination if it fails in its duty under ss.20-21 EqA to make reasonable adjustments for a disabled patient before seeking possession (or an injunction to exclude).
- s.15 EqA , a service provider or landlord discriminates against a disabled person if it ‘treats them unfavourably because of something arising in consequence of their disability (if they were or ought to have been aware aware of it) and cannot show the ‘treatment is a proportionate means of achieving a legitimate aim’

NORTHAMPTON GENERAL HOSPITAL NHS TRUST V MERCER [2024] EWHC 2515 (KB)

- If a hospital seeks possession ('unfavourable treatment') because of a patient's refusal to leave hospital ('something') due to a known mental disability, it will have to prove possession would be proportionate.
- A hospital is a 'public authority' owing the PSED to 'have regard' to the needs 'to advance equality of opportunity' for disabled people and to take different steps for them than for non-disabled people under s.149 EqA .
- a public authority would generally be wise to carry out and record a specific, open-minded and conscientious consideration of the impact of possession on the disabled person and whether that can be safely managed

NORTHAMPTON GENERAL HOSPITAL NHS TRUST V MERCER [2024] EWHC 2515 (KB) - CHECKLIST

- Has there been full and holistic preparation of the patient for discharge
- Have there been all necessary mental capacity assessments of the patient ?
- Has the proportionality of possession (or an injunction) been assessed?

NORTHAMPTON GENERAL HOSPITAL NHS TRUST V MERCER [2024] EWHC 2515 (KB)

- Claim wrongly issued in the county court
- No evidence of capacity to conduct litigation
- No evidence of compliance with the PSED – EIA required addressing the proportionality of possession and whether all lesser alternatives had first been explored
- At the adjourned hearing, court was satisfied possession was a proportionate means of achieving a legitimate aim – possession granted

OLDHAM MBC V KZ [2024] EWCOP 72 9(T3)

- KZ was aged 20 and profoundly deaf.
- Previous assessment that lacked capacity in all areas including residence, care and support and contact and had borderline learning disability. Psychiatrist assisted by assisted during her assessment by the service manager of the previous placement who acted as a BSL interpreter and had BSL Level 1 Training.
- New assessment that KZ had capacity to make decisions about residence, care and support and contact with his family, **save when** he became dysregulated when he may lack capacity and in those circumstances decisions would need to be made in his best interests.
- New assessment accepted by both the local authority and the Official Solicitor, as litigation friend for KZ

OLDHAM MBC V KZ [2024] EWCOP 72 9(T3)

- Court does have jurisdiction to make an anticipatory declaration under s 15 (1) (c) MCA 2005
- Can an anticipatory declaration as to capacity be made under s16 MCA 2005 due to the requirement under s 4A (4) MCA 2005 that a deprivation of liberty is only authorised if it is made pursuant to an order under s16 (2) (a) MCA 2005

OLDHAM MBC V KZ [2024] EWCOP 72 9(T3)

- KZ's social worker and support staff at placement were clear that not difficult to identify when KZ is aroused; care plan devised that described the behavioural signs
- Making of an anticipatory declaration would provide a proper legal framework for the care team, ensuring that any temporary periods of deprivation of liberty were duly authorised.

OLDHAM MBC V KZ [2024] EWCOP 72 9(T3)

- Any mental capacity assessment of a deaf individual fluent in BSL should ideally be undertaken by an assessor who is suitably qualified to communicate at the relevant level of BSL. If that is not done, there should be a clear explanation why and what measures, if any, are proposed to be in place to manage that gap .
- The assessor should ideally have a background in understanding deafness and engaging with the deaf community. If they don't, there should be a clear explanation why they are undertaking the assessment without such knowledge.

NORTH CENTRAL LONDON ICB V AA [2024] EWCOP 39 T3

- AA, 33 years old was in receipt of life-sustaining clinically assisted nutrition and hydration at a Regional Hyper-Acute Rehabilitation Unit commissioned by the ICB, who did not make clinical decisions in relation to AA.
- BI meeting - view of treating clinicians that it was in AA's best interests to be discharged from hospital and transferred to a nursing home where he would continue to receive nursing-home based palliative care. **Option 1**
- Second BI meeting - no longer in AA 's best interests to continue life sustaining treatment , application made to withdraw CANH and provide palliative care. **Option 2**

NORTH CENTRAL LONDON ICB V AA [2024] EWCOP 39 T3

- At second hearing, option 1 no longer available as the two nursing homes identified in Option 1 now declined to take him because AA had already progressed to the end-of-life phase, there was a risk of AA dying in transit, AA's need for IV medication, and the need for his end-of-life palliative care to be monitored and implemented at consultant-level.
- As only one option, relief was now sought under the inherent jurisdiction was" *a declaration that it is lawful for the treating hospital to implement the palliative plan dated 10 June 2024 in respect of AA*.
- No order in relation to AA's treatment was said by ICB to be inappropriate because of (a) AA's parents' strong objections, and (b) because an order would support the implementation of the palliative care plan

NORTH CENTRAL LONDON ICB V AA [2024] EWCOP 39 T3

- A patient cannot require a doctor to give any particular form of treatment and nor can a court.

- It is an abuse of process to try to use a best interests declaration under the MCA 2005 to persuade a clinician to provide treatment where none is being offered.
- There was only one available option before the court and there was no best interest decision to make.
- A declaration would have no purpose as the clinicians would continue to treat in accordance with their clinical judgment and the parents' views that CANH should continue would be unchanged.

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