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Court of Protection Case Law Update, July 2020

Sophy Miles
[@sophymiles1](https://twitter.com/sophymiles1)
s.miles@doughtystreet.co.uk

Gemma Daly
g.daly@doughtystreet.co.uk

Today's presentation

Chair: Amos Waldman
(a.waldman@doughtystreet.co.uk)

1. Introduction
2. Sophy Miles
3. Gemma Daly
4. Questions/discussion

Overview

- Open access article
<https://www.lag.org.uk/article/208428/court-of-protection--update--jul/aug-20->
- Further developments in the COP and Court of Appeal

Sexual Relations –again

A Local Authority v JB [2019] EWCOP 39

- JB had epilepsy and Asperger's syndrome and was believed to lack capacity to make a range of decisions.
- Considered to pose a moderate risk of sexual offending.
- Comprehensive care package with a number of restrictions intended to prevent disinhibited sexual behaviour towards women

JB at First Instance

Roberts J held:

“For the purposes of determining the fundamental capacity of an individual in relation to sexual relations, the information relevant to the decision for the purposes of section 3(1) of the MCA 2005 does not include information that, absent consent of a sexual partner, attempting sexual relations with another person is liable to breach the criminal law”.

On this test JB had capacity to consent to sexual relations.

Local authority appealed.

JB in the Court of Appeal-1

Judgment of Baker LJ (McFarlane P, Singh LJ)

The three imperatives:

- Autonomy- “lies at the heart of the MCA” and underpins purpose of UNCRPD.
- Protection of vulnerable people.
- Obligation on the COP to adhere to general principles of law- s6 HRA 1998.

JB in the Court of Appeal-2

- Full survey of case law
- Starting with X City Council v MB and Others [2006] EWHC (Fam)
- Pre-MCA decision- Munby J (obiter)
- "How then is one to assess whether someone has the capacity to consent to sexual relations, the ability to choose whether or not to engage in sexual activity?"

JB in the Court of Appeal-3

IM: “I would not regard the requirement that, in order to have capacity to engage in sexual relations, P must have the ability to understand that such relations must be mutually consensual to be inconsistent with the analysis in that case.” [53]

“.....giving consent to sexual relations is only part of the decision-making process. The fundamental decision is whether to *engage* in sexual relations. The focus on the capacity to *consent* derives, in part, from the judgments delivered by Munby J prior to the implementation of the MCA.....”

JB in the Court of Appeal-4

[93]: “But in the present case, it is JB who wishes to initiate sexual relations with women. The capacity in issue in the present case is therefore JB's capacity to decide to engage in sexual relations. In my judgment, this is how the question of capacity with regard to sexual relations should normally be assessed in most cases.”

JB in the Court of Appeal-5

[98]...No man is an island. This principle is well recognised in the [European Convention on Human Rights](#) . For example, the rights in [Article 8](#) are not absolute and must be balanced against other interests, including the rights of others. Although the Court of Protection's principal responsibility is towards P, it is part of the wider system of justice which exists to protect society as a whole.

JB in the Court of Appeal -6

Relevant information MAY include (at [100])

- Sexual nature/mechanics of the act
- Other person must have capacity to consent and does consent
- P can say yes or no
- Pregnancy is reasonably foreseeable consequence of intercourse between man and woman
- There are health risks of STIs which a condom can reduce.

JB in the Court of Appeal-7

Will those always be included?

- “Considerable importance” but would be obiter and “prudent .. to refrain from commenting”
- But...
 - In TZ [2013] EWHC 2322 (COP), Baker J tailored the relevant information so that a gay man did not need to understand risk of pregnancy
 - LBTH v NB [2019] EWCOP 17 Hayden J held relevant information should incorporate P’s circumstances (interim)
 - B v A Local Authority EWCA Civ 913- guidance on relevant information on social media is “to be adapted to the facts of the particular case”

Where does this leave us?

- Best interests/DOLS/LPS- risk to others more likely to form part of factual matrix
- Re—assessments of capacity likely of those who are considered to pose a sexual risk
- “A great opportunity to strike the right balance” - <https://www.communitycare.co.uk/2020/06/17/capacity-consent-sexual-relations-latest-case-may-help-social-workers-navigate-challenges/>
- Increase in Re X applications (and LPS.....?)
- Vital that if more people are assessed as lacking capacity, they are supported to attain it.

A Local Authority v RS [2020] EWCOP 29-1

- Capacity to make decisions on residence, care, contact, internet, social media
- RS had autism and mild LD, with a background of childhood abuse and a sexual fetish- paraphilic infantilism
- Not unlawful but all agreed it led to engage in risky behaviour- contacting males on the internet and going to meet them – one had forced RS to engage in sex; RS had been financially abused; was in contact with sex offenders.

A Local Authority v RS -2

- Joint expert Dr Lawson initially assessed RS as lacking capacity in all areas (with formative early experiences contributing) on basis of inability to use/weigh
- Fetish associated with “abnormally impulsive” behaviour and MAY be be a consequence of LD and impairment.
- Re-evaluated for final report.

A Local Authority v RS-2

- Expert accepted that RS could (and did) modify his impulses including deferring impulses to meet with those he chats with online
- “I cannot ... consider his impulsive behaviour to be abnormally impulsive... RS makes unwise decisions”
- Difficulties with decision-making may stem from immaturity, psychological make up, sexual desires.
- Declarations refused- financial capacity?

Health Service Executive of Ireland v Ellern Mede Moorgate [2020] EWCOP 12

Application for protective measures under Schedule 3 MCA

- SM was 19, serious eating disorder and moved to Springfield by order of Irish High Court where she was a ward.
- Her consultant requested move as a matter of urgency
- Irish High Court directed move to EMM, asked COP to recognize and enforce

HSE Ireland v EMM-2

- Hayden J accepted criteria met for recognition and enforcement under paragraphs 19-22, schedule 3
- SM not represented though had been heard by the Irish High Court. HSE said not need for her to be joined. Baker J had said in HSE v PD that it will not be necessary to join P in majority of cases.
- PD did suggest that an ALR might be appropriate (scheme not yet in place)- not suggested here.

Re SF [2020] EWCOP 15

- Person-specific capacity decisions on contact
- Agreed that SF lacked capacity to make decisions about contact with others *except* where this related to her husband.
- Dr O'Donovan assessed SF as lacking capacity to make decisions about contact with strangers, but having capacity to make such decisions about her husband because of the distinction between 'episodic' as opposed to 'semantic' memory (para 20).
- SF 'would need to have regular understanding of someone before she could reach a capacitous decision [about contact with them]' (para 20).
- SF was able to know that she had feelings for her husband, how he made her feel, and if he was in a good or bad mood.

Re SF [2020] EWCOP 15 (2)

- Dr also assessed SF as having capacity to consent to sexual relations, despite being vulnerable to sexual exploitation outside of her marriage.
- SF understood her right to give and withdraw consent. Her passivity and personality characteristics were, according to Dr O'Donovan, distinguished from her mental disorder in this regard:

Her view that males take the lead when in sexual relationships to decide about sexual relations and that women do not refuse to have sex with their partners, as this would negatively impact on the relationship, indicates that she is aware that she has a choice and has considered the perceived consequences of consent versus refusal. This in the context of her marriage does illustrate a degree of passivity. However, this is not unique to her mental disorder and pre-dates the onset of this. Furthermore, it is common view that is held in various relationships (see para 22).

Re SF [2020] EWCOP 15 (3)

- SF described as ‘passive’, ‘apathetic’, ‘a biddable woman’; ‘she is happy to be led by her husband’ (see, for example, para 19).
 - Causative nexus: the court had to disentangle what was attributable to her innate passivity and what was attributable to her disorder of the mind.
- Cobb J determined that SF *did* have capacity to make these two decisions: decide on contact with her husband, and consent to sexual relations.

Sunderland City Council v AS & others [2020]

EWCOPI3

- 44-year-old man with a diagnosis of mild learning disability and acquired brain injury living in supported accommodation. AS was subject to a CTO (MHA s17A).
- Whether AS had capacity to make decisions as to the litigation, residence and care.
- Cobb J accepted the local authority and NHS trust's submission that 'structure and routine' were an integral part of the information relevant to a decision on residence, these characteristics marking the difference between supported and independent living (para 34).

Tower Hamlets LBC v A & KF [2020] EWCOP 21

- A was 69 years old and had Korsakoff's dementia. Following an admission to hospital in 2019, she was discharged to a care home. A desperately wanted to return home to her flat, where she had lived for over 20 years.
- Senior Judge Hilder considered the tests for capacity to make decisions about residence and care.
- Senior Judge Hilder recalled relevant information for residence/care in *LBX v K, L and M* [\[2013\] EWHC 3230 \(Fam\)](#). The Theis J 'checklist' of relevant information to make a decision about residence includes 'what sort of care [they] would receive in each placement in broad terms' (para 42).
- The court also considered the Court of Appeal's decision in *B v A Local Authority* [\[2019\] EWCA Civ 913](#), in which the court found 'no principled problem' with Theis J's list 'provided that it is treated and applied as no more than guidance to be expanded or contracted or otherwise adapted to the facts of the particular case' (para 44).

Tower Hamlets LBC v A & KF (2)

- SJ Hilder applied *LBX* and *B* in finding that decisions about residence and care require different factors and should be assessed as individual domains of capacity (paras 62–63). It did not follow from such an approach, however, that residence and care are decisions that are made in separate ‘silos’ (para 64). While there are differences in the information relevant to each decision, there is also overlap: Theis J’s list of relevant information to make a decision about where to live includes a ‘broad understanding’ (para 65) of the sort of care available in each of the places of residence potentially available, for example.
- Overlap does not, however, imply that a decision in respect of residence incorporates a decision in respect of care: ‘[I]t is not necessary to make a capacitous decision about care in order to make a capacitous decision about residence’ (para 65).

DA v DJ [2017] EWHC 3904 (Fam) – s.48 threshold

- Threshold for interim declarations
- Decided 2017, only published March 2020
- Parker J considered the approach to interim declarations under MCA 2005 s48 and the conflicting judgments of HHJ Marshall QC (*Re F* [\[2009\] EWHC B30 \(Fam\)](#)) and Hayden J (*Wandsworth LBC v AMcC, AJ, CJ and JJ* [\[2017\] EWHC 2435 \(Fam\)](#)).

DA v DJ (2)

- In *Re F*, HHJ Marshall QC:

*... evidence required to found the court's interim jurisdiction under [s48] must be something less than that required to justify the ultimate declaration [under s15]. What is required, in my judgment, is simply sufficient evidence to justify a reasonable belief that P **may** lack capacity in the relevant regard ... the 'gateway' test for the engagement of the court's powers under s48 must be lower than that of evidence sufficient, in itself, to rebut the presumption of capacity (paras 35–37; see para 42 of the instant judgment; emphasis in the original).*

- Hayden J in *Wandsworth*:

[T]he presumption of capacity is omnipresent in the framework of this legislation and there must be reason to believe that it has been rebutted, even at the interim stage. I do not consider, as the authors of the 'Mental Capacity Assessment' did that a 'possibility', even a 'serious one' that P might lack capacity does justification to the rigour of the interim test ... (para 65; see para 60 of the instant judgment).

'Reason to believe' that P lacks capacity must be predicated on solid and well-reasoned assessment in which P's voice can be heard clearly and in circumstances where his own powers of reasoning have been given the most propitious opportunity to assert themselves (para 69; see para 62 of the instant judgment).

DA v DJ (3)

- Both parties invited the court in this case to prefer HHJ Marshall's approach, for risk that otherwise it 'makes the Act unworkable in practice and runs a high risk of imperilling the safety and wellbeing of those persons whom the Act and the judges are charged with protecting' (para 65).
- Parker J disagreed that P's voice had to be heard in the evidence for s48 declarations, and disagreed with Hayden J's approach. Parker J held that both 'a possibility', particularly 'a serious one', and 'an unclear situation', which might 'suggest a serious possibility P lacks capacity' met the s48 test (see para 70). Considered the s48 test required evidence on which a belief is formed, and it 'probably needs to be prima facie credible, not in the sense that it is believed but in the sense that it is capable of belief' (para 71). '[A] substratum of truth is probably sufficient enough to fulfil s48 in any event' (para 73).

Barnsley Hospital NHS Foundation Trust v MSP [2020] EWCOP 26 – personal autonomy

- Mr Justice Hayden
- Out of hours application – OS first time involved OOH
- 34 yo man with complicated abdominal history, sedated and ventilated
- Question whether Trust should continue to provide ITU support or withdraw treatment other than palliative care
- Focus on P's wishes and feelings

MSP (2)

- P “*utterly loathed life with a stoma*” and had reversal in May 2020.
- MSP developed significant abdominal pain and sepsis – life threatening need for stoma immediately
- MSP consented to the stoma being inserted
 - Contrary to unambiguous rejection of stoma previously
 - Long-term Drs surprised by consent to stoma
 - Inconsistent with everything said to family
 - Inconsistent with ‘Advance Directive’ prepared Feb 2020
 - Had been private about stoma; only parents and step-sister knew
 - Dr had been optimistic that stoma could potentially be reversed (at time)

MSP (3)

- Whilst court considered many people require a stoma and make necessary accommodations, this was simply not the case with MSP.
- Man in his 30s described by sister as *“knew he was good looking”*, could never accept life with a stoma.
- *“Its existence was corrosive to his self-esteem”* (para 7)
- Detailed Advance Directive (procedural deficiencies) included refusal of a stoma that is expected to permanent or with likelihood of reversal of 50%/under
- Judge described P as *“not mere vanity but a reflection of MSP’s determination to conceal the impoverishment of his health and to present himself to the world as competent and active.”*

MSP (4)

- *“he had come to a clear and entirely settled decision that he was not prepared to contemplate life with a stoma or indeed any significant life changing disability. It is not for me, or indeed anybody else, to critique those views or beliefs, but merely to identify them. They are a facet of MSP’s broader personality, the expression of which is integral to his own personal autonomy.” (para 17)*

MSP (5)

Q: whether it was in his BI for artificial nutrition and hydration to be withdrawn?

- ‘Advance directive’ was not binding as an Advance Decision, but represented clear expression of wishes & feelings, reinforced by family and 3 consultants’ evidence
- MSP’s consent to stoma was not necessarily inconsistent with entirety of other evidence because potential reversibility
- If Dr had been pessimistic about prospects of reversal, MSP would have rejected procedure and chosen to die – BUT *“this does not mean that this court should correct the error by brining about the death”* – contrary to s.4(5) MCA (para 46)
- P would unhesitatingly reject the parenteral feeding
- *“In the exercise of his personal autonomy he is entitled to take that decision which this court is required to and does respect.”* Trust plan authorised in BI.

MSP (6)

- Para 47: *“In a real sense this is not a case about choosing to die, it is about an adult’s capacity to shape and control the end of his life. This is an important facet of personal autonomy which requires to be guarded every bit as jealously for the incapacitous as for the capacitous”*

London Borough of Tower Hamlets v PB [2020] EWCOP 34 – unwise or incapacitous?

- Mr Justice Hayden
- 52 yo with ARBD and dissocial personality disorder

Q1: How the court should approach the assessment of capacity of individuals who are alcohol dependent?

Q2: Whether or in what circumstances the MCA should be used coercively to prevent people who are alcohol dependent from gaining access to alcohol?

PB (2)

- Dr Costafreda initially assessed PB as *having* capacity to make decisions re care/residence, fluctuating re litigation – revised opinion
- If PB started drinking again it was “*almost certain that he would lose control and trigger the cycle of homelessness, intoxication and withdrawals, self-neglect and hospitalisations likely, ultimately, to cause his death.*” (para 24)

PB (3)

- PB seriously overestimated ability to keep alcohol dependence under control but Dr C commented:
 1. Minimisations, rationalisations and justifications despite all evidence to the contrary are typical of people with substance dependence who are not generally considered to lack capacity
 2. PB did not exclude the possibility he could die and defended his decision to continue drinking on grounds of autonomy and fatalism.
 3. His answers showed “*sufficient understanding and acceptance of the risks to his health and well-being that would result from a decision to go back to drinking...*” (para 25)

PB (4)

- Mr Justice Hayden on Dr C's revised opinion: *"It strikes me as imposing a very challenging test of capacity to expect an alcoholic, who continues to drink, to be required to concede or acknowledge "beyond doubt" that he is unable to control his drinking and to such a degree that it has become a "certain" fact that he will drink to excess if not supervised... The effect of such a test strikes me as eroding, very significantly, "the space"... between a decision which is unwise and one which an individual does not have the capacity to take."* (para 29)

PB (5)

- Focus on s.3(4) MCA – material relevant to a decision includes information about the reasonably foreseeable consequences of deciding one way or another, or failing to make the decision.
- PB was able to see the reasonably foreseeable consequences of his decision.
- *“The plan that PB identifies may not be sustainable long term but that does not permit an inference that he is unable to foresee the consequences of drinking to excess on the sustainability of the placement.”* (para 42)
- *“The decision may hasten PB’s death but PB, like any of us... is entitled to make bad decisions if he chooses to do so.”* (para 44)

A NHS Foundation Trust v MC [2020] EWCOP 33

- Mr Justice Cohen
- Application by NHS Trust for court's consent for the harvesting of peripheral blood stem cells so they could be donated to P's mother, who has chronic leukaemia.
- P lacked capacity to decide on proposed procedure.
- Minor side effects but not risk free.
- MC did not understand details but clear wish that wanted to help mother if she could.
- No **physical** benefit to P, but she lived at home with parents, loving relationship, clear **emotional, social and psychological benefits** to P of her mother's life being extended.
- *“overwhelmingly in MC's best interests... as much as her mother's”* (para 18)

A few more!

- A CCG v AF [2020] EWCOP 16 – Considered contrary to AF’s interests for CANH to be removed because of “intrinsic quality” in his life and “from which AF derives pleasure and satisfaction”.
- Re Z [2020] EWCOP 20 – Insertion of intrauterine contraceptive device at the time of C-section.
- Re D (a young man) [2020] EWCOP 1 – Permission threshold same as for JR.
- Re QD (Habitual residence) (No.2) [2020] EWCOP 14 – Legal deadlock of man in UK but Spanish jurisdiction.
- Leicester City Council v MPZ [2019] EWCOP 64 – P’s failure to believe was a failure to understand.

And finally...

- Avon and Wiltshire Mental Health Partnership v WA & Anor [2020] EWCOP 37
- Young Palestinian man with PTSD and depression, consequent to trauma
- Home Office determined him to be older than he said which triggered traumatic reaction leading to refusal of nutrition/hydration
- “ must be emphasised that loss of capacity does not override respect for personal autonomy. Protecting the autonomy of the incapacitous is every bit as important as protecting the autonomy of the capacitous....”

For the diary.....

- **Seeking damages under the Equality Act 2010, Human Rights Act 1998 and in negligence in housing cases**
- **Thursday 23 July | 3-4pm**
- **[Zia Nabi](#) and [Sarah Steinhardt](#) consider damages claims in a webinar chaired by our newest member of the Housing Team, Alice Irving.**
- **To register your place, please click [here](#).**



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