



Welcome to the June 2023 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the JCHR has questions for the Government about the delay to the LPS; anorexia and capacity, and Caesarean sections and P-centricity;

(2) In the Property and Affairs Report: Hegel and testamentary capacity, and cross-border management of personal injury settlements;

(3) In the Practice and Procedure Report: a freeze on freezing injunctions, and ss.48 and 49 MCA under the spotlight;

(4) In the Wider Context Report: Mental Health Act reform potential and pitfalls, an update to the Mental Health and Justice Capacity Guide, and food refusal in prison;

(5) In the Scotland Report: Issues with powers of attorney – an unprecedented tangle, the Powers of Attorney Bill and Implementation of the Scott Report.

You can find our past issues, our case summaries, and more on our dedicated sub-site [here](#), where you can also sign up to the Mental Capacity Report.

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The picture at the top, “Colourful,” is by Geoffrey Files, a young autistic man. We are very grateful to him and his family for permission to use his artwork.

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LPS delay – Joint Committee on Human Rights questions for Government

The Joint Committee on Human Rights has written (by letter dated 26 May 2023) to the Minister of State for Social Care to express its view that the “delay [to implementation] is deeply concerning, given the serious problems with the DoLS system that we reported on last year,” and identifying how “if anything, the problems with DoLS appear to be getting worse.” The Committee finish its letter with four questions for the Minister to answer by 14 June:

1. Does the Government still believe that the system of DoLS is in need of reform? If so, given the delay in the implementation of the LPS, are any reforms of the system currently planned in the interim?
2. What steps are being taken to address the delays to the processing and completion of DoLS applications, with the aim of ensuring that no one is unlawfully deprived of their liberty in a care setting?
3. Will the availability of non-means-tested legal aid be extended to include those who may be subject to deprivation of liberty in care settings without an authorisation in place?

4. What steps are being taken to ensure that those involved in making DoLS decisions receive adequate human rights training, and fully understand the operation of DoLS?

For more on the implications of the decision to delay implementation, see our [May 2023 Report](#), and also [here](#).

Anorexia and capacity

North East London NHS Foundation Trust v Beatrice and Edward [2023] EWCOP 17 (Mostyn J)

Mental capacity – litigation – medical treatment

Summary

This case concerned ‘Beatrice,’ who was 50 years old; the second respondent, ‘Edward’¹ was her father. An application was made by North East London NHS Foundation for declarations that a palliative care plan for Beatrice which would withdraw active psychiatric treatment was lawful and in her best interests.

Beatrice had had a diagnosis of anorexia nervosa since she was 14 years old and had a more recent diagnosis of autistic spectrum disorder. The judgment noted that she was highly intelligent, having obtained post-graduate degrees, with a variety of interests, and was

¹ In both cases, there were pseudonyms given by Mostyn J, who has a long-standing, and entirely

understandable, dislike of the use of initials in Court of Protection.

“enthusiastic about giving her time to help other people” (paragraph 5).

Beatrice was profoundly unwell due to her anorexia, with a BMI of 11.5, and with a daily calorific intake of 260 calories. This followed a period during which she had not eaten at all. Beatrice appreciated that she would likely die if she continued with this pattern of highly restricted food intake. She had also stopped taking vitamins and her heart medication. The judgment records that “[s]he now says that she cannot continue the fight” against this condition (paragraph 6).

Beatrice had requested to be taken to a hospice to die, and had rejected all food and drink, in late April 2023. She changed her mind for a brief period of time and began ingesting the minimal amounts noted above, but by the time of the hearing, she was again expressing a wish to go to hospice. In light of her change in position, Mostyn J did not make s.16 MCA orders, but made determinations solely as to Beatrice’s capacity under s.15 MCA with a view to restoring the matter approximately two weeks later.²

The Trust submitted that Beatrice lacked capacity to make decisions regarding her care and treatment for anorexia because “the effect of the disease is so powerful that it renders Beatrice almost, if not actually, delusional so that she believes she is overweight and fat. The applicant argues that this belief derives from an impairment of the mind and prevents Beatrice from using or weighing the treatment options for someone in her position” (paragraph 19). Beatrice considered that she ‘might’ have capacity to make these decisions, though Mostyn J considered that this sent a subliminal message that Beatrice did not actually think she had capacity in these domains.

² A subsequent hearing has had press coverage, but at the point of preparing the Report no written judgment has been made available.

Mostyn J had evidence from both Beatrice’s treating psychiatrist and an independent expert concluding that she lacked capacity to take care and treatment decisions regarding her anorexia. Mostyn J concluded that

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. There is nothing to put on the side of the scales objectively in favour of starvation

Mostyn J’s considered this inability to weigh was caused by her anorexia nervosa, returning to an earlier metaphor that anorexia had been a ‘terrorist’ which had ‘invaded’ and ‘occupied’ Beatrice’s mind for most of her life:

34. ...The evidence showed beyond any doubt at all that the key weighing component within Beatrice’s decision-making process was not merely rendered faulty by the condition but rather that the condition caused it entirely to disappear.

Mostyn J also made findings on litigation capacity, finding that Beatrice was necessarily unable to conduct proceedings relating to an issue on which she lacked substantive capacity:

36...I remain convinced, as a matter of logic (I forebear from saying common sense), that if Beatrice is robbed by the

condition of the key element in the decision making process of weighing the relevant information, then she will be equivalently disabled from formulating and making submissions to a judge as to how he or she should undertake that very weighing exercise: see *An NHS Trust v P* (by her litigation friend, the Official Solicitor) [2021] EWCOP 27 at [33].

37. The test for litigation capacity surely has to be premised on Beatrice acting in person for, if that were not so, there would have to be an invidious debate as to the quality of the legal team hypothetically engaged by her. I am not getting into that in this case as I am completely convinced that Beatrice, even if represented, would not be able to formulate valid instructions to her lawyers by virtue of the impact of the condition to which I have referred above.

Mostyn J offered criticism of Hayden J's formulation of litigation capacity in *Lancashire and South Cumbria NHS Foundation Trust v Q* [2022] EWCOP 6, in which the latter had found that "the court could take into account when analysing a hypothetical instruction by P of hypothetical lawyers that P would not be "required" to instruct her advisers in a particular way, and that "like any other litigant, in any sphere of law, [she] may instruct [her] lawyers in a way which might, objectively assessed, be regarded as contrary to the weight of the evidence"(paragraph 38). Mostyn J stated that:

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.

Mostyn J also set out an amended order on reporting restrictions, which was notably shorter than the typical transparency order, and was titled as a 'Reporting Restrictions Order.'

Comment

Mostyn J's findings on substance matter capacity were unsurprising in this very sad case. He continues to take a stance at odds from other High Court judges on capacity to conduct proceedings, considering as a matter of logic that a person does not need to understand and use and weigh any less information to litigate about a decision than to make that decision (a discussion about this issue in the context of *Re P (Litigation Capacity)* [2021] EWCOP 27 is included in our [May 2021 report](#)).

In the abstract, it is also hard to disagree with Mostyn J's observation that 'Transparency' orders are likely more appropriately headed as Reporting Restriction Orders. However, we would note that Practice Direction 4C – Transparency does create a default position in the Court of Protection for the making such an order, and that the court will not ordinarily undertake an 'intense balancing exercise' as is required where matters are going from public to private.³ It is therefore a nice question as to whether there is a restriction on reporting, or whether the doors are

³ See also Alex's [discussion](#) of these issues in relation to an earlier decision of Mostyn J's.

simply being opened somewhat to enable transparency. In either event, we await with considerable interest the Law Commission's work in relation to contempt as an opportunity to make the whole area significantly less tangled.

Short note: P-centricity and Caesarean sections

Gloucestershire Hospitals NHS FT & Anor v Joanna [2023] EWCOP 21 concerned "Joanna", who was 26 years old, detained under s.3 of the Mental Health Act 1983, 38 weeks' pregnant and experiencing psychosis. An application was made to authorise serious medical treatment, namely a planned caesarean section, obstetric care and delivery of her child 3 days after the hearing. The evidence demonstrated on the balance of probabilities that she could not retain or weigh the relevant information to make decisions in relation to her obstetric care and that she lacked capacity to conduct the proceedings. As to best interests, Mostyn J adopted a P-centric approach and accepted that if Joanna had capacity she would likely choose a caesarean section after weighing up the risks as she was terrified of a vaginal birth. Her mother also supported her having a planned caesarean and, in conclusion, this was in her best interests.

This was a serious medical treatment case because the plan envisaged the use of restraint if necessary. The outcome is perhaps unsurprising, given that adopting a P-centric approach accorded with the evidential best interests analysis.

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Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; honorary membership of the Law Society of Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.



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Conferences

Members of the Court of Protection team regularly present at seminars and webinars arranged both by Chambers and by others.

Parishil Patel KC is speaking on Safeguarding Protected Parties from financial and relationship abuse at Irwin Mitchell's national Court of Protection conference on 29 June 2023 in Birmingham. For more details, and to book your free ticket, see [here](#).

Alex is leading a masterclass on approaching complex capacity assessment with Dr Gareth Owen in London on 1 November 2023 as part of the Maudsley Learning programme of events. For more details, and to book (with an early bird price available until 31 July 2023), see [here](#).

Alex is also doing a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his [website](#).

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity [My Life Films](#) in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next edition will be out in July. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: marketing@39essex.com.

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