Getting P To Hospital

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What we will cover

- Why is conveyance an important issue?
- Why are we talking about Maguire?
- Why an improved approach to conveyance is in everybody's best interests?

Why is conveyance an important issue?

Conveyance

- Conveyance in SMT cases is lawyer speak for how P gets from where they live to where they will receive their treatment.
- From a legal perspective, it's often one of the more difficult aspects:
  - Powers of entry into a private address;
  - The legal framework: Does restraint go beyond the parameters set out in sections 5 and 6 Mental Capacity Act 2005 and amount to a deprivation of liberty?
  - The legal duties: who is responsible for securing conveyance? Is there a responsibility on a public body to assist in the conveyance? Who should be parties in proceedings?

Careless Conveyance Causes Cases

- Prevention: Failed attendance at routine medical / dentistry appointments can cause health problems to become more acute.
- Issues with health care can cause welfare cases: Example, colo-rectal pain contributing to placement breakdown or reliance on opioid based pain relief.
- When persuasion fails: Professionals are, rightly, mindful of section 1(6) MCA, looking towards the least restrictive option. However, sometimes there is no contingency when persuasion fails. Sometimes persuasion may be doomed to fail, or may exacerbate a pre-existing psychological or psychiatric issue (e.g delusional belief or a phobia).

Why are we talking about Maguire?

Trinity Term
[2023] UKSC 20
On appeal from: [2020] EWCA Civ 738

JUDGMENT

R (on the application of Maguire) (Appellant) *v* His Majesty's Senior Coroner for Blackpool & Fylde and another (Respondents)

before

Lord Reed, President
Lord Lloyd-Jones
Lord Sales
Lord Stephens
Lady Rose

JUDGMENT GIVEN ON
21 June 2023

Heard on 22 and 23 November 2022

What’s Maguire about?

- Jackie. Jackie was a 52 year old woman with a learning disability and Down Syndrome who lived in a care home paid for by the local authority. Jackie was subject to DOLS.
- Jackie was found to lack capacity in various respects including issues around her healthcare, she had a long standing fear of medical assessment and treatment.
- Jackie had long standing stomach issues which were known but had not been fully assessed. Paramedics were called to her care home due to her having coffee ground type vomit. All agreed that Jackie needed to go to hospital and lacked capacity to make that decision. However, Jackie did not want to go and the issue arose as to how to convey her.

The legal issue in Maguire

- Jackie, sadly, worsened, was conveyed to hospital and then died. The issue which arose was whether the enhanced investigative duty arose under article 2 in respect of the inquest which followed.
- The Supreme Court concluded that in Jackie's case that article 2 *does not* apply. The case is incredibly important in respect of the systems and operational duty for the purposes of inquests. But it also tells us some things about planning and conveyance.

Lord Sales, para 163

- *163. "It would be difficult to formulate a protocol which specified in advance with precision how an individual ought to be treated in relation to every possible scenario which might arise. It seems inevitable that how an individual without capacity who is resident at a care home or a nursing home, or who is taken to hospital, ought to be treated in any given situation will require a high degree of individual assessment on the part of the persons who are dealing with them, according to judgments to be made in the light of the particular circumstances obtaining at the time"*
- Lord Sales was effectively talking about advanced care planning. The expectation here must be that there is a system in place that can perform an individual assessment of someone's circumstances at a material time.
- For a proper individual assessment to take place there needs to be processes for information sharing, considerations of capacity and rapid best interests decision making. Things like hospital passports will undoubtedly assist in this regard.

Lord Sales, para 183

- *183. "The Coroner examined the training and understanding of ambulance paramedics in relation to dealing with individuals lacking capacity, including in relation to the MCA 2005, and identified no problem with this. For ambulance crews, dealing with such individuals will be a common experience and the standards to be applied are subject to general regulatory overview of ambulance services in the usual way. The paramedics did in fact approach the question of whether Jackie should be removed to hospital on 21 February 2017 by assessing what was in her best interests, including by seeking medical advice, so their conduct tended to confirm that the system under which they were working was appropriate and effective. "*
- The expectation is therefore that those providing emergency care to individuals will have a system in place which will include: staff being conversant with the MCA, that removal to hospital will be considered and there will be an ability to escalate and access further medical advice.

Lord Sales, para 199

- *199. "In the present case, the operational duty applied to the staff at the care home in a graduated way, depending on their perception of the risk to Jackie. They were obviously aware that Jackie was a vulnerable person in their care for the general purpose of looking after her. They were not medically trained. By reason of the placement by the Council of Jackie at the care home, their responsibility was to look after Jackie on behalf of the state in substitution for her family.* ***In view of Jackie's vulnerability and limited ability to look after herself, they had the task of ensuring that she could have access to the healthcare which is available to the population generally, in the same way that a family could secure access for a vulnerable member:*** *Fernandes, para 173 (see paras 22 and 46-49 above)." (****my emphasis****)*
- When dealing with individuals who lack capacity to make decisions as to their medical care, we ought to expect equivalent access for them to healthcare provision.

Lord Sales, para 207

- *207. Also, as a general matter, healthcare professionals should seek to respect the autonomy of those in their care where possible and should at all times aim to act in their best interests, avoiding harm to them. Where an ambulance crew encounter a patient who is resistant to going to hospital, it is not a simple matter to say they must be forced to go either by means of physical restraint or by chemical restraint through the administration of sedatives. Both may have negative effects which harm the patient. An assessment is called for, to ensure that if such means are to be used, that is only where this is proportionate to the risk faced by the patient.*
- This is a reminder that plans for conveyance are not binary, it's not a question of restraint or no restraint. Rather an assessment of proportionality. Often that assessment cannot be conducted without underpinning of the clinical picture.
- Also a reminder that some restrictions may come within sections 5/6 see *Norfolk and Suffolk NHS Foundation Trust v HJ [2023] EWFC 92 (17 June 2023)*

David Lock KC in Norfolk and Suffolk NHS Foundation Trust v HJ [2023] EWFC 92 (17 June 2023)

*33. Applying that approach, it must follow that, **save in exceptional circumstances, any proper and lawful exercise of clinical judgment by clinicians in administering medical treatment to a detained person will not amount to a deprivation of the person's residual liberty because there is no element of arbitrariness in the actions of the clinical staff. If restraint is imposed in order to enable treatment to be administered for a physical health condition for a person who lacks capacity to consent under the MCA, the tests for the lawfulness of that restraint are set out in section 6 MCA. If those conditions are satisfied, the usual consequence will be that there will be no independent breach of the patient's rights under article 5 ECHR. Part of the reason that, in my judgment, there will be no breach of article 5 rights in such circumstances is that the Trust owes a common law duty of care to HJ. That duty means that, whilst she is detained in hospital, Trust staff are required to provide her with appropriate medical treatment to meet her physical and psychological needs. The Trust discharge that duty by administering medical treatment to her, including enemas as described above, and there is nothing arbitrary about their application in HJ's case. On the contrary, as set out above, this is a carefully thought-out treatment plan which is designed to meet her medical needs in a lawful and proportionate manner. I do not consider that acts taken by clinical staff to discharge that duty are capable of amounting to the type of exceptional circumstances which could lead to a further deprivation of HJ's residual liberty.** In my judgment, HJ cannot be deprived of her liberty as a result of actions of Trust staff that, to discharge their duty of care to HJ, they are required to take. I therefore consider that the revised position adopted by the Trust was correct and that the Official Solicitor was also correct to make the concession that HJ was not being deprived of her liberty when she was being administered enemas.*

Why an improved approach to conveyance is in everyone's best interests?

The benefits

- For P: Better health outcomes. A tooth extraction rather than a dental clearance, persuasion rather than physical restraint, avoiding trauma.
- For HCPs: More straight forward procedures / diagnostic testing, a more relaxed less complex patient.
- For the "system": Fewer wasted theatre slots, the ability to have specialist staff deployed on shift, less reliance on special ambulance transfer services.
- For the lawyers: "We haven't had done this before", we can help from a proactive perspective, rather than a reacting to a problem.
- For the courts: Avoiding "double" hearings and lessening the likelihood of out of hours hearings. (I have done an out of hours hearing on Christmas morning and on New Year's Eve – both have been about conveyance!)

Four Ps

- P: Who is P, what is their prior experience of medical treatment, what are their future needs likely to be, how can we prevent their needs intensifying? What does P want?
- Property: Where does P live? How do we extract them from that property? What is our lawful ability to enter? How to do we physically enter?
- People: Who do we need to be part of the conveyance? Is this a case where we need to use a GA in someone's living room, or is it a case where P will be driven to hospital in a family member's car? Do we need other parties (perhaps a fifth P) to be involved?
- Passing it on: Who do we need to share P's experience with for the future? What can we learn from this case that we can pass on so that other professionals might learn from it?

Thank you

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