

An introduction to the Court of Protection for health professionals

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We'd love to continue the
conversation

#COPMedicalBasics

Topics

- **The MCA in 2 minutes**
- **Why does the COP get involved in medical treatment decisions?**
- **What sort of decisions does the COP make?**
- **How does the COP make decisions?**
- **Urgent decisions**

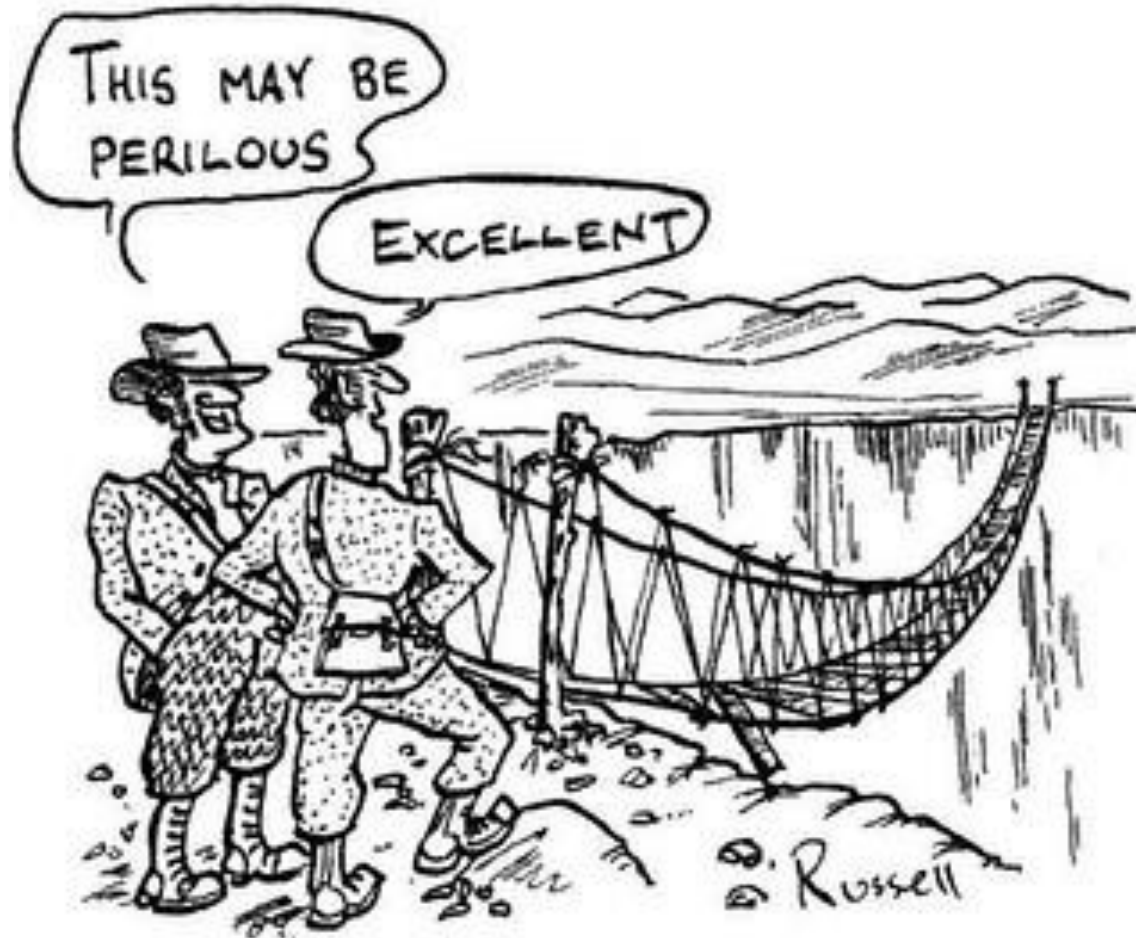
Capacity

- **Presume capacity**
- **Define the question & the relevant information**
- **Provide support**
- **Check understanding, retention, using/weighing and communication**
- **Check causal link to mental impairment**

Best interests

- Look at things from P's perspective
- Consider past and present wishes and feelings, beliefs and values
- Invite views from others about what they think P would want, and what they think is best
- Remember - what is best for P isn't *necessarily* the same as what the professionals advise

Victorian risk assessment



Providing treatment to people without capacity to consent

- Touching someone without their consent is a criminal offence
- BUT s.5 MCA says:
 - if reasonably believe P lacks capacity on the particular matter
 - and reasonably believe your act is in P's best interests
 - it is as if P had consented

(*unless P has an ADRT)

Restraint

- using, or threatening to use force to secure the doing of an act which P resists
 - restricting P's liberty of movement, even if P resists
-
- S.5 applies to restraint as well, if:
 - You reasonably believe restraint is **necessary** to prevent harm to P
 - It is a **proportionate** response to the likelihood of P suffering harm and the seriousness of that harm

So why does the CoP get involved?

- **S.5 will not or may not provide a defence**
- **Treatment involves a deprivation of liberty**

[Serious Medical Treatment, Guidance \[2020\] EWCOP 2 \(17 January 2020\) \(bailii.org\)](#)

The 2020 Guidance

- **Highly probable** you should come to court if:
 - Finely balanced
 - Difference of medical opinion
 - Lack of agreement from those with an interest in the person's welfare [**or from the person themselves?**]
 - Potential conflict of interest
- **Must** come to court if any of the above apply and the decision is about life-sustaining treatment including CANH

The 2020 Guidance (2)

- **Highly probable** you should come even if everyone is in agreement if the decision involves a serious interference with human rights eg:
 - Sterilisation
 - Organ, bone marrow, stem cell, tissue or blood donation
 - Covert contraception
 - Experimental/innovative treatment
 - Significant ethical issue in a controversial area

The 2020 Guidance (3)

- **Must** come to court if there will be a deprivation of liberty
 - No-one really knows what that means, but a useful question is – would you be imposing these restrictions on a person who had capacity?
 - Paradigm example – general anaesthetic for enforced sterilisation
- [39 Essex Chambers | Mental Capacity Guidance Note: Deprivation Of Liberty In The Hospital Setting - 39 Essex Chambers | Barristers' Chambers](#)

What sort of decisions does the COP make?

- Capacity disputes
 - [Kings College NHS Foundation Trust v C and V](#)
 - Weighing information differently to a health professional ≠ being unable to weigh information
 - Having unpalatable egocentric views ≠ a personality disorder
 - [Heart of England NHS Foundation Trust v JB](#)
 - Broad understanding only
 - Incapacity is different to indecision, avoidance or vacillation

Best interests disputes

- Amputation (often schizophrenia, diabetes and untreated leg ulcers)
- Caesarean section (often women detained under the MHA, or with severe learning disability)
- Covid vaccines (usually but not always in the person's best interests)
- Termination of pregnancy
- Cancer treatment
- Provision/withdrawal of CANH
- Provision/withdrawal of invasive ventilation
- CPR
- Dentistry

How does court make decisions?

- The court only knows that a decision needs to be made by application. Likewise, the decision is not an advice centre; the court will make the decision once the application is made.
- The obligation is on the treating hospital (or body commissioning the treatment) to bring the application before the court.

Evidence: Witness Statement

- **W**ho you are, your speciality and role.
- **I**ntroduce the patient, their history.
- **T**reatment options, which you say is in BI.
- **N**ecessity of any restrictions.
- **E**xplain what happens before, during, after.
- **S**how important records, imagery, data.
- **S**tatement of truth, sign, date.

Timing an application

It will not always be possible to get Court authorisation due to urgency: common law/s5

Application should be brought as soon as practicable after identifying treatment need

Patient

CoP Judge available 365 days of a year, 24 hours a day.

Remember: *shortest* lead time is approx. 4 hours before hearing.

Do not wait until incapacitous objecting patient has been rendered unconscious to provide treatment.

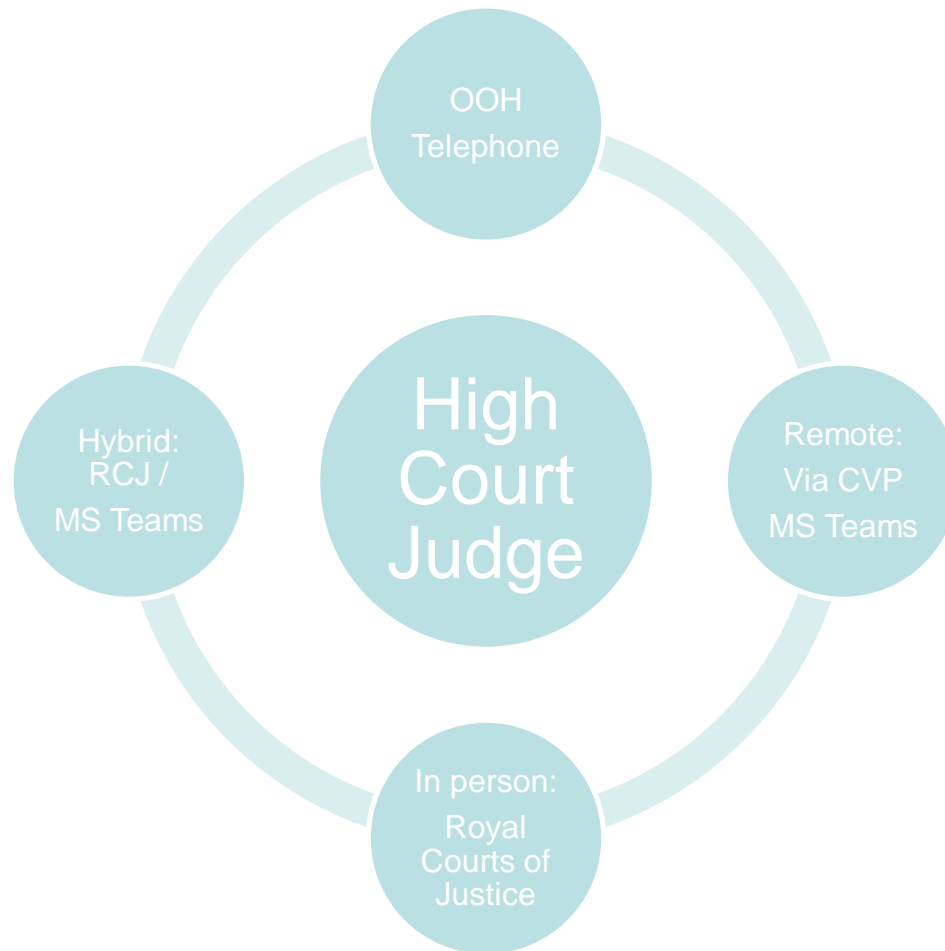
Representing P

- The incapacitous patient, the protected party, is known colloquially as, “P.”
- P is represented by a litigation friend, virtually always the Official Solicitor for England and Wales (in medical treatment cases.)
- OS acts as both LF and lawyer



Official Solicitor
and Public Trustee

Hearings



Decision Making

- Judge will determine what is in P's best interests considering:
 - Your evidence, including any second opinion evidence gathered pre-issue.
 - Independent experts instructed by the Official Solicitor on P's behalf.
 - P's wishes and feelings, views of those with an interest in P's welfare.

Open justice

- Starting position: hearing will be in public, P will not be named, treating clinicians will not be identified individually.
- Reporting is restricted by what is known as a transparency order. Breach of a transparency order is potentially a contempt of court.
- The public, other judges/professionals, will often observe hearings.

Things we don't have time to talk about

- Mediation – check out the Medical Mediation Foundation
- The court's reasons in particular cases or types of case. Check out the caselaw database at www.39essex.com
- Children and young people. Check out this recent decision: [A NHS Trust v X](#)
- All the other welfare decisions the COP takes – residence, care, contraception, sex, marriage, contact.....

If you want to observe a hearing



- <https://openjusticecourtofprotection.org/>
- Website sets out how you can:
 - Find relevant hearings;
 - Ask to join and observe;
 - Share your learning from the experience.

Questions and cash?

- If you have a spare couple of £s for charity

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