MENTAL CAPACITY REPORT:
HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

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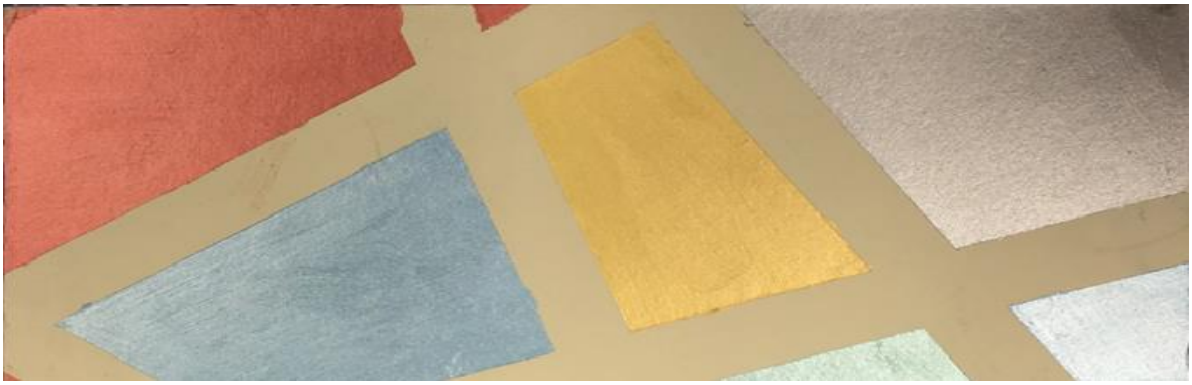

Welcome to the March 2019 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: an update on the Mental Capacity (Amendment) Bill; capacity and social media; the limits of the inherent jurisdiction (again); and best interests at the end of life;

(2) In the Practice and Procedure Report: an important decision on when it is legitimate summarily to dispose of s.21A applications; litigation capacity in the Court of Protection, Brexit contingency planning; and the launch of the Court of Protection Bar Association;

(3) In the Wider Context Report: CQC guidance on sexuality, litigation friends in the immigration tribunal; Strasbourg on the obligations towards voluntary psychiatric patients; and the Special Rapporteur on the Rights of Persons with Disabilities on ending disability-based deprivation of liberty.

We do not have a Property and Affairs report this month as there are insufficient developments to warrant a standalone report (but see the Practice and Procedure report for an update on the OPG's mediation pilot). Nor do we have a Scotland report, in part because we are disappointingly unable so far to report further progress on reform of the Adults with Incapacity (Scotland) Act 2000.

You can find all our past issues, our case summaries, and more on our dedicated sub-site here. You can also find here an updated version of our capacity assessment guide, with the best interests guide also due a refresh in the near future.

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

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Mental Capacity (Amendment) Bill update

The Mental Capacity (Amendment) Bill returned to the Lords on 26 February. The majority of the amendments introduced by the Government in the Commons were accepted (for an explanation of their rationale, see here). However, the Government's proposed statutory definition of deprivation of liberty was not accepted, and the Lords instead voted for the following definition advanced by Baroness Tyler.

> *"4ZA Meaning of deprivation of liberty*
>
> *(1) A person is deprived of liberty if the circumstances described in subsection (2) apply to them.*
> *(2) A person is deprived of liberty if they—*
> *(a) are subject to confinement in a particular place for more than a negligible period of time; and*
> *(b) have not given valid consent to their confinement; and*
> *(c) the arrangements are due to an action of a person or body responsible to the state.*
> *(3) For the purpose of subsection (2)(a), a person is subject to confinement where they—*
> *(a) are prevented from removing themselves permanently from the place in which they are required to reside, in order to live where and with whom they choose; and*
> *(b) are subject to continuous supervision and control."*

The Lords also voted for a cross-bench amendment proposed by Baroness Watkins to require responsible bodies to keep a record of the decision and justification if an authorisation record is not given to the person (and others) within 72 hours, and a review thereafter.

During the course of the debate, Baroness Blackwood (for the Government) made an important clarification of the extent of 'portability' of authorisations under the LPS, confirming that the Government's intention is that:

> *An authorisation can apply to different settings so that it can travel with a person but cannot be varied to apply to completely new settings once it has been made, as this would undermine Article 5.*

The Bill now returns to the Commons for consideration of the amendments proposed by the Lords.

Capacity, social media and the internet

Re A (Capacity: Social Media and Internet Use: Best Interests [2019] EWCOP 2 and *Re B(Capacity: Social Media: Care and Contact)* [2019] EWCOP 3 (Cobb J)

Mental capacity – assessing capacity – social media – contact – residence

Summary[1]

In two linked judgments, Cobb J has outlined the relevant, and irrelevant, information for purposes of deciding whether a person has capacity to make decisions about internet and social media use.

The importance of the internet and social media

Cobb J started his judgment in *Re A* by emphasising the central importance of internet and the social media to those with disabilities, including by reference to the CRPD. He also identified the potential for risks online, including, in particular, those with learning disabilities (and, in passing, noted that "[t]*hose who press for a change in the legislation* [to make it a crime to incite hatred because of disability] *have a compelling case*."

The nature of the decision

Cobb J was asked, first, to consider whether, in undertaking a capacity assessment, internet and social media use should form a sub-set of a person's ability to make a decision about either 'contact' or 'care'. He came to the clear conclusion that it was a different question, not least because "[t]*here is a risk that if social media use and/or internet use were to be swept up in the context of care or contact, it would lead to the inappropriate removal or reduction of personal autonomy in an area which I recognise is extremely important to those with disabilities*." Further

> *26. It seems to me that there are particular and unique characteristics of social media networking and internet use which distinguish it from other forms of contact and care; as I described above (see [4]), in the online environment there is significant scope for harassment, bullying, exposure to harmful content, sexual grooming, exploitation (in its many forms), encouragement of self-harm, access to dangerous individuals and/or information – all of which may not be so readily apparent if contact was in person. The use of the internet and the use of social media are inextricably linked; the internet is the communication platform on which social media operates. For present purposes, it does not make sense in my judgment to treat them as different things. It would, in my judgment, be impractical and unnecessary to assess capacity separately in relation to using the internet for social communications as to using it for entertainment, education, relaxation, and/or for gathering information.*

The relevant information

Having identified the decision, Cobb J reminded himself of the need to be careful not to overload the test for the information relevant to it, but to limit it to the "salient" factors (per *LBL v RYJ*

[1] Tor having acted for the local authority in *Re A*, and Neil for A's parents, neither have contributed to this report.

[2010] EWHC 2664 (Fam) at [24], and *CC v KK & STCC* [2012] EWCOP 2136 at [69]). "*In applying that discipline*," he continued, "*I am conscious that a determination that a person lacks capacity to access and use the internet imposes a significant restriction upon his or her freedom*."

Against that backdrop, he held that: 'relevant information' which P needs to be able to understand, retain, and use and weigh, is as follows:

> *28.*
> *i) Information and images (including videos) which you share on the internet or through social media could be shared more widely, including with people you don't know , without you knowing or being able to stop it;*
>
> *ii) It is possible to limit the sharing of personal information or images (and videos) by using 'privacy and location settings' on some internet and social media sites; [see paragraph below];*
>
> *iii) If you place material or images (including videos) on social media sites which are rude or offensive, or share those images, other people might be upset or offended; [see paragraph below];*
>
> *iv) Some people you meet or communicate with ('talk to') online, who you don't otherwise know, may not be who they say they are ('they may disguise, or lie about, themselves'); someone who calls themselves a 'friend' on social media may not be friendly;*
>
> *v) Some people you meet or communicate with ('talk to') on the internet or through social media, who you don't otherwise know, may pose a risk to you; they may lie to you, or exploit or take advantage of you sexually, financially, emotionally and/or physically; they may want to cause you harm;*
>
> *vi) If you look at or share extremely rude or offensive images, messages or videos online you may get into trouble with the police, because you may have committed a crime; [see paragraph below].*
>
> *29. With regard to the test above, I would like to add the following points to assist in its interpretation and application:*
>
> *i) In relation to (ii) in [28] above, I do not envisage that the precise details or mechanisms of the privacy settings need to be understood but P should be capable of understanding that they exist, and be able to decide (with support) whether to apply them;*
>
> *ii) In relation to (iii) and (vi) in [28] above, I use the term 'share' in this context as it is used in the 2018 Government Guidance: 'Indecent Images of Children: Guidance for Young people': that is to say, "sending on an email, offering on a file sharing platform, uploading to a site that other people have access to, and possessing with a view to distribute";*
>
> *iii) In relation to (iii) and (vi) in [28] above, I have chosen the words 'rude or offensive' – as these words may be easily understood by those with learning disabilities as including not only the insulting and abusive, but also the sexually explicit, indecent or pornographic;*
>
> *iv) In relation to (vi) in [28] above, this is not intended to represent a statement of the criminal law, but is designed to reflect the importance, which a capacitous*

> *person would understand, of not searching for such material, as it may have criminal content, and/or steering away from such material if accidentally encountered, rather than investigating further and/or disseminating such material. Counsel in this case cited from the Government Guidance on 'Indecent Images of Children' (see (ii) above). Whilst the Guidance does not refer to 'looking at' illegal images as such, a person should know that entering into this territory is extremely risky and may easily lead a person into a form of offending. This piece of information (in [28](vi)) is obviously more directly relevant to general internet use rather than communications by social media, but it is relevant to social media use as well.*

The irrelevant information

Importantly, Cobb J also considered whether to include in the list of relevant information that internet use may have a psychologically harmful impact on the user:

> *It is widely known that internet-use can be addictive; accessing legal but extreme pornography, radicalisation or sites displaying inter-personal violence, for instance, could cause the viewer to develop distorted views of healthy human relationships, and can be compulsive. Such sites could cause the viewer distress. I take the view that many capacitous internet users do not specifically consider this risk, or if they do, they are indifferent to this risk. I do not therefore regard it as appropriate to include this in the list of information relevant to the decision on a test of capacity under section 3 MCA 2005 .*

The application of the tests

Cobb J held, as a final declaration in *Mr A*'s case, and on an interim basis pending the taking practicable help to enable the gaining of capacity in *Ms B*'s case, that both lacked the material decision-making capacity.

Wider matters

In *Ms B's* case, Cobb J also usefully reiterated the tests (and relevant information) in relation to residence, care, contact and sexual relations. He also (earlier in his judgment) offered these interesting general observations:

> *19. General observations : In reviewing the capacity questions engaged here, I have reminded myself of the importance of establishing the causative nexus between the impairment of mind and the inability to make decisions. In this regard, counsel has rightly focused, when testing the evidence and making submissions, on the extent to which Miss B is influenced in her decision making by others – notably her father and/or Mr. C. Undoubtedly both men do exercise an influence over her; I was told (though make no finding) that her father can be abusive to her, verbally, and imposes boundaries on her which she finds unwelcome, whereas Mr C is persistent, and it may be thought controlling through his continual communications with her via social media (generally WhatsApp). I am satisfied that influence is a factor, but I share the view of Dr. Rippon that it is not actually operative on her decision making, and is in any event not more significant than the clearer evidence about impairment of the mind (Parker J in NCC v PB & TB [2014] EWCOP 14 at [86]).*

> *20. While there is some logicality to the strict decision-specific approach […], there is also some artificiality around the results. This case has revealed for me, once again, some of the anomalies of the required and disciplined approach in cases concerning capacity: thus, it will be shown that Miss B will be assessed as having capacity to decide on residence, but not her care (even if her proposed favoured residence is with someone who palpably will not care appropriately for her); she may have capacity to consent to sexual relations, but not have capacity to decide with whom to have those relations, or indeed any form of contact. That is the law which I must apply.*

Comment

These cases make absolutely clear how capacity assessment can be determined not just by application of the 'functional' test in the MCA, but by the two precursor steps of identifying the decision and the (ir)relevant information to that decision. Those two choices can make a radical difference in the process of determining whether, ultimately, the individual's choices are going to be afforded legal respect. In this case, it is of no little interest or importance that Cobb J reminded himself in *Re A* at the outset of the gravity of this task, and, in so doing, directed himself by reference by the CRPD, giving in the process a useful summary of the 'state of the art' in relation to the correct approach to take:

> *While the UNCRPD remains currently an undomesticated international instrument, and therefore of no direct effect (see Lord Bingham in A v Secretary of State for the Home Department [2005] UKHL 71; [2006] 2 AC 221 at [27]), it nonetheless provides a useful framework to address the rights of persons with disabilities. By ratifying the UNCRPD (as the UK has done) this jurisdiction has undertaken that, wherever possible, its laws will conform to the norms and values which the UNCRPD enshrines: AH v West London MHT [2011] UKUT 74 (AAC); [16] (See R(Davey) v Oxfordshire CC & others [2017] EWCA Civ 1308 at [62], and Mathieson v SS for Work and Pensions [2015] UKSC 47, [2015] 1 WLR 3250 at [32]). I am satisfied that I should interpret and apply the domestic mental capacity legislation in a way which is consistent with the obligations undertaken by the UK under the UNCRPD.*

Cobb J was acutely aware of the balance that he was seeking to strike by his choice of the relevant information (and irrelevant information) going into the mix in relation to the assessment of capacity to make decisions about social media and the internet. Even if one may take a different view of the information to put into the mix, the transparent process by which he reached and accounted for his decision is both of practical importance to front-line practitioners seeking to grapple with these cases, and also to allow wider society to understand the basis upon which such decisions are reached.

Where does the inherent jurisdiction end (2)?

Southend-on-Sea Borough Council v Meyers [2019] EWHC 399 (Fam) (Hayden J)

Article 5 – deprivation of liberty – CoP jurisdiction and powers – interaction with inherent jurisdiction

Summary[2]

This is the follow up to the permission decision of Baker LJ reported as *Re BF*, and represents the substantive hearing of the application before Hayden J for declarations from the local authority that they had discharged their obligations to the man in question, now identified as Ronald Meyers, under the Care Act 2014 and Human Rights Act 1998.

The factual background to the case can be found in our previous report, but in short terms the dilemma before the court was what, if anything, could be done to secure the interests of a 97 year old man with physical disabilities who was determined to live with his son in deeply squalid conditions in the father's home.

Hayden J was satisfied that Mr Meyers "*was entirely capable of and has the capacity (within the definition of the Mental Capacity Act 2005) for determining where he wishes to reside and with whom.*" Hayden J also made clear that he did not consider that Mr Meyers was vulnerable so as to bring him within the ambit of the inherent jurisdiction merely because he was blind, and he was clear that Mr Meyers did not satisfy the criteria of being of "unsound mind" so as to bring him within the scope of Article 5(1)(e) were his circumstances to amount to a deprivation of his liberty.

Normally, this set of conclusions would suggest that no court could intervene, and that any choices that Mr Meyers made, no matter how apparently unwise, would have to be respected. Hayden J, however, considered that Mr Meyers' son, KF:

> *41* [..]*... is needy, irrational, frequently out of control as well as manifestly emotionally dependent on a father who, despite the alarming history of this case, he obviously loves. KF's influence on his father is insidious and pervasive. It triggers Mr Meyers's sense of duty, guilt, love and responsibility. These, in my assessment, are pronounced facets of Mr Meyers's character, reflected in a different way in his sense of duty, love for his country and pride in his medals. In this particular context however, these admirable features of his personality have become confused and distorted in a relationship in which the two men have become so enmeshed that the autonomy of each has been compromised. In reality, KF exerts an influence over his father which is malign in its effect if not in its intention. The consequence is to disable Mr Meyers from making a truly informed decision which impacts directly on his health and survival.*
>
> *42. I am profoundly sympathetic not only to Mr Meyers's challenging circumstances but to his eloquent assertion of his right to take his own decisions, even though objectively they may be regarded as foolhardy. As I emphasised in Redbridge London Borough Council v SNA* [2015] EWHC 2140 (Fam)], *I instinctively recoil from intervening in the decision making of a capacitious adult. However well motivated the State may be in seeking, paternalistically, to protect people from their own unwise decisions, it is a dangerous course which has the potential to threaten fundamental rights*

[2] Katie having been acted for the local authority, she has not contributed to this report.

> *and freedoms. Again, as I said in Redbridge London Borough Council v A, the inherent jurisdiction is not ubiquitous and should be utilised sparingly. Here Mr Meyers' life requires to be protected and I consider that, ultimately, the State has an obligation to do so. Additionally, it is important to recognise that the treatment of Mr Meyers has not merely been neglectful but abusive and corrosive of his dignity. To the extent that the Court's decision encroaches on Mr Meyers' personal autonomy it is, I believe, a justified and proportionate intervention. The preservation of a human life will always weigh heavily when evaluating issues of this kind.*

Hayden J therefore required an order to be drawn up to reflect the objective that:

> *45.* […] *Mr Meyers be prevented from living with his son, either in the bungalow* or *in alternative accommodation. I do not compel him to reside in any other place or otherwise limit with whom he should live. For the avoidance of any doubt, Mr Meyers may live in his own bungalow, with an appropriate package of supportive care, conditional upon his son's exclusion from the property. This, to my mind, is the desirable outcome to this case. In this way I restrict Mr Meyers's autonomy only to the degree that is necessary to protect him, a measure which I have concluded is a proportionate interference with his Article 8 rights. As I have analysed above, it is the dysfunctional relationship between Mr Meyers and his son that serves to occlude his decision-making processes, concerning where and with whom he should live. The real issue is whether the framework of an order, giving effect to this, constitutes a deprivation of liberty at all. I am clear it does not.*

Although Counsel for the parties had agreed in the hearing with this proposition, they had both reconsidered and had subsequently contended such an order would give rise to a deprivation of Mr Meyer's liberty. Hayden J, however, held that:

> *56. Properly analysed, the ambition here is not to confine Mr Meyers to the Care Home, but to protect him from the grave danger that living in the bungalow with his son has already been demonstrated to represent. To safeguard him, by invoking the inherent jurisdiction of the High Court, it is necessary to restrict the scope and ambit of his choices, not his liberty. It is important to highlight that there remain a range of options open to him. The impact of the Court's intervention is to limit Mr Meyers's accommodation options but it does not deprive of his physical liberty which is the essence of the right guaranteed by Article 5.*
>
> *57. It is also necessary to restrict the extent of Mr Meyers's contact with his son in order to keep him safe. I am bound to say that I do not see that this should represent an insuperable challenge, even anticipating, as I do, that Mr Meyers may not cooperate. To the extent that this interferes with his Article 8 rights it is, again as I have indicated above, a necessary and proportionate intervention. I propose that the Order should be drafted in terms which provide for these restrictions.*

Hayden J refused to make the declarations sought by the local authority that it had discharged its responsibilities towards Mr Meyers. He did not then prescribe what the local authority should do, although noted that he considered that the ideal solution would be "*for*

Mr Meyers to return to his bungalow with a suitable package of support, his son having been excluded from the property. I should hope that the Local Authority will endeavour, within the framework of appropriate injunctive relief, to make provision for contact between Mr Meyers and his son."

Comment

All the comments that we made in relation to the *BF* judgment stand in relation to the final judgment in this case, although (on its face) the judgment looks even more like a case of 'be careful what you wish for' in relation to disability-neutral approaches to intervention predicated upon vulnerability. In practical terms:

- The judgment is a stark reminder that reliance upon the presumption of capacity and the "right" of individuals to make unwise decisions[3] cannot, in and of itself, discharge public bodies of their safeguarding obligations, especially where they may be charged with the positive duty under Article 2 ECHR to take practicable steps to secure that person's life;
- Further than that, the judgment is a reminder that, especially where life is at risk, local authorities are under an obligation not merely to investigate, but also to take action, which may include seeking the authority of the court to carry out draconian interventions;
- Although intended to be facilitative, rather than dictatorial, in its approach, the great safety net of the inherent jurisdiction is capable of "facilitating" a vulnerable adult to move in one direction, by removing all other available choices; and
- Necessity and proportionality seem to be the guiding principles in the exercise of this jurisdictional hinterland, rather than any pretense of best interests or will and preferences.

As to Article 5 ECHR, we presume that Hayden J took the view that there was no deprivation of liberty whereas Baker LJ had proceeded on the basis that there had been because the order as it stood before Baker LJ had required Mr Meyers to live at the care home, whereas Hayden J was seeking to bring about a restriction in the choices available to Mr Meyers rather that confining him to a particular location. We note that, had this case come before Sir James Munby, he might have taken a somewhat different view as to whether Mr Meyers would be deprived of his liberty by virtue of the order to be made by Hayden J. In *JE v DE* [2006] EWHC 3459 (Fam), in the long ago days of 2006, he observed in relation to a submission that a local authority:

> *"… [had] no objection in principle to DE living elsewhere than at the Y home, for instance either with his daughter or in some other residential establishment. That may be, but it wholly fails to meet the charge that he is being "deprived of his liberty" by being prevented from returning to live where he wants and with those he chooses to live with, in other words at home and with JE."*

Finally, those following the Government's

[3] There is no such right, at least to be spelled out of the MCA: the MCA, rather, provides a person cannot be taken to be unable to make a decision merely because they make an unwise decision. That the decision is unwise may well be a trigger to investigating whether, in fact, they have capacity to do so.

intention to introduce a domestic abuse bill may want to test the facts of this case against the scope of that bill, because it would, on its face, potentially fall within them (the bill, importantly, making clear that domestic abuse can be perpetrated by adult children upon their parents as they are 'personally connected'). It is perhaps striking, one may think, that there is no suggestion in the context of that bill that orders could ever be made against the victim of abuse, as opposed to the perpetrator.

Ceilings of care and best interests

University Hospitals Birmingham NHS Foundation Trust v HB [2018] EWCOP 39 (Keehan J)

Best interests – medical treatment

Summary[4]

HB, a 61-year-old mother of 8 with a significant history of diabetes and chronic kidney disease suffered a cardiac arrest in July 2018. Six weeks after her collapse, the treating Hospital trust brought an application to court, in essence, for confirmation that their proposed ceiling of care was lawful and in HB's best interests.

HB had suffered an irreversible brain injury and was diagnosed as being in a vegetative state, but not a persistent vegetative state given the shortness of time since her injury. The applicant Hospital Trust proposed downsizing her tracheotomy, removing her arterial and intravenous lines, transferring her to a respiratory ward and providing her with ongoing nursing care including the administration of nutrition hydration and medication via NG tube: "Part 1" of the treatment. It sought a declaration, however, that the proposed "Part 2" of her treatment plan, being more active resuscitative care in the form of CPR, renal replacement therapy, vasoactive drugs, ventilation and a potential transfer back to ITU, would not in HB's best interests.

HB's 8 children, represented by her daughter and attorney FB and the Official Solicitor on HB's behalf, agreed with Part 1, but opposed the declaration sought in relation to Part 2.

Keehan J heard telephone evidence from, among others, Dr Chris Danbury, a consultant intensivist as expert instructed by the Official Solicitor, and from HB's daughter FB. Keehan J heard that HB's husband had died of a heart attack 12 years previously and that his death had had a significant impact on HB and her children. Further, he heard that that FB had been appointed as HB's attorney for health and welfare and that she and her mother had discussed HB's wishes and feeling in the context of a previous hospital admission. FB gave evidence that HB was a practising Muslim and would wish all possible steps to be taken to keep her alive.

Dr Danbury gave evidence to the effect that it was simply too early to tell what HB's prognosis might be. He noted that she had suffered a very serious brain injury and her prognosis was poor but that if ten patients were placed before him with the same injury in the same timeframe, he would be unable to predict which of them would make no recovery whatsoever and which of them would make some recovery from their

[4] Note, this decision was reached in October 2018, but did not appear on Bailii until February 2019.

current condition. Dr Danbury did not support the Trust's application in relation to Part 2.

Keehan J's conclusions bear setting out in full:

> *32. When considering what is in HB's best interests, I take account of the fact that the balance of medical evidence would support the view that the treatment set out in the second part of the treatment plan would bring about no significant improvement in HB's underlying condition and, to that end, they might be seen as futile. I accept that those treatments set out in part 2 of the treatment plan numbers (1) to (6) would be burdensome treatments for her to receive because they are either invasive or, in the case of cardiopulmonary resuscitation, it is a violent treatment.*
>
> *33. Against that, I have to balance the very clear wishes, expressed by HB to her daughter, that she would want all steps taken to preserve her life and, as Professor of Critical Care Medicine mentioned at the best interests meeting, even if that meant that further continued physical incapacity, or indeed a lack of mental capacity.*
>
> *34. I am satisfied, within the meaning of the 2005 Act, that HB does not have the capacity to make decisions about her medical treatment. I accept that the quality of the care given by the Trust staff, both clinicians and nursing staff, has been of an excellent quality. I accept that the Trust, the clinical team, have taken all proper steps in their analysis of HB's needs and, indeed, seeking second opinions from Professor of Intensive Care Medical and Professor of Neurology. However, I accept the evidence of Dr Danbury that it is too early at this stage, just six weeks and two days post the cardiac arrest, to be clear as to whether HB will achieve any improvement in her neurological condition or not.*
>
> *35. Where it is not clear whether HB will make an improvement in her neurological condition, it is, in my judgment, contrary to her best interests and premature to rule out the treatments set out in Part 2 of the updated treatment plan, numbers (2) to (6). In relation to number (1), that is cardiopulmonary resuscitation, this, Mr McKendrick QC tells me on behalf of the Trust, is the particular treatment that causes most concern to the medical staff. I have carefully reflected and considered whether it would be in her best interests for her not to receive CPR should she suffer a collapse or further cardiac arrest. Mr McKendrick submits that it would not be in HB's best interests that the potentially last moments of her life were lived with her undergoing the violent and invasive procedures necessary in providing CPR, that it would be a traumatic scene for her children to witness in her final moments.*
>
> *36. I entirely accept those submissions and the force in them, but key to the decision must be the wishes and feelings of HB and it is plain that administering CPR in the event of a further collapse and giving her, albeit a very, very small chance of life, is what she would wish. In my judgment, at the moment, it remains in her best interests for that treatment to be provided to her. I entirely accept that there will undoubtedly come a time when such treatments would no longer be in her best interests but I am entirely satisfied that that stage has not been reached yet.*

Comment

Keehan J's judgment does appear at first blush significantly to privilege the view of P over a more objective assessment of medical opinion but the facts of this case appear very much to have been driven by the shortness of time since HB's injury and the evidence of Dr Danbury as to what her prognosis might be.

In its emphasis upon what HB would have wanted, the case is a powerful example of the post-*Aintree* approach to best interests decision-making in the medical field. One suspects that the clinicians may have felt more than a little discomforted at the conclusion that administering CPR would be in HB's best interests on the facts of the case. It is crucial to be clear, however, that they were not being ordered to provide it (and nor could they be: see *Aintree* at para 18). They had come to court to ask it to confirm that certain treatments were in HB's best interests, and certain treatments were not: that approach, in and of itself, gave rise to the possibility that the decision-maker (the court) would take a different view.

Short note: treatment withdrawal and the courts post *NHS Trust v Y*

In *SS v CCG & Anor* [2018] EWCOP 40, decided in October 2018, but not appearing on Bailii until March 2019, Newton J had to consider whether CANH should be withdrawn from a Muslim woman in a PVS. As Newton J noted:

> *There is a broad consensus that it is no longer in B's best interests for CANH to be continued, but nonetheless, I should and will review those issues later in this judgment. The application is supported by B's husband. It is supported by the treating doctors and the nursing staff. There has been some equivocation in respect of some family members, although that position was clarified as recently as 17 October by B's husband. There is in fact no active objection before the court. In those circumstances, it seemed to me as a matter of kindness and dignity that I should decide the case on submissions. No-one sought for evidence to be called and none was necessary. The circumstances are desperately sad.*

Decided after *NHS Trust v Y*, which made clear that applications are not required where a robust best interests decision-making process (following the relevant guidance[5]) leads to a clear agreement as to where the person's best interests lie, this is a good example of a case in which there was not sufficient unanimity, at least the outset, warranting an application to secure P's rights. It also shows how it is possible for such applications to be resolved on submissions alone without the need for evidence.

[5] Now the BMA/RCP guidance (endorsed by the GMC) available here.

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Conferences

Conferences at which editors/contributors are speaking

Essex Autonomy Project summer school

Alex will be a speaker at the annual EAP Summer School on 11-13 July, this year's theme being: "All Change Please: New Developments, New Directions, New Standards in Human Rights and the Vocation of Care: Historical, legal, clinical perspectives." For more details, and to book, see here.

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 April. 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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