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# Court of Protection, health and welfare

The Mental Capacity Act 2005 –  
Japanese Delegation 22.4.2015



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# Introduction

- \* The Mental Capacity Act 2005
- \* The Court of Protection since 2007
- \* Financial decisions
- \* Welfare decisions: all deeply personal:
  - Place of residence
  - Care
  - Medical Treatment
  - Contact
  - Capacity to consent to sexual relations
  - Capacity to consent to marriage

# Human Rights Act 1998

## European Convention on Human Rights

- ✖ **Article 1:** Right to life
- ✖ **Article 3:** Not to suffer torture or degrading treatment
- ✖ **Article 5:** Not to be deprived of liberty
- ✖ **Article 6:** Right to a fair trial
- ✖ **Article 8:** Right to a private and family life

# Human Rights cont...

*“The whole point about human rights is their universal character. The rights set out in the European Convention are to be guaranteed to “everyone” (article 1). They are premised on the inherent dignity of all human beings whatever their frailty or flaws.”*

*“Far from disability entitling the state to deny such (those with disabilities) people human rights: rather it places upon the state (and upon others) the duty to make reasonable accommodation to cater for the special needs of those with disabilities.”*

Lady Hale at paras 36 and 45 of her leading judgment in  
P v Cheshire West & ors UKSC [2014] 19

# Mental Capacity Act 2005; protect & empower?

- \* S1: Principles
  - Presumption of capacity
  - Support P to make the decision himself 'all practicable steps'
  - Unwise decisions and bar to making unjustified assumptions
  - Best interests and least restrictive option
- \* S2 & S3: Capacity – functional test with diagnostic element
  - \* Protection by law when assessed as being unable to make own decision
  - \* Time & decision specific
  - \* Causal link
- \* S4: Best Interests analysis
  - \* Ps wishes and feelings? (IMCA role in ensuring these heard)
  - \* Consultation – deputy & attorneys; family; professionals, P
- \* S4A/Schedule 1A: Authorising Deprivation of Liberty
- \* S5: **Protection** to D for acts done in P's best interest to protect P from harm
- \* S6: **Protection** to D for restraint to P; necessary & proportionate
- \* S9 / S16 & S24: Appointment of Deputies and Lasting Power of Attorneys , Advance Decisions - protect or empower?
- \* S15/16: Health and welfare declarations and decisions in the Court of Protection – capacity and best interests (available options only)
- \* S15/16 Best Interest declarations / decisions by the court
- \* S39: IMCAs

# S2 MCA 2005

## Diagnostic test

- ✘ S2(1) For the purposes of this Act a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in the relation to the matter because of an impairment of or a disturbance in the functioning of the mind or brain.
- ✘ The impairment of or the disturbance in the functioning of the mind or brain must be identified ie diagnosed
- ✘ And a causal link must be established between the diagnosis of the impairment or disturbance in the functioning of the mind or brain and the lack of capacity.
- ✘ Assessment of capacity is time and issue specific
- ✘ Some decisions (eg sexual relations/marriage) may be status specific and others eg contact may be person specific

# s3 MCA 2005

## Inability to make decisions

- ✘ S1 A person is unable to make a decision for himself if he is unable to
  - ✘ (a) to understand the information relevant to the decision
  - ✘ (b) to retain that information
  - ✘ (c ) to use or weigh up that information as part of the process of making the decision, or
  - ✘ (d) to communicate his decision .....



# S3(a) MCA 2005

## ‘Understand the relevant information’

- \* Code of Practice Chapter 4: Relevant information must include positive and negative eg risks information, and para 4.19 ‘what the likely consequences of a decision would be (the possible effects one way or another) – and also the likely consequences of making no decision at all.’
- \* Heart of England NHS Foundation Trust v JB [2014] EWHC 342 (COP) Peter Jackson J:
  - \* para 24 : ‘*What is in my view required is that JB should understand the nature, purpose and effects of the proposed treatment, the last of these entailing an **understanding of the benefits and risks** to have or not have or not to have one or another of the various kinds of amputation , or of not making a decision at all’*
  - \* Para 25: ‘*What is required here is a broad, general understanding of the kind that is expected from the population at large. JB is not required to understand every last piece of information about her situation and her options.... It must also be remembered that common strategies for dealing with unpalatable dilemmas for example **indecision, avoidance or vacillation are not to be confused with incapacity**. We should not ask more of people whose capacity is questioned than of those whose capacity is undoubted.*’

# S3(1)(b) MCA 2005

## Retain the information

- ✘ Capacity is time and issue specific and just because P is only able to retain information for a short period that should not on its own be a determinate factor.
- ✘ The more complex the decision or the more complex or long term the consequences of making or not making a decision may require more long term information retention.
- ✘ Remember practicable steps that might be taken to support a person in retaining the information eg writing down the information so that P can refer back to it.

# S3(1)(c ) MCA 2005

## ‘use or weigh up the information’

- \* In weighing up whether to remain in a care home or return home in *CC v KK* [2012] EWHC 2136 (COP) Baker J at para 68 said the choice P ‘*should be asked to weigh up is not between the nursing home and a return home to the bungalow with no or limited support , but rather between staying in the nursing home and a return home with all practicable support.*’
- \* Phobias, paranoia, other disorders eg anorexia may interfere with the weighing up process. In *A Local Authority v A* [2012] EWHC 1639 (COP) Peter Jackson J at para 49 said ‘*There is strong evidence that E’s obsessive fear of weight gain makes her incapable of weighing the advantages or disadvantages of eating in any meaningful way. For E the compulsion to prevent calories entering her system has become the card that trumps all others. The need not to gain weight overpowers all other thoughts.*’
- \* In order for P to weigh up information P must be given the relevant information in the first place.

# S3(1)(c ) MCA 2005

## Weighing up and Undue Influence

- \* Undue influence can apply to anyone regardless of our mental capacity
- \* Lord Donaldson M.R. in *Re T (Adult: Refusal of Treatment)*, [1992] 4 All ER 649 said of 'crucial importance' in the effects of influence were the relationship of the 'persuader' to P, and the strength and will of P saying P who is '*very tired, in pain or depressed will be much less able to resist having his will overborne than one who is free from pain and cheerful.*'
- \* Lord Munby in *SA (Vulnerable Adult with capacity: Marriage)*, Re [2005] EWHC 2942, para 78: '*..... Where the influence is that of a parent or other close or dominating relative, and where the arguments and persuasions are based upon personal affection, or duty, religious beliefs, powerful social or cultural conventions,, or asserted social, familial or domestic obligations, the influence may .....be subtle, insidious, pervasive and powerful. In such cases very little pressure may suffice to bring about the desired result.*'
- \* Lord Donaldson M.R. in *T (Adult: Refusal of Treatment)*, Re [1992] 4 All ER 649, at paragraph 662 said that while acceptable for a patient to receive advice and strong persuasion such persuasion must not '*overbear the independence of the patient's decision*' and went on to ask '*does the patient really mean what he says or is he merely saying it for a quiet life to satisfy someone else or because the advice and persuasion to which he has been subjected is such that he can no longer think or decide for himself?*'

# S1(4) MCA 2005

## Unwise Decisions

- ✘ S1(4) A person is not to be treated as being unable to make a decision merely because he makes an unwise decision
- ✘ Davis L.J. *'It is of course, of the essence of humanity that adults are entitled to be eccentric, entitled to be unorthodox, entitled to be obstinate, entitled to be irrational. Many are. But the decided authorities show that there can be no power of public intervention simply because an adult proposes to make a decision, or to tolerate a state of affairs, which most would consider neither wise or sensible.'* (DL v A Local Authority [2012] EWCA Civ 253 at para 76)

# Sex and marriage

- ✘ Section 27 MCA 2005 – no one, including the court can consent on behalf of P to a marriage, or sexual relations.
- ✘ Capacity is act specific not person specific for marriage and sex
- ✘ If P lacks the capacity to consent to sexual relations, then any care plan must remove the opportunity for sex. Consider education (DE).
- ✘ Deal with any this by restricting contact with a particular person (if P lacks capacity to have contact with a particular person)

# Sex and Marriage cont...

- \* Capacity should be assessed by way of reference to the “decision” not the domain. In *City of York Council v PC* [2014] 2 W.L.R. 1 McFarlane LJ held at paragraph 35:

“The determination of capacity under MCA 2005, Part 1 is decision specific. Some decisions, for example agreeing to marry or consenting to divorce, are status or act specific. Some other decisions, for example whether P should have contact with a particular individual, may be person specific. But all decisions, whatever their nature, fall to be evaluated within the straightforward and clear structure of MCA 2005, ss 1 to 3 which requires the court to have regard to 'a matter' requiring 'a decision'.”

- \* What information is required to be understood by P to have capacity for each matter?

# Capacity to marry

\* *In Sheffield City Council v E [2004] EWHC 2808 (Fam) (a case concerning the capacity to marry decided before the implementation of the 2005 Act) Munby J (as he then was) said (at paragraph 144):*

*“We must be careful not to set the test of capacity to marry too high, lest it operate as an unfair, unnecessary and indeed discriminatory bar against the mentally disabled”*



# Capacity to marry cont...

✱ Munby J (as he then was) in Re E [2005] 1  
FLR 965

*“The test is capacity to understand the nature of the contract of marriage . The test is not capacity to understand the implications of a particular marriage ...Whether A marries B or marries C, the contract is the same, its nature is the same, and its legal consequences are the same. The emotional, social, financial and other implications for A may be very different but the nature of the contract is precisely the same in both cases.”*

# Capacity to marry cont

- \* This approach has been approved by the court of Appeal in *York City Council v C*:
- \* *Munby J (as he then was) in Re E [2005] 1 FLR 965 at paragraph 141:*

*"In relation to the question of whether E has capacity to marry the law remains to day as it was set out by Singleton LJ in [In the Estate of Park, decd \[1954\] P 112](#), 127:*

*"Was the deceased ... capable of understanding the nature of the contract into which he was entering, or was his mental condition such that he was incapable of understanding it? To ascertain the nature of the contract of marriage a man must be mentally capable of appreciating that it involves the responsibilities normally attaching to marriage. Without that degree of mentality, it cannot be said that he understands the nature of the contract."*

- \* *v) More specifically, it is not enough that someone appreciates that he or she is taking part in a marriage ceremony or understand its words.*
- \* *(vi) He or she must understand the **nature of the marriage contract**.*
- \* *(vii) This means that he or she must be mentally capable of understanding the duties and responsibilities that normally attach to marriage.*
- \* *(viii) That said, the contract of marriage is in essence a simple one, which does not require a high degree of intelligence to comprehend. The contract of marriage can readily be understood by anyone of normal intelligence.*
- \* *(ix) There are thus, in essence, two aspects to the inquiry whether someone has capacity to marry. (1) Does he or she understand the nature of the marriage contract? (2) Does he or she understand the duties and responsibilities that normally attach to marriage?*
- \* *(x) The duties and responsibilities that normally attach to marriage can be summarised as follows. Marriage, whether civil or religious, is a contract, formally entered into. It confers on the parties the status of husband and wife, the essence of the contract being an agreement between a man and a woman to live together, and to love one another as husband and wife, to the exclusion of all others. It creates a relationship of mutual and reciprocal obligations, typically involving the sharing of a common home and a common domestic life and the right to enjoy each other's society, comfort and assistance.*

# Capacity to consent to sexual relations

- \* Low bar to avoid discrimination

Mostyn J in D Borough council v AB [2011] EWHC 101 COP

- \* *Mr O'Brien says that this argument is over-intellectual. We are dealing here, he says, with mentally incapacitated people, who in the terms of s2(1) of the Act are suffering impairment of, or a disturbance in the functioning of, the mind or brain. We are not talking about perverts who obviously have the capacity to consent to sex. This is true enough, but I believe that to import these knowledge requirements into the capacity test elevates it to a level considerably above the very simple and low level test propounded by Munby J namely "sufficient rudimentary knowledge of what the act comprises and of its sexual character".*
- \* *In his evidence Dr Hall emphasised that the need for consent is one of the very first messages that is conveyed to people with learning disabilities who are being taught about sex. Nothing I say is intended to diminish that obviously vital message. There is a difference, however, between the teaching of what is right and wrong in the pursuit of sex, and what level of understanding and intelligence is needed to be capable of consenting to it.*
- \* *I therefore conclude that the capacity to consent to sex remains act-specific and requires an understanding and awareness of:*
- \* *The mechanics of the act*
- \* *That there are health risks involved, particularly the acquisition of sexually transmitted and sexually transmissible infections*
- \* *That sex between a man and a woman may result in the woman becoming pregnant"*

## Capacity to consent to sexual relations cont...

- ✘ Hedley J adds that some grasp of sexual health is required, but only to the extent that sexual relations may lead to ill-health and that risks can be reduced by using contraception.
- ✘ Baker J in TZ (2013) dealt with capacity to consent to homosexual sexual relations - unnecessary for a person to have an understanding that sex between a man and woman may result in pregnancy.
- ✘ These approaches all approved by the Court of Appeal in:

# IM v LM [2014] EWCA Civ 37

- ✘ *On the basis that we have described, we hold that the approach taken in the line of first instance decisions of Munby J, Mostyn J, Hedley J and Baker J in regarding the test for capacity to consent to sexual relationships as being general and issue specific, rather than person or event specific, represents the correct approach within the terms of the MCA 2005.*
- ✘ Don't dress P in cotton wool – we all make mistakes
- ✘ Lady Hale – person specific (no appeal to Supreme Court)
- ✘ Policy / practical decision?

# Deprivation of Liberty

- \* **MAGNA CARTA:** No man shall be deprived of his liberty save by the authority of the law
- \* **HABEAS CORPUS:** Give up the body
- \* **ARTICLE 5 EUROPEAN CONVENTION ON HUMAN RIGHTS:**
  - \* (1) 'No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
    - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;
  - \* (4) 'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided **speedily** by a court and his release ordered if the detention is not lawful.'
- \* **MENTAL HEALTH ACT 1983:** S2, S3, S5(2), S7 (Guardianship); s135
- \* **MENTAL CAPACITY ACT 2005:** s64; s4A Schedules 1A and A1: Deprivation of Liberty Safeguards and Court authorised DOLS

# When is P Deprived of his or her liberty?

- \* Supreme Court decision [2014]UKSC19: When P **'is under continuous control and supervision and is not free to leave'**
- \* Supreme Court extended the application of the test to family and domestic settings eg supported living accommodation, adult placement schemes etc.
- \* Must be imputable to the state on more than a negligible basis (respite / small care package?)
  - Direct responsibility
  - Indirect responsibility - Violating positive obligation by failing to protect P from interference with his liberty carried out by private persons
- \* Care Homes now may face liability under HRA for failing to respect human rights of those who are providing care to those accommodated pursuant to s21(1)(a) and 26 of the NAA 1948. Not if self funding. Will be repealed, but similar provision in the Care Act 2014.
- \* If deputy arranges a self-funder's care without any recourse to the Local Authority, care agency or private care home unlikely to be required to act compatibly with the ECHR. BUT, LA might need to exercise its positive obligation and as such, be indirectly responsible.
- \* Article 5 breach if P is deprived of his or her liberty and it is not authorised either by way of a legal process eg DOLS Authorisation, MHA 1983 detention, or by the court.

# Defining Deprivation of Liberty – objective test

- ✳ **Test:** *‘concrete situation.....is that he is under continuous supervision and control and not free to leave’* (Lady Justice Hale; Supreme Court, Cheshire West [2014] UKSC 19)
- ✳ **Free to leave:** *‘I mean leaving in the sense of removing himself permanently in order to live where and with whom he chooses.’* (Lord Justice Munby JE v DE [2007] 2 FLR 1150 para 115)



# Defining Deprivation of Liberty

- ✘ ‘A gilded cage is still a cage’ (Lady Justice Hale, Supreme Court 2014, para 46)
- ✘ *‘We should not let the comparative benevolence of the living arrangements with which we are concerned blind us to their essential character if indeed that constitutes a deprivation of liberty.’* (Lady Justice hale, Supreme Court 2014, para 47)
- ✘ Much wider test than before – increase on pressure in resources

# Authorising a deprivation of liberty

1. If P lacks capacity to make decisions as to his or her care and treatment and is in a care home or hospital by way of a **DOLS Authorisation Schedules 1A and A1 MCA 2005**.
2. If P lacks capacity to make decisions as to where s/he should live or as to his/her care or treatment and in supported living, sheltered housing or any other type of accommodation that is not care home or a hospital by way of an **application to the Court of Protection**.
3. If P (with or without capacity to make decisions as to his /her care or treatment or where s/he should live) meets the criteria of s1 Mental Health Act 1983 then P can be detained in hospital **under s2, s3, s5 MHA 1983, or detained under s7 MHA 1983 (Guardianship)** in hospital, a care home or any other type of accommodation that is not a care home or hospital.

# 1. DOLS Authorisation, MCA

## 2005

- \* P must lack capacity to make decisions as to his/her care and treatment **and** does not meet the criteria to be detained under the Mental Health Act 1983 be residing (temporarily or permanently) in a hospital or care home
- \* 6 Assessments to be carried out including **mental capacity**, mental health and best interests.
- \* **Best interest Assessment:** DOL must be proportionate (least restrictive in the circumstances) and necessary.

# Dols Authorisation AND Courts s21A MCA 2005 Application

- \* A DOLS Urgent or Standard Authorisation must be in place
- \* P is protesting about being in that hospital or care home or about his or her care and treatment in that care home or hospital
- \* A close member of the family or person caring for P protests about P being in that care home or hospital or about their care and treatment
- \* The Local Authority should make the application – see s4 of Article 5, and *Neary*.
- \* Non-means tested legal aid for P and the unpaid RPR in s21A proceedings.

## 2. Application to the Court of Protection COP authorised DOL

- \* P lacks capacity to make decisions as to where s/he should live and/or to his care and treatment and is under continuous supervision and control and not free to leave (ie deprived of his or her liberty)
- \* P is not living in a care home or a hospital
- \* An application to the court **must** be made whether or not P or anyone else is protesting in order to authorise the deprivation of liberty in accordance with Article 5.
- \* Application may be able to be dealt with 'on the papers' without an oral hearing.

## 2. DOL Application Triggers for Oral Hearing, Sir James Munby, President COP

- ✘ Protest by P or anyone else as to P's care and treatment, or assessments of mental capacity, mental health, or best interest decisions made in respect of P's care and treatment or where P should live. (*para 13 (i) (iv)(v), para 35 (ii) – (vii)*)
- ✘ Failure to inform P and other relevant people in P's life of the application to ascertain P's and other's views. (*para 13 (ii), para 35 (viii)*)
- ✘ Concerns re P's wishes and feelings (*para 13 (v), para 35 (x)*)
- ✘ a need for urgent or specific judicial scrutiny (*para 13 (v), para 35 (xiv)*)
- ✘ The court may decide that the application requires an oral hearing

# 'Deprivation of Liberty' as a Safeguard

- \* Safeguarding NOT detention
- \* Who are we safeguarding?
- \* What are we safeguarding them from?
- \* Is the deprivation of their liberty proportionate AND necessary AND in P's Best interests?
- \* What is the Least Restrictive option – has this been explored?

## Health and Welfare COP Team



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