ASSISTED DECISION-MAKING:

AN ENGLISH JUDICIAL PERSPECTIVE

Mr. Justice Baker

22nd February 2016

Issues:

- the general principles;
- capacity;
- best interests;
- the Court of Protection;
- the inherent jurisdiction;
- representation in proceedings;
- transparency;
- advance decisions

General Principles

S.1 of the MCA 2005, headed “The Principles” provides as follows:

> "(1) The following principles apply for the purposes of this Act.
>
> (2) A person must be assumed to have capacity unless it is established that he lacks capacity.
>
> (3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.

(4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

(5) An act done or a decision made under this Act for or on behalf of a person who lacks capacity must be done or made in his best interests.

(6) Before the act is done or the decision is made regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action."

Compare the principles in s.1 MCA and s.8 ADM(C)A:

- presumption of capacity in s.1(2) in the MCA is mirrored in s.8(2) of the ADM(C)A;
- the principle about taking practicable steps to help decision-making in s.1(3) is in identical terms to s.8(3)
- the unwise decision principle in s.1(4) is similar, though not precisely the same, as the principle in s.8(4)
- the best interests principle in s.1(5) - the ADM(C)A contains the principle that “there shall be no intervention in respect of a relevant person unless it is necessary to do so having regard to the individual circumstances of the relevant person
- “less restrictive alternative’ principle is set out more comprehensively and expressly cites the importance, of the need to respect the right of the relevant person to dignity, bodily integrity, privacy, and autonomy, and also proportionality and the need to keep interventions limited in duration

But the ADM(C)A has further general principles in s.8 – the intervener shall

- shall permit, encourage and facilitate the relevant person to participate
- shall give effect to past and present will and preferences
- shall take into account beliefs and values and other factors so far as reasonably ascertainable
- shall consider the views of any person named by the relevant person, and any decision-making assistant, co-decision-maker, decision-making representative or attorney
- shall act in good faith and for the benefit of the relevant person
- shall consider all other relevant circumstances
- may consider the views of any carer or person with a bona fide interest or any healthcare professional
- shall, in the case of the person lacking capacity, consider the likelihood of recovery and the urgency of intervention
- shall restrict access to and use of information

NB all save the last feature in MCA under best interests provisions

“The Act and Code are, therefore, constructed on the basis that the vast majority of decisions concerning incapacitated adults are taken informally and collaboratively by individuals or groups of people consulting and working together. It is emphatically not part of a scheme underpinning the Act that there should be one individual who as a matter of course is given a special legal status to make decisions about incapacitated persons. Experience has shown that working together is the best policy to ensure that incapacitated adults such as E receive the highest quality of care”

(per Baker J in *G v E (Deputyship and Litigation Friend)* [2010] EWHC 2512 (COP) para 58).

Capacity

Fundamental principle – presumption of capacity in s.1(2) – repeated in the ADM(C)A s.8(2)

The principal provisions about capacity in the MCA are set out in ss 2 and 3. There are supplementary provisions in the Code of Practice. There have been a number of cases, including

- *PH v A Local Authority and others* [2011] EWHC 1704,
- *CC v. KK* [2012] EWHC 2136 (COP)
- *Re TZ No. 2* [2014] EWCOP 973,
- *PC and NC v City of York Council* [2013] EWCA Civ 478,
- *King's College Hospital NHS Foundation Trust v C and V* [2015] EWCOP 80 (MacDonald J)
- *Re Z and others* [2016] EWCOP 4 (Cobb J)

S.2(1) provides: “A person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or disturbance in the functioning of, the mind or brain”. This incorporates a two-stage test.

- The first stage, sometimes called the “diagnostic test”, is whether the person has such an impairment or disturbance.
- The second stage, sometimes known as the “functional test”, is whether the impairment or disturbance renders the person unable to make the decision.

In contrast, the ADM(C)A provides only a functional test, s.3(1) of that Act providing that “a person’s capacity shall be assessed on the basis of his or her ability to understand, at the time that a decision is to be made, the nature and consequences of the decision to be made by him or her in the context of the available choices at that time”.

S. 3(1) of the MCA provides that, for the purposes of s. 2, “a person is unable to make a decision for himself if he is unable

(a) to understand the information relevant to the decision;
(b) to retain that information;
(c) to use or weigh that information as part of the process of making the decision, or
(d) to communicate his decision whether by talking, using sign language or any other means”.

S. 3(3) adds that “the fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision”.

The ADM(C)A adopts the same four-limb test, but qualifies the second and fourth limb. The test for retention of information is qualified by addition of the words “long enough to make a voluntary choice”. The test for communication is qualifies by the additional words: “if the implementation of the decision requires the act of a third party, to communicate by any means with that third party”.

NB

- The importance of the general principles
- capacity is both issue-specific and time specific
- can P comprehend and weigh the salient features relevant to the decision?
- consider all the relevant evidence
- expert evidence important but not conclusive
- may be evidence from other clinicians, family friends
- what P says is also important
- beware the “protection imperative”
- the question is: is P *unable* to make the decision

Case study - *CC v KK*

The MCA Code of Practice is a crucial element in the scheme. It contains answers to questions such as:

- How should the statutory principles be applied?
- How should people be helped to make their own decisions?
- How should capacity be assessed?
- When should it be assessed?
- What practical steps should be taken when assessing capacity?
- When should professionals be involved?
- What if someone refuses to be assessed?
- How can someone challenge a finding of lack of capacity?

Therefore essential that guidance, whether in codes of practice or otherwise is provided to supplement ADM(C)A

Best interests

This element is a notable distinction between the two pieces of legislation. The ADM(C)A does not refer to best interests, and in this respect is closer to the Scottish provision in s.1(2) of the Adults with Incapacity (Scotland) Act 2000, which provides “there shall be no intervention in the affairs of an adult unless the person responsible for authorising or effecting the intervention is satisfied that the intervention will benefit the adult and that such benefit cannot reasonably be achieved without the intervention”.

But is it a distinction without a difference?

S.4 of the MCA provides inter alia that, when making a decision as to what is in M's best interests, anyone making the decision, including the court, must

- not make it merely on the basis of a condition of his, or an aspect of his behaviour which might lead others to make unjustified assumptions about what might be in his best interests (s.4(1))
- consider whether it is likely that the person will at some time have capacity in relation to the matter and, if so, when that will be (s.4(3))
- so far as reasonably practicable, permit and encourage the person to participate or to improve his ability to participate as fully as possible in any act done for him and any decision affecting him (s.4(4))

- consider, so far as is reasonably ascertainable, the person's past and present wishes and feelings, the beliefs and values that would be likely to influence his decision if he had capacity and the other factors that he would be likely to consider if he were able to do so (s.4(6))
- take into account, if it is practicable and appropriate to consult them, the views of, inter alia, anyone engaged in caring for the person or interested in his welfare, and any deputy appointed for the person by the court as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6) (s.4(7)).

These provisions are echoed substantially in s.8 (7) to (9) of the ADM(C)A, albeit not through the prism of the best interests test.

A trend in case law towards attaching greater importance to wishes and feelings.

See e.g. Baroness Hale of Richmond in *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67 (para 45):

"the purpose of the best interests test is to consider matters from the patient's point of view. That is not to say that his wishes must prevail, any more than those of a fully capable patient must prevail. We cannot always have what we want. …. But insofar as it is possible to ascertain the patient's wishes and feelings, his beliefs and values or the things which were important to him, it is those which should be taken into account because they are a component in making the choice which is right for him as an individual human being."

The Court of Protection

- a new superior court of record
- Not the same as the old Court of Protection
- Therefore – is it the right name? (NB avoid the protection imperative)
- Most judges are not specialists – all judges of the High Court are nominated to sit in the COP, as are a substantial proportion of circuit judges and district judges
- Regionalisation
- Resource difficulties

Cf ADM(C)A – no special court, but specialist judges

Inherent jurisdiction

- Historically, the courts exercised jurisdiction derived from the Crown as parens patriae in respect of incapacitated adults to protect the persons and property
- inherent jurisdiction in respect of incapacitated adults abolished in 1959
- jurisdiction in respect of children continued and evolved into the modern wardship jurisdiction
- a remedy was evolved by which the Family Division gave directions as to the medical treatment of a child: see *Re J (A Minor) (Wardship: Medical Treatment)* [1991] Fam 33
- in 1989 the House of Lords endorsed the use of the inherent jurisdiction to make declarations as to the lawfulness of medical treatment for persons who lack mental capacity: *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1
- developed into “a jurisdiction in relation to incompetent adults which is for all practical purposes indistinguishable from its well-established parens patriae or wardship jurisdictions in relation to children (per Munby J in *Re SA (Vulnerable Adult)* [2005] EWHC 2942 (Fam) para 37

The MCA was silent as to whether this jurisdiction was abolished – now clear that it has survived. As Mcfarlane LJ said in *DL v. A Local Authority* [2012] EWCA Civ. 253at para 61:

"It would have been open to Parliament to include a similar provision, either permitting or restricting the use of the inherent jurisdiction in cases relating to the capacity to make decisions which are not within the MCA 2005. In the absence of any express provision, the clear implication is that if there are matters outside the statutory scheme to which the inherent jurisdiction applies then that jurisdiction continues to be available to continue to act as the 'great safety net' described by Lord Donaldson [in *ReF*]."

For an example of the inherent jurisdiction being utilised, see *Re Dr A* [2013] EWHC 2273 (Fam).

Has the inherent jurisdiction survived the introduction of the AMD(C)A?

Representation of the individual

How should the individual ("P" or "relevant person") should be represented before the courts? Fundamental principle that his/her voice must be heard, but does (s)he need party status?

Major issue in England and Wales due to

- Concern about lack of flexibility
- Lack of resources in Official solicitor's department
- Fear of large number of cases following *Cheshire West*

NB series of cases

- *Re X and others* [2014] EWCOP 25 Munby J
- *Re X and others (No 2)* [2014] EWCOP 37 Munby J
- *Re X (Court of Protection Practice)* [2015] EWCA Civ 599 – Court of Appeal
- *Re NRA* [2015] EWCOP 59 Charles J

New rule 3A – sub-rule 2 provides range of alternative directions

- P should be joined as a party
- P's participation should be secured by the appointment of an accredited legal representative to represent P in the proceedings and to discharge such other functions as the court may direct
- P's participation should be secured by the appointment of a representative whose function shall be to provide the court with information as to the matters set out in section 4(6) of the Act [best interests wishes and feelings etc] and to discharge such other function
- P should have the opportunity to address (directly or indirectly) the judge determining the application and, if so directed, the circumstances in which that should occur (NB issues about the judge visiting P)
- P's interests and position can properly be secured without any direction under sub-paragraphs (a) to (d) being made or by the making of an alternative direction meeting the overriding objective the court may direct

Incapacitated adults need advocacy in settings beyond the court arena

- Care homes
- Medical treatment
- State residential accommodation
- Dealing with other agencies

Under the MCA, there are provisions (ss.35 – 41) for Independent Mental Capacity Advocates ("IMCAs") Significant resources implications – see e.g. *Re AJ* [2015] EWCOP 5

The scheme under the ADM(C)A seems much more comprehensive. (But do the resources exist to deliver it?)

Transparency ("The secret court of living hell")

Under the original rules, the general rule is that hearings in the COP are to be in private (COPR rule 90). The rationale for this rule was best expressed by the former Lord Chief Justice, Lord Judge, in *Independent News Media v A* [2010] EWCA Civ 343:

"The affairs of those who are not incapacitated are, of course, decided and handled privately, usually at home, sometimes with, but usually without, confidential professional advice. None of these decisions is the business of anyone other than the individual or individuals who are making them. And that, as we emphasise, represents an entirely simple, and we suggest self-evident aspect of personal autonomy. The responsibility of the Court of Protection arises just because the reduced capacity of the individual requires interference with his or her personal autonomy."

There were exceptions. Rule 92(1) provides that the court may make an order for a hearing to be held in public and paragraph 16 of Practice Direction 9E provides, in serious medical treatment cases, that the Court will ordinarily make an order pursuant to rule 92 that any hearing shall be held in public, with restrictions to be imposed in relation to publication of information about the proceedings. Two years ago, new rules were introduced providing for the publication of anonymised transcripts of all major judgments.

The President and rules committee have now instigated a pilot project effectively reversing the original rule. Hereafter, all hearings will be in public but subject to a reporting restrictions order preventing the identification of P in any reports of the proceedings.

Advance decisions

SS 24 to 26 of the MCA set out provisions for advance decisions to refuse treatment. The equivalent provisions in the ADM(C)A are in Part 8, headed “advance healthcare directives”. But whereas “advance decision” under the MCA mean a *decision* to *refuse treatment*, “advance healthcare directive” under the ADM(C)A means an advance *expression* of will and preferences *concerning treatment decisions* and is not confined to refusing treatment. A distinction is drawn, however, (as I understand the new law) between a refusal of treatment set out in an advance healthcare directive (which must be complied with if the formalities are complied with) and a request for treatment in an advance healthcare directive which is not binding on the decision-maker but must be taken into consideration.

In England and Wales advance decisions have not so far been much used. This may be a reflection on the strict provisions as to formalities.

Where the formalities are not complied with, expressions of wishes and feelings may be taken into consideration, but what weight should be attached to them? Contrast two cases involving MCS patients

- In *W v M* [2011] EWHC 2443 (Fam), I concluded that the various statements made by M prior to her illness in 2003 were informal, and not specifically addressed to the question I had to decide. Accordingly, I concluded they should not carry substantial weight in my decision.
- In *United Lincolnshire Hospitals NHS Trust v N* [2014] EWCOP 16, Pauffley J attached more weight to earlier statements by P. Her decision followed the decision of the SC in the *Aintree* case and may be a further reflection of the importance now being attached to wishes and feelings.

Conclusions

Empowerment

Munby J in *Re MM (An Adult)* [2007] EWHC 2003 (Fam):

"The emphasis must be on sensible risk appraisal, not striving to avoid all risk, whatever the price, but instead seeking a proper balance and being willing to tolerate manageable or acceptable risks as the price appropriately to be paid in order to achieve some other good – in particular to achieve the vital good of the elderly or vulnerable person's *happiness*. What good is it making someone safer if it merely makes them miserable?"