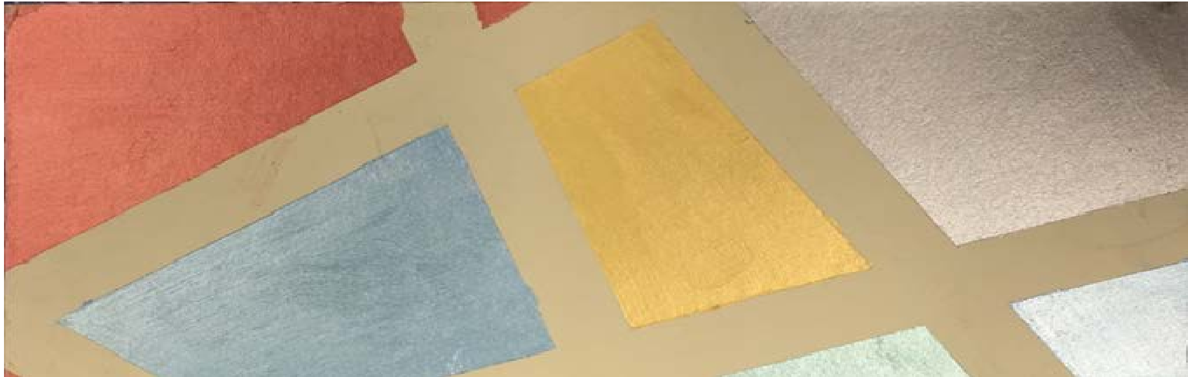

As the Court of Protection Law Reports series is being discontinued by LexisNexis, the Court of Protection is losing a dedicated series of headnoted reports. Pending any other publisher picking up the baton, we are stepping into the breach by launching this new series of headnotes. This series, which has its own citation [2023] 39ECMCR [xx], is unofficial, but we hope that it will be of assistance. Cases which appear in this series of headnotes are ones which meet the criteria of:

- containing an authoritative interpretation of the Mental Capacity Act 2005; or
- addressing a point of practice or procedure of wider significance.

The series of headnotes stands alongside our ordinary Mental Capacity Reports, in which you will find a longer summary and comment on the cases headnoted here, together with summaries and comments on cases which do not meet the criteria for inclusion here. The case report that you can find on our database will include both the headnote and the summary/comment.

For each case, you will find the headnote, together with a hyperlink to the case entry on The National Archives database.

We welcome feedback on these, to alex.ruckkeene@39essex.com.

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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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[2023] EWCOP 5
Court of Protection
MacDonald J
10 February 2023

Mental capacity – assessing capacity – whether woman had capacity to make a decision to undergo a clinically indicated procedure

A woman was a serving prisoner, a failed asylum contact, and wished no contact with her mother who was understood to be present in England. She had had two previous children, both of whom had been removed from her care, one to adoption and one to placement with her mother. She became pregnant, although little was known about the circumstances of her current pregnancy. She had had continued deterioration in the growth of her baby, and a number of other complications, which the clinicians involved considered meant that only a Caesarean section was consistent with recommended safe obstetric practice in this case. The woman had not said that she did not want a Caesarean section, but the clinicians were concerned as to whether she had capacity to make the decision. One doctor considered that she had capacity to make decisions about her birth arrangements; none of the other clinicians considered this to be so. The treating Trust sought declarations that the woman lacked the capacity to decide whether or not her unborn baby should be delivered pre-term by elective Caesarean section and that an elective Caesarean section at 34 weeks is in her best interests.

Held – declaring that the woman lacked the capacity to decide to undergo the clinically indicated procedure and that a Caesarean section was in her best interests –

(1) The cardinal principles flowing from ss.1-3 Mental Capacity Act had been set out in *Kings College Hospital NHS Foundation Trust v C and V* [2015] EWCOP 80. They now needed to be read in light of the judgment of the Supreme Court in *A Local Authority v JB* [2022] AC 1322, confirming that (1) the court must first identify the correct formulation of "the matter" in respect of which it is required to evaluate whether the person is unable to make a decision; (2) once the correct formulation of "the matter" had been arrived at, it was then that the court moved to identify the "information relevant to the decision" under s.3(1) MCA 2005, a task falling to be undertaken on the specific facts of the case; (3) once the information relevant to the decision had been identified, the question for the court was whether the person was unable to make a decision in relation to the matter and, if so, whether that inability was because of an impairment of, or a disturbance, in the functioning of the mind or

brain. (*Kings College Hospital NHS Foundation Trust v C and V* [2015] EWCOP 80 and *A Local Authority v JB* [2021] UKSC 52 applied (see paras [41]-[43]).

(2) Human decision making was not standardised and formulaic in nature in that people do not, at least consciously, break a decision down carefully into discrete component parts before taking that decision. In addition, decisions were always taken in a context, with the concomitant potential for a myriad of other factors, beyond the core elements of the decision, to influence the decision being taken. This had the potential to make the task of creating a definitive account of the information relevant to a particular decision a challenging one. This difficulty could be addressed however, by acknowledging that in order to demonstrate capacity, a person was not required or expected to consider every last piece of information in order to make a decision about the matter, but rather to have the broad, general understanding of the kind that is expected from the population at large (*Heart of England NHS Foundation Trust v JB* [2014] EWHC 342 (COP) applied) (see para 61).

(3) A formal diagnosis could constitute powerful evidence informing the answer to the second cardinal element of the single test of capacity, namely whether any inability of the person to make a decision in relation to the matter in issue was because of an impairment of, or a disturbance, in the functioning of the mind or brain. However, the court was not precluded from reaching a conclusion on that question in the absence of a formal diagnosis or in the absence of the court being able to formulate precisely the underlying condition or conditions. The question for the court remained whether, on the evidence available to it, the inability to make a decision in relation to the matter was because of an impairment of, or a disturbance in the functioning of, the mind or brain (see paras [46]-48].

(4) On the facts of the case, the "matter" was whether or not to undergo the procedure clinically indicated, and the information relevant to the matter included that the benefits and risks to her unborn child of an elective Caesarean section, notwithstanding the fact that the unborn child did not have a separate legal identity; the woman did not have capacity to retain, use or weigh that information, that inability being caused by a previously undiagnosed learning disability, and it was in her best interests to undergo the Caesarean section (*Guys and St Thomas NHS Foundation Trust & Anor v R* [2020] EWCOP 4 applied) (see paras [59], [62], [63], [68], [71], [81] and [84]).

Per curiam

Given the number of capacity assessments that are required to be carried out on a daily basis in multiple arenas, it would obviously be too onerous to require a highly detailed analysis in the document in which the capacity decision is recorded. However, a careful and succinct account of the formulation of the matter to be decided and the formulation of the relevant information in respect of that matter, together with a careful and concise account of how the relevant information was conveyed and with what result, would seem to the court to be the minimum that is required.

Postscript

In a postscript, the court recorded the woman had undergone an elective Caesarean section in accordance with the care plan, which proceeded smoothly. The baby was born in good condition and was doing well for his gestation.

Statutory provisions considered

Mental Capacity Act 2005, ss.1, 2, 3, 4, 15

European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Arts 2, 3 8

Cases referred to in judgment

A Local Authority v JB [2022] AC 1322
Aintree University Hospitals NHS Foundation Trust v James & Ors [2014] AC 591
Re DD [2014] EWCOP 11
Guys and St Thomas NHS Foundation Trust & Anor v R [2020] EWCOP 4
Heart of England NHS Foundation Trust v JB [2014] EWHC 342 (COP)
KK v STC and Others [2012] EWHC 2136 (COP)
Kings College Hospital NHS Foundation Trust v C and V [2015] EWCOP 80
Paton v British Pregnancy Advisory Service Trustees [1979] QB 276
Paton v United Kingdom (1981) 3 EHRR 408
PC v City of York Council [2014] 2 WLR 1
Pennine Acute Hospitals Trust v TM [2021] COPLR 472
R v Cooper [2009] 1 WLR 1786
Re SB (A Patient: Capacity to Consent to Termination) [2013] EWHC 1417 (COP)
Re S (Adult Patient: Sterilisation) [2001] Fam 15
RT and LT v A Local Authority [2010] EWHC 1910 (Fam)

Vikram Sachdeva KC (instructed by the Trust) for the applicants
David Lawson (instructed by the Official Solicitor) for the respondent

Full judgment available on The National Archives database here.

Reported by Alex Ruck Keene KC (Hon)

A Local Authority v PG & Ors [2023] 39ECMCR 2

[2023] EWCOP 9
Lieven J
10 March 2023

Mental capacity – assessing capacity – whether to take contingent or anticipatory approach to fluctuating capacity

A 34 year old woman had diagnoses of an intellectual disability in the moderate range, and autism spectrum disorder. She had also recently been diagnosed as having "trauma based mental illness with Emotionally Unstable Personality Disorder traits" (impulsivity, suicidal thoughts and emotional instability). She had placed herself in situations of risk, sometimes linked to excessive consumption of alcohol. It was agreed by the local authority responsible for her, the local Integrated Care Board and the Official Solicitor on the woman's behalf that (1) she lacked capacity to conduct proceedings before the Court of Protection and to enter into an occupancy agreement; and (2) she had capacity to make decisions about where she lives. The parties disagreed about whether PG had capacity in respect of decisions about her care, including when she was within the home, when in the community, and at times of heightened anxiety. They also disagreed as to whether she had capacity as to contact with others, including at times of heightened anxiety.

Held – declaring that the woman lacked capacity to make decisions as to her care and contact –

(1) The court was faced between making orders that followed the line taken in *Cheshire West v PWK* [2019] EWCOP 57, and thus taking a "longitudinal view" of the woman's presentation, and which closely related to the "macro" decisions approach taken in, or making anticipatory declarations as made in *Wakefield MDC v DN and MN* [2019] EWHC 2306 (Fam) in respect of times when the woman had has the equivalent of a "meltdown". Having analysed the facts of those cases, and considered those of the woman in question, the court did not think that one or other was the correct or indeed better approach. How an individual P's capacity was analysed would turn on their presentation, and how the loss of capacity arose and manifested itself (*Cheshire West v PWK* [2019] EWCOP 57, *Royal Borough of Greenwich v CDM* [2019] EWCOP 32 and *Wakefield MDC v DN and MN* [2019] EWHC 2306 (Fam) considered (see para [36]).

(2) The court had to have regard to the importance of making orders that were workable and reflect the reality of the woman's "lived experience", both for the sake of the woman and those caring for her. This could be analysed in various different ways. It was a fundamental principle of the European Convention on Human Rights and the Strasbourg jurisprudence that the rights should be interpreted in a way which made them real and practical, not theoretical and illusory. It was a principle of statutory construction that the court must have regard to the "mischief" of the statute. One of the mischiefs of the MCA was to seek to preserve an individual's autonomy, but in a way that ensured that when they do not have capacity, their best interests were protected (see para [37]).

(3) On the evidence before the court, the appropriate approach was to take the "longitudinal view". An anticipatory order would in practice be close to impossible for care workers to operate and would relate poorly to how the woman's capacity fluctuated. The care workers would have to exercise a complicated

decision making process in order to decide whether at any individual moment the woman did or did not have capacity. This might well vary depending on the individual care worker, and how much of the particular episode they had witnessed or not. The result would fail to protect her, probably have minimal benefit in protecting her autonomy and in practice make the law unworkable. The more practical and realistic approach was to make a declaration that the woman lacked capacity in the two key respects, but also make clear that when being helped by the care workers they should so far as possible protect her autonomy and interfere to the minimum degree necessary to keep her safe (see paras [38], [43] and [44]).

(4) There may well be times when the woman's decision making was impacted by alcohol consumption. However, on the evidence before the court, the evidence was that her decision making was impacted by her mental impairment under s.2(1) MCA 2005 and not simply by consuming excessive alcohol. The court was satisfied that it was not possible to disentangle the influence of alcohol from the impact of her mental impairment. If the evidence had been that the woman only lacked capacity at times when she was intoxicated then the position would be different, but that was not the evidence. No party argued that the mental impairment had to be the sole cause for the person being unable to make a decision within the meaning of s.3(1) MCA 2005 (see paras [40]-[41]).

Statutory provisions considered

Mental Capacity Act 2005, ss 1, 2, 3, 4

European Convention for the Protection of Human Rights and Fundamental Freedoms 1950

Cases referred to in judgment

Cheshire West v PWK [2019] EWCOP 57
Royal Borough of Greenwich v CDM [2019] EWCOP 32
Wakefield MDC v DN and MN [2019] EWHC 2306 (Fam)

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Sophie Allan (instructed by Moore Tibbits) for the second respondent
The third respondent did not attend and was not represented

Full judgment available on The National Archives database here.

Reported by Alex Ruck Keene KC (Hon)

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