

The inherent jurisdiction – what is it, and when (not) to use it?

October 2019

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Situations of concern

- Risk posed by others
- Risk posed by the person's own circumstances

AND

- The person appears to have capacity to make relevant decisions

What is the inherent jurisdiction?

- The ‘great safety net’: *DL v A Local Authority* [2012] EWCA Civ 253

77. It would be unwise, and indeed inappropriate, for me even to attempt to define who might fall into this group in relation to whom the court can properly exercise its inherent jurisdiction. I disavow any such intention. It suffices for present purposes to say that, in my judgment, the authorities to which I have referred demonstrate that the inherent jurisdiction can be exercised in relation to a vulnerable adult who, even if not incapacitated by mental disorder or mental illness, is, or is reasonably believed to be, either (i) under constraint or (ii) subject to coercion or undue influence or (iii) for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent.

Munby J in *Re SA(Vulnerable adult with capacity: marriage)* [2005] EWHC 2942 (Fam); [2006] 1 FLR 867

What do you need to think about?

- Does the person lack capacity to make the material decisions?
- Is there any other mechanism that you can use to secure the person's interests (or those of others?)
- Is the intervention necessary and proportionate?
- Will the person be deprived of their liberty?
- Are you trying to get orders against the person themselves?

Does the person really have capacity? The perils of the principles

- Principle 1 and the capacity conundrum

The presumption of capacity, in particular, is widely misunderstood by those involved in care. It is sometimes used to support non-intervention or poor care, leaving vulnerable adults exposed to risk of harm. In some cases this is because professionals struggle to understand how to apply the principle in practice. In other cases, the evidence suggests the principle has been deliberately misappropriated to avoid taking responsibility for a vulnerable adult.

(House of Lords Select Committee post-legislative scrutiny of MCA 2005, para 105)

- See also “Learning from SARS: a report for the London Safeguarding Adults Board” (March 2017)
- The second principle: A person is not to be treated as unable to make a decision merely because he makes an unwise decision – a right to make unwise decisions?

Capacity: what does the Act actually say?

Section 2: People who lack capacity

(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 relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

[...]

Section 3: Inability to make decisions

(1) For the purposes of section 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).

Capacity: the three questions

(1) Is the person unable to make a decision? If so:

(2) Is there an impairment or disturbance in the functioning of the person's mind or brain? If so:

(3) Is the person's inability to make the decision because of the identified impairment or disturbance?

Capacity and vulnerability

- Is the adult's lack of capacity 'because of' the impairment of or disturbance of their mind or brain? *PC v NC and City of York Council* [2013] EWCA Civ 478
- Or the inability to take the material decision because of the presence and actions of the third party? *LB Redbridge v GC* [2014] EWCOP 485

“the true question is whether the impairment/disturbance of mind is an effective, material or operative cause. Does it cause the incapacity, even if other factors come into play? This is a purposive construction.”
NCC v PB and TB [2014] EWCOP 14

- Can the person understand, retain use and weigh the fact that another person may have interests contrary to theirs, and if not, whether this inability is caused by mental impairment.

Is there another legal mechanism you can use?

- Eg coercive or controlling behaviour
 - Section 76 Serious Crime Act 2015
 - Modern Slavery Act 2015
 - Domestic Violence Protection Notices/Orders

Is the intervention necessary and proportionate?

- *London Borough of Croydon v KR & Anor* [\[2019\] EWHC 2498 \(Fam\)](#)
- What are you trying to achieve?
 - Saving life?
 - Well-being?
 - Financial abuse?
- What else have you tried?
- The more draconian the step, the more you need to evidence

Will the person be deprived of their liberty?

- Should you even be asking?

*In terms of the manner in which the jurisdiction should be exercised, I would expressly commend the approach described by Macur J in *LBL v RYJ and VJ* [\[2010\] EWHC 2665 \(COP\)](#) [above]. The *facilitative, rather than dictatorial*, approach of the court that is described there would seem to me to be entirely on all fours with the *re-establishment of the individual's autonomy of decision making in a manner which enhances, rather than breaches, their ECHR Article 8 rights*. (DL)*

- Is there evidence of mental disorder?
- Is it an emergency?
- [A Local Authority v BF](#) [2018] EWCA Civ 2962: using the inherent jurisdiction whilst investigating

Is the order to be directed against the person?

- Need to show consideration of whether the person
 - is likely to understand the purpose of the injunction;
 - will receive knowledge of the injunction; and
 - will appreciate the effect of breach of that injunction.
- If they won't, don't ask
- *Redcar & Cleveland Borough Council v PR & Ors* [2019] EWHC 2305 (Fam)

Keeping yourself up-to-date

- <http://www.39essex.com/resources-and-training/mental-capacity-law/>
- www.mentalhealthlaw.co.uk
- <http://www.scie.org.uk/mca-directory/>
- <http://www.mentalcapacitylawandpolicy.org.uk/>
- www.courtofprotectionhandbook.com

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