

Best interests – a legal refresher

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Best interests: the MCA 2005 (1)

Section 1: The Principles

The following principles apply for the purposes of this Act.

[...]

- (5) An act done, or 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.

Section 4 MCA at present

Section 4: Best interests

- The factors that must be taken into account in determining what is in a person's best interests can broadly be summarised as follows:
 - equal consideration and non-discrimination;
 - considering all relevant circumstances;
 - considering whether (and when) that the person may regain capacity;
 - permitting and encouraging participation;
 - the person's wishes and feelings, beliefs and values;
 - the views of other people;
 - special considerations for life-sustaining treatment;
- It cannot be emphasised enough that s.4 MCA 2005 never gives the answer, it just makes us (hopefully) ask the right questions.
- The best interests guide: <http://www.39essex.com/mental-capacity-guidance-note-brief-guide-carrying-best-interest-assessments-november-2017/>

An objectively subjective test (1)

“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. Nor will it always be possible to ascertain what an incapable patient’s wishes are. Even if it is possible to determine what his views were in the past, they might well have changed in the light of the stresses and strains of his current predicament. In this case, the highest it could be put was, as counsel had agreed, that “It was likely that Mr James would want treatment up to the point where it became hopeless”. 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.”

Aintree v James [2014] 1 AC 591

An objectively subjective test (2)

Briggs v Briggs [2016] EWCOP 53

57. It is clear and important to stress that a conclusion on what P would have done is not determinative of the MCA best interests test and so, by stating that the MCA enables the court to do for the patient what he could do for himself if of full capacity, the Supreme Court is not saying that a conclusion on what the patient would have done is decisive. The test is not a "what P would have done test", it is a best interests test and so a test that requires the decision maker to perform a weighing or balancing exercise between a range of divergent and competing factors.

But

It is the inescapable conclusion [...] that the views and wishes of P in regard to decisions made on his behalf are to carry great weight. What, after all, is the point of taking great trouble to ascertain or deduce P's views, and to encourage P to be involved in the decision-making process, unless the objective is to try to achieve the outcome which P wants or prefers, even if he does not have the capacity to achieve it for himself?

Long-standing wishes, feelings, beliefs and values (1)

“11.... As the Act and the European Convention make clear, a conclusion that a person lacks decision-making capacity is not an "off-switch" for his rights and freedoms. To state the obvious, the wishes and feelings, beliefs and values of people with a mental disability are as important to them as they are to anyone else, and may even be more important. It would therefore be wrong in principle to apply any automatic discount to their point of view.”

Wye Valley NHS Trust v B [2015] EWCOP 60

Long-standing wishes, feelings, beliefs and values (2)

“13. In some cases, of which this is an example, the wishes and feelings, beliefs and values of a person with a mental illness can be of such long standing that they are an inextricable part of the person that he is. In this situation, I do not find it helpful to see the person as if he were a person in good health who has been afflicted by illness. It is more real and more respectful to recognise him for who he is: a person with his own intrinsic beliefs and values. It is no more meaningful to think of Mr B without his illnesses and idiosyncratic beliefs than it is to speak of an unmusical Mozart.”

Wye Valley NHS Trust v B [2015] EWCOP 60

NB the limits of wishes and feelings

- Not reliably identifiable: *Abertawe Bro Morgannwg University Local Health Board v RY & Anor* [2017] EWCOP 2
- Circumstances under which wishes expressed: *ADS v DSM* [2017] EWCOP 8
- Past vs present wishes: “*When past and present wishes collide: the theory, the practice and the future*” Eld. L.J. 2016, 7(2) 132-140

Flashpoints

- Public law decision-making vs MCA decision-making
- Who is the decision-maker?
- The limits of section 5

Public law decision-making

- Application of statutory criteria and statutory principles within the framework of the ECHR
- The allocation of scarce resources between (for these purposes) competing individuals
- E.g. Care Act 2014 –
 - Section 9 assessment of needs
 - Section 13 determining eligibility
 - Section 24 determining how needs are to be met
- Identified public law decision-maker
- The place of personalisation
- Individual's ultimate choice: to accept/refuse the decision of the public law decision-maker

MCA decision-making in the public law context

- Decision-making on behalf of the individual
- Constructing the decision on behalf and in the name of the person
- Either in an informal or a formal context

N v ACCG [2017] UKSC 22

“35. So how is the court’s duty to decide what is in the best interests of P to be reconciled with the fact that the court only has power to take a decision that P himself could have taken? It has no greater power to oblige others to do what is best than P would have himself. This must mean that, **just like P**, the court can only choose between the ‘available options.’”

N v ACCG [2017] UKSC 22

Who is the decision-maker?

- Parliament's intention that the vast majority of such decisions in the context of care and treatment will be taken informally by those charged with delivering such care and treatment: *G v E (Deputyship and Litigation Friend)* [2010] EWHC 2512 (COP)
- So who is the decision-maker? And/or who will take responsibility for coordinating decision-making?
- Nb attorneys and deputies

The limits of s.5 – two views

- *Re AG [2015] EWCOP 78: “Local authorities must seek and obtain appropriate judicial authority before moving an incapacitous adult from their home into other accommodation. Local authorities do not themselves have power to do this”*

The wider view (1)

“Section 5 of the 2005 Act gives a general authority, to act in relation to the care or treatment of P, to those caring for him who reasonably believe both that P lacks capacity in relation to the matter and that it will be in P’s best interests for the act to be done. This will usually suffice, unless the decision is so serious that the court itself has said it must be taken to court. But if there is a dispute (or if what is to be done amounts to a deprivation of liberty for which there is no authorisation under the “deprivation of liberty safeguards” in Schedule A1 to the 2005 Act) then it may be necessary to bring the case to court...”

N v ACCG [2017] UKSC 22

The wider view (2)

126 [...] having looked at the issue in its wider context as well as from a narrower legal perspective, I do not consider that it has been established that the common law or the ECHR, in combination or separately, give rise to the mandatory requirement, for which the Official Solicitor contends, to involve the court to decide upon the best interests of every patient with a prolonged disorder of consciousness before CANH can be withdrawn. **If the provisions of the MCA 2005 are followed and the relevant guidance observed, and if there is agreement upon what is in the best interests of the patient, the patient may be treated in accordance with that agreement without application to the court.** I would therefore dismiss the appeal. In so doing, however, I would emphasise that, although application to court is not necessary in every case, there will undoubtedly be cases in which an application will be required (or desirable) because of the particular circumstances that appertain, and there should be no reticence about involving the court in such cases.

Lady Black in *An NHS Trust v Y* [2018] UKSC 46
(*"Powers, defences and the "need" for judicial sanction"* at
www.mclap.org.uk/articles)

Keeping yourself up-to-date

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

