



Berkshire Healthcare
NHS Foundation Trust

Mental Capacity Act, the Inherent Jurisdiction, and undue influence.



Learning Objectives

Following today's training you should be able to:

- ✓ Understand overarching responsibilities under the European Convention on Human Rights (ECHR).
- ✓ Be broadly aware of legal frameworks used in healthcare, with a focus on the Mental Capacity Act.
- ✓ Understand how the assessment of mental capacity can be approached where there is potential undue influence.
- ✓ Understand when an application for use of the Inherent Jurisdiction of the High Court should be explored, via legal advice.



Please Note

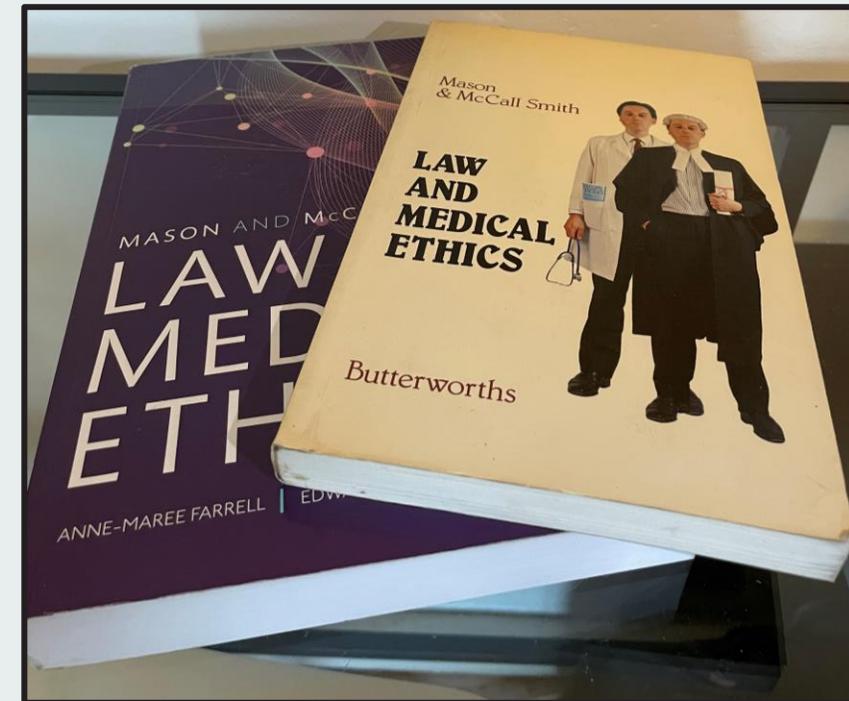
I am not a lawyer, and this training does not replace legal advice.

Please ensure you keep up to date with legal updates, and seek advice from your respective legal teams, or lead professionals, when indicated.

Keep an eye out for useful resources that will help you keep up to date, this will include free webinars provided by law firms and barristers chambers.

The National Mental Capacity Forum, who have a number of recorded webinars on medicolegal matters available here:

<https://autonomy.essex.ac.uk/nmcf/nmcf-events-resources/>



Please Note

This training may comment on, or refer to, the following topics:

- ! Self-neglect
- ! Death and suicide
- ! Coercion
- ! Domestic abuse
- ! Serious medical treatment



The Samaritans offer a 24-hour telephone helpline.

Call: 116 123

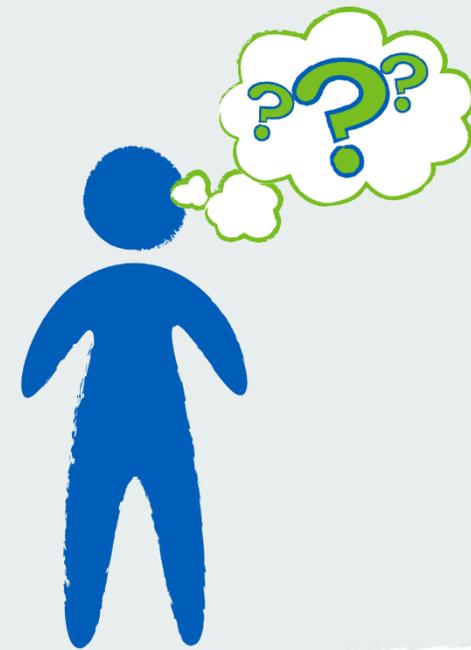
Refuge's National Domestic Abuse Helpline for England.

Call: 0808 2000 247

5 Initial Questions...



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European Convention on Human Rights (ECHR)

The ECHR

- Section 6(1) Human Rights Act 1998 (HRA): *It is unlawful for a public authority to act in a way which is incompatible with a Convention right.*
- The below are the key rights that apply in day-to-day health and social care, they are set out in schedule 1 of the HRA:
 - Article 2 – Right to life
 - Article 3 – Prohibition of torture
 - Article 5 – Right to liberty and security
 - Article 6 – Right to a fair trial
 - Article 8 – Right to respect for private and family life
 - Article 14 – Prohibition of discrimination



Human Rights

- There will often be a tension between different rights under the ECHR.
- Some are **absolute** rights, some are **qualified**.
- **Absolute rights** cannot be interfered with, such as the right to life.
- **Qualified rights** can be interfered with, as long as such an interference is proportionate and achieves a legitimate aim, such as the right to respect for private and family life.
- When balancing competing rights, the interference with a person's right to respect for private and family life may therefore be legitimate, if this protects their right to life.



Supporting Legislation

- **Mental Capacity Act (supportive)**
- Arose to provide a legal framework for making people have treatment against their will
- Code of Practice meant it evolved more into a framework for supported decision-making and to enhance autonomy
- **Mental Health Act (coercive)**
- Section 63 permits treatment of a mental disorder
- Treatment of physical disorder may be possible in some circumstances
- Doesn't say anything about capacity; based on status (i.e. having a mental disorder within the meaning of the Act) rather than function (i.e. ability to make decisions)



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Mental Capacity Act

Capacity

- ‘Capacity’ can mean different things in different contexts; it will not always be used to mean capacity in the context of the Mental Capacity Act 2005. Some examples are set out below:
 - **Mental Capacity Act 2005:** 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 (Emphasis supplied).
 - **Sexual Offences Act 2003:** defines capacity in the context of offences created in sections 30-33. Provides that a person is unable to refuse if *“he lacks the capacity to choose whether to [do the material thing] (whether because he lacks sufficient understanding of the nature or reasonably foreseeable consequences of what is being done, or for any other reason).”*
 - **Inherent Jurisdiction:** Can be applied to a person who is unable to make their own decision, so in a broad sense does not have ‘capacity’. For example, a person who lacks capacity due to undue influence.

Coercion or Undue Influence

- Munby J in *SA v A Local Authority* [2005] at [78] provided what he considered coercion or undue influence to consist of:

What I have in mind here are the kind of vitiating circumstances ... where a vulnerable adult's capacity or will to decide has been sapped and overborne by the improper influence of another. ... where the influence is that of a parent or other close and dominating relative, and where the arguments and persuasion 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, moreover, very little pressure may suffice to bring about the desired result.

The Principles

The following principles apply **for the purposes of [the Mental Capacity] Act.**

- A person must be **assumed to have capacity** unless it is established that he lacks capacity.
- 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.
- A person is not to be treated as unable to make a decision **merely because** he makes an unwise decision.
- 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.**
- 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.**

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*The presumption of capacity is important; it ensures proper respect for personal autonomy by requiring any decision as to a lack of capacity to be based on evidence. Yet the section 1(2) presumption like any other, has logical limits. **When there is good reason for cause for concern, where there is legitimate doubt as to capacity [to make the relevant decision], the presumption cannot be used to avoid taking responsibility for assessing and determining capacity. To do that would be to fail to respect personal autonomy in a different way.***

Royal Bank of Scotland Plc v AB [2020] UKEAT 0266_18_2702 at [26]

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As the principles are “for the purposes of [the Mental Capacity Act]”, the statement on unwise decisions is therefore not a general statement about a ‘right’ to make unwise decisions in all contexts.

The word ‘merely’ means that an unwise decision cannot be the **only** reason for concluding that a person lacks capacity, **however** unwise decisions could be a reason to question the presumption of capacity, unwise decisions may also contribute to a conclusion that a person lacks capacity.

The Assessment

- **Specific decision** – what is the decision you are asking the person to make?
- **Relevant information** – what key things does the person need to understand, retain and use and weigh to make the decision? This must include the reasonably foreseeable consequences of deciding one way or another, or failing to make the decision.
- **Stage 1 – Functional Test** – Can the person make the decision?
 - Understand the information relevant to the decision,
 - Retain the relevant information,
 - Use and Weigh the relevant information as part of the process of making the decision, and
 - Communicate their decision to you (by any means)

The Assessment

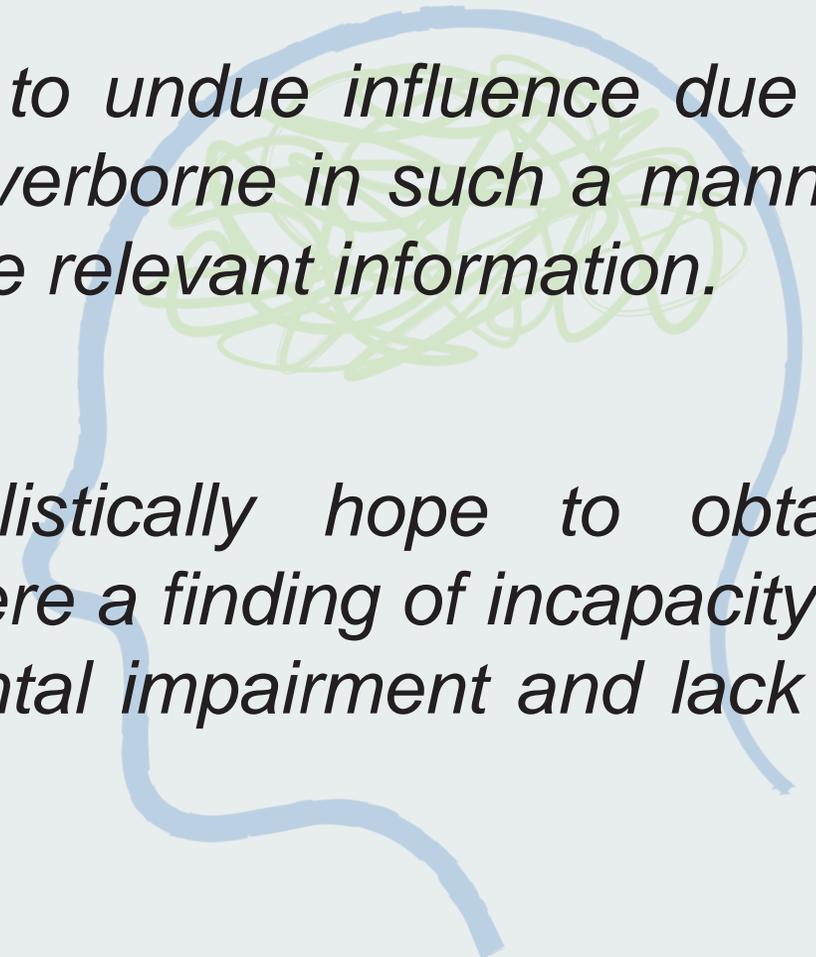
- **Stage 2 – Mental Impairment Test*** – Is there an impairment of, or a disturbance in the functioning of, the mind or brain?
- **Stage 3 – Causative Nexus** – If the person cannot make a decision, is this because of an identified disturbance / impairment of the mind or brain?

**This is also referred to as the ‘Diagnostic Test’, but ‘Mental Impairment Test’ has been adopted here following the recent submission on behalf of MIND in the case of ‘Sudiksha’ that diagnostic test is misleading, as no diagnosis of mental illness is required.*

Re BKR and undue influence

- *Re BKR* is a case from Singapore but is useful to consider as the relevant provisions in Singapore's Mental Capacity Act 2008 replicate England and Wales Mental Capacity Act 2005.
- Kong and Ruck Keene (2018, 22) note that the Singapore Court of Appeal outlined three conditions where the dynamics of a relationship would be relevant to the assessment of mental capacity:
 1. *Whether the individual can **retain, understand, or use** the information that relates to whether there might be undue influence being applied, e.g., whether she can grasp that another person may have interests contrary to hers, and if not, whether this is caused by mental impairment.*

Re BKR and undue influence

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2. *Whether the individual is vulnerability to undue influence due to mental impairment, where her will is overborne in such a manner that she is unable to **use and weigh** the relevant information.*
 3. *Whether an individual cannot realistically hope to obtain **assistance in making decisions**, where a finding of incapacity is because of the interplay between mental impairment and lack of support.*



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Inherent Jurisdiction

In the context of Adults (18+)

The Inherent Jurisdiction

- The Court's Inherent Jurisdiction is not new and was the source of all declarations and orders relating to vulnerable people needing medical treatment before the Mental Capacity Act 2005 came into force in 2007*.
- Munby J in *SA v A Local Authority* [2005] EWHC 2942 (Fam) noted that:

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. ...

It suffices for present purposes to say 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.

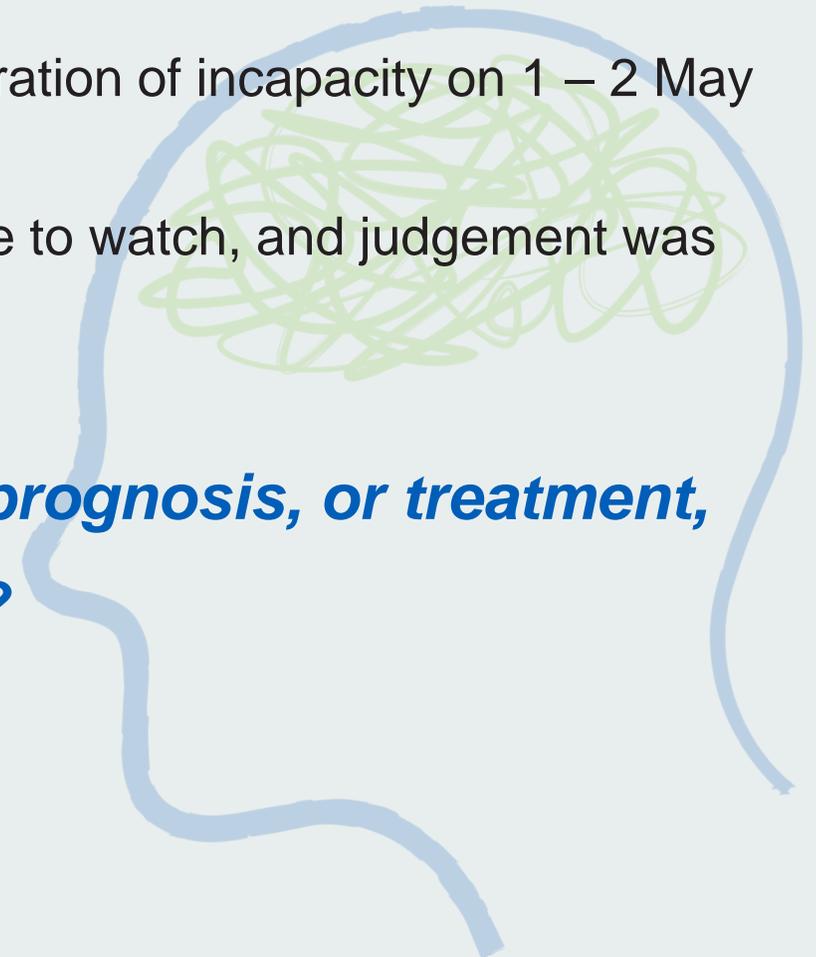
Initial Questions

- Does the person have mental capacity (within the meaning of the Mental Capacity Act 2005) to make the relevant decision(s). If they **lack** capacity, decisions can be made in their best interests, and any Court application would be to the Court of Protection.
- If the person **has** capacity, can the Mental Health Act 1983 (MHA) be used to provide any relevant care and / or treatment.
- If it is not a medical treatment decision, is there an alternative legal framework that can be used; such as legislation relevant to domestic abuse?
- If the person **has** capacity, and the MHA can't be used, what will you be asking the Court to authorise? This will typically be with a view to supporting the relevant person to re-gain their autonomy (ability to make their own decisions).

Sudiksha's Case

- The Court of Appeal has decided, heard appeal against declaration of incapacity on 1 – 2 May 2024.
- A reminder from presentation on 31 July 2024, this was a case to watch, and judgement was pending.

What if P understands a particular diagnosis, prognosis, or treatment, but does not believe it?



Sudiksha's Case

- 19 year old woman.
- Rare degenerative mitochondrial disorder.
- Mechanically ventilated.
- Regular haemodialysis.
- Clinicians and external expert feared she was nearing terminal stage.
- Wished to administer palliative care for breathlessness and pain when the time came.
- Sudiksha refused it.
- Although accepted the diagnosis, did not accept that there was any real prospect of her deteriorating any time soon, such that palliative care might be needed.

Sudiksha's Case

*...in relation to the judgment with which I am concerned, in order to understand and/or to use and weigh up the relevant information, Sudiksha's belief as to her prognosis and the likelihood of her receiving effective nucleoside treatment was **relevant, but not determinative** as to whether she was able to make a decision under section 3 and therefore satisfy the functional test.*

Sudiksha's Case

*As discussed above in my judgment from paragraphs [48] to [60] above, **there is no specific requirement of belief**, whether subsumed into the general requirement of understanding or in the ability to use and weigh information or otherwise. In as much as this Court is influenced by any of the pre-MCA cases, in my view the proper approach is that of Butler-Sloss LJ in *Re MB*: an absence of belief **may but not inevitably will**, on the facts of a particular case, lead to a clinician or a court to conclude that the functional test in section 3(1) is not satisfied and that the person in question does not have the ability to make the decision in question.*

Sudiksha's Case



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Once one displaces an absolute requirement for “belief”, then, where a 19-year-old young woman, fully conscious and suffering no identifiable mental illness or loss of brain function and with the full support of her close knit family, refuses to accept that her death is imminent but says loud and clear to two psychiatrists that she wants to “[d]ie trying to live”, it will take a great deal to displace the principle of autonomy and the presumption of capacity, no matter how unwise her decision to eschew palliative care may have seemed to a more mature mind.

It follows that against that backdrop, the judge in my judgment, failed to give sufficient reasons for disagreeing with the unanimous view of the experts that Sudiksha had capacity to make decisions as to her medical treatment.

A Change in Language?

Critical therefore is for a person making an assessment of capacity to conclude that the person is unable to make a decision for him or herself and that that inability is because of an “impairment of, or disturbance in the functioning of, the mind or brain”, hereafter referred to as “an impairment of mind”.

*This part of the test for capacity is most commonly known as the “diagnostic test”. Alex Ruck Keene KC and Neil Allen, acting for MIND as an intervener in the appeal, submitted that a more appropriate term would be to refer to the “**impairment test**” rather than the diagnostic test given that, in his submission, no diagnosis of mental illness is required in order to satisfy the test (see *North Bristol NHS Trust v R* [2023] EWCOP 5 (“North Bristol”) at [47]-[48]). As what is required is that the inability to make a decision is “because of” an impairment of mind, it follows that a delusional belief on Sudiksha’s part would amount to an impairment of mind. A decision, however, which to many older and/or more experienced people would seem to be thoroughly unwise, would not, without more, amount to such an impairment.*

The inherent jurisdiction?

It is entirely understandable that, having reached a conclusion that ST could not – functionally – make the decisions required of her, Roberts J sought then to explain why that was the case within the four walls of the MCA 2005.

The alternative ... would have been to identify that this was a case falling within the scope of the inherent jurisdiction.

At that point, however, very difficult questions would have arisen as to the circumstances under which it would have been legitimate to deploy the inherent jurisdiction of the High Court to make decisions in relation to medical treatment in circumstances where it could not be said (on the face of the material recorded in the judgment) that ST was subject to undue influence or coercion.

Case 1: Y NHS Foundation Trust

- Urgent application heard at around 02:00AM, 16-year-old requiring urgent treatment for leukaemia.
- No identified impairment or disturbance for purposes of MCA, but AN was not accepting of her diagnosis, or of the inevitability that she would become unwell in the absence of urgent treatment. This led assessor to conclude that AN *‘does not display sufficient capacity today to make decisions about her treatment/safety’*.
- A likely ... *‘serious negative impact on AN’s health if the treatment outlined by Dr X is not now started, and the extreme consequences of such an impact for AN’* and *‘AN’s own clearly expressed wish for more time’* the judge was *‘clear that the balance falls comfortably in favour of intervention’*.
- It is possible the matter of capacity will be revisited and the case proceed in the Court of Protection.

Further Considerations

- Most of the case law relating to the inherent jurisdiction since the Mental Capacity Act 2005 came into force has been in the context of welfare, as opposed to medical treatment decisions.
- For medical treatment, it is still important in where declarations as sought, where a person is anticipated to lose capacity in the future, or where a declaration is sought that it is not in a person's interests to use powers available under section 63 Mental Health Act 1983.
- Where a person's life is at stake, careful consideration must be given by public bodies as to whether they are **required** to bring an application.

Case 2: Ms Wolff



*“Citizens who are free to do so, are free to live their lives without restraint or interference from the state. ... The evidence is that she lived in her own home. She had declined additional intervention by the state. **Her mental capacity had been assessed, and she was deemed to have capacity.** She was therefore entitled to exercise choice. She had the right to take unwise or inappropriate decisions. The state does not take on added duties or responsibilities in such circumstances.”*

*“There is no reference in the judgment in Mrs Wolff’s case to the inherent jurisdiction, so it is not possible to say whether it was something that was considered and ruled out by the statutory authorities. Views undoubtedly differ amongst both professionals and (more problematically the judiciary) as to **whether and how the inherent jurisdiction can be used.** [However] ... at least some High Court judges might well have taken an expansive view of the ability of the state to intervene had they been asked to consider the question of what to do before Mrs Wolff’s death.”*



Alex Ruck Keene (2024) [Capacity, autonomy and the limits of the obligation to secure life](#)

Rachael Gourley (2024) [No Art 2 duty owed when a person with capacity exposes themselves to danger](#)

Charles Thompson (2024) [Rosslyn Wolff fire death inquest lawsuit heard at High Court](#)

Charles Thompson (2022) [Romford mother lived in squalor after mental health 'failings', court hears](#)

Deprivation of Liberty

- Article 5 European Convention on Human Rights:
 1. Everyone has the right to liberty and security of person. 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;
- Unsound mind (Secretary of State for Justice v MM [\[2018\] UKSC 60](#) at [8]):

[The person...] must reliably be shown to be suffering from a true mental disorder, established on the basis of objective medical expertise; the disorder must be of a kind or degree warranting compulsory confinement; and the validity of continued confinement would depend upon the persistence of such a disorder.

Deprivation of Liberty

- George (2024) notes that there will only be an exception to identifying a mental disorder in *‘genuine emergency, in particular when the state has reason to doubt capacity but has not yet had opportunity to make a determination. In such circumstances, emergency detention is lawful only for a short period of time – medical assessment must be undertaken as soon as possible if detention is to continue’*.
- It is not yet clear from case law if the Inherent Jurisdiction can be used to authorise a deprivation of liberty.
- The Court of Appeal did not answer the question as to whether it is lawful to deprive an adult of their liberty under its inherent jurisdiction in the case of *Mazhar*.

Case 3: Mr Myers

- Mr Meyers was considered to be ‘*entirely capable*’ and have the capacity (within the meaning of the Mental Capacity Act 2005) for determining where he wished to reside and with whom. He was blind and diabetic. He had promised his wife he would care for their son after her death.
- ‘*Some of Mr Meyers’ accounts [were] disturbing e.g. he claims that KF poured a bucket of water on him and deliberately broke his bed. Further, Mr Meyers articulated that his relationship with his son had cost him his home, his relationship with his wider family and the care provision that he needs to live comfortably and safely. In all this, he is entirely correct*’ [37].
- His son was considered to be ‘*needy, irrational, frequently out of control as well as manifestly emotionally dependent on [his] father*’ [41].
- The Court ordered that ‘*[...] Mr Meyers be prevented from living with his son, either in the bungalow or in alternative accommodation. I do not compel him to reside in any other place or otherwise limit with whom he should live*’ [45].

Case 4: Mr Mazhar

- Mr Mazhar was removed from his home to hospital without warning by police and paramedics in the middle of the night under the High Court's inherent jurisdiction on the basis of an out-of-hours application.
- In very brief summary, Mr Mazhar had been ill with respiratory problems, underwent a tracheostomy and been placed on a ventilator. He was supported in the community, fed through a PEG tube, and though his ability to speak was restricted, his mental capacity was considered to be unimpaired. In the lead up to an out of hours application, the care and support he was provided in the community had broken down and it had not been possible to find carers to look after him. Professionals wanted him to be admitted to hospital on an emergency basis, his relatives didn't agree to this. Professionals were concerned that Mr Mazhar was under the influence of his mother and other family members.

Some Guidance

- There was criticism of the application made in Mr Mazar's case. Baker LJ gave the following lessons that were to be learnt:
 - (1) Save in exceptional circumstances and for clear reasons, orders under the inherent jurisdiction in respect of vulnerable adults should not be made without notice to the individual.
 - (2) A party who applies for an order under the inherent jurisdiction in respect of vulnerable adults without notice to another party must provide the court with their reasons for taking that course.
 - (3) Where an order under the inherent jurisdiction in respect of vulnerable adults is made without notice, that fact should be recorded in the order, together with a recital summarising the reasons.

Some Guidance

(4) A party who seeks to invoke the inherent jurisdiction with regard to vulnerable adults must provide the court with their reasons for taking that course and identify the circumstances which it is contended empower the court to make the order.

(5) Where the court is being asked to exercise the inherent jurisdiction with regard to vulnerable adults, that fact should be recorded in the order along with a recital of the reasons for invoking jurisdiction.

(6) An order made under the inherent jurisdiction in respect of vulnerable adults should include a recital of the basis on which the court has found, or has reason to believe, the circumstances are such as to empower the court to make the order.

(7) Finally, ... if an order is made out of hours ... it is essential that the matter should return to court at the earliest opportunity. ...



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Thank you

Questions...?

