
BEST INTERESTS
AN INTERNATIONAL PERSPECTIVE

1. This paper has been prompted by the growing sense of surprise and some may say, doom at world events. Have we all become complacent with UK being at the centre of international institutions and movements that think fundamental norms and rights as important things?
2. This is not a political piece however. What is the role of the international norms upon the development of best interests? Do recent cases highlight a growing emergence of realisation of the need to consider the MCA 2005 in line with international conventions and can patterns be identified?

WHAT TO PROTECT?

3. Persons with mental health and intellectual difficulties are exposed to a range of human rights violations, which can occur inside institutions, through inadequate and harmful care and treatment, but also outside, with people experiencing limitation to the exercise of civil liberties and rights to employment, education and housing.
4. These violations are often motivated by the stigma, myths and misconceptions associated with their condition which can, in turn, also impact on their ability to gain access to appropriate care and reintegrate into community. A legal framework must critically address these issues affecting the lives of people with mental illnesses such as within institutions or in the community.
5. International human rights instruments are important in the context of mental health because they are the only source of law that legitimises international scrutiny of mental health policies and practices within a sovereign country and also because they provide fundamental protections that can not be taken away by the ordinary political process. Mental health and human rights are inextricably linked.

6. Some measure of mental health is indispensable for human rights because only those who possess some reasonable level of functioning can engage in political and social life. On the other hand, human rights are indispensable for mental health as they provide security from harm or restraint and the freedom to form and express beliefs that are essential to mental well-being.
7. There has been a huge amount of research and comment upon the MCA 2005 and its origins informing substituted judgment, it is not the place to review this analysis now; but the principled objectives of governments in this area should be recorded:
 - a. respect: the State's obligation not to infringe upon human rights;
 - b. protect: the State's obligation to prevent private violations;
 - c. fulfil: the State's obligation to promote human rights. Thus international human rights law places the onus on the State to safeguard the human rights of all people, including individuals with mental illnesses¹.
8. These 3 pillars colour each of the international treaties governing the treatment of those less capable than others. The watershed for the international protection of those with disabilities came in 2006 when the UN General Assembly adopted the Convention on the Rights of Persons with Disabilities ('CRPD'). It provides the 'framework for ensuring that mental health law fully recognise the right of those with mental illness.
9. Essential to this discussion is that it was formed from to prevent of *'stripping away a person's rights through a finding of mental incompetence or by placing people with an intellectual disability under guardianship without process'*².

¹ Gostin, Lawrence & Gable, Lance. The Human Rights of Persons with Mental Disabilities: a global perspective on the application of human rights principles to Mental Health. Maryland Law Review, 20- 121 (2004) [hereinafter Gostin & Lance, The Human Rights of Persons with Mental Disabilities

² WHO paper 'The role of International Human Rights' www.un.org/en/sections/universal...international-human-rights-law/index.htm, further that 'this can be considered to include 'those with intellectual disability having the same rights as other human beings...those rights cannot be restricted without due process that must contain proper legal safeguards against every form of abuse'.

10. The UK ratified the CRPD in 2009³ including the ‘Optional Protocol’. At this time of international flux, it is prudent to take stock and review where the UK is in terms of its international obligations and whether we should be comforted or dismayed at recent case law.

THE CRPD

11. The CRPD was radical not only in ambition (by its broad spread across social, legal and political spheres in the respective signatory nation) but also in substance. It sought to remove a presumption (or a the hint of a presumption) that those with mental disabilities should have decisions made on their behalf.

12. Moreover the UK as signatory to the Optional Protocol can be subject to complaints to the Committee on the Rights of Persons with Disabilities. The Committee as the overseer of the CRPD can request information and make recommendations of the signatory state⁴.

13. Of course unlike the ECHR, for example, it has no direct effect in the English Courts. Moreover from the Committee’s perspective, compliance with the *sentiment* of the CRPD has on the whole been commendable⁵. However there is a growing realisation that in a number of areas the MCA 2005 may fall short.

14. Article 12 CRPD provides as follows:

Article 12 - Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

³ A list of other countries is found at <http://fra.europa.eu/en/theme/people-disabilities/ratified-crpd>

⁴http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=29

⁵see UK report from 2013:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=29

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

15. From first reading, they are a spectacularly difficult set of principles to enshrine in a domestic legal framework. Recent commentators have suggested that the MCA is deficient in 2 respects:

- a. the nature of the diagnostic test prejudices disabled persons in that they are more likely to satisfy it and therefore be found to lack capacity;
- b. the objective nature of substituted decision making but taking into account 'best interests' and not solely the will and preferences of the protected party.

16. I am focused on the second concern and primarily the tension between objective best interests and the protected person's wishes and feelings.

RECENT DEVELOPMENTS

17. The early trajectory of wishes and feelings cases sought to identify hierarchy of importance within the MCA 205 considerations:

- a. HHJ in *Re S and S (Protected Persons); C v V* [2008] EWHC B16 (Fam):
HHJ Marshall QC tussled with this issue early on:

[57] As to how this will work in practice, in my judgment, where P can and does express a wish or view which is not irrational (in the sense of being a wish which a person with full capacity might reasonably have), is not impracticable as far as its physical implementation is concerned, and is not irresponsible having regard to the extent of P's resources (ie whether a responsible person of full capacity who had such resources might reasonably consider it worth using the necessary resources to implement his wish) then that situation carries great weight, **and effectively gives rise to a presumption in favour of implementing those wishes**, unless there is some potential sufficiently detrimental effect for P of doing so which outweighs this..”

- b. She then asks what the point is of going to all this trouble of getting P's views etc. when they are simply ignored

18. Then a number of well-known cases then explore the importance wishes and feelings both expressed and implied:

- a. *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67
- b. *RE M* [2013] EWCOP 3456, Jackson J
- c. *Sykes v. Westminster* [2014] EWHC B9 (COP), DJ Eldergill

19. *Wye Valley NHS Trust v. B* [2015] EWCOP 60, a wonderfully expressed judgment on all fours with the need to assess P as they are, not a construct of what they should be:

[10] Where a patient lacks capacity it is accordingly of great importance to give proper weight to his wishes and feelings and to his beliefs and values. On behalf of the Trust in this case, Mr Sachdeva QC submitted that the views expressed by a person lacking capacity were in principle entitled to less weight than those of a person with capacity. This is in my view true only to the limited extent that

the views of a capacitous person are by definition decisive in relation to any treatment that is being offered to him so that the question of best interests does not arise. However, once incapacity is established so that a best interests decision must be made, there is no theoretical limit to the weight or lack of weight that should be given to the person's wishes and feelings, beliefs and values. In some cases, the conclusion will be that little weight or no weight can be given; in others, very significant weight will be due.

[11] This is not an academic issue, but a necessary protection for the rights of people with disabilities. 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.

[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.**

20. Mr Justice MacDonald, only appointed in the summer of last year, has been busy making his presence felt in CoP matters: much of which is to be commended.

21. In *King's College NHS Foundation Trust v. C and V* [2015] EWCOP 80 is a thoughtful analysis of how capacity is assessed in light of a person presenting with difficult and perhaps unattractive views of how their own life should be, for example:

[93] ..having found that C is not a person unable to make a decision for herself for the purposes of s 3(1) it is not necessary for me to go on to consider the so called 'diagnostic test'. It is right to record that, as I observed at the conclusion of the hearing, had I been satisfied that C was unable to use and weigh

information in the manner contended for by the Trust, I believe I would have had difficulty in deciding that this inability was, on the balance of probabilities, because of an impairment of, or a disturbance in the functioning of, the mind or brain. Whilst it is accepted by all parties that C has an impairment of, or a disturbance in the functioning of, the mind or brain, the evidence as to the precise nature of that impairment or disturbance was far from conclusive. Further, and more importantly, with regard to the question of causation, and in particular whether what was being seen might be the operation of a personality disorder or simply the thought processes of a strong willed, stubborn individual with unpalatable and highly egocentric views the evidence was likewise somewhat equivocal. However, as I say, I need say no more about this in light of my conclusions as set out above.

[97] The decision C has reached to refuse dialysis can be characterised as an unwise one. That C considers that the prospect of growing old, the fear of living with fewer material possessions and the fear that she has lost, and will not regain, 'her sparkle' outweighs a prognosis that signals continued life will alarm and possibly horrify many, although I am satisfied that the ongoing discomfort of treatment, the fear of chronic illness and the fear of lifelong treatment and lifelong disability are factors that also weigh heavily in the balance for C. C's decision is certainly one that does not accord with the expectations of many in society. Indeed, others in society may consider C's decision to be unreasonable, illogical or even immoral within the context of the sanctity accorded to life by society in general. None of this however is evidence of a lack of capacity. The court being satisfied that, in accordance with the provisions of the Mental Capacity Act 2005, C has capacity to decide whether or not to accept treatment C is entitled to make her own decision on that question based on the things that are important to her, in keeping with her own personality and system of values and without conforming to society's expectation of what constitutes the 'normal' decision in this situation (if such a thing exists). As a capacitous individual C is, in respect of her own body and mind, sovereign.

In circumstances where I have decided that C has at this time the capacity to make the decision in question, this court has no jurisdiction to interfere with the decision making process. Accordingly, although rightly brought, I dismiss the application of the Trust for declarations under the Mental Capacity Act 2005.

As I said at the conclusion of this hearing, my decision that C has capacity to decide whether or not to accept dialysis does not, and should not prevent her treating doctors from continuing to seek to engage with C in an effort to persuade her of the benefits of receiving life saving treatment in accordance with their duty to C as their patient. My decision does no more than confirm that in law C is entitled to refuse the treatment offered to her for her benefit by her dedicated treating team. Nothing I have said prevents them from continuing to offer that treatment.

22. A further short but interesting case in *NHS Trust v. CS (Termination of Pregnancy)* [2016] EWCOP 10 reaffirms the importance of pre-incapacitous expressed views and consideration of strong evidence of the same.
23. An important case relating to personal injury trusts in *Watts v. ABC* [2016] EWCOP 2532, Charles J was reported at the beginning of November 2016. Whether this conflicts with Article 12 obligations in a person likely or possibly open to regaining capacity remains to be seen. As expected from Charles J, it is a detailed analysis of the best interests analysis when applied to an establishment of a trust or deputyship regime.
24. The cases discussed above have one common characteristic: the Courts continue to grapple with the tension between the views of the protected party and substituting judgment on their behalf. This is nothing new and it is enshrined in the considerations contained in the MCA 2005.
25. It will be interesting to note the conclusions of the Committee on the Rights of Persons with Disabilities when they assess and publish a report on the UK's compliance with the CRPD in late 2017⁶.

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EDWARD LAMB
9 GOUGH SQUARE

⁶ <https://www.equalityhumanrights.com/en/our-human-rights-work/monitoring-and-promoting-un-treaties/un-convention-rights-persons-disabilities>