The centrality of the voice of the person

November 2019

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Mental Capacity Act 2005 (1)

- Key concepts:
  - Statutory principles
  - Mental capacity: a functional test, with a 'causative nexus' required between disturbance or impairment in the functioning of the mind of brain and the inability to make the decision
  - Best interests: a statutory test based on 'checklist'
- Guided informality: "*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.*"

Re MN [2017] UKSC 22, per Baroness Hale

Mental Capacity Act 2005(2)

- Lasting Powers of Attorney (H&W and P&A)
- Advance Decisions to Refuse Treatment
- Oversight by Court of Protection, specialist superior court of record
- Margins of the MCA are contested:
  - Common law tests for eg testamentary capacity
  - The scope of the inherent jurisdiction

English lessons and dilemmas: focusing on the other side of incapacity

- Clearing the groundwork – the meaning of 'best interests': "The purpose of the best interests test is to consider matters from the patient's point of view" *Aintree v James* [2014] 1 AC 591

- Not a 'what P would have done test,' but if it is clear what P would have done will carry (at a minimum) very great weight absent compelling reasons to contrary, especially in medical context:
  - *Briggs v Briggs* [2016] EWCOP 53
  - Contrast *Wye Valley NHS Trust v B* [2015] EWCOP 60 and *East Lancashire NHS Trust v PW* [2019] EWCOP 10

Standing in the shoes of P – the implications

- The line between clinical appropriateness and best interests / will and preferences-based decision-making: *University Hospitals Birmingham NHS Foundation Trust v HB* [2018] EWCOP 39: "it is plain that administering CPR in the event of a further collapse and giving her, albeit a very, very small chance of life, is what she would wish"

- The consistently idiosyncratic (*Wye Valley*) and the pre- and post-incapacity (*Briggs*)

- Where wishes and feelings are 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

- The potential for the clash between past and present wishes: "*When past and present wishes collide: the theory, the practice and the future*" Eld. L.J. 2016, 7(2) 132-140

The wider context

- It’s not just about the ADMCA

- By analogy: best interests decision-making under the MCA is a choice between available options: *N v ACCG* [2017] UKSC 22

- What is an available option will often be function of decision-making by statutory bodies applying other statutes

- Or family members making their own decisions

One point to watch – AHDs and the change of mind

- MCA 2005 – ADRT not valid if the donor "has done anything else clearly inconsistent with the advance decision remaining his fixed decision"

- You've not got this loophole: s.85(3) "whilst he or she had capacity to do so, has done anything else…"

- Will you need a flexible interpretation of capacity to avoid the Margo dilemma?

Want to read more?

http://www.39essex.com/resources-and-training/mental-capacity-law/

www.mhj.org.uk

www.mclap.org.uk

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