3PB BARRISTERS

Serious Medical Treatment: case law update

HH Stephen Wildblood KC
Matthew Wyard
Jim Hirschmann

Agenda

- Refresher on the basics
- *Leicestershire CC v P & NHS Leicester, Leicestershire and Rutland ICB* [2024] EWCOP 53
- *Cardiff and Vale UHB v NN* [2024] EWCOP 61
- *NHS North West London Integrated Care Board v AB and others* [2024] EWCOP 62
- *The Health Service Executive of Ireland v SM* [2024] EWCOP 60

SMT: the basics

- What do we mean by “serious medical treatment” and when should proceedings be issued?
- Reg 4 of the Mental Capacity Act (Independent Mental Capacity Advocates) (General) Regulations 2006/1832
- NHS Trust v Y [2018] UKSC 46
- Practice guidance from Hayden J [2020] EWCOP 2
- Procedural differences

SMT: refresher of legal principles

- Consent to treatment
    - *Re: F (sterilisation)* [1990] 2 AC 1
    - *Airedale NHS Trust v Bland* [1993] AC 789

- Available options
    - *AVS v An NHS Trust* [2011] COPLR Con Vol 219
    - *Burke v United Kingdom* 19807/06
    - *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67

SMT: refresher of legal principles

- The key question for the court – *An NHS Trust v Y* [2018] 3 WLR 751

- Declaratory relief under s15 MCA 2005 usually what's sought (although see the judicial queries in *Aintree v James* about whether that is the correct approach to take)

Leicestershire CC v (1) P (2) NHS Leicester, Leicestershire & Rutland ICB [2024] EWCOP 53

- Tier 3 before Theis J
- Context
- Facts
- Issue

Leicestershire CC v (1) P (2) NHS Leicester, Leicestershire & Rutland ICB

*"**there is jurisdiction under s15 MCA that enables the court, in principle, to make anticipatory declarations**. Such declarations, if made, are not dependent on P lacking capacity at the time such a declaration is made as s15 (c) refers to 'the lawfulness or otherwise of any act done, **or yet to be done**, in relation to that person' (emphasis added), clearly referring to a future event. The reference to 'that person' is to a person whose capacity has been determined under s15(a) or (b), which includes a declaration as to whether a person has or lacks capacity to make the decisions referred to in s15 (a) and (b). **So, a declaration under s15 (c) is not dependent on a declaration of present incapacity,** as submitted by Mr Hallin, as both subsections (a) and (b) envisage positive declarations of capacity."*

Leicestershire CC v (1) P (2) NHS Leicester, Leicestershire & Rutland ICB

- Whether there are other ways to manage the situation, for example, whether s5 MCA can be utilised.
- The need to guard against any suggestion that P's autonomy and ability to make unwise but capacious decisions is at risk or any suggestion that the court is making overtly protective decisions.
- Carefully consider the declaration being sought and whether the evidence establishes with sufficient clarity the circumstances in which P may lack capacity and in the event that P does, the circumstances in which contingent best interests decisions would need to be made.

Cardiff & Vale UHB v NN [2024] EWCOP 61

- Interplay with anticipatory declarations
- Tier 3 before Victoria Butler-Cole KC sitting as a deputy High Court judge
- Takeaway: be clear about what you are asking for, act promptly and consider whether what is sought is needed
- Facts
- Issues

Cardiff & Vale UHB v NN [2024] EWCOP 61

"She has a **limited understanding of what a medical termination will involve for her** at this relatively advanced stage of pregnancy, and **has not been able to take on board and weigh up all the pertinent negative aspects of the procedure, or the possible impacts on her mental health of deciding one way or the other. Her inability or unwillingness to discuss the information relevant to the decision in any detail was not just due to the personal nature of the decision, or denial about the need to make a decision, but, on the balance of probabilities, due to her difficulties in consistently being able to retain and use information she had been given, as a result of her mental disorder. I further consider…it is entirely possible that at times during the medical termination procedure when decisions need to be made, NN will not be able to bring to mind or use information she is given by medical professionals as a result of her mental disorder**. Thus, even if I was wrong to accept that NN lacked capacity to make relevant decisions at the date of the hearing, I was satisfied that there was a real prospect of NN lacking capacity at a future point..."[17]

Cardiff & Vale UHB v NN [2024] EWCOP 61

- Approving the treatment plan
- Costs
  - OS sought 100% of their costs from the HB asserting it has delayed unreasonably in issuing proceedings which was prejudicial to NN.
  - UHB – accepted delay but said it was due to OS wanting further capacity evidence and that infection control measures in the hospital prevented access to NN for a period of time.

Cardiff & Vale UHB v NN [2024] EWCOP 61

- Court found that the UHB had unreasonably delayed in issuing proceedings
- The delay had “a serious, negative impact on NN” and also on her mother who was traumatized by having to see her daughter continue a pregnancy into the second trimester that she wanted terminated and then supporting her through a late termination which resulted in the baby being born alive.

Cardiff & Vale UHB v NN [2024] EWCOP 61

"A final observation: the application in this case was to authorise a possible future deprivation of liberty which did not, in fact, materialise. It would be reasonable for NN or her mother to ask what purpose was served by the proceedings...**It is incumbent on those concerned with obstetric cases to give the most careful scrutiny at the earliest possible stage to whether orders are actually required from the Court of Protection, and if so, the substance of those orders. In this case…there was a mistaken belief that any best interests decision about termination of pregnancy for a person without capacity required court authorisation.** If there is a professional consensus about the treatment proposed, no intention to impose treatment on P against her wishes, and no disagreement from those concerned with P's welfare such as close family members, the provisions of s.5 and s.6 MCA 2005 permit medical best interests decisions to be taken without court involvement, having followed the requirements of the MCA and any associated professional guidance"

NHS North West London Integrated Care Board v AB and others [2024] EWCOP 62 – per Mrs Justice Theis DBE, 30 October 2024 (hearing 16 Oct 2024)

- The principle issue in this case – whether it was in AB's best interests for continuation of CANH (clinically assisted nutrition and hydration).
- The clinical view was that it was not in AB's best interests for the CANH to continue. Some, but not all, of the family disagreed (§3). The Court noted that the Applicant had arrangements which provided: "*where there is no agreement or the decision is finely balanced[,] for an application to be made to the Court of Protection to be determined*." (§13).

NHS North West London Integrated Care Board v AB and others [2024] EWCOP 62 – Who was AB?

A lively energetic and much-loved mother to three children with a wide circle of family and close friends. On 30 March 2015 she tragically suffered a subarachnoid hemorrhage, secondary to a right cerebral artery aneurysm during an exercise class. Following treatment, she was discharged into the Specialist Nursing Home within the Royal Hospital for Neuro-Disability ("**RHN**") where she has been since (§1).

NHS North West London Integrated Care Board v AB and others [2024] EWCOP 62 – The Medical Evidence

AB is minimally conscious and on the lower end of this (in keeping with the then relevant but since updated national guidelines: Prolonged disorders of consciousness ("**PDOC**") following onset brain injury: National clinical guidelines 2013 – see §2 and §16)). She is dependent upon CANH and entirely dependent on others for all aspects of her care (§2). If AB experienced anything in the last 9 years it was likely distress (§11). It is highly unlikely for AB's condition to change (§17). Over the last three years AB had been treated for about twenty infections including Covid-19, skin infections and urinary tract infections (§18).

NHS North West London Integrated Care Board v AB and others [2024] EWCOP 62 – The Medical Evidence

- The high level of care AB required is indicated at §21.

- AB was described as grimacing and displaying pain behaviors while undergoing moving and handling. She was regularly repositioned, moved and handled to avoid the formation of ulcers and to maintain skin integrity. At §26 there is recognition that she smiles but Dr D's conclusions on examination were that these were "*involuntary movements without any meaning extracted from stimuli applied, or any communication intent behind their façade.*"

NHS North West London Integrated Care Board v AB and others [2024] EWCOP 62 – The Medical Evidence

At §27 it was noted "*Dr D considers AB's life expectancy with continued treatment is 'likely to be less than 3-4 years' subject to any infection. Her life expectancy would be 1-3 weeks should CANH cease. Dr D considers her current TEP, that she should not be transferred off site unless there is a clear benefit in doing so, is in her interests, as is the DNACPR (Do Not Attempt Cardio-Pulmonary Resuscitation). Dr D describes AB as being in a state of managed comfort if the restlessness and dystonia are discounted.*"

NHS North West London Integrated Care Board v AB and others [2024] EWCOP 62 – RNH

For AB a formal best interests review was not started until early 2023, seven and a half years after her admission to the RHN. "*The reasons for that was a systemic failure in the RHN to have the relevant framework in place for making these best interest decisions in a timely way. Prior to the recent changes there was simply a vacuum within the RHN, with no system for best interest decisions to be made.*" (§10) (The Court took notice of the previous criticisms directed at RHN in *North West London Clinical Commissioning Group v GU* [2021] EWCOP 59 Hayden J at §103-§105).

NHS North West London Integrated Care Board v AB and others [2024] EWCOP 62 – RNH

"Following their review in 2022 the legal framework and the wider landscape in the RHN are now pellucidly clear, providing a requirement for regular structured reviews of a person who is in PDOC, with an intense focus on their individual ongoing needs and timely best interest decisions being made. At each stage those decisions need to consider whether treatment which may have enhanced the patient's quality of life or provided some relief from pain may '*gradually or indeed suddenly reach a pivoting point where it becomes futile, burdensome and inconsistent with human dignity. The obligation is to be vigilant to such an alteration in the balance*' (per Hayden J in *GU* [105])." (§12).

NHS North West London Integrated Care Board v AB and others [2024] EWCOP 62 – RNH

The Court noted at §60-§63 that the RHN is a charity, though most placements are NHS funded. RHN was thought to have one of the largest cohorts of patients in PDOC in the country. It was noted that they had moved from a situation where they would continue CANH unless concerns were raised to one where they would more pro-actively considering whether CANHs is in a patient's best interests.

NHS North West London Integrated Care Board v AB and others [2024] EWCOP 62 – RNH at §64 noted

"(1) The updating of the RHN policies so they now include a structured process for both existing and new patients. There are three key stages –

(i) a best interest decision (with consultation with those close to the patient by the decision maker and the multi professional team);
(ii) a second opinion from an independent expert to confirm PDOC
(iii) and, an assurance process that the requirements of the process have been met.

(2) A programme of training and education has been rolled out to staff, and

(3) Agreeing a protocol for how it can most productively work with the ICBs regarding timeframes and responsibilities for various actions to ensure applications are made to the Court of Protection in a timely way."

NHS North West London Integrated Care Board v AB and others [2024] EWCOP 62 – RNH

At §64 "*Once a decision has been made to discontinue CANH or if a decision needs to be referred to the Court of Protection as there is disagreement as to what is in the patient's best interests or it is finely balanced, the case will be discussed at the weekly Executive Management Team (EMT) meetings. If the EMT are satisfied the correct processes have been followed the matter is then referred to the RHN's Ethics Committee.*"

NHS North West London Integrated Care Board v AB and others [2024] EWCOP 62 – RNH at §71

"71. As regards managing decision making for current patients as well as new patients Dr Luttrell reports that since October 2022 there have been 70 patients within the continuing care service at the RHN with a diagnosis of PDOC who are receiving CANH. Consultation in accordance with the RNH CANH Policy has completed for 51 patients. Decisions in relation to 7 patients have been referred to the ICB with a view to an application to the Court of Protection. The process is ongoing in respect of 17 patients (including those referred to the ICB) and 2 patients have died before the best interest consultation process concluded. For patients newly admitted to the RHN, consultation and best interest decisions for any incoming patients in PDOC will commence within two weeks of admission."

NHS North West London Integrated Care Board v AB and others [2024] EWCOP 62 – Judgment

- The law was agreed and is set out at §§36-49.
- The Court's best interests analysis is contained at 74-86. The Court ultimately concluded that AB's best interests in the widest sense require CANH to be withdrawn, as to continue to provide it is not in AB's best interests due to the very significant and increasing burdens her condition and treatment involves that outweigh the presumption of maintaining life.

NHS North West London Integrated Care Board v AB and others [2024] EWCOP 62 – Reflections

- A need for greater appreciation of when to make an application to the Court of Protection.
- An example of how the Courts can encourage compliance with the law on a systemic level.
- An illustration of how vulnerable those without capacity are.

The Health Service Executive of Ireland v SM [2024] EWCOP 60 – per Mr Justice Hayden, 1 November 2024 (hearing 24 October 2024)

§§1-2 confirm that this case concerned SM – a 24-year-old Irish citizen with a diagnosis of "*Anorexia Nervosa, Complex PTSD, Mixed Depressive and Anxiety Order*." More recently she had developed "*what is termed Pervasive Arousal Withdrawal Syndrome.*" An earlier judgment concerning her was "*reported as The Health Service Executive of Ireland v Ellern Mede Moorgate [2020] EWCOP 12*".

The Health Service Executive of Ireland v SM [2024] EWCOP 60 – per Mr Justice Hayden, 1 November 2024 (hearing 24 October 2024)

§§3-4 confirmed that the Health Executive of Ireland sought recognition and enforcement of an order made by the Irish High Court on 14 October 2024 which provided for "*the continued detention of SM at Ellern Mede for the purposes of assessment and treatment.*"

The Health Service Executive of Ireland v SM [2024] EWCOP 60 – Analysis

- At §13-44 the learned Judge set out the law and his analysis.
- The Judge reminded himself at §14 that Section 64 of Schedule 3 to the MCA 2005 has "*given effect to the central provisions of the 2000 Hague Convention on the International Protection of Adults ("the Convention") as a matter of English law and has done so on a very wide basis. Schedule 3 makes provision for the recognition, enforcement and implementation of protective measures imposed by a foreign Court regardless of whether that Court is located in a Convention country.*"

The Health Service Executive of Ireland v SM [2024] EWCOP 60 – Analysis

Mr Justice Hayden recalled at §21, what was said in *Re PA & Ors* [2015] EWCOP 38 by Baker J (as he then was) namely:

"93. First, by ***including Schedule 3 in the MCA, Parliament authorised a system of recognition and enforcement of foreign orders notwithstanding the fact that the approach of the foreign courts and laws to these issues may be different to that of the domestic court. These differences may extend not only to the way in which the individual is treated but also to questions of jurisprudence and capacity. Thus the fact that there are provisions within the Act that appear to conflict with the laws and procedures of the foreign state should not by itself lead to a refusal to recognise or enforce the foreign order.*** *Given that Parliament has included section 63 and Schedule 3 within the MCA, clearly intending to facilitate recognition and enforcement in such circumstances, it cannot be the case that those other provisions within the Act that seemingly conflict with the laws and procedures of the foreign state are mandatory provisions of the laws of England and Wales so as to justify the English Court refusing to recognise the foreign order on grounds of such inconsistency. In such circumstances,* ***it is only where the Court concludes that recognition of the foreign measure would be manifestly contrary to public policy that the discretionary ground to refuse recognition will arise. Furthermore, in conducting the public policy review, the Court must always bear in mind, in the words of Munby LJ that "the test is stringent, the bar is set high".*** **(Emphasis added)**

The Health Service Executive of Ireland v SM [2024] EWCOP 60 – Analysis

At §35 the learned Judge went on to note:

"35. Schedule 3 of the MCA is a provision which embodies the conventional principles of international comity. It authorises the recognition and enforcement of foreign orders, factoring in that the approach of the foreign courts may be very different from that of the domestic court. In PA (supra), **Baker J recognised that these differences may be extensive. It is not difficult to contemplate that they might cover the entire gamut of approach to the way in which an individual is treated, ranging from issues of capacity to the identification of best interest. It follows, axiomatically, in my judgement that conflict of law, procedure and even philosophy of approach does not, of itself, require the domestic court either to refuse to recognise or enforce the foreign order.**" (Emphasis added)

NB: *Health Service Executive of Ireland v Ellern Mede Moorgate* [2020] EWCOP 12

Per Mr Justice Hayden at §36

"36. Finally, counsel drew to my attention the decision of Mostyn J in **Re M [2011] EWHC 3590**, which was also concerned with the compulsory placement of an Irish national in an English psychiatric hospital. There Mostyn J concluded that an order recognising and enforcing a foreign measure under Schedule 3 is not a "*welfare order*", as defined by s.16A(4)(b) MCA. I respectfully agree, as I note did Baker J in **Re PA and Others**. One of the consequences of this is that the rules relating to "*ineligibility*" in s.16A and Schedule 1A do not apply. **Mr Setright properly points out that the consequence of this is that a court may find itself in the position of recognising and enforcing orders of a foreign court which have the consequence of depriving P of his or her liberty in circumstances where this would not be possible under the domestic jurisdiction, under the aegis of the MCA. This might arise, for example, where the Court of Protection is required to recognise and enforce an order where an individual is being treated or is treatable under the Mental Health Act 1983 ("MHA"), as defined in Schedule 1A MCA. The check on this, however, is provided, in my view, by the discretion the court has, in its review, to refuse recognition and enforcement where the order would be manifestly contrary to public policy**." (Emphasis added)

The Health Service Executive of Ireland v SM [2024] EWCOP 60 – Conclusions

Mr Justice Hayden §§36-44

At §36 he noted that *"…The prognosis of anorexia nervosa must always be guarded. Morbidity rates range from 10-20%, with only 50% of patients making a complete recovery. Of the remaining 50%, 20% remain emaciated and 25% remain thin. The seriousness of the condition is not always fully understood by the wider public. Treatment may be intermittent or, as here of protracted duration. It is highly intrusive, and it may deprive the protected party of their liberty. This last point is evident in the order made by the President and the extent of his order made to the Medical Director:*

> *"to take all necessary and/or incidental steps (including the provision of consent for any medical psychiatric psychological or other assessment treatment or assistance whether at Ellern Mede or (if necessary and appropriate) at some other location or facility) and to use such reasonable force and/or restraint as may be necessary in so doing to promote and/or ensure the care protection safety and welfare circumstances of [SM] and to provide [SM] with such hydration, sustenance, medication and treatment as may be clinically and /or medically indicated in accordance with the operational policies of Ellern Mede, including for the avoidance of doubt the provisions of nasogastric feeding.""*

The Health Service Executive of Ireland v SM [2024] EWCOP 60 – Conclusions

Per Mr Justice Hayden

At §43-§44 the learned Judge ruled that he required evidence to satisfy himself that SM continued to lack capacity and noted that the HSE had agreed to instruct a psychiatrist to assess SM's current capacity relating to her treatment and litigation capacity and for this to be filed by 21 November 2024. He said:

> *"43. SM's welfare has been unswervingly in focus during the Irish High Court's exercise of its inherent jurisdictional powers. It is clear, however, that SM's capacity has fluctuated over the last 6 months and may well continue to do so. Some of her recent recorded observations are, as I have commented, both measured and insightful. I* ***consider that, in such circumstances, having emphasised both the duration and the draconian nature of the order that I am invited to recognise and enforce, I am required, properly respecting SM's rights, to satisfy myself that she continues to lack capacity in the sphere of decision taking surrounding her medical treatment. This I regard as my obligation, both under the Human Rights Act 1989 and in ensuring that this order remains compatible with public policy in England and Wales.*** *As the papers presently stand, I am not yet able to undertake this exercise in the way that is required, as analysed above. For this reason, I propose to direct an up-to-date assessment of SM's capacity to understand and consent to her continuing treatment."*

The Health Service Executive of Ireland v SM [2024] EWCOP 60 – Reflections

- How hard it is to treat anorexia.
- An illustration of how international law is implemented domestically.
- An illustration of how pro-active the COP can be.

Contact

Matthew Wyard
0330 332 2633
matthew.wyard@3pb.co.uk

'Matthew is a conscientious barrister who will do his utmost for his client. He is a good lawyer and a very helpful junior in the quality of his legal research and his thoughts and ideas for advancing the case.'

Legal 500 2025/Court of Protection and Community Care/Leading Juniors

HH Stephen Wildblood KC
0330 332 2633
stephen.wildblood@3pb.co.uk

Jim Hirschmann
0330 332 2633
jim.hirschmann@3pb.co.uk

'Jim is always well-prepared and engages thoughtfully and constructively with opponents outside the courtroom. He has a well-judged advocacy.'

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