

NO. 1 BESTSELLING REVISION SERIES

MEDICAL LAW

7TH EDITION

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King's College Hospital v C [2015] EWCOP 80

Facts

A woman who had lived a 'sparkly' and glamorous life became unhappy with ill health and took paracetamol and champagne in an apparent suicide attempt. She was taken to hospital where it was determined only kidney dialysis would keep her alive. She objected to treatment but was assessed as lacking capacity to make the decision.

Legal principle

In determining her best interests it was important to pay attention to her current objections to treatment (even though they were the views of a person lacking capacity) and the values that dominated her life (a wish to be glamorous and independent). As the medical treatment required extensive intervention of her body and was not a guaranteed success it would not be in her best interests to be given it.

Analysis

This case shows how the court will try to 'get to know' the patient who lacks capacity. The court will try and find an outcome which fits in with their character and values.

Where an adult who lacks capacity is being deprived of their liberty, then there are special safeguards (known as Protection of Liberty Safeguards) that apply. These are found in the Mental Capacity Act 2005, section 4 and Schedule A1. These set out the requirements that must be satisfied before a person can be deprived of their liberty and require that the deprivation be proportionate to the risk they are facing and be justified in their best interests.

Medical treatment of children

A child is a person under the age of 18. In order to treat a child, a doctor needs effective consent. This can be provided by any of the following:

- a child aged 16 or 17;
- a **Gillick competent child** (a child who has sufficient maturity and understanding to make a competent decision about the issue. The child will need to understand not only the medical issues involved, but also the moral and family questions);
- a person with parental responsibility for the child; or
- an order of the court.

If the case is a medical emergency and it not possible to obtain one of these consents, then a doctor may have a defence under the doctrine of necessity.

3 Consent to treatment

Notice, that although a competent child can effectively consent to treatment, if the child refuses, a parent can still consent on the child's behalf. Indeed, even if the child and their parents refuse to consent to the treatment, the court can still authorise it. The courts have done this in cases where children and parents belong to the Jehovah's Witnesses religious group and refuse to consent to the child receiving a life-saving blood transfusion (e.g. *Re E (A Minor)* (1993)).

Impress your examiner

The current state of the law in relation to children is controversial and there is much to discuss. A good essay will consider some of the following points. In effect, the courts have said that a competent child has the right to say 'yes' but not the right to say 'no'. This is because even if the child refuses treatment, unlike an adult, consent can be provided by someone else. Some commentators argue that if the child is as competent as an adult, they should be treated in law as an adult. Others argue that the current law is based not on protecting the rights of children, but ensuring that they receive their medical needs. Also debated are the cases where the courts have overridden the views of children and parents. Do the courts know better than parents what is good for their children? On the other hand, should parents be allowed to martyr their children? (See Herring (2007) for a discussion of these issues.) Also note that only one parent has to consent. In *An NHS Trust v SR* (2012) the mother refused to consent to treatment, but the father did consent. The court held it was permissible for the hospital to provide the treatment as they had consent from a parent.

Putting it all together

Sample question

Could you answer this question? Below is a typical problem question that could arise on this topic. Additionally, a sample essay question and guidance on tackling it can be found on the companion website.

Problem question

Angelina is aged 25 and has been badly injured in a car crash. Doctors wish to use a new treatment that has been developed following embryo research, without which it is

very likely she will die. Angelina has been seen by a psychologist who explains that she is aware that she is very ill, but is finding it very difficult to concentrate because she is in great pain. The psychologist says that Angelina is not in a position to understand the exact nature of the treatment she is being offered, or the risks associated with it. She is, however, aware that the treatment could save her life. Angelina says that she does not want the treatment and she wants to die. Before the accident, Angelina had been completing a doctorate in medical law. The doctorate was arguing strongly against the use of medical treatments developed using embryo research. Angelina was a member of her local church and her pastor says that her church believes that people should never refuse life-saving treatment. The pastor is adamant that Angelina would have wanted the treatment. Angelina's boyfriend is also confident that she would have wanted the treatment. Angelina's mother is opposed to her being given any treatment. There is a note in Angelina's diary that says that if she is ever ill, everything should be done to save her life.

Discuss what treatment, if any, the doctors may administer to Angelina.

Answer guidelines

Approaching the question

This problem question raises quite a number of issues and it is important to have a clear structure. Use one paragraph to discuss each issue separately. You will need to keep the best interests test central to the answer.

Important points to include

The first issue here is to determine whether or not Angelina is competent to make a decision over her treatment. You will want to refer to the test for capacity in the Mental Capacity Act 2005. Note that it needs to be shown that she is able to understand the issues and able to reach a decision (*A Local Authority v Mrs A and Mr A* (2010)).

If she is found competent, remember that she has an absolute right to refuse treatment. Refer to the case law on this (e.g. *St George's Healthcare NHS Trust v S* (1998)).

If she is found incompetent, you will need to determine who can make the decision on Angelina's behalf. You will need to consider whether or not there has been an advance decision in this case, based on what is in the diary. If this is ineffective, who is the nearest relative?

Whoever the decision-maker is, they must make the decision based on what is in Angelina's best interests. Note that although the decision-maker may take into account her religious and other views, ultimately it is a question about what is in her best interests. Note that if anyone disagrees with the decision-maker, the matter can be brought to court for a judge to rule on what is in her best interests.

Impress your examiner

Make sure you make the fine distinction between an advance decision, which, if binding, will determine the case; and a previous expression of views, which is only a factor to be taken into account in determining best interests.

Key case summary

| Key case | How to use | Related topics |
|---|---|----------------|
| <i>Re C (Adult: Refusal of Treatment)</i> | To show the right to refuse treatment | Mental health |
| <i>A Local Authority v Mrs A and Mr A</i> | To provide an example of a person lacking capacity | Contraception |
| <i>Sidaway v Bethlem Royal Hospital Governors</i> | To discuss what information a doctor should disclose | Autonomy |
| <i>Chester v Afshar</i> | To examine when damages can be paid after failure to disclose | Negligence |
| <i>Re Y (Mental Incapacity: Bone Marrow Transplant)</i> | To consider the 'best interests' principle | Organ donation |

Key further reading

| Key articles/reports | How to use | Related topics |
|---|---|----------------|
| Arstein-Kerslake, A. and Flynn, E. (2017) The right to legal agency: domination, disability and the protections of article 12 of the Convention on the Rights of Persons with Disabilities, <i>International Journal of Law in Context</i> , 81 | To consider the relevance of disability rights to mental capacity law | Discrimination |

| Key articles/reports | How to use | Related topics |
|---|---|-------------------|
| Clough, B. (2014) 'People like that': Realising the social model in mental capacity jurisprudence, <i>Medical Law Review</i> , 23: 53 | To examine the justifications for mental capacity law | Justice |
| Clough, B. (2018) New legal landscapes: (Re)constructing the boundaries of mental capacity law, <i>Medical Law Review</i> , 26: 246 | To explore the limits of mental capacity law | Autonomy |
| Coggon, J. (2016) Mental capacity law, autonomy, and best interests: An argument for conceptual and practical clarity in the Court of Protection, <i>Medical Law Review</i> , 24: 396 | To understand the working of the Mental Capacity Act 2005 | Autonomy |
| Donnelly, M. (2016) Best interests in the Mental Capacity Act: Time to say goodbye?, <i>Medical Law Review</i> , 24: 318 | To examine the interpretation of the Mental Capacity Act | Euthanasia |
| Dresser, R. (1994) Missing persons: legal perceptions of incompetent patients, <i>Rutgers Law Review</i> , 46: 609 | To explore the arguments over advance directives | End of life |
| Foster, C. (2009) <i>Choosing Life, Choosing Death</i> , Oxford: Hart | To understand the concept of autonomy | Autonomy |
| Gilmore, S. and Herring, J. (2011) 'No' is the hardest word: consent and children's autonomy, <i>Child and Family Law Quarterly</i> , 23: 3 | To consider the law relating to consent and children | End of life cases |
| GMC (2008) <i>Consent: Patients and Doctors Making Decisions Together</i> , London: GMC | To understand the ethical issues around consent | Autonomy |



3 Consent to treatment

| Key articles/reports | How to use | Related topics |
|---|--|---------------------|
| Harrington, J. (1996) Privileging the medical norm: liberalism, self-determination and refusal of treatment, <i>Legal Studies</i> , 16: 348 | To debate the role of paternalism | Beneficence |
| Herring, J. (2007) Where are the carers in healthcare law and ethics? <i>Legal Studies</i> , 27: 51 | To consider the role of carers in capacity cases | End of life cases |
| Herring, J. (2010) Losing it? Losing what? The law and dementia, <i>Child and Family Law Quarterly</i> , 21: 3 | To explore the debates over advance decisions | End of life cases |
| Herring, J. and Foster, C. (2012) Welfare means relationality, virtue and altruism, <i>Legal Studies</i> , 32: 480 | To consider the meaning of best interests | Beneficence |
| Herring, J. and Wall, J. (2015) Autonomy, capacity and vulnerable adults: filling the gaps in the Mental Capacity Act, <i>Legal Studies</i> , 35: 698 | To examine cases at the borderline of capacity | End of life cases |
| Herring, J. and Wall, J. (2017) The nature and significance of the right to bodily integrity, <i>Cambridge Law Journal</i> , 76: 3 | To understand the nature of bodily integrity | Autonomy |
| Jackson, E. (2018) From 'doctor knows best' to dignity: placing adults who lack capacity at the centre of decisions about their medical treatment, <i>Modern Law Review</i> , 81: 247 | To consider the role of doctors | Autonomy |
| Mackenzie, C. (2019) Feminist innovation in philosophy: relational autonomy and social justice, <i>Women's Studies International Forum</i> , 72: 144 | To understand the concept of relational autonomy | Feminist approaches |