Burning issues in the Court of Protection

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Burning issues in the Court of Protection:

16 and 17-year-olds

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16 and 17 year-olds

- Why special category – overlapping legal frameworks
- Various relating to deprivation of liberty:
  - Ground for authorising – educational supervision/unsoundness of mind
  - S. 25/inherent jurisdiction - evidential requirements
  - Parental consent?
  - Northern Ireland AG's reference – revisiting consent for the purposes of the *Storck* test
  - Disability and DoLs – whether the acid test is met
- Extent to which parental consent can be relied on in other contexts
- Framework for assessing legal capacity – *Gillick* competence or capacity?

Overlapping legal frameworks (1)

- MCA applies to people aged 16+ - except for:
  - Schedule A1 DoLS Safeguards (though Liberty Protection Safeguards will apply)
  - Advance decisions to refuse medical treatment (s. 24(1) – court can 'countermand' capacitous refusal, duty to ensure that children survive to adulthood - *A NHS Trust v X* [2021] EWHC 65; *Re C* [2024] EWHC 3331 (Fam))
  - Power to make LPA (s. 9(2))/ ability to hold LPA
  - Statutory wills (s. 18(2))
- Does not, in general apply under 16 (s. 2(5)) but property and affairs functions may be exercised if court considers it likely that P will still lack capacity to make decisions in respect of that matter when they reach 18 (s. 18(3)).

Overlapping legal frameworks (2)

- At least three different legal frameworks potentially apply:
  - mental capacity law (including, in particular, MCA 2005);
  - family law (including Children Act 1989); and
  - mental health law.
- Two different potential models for assessing decision-making (or *legal*) capacity:
  - Capacity (in general under the MCA 2005); and
  - *Gillick* competence
- Different possible decision-making frameworks for those who lack capacity:
    - Best interests decision-making process under the MCA?
    - Consent from someone with parental responsibility?
- Different grounds for authorising DoL:
  - educational supervision (Art 5(1)(d);
  - unsound mind (Art. 5(1)(e));
- Different routes to court authorisation:
  - Family Court (Children Act issues, including secure accommodation order under s. 25)
  - Inherent jurisdiction of High Court (Family Division) – medical treatment, DoL
  - Court of Protection – DoL, health/welfare, property & affairs

Deprivation of liberty – ground for authorising (1)

- Two potential grounds for authorising DoL of 16/17-year-olds (and younger children) under Art 5(1):
  - For the purposes of educational supervision (Art 5(1)(d)); or
  - on the basis of unsoundness of mind (Art 5(1)(e))

- Possible that both grounds may apply in some cases.

- However, grounds for authorising DoL under Art 5 are **exhaustive:**
  - risk of harm, or absconding, alone (absent unsoundness of mind/educational supervision) **not** sufficient – *Derbyshire CC v AB* [2023] EWHC 1574 (Fam); *A Local Authority v LB* [2025] EWHC (Fam) [20]

Deprivation of liberty – ground for authorizing (2)

- Important to be clear about which ground for authorising a DoL is relied on
  - Requirements for care package/provision differ:
    - DoL under Art 5(1)(d) must "*take place in an appropriate facility with the resources to meet the necessary educational objectives and security requirements*" (*Bokhin v Russia* [2016] ECHR 300);
    - DoL under Art 5(1)(e) must be in an appropriate therapeutic setting and must be accompanied by therapeutic treatment (*Rooman v Belgium* [2019] ECHR 105)
  - Nature of evidence required in support is different:
    - For DoL under Art 5(1)(e) must be medical evidence establishing a "*true mental disorder*" (*Ruiz Rivera v Switzerland*, app. no. 8300/06, 18 February 2014 (§59); *Miklić v Croatia*, app. no. 41023/19, 7 April 2022)
    - For DoL under Art 5(1)(d) must be evidence that sufficient educational element to care to bring it within Art 5(1)(d) (risk of harm not sufficient) - *Derbyshire CC v AB* [2023] EWHC 1574 (Fam)
- Route for authorisation?
  - S. 25 CA/inherent jurisdiction of High Court (Family Division)?
  - Court of Protection?

Deprivation of liberty – ground for authorizing (3)

- Wide scope given to “educational supervision:”
  - Not limited to classroom teaching (*Derbyshire CC v AB* [2023] EWHC 1574 (Fam) [22]
  - Involves education in the broad sense – *Re T* [2022] AC 723 [82]-[88]; *Derbyshire CC v AB* [2023] EWHC 1574 (Fam) [24]
  - May embrace many aspects of the exercise of parental rights for the benefit and protection of the child concerned (*Derbyshire CC v AB* [22]; *P and S v Poland, 2012*, §147; *Ichin v Ukraine, 2010, §39; DG v Ireland*, 2002, §80)

Deprivation of liberty – ground for authorizing (4)

- However, not the same as child protection - *Derbyshire CC v AB* [24]:

> *"Education" in this context can include a proper protective element but must also, and possibly* ***primarily, be focused on supporting, teaching, coaching and possibly persuading a child to understand the world herself better and thus to support him or her to develop the skills she needs to protect herself from harm****. A child may be protected in the short term from harm by series of restrictions which constrain his or her actions. However, in order to come within article 5 there needs to be a* ***sufficient educational element to the care provision which is aimed at ensuring that the child is being educated to protect himself or herself from harm in the future. If that essential educational input is not present, in my judgment, a package of restrictions which are aimed at preventing the child from coming to immediate harm may fall outside article 5(1)(d)****."*

- Nor is it equated with a child's welfare: *A Local Authority v LB* [2025] EWHC 1264 [20], [25]

- ECtHR case law suggests must contain an important core schooling aspect - normal school curriculum must be standard practice, even when temporarily detained– *Blokhin v Russia* [GC], 2016, §170.

Deprivation of liberty – ground for authorizing (5)

- *A local authority v LB & Ors* [2025] EWHC 1264 (Fam) – David Lock KC sitting as a DHCJ:
  - LA's applied under the inherent jurisdiction for an order permitting it to continue to deprive LB (a 15-year-old girl, who was close to turning 16 [2]) of her liberty
  - She was the subject of a care order, made on the basis that her parents could not provide a proper level of parenting support to her because of DV initiated by her father against her mother, and the effects of drug taking in the household [2]
  - LB wished to live with her mother and, in December 2024, had absconded to return there
  - In its application to authorise a DoL, the LA had relied on LB's welfare as a basis for depriving her of her liberty.
  - David Lock KC (sitting as a DHCJ) declined to make an order under the inherent jurisdiction authorising a DoL (see later slides), but adjourned for further evidence
  - Considered considered whether the DoL could be justified on grounds of educational supervision (Art 5(1)(d) but found that, on the basis of the evidence supplied by the LA, it could not be justified under Art 5(1)(d).

Deprivation of liberty – ground for authorizing (5)

"25. I fully accept that the term "educational supervision" in article 5(1) has to be widely interpreted and is far wider than formal classroom based education. However, whilst educational supervision encompasses a wide concept, in my judgment it ***cannot be wholly equated with a child's welfare and restrictions and a deprivation of liberty cannot be justified under this part of the convention primarily to prevent a child absconding****. A Local Authority is fully entitled to advance a case to say that a child has been accommodated in a specific placement where the purpose of the placement is to provide educational support to the child across a wide range of life skills and to show that sufficient resources have been allocated to the placement so as to ensure that the education is a central focus of the placement. As part of that case, it could show that appropriate trained staff have been allocated so as to ensure that this educational provision is delivered. It is also open to a Local Authority to provide evidence to show that (a) in the particular circumstances of the case, this educational support can only be delivered to the child if the child is subject to restrictions on his or her liberty, (b) that those restrictions amount to a deprivation of the child's liberty and (c) that this is both necessary and proportionate. However, absent such evidence, I do not see how a court could properly conclude in a case like the present that the matter comes within article 5(1)(d) as interpreted by the ECtHR in the various cases set out above."*

- Suggest that to satisfy Art 5(1)(d) need evidence that:
  - Purpose of placement is to provide educational support (which can be in relation to a wide range of life skills) and that sufficient resources/staff have been allocated
  - Necessary and proportionate to deprive of liberty in order to deliver that educational support
- Evidence of risk of absconding/harm insufficient by itself.

Deprivation of liberty – section 25/inherent jurisdiction (1)

- *A local authority v LB & Ors [2025[EWHC 1264 (Fam)* – Judge also considered whether s. 25 secure accommodation should have been explored and whether the test for permission to invoke inherent jurisdiction was met
- s. 25 Children Act 1989, which contains provisions which enable a local authority to apply to place a child in secure accommodation if certain conditions are met.

> *(1)Subject to the following provisions of this section, a child who is being looked after by a local authority [F1in England or Wales] may not be placed, and, if placed, may not be kept, in accommodation [F2in England] [F3or Scotland] provided for the purpose of restricting liberty ("secure accommodation") unless it appears—*
> *(a)that—*
> *(i)he has a history of absconding and is likely to abscond from any other description of accommodation; and*
> *(ii)if he absconds, he is likely to suffer significant harm; or*
> *(b)that if he is kept in any other description of accommodation he is likely to injure himself or other persons.*

- To be "secure" purpose of accommodation must be to deprive of liberty
- For secure accommodation order to be lawfully made, must be designated as secure by Secretary of State –severe shortage, and not always suitable.
- In *Re T* [2021] UKSC 35 SC found court had power under inherent jurisdiction to authorise DoL in unregistered secure accommodation (even if that may amount to a criminal offence)

Deprivation of liberty – section 25/inherent jurisdiction (2)

- LA that wishes to place a child in secure accommodation can apply to the court for an order under s. 25(2) for an order permitting such a placement, and court can authorise it for initial period of up typo three months and thereafter for periods of up to 6 months.

- S. 25 can apply to 16+ year-old if SAO made before turned 16 (*Re G (Secure Accommodation)* [2000] 2 FLR 259)

- But could, e.g. apply to a child aged 16+ subject to a care order

- Amendments proposed to s. 25 CA 1989 to extend its scope – Children's Wellbeing and Schools Bill (now at Committee Stage in HL)

Deprivation of liberty – section 25/inherent jurisdiction (3)

LB: Whether s. 25 Children Act 1989 should have been explored

- Judge noted that s. 25 Children Act 1989, which contains provisions which enable a local authority to apply to place a child in secure accommodation could, in principle, be used where a child in care absconded (as *LB* had done in December 2024)
- The Judge stressed that, following the Supreme Court's decision in *Re T (A Child)* [2021] UKSC 35, in cases where s. 25 may apply, s. 25 orders and the inherent jurisdiction could not be seen as alternatives to be selected by an LA at will.
- Instead, before applying under the inherent jurisdiction, LA should have explored the possibility of s. 25 accommodation and set out in evidence why that framework with its protections for the child, had not been used – e.g. that didn't apply, or lack of secure accommodation, need for bridging accommodation or specialist therapeutic need that could not be met in s. 25 accommodation [11]-[12]

- *In any case that potentially falls within s. 25 and in which seeking authorisation under inherent jurisdiction, evidence should address why s. 25 framework not being used.*

Deprivation of liberty – section 25/inherent jurisdiction (4)

Whether s. 100(4) Children Act 1989 was satisfied

- To bring a case under the inherent jurisdiction, the LA needed the leave of the court under s. 100(4) Children Act 1989 [13]
- This requires "*reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child he is likely to suffer significant harm*" (s. 100(4) CA 1989)
- The LA must provide clear evidence as to how and why this condition is met [16]
- While the LA had set out concerns, in general terms, and had concluded that it would be better for LB to live in a placement where she could develop her life skills it had not provided sufficient evidence to establish on the balance of probabilities that LB was likely to suffer significant harm.
- In particular, it had not provided evidence which set out "whether the social workers have asked themselves the questions about how likely it is that LB will be exposed to harm at her mother's house, what the nature of that harm would be and whether it can be said that it is likely that would suffer substantial harm if she was not prevented from returning to live with her mother." [15]

Deprivation of liberty – parental consent (1)

- In *Re D (A Child)* [2019] UKSC 42, the majority of the SC found that parental consent **cannot** be relied on to authorise what would otherwise be a deprivation of liberty:
  - Three limbs of *Storck* test (a) objective component of confinement (*Cheshire West* "acid test"); **(b) subjective component of lack of valid consent**; (c) attributability to the state [1]
  - Question was whether parents, exercising PR could consent to a DoL on behalf of a 16/17 year-old who lacked consent such that limb (b) not met
  - Majority (3:2) found could not – Art 5 designed to protect against arbitrary deprivations of liberty [31] & imposes procedural safeguards [46]; parental consent could not substitute for subjective requirement under Art 5 [42]; no scope for operation of parental responsibility to authorise what would otherwise be a violation of a fundamental human right of a child [49]
  - Did not decide whether same applied in case of younger children (though Lady Hale indicated that, logically, the same principles would apply [50]

Deprivation of liberty – parental consent (2)

Children aged under 16:

- *Lincolnshire County Council v TGA* [2022] EWHC 2323 (Fam) – Lieven J
    - Found that a parent (including testamentary guardian) could consent to the DoL of a child aged under 16 who lacked Gillick competence, provided that there was no dispute that it was in their best interests [47], [58]
    - Host of statutory provisions that mark legal importance of turning 16 and legal separation that gives between child's rights and those of parents [50].
    - However, very nature of family life and protections under Art 8 for parental rights different for child aged under 16 [51]
- *Re J: Local Authority consent to Deprivation of liberty [2024] EWHC 1690 (Fam)* – local authority with PR could provide valid consent
- *Re J* overturned by Court of Appeal – *J v Bath & North East Somerset council* [2025] EWCA Civ 478 – focus should have been on the overarching purpose of Art 5, and if it had been "the inevitable conclusion would have been that, irrespective of the domestic law relating to parental responsibility the state can never give valid consent in these circumstances (Sir Andrew McFarlane [52]); must be independent check on state power (Lady Justice King [57]).

Deprivation of liberty – parental consent (3)

- Parental consent cases concerning DoL of under 16s focus on distinction between 16-year-olds and those aged under 16 (see, e.g. *TGA*, [50]-[51])

- So, arguably, do not affect the position of children aged 16+ (still covered by *Re D*)

Deprivation of liberty & consent revisited – NI AG's reference

- Attorney-General for NI has made a reference to the supreme court about whether proposed changes to NI Code of Practice that differ from approach set out in *Cheshire West* are compatible with Art 5 (right to liberty)
- Specific question:

  > *"Whether the Minister of Health has power to revise the Deprivation of Liberty Safeguards Code of Practice issued under s.288 of the Mental Capacity Act (Northern Ireland) 2016 ('the 2016 Act') so as to provide that, in the context of the delivery of care and treatment, individuals aged 16 and over with impaired decision-making may be understood to be consenting to confinement through the expression of wishes and feelings, so that their circumstances do not fall within the scope of Article 5 of the European Convention on Human Rights ('ECHR')"*

- Will look in more detail at whether a lack of mental capacity (for adults/children) would necessarily mean that the subjective element of limb (b) – lack of consent is not met.
- Implications for 16/17-year-olds – depending on the outcome may mean that limb (b) may not be met even where lacks mental capacity to decide whether to be DoL

Deprivation of liberty & disability (1)

- *Cheshire West* [2014] AC 896:
  - Lord Kerr suggested that, for children, modified version of "acid test" is needed – whether test is met to be determined by comparing the level of restrictions on the child with those on other children of their own age and relative maturity who are free from disability (Lord Kerr [77]-[79])

- *Re D (A Child) [2019] UKSC 42: Lady Hale identified the crux of the matter of whether the acid test is met* is whether the restrictions fall within normal parental control for a child of the relevant age [39]:

  "...[i]t follows that a mentally disabled child who is subject to a level of control beyond that which is normal for a child of his age has been confined within the meaning of Article 5 [42]

Deprivation of liberty & disability (2)

- Application of acid test to young people revisited (though in the context of a child aged under 16) in *Peterborough City Council v Mother (Re SM)* [2024] EWHC 493 (Fam) – Lieven J:
  - 12-year-old girl (SM) with profound disabilities, who was non-mobile and non-verbal.
  - Mrs Justice Lieven found that SM was not deprived of her liberty for the purposes of Art 5 because it was her mental and physical disability - not any 'restrictions' that were put in place by the State or parents to keep them safe – which, in reality, deprived her of her liberty [35].

  - At [38], Lieven J said,

    "On a conceptual level it is difficult to see how one can be deprived of something that one is incapable of doing. Equally, how can one be deprived of a right that one is incapable of exercising, not through the actions of the State or any third party, but by reason of ones own insuperable inabilities."

Deprivation of liberty & disability (3)

- In relation to Lord Kerr's approach in *Cheshire West,* Lieven J observed:
  - Not adopted by the majority of the Supreme Court [24]
  - Wholly unreal exercise to compare SM to another 12-year-old child – baby would be a more useful comparator [25]
  - Lord Kerr was "*simply not addressing the type of facts and, thus the legal issue, that therefore arises in this case*"
  - *Cheshire West* was concerned with three people who were physically capable of leaving the property in which they were confined [31]
  - Axiomatic that the three individuals in *Cheshire West* were not free to leave because of some action (or inaction) of the State and that the SC's decision did not "deal with the situation of a child such as SM how is incapable of 'leaving' because of a combination of her physical and mental disabilities, not by any reason of any restraints placed upon her' [31]
  - In order for there to be a breach of Art 14 ECtHR, it is necessary for there to be different treatment between people in a relevantly similar situation, and the able-bodied 12-year-old is "*plainly not an appropriate comparator*"

Deprivation of liberty & disability (4)

- Lieven J's reasoning not (as a point of principle) confined to children aged under 16
- But appears to conflict with SC's approach in *Re D* (not considered by Lieven J)
- Yet to be seen how will be applied to children aged 16+
- But in recent cases, the correctness of Lieven J's approach has been doubted:
    - *QX (Parental Consent for deprivation of liberty: Children under 16* [2025] EWHC 745. No one sought to argue that this was a *Peterborough*-type case, but HHJ Burrows sitting as High Court Judge described the approach as "plainly wrong"

Deprivation of liberty & disability (4)

"41. Had this case rested wholly or in part on this argument, I would have struggled to follow those authorities that appear to be plainly wrong. Wrong conceptually, because they fail to distinguish between "negative" liberty, the freedom from being prevented from doing something, and "positive liberty", the freedom to be enabled to do something..,Where a carer for a profoundly physically, but not mentally disabled person, decides not to assist that person to move from a place where they do not want to be, no one would surely argue that the disabled person was not deprived of their liberty. Unless, it seems, they are mentally incapable, too. But in that case, the universality of human rights, for abled and disabled people alike, as in Cheshire West must be recognised. In which case both are deprived of their liberty.

42. Wrong also because these decisions seem to conflict with the Cheshire Westdecision as distilled through the Court of Appeal's judgment in Rochdale MBC v. KW[2015] EWCA Civ 1054. In that case, Lord Dyson, MR rejected an earlier iteration of the Peterborough argument, by Mostyn, J. That argument was summarised by the Court of Appeal at [4]:

> *"Mostyn J purported to apply the test required by Cheshire West, although it is clear from para 19 of the first judgment that he did not agree with it. He said at para 17 that it was impossible to see how the protective measures in place for KW could linguistically be characterised as a "deprivation of liberty". Quoting from JS Mill, he said that the protected person was "merely in a state to require being taken care of by others [and] must be protected against their own actions as well as external injury". At para 25, he said that he found that KW was not "in any realistic way being constrained from exercising the freedom to leave, in the required sense, for the essential reason that she does not have the physical or mental ability to exercise that freedom".*

43. The Court of Appeal overturned Mostyn, J.

44. Consequently, a person, subject to a care plan that requires them to reside in a particular place and be under constant supervision and control and are not free to leave, whether or not their physical or mental capabilities prevent them from leaving, is deprived of his/her liberty, absent their consent."

Parental consent in other contexts

- Mental Capacity Act Code of Practice suggests two concurrent frameworks for making decisions about care and treatment for 16/17-year-olds who lack capacity:
    - Best interests decision under MCA 2005 (and/or reliance on s. 5 MCA 2005); or
    - Parental consent, in exercise of parental responsibility

12.16. Under the common law, a person with parental responsibility for a young person is generally able to consent to the young person receiving care or medical treatment where they lack capacity under section 2(1) of the Act. They should act in the young person's best interests.

12.17 However if a young person lacks the mental capacity to make a specific care or treatment decision within section 2(1) of the Act, healthcare staff providing treatment, or a person providing care to the young person, can carry out treatment or care with protection from liability (section 5) whether or not a person with parental responsibility consents.56 They must follow the Act's principles and make sure that the actions they carry out are in the young person's best interests. They must make every effort to work out and consider the young person's wishes, feelings, beliefs and values – both past and present – and consider all other factors in the best interests checklist (see chapter 5).

MCA Best interests/parental consent? (2)

- Guidance can't make the law (*NHS Trust v Y* [2018] UKSC 46).
- However, possibility also left open by SC in *Re D (A Child)* [2019] UKSC 42
  - it was argued on behalf of the Official Solicitor that the MCA 2005 provides a complete decision-making framework for 16-17-year-olds, to the exclusion of other potential models
  - Lady Black rejected that submission [71]:

> *"71….I cannot accept he Official Solicitor's case that the 2005 Act constitutes a complete decision-making framework for the care and treatment of those aged 16 and above who lack capacity, not least because there is an obvious overlap between the reach of the Children Act 1989, and that of the 2005 Act, and I can find nothing in the 2005 Act that could be said to indicate a general rule to the effect that, where it applies, it does so to the exclusion of tother common law and statutory provisions. However, it does seem to me that the deliberate choice of the legislature to include children of 16 to 18 years within the scope of the 2005 Act, and now (by virtue of the recent amendment to the Act, see para 49 of Lady Hale's judgment) to extend a regime of administrative deprivation of liberty safeguards to them, indicates an appreciation of the different needs of this particular age group."*

- Without deciding the issue, Lady Hale said it may well be that, as a general rule, parental responsibility extends to making decisions on behalf of a child of any age who lacks capacity to make them for themselves (subject to court's powers of intervention) [28]

MCA best interests/parental consent (4) – limits of PR

Medical treatment/care falling short of DoL

- Submitted that in cases where 16/17-year-old lacks capacity to decide (under s. 2 MCA), and matter falls within scope of MCA, best interests framework is preferable.
- Highly unlikely to be suitable to rely on parental consent to medical treatment in the face of a capacitous refusal by a 16 or 17-year-old:
  - In *Re D (A Child)* [2019] UKSC 42, [26(i)] Lady Hale called this "controversial"
  - *Re C* [2024] EWHC 3331 (Fam) – application to provide life—saving insulin to 17-year-old with capacity to make decisions about medical treatment and a history of poor-compliance. Parents were supportive of treatment, but Trust did not rely on their consent and, instead sought order from Court – appropriate approach

Competence or capacity – which model to apply

- Capacity under the MCA 2005
  - Presumption of capacity (s. 1(2))
  - Duty to provide support to make decision (s. 1(3))
  - Diagnostic/causation element to the test
  - Level of maturity not relevant

- *Gillick* competence:
  - *Whether has sufficient understanding and intelligence to enable them fully to understand what is involved in a proposed intervention to be able to consent to it.*
  - No presumption of decision-making ability
  - No duty to provide support to make the decision

Competence or capacity – Medical Treatment (1)

Family Law Reform Act 1969, s. 8

Consent by persons over 16 to surgical, medical and dental treatment
(1) The consent of a minor who has attained the age of sixteen years to any surgical, medical or dental treatment which, in the absence of consent, would constitute a trespass to his person, shall be as effective as it would be if he were of full age; and where a minor has by virtue of this section given an effective consent to any treatment it shall not be necessary to obtain any consent for it from his parent or guardian…
(3) Nothing in this section shall be construed as making ineffective any consent which would have been effective if this section had not been enacted."

- Does not say what "consent" is - .e.g. whether *Gillick* competent consent or capacitous consent

Competence or capacity – Medical Treatment (2)

***A NHS Trust v X* [2021] EWHC 65 (Fam) –**

- whether X – a 15 year-old child Jehovah's Witness who was *Gillick* competent had the same exclusive decision-making rights over medical treatment as an adult
- Trust sought rolling order which would authorise blood transfusions as and when needed until X reached 18, even if she refused them.
- In this context, Sir James Munby considered whether, for people aged 16+ the relevant test for medical treatment was *Gillick* competence or mental capacity.
- Applying Lord Donaldson's analysis of s. 8 FLRA 1969 in *In Re W (A Minor) (Medical Treatment: Courts Jurisdiction)* [1993] Fam 64 and *In RE R (A minor) (Wardship: Consent to Treatment*) [1992] Fam 11 Sir James Munby decided that [55]:
  - until a child reaches the age of 16 the relevant inquiry is as to whether the child is *Gillick competent*
  - *Once they are 16: (i) the issue of* Gillick competence falls away, and (ii) the child is assumed to have legal capacity in accordance with section 8, unless (iii) the child is mentally incapacitous (lacks capacity) in the sense in which one speaks of an adult as being incapacitous.

Competence or capacity – Medical Treatment (3)

- Munby J's approach in *A NHS Trust v X* was followed:
  - MacDonald J in *GK and LK v (1) EE (formerly known as KK); (2) A Local Authority* [2023] EWCOP 49 – application to CoP for order preventing surgery or medical treatment in respect of gender reassignment [48]-[49]
  - By Cusworth J in *Y NHS Foundation Trust v (1) and (2)* [2024] EWHC 805 –application under inherent jurisdiction for order authorising NHS Trust to keep 16-year-old "capacitous" girl in hospital for life-saving medical treatment in relation to her leukaemia. Cusworth J approached the matter on the basis that the relevant test was capacity.

Competence or capacity – Medical Treatment (4)

- The ”competence” test has been applied in other cases:

  Re J (Blood Transfusion: Oldre Child: Jehovah's Witnesses) [2024] EWHC 1035 (Fam) - Cobb J

  - Whether authorisation should be given to provide a 17-year-old Jehovah's Witness with blood products in a planned operation.
  - Framed issue of J's own ability to decide whether to have blood transfusions during the operation in terms of competence [24] but was not addressed on the question of whether "*Gillick* competence" or "capacity" was the test to apply

  O v P [2024] EWHC 1077
  - Application by mother of 16-year-old transgender boy to adjourn s. 8 CA 1989 proceedings and seek a declaration that medical treatment of transgender young people with puberty blockers or hormones by a private clinic must be subject to the oversight of the court. Could be read as suggesting that "*Gillick* competence" applies post-16.

Competence or capacity – Medical Treatment (5)

- However, on appeal to the Court of Appeal in *O v P* [2024] accepted (although the point wasn't argued) post-16 it's "capacity" not "*Gillick* competence" applies [3]

> *"This case now concerns mainly, if not only, the third issue that I have described above, namely whether now or in the future the court could or should override any consent given by the young person for cross-sex hormone treatment. It is accepted that, now the young person is 16, no Gillick competence question arises (see Sir James Munby at [55] in An NHS Trust v. X [2021] EWHC 65 (Fam), [2021] 4 WLR 11, and MacDonald J at [48]-[49] in GK and LK v. EE [2023] EWCOP 49). It is also accepted that the young person is "impressive, hardworking and intelligent" and has no mental health problems (see [8], [60] and [62] of the judge's judgment). Accordingly, questions as to the young person's mental capacity (the second issue I have described at [2] above) are unlikely ever to arise."*

Competence or Capacity – Deprivation of Liberty

- Supreme Court in *Re D (A Child)* appears to have proceeded on the basis that for the purpose of the subjective limb of the test for a deprivation of liberty under Article 5 ECHR (lack of consent), it's capacity, not competence, that applies.

- If/when the liberty protection safeguards are implemented, it will be capacity, not competence that is the test.

Competence or capacity – other contexts

- Reasoning of Sir James Munby in *A NHS Trust v X* was based on s. 8 FLRA, which only applies to medical treatment (and ancillary procedures, including anaesthetic) and diagnostic procedures.
- Not entirely clear which test applies in other contexts (e.g. non-therapeutic interventions/ to other issues)

Competence or capacity – practical implications

- If seeking to rely on MCA 2005, s. 5 (acts in connection with care and treatment), or a decision from the CoP it's s. 2 "capacity" not competence that determines jurisdiction
- Irrespective of which test applies:
  - the court (though not the CoP) retains power to 'countermand' capacitous (or competent) decisions (*An NHS Trust v X* [2021] EWHC 65 (Fam); *O v P, Q* [2024[EWCA Civ 1577)
  - however, the court's best interests jurisdiction in respect of medical treatment given by a capacitous 16/17 year-old is not a general welfare jurisdiction.
  - Court will only override capacitous consent where necessary to intervene to protect them from 'grave and irreversible mental or physical harm' (*O v P, Q* [46]; *Re W,* p. 94)

Executive Functioning

Amanda Weston KC, Garden Court Chambers

2 July 2025

Gary's story

- Gary is 20 and 'aged out' of children's social services.
- During his childhood, he has lived in many different places, in and out of temporary foster care, placed with his mother (mental health difficulties), removed from his mother's care and placed with father, that relationship broke down.
- Early problems with behaviour and learning (primary school)
- No EHCP until aged 15 – no formal diagnosis 'developmental delay' (?FAS??)
- Referral to CAMHS ineffective as Gary DNA
- Allocated tenancy of studio flat in centre of town - but not taken up
- LA Appointee for benefits – however Gary reliant on food banks – food delivery by outreach volunteers who often find him in town, intoxicated and hungry.
- Gary has a 'friendship group' who often borrow money from him and congregate in his home.

TO BE CONTINUED

What does Gary's support look like?

- Gary's social worker felt that he did have capacity for a tenancy as he understood how much items cost and what type of accommodation he wanted, but the Housing Department assessed that he did not, because he could not understand the consequences of breaching the conditions of his tenancy. No escalation pathway, stalemate.

- Referral to the LD team of ASS, by CSS transitions team, resulted in a 'triage' finding of no eligibility, no need for Care Act Assessment, Gary's aunt made a safeguarding complaint clear, but the LA response is that since ASS have concluded that Gary has capacity to take decisions around his accommodation, therefore his insecurity is as a consequence of his 'unwise decisions' and "lifestyle choices". No consideration of 'executive capacity'.

- Leaving care team not involved – Gary was not recorded as looked after for a 13-week period (although he probably was accommodated for a sufficient period under s 20).

- Gary, as a young adult, is highly resentful of LA's continued interventions.

- Community support team aware of him as he does approach them for support for discretionary payments, food parcels, etc.

Executive functioning – what is it?

- NICE Guidance:

The completion of tasks that involve several steps or decisions normally involves the operation of mental processes known as '**executive functions**'. If these executive functions do not develop normally, or are damaged by brain injury or illness, this can cause something called 'executive dysfunction'. **This involves a range of difficulties in everyday planning and decision-making, which can be sometimes hard to detect using standard clinical tests and assessments.**

Variety of terms used: "executive capacity" "executive dysfunction"

Executive functioning – breaking it down – composite tasks

- **Planning** - identify an end goal and how to reach this goal.
- **Initiation** - getting started on a task or taking action.
- **Prioritisation** - decide what is more and less important and then focus accordingly.
- **Self - Organisation** - keep track of belongings, organise thoughts, manage time and know how to get things done.
- **Flexible thinking** - think about different ways to solve problems, adjust to new situations, learn from mistakes, cope with routine changes, try new things and switch from one task to another.
- **Impulse control -** think before acting or speaking and appreciate consequences of actions/behaviour.
- **Emotional insight -** feel, identify, label and know the difference between different emotions and regulate them in a variety of social situations.
- **Working memory -** hold information in mind for a period of time and process it to problem solve and make decisions.

Some barriers to understanding impact of EF

- Problems with EF can be temporary – grief reaction, intoxication, depression
- General levels of consensus or understanding among professionals patchy – EF means different things to different
- Presumption of capacity and right to make ‘unwise choices’ disincentive to investigate
- Safeguarding v state oppression; freedom to make “lifestyle choices v protection from exploitation and risk”
- Impact of trauma, ACEs on development of executive functioning
- Masking
- Silos – housing, health and social care – all with slightly different approaches – no consistency of approach

Limits of the MCA 2005, Code of Practice and guidance for professionals

- Guidance does not address “executive capacity”, which is the ability to implement decisions taken and to deal with the consequences and the impact of someone else’s undue influence on the decision-making process.

- MCA statute, guidance toolbox and training doesn’t address in a coherent, way – no one consistent understanding of what is ‘EF’- NOT consistent with MCA ‘task and decision specific’ approach and presumption of capacity

- See approach in ***Re RS*** where ‘executive functioning’ described as providing a:
- “a causative nexus between the first and second stage of the capacity test … not possible to say RS's difficulties with decision making result from an impairment in the functioning of his mind and brain, as opposed to from his psychological makeup, his sexual proclivities and desire and the fact he is a young man with a level of impulsivity commonly seen at his age, which factors cause him to make unwise, but capacitous decision. This was because of a number of factors…..

MCA 2005, Code of Practice and guidance for professionals

- ***Re RS*** continued:

"It is important not to use repetitive risky behaviour to justify an assessment of lack of capacity (see e.g. example of a doctor who continues to smoke despite being fully cognisant of, and able to weigh up the risks of lung cancer, develops lung cancer and then goes back to smoking after the operation to remove the cancer). Repeated risk-taking behaviour may simply mean that the risk has been understood, weighed up and a decision made to take the risk again. Why RS continues to behave in a risky manner is complex."

- Re ***Re: A (Capacity: Social Media and Internet Use: Best Interests)*** [2019] EWCOP 2

"The evidence has largely been directed to the familiar 'functionality' test contained in section 3 ; this requires me to consider whether A can (a) understand the information relevant to each decision, (b) retain that information, (c) use or weigh that information as part of the process of making the decision or (d) communicate his decision (whether by talking, using sign language or any other means). If it is shown on the balance of probabilities that he is unable in any of these respects, then he is regarded as "unable to make a decision for himself"…. I have been most concerned with the issues of 'understanding' ((a) above) and 'using and weighing' ((c) above)…. **I have had to consider whether A's conduct reflects an inability to make a decision or whether it is 'unwise' decision-making** (section 1(4)).

MCA 2005, Code of Practice and guidance for professionals

- Re ***Re: A (Capacity: Social Media and Internet Use: Best Interests)*** [2019] EWCOP 2 continued: Cobb J considers key factors on the issue of capacity in A's case:

- A had only a partial understanding that information and images (including videos) which he shared on the internet or through social media could be shared more widely, including with people he didn't know. - "limited" understanding of privacy settings;

- Only a partial understanding that people may be upset or offended by information shared online but was not able to 'use or weigh' that information.

- "Poor" understanding of the risks which people might pose online and could not understand that people may disguise their identity to take advantage of him.

- "[A] is very, very, trusting. He is therefore easy to manipulate on the internet… He has no understanding of ulterior motives"; he was not able to 'use or weigh' the information that he may in fact be committing an offence in relation to e.g. sharing images

MCA 2005, Code of Practice and guidance for professionals

- Re ***Re: A (Capacity: Social Media and Internet Use: Best Interests)*** [2019] EWCOP 2 continued Cobb J's conclusions –

32. I am satisfied that the capacity assessment of A has been undertaken in an appropriate way by an experienced practitioner. It reveals clearly A's difficulty with flexible adaptive reasoning – that is, while in some respects he can repeat back what he has been told, he is unable to apply it to actual situations. I am equally satisfied that over recent months and years a number of practicable steps (section 1(3)) have been taken (and are still being taken) to help A to understand the issues, without success. The brief summary of the relevant and powerful evidence in [31] above are sufficient to reveal the deficits in A's ability to understand, and/or use or weigh the relevant evidence. This is not just 'unwise' behaviour. In the circumstances, I have reached the conclusion (section 15 MCA 2005) that he lacks capacity to use the internet or social media.

Limits of the jurisdiction to manage risks to vulnerable service users: applicant to CoP has to show lack of capacity within the MCA – not 'unwise decisions'.
How are professionals with safeguarding duties to manage risk?

Multi-disciplinary approach to assessment?

- Mental capacity assessments should **explore, rather than simply accept, notions of lifestyle choice.** This means applying understanding of executive capacity and how adverse childhood experiences, trauma and 'enmeshed' situations can affect decision-making. Repeating patterns may be one clue here, particularly when someone does not follow through on expressed intentions.

- Appointeeship was in place to enable LA to obtain and manage welfare benefits, pay bills, etc. Functioning assessment would have looked at how well Garry is managing small cash amounts for food, etc., whether being exploited – functioning 'in practice'

- Staged approach to independent living: assess the impact of trauma/ACEs on functioning, specialist behavioural input to be delivered through one small trusted group of key workers, making offers of support, meaningful, safe, supported accommodation as a starting point (away from identified risks)

- Safeguarding partnerships - all professionals clear across LA departments, health and MASH etc., how to resolve conflicts across services, consistent approach to multi-agency assessment executive functioning over time.

Using the inherent jurisdiction & current problems with COP

Tim Baldwin, Garden Court Chambers

2 July 2025

Airedale NHS Trust v Bland [1993] AC 789

- Pre-MCA 2005 case withhold medical treatment from Hillsborough victim in PVS. No conscious and no hope of recovery. Hospital with consent of parents sought declaration to withdraw treatment.

- Although the case did not directly invoke the *parens patriae* doctrine the decision reflected the then position of court's role as a guardian of individuals unable to make decisions for themselves, a function closely related to the *parens patiriae* concept.

- *Parens patriae* doctrine meaning "father (parent) of the country" or in these circumstances Queen Elizabeth II referred to as the mother of all people. A legal principle that gives the state the power to act as guardians for individuals who cannot make decisions for themselves, particularly those who are vulnerable like children or those with mental incapacities.

- In ***Bland*** a best interest decision on withdrawal of treatment.

- Pre HRA 1998 – pre s 42 Care Act 2014

N v ACCG [2017] UKSC 22

- The jurisdiction of the Court of Protection is limited to decisions that a person ('P') could take if he had the capacity to do so. It is not to be equated with the jurisdiction of the courts to make orders in respect of children: under the MCA the court does not become the guardian of an adult who lacks capacity, and the adult does not become the ward of the court.

- The MCA focuses on capacity in relation to a specific decision or matter. Rather than granting declaratory relief available under section 15, it is better, if possible, for the court to make orders under section 16.

- There is scope under section 16 for the court to make a decision on P's behalf, or to appoint a deputy to make such decisions, and the court's powers set out in section 17 include the power to decide where P is to live and what contact, if any, P is to have with any specified persons. These powers do not extend to decisions compelling third parties to accommodate, or meet, or to provide services or treatments for P.

- The fact that the court has no greater power to take a decision than P would have had himself means that it too can only choose between the 'available options'.

N v ACCG [2017] UKSC 22 continued

- The It resembles the inability of the family court in children cases to oblige an unwilling parent to have the child to live with him, or to oblige an unwilling health service to provide a particular treatment for the child.
- Nor can the court use its powers to put pressure upon a local authority to make particular decisions in exercise of its statutory powers and duties to provide public services.
- Such decisions can instead be challenged on judicial review principles, where the legal considerations for the public authority and for the court will be different from those under the MCA.
- Scope of s 47 Mental Capacity Act 2004 – High Court jurisdiction – inherent jurisdiction e.g. the making of injunctions?

Inherent Jurisdiction – High Court

- Inherent jurisdiction now – “safety net” for “vulnerable” adults offering protection when statutory remedies within MCA 2005 are insufficient or unavailable, e.g. when adult has capacity to make relevant decision.
- It can apply to adults who are vulnerable either due to lack of capacity or with capacity but are subject to undue influence, coercion or control.
- Jurisdiction steps in when MCA 2005 or statutory framework does not provide solution or remedy or when someone may lack capacity to make a decision for reasons other than mental impairment.
- Goal is related to safeguarding to enable vulnerable adults to make their own decisions or protect them when they are unable to make their own decisions.
- High Court can make various orders including restriction on their movement, require them to live at a particular location, or even deprive them of their liberty. But to be used sparingly and with careful consideration.
- Applications are made to High Court under Part 8 CPR: Require very careful evidence and must be proportionate to risk.
- Facilitative approach rather than imposing decisions.

When can it be used: some examples

- Lacks capacity due to situational factors: Language issues and barriers.
- To protect against undue influence or coercion by another person – financial matters and injunctions.
- Possible with issues of fluctuating mental capacity.
- Living situation poses risks to their wellbeing. Loss of previous statutory mechanisms.
- So, the questions are; when can it be used and how far can it go?

Some recent case-law examples

- *Re RK* (Capacity: Contact Inherent jurisdiction) [2023] EWCOP 37 Cobb J

- Article 3 – Ill Treatment and limits of States obligation? *Re P (Vulnerable Adult: Withdrawal of Application)* 2024 EWHC 1882 (Fam)

Present problems with the COP: is it currently fit for purpose?

- Really identifying disputes and when the court needs to be involved
- Delays – cases run for a long time take a lot of resource?
- S 21A is it used for issues beyond those intended?
- Is the COP overly "legalised" – Legislation, schedules, Practice Directions, Rules and Guidance – has it become difficult to navigate, overly complex and legalistic such that it is user unfriendly? Was that the intention?
- Judicial attitudes – problems with compliance with directions orders.
- The "hubs" are they failing? Not getting to the judge.
- Judge not reading the papers!
- Dealing with dual applications COP and IH – can this work effectively and how?
- Do we need urgent reform?

Thank you

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