



Thirty Nine Essex Street Court of Protection Newsletter: February 2011

Alex Ruck Keene and Victoria Butler - Cole
Editors

Introduction

Welcome to the February 2011 edition of our Newsletter. The main focus of this issue is the case of *D Borough Council v AB* [2011] EWHC 101 (COP), in which Mostyn J took on the difficult question of whether capacity to consent to sexual relations is 'issue' or 'person' specific. We are also very grateful to Vikram Sachdeva for his contribution by way of a guest commentary upon the topic of consent.

The pace of judgments has slowed down somewhat from the (relative) torrent at the end of last year, but for many February will end on an important note when the Court of Appeal hands down *Re MIG and MEG* on the 28th.

As ever, contributions or comments are very much appreciated, our email addresses being at the end of this Newsletter.

Cases

All cases discussed below can be found on www.mentalhealthlaw.co.uk if not otherwise available.

D Borough Council v AB [2011] EWHC 101 (COP)

Summary

In this case, the High Court (Mostyn J) was once again asked to consider the correct test for

capacity to consent to sexual relations. The case, which received considerable publicity, concerned A, who had a moderate learning disability and had developed a homosexual relationship with a fellow service user, K. There was no evidence of an exploitative relationship, but the local authority had in addition been alerted to two incidents in which members of the public had raised concerns about A's behaviour in public. The local authority sought a declaration that A did not have capacity to consent to sexual relations and that he should not have sexual contact with K.

The jointly-instructed expert advised that the following factors needed to be understood for someone to have capacity to consent to sexual relations: For capacity to consent to sex to be present the following factors must be understood: (a) the mechanics of the act, (b) that only adults over the age of 16 should do it (and therefore participants need to be able to distinguish accurately between adults and children), (c) that both (or all) parties to the act need to consent to it, (d) that there are health risks involved, particularly the acquisition of sexually transmitted and sexually transmissible infections, (e) that sex between a man and a woman may result in the woman becoming pregnant, and (f) that sex is part of having relationships with people and may have emotional consequences.

The judge rejected this analysis, and the local authority's submission that the personality and



characteristics of the sexual partner were relevant factors. He adopted the approach set out by Munby J in the cases of *X City Council v MB, NB and MAB* [2006] EWHC 168 (Fam), [2006] 2 FLR 968 and *Local Authority X v MM and KM* [2007] EWHC 2003 (Fam), [2009] 1 FLR 443, that consent to sexual relations is act-specific, not person- or situation-specific. He concluded (at paragraph 42) that the only information relevant to giving consent which the person must understand and retain is (a) the mechanics of the act, (b) that there are health risks involved including STIs, and (c), for heterosexual relations only, that sex between a man and a woman may result in pregnancy.

On the facts, the judge found that A lacked capacity because he had a very limited and faulty understanding of sexually transmitted infections, believing that sex could give you spots or measles. Clearly, A understood the mechanics of the act, because he had already engaged in sexual activity.

However, the judge refused to grant a final declaration and said that the local authority must put in place educational measures to assist A to acquire capacity. This went against the recommendation of the expert, who considered that it would not be in A's best interests to undergo such education. A might become confused and anxious and exhibit challenging behaviour which would jeopardise his placement.

Comment: Victoria Butler Cole

The law on capacity to consent to sexual relations is in disarray. This decision conflicts with the recent decision of Wood J in *LS*,¹ and it is difficult to see how the two judgments can be reconciled (or how this judgment can be reconciled with that of the House of Lords in *R v Cooper* [2009] 1 WLR 1786).

Permission to appeal was granted to the local authority but it is unlikely that an appeal will be pursued given the current economic climate, and that the local authority agreed with the Official Solicitor that A lacked capacity to consent to

sexual relations (albeit that they differed over the test that generated that conclusion). In the view of the authors, A's case would not be well suited to becoming a test case, since there was no concern about exploitation of A, and the reasons for proposing a person- and situation-specific test were far from clear. One of the difficulties with cases on capacity to consent to sexual relations is that the particular circumstances of the individual concern necessarily limit the scope of the court's deliberations - decisions are made in the absence of sufficient information about the circumstances in which the test may need to be applied. Thus, in this case, the lowest degree of knowledge possible was found to be needed to consent to sex. Had, for example, the judge been considering heterosexual relations, he may well have concluded that understanding not just the risk of becoming pregnant but that pregnancy itself may carry risks, was necessary. Had, for example, there been an exploitative relationship, the judge may have been more inclined to prefer a test that does not impose a blanket ban on sexual relations, but only within an exploitative relationship.

If this decision is correct, it is clear that the criminal test for capacity under s.30 of the Sexual Offences Act 2003 and the civil test are not the same; a point which was not acknowledged in A's case. It may also, counter-intuitively, impose more restrictions on people with learning disabilities rather than promote their sexual freedom, since where an exploitative or abusive relationship exists, the inclination may well be to 'fail' the individual on the test for capacity (as there is inevitably a degree of flexibility about how much knowledge of, for example, STIs, is required). This could then result in a global declaration preventing sexual contact for the individual in other, non-exploitative contexts. Local authorities and those working in this area can only hope that the issue does receive consideration by the Court of Appeal in the near future.

Comment: Vikram Sachdeva, 39 Essex Street

The correct test for capacity to consent to sexual relations is a highly controversial topic. The answer depends on an examination of the philosophical basis underlying incapacity law –

¹ *D County Council v LS* [2010] EWHC 1544.



specifically whether it is justified (on a utilitarian basis) to prevent significant sections of the population from indulging in sexual activity in order to prevent abuse in a small number of cases, or whether fewer should be barred from sexual activity, but with a risk of abuse in a small number of cases which would have otherwise been avoided.

This issue underlies another conceptual question: whether capacity to consent to sexual relations should be situation – (and therefore person -) specific, within *Re MB* [1997] 2 FLR 426, or whether it is not (as with marriage: see *Sheffield County Council v E* [2005] Fam 326). Or is the capacity to consent to marriage also situation-specific?

Further, is it essential (rather than merely desirable) for the test for capacity to consent to be identical in the criminal and the civil law? This again will depend on the purpose served by incapacity in the criminal and civil law, which may not be the same.

Although a number of first instance judges have valiantly tried to square the circle (Munby J (as he then was) in *X City Council v MB, NB and MAB* [2006] EWHC 168 (Fam) and in *Local Authority X v MM and KM* [2007] EWHC 2003 (Fam); Roderic Wood J in *D County Council v LS* [2010] EWHC 1544(Fam); *Mostyn J in D Borough Council v AB* [2011] EWHC 101 (COP), and the House of Lords has expressed a view in passing (*R v Cooper* [2009] UKHL 42 [2009] 1 LR 1786)), ultimately the answer is a question of policy for the Supreme Court. Its judgment will certainly make interesting reading...

Rudyard Kipling Thorpe (as Litigation Friend to Mrs Leonie Leanthie Hill) v Fellowes Solicitors LLP [2011] EWHC 61 (QB)

Summary

This wonderfully-named case arises in a context relatively far removed from the Court of Protection, namely a professional negligence action against a firm of solicitors involved in the sale of home of Mrs Hill (the mother of Mr Thorpe). It does, however, provide a useful restatement of the principles governing the

circumstances under which solicitors should take steps to confirm whether their clients lack capacity to give instructions.

For present purposes, the material contention on the part of the Claimant was that the solicitors had acted on the sale of the house without proper instructions because Mrs Hill was suffering from dementia. The evidence of the jointly instructed neurological expert, accepted by Sharp J (in the face of attempts by the Claimant to seek to undermine that evidence that the judge deprecated in strong terms) was that in Mrs Hill was suffering from mixed degenerative and vascular dementia. He concluded it was likely that this would have caused Mrs Hill cognitive difficulties. However, in his view:

“cognitive function can be quite impaired and yet a patient can still have free will and sense of what they want and what they do not want. It would be egregious to deny patients with dementia a say in their own care and a say in the disposal of their possessions. Just because their intellectual capacity is reduced it does not mean that they do not have the right to still make decisions. It is impossible ever to know exactly when the capacity to make decisions is completely lost, but when assessing this medically one would question the patient about how she understands the effect of her decision on other people and if the patient does understand this, even if there is profound cognitive compromise, then I would suggest that capacity is retained.

There is evidence from the solicitors that they met the client and she did understand the instructions and was, in fact, quite vehement in her direction to make a sale of the house and she understood the implications of this. Therefore my conclusion is that although she had cognitive problems that may have interfered with her decision making [s]he still had capacity in the sense that this was her opinion at the time and this was the expression of her free will.”



The expert concluded it was unlikely that Mrs Hill's dementia would have been apparent to a competent solicitor:

"Many patients with dementia actually come across as quite sociable and engaging and are able to ... answer a number of questions reasonably coherently. This all depends on what type of dementia is occurring but I think it would be entirely plausible that someone with mild to moderate dementia, as Mrs Hill, was suffering from, would not be apparent to a solicitor who engages her in conversation for the first time."

It was only if a solicitor perceived that there might be medical issues that a doctor's report would be obtained:

"but as far as I understand it the medical circumstances surrounding Mrs Hill were never discussed with the solicitor and one would not expect them to be discussed."

He said that overall, he shared some disquiet about this case and the sense that Mrs Hill's intellectual function was definitely impaired at the time she made these decisions. Nevertheless, his conclusion was that:

"... there is no reason to suppose that actually [Mrs Hill] was not acting with capacity at the time and this was not the expression of her free will."

In further written responses, the expert said there had been no change in the tests applied to assess cognitive function over the relevant period; and

"Patients with dementia can be vulnerable to influence by other people. The dementia may impact on the understanding of particular matters. However, even patients with quite severe dementia could still have formed and reasonable opinion" (sic).

Sharp J concluded (at paragraph 74) that there was no evidence that the solicitor in question knew at the material time that Mrs Hill was suffering from dementia, or ought to have appreciated that this was the position during the course of the retainer (indeed, this was apparently not put to the solicitor in cross-examination). She continued (at paragraphs 75 ff):

A solicitor is generally only required to make inquiries as to a person's capacity to contract if there are circumstances such as to raise doubt as to this in the mind of a reasonably competent practitioner; see, Jackson & Powell at 11-221 and by analogy Hall v Estate of Bruce Bennett [2003] WTLR 827. This position is reflected in the guidance given to solicitors in The Guide to the Professional Conduct of Solicitors (8th edition, 1999) which was in force at the relevant time, where it is said that there is a presumption of capacity, and that only if this is called into question should a solicitor seek a doctor's report (with the client's consent) "However, you should also make your own assessment and not rely solely upon the doctor's assessment" (at 24.04).

76. In opening, the Claimant's case was put on the basis that [the solicitors] ought to have been "more careful" with regard to the sale of the Property because Mrs Hill was suffering from dementia and did not really know what she was doing. The relevant test where professional negligence is alleged however is not whether someone should have been more careful. The standard of care is not that of a particularly meticulous and conscientious practitioner. The test is what a reasonably competent practitioner would do having regard to the standards normally adopted in his profession: see Midland Bank Trust Co Ltd v Hett Stubbs and Kemp [1979] Ch 384 at 403 per Oliver J at 403.

77. I should add (since at least part of



the Claimant's case seemed to have suggested, at least implicitly, that this was the case) that there is plainly no duty upon solicitors in general to obtain medical evidence on every occasion upon which they are instructed by an elderly client just in case they lack capacity. Such a requirement would be insulting and unnecessary."

Comment

The reiteration by Sharp J as to the duties imposed upon solicitors is a helpful summary of the position, and we would strongly endorse the statement at paragraph 77 of her judgment.

As a side note, we have reproduced the full extracts of the evidence of the consultant neurologist from the judgment partly because they would appear in our respectful submission to be rather curious. Whilst the decision in question was taken prior to the coming into force of the MCA 2005, the material underlying principles were essentially identical, and it would seem to us that it would have been possible to dissect the evidence of the neurologist forensically as failing to address the necessary issues. Sharp J does not seem to have considered these issues (or indeed whether the MCA 2005 applied). However, we would entirely share the sentiments the neurologist expressed about the need to ensure that assumptions are not made about those with dementia and about the need to ensure that their wishes are respected. We would also note the – related – exhortation to this end given to both of us in a recent directions hearing before Hedley J, where he bemoaned (without reference to the specific case before him) what he perceived as a seeming trend in the Court of Protection to place safety above all considerations.

HAWORTH V CARTMEL & COMMISSIONERS FOR HM REVENUE AND CUSTOMS [2011] EWHC 36 (Ch)

Summary

This fascinating case shows the reach of the MCA 2005. It came before HHJ Pelling QC (sitting as a Judge of the High Court) as an

application for a bankruptcy order to be annulled or rescinded. The application was made on the basis that either the applicant lacked relevant capacity on 2.5.08 (in relation to the purported service upon her by HMRC of a Statutory Demand) and/or during the period between 8.7.08 and 29.8.08 (in relation to the purported service by HMRC on the applicant of a bankruptcy Petition and hearing of that Petition) or that in serving the Statutory Demand and/or the Petition and/or inviting the Court to make a bankruptcy order HMRC acted in unlawful breach of the duties HMRC owed to the applicant under the Disability Discrimination Act 1995 ("DDA").

The applicant lacked litigation capacity, and was represented by the Official Solicitor as litigation friend.

The judge conducted an extremely extensive reconstruction exercise to seek to determine whether the applicant had the relevant capacity at the material times, reminding himself by reference to the MCA 2005 that it was issue and situation specific. As regards the Statutory Demand, the issue was whether the Claimant had established that she lacked the capacity to respond to the Demand on or after 2.5.08. The judge found (at paragraph 56) that:

The decisions and the steps that the applicant would have to have taken when she was served with the Statutory Demand was whether to open the envelope, understand the contents, retain the information long enough to take a decision as to what to do and then communicate that decision or decide to seek assistance from a third party. As I have already found, the applicant did not open the envelope containing the Statutory Demand. At the time that the applicant was served with the Statutory Demand it is common ground between the experts that the applicant was suffering from an impairment of the mind. The issue is whether the failure to open the letter was a consequence of this disorder as to which [the Claimant's expert] maintains that it was but [the expert



instructed by HMRC] *apparently does not.*

Having set out the respective evidence of the experts in some detail, HHJ Pelling QC concluded (at paragraph 69) that:

“the Claimant has established the existence of a condition that prevented her from opening mail at the time the Statutory Demand was served. Put simply at that time she could not and did not open the envelope containing the Statutory Demand.”

He continued, however:

“Since capacity is concerned with the ability to understand retain and evaluate information, and since the information that I am here concerned with is the information contained in the Statutory Demand and the importance of that document, an issue arises as to whether an irrational inability to access the information is relevant at all. The applicant’s submission was that without opening the envelope containing the Statutory Demand she could not make a decision to respond because she could not understand or evaluate the contents of the Statutory Demand or its overall importance. I have concluded that the applicant was unable to open the envelope because she suffered from a phobia which irrationally precluded her from taking that action. If, therefore, the true decision I am concerned with is not the evaluation of the contents of the Statutory Demand or its importance but the decision whether to open the envelope then the decision not to open the envelope is not a true decision at all because the applicant’s judgment has been so distorted by the phobia so as to render it an invalid [sic].”

HHJ Pelling therefore concluded that the applicant did not have the mental capacity to respond to the Statutory Demand either when it was served on her or thereafter down to the date when the bankruptcy order was made.

He therefore turned to consider whether the applicant had established that she lacked at the material time the capacity to understand the importance of the Bankruptcy Petition and act upon it. He noted (at paragraph 75) that the questions were more difficult than those in relation to the Statutory Demand, largely because there was evidence which appeared to point towards the applicant having at least had some understanding of its importance. However, having reviewed the totality of the evidence, he declared himself satisfied (at paragraph 84) that it was more probable than not that (a) at the date the applicant was served with the Petition she was suffering from an acute anxiety episode and (b) the effect of that episode was to deprive her of the capacity to understand the contents or significance to her of the Petition or the need for her to seek help from others or to retain that information for sufficiently long to seek the assistance of others.

Whilst not strictly relevant for readers of this Newsletter, it is perhaps also worth noting that the Judge further concluded that, were he to be wrong as to the conclusions on capacity, he would have found that HMRC had breached their obligations under the (then) DDA in essence by failing to have have any or any sufficient regard to the fact that the applicant could not respond or was impaired from responding by reason of her inability to respond to postal communications or otherwise manage her own affairs either adequately or at all. Not the least of the failings of HMRC identified was the failure to bring to the Court’s attention as at the date the Petition came on for hearing the information available to them as to the applicant’s disability.

Comment

The facts of this case are extremely unusual, and it is in the authors’ view very unlikely that many individuals will successfully defend claims against them on the basis that Ms Haworth did. It is, however, noteworthy as a case study in careful forensic analysis by experts and, in particular, the Court, of the capacity of a particular individual to take particular decisions



and particular steps at specific times. It is also noteworthy as a reminder of the fact that practitioners and professionals must always be alert to the fact that incapacity to make decisions can manifest itself in unusual ways and in unexpected circumstances.

Re Davies Decision of the General Social Care Council Conduct Committee 10.12.10

Summary and comment

This case (brought to our attention by the editor of Mentalhealthlaw) merits brief mention as a cautionary tale. One of the grounds upon which the social worker in question was suspended for 12 months for misconduct was because the Conduct Committee was satisfied that he had failed to ensure that an application for a Court of Protection order in respect of a service user was made expeditiously or at all for a period of a period of some 17 months. As the social worker admitted the charge, there is no further detail to be found on the GSCC website as to the circumstances of Mr Z and/or as to what order should have been sought.

Our next update should be out in March 2011, but we will be circulating *Re MIG and MEG* when it is handed down by the Court of Appeal.

Please email us with any judgments and/or other items which you would like to be included: full credit is always given.

Alex Ruck Keene
alex.ruckkeene@39essex.com

Victoria Butler-Cole
vb@39essex.com



Contributors:



Alex Ruck Keene: alex.ruckkeene@39essex.com

Alex has a very busy practice before the Court of Protection. He is regularly instructed by individuals (including on behalf of the Official Solicitor), NHS bodies and local authorities. He is a co-author of Jordan's Court of Protection Practice 2011 (forthcoming), and a contributor to the third edition of the Assessment of Mental Capacity (Law Society/BMA 2009)



Victoria Butler Cole: vb@39essex.com

Victoria regularly appears in the Court of Protection instructed by the Official Solicitor, family members, and statutory bodies. She previously lectured in Medical Ethics at King's College London and was Assistant Director of the Nuffield Council on Bioethics. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights' and a contributor to the Assessment of Mental Capacity (Law Society/BMA 2009).

David Barnes Director of Clerking
david.barnes@39essex.com

Alastair Davidson Senior Clerk
alastair.davidson@39essex.com

Sheraton Doyle Practice Manager
sheraton.doyle@39essex.com

Peter Campbell Assistant Practice Manager
peter.campbell@39essex.com

For further details on Chambers please visit our website www.39essex.com

London
39 Essex Street London WC2R 3AT
Tel: +44 (020) 7832 1111 Fax: +44 (020) 7353 3978

Manchester
82 King Street Manchester M2 4WQ
Tel: +44 (0) 161 870 0333 Fax: +44 (020) 7353 3978

Email: clerks@39essex.com