The decision of the Court of Appeal in *(1) PC and (2) NC v City of York* [2013] EWCA Civ 478

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Introduction

The argument about "issue specific" and "person specific" decision making capacity has taken a new turn. The Court of Appeal has held, in *PC's* case, that what is at issue is the capacity to make decisions (about a matter or matters). Undoubtedly that is correct but a "decision-specific" approach, which requires that capacity must be assessed with respect to each and every individual decision which falls for consideration[1], surely cannot be practicable? It must surely be, as has hitherto been thought to be the case, that capacity can lawfully and properly be assessed in relation to the making of decisions about matters of a class generally.

While it can be argued that the particular decision is the one which has been brought before the court, that is no answer to the fact that a myriad of decisions are made by, or have to be made for, the person concerned throughout their life, and they all cannot be brought before the court. Where a person does not have capacity to make the decisions, then the decisions need to be made for them, in their best interests and with the least restrictive outcome. But that does not mean that where they lack capacity, they can properly be treated as if they had capacity, unless and until they are about to make, or have made, unwise decisions.

Can it be lawful for the State to seek to interfere in the decision making of a person who has enjoyed autonomy in the community for years, because a local authority has decided that a decision or decisions, made or being made, in relation to a particular individual, by the person is or are unwise? This is especially worrying in cases where the local authority does not appear to have thought through the safeguarding corollaries of any such capacity finding.

There will undoubtedly be cases in which there has been an earlier failure to identify a lack of capacity. In them, once the lack of capacity is established safeguarding measures, including substituted decision-making, will need to be put in place. But the effect of those measures, necessary to protect the person from the consequences of their lack of capacity, will constitute substantial interference with the person's autonomy.

A regime "for evaluating capacity [which] is to be applied to *each and every individual decision* which falls for consideration" appears to beg the questions of when, in what circumstances and by whom the decision falls for consideration?

It is a prerequisite to a person falling within the scope of the statutory scheme created by and under the MCA that they both

[1] See per McFarlane LJ at [36].

- have an impairment of, disturbance in the functioning of, the mind or brain, and
- that their impairment or disturbance in functioning of, the mind or brain, causes them to be unable to make a decision for themself in relation to a matter.

Policy objective of the legislation

One of the policy aims of the statutory scheme appears to have been to preserve the autonomy persons with capacity but who might otherwise be thought to fall within the scope of the scheme. Baroness Hale's speech at paragraph 13 of *R v Cooper* [2009] UKHL 42; [2009] 1 WLR 1786 supports that view. The view is reinforced in McFarlane LJ's judgment in *PC's* case at [60] and by Lewison LJ at [64]

> "I well understand that all the responsible professionals take the view that it would be extremely unwise for PC to cohabit with her husband. But adult autonomy is such that people are free to make unwise decisions, provided that they have the capacity to decide. Like McFarlane LJ I do not consider that there was a solid evidential foundation on which the judge's decision can rest. We must leave PC free to make her own decision, and hope that everything turns out well in the end".

Freedom to make unwise decisions

Section 1(4) MCA provides "A person is not to be treated as unable to make a decision merely because he makes an unwise decision". And section 2(1), as the Court of Appeal emphasised, requires that a person's inability to make the decision for themself in relation to the matter or matters must be **because of** their impairment of, or a disturbance in the functioning of, the mind or brain.

In a case[2] in which he gave judgment in January of this year, Hedley J said

> "[10] In the field of personal relationships that is a very important qualification to the powers of the court. The plain fact is that anyone who has sat in the Family jurisdiction for as long as I have, spends the greater part of their life dealing with the consequences of unwise decisions made in personal relationships. The intention of the Act is not to dress an incapacitous person in forensic cotton wool but to allow them as far as possible to make the same mistakes that all other human beings are at liberty to make and not infrequently do.
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> [16] It is, as I said, very important to bear in mind, particularly in the field of those with significant learning difficulties who may well be unable to function independently in the community in every aspect of their life, that they may very well retain capacity to make deeply personal decisions about how they conduct their lives. One has in mind the question of choice

[2] A NHS Trust v P & anor [2013] EWHC 50 (COP)

> of partners; the extent to which they wish to be sexually active; the extent to which they may wish to make permanent relationships by way of marriage or indeed civil partnership; the extent to which they may wish to be able to make decisions about their own medical care, including, as in this case, the continuation or termination of a pregnancy. It cannot be the case that merely because a person has significant difficulties in functioning in the community, it can be presumed that they lack capacity to make profoundly personal decisions. They may in fact do so but that has to be assessed on an individual basis".

I do not take that to mean on the basis of individual decisions made by the same person but in the sense of the policy of the Act reflected in relation to capacity in sections 1(3) and 3(3) and in relation to best interests' decision-making in section 4(1).

The mischief

Why am I concerned about this? Baker J said in *CC v KK and another* [2012] EWHC 2136 (COP)

> "[25] There is a further point, to which I alluded in an earlier decision in *PH v A Local Authority, Z Ltd and R* [2011] EWHC 1704 (Fam). In assessing the evidence, the court must be aware of the difficulties which may arise as a result of the close professional relationship between the clinicians and professionals treating and working with, P. In *PH*, I drew attention to a potential risk, identified by Ryder J in *Oldham MBC v GW and PW* [2007] EWHC 136 (Fam), [2007] 2 FLR 597, another case brought under Pt IV of the Children Act 1989, that the professionals and the court may be unduly influenced by what Ryder J called the "child protection imperative", meaning "the need to protect a vulnerable child" that, for perfectly understandable reasons, may influence the thinking of professionals involved in caring for the child. Equally, in cases of vulnerable adults, there is a risk that all professionals involved with treating and helping that person – including, of course, a judge in the Court of Protection – may feel drawn towards an outcome that is more protective of the adult and thus, in certain circumstances, fail to carry out an assessment of **capacity** that is detached and objective. On the other hand, the court must be equally careful not to be influenced by sympathy for a person's wholly understandable wish to return home".

In *Ms B v An NHS Hospital Trust* [2002] EWHC 429 (Fam) at [100], a serious medical treatment case under the inherent jurisdiction, doctors had been reminded by Dame Elizabeth Butler-Sloss P that

> "If there are difficulties in deciding whether the patient has sufficient mental capacity, particularly if the refusal may have grave consequences for the patient, it is most important that those considering the issue should not confuse the question of mental capacity with the nature of the decision made by the patient, however grave the consequences. The view of the patient may reflect a difference in values rather than an absence of competence and the assessment of capacity should be approached with this firmly in mind. *The doctors must not allow their emotional reaction to or strong disagreement with the decision of the patient to cloud their judgment in answering the primary question whether the patient has the mental capacity to make the decision…*The treating clinicians and the hospital should always have in mind that a seriously physically disabled patient who is mentally competent has the same right to personal autonomy and to make decisions as any other person with mental capacity" (my emphasis).

The factual matrix

McFarlane LJ said in *PC's* case at [35]

> "I endorse Mr Hallin's argument to the effect that removing the specific factual context from some decisions leaves nothing for the evaluation of capacity to bite on".

But that is precisely the point. The factual context cannot exclude the way that the person has lived, and is living, their life. It must include, for example, as here, that *PC* has been autonomous in the community for years without interference from the State - until it was perceived that she was making an unwise choice. As was recognised by the Court of Appeal in her case

- she was 48 years old she had lived more or less independently for much of her life
- she had contracted and had dissolved two marriages before her marriage to NC she had proved herself capable of marrying NC while he was in prison
- "her mental impairment is insufficient to rob her of capacity in all other fields" per McFarlane LJ at [60]
- she has capacity to make decisions as to her residence and contact generally
- she has capacity to marry, i.e. to enter into a contract the essence of which was an agreement to live together with her husband and if she had capacity to make that promise she must have the capacity to decide to decide to keep that promise, see per Lewison LJ at [63]

If PC had not made what was perceived to be an unwise choice of husband, the proceedings would not have been brought, and there would have been no attempt to interfere with her autonomy.

Decision making in relation a matter or matters generally: section 15 declarations and section 16 decisions

While section 2 defines a lack of capacity in terms an inability to make a decision in relation to a matter, section 15 provides that the court may make declarations as to both

1. whether a person has or lacks capacity to make a decision specified in the declaration and
2. **whether a person has or lacks capacity to make decisions on such matters as are described in the declaration**.

So section 15 contemplates the court making declarations about a person's general decision making capacity in relation to matters of a class. Section 16 applies if a person lacks capacity both in relation to a matter or **matters** concerning their personal welfare or property and affairs.

So I would respectfully suggest that it is not putting an embellishment or gloss on the statutory wording to argue that a person may lack capacity in a "domain"[3] (or McFarlane LJ's synonym "field") or in relation to a matter or matters generally, and that if they do not lack such capacity then they do not, for the purposes of the MCA lack capacity in relation to that matter in respect of any particular individual. Indeed as the court in *PC* recognised there are many fields in which the common law has already recognised that capacity is issue specific. See also Sir Nicholas Wall P said in *RT v LT* [2010] EWHC 1910 (Fam) at [50] and [51]

> "[W]herever possible, the plain words of the Act should be directly applied to the facts of the case in hand, and complicating factors should, if possible, be avoided…That said, there will be cases in which it may be necessary to look at pre- or even post Act authority on the question of capacity. One example relates to the field of sexual relations".

Complex decisions

Of course a person may lack decision making capacity in relation to complex decisions of a class but not in relation to simple decisions of the same class, e.g. litigation, medical treatment or entering into a contract and so on

> "Someone may have the capacity to litigate in a case where the nature of the dispute and the issues are simple, whilst at the same time lacking the capacity to litigate in a case where either the nature of the dispute or the issues are more complex. In this sense litigation is analogous to medical treatment. Some litigation, like some medical treatment, is relatively simple and risk free. Some litigation, on the other hand, like some medical treatment, is highly complex and more or less risky. Someone may have the capacity to consent to a simple operation whilst lacking the capacity to consent to a more complicated—perhaps controversial—form of treatment. In the same way, someone may have the capacity to litigate in a simple case whilst lacking the capacity to litigate in a highly complex case. Just as medical procedures vary very considerably, so too does litigation" [4].

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[3] Defined in the OED, at 4.a. as "A sphere of thought or action; field, province, scope of a department of knowledge, etc".

[4] *Sheffield City Council v E and another* [2004] EWHC 2808 (Fam), [2005] Fam 326, per Munby J (as he then was) at [39].

How can a person have capacity to make decisions about contact generally but not have capacity to make a decision in relation to contact with a specific individual?
Both in principle, and because seeking to evaluate capacity in the context of "each and every individual decision which falls for consideration" will encourage paternalistic attempts to deprive the disabled with capacity of their autonomy, I have very considerable difficulty with any proposition along the following lines that

- a person who despite having an impairment of, or disturbance in the functioning of, the mind or brain
- is nevertheless capable of making decisions in all fields or domains, for example, as to where they should live, to marry and to decide to perform the terms of the marriage contract, to consent to sexual relations, and with whom they should have contact, in relation to the world at large
- can be held to lack capacity to making <u>those</u> decisions, or any of them, with regard to one particular person
- because of their impairment of, or disturbance in the functioning of, the mind or brain

The last two are essential before a determination that they lack capacity can be made in respect of the individual decision. But how can that be?

Not surprisingly, the Court of Appeal held in *PC's* case that to make out any such proposition required "clear and cogent evidence" or "a solid evidential foundation".

Would that not be some kind of fluctuating capacity, which did not in fact depend on the fluctuating nature of an impairment of, or disturbance in functioning, of the mind or brain but rather on the nature, attributes or character of the other person?

The information relevant to making decisions about contact for the purposes of section 3(1)(a) and (4) includes that others can pose risks. The fact that the person concerned cannot accept, for emotional reasons, that a particular person poses risks to them does not in itself support a finding that that inability arises because of their impairment of, or disturbance in the functioning of, their mind or brain.

If that were the correct analysis, what would become of the gate-keeping function of the diagnostic hurdle contained in section 2 MCA?

McFarlane LJ said in *PC's* case at [37]

> "The central provisions of the MCA 2005 have been widely welcomed as an example of plain and clear statutory language. I would therefore deprecate any attempt to add any embellishment or gloss to the statutory wording unless to do so is plainly necessary. In this context the reference within the Official Solicitor's argument to 'domains' of decision-making is unwelcome and unnecessary. The court is charged, in relation to 'a matter', with evaluating an individual's capacity 'to make a decision for himself in relation to the matter' (s 2(1)); no need has been identified for grouping categories of 'matter' or 'decision' into domains, save where to do so has been established by common law or by the express terms of the MCA 2005 (for example, capacity to marry)".

But I hope that I have explained my continuing concerns in relation to these issues.

What about sections 27 and 17? Do those sections affect the proper interpretation of sections 2 and 3?
Distinguishing the section 27 decisions from other decisions, when determining the proper approach to be taken when assessing capacity, has been described as "interesting"[5]. The commentary continues

> "S 27 contains a category of excluded decisions. It is welfare terrain that is excluded from best interest's decision-making when the person is found to lack capacity to make those particular decisions. The rationale for not permitting a best interests decision is either because the decision is so personal to the individual or because the matter is governed by other legislation. Section 28 also excludes the best interest's decision-makers from matters governed by Part 4 of the Mental Health Act 1983 and, by virtue of s 29, they cannot make a decision on the incapacitated person's behalf in respect of voting, at an election for any public office or at a referendum. Whether these decisions are excluded from the realm of best interests because the test for assessing their capacity is act-specific rather than person-specific is, however, open to doubt".

In addition to sections 28 and 29, special provision is made by sections 30-34 in respect of intrusive research carried out on, or in relation to, a person who lacks capacity. The exclusions and safeguards in respect of the decisions set out in those sections do not necessarily appear to be aids to the interpretation of sections 2 and 3.

The Explanatory Notes to the MCA state in respect of section 17

> "70. The powers created by section 16 in relation to making orders and appointing deputies will extend to a wide range of personal welfare issues. Particular mention is made in this section of issues which have arisen in the past and been dealt with by the High Court in the exercise of its inherent jurisdiction and may be most likely to arise in future. This is not an exhaustive, merely an indicative, list. It is not a list of decisions that must always go to court, rather it provides examples of where the court can act if it would be appropriate, and beneficial to the person, for the court to do so. There are restrictions on what may be delegated to a deputy, set out in section 20(2)".

While sections 15 and 16 appear to assist in the proper construction of sections 2 and 3, it may be doubtful that section 17 does so.

Is PC's marriage a critical factor?
At [38] McFarlane LJ said

> "…capacity to marry, involves understanding matters of status, obligation and rights, whereas capacity to make decisions as to contact and residence, may well be grounded in a specific factual context. The process of evaluation of the capacity to make the decision must be the same, but the factors to be taken into account will differ".

And at [63] Lewison LJ said

[5] 39 Essex Street Court of Protection Newsletter May 2013

> "Thus in 2006 PC had the capacity to enter into a contract the essence of which was an agreement to live together with her husband. If she had the capacity to make that promise, she must then have had the capacity to decide to keep her promise. There is no finding of any deterioration in her mental capacity since then. Nor has there been any relevant change of circumstances, because at the date of the marriage NC had already been convicted and imprisoned".

But making a "decision to resume married life" essentially involves the following decisions: to have contact with NC; to live with NC; and, to consent to sexual relations with NC. If PC has capacity to make those decisions (and it was not established that she does not), the decision of the court below would surely have been wrong even if PC and NC had not been married.
