

COURT OF PROTECTION
CASE UPDATE

Re Q [2022] EWCOP 6

A trust sought declarations as to Q's capacity to make decisions about treatment and whether Q had capacity when she created an Advance Decision to Refuse Treatment for low potassium levels, even if that meant her life would be at risk.

The independently instructed psychiatrist, Dr Glover, was of the view that Q could not, because of her "pervasively low self-esteem and hopelessness." Q's treating doctors were less persuaded that her sense of worthlessness was as pervasive as Dr Glover had found and Hayden J accepted their view.

The court held that Q had capacity to conduct the proceedings, and that there was no inconsistency in the possibility that Q might have litigation capacity but lack subject matter capacity.

Hayden J cast doubt on the view expressed in *An NHS Trust v P [2021] EWCOP 27* by Mostyn J that it would be virtually impossible to have capacity to conduct proceedings about a matter in respect of which a person lacked capacity.

S v Birmingham Women's And Children's NHS Trust [2022] EWCOP 10.

S was 38 years old and 23 weeks pregnant, thus there was urgency given the time limit for the lawful termination pursuant to the Abortion Act 1967. At the time of the hearing, S was detained under the Mental Health Act 1983 S.3. In 2010, S was diagnosed with bipolar affective disorder in relation to which she had had 4 hospital admissions but she had responded well to Lithium treatment. Deputy High Court Judge SJ Hilder observed that S had achieved much including having obtained a modern languages degree from Cambridge and having her own business in language tutoring. S had a strong wish to become a mother but felt that time was running out. She decided to conceive a child by IVF using a sperm donor.

Whilst consent is fundamental to the lawfulness of abortion, it is not sufficient and also depends upon 2 medical practitioners being satisfied that the conditions of the Abortion Act 1967 are met. The court cannot require a clinician to perform a procedure when he is unwilling to do so. The court acknowledged that it was unknown whether the availability of termination was a practical option, but accepted that, given the statutory time limits, the court needed to consider the evidence and make a determination.

The judge determined that S has capacity to consent to a termination of her pregnancy. The Judge determined that, specifically on the facts of this case, the relevant information for the purposes of assessing whether S has or lacks capacity to decide to undergo termination of her pregnancy was at [52]:

- a) what the termination procedures involve for S;
- b) the effect of the termination procedure / the finality of the event;
- c) the risks to S's physical and mental health in undergoing the termination procedure;
- d) the possibility of safeguarding measures in the event of a live birth.

The judge considered that the reasoning of the clinicians was insufficient. She observed that S had maintained her position for at least a month and that she had articulated reasons for her current stance. She was satisfied that she 'has amply enough "pieces of the jigsaw to see the whole picture."'. In relation to S being only 70 or 75% sure about whether to terminate or not, the judge noted that this reflected S's understanding of the magnitude of the decision [59]. She was not therefore satisfied that the presumption of capacity had been rebutted.

PH v Betsi Cadwaladr University Health Board [2022] EWCOP 16

PH a man aged 41 with longstanding medical difficulties. PH required PEG feeding as the result of drinking hydrogen peroxide sustaining significant gastric injuries in 2016. PH required round-the-clock in-patient care following a fit in 2019 in which he sustained a hypoxic brain injury. PH had been involved in long-running proceedings in which his previous care had been roundly criticised by the court. PH had, by the time judgment was handed down, refused to take nutrition for 41 days.

The question was whether the court should make orders under the inherent jurisdiction that PH should receive supplements should he request them. Hayden J refused to make an order under the inherent jurisdiction to the effect that PH should be provided with supplements if he requested them and concluded the court had no business telling capacitous individuals what is in their best interests.

Hayden J held that: *"It follows that the inherent jurisdiction cannot be regarded as a lawless void permitting judges to do whatever we consider to be right for children or the vulnerable, be that in a particular case or more generally (as contended for here) towards unspecified categories of children or vulnerable adults."*

North Yorkshire Clinical Commissioning Group v E (Covid Vaccination) [2022] EWCOP 15

The current approach to Covid vaccination was addressed by Poole J at [38]. It could more reasonably be said earlier in the pandemic that Covid-19 vaccines were "new" and that, if not "untested", the evidence for effectiveness and complications was not the same as it would have been for more established vaccination programmes. Now, millions of doses have been given and the evidence base is much larger albeit the vaccines have not been in use for long enough for longer term studies to be performed.

Poole J's general guidance:

- i) The best interest assessment is not confined to evidence of the health benefits and risks of vaccination but involves a wide review encompassing all the relevant circumstances including those in the MCA at s.4(6) and (7);
- ii) In relation to the benefits and risks to the health of P from vaccination, it is not the court's function to "*arbitrate medical controversy or to provide a forum for ventilating speculative theories.*" The court will "*evaluate P's situation in the light of the authorised, peer-reviewed research and public health guidelines.*" It will not carry out an independent review of the merits of those guidelines.
- iii) In the great majority of cases it will be in the medical or health interests of P to be vaccinated according to public health guidelines. There may be exceptional cases where P's condition, history or other characteristics mean that vaccination would be medically contra-indicated.
- iv) Family member disagreements about P being vaccinated which are at their root disagreements about the rights and wrongs of a national vaccination programme are unsuitable for determination by the court. It will be in P's best interests to avoid delay and for differences to be resolved without recourse to court proceedings.

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