Mike's Cheeky Blog: because I was told

I am currently in disagreement with someone who knows a lot about the law, about something which is significant in a fundamental legal sense in the context of the Mental Capacity Act (MCA), and which has consequences for, to use my phrase here, 'how the MCA can be explained or taught to normal people, who are not 'legal nerds''.

I'll start with the situation we were discussing, then I will explain what we both agree about: only then, will I explain what we disagree about [and how our respective different answers to the question, would in my view 'affect MCA teaching'].

The Situation

I will describe the type of situation which is being considered using real-world examples first, then I will reframe it 'using legal-style wording'.

Either of these situations will do, to describe the basic situation:

1) A General Practitioner (GP) is in the remote and relatively isolated home of one of his patients. While the GP is there, the patient starts a conversation about cardiopulmonary resuscitation (CPR). They talk for quite a long time, during which the patient makes it 100% clear to the GP, that there are no circumstances under which the patient would want CPR to be attempted. Basically the patient explains 'I am refusing CPR if my heart stops beating for any reason at all – no attempted CPR, full stop!'. The GP can see no obvious reason to consider that the patient is not mentally-capable to refuse CPR.

Having checked that the GP does get it - 'you have understood that I absolutely, and definitely, whatever causes my heart to stop, am refusing attempted CPR' - the patient then produces a piece of paper, saying 'I want this decision more formally backed-up – so I have prepared an Advance Decision refusing CPR (ADRT) and I want you to witness it, when I sign it'.

2) A mother and her daughter live together, in a remote and relatively isolated home, and the mother starts a conversation with her daughter about CPR. The conversation proceeds as in no 1), and again at the end of it the mother produces an ADRT and says 'I'm going to sign it, and I want you to witness it'. The daughter has been taught how to perform CPR as first-aid.

Reframing this using legal-style wording, and telling readers what happens next:

P and R are talking to each other in an isolated location, R is capable of performing CPR, P discusses CPR with R and makes it crystal clear that there are no circumstances under which he (P) would accept attempted CPR. R has decided he has no reason to doubt P's mental capacity to make a refusal of CPR. P then produces an ADRT refusing CPR, and asks R to witness the ADRT. It is not possible for any other person to witness P's signature on the ADRT, because only P and R are present.

P then has a cardiopulmonary arrest, before R has witnessed the ADRT (it is irrelevant whether or not P has signed the ADRT [but of course R cannot be refusing to witness the

ADRT because he thinks P lacks mental capacity] – the dispute I am engaged in, can most easily be investigated by thinking about the signature of R).

What we Agree about

The other person and I, both agree about what should happen when P arrests.

We both agree that R should NOT attempt CPR in the situation I have described.

What we Disagree about

Our disagreement, is this:

I believe that in this situation, what matters is that R understands that P has while capacitous forbidden CPR in the circumstances of the arrest, and that R is simply following P's decision. As P and R were 'in a situation of ongoing contact until the arrest occurred' R cannot ponder whether P had retracted his refusal, because if that had happened P would have informed R verbally. For me there is no best-interests decision-making involved here.

The person I am in disagreement with, insists that because there is not a valid ADRT refusing CPR (and we both agree that for the purposes of MCA 24 – 26 there is definitely not a valid ADRT), R must make a best-interests decision to withhold CPR (he argues that because of the depth of understanding imparted by the conversation about CPR, it would be unreasonable to the point of perverseness for R to decide that attempted CPR would be in P's best interests).

We cannot both be correct: the law is sharply divided into what I will here call 'informed consent territory' and 'best-interests territory' - and the legal descriptions of the two are completely different.

So – which of us is right?

I stated earlier, that the situation could be analysed by pondering the issue of R's signature. Here goes.

Clearly, the absence of R's signature means that the document cannot be a valid ADRT refusing CPR – MCA:

25(5) An advance decision is not applicable to life-sustaining treatment unless—
(a) the decision is verified by a statement by P to the effect that it is to apply to that treatment even if life is at risk, and
(b) the decision and statement comply with subsection (6).

25(6) A decision or statement complies with this subsection only if—
(a) it is in writing,
(b) it is signed by P or by another person in P's presence and by P's direction,
(c) the signature is made or acknowledged by P in the presence of a witness, and
(d) the witness signs it, or acknowledges his signature, in P's presence.

But, we must also consider that while an ADRT refusing a life-sustaining treatment must be written and witnessed in order for it to be valid, such an ADRT can be retracted verbally at any time of P's choosing:

24(3) P may withdraw or alter an advance decision at any time when he has capacity to do so.

24(4) A withdrawal (including a partial withdrawal) need not be in writing.

And in my scenario, it is the arrest itself which removes P's capacity – even if P showed to R an ADRT refusing CPR which had been witnessed by a third-party, R must be alert to the possibility that at any time prior to his arrest P could simply say 'I withdraw my refusal of CPR'.

In my scenario, R does not sign P's ADRT. I did not give a reason why – it is possible that R was about to witness the ADRT but P arrested before he had the chance to do that.

I will throw in a few observations about that witness signature.

The first, is that you will come across claims made by some professionals, that in the situation of R being the daughter, the daughter is not legally allowed to be the witness. The second, is that I recall reading at least one hospital policy, which told its staff to not witness ADRTs.

All the MCA says, is that the ADRT needs to be signed by a witness in order for it to be valid: it says nothing about 'a family member cannot be the witness' in section 25(6).

And – in my scenario, the only person <u>who could</u> witness the ADRT is R.

We also need to think about the legal purpose of the witness signature. So far as I understand it, the witness is only signing to confirm that P is indeed the person who signed the ADRT. So whoever the witness is, all the witness is doing is 'signing to say that I know P, and that it is indeed P who I saw signing the ADRT'.

Obviously, in my scenarios R knows who P is. Even if we changed the scenario to have R signing as a witness before P arrests, R's signature is not somehow telling R or P anything they did not already know: the only thing it does, is to make the ADRT legally valid if we accept that R can be the witness. R witnessing an ADRT, does not in any way improve R's understanding of P's refusal of CPR.

The person I am in disagreement with, does [I think] accept that once witnessed, R can then not make a best-interests decision when P arrests (section 5(4) of the MCA), although I don't know if he believes that R cannot be the witness if R is a relative or 'family-carer'.

Now for the really 'nerdy' bit

Clearly P cannot **force** R to witness the ADRT.

P can only ask R to witness the ADRT.

The purpose (see above) of the witness signature, is to confirm that it was indeed P who had signed the document.

I argue, that in my scenario, it is irrelevant whether or not R has witnessed the ADRT when viewed from the perspective of both P and R. From their positions, R must not attempt CPR, because while capacitous P clearly refused CPR.

The other person, argues that the law says if the ADRT is not witnessed, then when P arrests R is bound by best-interests decision-making – but that if the ADRT has been witnessed, R is bound by the law of patient self-determination.

If that is true – it means that R can decide 'which law applies to him when P arrests' by choosing to either witness the ADRT (which then means R must respect the patient autonomy concept of the MCA) or to not witness the ADRT (which means that R must apply the best-interests concept of the MCA).

I have noticed that laws can be somewhat strange: but surely NOT to the extent, that people can choose for themselves, which law will apply to them!

More pragmatically:

a) It is widely accepted that understanding of the MCA is decidedly poor, which is not a happy situation when family-carers are legally bound by the MCA, and

b) I know the person I am in disagreement with knows a lot about the law, but I suspect he has not been a family-carer during End-of-Life-at-Home.

I was a family-carer when both of my parents were dying, and unless other family-carers are not like me, **we do not want to make best-interests decisions about CPR!**

In the scenario I presented, where a relative is R, the whole point from R's perspective amounts to 'dad has explained to me that he doesn't want CPR under any circumstances – it is dad's life, his choice to make, and what I need to do is to ensure that dad's decision is followed'.

See for my personal experience of such a conversation with a dying parent, pages 24 – 26 in the PDF you can download from:

https://www.dignityincare.org.uk/Discuss-and-debate/download/317/

There is also some discussion in that PDF of the issue of verbal refusal of CPR, on pages 26 – 33.

I think most laypeople could understand 'my dad told me his decision, it was his decision to make, and obviously it was my duty to respect my dad's decision' (setting aside the fact that I consider it to legally correct anyway).

I'm not sure how easy it would be to explain to a normal person the consequence of the other person's position: it amounts to 'your dad's refusal of CPR is not legally-binding on

you, so you have to make a decision – but in this situation, you must decide that not attempting CPR is the legally-correct decision'.

I suspect many relatives, would have trouble getting their heads around that one.

I imagine, the conversation would go like this, with T as the person explaining the interpretation which I consider flawed, and L being a family-carer during end-of-life:

L: 'You agree that dad 'has got all his marbles' and can make his own decisions?'

T: 'Yes'.

L: 'So, if dad tells me he is refusing CPR, surely the decision has been made, and I simply follow it'.

T: 'No. If the decision is written down as a valid Advance Decision, then it is your dad's decision and it would be legally-binding on you'. But if he has only told you his decision verbally, you have to decide whether to attempt CPR or not. Although, because you have absolutely no reason to doubt that you understand what he decided, and you have no reason at all to believe your dad has changed his mind, when you decide if you should attempt CPR, you must decide to not attempt CPR'.

L: 'What! So – because my dad made his decision crystal clear to me, and it was his decision to make, but he did not write it down, the decision is mine to make but I must withhold CPR as he told me to!'.

T: 'Yes – you've got it'.

L: 'How is the decision mine to make, if I must decide not to attempt CPR!'.

For Clarity: I am saying that the verbal refusal of CPR from P to R, is legally-binding on R. I am NOT saying that it is legally-binding on anyone other than R.

If a father says to his daughter, when the father feels some sort of 'heart pain' at home, 'I've got a pain in my chest. I think my heart might be about to stop. If my heart stops, I definitely do not want anybody to try and get my heart beating again, full stop – if my heart has stopped beating, leave me alone to die' then that is a legally-binding instruction **to the daughter**.

If they call 999, and the father is still alert when the 999 paramedics arrive, and the father repeats his instruction to the paramedics, then his verbal instruction is also legally-binding on the paramedics.

But it is more complicated, if they call 999 to try and find out why the father has got a chest pain, and if when the paramedics arrive the father is in cardiopulmonary arrest. In that situation the daughter is legally-bound to not attempt CPR because of her dad's verbal instruction to her, and more widely to try and ensure that nobody attempts CPR, but her dad's verbal instruction to her is NOT 'legally-binding on' the paramedics, who therefore are legally 'in best-interests territory'.

Which leads to the problem I have always been bothered by: if the daughter knows that if she involves 999 to find out if her dad has arrested, then the paramedics would probably attempt CPR if he was in arrest, she has a very awkward decision to make about whether or not to call 999 before her dad is dead.

I will close with something which has always struck me a distinctly odd.

If we change the situation, to one in which there is a valid ADRT, and we make the family-carer also a welfare attorney with authority over life-sustaining treatments, then if I were the family-carer and my dad had made it crystal clear to me that he would never, ever, want CPR, then I would defend his decision and I would not even dream of making a best-interests decision about his CPR. If my dad arrested and I called 999 because I wasn't sure why he had collapsed, then if paramedics turned up and said 'he has arrested – we need to try CPR' I would thrust his ADRT at them. If the paramedics said 'we don't think the ADRT is applicable', I would point out that I was my dad's attorney and I would thrust the LPA documentation at them. I would say 'if you think the ADRT is not applicable, then my best-interests decision is that CPR is not in my father's best interests'. I might throw in '… and if you are thinking of attempting CPR after I have told you not to, I hope you have read MCA 6(6) and 6(7) – and in particular the 'while a decision as respects any relevant issue is sought from the court.' in section 6(7)'.

But in my own mind, I would absolutely NOT be engaging in any best-interests decision-making – I would just be doing what my dad had told me to do.

I wouldn't explain that to either the paramedics or police if they asked me how I had made my best-interests decision – I would simply point out that I am not required to explain 'how I made' my best-interests decision (the correct question, which can reasonably be asked, is 'how did you equip yourself yourself to make that best-interests CPR decision?').

Views on which of us is right very welcome,

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If anybody has got this far and is still interested, then 'as further reading' I would suggest these pieces (in this order):

https://www.dignityincare.org.uk/Discuss-and-debate/download/353/

https://www.dignityincare.org.uk/Discuss-and-debate/download/360/

https://www.dignityincare.org.uk/Discuss-and-debate/download/363/

https://www.dignityincare.org.uk/Discuss-and-debate/Dignity-Champions-forum/Mikes-Cheeky-Blog-the-Mental-Capacity-Act-inevitable-unknowns-and-safeguarding./991/