

There is decision by the Appeal Court, overturning a previous judgement, which is of significance in the context of the Mental Capacity Act (MCA), and the court ruling can be downloaded from:

<https://www.judiciary.uk/wp-content/uploads/2024/07/Hemachandran-final-judgment-CA-2023-001892.pdf>

The patient was a young woman called Sudiksha, and I disliked the original ruling so I was pleased to have heard on BBC Radio 4 that it had been overturned. I have now read the full ruling, and as usual it is a little more complex than 'as presented by the media'. However, there is a lot of significance in this Court of Appeal ruling.

I will not mention everything which caught my attention, but this is a fairly concise 'it seems to me' summary, when I read this case and think about it, as a non-lawyer with an interest in the MCA.

My first point, is that in 10 we are told that the judge who made the ruling which was overturned, had been 'in part, at least, influenced by an established legal approach to the relevance of a patient's belief in their illness and prognosis. That approach is, for the reasons set out in this judgment, wrong and contrary to Court of Appeal authority.'. In other words: *judges had been misinterpreting the MCA, for quite some time.*

My second point. This ruling hinged on the meaning of some words in sections 2 and 3 of the MCA, and in particular whether they can and should be expressed differently [by judges]. The appeal court decided the answer to that question is no:

123. As discussed above in my judgment from paragraphs [48] to [60] above, there is no specific requirement of belief, whether subsumed into the general requirement of understanding or in the ability to use and weigh information or otherwise. In as much as this Court is influenced by any of the pre-MCA cases, in my view the proper approach is that of Butler-Sloss LJ in *Re MB*: an absence

of belief *may* but not inevitably will, on the facts of a particular case, lead to a clinician or a court to conclude that the functional test in section 3(1) is not satisfied and that the person in question does not have the ability to make the decision in question.

124. All that is required is an application of the statutory words without any gloss. “Does this person have the ability to understand?”, “Is this person able to use and weigh this information?” The danger is that the introduction of the word “belief” is either the same as the statutory test, in which case it is otiose or, if that is not the case, there is the risk that by introducing a hard-edged requirement of ‘belief’ people will look for something different from the statutory test which is wrong in law. All that is required is the application of the words of the statute.

The doctors, and the judge in the earlier ruling, were of the view that Sudiksha lacked the capacity to decide whether it would be appropriate to move from active to palliative treatment, because she had an ‘inability to believe that she was going to die soon and that nucleoside experimental treatment was not going to help’. So, they believed that she failed MCA 3(1)(a), and that she could not understand **relevant** information. I have put ‘relevant’ in bold, because I will return to this shortly.

First, I will mention something interesting. According to section 3(1)(c), what a capacitous person does is to ‘use or weigh’ information – it does NOT say ‘weigh then use’ the information. And the ‘or’ seems to imply that weighing but not using information is a valid option, and that using information without weighing it is also a valid option.

Returning to what struck me – and I fully accept that I was not involved to actually listen – it is an issue with ‘weighing’ information, and also a question as to ‘were the clinicians correctly hearing, what Sudiksha was telling them’.

In 125 we can read ‘Unsurprisingly, both the judge and Dr Mynors-Wallis approached the case on the basis that Sudiksha’s inability to believe that she was going to die soon and that nucleoside experimental treatment was not going to help’. We can also read:

82. Dr Mynors-Wallis discussed with Sudiksha the potential success of nucleoside therapy. Sudiksha thought that the potential benefit was 50% but poignantly and, in my view, significantly said: “[t]his is my wish. I want to die trying to live. We have to try everything”. The whole family thought that any chance was better than no chance at all.

83. Dr Mynors-Wallis was satisfied that Sudiksha could follow the discussion. She was “animated and engaged and interjected spontaneously when she wished to express a view about her treatment or wishes”. She was clear that she would put up with pain and discomfort if it meant she could have nucleoside therapy which she thought had a 50% chance of success. Dr Mynors-Wallis saw no evidence of anxiety or agitation. At the end of the session, he recorded in his report that she had thanked him for coming and had apologised for not speaking to him at the previous appointment.

And in 109 – which seems a bit odd to me, as the sentence I have made bold here does not seem to be supported by what follows – we seem to see something perhaps different:

109. Having concluded that Sudiksha had failed the functional test because she lacked the necessary belief in the information given to her by the treating clinicians, the judge moved on to the mental impairment test and considered whether Sudiksha’s inability to make a decision for herself was because of an impairment of the mind. **The judge said that Sudiksha was able to recognise that without experimental treatment she will die:**

“95....In my judgment she refuses to contemplate when her death may occur because she has invested all her remaining physical, emotional and spiritual energy in staying alive and pursuing the option of alternative treatments. She cannot contemplate that her doctors may be right in their assessment of her prognosis because she does not recognise or believe that her progressive respiratory failure is a symptomatic manifestation of the course of the disease and she has managed to survive to this point in time despite their attempts to persuade her that she is dying.”

I am wondering, if when she said 50:50 she actually meant that – or if she really only meant ‘**we don’t know how well** an experimental treatment would work’?

However, I agree with MacDonald J when he said (my added bolds):

46. In *Kings College*, MacDonald J said this in relation to a person's ability to use and weigh information:

"38. It is important to note that s3(1)(c) is engaged where a person is *unable* to use and weigh the relevant information as part of the process of making the decision. What is required is that the person is able to employ the relevant information in the decision making process and determine what weight to give it relative to other information required to make the decision. **Where a court is satisfied that a person is able to use and weigh the relevant information, the weight to be attached to that information in the decision making process is a matter for the decision maker.** ...If P is unable to make the decision his or herself in relation to the matter then the court moves to the second question namely whether the inability is "because of" an impairment of, or a disturbance in the functioning of, P's mind or brain."

It is also clear, that Sudiksha was an intelligent and determined young woman, who believed that doctors sometimes 'get prognoses wrong' – as we can read in section 86 'In oral evidence, Dr Mynors-Wallis' stated his opinion, that Sudiksha's belief that she could live was "completely understandable in the social context in which Sudiksha found herself". "She was not delusional, it was rational and logical in the context of Sudiksha and the three people with whom she is spending her entire time, each believing that the doctors have not always got it right, that there is treatment that has a chance of working and that that is something that is actually worth holding out for".

If Sudiksha was determined to try and seize every chance of staying alive, then **rationally** she could not agree to a switch from active to palliative treatment – which does not necessarily mean that she did not believe the medical prognosis presented to her, but perhaps means that 'she attached zero weight to the relevance of that information'. And MacDonald J states (see above) that it is for a capacitous patient to decide how much weight to attach to information.

Also: did Sudiksha perhaps believe that *by even discussing* palliative care the doctors might believe, or subsequently argue if she lost capacity, that she had been considering it?

I can't really align 'The whole family thought that any chance was better than no chance at all' with the fact that Sudiksha, as an intelligent person must have known that it isn't logical to suggest that an experimental treatment has a 50% chance of being successful, or with 70:

70. Sudiksha told Dr Bagchi that she understood that her condition was progressive, but that she did not think that she was dying and did not want to be put on the palliative pathway. She told him that she would like to try and get the new treatment for her condition in Canada. She had, she said, a different view from the doctors about palliative care, and she wanted any emergent complications to be treated. Sudiksha told Dr Bagchi that *"I want to die trying to live. We have to try everything"*

I will leave the actual ruling at this point, after mentioning that 140 iii) is of significance. But I will throw in something.

Suppose a person in Sudiksha's situation, had said the following to doctors:

I accept that the medical prognosis is that I will die very soon. But I believe in miracles, and I also believe that God is more likely to intervene with a miracle, for someone who is trying to help themselves'.

In essence 'I want to continue with active treatment, because I am hoping for a miracle, and I think God is more likely to save me by means of a miracle if I'm trying to stay alive'.

Would a judge, have ruled what amounts to 'Believing in miracles indicates a lack of mental capacity'?

Written by Mike Stone, August 2024

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