MCA Best Interests: A Provocative Stance

I thought of what I'll write here, yesterday evening while I was thinking about my thread at:

https://www.dignityincare.org.uk/Discuss-and-debate/Dignity-Champions-forum/Understanding-and-Teaching-the-Mental-Capacity-Act-and-In-Memoriam-Rachel-Griffiths-MBE/1183/

When I first read the Mental Capacity Act, I got to the end and thought what amounts to 'so where did it describe the test for best interests?'. So I read it again. It doesn't describe the test – by which I mean, how you utilise the information you've gathered to actually arrive at your best-interests determination ('the equation' if you care to think of it like that) is NOT explained in the Act.

Section 4 is where the Act describes best interests, and everything in section 4 is, to use my phrase here, 'coming towards the person making a best-interests determination' with the possible exception of 4(11)(b)

(11) "Relevant circumstances" are those—
(a) of which the person making the determination is aware, and
(b) which it would be reasonable to regard as relevant.

Provided you interpret section (b) above as meaning 'which it would be reasonable to believe the incapacitous person would have regarded as relevant' then everything in section 4 is about the incapacitous person. If you consider that section (b) allows for the person making the determination to introduce his or her personal beliefs as to which circumstances are relevant, then you cannot also claim that MCA best interests is 'objective' [because different individuals could then legitimately make different determinations, even if they were applying the same 'equation' for best interests: taken to the extreme, anyone could therefore legitimately enormously influence the determination arrived at]. It seems that currently lawyers believe the second of those alternatives – I had always assumed that 'by implication' it must be the first, partly because of the '… you could decide more-or-less whatever you wanted to' consequence of the second. And partly because of something else: I read the MCA 'first', ca 2009, and only later did I read what people were claiming the MCA means. And when I read the MCA, I read section 3(1), and although most authors describe it as 'a test of capacity' it isn't – section 3(1) is a description of what is happening when a capacitous person decides whether to accept or refuse an offered treatment. That process usually being termed Informed Consent, although I call it Informed Consent/Considered Refusal. And I think that what should be happening during incapacity, is [to a very good 'first-order approximation'] the same

process as Informed Consent/Considered Refusal, but with the phase when a capacitous person would decide, replaced during incapacity by MCA Best Interests. So when I then read section 4, I see an attempt to describe the factors which a capacitous person would consider, and an instruction that 'best-interests does the considering': admittedly, without explaining HOW 'best-interests does the thinking'. So, thinking as I do, I always assumed that 4(11)(b) must mean '*which it would be reasonable to believe 'the incapacitous person' would regard as relevant.'.*

However, in reality an awful lot of debate about this type of point isn't awfully useful: if I only consider factors which I believe 'the person if capacitous would have considered' as being relevant, I think it would be very difficult to prove that my selection 'wasn't reasonable'. And I think, certainly outside of a court, that one of my suggestions would often resolve most of the complexity within section 4.

If you read legal discussion of best interests, you will probably find claims that the MCA's best-interests 'test' is objective. You will also discover, that there is so much dancing-on-legal-pinheads and intricate debate, that while Substituted Judgement can be clearly described, Best Interests cannot be clearly described.

At its heart, this discussion tends to hinge on a question, which I'll express as follows: In a world which is steadily moving towards increased personal autonomy, if we have laws [such as the MCA] which allow for decisions to be imposed on individuals who are deemed unable to make their own decisions, then how close to being Substituted Judgement should those laws be?

This was a '2-line e-mail exchange' about five years ago, so I might be flawed in my description of what the lawyer said, but from memory a lawyer said what amounts to 'the MCA deliberately doesn't define best interests because the Act wants flexibility' and I said what amounts to 'there is nuance and subtlety within the objective of best interests, which 'bleeds into' the process of arriving at a best-interests decision, and that makes it impossible to 'codify' the process for Best Interests [unlike for Substituted Judgement]'. To be crystal clear, what I'm saying is that perhaps the Act deliberately didn't define best interests by choice, but if it had wanted to define best interests then my instinct is the attempt would have proved impossible.

I will point out a few things:

1) The Act does define very clearly, what an Advance Decision is and how it functions, it doesn't say 'there is a lot of stuff out there about advance directives – you must apply that stuff'. There are many different versions of advance directives,

with law differing from country to country and even within a country (state by state in Australia, for example).

2) The Act introduces provisions for welfare attorneys ('LPAs') and clearly explains their authority – giving section 6(6) authority to OUR welfare attorneys. Our law is clear in section 6(6): doctors have to accept the best-interests decision of the attorney, unless the doctors appeal to court. When I glanced at the law in Scotland some years ago, their law was different: unless I am mistaken, in Scotland the law said something like 'the attorney and the doctors will come to an agreement about what is in the patient's best interests'.

3) It simply isn't reasonable, to believe that normal people – and I feel sure that the majority of welfare attorneys will be relatives and friends, i.e. 'normal people' - are to be required to trawl through legal discussions in order to work out what best interests means. BUT: normal people are given section 6(6) authority if they are appointed as attorneys. So the MCA must be assuming that normal people will be capable of understanding the Act's meaning of best interests.

The Act gives legal protections to individuals who make and act on a best-interests determination, provided the individual satisfies (my word) section 4(9):

(9) In the case of an act done, or a decision made, by a person other than the court, there is sufficient compliance with this section if (having complied with the requirements of subsections (1) to (7)) he reasonably believes that what he does or decides is in the best interests of the person concerned.

We also have:

(7) He must take into account, if it is practicable and appropriate to consult them, the views of—
(a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,
(b) anyone engaged in caring for the person or interested in his welfare,
(c) any donee of a lasting power of attorney granted by the person, and
(d) any deputy appointed for the person by the court, as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).

I believe that 'as to what would be in the person's best interests' is to be taken literally: that during those consultations you should be asking 'Do you have a view

on what would be in Fred's best interests?' before, or as well as, asking 'Do you know anything relevant to section 6?'.

The theme of my thread which the URL I gave at the start of this piece takes you to, is how can we improve understanding and implementation of the Act's concept of best interests. And everybody I have ever discussed this with, thinks that understanding of the Act is very poor among the public. As it happens, there is a 'coffee and chat' group on Monday mornings in my local library, and last week I asked the 10 or 12 elderly ladies who were there some quick questions. None of them knew what the MCA was. One of them had got an LPA appointing her daughter (her daughter is a solicitor). A couple had heard of advance decisions. One thought she had a DNACPR form, but within seconds it became clear she didn't – she had a ReSPECT form.

If doctors and welfare attorneys said 'Do you have a view on what would be in your brother's best interests' or 'We need to discuss what would be in your brother's best interests' then inevitably [reticence aside] the reply would probably be 'What does best interests mean?'. Then, it would be necessary to explain what best interests means. **In a way which normal people can understand! And having to explain best interests to the public, would improve the understanding of the clinicians as well.**

I think, that if we loosely-reason from the presence of 'certainty' within the Act for both ADRTs and LPAs, and contrast that with the absence of certainty about the way that we are supposed to get from the things we must consider to a decision/determination in section 4, then we could think in a different way about how our law tries to place the self-determination of the person/patient at the heart of things. **Before an issue gets to court, why can't we reason that our law is using the fact that a person chooses his/her welfare attorney, and the fact that then the attorney has got authority over best interests, as how (the mechanism by which) our law handles the insertion and implementation of 'the patient's individuality' during incapacity?**

That 'what does best interests mean?' has to be debated during those section 4(6) conversations, and 'the version/s which attorneys seem to believe in, are the most valid'. Justified by 'THE PERSON WANTED HIS/HER CHOSEN ATTORNEY TO MAKE THE BEST INTERESTS DECISIONS'.

I'll mention something here, because I need to put it somewhere. Doctors and medical organisations seem to think – or at least they imply in what they write – that, using language loosely here, doctors and welfare attorneys are on some sort of equal-footing within the MCA. And that doctors somehow 'rank above' normal family and friends [who are not attorneys or court deputies]. This is incorrect.

Doctors and 'normal' family and friends 'rank equally' and attorneys and deputies 'rank higher'. If you don't believe me, then I point to section 4(7) and ask 'where are doctors and relatives if an attorney is the decision-maker?'. BOTH doctors and relatives are in 4(7)(b). Look at section 50, and attorneys and deputies do not require permission to make an application to the court, whereas BOTH relatives and doctors do have to apply for permission.

We know that doctors tend towards not MCA best interests, but towards 'medical best interests'. It is difficult to argue that most 'normal people' should be told 'you need to read all that legal stuff before you can understand what best interests means'. By 'all that legal stuff' I mean things such as Professor Coggon's paper (see below).

It must surely be reasonable, if I'm a lay welfare attorney reading the Act, and looking at section 4, to have two thoughts:

If section 4 is asking me to apply a concept of Best Interests which is outside of this Act, then the Act has to point to where I can find it,

and

as the Act doesn't point to an external 'definition of' Best Interests, then the Act wants me to decide what Best Interests means by reading section 4 [and other parts of the Act].

As it happens, after I'd started writing this Dr Lucy Series pointed me at a paper by Professor John Coggon, and I thank Lucy for doing that. I will be dipping in and out of Professor Coggon's paper, to make several points

Coggon, J. (2025). Is Mental Capacity Law Law? *Oxford Journal of Legal Studies*, *45*(4), 1019-1046. Article gqaf028. Advance online publication. https://doi.org/10.1093/ojls/gqaf028

https://academic.oup.com/ojls/advance-article/doi/10.1093/ojls/gqaf028/8250273

So far as I can see (I'll try and get some feedback from Professor Coggon in case I'm wrong about his paper), the central theme of his paper is that the MCA's section 4 allows judges so much freedom – and in quite undefined ways – that judges aren't

really applying law in the usual sense: they are, to selectively quote from parts of the paper:

114Within this statement are several remarkable components. First, Jackson LJ urges attention to the MCA's words, but not with reference to (my term) 'standard' approaches to statutory interpretation. He disavows—because of the particular nature of best interests decisions—the application of a system of precedent; the court is not bound by what has come before (suggesting it was not law), nor is it creating any sort of binding determination (indicating that the decision is not and will not become law). The result for future practice, including adjudication, as Jackson LJ indicates, is not a normative system of action guidance, but a body of generally irreconcilable decisions that (happen to) have been handed down by courts.

The discretionary powers of the modern judge are seen most vividly—and most controversially—in the areas of child welfare and the best interests of those unable to make their own decisions. The question is: are discretionary powers compatible with justice? In his seminal work 'The Rule of Law', the late Lord Bingham wrote: 'Questions of legal right and liability should ordinarily be resolved by the application of the law not the exercise of discretion'. He concludes his chapter entitled 'Law not Discretion' with these words: '… No discretion should be unconstrained so as to be potentially arbitrary. No discretion may be legally unfettered.' As it happens, he does not discuss family or mental capacity law, but their practice, superficially at least, does not always sit easily with the principle that he identifies: one with which most would want to agree.71 (Hedley J)

[I]f the law requires the decision-maker to consider whether a certain course is 'in the best interests' of the patient, the skill and experience of the judge will carry him only so far. They will help him to clear the ground by marshalling the considerations which are said to be relevant, eliminating errors of logic, and so on. ***But when the intellectual part of the task is complete and the decision-maker has to choose the factors which he will take into account, attach relevant weights to them and then strike a balance the judge is no better equipped, though no worse, than anyone else****. In the end it is a matter of personal choice, dictated by his or her background, upbringing, education, convictions and temperament.67 (Lord Mustill)*

My bolds added to the final quote. Although as I've previously written, I don't think the decision-maker should be choosing the factors:

Provided you interpret section 4(11)(b) as meaning 'which it would be reasonable to believe the incapacitous person would have regarded as relevant' then everything in section 4 is about the incapacitous person.

I do agree, that having constrained the factors to be considered as I've just suggested, that '***But when the intellectual part of the task is complete and the decision-maker has to attach relevant weights to the factors and then strike a balance the judge is no better equipped, though no worse, than anyone else.***'is correct.

When I outlined – very imperfectly using the wording I've italicised – the thrust of this piece before I'd started writing it, to a lawyer, a quick reply was:

Very quickly on this:

Couldn't we just use BI as an indication/label for 'the person isn't the decision-maker'. And just state 'the welfare attorney makes the decision - because the person had wanted the attorney to decide'.

That approach would mean the WA could make *any* decision at all, and there would be no legal standard to hold them to. This would be really problematic if they made terrible decisions. Parliament was actually quite anxious about welfare attorneys and deputies for welfare, because of concerns that people might bump off older relatives to get the insurance, and the best interests test was seen as important safeguard for this. It holds them accountable.

I think most countries with attorneys/deputies or similar have a legal standard that may must follow, none simply gives them unfettered authority to do what they like.

Clearly, my use of language was far too imperfect: all I was trying to say, was that we keep section 4 but regard the words best interests as merely being indicative of 'whatever section 4 implies'. I wasn't trying to dispose of section 4. And we definitely need section 6(7). And, if you read Professor Coggon's paper, or just look at what I've extracted from it, the thrust of his argument is in essence '… the judges can to an unusual extent do what they like'. In fact, because of section 6(7) which applies to attorneys and doesn't apply to judges, 'unfettered authority to do what they like' fits better for judges than for attorneys. But in the context of arriving at best-interests determinations, anyone at all, from a relative to a Supreme Court Judge, is supposed to be applying the same version of Best Interests.

My suggestion which I think goes a long way to addressing the complications of section 4, is to regard close-family and close-friends as EXPERTS who are feeding-in

EXPERT OPINION about the incapacitous person's decision-making. They try to give what we should regard as expert answers to 'what would Alice decide, if she could decide, in this situation?'. In the same way that expert clinicians describe the clinical options and outcomes. And, as clinicians can disagree about what seems to be the best clinical option, the 'experts in the person as an individual' might not all agree: but that doesn't mean they aren't experts. This has in effect placed the tricky issues of 'which factors would Alice consider, and how would she weight them?' within the expertise of our 'close to the patient' experts. And, as Mr Justice Hayden has eloquently pointed out, you can 'know someone' despite your understanding stemming from what I'll term 'fuzzy knowledge': as Hayden J put it 'He may not have prepared a document that complies with the criteria of section 24, giving advance directions to refuse treatment but he has in so many oblique and tangential ways over so many years communicated his views so uncompromisingly and indeed bluntly that none of his friends are left in any doubt what he would want in his present situation.'.

That, only leaves the final stage, which so far as I can see ought to be – but isn't – clearly describable. We have clinicians feeding in the clinical options and outcomes, without any consideration of MCA best interests (to a very-good first-order approximation, these should be the same options which would be presented to a capacitous patient), then 'those close to the patient' feeding in 'what the patient, if capacitous, would have decided', then 'objective law' should get from there to the best-interests decision.

As I've put it elsewhere, both clinicians and family and friends might be capable of arriving at 'what Fred would have decided', and while 'what Fred would have decided' isn't the best-interests determination, all that then remain to get from there to the best-interests determination is an understanding of the law [which isn't an understanding possessed (or indeed not possessed) by the clinicians or the family and friends: it depends on whether or not you understand the MCA].

My own Musings on John Coggon's paper

I'm not a lawyer – I needed to decipher terms such as 'positivist law' – but having read the paper, it has prompted some thoughts. There is also a video of John Coggon talking to Alex Ruck-Keene about the paper, which reveals John almost laughing and Alex seemingly pondering. I must admit, that to my surprise and in contrast to the Sontaran

https://www.dignityincare.org.uk/Discuss-and-debate/Dignity-Champions-forum/That-dying-Sontaran-in-Dr-Who/934/

I enjoyed critiquing John's paper.

I'm not going to provide the link to the video, because reading the paper is better – watching the video, for a non-lawyer, is akin to watching two physicists discussing Dark Energy.

I wish that John had written his paper before 2020, because I could have introduced it into a discussion I had with a lawyer who is an expert on the MCA. To me, and from memory every doctor I've ever discussed this with, it makes **absolutely no sense** to think in terms of the requirement that an ADRT refusing CPR must be written, meaning that a verbal refusal of CPR during a situation of what I term 'ongoing contact' involves best-interests decision-making. I, and they, see it as Considered Refusal – so it is in the 'Informed Consent' bucket. But the lawyer said '… no – that would drive a coach and horses through the law!' or words to that effect.

In 'Decisions relating to cardiopulmonary resuscitation: A joint statement from the British Medical Association, the Resuscitation Council (UK) and the Royal College of Nursing October 2007' it stated in Main Messages,

If a patient with capacity refuses CPR, or a patient lacking capacity has a valid and applicable advance decision refusing CPR, this should be respected.

I now think, the lawyer meant '… but – that doesn't fit with standard legal reasoning'. And now I'd say 'Ah – have you read John Coggon's paper, which argues that MCA best-interests doesn't involve normal legal reasoning?'.

I've written about this issue in much of my writing since about 2011 when I started to find protocols and guidance which said 'A verbal refusal of CPR is not legally-binding, but must be considered as part of best-interests decision making', and a relatively recent piece is at:

https://www.dignityincare.org.uk/Discuss-and-debate/Dignity-Champions-forum/Can-a-verbal-refusal-of-CPR-be-legally-binding/1072/

which, having just looked at it, was clearly prompted by my discussion with the lawyer.

There are places in the paper, where we are shown things which judges have said, and are obviously true – so it doesn't take a judge to work them out. For example, that best-interests determinations do not set legal precedents (must admit, that this is my layman's grasp of 'precedent'. I'll also admit here, that I've only just realised that 'Bloggs J' isn't shorthand for 'Judge Bloggs' but indicates 'a rank': I used to, and still will as it happens, write 'Mr Justice Bloggs' and 'Bloggs J' as both meaning 'Judge Bloggs''). That must be true. All best-interests determinations, involve comparing two-or-more 'anticipated future situations', at least one of which involves the patient being alive {let us not be overly-nerdy here: yes, you would apply BI to the processes of dying if all of the options would result in death} and those situations have to be considered in terms of how the person/patient would regard them ('quality of life' as 'the patient would have judged things'). There is so much variation in both future situations and in the way that individuals assess their own 'quality of life', that it is conceptually impossible to say 'with a different person in the same situation, my best-interests determination would be the same'.

Elsewhere, in a lecture delivered in 1990 and published in a collection of his essays, Lord Bingham does address discretion within family law. The lecture's central purpose was to rebut jurisprudential theorists' claims that common law judges possess and exercise wide-reaching instances of discretion. Within that argument, Lord Bingham concedes: 'Perhaps the last real stronghold of almost unreviewable discretion is where the care and custody of children are concerned.'72 He goes on to reflect:

It is not perhaps very happy that an unfettered right of appeal should be effectively abrogated by judicial decision, nor that, in a field where judicial decisions have a unique capacity to cause lasting misery, the trial judge's decision should be effectively final. On the other hand, it would be very hard indeed to suggest any guideline to govern the exercise of this discretion which was not either so obvious or so heavily qualified as to be futile. It would seem that in this limited field, for better or worse, reliance must be placed on the trial judge to show the wisdom, sensitivity and insight of Solomon, although lacking the latter's extra-judicial powers.73

Now, that was not about the MCA, but reading it inside a piece which is about MCA best interests – and the MCA excludes children from its scope – it seems a bit perverse to point to Solomon [although I strongly agree that this example reveals insight, not wisdom] when the only story that comes to my mind is the one about the child. Google AI presents it as:

In 1 Kings 3:16-28, King Solomon resolved a dispute between two women claiming to be the mother of the same baby by proposing to cut the child in half. The true mother pleaded to spare the child, revealing her identity, while the imposter agreed to the split. Solomon awarded the baby to the true mother, showcasing his legendary wisdom.

My very vague recollection, is of the story being told as 'the real mother immediately screamed 'don't cut my child in half!' or something to that effect.

But it is interesting, as the insight is that all mothers would object to their child being cut in half – whereas the point of MCA best interests is that in the same situation, everyone is an individual, with individual views.

We need to be really careful, to not quote reasoning from pre-MCA, which doesn't stand-up post-MCA. We also need to not get the MCA obviously wrong – and I was surprised that John got this wrong in the Introduction – the bit I've made bold:

The MCA aims to protect and privilege, but also limits, adults' personal decision-making freedom in relation to their health, welfare, property and affairs.2 It determines how the legal assumption that a person has capacity may be rebutted.3 ***And when that assumption is displaced, it determines how and by whom decisions must then be made****.4*

4 See MCA, s 4 for the central aspect of this: the best interests standard. See also ss 9–23 regarding lasting powers of attorney and the appointment of deputies, and ss 24–6 regarding advance decisions to refuse treatment.

Section 4 does not determine 'by whom decisions must then be made' in any normal interpretation of that wording: section 4 allows any person to make a best-interests determination. Section 6(6) if it applies then imposes a restriction, and there is a different issue, of **who needs to rely on** the legal defence which satisfying section 4(9) provides. And – being really nerdy – the MCA deliberately [I'm told] and very annoyingly [I assert] only allows judges, attorneys and deputies to make a decision: everyone else, so doctors, family-carers, etc, can only make a best-interests determination.

The paper doesn't directly address the issue which the thread this PDF will be added to, set out to analyse: how do we promote understanding of the MCA among clinicians, patients, relatives etc, and how do we improve 'behaviour at the coalface'. The paper is about how things are decided and debated in a court – the thread is about 'in dad's bedroom at 11pm'.

Google AI was a bit ambiguous about when Nelson said this, but I think I've read he said it at the end of a meeting with his captains on the eve of the Battle of Trafalgar. Having explained his strategy and tactics in detail, it seems he closed by saying "No captain can do very wrong if he places his ship alongside that of the enemy".

What we need, if we are to improve implementation of the MCA during interactions between doctors, relatives, nurses, welfare attorneys, paramedics, friends, etc on hospital wards and in bedrooms, is to work out a set of simpler messages equivalent to "No captain can do very wrong if he places his ship alongside that of the enemy" but which would lead to in almost all situations good application of the Act.

I will refer back to when I wrote ' it makes **absolutely no sense**'.

A huge problem with protocols and the mindsets of professionals – and I'm including police officers here – is that when 'it makes **some sense to**' do things is considered, the relative and family-carer perspective is squeezed out by the professional perspectives. There are lots of balances which must be struck between 'it makes sense to do A' and 'it makes sense to do B' when those objectives are in direct conflict.

I'm going to post the PDF version of the covering e-mail text which I sent to my contacts while discussing this thread – it will be in my next post.

Written by Mike Stone, February 2026