

Casenotes

Capacity, Best Interests and Sex

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In the Matter of MM: Local Authority X v MM and KM.
[2007] EWHC 2003 (Fam).

Facts

MM had paranoid schizophrenia, a moderate learning disability and poor cognitive functioning. For some 15 years, she had been in a relationship with KM. KM led a nomadic life, encouraging MM to accompany him. In this process, he encouraged MM to disengage with psychiatric services. He further had a history of violence toward MM.

In March 2006, MM took up residence in supported accommodation. Thereafter, on the encouragement of KM, she left the accommodation for extended periods at various times, apparently sleeping rough and not receiving medication.

The relevant court proceedings commenced in June 2006, for determination of MM's capacity and best interests. An *ex parte* interim declaration was made that MM lacked capacity to decide where she would reside and with whom she would associate. It was declared that it was not in her best interests to be removed from the accommodation, and that she was not to have unsupervised contact with KM. Such contact was to occur at least twice weekly, for periods of at least two hours per session.

On 14 July 2006, these orders were continued. MM was missing from the accommodation at that time. KM was ordered to assist the LA and the police in achieving the return of MM to the accommodation, and the local authority (LA) was given the power to terminate contact between KM and MM if KM was under the influence of alcohol, abusive, aggressive, or put the LA's staff at risk of harm. MM was eventually returned to the accommodation by the police on 27 July 2006. She was in a dishevelled and unkempt condition. Deterioration in her mental health was resolved by medication. However she became aggressive and abusive to staff and other residents in the accommodation. The situation deteriorated, and MM was sectioned under section 2 of the *Mental Health Act 1983*, on 10 October 2006.

MM was moved to a family placement on 30 October 2006. At this time, her contact with KM was reduced to once per week. That placement broke down in December 2006. MM eventually moved into an independent supported living placement in March 2007. That placement appeared to have been successful.

The final hearing took place on 5 June 2007 (with judgement being reserved until 21 August 2007). The

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LA sought declarations that MM lacked capacity to litigate, to make decisions as to where and with whom she would reside, to determine with whom she would have contact, to manage her finances, and to marry. The LA accepted that MM had capacity to consent to sexual relations. It sought an order that MM's best interests were that she reside in supported accommodation provided by the authority, and would not be removed from that accommodation without the authority's consent. Finally, it sought an order that contact with KM would be restricted to once per month for a period of two hours, and be supervised by the local authority.

The Decision

The Court granted these declarations, with the exception that contact with KM was increased to weekly for a minimum of four hours, and would not be supervised. Further, the LA was required to make appropriate facilities available during this contact for MM to continue her sexual relationship with KM.

The decision was made before the relevant provisions of the *Mental Capacity Act 2005* came into effect. It was therefore decided under the Court's so-called 'inherent' jurisdiction. At issue was whether and for what decisions MM lacked capacity, and as concerned those matters, what decisions would be in her best interests. Both KM and MM testified in this case. Further evidence was provided by a psychiatrist, a social work consultant, and representatives of the LA. The Official Solicitor also provided statements.

The determination of capacity was issue-specific: there was nothing inconsistent in MM having capacity for some purposes but not others. The determination of capacity in various contexts had in turn given rise to a variety of different common law tests of capacity. Capacity to litigate, for example, was generally determined with reference to *Masterman-Lister v Brutton & Co (No 1)*;² capacity to consent to treatment with reference to *Re MB (Medical Treatment)*;³ capacity to consent to marry with reference to *Sheffield City Council v E*;⁴ and capacity to consent to sexual relations *X City Council v MB, NB and MAB (by his litigation friend the Official Solicitor)*.⁵ In the view of the court, these were different iterations of the same fundamental question: can the individual understand the nature and quality of the relevant transaction? That was to be determined based on the specific decision to be made, at the time it was to be made.

That approach also applied to capacity to make decisions as to where one would live, with whom one would associate or have contact, and issues concerning personal care.

Within that framework, and consistent with the expert evidence, the court held that MM lacked capacity to litigate, to make decisions as to where and with whom she would reside, to determine with whom she would have contact, to manage her finances, and to marry. It held that MM did have capacity to consent to sexual relations.

Given those determinations, the Court considered what decisions were in MM's best interests. Of particular concern was that the decisions made should be consistent with MM's rights under Article 8 of the ECHR, and in particular her right to privacy. That right included the right to pursue one's own personal life, develop one's personality as one chooses, and to interact and develop relationships with other human beings and the world at large. For the individual lacking capacity, that right could be restricted in his or her best interests, for example to protect the individual's safety; but the individual's views were also highly relevant to the appropriateness of intervention. As the court asks rhetorically,

2 [2002] EWCA Civ 1889.

4 [2004] EWHC 2808 (Fam).

3 [1997] 2 FLR 426.

5 [2006] EWHC 168 (Fam).

*“What good is making someone safer if it merely makes them miserable?”*⁶ Proportionality is the key.

While there was no legal presumption that an incapable individual would be better off with his or her family, it was equally to be acknowledged that institutions, no matter how well-intentioned or enlightened their managers might be, were also problematic. Removals to institutions could only be justified if a better quality of care would be offered by the state than by the individual’s family. The Court in such cases as this is exercising a protective jurisdiction, and intervention should occur only if there is a need to protect the vulnerable adult from abuse or the real possibility of abuse.⁷

The evidence in this case supported that MM had been subject to violence in her relationship with KM to the extent that when they were cohabiting together, she was frequently forced to leave the accommodation with him, resulting in periods of homelessness. In these periods, she had suffered from deteriorating mental health resulting in hospitalisation. KM seemed unable to take responsibility for his conduct towards MM. Notwithstanding MM’s desire to live in the community with KM, therefore, the Court held that her continued residence away from KM at the independent supported living placement run by the LA was in her best interests.

At the same time, over-control of contact between MM and KM would have the effect of precluding their sexual relationship, a relationship into which MM had capacity to enter and which appeared beneficial to her. The LA had initially proposed contact of once per month, supervised, for up to two hours. The Court held that such limited contact would violate MM’s Article 8 rights. By the time of the court hearing, the LA had agreed that weekly contact of up to 4 hours would be appropriate. The Court held that this was the minimum acceptable period. The contact should further be unsupervised.

Finally, the contact would be required to be organised in a fashion that would allow MM and KM to continue their sexual relationship, as for example by provision of a hotel room. The obligation to do so arose from the fact that the state’s involvement had resulted in MM being given a residence that KM was not permitted to visit. That involvement carried with it positive steps to avoid a breach of MM’s article 8 rights, in this case by taking steps to ensure that MM’s sexual relationship with KM could continue in an appropriate and dignified way.⁸

Discussion

Capacity to consent to sex, but not to determine with whom to associate

The case is eye-catching because it decides that while MM had capacity to consent to sexual congress, including sexual congress with KM, she did not have capacity to decide with whom she would associate. The result is that the LA could closely control MM’s association with KM, precluding him from visiting MM at her supported housing placement for example, but was required to facilitate unsupervised contact with KM that would allow the sexual relationship to continue.

While these decisions regarding capacity draw attention, they do not really raise new issues of law. As the court notes, capacity determination rests on the individual decision to be made, and people may have capacity for some purposes but not others: this is now trite law. The tests applied by the court may be more controversial. Thus capacity to consent to sexual activity merely requires an ability to understand the nature of the specific act in question. It is not necessary to understand the consequences of such

6 Paragraph 120.

7 Paragraph 118.

8 Paragraph 162.

activity with a particular partner. It is further said by the court to be a “simple” determination, not requiring reference to some of the more complex tests of the common law.⁹ Commentators who view sexual behaviour as a morally complex area are likely to view understanding those complexities as requisite to capacity, and thus unlikely to share the view that the question of capacity is ‘simple’. Similarly, parents of an adolescent girl may take the view that whether the object of her affections is, for example, a nice seventeen-year-old boy or a not nice fifty-two-year-old man may be of pivotal importance to the girl’s capacity to consent, even if the proposed activity is the same. Controversial though the court’s approach may be, it is not new to this case: see *Sheffield City Council v E*¹⁰ and *X City Council v MB, NB and MAB (by his litigation friend the Official Solicitor)*.¹¹ Given this approach, it is unsurprising that some people will have capacity to consent to sexual activity, but not to decide with whom they will associate.

The requirement that the LA organise contact between MM and KM to facilitate the continuation of their sexual relationship is new. The court in MM is clearly right that best interests determinations must be made consistently with the incapable individual’s Article 8 rights, and the ECHR jurisprudence regarding restriction of rights upon imprisonment expressly protects rights to communicate with close family members,¹² and to attend the funerals of close family members.¹³ There is an obligation to provide visiting facilities for prisoners’ friends,¹⁴ and particular efforts must be made to give effect to court-ordered rights of access to children.¹⁵ The scope of rights under a best interests determination must be at least this broad, as there is no reason to restrict MM’s rights further than those of an individual in a punitive environment. The specific question of conjugal visits does not appear to have been litigated in a non-criminal context. Within prisons, *Aliev v. Ukraine*¹⁶ noted with approval moves in a number of European countries to provide conjugal visits to prisoners, but nonetheless held that the failure to provide such visits was justified under Article 8(2) ‘for the prevention of disorder and crime’.¹⁷ It is not obvious that this could be a factor in the context of MM’s placement by the LA, however, as the restriction of her rights did not flow from a criminal process. This would appear to provide her with a markedly stronger argument for the provision of such visits.

Identity of Common Law tests of capacity and the Mental Capacity Act 2005

The case was determined under the so-called ‘inherent’ or ‘declaratory’ jurisdiction of the court, prior to the introduction into effect of the relevant sections of the *Mental Capacity Act 2005* on 1 October 2007. Nonetheless, much of the interest of the case is in its treatment of how the existing case law regarding mental capacity will integrate with the provisions of that legislation.

This is a complex question. As the court notes, the MCA does not supersede the tests of capacity developed at common law; it instead provides a process allowing decisions to be made for people lacking capacity, as defined by the MCA. This creates the possibility of ragged edges: a person might theoretically have capacity at common law but not under the MCA, or vice versa. It is not even obvious that the common law tests are themselves consistent with each other.

9 Paragraph 84.

10 [2004] EWHC 2808 (Fam).

11 [2006] EWHC 168 (Fam).

12 *McVeigh, O’Neill and Evans v. the United Kingdom*, Application Nos. 8022/77, 8025/77 and 8027/77, decision 8 December 1979, 25 DR 15, (1983) 5 EHRR 71 paras. 52-3, confirmed by Committee of Ministers, (1983) 5 EHRR CD305.

13 *Ploski v. Poland*, A application No. 26761/95, judgment

12 November 2002, paras. 32, and 37.

14 *X. v. the United Kingdom*, Application No. 9054/80, judgment 5 November 1981, 30 DR 113, (1981) 4 EHRR 188..

15 *Ouinis v. France*, Application No. 13756/88, decision 12 March 1990, 65 DR 265 at p. 277.

16 Application No. 41220/98, judgment 29 April 2003, (2004) 11 I.H.R.R. 170, para. 188.

17 *Aliev*, paragraph 188.

Further, the declaratory jurisdiction of the courts to make decisions for people lacking capacity developed after the Law Commission's report on Mental Incapacity established the overall framework that went on to become the MCA. The MCA was thus designed to deal with an absence of overall court jurisdiction to make decisions on behalf of people lacking capacity, but in fact has to deal with the jurisdiction that has developed. And it is not necessarily clear even that the capacity determination under the declaratory jurisdiction will match the remainder of the common law. As the Court notes, it is not theoretically impossible or inconsistent that the test for capacity to consent to sexual activity be different under the criminal than under the declaratory jurisdiction.¹⁸

From these divergent threads, the courts will have to create some sort of coherence, and this case represents an early, tentative step in that direction.

Interestingly, the court in *MM* seems to take it as a given that the declaratory jurisdiction of the court will continue in its current and ever-expanding form, notwithstanding the introduction of the MCA procedures. A more limited version of this view must be correct. The jurisdiction to make declarations on points of law is established by rule 40.20 of the CPR, and extends well beyond determination of decisions relating to persons lacking capacity. In that form at least, it obviously continues.

Case law in the last decade or so has however considerably expanded the role of the courts regarding persons lacking capacity, well beyond the jurisdiction envisaged by rule 40.20 and on pivotal points, with highly doubtful legal justification.¹⁹ The result is a system that largely mirrors the MCA: both systems allow decisions to be made in the best interests of persons lacking capacity. The desirability of the continuation of this expanded form is much more doubtful. Where a detailed statute governs the MCA processes, the declaratory jurisdiction is the result of organic common law growth: it is as broad as the court says it is. The court acknowledges that efforts should be made to merge the criteria of these systems, acknowledging that it would be unfortunate if the result of applications were determined on the basis of the forum in which they were brought.²⁰ This is no doubt correct, but it begs the question of whether the declaratory jurisdiction should continue at all in this form. Part of the point of the MCA was to introduce a specialised court to deal with matters of incapacity; if the declaratory jurisdiction continues, this objective at least will be undermined. Further, either its results will precisely mirror those that would be attained under the MCA, in which case it is difficult to see that the declaratory jurisdiction adds anything, or its results will differ from those under the MCA, in which case forum-shopping seems inevitable and undesirable. The introduction of the MCA processes provides an occasion for re-consideration of the role, if any, of the enhanced declaratory jurisdiction of the courts. It would be a shame for that opportunity to be missed.

As for dealing with potentially ragged edges between the manifold tests of incapacity, both at common law and in the MCA, the Court in *MM* emphasises their overall consistency of object and approach. The test of capacity to consent to medical treatment in *Re MB (Medical Treatment)*²¹ and of capacity to litigate in *Masterman-Lister v Brutton & Co (No 1)*²² become 'essentially the same test ... albeit expressed in slightly different words'.²³ These are in the court's view in turn essentially the same as the test of capacity found in s 3(1) of the MCA.²⁴ The Court further acknowledges that insofar as there are differences between the statutory definition and those at common law, the common law courts where appropriate may move closer to the statutory definition.²⁵

18 Paragraph 88.

19 See P Bartlett, *Blackstone's Guide to the Mental Capacity Act 2005* 2nd ed (Oxford: OUP, 2008), chapter 2.

20 Paragraph 78.

21 [1997] 2 FLR 426.

22 [2002] EWCA 1889.

23 Paragraph 71.

24 Paragraphs 73-4.

25 Paragraph 80.

Consistency between the statutory and common law tests is unquestionably a good thing, and inconsistency risks undermining the coherence of the statutory scheme. For example, the common law contains tests of capacity to make a will that are phrased somewhat differently from the test of capacity in the MCA, yet it is the test in the MCA definition that determines whether the Court of Protection may draft a will for a person lacking capacity. Inconsistencies in those tests could mean that either the testator *and* the court have authority to draft a will, a result which could create ambiguities, or that neither do, a result that would defeat the intent of the statute. Either way, this would not be a helpful outcome, and the court is right to favour convergence.

The court does make it clear that it is for the common law courts, if they think it appropriate, to move toward the MCA definition; it is not for the Court of Protection or others bound by the MCA to move from the MCA definition.²⁶ It is therefore somewhat distressing to see the court in the next breath bludgeon the MCA definition into conformity with previous common law jurisprudence. At issue is whether, in order to have capacity, an individual must believe the information presented to them. Following *MB*, the court states:

*“If one does not ‘believe’ a particular piece of information then one does not, in truth, ‘comprehend’ or ‘understand’ it, nor can it be said that one is able to ‘use’ or ‘weigh’ it. In other words, the specific requirement of belief is subsumed in the more general requirements of understanding and of ability to use and weigh information.”*²⁷

This is not a convincing reading of s 3 of the MCA. Inability to believe had been part of the common law test for many years prior to the passage of that Act,²⁸ in cases expressly considered by the Law Commission.²⁹ Its absence from the MCA cannot thus be viewed as accidental.

In cases where an individual does not believe the information provided, the reasons for the non-belief should be pivotal in the capacity determination. Certainly, there will be cases where the reason for lack of belief strongly suggests incapacity. A lack of belief flowing from a psychotic delusion is an obvious example. It is equally easy to imagine cases where a lack of belief does not constitute incapacity. If a patient is herself an experienced consultant, for example, it would be bizarre to say that she lacked capacity simply because she disagreed with her doctor, a less-experienced colleague in her field. Similarly, at least in the mental health field, doctors sometimes change diagnosis. Is a patient really to lack capacity because he prefers the old diagnosis to the new one, perhaps for coherent reasons? Is this not precisely what is meant by an ability to ‘weigh’ the information provided, as required by s 3(1)(c) of the MCA?

This is a vital point for the credibility of the MCA. The legal literature is replete with case notes suggesting the manipulation of the capacity threshold to achieve specific results. Further, there is a risk that ‘lack of belief’ can become a euphemism for decay of trust between an individual and his or her carers, but a formulation that focuses attention solely on the vulnerable person. If the issue is really a breakdown in trust, it behoves the court to consider the nature of that breakdown, not to disguise the real problem with a convenient finding of incapacity.

26 Paragraph 80.

27 Paragraph 81.

28 See, eg, *Re C (Adult: Refusal of Treatment)* [1994] 1

WLR 290, at 295.

29 *Law Commission, Mental Capacity, LawCom 231*, (London: HMSO, 1995), para 3.15.

Best Interests

Although the discussion of the law of capacity in the case is structured around the consistency between the common law and statutory tests, this theme is curiously absent from the discussion of best interests. This is curious, as the declaratory jurisdiction, as it has developed, adopts a much more flexible approach to best interests determination than that of the MCA. The determination under the declaratory jurisdiction is 'akin to a welfare appraisal',³⁰ with virtually no limits on material to be considered or people to be consulted. The MCA is much more prescriptive. It expressly requires consideration of whether the individual will regain capacity, and requires the maximum involvement of the person lacking capacity (P) in the decision-making process. P's wishes, feelings, beliefs and values, both at the time the decision is to be made and at a time when P had capacity must be considered, and to that end, consultation with specific carers is required.³¹ When restraint is necessary, it must be to avert harm to P, and the restraint must be proportional to the risk and severity of that harm.³²

It is perhaps arguable that these differences are smaller than they at first appear. The best interests criteria under the MCA are not closed: all relevant circumstances must be considered.³³ Further, much of what is in the MCA could arguably be viewed as good practice under the common law approach. Certainly, the court in MM notes that the wishes and feelings of the vulnerable adult are an important factor in determination of best interests.³⁴ Over-statement of these similarities is ill-advised, however, as they risk reducing the requirements of the MCA to mere tick boxes. These are new requirements, and they are meant to be taken seriously. The MM case offers no guidance as to whether the court will do so.

Instead, discussion in MM focuses most interestingly on the determination of best interests within the context of Article 8 of the ECHR. The court finds that intervention with Article 8 rights is justified when necessary for the welfare of the incapable adult. That said, rather refreshingly, the court further acknowledges the shortcomings of institutional care:

*"We have to be conscious of the limited ability of public authorities to improve on nature. We need to be careful not to embark upon 'social engineering'. And we should not lightly interfere with family life. If the State – typically, as here, in the guise of a local authority – is to say that it is the more appropriate person to look after a mentally incapacitated adult than her own partner or family, it assumes, as it seems to me, the burden – not the legal burden but the practical and evidential burden – of establishing that this is indeed so. And common sense surely indicates that the longer a vulnerable adult's partner, family or carer have looked after her without the State having perceived the need for its intervention, the more carerfully must any proposals for intervention be scrutinised and the more cautious the court should be before accepting too readily the assertion that the State can do better than the partner, family or carer."*³⁵

Intervention would be justified only if the care offered by the public authority was demonstrably better than that offered by the family.³⁶ The court continues, *"the court should only intervene where there is a need to protect a vulnerable adult from abuse or the real possibility of abuse."*³⁷ While this seems obvious, it is (notwithstanding the court's protestations to the contrary³⁸) a departure from the spirit of the established case law. In *Re S (Adult Patient) (Inherent Jurisdiction: Family Life)*,³⁹ the court had held that the only

30 *Re A (Male Sterilisation)* [2000] 1 FLR 549 at 560.

31 MCA, s 4.

32 See, eg, MCA s 6.

33 MCA s 4(2).

34 Paragraph 121.

35 Paragraph 116.

36 Paragraph 117.

37 Paragraph 118.

38 Paragraph 115.

39 [2002] EWHC 2278 (Fam).

criterion for intervention in the life of an incapable adult was best interests. There was no applicable threshold comparable to that of 'significant harm', such as needed to be shown under s 31(2) of the *Children Act 1989* for the removal of a child. While it is likely to be unhelpful to debate the differences between 'significant harm' and 'abuse or the real possibility of abuse', there can be little doubt that some substantive threshold of harm prior to intervention is a desirable outcome. In this, the *MM* decision is to be celebrated.

Conclusion

Viewed in this light, *MM* is a case in the calm before the storm. It provides a hint as to how courts may deal with the introduction of the MCA, and its interface with common law. The real engagement with those issues, however, will occur in cases which arise after 1 October 2007, when the MCA came into effect. It is at that time that the problems become real, rather than matters of speculation.