

Key Legal Developments Update – Healthcare Law

January 2020

Priority

 High Medium Low

Area of Interest	Title	Significance
Deprivation of Liberty	<i>Re D</i> [2019] UKSC 42	<p>This Supreme Court decision sets out that when a 16 or 17 year old lacks capacity to make decisions, a parent cannot consent to living arrangements which would amount to a deprivation of that child's liberty on their behalf.</p> <p>D was diagnosed with ADHD, Aspergers Syndrome and Tourette Syndrome. When he was 15 he was informally admitted to a psychiatric hospital and it was recognised that this amounted to an objective deprivation of liberty. However, the High Court acknowledged that his parents gave consent to this so there was no deprivation of liberty.</p> <p>When D turned 16 the matter was further litigated, and the Supreme Court eventually found that consenting on behalf of a young person aged 16 or 17 to deprivation of liberty is not within the scope of parental responsibility.</p> <p>Where a 16 or 17 year old child who cannot give their own consent to circumstances satisfying the 'acid test' in <i>Cheshire West</i>, and if the state either knows or ought to know of the circumstances, then the child is to be seen as deprived of their liberty for purposes of Article 5 ECHR, and requires the protections afforded by that Article. Therefore, if these circumstances arise, the relevant authorities would be required to obtain a court order.</p> <p>(Please see the case here: https://www.supremecourt.uk/cases/docs/uksc-2018-0064-judgment.pdf)</p>

Withdrawal of Treatment

Raqeeb v Barts NHS Foundation Trust [2019] EWHC 2531

This case attracted a great deal of media attention. The case relates to the judicial review of the Trust's decision not to agree to transfer the child to an Italian Hospital for treatment and potential palliative care.

TR was 5 years old when she suffered bleeding to the brain causing extensive and irreversible damage to her brain. Her treating clinicians were of the opinion that life-sustaining treatment was not in her best interests. It was argued that TR could not survive without mechanical ventilation and there was no / minimal hope of recovery. TR's parents sought for her to be transferred to an Italian hospital for treatment and potential palliative care.

In the judicial review proceedings, the court held that the decision of the Trust was unlawful however if they had followed the correct approach, they would have arrived at precisely the same point that had been reached. It would serve no practical purpose to quash the decision of the Trust. In relation to the Inherent Jurisdiction proceedings, the court held that it was in TR's best interests for the Trust to continue to provide TR with life-sustaining treatment. Furthermore, should she wish to receive treatment in the Italian Hospital, there is no justification for interfering with TR's Article 56 right to receive treatment in another EU member state.

With the great media interest in these kinds of cases, ultimately these decisions will be tough ones for the court to make. This decision contrasts to the decisions made in the Charlie Gard and Alfie Evans cases whereby the court allowed for life-sustaining treatment to be withdrawn. The courts will always determine what is in the best interests of the child on a case by case basis which involves a consideration of a number of factors.

(Please see the case here:

<https://www.bailii.org/ew/cases/EWHC/Admin/2019/2531.html>)

Powers of Attorney

Re GED (Various Applications Concerning Foreign Representative Powers) [2019] EWCOP 52

This judgment relates to 5 separate applications before the court whereby the applicants requested the court to make orders to give effect to representative powers which have originated from foreign jurisdictions.

Specifically, each of the applicants was seeking an order of recognition of the representative power as a "protective measure" for the purposes of the recognition provisions under paragraph 19 of Schedule 3 to the MCA 2005. This gave the court an opportunity to clarify its approach and to set out the legal framework that underpins the recognition and enforcement of foreign powers of attorney.

The court recognised that in the previous case of *Re JMK* [2019] EWCOP 5, the court had made an unduly restrictive interpretation of 'protective measures'. In the current case, the court decided that it could modify a power to provide that the exercise of the power is no wider than the restrictions in the law of England and Wales. Furthermore, under section 15, the court can make a declaration that an attorney will be acting lawfully when exercising their powers in England and Wales. However, such a declaration can only be made for an adult who lacks capacity.

Therefore, if NHS Trusts come across situations involving foreign representatives and powers, it would be wise to seek legal advice.

(Please see the case here:

<http://www.bailii.org/ew/cases/EWCOP/2019/52.html>)

Case Management

London Borough of Southwark v NP & Ors [2019] EWCOP 48

This case concerns a 17-year-old suffering from cerebral palsy and atypical anorexia.

NP lived at home with her mother but was on a child protection plan due to neglect. She was admitted to hospital for a re-feeding regime due to being severely malnourished. Upon discharge, NP was placed in a residential unit by the local authority pursuant to a court order.

The Court of Protection granted restrictions to limit NP's contact with her mother as there was evidence that her mother undermined NP's feeding regime, even though she had been at risk of death. Furthermore, the home conditions were said to be 'squalid'.

What is important about this case is the commentary provided by Hayden J sitting as the Vice President of the Court of Protection about how case management can be improved and the significance of expert evidence. It was emphasised that:

- Delay is undesirable and effective case management can avoid delays.
- Parties should seek directions when it appears further evidence is required.
- Representatives must ensure any witnesses are furnished with all relevant material which is likely to have an impact on their views, conclusions and recommendations - *“This should not merely be regarded as good litigation practice but as indivisible from the effective protection of P’s welfare and autonomy”*.

(Please see the case here:

<https://www.bailii.org/ew/cases/EWCOP/2019/48.html>)

Inherent Jurisdiction

CD v London Borough of Croydon [2019] EWHC 2943 (Fam)

In this case, the Court of Protection set out guidance on the inherent jurisdiction of the Courts. CD is a 65-year-old man suffering from a range of medical problems. The Local Authority initiated proceedings due to escalated concerns about the unhygienic state of CD’s accommodation and himself. The Court held that CD lacks capacity in relation to decisions concerning his care and made an order to provide appropriate care for CD himself and secondly to make his accommodation safe for human habitation.

Cobb J discussed the inherent jurisdiction of the court, summarising:

- (1) The inherent jurisdiction may be deployed for the protection of vulnerable adults;
- (2) In some cases, a vulnerable adult may not be incapacitated within the meaning of the MCA 2005 but may be protected under inherent jurisdiction;
- (3) In some cases capacitous individuals may be of unsound mind within the meaning of Article 5(i)(e) ECHR;
- (4) In exercising powers, the court is bound by the ECHR and must only impose orders that are necessary and

proportionate and have proper regard to the autonomy of the individual;

- (5) In certain circumstances it may be appropriate for a court to take interim protective measures whilst carrying out necessary investigations.

(Please see the case here:

<https://www.bailii.org/ew/cases/EWHC/Fam/2019/2943.html>)

Health and Safety

Health Service Safety Investigations Bill

Mentioned in the Queen's Speech on 19 December 2019, this bill aims to establish a new independent healthcare safety investigation body (HSSIB) to improve patient safety. The new HSSIB will replace the existing Healthcare Safety Investigation Branch.

The HSSIB will be a non-departmental public body which will investigate qualifying incidents that occur during the provision of NHS services or at premises where NHS services are provided.

The purpose of these investigations is to identify risks to the safety of patients and to address those risks by facilitating the improvement of systems and practices in the provision of NHS services.

The HSSIB will have a range of powers, including but not limited to entering and inspecting premises if considered necessary to do so for the purposes of an investigation, inspect or take copies of any documents, seize and remove from the premises any document, equipment or other items.

(Please find more information here:

<https://www.gov.uk/government/publications/health-service-safety-investigations-bill--2>)

Covert Recordings

Mustard v Flower and Others [2019] EWHC 2623 (QB)

The High Court has ruled that patients making covert recordings during consultations with clinicians did not breach the GDPR.

The patient underwent medical examinations for the purposes of her claim in which she covertly recorded the consultation. She claimed

that it was an aide memoir of what was said. The defendants argued that the recordings should be excluded from proceedings as covert recordings amounted to unlawful processing of data. This was a breach of the GDPR and the Data Protection Act 2018.

The Court held, although the way in which the recordings were made covertly were 'reprehensible', the court did not deem that they should be excluded from evidence. This was because the GPDR provides that the Regulation does not apply to the processing of personal data "*by a natural person in the course of a purely personal ... activity*". Recording a consultation with a doctor, or an examination by a doctor, would seem to fall into this category.

In a world of readily-available technology, it will be difficult to prevent a patient from recording a consultation if they wish to. Therefore, clinicians should be aware that they may be recorded and may want to make effort to accommodate patients to promote the therapeutic relationship.

(Please see the case here:

<https://www.bailii.org/ew/cases/EWHC/QB/2019/2623.html>)

Regulatory

Notification of Deaths Regulations 2019

The Ministry of Justice has published guidance on the Notification of Deaths Regulations 2019.

The guidance highlights that a death under certain circumstances as listed in the guidance should always be notified, regardless of how much time has passed since the death of an individual. The Regulations places a notification requirement on a medical practitioner even if they are aware that someone else has reported a death to the Coroner.

The guidance also sets out what information is to be provided to the Senior Coroner.

(Please see the guidance here:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/831100/notification-deaths-regulations-2019-guidance.pdf)

Children and Mental Health

Detention of children and young people with

In November, the Joint Committee on Human Rights published its report on an inquiry which

*learning disabilities
and/or autism inquiry*

looked into youth detention, solitary confinement and restraint.

The Committee found evidence on the inappropriate detention of children and young people with learning disabilities and/or autism in mental health hospitals and the threat that such placements pose to their human rights.

The Committee make the following urgent proposals:

- A review to be carried out of the framework for provision of services with those with learning disabilities and/or autism.
- Stronger legal entitlements to support individuals.
- Care and Treatment Reviews and Care, Education and Treatment Reviews to be put on a statutory footing.
- The criteria for detention under the Mental Health Act must be narrowed to avoid inappropriate detention.
- Families of those with learning disabilities and/or autism must be recognised as human rights defenders, and other than in exceptional circumstances, be fully involved in all relevant discussions and decisions.

We currently await the Government's response.

(Please find the report here:

<https://publications.parliament.uk/pa/it201919/jtselect/itrights/121/121.pdf>)

**Secondary
Victims**

*Paul v Royal
Wolverhampton NHS
Trust [2019] EWHC
2893 (QB)*

This case relates to the claim of 2 daughters who had witnessed their father's death caused by a heart attack. This was 14 months after the NHS Trust had allegedly failed to diagnose a cardiac issue.

The deceased was seen at the defendant's hospital for cardiac symptoms in 2012. The Claimant alleges that there was a failure of care by the hospital in not performing cardiac investigations. The Deceased collapsed in the streets 14 months later which was witnessed by his young daughters. They provided

evidence that witnesses the deceased's death caused them to suffer PTSD.

The Court held that the claim was bound to fail as there was no close proximity in space and time between the daughters witnessing their father's death and the NHS Trusts' alleged breach of duty. Therefore, the claim was struck out.

The case exemplifies the difficulties in making a successful claim as a secondary victim. The courts had confined the right of action of secondary victims by means of strict control mechanisms.

(Please see the case here:

<http://www.bailii.org/ew/cases/EWHC/QB/2019/2893.html>)

Urgent and Emergency Care

*Care Quality
Commission: Urgent and
emergency care survey
2018*

The CQC published its findings of a survey relating to urgent and emergency care provided by 132 NHS Trusts. The survey found that majority of patients using these services had a positive experience regarding the care they received. Particularly, patients felt positive about their interactions with staff.

However, the results suggest a scope for improvement. in a number of areas including:

- waiting times;
- help from staff to control their pain;
- information provision when leaving A&E or the urgent care centre.

The CQC will use the results from this survey in the regulation, monitoring and inspection of NHS acute trusts in England. Survey data will be used in CQC Insight, an intelligence tool which identifies potential changes in quality of care and then supports deciding on the right regulatory response.

(Please find more information here:

<https://www.cqc.org.uk/publications/surveys/urgent-emergency-care-survey-2018>)

For further information on any aspect of this Legal Update, please contact John Holmes (j.holmes@hempsons.co.uk) or Helen Claridge (h.claridge@hempsons.co.uk).

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