



CASE LAW UPDATE
Switalskis MCA Webinar
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COVID-19 Vaccine

E (Vaccine) [2021] EWCOP 7

**SD v Royal Borough of Kensington and Chelsea [2021]
EWCOP 14**

NHS Tameside & Glossop CCG v CR & SR [2021] EWCOP 19



Vaccine - Capacity

Re E:

[11] Evaluating capacity on this single and entirely fact specific issue is unlikely to be a complex or overly sophisticated process when undertaken, for example, by experienced GPs and with the assistance of family members or care staff who know P well.

NHS Novel coronavirus (COVID-19) standard operating procedure: COVID-19 local vaccination services deployment in community settings

- the anticipated benefits of vaccination in the simplest of terms,
- the likely side effects from vaccination and any individual risks they may run should be addressed, and
- the disbenefits of not consenting to the vaccination.



Vaccine - Best Interests

- P's past and presents wishes and feelings / beliefs and values
- Views of others
- Relevant circumstances
 - Age
 - Underlying health conditions
 - Care home resident
 - Understand of COVID-19 and social distancing measures
 - Approval and testing of the vaccine
 - Risks / benefits of vaccine



Vaccine

Re E:

‘[17]...The risk matrix is not, to my mind, a delicately balanced one. It does not involve weighing a small risk against a very serious consequence. On the contrary there is for Mrs E and many in her circumstances a real and significant risk to her health and safety were she not to have the vaccine administered to her’.

SD v Royal Borough of Kensington and Chelsea

[33] In cases such as this, there is a strong draw towards vaccination as likely to be in the best interests of a protected party (P). However, this will not always be the case, nor even presumptively so. What it is important to emphasise here, as in so many areas of the work of the Court of Protection, is that respect for and promotion of P's autonomy and an objective evaluation of P's best interests will most effectively inform the ultimate decision. It is P's voice that requires to be heard and which should never be conflated or confused with the voices of others, including family members however unimpeachable their motivations or however eloquently their own objections are advanced.



Vaccine - Delay

Re E

'[14] ... It has taken nearly a month for the application to come before me. I indicated that I consider this delay to have been unsatisfactory. When an issue arises as to whether a care home resident should receive the vaccination, the matter should be brought before the court expeditiously, if it is not capable of speedy resolution by agreement. This is not only a question of risk assessment, it is an obligation to protect P's autonomy.



[3] For those in care homes, perhaps more than any other, deprivation of contact with loved ones has the potential to corrode quality of life to such a degree that, it may become difficult to evaluate where the balance of harm lies, as between a risk of exposure to an insidious and life threatening virus and compromising the most basic quality of life. Into this equation of competing interests must be factored the moral imperative to protect a group as well as an individual. These countervailing interests each require consideration. This cannot be regarded as an either-or situation. The fact that the interests of an individual and those of the wider group are difficult to reconcile, perhaps frequently irreconcilable, does not absolve the care home, or the state more generally, from engaging in the effort to do so. The strength of the obligation to protect the rights of the individual, particularly the vulnerable and mentally incapacitated, is not in any way diminished by the pandemic health crisis; it is, if anything, enhanced.



Davies v Wigan Council [2020] EWCOP 60

*[4]... those in care homes should not be regarded as an homogenous group with identical needs. **Their characters, personalities, individual needs, which are as various as the needs of the rest of us, all require to be considered.** I have no doubt that those who work in care homes, who I have frequently heard in evidence over the last 9 months, are acutely aware of this and will regard this statement as trite and obvious. ..The objective of any plans or policies devised in care homes should always be to harness the skills and strengths of the carers so as most effectively to promote the best interests of the individual resident. My emphasis here is on the individual.*

*[22] As I have emphasised, Mrs Davies' needs, in respect of contact, must be regarded as unique to her, for the all the reasons I have set out above. **The scope of contact must be evaluated on an individual and not a generic basis.** Her identified needs will then have to be assessed in the context of the realistically available options.*



Davies v Wigan Council [2020] EWCOP 60

*[25] I emphasise that I do not want these enquires to be confined by what is presently available. Any plan should reflect the need for frequent and vigilant review and should proactively contemplate the various alternatives that may soon emerge. With some diffidence, in this ex tempore judgment, I indicate that, in the Court's assessment, **the time has come for care homes to position themselves in the vanguard of the developing opportunities. In other words, they should move to the front line and be careful not to lag behind when identifying the emerging options***



NG v HCC & Ors [2021] EWCOP 2

VE v AO & Ors [2020] EWCOP 23

[35] I start with the basic proposition that most people would strongly wish to die with their family around them. I entirely agree with what Hedley J said in DU that the court should seek to ensure circumstances of P's imminent death that are as peaceful and dignified as possible. Given the Covid 19 pandemic, the need to minimise the spread of the virus and the current Government guidance if AO were to stay at TO, then the most contact that she would be likely to have would be one short visit from one family member at or around the time of her death.



Remote hearings - Recording of proceedings

Re TA (Recording of proceedings; Communication with the Court Office) [2021] EWCOP 3



Domestic Violence - Re LW [2020] EWCOP 50

[11] I recognise that a judge has a significant advantage, reviewing all of the evidence in the forensic calm of a court room. Those working with LW on the ground, have not, until recently, had the same opportunity to weave the material together to gain a clear picture of the distorted and abusive nature of this relationship. That said, I reiterate my concern that this contact has been permitted to continue for as long as it has.

[17] Though the conduct I have described above appears obvious and extreme, individual instances of behaviour, observed in isolation, do not always signal to professionals the malevolent undercurrent beneath. Controlling and coercive behaviour of this kind requires an effective assessment of a pattern of behaviour, the impact of which is cumulative.

[18] This judgment provides a timely opportunity to highlight both the insidious nature of controlling and coercive behaviour and the extreme vulnerability of those lacking mental capacity in facets of their decision making.



Domestic Violence - Re LW [2020] EWCOP 50

Domestic violence and abuse is defined as:

Any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members, regardless of gender or sexuality. This can encompass, but is not limited to, the following types of abuse: psychological, physical, sexual, financial and emotional.“

The Government definition also outlines the following:

“Coercive behaviour is an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim.

Controlling behaviour is a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour”



Re LW [2020] EWCOP 50 - Controlling or Coercive Behaviour in an Intimate or Family Relationship Statutory Guidance Framework

- Isolating a person from their friends and family
- Depriving them of their basic needs
- Monitoring their time
- Monitoring a person via online communication tools or using spyware
- Taking control over aspects of their everyday life, such as where they can go, who they can see, what to wear and when they can sleep
- Depriving them access to support services, such as specialist support or medical services
- Repeatedly putting them down such as telling them they are worthless
- Enforcing rules and activity which humiliate, degrade or dehumanise the victim
- Forcing the victim to take part in criminal activity such as shoplifting, neglect or abuse of children to encourage self-blame and prevent disclosure to authorities
- Financial abuse including control of finances, such as only allowing a person a punitive allowance
- Control ability to go to school or place of study
- Taking wages, benefits or allowances
- Threats to hurt or kill
- Threats to harm a child
- Threats to reveal or publish private information (e.g. threatening to 'out' someone)
- Threats to hurt or physically harming a family pet
- Assault
- Criminal damage (such as destruction of household goods)
- Preventing a person from having access to transport or from working
- Preventing a person from being able to attend school, college or University
- Family 'dishonour'
- Reputational damage
- Disclosure of sexual orientation
- Disclosure of HIV status or other medical condition without consent
- Limiting access to family, friends and finances



Domestic Violence - Re LW [2020] EWCOP 50

*[22] It is important to emphasise that this list is **not exhaustive**...Abusive behaviour of this kind will often be tailored to the individual circumstances of those involved. The above is no more than a check list which should prompt questioning and enquiry, the responses to which should be carefully recorded so that the wider picture emerges. That which might, in isolation, appear innocuous or insignificant may in the context of a wider evidential picture be more accurately understood.*

Also note **F v M [2021] EWFC 4**



Cases with international element - Re UR [2021] EWCOP 10

[57] ...I consider the preparation and presentation of this case, by all the disciplines involved, is a **beacon of good practice**. It should be regarded as a **paradigm for professionals who find themselves considering similar situations in the future...** I do consider that the case management measures taken here are likely to be of wider and more general assistance in cases, in the Court of Protection, involving permanent relocation from the jurisdiction of England and Wales. Counsel submit, and I agree, that the following, non exhaustive, checklist is likely to provide useful guidance:

- i. Liaison with the relevant Embassy/ Consulate (in the first instance) to ascertain what guidance and assistance can be provided;
- ii. Evidence as to physical health to travel (GP);
- iii. Evidence as to mental health to travel (psychiatrist);
- iv. Legal opinion regarding citizenship, benefit entitlement, health and social care provision in the relevant country, and such other issues relevant to the case;
- v. Consideration of any applications that need to be made as a consequence of any legal opinion provided;
- vi. Independent social work evidence regarding the viability of the proposed package of care in the relevant country if such evidence cannot be provided by the parties to the proceedings or a direction under section 49 MCA;



Cases with international element - Re UR [2021] EWCOP 10

- vii. Confirmation of travel costings from the commissioners of the care package, both in relation to P and any carers that may need to travel with them (who will pay?);
- viii. Confirmation that the necessary medication/ care will be available during travel from the UK/ for the immediate future in the new country
- ix. Transition plan/ care plan, to include a contingency plan and how the matter should return to court in the event of an emergency in implementing the proposed plan;
- x. Best interest evidence from the relevant commissioners;
- xi. Wishes and feelings evidence;
- xii. Residual orders to allow the plan to be implemented, including single issue financial orders regarding opening/closing of UK bank accounts, the purchasing of essential items to travel (if necessary);
- xiii. Covid-19 considerations prior to travel (if applicable)



Cases with international element - Habitual residence

Re QD (Jurisdiction: Habitual Residence) (No 1) [2019]
EW COP 56

Paragraphs [7] - [15]

The Health Service Executive of Ireland v IM [2020]
EW COP 51

Paragraphs [28 - 33]



Capacity - a few helpful cases

A local authority v GP (Capacity - Care, Support and Education) [2020] EWCOP 56

A local authority v RS [2020] EWCOP 29

'[42]...As I have noted, risky behaviour is not inevitably evidence of a failure to understand the risk being taken or evidence of an inability to weigh that risk when deciding whether to act despite it. The repetition of risky behaviour can also indicate that a person has understood the risk, weighed it and decided to take it anyway notwithstanding the dangers.'

London Borough of Tower Hamlets v PB [2020] EWCOP 34

[6] It is necessary here to emphasise the cardinal principles of the Act. The presumption of capacity, Section 1(2), is the bench mark for decision makers in this sphere. **To my mind it is every bit as important as the presumption of innocence in a criminal trial.** The Act reinforces this by requiring that a person is not to be treated as unable to make a decision unless *"all practicable steps to help him to do so have been taken without success"*. **The scope of these unambiguous provisions requires fully to be recognised and vigilantly guarded.** The philosophy informing the legal framework illuminates the point that this case highlights, namely *'a person is not to be treated as unable to make a decision merely because he makes an unwise decision'*. This statutory imperative reflected extensive common law jurisprudence, prior to the Mental Capacity Act, recognising that the law does not insist that a person behaves *"in such a manner as to deserve approbation from the prudent, the wise or the good"*: **Bird v Luckie (1850) 8 Hare 301**. It is the ability to take the decision, not the outcome of it which is in focus: **CC v KK and STCC [2012] EWHC 2136 (COP)**; **Kings College Hospital NHS Trust v C & V [2015] EWCOP 80**.

[14] *Even where an individual fails to give appropriate weight to features of a decision that professionals might consider to be determinative, this will not in itself justify a conclusion that P lacks capacity. Smoking, for example is demonstrably injurious to health and potentially a risk to life. Objectively, these facts would logically indicate that nobody should smoke. Nonetheless, many still do...*



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