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The place of wishes and feelings in best interests decisions: *Wye Valley NHS Trust* v *Mr B*

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In *Wye Valley NHS Trust* v *Mr B* the Court of Protection (CoP) decided that it was not in the best interests of Mr B to receive amputation surgery against his will, notwithstanding that he would die without the treatment. Mr Justice Peter Jackson met with Mr B in person and his best interests decision placed significant weight on Mr B's wishes and feelings. This case note considers this high profile and influential case in the context of ongoing debate about the place of wishes and feelings in best interests decisions under the Mental Capacity Act 2005. It considers the history of the best interests principle, its interpretation by the Supreme Court in *Aintree University Hospitals NHS Foundation Trust* v *James*, ongoing debates about its compatibility with Article 12 of the United Nations Convention on the Rights of Persons with Disabilities, and recent proposals by the Law Commission for statutory amendments to the Mental Capacity Act.

Introduction

The Mental Capacity Act 2005 (MCA) codified the common law principle that an act done or a decision made on behalf of an adult deemed 'incapable' of making the relevant decision, must be done in that person's best interests.[1] This principle encapsulates the paternalistic basis of the MCA: the belief that third party decision makers may know better than the person themselves what is in their best interests, and may lawfully impose that decision upon them. This principle is increasingly being called into question. In light of the recently adopted United Nations Convention on the Rights of Persons with Disabilities (CRPD)[2], it is maintained that best interests decisions do not afford sufficient respect for the 'rights, will and preferences' of the person to comply with Article 12 CRPD – the right to equal recognition before the law.[3] In response to this critique the Law Commission has proposed amendments to the MCA that place a stronger emphasis on the wishes and feelings of the relevant person.[4] In *Aintree University Hospitals NHS Foundation Trust* v *James*[5] the Supreme Court

[1] MCA, s 1(5).

[2] United Nations Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008, 2515 UNTS 3). Ratified by the UK on 8 June 2009.

[3] P. Bartlett, 'The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law' (2012) 75 MLR 752; Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014) Article 12: Equal Recognition Before the Law* (adopted at the Eleventh session of the Committee, 31 March –11 April 2014, Geneva, CRPD/C/GC/1); G. Richardson, 'Mental Capacity in the Shadow of Suicide: What Can the Law Do?' (2013) 9 *International Journal of Law in Context* 87; W. Martin, 'Mental Capacity Law Discussion Paper: Consensus Emerges in Consultation Roundtables: The MCA is Not Compliant with the CRPD' *39 Essex St Mental Capacity Law Newsletter,* August 2014 (Issue 49); R. Harding, 'The Rise of Statutory Wills and the Limits of Best Interests Decision-Making in Inheritance' (2015) 78 MLR 945.

[4] Law Commission, *Mental Capacity and Deprivation of Liberty: A Consultation Paper* (Consultation Paper 222, London 2015).

handed down a ruling on the meaning of 'best interests' that placed a strong emphasis on the person's own 'point of view'.[6] These developments have prompted a renewed focus on how far best interests decisions under the MCA already accommodate the wishes and feelings of the relevant person.[7]

The recent ruling in *Wye Valley NHS Trust* v *Mr B*[8] places a strong emphasis on the person's own wishes, feelings, values and beliefs in determining their best interests. Although the case did not establish any new legal precedent, Mr Justice Peter Jackson's ruling is relevant to debates on whether the MCA requires statutory amendment. The case will be welcomed by those who argue that the best interests principle under the MCA already places sufficient emphasis on the 'will and preferences' of the relevant person to comply with the CRPD. It will provide support for best interests decision makers who wish to make potentially controversial or risky decisions that are strongly influenced by a person's wishes and feelings. However, I suggest that the *legal* parameters of respect for wishes, feelings, values and beliefs under the best interests principle remain unchanged by this and similar rulings. *Wye Valley* is significant as an example of a shift in the court's culture towards growing engagement with the person and their identity, but at law the weight placed on the person's wishes, feelings, values and beliefs still remains largely within the discretion of the best interests decision maker. For this reason, the conclusion that this and similar cases indicate that the best interests principle under the MCA do not require statutory amendment to place a greater emphasis on the person's will and preferences is premature.

Facts and Decision

At the time of the hearing Mr B was 73 years old. Prior to his admission to hospital for a chronic foot ulcer he had lived alone in an upstairs flat.[9] He spent his days shopping for food, browsing local charity shops, and collecting interesting books and paintings, clocks and radios.[10] He had some difficulty looking after himself; the conditions in his flat were described as 'squalid'. His care co-ordinator described him as 'fiercely independent'.[11] Despite being a sociable man Mr B was increasingly isolated: he was an only child whose parents had died, his partner of 20 years had died in 2000[12] and 'No one has ever visited him in hospital and no one ever will'.[13]

As a young man he was diagnosed with paranoid schizophrenia and was treated with antipsychotic medications. He had been detained in hospital in the past, but it was said that generally his 'mental illness did not cause him undue distress.'[14] For several years he had experienced 'persistent auditory hallucinations' in which he heard 'voices of angels and of the Virgin Mary.'[15] He told the judge that

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[5] [2013] UKSC 67.
[6] *ibid* [45].
[7] Martin, n 3 above; A. Ruck Keene and C. Auckland, 'More presumptions please? Wishes, Feelings and Best Interests Decision-making' (2015) 5 *Elder Law Journal* 293; R. Harding 'What's Wrong With Best Interests?' (*Revaluing Care Blog,* 27 March 2015) at http://revaluingcare.net/whats-wrong-with-best-interests/ [last accessed 26 November 2015].
[8] [2015] All ER (D).
[9] *ibid* [1], [21].
[10] *ibid* [21].
[11] *ibid* [21].
[12] *ibid* [19].
[13] *ibid* [43].
[14] *ibid* [21].
[15] *ibid* [19].

these voices 'stopped him from thieving', and that although he did not belong to any particular religion ('I'm not fussy') Mary wanted him to be a Catholic.[16]

Mr B was admitted to hospital with a chronic foot ulcer in July 2014. In January 2015 he was transferred to a psychiatric hospital as his psychotic illness had relapsed, and eventually he was detained under the Mental Health Act 1983.[17] He resisted treatment for his diabetes and infected foot. By August 2015 his mental health had begun to recover, but his foot infection had affected the bone and caused a systemic infection. He refused all treatment, but allowed dressings to be changed.[18] Wye Valley NHS Trust applied to the Court of Protection[19] to determine Mr B's mental capacity to refuse the proposed amputation and his best interests.

The expert medical evidence was clear: an amputation above the knee was now the only clinical option.[20] Without the amputation, Mr B would be subject to 'overwhelming infection' within days and would die from septicaemia.[21] With the amputation, a regime of intravenous antibiotics and improved diabetes control, Mr B could be rehabilitated with an artificial limb.[22] It was acknowledged, however, that even if the surgery were successful Mr B would not return to his own accommodation: 'The best that can be hoped for is that he might be discharged to a care home or, more likely, a nursing home, which he does not want'.[23]

Mr B opposed the surgery 'in the strongest possible terms', and had done since it was first proposed about a year earlier.[24] Mr B told Peter Jackson J that he did not want the surgery for the following reasons:

> I don't want an operation.
>
> I'm not afraid of dying, I know where I'm going. The angels have told me I am going to heaven. I have no regrets. It would be a better life than this.
>
> I don't want to go into a nursing home, [my partner] died there.
>
> I don't want my leg tampered with. I know the seriousness, I just want them to continue what they're doing.
>
> I don't want it. I'm not afraid of death. I don't want interference. Even if I'm going to die, I don't want the operation.[25]

Peter Jackson J applied the MCA's test of mental capacity to consider whether Mr B was able to make the decision to refuse the surgery. A person is considered to lack the mental capacity to make a specific decision if they are unable to understand, retain, use and weigh the information relevant to a decision, and to communicate their decision, because of 'an impairment or disturbance in the

[16] *ibid* [21].
[17] *ibid* [22]-[23].
[18] *ibid* [23].
[19] The Court of Protection was established by the MCA to make declarations and orders relating to mental capacity and best interests.
[20] *ibid* [28].
[21] *ibid* [29]-[30].
[22] *ibid* [31].
[23] *ibid* [37].
[24] *ibid* [37].
[25] *ibid* [37].

functioning of the mind or brain'.[26] Applying this test, Peter Jackson J concluded that Mr B lacked capacity to refuse consent to the amputation. This conclusion was based on Mr B not wanting the surgery 'because the Lord doesn't want him to have his leg taken off', his not understanding the reality of his injury – believing that if he did not have the surgery his leg would get better, his belief that once the doctors put him to sleep 'they could do anything', and because whenever his treatment was discussed he became agitated and would shut down conversations 'so that the pros and cons of the various options cannot be further discussed.'[27]

Under the MCA the test of best interests operates in lieu of consent to treatment where a person is found to lack mental capacity. The question posed is therefore not whether the patient should live or die, but whether or not treatment that will prolong life but constitutes a serious interference with bodily integrity and personal autonomy is in the best interests of a person who lacks mental capacity and therefore is lawful.[28] The law on best interests has long recognized a 'profound respect for the sanctity of human life'.[29] The starting point is a strong presumption that it is in a person's best interests to remain alive, but this presumption is not absolute.[30] Peter Jackson J concluded that it was not in Mr B's best interests to carry out the surgery against his opposition, thus it would only be lawful if he changed his mind, which was unlikely to happen.[31] Without the surgery, Mr B would receive palliative care to ensure his last days were as comfortable as possible.[32]

A: Wishes and feelings in Mr B's case

The NHS Trust argued that 'the views expressed by a person lacking capacity were in principle entitled to less weight than those of a person with capacity'.[33] Peter Jackson J stated that incapacity is not an 'off-switch' for a person's rights and freedoms, and no automatic discount should be applied to a person's own point of view.[34] Although 'incapacity' means that a person's views would not be determinative in the same way that they are for a person deemed capable 'there is no theoretical limit' to the weight they might be given'; sometimes 'very significant weight will be due', in others they might be accorded little or no weight.[35] Given that a person with capacity could 'quite reasonably' refuse the amputation, having considered the risks and benefits, it was 'important to ensure that people with a disability are not – by the very fact of their disability – deprived of the range of reasonable outcomes that are available to others'.[36]

The NHS Trust also argued that little weight should be placed on Mr B's religious beliefs because 'they were intimately connected with the cause of his lack of capacity'.[37] Peter Jackson J approached matters on the basis that Mr B's right to freedom of thought, conscience and religion under Article 9 of the European Convention on Human Rights (ECHR) was 'no less engaged than it would be for any

[26] MCA, s 2 and s 3.
[27] *ibid* [34].
[28] *Airedale NHS Trust* v *Bland* [1993] AC 789, p 868; *Aintree University Hospitals NHS Foundation Trust* v *James,* n 5 above [21].
[29] *Airedale Hospital Trustees* v *Bland*, *ibid*.
[30] *Aintree University Hospitals NHS Foundation Trust* v *James*, n 5 above.
[31] *Wye Valley NHS Trust* v *Mr B*, n 8 above [3].
[32] *ibid* [37].
[33] *ibid* [10].
[34] *ibid* [11].
[35] *ibid* [10].
[36] *ibid* [12].
[37] *ibid* [39].

other devout person'.[38] Religious beliefs are based on faith, not reason, and 'it cannot be right' that the religiously-based wishes and feelings of a person who lacks capacity should always be overruled.[39] It is not unusual for the Court of Protection to consider a person's religious and cultural background in making best interests decisions.[40] However the emphasis placed on Mr B's faith did not arise from his following any established religion[41] but because of the connection between his beliefs and his personal identity. His beliefs had been described as 'religious delusions'[42], an epithet that Peter Jackson J felt they did not deserve: 'they are his faith and they are an intrinsic part of who he is'. He went on to say that '[i]t is no more meaningful to think of Mr B without his illnesses and idiosyncratic beliefs than it is to speak of an unmusical Mozart.'[43] A similar approach was taken by District Judge Eldergill in *Re P (capacity to tithe inheritance)*[44] cautioning against pathologising religious beliefs[45] and against interfering with an important 'source of meaning, hope, strength, and recovery'.[46]

Although Mr B's religious beliefs featured prominently in the judgment, the most important factor appears to be what Peter Jackson J described as his 'core quality' of *'fierce independence'*.[47] There was no possibility that he would return to his former life in his own flat; the best outcome of the surgery would be discharge to a residential care home. Peter Jackson J felt that 'it would not be in Mr B's best interests to take away his little remaining independence and dignity in order to replace it with a future for which he understandably has no appetite and which could only be achieved after a traumatic and uncertain struggle that he and no one else would have to endure'.[48]

Unusually for a hearing in the Court of Protection, the judge met with Mr B in person to ask him about his views. Peter Jackson J commented that he 'did not feel able to reach a conclusion without meeting Mr B myself.'[49] Although there were reports of discussions with Mr B and expert reports, these were not a substitute for a face to face meeting. Peter Jackson J felt that the meeting enabled him to obtain 'a deeper understanding of Mr B's personality and view of the world, supplementing and illuminating the earlier reports' and Mr B seemed glad of the opportunity to get his point of view across.[50]

The Wider Context of the *Wye Valley* Case

Peter Jackson J's ruling in *Wye Valley NHS Trust* v *Mr B* is a stark example of how wishes and feelings can outweigh clinical conceptions of best interests under the MCA. It illustrates how far the best interests principle has developed since its common law foundation was established in *Re F (Mental Patient: Sterilisation).*[51] *Re F* concerned whether the non-therapeutic sterilisation of a woman with

[38] *ibid* [14].
[39] *ibid* [15].
[40] eg *St George's Healthcare NHS Trust* v *P & Anor* [2015] All ER (D) 292 (Jun); *Sandwell Metropolitan Borough Council* v *RG & Ors* [2013] EWHC 2373 (COP).
[41] *Wye Valley NHS Trust* v *Mr B*, n 8 above [14].
[42] *ibid* [14].
[43] *ibid* [13].
[44] [2014] EWHC B14 (COP).
[45] *ibid* [87].
[46] *ibid* [126].
[47] *Wye Valley NHS Trust* v *Mr B*, n 8 above [43]. Italics in original.
[48] *ibid* [45].
[49] *ibid* [18].
[50] *ibid* [18].
[51] [1990] 2 AC 1.

learning disabilities was lawful, notwithstanding that she was deemed incapable of consenting to it and there was nobody with legal authority to consent on her behalf. The House of Lords held that treatment provided in the best interests of a person who lacked the mental capacity to give consent was lawful under the common law doctrine of necessity. The standard for best interests established in *Re F* was the *Bolam*[52] standard of the duty of care – an action in accordance with a responsible body of medical opinion, skilled in the speciality.

Reading *Re F* today, it is striking just how little reference is made to F's own personal perspective – she is depicted solely as a medical, social and legal problem, not as a person with wishes and feelings worthy of consideration. Later best interests cases took into account social and emotional dimensions, as well as purely medical considerations.[53] The courts came to adopt a 'balance sheet' approach, contrasting the benefits and disbenefits of the various options within the '*Bolam* range', to determine which of these options was in the person's best interests.[54]

The approach taken in *Re F* can be contrasted with the 'substituted judgement' approach, which sought to make the decision the person themselves would have made if competent and which was, at that time, adopted for matters such as the making of a statutory will on behalf of an 'incapacitated' adult.[55] The Law Commission, whose recommendations formed the basis of the MCA, argued that there were problems with a 'pure' substituted judgement approach. Often it would be unclear what a person would have wanted as past expressed preferences were not the same as an anticipatory choice, and decisions made on this basis would involve a considerable degree of speculation.[56] There may be conflicts between a person's past and present wishes and feelings[57] and in situations where a person had never been regarded as having mental capacity the Law Commission felt that 'Any decision will inevitably be influenced by the decision-maker's view of what will be best for him'. Substituted judgement was also considered unattractive where the person had been a 'notoriously bad judge of certain matters'. For these reasons the Law Commission felt that some degree of 'censorship' by those applying the test was inevitable, but commented that 'thinking oneself into the shoes of the person concerned' was an important mark of respect for human individuality.[58]

The Law Commission proposed a hybrid test of best interests. Best interests amounted 'to something more than not treating that person in a negligent manner' and required 'a careful, focused consideration of that person *as an individual*'.[59] Yet it was not a substituted judgement test: the Commission commented that '[r]ealistically, the former views of a person who is without capacity cannot in every case be determinative of the decision which is now to be made'.[60] However it did include a checklist of factors for best interests decision makers to consider, including the

[52] *Bolam* v *Friern Hospital Management Committee* [1957] 2 All ER 118.
[53] *Re MB (Medical Treatment)* [1997] 2 FLR 426.
[54] *Re A (Male Sterilisation)* [2000] 1 FLR 549.
[55] *Re D (J)* [1982] Ch. 237; Harding, n 3 above.
[56] Law Commission, *Mentally Incapacitated Adults and Decision-Making: Medical Treatment and Research*, (Law Com no 129, London: HMSO, 1993) at [3.53]-[3.54].
[57] Law Commission, *Mentally Incapacitated Adults* (Law Com no 231, London: HMSO 1995) at [3.29].
[58] Law Commission, *Mentally Incapacitated Adults and Decision-Making: An Overview* (Law Com No 119, London: HMSO 1991) [4.23].
[59] Law Commission (1995), n 57 above [3.27] (italics in original).
[60] ibid [29].

person's wishes and feelings.[61] The proposed checklist was left deliberately flexible, so as to be able to adapt to 'changing views and attitudes'.[62]

Section 4 of the MCA almost exactly reflects the Law Commission's proposals.[63] Best interests decision makers must have regard to 'the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity)', 'the beliefs and values that would be likely to influence his decision if he had capacity' and 'the other factors that he would be likely to consider if he were able to do so.' The Explanatory Notes for the MCA confirm that best interests was intended to be an 'objective test', not substituted judgement, and that no factor in the checklist – including wishes and feelings – 'carries any more weight or priority than another'.[64] The MCA Code of Practice states that wishes and feelings 'should be taken fully into account', but 'will not necessarily be the deciding factor' in determining best interests.[65] There is no doubt that the MCA requires a person's wishes, feelings, values and beliefs to be considered as part of a best interests decision – the question left open by the statute is what weight they should be accorded in contrast with other considerations, such as risks of harm or loss of life.

Concerns about the extent to which the best interests principle respects the wishes and feelings of the relevant person have renewed legal and political force in light of the recently adopted UN CRPD. Article 12(4) CRPD requires measures relating to the exercise of legal capacity to respect the 'rights, will and preferences' of the person. A General Comment on Article 12 adopted by the UN Committee on the Rights of Persons with Disabilities states:

> The 'best interests' principle is not a safeguard which complies with article 12 in relation to adults. The 'will and preference' paradigm must replace the 'best interests' paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others.[66]

In situations where a person's wishes and feelings are unclear, the Committee recommends that the best interests standard be replaced by the 'best interpretation of will and preference'.[67] It is increasingly believed that the best interests principle under the MCA does not comply with Article 12 CRPD.[68] Accordingly the Law Commission has recently proposed, as part of a wider consultation on detention under the MCA, that section 4 MCA 'should be amended to establish that decision-makers should begin with the assumption that the person's past and present wishes and feelings should be

[61] ibid [3.28].
[62] ibid [3.28].
[63] Although the principle of least restriction was moved to MCA, s 1.
[64] Department for Constitutional Affairs and Department of Health, *Mental Capacity Act - Explanatory Notes* (London: TSO, 2005) at [28].
[65] Lord Chancellor's Office, *Mental Capacity Act Code of Practice*, (Department for Constitutional Affairs, London: TSO 2007) at [5.38].
[66] Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014) Article 12: Equal Recognition Before the Law* (adopted at the Eleventh session of the Committee, 31 March –11 April 2014, Geneva, CRPD/C/GC/1) at [18bis].
[67] ibid.
[68] Martin, n 3 above; Bartlett, n 3 above; E. Flynn and A. Arstein-Kerslake, 'Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity' (2014) 10 *International Journal of Law in Context* 81; A. Dhanda, 'Universal Legal Capacity as a Universal Human Right' in M. Dudley, D. Silove, and F. Gale (eds), *Mental Health and Human Rights: Vision, Praxis, and Courage* (Oxford: Oxford University Press, 2012); Harding n 3 above; D. Lush, 'The 2nd World Congress on Adult Guardianship' (2013) 3 *Elder Law Journal* 43; Ruck Keene and Auckland, n 7 above.

determinative of the best interests decision'.'[69] The Department of Health and Ministry of Justice have expressed the view that 'the core principles of the MCA are sound and are in line with the principles of the UN Convention on the Rights of Persons with Disabilities', but are interested in the views of stakeholders on whether amendments to the MCA are necessary.[70]

Peter Jackson J's discussion of his meeting with P was also symbolic of recent developments in Court of Protection practice and procedure. In evidence to the House of Lords Committee on the MCA, a group of lawyers argued that there was considerable variation in judicial willingness to meet with P. Judges agreed that it was rare to meet with the person whom the case is about.[71] However, recent cases in the European Court of Human Rights have emphasised the importance of 'personal presence' in cases concerning legal capacity[72], maintaining that 'judges adopting decisions with serious consequences for a person's private life, such as those entailed by divesting someone of legal capacity, should in principle also have personal contact with those persons.'[73] In response to these cases, the Court of Protection Rules 2007 were recently amended to include a new Rule 3A[74], and associated practice direction[75], requiring the court to consider in every case how the individual should participate – including whether or not they should have the opportunity to address the judge in person.

The biggest obstacles to more frequent meetings between P and judges in the Court of Protection are likely to be judicial culture and limited resources to facilitate these meetings. Nevertheless, in *Re CD*[76] Mr Justice Mostyn was inspired by Peter Jackson J's 'eloquent, moving and lucid judgment'[77] in *Wye Valley* to meet with CD. He found a person who 'was a world away from the violent sociopath described in the papers', and described the encounter as 'an enlightening experience' that he would recommend to any judge hearing a similar case.[78] Questions remain as to whether judicial encounters with P are merely a marker of respect for individual, an attempt to involve the person in the process of decision making in accordance with section 4(4) of the best interests checklist, or a

[69] Law Commission (2015), n 4 above. Provisional proposal 12-2, at [12.47].
[70] Department of Health, *Department of Health response to the Law Commission's consultation on mental capacity and deprivation of liberty* (London 2015). Online at: https://www.gov.uk/government/publications/deprivation-of-liberty-standards-dols-consultation-response [accessed 18 December 2015].
[71] Evidence of Victoria Butler-Cole and others, in House of Lords Select Committee on the Mental Capacity Act 2005, *Oral and written evidence – Volume 1 (A – K)* (UK Parliament, 2013) p 357; House of Lords Select Committee on the Mental Capacity Act 2005, *Evidence Session No. 14. Tuesday 26 November 2013. Witnesses: Mr Justice Charles, Senior Judge Denzil Lush, District Judge Margaret Glentworth and District Judge Elizabeth Batten* (UK Parliament 2013) Q306.
[72] L. Series, 'Legal Capacity and Participation in Litigation: Recent Developments in the European Court of Human Rights' in G. Quinn, L. Waddington, and E. Flynn (eds) *European Yearbook of Disability Law* (The Netherlands: Martinus Nijhoff, 2015); L. Series, *The Participation of the Relevant Person in Proceedings in the Court of Protection: A Briefing Paper on International Human Rights Requirements*, (Version 1.3, School of Law and Politics, Cardiff University 2015). Available: http://sites.cardiff.ac.uk/wccop/the-rule-of-personal-presence/ [accessed 8 March 2016].
[73] *X and Y* v *Croatia* (App no 5193/09) [2011] ECHR 1835, §84.
[74] As amended by The Court of Protection (Amendment) Rules 2015 SI 2015/549 (L6), Rule 5.
[75] Court of Protection, *Practice Direction 2A - Participation of P* (London 2015).
[76] [2015] EWCOP 74.
[77] *ibid* [28].
[78] *ibid* [31].

form of evidence gathering by the judge hearing the case.[79] The *Wye Valley* case suggests that judicial encounters with P may serve each of these functions.

Wishes and Feelings in Best Interests Decisions under the Mental Capacity Act 2005

The *Wye Valley* case is a good example of a judge placing a strong emphasis on wishes and feelings, and resonates with the approach encouraged in connection with the CRPD. However, the outcome in the case was not a foregone conclusion on the basis of the facts and the law alone. The structure of the best interests checklist under the MCA affords decision makers considerable discretion in how much weight they place on a person's wishes and feelings.

The courts often emphasise that each best interests decision turns on its own facts, making it difficult to establish *any* starting points or presumptions in the law.[80] As Mr Justice Hayden recently put it in *Re N*,[81] '[t]he factors that fall to be considered in this intensely complex process are infinitely variable… Into that complex matrix the appropriate weight to be given to P's wishes will vary'.[82] Yet whilst the factors influencing best interests decisions are undeniably 'intensely complex', judicial emphasis on the 'fact specific' nature of best interests decisions diverts attention from another equally important factor in best interests decisions: the values of the decision maker.

The MCA's test of best interests was deliberately crafted to be flexible, to enable it to respond to changing values and attitudes. [83] It is an example of the kind of decision where, as Lord Hoffmann remarked in *Piglowska* v *Piglowski,*[84] applying the same law to the same set of facts 'reasonable people may differ' and 'some degree of diversity in [judges'] application of values is inevitable'. This is as true for families and professionals making best interests decisions as it is for judges. For example, in *Wye Valley* a consultant psychiatrist acknowledged that his colleagues' views as to what was in Mr B's best interests would probably 'splinter widely'.[85] In the earlier case of *Re E (Medical treatment: Anorexia) (Rev 1)*[86] Peter Jackson J describes the process of balancing the competing factors as 'not mechanistic but intuitive'.[87] Ian Kennedy has argued that this amounts to 'a form of "ad hocery"', whereby the courts 'respond intuitively to each case while seeking to legitimate its conclusion by asserting that it is derived from the general principle contained in the best interests formula.'[88] Although it is arguable that there is therefore a 'lottery' element to best interests decisions as they are heavily influenced by the values of the person deciding on the day, it would be

[79] By comparison, judges in family proceedings are explicitly directed that meetings with children should not influence their decision: Family Justice Council, *Guidelines for Judges Meeting Children who are subject to Family Proceedings* (London, 2010); Children and Vulnerable Witnesses Working Group, *Report of the Vulnerable Witnesses & Children Working Group February 2015* (London 2015).
[80] eg *K* v *LBX* [2013] All ER (D) 357 (Nov), at [31]-[34]; *Sandwell Metropolitan Borough Council* v *RG & Ors*, n 40 above, at [3]; *ITW* v *Z & Ors* [2009] All ER (D) 314 (Oct), [132]; *Aintree University Hospitals NHS Foundation Trust* v *James,* n 5 above [32].
[81] [2015] EWCOP 76 (Fam).
[82] *ibid* [28].
[83] Law Commission (1995), n 57 above [3.28].
[84] [1999] 3 All ER 632.
[85] *Wye Valley NHS Trust* v *Mr B*, n 8 above [38].
[86] [2012] EWCOP 1639 (CoP).
[87] *ibid* [129].
[88] I. Kennedy, 'Patients, Doctors and Human Rights' in R. Blackburn and J. Taylor (eds) *Human Rights for the 1990s* (New York: Continuum International Publishing, 1991) at p 90.

unfair to characterise these decisions as 'arbitrary' as they are based on more than a personal whim or caprice and take place within a legal arena that permits scrutiny and challenge. However it is important for judges and other decision makers to recognise and reflect on how their own values and outlook shape the considerable discretion they exercise in best interests decisions.

Although *Wye Valley* and other recent cases[89] suggest growing judicial willingness to place significant weight on the person's wishes and feelings, a wider survey of the court's recent judgments would also include a number of best interests decisions that conflict with the expressed or likely wishes and preferences of the person.[90] For example, in *A Local Authority* v *WMA & Ors*[91] a man with autism and mild learning disabilities was removed from the care of his mother against his wishes, into an 'independent living' setting. In *Northamptonshire Healthcare NHS Foundation Trust* v *ML (Rev 1)*[92] it was said to be in the best interests of a young man with significant learning disabilities and 'challenging behaviours' to be detained in a psychiatric unit for up to 24 months, notwithstanding that it would make him unhappy, could cause a breakdown in his relationship with his parents and a positive outcome from this intervention was far from certain. In one of the most bleak Court of Protection cases to date, *The Mental Health Trust & Ors* v *DD*[93], Mr Justice Cobb authorised forced entry into the home of DD – a woman with autism and mild learning disabilities – and her forcible sterilisation. An earlier forced caesarean section had revealed serious health risks should she have any more children. Although these judgments provide explicit reasons for the best interests decisions – to promote 'independence', improve behaviour or protect life – it is often unclear why these factors outweigh the person's wishes and feelings in these particular cases when in other cases they might not, except to say that the decision maker considered them of greater value in that instance. Interestingly, the cases where the Court of Protection does authorise interventions that conflict with a person's wishes and feelings often involve people with learning disabilities. It would be useful to explore whether less weight is placed on the wishes and feelings of certain populations than others – this may relate to perceptions that their values and feelings are less 'authentic' because they were not formulated in the past at a time when the person had 'capacity', or greater difficulty directly engaging with the wishes and feelings of individuals with communication impairments.

At present, the MCA does not require explicit justification for best interests decisions that depart from the person's wishes and feelings, insofar as they can be ascertained. However, the CRPD has prompted renewed interest in the question of whether a hierarchy or presumption should be introduced into the best interests checklist to require such justifications to be made more explicit. A report by the Essex Autonomy Project based on expert roundtable discussions about the compatibility of the MCA with the CRPD[94] concluded that there should be a 'defeasible presumption that actions taken in the best interests of P requires making decisions that achieve the outcome that P would prefer'.[95] Ruck Keene and Auckland endorse this proposal, and add that 'the MCA should

[89] For example: *Westminster City Council* v *Sykes* [2014] EWHC B9 (COP); *Re N* [2015] All ER (D) 198 (Nov); *Re CD* [2015] All ER (D) 131 (Nov); *Kings College Hospital NHS Foundation Trust* v *C & Anor* [2015] All ER (D) 09 (Dec).
[90] For some recent examples, see Ruck Keene and Auckland, n 7 above.
[91] [2013] All ER (D) 01 (Sep).
[92] [2014] EWCOP 2.
[93] [2015] All ER (D) 96 (Feb).
[94] NB: The author of this case comment was a participant in these roundtable discussions.
[95] Martin, n 3 above [19].

make clear that rebutting that presumption requires justification' and that 'the further the departure from P's wishes, the more compelling the justification required.'[96]

Although the courts have, as described above, accepted a rebuttable 'presumption' that it is in a person's best interests to remain alive, there is judicial resistance to establishing a similar presumption that the person's wishes and feelings should prevail within best interests decisions. Ruck Keene and Auckland trace the emergence of a 'dialogue' in the court's case law 'between two lines of thought: on the one hand that a rebuttable presumption exists in favour of giving effect to a person's wishes and feelings; and on the other that the individual's wishes and feelings represent just one factor in the balance sheet which should not receive special consideration'.[97] In *Re S & S (Protected Persons)*[98] HH Marshall J QC proposed that if P's wishes can be reasonably accurately ascertained and they are not irrational, not impracticable, and not irresponsible then this 'effectively gives rise to a presumption in favour of implementing those wishes, unless there is some potential sufficiently detrimental effect for P of doing so which outweighs this'.[99] In later cases, however, this presumption was rejected[100] – including by Sir James Munby,[101] who is now the President of the Court of Protection.

Although many recent judgments have espoused the importance of considering the person's own wishes, feelings, values and beliefs,[102] judges have been keen to emphasise that a person's wishes and feelings are simply one component in a best interests decision, and they have not established any explicit hierarchy or a presumption affording them greater weight than other factors. The Supreme Court's recent ruling in *Aintree University Hospitals NHS Foundation Trust* v *James* has rightly been celebrated for placing a greater emphasis on the person's own 'point of view', but it did not go so far as to establish any presumption that the person's wishes should prevail or a hierarchy among the factors considered in the checklist. The Supreme Court simply stated that the person's own wishes, feelings, values and beliefs were 'a component in making the choice which is right for him as an individual human being'[103], which is little more than a re-statement of the original intentions of the Law Commission in framing the best interests checklist. The *Aintree* decision may well refocus the attention of the judiciary and decision makers on important aspects of the best interests checklist which are too often neglected, but it has not altered the non-hierarchical nature of the best interests test or established any threshold criteria that should be met for best interests decisions that conflict with a person's wishes and feelings.

By way of comparison, several other common law jurisdictions have adopted, or are considering adopting, explicit hierarchical approaches that require proxy decision makers to act in accordance with the person's wishes and feelings except in certain specified circumstances. Many of these proposals were prompted by the ratification of the CRPD. The Representation Agreement Act 1996 in British Columbia, Canada, requires representatives to 'consult, to the extent reasonable, with the adult to determine his or her current wishes, and… comply with those wishes if it is reasonable to do

[96] Ruck Keene and Auckland, n 7 above, at p 300.
[97] ibid, at p 295.
[98] [2008] CoPLR Con Vol 1074.
[99] *ibid* [57].
[100] *Re P* [2009] 2 All ER 1198.
[101] *ITW* v *Z & Ors*, n 80 above [28].
[102] See, for example, *Re N* [2015] EWCOP 76 (Fam); *Re CD* [2015] EWCOP 74; *Sheffield Teaching Hospitals NHS Foundation Trust* v *TH & Anor* [2014] All ER (D) 209 (May).
[103] *Aintree University Hospitals NHS Foundation Trust* v *James*, n 5 above [45].

so.'[104] Decision makers under the Assisted Decision-Making (Capacity) Act 2015, which was recently passed by the Oireachtas Éireann, must 'give effect, in so far as is practicable, to the past and present will and preferences of the relevant person, in so far as that will and those preferences are reasonably ascertainable'.[105] Thus even if a person is deemed to be 'incapable' of making a decision, their own preferred outcome would be determinative within a range of 'reasonable' or 'practicable' options, echoing HH Marshall J's proposals in *Re S & S (Protected Persons).*

Another approach is to require that a person's wishes and feelings are complied with provided they would not result in serious harm to the person. For example, the Australian Law Reform Commission has proposed that those making decisions on behalf of a person must apply the following principles:

a) The person's will and preferences must be given effect.

b) Where the person's current will and preferences cannot be determined, the representative must give effect to what the person would likely want, based on all the information available, including by consulting with family members, carers and other significant people in their life.

c) If it is not possible to determine what the person would likely want, the representative must act to promote and uphold the person's human rights and act in the way least restrictive of those rights.

d) A representative may override the person's will and preferences only where necessary to prevent harm.[106]

Some more radical proposals connected with the CRPD argue that if a person's *authentic* wishes and feelings can be ascertained it is never appropriate to override them.[107] This approach is likely to result in considerable legal argument about whether a person's wishes and feelings are truly authentic, especially if they would result in what Gooding describes as 'morally troubling dilemmas'.[108] Importantly, each of the proposals described here hinge on the degree of clarity around a person's wishes and feelings, and provide threshold criteria to override a person's will and preferences. It is debatable whether 'reasonableness', 'practicability' or 'freedom from harm' standards are preferable as threshold criteria – for example, it might be thought that Mr B's choice was 'reasonable' but clearly did not prevent 'harm' in the form of his death. There is, undeniably, still considerable scope for argument, ambiguity and discretion in determining when these override mechanisms should be applied. Yet these examples show that despite the challenges of framing a presumption that a person's wishes and feelings should prevail, introducing a hierarchy does require

[104] Representation Agreement Act 1996, British Columbia, Canada, s 16(2).
[105] Assisted Decision-Making (Capacity) Act 2015 (Republic of Ireland), s 8(7)(b).
[106] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws: Final Report*, (ALRC Report 124, Sydney 2014). Recommendation 3-3.
[107] Flynn and Arstein-Kerslake, n 68 above; A. Arstein-Kerslake and E. Flynn, 'The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: A Roadmap for Equality Before the Law' (2015) *The International Journal of Human Rights*, published online 19 November 2015, DOI: 10.1080/13642987.2015.1107052.
[108] P. Gooding, 'Navigating the "Flashing Amber Lights" of the Right to Legal Capacity in the United Nations Convention on the Rights of Persons with Disabilities: Responding to Major Concerns' (2015) 15 *Human Rights Law Review* 45.

explicit articulation of the values and factors mitigating against respecting a person's wishes and feelings, making them available for legal and public scrutiny.

In *Wye Valley*, Peter Jackson J commented that he saw no need to amend the MCA to prioritise the weight that should be given to wishes and feelings in best interests decisions, stating that 'All that is needed to protect the rights of the individual is to properly apply the Act as it stands.'[109] Perhaps Peter Jackson J felt that any judge (or other decision maker) 'properly' applying the best interests checklist to the same set of facts would arrive at the same outcome in each case. For the reasons discussed above this seems doubtful - Peter Jackson J himself acknowledged the 'splintered' views on Mr B's best interests among professionals.

Instead, the judge may have meant that the protection of rights conferred by properly following the best interests checklist is less about the outcome than the process of decision making itself. The Law Commission may have held a similar view - when proposing the best interests checklist during the 1990's they commented that the process of 'thinking oneself into the shoes of the person… may have a value greater than its practical effect'.[110] Yet we should be cautious about maintaining that provided one has carefully considered the evidence as to a person's wishes, feelings, values and beliefs, perhaps even met the individual in person, the law makes no further demands on the outcome of the decision beyond the intuition of the individual decision maker. That would be to suggest that the outcome of a matter of great personal significance to the individual matters little in law provided the correct process has been followed, which seems inherently disrespectful to the human dignity of the individual. Whilst several post-*Aintree* cases, including *Wye Valley*, show that the judiciary of the Court of Protection can, and increasingly often do, go to considerable lengths to engage with the wishes and feelings of the individual, the MCA does not require an explicit justification for acting contrary to a person's wishes and feelings where they can be ascertained. The Law Commission's recent proposals, and the examples from other jurisdictions, suggest that we can and should engage much more carefully and explicitly with the question of when it may, or may not, be appropriate to adopt a course of action based on what the person themselves wants or would have wanted.

[109] *Wye Valley NHS Trust* v *Mr B*, n 8 above [17].
[110] Law Commission (1991), n 58 above [4.23].