

Two sides to every story:
Rethinking common issues
arising from the Mental Capacity
Act 2005

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Are we the revolutionaries we think we are?



The start of the story?

The primary purpose of the Act was to empower and protect people who may lack capacity to make decisions for themselves and to enable people to be able to make provision for a time in the future when they may lack capacity. Implementation of the Act has ensured that these measures are in place.

*Kenneth Clarke MP, the Lord Chancellor (as he was) on
Thursday 28 October 2010*

Empowerment vs Protection

- A case of nominative determinism? Why did we name it the Court of Protection?
- The Mental Capacity Act 2005 was hailed as a fundamental change for people who couldn't make their own decisions. But, The Court of Protection evolved from the Office of the Master in Lunacy, which was renamed the Court of Protection in 1947. Its jurisdiction derived from both the [Lunacy Act 1890](#) and De Prerogativa Regis of 1324, which gave the monarch authority over the property of 'idiots' and 'lunatics'.

Things which impact our approach



The need to protect the vulnerable.

The approach the law (and courts) have taken with other groups: especially children.

How we teach judges, lawyers, social workers, doctors, nurses, carers.

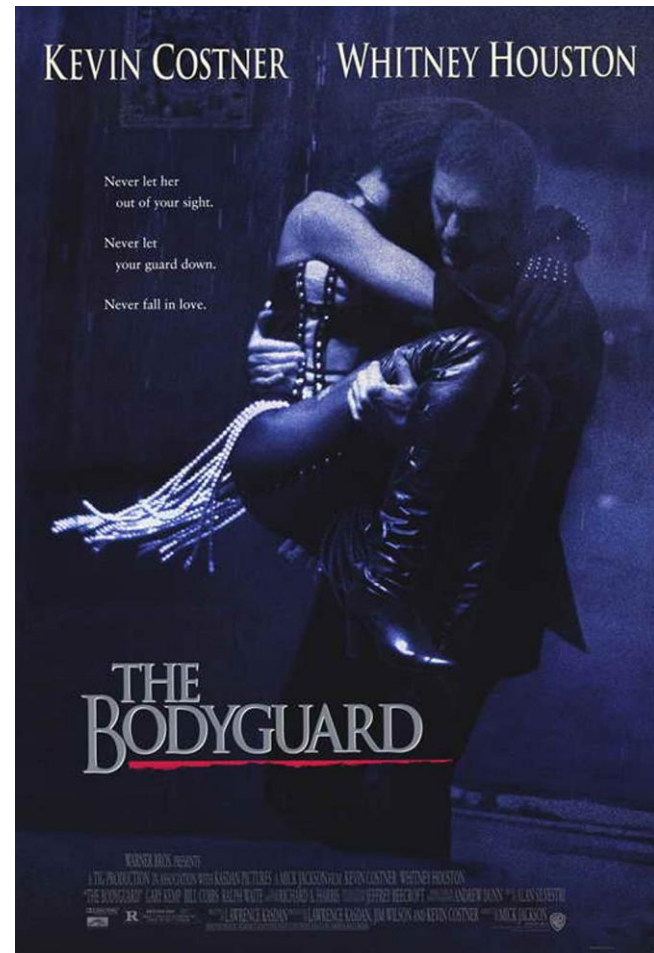
So, how do we empower
people? We think again about
how we protect them.

The Bodyguard Problem

Rachel: And I want to be able to eat brunch with my friends.

Frank: So go on Tuesdays.

Sy Spector: Tuesday morning brunch? Where'd you get this guy, Bill?



The protector and the protected

- Never let her out of your sight.
- Never let your guard down.
- (And, never fall in love)
- Constant supervision, care plans which prevent P from leaving.
- Restrictions on where P is allowed to go and when she goes there.
- Forms of vetting applied before P is allowed to meet someone.

*Taken from the
Bodyguard Theatrical
Poster*

A different approach

- In *Re SF (Injunctions)* [\[2020\] EWCOP 19](#), Keehan J was concerned with a young woman, SF, who had a diagnosis of Autism Spectrum Disorder and also had learning disabilities. She resided in a supported living establishment where she received (at least) 1:1 support 24 hours per day. In September 2019 the care and support provider became aware that SF was communicating with a number of men via social media and the internet – evidence she was being systematically being groomed.
- The initial approach from the local authority was to increase support, reduce SF’s community access and investigate her contraception.
- At court, the position changed, given opportunity to move away from those abusing her, injunction against the grooming gang, increased community access and reduced 1:1.

“Have you consented that patient?”

- The language of consent comes from criminal, family and medical legal cases where one person does something to another.
- The language of consent does not cater for participation in a decision making process. The language of consent is directed more towards someone being protected from something being *done* to them.

The language of consent: *Montgomery v Lanarkshire Health Board* [2015] UKSC 11

“75. [...] One development which is particularly significant in the present context is that patients are now widely regarded as persons holding rights, rather than as the passive recipients of the care of the medical profession.”

“87. [...] An adult person of sound mind is entitled to decide which, if any, of the available forms of treatment to undergo, and her consent must be obtained before treatment interfering with her bodily integrity is undertaken. The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments.

MCA - A-Z

The presumption of capacity is a fundamental safeguard of human autonomy. It requires cogent, clear and carefully analysed information before it can be rebutted.

Justice Hayden, 2020

The problem with the presumption of capacity...

The power of the presumption

- A person is protected from other people making decisions for them *unless* it is proved they cannot make that decision.
- Every adult starts from the same starting point that they are able to make their own decisions.
- A suspicion is not enough, there needs to be evidence (at least a reasonable belief) that someone lacks capacity.

The problem with the presumption

Protection

- Standard of proof: more likely than not
- Same starting point for everyone
- The Court cannot act unless it has a reasonable belief that a person lacks capacity.

Problem

- Difficult where P cannot be easily accessed/assessed.
- Ignores that some people have lifelong cognitive impairment
- Denies the Court jurisdiction to investigate where there are suspicions as to a person's capacity.

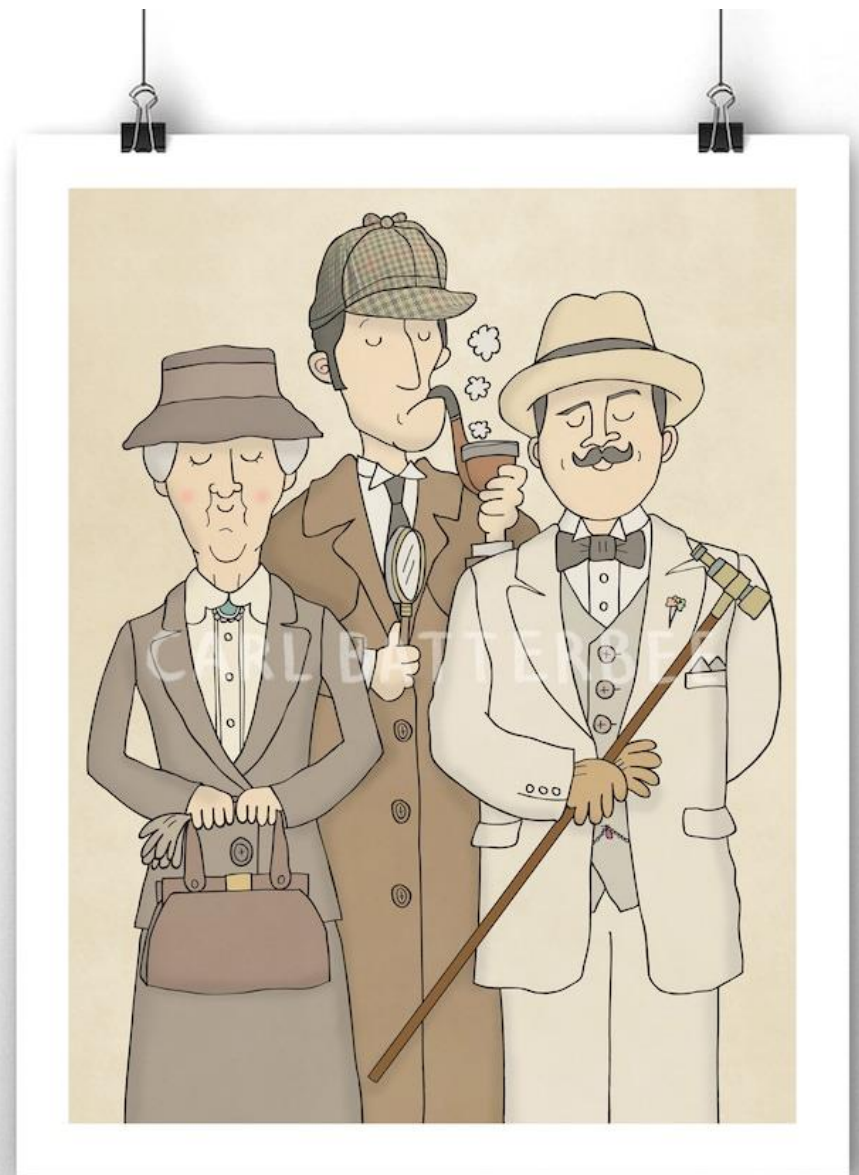
The curious case of the unwise decision

"Intuition is like reading a word without having to spell it out. A child can't do that because it has had so little experience. A grown-up person knows the word because they've seen it often before."

Agatha Christie (Murder at the Vicarage (Miss Marple, #1))

Investigation as an enabler

- The ability to make unwise decisions protects our autonomy.
- The presumption of capacity is a guarantee of equality.
- However, we should not be afraid to check that a person is making unwise decisions.
- Being curious about why somebody is making a particular decision is sometimes actually about enabling them to do so.
- Open the person's eyes to alternative options.
- Enable them to make a decision without another person subjecting them to coercive control/undue influence.





Our common practice



All the people, so many people

- The challenge is to take our generalised, common practice and tailoring it to the people with which we deal.
- Generalised tests mean that we are, in some sense, protecting equality by applying common standards. However, it must be wrong to take a one size fits all approach.
- Should we accept that actually, a generalised approach is impossible as we don't have a standardised approach to teaching the MCA?

The new generalised approach to capacity to engage in sexual relations

When considering that question, the information relevant to that decision may include: (a) the sexual nature and character of the act of sexual intercourse, including the mechanics of the act; (b) the fact that the other person must have the ability to consent to the sexual activity and must in fact consent before and throughout the sexual activity; (c) the fact that P can say yes or no to having sexual relations and is able to decide whether to give or withhold consent. (d) that a reasonably foreseeable consequence of sexual intercourse between a man and woman is that the woman will become pregnant; (e) that there are health risks involved, particularly the acquisition of sexually transmitted and transmissible infections, and that the risk of sexually transmitted infection can be reduced by the taking of precautions such as the use of a condom.

But!

Paragraph 71:

[...] Pragmatism does not require that consent to future sexual relations can only be assessed on a general and non-specific basis. Furthermore, such a restriction on the formulation of the matter is contrary to the open-textured nature of section 2(1) MCA. A general and non-specific basis is not the only appropriate formulation in respect of sexual relations as even in that context, “the matter” can be person-specific where it involves, for instance, sexual relations between a couple who have been in a long-standing relationship where one of them develops dementia or sustains a significant traumatic brain injury. It could also be person-specific in the case of sexual relations between two individuals who are mutually attracted to one another but who both have impairments of the functioning of their minds.

How do we practically tailor the relevant information?

- Aspects in respect of pregnancy removed for Ps engaging in sex where pregnancy isn't a risk (homosexual / medical reason);
- Aspects in respect of condoms/contraceptives removed in cases where they would not be used (cultural / religious region);
- Aspects in respect of STIs removed in longstanding monogamous relationships

How do we tailor the information safely/proportionately?

- Has to be care taken that we do not make assumptions (s 2(3)) based on age / behaviours / legal status of relationship (i.e don't assume monogamy because married).
- Have to reflect that sexual preference and partners can change over lifetime.

If I had my way...

1. An unwise decision, or a change in behaviour would prompt a question – why the change.
2. Where an abuser is identified the law is used to restrict that person rather than P.
3. Our first question should always be: what does P want to do, *not*, does P consent to a particular thing happening to them.
4. Everyone using the MCA would have the confidence, training and experience to not only apply a generalised approach but tailor it to a particular person.

Questions?

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