

# Powers, defences and the ‘need’ for judicial sanction<sup>1</sup>

## Introduction

Recent case-law has sharpened the focus on s 5 of the Mental Capacity Act 2005 (‘MCA 2005’) and, relatedly, the questions of: (1) which acts in relation to those lacking material decision-making capacity require judicial sanction; and (2) on what basis. In particular, Sir James Munby P has reiterated in obiter observations in *Re AG* [2015] EWCOP 78 (at para [56]) his oft-repeated view that judicial sanction is required before local authorities move incapacitous adults from their homes because, he considers, local authorities (and by extension NHS bodies) do not have the power to do so. Many social and health care professionals have – to my mind entirely reasonably – asked how that proposition sits with the understanding of the approach to s 5 of the MCA, reflected in the Code of Practice to the MCA, paras 6.10–6.11 of which suggest that recourse to the court is unnecessary even where the person is objecting. That question was the stimulus for this article, which also takes the opportunity to take a wider look at s 5 of the MCA, which, despite the fact that it is arguably the most widely relied upon provision of the whole Act, is curiously under-examined.

## Section 5: history and relevant case-law

It is important to start with a history lesson (which is usefully set out in more detail in ch 2 of Jordan’s *Court of Protection Practice* (2016)). The Law Commission in its original 1995 report and draft Bill (Mental Incapacity: Law Com 231) proposed the creation of a new statutory authority entitled ‘the general authority to act reasonably’, which would have replaced the defence of necessity as the basis upon which actions could be taken to deliver care and treatment to those who cannot give the consent which is required to prevent those actions being otherwise being both civil and criminal law wrongs. Importantly, the Law Commission’s intention was not to create any new or additional powers on anyone on behalf of the person that they would have already had under existing statute or the common law.

The Law Commission also devoted a part of their draft Bill to creating a comprehensive suite of tools to enable ‘public law protection for people at risk’ (who included, but went beyond, those lacking capacity). Those included powers of removal for assessment and for temporary protection, hedged about with procedural protections including – in the case of the latter – a duty upon the local authority granted the temporary protection order to return the person to the place from which he or she was removed as soon as that was practicable and consistent with their interests.

None of those provisions was included in the draft Mental Incapacity Bill. Further, when the ‘general authority’ was included in the draft Mental Incapacity Bill in 2002, that proposal was the subject of considerable concern, primarily on the basis that the term ‘implies an imposition of decision making upon an incapacitated individual rather than an enabling process designed to enact decisions taken in their best interests’ (*Joint Committee on the draft Mental Incapacity Bill, Report*, HL Paper 189-1, HC 1083-1, para 110). It was therefore recast in the Mental Capacity Bill that was finally enacted as section 5: cast as a defence to liability, rather than an express authority.

Section 5 is therefore, in essence, a codified defence of necessity (see further in this regard the appendix to this article). In other words, and in line with the intention underlying the original ‘general authority,’ it does not, itself, provide a formal power to anyone to do anything. Rather, what it provides is that, if reasonable steps are taken by a person, D, to determine whether P lacks capacity in relation to matter connected with the care and treatment, and D reasonably believes doing the act is in P’s best interests, then it is as if P has consented to the act being carried out. Assuming that D is neither negligent nor criminal in the way in which they carry out the action, then D will be protected from any form of liability. Section 5 is, in turn, limited where the act in connection with care or treatment involves restraint, by including additional criteria that must be

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satisfied before a person can rely upon it.

Although it refers only to acts, it is clear that s 5 of the MCA 2005 provides a defence not just in relation to positive acts but also to omissions. In *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67, [2013] COPLR 492, SC, Baroness Hale confirmed (at paras [20]–[22]) that s 5 is apt to provide a defence to a decision by a clinical team either to withhold or withdraw treatment, because the fundamental question is whether it is lawful to give treatment, not whether it is lawful to withhold it. The reasoning process that she adopted to reach this conclusion is extremely important. She held that, where treatment is not in a patient’s best interests, it would not be lawful to give it. It therefore follows (she held) that, provided that the clinical team acts reasonably and without negligence, it will not be in breach of any duty towards the patient if the team withholds or withdraws it. Whilst the judgment was given in the medical context, its logic also applies in any situation where carrying a particular act of care or treatment would not be in the person’s best interests.

In practice, and despite the reframing between the Law Commission’s draft Bill and the MCA, s 5 is treated as a de facto power, and health and social care professionals regularly describe themselves as acting on the basis of s 5. To some extent, this is hardly surprising: indeed, it is noteworthy that the underlying common law defence of necessity identified in *Re F (An Adult: Sterilisation)* [1990] 2 AC 1 was itself, often, described as a power (see eg the description given by Hale LJ (as she then was) in *R (Munjaz) v Mersey Care NHS Trust* [2003] EWCA Civ 1036 at para [46]).

On one view, whether s 5 constitutes a power or a defence may be a sterile debate: see, by analogy, the short shrift given by the Court of Appeal in *TTM*’s case to the arguments as to whether s 6(3) of the Mental Health Act 1983 constitutes a power to hospital managers or a defence against an action for false imprisonment (*TTM v London Borough of Hackney and Others* [2011] EWCA Civ 4 at para [37]). To that extent, we could legitimately doubt whether the recasting of the general authority as a defence has in fact solved the problem that the Joint Committee identified, and we should – perhaps – be more concerned to ensure that the defence (or the de facto power) is not abused.

From this perspective, the recent decision in *Winspear (Personally and on behalf of the estate of Carl Winspear, Deceased) v City Hospitals Sunderland NHS Foundation Trust* [2015] EWHC 3250 (QB), [2016] COPLR 161 is therefore particularly important, because it has made clear that a failure to carry out a step which was – on the facts – practicable and appropriate as part of the s 4 of the MCA determination of where a person’s best interests may lie will mean that the relevant body or individual cannot rely upon the defence under s 5 of the MCA. In that case, the failure was to consult with Carl Winspear’s mother prior to reaching a DNACPR decision and placing a notice in his records, a step which the judge considered would have been both practicable and appropriate for purposes of s 4(7) of the MCA 2005. This decision is also important for confirming both that the steps required under s 4 must be complied with before s 5 can be relied upon, and also that s 5 will also serve as a potential defence to an HRA claim (in that case, a claim for a breach of his Art 8 ECHR rights). Because s 4 and s 5 are always predicated upon the person doing the act having a reasonable belief as to what is in the person’s best interests, how detailed and rigorous the steps are that must be taken under s 4 will depend upon both the urgency and the gravity of the nature of the act being done (or not done): see *The Commissioner of Police for the Metropolis v ZH* [2013] EWCA Civ 69, [2013] COPLR 332, in which Lord Dyson MR recognised (at para [6]) that ‘a striking feature’ of the s 5 statutory defence is ‘the extent to which it is pervaded by the concepts of reasonableness, practicability and appropriateness’ and ‘strict liability therefore has no place here’.

### **Section 5 and the power to move**

Although I have posed above the question as to whether it makes any difference in practice whether s 5 is characterised as a defence or a power, I would suggest it does, in fact, make a significant difference as a matter of law. In particular, recall that Sir James Munby P appears to have reached the conclusion in *AG* that judicial sanction is required before moving an incapacitated adult from

their own home because local authorities (and by extension NHS bodies) do not have the power to do so. This is, I would respectfully suggest, a questionable proposition, but to understand why we need to dig a bit more deeply into what ‘power’ might mean here, because it is an ambiguous term.

Sir James Munby P could have been meaning that public bodies had no statutory power to move incapacitated adults. He could also have meant, more broadly, that public bodies have no proper basis upon which to arrogate upon themselves the right to do so without the involvement of the court.

Let us take for a moment the first possibility. As noted above, it is clear that the Law Commission did not intend to create any new powers by the ‘general authority’, and – as suggested above – it is clear that even if treated as a de facto power, s 5 of the MCA does not create any power that did not previously exist.

It is undoubtedly true that local authorities do not have an express power to move incapacitated adults. The (limited) powers of removal suggested by the Law Commission in 1995 were not taken forward, and s 47 of the National Assistance Act 1948 has now been abolished. Nor is there any equivalent to the powers given in by s 137ZA of the Social Work (Scotland) Act 1968 to local authorities in Scotland which could cover the situation. From this perspective, Sir James Munby P would be absolutely correct to hold that s 5 does not add to local authorities’ armoury.

On a proper analysis, however, I am not actually sure that it is right to say that public bodies have no power to move a person in such a situation. Indeed, it is legitimate to ask whether Sir James Munby P would in fact wish to hold that there was no power. This can be tested simply by asking what the point would be in seeking the sanction of a Court of Protection judge if the public body did not have the requisite powers. A Court of Protection judge cannot imbue a public authority with powers that the authority does not have (this is the logical corollary to the clear position that the Court of Protection is discharging the role of deciding on P’s behalf, and with the same ‘powers’ as P, between options actually available: see *Re MN (Adult)* [2015] EWCA Civ 411, [2016] Fam 87). So, even if the judge did agree on the person’s behalf that the move should take place, the local authority (or NHS body) would not be able to move them because they had no power to do so. This is in contrast, for instance, to the position under s 135 of the Mental Health Act 1983 where the grant of a warrant by a justice of the peace gives specific authority to a constable to enter the premises specified in the warrant to remove the person in question to a place of safety.

Arguably – although as far as I know no one has ever sought to examine precisely on what basis local authorities and NHS bodies are acting in these circumstances – what is actually going on is that:

- (1) A local authority participates in a determination of the person’s capacity and best interests under, now, its ‘general power of competence’ (s 1 of the Localism Act 2011), which gives it the power to do anything that individuals generally may do. I use the word ‘participate’ advisedly because the process of forming a view about a person’s best interests in relation to s 5 is meant to be an informal and collaborative process: *G v E (Deputyship and Litigation Friend)* [2010] EWHC 2512, [2010] COPLR Con Vol 470, [2011] 1 FLR 1652 at para [57]), in which the local authority is not in any privileged position.
- (2) On the basis of that informal determination of best interests, the local authority then forms the necessary reasonable belief as to the person’s capacity and best interests. It then acts under the same general power of competence to convey the person from home to care home, and can rely on the s 5 defence to answer any claim that might have been brought on that person’s behalf (most obviously for trespass and breach of Art 8 ECHR) on the basis that the person could not give the necessary consents.
- (3) By the same token, a CCG or other NHS body might also be said to be relying upon the general power in s 2 of the National Health Service Act 2006 to ‘do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any function

conferred on that person by [the] Act’ in both the assessing and the conveyance process.

On a proper analysis, therefore, I would suggest that we can in fact identify a power, and the real question is whether the public body is exercising it properly.

That brings us closer to what I suspect Sir James Munby P had in mind: in other words, seeking to reinforce the (absolutely correct) proposition that public bodies cannot simply exercise their powers in such a way as to cause enormous interference with the rights of individuals without due cause. We have already seen the damage that can be wrought, with a depressing toll of cases reported in the 39 Essex Chambers *Mental Capacity Law Newsletter* – usually following the car-crash between safeguarding concerns and misapplication of the principles of the MCA (for more, see further, Alex Ruck Keene, Kelly Stricklin-Coutinho and Henry Gilfillan, ‘The role of the Court of Protection in safeguarding’ (2015) 17(6) *The Journal of Adult Protection* 380–390).

### **The need for judicial sanction?**

The analysis above brings us to the first part of Sir James Munby P’s conclusion: ie that judicial sanction is required. On what basis could he have reached such a conclusion?

Neither in s 5, nor indeed in any other part of the MCA, is a specific requirement set down for judicial sanction in relation to any acts (or omissions) done in connection with care or treatment. Judicial sanction is required for deprivation of liberty outside hospitals and care homes, but that is, in essence, because Parliament failed to provide in DoLs the necessary statutory process to allow such deprivations of liberty to take place lawfully otherwise. Public bodies (and those who are otherwise required to comply with the ECHR in the discharge of their functions) must therefore seek orders of the Court of Protection as the only way in which they can obtain the necessary lawful authority to deprive a person of their liberty. It would also appear that deputies are or may be required to seek such orders (*Re SRK* [2016] EWCOP 27), although the precise basis upon which this obligation is imposed on them is not entirely clear from the judgment of Charles J.

Other than that, then properly analysed, there is no obvious requirement of law (whether by way of a directly imposed duty or sanction for a failure) to seek judicial sanction in respect of any act of care or treatment. This may seem a very strong statement, and I use the word ‘obvious’ advisedly for the reasons that I return to in the concluding section of this article.

In principle, I would suggest that the position in relation to all acts of care and treatment are governed by the authoritative statement of the law made by the Court of Appeal in *R (Burke) v General Medical Council* [2005] EWCA Civ 1003, [2005] 2 FLR 1223, CA (an appeal against a decision of Munby J, as he then was). In that case, Munby J had declared that the prior authorisation of the court was ‘required as a matter of law (and thus [artificial nutrition and hydration] cannot be withheld or withdrawn without prior judicial authorisation)’ in five specific categories of case, each essentially relating to situations where there was doubt as to the capacity or best interests of the individual patient.

However, the Court of Appeal held that he was wrong to postulate that there was a legal duty to obtain court approval to the withdrawal of clinically assisted nutrition and hydration (‘CANH’, as it would now be called) in the circumstances that he identified. The Court of Appeal held that:

‘71. ... So far as the criminal law is concerned, the court has no power to authorise that which would otherwise be unlawful – see, for instance, the observation of Lord Goff of Chievely in *Bland* at p. 785 H. Nor can the court render unlawful that which would otherwise be lawful. The same is true in relation to a possible infringement of civil law. In *Bland* the House of Lords recommended that, as a matter of good practice, reference should be made to the Family Court before withdrawing ANH from a patient in a PVS, until a body of experience and practice had built up. Plainly there will be occasions in which it will be advisable for a doctor to seek the court’s approval before withdrawing

ANH in other circumstances, but what justification is there for postulating that he will be under a legal duty so to do?

...

72. The true position is that the court does not “authorise” treatment that would otherwise be unlawful. The court makes a declaration as to whether or not proposed treatment, or the withdrawal of treatment, will be lawful. Good practice may require medical practitioners to seek such a declaration where the legality of proposed treatment is in doubt. This is not, however, something that they are required to do as a matter of law.’

In principle, I would suggest that exactly the same approach holds true as to any other act of care or treatment, although I would note that the Court of Protection would now achieve the same goal of confirming lawfulness by the slightly different route of deciding under s 16(2)(a) of the MCA on the person’s behalf whether or not to consent to the particular care or treatment and, where the relevant body felt the need for additional legal ‘cover,’ making a declaration of lawfulness under s 15(1)(c) (see *Aintree* at para [22], and also *Re MN* [2015] EWCA Civ 411 at paras [87]–[91]).

The analysis above has a number of implications. One of them is to lead us to question whether (as the current iteration of Practice Direction 9E to the Court of Protection Rules suggests) the sanction of the court is required as a matter of law in relation to certain serious medical treatment decisions. It seems to plain that it is not, and cannot be. I am hopeful that this position may be made clearer in the next iteration of the Practice Direction.

However, I want here to focus on the vexed issue of whether it is necessary to seek judicial sanction before moving a person from their own home. We could certainly – by easy analogy with *Burke* – hold that it is good practice for sanction to be sought in any case where local authorities or NHS bodies are in doubt as to whether it is lawful for them to move the person (or, looked at through the prism of the MCA, whether their belief that such is in their best interests is ‘reasonable’).

Sir James Munby P, however, sought to set this requirement down as a binding duty. I would respectfully submit that, following *Burke*, it is not, in fact, possible to frame it as a legally enforceable duty, at least in such a direct fashion.

I would, however, suggest that one could defend Sir James Munby’s approach by a rather different route. If I had been asked to defend his observations before the Court of Appeal, I would have sought to support his reasoning on the basis that he was – implicitly – holding that the interference with Art 8 ECHR rights inherent in a non-consensual move from home to care home could never be justified unless the Court of Protection has given its sanction by way of the necessary declarations/decisions.

In other words, I would suggest, he in fact was purporting to hold that a public body could not, compliant with its obligations under the Human Rights Act 1998 (HRA), exercise its powers under either the statutes set out above (or any other relevant statutes) without first seeking the relevant declarations/decisions under the HRA.

This would be a bold conclusion, although in line with the developing line of ECHR jurisprudence which is seeking to build in procedural safeguards into Art 8 ECHR: see, for instance, the dicta of the court in *Shtukaturov v Russia* [2008] ECHR 223 at para [89] reiterating that, whilst Art 8 of the Convention contains no explicit procedural requirements, ‘the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Article 8’. The greater the interference, the more rigorous the decision-making process required (see also in this regard, by analogy, *X v Finland* [2012] ECHR 1371 at 220–221).

It is also one for which some support can be found in existing domestic case-law: most obviously (although not expressly addressed on this basis), the decision of Mostyn J in *J Council v GU, J*

*Partnership NHS Foundation Trust, Care Quality Commission and X Ltd* [2012] EWHC 3531 (COP), [2013] COPLR 83 that the monitoring and interception of communications of an incapacitated adult in a care home on public protection grounds was a sufficient interference with his Art 8 ECHR rights that, in the absence of a statutory framework akin to that provided by the MHA Code of Practice for high security psychiatric hospitals, the approval of the court was likely to be necessary. It is a similar approach that we can see as was adopted (implicitly) by Peter Jackson J's approach in the *Neary* case ([2011] EWHC 1377 (COP)) case where it is clear that he considered the London Borough of Hillingdon simply should not have purported to rely upon the provisions of Sch A1 to address the major interferences in the Art 8 ECHR rights of Steven Neary and his father.

I would, though, not have sought to uphold the blanket statement by the President. In other words, I would not have sought to argue – not least because I suspect very strongly that he could not have intended to hold – that it is never possible without judicial sanction to move a person from their own home to a care home (or from a hospital to a care home on discharge, another situation in which there are no obvious statutory powers). Rather, I would argue that it will depend on the degree to which the move in question represents an interference with the autonomy rights enjoyed by the person as an aspect of their rights under Art 8 ECHR (rights that are not lost simply because decision-making capacity is lost: see *A Local Authority v E* [2015] EWHC 1639 (COP) at para [124]). There will be some circumstances in which the interference with the individual's Art 8 rights will be such that it can only be by involving the Court of Protection that the decision-making process can be said to be sufficiently rigorous to meet the necessary procedural requirements. This most obviously the case where the person concerned is objecting to the move, but I would not limit it solely to such cases. In such cases, a public authority that seeks to proceed without seeking the involvement of the court, will not be complying with its obligations under s 6 of the HRA 1998 to act compatibly with the ECHR. So it is possible to spell out a form of duty to go to court, albeit by an indirect route.

But those circumstances will not arise in every case (nor, indeed, would they arise in every case involving serious medical treatment). And in such cases, it seems to me – and I would be so bold as to suggest that the President would agree – that the sanction of the court is not required, and a properly MCA-compliant assessment of capacity and best interests will suffice to ensure that the public authority in question can discharge its powers confident in the knowledge that it can benefit from the defence under s 5 of the MCA 2005. Put another way, true compliance with s 5 of the MCA 2005 would constitute a sufficiently rigorous decision-making process to satisfy the implicit procedural requirements of Art 8 ECHR.

That is not to say, of course, that s 5 of the MCA 2005 is not capable of improvement. I would, in fact, argue that it does requiring improvement so as to make its limits clear. Readers with an interest in cross-border matters will already have gathered that the Northern Ireland Assembly has taken steps to circumscribe the defence in the recently enacted Mental Capacity (Northern Ireland) Act 2016. In that Act, the provisions on protection against liability have been developed into an entire Part, drawing a fundamental distinction between general acts done in connection with the care, treatment or personal welfare of the relevant person and those acts to which additional safeguards apply before reliance can be placed upon the protection. As set out in the explanatory notes to the Bill (the explanatory notes to the Act not being available at the time of writing): '[t]he general rule is that the more serious the intervention is for [the person lacking capacity], the more safeguards you need to put in place.'

Separate to developments in Northern Ireland, there appear to be other moves to reform s 5. The Law Commission in its Interim Statement on its Mental Capacity and Deprivation of Liberty project noted that amongst the amendments it was considering was 'qualifying the immunity from legal action in respect of best interests decisions under s 5 of the Mental Capacity Act so as to provide additional procedural safeguards in respect of certain key decisions by public authorities'. The Law

Commission is due to publish its final report and draft legislation by the end of 2016.

### Conclusion

The easy way out of the *Re AG* conundrum is to proceed on the basis that it represented an obiter observation, rather than a binding determination of the law. However, not least because Sir James Munby uses every opportunity that he can to seek – rightly in my view – to reinforce the need for public bodies to recognise that they cannot wave the banner of safeguarding to ride roughshod over the autonomy rights of individuals with impaired capacity, it seems to me that we should grasp the nettle of his observations more directly.

Whilst I have sought to give above an outline of how one might convert his obiter observations into a proposition of law that would ‘bite’ upon public authorities, it seems to me that the end result must – and must rightly – still require consideration of the individual circumstances of the case. From the perspective of the person, I suspect that I am less troubled whether the rigorous, MCA-compliant determination of their capacity and best interests takes place under the auspices of a public body-convened process or before a court – so long as it is indeed both rigorous and MCA-compliant. Further, in the case of the movement of people from their own homes, I want that determination to take place (wherever possible) before the move in question. That requires changes in practice as much as it does changes in the law.

### Appendix: does necessity survive?

In the body of this article I have asserted that s 5 of the MCA is the codified defence of necessity. I am aware that Sir James Munby P in *Re PO* [2013] EWCOP 3932 appears to have suggested (at para [18]) that necessity continues to exist and that recourse may well be required to it in order to decide whether acts are lawful as a precursor to deciding whether s 5 of the MCA can be relied upon. With the greatest of respect, I must express my doubts about this. Despite what Sir James Munby P said in *PO* to this effect, I do not read Baker J as having reached the conclusion that necessity coexists alongside s 5 of the MCA 2005 in *G v E* [2010] EWHC 2512 (COP). Further, it is clear that the Law Commission in its 1995 report intended that the ‘general authority’ should codify what had become practice under the common law following the ‘rediscovery’ of the defence of necessity in *Re F* [1990] 2 AC 1. The reformulation of the general authority into a defence in what became the MCA (although undertaken for essentially semantic reasons) made even clearer that the common law defence was being codified. It is a well-established proposition of statutory construction that where statute codifies a common law rule, the common law is presumed to be displaced (see *Black v Forsey* [1988] SC (HL) 28 and the discussion in *Re DL* [2012] EWCA Civ 253). Finally, and arguably determinatively, the Court of Appeal in *The Commissioner of Police for the Metropolis v ZH* [2013] EWCA Civ 69 can properly be said – in endorsing the approach taken by Sir Robert Nelson at first instance – to have upheld his conclusion that where the provisions of the MCA apply, the common law defence of necessity has no application (see para [44] of the judgment of Sir Robert Nelson [2014] EWHC 604 (Admin)).

It is, however, undoubtedly the case that the defence of necessity continues to exist where it has not been codified under s 5 of the MCA, most obviously where immediately necessary and proportionate steps are taken to protect others from the immediate risk of significant harm (whether or not the person being restrained lacks decision-making capacity): *R (Munjaz) v Mersey Care NHS Trust* [2003] EWCA Civ 1036 at para [46].

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