

Application pursuant to the Court's inherent jurisdiction seeking declarations as to the capacity of an individual the subject of a s.24 Mental Health (Bailiwick of Guernsey) Law, 2010 Treatment Order to make decisions in relation to medical treatment without which he would die. Declaration granted that the individual had the capacity to make a decision in relation to the medical treatment and that there should be no surgical intervention, save with his expressed informed consent.

[2023]GRC086

ANONYMISED JUDGMENT

**IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)**

IN THE MATTER OF YZ

Before: Jessica Elizabeth Roland, Deputy Bailiff

Hearing Date and *ex tempore* Judgment: 10 February 2023

Counsel for the Plaintiff: Advocate R L Donaldson

Counsel for the Defendant: Advocate S Mallett

Amicus Curiae: Advocate G S K Dawes

Cases and legislation referred to:

Mental Health (Bailiwick of Guernsey) Law 2010 (as amended)
Capacity (Bailiwick of Guernsey) Law 2020

Re T (adult: refusal of medical treatment) [1992] 4 All ER 649

Re C (adult: refusal of medical treatment) [1994] 1 All ER 819

Heart of England, NHS Foundation Trust and JB (by her litigation friend the Official Solicitor)
[2014] EWHC 342 (COP)

Montgomery v Lanarkshire Health Board (General Medical Council intervening) [2015] 2 All ER
1031

Introduction

1. On the 7th February 2023, the Law Officers of the Crown summonsed Mr YZ (Mr Z) seeking, under the Court's inherent jurisdiction, declarations as to his capacity to make decisions in relation to the medical treatment of his diabetes and in particular the physical complications arising therefrom to his right foot and heel.
2. On Thursday 9th February 2023, a directions hearing was held, where I made various directions in anticipation of a hearing which was set down for Wednesday 15th February. This included the appointment of Advocate Dawes as Amicus Curiae and dealing with the filing of skeleton arguments and evidence. However, on Friday 10th February 2023, the Law Officers were advised that Mr Z was now suffering from sepsis and an urgent hearing was necessary. The specific declaration now sought (in terms agreed by the parties) is that Mr Z has the capacity to make a

decision in relation to the medical treatment of his diabetes and in particular, but not limited to, the physical complications arising therefrom in his right foot and heel and an order that there shall be no surgical intervention relating to the Respondent's right leg save with his express informed consent.

3. On the 10th February an urgent hearing was convened, and I am grateful to all the parties for the efforts that were made over such a very short amount of time in order that the hearing could go ahead this afternoon.
4. I heard evidence from Mr Sadeo Kairsingh, who is a Consultant Vascular Surgeon, Dr Flambert, Consultant Psychiatrist, Mr Andrew Treacy who is the Team Leader of the Recovery and Rehabilitation Team, I have also had an affidavit from Mr Z dated 10th February 2023 and I heard submissions from Advocate Donaldson, on behalf of the Law Officers, Advocate Mallett, on behalf of Mr Z and also by Advocate Dawes as Amicus.

Background

5. Mr Z, whose date of birth is the ... 196., was admitted to Crevichon Ward at the Oberlands Centre on the 26th September 2022, under Section 24 of the Mental Health (Bailiwick of Guernsey) Law 2010 (as amended). This is a Treatment Order made by an approved social worker and authorised by the Law Officers. A copy of that Order was provided to the Court in the course of the hearing, during Dr Flambert's evidence (whose evidence I will come to further below).
6. As the Treatment Order sets out, Mr Z has a long history of contact with the Mental Health Services and has a diagnosis of Bipolar Affective Disorder. All his admissions, both locally and in the UK, have been in the context of a manic relapse, often with psychotic symptoms, which have led to periods of detention under the Mental Health legislation, including in the UK, when his episodes have been too severe to be managed on the Island.
7. This most recent admission was as a consequence of a relapse of his Bipolar Affective Disorder where it was said in the application that in the absence of treatment, he would deteriorate both mentally and physically.
8. In addition to his mental health challenges, Mr Z has a long history of Diabetes Mellitus, for which it is reported he has never been willing to accept treatment. His refusal for treatment for his physical health has been explored with him on many occasions and he has always been aware of the potential risks of uncontrolled diabetes.
9. During his recent admission to Crevichon Ward, he developed an ulcer on his right heel, most likely as a result of poor circulation, secondary to uncontrolled diabetes. This was initially treated with oral antibiotics but he did not respond to them, so he was referred to the Princess Elizabeth Hospital, under the care of Mr Kairsingh vascular surgeon. Mr Kairsingh recommended surgical debridement of the wound which was, by that point, infected and gangrenous. When assessed, regarding the surgical intervention, he was acutely unwell, with affective and psychotic symptoms and according to the psychiatric evidence before me, lacked capacity to consent to this operation, which he had, incidentally, refused, but the decision was taken that it was in his best interests and the operation took place.
10. I understand that the surgical intervention was, initially, positive but Mr Z's leg has subsequently deteriorated. It is Mr Kairsingh's opinion that without an amputation it is inevitable that Mr Z will develop an infection which is resistant to antibiotics resulting in sepsis and most likely death.
11. As I have indicated above, it does appear that Mr Z has had this first septic episode already, hence the need for urgency.

12. What has been clear, however, from all those who gave evidence during the hearing, is that Mr Z has maintained throughout that he does not consent to the amputation.

Evidence

13. Mr Z is clear in his affidavit, which was sworn this afternoon, and he has also been clear in his instructions, that he does not wish to have the amputation. He said he wishes to leave this world with both of his legs and has recently expressed a desire to leave sooner rather than later. Advocate Mallett, who appears on behalf of Mr Z, says that Mr Z does not wish to have the amputation. Fortunately she had the opportunity to go to the hospital, prior to the hearing, on the afternoon of the 10th February and obtain an affidavit confirming this (on the basis that he had capacity to make such an affidavit). Mr Z was able to recognise and remember Advocate Alan Merrien who attended with her as a notary public. He was able to provide her with instructions. His instructions were clear and consistent that he did not want the amputation. She was also in no doubt that Mr Z wished to execute the 'Do not resuscitate' order.
14. Although the documentation from the Best Interests meeting dated 3rd February 2023 indicated that Mr Z wished to attend court so I could hear his opinion, he, as I have said, has now instructed Advocate Mallett and has said he no longer wishes to attend court. He says that Advocate Mallett can provide the court with his instructions which she has done and she has been very clear about the basis upon which she makes those.
15. Mr XZ, Mr Z's father, has also been involved in the Best Interests meetings and he has also been clear that Mr Z would not want an amputation. In an e-mail to Advocate Donaldson, dated 8th February, Mr XZ stated that he had spoken to his son and asked him if he was fully aware of the serious nature of his illness and the consequence of not accepting the inevitability of his condition if this operation was delayed or cancelled. He said that from his knowledge of Mr Z throughout his life, he would say that his son was fully cognisant and adamant in the decision he was making. If this operation goes ahead, regardless of his serious plea, which I took to mean the plea of Mr Z that he did not want it, Mr XZ said he dreaded to think what the consequences were that would follow. His email said that as his father, he was convinced that Mr Z was being truly serious in declaring his wishes, saying that he was born with two legs and that is how he would leave this world. I put that e-mail to Dr Flambert and asked her if she recognised that description as reflecting the feelings of Mr Z and she said that they did.
16. I should say in passing, Mr XZ was asked whether he wanted to attend the hearing, but he expressed a wish, which I respect very much, that he would rather spend the time with his son.
17. In Mr Kairsingh's evidence, he confirmed that all the surgeons, including the second opinion, which had been sought from Southampton General Hospital, were unanimous in advising that a major amputation, either below or above the knee, was required. However, he also recognised that Mr Z has been consistent and clear that he does not want to have the operation and he has spoken to him about this on numerous occasions over the last few days and even today.
18. Although he is not a psychiatrist, his view was that Mr Z did understand the purpose and effects of the amputation and also the effects of what would happen if he did not have the amputation. He believed that Mr Z had understood and retained the information and was able to recall previous conversations about this. He also said that today Mr Z is not able to pass urine and had refused fluids, he had also refused a canular to receive intravenous antibiotics. When he met with him today, Mr Z had made clear to him again that he did not want the amputation. He also signed a unified 'Do not attempt cardiopulmonary resuscitation form' (known as DNACPR). He said it was his view that Mr Z had capacity when he signed this form, and he was clear in his wishes that he did not wish to have his leg amputated. Dr Kairsingh accepted that there was a risk that

even if there was a first amputation there might well be a second amputation and that amputees have a reduced life expectancy in these circumstances.

19. Dr Flambert, the Consultant Psychiatrist, has known Mr Z for approximately five years and has been his treating psychiatrist for the last four. When she gave evidence, she said that Dr Bishop was the treating consultant in relation to the treatment order (Dr Bishop was absent from the island at the time of the hearing). She has met with Mr Z along with Dr Bishop to consider his capacity.
20. She has also seen a letter dated the 8th February 2023 from Dr Bishop which sets out his view and she confirmed that she agrees with the contents of the letter. In that letter Dr Bishop says that he has assessed Mr Z's capacity on the 8th February when he reiterated to him the risks of surgical intervention versus non-surgical intervention, this included non-surgical intervention meant treatment resistant infection, sepsis and then death. Dr Bishop confirmed that Mr Z was able to understand the information given to him, he could retain it long enough to weigh up the risk of treatment against non-treatment and could clearly communicate his decision of refusal of any surgical intervention. Dr Bishop said that he had been told by Mr Z that he had no desire to have any form of surgical intervention as he has lived a full life and does not wish to live life as an amputee as this would affect the quality of his life and he feared it would make him an object of ridicule.
21. Mr Z also said to Dr Bishop that in view of the likelihood of sepsis and death he would not wish to be listed for resuscitation should he experience cardiopulmonary arrest as this would be futile and pointless.
22. Dr Flambert confirmed that her opinion was the same as the opinion of Dr Bishop that Mr Z does have capacity. She had seen Mr Z today between 3 and 3.30pm on Giffard Ward and he still has capacity. She said that for at least the last ten days she has considered he has capacity. She considers that this is the case even though he is still under the Treatment Order. She said that a Treatment Order would not be obtained now if it was applied for given Mr Z's capacity. She was asked what the effect upon him would be if he had the amputation against his wishes and she said it was very difficult to say, but it would seriously impact on his mental health, he would be very angry and it would be very difficult to manage. She is also clear that he understood the nature, purpose and effects of the proposed medical treatment and the consequences of him not having the treatment. He had comprehended and retained the information as to the amputation. He had believed the information and weighed this in the balance when making a choice. She was consistent throughout her evidence that he had capacity to make the decision about his leg and that his decision was not to consent to the operation.
23. Mr Andrew Treacy, who is a psychiatric nurse, working as Team Leader of the Recovery and Rehabilitation Team, has a very good relationship with Mr Z and has seen him regularly, particularly since he has been on Giffard Ward. He was also clear that Mr Z had capacity and that he had consistently understood what was being recommended, that is that he should have the amputation but that he did not want this. He described him as being adamant about not wanting the amputation, that he fully understood the consequences. When asked what would happen if the amputation was made against his wishes, he considered that the suicide risk of Mr Z would be very high.

The Law

24. The application is made under the inherent jurisdiction of the court. It was common ground that the court has inherent jurisdiction to make the declaratory relief being sought and that until the coming into force of the relevant sections of the Capacity (Bailiwick of Guernsey) Law 2020, it is necessary to rely on the inherent jurisdiction to make the Orders sought.

25. The starting point for this type of application are the propositions as set out by Lord Donaldson in Re T (adult: refusal of medical treatment) [1992] 4 All ER 649 at 664a:-

“(1) Prima facie every adult has the right and capacity to decide whether or not he will accept medical treatment, even if a refusal may risk permanent injury to his health or even lead to premature death. Furthermore, it matters not whether the reasons for the refusal were rational or irrational, unknown or even non-existent. This is so, notwithstanding the very strong public interest in preserving the life and health of all citizens. However, the presumption of capacity to decide, which stems from the fact that the patient is an adult, is rebuttable. (2) An adult patient may be deprived of his capacity to decide by long-term mental incapacity or retarded development or by temporary factors such as unconsciousness or confusion or the effects of fatigue, shock, pain or drugs. (3) If an adult patient did not have the capacity to decide at the time of the purported refusal and still does not have that capacity, it is the duty of the doctors to treat him in whatever way they consider, in the exercise of clinical judgment, to be in his best interests. (4) Doctors faced with a refusal of consent have to give very careful and detailed consideration to what was the patient's capacity to decide at the time when the decision was made. It may not be a case of capacity or no capacity. It may be a case of reduced capacity. What matters is whether at that time the patient's capacity was reduced below the level needed in the case of a refusal of that importance, for refusals can vary in importance. Some may involve a risk to life or of irreparable damage to health. Others may not.”

26. See also Montgomery v Lanarkshire Health Board (General Medical Council intervening) [2015] 2 All ER 1031 at 1053f:-

“An adult person of sound mind is entitled to decide which, if any, of the available forms of medical treatment to undergo and consent has to be obtained before treatment interfering with a person's bodily integrity is undertaken.”

27. In the case of Heart of England, NHS Foundation Trust and JB (by her litigation friend the Official Solicitor) [2014] EWHC 342 (COP) Mr Justice Peter Jackson said as follows (starting at paragraph 1): -

1. *“The right to decide whether or not to consent to medical treatment is one of the most important rights guaranteed by law. Few decisions are as significant as the decision about whether to have major surgery ... Such decisions are intensely personal, they are taken in stressful circumstances, there are no right or wrong answers. The freedom to choose for oneself is part of what it means to be a human being.*
2. *For this reason, anyone capable of making decisions, has an absolute right to accept or refuse medical treatment, regardless of the wisdom or the consequences of the decision. The decision does not have to be justified to anyone. In the absence of consent, any invasion of the body would be a criminal assault. The fact that the intervention is well-meaning or therapeutic makes no difference.”*

And at paragraph 7: -

“The temptation to base the judgment of a person's capacity from whether they seem to have made a good or bad decision and in particular upon whether they have accepted or rejected medical advice, is, absolutely, to be avoided. That would be to put the cart before the horse, or expressed in another way, to allow the tail of welfare

to wag the dog of capacity. Any tendency to this direction risks infringing the rights of that group of persons who though vulnerable are capable of making their own decisions. Many who suffer from mental illness are well able to make decisions about their medical treatment and it is important not to make unjustified assumptions to the contrary.”

28. Further in *Re C (adult: refusal of medical treatment)* [1994] 1 All ER 819 it was held that the High Court in exercising its inherent jurisdiction could direct by way of an injunction or declaration that an individual was capable of refusing or consenting to medical treatment, including future medical treatment. However, in determining whether that person had sufficient capacity to refuse the treatment, the question to be decided was whether it had been established that his capacity had been so reduced by his chronic mental illness that he did not sufficiently understand the nature, purpose and effects of the proffered medical treatment. That in turn depended on whether he had comprehended and retained information as to the proposed treatment, had believed it and had weighed it in the balance when making the choice. The same principles should apply equally in this jurisdiction.

Discussion

29. In this case, the evidence from the surgeons treating Mr Z's right leg, is that there is the unanimous opinion that it would be in his best interests in terms of his physical health at least, to amputate his right leg, either above or below the knee. However, Mr Z has been consistent that he does not want to have this amputation.
30. It is clear from the evidence that I have heard this afternoon, that initially Mr Z's capacity to make an informed decision was impaired by his mental health. However, for at least ten days, those who are treating Mr Z's mental illness, have said he has capacity. No one is now saying that he does not have capacity. Although the declaration that is sought is one that Mr Z has capacity, even though Mr Z is subject to a Mental Health Section, the presumption is still that he has capacity. Therefore I must consider whether on the balance of probabilities he does not have capacity to the extent that he does not sufficiently understand the nature, purpose and effects of the prospective amputation or not having the amputation. The psychiatric evidence is that he does have capacity. I am clear on the evidence before me, that Mr Z has comprehended and retained the information as to the proposed treatment, he has believed it and weighed in the balance when making a choice. Mr Z's choice is not to have the amputation. Having established that he has capacity, that choice is his right. The presumption is that he has capacity and the presumption has not been rebutted.

Decision

31. I will make the declaration sought by the Law Officers and supported by Mr Z, that Mr Z has the capacity to make a decision in relation to the medical treatment of his diabetes and in particular, but not limited to, the physical complications arising therefrom in his right foot and heel and I further order that there shall be no surgical intervention relating to Mr Z's right leg, save with his expressed informed consent. I hope that in the making of this declaration this will give Mr Z the peace that he desires.