

# Best interests decision-making under the Mental Capacity Act

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The Essex Autonomy Project

Green Paper Technical Report

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## 1 Introduction

The Mental Capacity Act (MCA) 2005 states that ‘[a]n act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests’.<sup>1</sup> Despite the statutory checklist set out in section 4 enumerating elements that are to be taken into account when determining someone’s best interests, the meaning of the notion is not entirely clear. In the context of surrogate decision-making, best interests is often contrasted to the substituted judgment standard; while the former is said to set ‘objective’ criteria for decision-making on behalf of others, the latter is based on the principle of respect for autonomy and instructs the surrogate to make a decision that the person would have made if he or she had the capacity to do so. Although the notion of ‘best interests’ appears quite early in the case law of British courts exercising the Crown’s *parens patriae* jurisdiction, the application of the standard, as incorporated in the MCA today, raises some fundamental questions:

- How does best interests in the English framework relate to the substituted judgment standard?
- What factors can be taken into account when assessing best interests? Besides physical well-being, is it possible to consider the incapacitated person’s emotions, values, past preferences or present feelings when determining best interests?
- How to balance different factors of best interests against each other? Most notably, how to balance the past and present wishes of the incapacitated person against ‘objective’ welfare elements? Do all factors weigh the same or are there predominant factors that might determine the outcome of the decision? Does the physical well-being of the patient always trump other considerations?
- Whose interests can be taken into account? Should the interests of the family members or carers influence the outcome of a best interests assessment?

The aim of this document is to facilitate a better understanding of the meaning of best interests through the analysis of the relevant case law and the examination of the statutory framework. Emphasis will be placed on the genesis and the historical evolution of concept since it seems essential for the proper understanding of the meaning of the contemporary legal standard.

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<sup>1</sup> Section 1 (5) MCA.

## 2 Historical overview

### 2.1 The *parens patriae* jurisdiction

Up until 1959, it was the doctrine of *parens patriae* which provided the legal basis for surrogate decision-making on behalf of incapacitated adults. The expression (which literally means ‘the parent of the country’) refers to the Crown’s power and duty to protect the persons and property of those unable to do so for themselves, including both the category of minors and persons of unsound mind.<sup>2</sup> The origins of the king’s *parens patriae* jurisdiction is ‘lost in the mists of antiquity’.<sup>3</sup> Its first formal statement is found in the fourteenth century statute *De Praerogativa Regis*.<sup>4</sup> Before the enactment of this statute, the custody of mentally ill people, and of their land, was vested in the lord of the manor although some sources suggest that the Crown’s prerogative had already existed before 1324 under common law and the *De Praerogativa Regis* was only a declaration of this power.<sup>5</sup> The *parens patriae* jurisdiction was first exercised directly by the Crown but it was later transferred to the Lord Chancellor and to the chancery courts in the seventeenth century.<sup>6</sup> Although essentially a

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<sup>2</sup> *Re F* [1990] 2 AC 1 p. 57 (opinion of Lord Brandon of Oakbrook).

<sup>3</sup> *E. (Mrs.) v Eve* [1986] 2 S.C.R. 388 (La Forest JJ) para. 32 with reference to Henry Theobald, *The Law Relating to Lunacy* (London: Stevens & Sons, 1924).

<sup>4</sup> 17 Edward II, chapter 9 (1324) and chapter 10 (1339). Chapter 9 deals with the group of ‘idiots’ (or ‘natural fools’, who have had no understanding from their birth), while chapter 10 regulates the affairs of ‘lunatics’ (or *non compos mentis*, who have lost their sanity due to a disease or accident). Cf. Amar Shah, ‘The Concept of ‘Best Interests’ in the Treatment of Mentally Incapacitated Adults’, 21 *The Journal of Forensic Psychiatry and Psychology* 306 (2010) p. 306; Mary Donnelly, ‘Best Interests, Patient Participation and the Mental Capacity Act 2005’, 17 *Medical Law Review* 1 (2009) fn. 1; Daniel Griffith, ‘The Best Interests Standard: A Comparison of the State’s *Parens Patriae* Authority and Judicial Oversight in Best Interests Determinations for Children and Incompetent Patients’, 7 *Issues in Law and Medicine* 283 (1991) p. 287.

<sup>5</sup> Blackstone suggests in his *Commentaries* (Book 1, Chapter 8, Branch 18) that the statute *De Praerogativa Regis* merely affirmed the common law in this respect. Lord Coke in the second part of the *Institutes* writes that the King had no prerogative in the custody of an idiot’s land by the common law, but in *Beverley’s* case he claims that this prerogative was by the common law, and that the statute *De Praerogativa Regis* is only declarative thereof. See John Griffith Williams and Wilmot Parker (eds.), *The Practice of the Court of Chancery* (vol. 1) (Philadelphia: William P. Farrand, 1807) p. 502. Henry Theobald writes that ‘the most probable theory [of the jurisdiction’s origin] is that either by general assent or by some statute, now lost, the care of persons of unsound mind was by Edw. I taken from the feudal lords, who would naturally take possession of the land of a tenant unable to perform his feudal duties’. See Henry Theobald, *The Law Relating to Lunacy* (London: Stevens & Sons, 1924) p. 1 as quoted in para. 32 of *E. (Mrs.) v. Eve* [1986] 2 S.C.R. 388 (La Forest JJ).

<sup>6</sup> Griffith (1991) p. 2; Shah (2010) p. 306. Chancery courts dealt only with lunatics with an estate. Lunatics without an estate were considered as ‘pauper lunatics’ and were dealt with under poor laws and local regulations. With respect to the historical evolution of the *parens patriae* jurisdiction, the Canadian Supreme Court in para. 33 of the *E. (Mrs.) v. Eve* case mentions that ‘[i]n the 1540’s, the *parens patriae* jurisdiction was transferred from officials in the royal household to the Court of Wards and Liveries, where it remained until that court was wound up in 1660. Thereafter the Crown exercised its jurisdiction through the Lord Chancellor to

fiscal prerogative, it seems that the powers granted by the *parens patriae* extended both to the person and estate of the mentally ill. Sir Edward Coke, for example, in *Beverley's Case* (1603) states that 'in the case of an idiot or fool natural, [...] the law has given the custody of him, and all that he has, to the King'<sup>7</sup>. In the *Commentaries on the Laws of England* (1765-1769), Blackstone lists the custody of lunatics and idiots under the 'ordinary revenues' of the King but mentions that the law also provides for the 'custody and sustentation of lunatics'.<sup>8</sup> The *parens patriae* was essentially a protective jurisdiction: it aimed at preserving the person and the estate of '*non compos mentis*' adults through decisions made by the chancery courts or by court-appointed deputies. With regard to this, Blackstone writes that the Lord Chancellor 'usually commits the care of [a *non compos*] person, with a suitable allowance for his maintenance, to some friend, who is then called his committee. However, to prevent sinister practices, the next heir is never permitted to be this committee of the person; because it is his interest that the party should die. [...] The heir is generally made the manager or committee of the estate, it being clearly his interest by good management to keep it in condition.'<sup>9</sup>

It is hard to tell what kind of standard was applied for the purposes of surrogate decision-making under the *parens patriae* jurisdiction in the early cases. The best interests standard was not commonly used before 1989 in relation to the mentally incompetent;<sup>10</sup> some authors suggest that the focus was on the 'benefit' of the person.<sup>11</sup> Although the exact difference between 'best interests' and 'benefit' is unclear,<sup>12</sup> the significance of these principles is that they provide a limit to the exercise of the *parens patriae* jurisdiction. 'Though the scope or sphere of operation of the *parens patriae* jurisdiction may be unlimited, it by no means follows that the discretion to exercise it is unlimited. It must be exercised in accordance with its underlying principle. Simply put, the discretion is to do what is necessary for the protection of the person for whose benefit it is exercised [...].'<sup>13</sup>

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whom by letters patent under the Sign Manual it granted the care and custody of the persons and the estates of persons of unsound mind'.

<sup>7</sup> *Beverley's Case* 4 Coke's Rep. 126b, 76 E.R. 1118 (at p. 1124) as quoted in para. 40 of *E. (Mrs.) v. Eve* [1986] 2 S.C.R. 388 (La Forest JJ).

<sup>8</sup> Sir William Blackstone, *Commentaries on the Laws of England* (1765-1769), Book 1, Chapter 8, Branch 18. Available at <http://www.lonang.com/exlibris/blackstone/> (10.10.2011)

<sup>9</sup> *Ibid.*

<sup>10</sup> Before the House of Lords judgment in *Re F* [1990] 2 AC 1.

<sup>11</sup> Donnelly (2009) fn. 2, Shah (2010) p. 307.

<sup>12</sup> The two expressions are often used interchangeably in case law. The Scottish Adults With Incapacity Act (2000) adopted the concept of benefit instead of best interests, cf. section 5.3 of this report.

<sup>13</sup> *E. (Mrs.) v. Eve* [1986] 2 S.C.R. 388 (La Forest JJ) para. 77.

## 2.2 Financial decision making and the substituted judgment standard

For financial decisions, the substituted judgment test has already appeared under the *parens patriae* jurisdiction. A landmark judgment in this respect was delivered in 1816 in the case of *Re Hinde, ex parte Whitbread*.<sup>14</sup> Lord Eldon argued that ‘the Court, looking at what it is likely the Lunatic himself would do, if he were in a capacity to act, will make some provision out of the estate for those persons.’ The Court was willing to make an allowance to the incapacitated person’s brothers and sisters ‘upon the principle that it would naturally be more agreeable to the lunatic, [...] than that they should be sent into the world to disgrace him as beggars’.<sup>15</sup> This early formulation of the standard was not really individualised: ‘the basis on which [the chancery judges] made decisions was a broad assumption that the payment in question was one which undoubtedly would have been made [...] by the sort of person in question’.<sup>16</sup>

Between 1926 and 1959, chancery courts had limited statutory power to deal with patient’s property affairs based on section 171 of the Law of Property Act 1925. After 1959, the *parens patriae* jurisdiction gave place to the regulations of the Mental Health Act which, among others, provided in section 102 (1) (c) that ‘the judge may, with respect to the property and affairs of a patient, do or secure the doing of all such things as appear necessary or expedient [...] for making provision for other persons or purposes for whom or which the patient might be expected to provide if he were not mentally disordered’. This formulation provided the statutory basis for the substituted judgment test which was further refined in common law. The *Re L (WJG)* judgment introduced the idea of a hypothetical ‘brief lucid interval’ which shall guide the process of substituted decision making.<sup>17</sup> For this, the judge must ‘assume that the patient becomes a sane man for a sufficient time to review the situation but knows that after a brief interval of sanity he will once more be as he was before’. In *Re D (J)*,<sup>18</sup> Megarry V-C.<sup>19</sup> gives detailed guidance how to conduct the substituted judgment test including the following ‘very curious assumptions’.<sup>20</sup> (1) It is to be assumed that the patient is having a brief lucid interval at the time when the will is made; (2) it is to be assumed that during the lucid interval the patient has full knowledge both of the past and of the future; (3)

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<sup>14</sup> *Re Hinde, ex parte Whitbread* [1816] 2 Mer 99 (Lord Eldon).

<sup>15</sup> *Ibid.*

<sup>16</sup> Barbara Rich, ‘Best Interests Revisited’, 3 *Elder Law Journal* (2011).

<sup>17</sup> *Re L (WJG)* [1966] Ch 135 (Cross J).

<sup>18</sup> *Re D (J)* [1982] Ch 237 (Megarry V-C.) p. 243-245. See also *Re P* [2009] EWHC 163 (Ch) (Lewison J) para. 16 and Barbara Rich, ‘Best Interests Revisited’, 3 *Elder Law Journal* (2011).

<sup>19</sup> Vice-Chancellor of the High Court (Chancery Division).

<sup>20</sup> *Re L (WJG)* [1966] Ch 135 p. 141 (Cross J).

it is always the actual patient who has to be considered and not a hypothetical one. Before losing testamentary capacity the patient may have been a person with strong antipathies or deep affections for particular persons or causes, or with vigorous religious or political views; (4) the patient is to be envisaged as being advised by competent solicitors during the hypothetical lucid interval; (5) it is to be assumed that the incapacitated person would take a broad brush rather than an ‘accountant’s pen’ to the provisions of his will.

The substituted judgment standard has reached the ‘high water mark of artificiality’<sup>21</sup> in the *Re C* case.<sup>22</sup> It was established that if it is not possible to determine the previous preferences of the patient because he or she never had capacity before, then the Court shall assume that the patient would have been ‘a normal decent person, acting in accordance with contemporary standards of morality’.<sup>23</sup>

Following the implementation of the MCA, the best interests standard has to be applied in financial decision-making as well. The exact relation between an incapacitated person’s past wishes and feelings and the other elements of best interests has been explored by the Court of Protection in the *Re P*, the *Re M* and the *Re G (TJ)* judgments.<sup>24</sup> We will discuss these cases in section 4 – for now, it is worth noting that in certain situations, i.e. ‘in the absence of any countervailing factors’,<sup>25</sup> it might be possible that the best interests of the individual actually corresponds to what the person would have wanted if he or she had capacity to make the decision.

### **2.3 The abolition of *parens patriae* and the birth of the inherent jurisdiction**

The *parens patriae* jurisdiction in relation to mentally incapacitated adults was abolished as a result of two related events occurring on 1 November 1960, namely the coming into force of section 1 of the Mental Health Act 1959 and the revocation of the Royal Warrant under the

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<sup>21</sup> Munby LJ quoting Palmer J in *Re M* [2009] EWHC 2525 (Fam) para. 29.

<sup>22</sup> *Re C (A Patient)* [1992] 1 F.L.R. 51 (Hoffmann J).

<sup>23</sup> *Re P* [2009] EWHC 163 (Ch) (Lewison J) para. 19.

<sup>24</sup> *Re P* [2009] EWHC 163 (Ch) (Lewison J); *Re M (Statutory Will), ITW v Z and others* [2009] EWHC 2525 (Fam) (Munby J); *Re G (TJ)* [2010] EWHC 3005 (COP) (Morgan J).

<sup>25</sup> *Re G (TJ)* [2010] EWHC 3005 (COP) (Morgan J) para. 65. In this case, Morgan J had to consider whether directing the deputy of Mrs G (an incapacitated elderly lady) to make maintenance payment from Mrs G’s funds to her daughter (C) was in the best interests of Mrs G. Paragraph 65 is particularly interesting with respect to the relation of the best interests and the substituted judgement standard: ‘Having identified the factors as best I can, it emerges that the principal justification, so far as Mrs G is concerned, for making the order for maintenance payments in favour of C, is that those payments would be what Mrs G would have wanted if she had capacity to make the decision for herself. I recognise that this consideration is essentially a ‘substituted judgment’ for Mrs G. I am also very aware that the test laid down by the 2005 Act is the test of best interests and not of substituted judgment. [However,] a substituted judgment can be subsumed into the consideration of best interests. Accordingly, in this case, respect for what would have been Mrs G’s wishes will define what is in her best interests, in the absence of any countervailing factors.’

Sign Manual.<sup>26</sup> The idea behind these changes was that the new MHA would provide adequate means for surrogate decision-making both in financial and welfare cases. However, as Munby LJ points out, ‘whilst the inherent *parens patriae* jurisdiction in relation to an incapacitated adult’s *financial* affairs was transferred to the (old) Court of Protection, the corresponding jurisdiction in relation to such an adult’s *non-financial* affairs was inadvertently abolished’.<sup>27</sup> The new MHA contained regulations concerning the management of patients’ property and affairs,<sup>28</sup> but did not provide any means for judges to decide questions related to the welfare of incapacitated persons (e.g. medical treatment for physical illnesses). Consequently, there was a gap in the welfare jurisdiction from 1960.<sup>29</sup>

This gap was filled by the House of Lords in *Re F* [1990] by invoking the inherent declaratory jurisdiction of the High Court.<sup>30</sup> It was generally accepted by the judges that the High Court has an inherent jurisdiction to make declarations with regard to the lawfulness of certain conducts that are proposed to the Court (e.g. the sterilisation of a mentally handicapped woman in the present case). The House of Lords derived the lawfulness of the proposed medical intervention from the common law principle of necessity. Similarly to an accident where it is necessary to administer medical treatment to non-consenting or unconscious victims, the necessity principle makes intervention lawful in the case of incapacitated adults as long as it serves their best interests or, more precisely, if the acting person ‘adopts the course which, to the judgment of a wise and prudent man, is apparently the best for the interest of the persons for whom he acts in a given emergency’.<sup>31</sup> It is important to emphasise that a proposed act does not become lawful because the court has given its consent; rather, it is ‘lawful [...] because and by virtue of the operation of the doctrine of necessity’.<sup>32</sup>

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<sup>26</sup> The Warrant under the Sign Manual was the legal instrument by which the jurisdiction of the Crown had been assigned to the Lord Chancellor and the judges of the Chancery Division in the High Court.

<sup>27</sup> Munby LJ, ‘Taking Stock: The Mental Health and Mental Capacity Reforms’, Key Note Address to the Cardiff Law School Conference at Manchester (15 October 2010).

<sup>28</sup> Part VIII of the MHA 1959 and later part VII of the MHA 1983.

<sup>29</sup> It seems that originally the guardianship regulations of the MHA were intended to fill this gap in welfare decision making. However, guardianship powers were not extensive enough, especially after the 1983 amendment of the MHA. See *Re F* [2000] 2 F.L.R. 512 (Butler-Sloss LJ; Thorpe LJ; Sedley LJ) (no numbered paragraphs).

<sup>30</sup> *Re F* [1990] 2 AC 1 (Lord Bridge of Harwich, Lord Brandon of Oakbrook, Lord Griffiths, Lord Goff of Chieveley and Lord Jauncey of Tullichettle).

<sup>31</sup> *Ibid.* Lord Goff of Chieveley quoting *Australasian Steam Navigation Co. v Morse* (1872) L.R. 4 P.C. 222, 230.

<sup>32</sup> *St Helens Borough Council v PE* [2006] EWHC 3460 (Fam) (Munby J) para. 11.

This solution has sufficed as the basis for judicial decision making in the medical or surgical context.<sup>33</sup> However, the doctrine of necessity and the inherent declaratory jurisdiction could only operate in relation to questions that could be formulated in terms of lawfulness. There are many welfare decisions which do not engage the doctrine of necessity because the issue falls outside the ambit of any identifiable tort or crime – consider, for example, decisions concerning an incapacitated person’s residence or contacts.<sup>34</sup> Moreover, the declaratory jurisdiction can only declare the lawfulness of a state of affairs but cannot provide judicial sanctions or order a specific act to be done.

The Family Division had to face an increasing number of cases which involved non-medical issues to which the doctrine of necessity did not apply. Furthermore, the limited legal means provided by *Re F* [1990] for welfare decision making seemed incompatible with the European Convention on Human Rights and the newly adopted Human Rights Act. As a result, family judges invented (or rather re-invented) a full blown welfare based *parens patriae* jurisdiction similar to the *parens patriae* jurisdiction existing in relation to children. The *Re F* [2000] and *Re SL* cases provided landmark judgments in this respect.<sup>35</sup> In *Re F* [2000], the local authority sought declarations from the court to prevent the return of the protected person to her mother and to restrict and supervise her contact with her natural family. The question was whether the High Court had the jurisdiction to make a declaration the effect of which would be coercive and which would require the protected person to live as directed by the local authority. The Court of Appeal answered in the affirmative. In *Re SA*, Munby LJ, commenting on the state of inherent jurisdiction, observed that ‘it is now clear [...] that the court exercises what is [...] a jurisdiction in relation to incompetent adults which is for all practical purposes indistinguishable from its well-established *parens patriae* or wardship jurisdictions in relation to children’.<sup>36</sup> He goes on to add that ‘the court can regulate everything that conduces to the incompetent adult’s welfare and happiness’.<sup>37</sup>

With the implementation of the MCA, the new Court of Protection received statutory jurisdiction over those who lack mental capacity. However, the inherent jurisdiction of the High Court survives in relation to the group of vulnerable adults – adults who might satisfy the requirements of Article 2 (1) MCA with respect to mental capacity but still require

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<sup>33</sup> Munby LJ, ‘Taking Stock: The Mental Health and Mental Capacity Reforms’ (2010).

<sup>34</sup> *Ibid.*

<sup>35</sup> *Re F* [2000] EWCA Civ. 192 (Butler-Sloss LJ, Thorpe LJ, Sedley LJ); *Re SL (Adult Patient) (Medical Treatment)* [2001] Fam. 15 (Butler-Sloss, Thorpe and Mance LJ).

<sup>36</sup> *Re SA (Vulnerable Adult with Capacity: Marriage)* [2005] EWHC 2942 (Fam) (Munby J) para. 37.

<sup>37</sup> *Ibid.* para. 45.

protection due to their vulnerability.<sup>38</sup> Munby J, in the context of the inherent jurisdiction, describes a vulnerable adult as ‘someone who, whether or not mentally incapacitated, and whether or not suffering from any mental illness, or mental disorder, is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation, or who is deaf, blind, or dumb, or who is substantially handicapped by illness, injury or congenital deformity’.<sup>39</sup> The powers of the High Court under the inherent jurisdiction are to be exercised by reference to the vulnerable adult’s best interests.<sup>40</sup>

### 3 The evolution of the best interests standard

As we have seen, the power to make medical welfare decisions in the best interests of an incapacitated adult was established in *Re F* [1990] by applying the common law doctrine of necessity.<sup>41</sup> The House of Lords, in the same judgment, adopted the *Bolam test* as the standard which should be applied in deciding whether a proposed operation is (or is not) in the best interests of the patient.<sup>42</sup> The Bolam test was originally used to determine the standard of reasonable care for doctors and other medical professionals in cases of medical negligence. According to the classical formulation, ‘a doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular form of treatment; nor is he negligent merely because there is a body of opinion which would adopt a different technique’.<sup>43</sup> This standard has been adopted in different areas of medical law besides negligence, including the areas of informed consent

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<sup>38</sup> *Re G (An Adult) (Mental Capacity: Court’s Jurisdiction)* [2004] EWHC 2222 (Fam) (Bennett J); *Re SA (Vulnerable Adult with Capacity: Marriage)* [2006] 1 F.L.R. 867 (Munby J); *Re SK* [2005] 2 F.L.R. 230 (Munby J); *A Local Authority v A* [2010] EWHC 1549 (Fam) (COP) (Bodey J); *Local Authority X v MM, KM* [2007] EWHC 2003 (Fam) (Munby J)

<sup>39</sup> *Re SA (Vulnerable Adult with Capacity: Marriage)* [2006] 1 F.L.R. 867 (Munby J) para. 82.

<sup>40</sup> *Ibid.* para. 96.

<sup>41</sup> Michael C. Dunn, Isabel C. H. Clare, Anthony J. Holland, Michael J. Gunn, ‘Constructing and Reconstructing ‘Best Interests’: An Interpretative Examination of Substitute Decision-making under the Mental Capacity Act 2005’, 29 *Journal of Social Welfare and Family Law* 117 (2007) p. 119.

<sup>42</sup> There was considerable disagreement between the House of Lords and the Court of Appeal whether the Bolam test was a sufficiently stringent standard for determining best interests. All three members of the Court of Appeal rejected the application of the Bolam test. As Neill LJ for the Court of Appeal put it: ‘With respect, I do not consider that this test is sufficiently stringent. A doctor may defeat a claim in negligence if he establishes that he acted in accordance with a practice accepted at the time as proper by a responsible body of medical opinion skilled in the particular form of treatment in question. [...] But to say that it is not negligent to carry out a particular form of treatment does not mean that that treatment is necessary. I would define necessary in this context as that which the general body of medical opinion in the particular specialty would consider to be in the best interests of the patient in order to maintain the health and to secure the well-being of the patient’. The House of Lords overruled this approach for fear of applying a double-standard to incompetent adults as compared to competent ones. See the opinion of Lord Brandon of Oakbrook on p. 68.

<sup>43</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. 582 (Westlaw Case Analysis).

and when determining ‘Gillick competence’. Against this backdrop, the *Re F* case can be considered as an additional stop in the ‘Bolamisation’ process of medical law.<sup>44</sup>

Although opinions had already been divided about the appropriateness of the Bolam test in *Re F*, the test was subsequently applied in cases such as *Airedale NHS Trust v Bland* or *Re T*.<sup>45</sup> The *Bland* case extended the notion of medical treatment to artificial nutrition and examined how the withdrawal of artificial nutrition would affect the best interests of a PVS (Persistent Vegetative State) patient with no prospect of recovery. While recognizing that ‘the formulation of the duty of care within the Bolam test may not by itself be an adequate basis’ for the present decision, the Court agreed that the duty of doctors towards a PVS patient does not extend to prolonging his life at all costs.<sup>46</sup> As Lord Keith of Kinkel explains, ‘a medical practitioner is under no duty to continue to treat such a patient where a large body of informed and responsible medical opinion is to the effect that no benefit at all would be conferred by continuance’.<sup>47</sup> The Court also makes it clear that the English notion of objective best interests cannot be equated with the substituted judgment approach as adopted in the United States but the views and the personality of P will necessarily form part of the best interests assessment.<sup>48</sup>

The judges in the *Re T* take a more paternalistic approach when ordering life-saving blood transfusion to be administered to a non-consenting patient.<sup>49</sup> The Court understands best interests purely as medical interests and contends that ‘neither the personal circumstances of the patient nor a speculative answer to the question “What would the patient have chosen?” can bind the practitioner in his choice of whether or not to treat or how to treat a patient.’ The Court comes to the arguable conclusion that ‘it is the duty of the doctors to treat [a patient] in whatever way they consider, in the exercise of their clinical judgment, to be in his best interests.’<sup>50</sup>

### 3.1 Problems with Bolam

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<sup>44</sup> Margaret Brazier, Jose Miola, ‘Bye-Bye Bolam: A Medical Litigation Revolution?’, 8 *Medical Law Review* 85 (2000) p. 90.

<sup>45</sup> *Airedale NHS Trust v Bland* [1993] AC 789; *Re T (Adult: Refusal of Treatment)* [1993] Fam. 95 (Lord Donaldson of Lynton M.R., Butler-Sloss LJ and Staughton LJ).

<sup>46</sup> *Airedale NHS Trust v Bland* [1993] AC 789 (Butler-Sloss LJ) p. 823.

<sup>47</sup> *Ibid.* p. 858-59 (Lord Keith of Kinkel).

<sup>48</sup> *Ibid.* p. 817 (Butler-Sloss LJ).

<sup>49</sup> *Re T (Adult: Refusal of Treatment)* [1993] Fam. 95.

<sup>50</sup> *Ibid.* p. 115.

The application of the Bolam test leaves the determination of incapacitated patients' best interests primarily with medical practitioners. While it had already been recognized in a 1994 judgment that 'there should not be a belief that what the doctor says is the patient's best interest is the patient's best interest',<sup>51</sup> courts generally followed the expert opinions of medical practitioners when making medical best-interests decisions. However, the Bolam test could not survive as a benchmark for best interests assessment. One of its main deficiencies is that it allows only for the consideration of medical interests; if we conceive best interests as a broader category that also includes emotional and other welfare consequences (which was increasingly the case beginning from *Re MB*<sup>52</sup>), the Bolam test cannot apply anymore. It seems improbable 'that a person should have his or her best interests restated as merely the right not to have others make negligent decisions on his or her behalf'.<sup>53</sup> This opinion was echoed by LJ Butler-Sloss in *Re A* when examining the relation between best interests and the Bolam test.<sup>54</sup> While doctors are required to 'act at all times in accordance with a responsible and competent body of relevant professional opinion',<sup>55</sup> they also have to take into account broader welfare implications when making best interests decisions. These two duties have not been conflated into one single requirement – in other words, the Bolam test is a necessary but not sufficient requirement of best interests. As it became apparent in *Re SL*, best interests assessment based strictly on the Bolam standard may lead to conflicting best interests options 'since there may well be more than one acceptable medical opinion' in certain situations.<sup>56</sup> The *SL* case concerned the sterilisation of a 29 year old mentally incapacitated woman. Justice Wall, delivering the judgment for the first instance court, came to the conclusion that it would equally be lawful to sterilize SL by means of hysterectomy or to provide her with a contraceptive Mirena coil because expert medical opinion was divided on the most appropriate form of treatment.<sup>57</sup> While Justice Wall's first-instance judgment complies with the Bolam test, it cannot be considered as a 'proper' best interests decision, since – as had been argued by the Official Solicitor and accepted by the Court on appeal – the 'best interests

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<sup>51</sup> Sir Thomas Bingham in *Frenchay Healthcare National Health Service Trust v S* [1994] 1 W.L.R. 601 p. 609. See also Shah (2010) 308. Cf. *Re A* [2000] 1 F.L.R. 389 'It is the judge, not the doctor, who makes the decision that it is in the best interests of the patient that the operation be performed.' Cf. *Re SL (Adult Patient) (Medical Treatment)* [2000] 3 W.L.R. 1288 p. 24 'It therefore falls to the judge to decide whether to accept or reject the expert medical opinion that an operation is, or is not, in the best interests of a patient.'

<sup>52</sup> *Re MB* [1997] 2 F.L.R. 426.

<sup>53</sup> Dunn (2007) p. 121.

<sup>54</sup> *Re A* [2000] 1 F.L.R. 389.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Re SL (Adult Patient) (Medical Treatment)* [2001] Fam. 15 (Butler-Sloss, Thorpe and Mance LJ) (no numbered paragraphs).

<sup>57</sup> *Re SL (Adult Patient) (Medical Treatment)* [2000] 1 F.L.R. 465 (Wall J).

test ought, logically, to give only one answer'.<sup>58</sup> When determining the 'objective' best interests of a person, one must take into account 'broader ethical, social, moral and welfare considerations' including the invasive character of the proposed treatment.<sup>59</sup> This approach of Butler-Sloss LJ in *Re SL* was reaffirmed by the Court of Appeal in 2005.<sup>60</sup>

Another instance where the Bolam test may produce inconclusive results is related to experimental medical treatment. This issue was raised in two cases in which the Court had to decide about the administration of experimental medication to patients suffering from a rare neurodegenerative disorder, the so-called Creutzfeldt-Jakob disease.<sup>61</sup> It has been claimed that if one has to comply with the Bolam test to its fullest extent, 'no innovative work such as the use of penicillin or performing heart transplant surgery would ever be attempted'.<sup>62</sup> However, the Bolam standard shall not be allowed to inhibit medical progress: subject to the degree of risks and benefits involved and an overall best interests assessment, if there is responsible medical opinion in support of the innovative treatment, experimental medication can be warranted by the Court.

Summing up, there are good reasons why the Bolam test has lost its central role in the determination of best interests.<sup>63</sup> But is it still a necessary requirement to be observed when deciding about medical treatment under the Mental Capacity Act? The fact that the newly established Court of Protection makes no reference to the Bolam test in its case law implies a negative answer here. However, as it was stated in a recent case before the Court, it is still 'unlikely in the extreme that the court would order a clinician to undertake a medical intervention which he, the clinician, did not believe to be in the best interests of the patient'.<sup>64</sup>

### 3.2 General welfare assessment and the balance sheet

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<sup>58</sup> *Re SL (Adult Patient) (Medical Treatment)* [2001] Fam. 15. See also 'Taking Stock: The Mental Health and Mental Capacity Reforms' (Key Note Address by Lord Justice Munby to the Cardiff Law School Conference at Manchester on 15 October 2010).

<sup>59</sup> *Re SL (Adult Patient) (Medical Treatment)* [2001] Fam. 15, p. 28.

<sup>60</sup> *An NHS Trust v A, SA* [2005] EWCA Civ 1145 (Waller, Mummery and Tuckey LJ).

<sup>61</sup> *Simms v Simms* [2002] EWHC 2734 (Fam) (Butler-Sloss J); *CS v A NHS Foundation Trust* [2010] EWHC 2746 (COP) (Sir Nicholas Wall).

<sup>62</sup> *Simms v Simms* [2002] EWHC 2734 (Fam) para. 48

<sup>63</sup> The evolution of the common law is in line with the Law Commission's Report on Mental Incapacity in which the Commission criticized the use of the Bolam test as a standard for best interests. 'It should be made clear beyond any shadow of a doubt that acting in a person's best interests amount to something more than not treating a person in a negligent manner. Decisions taken on behalf of a person lacking capacity require a careful, focused consideration of that person as an individual. Judgments as to whether a professional has acted negligently, on the other hand, require a careful, focused consideration of how that particular professional acted as compared with the way which other reasonable professionals would have acted.' Law Commission Report on Mental Incapacity No. 231 (1995) para. 3.27.

<sup>64</sup> *CS v A NHS Foundation Trust* [2010] EWHC 2746 (COP) (Sir Nicholas Wall) para. 24

The problems associated with the Bolam test, and in particular the obvious need to expand the boundaries of best interests beyond medical interests, led to the adoption of a broader, welfare-based assessment of best interests. In *Re MB*, a pregnant woman needed to deliver her baby by Caesarean section but refused to be given anaesthesia by injection because of her needle-phobia.<sup>65</sup> The Court of Appeal found that it was in MB's best interests to administer the injection to her and perform the Caesarean section, since she would suffer significant long-term psychological damage if her baby was born handicapped or died. Butler-Sloss LJ likens best interests assessment to the process of welfare assessment employed in the case of children: 'In considering the scope of best interests, it seems to us that they have to be treated on similar principles to the welfare of a child since the court and the doctors are concerned with a person unable to make the necessary decision for himself'.<sup>66</sup> Similar welfare assessments had been conducted in the *Re Y* and, subsequently, the *Re SL* case.<sup>67</sup> Another recurring theme of welfare assessments, especially in relation to the care of elderly or vulnerable, is the way how emotional well-being should be balanced against physical health and safety. As it was argued in *Local Authority X v MM and KM*, '[p]hysical health and safety can sometimes be bought at too high a price in happiness and emotional welfare. [...] What good is it making someone safer, if it merely makes them miserable?'<sup>68</sup> The recognition of the role of emotions and human relations in best interests assessments appears in the judgments of the Court of Protection as well. Justice Hedley tells us:

If one asks what has to be taken into account in considering the best interests of any human being [...] the answer is a very wide ranging one: his health, his care needs, his need for physical care and his needs for consistency. There is, of course, more to human life than that, there is fundamentally the emotional dimension, the importance of relationships, the importance of a sense of belonging in the place in which you are living, and the sense of belonging to a specific group in respect of which you are a particularly important person.<sup>69</sup>

Similarly, Justice Charles has argued that 'it is always important to recognise the commitment and love of a family to caring for a member of the family who lacks capacity, and the significant part that that inevitably plays in decisions that fall to be made by the court [...]'.<sup>70</sup>

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<sup>65</sup> *Re MB* [1997] 2 F.L.R. 426 (Butler-Sloss, Saville and Ward LJ).

<sup>66</sup> *Ibid.* para. 36.

<sup>67</sup> *Re Y (Mental Patient: Bone Marrow Donation)* [1997] Fam 110; *Re SL (Adult Patient) (Medical Treatment)* [2001] Fam. 15.

<sup>68</sup> *Local Authority X v MM and KM* [2007] EWHC 2003 (Fam) (Munby J) para. 120

<sup>69</sup> *Re GM* [2011] EWHC 2778 (COP) (Hedley J) para. 21.

<sup>70</sup> *A Local Authority v PB and P* [2011] EWHC 502 (COP) (Charles J) para. 7.

A more formalised approach to welfare assessment was introduced by Thorpe LJ in *Re A* in 2000. He argues that when determining best interests, the first instance judge shall draw up a balance sheet indicating on each side the actual advantages and disadvantages associated with the proposed course of conduct, together with the potential gains and losses and with the probabilities that the gain or loss might accrue.<sup>71</sup> Although the balance sheet approach was intended to be a provisional method for best interests assessment,<sup>72</sup> it has been invoked in many High Court and Court of Protection cases, even after the implementation of the statutory checklist of the MCA.<sup>73</sup> To be sure, such an exercise helps judges to strike a fairer (more complete and more transparent) balance between the competing interests in a specific case but, at the same time, it fails to give any guidance as to how much weight shall be attributed to the diverse and often conflicting elements that constitute a person's best interests. As we will see later, the case law of the new Court of Protection provides further directions in this respect.

### 3.3 The statutory evolution of the best interests standard

The Law Commission's first Consultation Paper on mentally incapacitated adults considered the best interests and the substituted judgment tests as being two conceptually distinct standards.<sup>74</sup> The difference of the two tests does not only manifest in their different historical development and scope of application; while best interests 'represent the more paternalistic and restrictive approach' based on what the decision-maker thinks is objectively best for the patient, the substituted judgment standard attempts to arrive at the choice that a particular

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<sup>71</sup> *Re A* [2000] 1 F.L.R. 389 (no numbered paragraphs).

<sup>72</sup> 'Pending the enactment of a check list or other statutory direction it seems to me that the first instance judge [...] should draw up a balance sheet' Ibid

<sup>73</sup> See, for example *Simms v Simms* [2002] EWHC 2734 (Fam); *Re S* [2003] EWHC 1909 (Fam); *Re S (Adult Patient: Family life)* [2002] EWHC 2278 (Fam); *Re GC* [2008] EWHC 3402 (Fam.) (Hedley J); *Dorset CC v EH* [2009] EWHC 784 (Fam). See, more recently *W, M and S v A NHS Primary Care Trust* [2011] EWHC 2443 (Fam). According to Lewison J in para. 44 of *Re P* [2009] EWHC 163 (Ch), the Parliament in the Mental Capacity Act actually endorsed the balance sheet approach which explains the continuing use of the concept. Obviously, there are certain situations where this approach cannot be applied. For example, 'there is no balancing operation to be performed where a patient has a definite diagnosis of permanent vegetative state and where the futility of the treatment would justify its termination.' *Re CW* [2010] EWHC 3448 (COP) (Ryder J) para. 66

<sup>74</sup> Law Commission Consultation Paper No. 119 (1991) (Mentally Incapacitated Adults and Decision-Making: An Overview). Paragraph 4.22 of the Paper states: "Two different tests have been developed for making decisions on behalf of a mentally incapacitated adult. The 'best interests' standard is derived principally from child care law and represents the more paternalistic and at times restrictive approach: the decision taken is that which the decision-maker thinks is best for the person concerned. It was adopted in *Re F* [1990] 2 A.C. 1. Under the 'substituted judgment' standard, decisions made for an incapacitated person attempt to arrive at the choice that particular person would have made had he been competent to do so. This has, for example, been adopted as the correct standard for the execution of a statutory will."

person would have made had he been competent to do so.<sup>75</sup> Considering the deficiencies of the substituted judgment standard, especially the possible difficulties of ascertaining an incapacitated person's previous wishes and feelings, the Law Commission's preference goes clearly towards best interests, realizing at the same time that 'the distinction between the two tests may be little more than a matter of language.'<sup>76</sup> This view has been further elaborated in a subsequent Consultation Paper in which it is argued that the 'best interests' and 'substituted judgment' standards are not mutually exclusive and it favours 'a compromise whereby a best interests test is modified by a requirement that the substitute decision-maker first goes through an exercise in substituted judgment.'<sup>77</sup> It is interesting to see how the opinion of the Law Commission was mirrored by the *dicta* of Hoffmann LJ in the *Bland* case.<sup>78</sup>

The Commission recommended in its 1995 Report to adopt this integrated approach in the upcoming legislation on mental incapacity.<sup>79</sup> It also proposed a checklist of factors that should be taken into account when working out someone's best interests. This checklist included the past and present wishes and feelings and the factors that the incapacitated person would consider if able to do so; the requirement of maximum participation; the duty to consult others and the duty to choose the least restrictive alternative. The Report and the Draft Bill also contained the 'general authority to act reasonably' which was an attempt to clarify the circumstances in which decisions can be made for people who lack capacity without formal authorisation (e.g. decisions related to everyday care).<sup>80</sup>

The concept of best interests in the MCA reflects, but at the same time goes beyond the common law.<sup>81</sup> It also reflects the preparatory work of the Law Commission but is not identical with the proposals contained in the Consultation Papers or in the Report on Mental Incapacity. Section 1 MCA sets out five general principles, two of which directly relate to decisions made for adults lacking capacity: the principle of best interests and the principle of

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<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> Law Commission Consultation Paper No. 128 (1993) (Mentally Incapacitated Adults and Decision-Making: A New Jurisdiction) para. 2.14.

<sup>78</sup> Hoffmann LJ opines on p. 833 of the judgment: '[t]he patient's best interests would normally also include having respect paid to what seems most likely to have been his own views on the subject. To this extent I think that what the American courts have called 'substituted judgment' may be subsumed within the English concept of best interests.'

<sup>79</sup> Law Commission Report on Mental Incapacity No. 231 (1995) para. 3.25.

<sup>80</sup> Ibid. part IV. The 'general authority to act reasonably' was not included in the MCA but section 5 of the Act contains similar provisions.

<sup>81</sup> Michael C. Dunn, Isabel C. H. Clare, Anthony J. Holland, Michael J. Gunn, 'Constructing and Reconstructing 'Best Interests': An Interpretative Examination of Substitute Decision-making under the Mental Capacity Act 2005', 29 *Journal of Social Welfare and Family Law* 117 (2007) p. 122.

least restrictive means.<sup>82</sup> Section 1 (5) requires that ‘[a]n act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.’ This principle covers all aspects of financial, personal welfare and healthcare decision-making and extends to all decisions made under the MCA, including acts in connection to care and treatment (section 5), decisions made by the Court of Protection, by deputies and by attorneys appointed under a Lasting Power of Attorney or Enduring Power of Attorney.<sup>83</sup>

The term ‘best interests’ is not defined in the Act. Section 4 MCA explains how to work out the best interests of a person who lacks capacity by setting out a checklist of common factors that must always be considered during the course of a best interests assessment. However, this checklist is not exhaustive and in many cases, additional factors will need to be considered.<sup>84</sup> The main elements of the checklist are the following. First, the decision maker must consider whether the person currently lacking capacity is likely to regain capacity in the future and, if so, when this is likely to occur. Second, the decision maker must ensure that the protected person participates as fully as possible in any act done for him and any decision affecting him. Third, he must consider (a) the person’s past and present wishes and feelings (b) the beliefs and values that would be likely to influence his decision if he had capacity, and (c) the other factors that he would be likely to consider if he were able to do so.<sup>85</sup> Fourth, the decision maker has an obligation to consult a number of people designated in the Act (e.g. the carers, deputies, attorneys or anyone specifically named by the protected person).

## 4 Best Interests in the MCA

### 4.1 Substituted judgment vs best interests

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<sup>82</sup> Mary Donnelly, ‘Best Interests, Patient Participation and the Mental Capacity Act 2005’, 17 *Medical Law Review* 1 (2009) p. 8.

<sup>83</sup> Dunn (2007) p. 122.

<sup>84</sup> MCA Code of Practice para. 5.6.

<sup>85</sup> The obligation to consider the past and present wishes, beliefs and values of the incapacitated person can overlap with the advance refusal of treatment contained in sections 24 and 25 of the Act. Obviously, section 4 (6) has a wider ambit than section 24 which covers only the refusal of medical treatment. Donnelly explains that when the necessary requirements for the application of section 24 are not met, section 4 (6) can still operate as a fall-back position. Donnelly (2009) p. 22.

The introduction of the statutory checklist in the MCA did little to clarify how the different elements of best interests shall be balanced against each other during the course of a best interests assessment. The integration of financial decision making into the framework of the MCA brought along the integration of the substituted judgment standard into the best interests scheme. Although it is made clear that there is no place in the new Court of Protection for ‘any harking back’ to old judgments that would require judges to perform ‘mental gymnastics’,<sup>86</sup> certain financial decisions may still call for the application of the substituted judgment standard ‘in the absence of countervailing factors’<sup>87</sup> – especially when the judicial order sought would leave the present interests of ‘P’ largely unaffected.

In the *S and S case*, the Court of Protection was asked to appoint a deputy for an elderly couple.<sup>88</sup> Judge Hazel Marshall attributed considerable weight to the couple’s past wishes and preferences when choosing the person to be appointed as their deputy. She argues in paragraph 57 that ‘where P can and does express a wish or view which is not irrational [...], is not impracticable [...], and is not irresponsible [...] then that situation carries great weight, and effectively gives rise to a presumption in favour of implementing those wishes.’ Lewison J, in a different case, states that Judge Marshall ‘may have slightly overstated the importance to be given to P’s wishes’.<sup>89</sup> He contends that the best interests test is not a test of substituted judgement but an objective one and claims that ‘the decision maker must form a value judgment of his own’ when determining best interests.<sup>90</sup>

In *Re M*, Munby J follows the opinion of Lewison J and characterizes *Re P* as ‘a judgment with compelling force’.<sup>91</sup> He breaks with the substituted judgment test and adds that ‘such well known authorities as *Re D (J)* and *Re C* are best consigned to history’.<sup>92</sup> There are three key factors that have to be borne in mind when assessing best interests under the MCA. Firstly, it is important to remember that the statute lays down no hierarchy as between the various factors that constitute best interests. Secondly, ‘the weight to be attached to the various factors will, inevitably, differ depending upon the individual circumstances of the particular case’. Thirdly, and somewhat contrary to the previous assertions, there may be one

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<sup>86</sup> *Re M (Statutory Will), ITW v Z and others* [2009] EWHC 2525 (Fam) (Munby J) para. 29.

<sup>87</sup> *Re G (TJ)* [2010] EWHC 3005 (COP) (Morgan J) para. 65.

<sup>88</sup> *Re S and S (Protected Persons), C v V* [2009] W.T.L.R. 315.

<sup>89</sup> *Re P* [2009] EWHC 163 (Ch) (Lewison J) para. 41.

<sup>90</sup> *Ibid.* para. 39.

<sup>91</sup> *Re M (Statutory Will), ITW v Z and others* [2009] EWHC 2525 (Fam) (Munby J) para. 28.

<sup>92</sup> *Ibid.* para. 29.

or more features or factors which are of ‘magnetic importance’ in influencing or even determining the outcome of a specific case.<sup>93</sup>

The idea of a ‘magnetic factor’ that is capable of determining the outcome of a balancing process appears originally in judgments delivered by Thorpe LJ in relation to section 25 of the Matrimonial Act.<sup>94</sup> As he explains: ‘although there is no ranking of the criteria to be found in the statute [i.e. the Matrimonial Act], there is as it were a magnetism that draws the individual case to attach to one, two, or several factors as having decisive influence on its determination.’<sup>95</sup> It seems that the presence of a magnetic factor does not only mean that an element is given distinguished weight in the balance sheet but rather that the magnetic factor ‘pulls’ the evaluation of all elements in a specific direction and thus determines the outcome of the case. In the recent *W v M* case, in which the Court of Protection had to decide about the withdrawal of the artificial nutrition of a minimally conscious patient, the sanctity of life seems to have acquired such ‘magnetic importance’. The importance of preserving life was deemed to be the decisive factor which could not be outweighed by other considerations on the opposite side of the ‘balance sheet’ (e.g. past preferences of the patient, the wishes and feelings of relatives, etc.).<sup>96</sup>

Although the Court in *Re M* rejects the use of the substituted judgment standard, Munby J offers valuable guidance concerning the weighing of the patient’s wishes and feelings against other, ‘objective’ elements of best interests.<sup>97</sup>

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<sup>93</sup> Ibid. para. 32.

<sup>94</sup> *Crossley v Crossley* [2007] EWCA Civ 1491; *White v White* [1999] Fam. 304. Section 25 of the Matrimonial Causes Act 1973 lists the relevant factors that must be taken into account for the settlement of financial matters in the case of divorce.

<sup>95</sup> *White v White* [1999] Fam. 304 (Thorpe LJ) (no numbered paragraph)

<sup>96</sup> *W v M and others* [2011] EWHC 2443 (Fam) (Baker J) para. 249.

<sup>97</sup> *Re M (Statutory Will), ITW v Z and others* [2009] EWHC 2525 (Fam) (Munby J) para. 35

He makes the following observations in paragraph 35 of the judgment (direct quotation follows):

1. P's wishes and feelings will always be a significant factor to which the court must pay close regard.
2. Secondly, the weight to be attached to P's wishes and feelings will always be case-specific and fact-specific. In some cases, in some situations, they may carry much, even, on occasions, preponderant, weight. In other cases, in other situations, and even where the circumstances may have some superficial similarity, they may carry very little weight. One cannot, as it were, attribute any particular *a priori* weight or importance to P's wishes and feelings; it all depends, it must depend, upon the individual circumstances of the particular case. [...]
3. Thirdly, in considering the weight and importance to be attached to P's wishes and feelings the court must [...] have regard to *all* the relevant circumstances.

In this context the relevant circumstances will include [...] such matters as:

- a) the degree of P's incapacity, for the nearer to the borderline the more weight must in principle be attached to P's wishes and feelings;
- b) the strength and consistency of the views being expressed by P;
- c) the possible impact on P of knowledge that her wishes and feelings are not being given effect to;
- d) the extent to which P's wishes and feelings are, or are not, rational, sensible, responsible and pragmatically capable of sensible implementation in the particular circumstances; and
- e) crucially, the extent to which P's wishes and feelings, if given effect to, can properly be accommodated within the court's overall assessment of what is in her best interests.

## 4.2 Whose best interests?

The notion of best interests might be criticized for the fact that it allows only for the consideration of the incapacitated person's interests and it does not take into account the interests of others such as carers or family members. The individualistic character of best interests seems to have historical roots in the Crown's *parens patriae* jurisdiction. As it was established by the Canadian Supreme Court in relation to the non-therapeutic sterilization of a mentally disabled person, the *parens patriae* jurisdiction cannot be used for the benefit of the person's carer; 'its exercise is confined to doing what is necessary for the benefit and protection of persons under disability.'<sup>98</sup> The same idea is recognized in the 'paramountcy principle' of section 1 (1) of the Children Act 1989.

Although section 4 (7) of the MCA contains a general obligation to consult certain people during the course of best interests assessments, the aim of this provision is to facilitate a better understanding of what would be in the person's individual best interests. However, there are certain situations where the interests of others are inseparable from the interests of the protected person and seem to carry moral relevance when making decisions on behalf of 'P'. In the case of *Re Y*, a mentally incapacitated woman ('Y') was deemed to be the best suitable donor for her sister who suffered from pre-leukemic bone marrow disorder. The Court, when deciding about the permissibility of the donation, held that the required operations were in Y's best interests as they would tend to prolong her sister's life and Y would continue to receive emotional, psychological and social support from her sister in return. At the same time, the Court stated that the mere fact that the donation would benefit Y's sister is irrelevant unless Y's best interests are served as a result.<sup>99</sup>

It is obvious that the rather torturous reasoning of *Re Y* cannot be applied in every situation. Certain cases of 'financial altruism' that involve the making of wills and gifts on behalf of an incapacitated person neither directly nor indirectly affect the well-being of P.<sup>100</sup> In the case of *Re G (TJ)*, the Court of Protection had to consider whether directing the deputy of an incapacitated elderly lady (Mrs G) to make maintenance payments from her funds to her daughter was in the best interests of Mrs G.<sup>101</sup> Morgan J, ordering the maintenance payments to be made, argued that 'the word "interests" in the phrase "best interests" is not

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<sup>98</sup> *E. (Mrs.) v. Eve* [1986] 2 S.C.R. 388 (La Forest JJ) para. 82.

<sup>99</sup> *Re Y (Mental Patient: Bone Marrow Donation)* [1997] Fam 110, p. 113.

<sup>100</sup> Provided that P's estate is left largely unaffected by the gifts and payments made on his or her behalf. Barbara Rich, 'Best Interests Revisited', 3 *Elder Law Journal* (2011).

<sup>101</sup> *Re G (TJ)* [2010] EWHC 3005 (COP) (Morgan J).

confined to matters of self interest’ and ‘a court could conclude in an appropriate case that it is in the interests of P for P to act altruistically’.<sup>102</sup> Having decided the case finally under the substituted judgment standard,<sup>103</sup> it remains unclear whether altruism is an ‘objective’ element of best interests or forms part of the substituted judgment standard because altruism is the way how Mrs G ‘would have decided if she had capacity to do so’.

Another way to argue for the execution of a will or a gift on behalf of an incapacitated person is to refer to the person’s abstract interest in how he or she will be remembered after his or her death. This argument appears in paragraph 44 of *Re P* when Lewison J argues for the execution of a statutory will: ‘But what will live on after P’s death is his memory; and for many people it is in their best interests that they be remembered with affection by their family and as having done “the right thing” by their will.’ This approach was endorsed by Munby LJ in *Re M*<sup>104</sup> who drew a parallel between Lewison’s argument and the analysis of Hoffmann LJ in the Bland case.<sup>105</sup> On the other hand, Morgan J in *Re G (TJ)* quite plausibly argues that the memory of the incapacitated person cannot be a relevant factor when making a surrogate decision because the person is not participating in the actual decision and ‘it seems very hard to say that she is “doing” anything’.<sup>106</sup> Moreover, ‘being remembered as having done the “right” thing’ is also problematic because it invites a moral judgment to which there may be more than one right answer.<sup>107</sup> Nevertheless, the argument still comes up in the reasoning of the Court of Protection.<sup>108</sup>

As we have seen, Courts generally try to avoid taking directly into account the interests of others in the course of best interests assessments. There are, however, a few cases where the interests of others – in particular, the interests of family members – play a decisive role in the outcome of the assessment. One example is the *Simms v Simms* case in which

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<sup>102</sup> Ibid. para. 35. The welfare rationale of *Re Y* does not seem to apply in the case of wills and gifts: ‘It seems unlikely that the legislature thought that the power to make gifts should be confined to gifts [...] where the gift would confer a benefit on P [...] by reason of that person’s emotional response to knowing of the gift.’

<sup>103</sup> I.e. the substituted judgment element of the best interests standard.

<sup>104</sup> Paragraph 38 of *Re M* states: ‘Best interests do not cease at the moment of death. We have an interest in how our bodies are disposed of after death, whether by burial, cremation or donation for medical research. We have, as Lewison J rightly observed, an interest in how we will be remembered, whether on a tombstone or through the medium of a will or in any other way. In particular, as he points out, we have an interest in being remembered as having done the ‘right thing’, either in life or, *post mortem*, by will.’

<sup>105</sup> Hoffmann LJ on p. 829 of *Airedale NHS Trust v Bland* argues that people (including those who lack capacity) have an interest in how they die since this affects the way they will be remembered after their death. ‘We pay respect to their dead bodies and to their memory because we think it an offence against the dead themselves if we do not. Once again I am not concerned to analyse the rationality of these feelings. [...] It is demeaning to the human spirit to say that, being unconscious, he can have no interest in his personal privacy and dignity, in how he lives or dies’.

<sup>106</sup> *Re G (TJ)* [2010] EWHC 3005 (COP) (Morgan J) para. 63.

<sup>107</sup> Barbara Rich, ‘Best Interests Revisited’, 3 *Elder Law Journal* (2011).

<sup>108</sup> See, e.g. *Re D* [2010] EWHC 2159 (Ch) (Hodge J).

Butler-Sloss LJ decided to attribute great weight to the emotions and feelings of the applicant's family members when making her decision in favour of an experimental medical treatment.<sup>109</sup> In paragraph 64, she argues:

In my judgment the views of both families should carry considerable weight in the circumstances of these two young people. [...] The impact of refusal by this court of granting the declarations on each set of parents and, in one case, five siblings, and in the other case, one sibling, would in my view be enormous and palpable. In a finely balanced case I should give the views of the parents and the effect upon them of refusal great weight in the wider considerations of the best interests test which the court has to apply to each patient.

In a somewhat similar manner, the Court of Protection was willing to take into account the wishes and feelings of family members when deciding about the withdrawal of the artificial nutrition of a patient in 'minimally conscious state', though it made clear that their wishes and feelings were not of 'paramount' importance.<sup>110</sup> In paragraph 242, Baker J states:

In particular, the wishes and feelings of S [the partner of the incapacitated patient] and B [the sister of the patient] are a matter which this court must carefully consider. I accept [the counsel's] submission that the continuation of ANH [artificial nutrition and hydration] would cause further distress to them. I agree with him that, while their wishes are obviously not paramount and do not apply as a 'stand alone' consideration, they are relevant to the balancing exercise to be carried out under the MCA, not least because they are one of the factors that would have informed M's view about the issue, were she able to consider it.

Another recent judgment of the Court of Protection suggests that wider 'social' considerations can also influence the outcome of a best interests assessment. Deciding whether to conduct a DNA test in order to establish the paternal link between the protected person and his alleged daughter, Justice Wall states that it would 'require unusual facts for [the protected person's] best interests to depart from the ascertainment of the truth or the interests of justice'.<sup>111</sup> Subject to the final hearing, the judgment seems to imply that certain 'objective' social interests (i.e. 'the ascertainment of truth' and 'the interests of

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<sup>109</sup> *Simms v Simms and Another* [2002] EWHC 2734 (Fam). In the earlier *Re A* case, her wording was a bit more 'cautious' when stating that 'the question whether third party interests should ever be considered in a case concerned with the best interests of a patient ought to be left open'. *Re A (Mental Patient: Sterilisation)* [2000] 1 F.L.R. 549 (no numbered paragraphs).

<sup>110</sup> *W v M and others* [2011] EWHC 2443 (Fam) (Baker J).

<sup>111</sup> *LG v DK* [2011] EWHC 2453 (COP) (Sir Nicholas Wall) para. 55.

justice’) can override the previously expressed preferences and wishes of the protected person.

### 4.3 Unwise decisions

An interesting problem arises concerning the relation between unwise decisions and best interests. Section 1 (4) of the MCA stipulates that making an unwise decision does not, in itself, justify a conclusion of lack of capacity.<sup>112</sup> A seemingly foolish choice, however grave its consequences might be, shall not ‘cloud’ one’s judgment on mental capacity since it might reflect a difference in values rather than an absence of competence.<sup>113</sup> People are generally free to make unwise decisions:

Just as a testator has always had the freedom [...] to make testamentary dispositions which are unreasonable, foolish or contrary to generally accepted standards of morality, so too a person in his lifetime has the freedom to act in a manner which is (for example) unwise, capricious, or designed to spite his relations. The pages of English fiction and of the law reports alike bear ample testimony to the exercise of this basic human right, even if it is not one enshrined in so many words in the European Convention on Human Rights.<sup>114</sup>

It might be tempting to interpret unwise decisions as decisions that go against the protected person’s (objective) best interests. As it was argued in a recent case before the High Court in the context of unwise decisions, ‘[a]n individual with capacity can make a decision which is not in his/her objective best interests, and the court has no power to intervene’.<sup>115</sup> This is certainly true.<sup>116</sup> However, to attribute an objective ‘best interests’ standard to unwise decisions does not only raise concerns about the value neutrality of the state, but it can also be a source of discrimination in the sense that people with capacity have the right to make ‘imperfect’ choices while those who are deemed to lack capacity must always ‘choose’ the ‘wisest’ option because courts (as surrogate decision-makers) are inclined to make decisions that further the objective best interests of P. Lewison J, for example, claims that an

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<sup>112</sup> It might, however, trigger capacity-assessment, especially if someone repeatedly makes unwise decisions or makes a ‘particular unwise decision that is obviously irrational or out of character’. MCA Code of Practice para. 2.11.

<sup>113</sup> *Re B* [2002] 2 All ER 449 (Butler-Sloss LJ) para. 100.

<sup>114</sup> *D v R (the deputy of S)* [2010] EWHC 2405 (COP) (Henderson J) para. 39.

<sup>115</sup> *Re LA v. DL, GRI, ML & JP* [2011] EWHC 1022 (Fam) para. 47 (argument of Miss Lieven Q.C. on behalf of defendant DL).

<sup>116</sup> With the exception of vulnerable adults who might possess capacity but come under the scope of the inherent jurisdiction of the High Court.

‘objectively’ unwise decision can never be in someone’s best interests once the decision-making power shifts to a third party due to the lack of capacity. He writes in *Re P*: ‘I cannot see that it would be a proper exercise for a third party decision maker consciously to make an unwise decision merely because P would have done so. A consciously unwise decision will rarely if ever be made in P’s best interests.’<sup>117</sup> Lewison’s position seems plausible in the context of *Re P* but does his opinion imply that the surrogate decision-maker should overrule every unwise decision of the protected person even in the face of P’s explicit past or present wishes?

## 5 Best interests in different contexts

### 5.1 Best interests and treatment without consent under the MHA

Although the notion of best interests is mostly associated with surrogate decision-making under the MCA, it has also acquired a limited role in relation to certain treatment decisions under the Mental Health Act. The term itself does not appear in the MHA; the requirement to consider the best interests of a psychiatric patient when making treatment decisions without his or her consent was introduced in a series of cases after the implementation of the Human Rights Act 1998.<sup>118</sup>

Treatment without the patient’s consent is regulated in Part IV of the MHA. Normally, the consent of the detained patient is not required for ‘medical treatment for mental disorder’ if it is prescribed by the approved clinician in charge.<sup>119</sup> However, certain types of medical treatment such as long-term medication, electroconvulsive therapy or neurosurgery require the second opinion of a SOAD (‘second opinion appointed doctor’) which certifies the appropriateness of the treatment proposed by the approved clinician.<sup>120</sup> The approval of the SOAD, before the implementation of the MHA 2007, was subject to the

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<sup>117</sup> *Re P* [2009] EWHC 163 (COP) (Lewison J) para. 42.

<sup>118</sup> *R (Wilkinson) v Broadmoor Special Hospital Authority* [2001] EWCA Civ 1545 (Simon Brown LJ, Brooke LJ, Hale LJ); *R. (on the application of N) v M* [2002] EWCA Civ 1789 (Phillips of Worth Matravers LJ, Rix LJ, Dyson LJ); *R (B) v Dr SS* [2005] EWHC 1936 (Charles J); *R (B) v S* [2006] EWCA Civ 28 (Lord Phillips CJ, Thorpe LJ, Rix LJ). We would like to thank Ben Spencer (SHO Psychiatry, South London and Maudsley NHS Trust) for drawing our attention to the mentioned cases.

<sup>119</sup> Section 63 MHA 1983.

<sup>120</sup> For the detailed procedures, see sections 57, 58 and 58A of the MHA. Neurosurgery (section 57) requires the competent consent of the patient *and* the second opinion of a SOAD. Medication that exceeds three months (section 58) requires the second opinion of a SOAD if the patient lacks capacity or if he/she has competently refused to consent to the proposed treatment. Separate restrictions apply to electro-convulsive therapy (section 58A).

‘likelihood of the treatment alleviating or preventing a deterioration of the patient’s condition’; this was replaced by the ‘appropriateness of the treatment’ requirement after 2008.<sup>121</sup> In the beginning, the ‘likelihood of a treatment alleviating a patient’s condition’ was to be assessed according to the Bolam test, meaning that the SOAD’s approval for the proposed medical treatment was to be given if, according to a responsible body of medical opinion, it was likely that the treatment would alleviate or prevent the deterioration of the patient’s condition.<sup>122</sup>

A change in this respect was brought about by the *Wilkinson* ruling, in which the court held ‘that SOADs were not merely to certify that proposed treatment was “reasonable in light of the general consensus of appropriate treatment”’; they were instead to reach their own independent judgment based on the section 58 criteria.’<sup>123</sup> According to later cases,<sup>124</sup> such an independent second-opinion judgment has to take into account the best interests of the mental health patient. As it was explained in paragraph 62 of the *R (B) v S* case:

The express criteria in section 58 (3) (b), namely ‘the likelihood of its alleviating or preventing a deterioration of his condition’ should not be equated with the test of whether treatment is in the best interests of the patient. That question will depend on wider considerations than the simple question of the efficacy of the treatment, such as whether an alternative and less invasive treatment will achieve the same result. [...] The SOAD has to certify that the treatment should be given and we do not see how he can properly do that unless satisfied that the treatment is in the best interests of the patient.

Despite the guidance contained in *Wilkinson* and the other mentioned decisions, the role of the best interests standard is not fully settled with respect to treatment decisions under the MHA. There are only a few judgments that deal with this issue and all concern the pre-2007 standard of compulsory treatment. Thus, it would be too early to claim that best interests has an established role within the framework of the MHA.<sup>125</sup>

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<sup>121</sup> Section 58 (3) (b) MHA 1983.

<sup>122</sup> The application of the Bolam standard ensured that SOAD approval was granted in the overwhelming majority of cases. Phil Fennell, ‘Best Interests and Treatment for Mental Disorder’, 16 *Health Care Analysis* 255 (2008) p. 262.

<sup>123</sup> Peter Bartlett, ‘The necessity must be convincingly shown to exist: Standards for compulsory treatment for mental disorder under the Mental Health Act 1983’, 19 *Medical Law Review* 514 (2011) p. 522.

<sup>124</sup> *R. (on the application of N) v M* [2002] EWCA Civ 1789 (Phillips of Worth Matravels LJ, Rix LJ, Dyson LJ); *R (B) v Dr SS* [2005] EWHC 1936 (Charles J); *R (B) v S* [2006] EWCA Civ 28 (Lord Phillips CJ, Thorpe LJ, Rix LJ).

<sup>125</sup> Peter Bartlett, ‘The necessity must be convincingly shown to exist: Standards for compulsory treatment for mental disorder under the Mental Health Act 1983’, 19 *Medical Law Review* 514 (2011) p. 522.

## 5.2 The best interests principle in family law

Section 1 (1) of the Children Act 1989 requires that the welfare of the child shall be the court's 'paramount consideration' when deciding about the child's upbringing or administration of property. This provision is often referred to as the 'welfare principle', the 'paramountcy principle' or the 'best interests test'.<sup>126</sup> Although the Children Act does not define the concept of welfare, it does contain - similarly to section 4 of the MCA - a non-exhaustive list of factors that courts have to take into account when deciding what is in the child's best interests.<sup>127</sup> Even though this checklist was aimed to ensure greater consistency in judicial practice by prescribing a set of minimum factors, the actual content of the notion of welfare remains fairly vague. In particular, the Children Act does not tell us much about how the wishes and feelings of the child must be weighed against other elements of welfare.<sup>128</sup>

Another issue related to the 'paramountcy principle' is whether it requires that the child's welfare shall be our *sole* consideration or it allows for taking into account the rights and interests of others as well. According to the established case law, the former interpretation prevails: the interests of adults and other children are only relevant in so far as they might affect the welfare of the child in question.<sup>129</sup> This approach is quite different from the approach of the European Court of Human Rights which allows the balancing of the child's interests against the Article 8 (privacy) rights of family members. The family judiciary have subscribed to the view that despite the different wording of the two instruments, by fulfilling the requirements of the Children Act, courts automatically fulfil the requirements of Article 8 and therefore there is no need to examine the compatibility of their orders with the Convention.<sup>130</sup>

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<sup>126</sup> Jane Fortin, *Children's Rights and the Developing Law*, (Cambridge: Cambridge University Press, 2009, 3<sup>rd</sup> ed.) p. 291, fn 1.

<sup>127</sup> Jonathan Herring, *Family Law* (Harlow: Pearson Longman, 2011, 5<sup>th</sup> ed.) p. 416. According to section 3 of the Children Act, a court shall have regard in particular to the following factors: (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding); (b) his physical, emotional and educational needs; (c) the likely effect on him of any change in his circumstances; (d) his age, sex, background and any characteristics of his which the court considers relevant; (e) any harm which he has suffered or is at risk of suffering; (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs; (g) the range of powers available to the court under this Act in the proceedings in question.

<sup>128</sup> The Children Act states that the 'age' and the 'understanding' of the child must be taken into account when considering his or her wishes and feelings. Courts tend to attribute decisive weight to the wishes of 'Gillick competent' children. A child is Gillick competent if he 'reaches a sufficient a sufficient understanding and intelligence capable of making up his own mind on the matter requiring decision'. *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

<sup>129</sup> *J v C* [1970] AC 668; Law Commission Report No. 172 (1988) paras. 3.12-3.13.

<sup>130</sup> This view has been confirmed by the House of Lords in *Re B (Adoption by One Natural Parent to the Exclusion of Other)* [2001] UKHL 70. As Lord Nicholls of Birkenhead argues in para. 31: 'But this balancing

### 5.3 Best interests – Scotland

The Scottish Adults with Incapacity (AWI) Act 2000 uses the word ‘benefit’ instead of best interests. Paragraph 1 (2) of the Act, as a general principle, stipulates that ‘[t]here shall be no intervention in the affairs of an adult unless the person responsible for authorising or effecting the intervention is satisfied that the intervention will benefit the adult and that such benefit cannot reasonably be achieved without the intervention.’ The actual difference between the terms ‘benefit’ and ‘best interests’ and the reason for adopting the former expression in the Scottish statute is - at least at first glance - somewhat unclear. Following the English case law, the Court of Session, in a 1996 judgment with respect to the withdrawal of a PVS patient’s artificial nutrition, indicated that the test to be applied under the *parens patriae* jurisdiction in Scotland was essentially a test of best interests.<sup>131</sup> The Report of the Scottish Law Commission sheds more light on the reason why the word ‘benefit’ was finally adopted in the AWI Act 2000.<sup>132</sup> Section 2.50 of the Report states:

Our general principles do not rely on the concept of best interests of the incapable adult. [...] [Some commentators] thought that best interests was too paternalistic, and many others considered that the wishes and feelings of the incapable adult should be given greater weight. [...] We consider that ‘best interests’ by itself is too vague and would require to be supplemented by further factors which have to be taken into account. We also consider that ‘best interests’ does not give due weight to the views of the adult, particularly to wishes and feeling which he or she had expressed while capable of doing so. [...] Accordingly, the general principles we set out below are framed without express reference to best interests.

The Law Commission’s concern with the best interests standard is that it can be overly paternalistic and that it does not give ‘due weight’ to the previous wishes and feelings of the

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exercise, required by article 8, does not differ in substance from the like balancing exercise undertaken by a court when deciding whether, in the conventional phraseology of English law, adoption would be in the best interests of the child. [...] Although the phraseology is different, the criteria to be applied in deciding whether an adoption order is justified under article 8(2) lead to the same result as the conventional tests applied by English law.’

<sup>131</sup> *Law Hospital NHS Trust v Lord Advocate* [1996] ScotCS CSIH\_2. As it was put by Lord Hope of Craighead: ‘There is almost no guidance in the Scottish authorities, such as they are, relating to the exercise of the *parens patriae* jurisdiction with regard to the test to be applied in deciding whether or not a course of conduct should be authorised. But in *In re B (a Minor) (Wardship: Sterilisation)* it was held that a court exercising the wardship jurisdiction in England was concerned only with one primary and paramount consideration, namely the welfare and best interests of the ward. [...] In *Airedale NHS Trust v Bland* Lord Goff of Chieveley [...], Lord Browne-Wilkinson [...] and Lord Mustill [...] accepted the best interests test as the test, or as Lord Goff put it ‘the fundamental principle’, which they had to apply.’

<sup>132</sup> Report on Incapable Adults, Scottish Law Commission Report No. 151 (1995).

patient. This position reflects a somewhat different interpretation of best interests compared to the English approach, which, as we have seen it, incorporates subjective elements into its framework.

Interestingly, best interests appear in the Scottish Mental Health (Care and Treatment) Act 2003 with respect to certain medical treatments such as neurosurgery and ECT.<sup>133</sup> While the potential role of best interests is still unclear in the context of the English Mental Health Act (*cf.* section 5.2), the Scottish Act fully endorses the concept as a safeguard against particularly serious medical interventions.

#### 5.4 Best interests – Canada

The Canadian Supreme Court considered the scope of the *parens patriae* jurisdiction and the issue of best interests in the *E (Mrs.) v Eve* judgment in which it had to decide about the non-therapeutic sterilisation of a mentally incapacitated woman. The court came to the conclusion that it ‘undoubtedly has the right and duty to protect those who are unable to take care of themselves, and in doing so it has a wide discretion to do what it considers to be in their best interests’.<sup>134</sup>

Many Canadian provinces seem to make use of the best interests standard when it comes to surrogate decision-making.<sup>135</sup> It can be argued, however, that the notion does not occupy such a central place in Canadian mental capacity law as it does in England & Wales since most Canadian statutes utilise best interests as a secondary, ‘fallback’ principle in cases where the incapacitated person’s previous wishes and preferences are not known to the surrogate decision-maker.<sup>136</sup>

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<sup>133</sup> Sections 234 to 242 of the Mental Health (Care and Treatment) (Scotland) Act 2003.

<sup>134</sup> *E. (Mrs.) v Eve* [1986] 2 S.C.R. 388 (La Forest JJ) para. 99.

<sup>135</sup> The Vulnerable Persons Living With a Mental Disability Act (Manitoba, C.C.S.M. c. V90) para. 76; The Adult Guardianship and Co-decision-making Act (Chapter A-5.3 of The Statutes of Saskatchewan, 2000) para. 3(a); Representation Agreement Act (British Columbia, RSBC 1996 Chapter 405) para. 16 (4) b; Health Care (Consent) and Care Facility (Admissions) Act (British Columbia, RSBC 1996 Chapter 181) para. 19; Substitute Decisions Act (Ontario, S.O. 1992 Chapter 30) para. 66.

<sup>136</sup> Para. 76 (1) of the Manitoba Act states that ‘[i]n making decisions on the vulnerable person’s behalf, a substitute decision maker for personal care shall be guided by the following considerations: [...] (c) the best interests of the vulnerable person, if (i) the substitute decision maker has no knowledge of the vulnerable person’s wishes, values and beliefs, [...] or, (ii) the substitute decision maker cannot follow those wishes, values or beliefs without endangering the health or safety of the vulnerable person or another person.’ The Ontario Substitute Decisions, in para. 66 (3) 4 states: ‘If the guardian does not know of a wish or instruction applicable to the circumstances that the incapable person expressed while capable, or if it is impossible to make the decision in accordance with the wish or instruction, the guardian shall make the decision in the incapable person’s best interests’. The British Columbia Representation Agreement Act states in para. 16 (4): ‘If the adult’s instructions or expressed wishes are not known, the representative must act (a) on the basis of the adult’s known beliefs and values, or (b) in the adult’s best interests, if his or her beliefs and values are not known’.

## 6 Conclusion

Surrogate decision-making on behalf of incapacitated adults had been traditionally exercised under the Crown's *parens patriae* jurisdiction in the United Kingdom. The idea that surrogate decisions must further the 'best interests' or the 'benefit' of the protected person has a long history in British case law although we have seen that chancery courts also made use of the substituted judgment standard in financial matters before the implementation of the MCA. After the abolishment of the *parens patriae* jurisdiction in 1960, and the following jurisdictional 'gap' in welfare decision-making between 1960 and 1989, the House of Lords judgment in *Re F* marked the beginning of a new period in which the inherent jurisdiction of the High Court was invoked to make welfare decisions on behalf of incapacitated adults. This jurisdiction was first limited to declarations of lawfulness related to medical treatment but later was gradually extended to different non-medical issues as well (e.g. residence, contact). Parallel to this, the Bolam test was replaced by a general welfare assessment in the determination of best interests. In the practice of courts, best interests assessment involves a 'balance sheet' approach in which the welfare of the incapacitated person is understood in the widest sense including medical, psychological and emotional elements as well.

Today, the Mental Capacity Act provides a statutory framework for the application of the best interests standard but the decisions of the High Court and the newly established Court of Protection continue to provide important guidance for its interpretation. The present state of play can be summarized as this:

- The best interests standard received statutory recognition in the MCA (2005). Section 1 (5) of the Act contains a statutory checklist that has to be followed when working out someone's best interests.
- The determination of best interests involves a general welfare assessment which takes into account the most diverse elements of the protected person's well-being including emotional and psychological factors as well. Depending on the specific case, some elements might have a magnetic importance in the determination of best interests.
- A 'balance sheet' is commonly used when considering the possible advantages and disadvantages of the proposed decision.
- The weight that has to be attributed to the incapacitated person's past and present wishes and feelings is largely case specific.

- In principle, only the interests of the protected person can be taken into account when determining best interests. Some cases suggest that the interests of others (e.g. family members) can also have relevance here.

Despite all these clarifications, best interests seems to remain an elusive and controversial concept and the weight to be attributed to the different elements of best interests remains largely case and situation specific.