



Weightmans

Weightmans

Medical treatment, MCA and LPAs

Royal College of Podiatry
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Our Healthcare Practice

Our people

150+

specialist healthcare lawyers



180+

local government and public sector lawyers



Our clients



166 NHS Bodies

NHS Trusts, ICBs and national bodies (including NHS Resolution, NHS England)



200+ Primary Care Practices

GP surgeries, pharmacies and dental practices.



15 Medical Defence Organisations

Royal Colleges, medical insurers and practitioner membership bodies.



242 Local & National Government Organisations

Local and regional councils, central government departments and government funded bodies.



140+ Private and Independent Health and Care providers

Care homes, charities, healthtech companies and private secondary care providers.

Instructing us

We are appointed to the main national NHS frameworks including:



Award success



HSJ Partnership awards (2024): Bronze winner – Best legal services partnership with the NHS

Health Investor awards (2024): Finalist – Public Sector Legal advisors of the year

Health Investor awards (2023): Finalist – Transactional Legal advisors of the year

What our clients say

“The Weightmans health team are exceptionally good.”

NHS Client
Legal 500, 2024



“They’re always wanting to go the extra mile and find ways in which to support.”

NHS Client
Chambers and Partners, 2024



Content

- Consent – communication (and not getting sued)
- Capacity and best interests - Getting the MCA right
- Going to Court

Consent

- Consequences of treatment without consent
- No consent without
 1. Capacity
 2. being freely given
 3. informed

- What should a patient be told?
- Doctor knows best?
 - Hatcher v Black (1954)
 - Bolam (1957)
 - Sidaway (1984)
 - Montgomery (2015)

Listening and understanding what is material to the patient

Nadine Montgomery wins £5m from NHS Lanarkshire over brain damage to son

11 March 2015 | Glasgow & West Scotland

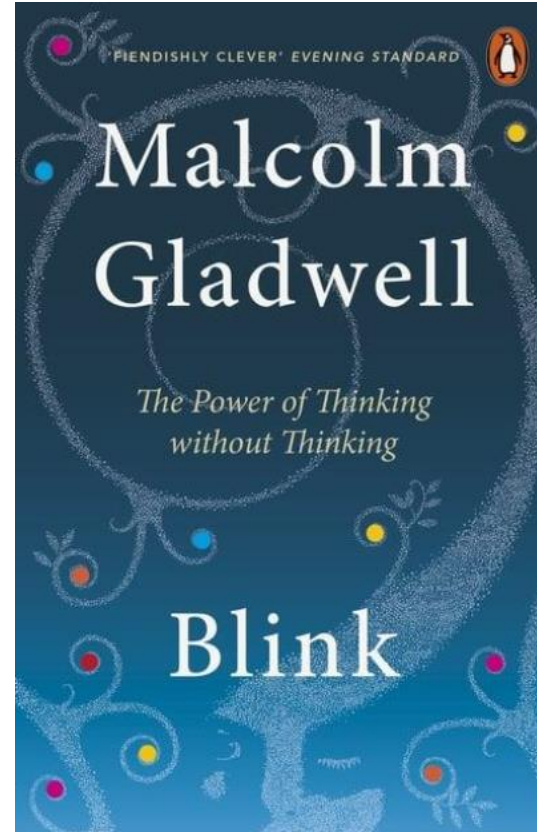


Nadine Montgomery has won a 16-year legal fight for damages for her son Sam

A Lanarkshire woman whose baby suffered brain damage during birth has won a 16-year fight for £5.25m compensation.

Nadine Montgomery, 40, claimed medics neglected to give her proper advice which may have led to her son Sam having a safer caesarean birth in 1999.

First impressions and feeling heard...

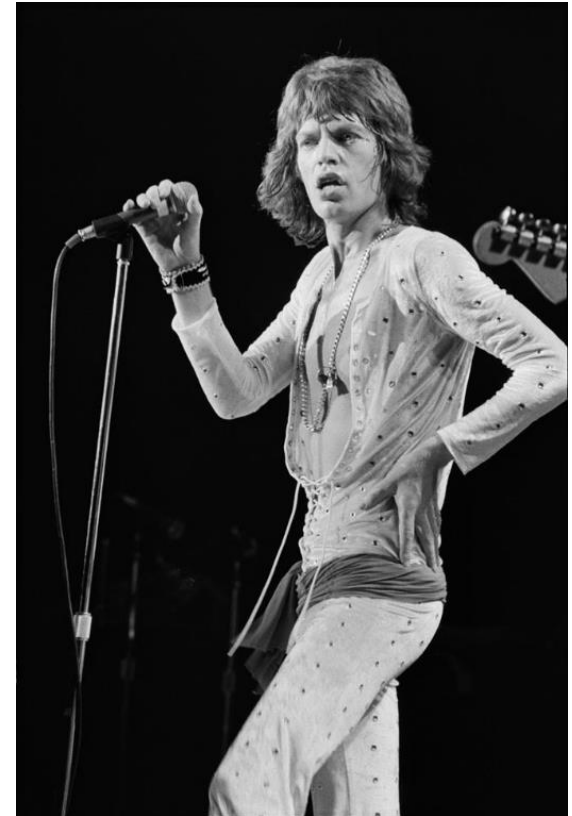


Capacity – making this decision

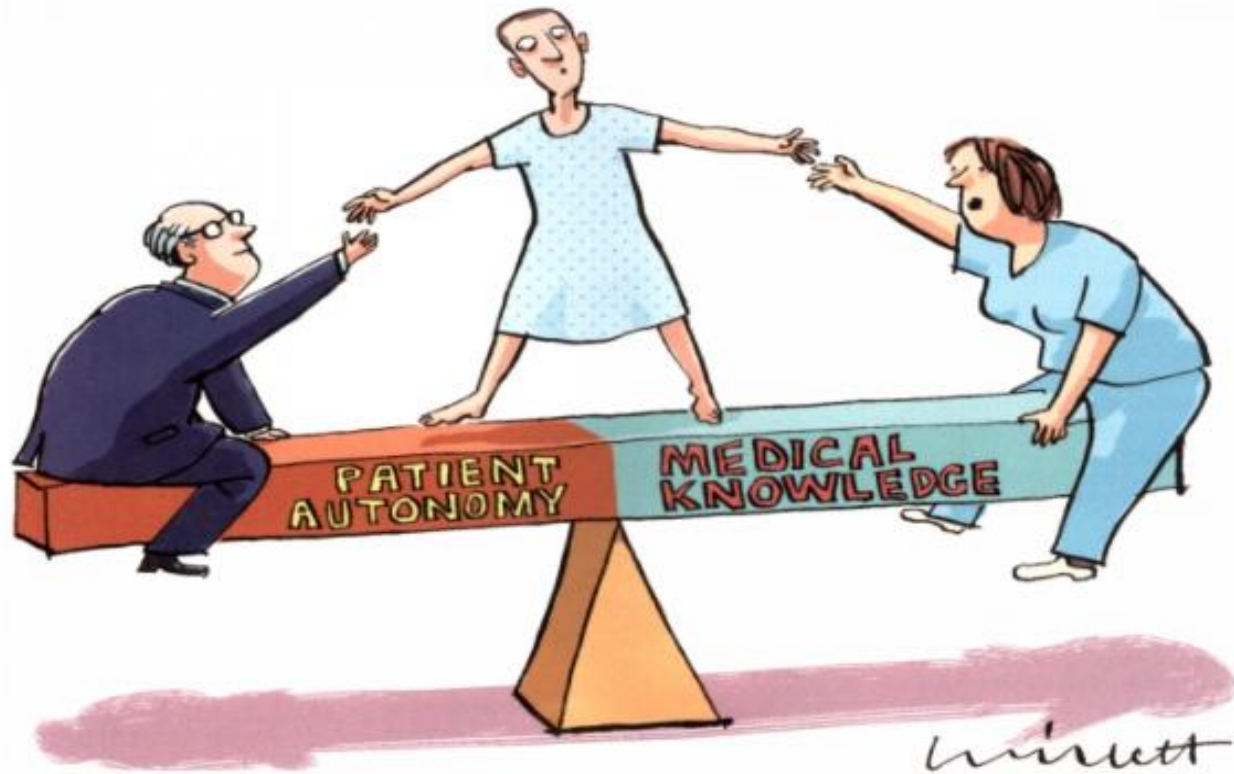


Limited options

- You can't always get what you want...
- Not a matter of best interests - *N v A CCG* (Supreme Court, 2017):
 - 'just like P, the Court can only choose between the "available options"', Baroness Hale
- Can lawfully be limited by:
 - Clinical indication / Clinical willingness (*Burke v GMC*; *AVS*)
 - Resource – availability and allocation



Paternalism v Autonomy



Unwise decisions – just because I
make an unwise decision, it doesn't
mean I lack capacity



Bob “lacks capacity”

- Lack of capacity means an inability to make a decision (because unable to understand or retain or weigh information relevant to the decision because of an impairment or disturbance in the functioning of the mind or brain – or (less often) to communicate that decision)
- What decision? – the options
- When? – can it wait?
- Whose decision? – distinguish our offer v their choice

Who decides?

- Patient
- Patient in advance - ADRT
- consent vs refusal vs demands
- Patient's appointee? Ie an LPA
- Court appointee? Ie a "Deputy"
- Or You ?! - S5 MCA rule of thumb
- "Next of Kin"
- The Court

Lasting Power of Attorney

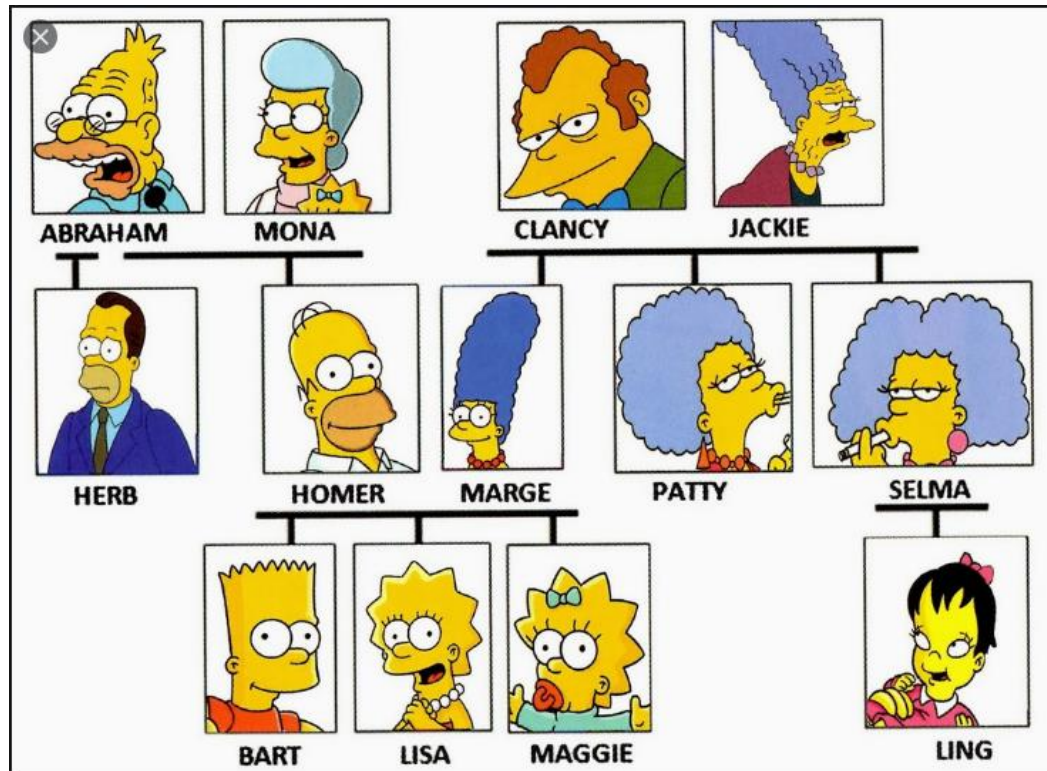
- Appointed by P – over 18 and with capacity to do so
- Can be for health & welfare or for property & finances
- For H&W decisions – P must have lost capacity to make the decision
- Only applies to decisions within scope, and only to life sustaining if explicitly says so
- Only valid if registered with the OPG.
- Only makes the Attorney a best interests decision maker – can still be challenged.

MCA s5

No liability (ie as if treatment with valid consent) if you reasonably believe that P lacks capacity for the relevant decision, and you act in a way you reasonably think is in their best interests

so show your working!

Next of kin...?



Collaborative decision-making

- The decision maker (try the MCA s5 test)
- “Those engaged in caring for P and interested in their welfare” (MCA s4(7))
- And any LPA / deputy
- And P – their own involvement, wishes, values and beliefs (MCA s 4(6))
- And the Court of Protection
- BUT NB – information sharing and confidentiality

Best interests

- Limited by the available options
- MCA s4 – people to consult and things to take into account
- Widest possible view – not just best clinical outcome, and taking P’s point of view.
- Munby LJ – “what use is it making someone safe if it only makes them miserable?”
- Role of the Court of Protection

There is no such
thing as “Next of Kin”

Summary

- What is the decision? Available options?
- Whose decision is it? –
 - Patient, including by Advance Decision to Refuse Treatment
 - A best interests decision maker – with appropriate consultation
 - Someone with LPA (or parental responsibility)
 - Or clinician / provider (or commissioner) limiting options
- Available options is key - defines the information relevant to be given to the patient – both for purposes of consent and for assessing capacity
- Cannot force clinicians / carers to offer what they do not want to
- “Best interests” – like choice for capacitous patient – can only be among available options – autonomy has limits
- Collaboration in decision making is good – compromise of P’s best interests is not.
- The Court can resolve disputes – do not delay.

**A PRACTICAL GUIDE TO
THE LAW OF MEDICAL
TREATMENT DECISIONS**



BEN TROKE
Law Brief Publishing 

<http://www.lawbriefpublishing.com/product/medicaltreatmentdecisions/>

**All proceeds to the
Alzheimer's Society**

Any Questions?

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