AN INVESTIGATION OF SURROGATE DECISION-MAKING IN RELATION TO DEMENTIA PATIENTS IN CARE HOMES AND THE ‘BEST INTERESTS’ TEST UNDER THE MENTAL CAPACITY ACT 2005

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by

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ABSTRACT:

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AN INVESTIGATION OF THE NATURE OF SURROGATE DECISION–MAKING IN CARE HOME PLACEMENT OF DEMENTIA PATIENTS IN RELATION TO ‘BEST INTERESTS’ PROVISION UNDER THE MENTAL CAPACITY ACT 2005.

This work is an investigation of the nature of surrogate decision making in care home placements by family carers of dementia patients under the best interests provision of the Mental Capacity Act 2005 (MCA). It addresses the subjective and objective applications of the best interests decision-making standard while looking at the role that autonomy and welfare play in the assessment of best interests during surrogate decision-making. This work addresses the operation of the best interests standard in the background of the consideration of care home placement for the dementia patient by family carers where the interests of the family carer are linked with the interests of the dementia patient. It therefore addresses the issues of joint and intertwined interests.

The pursuit of this research therefore is to answer the question of whether a robust application of the law would be legally and ethically justified under these circumstances. This is in terms of the features of relationship and the significance of a relational approach in the context discussed in this work.

The sections of the law considered in this work are section 1 (5) and section 4 of the MCA, with particular focus on section 4 (6)- (7) in respect of the analysis on the subjective and objective nature of best interests. While the ethical underpinning of autonomy and welfare is also considered from the philosophical point of view.

Key words: Best Interests; Autonomy; and Welfare.
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1.1 INTRODUCTION:

This work is an investigation into the nature of surrogate decision-making for care home placement by the family carers of dementia patients under the ‘best interests’ provision of the Mental Capacity Act 2005 (MCA).¹ The focus of this work is therefore centred on surrogate decision-making for care home placement for incapacitated individuals who are suffering from dementia in the context of a family caring relationship, where the interests of both the dementia patient and the family carer are intertwined or interwoven.² These issues are considered in respect of the individual approach,³ and the individualistic tendency evidenced in the individualist model in the application of the best interests standard during surrogate decision-making under section 4 of the MCA.⁴ This approach is therefore analysed in the background of the relational context of this thesis.

The starting point for this discussion is therefore based on the current legal framework for decision-making for incapacitated individuals which is contained in the MCA. This legal framework is underpinned by the principles of autonomy and welfare, which are aimed at protecting and promoting the rights and dignity of these individuals.\(^5\) This is clearly seen in the best interests standard applied under the Act.\(^6\) This standard became the applicable standard for surrogate decision-making for incapacitated individuals in property, ‘personal welfare’ and financial matters, \(^7\) and it is discussed in more details in chapter 1 of this work. The background to this work which is located at the end of this introduction therefore consists of a brief discussion on the ageing population and the impact of dementia resulting in incapacity to make decisions.

This work will therefore discuss the concept of an individual and individualist model in best interests application. It will distinguish between the two concepts and locate their features in Court’s decisions. The cases discussed will highlight the operation of the principles of autonomy and welfare in the individual application of best interests.

Furthermore, the outcome of the application of an individualist model in the context of a family caring relationship where other interests are present will be particularly showcased in this thesis. This will be in consideration of the applications of the moral


\(^6\)Re GM [2011] EWHC 2778 (COP) [21] (Hedley J) Aintree (n3) [45] (Lady Hale).

principles of justice, and proportionality during best interests decision-making. Since the best interests standard is the legal basis of this discussion, the provision of section 1.(5) and section 4 of the MCA will be discussed, although the focus in this thesis is on section 4 (6) and (7) of the Act.

The discussion with regards to these provisions is firstly regarding the perception of the operation of the principle of autonomy and welfare in the individual assessment of best interests. This leads to the analysis of the subjective nature of best interests and its feature in the individual approach to best interests assessment. Dunn and others noted the subjective analysis of best interests as being of a personal nature. This therefore highlights its individual tendency in the background of a subjective analysis where the autonomy and welfare of the individual is promoted. The provision of section 4(6) of the MCA is therefore discussed in detail in respect to this approach.

However, the objective approach is noted to include considerations beyond the subjective and present perspective of the incapacitated individual. Although this perspective is used in the argument to broaden the assessment of best interests to include others, this thesis will demonstrate that an individualist model remains pronounced in best interests assessments. It will also show that the focus of both the subjective and objective assessments of best interests remains, the incapacitated person, despite the presence of other relevant interests.

Consequently, the aim of this work is to investigate whether the inclusion of the interests of others would be legally and ethically justified. It addresses the specific

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context of this discussion which is that of a family carer whose interests are inte-
twinned with that of the dementia patient. This work will therefore discuss the issues of
individual rights and the roles they play while relating these to the operations of the
principles of justice and proportionality in addressing the research question posed.
1.2 THE INDIVIDUAL APPROACH AND THE INDIVIDUALIST MODEL IN THE BEST INTERESTS STANDARD.

The individual approach in determining the interests of an incapacitated dementia patient has been based majorly on a concentration on their autonomy and welfare considerations,\(^{11}\) and this has increasingly featured as a modern trend.\(^{12}\) These considerations have paved the way for the application of an individualist model that concentrates on the incapacitated person where the interests of other persons, particularly those of family members, as discussed in this work, are evident and relevant to the decision that is being made.\(^{13}\)

The case of Re VW is particularly illustrative of an individualist model. In this case the Court of Protection, while deciding on the care home residence of a lady with dementia, refused the request by her son to move her closer to him even though this would facilitate frequent visits to his mother. In rejecting the request, the Court stated as follows:

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\(^{13}\) Winspear (n12); Re VW; NK v VW (2011) COP 27/10/10 11744555; L Houlgate, Philosophy, Law and the Family (Springer International Publishing 2017) 132.
The sad fact of the matter is that NK lives at a considerable geographical distance from VW. His journeys to exercise contact with VW are difficult and costly. They are uncertain in that dependent upon VW’s moods, she may not be in a fit state to receive him. Those difficulties, unfortunately, are his, and I am not required to have regard to the benefits that would flow from the proposed order or directions to anyone other than VW.\(^14\)

This dictum significantly states the position of the law as explained in the CoP which is to the effect that it is the best interests of the incapacitated individual that is of paramount consideration.\(^15\) Furthermore, it highlighted the principle of welfare and autonomy for VW in terms of being in an agreeable ‘mood’ and ‘in a fit state to receive him’.\(^16\) This reflects the consideration of the well-being, and respect for the wish of VW to see her son (NK) or not to do so, which are both constituents of her best interests. It also, highlighted that the fundamental doctrine of consent plays a pivotal role in medical law.\(^17\)

However, the judge’s dictum displayed dual interests in this case which consists of that of the mother, and her son. Furthermore, although the judge listed issues that reflected the interests of NK, which are connected to the family relationship they both share, it was VW’s interests that were central and paramount in that judgement. Clearly therefore, an individualist model as shown in this case is based on the interest of the incapacitated person.\(^18\)

\(^{14}\) Re VW (n13) [13] (Macur J) see also [12] (Macur J).
\(^{15}\) MCA 2005, CoP para 5.38.
\(^{16}\) Re VW (n13) [13] (Macur J).
\(^{17}\) E Wicks, Human Rights and Healthcare (Hart publishing, 2007) 65.
Houlgate explained that in an individualist model, ‘(...) the central concepts are the individual and the rights of the family member’. This explanation demonstrates the centrality and the importance of the rights of the specified individual in this model. This agrees with the view on the individualistic theory expressed in the work of Realo and others, where the exercise of the right to maximum freedom and action in an individual’s chosen objective was upheld.

This tendency can also be related to the individualistic theory of the human nature that stipulates the requirement of maximum freedom of choice and action for the individual. This idea has had a bearing on the notion of individualism in respect of its high value on the unconstrained expression of ‘individual freedom’. Individualism itself as a social and political theory is stated to comprises of the maximization of the welfare and freedom of the individual in a ‘society existing only for the sake of its members’. In this regard therefore philosophical thinking is in agreement with the idea that liberty is at the core of liberalism while the individual remains its central focus.

The concept of individual liberty is also very much pronounced in the philosophies of Kant and Mill. However, while Kant advocated the concept of freedom of choice in

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20 Ibid, 164-165.
21 Ibid, 164.
22 Ibid 164
the exercise of individual will, he also advanced the principle of ‘respect of persons’ in his moral law.\textsuperscript{26} This appears to set a boundary in regard to the exercise of individual liberty.\textsuperscript{27} In this respect O’Neil noted that Kant’s philosophy postulates a duty owed to others which should flow from person to person.\textsuperscript{28} In Mills philosophy the exercise of individual liberty is also stated to be constrained by the principle of harm to others.\textsuperscript{29} Although both the principles of respect of persons and prevention of harm to others feature significantly as cautions to the exercise of individual liberty, they have not hindered the progressive advancement of individualistic tendencies in modern society.\textsuperscript{30}

The advancement of both the individual approach and the individualist model have featured clearly under the best interests provision.\textsuperscript{31} The idea of an individualist model in health care law for example has been translated as providing a ‘patient centred care’.\textsuperscript{32} Coggan explained this as a type of care that is aimed at achieving the patient’s values as much as possible regardless of his decision-making incapacity.\textsuperscript{33} It is therefore clear that the individual is not only important but also central in this model.

The individual approach and the individualist model in the best interests standard discussed in this work is pitched against a relational and inclusive approach that

\textsuperscript{26} I Kant, \textit{Groundwork For The Metaphysics of Morals}; ( A Wood trs, University of Yale Press, 2002) 63; R Gillon, \textit{Philosophical Medical Ethics} (A Rowe Ltd Wiltshire, 1992) 16.

\textsuperscript{27} O O’Neil, \textit{Autonomy and Trust in Bioethics} (Cambridge University Press, 2002) 74; 83

\textsuperscript{28} ibid

\textsuperscript{29} D Ogunkoya, ‘John Stuart Mill’s “Harm Principle” as the Foundation for Healthy Social Relations’ (2011) The Journal of International Social Relations 516;518.

\textsuperscript{30} T Takala, ‘Concepts of “Persons and Liberty” and Their Implications to Our Fading Notions of Autonomy (2019) J.Medethics.Com

\textsuperscript{31} MCA 2005, CoP (n15).

\textsuperscript{32} J Coggon, ‘Mental Capacity Law, Autonomy, and Best Interests: An Argument For Conceptual and Practical Clarity In the Court of Protection’ (2016) 24 (3) Medical Law Review 396,397.

\textsuperscript{33} ibid.
advocates that the relevant interests of family carers should also be recognised and
given effect to during surrogate decision-making.\(^{34}\) There is a growing and strong
agreement on this view amongst different authors.\(^{35}\) This perception has strengthened
the criticisms of an individualistic conception based mainly on the claim of its
isolationist tendency.\(^{36}\) Perhaps the most forceful of these criticisms were directed at the
perception of individual autonomy especially in respect of the challenge it poses to
other values.\(^{37}\) With reference to this thesis the challenge of this concept is seen as
countering the values of family relational experience of inter-dependency.\(^{38}\)

Christman’s concern is based on the exaggerated perception of individual autonomy
which has led to its criticism of ‘hyper-individualism’.\(^{39}\) A term also used by Martin
and others while addressing the individual focus of best interests.\(^{40}\) The authors stated
that the interests of others should be considered in the determination of the interests of
persons who lack capacity’s best interests.\(^{41}\) In Dryden’s view, the individualistic
understanding of autonomy was seen as incorrect. The author advocated a concept of

\(^{35}\) J Herring, ‘Where are the Carers in Healthcare Law and Ethics?’ (2007) 27 (1) Legal Studies 51; 59; H
139;139; A Ho, ‘ Relational Autonomy or Undue Pressure? Family’s Role in Medical Decision-making’
and Dementia’ (2009) 21 (1) Child and Family Law Quarterly 3; J Herring, ‘Forging a Relational Approach:
Best Interests or Human Rights?’ (2013) (1) Medical Law International 32; J Herring, ‘Legal issues
\(^{36}\) Ibid.
(1) 3.

117 Philosophical Studies 143,143.
\(^{41}\) Ibid.
autonomy that acknowledges the social constitution of humans who perform their autonomous actions in a social and relational context instead.\(^{42}\)

Other critics have viewed individual autonomy from health care perspective and have suggested a version of autonomy that empowers a patient to make decisions that are considerate of others.\(^{43}\) It is in line with this view that Smith suggested that ‘(...) medical law should be prepared, at least to question the liberal individualist consensus (...)’.\(^{44}\) These various views clearly suggest that placing overall perception on individualistic tendencies such as individual freedom and liberty present with a narrow view of the society and social interactions.

Ethical perspectives are therefore vital in this discussion, and the moral principles of justice and fairness are important considerations that should guide decisions in these circumstances. This is particularly important where the interests and rights of other parties are involved. In explaining the concept of justice Rawls noted that each individual involved in an undertaking or affected by it has equal rights.\(^{45}\) Based on this perception therefore it would be unfair to base decisions on the consideration of the interests of a single individual in this context. In the criticism of an individualistic approach in this specified context Clough noted that, ‘A sense is now developing of legal and policy approaches that are one-dimensional and not sufficiently nuanced to


appreciate or resolve the complex interplay of interests inherent in the caring relationship.⁴⁶

This ‘one dimensional’ approach entails the giving of paramount consideration to the rights and interests of the incapacitated person while those of the family carer are relegated and neglected.⁴⁷ It is based on these issues that the need for a balanced and proportional application of the principles of autonomy and welfare during surrogate decision-making under the best interests standard, where there is a family caring relationship will be advocated and advanced in this work.

The individual focus of best interest is seen in both the empowerment ethos of the MCA which is displayed under its governing principles contained under section 1(2)-(6) and particularly under the best interests provision contained under section 4 of the same law. The provisions of section 1 (2)-(6) of the MCA deal with issues ranging from the following; presumption of capacity rebuttable by a capacity test,⁴⁸ to empowerment and respect of the choices made by individuals;⁴⁹ assessments based on best interests to the protection of the right to individual freedom respectively.⁵⁰

However, with respect to the application of the best interest standard, section 1 (5) and 4 of the MCA are most relevant. This is because although the best interests standard was not defined under any section of the MCA, nevertheless the directions for its application

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⁴⁸ MCA (2005) s 1 (2).
⁴⁹ MCA (2005) s 1 (3)-(4).
⁵⁰ MCA (2005) s 1 (5)-(6).
are contained mainly under section 1(5) and section 4 of the MCA. While the introduction of the standard is contained under section 1 (5), of the MCA, the guidelines for its application are contained in the checklist provided under section 4 of the same law.

The provision of section 1 (5) states that, ‘An 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 provision by implication not only includes decisions on property, financial and personal welfare but embraces all other decisions made under the Act including ‘health care decision and actions.51

This provision begins to point the decision maker to what the nature of the best interests standard should be. In effect therefore, it encompasses acts or decisions which must be focused on the best interests of the incapacitated person for whom the decision is being made.52

The provision of section 1 (5) at once classifies the best interests operation in the sense that it refers to acts, or decisions in the first part and goes on to restrict its application in the second part to the incapacitated individual. In this respect the best interest provision under the Act can be stated to be individually based. Section 1. (5) therefore provides a useful tool in terms of the provision of the parameters of the best interests standard; however this provision did not include a definition of the concept itself. It is in this sense that the provision of section 4, which directly stipulates the guidelines to the application of the standard, becomes relevant and it is the main provision discussed in this work.

51 MCA 2005, CoP para 5.2.
52 MCA 2005, CoP para 5.38.
Although section 4 of the MCA is outlined and discussed fully in chapter 1 of this work, a synopsis of aspects of the section will be useful in this introduction especially in respect of the individual approach and the individualist model of best interests. The provision of section 4 therefore includes issues ranging from the following: lack of discrimination due to incapacity resulting from any disenabling circumstance;\textsuperscript{53} the probability of the vulnerable individual regaining capacity;\textsuperscript{54} the encouragement of the participation of incapacitated individuals in the decisions made on their behalf; respecting their feelings and wishes,\textsuperscript{55} to consultations during best interests assessments.\textsuperscript{56} These lists no doubt relate to the empowerment of vulnerable individuals and in this regard connect the provisions of sections 1 and 4.

Furthermore, these issues have significant impact on the concepts of the autonomy and welfare of an incapacitated individual, particularly with regards to recognising and respecting the wishes and feelings of the individual in a best interests assessments and decision-making.\textsuperscript{57} While some views are that these need only to be considered during surrogate decisions,\textsuperscript{58} others have expressed the view that they must not only be considered but should be implemented.\textsuperscript{59}

Although both outlook display different views of the interpretation of section 4 (6) and (7) of the Act, nevertheless it is clear that the provisions of these particular sections

\textsuperscript{53} MCA 2005 s 4 (1) (a) & (b).
\textsuperscript{54} MCA 2005 s 4 (2) & (3).
\textsuperscript{55} MCA 2005 s 4 (4) & (6).
\textsuperscript{56} MCA 2005 s 4 (7).
\textsuperscript{59} Re G ( T) [2010] EWHC 3005 ( COP), [2010] COPLR Con Vol 403 [37] (Morgan J ); Aintree University Hospital NHS Foundation Trust v James [2013] UKSC 67, [2013] COPLR 492 [45] ( Lady Hale); Re M ( Best Interests: Deprivation of Liberty) [2013] EWHC 3456 (COP), [2014] COPLR 35 [38] ( Jackson J ).
embodi the autonomy and welfare of the incapacitated individual. The issues contained in the assessment of the autonomy and welfare of the incapacitated individual altogether forms an aggregate of the interests of the incapacitated individual, which the law desires to protect and promote through the application of the best interests standard.

The capacity assessment for instance provides opportunity for such individuals to make their own decisions based on the outcome of this assessment, while the provision of section 4 (4) mandates the involvement of the vulnerable individual in decisions being made on their behalf, where they lack decision-making capacity. These provisions are protective of the autonomy right and interests of the vulnerable person while the provisions of section 4 (6) - (7) goes further to promote these interests post decision-making capacity.

However, it is the mode of the assessment, advancement and execution of the outcome of best interests standard that evokes concern when an individualist model is applied where the interests of others are present. The examination and analysis of this is most relevant in a caring relationship. The tendency towards an individualistic based approach in assessments and decisions for vulnerable individuals who lack capacity is also mostly the current trend in the law. Based on this approach, the concern in this work is in addressing the issue of whether this trend should be the general approach.

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62 MCA 2005, ss 2 & 3
63 N Munro, (n57) 71.
64 Re G (T) (n59); Aintree (n59) Re M (Best Interests: Deprivation of Liberty) [2013] EWHC 3456 (COP), [2014] COPLR 35; Westminster CC v Sykes [2014] EWCOP B9; Newcastle-upon-Tyne Foundation Trust v LM [2014] EWHC 454 (COP); Sheffield Teaching Hospitals NHS Foundation Trust v TH and Another [2014] EWCOP 4; J Coggon, (n32)396, 397; B Clough, (n46) 18.
regardless, especially where the interests and rights of others are prominent and affected by the decision being made.

Therefore, chapter one of this work will give a more general summary of the provisions of section 4 of the Act, however it will pay particular attention to section 4 (6) and (7) in greater detail. This is due to the roles that these sections play in the subjective and objective assessments of best interests considerations during surrogate decision-making and the impact of such considerations on individuals in a caring relationship.

The best interests standard as stipulated under these provisions is therefore poised both to protect and promote the individuality of incapacitated persons. As a result, their autonomy and welfare remain a prominent consideration in this assessment. However with respect to the intertwined interests of family carers, which is considered in this work, it will be suggested that the feature of an individualist consideration has paved the way for the idea of individualism in best interests assessment based on the individualist model adopted in best interests assessments despite the presence of other relevant interests.65

Consequently, this thesis will address the autonomy and welfare issue in respect of the individual focus of best interests on the one hand,66 and the application of the individualist model, where the interests of family carers are evident in the decision being made.67 This work particularly focuses on the care home placement of the dementia patient where the family carer’s interests are involved in the decision being...
made as stated earlier. Therefore although the individual interests of the incapacitated person is stipulated under the best interests standard during surrogate decisions,68 the interests and rights of the family carer often features in this relational and caring capacity.69 Consequently, this research sets out to answer the question stated below:

Would a more robust/comprehensive best interests standard accommodating others interests during care home placement decision by the family carers be ethically and legally justifiable?

This work will therefore investigate the nature of surrogate decision-making in care home placement of the dementia patient by an inquiry into the practicality of the current application of best interests provision under section 4 of the MCA. The outcome of this work will reveal whether a comprehensive approach to the perception and focus of best interests standard when the interests of others are involved should be the appropriate approach. It will further probe into the elasticity of the current law with respect to the accommodation of relevant interests in best interests decisions in a family relational context.

This thesis therefore considers both the legal and theoretical basis of the individualistic approach adopted under the MCA and the relevance of a relational approach in view of the principle of justice and proportionality in addressing the research question posed in this work. These considerations are important, since the interests of both parties

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68 MCA 2005, s 4 (6); MCA CoP para 5.38.
involved generates rights which are protected under the law and the moral principle of fairness and justice are important philosophical considerations in human interactions.\textsuperscript{70}

As a result, this work will advance the argument for the amendment of the MCA to recognise the interests and rights of family carers in the context of this research. It should however be noted that the issues in this research are discussed amidst the growing trend of the promotion of individual liberty, which may constitute a hindrance to this perspective.\textsuperscript{71} Therefore, this work will advance for a greater awareness of relational issues by the Courts in the evaluation of best interests in this specified context.


1.3 ASPECTS OF THE CURRENT TREND IN INDIVIDUAL LIBERTY.

The current trend in individual liberty is prominently seen in the promotion and advancement of the rights and dignity of incapacitated individuals in particular, and it is against the unlawful deprivation of liberty which is considered as an infringement of their legal and guaranteed rights. Definitions of rights have therefore included references to it as a valid claim, and the exercise of liberty and autonomy. Wicks' perception of rights also incorporated the principles of autonomy and dignity while basing its relevance to the exercise of patient’s rights within the relationship existing between the patient and the doctor.

Individual liberty and freedom can be seen to permeate the concept of right. Consequently, apart from the UDHR, and the European Convention on Human Rights Treaty (ECHR) of 1950 specified laws and treaty promoting the dignity and rights of vulnerable individuals were enacted. The CRPD (2006) for instance has continued to

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78 MCA (2005); Equality Act (2010) https://www.gov.uk Accessed 16-03-19; MCA 2005; See also CRPD 2006. This treaty was ratified by the UK since 2009, as a result the domestic laws of the UK are committed to conform to it.
champion the rights of persons with disabilities while placing domestic laws in the spotlight in terms of their compliance.\textsuperscript{79}

Therefore since liberty is advocated by the liberal philosophies,\textsuperscript{80} and guaranteed by the law, its deprivation would stand in direct antithesis to moral concepts and legal guarantees.\textsuperscript{81} Article 5 of the ECHR for example states that, ‘Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law’. This provision therefore clearly affirms the right of the individual to liberty while prohibiting the arbitrary deprivation of his liberty.\textsuperscript{82} However, under this Article the right to liberty is qualified and therefore can be overridden under the circumstances listed therein.\textsuperscript{83} Therefore under Article 5. 1 (e) a lawful detention can be enforced where safety and prevention of harm to others are necessary. The constraint of harm on liberty in this context reflects the standard that is validated in Mill’s liberal philosophy.


\textsuperscript{80} G Birchley, ‘…..What God and The Angels Know of Us?’ Character, Autonomy, and Best Interests in Minimally Conscious State’ (2017) 26 (3) Medical Law Review 392;414.

\textsuperscript{81} HRA (1998) s 5; ECHR Article 5 ECHR; UDHR Articles 3.

\textsuperscript{82} ECHR (1950) Article 5 (1).

\textsuperscript{83} ECHR Article 5. 1 (a) – (f), See also Article 5 (2)- (5).
The deprivation of individual liberty is characteristic of care homes and hospital admissions in cases where individuals need to be admitted for care and treatment. It has been noted that this has to be in consonance with the law.  

Therefore, the Deprivation of Liberty Safeguards (DOLS) applicable in the UK can be stated to provide a framework for the lawful deprivation of the liberty of individuals in the care home and hospital setting. The law guarantees the right of everyone to liberty regardless of their circumstances and stipulates that there should be a lawful procedure to be followed in case of deprivation of liberty in any of the exceptions listed under Article 5 (2)-(5) of the ECHR as noted earlier. DOLS were introduced into the MCA through the Mental Health Act 2007, and they provide safeguards against arbitrary detention of people who lack capacity to consent to their own care.

The application of DOLS is justified when deprivation of liberty is in the best interests of individuals lacking capacity and when there is no other less restrictive means of providing care and treatment to such vulnerable individuals. However, DOLS itself is not without its shortcomings which include the cumbersome and burdensome process of its authorisation and the lack of clarity in the defining test of deprivation of liberty.

The uncertainty on the issue of definition and distinction between deprivation and restriction appears resolved by the decision of the Supreme Court in the case of Cheshire West and Chester Council v P after the consideration of a host of Strasbourg

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87 Ibid
88 Joint Committee on Human Rights (n86) 7; T Elliott, (n 84) 136.
The Cheshire West’s case involved the need to determine whether a disabled man (P) was unlawfully detained in respect of the definition of deprivation of liberty. The Supreme Court after a consideration of Strasbourg case law ruled that since P was under ‘continuous supervision and control and was not free to leave’ a deprivation of liberty had occurred. The case is mainly concerned with the human rights of such vulnerable individuals and in defining the nature of deprivation of liberty.

The CRPD further advances and strengthens the rights of individuals with disabilities under its Article 14 where it stated that the, ‘existence of a disability shall in no case justify a deprivation of liberty’. However, the UK remains bound by the view adopted by the ECHR that under prescribed circumstances and procedure, deprivation of liberty would be lawful. The issue of deprivation of liberty is relevant to care home admission discussed in this work, especially in the case of a dementia patient. Care home placement decision infringes on the article 5 right of the individual concerned under the HRA and the ECHR in terms of the definition of deprivation provided in the Cheshire West’s case. It is for this reason that the DOLS is relevant.

Consequently, in summarising this section, these various laws can be seen to champion human rights through advocating and promoting the equality of all persons. This

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involves championing equal treatment of persons with disabilities. This has basically pursued the path of promoting the autonomy and welfare of those who lack capacity to make decisions for themselves. This view features prominently in the best interests provision under the MCA and depicts an individual outlook. The strict application of this outlook especially where the individual consideration is foremost has generated a critique of the approach in surrogate decision-making where the interests of others are involved. In line with this criticism of the Act, Clough stated that the MCA ‘(.....) perpetuates an individualistic approach to capacity and care, and is not attentive to the lived reality of interdependence.’

In the case of disabilities, the issue of care is prominent. The provision of care enables the individual to fulfil most of his human functions and retain his dignity. Most care are provided in a family caring relationship where the interests of the incapacitated individual are interwoven with the interests of the carer as will be discussed further on in this work. It is under this circumstance that individualistic consideration is challenged. It is also in this respect that the image of the individual portrayed in liberal theories is stated to differ from that of the individual in the society.

The concepts of autonomy and welfare portrayed in the liberal philosophies are therefore confronted with the concept of a relational approach relevant in a family caring relationship where the interests of the carers are also involved in the decision

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93 Ibid 18.
96 B Clough (n 94) 19.
being made. It is within this context that the consideration of the relational approach to autonomy becomes relevant to this thesis.

The view here is based on care in a relational situation and the ethics of care is the most relevant relational theory in this context. Held noted that the ethics of care has been ‘developed as a moral theory relevant not only to the so-called private realms of family and friendship but to medical practice, law, political life and international relations’. 97 As a relational theory, the ethics of care is concerned with meeting others needs in the particular context of care. It is within this context that emotions of sympathy, empathy, sensitivity and responsiveness are at play in this theory. 98

Ethics of care functions with the conception of persons as relational as opposed to the concept of a self-sufficient and independent individual which is the main feature of the other moral philosophies.99 Furthermore, whereas the issue of justice based on seeking fair solutions between competing individual interests and rights protects equality and freedom, the ethics of care recognises the interests of carers and the person cared for as relevant and connected rather than viewing them as competing.100

The outcome of the influence of liberal philosophies on both the perception of autonomy and welfare have resulted in the modern perception of both as individualistic in nature.101 This liberal view is not only reflected as underpinning the law but has greatly influenced the interpretation and application of the law as would be seen under the MCA. Furthermore it has led to the development of a distinct individualist model in best interests decisions. The application of this model is demonstrated in the subjective

98 Ibid.
100 Ibid 15.
101 G Birchley (n80) 419
application of best interests. It is also advanced in this work that the objective interpretation of best interests under section 4 of the MCA cannot be considered outside an individualistic and subjective realm.

It is noteworthy however, that the individual application of best interests poses no challenge in this thesis where it is only the interests of the incapacitated individual that is involved. However, where other relevant interests such as that of family carers are present, its monolithic application based on a liberal view is then challenged. This is a basic issue that has resulted in the criticism of best interests as being hyper-individualistic in nature.102

The background to this work encompasses the increasing incidence of dementia and its effects, leading to decision incapacity among the ageing population. This brings surrogate decision-making under these circumstances under the domain of the MCA, with best interests stipulated as the applicable standard.103 Consequently this research examines the individualistic approach adopted under the MCA in relation to the interplay between subjective and objective considerations in best interests decisions. This is important in addressing the research question posed in this work. The methodology of this research work will therefore consist firstly of a doctrinal research. The theoretical aspect will involve a discussion of the philosophical underpinning of individualism reflected in the concept of autonomy and welfare which are seen in the best interests standard.

103 MCA 2005 s 1(5).
1.4 BACKGROUND

THE AGEING POPULATION AND THE INCREASING INCIDENCE OF DEMENTIA:

There is only one solution if old age is not to be an absurd parody of our former life, and that is to go on pursuing ends that give our existence a meaning-devotions to individuals, to groups or to causes, social, political intellectual or creative work. (...) In old age we should wish to still have passions strong enough to prevent us turning upon ourselves.\(^\text{104}\)

The quotation above displays an existentialist outlook and approach to old age.\(^\text{105}\) In this statement Beauvoir acknowledged the reality of old age and the implications associated with it. These implications include a devastating transformation of the former individual person which could result, and is depicted as being ‘an absurd parody of our former life’. It also includes the possibility of a withdrawn lifestyle depicted by ‘turning in upon ourselves’.\(^\text{106}\) These aspects relate to appearance and behaviour instigated by the impact of age.

This view is in line with the impact of age on an individual described under section 4 (1) of the MCA. The Act places ‘appearance’ next to ‘age’,\(^\text{107}\) and talks of condition and behaviour in the following line.\(^\text{108}\) This suggests the close associations of these elements on the individual. The CoP further explained that appearance would include ‘any


\(^{105}\) Ibid.

\(^{106}\) Ibid.

\(^{107}\) MCA 2005 s 4 (1) (a).

\(^{108}\) MCA 2005 s 4 (1) (b).
visible medical problems’ and also other forms of ‘disabilities’. It also related a person’s condition to ‘age related illness’.

Dryden explains that in addition to the perception of old age as a real limit Beauvoir’s account of old age has diverse reflections with disability. These reflections include ‘experiences of the body that are often feared and stigmatized’. These experiences can be translated to have both health and social welfare implications. The significant disenabling experience associated with old age discussed in this work is dementia and its consequences of neurological and cognitive deficits.

The examination of societal intervention through the medium of the law during decision–making is therefore an important consideration in this work. The concern in this work in relation to the effects of dementia is centred on cognitive deficit in relation to loss of memory resulting in surrogate decision-making due to the incapacity of the sufferer. This background therefore establishes that old age is not only real but it also has associated implications.

These facts are buttressed by demographical evidences which reveal a significant change in the world’s population. This is in relation to the increasing trend of growth in the ageing population. A United Nations report stated that this phenomenon ‘is poised

to become one of the most significant social transformations of the twenty-first century, with implications for nearly all sectors of society, (...)'  

The projection shows an increase from 901 million to 1.4 billion in the number of people aged 60 or over between 2015 and 2030. This displays a 56 percent growth. By 2050 the forecast from 2015 is estimated to doubled its size reaching nearly 2.1 billion. The report noted that when compared with other age groups the growth in the ageing population is faster.  

This fact is notably displayed in the UK forecast where it was projected in 2009 that the increase in the population of children will be 11 percent, working adults 15 percent and older people will rise by 32 percent over the next 25 years. A more recent forecast showed that by 2035 the figures of people aged 85 would have reached 3.5 million showing an increase of almost 2.5 million from 2010. This would account for 5 percent of the total population in the UK. This demographic pattern therefore leads to the conclusion of the reality that there will be greater number of elderly population in succeeding years.  

In this respect the ageing population therefore becomes not only a real phenomenon to reckon with but brings along at the same time challenges to society in terms of the

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113 Ibid 2.

114 S Leadbeater, ‘Sam and May’s Recipe: A Life Time of Consuming is No Preparation For Old Age’ in G Bedell and R Young (eds), The New Old Age: Perspectives on Innovating our Way to the Good Life For All. (Nesta London 2009).


implications of ageing which Raisanen described as cultural, economic and social.\textsuperscript{117} These implications of ageing and challenges it brings to society include the vulnerability that old age presents in terms of loneliness and morbidities. A major morbidity associated with age which currently has health and legal implications is the incidence of dementia.\textsuperscript{118}


1.5 THE INCIDENCE OF DEMENTIA IN AN AGEING POPULATION, EFFECTS, AND IMPACT ON CARE GIVING

Dementia is a degenerative disease that affects both cognitive and neurological functions and it is prevalent in old age.\textsuperscript{119} Figures show that a significant proportion of the ageing population in the UK suffer from the disease. 750,000 people were stated to suffer from the disease in 2007.\textsuperscript{120} This figure increased to 821,888 representing 1.3% of the UK population by 2010. The forecast for 2015 was 850,000.\textsuperscript{121}

The prevalence of the disease is forecast to increase to over 1 million by 2025 and over 2 million by 2051.\textsuperscript{122} This is however dependent on the stability of the age specific prevalence of the disease which has remained an important variable.\textsuperscript{123} There is also evidence of large significant costs not only to the nation but also to family carers who have been providing great amount of care to people with dementia.\textsuperscript{124}

The unpaid carers of dementia patients have been shown to bear a significant cost in the care of dementia patients.\textsuperscript{125} This is seen in the contributions of unpaid carers to the care of dementia patients. Figures show that over one third of the financial cost of dementia care is borne by unpaid carers. This is seen in the fact that while the cost of dementia to the government is estimated at £26.3 billion per year, amounting to an

\textsuperscript{119} EL Ash, ‘What is Dementia’ in C Foster and Others (eds) Law and Ethics of Dementia (Hart publishing 2014).
\textsuperscript{123} Ibid 5.
\textsuperscript{124} Ibid.
average of £32.250 per individual, the contributions of unpaid carers were estimated at £11.6 billion. Figures also reveal that there are about 550,000 carers of dementia patients in England. Furthermore, while two thirds of dementia patients reside in their own homes one third of this population are estimated to be in residential care. Within the residential care population current figures show that approximately two thirds of the residents suffer from the disease.

However, the contributions of unpaid carers have been shown to result in a financial burden being placed on them. This is because carers in this situation would often give up their time and jobs to care for their loved ones. Furthermore, dementia care is shown, not only to have a financial impact on the carers, but also health and emotional impacts. The contribution of numerous studies on the impact of dementia care on family carers is seen in the details revealed on the effects of the burden of care which has invariably affected their interests.

The issues portrayed in this section therefore highlight the current societal population demographics in terms of an ageing society and the associated increasing incidence of dementia in the ageing population. The contributions of family carers in this respect

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126 Ibid.
129 Ibid.
become significant. This section further introduces the fact that the significant contributions of family carers comes at a cost in various areas that affect their own interests. This point raises a fundamental concern of this work in respect of the understanding and application of a best interests standard that seeks the promotion of the individual autonomy and welfare of the dementia patient alone in the context of a caring relationship.
1.6 ORGANISATION OF THESIS

This work therefore consist of three chapters. Chapter 1 is an examination of the best interests standard under section 4 of the MCA. It discusses the guidelines for its application under section 4 of the Act. Chapter one is therefore mainly an introduction of the best interests standard and a summary of the guidelines contained therein. Its particular focus is on section 4 (6) and (7).

This is in relation to the subjective and objective applications of best interests in respect to the evaluation of the individualistic approach and the development of a distinct individual model. These feature not only in the subjective application of the standard but also in its objective interpretation and application as evidenced in the decisions of the Courts. This is seen particularly in the analysis of section 4 (6) of the Act. While under section 4 (7) the inclusion of other individual’s input to best interests assessment is seen and evaluated in terms of the impact of an individualist model in best interests application on joints interests in a relational setting. This is examined further in chapter two.

Chapter two of this work therefore consists of the case law analysis in respect of the nature of the objective and subjective applications of best interests within an individualist model. In this chapter, Dorset CC v EH is analysed in the discussion of the autonomy and welfare of the incapacitated individual and the role these considerations play in the perception of the interests of others. 131 The Dorset case is a realistic example of the basic focus of this thesis. It encompasses the main themes of this research which includes old age, the incidence of dementia, the involvement of the

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131 [2009] EWHC 784 (Fam).
family carers of the dementia patient in the care of the dementia patient; the position of their interests and the application of the best interests standard. It also includes the determination of care home placement involving the deprivation of liberty of the dementia patient; the consideration of the autonomy and welfare of the dementia patient.

The Dorset case will reveal more clearly the distinction between the autonomy/welfare issues considered in best interests assessment, and the issue of the individual/others that is apparent in a family caring relationship where an individualist model has been applied. The concepts of autonomy and welfare are also discussed as an ethical construct in this chapter while investigating the individual approach in both concepts.

In chapter three, the role played by individual autonomy in fostering the individualist model seen in the best interests application is discussed. This is contrasted to the relational model and its relevance to existing family caring relationship. The application of the individualist model of best interests is considered particularly in this chapter with respect to the care home placement of dementia patient involving the interests of care givers. This leads to the discussion of the concept of proportionality and the application of the principle of justice in addressing the research question in the conclusion to this work.
CHAPTER 1

2.1 BEST INTERESTS UNDER SECTION 4 OF THE ACT:

This section introduces the best interests standard under the MCA and provides a general summary of the majority of the provisions under section 4 and their relation to this work. It goes on to examine the provisions of section 4 (6) and (7) in more details in terms of the subjective and objective assessment of best interests and the impact of such considerations on surrogate decisions involving the interests of others.

These provisions therefore display the elements of the autonomy and welfare interests of the incapacitated individual and the application of an individualist model where the interests of others are evident during surrogate decisions. Whereas welfare and autonomy considerations are vivid under the provisions of section 4 (1)-(6) (a) & (b), section 4 (6) (c) and (7) display an individualist model. The features of welfare and autonomy, and the individualist model in relations to these provisions will be addressed respectively.

The best interest’s standard under section 4 of the MCA provides a set of criteria that enables a surrogate to make decisions on behalf of incapacitated individuals. The check lists for the application of the best interests standard are therefore contained under section 4 of the MCA. The provisions of section 4(1) –(7) are as follows:

(1) In determining for the purposes of this Act what is in a person’s best interests, the person making the determination must not make it merely on the basis of –

(a) The person’s age or appearance, or

132 MCA 2005, CoP paras 5 1.5; 5.6; MC Dunn and Others (n8) 117, 118.
133 MCA 2005, CoP para 5. 6
(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.

(2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.

(3) He must consider-

(a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and

(b) if it appears likely that he will, when that is likely to be.

(4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.

(5) Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.

(6) He must consider, so far as is reasonably ascertainable-

(a) the person’s past and present wishes and feelings (and, in particular, any relevant written statement made him when he had capacity),

(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.
(7) He must take into account, if it is practicable and appropriate to consult them, the views of-

(a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,

(b) anyone engaged in caring for the person or interested in his welfare,

(c) any donee of a lasting power of attorney granted by the person, and

(d) any deputy appointed for the person by the court,

As to what would be in the person’s best interests and, in particular, as to the matters mentioned in subsection (6).

Whereas section 4 (1) is both mandatory and prohibitive, the provisions of sections 4 (2)-(7) are mainly mandatory. The provision of section 4 (1) of the Act is to the effect that surrogate decision-making for incapacitated individuals must be free of any form of bias or prejudice such as are listed therein. The CoP explained that this provision is aimed at the display of any form of discrimination against incapacitated individuals during decision-making as a result of their circumstances.\textsuperscript{134}

By reference to the age, appearance, condition and aspects of the behaviour of the individual, the MCA identifies issues and features that could render an individual incapacitated and impact negatively on their personal estimation when decisions are being made on their behalf.\textsuperscript{135}

\textsuperscript{134} MCA 2005, CoP para 5.16
\textsuperscript{135} MCA 2005 s 4 (1) (a)-(b)
In explaining the scope of the perception of appearance under this section the CoP noted that a broad view of ‘appearance’ would be assumed in this context. This embraces the physical appearance; mode of dressing; skin colour; visible medical problems; scars and other physical disabilities of the individual.\textsuperscript{136} While reference to a person’s condition covers factors relating not only to physical disabilities but also to age related illnesses.\textsuperscript{137} The mention of the age of the individual under this section bears a significant relevance to this thesis, not only in respect of its impact on appearance and behaviour, but also on age related diseases such as dementia. This is in regard to its associated neurological and cognitive deficits leading to incapacity as was discussed earlier in the background to this work.\textsuperscript{138}

Furthermore under section 4(2) the decision maker is obligated to consider the circumstances that are relevant to the decision being made, including the circumstance of regaining capacity as outlined under section 4(3). The relevance of this provision to the situation of temporary loss of decision-making capacity is important due to the fact that individuals in this situation can resume their autonomy once the hindering factors are no longer present.\textsuperscript{139} However, while the loss of capacity is present and decisions cannot be delayed then decisions must be made in their best interests.\textsuperscript{140}

This provision has limited application to a dementia patient who is in an advanced stage of the disease and is presenting with complete and permanent loss of memory, resulting consequently in loss of decision-making capacity. This is more so, since dementia is a degenerative disease with neurological and cognitive functions worsening with the

\textsuperscript{136} MCA 2005, CoP para 5.17
\textsuperscript{137} MCA 2005, CoP para 5.17
\textsuperscript{138} ‘n119’
\textsuperscript{139} MCA 2005, CoP paras 4.29; 5.28.
\textsuperscript{140} MCA 2005, CoP paras 5.25; 5.26.
progression of the disease.\textsuperscript{141} In this case the provisions of section 4 (4); (6) and (7) becomes more relevant during surrogate decision-making for such individuals.

Section 4 (4) states that the decision maker must encourage the participation of the incapacitated person during decision making on his behalf. In this respect the CoP notes that the individual’s involvement may help to work out what would be in his best interests.\textsuperscript{142} This aspect highlights the desire of the MCA to promote the principle of self-determination despite loss of capacity for such individuals.\textsuperscript{143} Donnelly listed the justification of this participatory policy of the MCA irrespective of the loss of capacity of the individual as follows:

First, the MCA approach recognises the contribution to be made by the person lacking capacity; secondly, the MCA accords with best decision-making practice; thirdly, the MCA accords most closely with human rights standards; and finally, the MCA provides the most workable framework within which to preserve the important right of patient autonomy post-incapacity.\textsuperscript{144}

This view and the explanations of the policy that underpins it show the desire of the MCA to maintain the rights and dignity of the incapacitated individual as a human being.\textsuperscript{145} This is both in respect of the right to self-determination and the reasonable promotion of his welfare. This is demonstrated under the best interests provisions and it is clearly seen under section 4 (4) of the MCA. Although the provision of section 4 (5)

\textsuperscript{142} MCA 2005 CoP para 5.22
\textsuperscript{145} MCA 2005 CoP para 5.22; M Donnelly, (n 144) 10;13.
can be stated to be mainly directed at the welfare of the incapacitated individual since its instruction is in relation to the life and well-being of that individual, the Act continued in its aim of upholding their rights and dignity in the succeeding provisions.

The decision maker is therefore, instructed furthermore, under section 4 (6) to consider the past and present wishes of the incapacitated individual, as well as his beliefs and values, and other factors that the incapacitated individual would likely consider if he was able to do so. The lists of issues to consider under this section consist of a whole package of issues that embodies and represents the individual for whom the decision is being made.

These include his values and outlook on life. These can be described as spiritual; physical, psychological, and emotional considerations. These features not only determine who he is, but they go on to enable the decision maker to decipher what he would have done if he had capacity, and the overall consideration of what is best for him. It can therefore be safely deduced that under these provisions, there is a ‘continued role’ played by ‘patient autonomy’ despite the loss of decision-making capacity.

This is seen in the fact that the demand of the statute under this section requires according respect, dignity and upholding the rights of incapacitated individuals.

These features are in every respect aspects of the components of individual autonomy.

146 MCA 2005 s 4(6) (a)
147 MCA 2005 s 4 (6) (b)
148 MCA 2005 s 4(6) (c)
149 Re M (Adult Patient) Minimally Conscious State: Withdrawal of Treatment) [2011] EWHC 2443 (Fam); [2012] I WLR 1653,[81] (Baker J).
150 M Donnelly, (n144) 13.
151 Aintree (n3) [45] ( Lady Hale); B Clough, ‘Anorexia, Capacity and Best Interests: Developments in the Court of Protection Since the Mental Capacity Act 2005’ (2016) 24 (3) Medical Law Review 434, 442;444.
and they play an important role in the welfare of the incapacitated individual.\textsuperscript{152} This is in terms of the consideration of their past and present wishes as well as their beliefs and values as provided under that section.

However, this provision would not be considered in isolation of other related sections of the Act such as sections 24 -25. These sections relate to advanced decisions and they entail that the wishes of the incapacitated individuals must be implemented as directed under that Act. These provisions are in concordance with the provision of section 4 (6) in respect of effecting the wishes of the incapacitated individual. In this respect section 4(6) (a) specifically noted that the written statements of the incapacitated individual pre-incapacity are relevant and should be considered during surrogate decision-making. This instruction evidently incorporates not only advanced decisions but generally other relevant written statements made by the individual pre incapacity.\textsuperscript{153}

Furthermore under section 4 (6) (b) the code noted the influence of the role of the belief and values held by the incapacitated individual on decisions made on their behalf. Obviously, these beliefs and values could result from the individual’s culture; religion; political outlook, behavioural tendencies or habitual practices.\textsuperscript{154} In the case of \textit{Ashan v University Hospitals Leicester NHS Trust}, the family of a patient who was in a vegetative state argued that she should be treated in accordance with Islamic values which requires that she should be cared for at home. The judge agreed and held that the

\textsuperscript{152} \textit{Re GM} [2011] EWHC 2778 ( COP) [21] (Hedley J); \textit{Aintree} (n3) [24]; 39] (Lady Hale)

\textsuperscript{153} MCA 2005, CoP paras 5.41; 5.42.

\textsuperscript{154} MCA 2005, CoP para 5.46.
patient’s best interests should be based on her values which should impact on how she is treated even in her current state.\textsuperscript{155}

Under section 4(6) (c) the MCA requires that other factors should be considered by the decision maker. Although this provision appears to widen the ambit of the best interests standard in the sense that the CoP mentions the consideration of ‘other people’ in a best interests decision for the incapacitated individuals.\textsuperscript{156} This is in terms of the effects of the decision being made on ‘other people’; the obligations of the incapacitated individual to dependants or the duties he owes as a responsible citizen as explained by the CoP.\textsuperscript{157} Nevertheless, this view would be placed under scrutiny in the context of this discussion in view of the overarching aim of the MCA, and the interests actually protected under that provision.\textsuperscript{158}

The theme of the widening of the domain of best interests is advanced further under section 4 (7) (a)–(d). However, a subtle form of proviso can be read at the end of that provision. This is to the effect that the contributions of others as expressed in their views would only be useful to the extent that they are in the best interests of the incapacitated individual. Furthermore, that such contributions would be subject to the provisions contained under section 4 (6) of the MCA.\textsuperscript{159} This demonstrates an emerging individualist model where central considerations are on the incapacitated individual irrespective of others interests.

Generally the provisions of sections 4 (4)-(7) aim to strongly buttress the underlying philosophy and intention of the Act which is to empower the incapacitated individual by

\textsuperscript{155} Ashan v University of Leicester NHS [2006] EWCH 2624 (QB) : [2007] P19
\textsuperscript{156} MCA 2005, CoP paras 5.47; 5.48.
\textsuperscript{157} MCA 2005, CoP para 5.47
\textsuperscript{158} MCA 2005, CoP para 1.3.
\textsuperscript{159} MCA 2005 s 4 (7); MCA 2005, CoP para 5.49
ensuring that decisions made or actions taken on their behalf are in their best interests. These provisions undoubtedly aim at compliance with the general rule of law based on the doctrine of consent and the legal and ethical principle of autonomy which are integral to the welfare of incapacitated individuals as stated earlier.

The importance of consent in health care generates from the important role this doctrine plays in legal and ethical parlance. Its importance is stated to derive from the concept of respect for the person which is widely regarded as the foundation of any ethical dealings with human beings. This is based on the highest value of moral importance of the human being assumed by the society. It is as a result of this view that Harris noted that, ‘respect for persons requires us to acknowledge the dignity and value of other persons and to treat them as ends in themselves and not merely instrumentally as means to an end or objectives chosen by others’.

This idea resonates with Kant’s supreme moral law and holds an important place in moral philosophical human relationships. It is evident that it is also adaptable to the arguments for respecting the interests and rights of the vulnerable individual, and those of others. This is to the extent that the dignity of all humans is its goal and fairness is central to this perception.

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160 MCA 2005, CoP para 1.3
161 M Donnelly, (n144) 1, 9-15.
163 ibid
164 ibid
165 R Gillon, Philosophical Medical Ethics (A Rowe Ltd Wiltshire, 1992). 16
This ethical principle which embodies respect for the person has been legally endorsed and features in most legal systems. The feature generated by this principle is enshrined in the legal doctrine of consent and has become the cornerstone of medical ethics.

The development of this doctrine in medical law has featured consent based mainly on the autonomy model as opposed to the beneficial model which was previously practiced. Indeed Selinger considered autonomy as the bedrock of informed consent in medical ethics. However, its application can be traced to the common law’s stipulation of the protection of the individual from assaults and unlawful touching to enhancing the principle of self-determination demonstrated in the application of the doctrine of consent under medical law.

In this respect the exercise of the concept of autonomy can rightly be viewed from the stance of the ethical and legal rights of all humans under the doctrine of consent. Whereas the application and exercise of the principle of autonomy becomes more appropriate in the case of patients who are able to make decisions for themselves, its application appears unwarranted in the case of incapacitated individuals since they have lost the capacity to make decision for themselves.

In respect of this issue Kluge argues that since all humans have a right to self-determination regardless of their circumstances, then the principle of equality and

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168 J. Harris (n162) 10.


justice demands that a ‘just and fair’ society should provide a device which compensates for this lack. This, the author stated would prevent the loss of this right by the incapacitated individual.\textsuperscript{171} The mechanism of substitute decision-making is viewed as the device adopted by society for a fair and just decision-making process for the incapacitated individual.\textsuperscript{172}

From this background, the task of the MCA as listed in Donnelly’s work discussed earlier,\textsuperscript{173} can indeed be considered as relevant and appropriate in most respects except that the MCA is confronted with the criticism of extreme individual focus based on the best interests standard.\textsuperscript{174} This criticism challenges the view of the Act as being in accordance ‘with best decision-making practice’ as stated by the author in that work.\textsuperscript{175} Nevertheless, the MCA’s recognition of the contribution made by the incapacitated person depicts the adoption of a non-discriminatory stance against him due to his circumstances. While the best interests standard encapsulating a right to self-determination accords with the recognition and enforcement of the human rights of the incapacitated individual. These in turn display an accord with the ethical doctrine of consent enshrined in the legal provision.

The Act therefore aims to ensure that the fundamental right of the incapacitated individual to self-determination is not lost due to the loss of decision-making capacity. In other words the loss of decision-making capacity does not equate to a loss of the right to self-determination, although the exercise of this right is achieved through a

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\textsuperscript{172} EW Kluge, \textsuperscript{(n171)} 240.
\textsuperscript{173} M Donnelly, \textsuperscript{(144)} 10.
\textsuperscript{174} W Martin and Others, An Unblinkered View of Best Interests’ (2012) 345 BMJ 22, 22.;
\textsuperscript{175} M Donnelly, \textsuperscript{(n144)} 10
\end{flushright}
proxy. The best interests standard therefore encapsulates both legal and ethical considerations and the guidelines for its application made no equivocation with respect to its intended subject. 176

Although the principles underlying the best interests standard and codified under the Act display desirable outcomes for the incapacitated individual in terms of the principles of the promotion of autonomy and welfare by ensuring that their dignity and rights are enforced yet the individual focus remains a cause for concern.177 This is in view of the individualistic outcome of its application in cases where the interests of other individuals, especially those of close intimates are involved in the decision being made. It is mainly on this ground that its legal and ethical justifications are being questioned in this thesis.

Consequently, section 4 (6) and (7) of the MCA becomes the major focus of this work in respect of the context of this thesis, which involves the application of the best interests standard in a care home placement decision of a dementia patient by a family carer with intertwined interests.

This is because the interpretations and applications of these sections not only deal with incapacitated individuals, but they expose the consequences of their applications and impacts on social relationships in the context of surrogate decisions involving the interests of family carers. In this respect, the consideration of how the Courts have interpreted the application of the past and present wishes of the incapacitated individual in respect of subjective and objective assessments and applications of the best interests

176 MCA 2005 s 1 (5) & s 4 ; W Martin and Others, (n174) 22.
standard would be useful in this analysis.\textsuperscript{178} Furthermore, how the views of others are regarded would provide tools in arriving at an outcome in this investigation.\textsuperscript{179} This work therefore examines both the provisions of section 4 (6) and 7 (b) of the MCA in more details in the next section.

\textsuperscript{178} MCA 2005 s 4 (6).
\textsuperscript{179} MCA 2005 s 4 (7).
2.2 MENTAL CAPACITY ACT 2005, SECTION 4 (6) & (7).

The provisions of section 4 (6) and (7) are considered to be especially important to this work because of their particular relevance to advance dementia patients who have totally lost decision-making capacity. In order to promote their autonomy and welfare under section 4 (6), the law requires the inclusion of their past and present wishes, beliefs and values in decisions being made on their behalf.\textsuperscript{180} This provision instructs the decision maker as follows:

- He must consider, so far as reasonably ascertainable-
  - (a) The person’s past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),
  - (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.

In the first instance this provision is a mandatory requirement by the MCA. Its significance demonstrates the empowerment ethos of the Act,\textsuperscript{181} and it provides an avenue whereby the incapacitated individual’s voice can be heard during surrogate decisions-making.\textsuperscript{182} Although Keene and Auckland noted variations in the case law interpretations of what weight should be given to the consideration of the provisions

\textsuperscript{180} MCA 2005, CoP para 5.46
\textsuperscript{181} MCA 2005, CoP paras 1.3; 1.4
\textsuperscript{182} B Clough, ‘Anorexia, Capacity, and Best Interests: Developments in the Court of Protection Since the Mental Capacity Act 2005’ (2016) Medical Law Review, 24, (3) 434, 441.
under this section, nevertheless they have remained significant in best interests considerations during surrogate decisions-making.183

The variations noted by these authors lie on the one hand in the favour of effecting the individual’s wishes and feelings regardless,184 and on the other hand that these should be considered on their merits.185 These tendencies have been reflected in the deliberations and outcome of decisions made based on the best interests standard under various circumstances.186 The case of Re S and S (Protected Persons) Cv V for instance involved a dispute over a will. The construction of a statutory will was necessitated, despite the presence of an existing will in that decision.187 This case preceded successive cases in the interpretation of the provision of section 4 (6) and it is instructive in its reasoning in respect of the consideration of the past and present wishes of the incapacitated individual during best interests decision-making.188

With respect to its deliberation on the section concerned, the Court started from the premise of the ascertainment of the wishes of the incapacitated individual by encouraging the participation of the individual in the decision as provided under section 4 (4). The deduction made by the Court in this respect was that the MCA intended by

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186 Ibid.
188 Re P [40]; [41] (Lewison J); ITW v Z and M [34] (Munby J); Vac V Jad and Others [2010] EWHC 2159 (CH); NT v PS and Others [2013] EWHC 684, [2013] COPLR 313; Re G(T) [2010] EWHC 3005 (COP), [2010]COPLR Con Vol 403) [37] (Morgan J).
that undertaking to ascertain the wishes and desires of the incapacitated individual and
to endeavour the achievement of the outcomes so desired.\textsuperscript{189}

In following this path, the Court kept the underlying philosophy of the Act, which is
based on its empowerment ethos closely in sight.\textsuperscript{190} This outlook adopted by the Court
continues to enhance the role of the doctrine of consent, and the promotion of the
principle of autonomy. The feature of consent in this sense can be extracted from the
identification of the desires of the incapacitated individual which is reflected in their
past and present wishes; feelings; belief; values; and other factors that are considered as
relevant. Also reference here to autonomy relates to the accordance of dignity and the
exercise of the rights of the incapacitated individual in respect of self -determination
which is afforded under this provision.\textsuperscript{191}

However, the Court noted that the realisation of the requirements under section 4 (6)
would afterwards be subject to analysis through the weighing process in respect of what
is in the best interests of the incapacitated individual concerned.\textsuperscript{192} This is because, as
the Court puts, it ‘The Act does not of course say that P’s wishes are to be paramount,
nor does it lay down any express presumption in favour of implementing them if they
can be ascertained’.\textsuperscript{193} In this case the Court appears to be distinguishing the wishes
and the feelings of the incapacitated individual from his best interests while advancing
the view that it is indeed the weighing process that actually enables the decision maker
to decipher what are the best interests of that individual.\textsuperscript{194}

\begin{footnotes}
\item[189] S v S [53] (Judge Marshall QC).
\item[190] S V S [58] (Marshall QC).
\item[191] Ibid.
\item[192] S v S [56] ( Marshall QC)
\item[193] Ibid
\item[194] Ibid
\end{footnotes}
Although in *Re S and S (Protected Persons) C v V*, the Court arrived at the conclusion that although the past and present wishes of the individual should be ascertained and respected by attaching great weight to them, nevertheless the decision maker is not bound to implement them if they are contrary to the best interests of the incapacitated individual. It is in view of this reasoning that the Court ruled for a statutory will to be made despite the existence of a previous will which was the subject of the dispute.

The analytical pattern followed by the Court in this case is seen firstly in the acknowledgement of the underlying principle of the Act in relation to best interests. This displayed the role of the doctrine of consent and the concept of autonomy which are both significant in legal and ethical reasonings. These doctrinal legal and ethical analysis which are embedded in this provision can be seen as the building block of this judgement. However the Court in this case appears to be distinguishing ‘form’ from ‘substance’. The identification and verification of the incapacitated individual’s present and past wishes can be stated to constitute aspects of the form or pathway, while the weighing process can be stated to be the substance of the determination of the standard.

The decision of the Court no doubt tallies with the ratio in this case, which is that the identification of the wishes of the individual are quite important as well as the weight to be given to them; however, that these considerations should attain to his best interests. Lewison J was in agreement with this decision in *RE P* where the case also involved the construction of a statutory will which was granted by the Court. Although the Court in that case made some modifications on the views expressed in the former case under

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195 *S v S [57]* (Marshall QC)
196 MCA 2005, CoP para 5.38
197 *Re P [41]* (Lewison J).
section 1 (6) of the Act. Lewison J modified the ‘overstatement’ on the consideration of the wishes of incapacitated individuals regarding the interpretation of section 1 (6) of the Act which deals with the achievement of an objective for the incapacitated individual by the application of the ‘least restrictive route’.  

This modification relates to the fact the best interests of the incapacitated individual is the only overriding imperative instructed in this circumstance under the MCA. Furthermore, that although this standard takes into consideration all other relevant issues such as the wishes of the individual concerned, nevertheless it would override all other considerations including the situation under section 1 (6) of the MCA. It is in line with this reasoning that Lewison J held in *Re P*, that the principle of individual autonomy in terms of the concentration on effecting of the incapacitated individual’s wishes regardless, negates his best interests in this context.  

The consideration given to section 1 (6) is important as it relates to the right to individual liberty of the incapacitated person that is protected by the law, and it is indeed a necessary consideration while assessing his best interests. This provision has further necessitated the application of DOLs where deprivation of liberty is considered to be in the best interests of incapacitated persons.  

The line of reasoning in the former cases in regard to the nature of best interests assessment also featured in the case of *ITW v Z and M*. This case also involves the construction of a statutory will. Munby J stated that the wishes of the incapacitated

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198 Ibid.  
199 Ibid.  
200 *Re P* [44] (Lewison J).  
201 UDHR 1948, ECHR (1950).  
202 *Re P* [41] (Lewison J).  
203 [n 84] & [n85]; *Dorset CC v EH* [121] & [122] (Parker J).  

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individual are important factors and should be considered by the Courts during his best interests assessment.\textsuperscript{205} This outlook accords with the direction and the spirit of the law explained earlier. However the Court also noted in this case that the Act has not mandated the effecting of such wishes regardless.\textsuperscript{206} Munby J noted that these wishes will undergo the weighing process and that they will be case and facts specific.\textsuperscript{207} Based on this reasoning also, it can be deduced that although the consideration of the wishes of these individuals are significant, this is no guarantee that they must be effected.

The decision in \textit{Vac v Jad and Others},\textsuperscript{208} involving the construction of a statutory will was based on the specific facts of the case in setting aside the previous will following the decision in \textit{ITW v Z and M}. The general consensus seen to run through these cases display an acknowledgement of the vital role of the rule law and ethical principles in respect of the doctrine of consent and autonomy during best interests decision-making. This is seen in the efforts demanded for the identification of the wishes of these individuals by the statute; the importance given to them and their incorporation into surrogate decisions made for them based on the best interests assessment. Significantly however, these cases reveal that where there are differences between the wishes of the individual and his best interests, then his best interests overrides following the weighing process.

An opposing view in the construction and interpretation of the provision of section 4 (6) is displayed by the effecting of the wishes of the incapacitated individual regardless. In

\textsuperscript{207} \textit{ITW v Z and M} [35] (Munby J).
\textsuperscript{208} \textit{(2010) EWHC 2159 (CH) [21] (Hodge J).}
the case of Westminster City Council and Sykes, the wishes of a lady suffering from dementia were effected despite her loss of decision-making capacity. The case involved the liberty, residence and care of the affected individual (MS). The decision in this case featured the issues of autonomy and welfare. It was thought in that case that the refusal to grant MS her wish to reside in her own house would infringe on her liberty and autonomy. These concerns are linked to the issues of her dignity and rights. While the concerns for her residence and care relates to her welfare or wellbeing. In reference to these issues, the Court stated that:

‘On a personal level her strong sense of self, her belief in the importance of the individual, her desire for freedom and autonomy are magnetic factors, operating at positive and negative poles by providing both the pull of freedom and the counterforce of resistance to outside care’

Based on these observations the Court’s judgement therefore centred on the issue of the right to self-determination and the welfare of MS. It further displayed MS’s right to individual liberty. In this respect, MS had given directions on how her latter days and property were to be dealt with in a Lasting Power of Attorney (LPA) given to a trusted friend. In that document MS had instructed her attorney not to sell her property and had expressed a desire to continue to live in her ‘own property for as long as this is feasible’.

212 Westminster CC v Sykes [§10] (Eldergill J).
213 Westminster CC v Sykes [§6]; [§7] (Eldergill).
In this case after having ascertained and confirmed the validity of the LPA, the judge proceeded from the premise of the guarantee of rights provided under the ECHR with respect to deprivation of liberty. Under Article 5 (1) of that provision the protection of liberty of citizens is guaranteed except under the circumstances where a proper authorisation or Court’s order negates this provision. Also article 8 of the provision provides for the protection of private and family life.\(^{215}\) It can therefore be noted that the issue of individual right features prominently in best interests consideration as is seen in this case especially with specific reference to Article 5 (1) and Article 8 of the ECHR.

The Court in this case took into account the past and present wishes of MS and stated that it is her welfare considered in relation to the wishes she has expressed as well as her feelings, beliefs and values that are important.\(^{216}\) The Court regarded the Local Authority as MS’s servants who have been entrusted with the task of furthering her important and legitimate interests. Following this reasoning a trial period at home was granted by the Court.\(^{217}\) This case was decided on similar terms as the decision of Jackson J in Re M (Best Interests: Deprivation of Liberty) where a diabetic patient was granted her wish to return to her own home rather than to a care home as proposed.\(^{218}\) In this case the right to self-determination and individual liberty was also upheld in the consideration of best interests determination.\(^{219}\)

\(^{216}\) Westminster CC v Sykes [§10] (Eldergill J).
\(^{217}\) Westminster CC v Sykes [§10];[§12] (Eldergill J).
\(^{218}\) Re M (Best Interests: Deprivation of Liberty) [2013] EWHC 3456 (COP), [2014] CoPLR 35 [38] (Jackson J) See also Newcastle-upon-Tyne Foundation Trust v LM [2014] EWHC 454 (COP).
\(^{219}\) Re M (Best Interests: Deprivation of Liberty) [31]-[33] Jackson J.)
There is no doubt that there is sharp contrast between the decisions in these cases and
the previous cases considered based on the weight given to the provision of section 4 (6)
of the Act. While the concentration in these cases rests majorly on the wishes and
desires of the incapacitated individual as being the basis of their best interests,\textsuperscript{220} the
former cases considered these only as part of the best interests assessment.\textsuperscript{221}

Indeed in the \textit{Westminster’s} case, the question posed by Eldergill J on the wishes of the
incapacitated individual was framed thus ‘(...) why would anyone wish someone to be
cared for otherwise than in accordance with their wishes if they can be adequately cared
for in accordance with their wishes?’.\textsuperscript{222} This question assumes not only that the wishes
of the individual concerned have been clearly identified but that they are also
achievable. However, the same question demonstrates a condition in the later part that
the wishes expressed by the individual should actually meet his needs. Invariably such
wishes would need to go through the weighing process to determine whether they meet
this condition. There is no doubt that this fits into the best interests test. Furthermore, it
appears to make a distinction between wishes and best interests.

In another case where the application for continuation of artificial nutrition and
hydration (ANH) was being considered, Hayden J displayed an agreement with the view
that there is a distinction between the wishes of the incapacitated individual and his best
interests.\textsuperscript{223} The Judge stated that ‘‘Wishes’’ and ‘‘best interests’’ should never be
conflated, they are entirely separate matters which may weigh on different sides of the

\textsuperscript{220} Westminster CC v Sykes [610] (Eldergill J); Re M (Best Interests): Deprivation of Liberty [2013] EWHC
3456 (COP) [2013] COPLR 35 [38] ( Jackson J).
\textsuperscript{221} Re P; ITW v Z and M; Vac v Jad and Others.
\textsuperscript{222} Westminster CC v Sykes [510] (Eldergill J).
\textsuperscript{223} Sheffield Teaching Hospital NHS Foundation Trust v TH and Another [2014] EWCOP 4. [56] (Hayden J).
balance sheet’ 224 Although this view appears in agreement with the view expressed by Marshal QC in the case of S v S,225 where the judge distinguished wishes from best interests yet both judges arrived at different perceptions in their estimations during surrogate decision-making. Whereas one view sees wishes as paramount,226 the other perceived best interests as overriding. 227

The consideration of best interests standard under one of the approaches tended to restrict its consideration to the wishes of the incapacitated individual; therefore much emphasis is laid on them as opposed to the other approach where more emphasis is laid on the weighing process. This latter approach admits the need for other considerations in arriving at the best interests decision for the incapacitated individual.

It is important to note however that basing best interests on the wishes of the individual cannot be stated to be an unlawful approach since the wishes and desires of the incapacitated individual are part of the consideration of his best interests as provided under the MCA.228 However the standard of best interests mandated by the MCA requires a consideration of all the items listed under that provision as are considered relevant during the weighing process. This fact is buttressed by the provisions of section 1. (5) and section 4 of the MCA. Therefore whereas the former approach, which represents a narrow view, is likely to foster a strictly individualistic and subjective perspective, the latter approach would foster the consideration of other factors and represents an inclusive and wider perspective to the consideration of best interests.

224 Sheffield Teaching Hospital [56] (Hayden J).
228 MCA 2005 s 1 (5); s 4.
The issue of the place and consideration of the wishes of incapacitated individual during surrogate decision-making under the best interests standard seem to have elicited views that challenge the continued application of the law as it currently is.229 The issues raised in this respect relate to the varying interpretations and attitudes of the Courts with regard to the wishes of the incapacitated individual. This also includes the construction and perception of the role the best interests standard plays during surrogate decision-making vis à vis the estimation of the position of the wishes of the incapacitated individual during the same process.230

While being aware of the arguments on this issue, it is important to note that although the law required that the decision maker must consider the past and present wishes and feelings of the incapacitated individual under section 4 (6) (a) & (b); nevertheless, these only constitute aspects of the requirements listed under the standard. The best interest standard can evidently be seen to consist of a host of considerations which are listed under section 4 of the Act. Therefore the applications of either approach are likely to produce varying results leading to the emphasis on the subjective or objective analysis of the best interests standard respectively.

It is suggested that it is the outcome and effect of these different outlook or processes during decision-making which involves relevant others in the context of incapacity that would justify or challenge the application of a particular approach. It would further instigate the question of whether a revision of the law is warranted. This indeed is the


230 Ibid.
goal of this work, and its relevant context remains decision-making for care home placement for the dementia patient in a family caring relationship where there are intertwined interests.

The views displayed in cases considered give an insight into the nature of objective and subjective considerations in best interests analysis. Dunn and others noted the nature of subjectivity and objectivity in best interests assessment during surrogate decision making and stated that ‘(...) Subjective determinations of ‘’best interests’’, draw heavily on personal context and the outcome, whilst not necessarily consistent with an objective account of a person’s best interests, will be judged to be best for that person’.231 This view suggests that while a subjective approach, which takes account of an individual’s past and present wishes, beliefs and values may be considered as his best interests, however such consideration when viewed objectively could be inconsistent with his perceived subjective best interests.

The concern of Keene and Auckland however is the increasing occurrence of the overriding subjectivity of best interests assessment in Courts decisions that likens it more to a substituted judgement standard.232 This places enormous emphasis on the individual wishes of the incapacitated person whilst constricting his needs to be dependent almost entirely on his autonomy. This approach evidently represents quite a narrow outlook.233

Lewison J in Re P, however discussed the best interest principle in line with the explanatory notes to the Mental capacity Act where the best interests test was

231MC Dunn and Others, (n8)118, 124.
distinguished from the substituted judgement test and clearly referred to as an ‘objective test’. 234 Although this is not to be understood to mean that best interest is solely or entirely an objective test. The dictum of Lewison J rightly acknowledged best interests as a structured decision-making process which involves the views of the incapacitated person and the consideration of all relevant circumstances. 235 This suggests that the best interests standard, in line with theoretical analysis, admits of both subjective and objective assessments during surrogate decision making. 236

234 [2009] EWHC 163 (Ch) [37] (Lewison J).
235 Ibid, [38] (Lewison J).
236 MCDunn and Others (n8)124-125
2.3 THE SUBJECTIVE AND OBJECTIVE NATURE OF BEST INTERESTS
CONSIDERATION UNDER SECTION 4 (6) & (7).

It is evidenced from the cases discussed that subjective and objective assessments play important roles in the outcome of a best interests determination for the incapacitated individual. These cases highlight the outcome of a best interests determination. The nature of best interests determination is explained fully in relation to the issue of the wishes of incapacitated individuals in the case of Aintree University Hospitals NHS Foundation Trust v James,237 which is discussed next in this work.

The decision in Aintree University Hospitals NHS Foundation Trust v James, made important contributions in this respect. This case relates to an individual (James) who is on ventilation support. James had suffered a multiple of health conditions including a stroke and was rendered incapacitated as a result. The proceeding in this case was for a declaration that certain life –sustaining treatments should be withheld from him based on his best interests.238 The Court held that the decision must be based on the best interests of the incapacitated individual which includes the consideration of his past and present wishes.239

The legal and ethical issues considered in this case are encased primarily under section 4 of the Act which deals with the best interests standard. The Court, from the outset of the case, stated that the aim of the MCA is to make decisions on behalf of incapacitated individuals based on their best interests.240 Since the aim of the proceeding itself was to obtain a declaration that it would be in the best interests of the incapacitated individual

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238 Aintree (n3) [1] (Lady Hale)
239 Aintree (n3)[45] (Lady Hale)
240 Aintree (n3) [1] (Lady Hale)
to withhold life-sustaining treatments from him, the provision of section 15 (1) was considered. In this case the provisions of section 15 (1) relating to the declaration sort was considered with particular reference to the provisions of section 4 of the MCA. In this respect, although the provisions of section 4 (5) and (6) are primarily central to this case, the main concern of this work is in respect of how the Court viewed and interpreted the provision of section 4 (6) which relates to the past and present wishes of the incapacitated individual.

The application of the best interests standard in this case is again underpinned by the doctrine of consent. Its prominent role in medical ethics continues to be in the enforcement and protection of the autonomy and rights of patients. In the case of the incapacitated individual, the respect and promotion of this concept in relation to their autonomy, and welfare has been the goal. With regard to the autonomy of the incapacitated individual, the consideration in this case included how the Court construed and understood the provisions of section 4 (6) (a) in terms of effecting James’s wishes. This involves the determination on continued treatment and sustenance of his life considering his diagnosis and circumstances.

In regard of the best interests provision, Lady Hale noted the construction and perspectives of the two preceding Courts. The Court of first instance was in favour of a subjective construction of the incapacitated individual’s wishes that regards the views of the incapacitated patient as of utmost importance. The Court noted that in sustaining treatment for the incapacitated individual, the view of his quality of life must be seen

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241 E Wicks, Human Right and Health Care (Hart 2007) 65
242 Aintree (n3) [1] (Lady Hale)
from the perspective of the incapacitated individual himself. 243 The Court of Appeal however favoured an objective interpretation of this section stating that the wishes of the incapacitated individual in this case ‘must give way to what is best in his medical interests’. 244

Although the construction of best interests reached by the Court of Appeal accords with the imperative given by the MCA, 245 which is to the effect that the best interests of that person is the overarching consideration nevertheless the Supreme Court appeared to be in favour of the entirely or strictly subjective approach applied by the Court of first instance. 246 The reasoning of the Supreme Court can however be analysed to reflect both views of the perception of best interests. 247

In the first instance by stating that the aim of the best interests standard is to view issues from the patient’s perspective, a subjective approach is portrayed. However by cautioning that the consideration of the wishes of the incapacitated individual should not be a license to enforcing them, but should be rather construed as a component of best interests decision for him, the Court here assumed a wider construction of best interests. 248 Based on the ratio of the Appeal Court, discussed by Lady Hale, 249 It is suggested that this perspective is in line with the sense of objectivity advanced by that Court, rather than the limited sense of objectivity which is based on the ‘reasonable patient’ as was stated by the Supreme Court. 250

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243 Aintree (n3)[30] (Lady Hale)
244 Aintree (n3)[33] (Lady Hale)
245 MCA 2005 s 1.(5); s 4.
246 Aintree (n3)[40]; [45] (Lady Hale).
247 Aintree [(n3) 45] (Lady Hale).
248 Ibid.
249 Aintree [(n3) 33] (Lady Hale).
250 Aintree (n3) [33] (Lady Hale).
The different cases considered earlier seem to portray that there is a division or difference between the wishes of the incapacitated individual and their best interests. While some have laid emphasis on past and present wishes, others have stated that the imperative of the law is focused on the best interests of the incapacitated individual as a whole.

It is important to note however that the best interests standard is not limited to the consideration of the wishes and desires of the incapacitated individual alone otherwise it would make the consideration of other aspects of that provision of no value in the estimation of the standard. Therefore, although the wishes of the individual are a component of best interests consideration, it is not the overall consideration of a best interests assessment and it is therefore not limited to it.

This point was made clearer in Aintree’s case where the Court stated that the ‘wishes, feelings beliefs and values or the things which are important’ to the individual are a component of his best interests. The perception of these as a component of best interests and not as the overall focus of best interests is in accordance with the intention and the spirit of the law.

This is seen in the fact that the law listed a whole range of subjective and objective considerations that should guide or inform the decision maker during his best interests assessment under section 4 of the Act. In this respect the language of the Act is plain and cannot be subject to any equivocation. The assumption that the best interests

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251 Westminster CC v Sykes.
252 Re P [2009] EWHC 163; ITW v Z and M [2009] EWHC 2525 (Fam); Vac v Jad and Others (2010 EWHC 2159 (CH).
253 Aintree (n3) [45] (Lady Hale).
254 MCA 2005, CoP para 5.38.
255 MCA 2005 s 4 (1) –(11).
standard is totally subjective could therefore lead to an erroneous conclusion, while basing it solely on an objective view would also achieve the same outcome.

Whereas the prevailing rule in the subjective approach with respect to the weight given to the consideration of the wishes and feelings of the incapacitated individual accords with the legal and ethical doctrine of consent, a wider consideration of the best interests standard, which considers other relevant circumstances in the weighing process would be inclusive of his welfare generally. Under this circumstance therefore best interests consideration cannot be said to be limited to the autonomy consideration alone.

The *Aintree’s case* is however being advanced in support of the subjective consideration of best interests as well as in favour of its objective consideration contrary to a strictly subjective application suggested by Keene and Auckland.\(^{256}\) In *Sheffield Teaching Hospitals NHS Foundation Trust v TH and another*,\(^ {257}\) although Hayden J cited Lady Hale’s dictum on the need for a holistic assessment in a best interests consideration, nevertheless the Court adopted a subjective view based on the wishes of the incapacitated individual in that case.\(^ {258}\) In that case Hayden J referred to the ‘full force’ of Lady Hale judgement as being based on enforcing the wishes of the incapacitated individual.\(^ {259}\)

It is of significance that the same *Aintree’s case* was heavily relied on in arriving at an objective conclusion in the case of *The Mental Health Trust and Others v DD (No 1)*.\(^ {260}\)

In this case the best interests decision included deciding on the mode of delivery for a

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\(^ {256}\) AR Keene and C Auckland, (n231) 297.


\(^ {258}\) *Sheffield Teaching Hospitals NHS Foundation Trust v TH and Another* [2014] EWCOP 4. [53]-[56] (Hayden J)

\(^ {259}\) Ibid [55] (Hayden J).

\(^ {260}\) [2014] EWCOP 11.
36 year old incapacitated pregnant woman (DD) and the choice between long-term contraception and sterilisation. DD had neither been co-operative nor agreeable with recognised choices in her care. Indeed, Cobb J observed that, ‘DD has not articulated her reasons for rejecting or supporting contraceptive treatment in any consistent manner. However, she has been consistent in maintaining a wish to be left alone and to assert her personal autonomy in relation to her body’.261

Cobb J while acknowledging the need to respect DD’s autonomy and her privacy decided contrary to her wishes, stating that it was in her best interests to have a caesarean section. In arriving at this decision Cobb J quoted the dictum of Lady Hale as follows:

The purpose of the best interests test is to consider matters from the patient’s point of view. That is not to say that his wishes must prevail, any more than those of a fully capable patient must prevail. We cannot always have what we want. Nor will it always be possible to ascertain what an incapable patient’s wishes are (....) But in so far as it is possible to ascertain the patient’s wishes and feelings, his beliefs and values or the things which are important to him, it is those which should be taken into account because they are a component in making the choice which is right for him as an individual human being.262

This dictum reinforces the point made earlier that best interest is not based on the wishes of the individual alone, but when identified, they remain an important component of his best interests assessment and determination. It is important to note

262 The Mental Health Trust and Others v DD [2014] EWCOP 4 [115] (Cobb J) The underlined emphasis was made by the Judge.
that although different outcomes were reached in both cases, the two cases relied on the same authority.263

The dictum of Lady Hale above also went further to highlight hindrances to the implementation of the patient’s wishes. This includes firstly a realistic view applicable to all human’s that ‘we cannot always have what we want’.264 The second hindrance is the problem of ascertaining an individual’s past wishes which are subject to changes during the passage of time.265 The problem in this respect also extends to the difficulty in identifying the past wishes of an individual who has been permanently lacking in capacity.266 Furthermore, another problem presented is where there are conflicting past and present wishes. While identifying such conflicts Donnelly notes as follows:

In less dramatic circumstances, a person while capable may have had clear preferences regarding her life-style or family matters but these might change following a loss of capacity. Thus, the devoted wife may forget her husband and develop other relationships, something which would have been unimaginable to her pre-incapacity self.267

These problems, which are highlighted by the strictly subjective approach, and feature total reliance on, and effecting of the incapacitated person’s past and present wishes do indicate the need for the inclusion of an objective approach during surrogate decisions. It appears the subjective approach gives much credence to the respect and exercise of

263 Aintree (n3) [2013] UKSC 67, [2013] COPLR 492.
264 Aintree (n3)[45] (Lady Hale).
265 M Donnelly, (n144) 18-24.
267 M Donnelly ( n144) 21; see also J Coggon, ‘Mental Capacity Law, Autonomy, Best Interests: An Argument for Conceptual and Practical Clarity in the Court of Protection’ (2016) Medical Law Review 24 (3) 396, 403
individual autonomy, where effect is given to the past and present wishes of the incapacitated individual regardless.\(^{268}\) Whereas the objective consideration embraces a whole range of considerations which may be beyond and outside of a subjective ambit but which are still related to the wellbeing of the incapacitated individual. In this sense therefore, objective considerations are more embracing of general welfare considerations.

This is depicted in *Re E*\(^{269}\) where the applicants who were concerned about the imminent death of E, a 32 year old woman who suffered from extremely severe anorexia nervosa and alcoholism, applied to the court for both investigation and protection with respect to her condition. A major issue that the Court considered was whether further treatment would be beneficial to E.\(^{270}\) This was because E had previously had treatments to correct the effect of her eating disorder which had proved futile. The futility of this effort was due to her reversal of the benefits of the intervention.\(^{271}\) The Court considered whether respecting the wishes which had been expressed by both herself and her family members to be allowed a dignified death would be in her best interests.\(^{272}\) The Court overruled E’s wishes after being convinced of the availability of further treatment for her. The Court stated that:

\[
\text{I would not overrule her wishes if further treatment was futile, but it is not.}
\]

\[
\text{Although extremely burdensome to E, there is a possibility that it will succeed.}
\]

\[
\text{Services and funding will now be provided that were not available before, and it would not be right to turn down the final chance of helping this very vulnerable}
\]

\(^{268}\) *Re E (Medical Treatment: Anorexia) (Rev 1) [2012] EWCOP 1639 [124]-[125] (Jackson J)*

\(^{269}\) Ibid.

\(^{270}\) Ibid.

\(^{271}\) Ibid [17]; [21] (Jackson J).

\(^{272}\) Ibid [36]; [76]; [80] (Jackson J)
young woman. I accept that the nature of the treatment is different to anything E
has previously been offered, and I am reassured, rather than discouraged, by the
realistic outlook of Dr M.\textsuperscript{273}

In arriving at this decision, the Court considered the provisions of the MCA, HRA and
the ECHR.\textsuperscript{274} This case consists of a range of important issues that underpin medical
law. These include consent to treatment; individual autonomy and welfare.\textsuperscript{275} This is in
respect of the legal and ethical approaches that should be adopted in these principles.
The case highlighted very clearly the struggle between autonomy and welfare and
shows that there is delineation between subjective and objective considerations and their
roles in best interests considerations under section 4 of the MCA.

In relation to consent the Court considered the provisions of section 1-3 of the MCA in
deciding the capacity of E and proceeded after being satisfied that E lacked capacity to
consent to her treatment in this circumstance.\textsuperscript{276} By virtue of this conclusion the
provisions of section 4 of the MCA which mandates the decision maker to make
decisions in the best interests of the incapacitated individual becomes operational.
However, the provisions of the MCA with section 4 inclusive must be read, and given
effect to, in accordance with human rights provisions as far as it is possible to do so.\textsuperscript{277}

The human rights provisions considered in this case relate to both the autonomy and the
welfare of the incapacitated individual. Articles 2, 3, 5 and 8 of the ECHR protect the
individual’s rights to life; prohibits torture; maintains liberty and security and respects

\textsuperscript{273} Ibid [138] (Jackson J).
\textsuperscript{274} ibid [11]; [13] (Jackson J)
\textsuperscript{275} ibid [3]; [5] (Jackson J)
\textsuperscript{276} Ibid [11]; [47]-[53], (Jackson J)
\textsuperscript{277} Human Rights Act 1998 s 3; European Convention on the Protections of Human Rights and
Fundamental Freedoms 1950 Articles 2;3; 5 and 8; Re E, [13];[118]-[126] (Jackson J).
an individual’s private and family life respectively. It is the interplay and the balancing of these rights that constituted the major challenges in this decision.

The facts of the case showed that E was averse to being forced fed. Whereas to order a feeding regime would amount to a violation of her private life and invariably constitute a tortuous procedure to her. Furthermore, her liberty and sense of security would be violated. However, these rights must be balanced with the rights contained under Article 2 and 8 (2) of the provision. While Article 2 gives a right to life, Article 8 (2) provides an exception under which the right to privacy can be lawfully violated. These later provisions are lawfully within the ambit of the Court.

The Court therefore is legally empowered to protect E’s life and has a moral duty to protect both her life and her health. The paradox here is that the effecting of E’s rights which promotes her autonomy appears in conflict with the duty of the Court as interpreted under Article 2 and 8 of the Convention. Jackson J in providing a justification for the Court’s approach noted that, ‘All human life is of value and our law contains the strong presumption that all steps will be taken to preserve it (...)’.278

In expressing a moral view in this direction, the Court clearly applied an objective view in the determination of this case. This objective approach to decide what is best for the individual clearly contravenes her subjective wishes.279 On the other hand, E’s refusal to submit to further treatment of tube feeding is dependent upon her convictions, feelings and emotions and is therefore subjective. This highlights a remarkable point that although an incapacitated person might have lost capacity to consent, such individual is still able to express emotions and feelings. These can be interpreted to

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278 Re E [119] (Jackson J). cf Re M (Best Interests Deprivation of Liberty) [38] (Jackson J).
279 MC Dunn and Others (n8) 124.
either express a positive or a negative wish.\textsuperscript{280} This is in line with the provision of section 4 (6) of the Act which mandated the consideration of past and present wishes in best interests decisions.

In arriving at a decision in \textit{Re E’s} case Jackson J noted that ‘there are weighty factors on both sides of the scale’.\textsuperscript{281} The rights contained under Article 3 and 5 therefore relate to the exercise of individual autonomy and are subjective, whereas an objective approach which considered other factors including exceptions to individual rights are contained under Article 2 and 8.

The issue of balancing the complex and opposing rights of the incapacitated individual as was demonstrated in this case can be quite challenging. This is in respect of the balancing of the rights to life and self- determination, where the individual is opposed to the continued sustenance of life. Clough notes that since those with psycho-social disabilities such as anorexia can be brought within the ambit of the application of CRPD, then their wishes should be the paramount consideration and should be implemented.\textsuperscript{282} This was viewed in the background of the will and preference approach that has been advance under the CRPD.\textsuperscript{283}

However subsequent cases following this include in \textit{A NHS Foundation Trust and Ms X}\textsuperscript{284} and \textit{Re W (Medical Treatment : Anorexia)}\textsuperscript{285} where both cases related to anorexia nervosa patients and the question of whether they should be forced fed against their

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{280} B Clough, ‘Anorexia, Capacity, and Best Interests: Developements in the Court of Protection Since the Mental Capacity Act 2005’ (2016) 24 (3) Medical Law Review 434; 441
\item \textsuperscript{281} \textit{Re E}, [129] (Jackson J).
\item \textsuperscript{282} B Clough (n280) 443.
\item \textsuperscript{283} Article 12 (4).
\item \textsuperscript{284} [2014] EWCOP 35.
\item \textsuperscript{285} [2016] EWCOP 13.
\end{itemize}
\end{footnotesize}
will. The Court took a different view to the decision in *Re E.* The approach of the Court in both cases was to effect the wishes of the patients not to be tube fed. This approach considered their past and present feelings in accordance with the provisions of section 4 (6) of the Act.

This represented a subjective approach and tended mostly to promote the individual autonomy of the patient. It further gives the individuals control over their lives and bodies. This approach tends to bring the interpretation of best interests more in accord with the subjective approach of the CRPD in terms of effecting the wishes of incapacitated persons. It further noted the issue of the right to liberty of an individual which plays an important consideration if a forced feeding regime were to be ordered. In this regard the criteria for the application of DOLS as discussed in the introduction to this work should be satisfied.

The objective approaches advanced under the section 4 provision are evidently seen under section 4(6) (C)) and section 4 (7). The provision of section 4 (6) (C) mandates the decision maker to consider, 'the other factors that he would be likely to consider if he were able to do so’. This allows the decision maker to include other considerations beyond subjective considerations in a best interests assessment. This view no doubt acts to widen the scope of best interests beyond the subjective interests of the incapacitated individual, and it is within an objective assessment involving how the interests of others are viewed in a best interests decision that an individualist model is more clearly

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286 A NHS Foundation Trust and Ms X [58] (Cobb J); *Re W (Medical Treatment : Anorexia)* [48]-[52] (Jackson J).
288 ‘n90’; ‘n86’.
distinguished. This can be illustrated in several cases featuring this tendency in respect of the interpretation and applications of these provisions.

The case of Re G (T.J) for instance provides a judicial interpretation of section 4 (6) (C). In that case maintenance was sought to be paid to the daughter of an incapacitated individual from the funds which were administered on her behalf. In granting the payment of the maintenance the Court stated that the Act allows actions that are beneficial to other people provided that they are in the best interests of the incapacitated individual.289

The constituents of best interests were considered in line with the provision of section 4 (6) (c). The Court noted that by this provision the Act has extended and widened the relevant matters to be considered beyond the past and present wishes of the incapacitated individual.290 The CoP’s explanation of this section is to the effect that such considerations might include the ‘effect of the decision on other people, obligations to dependants or the duties of a responsible citizen’.291 The decision in Re G (T.J) accords with the explanation of that section by the CoP.

The provisions of section 4 (7)(a) –(d) can be seen to follow on from the previous section in relation to the widening effect they both provide for best interests consideration. This is because although the previous provision did not categorically state the other factors to be included in the best interests consideration, nevertheless it provides a gate for the inclusion of other relevant factors in a best interests

290 Ibid [36]-[37].
291 MCA 2005, CoP, para 5.47
consideration. It is in line with this perspective that the mandate to consult given under 4 (7) can be seen to become relevant.

The MCA listed certain sources deemed relevant in the consultation process.\textsuperscript{292} In respect of the list of persons to be consulted, section 4 (7) (b) is the most relevant to this thesis. The Act directs the surrogate under this provision to ‘take into account’ and ‘consult’ the views of: ‘Anyone engaged in caring for the person or interested in his welfare’.\textsuperscript{293} The CoP gave examples of such persons to include the family carers of such incapacitated persons.\textsuperscript{294}

It is significant that the objective approach in best interests consideration allows for the inclusion of other factors besides the incapacitated individual’s past and present wishes which are subjective. However, for these ‘other factors’ to be valid they must be limited to the benefit of the incapacitated individual.\textsuperscript{295} In other words the objective approach is subject to the benefit and interests of the incapacitated individual and in practical terms it is never free from subjectivity. This limitation points to the application of an individualist model where different interests and considerations are at play, and it ensures that the focus of the decision maker does not stray from the incapacitated individual who should be at the centre of such consideration.

This notion therefore challenges the objectiveness of the best interests concept in this individually subjective context. It further casts a shadow and challenges the objectivity claim in the best interests standard. This is buttressed by the explanation of this section contained in the Cop. The Cop stated that ‘The Act allows actions that benefit other

\textsuperscript{292} MCA 2005 s 4 (7) (a)-(d).
\textsuperscript{293} MCA (2005) s 4 (7) (b).
\textsuperscript{294}MCA (2005) CoP para 5.49.
\textsuperscript{295} MCA (2005) s 4 (7).
people, so long as they are in the best interests of the person who lacks capacity to make the decision’. 296

In respect of section 4 (7) (b) the objective intention framework is quite evident in that the Act allows consultation with someone other than the incapacitated individual. It therefore allows for an external view. The Code of practice particularly acknowledged family carers in this respect. 297 Barron defined a family carer as ‘someone who is providing an ongoing significant level of unpaid care to a family member or a friend who is in need of that care in the home due to illness or disability or frailty’. 298

In the light of this definition, the significant role the family carer of a dementia patient plays in the care of such incapacitated individual cannot be overstated. This is evident in long hours of care comprising of bathing, feeding and assisting with other forms of personal activities of daily living. 299 This demonstrates a deep sense of selflessness, emotional and physical commitments. However, the activity of care giving does take its toll on the caregiver in diverse ways and will be discussed in chapter 3 of this work. 300

In investigating the nature of surrogate decision for care home placement in this circumstance, the subjective and objective approach discussed under the provision of the Act is of relevance. Whereas the subjective approach considers the past and present

296 MCA (2005), CoP para 5.48.
297 Ibid.
wishes of the incapacitated individual, the objective approach accommodates a range of ‘other factors’ including consultation with carers. However, it is noted that the objective consideration itself must be directed to the subjective individual consideration of the incapacitated person.\textsuperscript{301}

This is deduced from the explanation of section 4 (7) (b) given by the Code which states that the aim of the consultation is to ‘find out: what the people consulted think is in the person’s best interests in this matter, and if they can give information on the person’s wishes and feelings, beliefs and values’.\textsuperscript{302} This reveals that the consideration of other factors must be linked to the best interests of the Incapacitated individual which therefore effectively evidences the feature of an individualist model in best interests consideration.

The relevance of this point is that the strict application of the law places total focus on the Incapacitated individual. This tends to depict the incapacitated individual as isolated and insulated from other important factors of life such as relationships and how activities in these relationships affect those involved and may sometimes dictate or necessitate certain decisions and actions.

On this issue Herring and Foster stated as follows:

\begin{quote}
\text{it is impossible to speak atomistically about an “individual”. We are such quintessentially relational creatures that we should (and for all practical purposes do) abandon the legal fiction of a person who is an island unto herself. A judge who seeks to assess the best interests of X by taking her out of her
\end{quote}

\textsuperscript{301} MCA CoP para 5.53. \\
\textsuperscript{302} MCA CoP para 5.53.
social context and examining her in isolation in a forensic Petri dish will come to a wrong conclusion.\textsuperscript{303}

These authors suggest that a view of best interests which obliterates other important considerations such as social interactions and relationships would lead to an outcome devoid of reality and practicality. Where there is an existence of a caring relationship therefore the impact of the application of this section would expose the weakness of the objective nature of this provision in terms of how the views of carers involved in the care of incapacitated individuals are regarded. This work now looks at the interpretation and application of section 4 (7) in decided cases and the impact these decisions have on carers of incapacitated individuals.

2.4 THE INTERPRETATION AND APPLICATION OF THE IMPACT OF SECTION 4 (7) ON CARERS.

The case of *Winspear v City hospitals Sunderland NHS Foundation Trust*,\(^{304}\) is an important decision in respect of the application and operation of the provision of section 4 (7). In this case a doctor treating an incapacitated individual (Carl) had attached an uncompleted ‘Do Not Attempt Cardio Pulmonary Resuscitation’ (DNACPR) form onto his notes during the night.

The doctor had had no consultation with Carl’s mother who had been his carer before attaching this instruction. The claim of the mother was firstly on a personal ground and secondly in a representative capacity of her son’s estate. The claimant contended that there had been a procedural failure due to the lack of consultation, which had resulted in the violation of her son’s right to have his private life respected under Article 8 (1) of the ECHR.

Blake J noted that ‘Section 4 (7) of the Act has assumed central importance in the trial’.\(^{305}\) The Judge noted two important elements that are significant to the claims of Carl’s mother; firstly that she was in a caring relationship with her son and secondly that she had interests in his welfare. While ruling on the application of section 4 (7) the Court therefore held as follows:

> The decision maker must take her views into account if it was practicable and appropriate to do so. She submits that given the significant nature of the decision; her life-long care of Carl; her travelling with him in the ambulance and her communication with the nursing staff on 2 January, it was both appropriate

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\(^{305}\) *Winspear v City Hospitals Sunderland NHS Foundation Trust* [2015] EWHC 3250 (QB) [38] (Blake J).
and practicable for Dr Swarbrick to consult with her either by telephone or invitation for a meeting in person in the early hours of the morning, to discuss the proposed DNACPR notice.\textsuperscript{306}

The Court found in favour of the claimant stating that there has been a breach of duty due to violation of the provisions of section 4 (7) which cannot be remedied under the provision of section 5 (2). Furthermore that the procedural duty under Article 8 (2) of the (ECHR) was also violated.\textsuperscript{307} However, the Court refused to award damages to the claimant in her personal capacity. The Court stated that, ‘I am not persuaded that she has any personal claim for damages. Her legitimate interest was as Carl’s carer, it is his best interests and rights to respect for private life that is under consideration’.\textsuperscript{308}

This case is seen to uphold the rule of law embedded in the overriding principle of the Act and engrafted in the provisions of section 4 of the Act as reflected under the best interests standard in surrogate decision making. The principle of empowerment of incapacitated individuals entails respect and promotion of their autonomy, upholding of their rights and according them dignity during surrogate decisions. These are also integral aspects of their welfare and accord not only with legal principles but also ethical philosophies.\textsuperscript{309} Although autonomy is at the core of the liberal philosophy for instance, yet welfare equally occupies an important position in the liberal theory of moral rightness.\textsuperscript{310} These elements are firmly established by the Court and seen in the

\textsuperscript{306} Winspear (n305) [39] (Blake J).
\textsuperscript{307} ibid [59] & [61] (Blake J).
\textsuperscript{308} ibid [63] (Blake J).
weight attached to the provisions of section 4 (7) of the Act and Article 8 (1) of the ECHR.

However the Court’s interpretation of the provision of section 4 (7) appears to be strictly subjective although applied in an objective context. The strict subjectivity view can be seen to be based on its determination to focus solely on the incapacitated person while the objective context is based on the external views of the claimant in the case under consideration. It is significant that the Court noted the issue of the relationship of the claimant to the incapacitated person and her interests which were the justified basis of her claims, nonetheless her personal claim failed.

The reasoning in this case in this respect can be contrasted to the reasoning of Lewison J in Re P and Behrens J in NT v FS and Ors. Although the interpretation and application of section 4 (7) was not central in both cases however, how best interests was considered is relevant. In both cases, the Court perceived and construed best interests to extend beyond the legal rules embedded in the principle of autonomy. Lewison J in Re P explained this perception simply as ‘part of an overall picture’, which would only be completed by moral consideration. This moral consideration lies in being ‘remembered with affection’ as doing ‘the right thing (...)’.312

It is significant that the Court in the Re P’s case went beyond recognising the views of others to accomplishing such views in terms of the incapacitated individual doing ‘the right thing by his will’.313 By this undertaking the Court portrayed that the components

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313 Re P [44] (Lewison J).
of best interests should not consist totally of legally enforceable rules but should include moral and ethical considerations.

In the case of *NT v FS and Ors*, N was the partner of F who was suffering from dementia and subsequently became his carer. In constructing a will the Court stated that F had a ‘Large moral obligation to N’ and consequently awarded N 35% of F’s estate.\(^{314}\) The Court noted that its ‘paramount instruction’ was that the will must be constructed in the bests interest of F and that ‘it must consider all relevant matters including the matters in section 4 (6) and (7)’.\(^{315}\)

In construing the gifts in accordance with the stated provisions of best interests the Court rejected the suggestion that N should be given 20% of the estate of F. Behrens J stated that ‘in my judgement this is too low and does not reflect F’s best interests’.\(^{316}\) The Court in this case considered the nature of the existing relationship between the two and the input of N to the relationship in determining the best interests of F.

It is significant that the Court considered the obligation owed to others by the incapacitated individual rather than viewing best interests solely on the obligations owed by others to the incapacitated individual. Although these two cases relate to the construction of a statutory will, nevertheless the interpretation and application of best interests standard in the construction of the will by the Court reflected a wider approach and presented a moral outlook.

In contrast, the reasoning and the decision of the Court in the *Winspear’s case* appear totally based on a narrow perception of autonomy which provides no legal justification.

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\(^{314}\) [2013] EWHC 684 (COP) [85] (Judge Behrens).

\(^{315}\) Ibid [80] (Behrens J).

\(^{316}\) NT v FS and Ors (n311) [87] (Behrens J).
for the claimant’s claims. It was obvious that the Court was more concerned with the issues of the individual autonomy and the right of the incapacitated individual, although it had earlier recognised and justified the claimant’s relationship with her son and the interests arising as a result.317

The flaws of this approach lies firstly on the concentration on an individualistic approach to self-determination rather than a relational approach as indicated in this case. Secondly, its flaw lies on the approach to the issue of interests. This is due to the fact that the evidence that an interest exists in some instances, is evidence of the existence of a right.318 In a situation where this is rightly construed then the interest of the claimant in this case such as Carl’s mother should have indicated that she would have a right to private and family life.319 This would justify that such information that affects the private and family life she shares with her son needs to be properly passed on to her.

The Winspear’s case can be compared and contrasted to the case of Glass v The United Kingdom. The case involved a joint application by a son and his mother (D and C respectively). In that case the doctors taking care of D, who was disabled and suffering from a respiratory related condition, administered the opiate diamorphine to him and also attached a ‘DO NOT RESUSCITATE’ (DNA) order on his note contrary to the indicated wishes of C. The applicants therefore maintained that these actions interfered with the first applicant’s ‘right to physical and moral integrity’ and also the

317 Winspear (n304) [38] (Mr Justice Blake).
the second applicant’s article 8 right under the ECHR. The Court upheld these claims stating that the imposition of the diamorphine treatment was a violation of the first applicant’s right to respect for private life and ‘in particular his right to physical integrity’. In upholding the claim of the second applicant, the Court noted that the imposition of the treatment on the first applicant also violated her Article 8 right under the ECHR. In view of this conclusion the Court did not regard it necessary to separately consider the second applicant’s complaint on the DNA issue.

It can however be deduced from this judgement that the second applicant’s claim would have been upheld on the same point of law and reasoning based on the conclusion of this case. This is because the Court noted that it was as a result of the outcome of these that it would not now be necessary to consider the DNA issue. However in a separate opinion, it was stated that the complaint with respect to the DNA order deserved an additional examination.

The decision in this case was based on the consideration of case law and the local guidelines and practices. Although the decision was before the MCA was enacted yet the principle regarding the application of the best interests standard under the Common law was clearly visible. The European Court of Human Rights (ECtHR) noted the application of domestic law at the earlier hearings of this case where the cases in respect of the doctrine of consent, and the application of the best interests standard were cited. Furthermore, it acknowledged the domestic guidelines and practices applicable

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320 Glass v UK (n319) [61] (Mr M Pellanpaa Presiding as President of the ECtHR)
321 ibid [70] (Mr M Pellanpaa)
322 ibid [87](Mr M Pellanpaa)
323 ibid See the separate Opinion [3] (Mr J Casadevall)
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325 Glass v UK (n319) [45]; [49];[52];(Mr M Pellanpaa)
to this case.\textsuperscript{326} The notable international material considered was in reference to consent under the Council of Europe’s Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: (Convention on Human Rights and Biomedicine (1977)).

The doctrine of consent continues to feature and play a prominent role in these considerations. This directs that ethical dealings with individuals who lack decision-making capacity demands according them dignity and respect, hence the relevance of surrogate decision-making in their best interests. In dealing with the issue of best interests, the common law position was explained in this case by the Court of Appeal.\textsuperscript{327} It noted that although the principles of the application of the best interests of a child were clearly established by the law, yet the application of conflicting principles presents some difficulties.

The Court noted that in assessing the best interests of a child account should be taken of the ‘natural concerns and the responsibilities of the parent’.\textsuperscript{328} The Court also noted that views of the doctors and other relevant sources are important in this consideration. It is clear from the view expressed by Lord Wolf MR regarding the assessment of best interests in this case that the best interests assessment is based on multifarious considerations.\textsuperscript{329} The Court noted that the natural concerns and responsibilities of the parents are important consideration in this matter. Furthermore, that the doctor’s views and other relevant views are also a component in deciding what is best for the child. This account leans heavily on the welfare of the child and highlights the welfare

\textsuperscript{326} Ibid [53] ;[45]; [47] & [48]; (Mr M Pellonpaa)
\textsuperscript{327} Glass v UK (n319) [40] (MR M Pellonpaa reviewed the previous judgement citing the dictum of Lord Wolf MR)
\textsuperscript{328} Ibid
\textsuperscript{329} Ibid
principle in best interests assessment. However at the same time it highlights the relational aspects in terms of the natural parental concerns and responsibilities.

There is however no doubt that under this common law application of best interests, it is the interests of the individual for whom the decision is being made that is central. In this respect the underlying perspective of the principle both under the common law and the MCA agree. Based on this therefore, it stands to reason that where the views of C is at opposing end with that of the Court’s assessment of D’s best interests then C’s claim would have failed. It is therefore noteworthy that the applicants in this case did not proceed on the grounds of the consideration of best interests in the ECtHR, but rather resorted to the claim of the violation of their rights in the present hearing. It was noted therefore that, ‘(.....) the applicants have questioned the adequacy of the domestic legal framework for resolving conflicts arising out of parental objection to medical treatment proposed in respect of a child (...)’.

In the ECtHR the Article 8 right was the main focus rather than a best interests focus. In this regard the individualistic approach in viewing the issues where there are interplay of interests and rights became inapplicable. Furthermore, although the Court noted in this case that it was only required to examine the issues raised from the standpoint of the first applicant’s right to respect for his personal integrity, nevertheless it considered that regard had to be given to the second applicant’s role as his mother and legal proxy. The Court therefore upheld the claims of both applicants in respect of the violation of their rights under Article 8 of the ECHR. The ECtHR, while recognising the

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331 Glass v UK (n319) [40] (Mr M Pellonpaa).
332 A National Health Service v D ([2000] FCR 577)
333 Glass v UK (n319) [74] (Mr M Pellonpaa)
334 Ibid [72] (Mr M Pellonpaa)
interests and the rights of all the individuals involved in this case, went further to confirm and affirm the interests and rights arising from the existing family and caring relationships.\footnote{ibid}

Although this case can be distinguished from the Winspear’s case regarding the applicable legal framework since the Winspear’s case was considered under the MCA with the best interests standard in perspective, the Glass’s case however, was initiated under domestic law where the best interests standard was relevant. It was finally decided under the ECtHR based on the claim of rights. Therefore while the common law was applied in the present case under the domestic law, and the MCA was applied in the Winspears case, the best interests standard was applicable to both. The standard as applied bears the same applicable individualist model where the interests of others are involved as is seen the decision in Re Y.\footnote{Re Y (Mental Patient: Bone Marrow Donation) [1997] Fam 110}

Furthermore, the approach of the Courts to the attachment of the DNA order on the notes of the patient was different in the Glass’s case. Initially in the domestic courts this was considered as insignificant but under the ECtHR it was attached to the outcome of the violation of Article 8 where the claim was upheld. Indeed it was stated that it was worthy of examination in its own right.\footnote{Glass v UK n319) [1] & [2] (See the separate opinion of Mr J Casadevall). Therefore, Article 8 can be seen to demonstrate the potential to accommodate the genuine and related claims of multiple applicants in a single trial as is demonstrated in this case without the need to proceed on a separate trial. It was also demonstrated that the success of one claimant does not debar the claims of another under this provision.
Whereas in the *Winspear’s* case the attachment of a DNAR was considered as a procedural flaw under section 4 (7) of the MCA, and since it was the best interests of the incapacitated individual that was considered, the claim of Carl’s mother failed. It is important to note that the Court viewed the interests of the mother in the *Winspear’s* case merely as that of carer.\(^{338}\) It failed to see the relational and family aspect that generated the interests and rights seen the case of *Glass v UK*.

The Court in the *Winspear’s case* went on to distinguish the circumstances of the claims in both cases. It stated that whereas in the *Glass’s case* the first applicant D was still a child under the care of his parent, while Carl in the *Winspear’s case* was not.\(^{339}\) This distinction is clearly insignificant when there is not only a caring relationship but also a family relationship to which all the parties involved have existing interests and rights.

The decision in the *Winspear’s case* therefore not only showed the estimation of the rights of others under the MCA but also displayed the perception of family relationship and the estimations of their interests and rights during best interest decisions. The application of an individualist model can therefore be seen to be clearly averse to the genuine claims and consideration of other relevant interests in this context. It is under this circumstance therefore that the issue of the MCA’s approach to others interests where there are relevant, and genuine multifarious claims of interests and rights raises concern.

Whereas the approach of the ECtHR accorded more recognition to the involvement and outcome of the relatedness and the responsibility of C to D as a parent in respect of the violation of her own right in the *Glass’s case*; the *Winspear’s case* did not. In this regard

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\(^{338}\) *Winspear* (n304) [63] (Mr Justice Blake)

\(^{339}\) *Ibid*.
the Court described the ‘feelings of powerlessness and frustration’ in preventing a perceived harm by the administration of the opiate drug and the attachment of the DNA order to his notes resulting in the violation of the mother’s rights in the *Glass’s case*[^340].

The same approach was applied by the ECtHR in the case of *Dordevic v Croatia* which involved a joint application by a mother and her son in respect of the violation of their rights. The claims of the first applicant who was severely disabled were based on physical violence, and abuse while both applicants alleged verbal violence over a period of years. In awarding damages to both applicants, the Court noted that the right of the first applicant under Article 3 of the ECHR had been violated while in respect of the second applicant the Court noted that her Article 8 was violated.

The approach of the Court to the claims of the second applicant is particularly relevant to this discussion when compared to the approach of the Court in the UK where the MCA was applied in cases involving the interests of others. The approach to the interests of family carers is particularly relevant in respect of the rights claim under the ECHR as opposed to the application of the best interests standard under the MCA. It can be noted that the ECtHR applied the same ratio in considering the relationship between the mother and son as was applied in the Glass’s case. The Court stated as follows:

> As regards the second applicant, the Court notes that she has not been exposed to any form of violence affecting her physical integrity. However, there is no doubt that the continuing harassment of the first applicant, her disabled son for whom she has been taking care, and the incidents of harassment which also

[^340]: *Glass v UK* (n319) [87]. (Mr M Pellonpaa)
concerned her personally, even in their milder forms, caused disruption to her daily life and her routines, which had an adverse effect on her private and family life. Indeed, the moral integrity of an individual is covered by the concept of private life. The concept of private life extends also to the sphere of the relations of individuals between themselves.\footnote{Dordevic v Croatia (n319) [97] (Mr A Kovler, presiding as President of the ECtHR.)}

In this case the Court noted two grounds for the claims of rights in respect of the second applicant here. Firstly harassment arising in connection to her son for whom she has been a carer and secondly harassment which also concerned her personally. Although the Court distinguished between interests arising out of relational and personal interests, yet it was prepared to see the connection between the two in terms of existing family relationship and interests, and the rights that these generate. These decisions under the ECtHR have considered the different interests represented in the claims while applying the relevant sections of the law in upholding the rights and dignity of all the parties and interest represented in the claims.

This represents a balanced approach to the extent that it is not just the interests of the incapacitated individual that is being considered, neither were the interests and rights of others relegated. This approach embraces a moral perspective to the extent that the justified claims of family carers were upheld. It can therefore be suggested that the ECHR advances a strong claim of rights for family carers and others whereas their claims would have been accounted as weak or non-existent under the MCA where the
best interests standard is operational.\textsuperscript{342} This is apparent in the subsequent cases considered in this chapter.

The case of \textit{K v LBX}, which was decided under the MCA is a vivid portrayal of this. Article 8 right was examined in the case of \textit{K v LBX} where the Court decided on the accommodation for an incapacitated individual. The Court approved the approach of the trial judge in that case in acknowledging the rights of family members. Black LJ noted that ‘She expressly bore in mind (§104) the Article 8 rights of L, his brother and K and that there should be no interference with the exercise of those rights except such as is in accordance with the law and is necessary and proportionate’.\textsuperscript{343} Nevertheless, the best interests of the incapacitated individual were held to be paramount in this case. This followed the identified pattern of the paramount nature of the incapacitated individual’s interests and rights amidst the existence of other interests and rights, thus reinforcing the individualist model in best interests assessment.

It should be noted that the application of section 4 (7) of the MCA plays a pivotal role in the Court’s determination of the best interests standard in the cases considered here under the MCA. In discussing this further, the approach of the judge in the \textit{Winspear’s} case can be contrasted to the approach of the judge in the case of \textit{The Mental Health Trust & Others v DD & Another}.\textsuperscript{344} In this case although DD was in a relationship with another incapacitated individual (BC) who was believed to be the father of her unborn child, yet BC’s views were not obtained during the decision to determine the mode of delivery and determination of a contraceptive regime for DD.

\textsuperscript{342} \textit{Re VW; NK v VW} (2011) COP 27/101/10/1744555 [13] (Macur J)
\textsuperscript{343} \textit{K v LBX} (2012) EWCA Civ 79 [54] (Black LJ).
\textsuperscript{344} [2014] EWCOP 11
This approach contravenes the duty and procedure required under section 4 (7) of the Act and also his rights under Article 6 ECHR. Cobb J in that case noted that the partner of the incapacitated person should take part in the proceedings as the decisions to be taken constitute’ intrusions into his life’ and affects his article 6 ECHR rights. However, due to the urgency of the decision being made the right of BC was overridden in that case.

Although the relationship between DD and BC in this case is not a carer relationship as in the Winspear’s case yet by virtue of their existing relationship BC could be regarded as someone who cares about the welfare of DD. In this respect his views should be obtained in surrogate decision of this nature. It is significant that although there was need for an urgent decision to be made yet the Court acknowledged that there was a procedural breach and a breach of his Article 6 right. Furthermore, it acknowledged that the external views of BC were important and necessary enough to establish a legal right. In contrast to this, the interests of the claimant in the Winspear’s case could not afford her any personal legal right of claim.

In contrast to the decision in the former cases, the case of ZH v Commissioner of Police for the Metropolis. directly considered the views of carers in relation to section 4 (7). The claimant ZH who had an autistic syndrome and also suffered from epilepsy, was restrained after having jumped into a swimming pool, before being released to his carers.

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345 The Mental Health Trust and Others v DD & Another [2014] EWCOP 11 [17] (Cobb J)
The case for ZH was based on the following; restraint, failure to make reasonable adjustments to regular interventions in order to accommodate ZH and finally a breach of Article 3, 5, and 8 of the ECHR. The Court upheld all claims with an award of £28,250 to the claimant in damages. In respect of the claim of restraint, ZH contended that the defendants did not seek any advice from his school carer regarding how to address the situation in view of his disability.

The Court of Appeal in upholding the judgement of the trial court noted that there has been a breach of duty and a procedural flaw under section 4 (7) of the Act due to lack of consultation with ZH’s carer when it was appropriate and practicable to consult him before the officers took action.\(^\text{347}\) However, the Court stated that the question of appropriateness and practicality of consultation will always be ‘fact sensitive’.\(^\text{348}\) This suggests that consultation is dependent on the appropriateness and practicality of the facts or situation. This appears to create an exemption to the provision to consult without specifying the exemptions. The lack of specificity would create a wide margin as to what should come under such exemption. Although it was clear in the case of Re DD that a matter of urgency would qualify to wave the right to a fair hearing which would have invariably satisfied the requirement of consultation. This leaves the Courts to determine the practicality and appropriateness of consultations in best interests decisions under this section.

This case also seeks to uphold the principle of self-determination embedded in the concept of individual autonomy through the means of the protection of individual rights and interests of incapacitated individuals. This case as in the previous cases highlights a

\(^{347}\) Ibid [50] (Sir Robert Nelson)
procedural flaw under section 4 (7) of the Act and the need for respect of the human rights of the incapacitated individual in following an individualist model.

With regard to the position of the carer, it is clear that the relationship here is simply a professional caring relationship and his interest does not extend beyond a professional interest, unlike the previous cases. Nevertheless, the establishment of a caring relationship still evoked the need for consultation in line with the provision of the law.\textsuperscript{349}

It is important however, that the Court noted that the exercise of consultation would be ‘fact sensitive’. This is justifiably deduced from the language of the Act under section 4 (7) which mandated consultation where it is appropriate and practicable to do so. This suggests that where it is not practicable and appropriate then consultation would be dispensed with. This position was adopted in the \textit{Re DD’s} case.\textsuperscript{350} It can therefore be deduced that the requirement of Section 4 (7) of the MCA would include the need for individuals to fall within the categories stated under that provision which includes being a carer in whatever capacity. Furthermore that the circumstances of consultation must be appropriate and practical.\textsuperscript{351}

However, the important contribution of these cases to this work is in the outcome of the impact of consultation on the rights of the individuals involved in relation to the interpretation of the section 4(7) provision by the Courts. The concern here is with the strict subjective interpretation of best interests adopted in the cases decided under the

\textsuperscript{349} MCA 2005, s 4 (7) (b).
\textsuperscript{350} The Mental Health Trust and Others \textit{v} DD \& Another (2014) EWCOP 11.
\textsuperscript{351} MCA 2005, s 4 (7) (b).
MCA. This is highlighted even in the professional caring relationship as well as in family and private relationships of the incapacitated individual.352

Finally, the ZH’s case approached the issue of self-determination based on the protection of human rights and invariably the interests of the incapacitated individual.353 This fact is also evidenced in the previous two decisions discussed and reflects that the concept of right which generates interests is integral to the concept of self-determination.354

However there exists in the Winspear’s case and the Re DD’s case a relationship that is distinguishable from a simply professional caring relationship with limited interest. This is due to the fact that the existence of a family and private relationship displays the presence of rights which could either co-exist, conflict or intersect with each other.355 In most family relationships rights and interests are often tied and interdependent.356 In line with this view the decision in the ZH’s case which is based on the sole consideration of the best interests of ZH is distinguished from the other cases where there are family carers and a partner whose interests transcends the interests of a professional carer.

The cases discussed here can be summarised as consisting firstly of; the application of an objective test in the subjective consideration of best interests standard in surrogate decision—making for incapacitated individuals. This is as a result of the conjunctive decision

353 ECHR [1950] Articles 3; 5 & 8.
356 Ibid.
application of section 4 (7) which highlights an objective framework with the other relevant provisions under section 4 of the Act which are mainly subjective.\(^{357}\)

The mandatory instruction of the Act that even the information acquired under an objective approach must be directed solely to the best interests of the incapacitated individual appears to jeopardise the objective claim of the best interests standard in surrogate decisions. The effect is that the inclusion of other concerns during objective contributions advanced by relevant individuals such as family carers must pass through a subjective test before its approval as being in the best interests of the incapacitated individual. In this respect Dunn and Others rightly noted as follows:

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\text{The assessment of a vast range of subjective evidence within an objective framework, in a manner consistent with the maximisation of personal welfare, remains the major stumbling block in person-centred substitute decision-making. The best interests checklist stresses that relevant interests are only substantive when linked to the context in which they are based.}\(^{358}\)
\]

This is the exact reflection seen in the *Winspear’s case* where the personal claim of the claimant failed despite of the existence of a family and caring relationship. This is quite a curious situation since the interests were linked with rights and vice versa in that case. Therefore the presence of an interest by the claimant in this case should reveal a right that ought to be respected by the court.\(^{359}\) It is lamentable that the court found no legally enforceable right by the claimant in that case.

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\(^{357}\) MCA 2005 s 4 (1)-(6)

\(^{358}\) MC Dunn and Others (n8) 117, 126.

\(^{359}\) *Glass v UK* (n319); *Dordevic v Croatia*(n319).
The approach of the Court correlates with the common law approach adopted in the earlier decision of *Re Y* (Mental incapacity: Bone Marrow Transplant),360 where the central concentration was on the best interests of the incapacitated individual in a family relationship. This therefore questions the usefulness of section 4 (7) as a constituent of the objective framework of the MCA when viewed in such a narrow perspective. This is in terms of its stipulation of how the consultation with others should be viewed and utilised in a best interests consideration.361

In summarising this section therefore, the cases discussed earlier,362 recognised the need for adherence to the mandatory procedural approach under section 4 (7) of the Act in order to enforce the principle of empowerment stipulated under that provision. However, it is the strictly subjective application inherent in this procedure that poses a problem of practicality in a family caring situation.

This issue is addressed mainly in this work in the situation of family carers of dementia patients where a decision for care home placement is required. The case of *Dorset CC v EH* is the major case discussed in this respect,363 with a view to investigating whether a concentration on the sole interests of a dementia patient in care home placement decision under the best interests standard where the family carer’s interest are involved is ethically and legally justifiable. The analysis of this case would further highlight whether there is a need for the modification of the current approach under the existing law.

361 J Herring and C Foster (n360) ibid 493-497.
362 Winspear (n354); NT v FS and Ors (n 314); Re P (n313); ZH v Commissioner of Police For The Metropolis (n353);
363 [2009] EWHC 784 (Fam)
CHAPTER TWO

3.1 *Dorset CC v EH*: A REFLECTION OF THE PERCEPTION OF AUTONOMY AND WELFARE, AND THE INDIVIDUALIST MODEL IN BEST INTERESTS APPLICATION.

The issue of autonomy and welfare play significant roles in the subjective and objective views of best interests.\(^{364}\) These issues impact not only on the outcome of surrogate decisions for the incapacitated individual in terms of the outcome of a constricted or wider perspective, but also on significant ‘others’ such as family members where an individualist model is applied. This is of relevance in cases of relational and inter-twined interests in best interests assessments.\(^{365}\)

Therefore a clear difference can be seen in the consideration of the autonomy and welfare of the incapacitated individual and the individualist model in best interests assessment. The *Dorset* case exemplifies both the individual and the individualist model of best interest applications. This is discussed in respect of the consideration of the autonomy and welfare interests of the incapacitated individual, and the interests of family carers in a best interests assessment. Although these features are distinctive, yet they can overlap. This could occur in cases where the rights and interests of the family carer are relegated, overshadowed or inter-mingled with the rights and interests of the incapacitated individual.\(^{366}\)


\(^{366}\) *Winspear* (n354); *R v W* (n 13).
Consequently, this would result in the difficulty of distinguishing the rights and interests of others. Therefore, the best interests assessment in this situation, although based on the autonomy and welfare interests of that individual, assumes an individualist model since other rights and interests remain in the background.\(^{367}\) In this case the autonomy and welfare interests of the incapacitated individual overlaps the individualist model applied. A vivid example of this is demonstrated in Re VW where it was stated that the concern of the Court was to concentrate on the incapacitated person.\(^{368}\) This involved the applications of the principles of autonomy and welfare with respect to her best interests.\(^{369}\) This leads to the application of an individualist model despite the presence of the interests and rights of the family member.

The subjective and objective assessments of best interests also play significant roles in this regard. A subjective assessment of best interests displays a strong tendency towards both the concentration on the autonomy and welfare of the incapacitated individual and the application of an individualist model in best interests assessment. Furthermore, although the objective assessment of best interests was stated to accommodate a wider perspective in relation to an altruistic approach, that should affect how others interests are viewed,\(^{370}\) the MCA significantly qualifies such an approach.\(^{371}\)

The Act directed that the perception of best interests assessment should be for the benefit of the incapacitated individual.\(^{372}\) This could result in an overlap in the assessments of autonomy and welfare for the incapacitated person and the application of

\(^{367}\) JK Walter and LF Ross, ‘Relational Autonomy: Moving Beyond the Limits of Isolated Individualism’ (2014) 133 (1) Paediatrics 16,16.
\(^{368}\) Re VW; NK v VW (2011) COP 27/10/10/1744555 [13] (Macur)
\(^{369}\) Ibid.
\(^{370}\) Re G (TJ) [2010] EWHC 3005
\(^{371}\) MCA (2005) s 4 (7) (b); Winspear (n304)
\(^{372}\) MCA 2005 s 4 (7) (b); Re (G TJ) [2010] EWHC EWHC 3005
an individualist model under the best interests standard where the interests and rights of others are apparent. Therefore, this approach makes the application of the standard individualistic in nature.

While a subjective assessment of best interests which focuses on the implementation of the wishes of the individual has been advocated in some cases, other cases have seen the need for the inclusion an objective approach that extends the ambit of best interests assessment to others. In Re GM for instance, the Court was to decide on the best interests of the incapacitated individual by considering whether GM should return to his own home on discharge from hospital. Hedley J viewed the perception of best interests as ‘(...) a very wide ranging one: (...)’. Which should consist of considerations that cater for the autonomy and welfare of the incapacitated individual. Hedley J further noted ‘the importance of relationships’ in such considerations. The judge in this case construed best interests as consisting of a range of considerations which although relating to the incapacitated individual, extends beyond that border to include relationship with others.

This reflects the core significant considerations in best interests decisions noted earlier which are based on the competing focus between autonomy and welfare on the one hand, and the position of the interests at play due to existing relationships during the assessment of best interests. It can be noted that the majority of the cases focusing on

374 Re G (TJ) [2010] EWHC [48] (Morgan J); Re P [44] (Lewison J); NT v FS and Others [2013 EWHC 684 (COP) [85] Judge Behrens).
377 Re G (TJ) [2010] EWHC 3005 [COP] [48] ( Morgan J); K v LBX [2012] EWCA Civ 79 [54] (Black J ); NT v FS and Ors [2013] EWHC 684 ( COP) [85] ( Judge Behrens); The Mental Health Trust and Another v DD &
the subjective assessment of best interests displayed a tendency to majorly highlight autonomy considerations as paramount in best interests assessment whereas the objective views displayed a wider consideration and assessment of best interests which highlights a broader welfare consideration that tends to consider an outlook beyond the incapacitated individual.378

However, although the wider approach embraces the consideration of a variety of issues including relationships, nevertheless the issue in this work hinges on how the interests of others in a caring relationship are considered in a best interests assessment. Herring’s criticism of Re Y( Mental Incapacity: Bone Marrow Transplant), 379 for instance was based mainly on the weakness of the reasoning in that case.380 In Re Y, bone marrow donation from an incapacitated individual to her sister was granted since it was construed that this was in the best interests of the incapacitated person.

Herring based his criticism of the weakness of the reasoning in that case on the fact of its insensitivity to the dynamics of family relationship and the interests that are evident within that context.381 Although Re Y was decided under the common law, nevertheless it provides an insight into the nature of best interests assessment that has had

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378 Westminster CC v Sykes; Winspear v City Hospitals Sunderland NHS Trust (2015) EWHC 3250 (QB) [63] (Blake J); Re W (Medical Treatment Anorexia) [2016] EWCOP 13; cf Re P [2009] EWHC 163 (CH) [44] (Lewison J) Re G (TJ) [2010] EWHC 30005 (COP) [48] (Morgan J); Re E (Medical Treatment Anorexia) [Rev 1] [2012] EWOP 1639 [124-125] (Jackson J); NT v FS and Ors [2013] EWHC 684 (Cop) [85] (Judge Behrens).


381 Ibid.
considerable impact under the current law. This is in respect of the considerations of the autonomy and welfare principle for incapacitated individuals.\textsuperscript{382}

The case of \textit{Dorset CC v EH} which is majorly considered in this chapter deals with best interests assessment during which the consideration of autonomy and welfare interests play major roles in the decision.\textsuperscript{383} The aim of the analysis of this case is to see the role played by autonomy and welfare in best interests assessment and the perception of the interests of the care giver during surrogate decision-making in the context of care home placement of a dementia patient.

This case will highlight the impact of dementia not only on the dementia patient but also on care givers who are family members and the role it plays in the decision for care home placement of the patient. The aim is to address the research question of whether a more robust best interests standard that accommodates the interests of others during care home placement decision for a dementia patient by a family carer would be ethically and legally justified. The Dorset case therefore displays the theme of dementia in old age; autonomy and welfare; rights; care home placement; and the interests of family carers. The facts of this case are stated below.

In \textit{Dorset CC v EH} an eighty two years old dementia patient (EH) has been living alone and was becoming increasingly unable to maintain her own care. Furthermore, the support from her brother and his wife (EP and WP) was also becoming difficult to provide due to the discomfort of EH’s night calls and the strain on their own health.\textsuperscript{384} Proceedings commenced by the court of protection at the instigation of the local social

\textsuperscript{382} Winspear (n304) [63] ( Blake J) cf \textit{NT v FS and Ors} [2013] EWHC 684 [85] (Judge Behrens); J Herring (n380) 42.

\textsuperscript{383} Dorset (n364) [6] ( Parker J).

\textsuperscript{384} Dorset(n364) [12]; [42] (Parker J).
service were on two grounds. Firstly that EH lacked decision-making capacity with regard to her daily life and secondly that she was unable to look after herself. Application was sought consequently for reasonable and appropriate force to apply the restraint that is needful for EH’s transfer to a care home.385

The issues highlighted in this case centre broadly on the autonomy and welfare of EH and it reflects the grounds on which the proceedings were instigated in the first instance.386 In this regard, issues of maintenance of rights and accordance of dignity featured prominently in the discussion.387 This is due firstly to the issues of care home placement in respect of which the deprivation of liberty, which impacts on the rights of EH are evident. The issue of dignity also relates to her welfare. The other issue highlighted here is the failing health of the family carers of EH and the position of their interests and rights in this consideration.

The reflection in this case highlights EH’s position and the starting point stems from the doctrine of consent. The doctrinal principle of consent features prominently in the issue of decision-making capacity and the application of the best interests standard.388 In this respect the MCA instructs that a capacity test should be done to identify whether the individual has decision-making capacity.389 Where the individual lacks decision-making capacity, the MCA instructs the surrogate to make decisions in his best

387 ibid [44]; [124], (Parker J).
389 ibid.
interests. The principles of autonomy and welfare contained in this standard reflects the important role the doctrine of consent plays in medical law.\footnote{MCA 2005 ss 1,(5); 2; 3 & 4.}

The facts and the reasoning in the Dorset case are therefore of significance to this discussion in terms of the application of the principles of autonomy and welfare during decision making for care home placement of a dementia patient. Also, the implications that these issues present to inter-related interests during surrogate decisions where family carers are involved constitute important considerations. The Dorset case also displays philosophical concepts and models that inform on the outcome of the decision. Overall therefore, the Dorset case has implications for surrogate decision- making in health and welfare matters which would be useful in this investigation. The important matters highlighted in this case that will be discussed further are:

- The focus of best interests on the individual for whom it is applied.
- The tension between welfare and autonomy.
- The appropriateness of the philosophical concepts/ models of autonomy applied.
3.2 THE FOCUS OF BEST INTERETS ON THE INDIVIDUAL FOR WHOM IT IS APPLIED.

The decision in the Dorset case was based on the contention by the local authority that the placement of EH (an Alzheimer’s dementia patient) in a secure home will be in her best interests. However, the official solicitor’s contention was that there was insufficient justification for the interference with the vulnerable adult’s autonomy by such care home placement. In this respect the contention between autonomy and welfare can be noticed at once. It is therefore needful to consider how the statutory test of best interests was applied in this case based on the construction of the autonomy and welfare principles that are at play in this decision.

The first application in this proceeding was for a declaration that EH lacked capacity to decide where she lives. The burden this lays on the applicant is the proof of capacity assessment leading to a diagnosis of dementia, and that its presentations and effects have rendered EH incapable of making the decision about her residence under the provisions of sections 1 (2); 2; and 3 of the MCA. This led the Judge to ascertain proof of lack of capacity before proceeding to her judgement. Parker J stated as follows:

Dr Jeffrey’s and Dr Doherty are in agreement about the diagnosis and prognosis for EH. EH suffers from Alzheimer’s dementia. This is a progressive condition and there is no prospect of recovery. Her condition and functioning will only deteriorate over time and her care needs will increase. EH lacks capacity. She has an impaired function of brain or mind and she lacks the specific capacity to make decisions as to residential care, health, welfare and care. An agreement to

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this affect was recorded in the order of District Judge Jackson on 7 November 2008. She will not recover capacity. Her Dementia causes her to be unable to recall new information and she also has impairment of recall of past events. She has an impaired appreciation of risk.\textsuperscript{393}

This statement by Parker J evidently summarises the requirements of sections 1-3 of the Act which is a presumption of capacity that can be rebutted by means of capacity assessment, diagnosis and a confirmation of impairment resulting in incapacity. The judge cited the requirements of sections 1-3 of the Act, and also relied on the evidences supplied in assessments and tests in concluding that the requirements of sections 1-3 of the Act have been satisfied.\textsuperscript{394}

The ascertainment of capacity under the provisions of sections 1-3 of the MCA is an important first step before section 4 can be operational. Capacity is important because it is classed as a major factor in determining informed consent which has been established as a requirement of healthcare law.\textsuperscript{395} The determination of capacity also reflects the overriding principle of the MCA in relation to empowerment as a procedural medium to the application of best interests standard; the maintenance of individual right and autonomy as well as welfare. These issues have significant impact on the legal doctrine of consent addressed further on in this work.

Therefore, the approach of the Court in the \textit{Dorset} case is in accordance with the stipulation of the MCA in respect of its capacity assessment. This is also in line with the approaches applied in several other decisions relating to capacity and its assessment.

\textsuperscript{393} \textit{Dorset CC v EH} [2009] EWHC 784 (fam) [21] – [23] (Parker J), see also [41]; [70] (Parker J).
since the Act and reflects the correct position and application of the law.\textsuperscript{396} This is evidently a common law approach which presumes the full legal capacity of an adult unless proven otherwise.\textsuperscript{397} This common law position is also seen in a number of cases decided before the enactment of the Act.\textsuperscript{398} Therefore where the individual has been proven to lack capacity, the best interests standard which is based on the consideration of the autonomy and welfare interests of the incapacitated individual becomes applicable.

After the consideration of decision-making capacity in the \textit{Dorset} case, the Court proceeded to the determination of best interests under section 4 (1) - (7) of the Act. However, for the purpose of this analysis section 4 (4) – (7) comprise the major focus. The provision of section 4 (4) of the Act stipulates the encouragement of the vulnerable individual’s participation in the decision-making process.

In this regard the judge noted instances of previous discussions between EH and her medical practitioner and acknowledged that this condition has invariably been satisfied.\textsuperscript{399} The judge however acknowledged that at the period of her judgement, with regard to this requirement, no other steps were practicable.\textsuperscript{400} Evidently at the present

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{397} P Letts, ‘Mental Capacity Act 2005: The Statutory Principles and Best interests Test’ (2005) Journal of Mental Health Law 150, 152.
\item\textsuperscript{398} \textit{Re A (Medical Treatment: Male Sterilisation)} [2000] 1 FLR 549 (unnumbered paragraph) pg 3, (Dame Buttler-Sloss); See also, \textit{In Re T (Adult : Refusal Of Treatment)} [1992] EWHC Civ 18; \textit{Re C (Adult Refusal of Medical Treatment)} [1994] 1 FLR 31; \textit{Re MB (An Adult Medical Treatment)} [1997] 2 FLR 426.
\item\textsuperscript{399} \textit{Dorset CC v EH} [2009] EWHC 784 (fam) [68]; [70] (Parker J); cf \textit{The Mental Health and Others v DD & Another} (2014) EWCOP 11 [17] ( Cobb J ).
\item\textsuperscript{400} \textit{Dorset} (n399) [109] (Parker J).
\end{enumerate}
\end{footnotesize}
stage and in view of the advancement of the dementia of EH, it has clearly become impracticable to meet this condition.401

The complication presented in this case was based on determining between the competing factors of autonomy and welfare in relation to which should take priority over the other.402 It is without doubt that the intentions underlying the best interests provision under the Act include the promotion of the autonomy of vulnerable individuals and according them with dignity through surrogate decision-making.403 However an important question this case presents relates to the determination of the nature and ambit of the autonomy of the dementia patient which is being promoted. This is especially in view of the interplay between the dementia patient’s interests and the interests of others during surrogate decisions.404

The aim of the Act appears to be mainly centralised on the impact the incapacitated individual has on the decision being made, which has often been interpreted to be based on their wishes and desires.405 However the practicality of this perspective appears to render this aspect of the best interests provision as an ideal that is difficult and on occasions neither practicable nor achievable.406

403 MCA 2005, CoP para 1.3
404 Dorset (n399) [124] (Parker J).
405 Re M (Best Interests: Deprivation of Liberty) [2013] EWHC 3456 (COP) [38] (Jackson J); Westminster CC v Sykes [§10]; [§12] (Eldergill J); A NHS Foundation Trust and MS X [2014] EWCOP 13; Sheffield Teaching Hospitals NHS Foundation Trust v TH and Another [2014] EWCOP 4 [55] (Hayden J); Re W (Medical Treatment Anorexia);[2016] EWCOP 13; Law Commission NO 231 (London: H.M.S.O., 1995)
The central concern of this work is to investigate whether a more robust interpretation and application of best interests when other interests are evident would be legally and ethically justified rather than a sole individual focused approach during surrogate decisions in this context. The nature of surrogate decision during care home placement for an incapacitated individual suffering from dementia is therefore important to this investigation.

Although autonomy was noted to have a ‘continued role’ during best interests assessment, nevertheless the identification and determination of the nature of the autonomy to be exercised in this context would be useful in this investigation. This is because it is a key determiner of the type of interests that would be most suitable to be considered during such surrogate decision for care home placement. Nevertheless, various other issues arising from this consideration remain important queries surrounding this investigation.

The provision of section 4 (6) of the Act directly operates to protect the interests of the incapacitated individual. These interests feature in their past and present wishes and could be either autonomy or welfare interests. The provision mandates the decision maker to consider and reasonably confirm the past and present wishes and feelings of the incapacitated individual as well as their beliefs and values.

In the application of this provision in the Dorset case, the judge acknowledged the lack of direct evidence of EH’s past and present feelings and was therefore compelled to rely on evidences from the social service employees handling EH’s case, EH’s doctor and

407 M Donnelly (n406) 13.
her daughter. The first challenge on this issue is the lack of direct evidence. This is evident in situations where an advanced dementia suffer has no advanced decision written.

The effect is that although the Act desires individual participation and promotion of the autonomy of the incapacitated individual such as a dementia sufferer, however direct involvement are sometimes difficult to achieve or not achievable at all. In the case of Re DD for instance, Cobb J lamented not only the fluctuating expressions of DD’s past and present wishes but also the difficulty of obtaining her partner’s wishes and the incoherence in his available expressions. This exposes an aspect of the impracticality encountered in best interests assessments where its base is mainly individualistic. The application of an individualist model in this situation would comply with the legal mandate under the MCA but its ethical justification remains an issue of concern.

The second challenge in this respect is in the interpretation of the views and feelings of the incapacitated individual if evidences of such views exist. The challenges of the judge in arriving at a conclusion on this in the Dorset case for instance were numerous. They include the consideration of the various statements of evidences of a variety of people concerned over a period and range of time; making sense of conflicting statements; and making inductions and deductions from such statements.

The risks in this approach are twofold. One lies in merely acknowledging the incapacitated individual’s view without such view actually affecting the decision to be arrived at: while the other risk leads the decision maker to invent and interpret the

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408 Dorset (n399) [110]-[114] (Parker J).
409 MCA 2005 s 24
410 The Mental Health Trust and Others v DD and Another [2014] EWCOP 11
411 MCA 2005 s 1 (5) MCA (2005); Mental Capacity Act 2005, CoP para 5.38.
412 Dorset (n399) [110] (Parker J).
wishes of the individual to accord with the decision maker’s views. In both of these risks the outcomes frustrate the intension of the law and leads to the need for a strict scrutiny of the emphasis on individualism in best interests applications. This approach is also strictly subjective, and often presents conflicts with objective assessments in a best interests decision.

In relating this to the Dorset case, the issue of conflicting accounts of past and present wishes were seen. The Court had to consider for instance two accounts of EH’s past wishes in respect of residence in a care home. While the community service worker (CA) interpreted previous conversation with EH as indicative of her willingness to reside in a residential home, her consultant’s account stated her decline of such a proposition.

In view of these conflicting accounts, the Court noted that implementing the account which expressed EH’s wish to remain in her own home would be unrealistic due to welfare risks. The Court regarded the account provided by CA as being realistic and as the right expression of her wish. This evidences the difficulty in interpreting past wishes of individuals with advanced dementia, where such wishes are incoherent or in conflict.

Finally, the provision of section 4 (7) was considered in the Dorset case. This provision involves taking into account and consulting others when practicable and appropriate to do so. This features the following; an aspect of the introduction of an objective element

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415 Dorset CC v EH [109] (Parker J).
416 Ibid [130] (Parker J).
into a subjective assessment of best interests by the Act instructing consultation with others. It was suggested in the case of *ZH v Commissioner of Police for the Metropolis* that this should be ‘fact sensitive’ in terms of the stipulation for its practicality and appropriateness.417

Furthermore, that the information derived from this undertaking must be directed to a subjective use, in that such information should only serve the best interests of the incapacitated individual.418 It should be recalled that this provision assumed central focus in the *Winspear*’s case discussed earlier and the issue is whether this provision can accommodate the interests of the family carer. This point displays the distinction between the autonomy and welfare issue and the individualist model in this case.

The *Winspear*’s case and ZH’s case for instance reveal a strict interpretation of section 4 (7) provision in favour of accommodating only the interests of the incapacitated individual.419 Only the case of *Re DD* in contrast displayed a tendency towards the consideration of the interests of others in a best interests assessment. Although the Court had no opportunity to enforce such interests in that case, nevertheless it acknowledged that the interests of ‘BC’ were derived from his human rights.420

This indicates that in the consideration of the best interests of incapacitated individuals where the individualist model is applied, the human rights of close intimates such as family carers or relevant ‘other s’ may stand the risk of being violated. Consequently, this fact therefore challenges the legal and moral justifications of an objective and

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419 Ibid.
420 *The Mental Health Trust and Others v DD and Another* [2014] EWCOP 11, [17]) (Cobb J); see also *K v LBX* [2012] EWCA Civ 79, [36] (Thorpe LJ); [54] (Black LJ).
subjective best interests assessment which is based on the concentration of the interests of the incapacitated person alone. This reflects the application of an individualist model especially in the context of a family caring relationship which is the setting of this thesis.

The cases of *Re P* and *Re NT and Ors* were not directly focussed on the provision of section 4 (7), however, these cases remain instructive on the introduction of moral considerations in best interests assessment. This moral consideration is particularly useful in a caring relationship and it appears to operate to accommodate the interests of others.

This emphasises the point that the assessment of best interests does not comprise solely of legal consideration but also accommodates ethical considerations. The ethical consideration does not lay a moral duty only on others towards the claimant but also on the claimant towards others. It is in this sense that the research question in this work becomes relevant in addressing the query of whether a more robust application of best interests that accommodates the interests of others would be legally and ethically justified. This consideration is necessary since the interpretation and application of autonomy and welfare both statutorily and judicially protect mainly the autonomy and welfare interests of the incapacitated person.

Furthermore, with respect to the interest of others, it promotes an individualist model during best interests assessments. This is reflected in both the subjective and objective consideration of the standard. It is under these circumstances that the ethical

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422 Ibid.
justification of a more robust consideration of best interests becomes relevant. The
*Dorset* case will be examined in this respect particularly with regard to the caring
relationship existing between the parties.
3.3 THE POSITION OF A CARING RELATIONSHIP IN THE DORSET CASE:

In the Dorset case the Court acknowledged the contributions of carers, particularly family carers (EP and EW) to the care and welfare of the incapacitated individual (EH). In compliance with the provision of section 4 (7) the Court noted as follows:

‘By Paragraph 7 of the Act I must take into account the views of anyone engaged in caring for her or interested in her welfare. The views of EP, WP, CR and PH are of considerable importance. They know her best, and EP and WP bear the brunt of ‘‘out of hours support’’ of EH. I take into account not only their views but the risks to EH if that support cannot continue’’. This dictum emphasised the mandatory nature of this provision in best interests assessment during surrogate decisions. It also introduced an objective element into this assessment. The dictum further recognised the important contributions of carers. It particularly noted that the family carers bear extra responsibilities which impact on their private lives in terms of their health and welfare. The existence of both caring and family relationships which impacts the life of the carers in this way would no doubt affect their interests and rights. However, the Court went on to relate the contributions and interests of the carers primarily to the best interests of EH. The primary concern of the judge was evidently the risks to EH if the support of these family carers was to stop. In this respect the individual interests of EH continued to be the primary concern in this best interests assessment.

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424 Dorset (n399) [2009] EWHC 784 (Fam) [115] (Parker J).
425 ibid [115]; [92] (Parker J).
426 Glass v UK (n319); Dordevic v Croatia (n319); J Herring, Older People in Law and Society. (Oxford 2009) 110-117.
This is regardless of the fact that at this point the interests of others (EP and WP) are involved and are significantly tied with the interests of EH. These interests further represent conflicting interests. Nevertheless, the inconveniences and exhaustion experienced by EP and WP received mere acknowledgement while the judge followed strictly the provisions of the MCA.

Furthermore, in granting the placement of EH in the particular care home, the judge noted the advantage of proximity during visits by the family. However, this was not meant to be for their own advantage and interests or shared advantages and interests but solely for the continued advantage and interests of EH. This highlights the concern on the objectiveness of the best interests provision when applied solely for the subjective purpose of the incapacitated individual.

It is important to note that in considering the sole interests of the incapacitated individual the legal requirement appears fulfilled since this is what the law demands, but it leaves the issue of moral obligation, which should recognise the interests of all parties in a caring relationship at jeopardy and raises concern on the ethical ground of the individualistic consideration and individualist model evident in best interests assessment and applications in this context. In the case of Glass v UK and Dordevic v Croatia a different approach was adopted, and the rights of the family members were not only affirmed but upheld leading to an award of damages. Although it should be noted that Glass v UK was decided before the MCA and the approach adopted by the Court on appeal was mainly based on human rights.

427 Dorset (n399) [92] (Parker J).
The interpretation and application of section 4 (7) of the Act in best interests decisions as seen in the earlier cases considered, and also in the Dorset case show a strict and narrow interpretative trend that works adversely in a caring relationship. This trend highlights an individualistic consideration and the application of an individualist model amidst growing concern especially in circumstances where the interests of others are involved in such decisions.

The extent of the effect of an individualistic application of best interests where there are joint interests of the incapacitated individual and the family carer are apparent. Therefore, the justification of the individualistic application of this standard is called into question. It further raises the fundamental question of what the nature of the interests should be when the interests of the surrogate decision-maker are tied to the interests of the incapacitated individual.

The feature of a joint, inter-twined and inter-related interests occur in most surrogate decisions involving family carers and sometimes these interests conflict and compete. This is a common feature particularly with family carers of dementia patients due to the different presentations of the impact of care on them as can be in the Dorset case. However, with regard to the family carer’s situation in surrogate decision-making, the relegation of their interests and rights remain a major ethical concern and it is addressed in this work.

428 ‘Text to n344 ch 2’.
431 Dorset (n 399) [47]& [99] (Parker J).
In the case of a family carer whose health is failing for instance, a decision to place the dementia patient in a care home would be passed on as the best interests of the dementia patient and nothing to do with her health. This view is clearly seen in the Dorset case.  

432 This does not reflect the total reality of the situation. In this respect Tsou and Karlawish stated as follows:

[W]ith increasing disability caregivers can experience both physical and psychological exhaustion; clinicians should be aware that the strain on care givers may not only affect the care they provide but also the judgements care givers make as surrogate decision makers. As the well-being of the care giver is central to dementia care. Clinicians must attend to caregivers as well as patient’s needs and in essence may find themselves caring for two patients instead of one’. 433

Tsou and Karlawish here admitted some points relevant to the interests of caregivers. Firstly, that the increasing disability of the dementia patient increases the impact of care on the care giver. Also, that this could lead to strain which affects surrogate decisions by the care giver. The authors acknowledged that the well-being or welfare of the carer is central to the care they give. In essence the welfare interests of the carers themselves become relevant in a surrogate decision for the dementia patient under this circumstance. Although the authors advocated that both the needs of the patient and the care givers are important they did not state which should be prioritised. The concept of

432 Ibid [92] (Parker J).
the best interests standard however prioritises the interests of the incapacitated individual over the interests of others.\textsuperscript{434}

While building on the feminist conception of the relational self, Ho noted that the prioritising of patient’s interests marginalises the concerns and well-being of intimates and renders them morally irrelevant.\textsuperscript{435} Gilbar for instance noted the emotional and caring involvement of family members,\textsuperscript{436} and located a joint interest of both the patient and the family in sharing genetic information in this respect.\textsuperscript{437} These views reveal that there can be occurrences of joint or related interests during surrogate decisions.

However, the questions remain how such joint interests are placed in a best interests decision.

In summary, the \textit{Dorset} case shows clearly that the autonomy and welfare interests of incapacitated person constitute important consideration in best interests assessments, however it also displayed the relevance of the relational and caring role of family members. This case displayed the effect of the dementia on family members. It also showed that the implication of the decision for care home placement is not limited to the dementia patient but affects the family members who are involved in this caring relationship. Parker J for instance balanced the autonomy and welfare interests of EH in deciding care home placement for her,\textsuperscript{438} but also noted the strain of care on the carers particularly with respect to EP’s health.\textsuperscript{439} The \textit{Dorset} case therefore sheds a bright light

\textsuperscript{434} MCA 2005, CoP para, 5.8; Sheffield Teaching Hospitals NHS Foundation Trust v TH and Another [2014] EWCOP 4 [53]-[56] (Hayden J).

\textsuperscript{435} A Ho, ‘Relational Autonomy or Undue Pressure? Family Role in Medical Decision-Making’ \url{http://nursing.ouhsc.edu/palliative-care/documents/relational-autonomy-ordue-pressure.pdf} 128,131.

\textsuperscript{436} R Gilbar, \textit{The Status of the Family in Law and Bioethics: The Genetic Context}. (Ashgate 2005) 50-59

\textsuperscript{437} ibid 69-76.

\textsuperscript{438} Dorset (n 399) [133] (Parker J).

\textsuperscript{439} ibid [47] (Parker J).
on how the effect of care impacts on the family carers and how their interests and rights are considered under the MCA.

This is important in view of the research question posed in this work in respect of the justification for a wider/robust application of best interests to accommodate the interests of others which is considered here in a caring relationship particularly in the care home placement of a dementia patient. It is based on this that a rational approach to the assessment of best interest is needful in the context under consideration.
3.4 THE NEED TO APPLY A RATIONAL APPROACH IN CASES OF TIED INTERESTS IN A BEST INTERESTS DECISION:

It is apparent that although the mandatory instructions of the MCA is that best interests standard should be applied in surrogate decisions for the incapacitated individual, the application of this principle presents with difficulty where there are interplay of interests. This is due to impracticalities and moral injustices resulting in relation the position of the rights and interests of family carers. These lead to the examination of the constituents of best interests itself which consist of legal and ethical principles. In view of the difficulty seen in the direction of the best interests standard under the legal provision resort is to the explanations of the ethical principles which underpin this provision.

The ethical principles indentified in this provision consist of the concepts of autonomy and welfare. With respect to the concept of autonomy the ethical approaches considered in this work relates to the deontological; consequentialist; communitarian and relational approaches to autonomy. The relational approach would be considered in more dept due to the presence of relational interests identified in the family /carer relationship.

Furthermore the concept of individual well-being is also well pronounced within the best interests concept. However the concern lies mainly in the philosophical understanding and application of the concept of autonomy which has had the tendency to influence the individualistic outlook of the best interests application. It is therefore

for this reasons that more attention would be given to the operations of individual autonomy in this work.

This involves an inquiry into the appropriateness of an ethical approach that would be relevant in the circumstances of tied or conflicting interests of a dementia patient and the family carer in the context of care home placement decision in view of the research question pursued in this work.
3.5 THE TENSION BETWEEN WELFARE AND AUTONOMY

The Dorset case featured the interplay of both the concepts of autonomy and welfare as well as conflicts between them leading to the suggestion of tension and the question of which of the two should trump the other. The relevance of this section highlights the nature of autonomy and the constituents of the well being of an incapacitated individual. It addresses not only the components of autonomy but types of autonomy. This leads to the need to identify which understanding of autonomy would be most suitable in surrogate decisions by a family carer for a dementia patient.

The issue of what constitutes welfare for an incapacitated individual is also an important aspect of the discussion. It pertains not only to legal significance but also to psychological and philosophical significances.441 The psychological definition of welfare relates to the emotional state of the individual and makes happiness central to the well being of the individual. It views happiness basically as a mental state.442 The subject of individual well-being has also been of interest to philosophers. The tendency in philosophical parlance is to view the issue from the stance of happiness and to combine a state of the mind and a life that goes well for the individual. To this extent the philosopher goes beyond the mental state to the constituents of the actual life lived by the individual.443

443 Ibid.
The philosopher’s view therefore encompasses well-being, utility, welfare and the flourishing of the individual. To this extent its nature relates to prudential value. Authors have seen the inter-relation of the two approaches, and suggest the combination of the two in the determination of individual welfare. Bishop for instance is of the view that the study of wellbeing must be based on a joint approach. Whereas psychological interests in well-being leading to experimental studies and treatment regimes have been more recent. The philosophical interests on the issue dates back to the millennia.

The deliberations of judges in attempting to identify welfare issues can be seen to encompass both the psychological and philosophical concepts of individual well-being. The cases considered in this respect involve welfare assessments of best interests both under the common law and the Act. In the case of Re MB (Caesarean section) for instance, a pregnant woman who needed a caesarean section refused to have anaesthesia due to her needle phobia. Butler-Sloss LJ in that case stated that the woman was ‘likely to suffer significant long-term damage if she was not operated upon and the child was born handicapped or died’. This damage related not only to the physical well being but also to the psychological and emotional wellbeing of the woman. Furthermore the Court in this case likened best interests assessment to welfare assessment in children’s cases.

446 M Bishop (n445) 208.
448 Ibid.
450 Ibid.
Welfare issues often form a major part of the deliberations in the decision for care home placement of an incapacitated individual following the diagnosis, and severe presentations of dementia as seen in the **Dorset** case.\(^{451}\) Therefore while the surrogate decision maker aims at aiding and promoting the autonomy of the incapacitated individual, the welfare of such individual must also be well catered for within the provisions of the MCA.\(^{452}\)

The problem is that conflicts do arise regarding whether welfare considerations should take priority over autonomy and also regarding the question of which welfare matter should take priority. This issue highlights the importance of the categorisation and classification of the interests of the incapacitated individual. These conflicting interests and the difficulties arising in the accurate placement of interests often lead to tension between autonomy and welfare.\(^{453}\) The perception of autonomy in this context relates to the concept of autonomy as the independence, freedom or liberty of an individual to do what he wishes.\(^{454}\)

In the **Dorset** case, the tension between autonomy and welfare were apparent from the onset of the case to the point of the final decision of granting the placement of the patient in a care home. The local authority contended in that case that placement was in the best interests of EH and provided evidences of the risks of EH’s continued independent living at home. The risks listed included the following; leaving home

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\(^{451}\) *Dorset CC v EH* [6] (Parker J).

\(^{452}\) s 4 (5); (7) (b); (10); ss. 5,7 & 8.


without sufficient clothing; wandering and getting lost; inadequate food intake; inability to self-medicate as prescribed and failure to recognize fire hazards.\textsuperscript{455}

Whereas the official solicitor’s contention was that these were insufficient justifications to interfere with the autonomy of a vulnerable adult. An important issue considered in this case was how these risks might be reduced. The official solicitor favoured more social welfare input from the local authority, while the local authority contended on the impracticalities and the futility of such input to curtail these welfare risks.\textsuperscript{456}

The case for the official solicitor can be seen to be premised not only on the psychological view of welfare but it also encompasses the philosophical outlook that considers the well being and flourishing of the individual. The risks to which EH was exposed were perceived to have negative impact on her well being. The approach adopted by the Court was a welfare assessment that balances the risks against the benefits to be derived from care home placement for EH, which involves the deprivation of her liberty and impacts on her autonomy.\textsuperscript{457} The balancing approach is in line with that adopted in cases that have preceded this decision and can be stated to reflect the right intensions of the law as interpreted by the Courts. This is to the effect that welfare considerations are important constituents of best interests.

It is in this background that the deprivation of the liberty of EH’s was considered. Parker J noted that care home placement will involve the deprivation of the liberty of EH which will lead to the violation of her right under Article 5 of the ECHR. As a result Parker J stated the relevance of section 4A of the MCA in relation to the standard

\textsuperscript{455} Dorset (n 399) [24] (Parker J).
\textsuperscript{456} Ibid [30]; [31] (Parker J).
\textsuperscript{457} Ibid [123] (Parker J).
authorisation for the deprivation of liberty.\textsuperscript{458} Furthermore, The Court also noted that the DOLS provides useful guidance and direction in this determination.\textsuperscript{459} This brings the judgement not only in compliance with the requirements of Article 5 the ECHR but also in accord with Article 14 (1) (a) and (b) of the CRPD stated below.

The decisions before the \textit{Dorset} case and after it have had remarkable influence on the issue of deprivation of liberty particularly with reference to admissions into hospitals and care homes.\textsuperscript{460} In this regard the case of \textit{HL v The UK} is relevant. The incapacitated person (P) was informally admitted into hospital and denied access to his carers for the period of 3 months. The ECtHR held that P had been denied his liberty. The House of Lords had considered the case from the perspective of unlawful detention under the common law. However, the ECtHR considered it from the perspective of the deprivation of liberty.\textsuperscript{461} It was in these circumstances that the Court held that P’s Article 5 (1) and (4) had been breached.

This case affirmed and strengthened the Article 5 right of incapacitated persons, and made the case for the application of appropriate guidelines and procedure seen in the DOLS during hospital and care home admissions for vulnerable persons. The \textit{Dorset} case therefore specifically acknowledged the Article 5 right of EH under the ECHR and the application of safeguards under the DOLS in compliance with the legal requirement.\textsuperscript{462} Furthermore the provision of Article 14 (1) (a) & (b) of the CRPD provides for the enjoyment of liberty and security for persons with disability. It also

\textsuperscript{459} Dorset (n399) \[118]\&\[121] ( Parker J).
\textsuperscript{460} \textit{HL v The United Kingdom} [2004] ECHR 471; \textit{P v Cheshire West and Chester Council and Another} [2011] EWCA Civ 1257; [2011] EWCA Civ 190
\textsuperscript{461} \textit{HL v The United Kingdom} [2004] ECHR 471 [120]; [121]; [122] \&[140] [(Mr M Pellonpaa )
\textsuperscript{462} Dorset (n399) \[118]\&\[121] ( Parker J)
prohibits the unlawful or arbitrary deprivation of liberty. It stated specifically that the existence of disability shall not justify the deprivation of liberty.

Although the case of *HL v UK* highlighted the plight of vulnerable persons in respect of the violation of their Article 5 right during institutional admissions yet it leaves uncertainty in respect of the precise test of the circumstances constituting deprivation.463 This issue has been made clearer in the case of *P v Cheshire West and Chester Council and another* where it was stated that the ‘acid test’ for the deprivation of liberty consists of an individual being under continuous supervision and control and not having the freedom to leave.464

Where care home admission is contemplated, there is no doubt that the features constituting deprivation of liberty as is defined in this case would be present. This is particularly in relation to the medical condition, presentations, treatment and care of dementia. It is therefore important that where deprivation is considered necessary by care home admission then the safe guards should be applied. Although the *Dorset* case was decided before the Cheshire West’s case however the appropriate application of the law and the safeguards were evident in the former case.

It is however noted that the lists of benefits and risks drawn by the Court in the *Dorset* case in the balancing exercise consist entirely of benefits to the incapacitated individual, although the Court stated the impact of the burden of caring for EH on her family

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carers.\textsuperscript{465} This observation is crucial to this work in respect of the individualistic interpretation and application of the best interests provision and the model applied here.

The official solicitor’s case based on the principle of autonomy advocated liberty and freedom for EH to live in her own home despite the evident risk to herself and the inconveniences of giving care by the family carers. The official solicitor stated that autonomy should be the overriding principle.\textsuperscript{466} This stand at once creates a tension between welfare and autonomy. Furthermore the view of autonomy in this case reflects the liberal approach to freedom, which relates to the expressions of an individual’s wishes and desires. This stance is distinct from the relational approach to autonomy which takes into consideration the autonomy and rights of others.\textsuperscript{467} However by the acknowledging of the support to the dementia patient, an inter-dependent relationship is recognised albeit duty in this instance appears to be one directional.\textsuperscript{468} This has been one of the criticisms against the deontological approach’s understanding of autonomy.\textsuperscript{469}

In the \textit{Dorset} case, the Court noted that although the family carers of EH, (EP and WP) live apart from her, nevertheless they still contribute to EH’s welfare by taking her to shops and answering midnight telephone calls at their own discomfort.\textsuperscript{470} EP and his wife are in their mid 70’s and EP’s eyesight was beginning to deteriorate.

\begin{itemize}
\item \textsuperscript{465} Dorset (n399) [99] (Parker J).
\item \textsuperscript{466} Ibid [124] (Parker J).
\item \textsuperscript{467} J Herring, ‘Forging a Relational Approach: Best Interests or Human Rights?’ (2003) Medical Law International 32, 41.
\item \textsuperscript{468} Dorset (n399) [47]; [48] (Parker J).
\item \textsuperscript{470} Dorset (n 399) [47]; [48] (Parker J).
\end{itemize}
Furthermore the occurrences of midnight phone calls from EH further disturbs their sleep and could lead to adverse health issues. As a result there is no doubt that an adequate and appropriate plan for EH’s welfare would also improve their own welfare. This is because EH’s welfare was tied to their own welfare. Consequently, the facts presented are clear indicators of joint and conflicting interests that affect the rights of all the parties concerned. These also display a relational autonomy in the sense that the exercise of the autonomy of the individuals concerned in this case should be reflective of the existing relationship between them.

However, although the Court noted the important role of the family carers, it missed the opportunity to highlight their rights which it suppressed under the individual autonomy and welfare of the incapacitated person. The concentration of best interests provision on the dementia patient alone as decided in the present case under the MCA evidently denies the realities and practicalities involved in of surrogate decision-making in a family caring context considered in this thesis. It further shows how the individual approach overlaps with the application of an individualist model in best interest assessment involving the interest of others.

In regard to this discussion, the case of Glass v UK is quite illustrative of a family caring role and commitment. It also evidenced joint interests and rights, and the approach of the Court in this case was clear. Where a joint claim was advanced by a son and mother the Court found the existence of rights and interests arising from the relationship, and also as a result of the care provided by the family member.471

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471 [2011] ECHR 1664[87] (Mr M Pellonpaa, Presiding as President of the ECtHR).
The Court had no difficulty firstly in locating that the existence of the interest and the right of the carer arose from the relationship existing between the two, and secondly that the effects of any decisions made on the care of the first claimant in that case affected the second claimant also. Furthermore, in *Dordevic v Croatia* in holding that the rights to private and family life of a mother was violated as a result of the discriminatory behaviours to her disabled son, the Court acknowledged the interconnective nature of interests and rights in this family caring context.472

While connecting the issues of interests and rights of carers to the decision in the *Dorset* case and the application of the individualist model under the MCA certain relevant observations were made. These are seen in the fact that although the interests and rights of family carers were recognised in the *Dorset* case, their bearings on the decisions were related to the interests of the incapacitated individual.473

Furthermore, the estimations of their interests were not considered as warranting a right to private and family life that should also be protected. For instance the interests of EP and WP did not amount to rights even though there were evidences of harm to them.474 The concern of the Court was in promoting the autonomy and welfare of the dementia patient in that case as directed under the MCA.

This approach clearly violates the justification of the principle of harm in curtailing individual liberty,475 respect for the rights of others,476 and the application of the principle of proportionality in resolving conflicting rights.477

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472 [2012] ECHR 1640 [151]; [152] & [153] (Mr A Kovler, Presiding as President of the ECtHR).
473 ‘Text to n 470’.
474 Ibid.
475 Article 5 (1) (a)-(f); D Ogunkoya, ‘John Stuart Mills “Harm Principle” as the Foundation for Healthy Social Relations’ (2011) The Journal of International Relations’ 516, 518.
The curtailment of individual liberty where harm to others is evident is endorsed both under the law and in ethical philosophy. Furthermore, according respect to individuals demands that they should be treated as an end in themselves and not as a means to an end. Lastly where conflicting interests are present as was seen in the *Dorset* case, rather than relegating the relevant interests of the carers to the background the proportional consideration of the interests presented will be ethical.

The principle of proportionality is applicable to human and constitutional rights law. This principle is applied as a test in determining the justification for interfering with a prima facie right. Booth noted the tendency of rights to compete and conflict. The author therefore stated that the search for a fair balance between rights and freedom is at the heart of the HRA. The exercise of the principle of proportionality therefore becomes vital and relevant where an assessment for the justification of an interference with a qualified human right will be considered necessary in a democratic society.

The doctrine of proportionality has been applied in a number of cases in the UK. In *Brown v Stott* (Procurator Fiscal, Dunfermline) and another, a lady who was being prosecuted for theft and driving under the influence of alcohol contended against the use

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476 Ibid.
478 ‘n475’; ‘n477’
483 Ibid 5.
484 Brown v Stott (Procurator Fiscal, Dunfermline) and Another [2001] 2 All ER 97; McIntosh v Lord Advocate and Another [2001] 2 All ER 638; Wilson v First County Trust Ltd [2001] 3 All ER 229; Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and Another [2001] 3 All ER 393.
485 Brown v Stott *(n484)*
of her confession to the second count based on her right under a Article 6 of the ECHR. The Court held that the doctrine of proportionality was applicable; therefore it balanced the right to fair hearing of the appellant under the ECHR against the interests of the community in upholding the admission of the confession as evidence against her in that case.

The different stages of the application of this test which consist of the existence of a legitimate goal, suitability, necessity and balancing are important in endorsing a moral outlook to conflict resolution. An important aspect of the application of the proportionality principle involves ‘balancing all the relevant considerations’ 486 In this regard all the interests and rights involved would of necessity be considered and none would be relegated. Moller noted that ‘the outcome of this exercise of practical reasoning is that it is impermissible to kill the one’ .487

In essence all the interests involved must be weighed and balanced. In contrast to this perspective, neither the interests nor the rights of the carers were of significance to the decision in the Dorset case . It can therefore be deduced that the MCA does not adequately recognise or cater for the rights of others. This is in respect to the direction for an individualist model in best interests assessment and application.488

In addressing the Dorset case with reference to these principles, although harm was noted to the carers of EH in relation to health, and interference with family and private life, yet these constituted no justification for the interference with the right to individual autonomy and welfare of EH under the MCA. Furthermore the application of the

486 K Moller (n481) 716.
487 Ibid.
488 MCA 2005, CoP para 5.38.
weighing and balancing process in the assessment of best interests in this case was contrary to the application of the principle under the doctrine of proportionality.

Whereas under the MCA the issues that are qualified to be weighed are those related to the best interests of EH. In this respect it is an individualistic approach and it is in opposition to the doctrine of proportionality. Therefore, with respect to this doctrine the rights of EP and WP in the *Dorset* case should be important considerations arising from their relationships and the care they give.\(^489\)

In applying this to the research question, the application of the best interest standard under the MCA consist of the consideration of the autonomy and welfare of the incapacitated individual which is the legal stipulation as is evident in the *Dorset* case. However the application of the same standard where the rights of others are involved would necessitate a wider outlook and the justification for this approach lies in ethical considerations which are seen in the principles of harm, respect for persons and the doctrine of proportionality.

This will entail the consideration of the harm and the injustice that the application of an individualist model will generate where other legitimate interests and rights are present. This issue is addressed in chapter three of this work where research evidences have revealed the plight of family carers of dementia patients. Furthermore, it will involve the consideration the moral value of everyone involved in the decision in terms of according respect and dignity to them. Finally, it will involve the balancing of all interests and rights of the individuals concerned resulting in a moral outlook to resolving conflicting interests.

\(^489\) *Glass v UK* (319); *Dordevic v Croatia* (n319)
The understanding and applications of the concept of autonomy have played an important role in the individualist model applied, although the concept of welfare is also significant. However the concept of welfare appears less complicated than autonomy since the psychological and philosophical conceptions of welfare are often combined during its consideration. Autonomy has various conceptions that are prone to lead to divergent and conflicting outcomes.\textsuperscript{490} It is therefore needful to explore the concept in more details in order to locate the appropriate concept desirable during surrogate decisions of this nature.

\textsuperscript{490} G Birchley (n80) 22-24.
3.6 THE APPROPRIATENESS OF THE PHILOSOPHICAL CONCEPTS AND MODELS OF AUTONOMY IN THE DORSET CASE

The philosophical concepts of autonomy that are identified as underlying the approaches in the Dorset case are diverse. However the three prominent philosophical theories of autonomy identified in this decision are the utilitarian consequentialist theory; Kant’s deontological theory and the rights theory. These theories appear to contend against each other for dominance in the camps of the local authority and the official solicitor for EH.

The Local Authority’s contention for instance was based on EH’s welfare which features prominently in the utilitarian consequentialist theory of autonomy. The value of wellbeing under this philosophical concept is analysed amongst others in terms of welfare.491 The relevant aspect of this theory with respect to the case considered is the pursuit and achievement of the welfare of EH in which placement in a residential home appeared to be the reasonable outcome.

In this respect welfare consideration should be seen as fostering the dignity of EH. In the utilitarian view therefore welfare considerations play an important role in the autonomy of individuals. In this regard to insist on disengaging the two principles would result in a narrow conception of autonomy. Consequently Dunn and Foster have suggested that ‘(....)These two principles should be seen, in fact, as amici curiae’.492

The other contending approach is the Official Solicitor’s views of autonomy firstly as freedom and self determination. Secondly the official solicitor’s view of autonomy also leans on the deontological approach in terms of the duty owed to the dementia patient. This duty is to preserve independence and dignity of the dementia patient by social welfare provisions from the state in terms of the provisions of support for EH and from the family.

These supports are aimed at enabling EH to live independently at home. It is noteworthy that the interpretation of dignity itself appears conflicting in both consequentialist and deontological approaches. While the former theory appears to curtail autonomy to achieve dignity in terms of welfare provision, the latter theory appears to be adverse to such curtailment regardless of the welfare risks involved.

The issues these present are how risks are to be curtailed in this circumstance in order to accord dignity to the dementia patient. Furthermore in choosing which of these approaches would best promote the autonomy and invariably the dignity of the dementia patient. Lastly in deciding what should be the constitution or nature of the autonomy that is appropriate in this context. In a quest for a solution, an examination of the various philosophical concepts of autonomy would be done. This would reveal whether an extreme reliance on any one of these approaches is practicable in the application of autonomy in the context considered in this work.

A third philosophical approach identified in the Dorset case is based on rights. In this regard the human rights to liberty and security of EH were considered. The consideration was whether the rights to privacy and dignity would be infringed by granting the care home placement of EH. The judgement of Parker J revealed that
welfare considerations would not arbitrarily erode the autonomy and rights of a dementia patient. However that in some contexts such as the case under consideration the concepts of autonomy and rights could be modified and curtailed in order to promote the welfare of the dementia patient while taking into consideration the required approach to deprivation of liberty.493

Whilst the internalist and procedural models of autonomy cannot be properly located in the Dorset case evidence of the features of the substantive model exist in the case. The substantive model of autonomy which is value laden leads to restrictions on the content of an autonomous agent’s preferences (strong substantive model) or stipulate some necessary conditions (weak substantive model). 494

The justification for the application of the strong substantive model is explained thus: ‘where a person wishes to engage in activity which impairs their future ability to live autonomously, intervention is justified’.495 Although this approach stands the risk of criticism as being paternalistic and individualistic in nature, the local Authority’s view in the Dorset case tends to favour this approach. However, the relational model of autonomy is stated to offer an alternative to the individualistic conceptions of other models such as procedural and substantive models. With regard to the relational model of autonomy Ashley stated as follows:

‘The distinction has proved particularly relevant and influential in social care settings, where decision-making can often be seen to take place within “decision communities”’, in which others take a role in supporting a mentally

493 Dorset CC v EH [2009] EWHC 784 (Fam) [136] [118]; [121] (Parker J).
494 Essex Autonomy Project (EAP), Philosophical Models of Autonomy (V Ashley, 2012) http://autonomy.ac.uk/wp.content/uploads/2012/10/essex
infirm individual to make important choices including those people whose interests may be affected by that choice’.496

In summing up the reflections on the Dorset case, the dictum of Parker J in respect of EH’s carers EP and WP is particularly useful. The Judge acknowledged the views of EP and WP as well as their contributions and support to EH’s care. The effect these contributions have on their own wellbeing was further recognised by the Judge.497 This highlights the fact that the wellbeing of intimates rather than that of dementia patients alone are affected in this circumstance. As a result the interests generated would relate not only to the best interests of the dementia patient but also to the interests of relatives who are affected by the care they give.

Flowing from this, it can be noted that, there exist a plurality of interests which are interrelated. These interests can be seen as the autonomy and welfare interests of all the parties concerned. However the Dorset case evidently highlighted the principle of individual autonomy for the incapacitated individual while welfare considerations were generated from the benefit to the incapacitated individual alone, as a result it displayed an individualist model.498

This therefore recognises not only the problem in the application of autonomy but also in the perception of welfare. The concept of autonomy consists of various understandings and a wrong understanding and application of the concept is likely to present undesirable outcomes in different context of its application. This highlights the

496 Ashley (n495) 18.
497 Dorset (n493) [115] (Parker J).
498 ibid [89];[92]; [115] (Parker J).
fact that the appropriate understanding of autonomy should be located, and applied to the relevant context.\textsuperscript{499}

The utilization of the three major philosophical concepts of autonomy have been clearly identified in this decision, each of which has relevance to the welfare and the autonomy of the dementia patient in varying degrees. However, by concentrating on the best interests of the dementia patient alone this decision tends to lean heavily on an aspect of consequentialist theory which is derived from utilitarianism and features basically as individualism.\textsuperscript{500} The same applies to the model of autonomy applied.

However while the principles of welfare has been clearly defined and applied, the understanding and application of autonomy continues to pose a challenge. Having considered the relationship between these core principles in the Dorset case, this work will now consider the philosophical aspects of autonomy and welfare.

The concept of autonomy will be considered in greater details in a bid to identify and justify the appropriate nature of its application during surrogate decision involving others. It would further discuss the implication of this during surrogate decision for care home placement of the dementia patient by a family carer in the next section of this work.


THE PHILOSOPHICAL CONCEPTS OF AUTONOMY AND WELFARE AS AN ETHICAL CONSTRUCT:

3.7 THE CONCEPTS OF AUTONOMY AND WELFARE

The concepts of autonomy and welfare feature as legal and ethical mandates. The legal mandate demonstrated in the application of both concepts has contributed immensely to the focus of the discussion on the legal underpinning of the best interests provision under section 4 of the MCA in the previous chapter. Whereas legal principles are conceived as rooted in positive law, ethical principles are enshrined in the natural law province.

The implication of the dual perception of the concepts of autonomy and welfare both as legal and ethical constructs is that as legal principles they should be adhered to, while as ethical constructs their moral and ethical applications should be justified. This is considered in the light of the research question posed in this work which is to investigate whether a more robust best interests standard that accommodates the interests of others during care home placement decision for a dementia patient by a family carer will be ethically and legally justified.

The strict adherence to legal rules would emphasise the upholding and enforcement of an individualistic approach to the autonomy and welfare of the incapacitated dementia patient.

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501 J Coggon and J Miola, ‘Autonomy, Liberty and Medical Decision Making’ (2011) 70 (3); Cam Law J 52; 523, 523.
patient investigated in this inquiry. Evidences of a strict legalistic approach have already been seen in the cases considered in the previous chapter.\(^{503}\)

Some of these cases have also revealed the plight of family carers of incapacitated patients in instances of related interests during surrogate decisions.\(^{504}\) However due to the nature of ethical principles which relates to fairness and justice this poses a challenge when others interests are involved. This is in view of the fair treatment of individuals which is advanced under the principle of justice.\(^{505}\)

It is therefore to the ethical underpinning of the law that this section resorts. In this respect Richardson noted that ‘moral philosophical approaches attempt to resolve the problems resulting from such ethical dilemmas of fairness and justice’.\(^{506}\) In Green’s view ‘morality sets ideals for law and law should live up to them’.\(^{507}\) Therefore, the research question in this thesis not only addresses the legal justification of the law embodied in the legal rules but also its moral justification embodied in ethical consideration.

\(^{503}\) Re S and S (Protected Persons) v V [2008] EWHC 616 (fam) [55]-[57] (Marshall QC); Westminster CC v Sykes [2014] EWCOP B9 [§10]-[§11 (ElderGill J); Sheffield Teaching Hospital NHS Foundation Trust v TH and Another [2014] ECOP 4 [55] (Hayden J); Winspear (n 304) [55]; [61] (Blake J).

\(^{504}\) Dorset (n 493) [47]; [48] (Parker J); Winspear (n 304) [39] (Blake J).

\(^{505}\) I Summers, ‘Principles of Health Care Ethics’ in E Morrison, Health Care Ethics (Jones and Barlett Publishers, 2009) 52.


WELFARE AS AN ETHICAL CONTRACT:

Although autonomy plays a prominent part in this discussion yet the concept of welfare cannot be overlooked. This is because welfare principle has plays an important role alongside autonomy in surrogate decisions. However although the two principles cannot be conflated yet they are often inter-related. While welfare accommodates a whole range of issues that relate to the wellbeing of an individual, autonomy appears to be only a segment of that consideration. The term welfare itself has however been used conversely with wellbeing.

The common goal of both principles is the achievement of the ‘goodlife’ for the incapacitated individual through surrogate decisions in this context. It would therefore be difficult to ignore the operation of the welfare principle even when the autonomy of the individual is achieved. The aim therefore would be to ensure that the autonomy of the individual promotes his wellbeing. In this respect autonomy becomes an important goal to be ensured in the promotion of the wellbeing of the incapacitated individual.

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508 Local Authority v MM and KM [2007] EWHC 2003 (Fam) [120] (Munby J); Dorset (4393) [112]; [124] (Parker J); Re GM [2011] EWHC 2778 (COP) [21] (Hedley J); A Local Authority v PB and P [2011] EWHC 505 (COP) [7] (Charles J).
513 Dorset (n493) [124] (Parker J).
514 Ibid.
Tiberius projected the welfare view that ‘in moral philosophy the promotion of well-being is the ultimate aim of all moral action; well-being is the fundamental notion in moral theory’. When viewed in this sense therefore the concept of welfare becomes relevant as an important moral principle. While attempting a definition, the welfare concept has been divided into three different views.

The first is the hedonistic view which projects happiness as the ultimate goal of welfare and it also represents a psychological or mental state outlook. The second view Eudemonia is translated as human flourishing and lastly is the concept of the good life. This later classification is based on the perception that the achievements of certain moral standards are the perfection of one’s nature or the achievements of the human capabilities. These different outlooks are compartmentalised into different philosophical theories such as the mental state theory; desires fulfilment theory and the objective list theory.

The constituents of the objective list theory which include a multi dimensional approach to welfare are stated to consist of ‘autonomy’ and positive relationships with others. This perception strikes an agreeable cord in the discourse of this research. This is in the sense that the promotion of autonomy can be viewed as an important and integral aspect of an incapacitated person’s welfare. Furthermore that an individual’s relatedness is also an important aspect of his well-being. The issue of concern however, is how to strike a balance between the relevant concept of autonomy, and social interaction encased.

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518 Ibid.
within this important category of the definition of wellbeing. The present difficulty lies not only in the interpretations and judicial applications of autonomy but also in its philosophical perception. 520

The importance of autonomy to the welfare of the incapacitated individual under best interests consideration is prominent. It is therefore important that the right philosophical perspective of autonomy is achieved in a best interests decision. It is for this reason that the concept of autonomy would be explored in more depth in this work.

A BRIEF HISTORICAL BACKGROUND OF THE CONCEPT OF AUTONOMY

Historically autonomy was used by the ancient Greeks to describe city-state’s right to legislate and govern themselves without interference from external powers. The individual autonomy was however predicated as far back as the end of the first century. The ideal for humanity was thought to be a self sufficient ‘self’ that is independent of others.

The concept of autonomy is therefore defined in various terms such as self determination, governance of self, ownership of self and personal sovereignty. The word autonomy itself is derived from the Greek word ‘Autonomia’ while ‘autos’ translates as self, ‘nomos’ translates as law. The individual application of autonomy could therefore refer to the capacity to govern one’s self. Dio Chrysostom’s postulated the worthlessness of political autonomy without evident individual autonomy. In view of this understanding of autonomy, it became necessary to distinguish political autonomy from personal autonomy which developed to connote individual self rule.

However within this conception of individual or personal autonomy was entrenched the ideal for an individual to adapt to community life. This distinguishes it from the modern

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521 EAP, Philosophical Models of Personal Autonomy (V Ashley 2012. Pg 2).
523 JM Cooper 1-5;
527 EAP, Philosophical Models of Personal Autonomy (V Ashley, 2012) 2.
conception of individual autonomy which appears to be free from such communal adaptation. 528 Indeed the idea that an individual’s expression of freedom must be community based runs through the work of Aristotle. 529 It is in this respect that Long noted that Aristotle’s notion of ‘normative social theory contains both liberal and communitarian tendencies which are often closely intertwined’. 530

The sharp contrast between the ancient practice of individual autonomy and the contemporary conception of the idea appear to be that while individual autonomy in ancient times is community based the modern understanding and practice of the concept appear to be strictly focused on the individual. 531 The ancient concept of individual autonomy was also succinctly portrayed in Rousseau’s idea of the achievement and sustenance of moral freedom by individuals within society in which exist the presence of relations of social dependencies. 532

The idea portrayed by Rousseau is that the primitive state of individual existence would give way to the formation of the association that is aimed at the defending and protection of the persons and goods of its associates. 533 This idea challenges the isolationistic understanding of the modern conception of individual autonomy which has had profound impact in health care in contemporary times.

530 Ibid 777.
THE IMPACT OF THE MODERN CONCEPTION OF INDIVIDUAL AUTONOMY
IN HEALTH CARE:

There is no doubt that the modern understanding of individual autonomy has had a profound effect on health care practice.\textsuperscript{534} It particularly impacts the rights of patients during decision making by individuals with capacity and also during surrogate decisions for incapacitated individuals.\textsuperscript{535}

Individual autonomy progressed rapidly with the advent of western liberalism. This promoted the idea of the freedom of humans to direct their own actions as they perceive fit without the obligation or dependence on another man’s will.\textsuperscript{536} This is based on the principle of self determination. In Health care parlance this concept became evidenced in a shift from the beneficence model in medical care to the autonomy model with the doctrine of informed consent playing a prominent role in many jurisdictions.\textsuperscript{537}

Individual autonomy therefore became established as a fundamental paradigm in health and social care.

Beauchamp and Childress noted the important position autonomy occupies in current health care ethics.\textsuperscript{538} Gillon estimated its status and rank in health care in the following


\textsuperscript{535} J Herring, Medical law and Ethics (5th Edn, Oxford, 2014) 205.


terms, ‘(....) Primus inter pares-first among equals-among the four principles’. This ranking of autonomy in healthcare gives a more succinct estimation of its perceived status.

The individual understanding of autonomy became an important factor in health and social welfare decision making by 1960. In relation to health care the main concern was against medical paternalism. In both health and social care however the paramount pursuit lies in the desirability of allowing individuals to make their choices in various health and social welfare decisions.

In this respect consent plays a prominent role. It could feature as consent to treatment or consent to social welfare decisions or both. Will noted that by this trend the beneficence model which had paternalistic tendencies has been replaced by the autonomy model in health care. Furthermore that the origin of this current model can be located in the doctrine of informed consent.

Maclean noted consent as the affirmation of a patient’s autonomy and discussed the moral basis for consent. This modern era has therefore also witnessed a philosophical
outlook that values patients as autonomous agents. This became established as an important aspect of medical law since the decision in Schloendorff v Society of New York Hospital. However the modern conception of autonomy appears prone to extreme application leading to the individual focus of the concept.

The modern concept of atomistic autonomous individuality has therefore engendered debates leading to the quest for an ideal concept of autonomy practicable and relevant to the society and particularly in health and social welfare matters. While the concept of individual autonomy based on communal adaptation has inclinations toward the concept of modern relational autonomy and communitarian theories the modern practice of individual autonomy has inclinations toward right theories and liberal ideas.

In this respect Walby acknowledged that one of the strengths of rights is its basis for justified claims but stated that ‘(...) its potential weakness lie in its focus on individuals rather than on social groups and systems and in its difficulty with issues of diversity and differences’. The tension presented in modern times from the onset therefore is between relational community based autonomy and individualistic right based autonomy with liberal tendencies.

544 105 NE 92 (NY 1914)
545 W Martin and Others (n102) 22.
THE ROLE OF SELF DETERMINATION IN AUTONOMY

Autonomy was understood in its initial form as a political property as noted earlier. By the period of the enlightenment however there emerged a dual application of the word autonomy both as a political and personal property. With this diversified application of autonomy focus was on self determination which has been regarded as an ideal of autonomy.

This is important as the majority of the different views on autonomy were focused on the significant notion of self government although the details of each are different. Kant’s philosophy of autonomy for instance is based on the conception of the moral freedom of an individual to self legislate and the obedience of the individual to such self legislated law. Mill’s Conception of autonomy however concentrates on liberty which is based on the principle of self determination.

The modern liberal interpretation of personal autonomy lays great emphasis on the principle of self determination which plays an important role in health and social care. It has featured mostly in the area of decision-making, either as consent given by a patient or during surrogate decision-making for decisional incapacitated patients.

However within these understandings of autonomy lies the central role capacity plays in self determination. The importance of capacity lies in the identification and

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551 ibid
553 E Wicks, Human Rights and Health Care. (Hart 2007) 65; M Brazier and E Cave, Medicine Patients and the Law. (5th edn, Penguin 2011) 56; 104.
categorisation of agents who lack decision making capacity as non-autonomous individuals with respect to such decisions.\textsuperscript{554} The law is interested in the promotion of the autonomy of this category of individuals based on the principle of self determination.\textsuperscript{555} This constitutes the main objective of the MCA listed under section 1 as empowering the incapacitated individual during decision making.

However this objective appears challenged by the views expressed on the perceived discriminatory role of the diagnostic threshold in the capacity assessment under section 2 (1) of the Act.\textsuperscript{556} Nevertheless in clinical practice, assessment and diagnosis are essential part of a patient’s consultation process and they demonstrate the general standard for everyone regardless of their condition or circumstances.\textsuperscript{557}

\textsuperscript{555} MCA 2005 s 4 (6) (a)-(C).
AUTONOMY: THE LACK OF A LEGAL DEFINITION

This discussion highlights the important role of autonomy in decision-making and self-determination; however there is no specific definition of the concept in any of the relevant Acts.\textsuperscript{558} This has not been helpful in the understanding and applications of autonomy. This is because the provision of a definition in the Act would lead to legal clarity that would enhance the application of the concept. It is in this respect that Loukacheva commented that the concept ‘lacks legal clarity’ while reinforcing Wiberg’s view that there is ‘no clear account of the concept’.\textsuperscript{559} Furthermore Wiberg commented on the existence of the various conceptions that have created the problem of identification of an eternally true conception of the term.\textsuperscript{560}

Lindley identified the fact that there is a general concept of autonomy as distinguished from particular conceptions of the term.\textsuperscript{561} These conceptions the author stated, are particular attempts to interpret and explain the general concept of autonomy. This view perceives the general concept of autonomy as a framework generating specific conceptions of autonomy.\textsuperscript{562} The views expressed by these authors sum up in a nutshell the whole exercise of the legal and ethical discourse on autonomy.

Firstly that as a legal term autonomy is ambiguous. Secondly that it features a general concept and thirdly that it has capacity to generate various conceptions that rival each other. Whereas ambiguities relating to the legal aspect can be seen in the lack of legal

\textsuperscript{560} Ibid, 57.
\textsuperscript{561} R Lindley, Autonomy (Humanities Press, 1969) 3.
\textsuperscript{562} Ibid.
definition in statutes and legislations, there is no doubt also that conceptual
controversies abound in the various philosophical explanations of autonomy.

This indeed has been an age long problem in respect of the three issues identified. The
existence of a general concept of autonomy has remained constant while the other two
factors remain variable resulting in diverse and varied interpretations and understanding
of autonomy. In this regard there exist broad categories of conceptions of autonomy
which includes political and individual autonomy.563

This work explores the general concept of autonomy in relation to particular
conceptions of the term. It also highlights the relevance of the rival conceptions of the
concept as seen in philosophical theories and models of autonomy; also in statutory
interpretations and legal decisions. Loukacheva noted that although the notion of
autonomy presents with a remarkable complexity, nevertheless the incorporation of the
concept into law generates grounds of legal claims to rights, support from institutions,
privileges, obligations and status.564

This discussion provides a philosophical insight to the concept of autonomy which is
mainly based on the principle of self determination. This view of autonomy can be seen
as a general conception of the idea of autonomy that cuts across the various
philosophical understanding of the concept. However, the difficulty seen in the
philosophical aspect of autonomy relates to the evolution of the various philosophical
understandings of autonomy such as individual, political and relational autonomy. It is
noted that the problem becomes compounded by a lack of legal clarity on the issue.

http://www.globalautonomy.ca/global1/index.jsp Accessed 05/25/16
564 Ibid 19 & 20.
In relation to surrogate decision for an incapacitated individual, the lack of legal clarity remains unhelpful in view of identifying which philosophical understanding of autonomy should be applicable in that circumstance. It is within this background that the philosophical models and approaches to autonomy are considered next.
3.8 APPROACHES TO AUTONOMY:

MODELS OF AUTONOMY

Models and philosophical theories have formed the outline of the application of the principle of autonomy. Philosophical theories of autonomy are closely linked with specific models of autonomy. The common models of autonomy include the proceduralist; substantive; internalist; externalist and relational models. These models rival each other in claims of competing advantages.

The procedural model is closely linked to the internalist model. This model claims liberal neutrality while highlighting individuality. The advantage of this model has been stated to include its claim to authenticity. This model can therefore be closely linked to the liberal view of autonomy. The substantive model however admits of external values and it is an infusion of personal and moral autonomy leading to its high standard.

The disadvantage of the procedural model apart from its narrow focus is stated to include its inability to distinguish between an agent’s genuine desire and the desires that

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568 V Ashley (n565) 11.
569 Ibid 12; see also S Wolf, Freedom Within Reason (Oxford 1990) 76.
are subject to influence through manipulation.\textsuperscript{570} While the criticism of the substantive model is stated to be its requirement of an extremely high standard.\textsuperscript{571}

The criticisms of these two models reveal their pitfalls and point to the need for a model of autonomy that would highlight the interplay between an agent’s socialisation and self determination in the quest for an acceptable and practical approach to autonomy. In this regard the relational model of autonomy which is discussed next becomes a topical issue both in the search for a model and a theory of autonomy that is reasonable, practical and fair in a social relationship.

THE RELATIONAL MODEL

The relational model of autonomy is a recent development. 572 The attraction to this model results from the individualistic interpretations of extremism in personal autonomy. 573 This is reflected in the procedural intrinsic interpretations of individual autonomy. 574 A relational model of autonomy is therefore advocated as an alternative that offers and emphasises the role of the social embeddedness of agents. This model aims to ensure a balance of agency while avoiding excessive interpretations in the conceptions of personal autonomy. 575

The relational concept of autonomy, of which Gilligan is a foremost protagonist, advocates the importance of personal relationship as a basic ingredient of self identity. 576 The relational model explains that some social conditions could be oppressive but because their values have become internalised by the agent they subtly erode the autonomy of the agent. 577 This is stated to result in the lack of authenticity of an individual. 578

There exist different conceptions of self and the role played by social relations in the determination of autonomy within the advocates of relational autonomy itself. However, two accounts of self are quite distinctive; the causally related account and the

574 M Oshana, ‘Autonomy and the Question of Authenticity’ (2007) Social Theory and Practice 33 (3) 1
577 Ashley (n 565) 19
constitutively relational account. These accounts in turn are classified into the subgroups of procedural/ intrinsic and substantive/external camps in the divide. The explanation of the causal account is that socio-historical circumstance influences an agent’s capacity. Whereas the constitutively related account views interpersonal or social account as a constituent of the condition that defines autonomy.

The impact and the usefulness of the relational outlook continue to be explored as a possible alternative to a concentration on the individual and atomistic tendencies of the traditional based autonomy theories and approaches. The recommendation of the Nuffield Council on Bioethics for instance portrays autonomy as not being based entirely on an individual’s ability to make and communicate rational decisions, but rather on the expression of self by an agent within the context of important relationships. In health and social care decision making, this outlook is increasingly becoming relevant and it is being tested especially in cases where family carers are involved in making decisions for decisional incapacitated family members as in the context considered in this work.

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THE ROLE OF RELATIONAL AUTONOMY IN SURROGATE DECISION-MAKING

The emergence of relational autonomy as a model has profound effect not only on the overall consideration of the concept of autonomy but also on the health and social care issues of surrogate decision-making for the decisionally incapacitated individual. The relational model in the first instance has provided an alternative and shifted the absolute focus on individualistic considerations during surrogate decision-making in the particular context discussed.583 Furthermore, the strict adherence to the requirement of rationality in relation to the individualistic conception of autonomy has altered.584

It is important to note that this does not mean that the requirement of rationality has been eradicated in the relational model; rather the compromise agreed by authors is that rationality has a role to play in relational model however, that it is not strictly dependent upon it.585 In the emergent relational model rationality is combined with emotionality which can be applied in surrogate decision-making. The advantage is that a host of considerations affecting and related to the individual for whom the decision is being made are considered in this process.586

The outcome of the various analysis and consideration is the emergence of a relational model that does not adhere strictly to the existing traditional models of procedural or

583 Ibid.
584 Ibid 87.
substantive models, but rather a model that gleans the advantages of both. It appears the aim is to eradicate the weakness of the two previous models of autonomy such as hyper individualism or idealistic tendencies seen in what the liberal and moral philosophies of autonomy offers.\textsuperscript{587} When applied in this sense the relational model appears to bridge the gap between two extremes.

It also provides useful contributions to the concern on the appropriate concept of autonomy that is relevant in the consideration of surrogate decision by a family carer in health and social welfare situation considered in this context. In this regard Ho noted that patients have the tendency to desire close intimates to make the right decision that reflects their relational component.\textsuperscript{588} The difficulty of detaching the interests of the incapacitated individual from those of intimates is a further justification for this approach. This work will consider next the philosophical concepts that underpin autonomy.


3.9 PHILOSOPHICAL CONCEPTS OF AUTONOMY.

Philosophical theories have long underpinned the understanding and application of the models of autonomy. Although it is not uncommon for one model of autonomy to cut across different philosophical approaches. The relational model of autonomy for instance is located in the feminist and communitarian theories.

The feminist perception of autonomy stipulates the consideration of the importance of interdependent relationships. A prominent feature of feminist philosophy is the ethics of care which is directly relevant to this work. In Gilligan’s view the task of feminist philosophy is to meet the specific needs of individuals and also the maintenance of relationships during this process.

The task of the feminist can therefore be stated to target two broad projects. These projects have been identified as human rights and social democracy. Whereas the human rights concerns can be identified with individual liberalism, the later is identified with collective socialism. However the philosophy of rights can have a dual application to both outlooks in the sense that it can foster both individual and collective claims of rights and interests.

The concept of rights is strongly associated with the feminist claims based on its background of the perception of gender inequality. However the important and

\[\text{References:}\]

589 KA Moran, Community and Progress in Kant’s Moral Philosophy (Catholic University Press 2012) 1.
591 Ibid.
594 Ibid
595 GWF Hegel, Elements of the Philosophy of Rights (Trans HB Nisbet, Ed AW Wood, Cambridge, 1991) Xvii
relevant fact to this work is the codification of such rights and the promotion of the
dignity of vulnerable individuals. An important aspect of the promotion of this dignity
for incapacitated individuals is through the concept of autonomy which has been clearly
enshrined under section 4 of the MCA.

Nevertheless closely associated with the realisation of the rights of these individuals is
the feminist concern about social democracy. The relevant aspect of the understanding
of social democracy here is in terms of the moderation of social relations by democratic
principles. This has implication for both social interaction and the environment of the
exercise of such individual rights. 597

The feminist approach to the introduction of a relational autonomy model for instance
appears to suggest a synthesis of the two approaches to justice. Furthermore it
represents the legal implication in terms of the codification of individual autonomy and
ethical implication in terms of the social and environmental implications of its exercise.
The implications in terms of these social considerations would include the
considerations of the rights and interests of close associates.

Communitarian philosophy has features of similarity to the feminist approach
highlighted in the ethics of care. Etzioni and others for instance noted such
communitarian theories of loyalties, conventions, tradition and social nature of life and
institutions as bearing the same pursuit as related autonomy. 598 The promotion of

597 Ibid 136.
598 A Etzioni and Others, ‘The Responsible Community Platform: Rights and Responsibilities’ in A Etzioni
and Others (eds), The Communitarian Reader; Beyond the Essentials. (Rowaman & Littlefield, 2004)
2;4;5.
communal values and acts is at the centre of communitarian theory. Although there is no systematic account of this theory yet the themes highlighted therein are distinct. These themes include societal influence on individuals, communal values based on communal history, traditions and practices and the value of the community. A prominent feature of communitarian theory which is important to the context of this research is its challenge to the placing of individual rights above the good of the community. The communitarian philosophy exposes the view of an individual as an isolated atom existing without interdependency as a mistaken view.

In contrast to feminist and communitarian tenets of inter-social relations and dependency, liberal individualism focuses on the individual to the disregard of social connections. Liberalism stems from the idea of freedom, and liberty is regarded as primary under this theory. The individualistic feature of liberalism cuts across the traditional philosophical concepts.

Philosophical proponents of liberalism believe that the good life is mandatorily a freely chosen one in which an individual develops his unique capacity. Mill for instance views the development of individuality as the foundation of the endorsement of freedom. Furthermore the consequentialist theory of utilitarianism equates

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individuality with authenticity.\textsuperscript{607} This theory concentrates on the value of well-being analyzed amongst others in terms of pleasure, happiness, preferential satisfaction and welfare.\textsuperscript{608}

Kantian and Hobbesian liberal views are contractual in nature hence viewed as moral contractualism.\textsuperscript{609} However Kantian contractualism postulates that the individual’s motivations are based on the intension of justifying their claims on other individuals hence emphasising obligations and duties.\textsuperscript{610} Whereas the Hobbesian contractual idea offers a different liberal conception of morality which is founded on an individual’s unrestrained freedom in pursuing their self based interest.\textsuperscript{611}

A summary of these different outlook lead to the conclusion of two divides. While the feminist and communitarian concepts acknowledge the exercise of individual’s rights in the background of social relations and interdependencies, the traditional theories tend to strictly promote individuality.\textsuperscript{612} This has greatly influenced the concept of autonomy applied in various situations.

It is apparent that the concept of autonomy has various connotations and interpretations in relation to the different theories and approaches. Nevertheless, the role autonomy plays in surrogate decision for incapacitated individuals cannot be overestimated. Its

\textsuperscript{610} O O'Neill, Autonomy and Trust in Bioethics. (Cambridge 2005) 83.
\textsuperscript{612} W Moka- Mubelo, Reconciling Law and Morality in Human Rights Discourse (Springer 2017) 52.
importance has featured prominently in best interests decisions under the Act. However what is of concern is that the weaknesses of the traditional theories of autonomy appears to have overshadowed the benefits they have provided against paternalism in health and social welfare decision-making in specific contexts over the years. This has in turn led to a search for an acceptable and relevant theory of autonomy which would invariably be applicable in a wider context of surrogate decision making where the interests of family carers are involved such as is considered in this research.

The basic flaw identified in the traditional approaches to autonomy is the individualistic tendency which has featured in the application of individualist model in best interests provision under the MCA where the interests and rights of family carers are involved. This issue is discussed in the next session.

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CHAPTER 3

4.1 INDIVIDUALISM IN BEST INTERESTS.

This chapter will discuss the features of individualism in the best interests standard. It will also look at the connection of the individual with the concept of ‘self’.\(^{615}\) This is with a view to analysing the role individual considerations play in the best interests application. Furthermore, the relationship of the individual to the society will be addressed in this chapter. It will also consider which philosophical perception of the self and the individual will be most suitable during surrogate decision-making involving the interests of others. In arriving at a conclusion, this chapter will summarise the various discussions in the preceding chapters in order to address the research question posed in this thesis.

The feature of individualism stems from the concept of individual liberty.\(^{616}\) This is reflected in the application of the individualist model in the best interest standard which was discussed in the introduction to this work.\(^{617}\) The underlying philosophy of the MCA places emphasis on its empowerment ethos as is seen in the provisions under section 1 of that Act. The provision of section 1.5 of the MCA in particular, states that any act carried out or decision made for or on behalf of the incapacitated person must to be in that person’s best interests.\(^{618}\) Section 4 of the Act provides the procedure on how

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\(^{616}\) Realo and Others, (n20) 165

\(^{617}\) ibid

to determine these best interests as discussed earlier in the previous chapters. The entire provision under these sections focuses on the individual lacking decision-making capacity.\textsuperscript{619}

However, the provision of section 4 of the MCA has often been interpreted in the strictest sense as displayed by the sole concentration on the incapacitated individual leading to the application of an individualist model.\textsuperscript{620} Furthermore, the application of the philosophical concepts underlying the approaches to the principles of autonomy and welfare, which are evident in this view, is challenged due to its impracticality in respect of the components and practical functions of individuals.

This is seen in the ideas postulated in liberalism against those in relational and communitarian concepts.\textsuperscript{621} A strict tendency towards the former idea has led to claims of hyper-individualism.\textsuperscript{622} It has been asserted that one of the major challenges of the MCA is the lack of definition of the best interests standard resulting in its individualistic interpretation,\textsuperscript{623} and evoking the conception of hyper-individualism during surrogate decision making.\textsuperscript{624}

This situation is worse where the interests of other persons are related to the interests of the incapacitated individual. Although the Act has provided the procedure to achieve

\textsuperscript{619} MCA 2005 s 1 (1)-(5).
\textsuperscript{622} W Martin and Others (n102) 22.
\textsuperscript{623} ibid
\textsuperscript{624} ibid
best interests decisions, however it did not prohibit the extreme individualistic interpretation of its provision.\textsuperscript{625} Hence, neither a strict nor relaxed interpretation and application of that section is seen to contravene the law as long as the incapacitated individual remains the focus of the decision.\textsuperscript{626} However, it was noted that this lacuna in the law created uncertainty and difficulty in the definition of best interests standard as well as identification of its form and nature.\textsuperscript{627}

The achievement of the codified best interests standard notwithstanding, its intense individualistic concentration, has led to constant tension in the interpretation and application of the law.\textsuperscript{628} The outcome of this is the suggestion of the consideration of other forms of interests in surrogate decision making for incapacitated individuals.\textsuperscript{629} This work discusses next the need for an acceptable boundary in the perception and application of individuality, which would invariably shape the nature of the autonomy and the interests that are suitable in surrogate decisions of this nature.

\textsuperscript{625} ibid 23
\textsuperscript{628} ibid.
4.2 THE NEED FOR AN ACCEPTABLE BOUNDARY IN THE INDIVIDUAL CONCEPTION OF BEST INTERESTS.

It is apparent that the notion of individuality and self determination cannot be entirely divorced from the notion of personal autonomy which features prominently in the best interests standard.\textsuperscript{630} This is reflected in the ideas advanced under the varieties of provisions under section 4. They range from recognition and acceptance of the person of the incapacitated individuals,\textsuperscript{631} to encouraging their participation in decisions that are being made on their behalf; \textsuperscript{632} recognising and respecting their wishes and desires and the consideration of the views of others with respect to their best interests.\textsuperscript{633}

These evidently emphasised not only the personhood of the incapacitated individual, but also their identity and individuality in all the respects identified in that section. In this regard personal identity appears to play an important role in the discussion on individuality and in the perception of ‘Self’.\textsuperscript{634} Although personal identity refers to the individual conception of the person, the notion of ‘self’ has appeared quite evasive in determination.\textsuperscript{635}

This is due to the different perceptions of the concept which includes a monolithic individual perception as opposed to a pluralistic and social perception.\textsuperscript{636} Therefore, although the issue of the identity of the self is subject to metaphysical underpinning, its

\textsuperscript{630} W Moka-Mubelo (n612) 52.
\textsuperscript{631} MCA 2005 s 4 (1).
\textsuperscript{632} MCA 2005 s 4 (4).
\textsuperscript{633} MCA 2005 s (6) & (7).
\textsuperscript{634} J Christman (n615)145.
\textsuperscript{635} G Wheeler, Beyond Individualism: Toward a New Understanding of Self, Relationship & Experience. (GIC Press 2000) 29.
\textsuperscript{636} J Christman (n615) 144.
philosophical perspective is divergent. The concept of self has important philosophical underpinnings and raises questions with respect of its constitution.

The issue of what constitutes self and invariably individuality prompted Wheeler to ask these pertinent questions, ‘What is the self? What do we mean exactly when we use this familiar yet elusive term, at once as near to us as our own skin and still somehow as vanishing as a mirage, always seeking to recede as fast as we try to approach it and pin it down?’ 637 These questions appear to address the search for the right perception of ‘self’ in contrast to the isolationistic view in contemporary society. This is in terms of its philosophical outlook. The author further noted that, ‘(...) the individualistic paradigm itself is somehow creating or contributing to the problem of how such an isolated self can ever be in meaningful or useful relationship with other selves (.....)’. 638 Machan in an attempt to solve the riddle of the meaning of self, pitched with Aristotle’s conception of individualism. 639 Aristotle equated this with the identity of the human and his individuality. This notion can be linked to Aristotle’s conception of the discovering of one’s true self. Aristotle’s insistence is on the components of the human being as consisting of the body and the soul which are inseparable in his view. 640 This views the essential characteristics of humans as individuals with unique characteristics. Thus, emphasising the uniqueness in individual characteristics. 641

This contrasts with the Hobbesian and liberal interpretations of the concept. The Hobbesian conception of individualism for instance, solely focussed on the preservation

637 G Wheeler (n635) 29.
638 Ibid 41.
641 Ibid.
and the advancement of the self and that the efficiency of such would blossom where there is lack of external interference or impediment.\textsuperscript{642} This individualistic approach has been criticised as having the tendency of fostering self-centeredness, social isolation and alienation of individuals.\textsuperscript{643} This resonates strongly with the criticism of the modern manifestation of individuality.\textsuperscript{644}

Furthermore, the liberal idea fostered by Locke has also compounded the modern conception of individualism. Whereas Locke’s individualism concentrated on the idea of property and freedom and could be viewed as being mainly economic in nature, Hegel’s individual concept was based on the individual’s growth and the individual development of self-awareness.\textsuperscript{645} The liberal concept of individuality also runs through the philosophies of Kant and Mill as well as their successors in modern times resulting in a modern conception of individualism that is mostly focused on the self or the individual.\textsuperscript{646}

In contrast to the views expressed in liberalism, the advocates of relational autonomy recognise and envisage the uniqueness of the individual who flourishes within a social

inter-dependence with other individuals. This outlook can be seen to combine the human identity and the social identity of the understanding of ‘self’. The view of the inseparability of the soul and the body has also been advocated by modern theorists of autonomy especially in advancement of a relational theory of autonomy. However, while these identifications of the human components appear harmless, the perception of the ‘self’ appears to take an extreme form in individualistic approaches. This has culminated in extreme manifestations of the concept of self and individuality and has had a bearing on the perception and practice of individual autonomy.

In deducing from these various views of the ‘self’ and the nature of the individual, the logical route will be to seek a fair balance between the different approaches. Christman, for instance cautioned against taking a monolithic stance on the perception of ‘self’ due to the nature of social dynamism. This appears to stipulate that the correct and appropriate application of the concept would be most desirable in addressing the issue of autonomy. This is because an extreme concentration on each can jeopardise the value and nature of the concept of autonomy.

Zutlevics in consonance with this view argues for the creation of, ‘(.....) a space for personal autonomy (....)’ within modern feminist perception while contemporaneously

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promoting the social embeddedness of individuals.\textsuperscript{652} The idea of the recognition of the individuality of the individual amidst social interdependence appears reasonable and can be tested in view of the various social dynamics encountered within human relations.

THE APPLICATIONS OF THE CONCEPTS OF INIDIVUALITY AND ‘SELF’ DURING SURROGATE DECISION-MAKING.

In considering the different views and approaches to the concepts of individuality and ‘self’ this work firstly recognises that the concepts of individuality and self, play key roles. This is because the MCA in its provisions seek to maintain the individuality and dignity of the incapacitated person despite the loss of decision -making capacity. This is prominent under section 1.5 and section 4 of the Act. Secondly, that identity is of common application to both concepts. The search for the true perception of the self, points foremost to the identification of the self as a human, and invariably as an individual.

The idea of the self both as a human and an individual therefore relates to his identity. However, according to Aristotle’s perception as discussed earlier, the self, possesses a soul and a body.653 The latter being an outward expression of the former. Aristotle also noted that the two notions of the self are inseparable. Having established that the self is human based on this reasoning and therefore an individual; the social philosophical input on the human characteristic becomes relevant in this discussion. Dy noted that humans are social in everything. While advancing this view Dy stated that ‘By everything we mean to say that in the zone of self-project or self-actualization, the human being is socius-a fellow, a comrade, together with others’.654 Based on this notion the concept of self would be adverse to a monolithic approach in its analysis.

This work therefore postulates firstly that the recognition of the individual identity of
the person relates to his personal autonomy in respect of the expression of ‘self’ and his
individuality. This view is in consonance with Aristotle’s equation of self with the
identity of the human and his individuality. This approach adopted in this work further
highlights the uniqueness of the particular individual within the society. The notion of
individual uniqueness appears comprehensive enough to identify and distinguish
individual needs and aspirations in so far as the soul and the body are represented in this
reasoning. To this extent it covers the metaphysical and psychological components of
the individual.

Furthermore, the deductions that are made from the different notions of human identity
in relation to the self are that the perception of self as a social entity cannot disregard
the human identity that makes the individual unique. This is because although the
individual possesses body and soul that identifies him and makes him recognisable and
unique within society, yet this fact does not dissociate him from society. It mainly
serves to distinguish the individual and to direct attention to his identifiable needs,
expressions, and aspirations.

The notion of the uniqueness of an individual within a society therefore counters the
features of hyper-individualism discussed earlier.655 This is in the sense that the notion
of hyper individualism as understood by the applications in the liberal philosophies are
based entirely on the focus on the individual, to the disregard of societal considerations.
Whereas the notion of the uniqueness of the individual acknowledges the individuality
of the person within the society. It is in line with this view that this work identifies a
‘uniquely relational autonomy’ (URA). Christman explained the idea of autonomy as

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655 ‘Text to n 622’.
being uniquely relational in terms of the requirement of interpersonal or social environment. However, the idea of the uniqueness identified in this work is centred on the individuality or individual needs and identity of the ‘self’.

This views the individual as a distinctive entity entitled to demonstrate distinct aspirations, needs and self-expressions albeit within a relational setting as opposed to the isolationist view of the self and individualistic demonstration of autonomy identified in the liberal philosophies. This transcends the interpersonal or social environment of the agent to include the agent’s demonstration of his autonomy within such interpersonal and social environment.

In relating this view to the context of this discussion, it is recognised that the aspiration of the MCA has always been to ensure that incapacitated individuals maintain a voice within the society in terms of respecting their wishes and aspirations. The best interests standard has no doubt been a significant vehicle in attaining this aspiration. In this thesis therefore, the recognition of the need to give expression to, and meet the needs of incapacitated individuals demonstrates the existence of a metaphysical and psychological fact of the identity or the ‘self’ of these individuals. Indeed, it relates to and reflects their human identity.

Furthermore, it demonstrates that these needs can be identified as the required needs of the individual. Also, that these needs are unique to that particular individual. However, the fulfilsments of the needs are met within the society in which they reside therefore this takes into cognizance societal and relational factors. The term ‘URA’ foresees the

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657 MCA 2005 s 4 (6).
effectiveness of the combined applications of individual uniqueness and social relatedness in the consideration of the autonomy that should be applicable during surrogate decision-making for a dementia patient in the context of this research. This would ultimately affect the outcome of decisions made where interests are related, tied or in conflict. There is therefore the need for acceptable boundaries of individualistic considerations during surrogate decision-making in this respect.

The nature of the decision for care home placement of dementia patients investigated in this work is centred both on the dementia patient and the family carer. The motivating factors and concerns leading to this decision for care home placement will give a clue to the considerations and the factors that are influential to the decision. Furthermore, these would showcase the interests that are at play during such decisions. The impact of care on family members leading to care home placement decisions is seen in several studies which are discussed below.
4.3 EXPLORING THE RESEARCH EVIDENCES OF THE IMPACT OF CARE ON FAMILY SURROGATE DECISION-MAKERS OF DEMENTIA PATIENTS.

The aim of exploring the experiences of carers in this work is to establish the following; whether care impacts on the rights and interests of the family carer; the existence of intersecting interests and how these impact on the rights of the carer. It will further consider the overall impacts of these on the care home placement decision.

The studies conducted on the impact of care on the family carers of dementia patients will be useful in the analysis of the influencing factors on surrogate decision for care home placement. Some of these studies were focused on the family carer’s experiences, which have significantly influenced the care home placement of the dementia patient. The effects of the impact of care on these families were broadly physical and psychological. These effects ranged from adverse health presentations to financial adversities resulting in stress and other forms of health problems. The various presentations are seen in the studies discussed below.

The studies conducted by Zarit and others revealed the psychological burden of providing care by the carer to a relative with dementia. The aim of one of the studies

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https://www.thinklocalactpersonal.org.uk/assets/resources/personalisation/carers/inn> pg 3 Accessed 21, 02 18
was to identify the sources of the burden of care.\textsuperscript{660} This study established the presence of the effects of senile dementia on the cognitive abilities of the subjects involved, and noted the potential increase of the care givers burden of care with further decrease in the cognitive abilities of the sufferers.\textsuperscript{661}

It went on to measure the degree of the burden and noted that the incidences providing the most burden were, ‘(...) the caregiver’s lack of time for oneself, the excessive dependency of the patient on the caregiver, and caregiver’s fears about further deterioration in the patient’s behaviour’.\textsuperscript{662}

It is important to note that this study was conducted on family members who were care givers and, in a position, to make decisions for the incapacitated dementia patient on a daily basis. The study noted the existence of a burden on the caregivers and the potential for the burden to increase. It also noted the impact and the concerns resulting from these burdens, which were verbally expressed by the carers.

These expressed concerns highlight the needs of the care givers which are associated to the care they give. It highlights also that their own interests which are related to the interests of the dementia patient, are at stake. This is seen in the potential increase in the burden of care which is due to the fact that the more the dementia patient deteriorates the more the burden of care that the care giver is likely to bear. As a result, the impact of care on the carer will increase.

The burdens and the impacts of care cannot be a myth, neither were they overstated. It is a reality that is being borne daily by care givers, specifically the family carers. The

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{660} SH Zarit and Others, ‘Relatives of Impaired Elderly: Correlates Feeling to Burden’ (1980) Gerontologist 649.
\item \textsuperscript{661} ibid 650.
\item \textsuperscript{662} ibid 652.
\end{itemize}
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Dorset case, considered earlier in this research, for instance demonstrated the role of the impact of care on the family resulting in the welfare concerns of the family members of the dementia patient in that case.663

The result of the burden and the impact of care has different manifestations on carers as stated earlier. The study conducted by Khan and Tadros revealed that the predominant re-current relevant features of family carers in this respect include stress, financial burden, mental and physical health problems resulting from care giving. 664 This study was mainly a literature review on the cost effectiveness of caring for the dementia patient at home. The study concluded that the care burden experienced by families of dementia patients needs to be addressed by the provision of basic necessities aimed at promoting their mental health, wellbeing, as well as financial and social resources.665 This study provided more insight on the impact of care on care givers which necessitated the recommendation of social input and various interventions.

Furthermore, it appears that the effect of the impact of care on care givers plays a significant role in the placement of the dementia patient in a care home. This can be deduced from various studies conducted in this respect.666 The randomised control trial conducted by Eloniemi-Sulkava and others compared the spouses who cared for dementia patients. In this study the control group was made up of the spouses who did

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663 Dorset (n 613).
not receive multi component interventions consisting of support from family care coordinator, a geriatrician, incorporation into a support group and individualised services. The result revealed that at the end of one and a half years 25.8% of the dementia population in this group have been placed in long term institutional care in comparison to 11.1% of the group that received intervention. This shows that the impact of burden of care on the care giver had significant and related effect on the care home placement of the dementia patients considered in that study.

The impact of the burden of care on family carers leading to institutionalisation of the dementia patient is shown not to be localised, as this feature is seen in the study conducted across eight European countries. The burden of care was consistently mentioned in all the countries. The study further noted the health of the carers as the second category of factors leading to institutionalisation of dementia sufferers. This study was noted to be aimed at aiding both the patient and the informal care giver. Although the majority of these studies assessed the impact of care giving on the carer. Other studies conducted include the effect of respite care in an institution on

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the burden experienced by the caregivers and also on the cognitive and physical functions of the individual with dementia.\textsuperscript{670}

Furthermore, the study of Edward and others highlighted amongst other findings, the important role that social dynamics play in influencing surrogate decision for dementia patients.\textsuperscript{671} This issue was discussed in the work of Livingstone and others.\textsuperscript{672} The main objective of this study was to identify common difficult decisions confronted by family carers of dementia patients during surrogate decisions. It noted the major barriers reported by family carers to decision-making. These include not only the difficulty of deciding what to do but also the experiences of distress during decision-making.\textsuperscript{673} This work further identified the decision about care home placement and contingency plan for the care of the dementia patient in case of illness of the family carer as one of these difficulties.\textsuperscript{674}

It is significant however that this study noted that the ease of making decisions was not dependent on one single factor but was rather related to all involved or affected by the proposed decision. It stated that (..)‘Generally, these are the patients, the primary carer, other family members, the healthcare and social care professionals, and sometimes the voluntary sectors’\textsuperscript{675} In essence it can be deduced from the evidence presented in this study that the contributions of others, and the considerations of related factors representing a wide approach, is prone to provide an ease during decision-making. This

\textsuperscript{670} MP Burdz and Others, ‘The Effect of Respite Care on Dementia and Non Dementia Patients in Caregiver’ (1988) 3 (1) Psychology and Ageing 38.
\textsuperscript{672} G Livingstone and Others, ‘Making Decision for People with Dementia who Lack Capacity’ (2010) BMJ 341
\textsuperscript{673} ibid
\textsuperscript{674} ibid
\textsuperscript{675} ibid 341.
is in opposition to the application of a narrow approach. Newbronner and others identified the impact of the health of carers and their circumstances as part of the ‘critical’ point in the experiences of carers of dementia patients.\textsuperscript{676}

This present research work focuses on surrogate decision making under the best interests provision of the MCA by family carers for advanced dementia patients who are deemed to have lost decision-making capacity. These various studies have therefore presented evidences of the direct impact of care on family carers. It is evident that the very nature of the presentations of dementia displays a burden, which has the potential to increase as the disease progresses.\textsuperscript{677} Also, that following the burden of care is the impact of care on the family carer, which leads to health and financial adversities.\textsuperscript{678} In relation to this, the issue at stake, which is addressed by this research work is whether the consideration of the needs of others in a best interests decision in such situations, as these would be morally justified.

\textsuperscript{676} L. Newbronner and Others, ‘A Road Less Rocky-Supporting Carers of People with Dementia: (Executive Summary)’. \url{http://www.carers.org/sites/default/files/dementia}. Accessed 17-06-14.
\textsuperscript{677} MJ Passmore, ‘Neuropsychiatric Symptoms of Dementia: Consent, Quality of Life and Dignity’ (2013) Bio Med Research International 1, 1. \url{http://dx.doi.org/10.1155/2013/230134}.

The deliberations in this work which have included statutory provisions, philosophical concepts and research evidences make it necessary to evaluate the position of the interests of others during a best interests decision for incapacitated individuals. The legal provisions considered in this work have displayed a link to the philosophical conception of autonomy applied both in the interpretation of the statute and the outcome of legal decisions as being mostly liberal and individualistic as discussed earlier in this chapter.

However, evidences of concluded researches, which were also discussed in this work have shown how closely related and sometimes dependent, the interests of family carers are on the interests of the incapacitated dementia patients and vice versa. It was noted also that these interests do conflict. This is seen in the fact that it is in the interests of the dementia patient that the care being received should continue while the physical and psychological health of the carer is being affected due to the care she has

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680 ‘Text to n619’
682 Ibid.
been providing. These facts invariably debunks the justification for a one sided approach where decisions are focused on the interests of just one of the parties.

They further portray that the theory of the existence of any individual in isolation is more of a farce than reality. They also portray that any conclusion or decision based on this view would be difficult and most often unrealistic. This results in questioning the fairness of any law with individualistic focus based on moral considerations under these circumstances. It further strengthens the suggestion of the applications of moral principles discussed in chapter two of this work, particularly the application of the principle of proportionality where the interests of the dementia patient and the family carer are in conflict.

The issues of interests highlighted here therefore are seen from three different perspectives in this work; the legal perspectives seen in both the provisions of the MCA, and decisions of the Courts; the influence of the philosophical perception of autonomy, and the evidences from concluded studies. These are summarised in turn.

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685 ‘n486’
THE LEGAL PERSPECTIVE OF THE CONSIDERATION OF THE INTERESTS OF OTHERS.

The legal perspective of the consideration of the interests of others is based both on the statutory provisions and the decisions of the Courts which were considered in chapter one and two of this work. The consideration of the interests of others was in the background of the subjective and objective interpretations of the provisions of section 4 of the Act. In this respect section 4 (6) (c) and (7) were most relevant.686

These provisions allow the input of ‘others’ in a best interests decision, however this is restricted only to the extent that such input are in the sole interests of an incapacitated individual.687 These provisions are mandatory provisions and their interpretations and applications by the Courts have been both subjective and objective in nature. The outcomes of both the subjective and objective applications of these provisions have in turn been confined to the sole consideration of the interests of the incapacitated individual leading to the identification of an individualist model.688

The cases outlined in this work generally have ranged from the cases which have demonstrated primarily a subjective approach, focusing on the interests of the incapacitated individual,689 to the cases which have included other considerations such

686 MCA 2005, CoP para 5.47.
687 MCA 2005 s 4 (6) (c) & (7), CoP para 5. 48.
as the carers of incapacitated individuals. Albeit as noted earlier the recognition of the interests of others cannot be actualised in law under the best interests standard, except as arising from the best interests of the incapacitated individual. In this respect the carer appears to be a *persona non grata*. It is indeed quite a peculiar situation that a law would recognise the existence of an interest without providing a direct enforcement of the interest, except by an indirect means that in effect relegates the beneficiary of that very interest.

Furthermore, this work also noted the paradox in the moral underpinning in the Court’s interpretations of the provisions of section 4 of the MCA in decided cases. This is in view of the philosophical underpinning of best interests which has been applied in the promotion of the autonomy of the incapacitated individual while relegating the interests and the rights of other individuals. It is also even more astonishing that the rights and interests of others were recognised in some cases based on the same principle of morality however, moral virtue was attributed to the incapacitated individual.

Although the Court in the *Winspear*’s case admitted that section 4 (7) of the Act had taken a central role, yet it appeared to have missed the opportunity to properly consider the position of the interests and rights of carers. While the Court distinguished the fact in the *Winspear*’s case from the case of *Glass v UK* in relation to the ages of the

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690 *ITW v Z and M* [2009] EWHC 2525 (Fam); *Vac v Jad and Others* (2010) EWHC 2159 (CH); *Re G (TJ)* [2010] EWHC 3005 (COP); *NT v FS and Ors* [2013] EWHC 684 (COP).
691 MCA s 4 (6) (C) & (7); MCA CoP para 5.47; 5.48.
693 *Winspear* (n 613); *Aintree* (n613) [24]; [45] (Lady Hale); *The Mental Health Trust and Others v DD* [2014] EWCOP 4 [115] (Cobb J);
694 *Re P* [2009] EWHC 163 (CH) [44] (Lewison J); *NT v FS and Ors* [2013] EWHC 684 (COP) [85] (Judge Behrens).
695 ‘n305’
incapacitated individuals concerned,\textsuperscript{696} the same was not applicable in the case of \textit{Dordevic v Croatia} since this case also involved an adult. Whereas the interests and rights of the family carer in the \textit{Dordevic’s} case was considered to arise from both the family and caring relationship of the mother of the incapacitated person and also in her personal capacity, these views were negated in the \textit{Winspear’s} case.\textsuperscript{697} It can therefore be stated that the Court missed the opportunity in the \textit{Winspear’s} case to lay road maps which could influence changes or modifications to the law with respect to the interests of others, particularly the interests and rights of family carers.

\textsuperscript{696} 'n338'

\textsuperscript{697} 'n305'
THE PHILOSOPHICAL PERSPECTIVE OF THE INTERESTS OF OTHERS

It has been noted that both the understanding and the applications of the principles underlying the concept of autonomy have greatly influenced its perception and application.698 This view has been reflected in Court’s decisions.699 Court’s decisions have been influenced mostly by the traditional understanding of autonomy which advocates the principle of freedom and liberty.700 These principles have fostered the concept of individualism. While the utilitarian’s have equated individualism with authenticity, the deontological approach viewed it as contractual in terms of the performance of duties and obligations.701

It is evident from the earlier discussion of these approaches in the introduction,702 and chapter two of this work that individual consideration is paramount in terms of perceptions and actualisations.703 It has also been noted in this work that this strand of the understanding of autonomy has featured not only in the legal provisions but also in judicial decisions considered earlier, where individual autonomy predominated other considerations.704 This resulted in the focus of best interests decisions on the interests of

699 Re S and S (Protected Persons) (C v V) [2008] EWHC B16 (Fam); Aintree (n 613); Westminster CC v Sykes [2014] EWHC B9 (COP); Sheffield Teaching Hospitals NHS Foundation Trust v TH and Another [2014] EWCOP 4.
700 Ibid
702 ‘n37’; ‘n38’; ‘n40’ ‘n46’.
703 ‘Text to n 405 in ch 2’.
704 Ibid.
the incapacitated individual even in cases where the interests of other individuals such as family members were apparent.\textsuperscript{705}

In cases where the interests of others have been recognised, it has usually been tied to the interests of the incapacitated individual.\textsuperscript{706} It is noted without doubt therefore that the approaches displayed in Court’s decisions and the interpretations of the provisions of the law have evidently been a relegation of the interests of ‘others’ in best interests decisions.

In view of the staggering evidences of the impact of care on a family carer as displayed in the studies considered earlier in this chapter, and evidenced in cases involving carers, this work therefore questions the justification of such an approach. Although the legal frame work of the best interests provision is clear as seen in the provisions of the law considered in chapter One and Two of this work, however its ethical underpinning is of major concern.

This stand stems from the fact that from the point of positive law, the law is simply what it stipulates that it is, and it demands obedience and compliance regardless. The Courts have relied on the provisions under section 4 in the application of a narrow and subjective approach to the best interests standard, and section 4 (6) has been most relevant to this view.\textsuperscript{707} In this sense the legal justification for the application of the provision of best interests remains firmly established. However, in this nature of a strict

\textsuperscript{705} The Mental Health Trust and Others v DD & Another [2014 EWCOP 11 [17] (Cobb J); Winspear v City Hospitals Sunderland NHS Foundation Trust [2015] EWHC 3250 (QB) [63] (Blake J).

\textsuperscript{706} Re P (2009) EWHC 163; (CH) [44] (Lewison J); NT v FS and Ors [2013] EWHC 684 (COP) [85] (Judge Behrens).

interpretation of best interests, could it be stated as Green suggested that the inner morality of the law might have been maximally instantiated leading to legalism, which results in a law that is not necessarily in its best form? This is a question that would be resolved in the progress of this analysis.\textsuperscript{708}

In contrast to the individualistic view of autonomy advocated by the traditional theories the relational theory advocates interdependency. This has greatly influenced the relational view of autonomy which is reflected in the relational model of autonomy. At the centre of this theory is the maintenance of relationships.\textsuperscript{709} It is relevant that the relational theory advocates that specific individual needs can be met while still maintaining relationships.\textsuperscript{710}

The implication of this approach is that, it can be interpreted to mean that specific individual needs can be identified, and a concerted effort can be directed towards meeting such needs without adverse effects on the maintenance of existing relationships as identified earlier in this chapter. Furthermore, this theory bears a strong moral underpinning since within this framework the rights and the interests of all individuals involved are respected and social democracy is maintained.\textsuperscript{711}

This type of outlook can certainly not be fostered within the understanding of autonomy driven entirely by liberal philosophy. It is in this context that the role of relational autonomy becomes relevant and is highlighted in this work. It is also within this context that the issue of the solution to resolving conflicting interests between the dementia patient and the carer can be located while applying a balanced approach.

\textsuperscript{709} J. Nedelsky, Law’s Relations: A Relational Theory of Self (Oxford 2011) 3; 4.
\textsuperscript{710} ‘n34’; ‘n581’.
\textsuperscript{711} \textit{Glass v UK} (n319); \textit{Dordevic v Croatia} (n68).
The situation in this circumstance therefore remains firmly located within the realm of moral philosophy. This is because of the difficulty of achieving a fair solution to this issue under the law as it is currently. This is due to the fact that the law is clear that in such circumstances of conflicts of interests, the incapacitated individual’s interests should take priority. It is therefore through moral philosophy that a solution which would impact the law will be sought and initiated.

This issue extends beyond the boundaries of the application of the principle of autonomy itself to the underlying factors that underpin and motivate the application of the concept. These factors can be identified as including the principles of justice and fairness. The operation of these principles in the context of surrogate decisions for incapacitated individuals is seen in the provisions of the law.

It enables incapacitated individuals to participate in decisions made on their behalf and to see their wishes and desires implemented. These recognise and respect the fundamental human rights of incapacitated individuals and ensure fairness and justice for them. These are reflected both in the areas of consent and respecting their views and wishes. However, the situation appears to pose a dilemma when the rights or the interests of these individuals are in conflict with those of others. This situation feature in a caring relationship and it is evidenced in the burden of care experienced by family carers of dementia patients discussed in this work.

712 MCA (2005) s 1 (5); s 4 (6); (7); MCA (2005), CoP paras 5.47; 5.48.
713 MCA s 1 (5); s 4.
714 Ibid.
715 HRA (1998) ss 8; 9; 10.
716 MCA s 4 (6).
The law stated mandatorily that the main interests to be considered are the interests of the incapacitated individual.\textsuperscript{717} This, without exception, includes situations where there are conflicts of interests since no exceptions on this issue are provided under the MCA. Furthermore, as seen in decided cases where other people’s interests have been considered, it has been in relation to or derived from the interests of the incapacitated individual. This features in terms of the benefits that will accrue to the incapacitated person.\textsuperscript{718}

It is also within this context that the equitable nature of the law is challenged with regards to its justification, especially where there is a family carer and conflicting needs are apparent.

\textsuperscript{717} MCA s 1 (5); s 4 (6); (7); MCA (2005) CoP para 5.47; 5. 48.
\textsuperscript{718} Re P [2009] EWHC 163 (ch) [44] (Lewison J); NT v FS & Ors (2013) EWHC [85] (Behrens J); Re G (Tj) (2010) EWHC 3005 (COP) [56] (Morgan J).
THE INTERESTS OF OTHERS IN RELATION TO THE PRINCIPLE OF FAIRNESS AND JUSTICE.

Beauchamp and Childress noted that the terms ‘fairness’, ‘desert’ and ‘entitlement’ have been used by philosophers in explaining the meaning of justice.⁷¹⁹ The authors noted that ‘These accounts interpret justice as fair, equitable and appropriate treatment in the light of what is due or owed to persons’.⁷²⁰ This therefore suggests that fairness is indeed one of the components of the principle of justice.

The view expressed here also suggests that the operation of the principle of justice is important in an inter-active situation. This theme so conspicuously displayed in Aristotle’s explanation of the concept was described thus:

Justice is a virtue-the most difficult of all virtues which differs from all other virtues in that it is displayed towards others and not towards oneself...it is a social virtue, for it involves a relationship with others and embodies the good of others, because it does what is to the advantage of another.⁷²¹

It is evident here that the absence of the operation of the principle of justice in any interaction would negate the acceptable standard of social morality in philosophical terms. Justice therefore projects virtue beyond self towards others.⁷²² It is within this background of the stipulated standard of morality that the question of whether a more robust application of the best interests standard which would accommodate the need of

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⁷¹⁹ TL Beauchamp and JF Childress, *Principles of Biomedical Ethics* (7th edn, Oxford 2013) 249.
⁷²⁰ Ibid.
⁷²² Ibid.
others can be addressed. It is noted here therefore that the issue of what the solution should be in the case of conflicting interests is tied to the main question of this research.

The modality for the legal application of the best interests standard as explained earlier can be located in the realm of positive law. Therefore, based on this view the best interests standard under the MCA assumes a legal justification however this justification can be hindered not only by ‘legalism’ but also where its application lacks justice. The justice addressed here is regarding social morality in terms of social interactions and inter-relationships which embodies the consideration of the needs of others. Rawls noted that ‘A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust’.723

In this regard therefore, moral consideration can have an impact on the perception, application and sustenance of legal rules to the extent of influencing a change where such are morally deficit. Consequently, the principle of justice presents an appealing counter- balance to the legalistic application of the best interests standard where the interest, and rights of family carers are involved. The principle of justice itself presents with diverse theories in a bid to address the issue of distributive justice which relates to the fairness, appropriateness and equitable distribution of benefits and burdens. The distribution of these would be based on the rules that form the standard of social co-operation.724

Beever noted Aristotle’s distinction between legal and absolute justice stating that in this distinction ‘(...) legal justice is not absolute justice (distributive or corrective) but is

724 TL Beauchamp and JF Childress, Principles of Biomedical Ethics (7th Edn, Oxford 2013) 249.
the kind of justice appropriate to the activity of doing law (...)’.725 In Aristotle’s view therefore the operations of legal justice present with deficiencies as a result of its universal application, whereas the nature of ethical truth is its complexity which cannot be ‘captured by any finite consistent set of principles’.726 By this outlook therefore, legal justice appears narrow in nature while ethical justice by its nature would accommodate a wider view of justice.

The communitarian theory of justice which is preoccupied with the general welfare of all individuals and upholds conventions, traditions, loyalties, the social nature of life and institution is a more appealing solution to the issue of conflicting interests in the context discussed in this work.727

Although Beauchamp and Childress suggested the application of a variety of theories in the approach to justice however, the communitarian theory is most appropriate in the context of this work to address the issue of conflicting interests.728 This is because the communitarian theory of justice embraces the concept of general welfare, loyalties and the social nature of life. This theory of justice is also in alignment with the concept of a relational theory of autonomy.729 It is therefore in the background of a relational approach to autonomy and communitarian theory of justice that the question of conflicting interests would be best addressed in this work.

The communitarian theory of justice which values relationship in terms of loyalties and the social nature of life are of paramount consideration in addressing the issue of

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726 Ibid.
727 TL Beauchamp and JF Childress, Principles of Biomedical Ethics (7th Edn, Oxford 2013) 258.
728 Ibid 253.
conflict of interests in a caring relationship. This approach to justice would be combined with the relational approach to autonomy where necessary concessions would be willingly made in the mutual interests and benefits of all the individuals concerned and affected in the relationship.

The narrow and strict application of section 4 of the Act is consistent with legal justice described in Aristotle’s analysis of justice. Whereas the analysis of absolute justice accords with the communitarian view of justice. The notion of absolute justice appears not to be limited by legal rules and could escape the criticism of legalism. In this sense it can be construed fit enough to embrace the tenets listed under the communitarian theory of justice.

While directing this view to the question of conflicting interests between the incapacitated individual and the carer, the consideration of the general welfare of all individuals is important. Indeed, the term the ‘general welfare of all individuals’ embraces the four remaining tenets listed under the communitarian theory of justice which are also values promoted under the relational theory.

This would entail the consideration of the welfare of all the individuals involved in the surrogate decision in the context of a conflicting interest. This issue of general welfare consideration would in turn be decided based on agreement and consent of the parties in the in the context of a family caring relationships. It is evident under section 4 of the Act that the law seeks to protect the vulnerable, incapacitated individual during decision making by ensuring participation and consent, however it would be unjustified for the law to enforce any provision that conflicts with the interests or rights of another party where there is an existing relationship.
The communitarian theory of justice therefore advocates the maintenance of conventions in its theory of justice. The maintenance of tradition is also important in this theory, in this case the maintenance of family tradition and loyalties. This is important and excludes the concentration of decision on just one of the parties in respect of loyalties. In this consideration, Herring maintains that in the tradition of family life there is ‘give and take’. Under family traditions therefore decisions cannot always be in the favour of one single individual all the time. This demands that in situations of conflicts sacrifices would be made by all individuals concerned for the general welfare of all concerned and who are going to be affected by the decision.

These considerations demonstrate the interdependent and social nature of life and indeed the nature of family institution. It also portrays the need for the law to demonstrate absolute justice in considerations of this nature. On the issue of conflicting interests therefore based on the communitarian theory of justice, the consideration of the general welfare of all the individuals involved in the decision would be the appropriate pathway to a fair and ethical solution. Furthermore this approach can be justified as giving recognition to the rights and interest of all concerned in the decision and a balanced approach to these issues. These considerations are also relevant under the claims of rights and the doctrine of proportionality.

730 TL Beauchamp and JF Childress, Principles of Biomedical Ethics (7th Edn, Oxford 2013) 258.
733 Brown v Stott (Procurator Fiscal, Dunfermline) and Another [2001] 2 All ER 97.
THE PERSPECTIVE OF RESEARCH EVIDENCES

The evidences from concluded researches on the impact of care on carers provide revealing information on the nature and the extent of the burden of care on carers and especially on the family carers of dementia patients. This is due to the nature and effects of the disease not only on the sufferer but also on the family carer. This has been shown to have adverse and devastating effects on different aspects of their lives, ranging from financial to health impacts. These effects are classified as both physical and psychological in nature. Furthermore, these impacts have no doubt affected the general welfare of family carers.

The effects on family carers have been listed to include; health and financial effects. In one study for instance a family carer has noted lack of time for ‘one’s self’ as an aspect of the impact of care. This would no doubt infringe on the rights and interests of such a carer. In another study, financial burden leading to stress was noted, while another study noted a lack of social support. The family carer must consider and contend with these various personal circumstances while making decisions on the behalf

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735 Ibid.

736 Ibid.

737 SH Zarit and Others (n732) 649.


of the incapacitated individual. There is no doubt that under these circumstances the interests of both carer and the incapacitated patient are bound to conflict.

It is however in the area of care home placement of the dementia patient that the issue of the nature of surrogate decision –making is directly relevant here. The issue of care home placement of the dementia patient is considered in the background of conflicting interests of the carer and the dementia patient with respect to the consideration of the interests of others. These conflicts of interests have been seen to be resolved by arrangements in care home placements of the dementia patient either for a long term or short term period. On other occasions financial support for the carer has been provided for the purpose of relieving the burden of care on the carer.

The evidences in the researches considered therefore support the view that where conflict of interests arises the consideration of the interests of both parties becomes of paramount importance in proffering a solution. This invariably involves balancing all the interests in the existing family relationship.

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4.5 RELATING THE RELATIONAL THEORY AND THE THEORY OF JUSTICE TO THE CONSIDERATION OF THE INTERESTS OF SURROGATE FAMILY CARER DURING BEST INTERESTS DECISION FOR CARE HOME PLACEMENT.

It is now important to relate the relational theory of autonomy and the communitarian theory of justice to the specific situation of the placement of the dementia patient in a care home. The relational theory of autonomy is stated to feature a combination of rationality and emotionality which are laden with moral judgements and considerations.742 In this respect rational judgements are balanced with emotional consideration in a relational experience. These considerations are mostly the issues that arise in the maintenance of relationships. They involve the considerations of the interests and rights of those involved in the relationship which are specifically close intimates during decisions and actions.743

Consequently, the family carer making surrogate decisions would weigh up the various circumstances factually and rationally in conjunction with the consideration of the existing relationship. The rational facts to be considered therefore will involve the circumstances of the fact of the existence of the dementia, and the impact not only on the sufferer of the disease, but also the impact on the health and welfare of the family carer.

These facts will certainly have major effects on the care home placement of the dementia patient. The facts therefore depend not only on the state and needs of the dementia patient but also on the circumstances of the family carer. This is in respect of

742 TL Beauchamp and JF Childress, *Principles of Biomedical Ethics* (7th Edn, Oxford 2013) 258.
whether the carer not only has the means but also the capacity to cope with the 
continued care of the dementia patient at home.

This perspective agrees with the communitarian outlook of justice which relates to the 
consideration of the general welfare of all individuals and indeed the social nature of 
life and institutions. In addressing the issue in this way, the full impact of dementia on 
society would be fully realised as opposed to the traditional individualistic focus which 
presents quite a narrow perspective.

Furthermore, the impact of dementia care would be more embracing and felt within the 
family and the society at large since family units contribute immensely to the make-up 
of society. It has been established that modern society is confronted with an ageing 
population, and the increasing incidence of dementia as is seen in the facts presented in 
the introduction to this work.744 Furthermore, that family dynamics have been affected 
since family members are increasingly involved in the care of those suffering from the 
disease.745

The law under the Act aims to empower the dementia patient by giving them a voice in 
the decisions made on their behalf based on the principle of self determination under the 
concept of autonomy. However, the understanding of autonomy mostly applied as 
stipulated by the Act, and enforced by the Courts has a narrow application in a family 
caring setting: hence the difficulty of embracing the needs of all those involved in the 
relationship of caring and receiving care.

The evidences from research studies have shown that caring for a dementia patient 
presents real burdens on the care giver and does affect both the psychological and

744 ‘n122’
745 ‘n125’
physical interests of the care giver: yet under the MCA decisions are meant to be made only in the best interests of the dementia patient. This no doubt presents with a dilemma that needs to be resolved both legally and ethically.

This calls for an examination of the appropriate understanding of autonomy which is what the relational model of autonomy offers. Furthermore, the application of the general tenets of justice sees the application of fairness, equity and appropriateness with respect to distributive justice. In this respect the decision of care home placement of the dementia patient resulting from the burden of care of the family carer will necessarily be in the joint interests of all the parties involved. This represents not only the reality of the situation but also the interplay of justice and fairness in such situations. It is this moral outlook that challenges the law as it is currently.
SUMMARY

This thesis presents an examination of the nature of surrogate decision-making for care home placement of the dementia patient by the family carer under the best interests provision of the MCA. It has therefore involved an examination of the relevant sections of the Act. The best interest standard was introduced in the Act under section 1. (5) While stating its general principles. The provision of section 4 of the MCA contained the guidelines for the application of the standard.

The focus in this research has been on the effect of the interpretation and the application of the law and Courts decisions on the family carers of dementia patients. This is in terms of the impact of the application of the best interests standard on inter-relationships where the incapacitated individual is the focus under the best interests standard.

The constituents of the best interests standard identified as autonomy and welfare were consequently introduced in this work. It was recognised however that there are different understandings of the philosophical approaches to autonomy which has greatly influenced its application as seen in the interpretation of the law. This was particularly noted in the liberal approaches and in the application of the liberal philosophy of autonomy which has led to an individualist model in the application of the best interest standard.746 Consequently this highlighted the need to identify and apply the correct understanding of autonomy that is appropriate in the context of the existence of a family caring relationship.

This research was necessitated in the background of the growth in the ageing population and the increasing incidence of dementia which is a disenabling disease. This has

fostered the increase within the current population of family care givers, resulting in
evidences of the implications of care giving in terms of the associated burdens of care.
It became necessary therefore to examine the claims and consequences of a strictly
individualistic and narrow approach to the interpretation and application of the best
interests standard.

Consequently, the research question generated in this pursuit is whether a more robust
best interests standard which accommodates the interests of others would be legally and
ethically justified? This work therefore entailed not only the examination of the
provisions and application of the law but also the morality of the law under the best
interests standard as applied under the Act presently. This is with a view of identifying
whether any changes or adjustment would be needful in terms of the recommendations
and the perception of the law as it ought to be.

The introduction to this work therefore consists of the discussion of the best interest
standard applied under the MCA and the individualistic approach adopted under it. It
identified the concepts of autonomy and welfare as components of the standard and
noted that the individualistic approach to best interests, which is based in the central
focus on the incapacitated individual, has resulted in the application of the individualist
model in best interests consideration.\textsuperscript{747}

The application of the individualist model when the interests and rights of the family
carer of the dementia patients are interwoven with the interests of the dementia patient
therefore became the main concern of this thesis. This prompted the question of the
robust application of the standard. The introduction to this work however noted that the

\textsuperscript{747} J Coggon, ‘Mental Capacity Law, Autonomy, and Best Interests: An Argument for Conceptual and
Practical Clarity in the Court of Protection’ (2014) 24 (3) Medical Law Review 396, 397.
Underpinning philosophy of the Act was based on empowering the incapacitated individual hence the promotion of individual autonomy and welfare advanced by the liberal theories. It is in view of the empowerment ethos of the Act which is based on the current trend of individual liberty, and located and in the liberal theories that the concepts of rights and deprivation of liberty were discussed in this work.

This introductory chapter noted that the idea of individual liberty has been long advanced and advocated. This is rooted in philosophical perceptions which have permeated the 21st century and is now rooted firmly in the body of various laws.\textsuperscript{748} These laws were seen not only to empower the individual but also to recognise individual rights and promote their dignity. Individual liberty has thus advanced and is a strong feature of the present century. It is in this background of the force of individual empowerment and the promotion of human dignity that a relational approach to individual autonomy was considered in this work.

This is important especially where the social nature of the individual is taken into consideration in respect of family relationship. The context discussed here is the relationship of family carer of the dementia patient seen in this work. Therefore, although the case for individual liberty is quite strong as attested to by the various laws promoting and enforcing it, nevertheless the case for the application of a relational approach in an existing and recognised social context such as that of family carer is very real and also of a practical nature. It is for this reasons that these approaches can be seen as being pitched against each other in both the legal analysis and the philosophical perspectives discussed in the succeeding chapters.

\textsuperscript{748} UDHR (1948), ECHR (1950); HRA (1998); MCA (2005); UNCRPD (2006).
Chapter one of this work therefore consists of a general summary of the provisions under section 4 of the Act. This is with a view to establish the intentions of the law under those provisions. Particular focus was on section 4 (6) and (7). It was noted that these provisions contained directions for both the subjective and objective applications of the best interests standard.

The interpretations and applications of the provisions of this section by the Courts demonstrated some tendencies: the first is toward a strict and narrow interpretation of the provisions therefore applying mostly a subjective approach. While the second approach displays a wider and objective outlook by considering issues beyond the incapacitated individual. However, a common tendency of both approaches is that the incapacitated individual remains the only focus in that decision even when the interests of other individuals were involved.

In essence the legal interpretation and application of the best interests standard displayed a lack of elasticity to address the issues of joint interests. Furthermore, where there are conflicting interests, the legal implication of these provisions directs that the interests of the incapacitated individual remains the focus and takes priority.749 Therefore, in both its objective and subjective applications the interests of the family carer for instance remains in jeopardy.

This issue affects surrogate decision making intensely especially where as is investigated in this case, the motivation for care home placement could be due to the failing health of a family carer. Where the law has directed that the main focus should

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749 MCA 2005 s 1(5); s 4; MCA (2005), CoP para 5.38.
be placed on the incapacitated individual,\textsuperscript{750} this challenges the moral justice of such a law. Therefore, whereas the legal justification of such a law remains valid under the MCA, however its stand is challenged on a moral ground in the contest of this work.

The provisions of sections 4 (6) and (7) were examined in respect of their subjective and objective interpretations and applications. It was noted that under these provisions the language of the law is mandatory. The law mandates the implementations of the past and present wishes of the incapacitated individual where they are ascertainable under the former provision.

The judicial interpretations and applications have displayed strict compliance to this mandate.\textsuperscript{751} However, departures from the enforcement of the past and present wishes of incapacitated individuals have been based on distinctions of the facts in each case.\textsuperscript{752} Nevertheless, the overall aim and outcome of all the decisions were based on the interpretation of the application of the best interests standard for the sole benefit of the incapacitated individual.

In relation to the objective view advanced in the best interests application the provision of section 4 (6) (C) and (7) are relevant. This is because of the external outlook of these provisions. However, these provisions were interpreted in the sole interests of the incapacitated individual in the decisions discussed.\textsuperscript{753} It was however noted that these interpretations and applications have been mostly in the spirit of the law itself.

\textsuperscript{750} ibid
\textsuperscript{752} Re E; Re P; NT v FS and Ors;
\textsuperscript{753} Winspear ; ZH v Commissioner of Police For the Met; NT v FS and Ors; Re DD
The aim of the law has been to empower the incapacitated individual and to give them a voice in surrogate decisions made on their behalf. Based on the analysis in this work, it can be stated that this outcome has been mostly satisfied by the strict adherence to both the letters and spirit of the law by the Courts. This is in respect of the outcome of the decisions considered so far and in the background of the mandatory nature of the language of the law.

Consequently, it can be stated that both the interpretation and the application of the law based on the rules of legal interpretation and enforcement of mandatory rules cannot be faulted. This is because the Courts have simply interpreted the law as directed and have applied it based on the applicable standard.

However, as seen in a number of cases, the Courts identified the existence of other important interests that extended beyond the subjective interests of the incapacitated individual. The Courts in those circumstances utilised the provisions of section 4 (6) (C) and (7) to accommodate those interests: albeit they have been interpreted only to the advantage and subjective interests of the incapacitated individual. The family members in the cases decided under these provisions had no claim based on their personal interests because the best interests standard cannot be extended to accommodate their claims.

This was regardless of the fact that the Courts identified their interests which had been the basis of their claims. The situations of this nature have contributed to the questioning of whether a more robust approach to best interests interpretation and assessment will be legally and ethically justified. The recognition of these other

754 Ibid.
interests by the Courts and the inability of the Courts to enforce them based on the claimant’s rights, other than through the rights and interests of the incapacitated individual alone, can be interpreted as the existence of legalism within this law.

Within the legalistic application of the best interests standard therefore, the interests of others are evidently hidden behind the interests of the incapacitated individual. The approach to the interests of family carers under the MCA was countered by the approach of the ECtHR, where the interests and rights of all the parties concerned were not only recognised but enforced.755

Chapter two of this work consists of a reflection on the Dorset case. This chapter considered both the autonomy and welfare concepts in best interests and vividly demonstrated the application of an individualist model where the interests and rights of family carers were involved. The Dorset case was utilised in the analysis of the autonomy and welfare interests of the incapacitated individual. It also portrayed the subjective, and objective nature and applications of the standard. The Dorset case was further utilised in the analysis of the research question in this work, since it bears similar reference to the context and the topic discussed. The case portrayed the approach adopted by the MCA clearly as opposed to the approach adopted under the ECHR.

In chapter three the examination of the ethical underpinnings of the best interests standard were examined in the light of autonomy and welfare principles. Although autonomy which comprised of ethical principles also featured in the previous chapters

755 Glass v UK(n 319); Dordevic v Croatia (n319).
of this work, its application was seen to be based on a narrow philosophical understanding of the concept under the best interests standard.

The liberal individualistic application of the autonomy concept adopted under the best interests standard was seen to have influenced both the judicial interpretation of the law and the outcome of the decisions reached. The liberal philosophies chiefly promoted the idea of liberty, freedom and self determination. Whereas the ideas advanced in relational autonomy promoted inter-dependency and relationship. The projection from these different understandings of autonomy led to the examination of the concept of self in philosophical thinking in order to determine the relevance of the correct perception of self in the context of this discussion.

The idea of a monolithic perception of the self under the liberal philosophy was placed against the relational perception of the self in the determination of best interests assessment. The relational approach displayed a dynamic outlook to the issue of self. This is seen when the individual is viewed both as a rational and emotional being capable of displaying individual characteristics, yet able to maintain relationship with others.

The idea of the self as extending beyond a monolithic view of self- centralization leads to the inclusion of others in any self -evaluation. This fact was rooted in ancient philosophy and reflects in daily interactions of human’s in modern society. This fact is bound to have tremendous effect on decision -making.

Furthermore, the evidences of research studies relating to carers of dementia patients show different links between the interests of the incapacitated individual and that of the carer. In certain circumstances for instance these interests can be joint and on other
occasions they can conflict. The very existence of these links defeats the perception of a monolithic view of the incapacitated individual displayed in best interests decisions. The achievement of a balanced approach under these circumstances is therefore quite important in proffering both a legal and moral solution in the context of this work and the research question posed.
CONCLUSION:

This research therefore concludes that the best interests standard in its current applications reflect both subjective and objective interpretations, although variations are seen in these interpretations in terms of the narrowing and widening effects of its subjective and objective perspectives respectively. Nevertheless, both perspectives were mandated by the MCA since best interests consist of both subjective and objective assessments of the interests of the incapacitated person.

Furthermore, in the circumstances of their applications both approaches were unified in the adherence to the underpinning ethos of the MCA which is the empowerment of the incapacitated individual. Therefore, the focus of the decisions have continued to be on the individual under both approaches. Nevertheless, the justification for the application of this approach, where the interests and rights of caring family members are present raises concerns legally in view of the decisions considered under the ECtHR.

Furthermore, its moral implication is also quite glaring in respect of the issue of fairness to all parties especially, where a family caring relationship exists. Therefore, the involvement and interference with the interests and rights of others in a caring relationship provides both legal and ethical justifications for a more robust application of the law.

Consequently, it is under these circumstances that this thesis suggests an amendment of the law to enable the MCA to explicitly recognise the interests, and invariably the rights of family carers in best interests decisions in circumstances where a family caring relationship exists, and there are evidences of intertwined interests. This therefore calls for a more robust application of the best interests standard.
However, this suggestion is confronted by the current gains of individual liberty enshrined in various laws particularly under the MCA. Individual liberty has continued to have tremendous sway in the present century, and the demand for its modification may appear as a regression of its gains.

Nevertheless, in the circumstances of family a caring relationship, where the individual rights and interests of the family carers are also presented, then the MCA could at least give a greater level of awareness to issues arising out of the relational context of the incapacitated individual. This would not only accurately reflect the impact of dementia on the family unit, but would provide a more holistic approach to dementia care involving family carers. The issues discussed in this work, therefore calls for a review of the current legislation.
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