Insight and Capacity: an uneasy relationship

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Overview

- **Test for incapacity** – language and relevance clinical judgement
- Origins of **insight** and it's relationship with assessing capacity
- Use of insight by expert witnesses in **COP cases**

Clinical judgement and Capacity

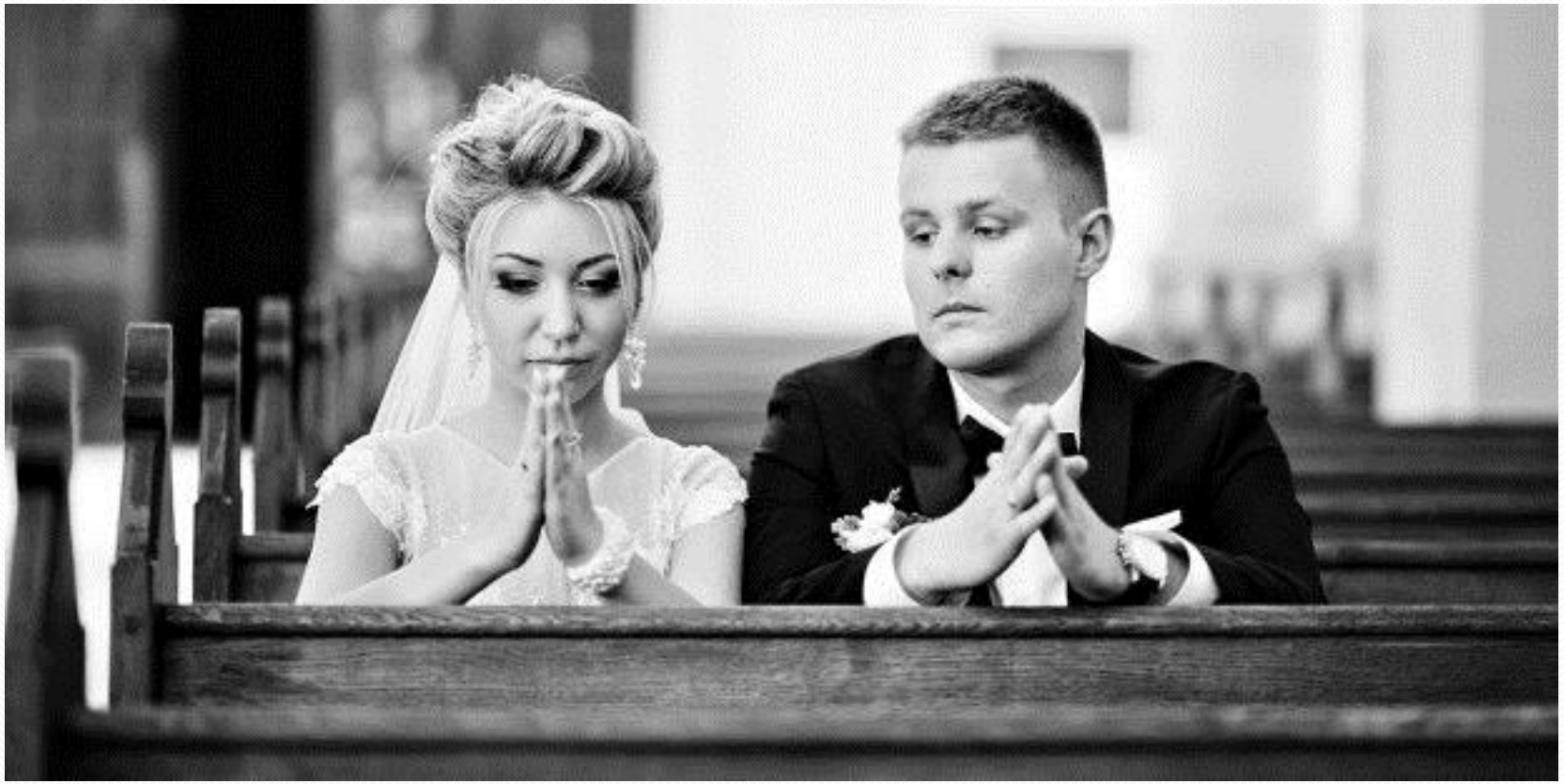
- **Four pronged approach** 1) presumption 2) diagnostic threshold 3) failure to satisfy functional criteria 4) causative nexus
- **Stage 1** diagnostic test – **prominence** in the two stage test
- **Stage 2** functional test – understand, use/weigh, retain, communicate
- **Belief criterion** still used

Munby

if someone does not 'believe' information relevant to the decision, they cannot be said to 'understand' it or be able to 'use' or 'weigh' it.

Local Authority X v MM [2007]

Belief



Munby again

Re: Stage 2

'only the court has the full picture. Experts are neither able nor expected to form an overview.' (A local authority v A)

- 57 judgments
- Over half expert witnesses psychiatrists
- Provide evidence on functional criteria
- Fairly common to make reference to insight (Case, 2016)

The trouble with insight

- Significant number of capacity assessments refer to P as having ‘a lack of insight’
- Not in MCA nor the Code of Practice
- Shared meaning *but* lacks transparency

Insight

History of insight

- Clinical centric concept
- Controversial history
- ‘poorly understood phenomenon’ (Chaudry 2014) with ‘poor construct validity, being differently defined in different studies’ (Beck-Sander 1998)
- Professional imperialism and arrogance

Diagnostic creep

- Initially hallmark of schizophrenia
- Anorexia, stroke, dementia, Huntington's
- **Anosognosia** – unawareness of cognitive, sensory or physical deficit, biological cause

- Wider implications for many more people

Increased diversity in aetiology

- **Psychological defence mechanism** - unconscious self preservation
- Damage to the **frontal lobe or right parietal lobe**
- Schizophrenia – general **cognitive deficit**
- Imaging - frontal lobe/right hemisphere damage
- Tendency to make reference to biological explanations reinforces **clinical authority**
- **Behaviours may be pathologised**

The compliance connection

- Changes in the definition of lack of insight
- 'a ***correct*** attitude to morbid change in oneself' A Lewis, 'The Psychopathology of Insight' (1934)
- (i) the patients' understanding that they are mentally ill, (ii) their ability to 'relabel' mental events as pathological, and (iii) their **compliance** with a treatment regime A David Soc Sci Med 507(1990)

Insight and capacity in the CoP

- Paula Case; Dangerous Liaisons? Psychiatry and Law in the Court of Protection—Expert Discourses of 'Insight' (and 'Compliance')

- **Some expert witnesses - 'lack of insight' used as a metaphor for incapacity**
- **Undisciplined use of 'insight'**
- **Jeopardise the autonomy promoting provisions of the MCA**
- **Three COP cases**

Pervasiveness of insight testimony and ‘minimisation of problems’

- ***PH v A Local Authority 2011***
- PH, Huntingdon’s – challenged a standard authorisation to stay in care home
- J Baker - found PH to lack capacity
- Preferred evidence of four expert witnesses who discussed insight over independent psychiatrist and partner

Pervasiveness of insight testimony and 'minimisation of problems' continued

- '[PH has] … poor insight into his **physical and mental health** condition.' (Dr C, General Practitioner)
- '… PH is very limited in insight about his **care needs**.' (Dr A, consultant psychiatrist)
- 'He lacks insight into the **needs of other residents**, not from malice but diminished comprehension.' (Dr B, General Practitioner)
- '… due to PH's limited insight into his **own abilities and care needs**, he does not appear to be retaining information with regard to his place of residence or care needs … PH appeared to have no insight into the risks that would be present in the community.' (D, social worker)

Pervasiveness of insight testimony and 'minimisation of problems' continued

- Minimisation of problems
- Could not 'evaluate the practicalities'
- 'no insight into the risks that would be present in the community'
- Did he simply not believe the risks?
- Was he not entitled to disagree?
- Minimisation – cognitive deficit or valid attempt to downplay aspects to increase chances of favoured outcome

‘Concertina effect’

Boundaries of capacity assessment and bests interests become blurred

Insight, compliance, and the problem of 'conceptual fusion'

- ***Wandsworth Clinical Commissioning Group v IA***
- Four experts: a consultant psychiatrist, consultant psychologist *and* two consultant neuropsychiatrists
- IA, ready for discharge
- Diabetes, previous head injury
- Cognitive impairment – capacity to decide on residence and care

Insight, compliance, and the problem of 'conceptual fusion' continued

- J Cobb – 'difficult and finely balanced'
- *IA did* have capacity to decide his medical treatment, residence and care and financial and property affairs
- Expert evidence - *IA* lacked insight into 'his health problems', 'his cognitive and emotional problems', but also external factors such as 'the state of his housing'
- observed as having a tendency to minimise his problems

Insight, compliance, and the problem of 'conceptual fusion' continued

- interpretation of *IA*'s obstructive and uncooperative behaviour

- '**appeared to' understand and weigh up the information and to have reached a reasoned decision**, … his subsequent 'failure to consistently maintain that position' demonstrated his **lack of insight** and the 'deficit in his

- Lack of insight and executive functioning trumped the statutory criteria

The Need to Map Insight to the Functional Criteria

- **London Borough of Islington v QR**
- QR, Schizophrenia, CTO
- *QR* was regarded as having capacity in relation to nearly all aspects of her life, including litigation capacity
- *Lacked capacity* to sign up (or not) to a supported living tenancy
- *QR*'s **lack of insight** is referenced by all three consultant psychiatrists

The Need to Map Insight to the Functional Criteria continued

- *QR*'s insight deficit, namely her **lack of belief in the diagnosis of schizophrenia**, was central to the decision that she lacked capacity
- *QR* did not understand that she was '… required to live in 24 h supported accommodation because of her mental illness and this is why she has to sign a supported tenancy agreement', consequently, she could not understand the nature and *purpose* of that tenancy agreement (i.e. provision of 24-h support and oversight of medication).

The Need to Map Insight to the Functional Criteria continued

- Even if QR had shown 'insight' re: schizophrenia her decision would not have been different
- Rational reasons - safety, area, male workers, room size etc.

- Has insight distorted the line of reasoning?
- Belief criterion back again!

Insight and the obscuring of transparency in capacity assessment

- 'transparent, consistent, and accepted as proper' Morris, 2009
- 'people are assumed to have capacity to make their own decisions and should only be deprived of the right to do so *in clear cases*.' Lady Hale, 2014
- Failure to map onto statutory criteria – opaque and difficult to challenge
- Generic use of insight – 'deep understanding', threshold not set too high

Insight and pathologising refusal

- Over reliance on clinical euphemisms
- Value judgements are can masquerade as ‘indisputable medical facts‘
- Risk of assuming lack of capacity due to refusal of care **- at odds with presumption of capacity**
- Pathologising refusal –risks **undermining right to unwise decisions** and **at odds with principle that behaviour should not be equated with lack of capacity**

Conclusion

- Relevance of the psychiatric view may be overstated and ‘mishandled’
- Insight obscures the use of statutory criteria
- Lacks transparency
- Not mapped onto statutory criteria
- Masks value judgments
- Lack of co-operation pathologised
- Conflicts with core values

Take home messages

- Be mindful of your use of the term insight
- Avoid it in relation to capacity assessments
- Make sure you map it on to the functional statutory criteria
- Avoid generic use – be clear what you mean

Further reading

- Paula Case; Dangerous Liaisons? Psychiatry and Law in the Court of Protection—Expert Discourses of 'Insight' (and 'Compliance'), ***Medical Law Review***, Volume 24, Issue 3, 1 August 2016, Pages 360–378
- ALLEN, Neil. Is Capacity "In Sight"?. ***International Journal of Mental Health and Capacity Law***, [S.l.], n. 19, p. 165-170, sep. 2014. ISSN 2056-3922..