



2016 CHAPTER 18

PART 2

LACK OF CAPACITY: PROTECTION
FROM LIABILITY, AND SAFEGUARDS

CHAPTER 9

DEFINITIONS FOR PURPOSES OF PART 2

Meaning of “emergency”

Meaning of “emergency” in relation to safeguard provisions

65.—(1) This section applies in relation to sections 13, 15, 16, 17, 19, 20, 24, 26, 28 and 35 (provisions which contain additional safeguards, and which require a determination of whether the situation is an “emergency”).

(2) For the purposes of any one of those sections, the situation is an “emergency” if at the relevant time—

- (a) D knows that the safeguard in that section is not met, but reasonably believes that to delay until that safeguard is met would create an unacceptable risk of harm to P; or
- (b) D does not know whether that safeguard is met, but reasonably believes that to delay even until it is established whether it is met would create an unacceptable risk of harm to P.

(3) But the situation is not an “emergency” by virtue of falling within subsection (2) if the fact that the safeguard in question is not met by the relevant time is to any extent due to an unreasonable failure by D to take a step that

it would have been practicable to take for the purposes of ensuring that the safeguard is met by the relevant time.

(4) Subsections (2) and (3) are to be read in accordance with section 66.

(5) For the purposes of any section mentioned in subsection (1), the situation is also an “emergency” if, at the time when the act mentioned in that section is done, D—

- (a) does not know of the effect of that section;
- (b) is not a person with expertise such that he or she could reasonably be expected to know of its effect; and
- (c) reasonably believes that it is necessary to do the act without delay to prevent harm to P.

Section 65: definitions etc

66.—(1) For the purposes of section 65(2) and (3) and this section—

- (a) the safeguard in section 13 is met when a formal capacity assessment has been carried out and a statement of incapacity made;
- (b) the safeguard in section 15 is met when a nominated person is in place for P;
- (c) the safeguard in section 16 or 17 is met when a second opinion is obtained;
- (d) the safeguard in section 19, 20, 24, 26 or 28 is met where the provision of treatment, detention or requirement mentioned in that section is authorised;
- (e) the safeguard in section 35 is met when—
 - (i) an independent mental capacity advocate is instructed under section 91 to represent and provide support to P in the determination of what would be in P’s best interests; or
 - (ii) P has made (and not revoked) a declaration under section 90 or 93 in relation to the matter.

(2) In section 65(2) and (3) and this section “the relevant time” means—

- (a) in relation to section 15 or 35, the time when D determines that the act mentioned in that section would be in P’s best interests;
- (b) in relation to any other section mentioned in section 65(1), the time when the act mentioned in that section is done.

(3) For the purposes of section 65(2), the risk of harm to P created by delaying until a particular safeguard is met, or until it is established whether it is met, is an “unacceptable” risk if—

- (a) the seriousness of the harm that could be caused to P by such delay, and
- (b) the likelihood of the harm,

are such as to outweigh the risk of harm to P of not complying with the safeguard.

Status: This is the original version (as it was originally enacted).

(4) In determining for the purposes of section 65(2) and this section when a safeguard would be met, or when it would be established whether a safeguard is met, it must be assumed that any necessary steps would be taken as soon as practicable.

(5) For the purposes of section 65(3), a failure by D at any time (“the time in question”) to take a practicable step for the purposes of ensuring that the safeguard is met by the relevant time is unreasonable unless, at the time in question—

(a) he or she reasonably believes that (ignoring any provision of this Act relating to emergency situations) the matter is not one to which the safeguard will apply; or

(b) he or she reasonably believes that that step does not have to be taken immediately in order for the safeguard to be met in time, and not taking that step immediately is reasonable in the circumstances.

(6) Expressions used in a paragraph of subsection (1) and in the section mentioned in that paragraph have the same meaning in that paragraph as in that section.

Failure by persons other than D to take steps to ensure safeguard met

67.—(1) This section has effect in relation to section 65(2) in a case where D is an employee of a person (“E”).

(2) For the purposes of determining whether E is liable in relation to an act done in a situation falling within section 65(2), any reference in section 65(3) or 66(5) to “D” includes any other employee of E.

(3) Any person for whose acts another person may be vicariously liable is to be treated for the purposes of this section as an employee of that other person.