



2016 CHAPTER 18

PART 2

LACK OF CAPACITY: PROTECTION
FROM LIABILITY, AND SAFEGUARDS

CHAPTER 1

PROTECTION FROM LIABILITY, AND GENERAL SAFEGUARDS

Protection from liability for acts in best interests of person lacking capacity

9.—(1) This section applies where—

- (a) a person (“P”) is 16 or over;
- (b) another person (“D”) does an act in connection with the care, treatment or personal welfare of P;
- (c) before doing the act, D takes reasonable steps to establish whether P lacks capacity in relation to the matter;
- (d) when doing the act, D reasonably believes—
 - (i) that P lacks capacity in relation to the matter; and
 - (ii) that it will be in P’s best interests for the act to be done; and
- (e) D would have been liable in relation to the act if P had had capacity in relation to the matter and D had done the act without P’s consent.

(2) D does not incur any liability in relation to the act, apart from such liability, if any, as D would have incurred in relation to it even if P—

- (a) had had capacity to consent in relation to the matter; and
- (b) had consented to D’s doing the act.

(3) But subsection (2) has effect subject to the additional safeguard provisions (each of which imposes a safeguard, additional to those in subsection (1)(c) and (d), and more than one of which may apply in a given case).

(4) The additional safeguard provisions are—

- (a) section 12 (conditions for any act of restraint);
- (b) sections 13 and 15 (formal assessment of capacity, and consultation of nominated person, required for serious interventions);
- (c) sections 16 and 17 (second opinion required for certain treatment);
- (d) sections 19, 20, 24, 26, 28 and 30 (authorisation required for serious treatment where there is objection from P's nominated person or compulsion, and for deprivations of liberty and certain other measures);
- (e) section 35 (independent mental capacity advocate required for certain serious interventions).

(5) The principles in sections 1(3) to (5) and 5 (P not to be treated as lacking capacity on irrelevant grounds, or where practicable help and support not given) and section 7 (best interests) apply in particular for the purposes of determining whether a belief mentioned in subsection (1)(d) is reasonable.

(6) Where P is under 18, in subsection (1)(e) “without P's consent” is to be read as “without P's consent and without any consent that could be given by a parent or guardian of P”.

General limitations on section 9

10.—(1) Section 9 does not exclude—

- (a) civil liability for loss or damage resulting from a person's negligence in doing an act; or
- (b) criminal liability resulting from such negligence.

(2) Section 9 does not apply in relation to an act which is, or is done in the course of, psychosurgery.

(3) Section 9 does not apply in relation to an act that conflicts with a decision concerning the care, treatment or personal welfare of a person (“P”) which—

- (a) is made in accordance with this Act by an attorney under a lasting power of attorney granted by P and is within the scope of the attorney's authority; or
- (b) is made in accordance with this Act by a deputy appointed for P by the court and is within the scope of the deputy's authority.

(4) Nothing in subsection (3) prevents a person from—

- (a) providing life-sustaining treatment, or
- (b) doing an act which the person reasonably believes to be necessary to prevent a serious deterioration in P's condition,

while a decision as respects any relevant issue is sought from the court.

(5) The Department may by regulations amend subsection (2) so as to extend the descriptions of treatment to which section 9 does not apply.

Advance decisions: effect on section 9

11.—(1) Section 9(2) (protection from liability) does not apply if—

- (a) the act mentioned in section 9(1) is the carrying out or continuation of treatment of P; and
- (b) carrying out or continuing that treatment conflicts with an effective advance decision to refuse treatment which has been made by P.

(2) In this section “an effective advance decision to refuse treatment” means a decision which, under the common law relating to advance decisions, has the same effect as if at the material time P—

- (a) refused consent to the treatment’s being carried out or continued; and
- (b) had capacity to refuse that consent.

(3) In subsection (2) “the material time” means the time when the question arises whether the treatment should be carried out or continued.

(4) Nothing in this section prevents a person from—

- (a) providing life-sustaining treatment, or
- (b) doing an act which the person reasonably believes to be necessary to prevent a serious deterioration in P’s condition,

while a decision as respects any relevant issue is sought from the court.

Acts of restraint: condition that must be met

12.—(1) This section applies where the act mentioned in section 9(1) (“the relevant act”) is—

- (a) an act restraining P; or
- (b) an act that consists of instructing or authorising another person to do an act restraining P.

(2) Section 9(2) (protection from liability) applies to the relevant act only if the restraint condition (as well as the conditions of section 9(1)(c) and (d), and any other conditions that apply under this Part) is met in relation to the relevant act.

(3) The restraint condition is that at the time the relevant act is done, D reasonably believes—

- (a) that failure to do the relevant act would create a risk of harm to P; and
- (b) that the relevant act is a proportionate response to—
 - (i) the likelihood of harm to P; and

(ii) the seriousness of the harm concerned.

(4) In this section an “act restraining P” means an act which—

- (a) is intended to restrict P’s liberty of movement, whether or not P resists; or
- (b) is a use of force or a threat to use force and is done with the intention of securing the doing of an act which P resists.

(5) This section does not apply to an act which in itself amounts to a deprivation of liberty (as to which see sections 24 and 25).

(6) Subsection (5) does not affect the application of this section to an act restraining P which is done while P is detained in circumstances amounting to a deprivation of liberty.