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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2

Wednesday, 18 May 2011

LORD JUSTICE PITCHFORD

MR JUSTICE TREACY
RECORDER OF BIRMINGHAM, HIS HONOUR JUDGE WILLIAM DAVIS QC
Sitting as a Judge of the Court of Appeal, Criminal Division

R E G I N A
-v-
HOPKINS

R E G I N A
-v-
PRIEST

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MR A FEEST appeared on behalf of the CROWN
MR W CLEAVER and **MISS A HAMILTON** appeared on behalf of the APPELLANT Priest
MR A FEEST appeared on behalf of the CROWN

J U D G M E N T
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1. LORD JUSTICE PITCHFORD: This is an appeal against convictions returned on 29 June 2010 at Southampton Crown Court before His Honour Judge Hope following a trial lasting some two months. Each of the convictions was for an offence of wilful neglect of persons lacking capacity, contrary to Section 44 of the Mental Health Act 2005. As we shall observe later in this judgment, this is not the first time that a conviction under Section 44 has been considered by this court.

2. Grounds of appeal can be summarised as follows. (1) More than one offence was charged in each count of the indictment. Accordingly the indictment was bad for duplicity, rendering the convictions unsafe. (2) The judge should have acceded to submissions of no case to answer made both at the close of the prosecution case and at the end of the evidence. (3) The jury should have received a direction that they must be agreed as to the factual basis on which they returned any verdict of guilty. (4) The summing-up was defective because the jury received an inadequate direction upon the law and an inadequate summary of the evidence.

3. We have been assisted by submissions from counsel who represented the parties at the trial: Miss Lumsdon and Mr McElduff on behalf of the appellant Annette Hopkins, Mr Cleaver and Miss Hamilton on behalf of the appellant Margaret Priest, and Mr Feest and Mr Taylor on behalf of the respondent.

4. Before we turn to the grounds of appeal, we shall summarise the background and the evidence.

5. Mrs Annette Hopkins is aged 65. She was the effective owner of a care home called The Briars in Thorold Road, Bitterne Park, Southampton. She first opened the home, which was at that time her family home, in a single property in partnership with her husband in April 1987. Over the course of time, Mr and Mrs Hopkins acquired two adjoining properties and by 2007 it was registered with the Commission for Social Care Inspection ("CSCI") under the Care Standards Act 2000. It was licensed for the care of up to thirty-four residents. Mrs Hopkins was registered as the responsible individual under the Act.

6. The second appellant Mrs Margaret Priest is now aged 57. Mrs Priest first worked in The Briars in its early years but left for personal reasons. She returned at Mrs Hopkins' invitation in the late 1990s. In about 2003, Mr and Mrs Hopkins wished to reduce their daily commitment to the care home and Mrs Priest was invited by them to become manager of the home. At first she was reluctant to take on this responsibility but, with encouragement, after about six months, she agreed.

7. In 2007 she was the registered manager of the home. Sadly, Mr Hopkins had died. Mrs Hopkins retained an office at The Briars in order to carry out her responsibilities concerned principally with administration and business. The registration permitted The Briars to provide personal care to those over the age of 65 and those suffering from dementia. This is to be distinguished from a registration which permits a nursing home to provide medical and nursing care. In the case of The Briars, medical and nursing care, if required, would be sought from general practitioners and district nurses. As a

care home, The Briars was subject to the Care Home Regulations 2001 which set out the formal requirements for registration and for standards of staffing, training and care. Regulation 43 created offences of failing within three months to comply with notices informing the registered person of breaches of the Regulations. The offender was, under Section 25 of the Care Standards Act 2000, liable, on summary conviction, to a fine not exceeding level 4.

8. The enforcement authority is CSCI which performs annual or unannounced inspections. Following such inspections, CSCI may issue a notice requiring action to be taken or it may tender advice or both. Regulation 10 requires the registered provider (in this case Mrs Hopkins) and the registered manager (Mrs Priest) "to carry on or manage the care home (as the case may be) with sufficient care, competence and skill", having regard to its size, its statement of purpose and the needs of its service users.

9. By Regulation 26, where the registered provider is an individual but is not in day-to-day charge of the care home, she should visit once a month, interview staff, inspect the premises and prepare a written report of the conduct of the home. Mrs Hopkins was, as a matter of fact, occupying her office at The Briars either every day or almost every day although the running of the home was left largely in the hands of Mrs Priest. It is moot whether or not, for the purposes of Regulation 26, Mrs Hopkins was in day-to-day charge. The two ladies would however consult daily. Mrs Hopkins would also from time to time visit residents and speak to family visitors.

10. The home was inspected in the years 2005, 2006 and 2007 and, no doubt, in earlier years. CSCI applied care standards which would provide evidence whether a breach of a regulation had occurred. Although The Briars never received acclamation for all aspects of its care, no action was ever taken for breach of a notice. What seems to have occasioned more intense interest in The Briars was the death of a resident, Mr Ronald Reed. Mr Reed suffered a stroke in 1983 that left him with right-sided paralysis. In 2002, he suffered chronic renal failure, an aneurysm of the aorta and reduced circulation in his legs. He was particularly vulnerable to skin ulcers and suffered sometimes severe pain. He was admitted to The Briars in 2006 following hospital treatment and a short period in a nursing home. He required a double daily dose of slow-release morphine to control his pain.

11. The prosecution relied in opening its case to the jury upon Mr Reed's care as evidence of "systematic incompetence that was being shown by The Briars during this period".

12. That is to be compared with the evidence of Dr Townsend, the treating general practitioner. Dr Townsend's evidence, summarised at page 104 of the judge's summing-up, was to the following effect. Dr Townsend's had known Mr Reed for well over a decade before his death in 2008. He was an independent gentleman who had recurring problems with his toes caused by poor circulation. On 10 July 2008 Dr Townsend was called to The Briars because Mr Reed was suffering an infected toe. He was visited by a hospital registrar the following day. On 28 July it was clear that the condition of Mr Reed's toes was deteriorating. Dr Townsend, in evidence, spoke of the concern that morphine was dangerous to the kidneys but, on the other hand, without morphine Mr Reed could not be turned without suffering intense pain. He continued

that the relationship between his surgery and The Briars was a good one, better, he said, than with most care homes. Sadly, Mr Reed had to be admitted to hospital on 6 August. He died on 9 August 2008. It appears to have been his death which brought the full weight of CSCI to bear upon The Briars.

13. Somewhat earlier in 2008 other concerns were being expressed. There had been a change of district nurse in 2007. The new nurse, District Nurse French, became concerned that the staff at The Briars had an inadequate understanding of pressure sores and their prevention and the need to seek nursing help in the early stages. She said she had several conversations with Mrs Priest about these problems in June 2008. On 30 June, a one-and-a-half hour conversation took place between Mrs Priest and District Nurse French during which District Nurse French reviewed the shortcomings in care which she had observed. These concerned, in particular, pressure relieving care, skin treatment, hydration and diet. Mrs Priest said that she would endeavour to improve practice.

14. On 6 August, District Nurse French spoke at length to Mr Birt, The Briars' trainer in care techniques. He assured District Nurse French that he had provided the appropriate training and, as a result of her telephone conversation with him, District Nurse French concluded that the level of training was adequate.

15. Mrs Terry Mays was the Senior Practitioner for Adult Social Services in Southampton. During her visit and meeting at The Briars on 30 July, Mrs Mays was shown samples of their care plans, including that for Mr Reed. In Mrs Mays' view insufficient information was recorded. She was concerned at the number of patients who were suffering pressure sores. She informed CSCI of her concerns.

16. Mrs Mays gave important evidence about Mrs Priest's ability to cope. Reading from page 63 of the summing-up, she said:

> "In mid-August I think Mrs Priest was very hard working and working very long hours. She appeared very tired. She said she was trying to monitor staff at both ends of the shift, early mornings and evenings. She said she was there until 10 pm sometimes and she also told me she had started at 5 am one morning. Generally she was quite helpful to social services. The management team were helpful and allowed us to see documentation and answered questions when I arrived, but I did have some reservations. Maggie Priest was trying to up-date care plans and risk assessments. It seemed an enormous task. This was partly because of the numbers and also lots of tasks fell on her shoulders: staff supervision, up-dating documents as well as the day-to-day management of the home. She did look very tired in the middle of August and I felt she was struggling, doing her best but unsupported. I did not feel she had the tools to do the job .....
>
> ..... A care plan is a very, very important document. They were talking about purchasing the one-stop shop but it is about having the knowledge and skills and I do not believe that Mrs Priest did, but I believe she was

> undertaking some management training which would have assisted her with some of these tasks ..... I observed on a couple of occasions her with quite lovely care practice, communicating with residents but the managerial side was different to the care [side]. She was under pressure managerially."

17. When interviewed under caution, Mrs Priest expressed much the same judgment about herself as Mrs Mays expressed in her evidence. She did her best, she said, but she now realised that her best had not been good enough. She had not, for example, disciplined staff for failings when she should have done. The intensification of interest in The Briars by social services and CSCI in August and September 2008 had interrupted even the fragile grip that she and her staff had on the necessary routines at The Briars and it appears she had, by the end, become overwhelmed. Mrs Priest did not give evidence.

18. On advice, Mrs Hopkins made no reply in interview under caution but she did give evidence in the trial during which she expressed confidence in Mrs Priest as the manager of the home. She understood that the action points which had emerged from her meetings on 30 July were being dealt with. She accepted that there were problems at the home but she said she understood they were being resolved. In an endeavour to improve the situation and assist Mrs Priest, on 15 September she engaged the services of a consultant Mr Fawcett to give advice about necessary institutional changes, but by then it was too late. She was at that time worried about Mrs Priest who was in tears, under pressure from constant inspections.

19. During her evidence Mrs Hopkins said (page 327 of the summing-up):

> "I never had any doubts about the way she [Mrs Priest] cared for the residents, or any concerns that the needs of residents were being deliberately ignored or overlooked or disregarded. Not once. I had no concerns that they were being wilfully neglected. I have known Mrs Priest for many years and she would do anything to help anyone. She is not a confrontational character. She is a good natured lady and compliant. If asked, she gets on and does things. I would say also, she is somewhat deferential. Once she took over as manager, she understood the RMA course and completed it and was to go on to deal with NVQ level four. We had already started looking at that when we were closed. When recommendations were made as to alter procedures, she assisted in implementing them, very much so. On many occasions suggestions for improvements came from her. For instance moving from the cardex to Spandex system. And she was willing to embrace improvement and move with the times and get on with the job. The Briars was a place that I personally took pride in and I sought to instill this in my staff."

20. On Mrs Hopkins' behalf, a substantial number of relatives, visitors and staff were called to give evidence, including relatives of residents who were the subject of counts on the indictment. They spoke of a warm, friendly and caring environment at The Briars.

21. The strong impression which this court has received from reading the summing-up was that as the population of The Briars aged, their physical and mental health deteriorated. The staff were, for one reason or another, unable to meet the increasing demands on their time. Some patients, undoubtedly, should no longer have been in the care home since they required specialist nursing care.

22. We now turn to consider the nature of the charges in the indictment. The appellants were charged jointly in an indictment containing sixteen counts which alleged that between a wide span of dates, commencing in 2007 or early 2008 and ending on 30 September 2008, they, while having the care of a named resident - a person who lacked capacity or who they reasonably believed lacked capacity - ill treated or wilfully neglected that person. At the close of the prosecution case, the prosecution made it clear that it did not rely upon any act of ill treatment. There was indeed no evidence to support such a claim. The prosecution relied on wilful neglect. There was in that respect no evidence to support counts 10, 12 and 16 and formal verdicts of not guilty were returned.

23. After a retirement lasting from 11.10 am on 23 June to 12.30 pm on 29 June 2010, with a break for a weekend, the jury returned verdicts of guilty in the case of Mrs Hopkins upon the remaining counts, save counts 11, 13, 14 and 15. In Mrs Priest's case they returned verdicts of guilty upon counts 2, 3, 4 and 7 and not guilty upon the remainder.

24. The offence of ill treatment or neglect of a person who lacks capacity was created by Section 44 of the Mental Capacity Act 2005. Section 44 provides:

> "44 .....
>
> (1) Sub-section (2) applies if a person ('D') —
>
> (a) has the care of a person ('P') who lacks, or whom D reasonably believes to lack, capacity;
>
> (b) is the donee of a lasting power of attorney, or an enduring power of attorney (within the meaning of Schedule 4), created by P; or
>
> (c) is a deputy appointed by the court for P.
>
> (2) D is guilty of an offence if he ill-treats or wilfully neglects P.
>
> (3) A person guilty of an offence under this section is liable —
>
> (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum or both;
>
> (b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or a fine or both."

25. The purpose of the Mental Capacity Act 2005 was to make new provision for those who lacked decision-making capacity, to establish the Court of Protection and to

incorporate into domestic law the Convention on the International Protection of Adults of 13 January 2000. The scheme of the Act was to make provision for the protection of the interests of those who lacked mental capacity such as, but not limited to, the elderly who suffer from dementia and also for the protection of those who care for such persons when acting in their best interests.

26. Part I, Sections 1 to 3, describe the concept and meaning of capacity under the Act. Section 4 identifies the manner in which the best interests of a person lacking capacity is to be ascertained. Sections 5 and 6 give protection against liability for those who, while caring or treating, act in the best interests of the person lacking capacity. Sections 9 to 14 concern the grant of lasting powers of attorney. Sections 15 to 23 deal with the powers of the Court of Protection to make declarations, to make decisions or to appoint deputies to make decisions on behalf of a person who lacks capacity. Sections 22 and 23 define the court's powers to deal with powers of attorney. Sections 24 to 26 make provisions concerning advance decisions to refuse treatment. Sections 27 to 29 identify those decisions which are excluded from the operation of the Act. Sections 30 to 34 deal with the interests of a person without capacity taking part in research projects. Sections 35 to 41 create mental capacity advocates and define their role. Sections 42 and 43 require the Lord Chancellor to issue codes of practice. Section 44 creates the criminal offence to which we have just referred.

27. Part II of the Act contains provisions as to the creation, staffing and jurisdiction of the Court of Protection and the creation of the office of the Public Guardian and Court of Protection Visitor. Part III contains miscellaneous and supplementary provisions.

28. Capacity and lack of capacity are described and defined in Sections 1 to 3 of the Act. Section 1 sets out the principles upon which capacity is to be assessed:

> "1 .....
>
> (1) The following principles apply for the purposes of this Act.
>
> (2) A person must be assumed to have capacity unless it is established that he lacks capacity.
>
> (3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
>
> (4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
>
> (5) 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.
>
> (6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action."

29. Section 2 contains detail as to the manner in which a person can assess the capacity of another:

> "2 .....
>
> (1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.
>
> (2) It does not matter whether the impairment or disturbance is permanent or temporary.
>
> (3) A lack of capacity cannot be established merely by reference to —
>
> (a) a person's age or appearance, or
>
> (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.
>
> (4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.
>
> (5) No power which a person ('D') may exercise under this Act —
>
> (a) in relation to a person who lacks capacity, or
>
> (b) where D reasonably thinks that a person lacks capacity -
>
> is exercisable in relation to a person under 16.
>
> (6) Sub-section (5) is subject to section 18 (3)."

30. Section 3 sets out the test for deciding whether or not a person is able to make a decision for himself or herself:

> "3 .....
>
> (1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable —
>
> (a) to understand the information relevant to the decision
>
> (b) to retain that information
>
> (c) to use or weigh that information as part of the process of making the decision, or
>
> (d) to communicate his decision (whether by talking, using sign language

or any other means).

(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

(3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

(4) The information relevant to a decision includes information about the reasonably foreseeable consequences of —

(a) deciding one way or another, or

(b) failing to make the decision."

31. Section 4 concerns the judgment of the best interests of the person under consideration.

32. A person who is contemplating acting in the best interests of a person who lacks capacity must comply with Section 5 of the Act in order to obtain the protection of the Act:

"5 .....

(1) If a person ('D') does an act in connection with the care or treatment of another person ('P'), the act is one to which this section applies if —

(a) before doing the act, D takes reasonable steps to establish whether P lacks capacity in relation to the matter in question, and

(b) 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.

(2) D does not incur any liability in relation to the act that he would not have incurred if P —

(a) had had capacity to consent in relation to the matter, and

(b) had consented to D's doing the act.

(3) Nothing in this section excludes a person's civil liability for loss or damage, or his criminal liability, resulting from his negligence in doing the act.

(4) Nothing in this section affects the operation of sections 24 to 26

(advance decisions to refuse treatment)."

33. Although Section 5 is not limited to professional people, it follows that when a professional person such as a nurse or a doctor or a carer seeks to carry out a procedure, for example to administer medication or to change a person's clothing, he must first ascertain whether that person has the capacity to make a decision about that matter and may proceed to perform the act only if he has a reasonable belief in the person's incapacity and that the act will be in the person's best interests. If these three conditions are satisfied the person doing the act will be indemnified against civil or criminal liability subject to Section 6 of the Act.

34. The question emerges: in respect of what matter does a person need to lack capacity for the purpose of Section 44 (1) (a) which creates the criminal offence charged in the present case? The appellant sought to argue before the judge that Section 44 (1) (a) is so vague that no prosecution could succeed. As we have seen, "capacity", as treated by the 2005 Act, is not an absolute condition. Whether a person has capacity must be ascertained in the context of the matter under consideration in respect of which a decision must be made. A person may have capacity to decide what to eat but no capacity to decide whether to accept medication or to employ a particular carer or to sell a car or a house. Section 44 does not specify in respect of what matter the incapacity of the person must be proved. Section 44 requires proof either that the person lacks capacity in respect of a matter which is unidentified or that the defendant reasonably believed that the person lacked capacity in respect of a matter which is unidentified. On first reading, therefore, an offence charged under Section 44 (1) (a) is incapable of proof.

35. The judge acknowledged the difficulties created by the drafting of Section 44 but concluded that the duty of the Crown Court was to do its best to interpret the law as Parliament had enacted it. The judge concluded as follows in his ruling (Vol 1, page 5):

> "I do not consider it wrong or improper to direct a jury in this case that they must be first of all sure that the person, the named resident of The Briars, as set out in the particulars in a particular count, is a person to whom Section 44 (1) applies, including adopting the statutory test contained in Section 2, (4) of the Act. To do so, and if they are so sure, that they must also be sure that that person has been ill treated or wilfully neglected by the particular defendant concerned. If that is carried out properly, I do not consider such proceedings to be an abuse of the process of the Court, and it will enable any defendant to have a fair and proper trial in the circumstances. And in my judgment with no breach of the European Convention for the Protection of Human Rights."

36. This left the question in respect of what matter should the jury judge the resident's capacity. During the CSCI inspections in August and September 2008 assessments were made by social workers against the criteria whether the resident was capable of making a decision about his or her long-term care in The Briars or any other establishment. The judge held that it was for the jury to decide whether this evidence

was sufficient to establish the lack of capacity required by Section 44 (1) (a) as interpreted against the test set out in Section 2 (1).

37. Having considered the evidence for ourselves, we agree with the judge that provided Section 44 satisfied the requirement of certainty, there was evidence upon which the jury could conclude that each patient lacked the capacity to make a decision about his or her place of residence. This however does not provide an answer to the preceding objection in principle, namely that Parliament had not identified the matter in respect of which a judgment of capacity must be made. This court could make suggestions as to what Parliament had in mind, for example, capacity to make a decision as to (1) residence, (2) personal hygiene and care, (3) personal finances, and (4) the identity of personal carers. We can think of more examples. The question for this court is whether any of them necessarily must be implied or is capable and should be implied into the wording of Section 44 (1) (a).

38. As to the issue of certainty, in Misra [2005] 1 Cr App R 328, at paragraphs 29 to 34, Judge LJ (as he then was) traced the development of the requirement of "sufficient certainty" in the criminal law, whether a creature of the common law or of statute. At paragraph 34 he concluded:

> "34 ..... In summary, it is not to be supposed that prior to the implementation of the Human Rights Act 1998, either this Court, or the House of Lords, would have been indifferent to or unaware of the need for the criminal law in particular to be predictable and certain. Vague laws which purport to create criminal liability are undesirable, and in extreme cases, where it occurs, their very vagueness may make it impossible to identify the conduct which is prohibited by a criminal sanction. If the court is forced to guess at the ingredients of a purported crime any conviction for it would be unsafe. That said, however, the requirement is for sufficient rather than absolute certainty."

39. Lord Justice Judge's analysis was cited with approval by Lord Bingham of Cornhill in his speech in R v Rimmington and R v Goldstein [2006] 1 AC 459, paragraph 33. Their other Lordships agreed. Concluding at paragraph 33, Lord Bingham continued:

> "33 ..... There are two guiding principles: no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly and ascertainably punishable when the act was done. If the ambit of a common law offence is to be enlarged, it 'must be done step by step on a case by case basis and not with one large leap': R v Clark (Mark) [2003] EWCA Crim 991, [2003] 2 Cr App R 363, para 13."

Lord Bingham proceeded to examine the Strasbourg jurisprudence upon Article 7.1 of the European Convention on Human Rights (ECHR) and concluded to similar effect (see paragraphs 34-36).

40. Unconstrained by authority, this court would be minded to accept the submission made on behalf of the appellants that Section 44 (1) (a), read together with Section 2 (1) of the Mental Capacity Act 2005, is so vague that it fails the test of sufficient certainty at common law and under Article 7.1, ECHR. However this court has made a decision upon Section 44 of the Act which binds this court.

41. In R v Clare Dunn [2010] EWCA Crim 2395, This court (Lord Judge CJ, Mr Justice Calvert-Smith and Mr Justice Griffith Williams) considered a submission made on behalf of the appellant that directions given to the jury by the Recorder were insufficiently explicit in their assistance to the jury upon the meaning of "a person without capacity". The appellant had been convicted upon four counts alleging ill treatment, contrary to Section 44 (1) (a) and (2) of the Act.

The directions provided by the Recorder to the jury included the following:

> "What is 'a person without capacity'?
>
> A person 'lacks capacity' within the meaning of the Act of Parliament if he is unable to make decisions for himself because of some impairment or disturbance of the function of the mind or brain. The key phrase is, 'unable to make decisions for himself'. A diagnosis of dementia on its own is not enough. The impairment or disturbance may be permanent or temporary ..... You always assume to start with that a person has capacity and then you look at the evidence as a whole including the medical evidence and you ask yourselves this question: 'Did he probably lack capacity?' To put it another way, 'Is it more probable than not that he lacked capacity?'"

42. Having recited the terms of the relevant sections of the Act, the Lord Chief Justice continued at paragraphs 20-23 as follows:

> "20 We have outlined the way in which the Recorder directed the jury on this issue. The criticism of the direction, as we have already indicated, is that it was insufficient or inadequate. The problem, so Mr Traversi argues, is that the way in which the Recorder directed the jury was too broad and not sufficiently specific for the purposes of identifying for each individual whose case was under consideration the matters identified in section 3 (ie the diagnostic questions). As to this, although it is right that the Recorder made clear in his summing-up that his direction applied to all three of the complainants in question, it was not enough for him to explain these matters in the way that he did. In the end the direction is said to have failed to focus sufficiently on the capacity of each of them to make decisions at the time with which the counts in the indictment were concerned.
>
> 21 The question therefore, in each of these cases, is whether the absence of express reference to 'the specific decision test of capacity' and 'the specific time of decision requirement' resulted in a direction that was

flawed because it was incomplete.

> 22 In each case with which the court is concerned, the ill-treatment occurred in the course of the provision of care in circumstances which the jury found (and if they rejected the appellant's account on the evidence, unsurprisingly found) constituted ill-treatment. Although, as Mr Traversi's submissions indicated, there is something of a disconnection between the simple criminal offence created by section 44 of the Act and the elaborate definition sections which are directed to the more general questions of mental capacity in the wide context of the legislation as a whole, nevertheless the stark reality is that it was open to the jury to conclude that the decisions about the care of each of these residents at the time when they were subjected to ill-treatment were being made for them by others, including the appellant, just because they lacked the capacity to make these decisions for themselves. For the purposes of section 2, this was 'the matter' envisaged in the legislation. On this basis the Recorder's direction properly expressed the issues which the jury was required to address and resolve by putting the direction clearly within the ambit of the language used in section 2.
>
> 23 In the context of long-term residential care, and on the facts of this particular case, it was unnecessary for the Recorder further to amplify his directions and complicate the position for the jury by referring in this part of his summing-up to any of the provisions of section 3, or for them to be incorporated into his directions. Therefore, the omission to incorporate them or to refer to the material contained in section 3 does not lead us to doubt the safety of the conviction of offences contrary to section 44 of the 2005 Act."

43. We are conscious that it may be the short report of this decision of the court conceals the breadth and ambit of argument addressed to the court by counsel on behalf of the appellant. At first sight it would appear that the submission made was somewhat different to that addressed to this court in the current appeal. However, the ratio of the court was as expressed by the Lord Chief Justice in paragraph 22, namely that the matter in respect of which capacity was required to be lacking for the purposes of Section 44 was the person's ability to make decisions concerning his or her own care.

44. It seems to this court that we are bound by the decision in Clare Dunn, and for that reason we find that the ground of appeal as to uncertainty is not made out.

45. Further submissions were made on behalf of the appellants as to the interaction between Section 44 and Section 2 (4) of the Act. It was argued that Section 2 (4) should be construed as inapplicable to proof of the criminal offence. Unless expressly stated to the contrary, it is a principle of criminal law in England and Wales that a burden of proof placed on the prosecution must be established to the criminal standard, namely so that the jury is sure of guilt. Section 2 (4) provides that in "proceedings" under the Act or any other enactment, any question whether the person lacks capacity within the meaning of the Act must be decided on the balance of probability.

46. There are, it is observed, many and various "proceedings" in which the existence of capacity will required precision, not least in proceedings in the Court of Protection. The word "proceedings" is however apt to describe both civil and criminal proceedings. We cannot assume that Parliament intended Section 2 (4) to apply to all proceedings except those contemplated by Section 44. Had the intention been to exclude Section 44 from the operation of Section 2 (4), then we can see no reason why that could not have been achieved explicitly.

47. The effect of this construction is not to change the criminal standard of proof of the offence but only of the state of affairs in which the offence was committed. In other words, the prosecution must prove (1) to the criminal standard that the defendant ill treated or wilfully neglected a person in his care, and (2) that on a balance of probability that person was a person who at the material time lacked capacity.

48. In an endeavour to explain to the jury the meaning of lack of capacity, the judge handed to the jury a resume of Sections 1 to 3 of the 2005 Act which included the reference to probability in Section 2 (4). However on two occasions, once before and once after his explanation of capacity, the judge instructed the jury that they must be sure that the resident named in the count they were considering lacked capacity in relation to a matter concerning his or her care or lack of it. As we have said, it is our view that it would have been permissible to attach to the question of capacity the civil standard of proof provided that capacity, as deployed in Section 44, is capable of definition. We are reassured in this decision by the fact that in Clare Dunn the Recorder had directed the jury as to the civil standard of proof in ascertaining whether or not a resident lacked capacity, and no point was taken before the court.

49. We turn to the judge's handling of the issues of wilful neglect. In this context, we have to consider the issue of duplicity and the judge's directions in law together with his summary of the facts. It is now argued that the indictment was bad for duplicity because the prosecution was relying, in the case of each resident in each count, upon more than one feature of neglect during the indictment period. We do not agree. Neglect may be an instant or a continuing phase. We note that Section 44 does not require proof of any particular harm or proof of the risk of any particular harm. The prosecution was required to prove neglect which, in our view, the judge rightly directed the jury would be proved by a failure to act during any period embraced by the count. On the evidence, that period was in fact August and September 2008.

50. The appellants also submit that the jury should have been directed in accordance with Brown [1984] 79 Cr App R. 115 (CA) to the effect that they must be agreed upon each failure of care upon which the prosecution relied in respect of each count. We do not accept this submission. This was not a Brown case. The offence charged was a continuing one. It was not necessary for the jury to be agreed upon each aspect of the neglect relied upon. It was necessary for each juror to be sure that during the indictment period the defendant was guilty of wilful neglect (see R v Young [1970] Cr App R 280).

51. We well understand, however, the complaint made on behalf of the appellants that there was no document in which the prosecution had itemised the features or consequences of

neglect on which they were relying. Such a document was produced by way of riposte to the submissions of no case to answer. It was called "Neglect - Draft 1". It was not, however, adapted for the use of the jury.

52. We need refer only to the entries concerning one of the residents, Mrs Maud Jones in count 1 since the same pattern was followed throughout the schedule. The prosecution relied, first, on events of 19 August 2008 when it was observed that Mrs Jones' pressure mattress was "set too high". No NHA nursing assessment had been done. She had a soiled pad with loose stools. A hoist was present but its suitability for use had not been assessed. She was using a bed that was inappropriate. On 19 September she was supported when lying down with a risk of choking. She needed a liquidised diet but had, on occasion, been given solids. No eating assessment had been made. On 23 September a catheter tube was found wrapped around one of her legs. Mrs Jones was suffering from grade 2 bed sores.

53. In respect of each count in the indictment, the prosecution had to establish that (1) the resident was in the appellants' care, about which there was no issue; (2) the resident lacked capacity; (3) the appellant wilfully neglected that resident. The evidence established that in many, if not all, respects there were shortcomings in the standard of care being provided to the residents. The primary issues for the jury were whether those shortcomings constituted neglect by the appellant whose case was being considered and, if so, whether that neglect was wilful.

54. As we have observed, the division of responsibility within The Briars was an important factual consideration. Mrs Hopkins was the owner. However her principal day-to-day tasks were administration of the business and executive decisions rather than care of patients. She relied upon her manager, Mrs Priest, who performed all necessary managerial functions, including supervision of staff and some personal care of patients.

55. Part 3 of the Care Homes Regulations 2001 places specific obligations upon "the registered person", including ensuring that (Regulation 12) the care home is conducted so as to promote and make better provision for the health and welfare of service users, (Regulation 15) to prepare a care plan for each resident, and (Regulation 18) to employ suitably qualified and supervised staff. However by Regulation 44 -

> "whether there is more than one registered person in respect of a care home, anything which is required under these Regulations to be done by the registered person shall, if done by one of the registered persons, not be required to be done by any of the other registered persons."

In other words, the Regulations themselves recognise that there will be a division of responsibility between registered persons.

56. The judge handed to the jury a synopsis of the regulatory requirements but he did not include Regulation 44. He informed the jury that they could take into account any breaches of the regulations, but he went on to emphasise that proof of breach was not proof of wilful neglect. He directed the jury that they must be sure that the particular defendant they were considering deliberately or recklessly failed to -

> "ensure that things like proper assistance of care plans, recordings of medications or fluid in-take or nutritional assessments or turning charts or pressure sores and other risk assessments or training ..... all those things that we have been hearing about in the trial, whether they were in place with the proper supervision in relation to that particular resident, such that it is proved so that you are sure that the particular defendant did have that guilty mind and so wilfully neglected a vulnerable resident at The Briars within the definition contained in the Mental Capacity Act 2005 and R v Shepherd that I directed you now about."

57. In our judgment that direction was inadequate. The judge had made reference R v Shepherd. What he did was to write out in longhand extracts from the speeches of Lord Diplock, Lord Edmund-Davis and Lord Keith, hand copies to the jury and read them into his legal directions. We are informed by counsel that this was a matter of some surprise to all those involved. In our view this course was most unwise. First, their Lordships' speeches are not identically expressed. Second, they are ripe for contentious interpretation between twelve individuals without legal training. Third, it was unnecessary. What the jury required was a short, unambiguous statement of the law, probably in writing and, we would suggest, a written route to verdict or something similar.

58. By way of example, returning to count 1 which alleged wilful neglect of Mrs Maud Jones, the prosecution relied on several alleged failings. The jury needed to ask in respect of each one (1) are we sure lack of care is proved?; (2) if so, are we sure that it amounted to neglect?; (3) if so, are we sure either (i) that the defendant knew of the lack of care and deliberately or recklessly neglected to act, or (ii) that the defendant was unaware of the lack of care and deliberately or recklessly closed her mind to the obvious?

59. We do not suggest that this is the form of question required in every case. But in this case the appellants were persons whose primary responsibility was supervision and management rather than hands-on care. The issue whether or not either or both of them was aware of the failing was a principal fact about which the jury required direction or, in the alternative, if unaware of that failing, whether the jury were sure that it was the consequence of a deliberate or reckless closing of the eyes to the obvious.

60. The judge did not explain the concept of wilful neglect as it applied to each defendant in the circumstances of her role in the care plan. Neither did he relate the requirement for wilful neglect to any of the failings which, it was alleged, applied to any particular count.

61. Surprisingly, the jury did not receive a list of particulars justifying each count in the indictment. Mr Feest was driven by inquiry from the court to accept that particulars of the requirements in respect of each count were desirable features of the summing-up which were missing. Mr Feest's submission to the court was, notwithstanding, the verdicts returned by the jury could be regarded as safe.

62. For a period of up to six days the judge simply read out the contents of his note book of the evidence, starting with the CSCI personnel, moving to the social workers, the district nurse, occupational therapists, doctors, relatives and the police. There were some thirty-seven witnesses for the prosecution whose evidence was dealt with in this way. The judge then read out the contents of Mrs Priest's interviews and followed the same system of reading the evidence from his note book in respect of defence witnesses, twenty-seven witnesses in all for the defence.

63. Mr Feest relies upon the fact that there were different verdicts recorded in respect of Mrs Hopkins from those recorded in respect of Mrs Priest as evidence of the fact that the jury must have paid close attention to the evidence and was able to make distinctions between them. We are baffled as to how the jury could be expected to relate to any particular count in the indictment all the evidence relevant to that count. Whenever a witness spoke about a resident named in the indictment the judge did identify that resident and the appropriate count number, but the jury cannot in our view have received an holistic impression of all the evidence relating to any particular resident.

64. This case, in our view, cried out for a compartmentalised and structured summing-up dealing with each resident in turn. We are at a loss as to how the jury did manage to distinguish between Mrs Hopkins and Mrs Priest on those counts in respect of which Mrs Priest was acquitted. Valiantly though Mr Feest attempted to justify those decisions, we are unable to detect a route by which such distinctions could safely be made. What was required here in our opinion was an analysis of the issues of wilful neglect in the context of the evidence in the case concerning these two separate appellants as they now are. The jury needed careful directions on the issue of delegation of tasks and upon the difference between wilful neglect of the welfare of residents on the one hand, and failure of honest efforts of an overworked but caring manager on the other.

65. In the circumstances we have been driven to conclude that these verdicts cannot be sustained and the appeals are allowed.

66. MR FEEST: As far as any re-trial is concerned, I have not had a formal decision, particularly bearing in mind the nuances of your judgment. I can say that I do not anticipate a re-trial will take place.

67. LORD JUSTICE PITCHFORD: Would it be in the public interest?

68. MR FEEST: That is why I say that.

69. LORD JUSTICE PITCHFORD: The home has closed down.

70. MR FEEST: The home has closed down.

71. LORD JUSTICE PITCHFORD: All these matters would need to be considered afresh if there were a further application.

72. MR FEEST: They would. That is exactly why I say I do not anticipate there would be a re-trial. Could I seek twenty minutes to confirm that?

73. LORD JUSTICE PITCHFORD: If we come back at 2 o'clock, will that give you sufficient time?

74. MR FEEST: I hope so. If not, I can ask for more. I anticipate it will.

75. LORD JUSTICE PITCHFORD: Miss Lumsdon, do you want to give consideration either within the next half-an-hour or over a longer period, if you make the application in writing, as to certification on a point of law? Do you want to reflect on that?

76. MISS LUMSDON: Yes, we would like to. I should try to think of a question. You may already have a question.

77. LORD JUSTICE PITCHFORD: We will leave the onus on you.

78. MR JUSTICE TREACY: I draw your attention to Criminal Procedure Rule 74.2 which you will find at Archbold 7-324. You need to look at that.

79. LORD JUSTICE PITCHFORD: None of us is at the moment clear without looking at the rules as to whether you may be given leave to appeal on a point of law which does not arise because you have already succeeded on appeal.

80. MISS LUMSDON: That was one of the questions praying on my mind.

81. LORD JUSTICE PITCHFORD: It is one of the reasons why you are here to help us.

82. MR FEEST: We may well support that application if it is made bearing in mind the important point it goes to.

83. LORD JUSTICE PITCHFORD: If it cannot be made - - you cannot support it.

84. MR FEEST: No.

(Adjourned)

85. LORD JUSTICE PITCHFORD: When I was about half-way through our judgment, I asked if the shorthand writer would incorporate Section 45; I meant Section 44.

86. MR FEEST: Yes. I have taken formal instructions and the Crown agree with the court that it is not in the public interest to seek a re-trial.

87. LORD JUSTICE PITCHFORD: Thank you.

88. MISS LUMSDON: In the light of the decision that has been reached today and the prosecution's indication, Mrs Hopkins has served a community service in any event. That has been and done. She also had to pay a fine of £27,000 and a contribution towards prosecution costs of £25,000. Where the Court of Appeal reverses or varies a ruling, it may make such an order as to the costs to be paid by the accused - - - - -

89. MR JUSTICE TREACY: What is your application?

90. MISS LUMSDON: We would like an order that she is reimbursed sums of money that she has paid. It may follow automatically. I thought it did. If I need to mention it, I do mention it.

91. MR JUSTICE TREACY: If you sought an order from us that the costs are quashed, which may well follow from the decision of the court, then that would be all you needed.

92. MISS LUMSDON: It would. I am sure that will be it exactly. I did not want to omit it.

93. So far as the Supreme Court is concerned, I have been wrestling with construction of the section of the Criminal Appeal Act. It may be that the wording of Section 33 - appeal lies to the Supreme Court at the instance of the defendant, the prosecutor - meant decision of the Court of Appeal on appeal to that court etc. Of course your decision is that the appeal has been allowed.

94. LORD JUSTICE PITCHFORD: We would not be granting you leave. We might be persuaded to certify a point of law.

95. MISS LUMSDON: Yes.

96. LORD JUSTICE PITCHFORD: If there is no prospect of the Supreme Court entertaining an appeal on which you have been successful on the merits, then there would be no point in certifying a point of law of general public importance, would there?

97. MISS LUMSDON: No.

98. LORD JUSTICE PITCHFORD: That is what we were interested in.

99. MR JUSTICE TREACY: The Supreme Court is not a forum for determining moot points. It is a forum for dealing with decisions of this court, as Section 33 makes clear. We have made our decision, and you have been successful.

100. MISS LUMSDON: Yes.

101. LORD JUSTICE PITCHFORD: We will leave it there.

102. MISS LUMSDON: Thank you.

103. LORD JUSTICE PITCHFORD: Very well. We shall quash the orders that were consequential upon conviction, including, n the case of Mrs Hopkins, the fine and the order for prosecution costs. Anything else?

104. MISS LUMSDON: No.