Neutral Citation Number: [2018] EWCA Crim 2743

Case No: 2018/01659/C3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)

ON APPEAL FROM OXFORD CROWN COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 10/12/2018

Before :

LADY JUSTICE MACUR

MR JUSTICE JULIAN KNOWLES

AND HIS HONOUR JUDGE WALL QC

(SITTING AS A JUDGE OF THE CACD)

- -

Between :

EMMA-JANE KURTZ — **Appellant**

- and -

THE QUEEN — **Respondent**

- -

- -

Clare Wade QC and Susan Wright (instructed by **the Registrar of Criminal Appeals**) for the **Appellant**
Oliver Saxby QC (instructed by **CPS**) for the **Respondent**

Hearing date: 9 October 2018

- - - - - - - - - - - - - - - - - - - -

Approved Judgment

The Right Honourable Lady Justice Macur:

Introduction

1. The Registrar of Criminal Appeals has referred this application for permission to appeal against conviction and sentence to the Full Court. The application concerns the scope of the offence created by s 44(2) read, in this case, with s 44(1)(b) of the Mental Capacity Act 2005 ('MCA 2005) of which the Appellant was convicted. This provision has not previously been considered by the Court of Appeal. We grant permission.

2. Section 44(1)(2) provides:

> **"***44 Ill-treatment or neglect*
>
> (1) Subsection (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. Section 2 of the MCA 2005 defines lack of capacity and contains other relevant provisions:

> "*2 People who lack capacity*
>
> (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) …
>
> (6) ..."

4. The essential question at the heart of this appeal is whether, on a prosecution for the offence contrary to s 44(2) read with s 44(1)(b), the prosecution must prove that the person said to have been wilfully neglected or ill-treated lacked capacity, or that the defendant reasonably believed that s/he lacked capacity. We shall refer to this as 'the lack of capacity requirement'.

5. In this judgment henceforth, for brevity, we shall refer to 'the offence contrary to s 44(1)(a)', 'the offence contrary to s 44(1)(b)', etc, albeit that, strictly, the offence is created by s 44(2) in relation to each of the persons identified in the three sub-paragraphs of s 44(1).

The factual background

6. On 27 March 2018 Emma-Jane Kurtz ('the Appellant') was convicted of an offence of wilfully neglecting her mother, Cecily Kurtz ('Cecily') in respect of whom she was the donee of an enduring power of attorney ('EPA'), contrary to s 44(1)(b) of the MCA 2005. On 27 April 2018 she was sentenced to 30 months' imprisonment.

7. This is a distressing case. In summary, the prosecution's case was that Cecily was elderly and suffered from serious mental illness and that her daughter (who lived with her and her father) had wilfully neglected her over a long period of time, in particular, by failing to arrange for proper medical treatment. As a consequence, Cecily lived in squalor and her health deteriorated until she died. The prosecution said that if she had received medical treatment then she would have recovered and survived, just as she had done in the past.

8. On 2 July 2014 paramedics attended the home which the Appellant shared with her mother and father in Didcot, Oxfordshire. Her mother was pronounced dead at the scene. She was 79 at the time of her death. Her body was in a seated position on a sofa in the living room which had an indent in it suggestive of her having sat there in the same position for some considerable time. She was sitting in her own urine and faeces, and had urine burns and sores on her buttocks and legs. She was malnourished (weighing only about six stone) and was covered in dirt. Her hair was matted and her nails were unkempt, suggesting that they had received no attention for over a year. When the paramedics tried to lift her body from her seat, her clothes fell apart. She had not changed her clothing for many, many months.

9. The house itself was in a state of squalor. There was water running down some of the walls, a stair was missing from the staircase, and it smelt of mould and damp.

10. The Appellant had made no attempt to seek medical treatment for her mother. She had approached Dr Corps on 1 July 2014, the day before her mother's death, and told him that her mother needed to be accommodated elsewhere to enable some maintenance work to be done to the house. She dialled 999 to call for an ambulance on the day of her mother's death, and again was keen to tell the operator about the house and that it was in a very bad state.

11. The Appellant told the paramedics who attended at the house that her mother had not wanted help, had been unable to stand for some time, and had been refusing food. She had been sitting in the same position for a number of days. Thereafter, she made no comment in interview but presented the police with a prepared statement.

12. Dr Croker, a consultant geriatrician, concluded that Cecily had not been looking after herself for months or possibly years before her death. In his opinion, she was obviously in need of hospital treatment. She would have been unable to stand, move or take herself to the lavatory. The cause of death was a deep vein thrombosis which was the result of a prolonged period of inactivity. He was clear that she would likely have benefited from being admitted to hospital some time before her death.

13. Cecily had a history of mental illness including bipolar disorder, depression and obsessive-compulsive disorder. She also had a history of failing to co-operate with medical professionals when they tried to help her. She had refused to see her GP or to have a Mental Health Act 1983 assessment in 2004, and thereafter had had nothing to do with doctors. There was evidence that in the past when Cecily had availed herself of medical assistance it had temporarily alleviated her mental health conditions. There was also evidence that Cecily could be difficult with anyone within the family who tried to persuade her to seek medical attention.

14. As is obvious from this summary, life for this family was unusual and difficult. They did not socialise with other people. The Appellant's father and mother did not have a happy relationship, and over the years her father moved to the upstairs of the house and effectively lived a separate life from her mother.

15. The Appellant was a 41-year-old solicitor of good character. The senior partner at the law firm at which she worked described her as having particular empathy for the elderly while at work. She specialised in issues relating to mental capacity and dealt with other people's powers of attorney. She was, however, mildly autistic herself and had few friends. Professor Coyd and Dr Bagshaw, who gave evidence for the defence at trial, described her as having paranoid traits and being unusually keen to avoid conflict situations.

16. In 2006 Cecily granted an EPA to the Appellant pursuant to the Enduring Powers of Attorney Act 1985 ('EPA Act 1985'). This EPA (which remained in force following repeal of the EPA Act 1985, pursuant to Sch 4 of the MCA 2005) was never revoked or replaced with a Lasting Power of Attorney ('LPA'), a new form of power of attorney created by the MCA 2005, nor was any application made to register it with the Public Guardian.

The indictment

17. Originally the indictment contained a count against the Appellant and her father of wilfully neglecting someone for whom they were caring and who lacked, or whom they reasonably believed to lack, capacity contrary to s 44(1)(a) of the MCA 2005. However, before the trial began, the prosecution decided that it was not in the public interest to prosecute the Appellant's father because of his own ill-health. Having made that decision, the prosecution then amended the charge against the Appellant from the offence under s 44(1)(a) to one under s 44(1)(b) of the MCA 2005. This was not opposed by the defendant's legal representatives.

18. Mr Saxby QC, who appeared before us for the Crown and who appeared at the trial, submitted that the amendment, which substituted a charge pursuant to section 44(1)(b), obviated the need for the prosecution to prove the lack of capacity requirement in relation to the Appellant's mother, or that the Appellant had the care of her mother. He submitted that it was thought that this made the prosecution's task simpler before the jury.

19. We can imagine cases in which the requirement to prove lack of capacity, or the defendant's reasonable belief in lack of capacity, would be hard to establish. We can also envisage cases where it might be difficult to show that the defendant was in a caring a role. This case was unlikely to have been one of them. The state of Cecily Kurtz in the months leading up to her death, and the conditions in which she spent the last weeks and months of her life, might well have been sufficient, without more, for the jury to have been satisfied that she lacked capacity. Also, given that the Appellant was a solicitor specializing in mental capacity matters, and given that she lived with her elderly and infirm parents, the prosecution would have had little difficulty in showing that she had the care of her mother for the purposes of s 44(1)(a). We consider that had the prosecution proceeded on the indictment as originally drafted then the complications of this case might never have arisen.

The decision below

20. Following the amendment of the indictment, the trial judge was asked to rule in advance of the trial whether the prosecution had to prove the lack of capacity requirement in relation to Cecily. He ruled that they did not, in the following terms:

> "Parliament has made the position on capacity clear in relation to subsections (1)(a) and (1) (c) and could easily have done so, if that was their intention, in relation to (1)(b). For example, subsection (1) of Section 44 could have been drafted to give effect to the submissions of Miss Wade [counsel for the Appellant] in the following way. Where a person (P) lacks capacity and (a) D knows or reasonably believes P lacks capacity, (b) D is the donee of an LPA or registered EPA created by P or (c) is a deputy appointed by the court for P, then the effect could easily have been achieved. That is not what Parliament has said. There is no need on the face of the legislation for either a lack of capacity to be known or believed by D, nor that there has been a finding elsewhere on the balance of probability that incapacity exists.

> This may sit uncomfortably with the purposes set out at the beginning of the Act, but it is clear to me that the meaning, the interpretation I have given to the words of the statute, which are simple and straightforward, is that Parliament did not intend there needs to be a lack of capacity or a reasonable belief in the lack of capacity in relation to an offence under subsection 1(b)."

21. The questions for the jury in the judge's route to verdict were as follows:

> "6. In order to reach your verdict you must answer the following questions:
>
> (a) Are we sure that CK required medical help (either physical or mental) or care for her personal needs to protect her health ? If yes go to question b); if no then the verdict is not guilty.
>
> (b) Are we sure that [the Appellant] appreciated that she needed such help? If yes, go to question d); if no go to question c).
>
> (c) Are we sure that [the Appellant] metaphorically 'closed the door' on CK such that she did not care (was indifferent/could not face helping her) whether she required medical help/care for her welfare ? If yes, the verdict is guilty and you do not need to consider (d) and e) below; if no then the verdict is not guilty.
>
> (d) Are we sure that [the Appellant] failed to seek to obtain the help/care that was required in a) above? If yes, go to question e) if no, then the verdict is not guilty.
>
> (e) Are we sure that it was unreasonable for [the Appellant] not to seek to obtain that help/care in the circumstances that were known to her (or that c has applied) ? If yes, the verdict is guilty; if no, the verdict is not guilty. (It is not reasonable if someone is indifferent or does not care whether or not to seek help.)"

22. Consistently with his earlier ruling, the judge did not give the jury any direction relating to Cecily's capacity when summing up. The jury convicted the Appellant.

The submissions on the application

23. The submission by Ms Wade QC on behalf of the Appellant was that the existence of the EPA was not sufficient of itself to render the Appellant guilty of the offence contrary to s 44(1)(b) of the MCA 2005 even if she had wilfully neglected her mother. She took two points:

a. Firstly, she argued that, as most of the powers conferred by an EPA cannot be exercised until the document is registered under Sch 4 to the MCA 2005, s 44(1)(b) should be read as if it applied only to registered EPAs. She submitted that if the Appellant were to incur criminal liability 'in virtue of the unregistered EPA *simpliciter* then that is too remote a basis for the imposition of criminal liability in relation to the matters alleged.' This EPA had never been registered and so the Appellant could not be guilty of the offence. This was Ground 1.

b. Second, she submitted that the MCA 2005, in accordance with the Act's long title that it is 'to make new provision relating to persons who lack capacity' should not be read in a way which would mean that anyone who is the donee of a power of attorney, and who wilfully neglects the donor, is guilty of the offence where the donor still had capacity at the time of neglect. The mere fact that someone (the donor) grants to another (the donee) an EPA does not mean that donor lacks capacity. Indeed, an EPA can only have legal effect if it is created by someone who at the time of making it was capacitous. Therefore, she submitted that in order to reflect the mischief which s 44 was designed tackle, s 44(1)(b) should be read as if it required the prosecution to prove the lack of capacity requirement in relation to the donor of the EPA. Because the judge held that this did not have to be proved, and directed the jury accordingly, Ms Wade submitted that the Appellant's conviction is unsafe. This was Ground 2.

24. Other grounds of appeal were advanced in writing but rightly not pursued in oral submission. We say no more about them.

25. On behalf of the Respondent, Mr Saxby's submission was that the Appellant was the donee of her mother's EPA. He argued that fact alone triggered a duty on her not to ill-treat or wilfully neglect her mother. Registration was not necessary. She had breached that duty by not seeking medical help for her mother when it was obviously needed. Therefore, she had wilfully neglected her mother and was guilty of the offence contrary to s 44(1)(b) of the MCA 2005. We were urged to read the section literally and not to imply into it - as Mr Saxby would have it - further requirements. He said that the meaning of the section was clear on its face, and that was the answer to both parts of Ms Wade's case.

26. Unfortunately, at the conclusion of the hearing we were not satisfied that we had been provided with sufficiently detailed written submissions or relevant contextual and background material on the MCA 2005 in general, and s 44 in particular. Accordingly, we requested and received further written submissions from both sides, and a quantity of supporting material, which we have taken into account.

27. For the reasons given hereafter we reject Ground 1. In relation to Ground 2, we have decided that s 44(1)(b) of the MCA 2005 must be construed to require the prosecution to prove the lack of capacity requirement as an element of the offence. It is not sufficient for the prosecution merely to prove that the defendant was the donee of an LPA or EPA, and that the defendant ill-treated or wilfully neglected the donor. That means the judge misdirected the jury in a material way and we are satisfied that the Appellant's conviction is therefore unsafe.

Discussion

28. We have every sympathy for the trial judge. He was faced with the task of interpreting this statutory provision in the absence of Court of Appeal authority and against the background of criticism by this Court of the drafting of s 44 in connection with appeals against conviction for the offence contrary to s 44(1)(a) of the MCA 2005.

29. In *R v Hopkins; R v Priest* [2011] EWCA Crim 1513, two people who worked at a care home for persons with dementia and other care needs were prosecuted for the offence contrary to s 44(1)(a). They challenged s 44 on the grounds that it lacked sufficient legal certainty and so was incompatible with Article 7 of the European Convention on Human Rights, which requires that 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 that no one should be punished for any act which was not clearly and ascertainably punishable when the act was done: *R v Rimmington and R v Goldstein* [2006] 1 AC 459, [33].

30. In *R v Hopkins; R v Priest*, supra, Pitchford LJ observed:

> "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 [in s 2(1)] , 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."

31. At [36] Pitchford LJ said that this left the question: To what aspect of the resident's capacity (or lack thereof) should the jury be directed to judge the resident's capacity? During inspections by the care home's regulator 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 care home 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 s 44(1)(a) as interpreted against the test set out in s 2(1) of the Mental Capacity Act 2005.

32. The Court agreed with the judge that provided s 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. However, the Court went on to observe that that did 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. The Court could make suggestions as to what Parliament had in mind, for example, capacity to make a decision as to (a) residence; (b) personal hygiene and care; (c) personal finances, and (d) the identity of personal carers. The question was whether any of them necessarily must be implied, or is capable and should be implied, into the wording of s 44(1)(a). The Court then held at [40]:

> "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."

33. Pitchford LJ then having made reference to the facts of *Dunn*, supra, and the fact that the Court in that case had concluded that the 'matter' in respect of which the relevant complainants had lacked capacity was the ability to make decisions concerning his/her care, went on to observe that the Court was bound by the earlier decision, and for that reason, it concluded that the ground of appeal as to uncertainty was not made out.

34. At [45] - [47] the Court went on to consider the question of the burden and standard of proof in relation to capacity, and s 2(4) of the MCA 2005. At [45]-[46] the Court observed:

> "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 require 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."

35. Hence, at [47] the Court said that in order to prove the offence contrary to s 44(1)(a) the prosecution must prove (a) to the criminal standard that the defendant ill-treated or wilfully neglected a person in his care, and (b) that on a balance of probabilities that person was a person who at the material time lacked capacity (or who the defendant reasonably believed lacked capacity).

This Appeal

Ground 1

36. Ground 1 raises a question of statutory construction. Ms Wade's submission is to the effect that the offence contrary to s 44(1)(b) can only be committed by the donee of an LPA which has been registered with the Public Guardian pursuant to paras 4 and 13 of Sch 4 to the MCA 2005. We have no hesitation in rejecting that submission, for the following reasons.

37. First, it is contrary to the words of s 44(1)(b), which impose no such requirement. It simply refers without qualification to the 'donee of a lasting power of attorney, or an enduring power of attorney (within the meaning of Schedule 4)'. Paragraph 2(1) of Sch 4 provides an express definition of an EPA within the meaning of Sch 4, and that definition does not include a requirement for registration:

> "2(1) Subject to sub-paragraphs (5) and (6) and paragraph 20, a power of attorney is an enduring power within the meaning of this Schedule if the instrument which creates the power—
>
> (a) is in the prescribed form,
>
> (b) was executed in the prescribed manner by the donor and the attorney, and
>
> (c) incorporated at the time of execution by the donor the prescribed explanatory information."

38. Nor is there any basis for 'reading in' the words which would be necessary for Ms Wade to be correct, and good reason why they ought not to be. Under paras 4 and 13 of Sch 4, only the donee of an EPA can register it. If the s 44(1)(b) offence required the EPA to be registered, then the donee could avoid liability for the offence, no matter much they ill-treated a non-capacitous donor, by not registering the EPA. This would hardly further the principal aim of the MCA 2005 to provide protection for those who are vulnerable through a lack of capacity.

39. This ground of appeal fails.

Ground 2

40. The issue we must decide in relation to this ground of appeal is also one of pure statutory construction. We formulate the question as follows:

    a. Is P, in the context of s 44(1)(b), to be taken as someone who lacks capacity, or whom D reasonably believes lacks capacity, as *per* the definition of who P is in s 44(1)(a) and must be in s 44(1)(c)? ('The narrow construction'); or

    b. Is P to be taken to be a person who has simply donated an EPA or LPA, and who might have capacity, and thus is a person with characteristics different to the P referred to and defined in s 44(1)(a) and must be in s 44(1)(c)? ('The broader construction')

41. With respect to the judge below, who favoured the broader construction, we have concluded that the narrow construction is the correct interpretation, and thus that the offence created by s 44(1)(b) can only be committed by the defendant donee of an EPA or LPA created by a person, P, who at the relevant time lacks capacity, or whom the defendant reasonably believes lacks capacity. In other words, the prosecution must prove the capacity requirement.

42. The broader context demonstrates that the genesis of s 44 lay in earlier statutory provisions criminalizing the neglect and ill-treatment of those suffering from mental disorder and the perceived need to extend the reach of those provisions, but only in relation to incapacitated persons (a broader category of vulnerable person than merely the mentally disordered). There is no suggestion in any of the material we have seen that there was any perceived need to extend them to the ill-treatment or neglect of those with capacity.

43. The MCA 2005 followed on from work done by the Law Commission, including its 1995 report, *Mental Incapacity,* (LAW COM No 231). Earlier, in its 1993 Consultation Paper *Mentally Incapacitated Adults and Decision Making: A New Jurisdiction* (Consultation Paper No 128) the Commission provisionally proposed that the offence in s 127(2) of the Mental Health Act 1983 should be extended to protect all incapacitated persons from ill-treatment or wilful neglect by their carers. Section 127(2) made it an offence to 'to ill-treat or wilfully to neglect a mentally disordered patient who is for the time being ... in his custody or care (whether by virtue of any legal or moral obligation or otherwise)'. The Commission said that whilst there might be grounds for reviewing the exact formulation of the offence, pending such review, it

would see value in a very modest extension of the offence to include all incapacitated persons.

44. In *Mental Incapacity*, supra, the Commission said at [4.38]:

> "In Consultation Paper No 128 we provisionally proposed that the existing offence of ill-treating a "mentally disordered patient" should be extended to protect anyone without capacity. Many respondents supported the creation of a new offence, and also expressed concern about the efficacy of the criminal justice system in protecting people with mental disabilities. The points they raised about the attitude of the police and prosecuting authorities, and about the inflexibility of procedural rules which mean that witnesses with disabilities do not get the help they deserve, are outside the scope of this project. We do, however, see a need for a specific offence of ill-treatment, independent of the existing offence in the Mental Health Act. The new offence should address the fact that the draft Bill creates a number of ways in which a person can acquire powers over another person who lacks some decision-making capacity. It is right that a person with such powers should be subject to criminal sanction for ill-treating or wilfully neglecting the other person concerned."

45. The Commission therefore recommended that it should be an offence for anyone to ill-treat or wilfully neglect a person in relation to whom he or she has powers by virtue of the new legislation. The proposed offence was set out in the draft Bill annexed to the Consultation Paper at clause 32(2), which was entitled 'Ill-treatment of mentally disabled persons and persons unable to communicate'. It was aimed at carers making informal financial decisions, donees of Continuing Powers of Attorney ('CPAs') (which became LPAs under the legislation as eventually enacted) and persons appointed as managers (who became deputies under the legislation). The Commission did not include donees of EPAs in clause 322.

46. In 1997 the Lord Chancellor issued a Consultation Paper, *Who Decides ? Making Decisions on Behalf of Mentally Incapacitated Adults* (Cm 3803), and this was followed in 1999 by a Government policy statement, *Making Decisions* (Cm 4465). In that document the Government rejected the Law Commission's suggestion that there should be a new offence (at [1.36] – [1.37]):

> *"A New Offence to III Treat or Wilfully Neglect a Person Without Capacity*
>
> 1.36. The Law Commission recommended that it should be an offence for a person to ill-treat or wilfully neglect a person in relation to whom he or she has responsibility under the new legislation. This would relate to people appointed as managers by the court; donees of CPAs; and those having care of, or in lawful control of, the property of the person without capacity.

1.37. Many respondents were keen to support sanctions for ill treatment and supported the idea of a new offence. The Government recognises that ill treatment of a person without capacity is a very serious matter. However, while the Government has not ruled out the need for such legislation, it is not persuaded that the creation of a new offence would be the best way of tackling abuse."

47. A draft Mental Incapacity Bill was published in June 2003 which was scrutinised by the Joint Committee on the Draft Mental Incapacity Bill. The Joint Committee's First Report on the Bill was published on 17 November 2003 and helpfully summarized the background to the Bill as follows:

> "1. The Draft Mental Incapacity Bill and accompanying Commentary and Explanatory Notes were presented to Parliament on 27 June 2003 by Lord Filkin, the Parliamentary Under-Secretary of State for the newly-created Department for Constitutional Affairs.
>
> *Consultation*
>
> 2. The draft Bill is the result of a very lengthy and detailed process of consultation. As long ago as 1989, the then Lord Chancellor, Lord MacKay of Clashfern, invited the Law Commission of England and Wales to carry out a comprehensive investigation of all areas of the law affecting decisions on the personal, financial and medical affairs of those who lack capacity. This was in response to concerns raised by professional bodies and voluntary organisations dealing with mental disability
>
> 3. Following five years of consultation and deliberation, the Law Commission produced its final report and recommendations for Law Reform in March 1995. The Commission recommended that "there should be a single comprehensive piece of legislation to make new provision for people who lack mental capacity".
> …
>
> 7. In response to the Law Commission Report, the (then) Lord Chancellor's Department published a Green Paper 'Who Decides' in December 1997 and, after a further consultation, a policy statement entitled 'Making Decisions' in October 1999. This set out the Government's commitment to bring forward new legislation 'when Parliamentary time allows' …
>
> 8. Following the publication of the Green Paper, the (then) Lord Chancellor's Department established the Mental Incapacity Consultative Forum. This was designed to work with stakeholder organisations, to develop solutions to problems which exist under the current law and to explore proposals for new legislation. The Department also produced a series of six booklets giving guidance

> on the existing law respectively for legal practitioners, social care professionals, health care professionals, family and friends, people wishing to prepare for possible future incapacity and those with learning difficulties. Meetings and consultation seminars with those representative groups, organised by the Department, to discuss the scope for law reform eventually led to publication of the draft Bill."

48. Following Parliamentary scrutiny of the draft Bill, the Mental Capacity Bill was published on 18 June 2004. In clause 42 the Bill contained the new offence which the Law Commission had first suggested in 1995. This clause provided:

> "*42 Ill-treatment or neglect*
>
> (1) A person is guilty of an offence if he—
>
> (a) has the care of a person who lacks or whom he reasonably believes to lack capacity, or is the donee of a lasting power of attorney or a deputy appointed for a person by the court, and
>
> (b) ill-treats or wilfully neglects the person concerned.
>
> (2) 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."

49. It is to be noted that the clause originally only covered the donees of LPAs. It was amended to include donees of EPAs following the Committee Stage (see Standing Committee A, 4 November 2004, col 384).

50. The intended scope of this clause vis-à-vis the person subject to neglect or ill-treatment was summarized in the House of Common Library's Research Paper 04/73, *The Mental Capacity Bill*, (p57):

> *"Ill-treatment or neglect*
>
> The Bill would create a new criminal offence of ill-treatment or neglect of a person who lacks capacity by an attorney or deputy, or someone who has care of the person who lacks capacity (Clause 42). The maximum sentence on conviction on indictment would be 5 years imprisonment or a fine or both (revised from a maximum 2 year sentence in the draft bill). This underlines the intended seriousness of the offence and puts the penalty in line with the maximum penalty for such offences as inflicting grievous bodily harm and assault occasioning actual bodily harm. The

Government rejected the Joint Committee's recommendation that the statutory authorities should be given additional powers of investigation and intervention in cases of alleged physical, sexual or financial abuse of people lacking the capacity to protect themselves from the risk of abuse:

> 'The Committee recommended that the draft Bill should go further in the protection it offers against abuse and exploitation of those lacking capacity. However, the Government is already taking action to protect vulnerable adults against abuse. In particular, the 'No Secrets' guidance requires Councils to liaise with other public authorities and other agencies in their area and to produce written and agreed, local procedures for handling incidents of abuse concerning vulnerable adults. It is right that this extends beyond adults who lack capacity to all vulnerable adults. The new Public Guardian under the Bill would have a role working with Councils and other agencies."'

51. The Joint Committee commented as follows on clause 31 of the draft Bill, the predecessor to clause 42, which showed that its view was the clause applied only to those who lacked capacity:

> "271. Clause 31 of the draft Bill proposes the creation of a new criminal offence where an attorney or deputy or someone who has care of an incapacitated person ill-treats or wilfully neglects that person. While this additional protection is to be welcomed, the Master of the Court of Protection has pointed out that it appears to relate solely to physical ill-treatment and does not cover financial abuse."

52. In our judgment, all of this material shows that the discussion and debate which took place in relation to what became s 44 was only ever in the context of criminalizing the wilful neglect or ill-treatment of those who lacked capacity. It was not suggested at any time that the offence should extend to those with capacity.

53. There are a number of reasons why we consider that the narrow interpretation of s 44(1)(b) rather than the broader one is the correct approach.

54. Firstly, we note that s 44 as enacted is structured differently from clause 42, which was subjected to number of amendments during the Committee stages of the Bill's passage through Parliament. It seems to us that the natural and ordinary meaning of the words used by Parliament in s 44 supports the view that P, as referred to in s 44(1)(b), is a person who lacks capacity, or whom the defendant reasonably believes lacks capacity. P is defined as such a person in s 44(1)(a), and if Parliament intended that P, as referred to in s 44(1)(b) was to have different characteristics and be *any* donee of an EPA or LPA – whether lacking capacity or not – then that would have been made clear. We consider it unlikely that Parliament intended P in s 44(1)(a) to have different

characteristics to P as referred to in s 44(1)(b) when at no stage during any of the work which led to s 44 was it ever suggested that a criminal offence should be created to protect capacitous donors of EPAs or LPAs.

55. We respectfully agree with what the Court said in *Clare Dunn*, supra, [3], having set out s 44(1)(a) and (b):

> "On the face of it that is clear and simple language. Its purpose is to provide for the protection of those who are mentally disadvantaged from any form of ill-treatment."

56. Similarly, at [19], the Court said:

> "But we pause to remember the purpose of section 44 and the creation of the offence; and bear in mind that everyone, who for whatever reason but in particular the natural consequences of age, has ceased to be able to live an independent life and is a vulnerable individual living in a residential home, is entitled to be protected from ill-treatment if he or she lacks 'capacity' as defined in the Act."

57. Both of these passages provide support for our conclusion that the narrow construction is the correct one.

58. Second, to interpret s 44(1)(b) as applying to all donees, including those having capacity, would produce an anomalous result, and so offend against the principle that the legislature intends that the court, when considering which of the opposing constructions of an enactment corresponds to its legal meaning, should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result: *Stock v Frank Jones (Tipton) Ltd* [1978] ICR 347, per Lord Simon of Glaisdale; *Canterbury City Council v Colley* [1993] AC 401, 406. Section 44(1)(a) applies in relation to carers of persons who lack capacity or whom the defendant reasonably believes lack capacity. Section 44(1)(c) imposes criminal liability on deputies. But the Court of Protection may only appoint a deputy to make decisions as to a person's personal welfare and/or property and affairs if he/she lacks capacity in relation to the same: s 16(2), MCA 2005. Hence, the broader construction produces the result, which seems to us to be anomalous, that although s 44(1)(a) and 44(1)(c) only apply in relation to persons who lack capacity, or whom the defendant reasonably believes lacks capacity, s 44(1)(b) applies in relation to a much wider class of persons many of whom are of sound mind. We can think of no sensible justification for such a result, and Mr Saxby was not able to suggest one.

59. Third, an EPA may be exercised by the donee, subject to restrictions, despite the donor possessing mental capacity but is confined to property and financial affairs: see EPA 1985, s 3; MCA 2005, Sch 4, para 3. Hence the Appellant, as the donee of her mother's EPA, did not have any authority in respect of her personal welfare.

60. An LPA, on the other hand, is potentially broader in scope. It can confer on the donee authority to make decisions about the donor's property and affairs, and also about specified matters concerning the donor's personal welfare, property and affairs (MCA

2015, s 9(1)). However, where an LPA authorises the donee to make decisions about the donor's personal welfare, that authority does not extend to making such decisions in circumstances other than those where the donor lacks, or the donee reasonably believes that the donor lacks, capacity: MCA 2015, s 11(7)).

61. We recognise that possibly there might be circumstances when a donee of an EPA with authority for property and affairs could wilfully neglect a donor who has the relevant mental capacity regarding his/her property and affairs, but with physically restricted access to funds, for whatever reason. However, we find it difficult to contemplate how a capacitous donor of an EPA could be wilfully neglected in terms of their personal welfare, if that donor refuses medical treatment and why the donee of an EPA, restricted as it is to property and financial affairs, should be made criminally liable in those circumstances. We do not believe that this result, which would be a consequence of the broader interpretation, could represent the will of Parliament, which was careful to preserve the autonomy of the individual by the principles expressed in s 1 of the MCA 2005.

62. Under the rule in *Pepper v Hart* [1993] AC 593 reference is permissible to Parliamentary material as an aid to statutory construction where (a) legislation is ambiguous or obscure or leads to absurdity; (b) the material relied upon consists of one or more statements by a minister or other promoter of the relevant Bill together if necessary with such other Parliamentary material as necessary to understand such statements and their effect and (c) the statements relied upon are clear.

63. For the reasons above we have assumed that condition (a) is satisfied, and we consider there is material satisfying conditions (b) and (c) which supports our conclusion that the narrow interpretation of s 44(1)(b) is the correct one.

64. During the Second Reading of the Mental Capacity Bill in the House of Commons, the Parliamentary Under-Secretary of State for Constitutional Affairs said:

> "The Bill also protects and supports people who lack mental capacity. Sadly, as we know, there are occasions when people without mental capacity are abused by those whom they trust … Accordingly, we have introduced in the Bill a new criminal offence of ill treatment or neglect, with a maximum sentence of five years. We cannot tolerate abuse of vulnerable people." (Hansard, HC, Vol 425, col 26, 11 October 2004)

65. Subsequently, when the Bill was in Standing Committee A, he said:

> "First, I fully understand the principles that underlie all the amendments. It is of course right that we better protect those who lack capacity and better deter we have not talked as much about that people who would take advantage of those who lack capacity. It is a tribute to much of what we have been saying that we have talked about that positive duty but it is now right that we think a bit about those with ulterior motives. Offences aimed at tackling abuse of vulnerable adults require the offender to do a positive action. The clause, however, creates a new offence of ill treatment

> or wilful neglect of the person lacking capacity, which I hope shows that we in government take abuse of vulnerable adults very seriously.
>
> …
>
> That is why this offence is aimed at capturing those individuals who are in a position of trust, care and power over people who are then ill-treated or wilfully neglected. That could be a donee of a lasting power of attorney, a deputy appointed by the court or a person who has the care of someone who lacks capacity, such as a member of staff in a hospital or care home or a family member." (Standing Committee A, 4 November 2004, cols 382 – 383)

66. In our judgment, these Ministerial statements satisfy the *Pepper v Hart*, supra, criteria and provide firm support for the construction we have given to s 44(1)(b). They confirm our view that s 44(1) (b) should be read to include the requirement that the donor lacked mental capacity, or was reasonably believed by the donee to do so, in relation to the matter in question.

67. There are two final matters from which we have drawn support for the conclusion that we have reached.

68. First, the s 44 offence can be committed by wilful neglect, that is, by omission. Generally speaking, English law does not impose criminal liability for omissions absent some special circumstance, such as a special relationship between the defendant and the person harmed. (see generally, *Blackstone's Criminal Practice 2019*, [A1.17] et seq). The assumption of care for another may be a special circumstance where the law imposes criminal liability for omissions. For example, the Domestic Violence, Crime and Victims Act 2004, creates an offence of causing death or serious harm to a child or vulnerable adult *inter alia* through omission, in relation to a defendant who was a member of the same household and who had frequent contact with them. The Criminal Justice and Courts Act 2015, ss 20 and 21, creates offences that can be committed by care workers.

69. In our judgment, whilst it would have been open to Parliament to have made it an offence for the donee of an EPA or LPA to wilfully neglect or ill-treat a donor who is capacitous, this would potentially have represented a significant policy departure from the criminal law's traditional approach. We would have anticipated that, had it intended this result, Parliament would have made it clear through unambiguous language.

70. Finally, s 42 of the MCA 2005 requires the Lord Chancellor to issue a Code of Conduct for the guidance of the people listed in s 42(1) (eg, persons acting in connection with the care or treatment of another person). Section 42(5) provides that

> "If it appears to a court or tribunal conducting any criminal or civil proceedings that –
>
> (a) a provision of a code, or

(b) a failure to comply with a code,

is relevant to a question arising in the proceedings, the provision or failure must be taken into account in deciding the question."

71. The view we have reached is consistent with the Code of Practice, which in two places indicates that the s 44 offence only applies in relation to those who lack capacity (or whom the defendant reasonable believes lacks capacity). First, at [14.23] it states:

> "The Act introduces two new criminal offences: ill treatment and wilful neglect of a person who lacks capacity to make relevant decisions (section 44). The offences may apply to:
>
> • anyone caring for a person who lacks capacity – this includes family carers, healthcare and social care staff in hospital or care homes and those providing care in a person's home
>
> • an attorney appointed under an LPA or an EPA, or
>
> • a deputy appointed for the person by the court."

72. Second, the table at p286 states:

> "Section 44 of the Act introduces a new offence of ill treatment of a person who lacks capacity by someone who is caring for them, or acting as a deputy or attorney for them. That person can be guilty of ill treatment if they have deliberately ill-treated a person who lacks capacity, or been reckless as to whether they were ill-treating the person or not. It does not matter whether the behaviour was likely to cause, or actually caused, harm or damage to the victim's health."

73. Both of these passages support the view we have reached.

Conclusion

74. Despite our comments in [19] above as to the evidence which suggests that, at a minimum, the Appellant should reasonably have believed her mother to lack mental capacity in matters of personal welfare, the judge's failure to direct the jury in this regard is fatal to the safety of the conviction and the appeal must be allowed. Accordingly, we need say nothing about the application in respect of sentence.