Neutral Citation Number: [2023] EWHC 3182 (Admin)

Case No: CO/4351/2022
AC-2022-LON-003289

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT IN THE MATTER OF AN APPLICATION UNDER CPR PART 8 FOR DECLARATORY RELIEF

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/12/2023

Before :

MR JUSTICE LANE

- -

Between :

Derbyshire Healthcare NHS Foundation Trust	**Claimant**
- and -	
Secretary of State for Health and Social Care	**Defendant**
-and-	
(1) NHS England	**Interested Parties**
(2) PQR	
(3) MIND	

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Ms F Morris KC (instructed by **Browne Jacobson**) for the **Claimant**
Mr T Cross (instructed by **The Government Legal Department**) for the **Defendant**
Ms V Butler-Cole KC (instructed by Hill Dickinson) for the **First Interested Party**
Mr S Simblet KC and **Mr O Persey** (instructed by Ms D Robinson, Cartwright King) for the **Second Interested** Party
Mr R Pezzani and **Mr A Schymyck** (instructed by MIND) for the **Third Interested Party**

Hearing dates: 31 October and 1 November 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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MR JUSTICE LANE

Mr Justice Lane :

1. The claimant is a mental health trust. It brings these proceedings under Part 8 of the CPR, seeking declarations as to the meaning of particular provisions in the Mental Health Act 1983 ("the 1983 Act"). The provisions in question contain pre-conditions for the lawful imposition of restrictions on the liberty of a person who has or may have a "mental disorder", defined in section 1 of the 1983 Act as "any disorder or disability of the mind".

THE DECLARATIONS SOUGHT

2. The declarations sought are as follows:-

> "1. The responsible clinician is not required to undertake a face-to-face examination of the patient before making a community treatment order ("CTO") under section 17A(1);
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> 2. The word "examine" in section 20A(4) should not be interpreted as meaning a face-to-face examination, so that a remote examination of the community patient by the responsible clinician before the latter extends the CTO may be sufficient; and/or
>
> 3. The word "examine" in section 20(3) and (6) should not be interpreted as meaning a face-to-face examination, so that a remote examination of the patient by the responsible clinician before the latter renews the authority for detention for hospital treatment of a patient under section 3 or guardianship in the community under section 7, may be sufficient."

THE MENTAL HEALTH ACT 1983

3. It is necessary to refer in some detail to the provisions of the 1983 Act. Section 1(1) explains that the Act has effect with respect to the reception, care and treatment of mentally disordered patients, the management of their property and other related matters. Section 1(2) defines "mental disorder" as "any disorder or disability of the mind", such that "mentally disordered" is to be construed accordingly.

4. Section 2 concerns admission for assessment. A person ("P") may be admitted to a hospital and detained there for a period not exceeding 28 days (except in certain circumstances). The application for admission for assessment can be made on the grounds that P is suffering from mental disorder of a nature or degree that warrants detention in hospital for assessment and that P ought to be detained in the interests of P's own health or safety or with a view to the protection of others.

5. Section 3 is concerned with admission for treatment. P may be admitted to hospital and detained for the period allowed by the 1983 Act, in pursuance of an application made in accordance with the requirements of section 3. Section 3(2) states that the application must be made on the grounds that P is suffering from mental disorder of a nature or degree which makes it appropriate for P to receive medical treatment in hospital and that it is necessary for P's health or safety or the protection of others that P should

receive that treatment, which cannot be provided unless P is detained and provided with appropriate medical treatment.

6. Section 3(3) provides that admission for treatment is founded on the written recommendations in prescribed form of two registered medical practitioners, including in each case a statement that in the opinion of the practitioner the conditions of section 3(2) are complied with.

7. Section 5 contains provisions concerning an application for admission in respect of a patient who is already in hospital as an inpatient.

8. Section 6 explains what the effect is of an application or admission duly completed in accordance with the provisions of Part II of the 1983 Act. The application is sufficient authority for the applicant or any other person authorised by the applicant to take P and convey P to hospital. Where P is duly admitted to hospital, the application is authority for the hospital managers to detain P there in accordance with the provisions of the Act.

9. Section 7 concerns an application for guardianship. If P has attained the age of 16, P may be received into guardianship for the period allowed by the Act, in pursuance of a guardianship application made in accordance with section 7. Section 7(2) provides that the application may be made on the ground that P is suffering from mental disorder of a nature or degree that warrants P's reception into guardianship and that it is necessary in the interests of P's welfare or the protection of other persons that P should be so received. Section 7(3) provides that the guardianship application is to be founded on the written recommendations of two registered medical practitioners.

10. Section 8 concerns the effect of a guardianship application etc. Where a duly made guardianship application is forwarded to the local social services authority, within the period allowed by section 8(2), and is accepted by that authority, the application shall confer on the authority or person named in the application as guardian, certain exclusive powers; namely, to require P to reside in a place specified; to require P to attend at places and times specified for the purpose of medical treatment, etc; and to require access to P to be given, at any place where P is residing, to any registered medical practitioner, approved mental health professional or other person so specified.

11. Section 11 deals with general provisions as to applications for admission for assessment, admission for treatment and guardianship. Section 11(5) provides that none of the applications in question are to be made by any person in respect of P "unless that person has personally seen" P within a period of 14 days ending with the date of the application.

12. Section 12 provides that the recommendations required for the purposes of an application for admission of P under Part 2 or a guardianship application must be signed and must be given "by practitioners who have personally examined the patient either together or separately…". Section 12(2) provides that, of the medical recommendations given for the purposes of any such application, one is to be given "by a practitioner approved for the purposes of this section by the Secretary of State as having special experience in the diagnosis or treatment of mental disorder". Additionally, unless that practitioner "has previous acquaintance with the patient", the other recommendation "shall, if practicable, be given by a registered medical practitioner who has such previous acquaintance".

13. Sections 17A to 17G were inserted into the 1983 Act by the Mental Health Act 2007. The sections concern community treatment orders (described above and hereafter as CTOs). Section 17A provides that the "responsible clinician may by order in writing discharge a detained patient from hospital subject to his being liable to recall in accordance with section 17E…". The responsible clinician is not to make a CTO unless in their opinion the relevant criteria are met and an approved mental health professional states in writing that they agree with that opinion and that it is appropriate to make the order. The relevant criteria, defined in section 17(5), broadly reflect the criteria in section 3, adapted so as to provide for recall. Section 17A(6) provides:-

> "(6) In determining whether the criterion in subsection (5)(d) above is met [viz. the power of recall], the responsible clinician shall, in particular, consider, having regard to the patient's history of mental disorder and any other relevant factors, what risk there would be of a deterioration of the patient's condition if he were not detained in a hospital (as a result, for example, of his refusing or neglecting to receive the medical treatment he requires for his mental disorder)."

14. Section 17B provides that a CTO shall specify conditions to which P is to be subject while the CTO remains in force. Section 17B(3) specifies conditions to be imposed in all CTOs. These are that P makes themself available for examination under section 20A; and that, in certain circumstances, P makes themself available for examination so as to enable a Part 4A certificate to be given. Section 17B(2) confers a power to specify other conditions if the responsible clinician, with the agreement of the approved mental health professional, thinks them necessary for certain specified purposes concerning P's receiving medical treatment, preventing risk of harm to P and protecting other persons. Section 17B(6) provides that if P fails to comply with a condition under section 17B(2), that fact may be taken into account for the purposes of exercising the power of recall.

15. Section 17C deals with the duration of a CTO. A CTO remains in force until expiry of the period mentioned in section 20A(1) (as extended under any provision of the Act), but subject to sections 21 and 22.

16. Section 17E makes provision for the power of recall to hospital. A responsible clinician may recall P to hospital if, in the opinion of the responsible clinician, P requires medical treatment in hospital for his mental disorder and there would be a risk to P or others if P were not so recalled. The recall notice is sufficient authority for the managers of the hospital to detain P there in accordance with the Act. Section 17F concerns the powers in respect of recalled patients.

17. Section 20 (duration of authority) provides that a patient admitted to hospital in pursuance of an application for admission to treatment, and a patient placed under guardianship in pursuance of a guardianship application, may be detained in a hospital or kept under guardianship for a period not exceeding six months beginning with the day on which P was so admitted, or the day on which the guardianship application was accepted. P is not to be so detained or kept for longer unless authority for P's detention or guardianship is renewed under section 20.

18. Section 20(2) provides for renewal from the expiration of the initial six months period in section 20(1), for a further period of six months; and from the expiration of any such

extended period for a further period of one year, "and so on for periods of one year at a time".

19. Section 20(3) provides that within the period of two months ending on the day on which P, who is liable to be detained in pursuance of an application for admission for treatment, would cease to be so liable in default of renewal of authority for P's detention, it shall be the duty of the responsible clinician:-

> "(a) to examine [P] and
>
> (b) if it appears to [the responsible clinician] that the conditions set out in subsection (4) below are satisfied, to furnish the managers of the hospital where [P] is detained a report to that effect in the prescribed form".

20. Section 20(4) sets out the conditions referred to in section 20(3). They are that P is suffering from a mental disorder of a nature or degree which makes it appropriate for P to receive medical treatment in hospital; that it is necessary for P's health or safety or for the protection of others that P should receive such treatment and it cannot be provided unless P continues to be detained; and that appropriate medical treatment is available for P.

21. Section 20(5) provides that before furnishing a report under section 20(3), the responsible clinician "shall consult one or more other persons who have been professionally concerned with [P's] medical treatment". Section 20(5A) provides that the responsible clinician may not furnish such a report unless a person who has been professionally concerned with P's medical treatment, but who belongs to a profession other than that to which the responsible clinician belongs, states in writing that they agree that the conditions set out in section 20(4) are satisfied.

22. Section 20(6) provides that within the period of two months ending with the day on which P who is subject to guardianship would cease to be so liable in default of the renewal of guardianship, it shall be the duty of the appropriate practitioner to examine P. If it appears to them that the conditions set out in section 20(7) are satisfied, the appropriate practitioner must furnish to the guardian and, where the guardian is a person other than the local social services authority, to the responsible local social services authority, a report to that effect in the prescribed form.

23. Section 20(7) states that the conditions are that P is suffering from mental disorder of a nature or degree which warrants P's reception into guardianship and that it is necessary in the interests of P's welfare or for the protection of others that P should remain under guardianship.

24. Section 20(8) states that where a report is duly furnished under section 20(3) or (6), the authority for the detention or guardianship of P is thereby renewed for the period prescribed in that case by section 20(2).

25. Section 20A concerns the duration of the period of a CTO. Section 20A(1) provides that a CTO is to cease to be in force at the end of six months beginning with the day on which it is made. The community treatment period may, unless the CTO has previously ceased to be in force, be extended by section 20A(3) from its expiration for a period of

six months and from the expiration of any such extended period for a further period of one year "and so on for periods of one year at a time".

26. Section 20A(4) provides that within the period two months ending on the day on which the CTO would cease to be in force in default of extension, it is the duty of the responsible clinician "to examine" P and if it appears to the responsible clinician that the conditions set out in section 20A(6) are satisfied and if a statement under section 20A(8) is made, to furnish to the managers of the responsible hospital a report to that effect in the prescribed form.

27. Section 20A(6) sets out the conditions referred to in section 20A(4). These are that P is suffering from mental disorder of a nature or degree which makes it appropriate for P to receive medical treatment; that it is necessary for P's health or safety or for the protection of others that P should receive such treatment; that subject to P continuing to be liable to be recalled, such treatment can be provided without P being detained in hospital; that it is necessary that the responsible clinician should continue to be able to exercise the power under section 17E(1) to recall P to hospital; and that appropriate medical treatment is available for P.

28. Section 20A(7) states that in determining whether it is necessary that the responsible clinician should continue to be able to exercise the power to recall P to hospital, the responsible clinician shall, in particular, consider, having regard to P's history of mental disorder and any other relevant factors, what risk there would be of a deterioration of P's condition if P were to continue not to be detained in a hospital, such as for example by virtue of P refusing or neglecting to receive medical treatment that is required for P's mental disorder.

29. Section 20A(8) provides that the statement referred to in section 20A(4) is a written statement by an approved mental health professional that it appears the conditions in section 20A(6) are satisfied and that it is appropriate to extend the period of the CTO.

30. Section 20A(9) provides that before furnishing a report under section 20(4), the responsible clinician shall consult with one or more other persons who have been professionally concerned with P's medical treatment.

31. Section 24 concerns visiting and examination of patients. Section 24(1) provides that for the purpose of advising as to the exercise by the nearest relative of a patient who is liable to be detained or subject to guardianship of any power to order discharge, any registered medical practitioner or approved clinician authorised by or on behalf of the nearest relative of P may, at any reasonable time, visit and examine P in private. Any registered medical practitioner or approved clinician who is so authorised to visit and examine P may require the production of and inspection of records relating to P's detention or treatment in any hospital.

32. Section 34 defines expressions used in Part II of the 1983 Act. "The appropriate practitioner" means, in the case of a patient who is subject to the guardianship of a person other than a local social services authority, the nominated medical attendant of P and, in any other case, the responsible clinician. The "nominated medical attendant" is "the person appointed in pursuance of regulations made under section 9(2)… to act as the medical attendant of" P.

33. Section 34 defines "the responsible clinician" as meaning, where P is liable to detention by virtue of an application for admission for treatment, the approved clinician with overall responsibility for P's case. Where P is subject to guardianship, "the responsible clinician" means the approved clinician authorised by the responsible local social services authority to act as the responsible clinician.

34. Section 40(4) provides that where P is admitted to a hospital in pursuance of a hospital order or placed under guardianship, P is to be treated as if P had been so admitted or placed on the date of the order.

35. Section 114 empowers a local social services authority to approve a person to act as an approved mental health professional for the purposes of the 1983 Act. Section 114(2) however states that the authority may not approve a registered medical practitioner to act as an approved mental health professional.

36. Section 118 concerns codes of practice. The Secretary of State must prepare and from time to time revise a code of practice for the guidance of registered medical practitioners, approved clinicians, managers and staff in hospitals, independent hospitals, care homes and approved mental health professionals in relation to admission of patients to hospitals etc and to guardianship and community patients. A code of practice must also be issued for the guidance of registered medical practitioners and members of other professions in relation to the medical treatment of patients suffering from mental disorder.

37. Section 119 provides for the remuneration etc by the "regulatory authority" of registered medical practitioners appointed by that authority for the purposes of Part IV of the 1983 Act and section 118 thereof. Such a person may, for the purpose of exercising functions under the relevant provisions, visit and interview and, in the case of a registered medical practitioner, examine in private any patient detained in a hospital or registered establishment or a community patient in a hospital or regulated establishment or (if access is granted) other place.

38. Section 120(3) provides that the regulatory authority must make arrangements for persons authorised by it to visit and interview relevant patients in private. These are patients liable to be detained, community patients and patients subject to guardianship (section 120(2)). Section 120(7) provides that for the purposes of a review or investigation for the exercise of functions under arrangements made under section 120, a person authorised by the regulatory authority may at any reasonable time visit and interview in private any patient in hospital or regulated establishment; and if the authorised person is a registered medical practitioner or approved clinician, examine the patient in private there.

39. Section 129 creates criminal offences of obstruction. Section 129(2) provides that any person who insists on being present when required to withdraw by a person authorised to interview or examine P in private shall be guilty of an offence.

40. Section 145 contains general interpretative provisions. It defines an "approved clinician" as a person approved by the Secretary of State or other person (in certain other circumstances) to act as an approved clinician for the purposes of the Act and "approved mental health professional" has the meaning given in section 114. The expression "mental disorder" has the meaning given in section 1 and "patient" means a

person suffering or appearing to be suffering from mental disorder. The "regulatory authority", in relation to England, means the Care Quality Commission; and in relation to Wales, the Welsh Ministers.

PROCEDURAL HISTORY AND ISSUES

41. The relevant procedural history of this case is as follows. The claim was filed in November 2022, following the judgment of the Divisional Court (Dame Victoria Sharp PQBD and Chamberlain J) in Devon Partnership NHS Trust v the Secretary for State for Health and Social Care [2021] EWHC 101 (Admin) ("*Devon*"), which had concluded that the phrase "personally seen" in section 11(5) of the 1983 Act and the phrase "personally examined" in section 12(1) required the physical attendance of the person in question on the patient ("P").

42. Following *Devon*, doubts arose as to whether the conclusion of the Divisional Court applies to the examinations required in sections 20 and 20A. NHS England, which is the first interested party in these proceedings, issued advice on the matter on 4 February 2021. In this, the National Director for Mental Health pointed out that the Court in *Devon* did not rule on assessments or examinations made under any other section of the 1983 Act than sections 11 and 12. As a result, "we do not know whether a Court would find remote assessments under any other section lawful. However, in view of the judgement, providers/councils may wish to take a precautionary approach and stop all remote MHA assessments and renewals where the clinician or AMHP is required to 'examine' or 'see' the individual. This includes assessments and/or renewals under s.20, s.20(A) and s.136 and therefore impacts s.3 renewals, s.37 renewals, s.7 (Guardianship) renewals and CTO extensions…".

43. Shortly thereafter, the Association of Directors of Adult Social Services issued a briefing on the implications of *Devon*. Having consulted counsel, the briefing stated that the Local Government Association was advised that, in *Devon*, the Divisional Court had held that the expressions "personally seen" and "personally examined" needed to be read as "compound phrases", so that the two words comprising the phrases had a "distinct meaning" within the context of sections 11 and 12. This reasoning, however, "does not apply in other parts of the Act where this phrase is not used. Therefore, we do not believe that the same result necessarily applies in situations where the Mental Health Act refers only to 'reviewing', 'examining', or 'interviewing' a person, such as in relation to extensions for CTOs or Guardianship under s.20 of the Act". The briefing recognised however, that the issue of whether direct contact was required with P "may be challenged in Court in the future". The briefing considered that "direct face-to-face assessment should be regarded as the norm, but using video technology to review and consider extending a CTO or Guardianship might still be appropriate, subject to the particular needs and circumstances of the person being assessed". The briefing suggested that authorities "may wish to obtain their own legal advice in specific cases…".

44. The second interested party is an individual, who is referred to as PQR. In 2020, during the COVID-19 pandemic, PQR's CTO was reviewed by a psychiatrist by means of a telephone conversation (the psychiatrist was "shielding" at the time). Some two years later, PQR challenged the lawfulness of the consequent continuation of the CTO in the First-tier Tribunal. That Tribunal in September 2022 was concerned that it might not have jurisdiction to determine the validity of the CTO. Later in September 2022, the

present claimant informed the First-tier Tribunal and the solicitors acting for PQR of its intention to make a Part 8 application, seeking judicial clarity regarding the interpretation of the relevant provisions of the 1983 Act. PQR thereupon sought to be joined to these proceedings.

45. In December 2022, the First-tier Tribunal (Judge Keates and members) decided that it did not have jurisdiction to determine whether the CTO in respect of PQR was valid. PQR obtained permission to appeal against that decision. Following a hearing on 7 August 2023, Upper Tribunal Judge Jacobs, sitting in the Upper Tribunal (Administrative Appeals Chamber), dismissed PQR's appeal, concluding that the First-tier Tribunal "was right to decide that it had no jurisdiction to rule on the validity" (paragraph 29).

46. On 4 July 2023, Sir Ross Cranston heard an application by PQR to strike out the claimant's Part 8 proceedings. PQR contended that, were those proceedings to take place, they might well determine whether PQR's CTO was valid. PQR would, however, prefer matters to be determined by the specialist tribunal. PQR further contended that there were no reasonable grounds for bringing the claim; that it was an abuse of process; and that the claimant had failed to comply with a rule, Practice Direction or Court order. PQR highlighted the specialist character of the Upper Tribunal, which heard appeals under the 1983 Act and was therefore, in his submission, the appropriate forum to consider the matters in question. The Part 8 claim was an abstract claim; but the Courts did not deal with matters in the abstract except in exceptional cases. Reference was made to R (Rusbridger) v Attorney General [2003] UKHL 38 and R (on the application of Stamford Chamber of Trade and Commerce) v Secretary of State for Communities and Local Government [2010] EWCA Civ 992. The *Devon* case was said by PQR to be a special one, arising in the context of the COVID-19 pandemic. The claimant had not informed PQR's solicitors that it was about to make a Part 8 application and thereafter failed to inform them as to its progress. The Part 8 application had been lodged without informing this Court that behind it stood PQR's claim to the Tribunal. Such behaviour failed to comply with the rules of this Court.

47. Sir Ross was not persuaded by those submissions of PQR. He observed that, whilst the Court was averse to giving declarations on statutory reconstruction, there were nevertheless circumstances in which it would do so. The instant case was one of them: paragraph 22 of the judgment. Sir Ross identified three criteria that must be satisfied. First, the application must raise a real question, rather than a hypothetical or academic one. Secondly, the person seeking the declaration must have a real interest. Thirdly, the Court must hear proper argument. Additionally, an application for a declaration in the abstract required particular justification: Stamford Chamber of Trade.

48. At paragraph 23 of his judgment, Sir Ross considered it "clear that the first criterion is met." There was a real question for the Court to answer; namely, the interpretation of important powers in the 1983 Act exercised over patients. The outcome of the Part 8 application would have significant impacts on the liberties of many individuals. Sir Ross also considered the second and third criteria to be satisfied. Not only the claimant but, importantly, the Secretary of State and NHS England had said it would be highly desirable for doubts to be removed about the interpretation of the relevant provisions, following *Devon*. Both the Secretary of State and NHS England would be involved in the hearing, "so the Court will hear proper argument": paragraph 23.

49. Sir Ross considered the justification for the application to be "obvious", as it followed in the wake of *Devon* and "both that case and this should be considered as one". In *Devon*, important rulings have been made in relation to the interpretation of some sections bearing on examinations conducted on patients under the 1983 Act. The present application should result in gaps of interpretation being closed.

50. At paragraph 25, Sir Ross noted that, as matters then stood, an appeal was pending to the Upper Tribunal. It was, however, not clear whether the Upper Tribunal had jurisdiction to consider PQR's case about the invalidity of the 2020 order. As well as this Court having undoubted jurisdiction in the matter, Sir Ross identified an "additional factor in favour of these proceedings over those in the Upper Tribunal, that the issues before this Court are wider than those raised in PQR's case": paragraph 25.

51. Although Sir Ross considered that the claimant could have kept PQR's solicitors better informed, any such failings "do not constitute egregious behaviour". So far as concerned the claimant's duties to this Court, even if there had been failings, which he doubted, Sir Ross held that it would not be proportionate to strike out the proceedings, since it was in the public interest and in accordance with the overriding objective that the doubts about statutory interpretation should be resolved.

52. At the hearing before me, Mr Simblet KC pursued the submissions he had made to Sir Ross Cranston in July 2023, concerning the alleged inappropriateness of the Part 8 claim. For the reasons given by Sir Ross, I reject PQR's challenge. This is, plainly, a case where, exceptionally, this Court can and should resolve the matter of statutory construction in respect of sections 20 and 20A of the 1983 Act. Whether the declaration sought by the claimant in respect of those provisions is appropriately framed is a different matter. On that issue, for reasons I will later explain, I find myself substantially in agreement with the case advanced by PQR, which is supportive of the position taken by the defendant.

53. Mr Simblet was critical of the evidence of Mr Andrew Coburn, on behalf of the claimant. Mr Coburn is the claimant's Assistant Director of Legal Governance and Mental Health Legislation. As the heading immediately above paragraph 17 of his witness statement says, Mr Coburn purports to give "the Trust's view" as to why "virtual assessments are appropriate in some cases and that allowing such flexibility can have benefits for the individual concerned as well as mental health services as a whole". Mr Simblet submits that, given he is not medically qualified, Mr Coburn is ill-equipped to give a medical (as opposed to an administrative) view on whether and, if so, when, a "remote" examination might be appropriate.

54. I do not consider that PQR's criticisms of Mr Coburn's evidence constitute, or add to, any *in limine* objection to the bringing of this claim. The criticisms are, however, of relevance in dealing with the substance of the claim for declarations.

55. The first of the declarations sought concerns section 17A of the 1983 Act. This differs from sections 20 and 20A, in that there is no express requirement in section 17A for an examination. Any exercise of statutory construction is, accordingly, of a different order in the case of section 17A. The defendant is opposed to the making of a declaration in respect of section 17A on the ground that what might be required of a responsible clinician acting lawfully to form an opinion under section 17A is a matter which may depend on the facts of the case. The particular circumstances in which an examination

"in person" or in the physical presence of the examiner and P may be required is, according to the defendant, not for this Court to determine in the abstract. It is a matter best left to be determined in a case with real-life facts.

56. Despite this somewhat different stance on the part of the defendant and PQR in respect of the first of the declarations sought by the claimant, it is evident that that declaration too satisfies the three criteria identified by Sir Ross Cranston. Accordingly, the section 17A issue requires to be addressed substantively.

57. Mr Simblet asks that, in my judgment, I should make a finding as to the unlawfulness, as PQR contends, of the examination carried out on him in 2020. I shall deal with that submission later.

DEVON PARTNERSHIP NHS TRUST V SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE AND NHS COMMISSIONING BOARD [2021] 1 WLR 2945

58. In *Devon*, the Divisional Court was asked to make declarations on the interpretation of sections 11 and 12 of the 1983 Act, as regards the requirement to have "personally seen" P within the period of 14 days ending with the date of the application; and the requirement in section 12 for the medical practitioner to have "personally examined" P before completing a medical recommendation in support of P's detention.

59. Amongst the submissions made on behalf of the claimant in *Devon* were the following:-

> 26. For the Trust, Ms Morris submitted that the phrase "personally examined" in s. 12(1) MHA means at least that the examination must be carried out by the practitioner himself or herself, rather than by someone else. The same is true of the phrase "personally seen" in s. 11(5). The question is whether these phrases also require that the medical practitioner should examine, or the AMHP should see, the patient face-to-face or whether this may be done remotely in an appropriate case.
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> 27. The context is deprivation of liberty, which in the case of a detention under s. 3 might be for up to six months. In those circumstances, and given that a face-to-face examination is likely to be preferable to a virtual one, Ms Morris accepted that it *could* be said that a strict construction is required. However, the words "personally examine" and "personally see" are ordinary English words and do not necessarily rule out the kind of interaction that could take place remotely. When pressed in oral argument, Ms Morris said that there was a strong argument that even an examination conducted by voice over the telephone could qualify as an examination for these purposes. Whilst it involved a little stretching of the language, she submitted that there was an argument that an AMHP who spoke to a patient by telephone could say that he or she had "personally seen" the patient (reading those words purposively and in context)."

60. The defendant's submissions began as follows:-

> "32. For the Secretary of State, Mr Cornwell submitted that the phrases "personally examined" and "personally seen" should be given their ordinary meanings. The adverb "personally" could mean either "connoting the physical presence of the individual" or "connoting the doing by the individual themselves". The verb "examine" is defined by the Shorter Oxford English Dictionary as "investigate the nature, condition, or qualities of (something) by close inspection or tests; inspect closely or critically…; scrutinise; …give (a person) a medical examination". This, Mr Cornwell submitted, focuses on the intensity of the inspection, rather than whether or not it is carried out face-to-face. Likewise, "see" does not shed any additional illumination on the issue, since a medical practitioner or AMHP could "see" a patient using video-conferencing facilities. This can be contrasted with "visit and interview", which is used in other provisions of the MHA and which clearly entails physical presence. The fact that Parliament has used this phrase in other contexts may suggest that, where it was not used, physical presence was not required. Similarly, the flexibility inherent in the requirement on the AMHP in s. 13(2) "to interview the patient in a suitable manner" may be considered difficult to square with a reading which requires physical presence, since there is no reason why an interview using video-conferencing facilities would not be capable of being "suitable" in an appropriate case.

61. The submissions of the advocate to the Court were recorded as follows:-

> "41. Mr Auburn began by emphasising that care must be taken not to reason from the convenience of the result sought in present circumstances. If, on proper analysis, it was not Parliament's intention to provide for the examination of patients by remote means, then the manifest challenges raised by the current situation maybe for Parliament, rather than this Court, to address. The court should guard against construing the MHA by reference to the experience of the current pandemic rather than the intention of Parliament when the relevant provisions were enacted. It should also be borne in mind that the restrictions on the manner of a medical practitioner's or AMHP's assessment represent an important safeguard of a patient liberty. Any construction of the relevant provisions by this Court will be for all time, not just for the duration of the pandemic."
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> 42. Mr Auburn made five principal points.
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> 43. First, the ordinary meaning of the word "examine" in a medical context is "to perform an examination of (a person or part of the body) for diagnostic purposes esp. by means of visual inspection, palpation, auscultation or percussion": Oxford English Dictionary. This suggests an activity carried out in. the physical presence of the patient. While the word "personally" might have a different meaning on its own, it is important to treat

"personally examine" in s. 12(1) as a compound phrase. Read as such, there are reasons to believe that the phrase connotes the physical presence of the medical practitioner. The same goes for "personally see" in s. 11(5). More generally, in psychiatry, there are reasons why a proper examination may require physical presence. Such an examination may require the psychiatrist to read body language, discern non-verbal cues and other diagnostic aids, for example shaking or self-harming scars. Some examinations cannot be carried out remotely, for example taking a patient's blood pressure and temperature, which may be important for ruling out differential diagnoses with a better understanding a patient's mental state. Smell may be an important diagnostic tool, for example because it may suggest use of alcohol or poor personal hygiene. It may also be important to consider and test a patient's proprioception (the brain's understanding of the sense of movement and the positioning of the body in space), which would be difficult or impossible using video-conferencing facilities. Mr Auburn also drew attention to an academic article about the importance of a physical examination to rule out differential diagnoses: see Welch and Carson, 'When psychiatric symptoms reflect medical conditions', *Clinical Medicine* vol. 18(1), February 2018.

44. Second, there is no reason to believe that, at the time the 1959 Act or the MHA were enacted, Parliament foresaw the possibility of an examination taking place by video-conference. That being so, the use of the phrase "visit and examine" in other parts of the Act may indicate that Parliament intended there to be a requirement of physical attendance. The 2020 Act shows that, where in Parliament's view the pandemic makes it appropriate to modify the requirements of the MHA, it can and does do so. No such modification has been made in relation to subsections 11(5) or 12(1). The words "suitable manner" in s. 13(2) refer to the way the interview is conducted, not the minimum requirement of physical attendance.

45. Third, the statutory history may in fact tend against the declaration sought. The concerns which led to the use of the words "personally examine" included cases where "certificates of insanity" had been signed in blank for the proprietors of asylums to use: see McCandless, 'Liberty and Lunacy: The Victorians and Wrongful Confinement' in A. Scull ed. *Madhouses, Mad-doctors and Madmen: The Social History of Psychiatry in the Victorian Era* (1981), p. 346. An example, which attracted public attention at the time, was the case of *Hall v Semple* (1862) 176 ER 151, where a patient was committed to a "mad house" by a doctor who admitted that his only evidence of the plaintiff's insanity was the testimony of his wife. This suggests that the need for physical attendance may well have

> been as important in the minds of those who enacted the legislation as the need to avoid delegation.
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> 46. Fourth, the interpretation of s. 11(5) and 12(1) must be informed by the common law principle that "a person's physical liberty should not be curtailed or interfered with except under clear authority of law" and that in consequence "[t]he court may be expected to construe particularly strictly any statutory provision which purports to allow the deprivation of individual liberty by administrative detention": *Bennion on Statutory Interpretation* (7th ed., 2017), §27.3. It is for this reason that "circumstances in which the mentally ill may be detained are very carefully prescribed by statute": *Re S-C (Mental Patient: Habeas Corpus)* [1996] QB 599. This means that the court should be cautious about apply an "updating construction". It should be borne in mind that a court "cannot construe a statute as meaning something 'conceptually different' from what Parliament must have intended": *Owens v Owens* [2017] EWCA Civ 182, [2017] 4 WLR 74. He relied also on the observations of Lord Wilberforce in *Royal College of Nursing v Department of Health and Social Security* [1981] AC 800, at 822B-E, which – although part of a dissenting opinion – have subsequently been regarded as authoritative: *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2005] 2 AC 561, at [10] (Lord Bingham).
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> 47. Finally, Mr Auburn submitted that there was a real risk that the construction advanced by the Trust and the Secretary of State could make legitimate a very significant and permanent change in clinical practice which would allow detention in circumstances not envisaged when the MHA was enacted. It could, for example, enable the contracting out of assessments by a mental health trust to UK qualified doctors abroad or in another part of the UK far removed from the physical location of the patient. Resource pressures on the NHS are real. Once the link with the physical presence of a practitioner is broken, the possibilities for making efficiencies in a system under pressure become open-ended.

62. The Divisional Court's analysis began as follows:-

> "48. We begin with Lord Wilberforce's famous statement in the *Royal College of Nursing* case of the proper approach to statutory construction in cases where technology has moved on since the date when the statute was enacted: [1981] AC 800, at 822B-E. As Mr Auburn said, this statement has since been regarded as authoritative: see *Quintavalle*, at [10]. Lord Wilberforce was considering the statutory requirements for the termination of pregnancy. He said this:

‘In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs. Leaving aside cases of omission by inadvertence, this being not such a case, when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the Parliamentary intention. They may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made. How liberally these principles may be applied must depend upon the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive. They will be much less willing to do so where the subject matter is different in kind or dimension from that for which the legislation was passed. In any event there is one course which the courts cannot take, under the law of this country; they cannot fill gaps; they cannot by asking the question 'What would Parliament have done in this current case—not being one in contemplation—if the facts had been before it?' attempt themselves to supply the answer, if the answer is not to be found in the terms of the Act itself.’

49. In this case, the MHA was a consolidating statute, so the relevant time for ascertaining "the state of affairs existing, and known by Parliament to be existing" is 1959. It is agreed on all sides that, in 1959, there was no way of conducting a medical examination other than by means of the physical attendance of the doctor. The possibility of doing so using video-conferencing facilities would then have been regarded as the stuff of science fiction. Even in 1983, an "examination" conducted by video-conferencing could not have been contemplated by Parliament. Applying Lord Wilberforce's test, the question is therefore whether such an "examination" falls within "the same genus of facts" as those to which the policy of the MHA is directed. Another way of putting the same question, using the words adopted by Sir James Munby in *Owens* from Lord Hoffmann's opinion in *Birmingham City Council v Oakley* [2001] 1 AC 617, 631, is whether such an "examination" is "conceptually different" from that intended by Parliament.

50. Mr Cornwell suggested that the fact that subsections 11(5) and 12(1) do not use the word "visit", whereas other parts of the MHA do use that word, shows that Parliament did not intend "personally seen" and "personally examined" to require the

> physical attendance of the AMHP/nearest relative or medical practitioner. We do not agree. Sometimes, the fact that Parliament uses one formula in one part of an Act and a different formula in another part shows that a different meaning was intended, but that is not invariably so. In this case, as everyone agrees, video-conferencing was not possible in 1959, or even in 1983. At those times, it would not have been possible to "examine" a patient other than by personal attendance on him or her. The same can be said, *mutatis mutandis*, of the phrase "personally seen" in s. 11(5). Although Ms Morris at one stage suggested that this latter requirement could be fulfilled by a telephone voice call, she did not advance that submission with any great enthusiasm and this was in our judgment understandable: "personally seen" must involve, at minimum, an arrangement in which the patient is visible to the person conducting the interview.

63. Having explained why it did not find the case law cited by the parties to be of assistance in resolving the question of construction before the Divisional Court, the judgment proceeded as follows:

> **"**56**. First**, subsections 11(5) and 12(1) set preconditions for the exercise of powers to deprive people of their liberty. In this country, powers to deprive people of their liberty are generally exercised by judges. It is exceptional for such powers to be exercisable by others. Where they are (i.e. where statute authorises administrative detention), the powers are to be construed "particularly strictly": see the extract from Bennion cited above, which cites the decision of the Privy Council in *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97, at 111 (Lord Browne-Wilkinson) and the decision of the Court of Appeal in *R (B) v Secretary of State for the Home Department* [2016] QB 789, at [32] (Lord Dyson MR). The question of construction with which we are now concerned must, in our view, be seen through this lens."
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> 57. **Second**, we do not think it appropriate to take the compound phrases "personally seen" and "personally examined", as used in the 1959 and 1983 Acts, and split them up, asking first what "examined" or "seen" means and then what "personally" was intended to add. We agree with Mr Auburn that this is an artificial approach which fails to capture the true import of these compound phrases as they would have been understood in 1959 and 1983.
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> 58.**Third**, the meaning of the phrases "personally seen" and "personally examined" might no doubt depend on who or what was being examined or seen. In this case, it is a patient. The concept employed by s. 12(1) is that of a medical examination, not merely a consultation. We have no doubt that Parliament in 1959 and 1983 would have understood the medical examination

of a patient as necessarily involving the physical presence of the examining doctor. That is confirmed by the use of the word "visit" in other parts of the Act (in circumstances where the difference in language cannot have been intended to connote a difference in meaning). It is also confirmed by the fact that a psychiatric assessment may often depend on much more than simply listening to what the patient says. It may involve a multi-sensory assessment for the purposes summarised at para. 43 above. It may involve a physical examination in order to rule out differential diagnoses. It is no answer to say that it should be up to the examining doctor to decide when physical attendance is necessary, because without the cues that could only be picked up from a face-to-face assessment, the doctor might wrongly conclude that physical attendance was not required.

59. **Fourth**, although we accept that it may sometimes be appropriate to apply what has been referred to as an updating construction, we do not think that such a construction would be appropriate here. As Lord Wilberforce said in *Royal College of Nursing* case: "The courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive". In this case, the statutory history unearthed by Mr Cornwell shows that the words we are construing were indeed intended to be restrictive and circumscribed. They were inserted to address a particular problem in which doctors had certified patients as liable to detention without physically attending on them. Whilst it is true that part of the problem was doctors delegating their functions to others, the remedy fixed upon by Parliament was to require the examination to be carried out personally by the person whose recommendation was being relied upon. That would have been understood then, and should be understood now, as connoting the physical presence of the doctor.

60. **Fifth**, the fact that the Code of Practice requires physical attendance and that the Secretary of State's Guidance makes clear that in person examinations are always preferable seem to us to show that, even today, medical examinations should ideally be carried out face-to-face. The fact that the 2020 Act made amendments to other parts of the MHA does not assist one way or the other in construing the provisions we are considering today, because the lack of amendments to subsections 11(5) and 12(1) could suggest either an assumption that those provisions already authorised interviews and examinations by video-conference or an assumption that they did not and an intention not to attenuate the requirement for physical attendance in this context. Either way, however, the 2020 amendments do show that – where Parliament considers that the pandemic necessitated amendments to the safeguards in the MHA – it is willing and

> able to make such amendments. The decision whether to allow the AMHP/nearest relative to see a patient and/or to allow a medical practitioner to examine a patient by video-conference (contrary to the common understanding of all concerned until the start of the current pandemic) will involve balancing two important public interests: the need to ensure that administrative deprivations of liberty are properly founded on objective evidence and the need to maintain the system of MHA detention given the exigencies of the pandemic. In our constitution, the weighing up of competing and incommensurable public interests of this sort is for Parliament, even in times of national emergency.
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> 61. The **sixth** point is related. We bear firmly in mind that the construction which we are asked by the Trust and the Secretary of State to endorse will be applicable immediately and may remain in force for some time after the end of the current pandemic. The benefit of allowing any modifications to be made by Parliament is that, if they are considered necessary, a judgment might be made not to bring them into force; and Parliament could also consider whether they should be time-limited. Both these things were done in relation to the modifications for which the 2020 Act provided. These techniques offer a tailored way of addressing a time-limited problem. They confirm our view that it is Parliament, and not the courts, that can best address the problems to which the pandemic gives rise in this area."

64. The Divisional Court concluded that the phrases "personally seen" in section 11(5) and "personally examined" in section 12(1) "required a physical attendance of the person in question on the patient. We accordingly refused the declarations sought" (paragraph 62).

THE CASE FOR THE CLAIMANT

65. For the claimant, Ms Morris KC submitted that, in interpreting sections 17A, 20 and 20A, it was important to observe that the person concerned is "the responsible clinician". As we have seen, section 34 defines this person as "the approved clinician with overall responsibility for the patient's case" in respect of a patient liable to be detained by virtue of an application for admission for assessment or an application for admission for treatment; and, in relation to guardianship, as the approved clinician authorised by the responsible local social services authority to act as the responsible clinician. The "approved clinician" is defined in section 145. Ms Morris submits that this is important. It reflects the practical reality that, in deciding whether to discharge P into the community under section 20, the examination will be conducted by a clinician who knows P and who is able to draw upon that knowledge and the knowledge of others who have been concerned in treating P. That contrasts, she says, with the position in sections 11 and 12, concerning applications for admission for assessment or treatment, or an application for guardianship. This is, therefore, an important factor in distinguishing the present case from *Devon*. If this submission is incorrect, then the claimant contends that it is difficult to understand why Parliament used the expression

"personally" in sections 11 and 12 but not in sections 20 and 20A, as well as there being no requirement at all for examination in section 17A, before the initial making of a CTO.

66. Ms Morris says CTOs were introduced in 2007 in order to deal with the situation whereby P would be detained and then treated with medication to the point where P could be discharged, only to fail to take the medication on a continuing basis, once out of detention, with the result that P had to be detained again for treatment in hospital. The purpose of a CTO is to reduce the risk of such occurrences by providing a measure of supervision and control over P. This can be seen, in particular, in section 17A(6).

67. The claimant draws support from the code of practice issued under the 1983 Act. Paragraph 29.7 states that a clinician should take account of the available evidence, when considering whether to make a CTO, as regards, amongst other matters, the likely effectiveness for the patient in question. Paragraph 29.10 says that "Consultation at an early stage with the patient and those involved in the patient's care will be important, including family and carers". Paragraph 29.13 states that in assessing any risk, the responsible clinician "should take into consideration the patient's history of mental disorder, previous experience of contact with services and engagement with treatment". Paragraph 29.14 says that other relevant factors "are likely to include the patient's current mental state … and attitude to treatment at the risk of relapse…".

68. The claimant draws attention to the prescribed form for the "order in writing" provided by section 17A, especially the passage in which the responsible clinician states that they have had "regard to the patient's history of mental disorder and any other relevant factors". Thus, says the claimant, it is P's history that predominates and P's current mental state can be a decisive factor.

69. Similar points may be made in respect of sections 20 and 20A with regard to the extension of detention, guardianship and a CTO. The claimant draws attention to chapter 32 of the code of practice. Paragraph 32.2 highlights the requirement for the responsible clinician to consult one or more other people who have been professionally concerned with P's medical treatment. The responsible clinician "must make this decision on the basis of clinical factors only...". Others who have been professionally concerned will include, for example, the community psychiatric nurse, P's carers and members of P's family. Paragraph 32.4 highlights the requirement for the written agreement of another professional to be obtained. They must be "professionally concerned with" P's treatment and not belong to the same profession as the responsible clinician.

70. The claimant submits that the reason why the word "personally" is not present in section 20 and 20A is because, by definition, the responsible clinician does not necessarily need physically to examine P in order to proceed under those sections. The responsible clinician does not, in particular, necessarily have to examine P for scars or signs of poor self-care because the responsible clinician will have been aware of P over the previous six months (in the case of an initial extension) and will have been able to speak to others who have been involved with P's treatment.

71. At this point, it is helpful to refer to the witness statement of Mr Coburn. At paragraph 19, he says that in the situation under discussion, the claimant has patients who have moved out of the area. Requiring them or the responsible clinician to travel long

distances, where it was considered that a proper assessment could take place virtually, does not appear to be conducive to P's well-being. Nor is it an effective use of resources. In the case of section 20, Mr Coburn considers that "the responsible clinician and the team will be very familiar with the patient having been responsible for their care, typically for a number of weeks at least, often months or longer."

72. Mr Coburn says that since the pandemic there has been a significant increase in the use of virtual technology. Although this was in part borne out of necessity, it has "since demonstrated its efficacy in mental health services". The claimant has seen "positive responses both from staff, allowing them to operate more efficiently, but also from patients who appreciate the flexibility and reduced imposition on their day-to-day lives that remote technology provides. In the situation where clinicians are considering renewals, or the creation of CTOs, there will usually be a deeper knowledge and appreciation of the patient and their mental health".

73. Ms Morris drew attention to the way in which the First-tier Tribunal operates in the mental health jurisdiction. There is no legal requirement on the Tribunal's medical member to carry out a personal, physical examination of P. The member's examination can be undertaken by a video call. This is confirmed by the information to appellants provided on *Gov.uk* by the Ministry of Justice. The First-tier Tribunal, of which the medical member is a part, has power to discharge P from detention. The appeal hearing is, itself, often conducted remotely.

74. In seeking to distinguish the present case from *Devon*, Ms Morris emphasised the Divisional Court's finding at paragraph 57 of the judgment that the compound phrases "personally seen" and "personally examined", as used in the 1983 Act (and its predecessor, the Mental Health Act 1959) should not be "split" so as to ask first, what is "examined" and only then ask what "personally" was intended to add. Given that, in sections 20 and 20A, we are concerned only with the expression "examined", Ms Morris submitted that what the Divisional Court went on to say in paragraph 58 could not, in effect, be relied upon by the defendant and the interested parties. In paragraph 58, the Court was not, in any case, stating that a physical examination in the presence of both the responsible clinician and P was always required. Such a form of examination may, the claimant accepts, sometimes be required. However, this was not necessarily the position. Indeed, it could be inhumane to compel someone who was doing well in the community to go back to a hospital for examination and thus face being re-medicalised.

75. Ms Morris referred to the *Mental Health Act Manual (26th edition)* by Richard Jones. Commenting on section 20 of the 1983 Act, the author opines that, in light of the judgment of the Divisional Court in *Devon it*, is likely that a Court would find that the physical presence of the examining doctor is required and that examining the patient cannot be undertaken by the use of remote technology. Ms Morris highlighted the conflicting advice from ADASS and the LGA.

76. Ms Morris submitted that the absence of any reference to examination in section 17A could, additionally to her earlier points, be explained by the fact that section 17A is concerned with increasing the liberty of P, not restricting it. Thus, any principle of statutory construction which requires a restricted reading of provisions interfering with liberty has no application. Despite the defendant's stance in relation to the seeking of a

declaration regarding section 17A, Ms Morris urged this Court to deal with the issue, given that there was at present "real confusion on the ground".

77. As a general matter, in order for the defendants to succeed, Ms Morris submitted that I would have to find that a physical examination in the presence of a responsible clinician and P was "necessary"; not that it would be the best way of undertaking the examination.

78. According to the claimant, the amendments made by the Mental Health Act 2007, inserting the provisions concerning CTOs, were entirely novel. They were accordingly not to be regarded as parasitic on what was then in the 1983 Act. Their novelty means they demand to be examined on their own. By 2007, forms of video conferencing were in existence; and so Parliament could be taken to have had these in mind in framing the CTO provisions.

DISCUSSION

79. I deal first with the declaration which the claimant seeks in respect of section 17A. The Court is asked to declare that the responsible clinician is not required to undertake what is described as a "face-to-face examination" of P before making a CTO.

80. I consider there is an element of ambiguity in the expression "face-to-face", in that interactions between individuals communicating remotely by means of sound and vision are sometimes described as occurring "face-to-face". A better descriptor is that used in paragraph 62 of *Devon*, which speaks of the "physical attendance of the person in question on the patient".

81. Be that as it may, there are substantive problems with making the first declaration. The declarations sought in respect of sections 20 and 20A involve straightforward issues of statutory interpretation of the language used by Parliament; namely, the word "examine". By contrast, the first requested declaration involves an examination of the significance, if any, of Parliament not using that word in section 17A(1). I agree with the defendant that this necessarily leads to a much broader analytical exercise, which may well depend upon the facts of a particular case, as to which we have no examples. There may be circumstances in which the responsible clinician cannot discharge their responsibilities under section 17A without conducting an examination in the physical presence of P, notwithstanding the absence of a specific obligation of examination. This Court is simply not in a position to say in what circumstances such an obligation could arise. I agree with the defendant and the interested parties that, were I venture down this route, there is a very real risk that any declaration would be assailable for the reasons given by the Court of Appeal in R (Burke) v General Medical Council (official solicitor and others intervening) [2005] EWCA Civ 1003. At paragraph 21 of its judgment, the Court of Appeal (Lord Phillips MR) held that there are "great dangers in a court grappling with issues … that are divorced from the factual context that requires their determination. The court should not be used as a general advice centre." There is, in particular, a danger that "the court will enunciate propositions of principle without full appreciation of the implications that these will have in practice, throwing into confusion those who feel obliged to attempt to apply those principles in practice."

82. In so concluding, I should not be taken as in any way questioning the fact that, in the light of *Devon*, there is uncertainty in respect of section 17A. This Court must, however,

resist the temptation to venture outside the limits of its ability to give sound and effective declaratory relief.

83. I therefore turn to the declaration sought in respect of sections 20 and 20A. The search here is for Parliament's intention in using the word "examine".

84. The claimant seeks to derive support for its construction of the provisions by emphasising paragraph 57 of the judgment in *Devon*, in which the Divisional Court refused to approach the phrases "personally seen" and "personally examined" by splitting them up, so as to consider first what "examined" or "seen" meant and then consider what was intended to be added by the word "personally". This means, according to the claimant, that the Divisional Court's conclusions have no bearing on the present claim for declarations.

85. I am unable to accept this submission. Despite paragraph 57, it is in my view evident that, in saying what it did in paragraph 58, the Divisional Court was concerned with the issue of what was understood by Parliament in 1959 and 1983 to be the essence of a medical examination. The Divisional Court held that a medical examination was to be understood "as necessarily involving the physical presence of the examining doctor". What follows in paragraph 58 is as pertinent to the interpretative exercise I am asked to undertake in respect of sections 20 and 20A, as it was to sections 11 and 12.

86. Ms Morris laid emphasis on the Divisional Court's use in paragraph 58 of the word "may" in the passages "a psychiatric assessment may often depend on much more than simply listening to what the patient says…"; that it "may involve a multi-sensory assessment…"; and "may involve a physical examination in order to rule out differential diagnoses".

87. I do not consider that the Divisional Court's use of the word "may" in these passages assists the claimant. This is because the Divisional Court concluded that Parliament requires a "physical presence" examination, as a general matter, in sections 11 and 12, notwithstanding that the relevant information could sometimes be obtained by different means or that there might, on occasion, be no relevant information to derive from such an examination.

88. In any event, the attempt by the claimant to distinguish *Devon* cannot succeed even if (which is clearly not the case) the Divisional Court reached its conclusion because of the presence of the adverb "personally" in the provisions under consideration in that case. Since it is evident from *Devon* that the parties were agreed that Parliament could not have had video conferencing facilities in mind in 1959 or 1983, the use of "personally" in section 12 cannot be intended to exclude such "remote" means of examination for the simple reason that those means of examination did not exist. Accordingly, as the claimant submitted in paragraph 26 of *Devon*, the reason for requiring P to be "personally examined" can only have been to ensure that the examination was carried out by the practitioner themselves, rather than some delegate. This conclusion is supported by the legislative history, referred to by the Divisional Court at paragraph 45 of its judgment. There, the Court noted the concerns that had led to the use by Parliament of the words "personally examined". The concerns included cases where certificates of insanity had been signed in blank for the proprietors of asylums to use; and where a patient was committed to a "mad house" by a doctor who admitted that his only evidence of the patient's insanity was the testimony of his wife.

89. It is, of course, true that we are concerned in the present case with the process for renewal of detention or guardianship (section 20) and for the extension of a CTO (section 20A), rather than the process under sections 11 and 12. The fact, however, remains, that the legislative language in sections 20 and 20A arises from Parliament's concern that decisions extending P's detention or imposing other forms of restriction on P's liberty should be undertaken as effectively as possible, rather than in a manner which may inherently be ineffective, albeit perhaps only in a minority of cases. In this regard, Mr Cross rightly laid emphasis upon the final sentence of paragraph 58 of *Devon*, in which the Divisional Court said that it was "no answer to say that it should be up to the examining doctor to decide when physical attendance is necessary, because without the cues that could only be picked up from a face-to-face assessment, the doctor might wrongly conclude that physical attendance was not required".

90. The defendant draws attention to the Report of the Royal Commission on the Law relating to Mental Illness and Mental Deficiency 1954-1957 ("the Percy Report"), which led to the enactment of the Mental Health Act 1959. Dealing with "future procedures when compulsory powers are used…", paragraph 376 of the Percy Report emphasised that "the procedures used at the time of admission, the opportunities for review and discharge and the procedures for renewing the authority for detention must provide sufficient safeguards against the misuse of compulsory powers…". This strongly supports the defendant's case that, in framing the 1959 Act, Parliament did not intend there to be a more relaxed regime when it came to deciding if there should be an extension of compulsory powers over P.

91. As we have seen, a major feature of the claimant's case concerns the submission that the responsible clinician who is reporting that P should continue to be detained or subject to guardianship (or that P should continue to be subject to a CTO) will have a greater degree of knowledge of P, than would be the case with those making recommendations under section 12, who must have "personally examined" P. As both Mr Cross and Mr Pezzani pointed out, however, this assumption does not necessarily follow. The responsible clinician may only just have taken over that role, before acting under section 20 or 20A. They may be discharging that role on a temporary (eg. locum) basis. Conversely, a practitioner acting pursuant to section 12 may, in fact, have knowledge of P, not least where P has previously been admitted for assessment (section 2) or treatment (section 3). Indeed, section 12(2) specifically recognises that a practitioner may have "previous acquaintance with" P; but that does not affect the requirement for an examination in the physical presence of P.

92. It is also noteworthy that section 12 requires two practitioners to recommend compulsory admission. By contrast, extending the duration of the consequent detention of P requires a report of only one responsible clinician. I agree with the defendant that this underscores the importance of the examination that that clinician must undertake and strongly indicates that Parliament did not intend the nature of that examination to be any less generally effective than in the case of section 12. This is reinforced by the fact that second and subsequent extensions authorised under section 20 can be for a period of one year, which is twice as long as the initial period of detention or guardianship.

93. Because section 20 concerns, in part, decisions to continue to deprive P of liberty, the provision falls to be construed with particular strictness: *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edition 2020) section 27.2. The governing principle

that a person's physical liberty should not be curtailed or interfered with except under clear authority of law gives rise to the presumption that, in enacting legislation, Parliament is presumed not to intend to interfere with the liberty of the subject without making such an intention clear: Tai Chau Detention Centre [1997] AC 97, 111E; B (Algeria) v Secretary of State for the Home Department [2016] QB 789, 32.

94. It is important to bear in mind that the principle just mentioned applies not only to deprivation of liberty but also to measures which restrict liberty. There can be no doubt that the extension of guardianship is a measure which restricts P's liberty in important respects. Amongst other things, section 8 of the 1983 Act means that a person under guardianship may be required to reside at a particular place; attend at places and times specified for the purpose of receiving medical treatment etc; and be subject to visits by, and examinations from, medical practitioners etc.

95. Similarly, a person who is subject to a CTO must make themselves available for examination and may be subject to conditions concerning the taking of medical treatment and preventing risk of harm to P or others. Furthermore and importantly, a person in respect of whom a CTO is made is subject to the power of recall to detention. That power may be exercised without any further statutory requirements concerning examination and so forth.

96. All of this means that the CTO provisions fall to be construed strictly. The claimant's case on CTOs also suffers the additional problem that Parliament's use of the same word in an enactment gives rise to the presumption that the word has the same meaning, wherever it occurs. Thus, the use of "examine" in section 20A falls to be construed as meaning the same as "examine" in section 20.

97. The claimant submits that because sections 17A-17G and 20A were inserted by the Mental Health Act 2007, at a time when video conferencing was possible, then whatever might be the position regarding section 20, "examine" in section 20A should be interpreted as including examinations that are carried out by remote means.

98. I do not consider that this submission enables the claimant to overcome the interpretative presumptions just mentioned. It does, however, lead to the broader submission, which featured at some length in the hearing, concerning whether the word "examine" in section 20 and/or section 20A is subject to an "updating construction" whereby, on the assumption that a statute is "always speaking", an expression used by Parliament should be read as encompassing things that Parliament cannot have envisioned (at least, in practical terms) at the time the statute was enacted. As we have seen, this issue was discussed by the Divisional Court in *Devon*. It is necessary to examine the case law in some detail.

99. Birmingham City Council v Oakley [2001] 1 AC 617 involved a tenant who claimed that his accommodation was prejudicial to health because there was no wash hand basin in the water closet of the premises, meaning that he might have to wash his hands in the basin in the bathroom or in the kitchen sink, with the resultant danger of cross-infection. Section 79(1)(a) of the Environmental Protection Act 1990 made it a statutory nuisance for premises to be "in such a state as to be prejudicial to health…". The appellant council showed that section 79(1)(a) could be traced back to temporary emergency legislation rushed through Parliament in the August of the unusually hot summer of 1846, when rumours of cholera and typhoid were rife (page 630B-C).

100. Lord Hoffmann addressed the tenant's contention that the relevant legislation fell to be construed in the light of modern conditions. The tenant submitted that the words "state… prejudicial to health" fell to be construed as "always speaking". At pages 631-632, Lord Hoffmann agreed that when a statute employs a concept which may change in content with advancing knowledge, technology or social standards, it should be interpreted as it would be currently understood: "The content may change but the concept remains the same. The meaning of the statutory language remains unaltered". Thus, in Lord Hoffmann's example, the concept of a vehicle has the same meaning today as it did in 1800, even though "it includes methods of conveyance which would not have been imagined by a legislator of those days." The same is true of social standards, in that the concept of cruelty is the same today as it was when the Bill of Rights 1688 forbade the infliction of "cruel and unusual punishments". This was so even though changes in social standards meant that "punishments which would not have been regarded as cruel in 1688 will be so regarded today".

101. Importantly, however, Lord Hoffmann held that the doctrine "does not... mean that one can construe the language of an old statute to mean something conceptually different from what the contemporary evidence shows that Parliament must have intended". Thus, in Goodes v East Sussex County Council [2000] 1 WLR 1356, the House of Lords decided that the statutory duty of a highway authority to "maintain" the highway did not include the removal of ice and snow. Although the word "maintain" was capable of including the removal of ice and snow "and such removal might be expected by modern road users, the contemporary evidence showed that the concept of maintenance in the legislation was confined to keeping the fabric of the road in repair". Accordingly, construing the legislation so as to require the removal of ice and snow would be to "express a broader concept that Parliament intended".

102. In Owens v Owens [2017] 4 WLR 74, the Court of Appeal held that the Matrimonial Causes Act 1973, reproducing a provision of the Divorce Reform Act 1969 which used the words "cannot reasonably be expected", created an objective test to be addressed by reference to the standards of the reasonable man or woman as at the present time. The test of reasonableness was to be determined not according to the standards of the reasonable man or woman in 1969 but, rather, by reference to the standards of "the man or woman of the Boris Bus with their Oyster card in 2017" (paragraph 41).

103. In R (N) v Walsall Metropolitan Borough Council [2014] EWHC 1918 (Admin), Leggatt J said at paragraph 42 of his judgment that "the conflict between the historical approach and the updating approach to statutory interpretation is not as deep as may first appear". This was because treating legislation as "always speaking" could still be seen as an exercise in identifying the meaning of the legislation at the time it was made: "it is just that this meaning is one which allows the relevant statutory language to have a changing application". As an illustration, Leggatt J cited Lord Bingham's judgment in R (Quintavalle) v the Secretary of State for Health [2003] 2 AC 687 where, at paragraph 9, he gave the example that if Parliament passed an Act applicable to dogs, it could not properly be interpreted to apply to cats. It could, however, properly be held to apply to animals which were not regarded as dogs when the Act was passed but which are so regarded now.

104. In the present case, the stance taken on this issue by the defendant and the interested parties is that, in using the word "examine", Parliament had in mind a concept which necessarily involves the physical presence of the examiner with the examinee. The

defendant points to the definition of "examine" in the Oxford English Dictionary, where definitions 4a and 4c refer respectively to investigating the nature or condition of a person or thing by visual or physical inspection; and performing an examination of a personal part of the body for diagnostic purposes, especially by means of visual inspection, palpation, auscultation, or percussion.

105. Ms Morris counters that the examinations with which we are concerned are not properly understood to be diagnostic. She says that examinations, in the modern age, take a variety of forms, involving a variety of procedures and tests, by no means all of which need the physical presence of tester and tested.

106. It is in my view dangerous to assume that the issue can always be resolved merely by assigning the case in question to the "concept" or the "content" category. Indeed, the present case is one that cannot be resolved merely by assigning it to a category. As Leggatt J held, the exercise is at heart one of statutory interpretation. One must find what Parliament intended at the time it enacted the provision in question and ask whether that intention applies to the object or activity which is said today to fall within the ambit of the provision.

107. For the reasons I have given, it is evident that Parliament requires the highest degree of assurance that the examination in question will be as effective as it can be. There is no mandate for assuming that, in enacting sections 20 and 20A, Parliament intended to leave the matter to be determined by the responsible clinician. If that had been the intention, then Parliament can be expected to have said so. This is particularly true of section 20A where, as the claimant points out, at the time of its insertion into the 1983 Act, video conferencing facilities were in existence.

108. The present case can, therefore, be said to be one of "content", with the content being, in all cases, an examination of the requisite quality. This does not, however, carry the claimant the required distance. What the case law makes plain is that, even if the legislative provision under scrutiny is one which can be read as encompassing things not known to Parliament at the time of enactment, those things must be generally and uncontroversially recognised as falling within the ambit of the provision. In other words, taking the example from Oakley of a vehicle now including a motor car etc, there must be no room for doubt that, in 2023, a motor car falls to be treated as a "vehicle". Likewise, although it is somewhat uncertain what Lord Bingham had in mind in saying what he did about the concept of a "dog", it is evident that he was envisaging something about which there could be no genuine disagreement in the present day.

109. In the instant case, it is quite apparent that there is no consensus in 2023 (let alone 2007) that an examination conducted by remote means, such as a video call, will necessarily be of the same quality as an examination that involves the physical attendance of the responsible clinician and P. Not only does the last sentence of paragraph 58 of Devon apply with the same force in the case of sections 20 and 20A, the fact that there can be serious difficulties with on-line examinations is borne out by the evidence filed in the present proceedings by Rheian Davies of Mind. In her statement, Ms Davies describes an online survey carried out between December 2020 and February 2021 of 1914 people, in order to find out their experiences of being offered and using support from the NHS for their mental health by phone or online. There were also eleven in-depth interviews conducted, resulting in a report called "Trying to Connect", published in April 2021.

110. Mr Pezzani acknowledged the limitations of this evidence, which I fully take into account. It is, nevertheless, instructive. It describes on-line interactions as crashing and as being regarded by patients as a lot harder than a "face-to-face" interaction. Certain individuals found it more difficult to speak over the telephone, fearing that their family could overhear. For some autistic people, it can be more difficult to make a meaningful personal connection with another person by video call.

111. The point about privacy was emphasised by Mr Pezzani, who drew attention to the fact that section 129 of the 1983 Act makes it an offence for a person to insist on being present when required to withdraw during an interview or examination in private. Although the responsible clinician will no doubt do their best to ensure that a remote examination is being conducted privately from both locations, it is obvious that they can have no certainty that that is so, as regards the place in which P is present, in contrast with the position where both the responsible clinician and P are in the same room.

112. In short, on the state of the evidence, the claimant cannot show that there is the necessary societal consensus that an examination conducted by telephone or video conferencing will always be of the same high quality as one involving the physical co-location of clinician and patient. As I have sought to explain, Parliament's intention was to demand, as a general matter, an examination of such quality. Accordingly, the claimant cannot rely upon the "updating" or "always speaking" principle of statutory construction as a reason for this court to grant the remaining two declarations.

113. In her reply, Ms Morris took issue with Mr Cross's categorisation of the examinations under section 20 and 20A as diagnostic. I do not consider that anything material turns on this. The purpose and function of the examinations are set out in the sections themselves. The essential point is that, in order to fulfil them, the responsible clinician has to undertake an examination of P. The Upper Tribunal Administrative Appeals Chamber case (HM/1073/2009), produced by Ms Morris in reply, concerned a section 2 hearing; that is to say, a hearing concerning admission for assessment where different considerations apply.

114. Also in her reply, Ms Morris adduced the decision of Lieven J in Cumbria, Northumberland and Tyne and Wear NHS Foundation Trust and Secretary of State for Justice v EG [2021] EWH8 2990 (Fam). As I understood her, Ms Morris did so because, at paragraph 52 of the judgment, Lieven J observed that the evidence in the case before her showed that "being in hospital, even as an out-patient, is positively counter-therapeutic for EG". By the same token, Ms Morris submitted that there may be (as Mr Coburn's evidence suggests) occasions when it would not only be more convenient, in terms of travelling etc, for P to be examined by remote means but also that there may be occasions when this would be medically preferable solution and requiring P to be examined in the physical presence of the admission.

115. I accept this may be so; but it cannot affect this Court's task of statutory construction. I reiterate the fact that Parliament cannot be said to have enacted the provisions on the basis that it would be left to medical practitioners, however skilled, to decide when to hold remote examinations.

116. I do not consider that the claimant can derive any assistance from the procedures employed by the First-tier Tribunal in exercising its mental health jurisdiction. The fact

that remote examinations may be undertaken by the medical member of that Tribunal says nothing about what Parliament intended when enacting sections 20 and 20A.

117. For these reasons, the application for each of the declarations is refused.

118. Finally, I return to PQR's submission that I should say something specific in this judgment about the legality or otherwise of the examination undertaken in his case in May 2020. Mr Simblet sought to rely upon Re S-C (Mental Patient: Habeas Corpus) [1995] QB 599, where the Court of Appeal held that since an error had resulted in there not being jurisdiction to detain the applicant under the 1983 Act, the applicant was entitled to habeas corpus, even though the hospital managers had been entitled to act upon what they considered to be an apparently valid application. Mr Simblet said that the juridical basis of PQR's position was plain and should be reflected in my judgment.

119. I disagree. The factual basis of what happened in May 2020 may be entirely as PQR asserts; but the present proceedings have not provided any opportunity for this to be interrogated. I am also not persuaded that there is a direct correlation with S-C, which, significantly, was a habeas corpus case. In the circumstances of the present case, where PQR is not being detained, the proper course, given the outcome of the proceedings in the Upper Tribunal, would be for PQR to pursue his case by way of judicial review. There are, however, plainly issues of timeliness to address in this regard. In these circumstances, therefore, making a finding in this judgment would ride roughshod over the timeliness requirements of CPR 54 and, more broadly, the need to obtain permission in order to bring judicial review.