

# Paternalism v capacity to choose

WITH CHRISTINE SMYTH



## Patriarchy...is a word in modern context that often forms part of a certain expletive phrase.

It is a word that can stir emotions, as was demonstrated by the reactions to journalist Mona Eltahawy when she appeared on the ABC's Q&A last year. It is certainly not a word we encounter all that often in judgments. Yet a derivative of it – paternalism<sup>1</sup> – was a central aspect to a recent ACT guardianship decision involving a capacity assessment: *In the Matter of Pari*<sup>2</sup> (*Pari*).

*Pari* emphasises that our right to make our own decisions includes our right to make choices that others would not make. It affirms that a capacity assessment is not merely evidenced by poor choices with which better educated, psychologically sound, well-meaning and better resourced people do not agree,<sup>3</sup> and that the capacity assessment ought not be conflated with a best interests assessment.<sup>4</sup>

In *Pari*, the ACT Civil & Administrative Tribunal (the tribunal) carefully considered the importance of a vulnerable older woman's right to autonomy, the critical role of close family relationships, and the intersection with the well-meaning objectives of a number of professionals who sought to protect her from herself, utilising the ACT guardianship legislation.

*Pari*<sup>5</sup> is a 73-year-old “non-English speaking woman who needed to communicate through an interpreter”.<sup>6</sup> Born in Afghanistan, she moved to Iran 30 years ago. Then, in “2014 *Pari* and her daughters, Roya aged 52 and Tela aged 48, came to Australia as refugees (Women at Risk Status)”.<sup>7</sup> They have a highly traumatic history<sup>8</sup> and their experience of life in Australia included “sleeping rough” over a number of years.<sup>9</sup>

*Pari* and her daughters were close and “extremely dependent upon each other”.<sup>10</sup> Leading a peripatetic life, at the time of the matter they were living on the streets of Canberra and were well known to local police.<sup>11</sup>

An incident occurred which resulted in *Pari* being admitted to hospital. Two social workers, concerned for *Pari*'s welfare, “brought an application for the appointment of the Public Trustee and Guardian (PTG) as guardian and manager for *Pari*”. At the time of

the application, *Pari* was living in the hospital, it seems “because no one ha[d] found a suitable place to which she can be discharged”.<sup>12</sup>

The social workers were of the view that *Pari* was a great risk because of her advanced age and her unwillingness to engage with support and service providers, including housing. A report provided by a Dr Choudhry found *Pari* was “severely malnourished, very hungry”, had “poor dentition” and had “a lot of skin damage”...so that she required “full assistance with all her ADLs including showering, dressing, meal set-up and toileting”.

Dr Choudhry stated that “this all points towards advanced cognitive impairment”.

However, Dr Choudhry caveated his assessment as being “potentially incomplete” as a result of the “language barriers”<sup>13</sup>.

In reaching its determination to dismiss the application, the tribunal had regard to the criteria of the *Guardianship and Management of Property Act 1991* (ACT),<sup>14</sup> giving careful consideration to Dr Choudhry's evidence.<sup>15</sup> The tribunal expressed doubt as to the conclusion to be drawn by his evidence and others that *Pari* probably had “advanced cognitive impairment”.<sup>16</sup>

The tribunal expressed real doubt that *Pari*'s “lifestyle and circumstances are a product of impaired decision-making ability”,<sup>17</sup> concluding “that how she lives is primarily a function of her lifestyle and ‘situation’ in life, rather than impaired decision making-ability”.<sup>18</sup>

The tribunal affirmed:

“There is a need for caution about...treating a poor decision as demonstrating lack of insight and poor reasoning and as supporting an inference of a cognitive impairment.”<sup>19</sup>

The tribunal emphasised that “when making decisions about a person, the views and wishes of the person should receive paramount consideration unless doing so is likely to significantly adversely affect their interests”.

Citing the binding ACT Supreme Court decision in *A v Guardianship and Management of Property Tribunal*,<sup>20</sup> the tribunal affirmed the court's statement about “the importance of ensuring that the proviso does not override the general rule, and to guard against paternalism or protection overriding individual autonomy”.<sup>21</sup>

Relying on the decision of Justice Baker of the Court of Protection (England and Wales) in *KK v STCC*, the tribunal affirmed this statement:

“There is, I perceive, a danger that professionals, including judges, may objectively conflate a capacity assessment with a best interests analysis. ...I remind myself again of the danger of the ‘protection imperative’ identified by Ryder J in *Oldham MBC v GW and PW* ([2007] EWHC136 (Fam) [2007] 2 FLR 597). These considerations underpin the cardinal rule, enshrined in statute, that a person is not to be treated as unable to make a decision merely because she makes what is perceived as being an unwise one.”<sup>22</sup>

In Queensland, the *Guardianship and Administration Act 2000* underscores this statement, by requiring such an assessment to be approached from this perspective:

- “(a) an adult's right to make decisions is fundamental to the adult's inherent dignity;
- (b) the right to make decisions includes the right to make decisions with which others may not agree.”<sup>23</sup>

On 1 January this year the *Human Rights Act 2019* (Qld) became operative.<sup>24</sup> Its objects are set out in section 3. Succinctly, these are to protect and promote human rights, to help build a culture in the Queensland public sector that respects and promotes human rights, and to help promote a dialogue about the nature, meaning and scope of human rights.

The Act ties in its operation with provisions of the *Guardianship and Administration and Other Legislation Amendment Act 2019* (GAOLA),<sup>25</sup> which are yet to commence.

GAOLA introduces two different definitions of capacity. The tests are set out in section 41 (1) to define general capacity and a specific definition of capacity to make an enduring document. Section 42(2) contains a list of factors the person must be able to understand.

GAOLA also removes the General Principles and replaces them with new principles which are more closely aligned with the United Nations Convention on the Rights of Persons with Disabilities. Relevantly, the *Human Rights Act* binds public entities such as hospitals.

Accordingly, a person or entity performing a function will be required to comply not just with this new GAOLA regime<sup>26</sup> but also

the newly operative *Human Rights Act*.

Neuroscience is a relatively new discipline<sup>27</sup> from which our understanding of cognition and the factors that impact it and the extent to which they impact it is yet to mature. It is therefore understandable that it is difficult for us all, including professionals, to distinguish between impaired decision making and the right to make choices with which others do not agree, regardless of how illogical.

It is made all the more difficult in an environment in which we are just beginning to understand the extent of elder abuse and the influence of others in taking advantage of vulnerable elderly people.

Dr Jane Lonie, in her paper 'The Cognitive Mechanics of Elder Abuse', explains that "[a]n understanding of the relationship between cognitive impairment and elder abuse is required to differentiate undue influence from supported decision making and to facilitate the selection of appropriate forms of decision-making support in cognitively impaired elderly clients".

*Pari* stands as a timely reminder of the necessary balance to be struck between a caring and supportive society and the risk of overreach by our institutions in a quest for neat, efficient solutions to complex problems.

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#### Notes

<sup>1</sup> "The term paternalism first appeared in the late 19th Century as an implied critique predicated on the inherent value of personal liberty and autonomy, positions elegantly outlined by Immanuel Kant in 1785 and John Stuart Mill in 1859." Paternalism by Lindsay J. Thompson. [britannica.com/topic/paternalism](http://britannica.com/topic/paternalism).

"Paternalism is the interference of a state or an individual with another person, against their will, and defended or motivated by a claim that the person interfered with will be better off or protected from harm. ...At the theoretical level it raises questions of how persons should be treated when they are less than fully rational." Paternalism – *Stanford Encyclopedia of Philosophy*, first published 6 Nov 2002; substantive revision 12 Feb 2017.

<sup>2</sup> *In the Matter of Pari (Guardianship and Management of Property)* [2019] ACAT 120.

<sup>3</sup> *J v Guardianship and Administration Board* [2019] TASSC.

<sup>4</sup> At [21] citing Justice Baker of the Court of Protection (England and Wales) in *KK v STCC*.

<sup>5</sup> A pseudonym given by the tribunal at [1].

<sup>6</sup> At [9].

<sup>7</sup> At [3].

<sup>8</sup> *Ibid*.

<sup>9</sup> *Ibid*.

<sup>10</sup> *Ibid*.

<sup>11</sup> At [4]-[5].

<sup>12</sup> At [5].

<sup>13</sup> At [7].

<sup>14</sup> At [17]; the provisions are similar to the *Guardianship and Administration Act 2000* (Qld).

<sup>15</sup> At [17]-[22].

<sup>16</sup> At [21].

<sup>17</sup> At [22].

<sup>18</sup> *Ibid*.

<sup>19</sup> Citing and approving *J v Guardianship and Administration Board* [2019] TASSC 15.

<sup>20</sup> At [25].

<sup>21</sup> *Ibid*.

<sup>22</sup> At [26].

<sup>23</sup> The *Guardianship and Administration Act 2000* (Qld) Chapter 2 section 5.

<sup>24</sup> See [legislation.qld.gov.au/view/html/inforce/current/act-2019-005](http://legislation.qld.gov.au/view/html/inforce/current/act-2019-005).

<sup>25</sup> With relevant provisions to commence on 30 March 2020. See [legislation.qld.gov.au/view/html/asmade/act-2019-009#sec.66](http://legislation.qld.gov.au/view/html/asmade/act-2019-009#sec.66).

<sup>26</sup> For a broader analysis of the GAOLA, refer to Mehera Saunders' paper, 'Guardianship and Administration and Other Legislation Amendment Act 2019', changes to powers of attorney/guardianship legislation' presented at a Sunshine Coast DLA seminar on 28 January.

<sup>27</sup> 'The Emergence of Modern Neuroscience: Some Implications for Neurology and Psychiatry' – *Annual Review of Neuroscience*, Vol. 23:343-391 (Volume publication date March 2000) W. Maxwell Cowan, Donald H. Harter and Eric R. Kandel.

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