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**Assessing capacity: Procedural issues and difficult cases**  
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# Overview

- *Brief* introduction to the Mental Capacity Act.
- "The Matter"- identifying the right decision.
- Assessing capacity-common issues
- Using the Court of Protection.

# The Mental Capacity Act 2005

Implemented 1 October 2007.

- Clarifies the test for (i) capacity and (ii) best interests.
- Creates “statutory defence” (section 5 –based on common law doctrine of necessity).
- Creates Lasting Powers of Attorney (property and affairs/health and welfare).
- Creates a new Court of Protection – power to make decisions on behalf of the person OR appoint a deputy; deprivation of liberty applications and appeals.

# Guiding Principles-1

## The principles- Section 1

- (1) The following principles apply for the purposes of this Act.
- (2) A person must be assumed to have capacity unless it is established that he lacks capacity.
- (3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
- (4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision

# Guiding Principles-2

- (5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
- (6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

# Presumption of Capacity/Unwise Decisions

“The presumption of capacity.....is widely misunderstood by those involved in care. It is sometimes used to support non-intervention or poor care, leaving vulnerable adults exposed to risk of harm.”

**-HL Select Committee, Post-Implementation Review of MCA,2014-[105]**

# Presumption of Capacity/Unwise Decisions

“The presumption of capacity is important; it ensures proper respect for personal autonomy by requiring any decision as to a lack of capacity to be based on evidence. Yet the section 1(2) presumption like any other, has logical limits. When there is good reason for cause for concern, where there is legitimate doubt as to capacity to litigate, the presumption cannot be used to avoid taking responsibility for assessing and determining capacity. To do that would be to fail to respect personal autonomy in a different way.”

**RBS Ltd v AB [2020] UKEAT 0266\_18\_2702**



# What does it mean to lack capacity?

- “A person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter, **because of** an impairment of, or a disturbance in the functioning of, the mind or brain.”
- **Time and issue specific.**
- Importance of the **causative nexus- to follow.....**
- - Section 2 MCA

# What's inability to make a decision?

- Inability to make decisions (s3):
- (1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable –
- (a) to understand the **information relevant** to the decision,
- (b) to retain that information,
- (c) to use or weigh that information as part of the process of making the decision, or
- (d) to communicate his decision (whether by talking, using sign language or any other means).....and
-

# What's inability to make a decision? S.3 cont'd.

- (2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).
- (3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.
- (4) The information relevant to a decision includes information about the reasonably foreseeable consequences of–
  - (a) deciding one way or another, or
  - (b) failing to make the decision.

# Best Interests Checklist- section 4

- Provides list of factors which MUST be followed "where a person reasonably believes another person lacks capacity"
- Key factors: encouraging "P" to participate (subs 4); ascertain past and present wishes and feelings (subs 6), taking into account views of others eg appointees, (subs 7), "anyone engaged in caring for the person or interested in his welfare"; deputy or donee of LPA.
- No presumptions, hierarchy or starting points; weight depends on case: **ITW v Z and others [2009] EWHC 2525 (Fam), K v LBX and others [2012] EWCA Civ 79**

# Statutory Defence- Section 5

- Codifies common law duty of necessity
- Provides a defence to actions which would otherwise be unlawful: D will not be liable for any act in connection with **care and treatment [NOT property and affairs]** of P if D:
- Takes reasonable steps to establish whether P lacks capacity to decide “the matter” and
- Reasonably believes P lacks capacity and it is in P’s best interests for the act to be done.
- Does not exclude liability for negligence.
- Does not affect provisions as to advance decision

# Capacity: Identifying “the matter”

- **A Local Authority v JB [2021] UKSC 52**
- Identify “the correct formulation of the matter in respect of which it must evaluate whether P is unable to make a decision for himself”
- This leads to a need to identify “**the information relevant to the decision**”. This needs to be identified “within the specific factual context of the case”. May help work out how to help P make the decision
- Consequences P must understand **CAN extend to consequences for others**. But salient features only.

# Capacity: Identifying “the matter”

- Make decisions about where to live?
- Make decisions about what care s/he needs?
- Manage property and affairs?
- Make decisions about the reduction and removal of his/her personal possessions from his/her home?
- Comply with the obligations of a tenancy and understand the risks and implications of not complying?

# One off or repeat?

- Some decisions are “ongoing” -
- Managing money – relates to a continuous state of affairs whose demands may be unpredictable and may occasionally be urgent (**A, B and C v X and Z [2012] EWHC 2400 (COP)**)
- Managing diabetes – a global decision, because of the interdependence of diet/testing blood levels/administering insulin/agreeing to hospital when needed (**Royal Borough of Greenwich v CDM [2019] EWCOP 32**)
- - so require consistent ability to understand, retain etc.



# Capacity: The Assessment

- **A Local Authority v JB [2021] UKSC 52**
- **FIRST** – Assess whether P is unable to make decision applying section 3.
- **THEN**- Consider whether that is **BECAUSE OF** an impairment.
- “The second question looks to whether there is a clear causative nexus between P’s inability to make a decision for himself in relation to the matter and an impairment of, or a disturbance in the functioning of, P’s mind or brain.” - JB at [78].
- **NB**- Many pro-forma documents approach this the other way round.

# The causative nexus

- Impairment/Disturbance does not need to be permanent
- Key question: *how* does the condition prevent P from being able to understand/retain/use or weigh/communicate?
- - Could include (eg) intoxication/concussion. Can the decision wait?
- -Longer term conditions:
- Dementia? Delusional disorders? ASCs? Learning disabilities?
- Eating disorders –see **Re E (Medical Treatment: Anorexia [2012] EWHC 1639 (COP))**

# The causative nexus

- Cases concerning “hoarders”:
- **Lincolnshire County Council v JK [2016] EWCOP 59:** P’s dementia prevented her understanding the risks posed by living in her current conditions
- **Royal Borough of Greenwich v CDM [2018] EWCOP 15:** P had a personality disorder and lived in appalling conditions- judge found inability to acknowledge risks of remaining at home direct consequences of PD.

# Using the Court of Protection

Superior court of record

Power to make declarations- s15; and make the decision for P by making an order; or appoint a deputy

Deprivations of liberty under Schedule A1 (“DOLS”-hospitals and care homes ) or s.16 –other settings.

Remember

- **N v ACCG [2017] UKSC 22**- the Court “....has no greater power to oblige others to do what is best than P would have himself. This must mean that, just like P, the court can only choose between the “available options”.

# Using the Court of Protection

- We don't know the answer!

**Hillingdon LBC v Neary [2011] EWHC 1377 (COP) [142]**

“Where a dilemma exists, the court provides an accessible forum. Often, parties will have a clear view of what they are proposing, but if a party needs more evidence or is uncertain about the best outcome in a difficult case, it is no shame to say so. Proceedings in the Court of Protection need not be adversarial.”

# Getting to court

- Most applications require permission- section 50 MCA
- Court of Protection Rules 2017 impose duties on parties to co-operate and assist the court: see COPR1.4, and costs sanctions.
- Familiarise yourself with case management “pathways”- Practice Direction 3B
- Any welfare case has a pre-issue stage which should be complied with other than in urgent cases- Para 2.2.

# What might the court do?

Orders sought could include- *if* court satisfied in P's best interests:

- Authorise an inspection of the property
- Authorise a programme to “de-clutter” or remove hazardous items
- Authorise disposal of items removed
- Authorise a programme of repairs
- Authorise a move by P and deprivation of liberty.

# Resources

Court of Protection Handbook: links to statutory material, precedent orders, blog on procedural issues: <https://courtofprotectionhandbook.com>

Mental Capacity Law and Policy: thoughtful and comprehensive posts on all issues related to capacity, run by Alex Ruck Keene QC (Hon)

<https://www.mentalcapacitylawandpolicy.org.uk>

Mental Health Law Online: website with case law database on mental health and mental capacity law:

[https://www.mentalhealthlaw.co.uk/Main\\_Page](https://www.mentalhealthlaw.co.uk/Main_Page)

39 Essex Street Newsletters: <https://www.39essex.com/mental-capacity-report-december-2021/>





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# How to find a practical way forward: Overview

- Part 21
- Identifying the issue
- Raising the issue
- Procedural Steps
- Experts
- Refusal to be assessed

# Part 21

- A person who lacks capacity is a protected party, and will need a litigation friend to act on their behalf (CPR 21.2)
- No party may take any step in proceedings involving a protected party without the permission of the court until a litigation friend is appointed, save for issuing or serving a claim form or applying for the appointment of a litigation friend (CPR 21.3(2)).
- If a party loses capacity during proceedings, no party may take any further steps without the permission of the court until the protected party has a litigation friend (CPR 21.3(3))
- Any steps taken whilst a protected party does not have a litigation friend will have no effect (CPR 21.3(4))

# Identifying the Issue

*“... once a legal adviser reasonably entertains a doubt about a client's capacity to give proper instructions, it is that adviser's professional duty to satisfy him or herself that the client either has or does not have the capacity to give instructions.” (RP v*

*Nottingham CC [2008] EWCA Civ 462 [99])*

## What to look out for when meeting a client for the first time:

- The nature of the allegations/evidence against them: e.g. hoarding, verbal outbursts, risky behaviours
- Medical history
- How the client got their tenancy
- Friends/family of the client answering questions on their behalf
- Client unable to repeat or paraphrase the advice you have given (and again at the end of the meeting)
- Lack of insight into own behaviour/health
- Unable to give full responses to allegations (including giving an alternative version of events)
- Fluctuating capacity

# Raising the Issue

- The duty to raise any doubts about capacity arises from the duty to the court (*McFaddens (A Firm) v Platford* [2009] EWHC 126 (TCC) [380]).
- Once the issue has been raised, the court should investigate it at the “*first convenient opportunity*” (*Masterman-Lister v Brutton & Co and Jewell* [2002] EWCA Civ 1889 [17]).
- The duty to raise the issue applies regardless of whether the protected party is your opponent or whether your client agrees to the issue being raised (see *Platford* [380]).
- Where the client does disputes that they lack capacity, the question should be determined by the court (*Folks v Faizey* [2006] EWCA Civ 381 [26]).

# Raising the Issue (Cont.)

## Practical Steps:

- If you become aware of the issue before the first hearing, write to the other side and attempt to agree an adjournment whilst capacity is assessed.
- If you only become aware at the first hearing, again attempt to agree an adjournment pending an assessment.
- Try to disclose the minimum amount of information possible as you are in effect without instructions.
- If your client disputes capacity, make an application for an ex parte hearing to determine the issue.

# Procedural Steps

- Where it is established that a party lacks capacity, a litigation friend can be appointed without court order by *filing* a certificate of suitability (CPR 21.5).
- Expert evidence in support of finding that a client lacks capacity must be *filed* (CPR PD 21 para 2.2(c)).
- Neither the certificate of suitability nor the evidence in support need be *served* on any other party to the proceedings (*Folks v Faizey* [2006] EWCA Civ 381 [20]).
- Where an application is made under CPR 21.6, it needs to be served on the protected party but need not be served on the opponent (*Folks v Faizey* [31]; *Hinduja v Hinduja and others* [2020] EWHC 1533 (Ch) [19]).

# Experts

“...even where the issue does not seem to be contentious, a District Judge who is responsible for case management will almost certainly require the assistance of a medical report before being able to be satisfied that incapacity exists.” *Masterman-Lister v Brutton & Co and Jewell* [2002] EWCA Civ 1889 [17]).

## What to flag to an expert:

- What interactions you have had with your client that has caused you to query capacity
- What a client needs to be able to do in order to conduct proceedings (e.g. give clear instructions, understand and consider legal advice, give alternative versions of events, give evidence)
- GP records
- Whether capacity may fluctuate
- Guidance from caselaw about more complex issues. For example, in cases where a client may have have ability to understand the relevant information but lacks the ability to rationally weigh that information up when making a decision because of a mental impairment like OCD (*Re RGS* [2012] EWHC 4162 (COP) [26])



# Refusal to be assessed

- You cannot force a person to be assessed, but it may help to explain why the assessment is needed, and what the consequences of no assessment would be (*Mental Capacity Code of Guidance*, para 4.57).
- Explain that someone will be appointed who will be making decisions in their best interests, but that they will continue to be involved in the proceedings and having their wishes considered.
- Where an assessment is impossible, that in itself can stand as evidence of a lack of capacity (*W NHS Trust v P* [2014] EWHC 119 (COP) [26]; *ZZ v Kent CC* [40]). Court should take a practical approach, possibly paying attention to other kinds of medical evidence, and possibly seek assistance of OS to investigate if need be.



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***QUESTIONS?***