HOW TO WORK WITH PEOPLE WITH FLUCTUATING CAPACITY

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CREDIT TO 39 ESSEX CHAMBERS

- Most of the information contained in this presentation was taken from 39 Essex Chamber's most recent guide on FLUCTUATING CAPACITY
- Written by Katie Scott Alex Ruck Keene
- Published 18.6.19
- Available on https://www.39essex.com/wp-content/uploads/2019/08/Fluctuating-capacity-19.6.19-paper-final.pdf

WHAT DO WE MEAN BY FLUCTUATING CAPACITY?

"Fluctuating capacity means that a P at some times has the mental capacity pursuant to the MCA to make decisions and sometimes does not…"

39 Essex Chambers

THERE ARE THREE BROAD GROUPS OF PEOPLE FOR WHOM FLUCTUATING CAPACITY CAN BE A FEATURE:

1. Temporarily loss due to identifiable change

2. Predictable loss in circumstances which are easily identifiable

3. Fluctuations in capacity which are very unpredictable

The most straightforward to deal with are those individuals who as a result of an identifiable change in their mental functioning temporarily lose decision-making capacity…

This will include those with mental illness who have a temporary episode of crisis (for example a floridly psychotic episode as a result of failing to take medication) or those who experience a change in their physical health which impacts on their mental functioning (for example an elderly person with a urinary tract infection).

MCA COP 4.26 ON TEMPORARY LOSS

- Some people have fluctuating capacity – they have a problem or condition that gets worse occasionally and affects their ability to make decisions.
- For example, someone who has manic depression may have a temporary manic phase which causes them to lack capacity to make financial decisions, leading them to get into debt even though at other times they are perfectly able to manage their money.
- A person with a psychotic illness may have delusions that affect their capacity to make decisions at certain times but disappear at others.
- Temporary factors may also affect someone's ability to make decisions. Examples include acute illness, severe pain, the effect of medication, or distress after a death or shock.

The second category is those whose capacity fluctuates on a predictable basis and in circumstances which are easily identifiable…

For example, some with dementia have relatively unimpaired functioning in the morning but by the afternoon have become confused and unable to make decisions (a phenomenon colloquially known as sundowning).

The third category are those whose fluctuations in their capacity are unpredictable…

This category is often associated with brain injuries or certain forms of mental disorders.

ASSESSING FLUCTUATING CAPACITY

- Remember the legal framework of assessing capacity as set out in the MCA.
- *"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…"* (s.2 (1) MCA 2005).
- Whether P is 'unable to make a decision for herself in relation to a matter' is the 'single test' and falls to be interpreted by applying the more detailed description given around sections 2 and 3 (York City Council v C at paragraphs 56 and 58).

APPLYING THE 3 STAGE CAPACITY ASSESSMENT MCA S2(1) AND S(3) PLUS CASE LAW

Stage 1: The diagnostic test/element

- Is there an impairment or disturbance in the functioning of the mind/brain? (MCA s2(1))
- If so, you move on to…

Stage 2: The functional test/element:

- Is the person unable to make a decision? (MCA s3)
- To establish this you ask whether they are unable to a) understand, b) retain or c) weigh the relevant information or d) communicate their decision.
- If the person is unable to do any one of these things, then it means that they are unable to make the decision, so that you then consider…

Stage 3: The 'because of' element:

- Is this inability because of the identified impairment or disturbance? (Case Law)
- Any inability to make a decision has to be because of an impairment of, or disturbance in, the functioning of the mind or brain and not because of other factors, such as the influence of a third party.

THE DILEMMA OF FLUCTUATING CPACITY

- *The main MCA 2005 Code of Practice para 4.26 notes that that some people have fluctuating capacity as a result of "a problem or condition that gets worse occasionally and affects their ability to make decisions" (the examples being given are manic depression (or, as it is now termed, bipolar disorder) or a psychotic illness).*
- *However, whilst the Code indicates steps that should be taken to support a person to take their own decision by (for instance) choosing the time of day at which they are most alert, it does not indicate what should happen where an assessment is required of a person's ability to make decisions on an ongoing basis as regards a particular matter.*
- *The Code is, in reality, more focused upon when to assess an individual's ability to make a single decision, and how to ensure that they are best supported to enable them to do this.*
- *As stated in paragraph 4.4 of the Code "An assessment of a person's capacity must be based on their ability to make decisions at the time it needs to be made, and not on their ability to make decisions in general…" [See also paragraph 4.27 of the Code].*

THE LEGAL CONSEQUENCES OF FLUCTUATING CAPACITY – HAVE WE REALLY GOT CONSENT?

There will be situations in which a person's fluctuating capacity will impact upon the ability of others to rely upon that person's consent. At any given moment, a relevant professional who is required to take reasonable steps to provide care and treatment to a person will have to ask themselves as to the **basis upon which they are acting**. In the case of a person with fluctuating capacity, there will at any moment be three possibilities:

1. *The person **does not have the capacity to consent** to the intervention in question and act would be carried out in the person's **best interests under s.4 of the MCA**.*
2. *The person **has the capacity to – and does – consent** to the intervention in question. At that point, the act could be carried out on the **basis of consent**.*
3. *The person **has the capacity to – and does not – consent** to the intervention in question. At that point, and absent special circumstances (for instance compulsory medical treatment for mental disorder under the Mental Health Act 1983), the **act could not be carried out because it would give rise to an interference with the person's bodily integrity, and hence tortious and criminal liability, as well as** – in the case of a person discharging a function of a public authority - liability under the Human Rights Act 1998.*

TWO REAL PROBLEMS THEREFORE PRESENT THEMSELVES…

a) a person is misidentified as having the material decision-making capacity, purports to refuse the act, and the act is not carried out on the basis of the apparently capacitous refusal, and the person either suffers serious adverse consequences or dies;

b) a person is misidentified as lacking the material capacity, and an act is carried out in the face of what is, in fact, a capacitous refusal, giving rise to a breach of their Article 8 ECHR rights and liability on the part of the professionals concerned.

HOW TO DEAL WITH THIS DILEMMA

- Outside the court setting, it will always be for relevant professionals to make the decision, in line the test as set out in the MCA, whether the person has, or lacks, the relevant capacity at the time that treatment is being recommended or offered.
- Given the operational duties imposed by Articles 2, 3 and 8 ECHR, there is likely to be an obligation in a case of fluctuating capacity on the relevant professional to explain why in relation to any given decision they determined that the person in question had capacity to refuse a necessary intervention; or lacked capacity necessitating the need to provide the intervention in their best interests.
- Reaching this determination in relation to any given decision may well be practically difficult, but in legal terms it is unproblematic.
- And remember MCA s.2(4), which provides that in proceedings, the question of whether a person lacks capacity within the meaning of the MCA 2005 must be decided on the balance of probabilities.

ALSO REMEMBER THE PRINCIPLES OF THE MCA

Principle 1 (MCA s.1(2)), which directs that a person must be assumed to have capacity unless it is established that he does not. If you cannot displace this presumption of capacity, then your default position must be that the person has capacity to make the relevant decision.

Principle 2 (MCA s.1(3)), which provides that 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 and that any question whether a person lacks capacity must be decided on the balance of probabilities.

Principle 3 (MCA s.1(4)) adds that a person is not to be treated as unable to make a decision merely because he makes an unwise decision.

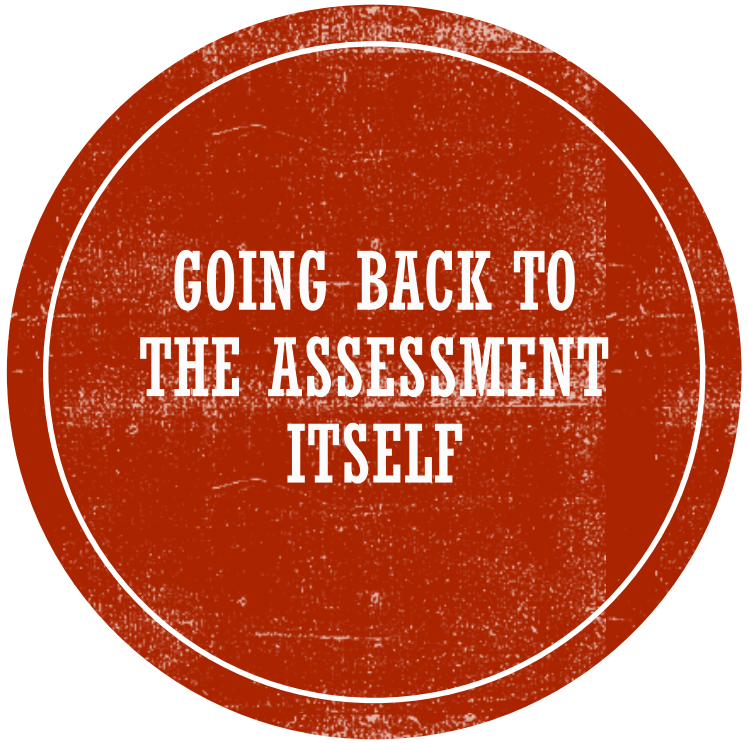
IT IS HELPFUL TO CONSIDER THE OPTIONS DEPENDENT ON THE CIRCUMSTANCES IN WHICH P'S CAPACITY FLUCTUATES

1. **Those whose capacity fluctuates temporarily** – complete and interim assessment that the person lacks capacity, which can be re-visited once the person's capacity has been maximised and (presumably) returned.
2. **For those whose capacity fluctuates on a predictable basis** - professionals can circumvent some of these difficulties by getting the person to draw up an advance decision (if there is an issue about medical treatment) when the P has capacity to do so, or for other decisions setting out in written from how they want to be treated during the times that they lack capacity. But when a person lacks capacity, decisions will still need to be made in the person's best interests at that point in time, as there is no legal basis for giving "advance consent" (views can however be considered as part of best interests decision making process).
3. **Those whose capacity fluctuates unpredictably** - The real problem arises when a P's capacity fluctuates in an unpredictable manner. These difficulties are compounded when the decision at hand needs to be made on an ongoing basis. Complex cases such as this often needs to be referred to Court for a decision…

THERE ARE FIVE OPTIONS THAT THE COURT MIGHT CONSIDER WHERE A PERSON APPEARS TO HAVE FLUCTUATING CAPACITY TO TAKE RELEVANT DECISION(S) WHICH WILL NEED TO BE TAKEN ON AN ONGOING BASIS

1. The Court does nothing, leaving it solely to the professionals to decide on a moment by moment basis.
2. The Court seeks to differentiate between the person's capacity in the abstract to take decisions of a particular nature (their capability) and their ability to do so at any given moment.
3. The Court makes a time-limited order lasting say a year, and consider whether, if this is the material time period, on balance the person during that year has or lacks capacity to make the decisions over that period.
4. The Court declares that as at the point of the hearing, the person has capacity to take the relevant decisions, but indicate, if it can, the circumstances under which they might lose or lack that capacity.
5. The Court declares that the person lacks capacity to take the relevant decisions as at that point, but indicates the circumstances under which they are likely to have capacity.

- Given that there is really no easy answer as to how to deal with the issue of fluctuating capacity it is perhaps worth looking again at how we assess capacity.
- Very often the conclusion is reached that a person has fluctuating capacity because there is a difference between how a person presents in assessment and how they in fact make decisions in real life.
- This is a common pattern seen in those with acquired brain injuries. Confronted with the need to make the actual decision, the person's deficits mean that they act with a degree of impulsivity which is entirely out of keeping with their presentation under assessment.



RESEARCH, CASE LAW AND FURTHER GUIDANCE: ACQUIRED BRAIN INJURY

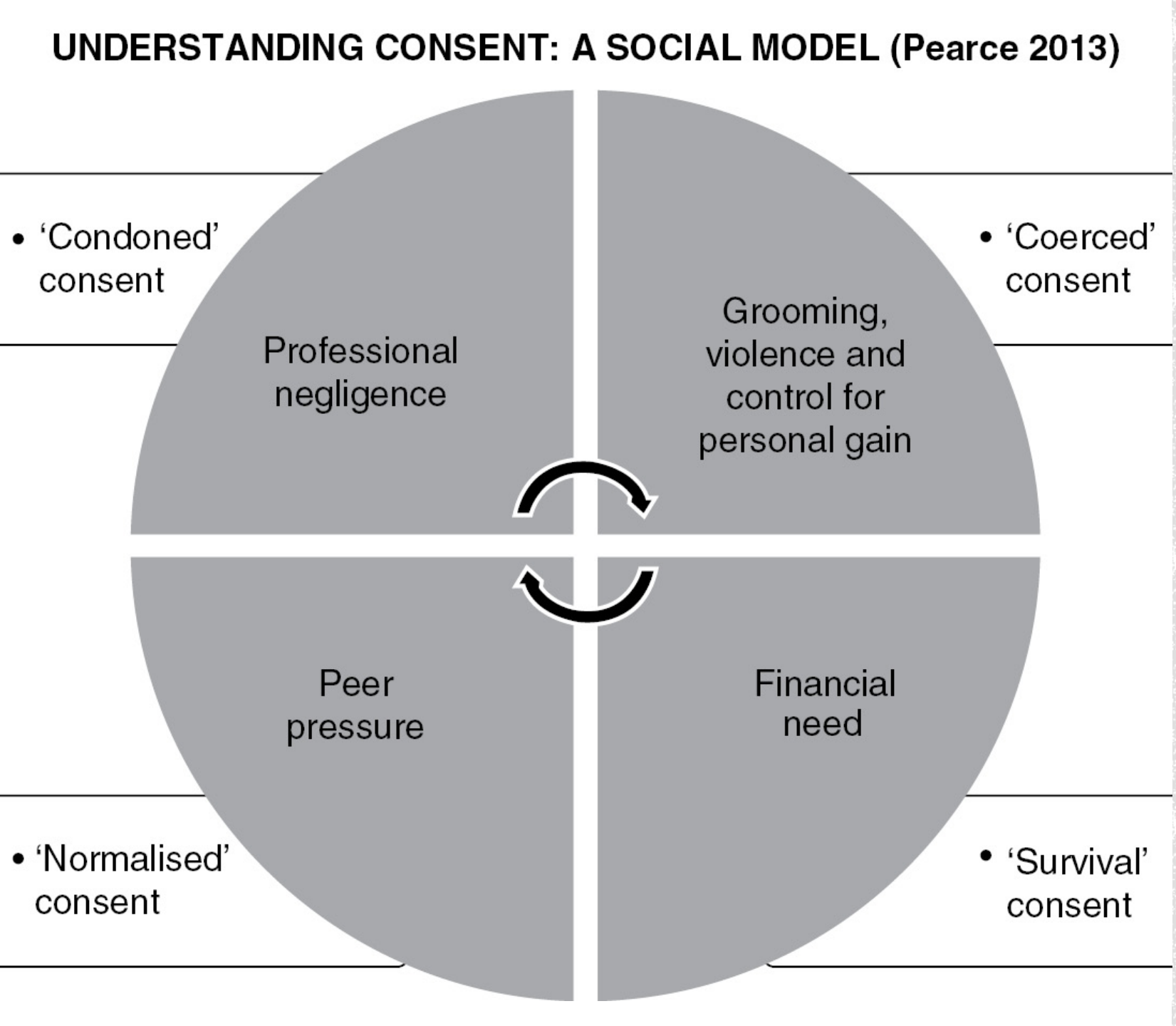
- There is some clinical research for those with acquired brain injuries establishing a mechanism by which such cases can be approached within the four walls of the MCA – see Owen, et al, in their paper Clinical assessment of decision-making capacity in acquired brain injury with personality change Neuropsychological Rehabilitation (2017), 27:1, 133-148.
- The mechanism is, in brief, that, if the person does not have an awareness of the deficits in their decision-making at the time that they are making the relevant decision, they cannot understand, use and weigh the fact of those deficits, and they therefore can be said to lack the capacity to make the decision.
- However, the research does not show that if the P can use/weigh that information, then they do have capacity. However, common sense might suggest that if that understanding is there, that person has the chance, to recognise during decision making that the deficit is coming into play and ask for assistance.
- An example of this being applied in a personal injury case is in Louglin v Singh [2013] EWHC 1641 (QB) a first instance decision in which the Court accepted the evidence of a consultant neuro-psychiatrist that so long as the Claimant had capacity to recognise that he needed appropriate guidance and assistance, then he could be treated as having capacity in the legal sense.

RESEARCH, CASE LAW AND FURTHER GUIDANCE: DEFICITS IN DECISION MAKING

- Clearly then capacity assessments in such cases can only be carried out on the basis of evidence of the person's actual decision-making as well as assessment in interview.
- This then allows the assessor both to consider the decision-making in real life and the apparent deficits that it demonstrates, as well as to explore whether the person, in interview, can understand, etc the information that the person has those deficits.
- This is consistent with the recent NICE guidelines which suggests that a capacity assessment must take account of both what is said during the assessment process and real time decision making, but does not explain precisely how the MCA capacity test should be applied where there is a mismatch.
- This also means that part of the 'relevant information' that the P would have to understand etc at the moment of making the decision (i.e. not in the abstract or in retrospect) is that the P has a deficit in decision making.
- Approaching the question of capacity in this way has some advantages in that it provides a logical way in which the test under the MCA can be applied to that small but legally (and factually) difficult cohort of people who appear to have decision making capacity on assessment but who regularly make impulsive and unwise decisions in real life. This group is the most challenging for those assessing mental capacity and delivering services.

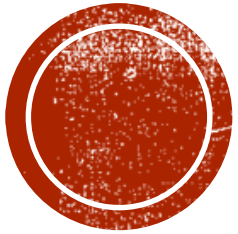
RESEARCH, CASE LAW AND FURTHER GUIDANCE: PERSONALITY DISORDER

- Those with personality disorders are also extremely challenging to assess given the seeming fluctuations in their presentation. By way of example, Emotionally Unstable Personality Disorder can be characterised by a rapidly fluctuating mental state, unstable and labile emotions and a high level of impulsivity.
- However a person with EUPD can have a balanced and thoughtful conversation when not emotionally dysregulated. Hence those with such a diagnosis are another cohort of P's who are often assessed as having fluctuating capacity.
- In a recent unreported case in which this was the factual position faced by the Court, Sir Mark Hedley found that in fact P's personality disorder pervaded her thought processes at all times, not just when she was distressed or agitated and it became manifest. While P had relatively good cognitive function which enabled her to understand and retain information, he found that her ability to "weigh" was compromised as she viewed "relevant information" through the prism of her personality disorder.
- Accordingly he found that P lacked decision making capacity in relation to all the matters before the Court. This conclusion could be problematic if broadly applied as it could be interpreted to mean that having a personality disorder means that a P's status is to lack capacity.
- Ayre & Ors, Mental capacity and borderline personality disorder, BJPsych Bulletin (2017), 41, 33- 36 sets out some of the challenges associated with assessing capacity in those with borderline personality disorders and concludes that further research along with clinical consensus and legal guidance is urgently required.



One last complex area to highlight: Abused consent

- More research are emerging around how past trauma can influence decision making, particularly in cases involving abuse and exploitation.
- Jenny Pearce's A Social Model of abused consent (2013) is very useful in helping health professionals to consider these influences in their decision-making and developing professional curiosity when working with young people.
- For further information: https://www.nwgnetwork.org/agency-structure-abused-consent-relation-young-peoples-decision-making/



ANY FURTHER QUESTIONS?

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