

Mental Capacity Act update*

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* But not DoLS

Is capacity even the question?

- Stop and think – why are actions being taken?
- How is the person's capacity relevant to what is being done?
- Is there another legal framework which is relevant?
[Suicide and the \(mis\)use of capacity – in conversation with Dr Chloe Beale – Mental Capacity Law and Policy](#)

A first principles reminder

Is there anything wrong with the following?

He said the law requires a person “must be assumed to have capacity unless it is established that they lack capacity”. In the absence of a capacity test, he said it was right for Havering Council to treat Mrs Wolff as having capacity.

[Romford mother lived in squalor after mental health 'failings', court hears | Romford Recorder](#)

Capacity: the three questions

- Please don't follow what the Code of Practice says: it is **WRONG**: *A Local Authority v JB* [2021] UKSC 52: instead, three questions in this order

(1) Is the person able to make a decision? If not:

(2) Is there an impairment or disturbance in the functioning of the person's mind or brain? If so:

(3) Is the person's inability to make the decision because of the identified impairment or disturbance? (it does not matter if you cannot give a diagnosis: *North Bristol NHS Trust v R* [2023] EWCOP 5 – but how far does this extend: *An NHS Trust v ST & Anor* [2023] EWCOP 40)

Capacity: a diagnostic pause

- It does not matter if you cannot give a diagnosis: *North Bristol NHS Trust v R* [2023] EWCOP 5
- But how far does this extend? *An NHS Trust v ST & Anor* [2023] EWCOP 40
- And the need for precision in relation to learning disability (as well as the impact of deafness): *TW v Middlesbrough Council* [2023] EWCOP 30

Fluctuating capacity

- Not a concept expressly addressed or provided for in the MCA 2005, although it is referred to in the Code of Practice
- Two approaches before the court:
 - Anticipatory declarations
 - The longitudinal approach
- Need to be practical and workable: *A Local Authority v PG & Ors* [2023] EWCOP 9
- And remember, outside court, always a question of reasonable belief (s.5) or longitudinal DoLS determination

A cautionary tale

- *Wiltshire County Council v RB & Ors* [2023]
EWCOP 26
 - The need for decision-specificity
 - And does the decision even need to be taken?

Executive capacity

- Distinction between a clinical phenomena (and in some cases a research question) and how it relates to the MCA: *Warrington Borough Council v Y & Ors* [2023] EWCOP 27
- Need to explain **how** a person's difficulties with executive functioning mean that they cannot make the decision for purposes of the MCA
- If this is not explained, then it's not a capacity determination
- Suggest a key question is whether the person is aware of their own deficits – can they understand (or use and weigh) the fact that there is a mismatch between their ability to respond to questions in the abstract and to act when faced by concrete situations
 - => How can you reach a conclusion without triangulation between talking to the person and seeing them in action?
- Executive Dysfunction and the MCA webinar: [NMCF Events - Essex Autonomy Project](#)

Capacity / vulnerability

- Listening carefully to the person caught in the middle: *Re RK (Capacity; Contact; Inherent Jurisdiction)* [2023] EWCOP 37
- Expanding incapacity? *An NHS Trust v ST & Anor* [2023] EWCOP 40
- The line between capacity and vulnerability: [39 Essex Chambers | Mental Capacity Guidance Note - Inherent Jurisdiction - 39 Essex Chambers | Barristers' Chambers](#)
- [Interpersonal influence and decision-making capacity – in conversation with Kevin Ariyo – Mental Capacity Law and Policy](#)



MCA and 16/17 year olds

- ‘Competence’ is not relevant after the age of 16 – it is MCA 2005 capacity
- MCA applies to 16/17 year olds in the same way that it does to adults except:
 - Cannot make advance decision to refuse treatment (but could make advance statement)
 - Cannot grant power of attorney (or be an attorney)
 - Cannot make statutory will
- Parallel framework with common law role of person with parental responsibility
 - Critical to be aware of which framework is being used and why
 - [Shedinar – the MCA and 16/17 year olds – Mental Capacity Law and Policy](#)

Writing it up

Given the number of capacity assessments that are required to be carried out on a daily basis in multiple arenas, it would obviously be too onerous to require a highly detailed analysis in the document in which the capacity decision is recorded. However, a careful and succinct account of the formulation of the matter to be decided and the formulation of the relevant information in respect of that matter, together with a careful and concise account of how the relevant information was conveyed and with what result, would seem to me to be the minimum that is required.

North Bristol NHS Trust v R [2023] EWCOP 5

Three resources which may be of assistance

- Wellcome-funded work on contested capacity assessment: <https://capacityguide.org.uk/>
- 39 Essex Chambers guidance note on [carrying out and recording capacity assessments](#)
- 39 Essex Chambers guidance note on [relevant information for different categories of decision](#)



Sherlock Holmes and best interests decisions

- The first step: eliminate **unnecessary** complexity, introduced by
 - Lack of clarity about the law
 - Lack of clarity about the decision
 - Lack of clarity about the decision-maker
 - Lack of clarity about the procedure to follow
- The second step: addressing **necessary** complexity
 - Working with 'just' uncertainty: the individual decision and the system
 - Transparency and accountability

Worked examples of determining best interests

- *Nottingham University Hospitals NHS Trust v JM & Anor* [2023] EWCOP 38
 - Autism, ‘different reality’ and dialysis
- *NHS Surrey Heartlands Integrated Care Board v JH* [2023] EWCOP 2
 - Relevance of advance decision to refuse treatment
- *Cambridge University Hospitals NHS Foundation Trust & Anor v RD & Ors* [2022] EWCOP 47
 - Self-harming, contingency care planning and best interests
- *Barnet Enfield And Haringey Mental Health NHS Trust & Anor v Mr K & Ors* [2023] EWCOP 35
 - Treatment refusal and ulcers

Advance care planning – getting it right

- Where the person currently has capacity to make decisions/participate:
 - Advance decisions to refuse treatment
 - Advance statements
 - Appointment of attorney
- Where person currently lacks capacity to make decisions/participate
 - Identification of wishes, feelings, beliefs and values
 - Crucial to enable the person to access treatment they may not readily accept –
R (Maguire) v His Majesty's Senior Coroner for Blackpool & Fylde and another
[2023] UKSC 20
- Critical point: advance care planning is to be done **with** not **to** the person

What might be coming down the line?

- Updated version of main MCA Code – timeline?
- In the meantime [Mental-Capacity-Guidance-Note-Codes-of-Practice-Update-February-2022.pdf \(netdna-ssl.com\)](https://www.netdna-ssl.com/pdf/Mental-Capacity-Guidance-Note-Codes-of-Practice-Update-February-2022.pdf)
- ADASS forms review? COP forms review?
- Caselaw?
- Powers of Attorney Act 2023

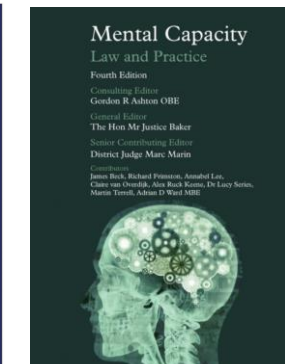
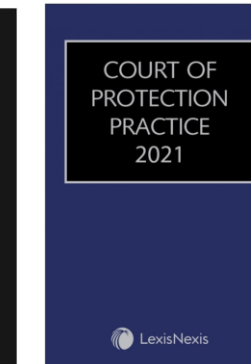
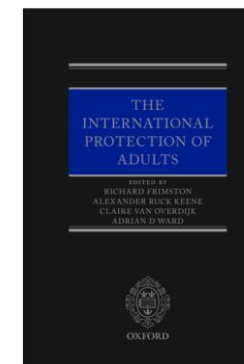
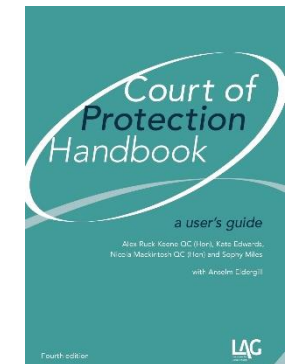
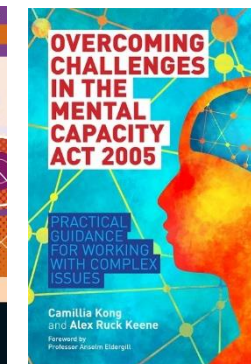
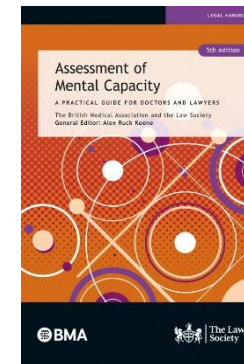


More resources

- [39 Essex Chambers | Mental Capacity Law | 39 Essex Chambers | Barristers' Chambers](#)
- [Mental Health & Justice | \(mhj.org.uk\)](#)
- [Mental Capacity Law and Policy](#)
- [MCA Directory | SCIE](#)

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