

SAFEGUARDING ADULTS PARTNERSHIP BOARD CONFERENCE 2023

*“The MCA in sixty minutes without any law...
sort of”*

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6078 days

*Since the Mental Capacity Act 2005
came into force.*

589 Safeguarding Adults Reviews

Which mention Mental Capacity

6 Supreme Court Cases

*Which answer legal questions in
respect of the Mental Capacity Act
2005*

The practical problems from my perspective (and my 24 published COP cases)

- The presumption of capacity is misunderstood;
- The Code of Practice is out of date and has been given an elevated status;
- The myth that the Public Guardian will handle every concern about deputies and attorneys;
- The Mental Health Act “default setting”;
- A doctor said P, “has capacity” or “lacks capacity.”

The practical problems from your perspective

- Who does the assessment of capacity?
- What happens when people disagree as to someone's capacity?
- How does information sharing work for people who lack the capacity to make decisions about it?

Who does the assessment of capacity?

Jane is a 19 year old woman who is currently detained under the Mental Health Act. She is approaching her 38th week of pregnancy. She has a social worker in the community and is a care leaver. Concerns have been raised as to her capacity to make decisions as to her birth plan and obstetric care.

Professionals involved in Jane's care

Consultant
Obstetrician

Community
Midwife

Responsible
Clinician

Safeguarding
Lead in the
MH Hospital

Safeguarding
Midwife

What influences who does the capacity assessment?

- Who is doing the act? I.e who is provided the care/treatment/selling the property/entering into the transaction.
- Does the person have specific needs which would indicate an assessor with a particular skill set?
- Which assessor has the most experience in respect of: (i) MCA assessments, (ii) MCA assessments which may be used in a court process.
- Is there a specific statutory or professional duty which would lead to a particular professional satisfying themselves as to P's capacity?

The universal approach to assessing capacity



Step 1: Identify the decision that needs to be made.



Step 2: Identify the relevant information.



Step 3: Assess whether P is able to understand, retain, use or weigh the relevant information.



Step 4: Is P able to communicate a decision?



Step 5: Identify whether any functional deficit is caused by a disorder of the functioning of the mind or brain.

How to resolve a dispute about P's capacity

*Remember, a dispute as to a diagnosis, or a lack of diagnosis does not actually mean that the person **has** capacity.*

The test contained within the Act is whether the person is unable to make a decision due to a disorder of the functioning of the mind or brain.



Check that each assessor has followed the “universal approach”



Is there a dispute as to what the actual decision is, or the relevant information? Can it be resolved?



Have you checked whether there is a legal issue? Does the dispute turn on an application of the law?



Issue proceedings in the Court of Protection for a declaration as to P's capacity in respect of an issue.

Avoid the traps

- Repeat assessments trying to find the “*right answer*”.
- Over medicalising the process, “*has there ever been a case where a person with autism has been found to lack capacity?*”
- Wrong jurisdiction, are you dealing with a mental capacity issue, or one of undue influence/coercive control: inherent jurisdiction.

Capacity in respect of information sharing

- Return to the universal approach to assessing capacity – ask – is this a decision that P needs to make?
- Remember there are some decisions in respect of information sharing which do not require P's consent.
- Have you asked the Caldicott Guardian?

My top 10 mental capacity mistakes

10. “The police have no powers under the Mental Capacity Act”

9. “Time specific assessments of capacity mean here and now”

8. “You can’t retrospectively assess someone’s capacity to make a decision”

7. “Everyone in prison has mental capacity”

6. “Capacity to consent to sexual relations”

5. The first stage in a capacity assessment is the diagnostic test

4. For a capacity assessment to be lawful you have to follow the relevant information set down by case law

3. It takes ages to get a case before the Court of Protection

2. “We are making an application to seek the advice of the court.”

1. DOLS “covers that”

QUESTIONS?

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