

Mental Capacity

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Is your organisation compliant with MCA?

Revisit the House of Lords MCA 2005: Post-Legislative Scrutiny Report of 2014 to evaluate compliance

[https://publications.parliament.uk/pa/
ld201314/ldselect/ldmentalcap/139/139.pdf](https://publications.parliament.uk/pa/ld201314/ldselect/ldmentalcap/139/139.pdf)

The 5 statutory principles

- The 5 principles should be etched in your mind
- The minute that a decision needs to be made you are using the MCA and must pay heed to the principles
- It is important to understand what they mean. Refer to the afore-mentioned scrutiny report to understand what we must do differently

The statutory principles

- A person has capacity unless it has been established that they do not have capacity
- A person must be enabled as much as is practicable to make their own decision
- A person can make an unwise decision; this does not mean that they lack capacity to make the decision
- Any decision made or action taken on behalf of a person who lacks capacity must be in their best interests
- When determining best interests regard must be paid to applying less restrictive alternatives

Mental Capacity is not static – it changes

Mental capacity can:

- Improve with treatment, learning and maturity
- Be regained
- Change over time – improve or deteriorate

Your response to change

. Review capacity

. If it deteriorates, then best interests will change but must be accompanied by new capacity assessment

Capacity Assessment and best interests

Carry out a new assessment and where lack of capacity is assessed, follow the best interests process

- For every decision
- Each time for the same decision where change occurs

Just because someone lacks capacity in one area, it does not mean they lack capacity in all areas

Case Law

- Re: X
- Lawyer, has Korsakoff's syndrome due to excessive drinking
- Was detained in hospital under the mental health act
- Finds himself detained in a care home
- He challenges the DoLs
- The DoLs assessors claim that he has fluctuating capacity

Re X

- The judge hears from X
- The judge carries out a capacity assessment
- He finds that X has capacity at that time (decisional capacity)
- He says he can understand the salient points
- He has a plan to move out
- He says that X's decision to drink should he do so would be an unwise decision
- He says that X could relapse

Re X

- The social worker and his own psychiatrist stated that X lacks capacity
- They said that he was unrealistic in his intentions
- They said that he would not be able to execute the decision (executive capacity)
- As a result of the judge's decision, DoLS no longer applied

Some thoughts

- It would have been preferable to enable X to demonstrate his ability to execute his wish to live elsewhere in advance of going to court
- This would have served as evidence that he would not execute his decision and if he could, the DoLS would have been discharged without needing to go to Court
- Even if in time to come someone is likely to lose capacity in relation to the decision, until then autonomy is a right.
- The less restrictive option exists in order to ensure that even where someone lacks capacity intervention in their freedoms are the least possible as long as these are in their best interests

Re: MB

- This case had been in court previously when MB was deemed not to have capacity to decide on his residence
- On this occasion all parties agreed that he had capacity
- MB had moderate LD, autism and complex epilepsy. At times when he was anxious, and at the time of having fits he lacked capacity to decide on his care, treatment and residence
- At these times he was at great risk

Re MB

- DoLS can apply when someone has fluctuating capacity

But

- Where someone has fluctuating capacity, and for a significant amount of the time they have capacity and for lesser time they lack capacity but at such times they are at great risk, do you favour capacity or incapacity in relation to the decision?
- The periods of time when he lacked capacity and did not have capacity were not recorded – this recording is always helpful for purposes of evidence gathering

Re CDM

- Woman in her 60s with Personality Disorder and poorly controlled diabetes. One impacted on the other and vice versa
- She was in a care home. She wanted to return home
- The judge said that when she made appropriate decisions she had capacity and when she did not, she did not have capacity
- Staff will have to carry out ongoing capacity assessments
- The case is being appealed

Objectivity in assessing capacity

What hinders objectivity?

- Our own unconscious bias (prejudgments and assumptions)
- Applying our norms to our clients lives
- Being risk averse
- Applying unreal expectations; setting targets they cannot achieve

Applying Objectivity

What helps objectivity?

- A person comes with experiences, a life lived, a view about their life and an approach to risk; Meet them where they are at
- We are not them; realise that they do not have to see things our way
- We are not in their shoes; we don't judge them

Objectivity : P v A

- This case has snippets of an objective assessment by an LD nurse
- She came to the conclusion that P lacked capacity to decide about his residence
- This was contrary to views of fellow professionals who felt P had fluctuating capacity

Case study

- First and foremost, Jane is a person
- Then I note that she is young (young people make healthy and unhealthy choices Re: Z)
- I note she has a brain injury, and in relation to mental capacity, this only has relevance if it impacts on her decision making, and it does not always have to
- I will have to decide its relevance if I am concerned about her capacity to make a decision

Case study contd.

- I will have to assess her capacity for each decision where I have concerns, and not apply the same capacity for every decision going forward
- I will not assume that she has capacity where the risks are high, without undertaking a capacity assessment to establish her capacity
- I will not assume that she is making an unwise decision unless I have undertaken a capacity assessment to ascertain that

Case study – partnership working

- If she is making an unwise decision I will work with her to establish parameters within which I will not intervene and where I will have to intervene, and to inform her of how I can support her to stay within these boundaries
- People do not want their rights infringed, and will usually take responsibility if we work in partnership with them but they will not be able to do so if the boundaries are tight and there is no room to move or if they don't know the boundaries.

Case Law References

- MB v Surrey County Council [2007] EWCOP 25B27 - <http://www.bailii.org/ew/cases/EWCOP/2017/B27.html>
- <https://www.no5.com/news-and-publications/news/1688-fluctuating-capacity-and-how-to-address-future-uncertainties-of-care-planning-in-a-section-21a-appeal/>
- *X v A Local Authority and an NHS Trust* [2014] EWCOP 29 (HHJ Cardinal) - http://www.localgovernmentlawyer.co.uk/index.php?option=com_content&view=article&id=20414%3Afluctuating-capacity-and-deprivation-of-liberty&catid=52%3Aadult-social-services-articles&Itemid=20
- ***Loughlin v Singh*** [2013] EWHC 1641 (QB)
- P V A Local Authority
- <http://www.mentalcapacitylawandpolicy.org.uk/wp-content/uploads/2016/12/WHI0021-Sealed-Judgement-17.12.15-final-.pdf>
-
- Re Z and Others 2016
- <http://www.bailii.org/ew/cases/EWCOP/2016/4.html>

Relevant articles

- The right to take foolish decisions

<http://www.mentalhealthlaw.co.uk/>

[Mark Hedley, %27The %22right%22 to take foolish decisions%27 \(speech at MHLA conference, 22/11/13\)](#)

- Making the abstract Real

<https://www.biswg.co.uk/files/>

[2214/1285/3006/DoH MCA ABI 17 09 14.pdf](#)