
GARDEN COURT
CHAMBERS

Resolving capacity disputes: current developments (1)

Tim Baldwin, Garden Court Chambers

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Where are we on capacity- back to basics

- Is there really a dispute and on what issue?
- Reminder of the statutory framework and Code of Practice
- Fluctuating or longitudinal capacity? How is this dealt with?
- Letter on s 49 reports
- Rules on instruction of experts
- A way forward – practical consideration
- Fluctuating or longitudinal capacity?

The principles, s 1

The principles

(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.

(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.

S 2 People who lack capacity

People who lack capacity

(1) For the purposes of this Act, 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.

(2) It does not matter whether the impairment or disturbance is permanent or temporary.

(3) A lack of capacity cannot be established merely by reference to—

(a) a person's age or appearance, or

(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.

(4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.

(5) No power which a person ("D") may exercise under this Act—

(a) in relation to a person who lacks capacity, or

(b) where D reasonably thinks that a person lacks capacity,

is exercisable in relation to a person under 16.

(6) Subsection (5) is subject to section 18(3)

S 3 inability to make decisions

Inability to make decisions

(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).

(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.

Disputes – are disputes on the issue and what expertise do you need and is it available to resolve them?

Court of Protection Rules 2017 Practice Direction 14E and independent experts

Code of Practice Mental-capacity-act-code-of-practice.pdf (publishing.service.gov.uk)

Chapter 4

S 49 letter Section-49-Guidance-December-2022.pdf (mentalcapacitylawandpolicy.org.uk)

Independent experts – beyond s 49

The Court of Protection Rules 2017 (legislation.gov.uk)

Overriding object and participation of P and

Duty to restrict expert evidence
15.3.—(1) Expert evidence shall be restricted to that which is necessary to assist the court to resolve the issues in the proceedings.
(2) The court may give permission to file or adduce expert evidence as mentioned in rule 15.2(1) and 15.5(1) only if satisfied that the evidence—
(a)is necessary to assist the court to resolve the issues in the proceedings; and
(b)cannot otherwise be provided either—
(i)by a rule 1.2 representative; or
(ii)in a report under section 49 of the Act.

And rule 15.5

Rule 15.5

15.5.—(1) Subject to rule 15.2, no party may file or adduce expert evidence unless the court or a practice direction permits.
(2) When a party applies for a direction under this rule, that party must—
(a) identify the field in respect of which that party wishes to rely upon expert evidence, and the issues to which the expert evidence is to relate;
(b) where practicable, identify the expert in that field upon whose evidence the party wishes to rely;
(c) provide any other material information about the expert;
(d) state whether the expert evidence could be obtained from a single joint expert;
(e) provide any other information or documents required by a practice direction; and
(f) provide a draft letter of instruction to the expert.
(3) When deciding whether to give permission as mentioned in paragraph (1), the court is to have regard in particular to—
(a) the issues to which the expert evidence would relate;
(b) the questions which the expert would answer;
(c) the impact which giving permission would be likely to have on the timetable, duration and conduct of the proceedings;
(d) any failure to comply with any direction of the court about expert evidence; and
(e) the cost of the expert evidence.
(4) Where a direction is given under this rule, the court shall specify—
(a) the field or fields in respect of which the expert evidence is to be provided;
(b) the questions which the expert is required to answer; and
(c) the date by which the expert is to provide the evidence.
(5) The court may specify the person who is to provide the evidence referred to in paragraph (3).
(6) Where a direction is given under this rule for a party to call an expert or put in evidence an expert's report, the court shall give directions for the service of the report on the parties and on such other persons as the court may direct.
(7) The court may limit the amount of the expert's fees and expenses that the party who wishes to rely upon the expert may recover from any other party.

Resolving capacity disputes: current developments

Felicity Williams, Garden Court Chambers

17 May 2023

Capacity Challenges: Tell Me More!

- How will expert evidence on capacity apply in practice?

- Issues highlighted, in recent decisions, include:

  - Fluctuating capacity
  - Autonomy
  - Boundaries of the Mental Capacity Act Regime
  - The scope of ”relevant information” for the purposes of section 3

What They Say

PG v A Local Authority [2023] EWCOP 9

Issues: Determining capacity in relating to (1) care and (2) contact and
The correct form of declaration by the court

Context: Finely balanced decision on capacity, demonstrating uncertain boundaries between diagnosis and presentation.

Mrs Justice Lieven noted: "*that the law's desire for clear lines as to both what decisions she does and does not have capacity to make and in what circumstances she loses capacity, does not fit with the reality of PG's presentation*" [19].

Facts

PG was a 34-year-old woman.

- **Diagnosis:** intellectual disability; ASD; EUPD and Mild Learning Disability.
- **Placement:** In a supported living placement with a high level of supervision.
- **Behaviour:** P displayed unsafe and dysregulated behaviour in the community.

  Frequently intoxicated, approached young men, and climbed into their cars.

  There were incidents of self-harm and suicidal ideation.

  Dysregulated behaviour was also seen at the placement: inc. verbal and physical abuse to staff, property damage, refusal of support and absconding.

  Triggers included: sirens, increased alcohol consumption, stress around court hearings; her menstrual cycle, changes of residence and police involvement.

Expert Evidence

- In reports, the expert assessed PG to have capacity in relation to contact. In relation to her care and support, PG lacked capacity in the community "because of attentional deficits and/or heightened anxiety attributed to her Intellectual Disability and Autism" [22].

- In evidence, the expert stated that PG would struggle to weigh and understand information when dysregulated, but not when calm. In the community, it was hard to disentangle the influence of alcohol from the issues concerning mental capacity.

- The challenges: (1) Evidence suggested that P sometimes had capacity, sometimes not; (2) Close correlation between when P might lack capacity and the making of unwise decisions. (3) Correlation between unwise decisions and being intoxicated.

Two approaches:

APPROACH 1: The Longitudinal Approach
***Cheshire West v PWK* [2019] EWCOP 57**

P at times became overwhelmed by anxiety.

The Court took a "longitudinal view".

Caselaw drew a distinction between isolated decisions and those taken regularly (or repeatedly), sometimes at short notice.

See also *Greenwich v CDM* [2019] EWCOP 32 A "macro" decision or a series of "micro" decisions [31] about diabetes management - a global decision.

APPROACH 2: Anticipatory Declarations
***Wakefield MDC v DN & MN* [2019] EWHC 2306 (Fam)**
DN had a severe form of Autistic Spectrum disorder and a general anxiety disorder. DN was assessed to generally have capacity but when he had "meltdowns" he became highly dysregulated and lost capacity.

The judge observed: *"It seems to me that the outcome of an anticipatory declaration would provide a proper legal framework to the care team, ensuring that any temporary periods of deprivation of liberty are duly authorised…"* [51].

The order declared DN had capacity *"except when presenting in a state of heightened arousal and anxiety"* and at those times care and treatment was to be delivered in accordance with an annexed care plan.

Considering the two approaches the judge did not think *"that one or other is indeed the better approach"* [36]. . . .What will dictate the approach taken?

- "How an individual P's capacity is analysed will turn on their presentation, and how the loss of capacity arises and manifests itself. Both the decisions in issue here are ones that arise on a regular basis and often not in a planned or controlled situations" [36]

- Regard was to be had "to the importance of making orders that are workable and reflect the reality of PG's "lived experience" for the sake of PG and those caring for her." [37]

Decision: PG lacked capacity in relation to care. She also lacked capacity in relation to contact (evidenced by frequent approaches to strange men and attempts to get into their cars). The primary cause of her lack of capacity was mental impairment, although alcohol played a part.

Approach 1 or 2? :

> *" …**the appropriate approach is to take the "longitudinal view". An anticipatory order would in practice be close to impossible for care workers to operate and would relate poorly to how her capacity fluctuates.** The care workers would have to exercise a complicated decision-making process in order to decide whether at any individual moment, PG did or did not have capacity. This might well vary depending on the individual care worker, and how much of the particular episode they had witnessed or not. The result would fail to protect her probably have minimal benefit in protecting her autonomy and in practice make the law unworkable…*
>
> *…**the more practical and realistic approach is to make the declaration that PG lacks capacity in the two key respects, but also to make clear that when being helped by the care workers they should as far as possible protect her autonomy and interfere to the minimum degree necessary to keep her safe**."* **[44-45]**

Évidemment

Of course… - The approach taken in cases of fluctuating capacity will be case-specific and analysis is critical.

Practical issues:-Background

-Diagnosis

-Current presentation

-Relevant information to be considered (domain)

-Form or decisions

-Regularity of decisions

-Context-workable solutions and protection of autonomy

Bridges

The focus was again on autonomy in ***A Local Authority v H*** [2023] EWCOP 4

- P was described as having very complex psychological and psychiatric challenges. This included: global developmental delay, ADHD, executive dysfunction, developmental trauma disorder, possible EUPD.
- When "dysregulated", H's behaviour could present a risk of harm to herself and others.
- The court was asked to consider H's capacity in relation to: residence; care/support; contact with others; use of Internet and social media.
- The expert evidence was that H lacked capacity in the relevant domains and the court's judgment accorded with that view.

Mr Justice Hayden set out to put the relevant law relating to capacity issues which arise regularly in the court of protection "in one accessible judgment". He wished P to see "the effort and care that has been taken for her, by all the professionals, to respect her autonomy, as an individual".

a. The basic principles of the MCA 2005 included the necessity to address: The diagnostic test, the functional test and the causal connection between them [12]. The question of causation should only be considered if the functional inability to make the decision has been established [14].

b. An assessor of capacity and the court must ask as a preliminary matter: (1) what is the decision to be made? (2) what is the information relevant to that decision? [15]. The relevant information must be set within the specific factual context of the case. The **"assessment must be unique to P, and to P's specific circumstances".** [16]

c. Core to the assessment is the protection of individual autonomy, which demands a highly fact-specific approach [19-20] and "the relevant information which informs the decision will be both fact and person-specific." [21]

d. As to whether P has capacity to make a specific decision at [the material time], if there is evidence of fluctuating capacity that will be an appropriate qualification to the assessment. [26]

Core message:

"*The danger of elevating the instinctive need to protect a vulnerable adult to such a degree that it corrupts the integrity of an objective assessment of capacity, is an ever-present danger in this sphere of work and requires vigorously to be guarded against. Paternalism has no place; protection of individual autonomy is the magnetic north of this court.*" [19]

Practical application:

- A merely technical approach to identifying decisions and relevant information is insufficient.

-Relevant information is to be decision and person-specific

-Autonomy v protection of vulnerable adults

Cha Cha Cha . .

Recent case law has also considered the boundaries of the MCA, ***DY v A City Council*** [2022] EWCOP 51, addressed criminal justice and capacity issues.

- DY was a young man in his 20s. He had a diagnosis of ASD, Generalised Anxiety Disorder and Paedophilia. In 2016 he was detained under the MHA. In 2017 he was determined to lack capacity in relation to his detention and treatment under the MCA. He was moved to a specialist placement.
- In 2017 he was convicted of two offences of sexual assault on a girl under 13, placed on the sex offender's register and referred to MAPPA. He was subject to a Sexual Harm Prevention Order (SHPO).
- DY moved to a further placement in 2019 and continued to be assessed as unable to make decisions about accommodation and care. He continued to be deprived of his liberty subject to a standard authorisation.

Issues:

(1) Was the primary focus of the care plan to avoid harm to DY? (for the purposes of the best interests qualifying requirement)?

Yes

(2) Did DY have capacity to consent to his care and support arrangements?

Yes

Evidence:

The expert Consultant Psychiatrist instructed, considered that DY's ASD, which included anxiety, was the relevant condition for the purposes of the diagnostic test. The judge noted that the expert evidence included [30]:

" . .[DY] was able to set out a level of care that he believed would be both sufficient, beneficial and would balance his own wishes for a greater degree of autonomy and independence with an umbrella of oversight and protection." The expert was of the view that any further offending should be reviewed as within the remit of the Criminal Justice System and that this is consistent with the current SHPO.

Decision:

The judge noted that the respondents' experts relied heavily on the fact that DY made contradictory statements, failed to think things through and could overestimate his abilities. She observed: "In doing these things, DY is no different from many people who do have capacity. People with capacity can make unwise decisions and act on impulse". The court preferred the evidence of the psychiatrist.

The judge concluded [35]:

> *"I entirely understand why the respondents in this care are so concerned, because there is a high risk that DY will reoffend if he is given the opportunity to do so... But Dr Ince is right that any further offending is a matter for the Criminal Justice System. The current SHPO is an example of such risk management. The truth is that most sexual offenders and risky adults have capacity, and, like DY are not to be managed by a Deprivation of Liberty within the provisions of the Mental Capacity Act 2005".*

Observations

- Expert questions appeared well identified
- Context of decision-making considered
- Person-specific approach
- Balance for autonomy sought
- Public protection issue addressed

Echo

A final case to re-emphasise the tailored approach*: Gloucestershire County Council v AB* [2022] EWCOP 42

Issues: P had a pattern of severe self-harm, posing a potential risk to her life. The court had to consider best interests in relation to care and support arrangements and capacity and best interests in respect of internet and social media access.

Capacity: The court, following agreement by the parties, identified the following as "relevant information" (summarised) for the purposes of determining capacity in AB's case:

(a) some people you meet or communicate with online, who you don't otherwise know, may not be who they say they are; someone who calls themselves a 'friend' on social media may not be friendly;
(b) some people on the internet will encourage you to commit serious acts of self-harm or suicide;
(c) there are opportunities to purchase objects on the internet which can be used to facilitate self-harm;
(d) there is content on the internet which promotes self-harm;
(e) there is content online which may trigger your drive to self-harm, even if you do not intentionally access it;
(f) there are graphic images and videos of self-harm and suicide online;
(g) people you have contact with, or material you can access online, may negatively impact your mental state and encourage or otherwise exacerbate the desire to self-harm or attempt suicide.

Decision:
On the basis of this framework, the parties agreed and the court was satisfied that AB lacked capacity in relation to the internet and social media. However, no party sought for the court to make a final declaration as to AB's capacity to access the Internet and social media as expert queries were outstanding. This was as to whether AB's medication had been optimised to support her to demonstrate capacity. As a result of the finding that AB lacked capacity, her internet and social media access was to be restricted in accordance with a targeted care plan.

Observations:

-Relevant information was targeted

-Person-specific approach

-Fluctuating capacity taken into account

-Workable outcome

Thank you

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