



Community Care Live

Legal Masterclass: The Mental Capacity Act 2005



Basic Principles

- Section 1 MCA 2005:
 - (1) Assumption of capacity
 - (2) All practicable steps
 - (3) Unwise decisions
 - (4) Best interests
 - (5) Least restrictive option



Basic Principles

- *K v LBX* [2012] EWCA Civ 79:

“I also found it disconcerting, on the argument advanced, that the proposed starting point finds no reflection either in the structure or in the wording of the 2005 Act. Section 1 sets out principles generally applicable for the purposes of the Act. It is noteworthy that nothing corresponding to the suggested starting point is found there.”

Basic Principles

- *Heart of England NHS Foundation Trust v JB* [2014] EWHC 342 (COP):
 - “[P] is unable to show that she had considered the option of [xx]”
 - “One needs to be certain of her capacity”
 - “[P] is unable to fully understand, retain and weigh information”



Assessing Capacity

- *PC and NC v City of York Council* [2013] EWCA Civ 478
 - Section 2(1) is the “*core determinative provision*” supported by the remainder of sections 2 and 3
 - The determination of capacity is decision-specific



Assessing Capacity

- Section 2(1) of the MCA 2005:
“...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.”



The Diagnostic Test

- Medical evidence: *Baker Tilly v Makar* [2013] EWHC 759 (QB)
- The impairment or disturbance in the functioning of the mind or brain can be temporary or permanent: section 2(2)
- Does not require specific diagnosis

Functional Test

- Section 3(1) MCA 2005:

“(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).”



The Functional Test

- Capacity is decision-specific
 - *PC v City of York* [2013] EWCA Civ 478
 - *Heart of England NHS Foundation Trust v JB* [2014] EWHC 342
- Must ask P the specific question
- Relevant information



The Functional Test

- Reasonable steps
 - Method of communication
 - Best time of day and location
 - Other people present
 - Visual aids
- *Re DE* [2013] EWHC 2562

Understand

- *LBJ v RYJ* [2010] EWHC 2664 (Fam) – must understand “*salient details*”
- *Heart of England NHS Foundation Trust v JB* – “*a broad general understanding... [P] is not required to understand every last piece of information*”
- *PH and A Local Authority v Z Limited & R* [2011] EWHC 1704 (Fam) – level of understanding must not be set too high



Retain

- Section 3(3):

“(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.”



Use or Weigh

- *PC and NC v City of York* [2013] EWCA Civ 478:
“there is a space between an unwise decision and one which an individual does not have the mental capacity to take...”
- *CC v KK & STCC* [2012] EWHC 2136 (COP) – must not start with a *“blank canvas”*



Communicate

- Section 3(1)(d) MCA 2005:
“...whether by talking, using sign language or any other means.”



Causation – “Because of”

- *PC and NC v City of York Council* 2013 EWCA Civ 478
- *Heart of England NHS Foundation Trust v JB* [2014] EWHC 342:
do not “*allow the tail of welfare to wag the dog of capacity*”
- *London Borough of Redbridge v G, C and F* [2014] EWHC 485 (COP) – inherent jurisdiction



Capacity – Practical Tips

- Be specific about the decision
- Concrete details of choices available
- Concentrate on salient details
- Avoid the protection imperative
- Demonstrate efforts to support P
- Evidence each element of assessment
- Incapacitated or unwise decision?



Best Interests

- Not defined in the MCA 2005
- *Aintree University NHS Hospitals Trust v James* [2013] UKSC 67:
 - “*The purpose of the best interests test is to consider matters from the patient’s point of view.*”
- *Commissioner of Police for the Metropolis v ZH* [2013] EWCA Civ 69



Checklist

- Equal consideration and non-discrimination
- All relevant circumstances
- Regaining capacity
- Permitting and encouraging participation
- Wishes, feelings, beliefs and values
- Views of others
- Life sustaining treatment



Wishes, feelings, beliefs, values

- *Re M (Adult Patient)* [2011] EWHC 2443 – Best interests is not a test of “substituted judgment”
- *Wye Valley NHS Trust v Mr B* [2015] EWCOP 60
- Law Commission proposals
- UN Disabilities Convention



Options and public law

- Not all decisions are best interest decisions
- *Chatting v Viridian Housing* [2012] EWHC 3595 (Admin)
- *Re MN* [2015] EWCA Civ 411
- *Re DW* [2015] EWCOP 53
- *Re MAG* [2015] EWCOP 64



Best Interests – Practical Tips

- Identify the decision
- Identify the options
- Balance sheet of benefits and disadvantages
- Reasons
- What else can be done
- Contingency plan
- Revised balance sheet



Advocacy

- When to refer to an IMCA
- Mandatory:
 - Medical treatment (s. 37(3) MCA)
 - Provision of accommodation (ss. 38(3) and 39(4) MCA)
- Discretionary:
 - Care Reviews
 - Adult Protection

Contact

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