

Brain Injury in the Court of Protection: the importance of P

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Overview

- ✓ Capacity: key provisions and best practice
- ✓ Best interests: key provisions and best practice
- ✓ Interesting Cases
- ✓ The Court of Protection: Procedural Rules for involvement of P



Section 1 MCA: the Cardinal Principles

1(2) A person must be assumed to have capacity unless it is established that he lacks capacity

1(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

1(4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision



Capacity: section 2

2 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**

Capacity: section 3

3 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).

Capacity: section 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.

(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.



Capacity: what do sections 2 & 3 mean?

Mental Capacity Act 2005 contains a two-stage test of capacity:

- is there any impairment of or disturbance in the functioning of, the person's mind or brain? **(diagnostic test)**
- if so, does the impairment or disturbance mean that the person lacks the capacity to make a decision in relation to the matter in question? **(functional test)**



Remember.... Decision Specific



Determination of capacity is always **'decision specific'** having regard to the **clear structure provided by sections 1 to 3 of the MCA** (*PC v City of York Council* [2014] 2 WLR 1 at [35]).

Thus capacity is required to be **assessed in relation to the specific decision at the time the decision needs to be made and not to a person's capacity to make decisions generally**

Section 2: diagnostic test

Paragraph 4.12 of the Code of Practice provides examples of "*an impairment or disturbance in the functioning of the mind or brain*", which may include the following:

- conditions associated with some forms of mental illness;
- Dementia;
- significant learning disabilities;
- **the long-term effects of brain damage;**
- physical or medical conditions that cause confusion, drowsiness or loss of consciousness;
- Delirium;
- concussion following a head injury;
- the symptoms of alcohol or drug use.



Section 3: functional test

An **inability to undertake any one of the four aspects of the decision making process set out in section 3(1) MCA will be sufficient** for a finding of incapacity provided the inability is because of an impairment of, or a disturbance in the functioning of, the mind or brain (see *RT and LT v A Local Authority* [2010] EWHC 1920 (Fam) at [40]).

Section 3: functional test

It is important to remember that for a person to be found to lack capacity there must be a causal connection between being unable to make a decision by reason of one or more of the functional elements set out in section 3(1) of the MCA and the ‘impairment of, or a disturbance in the functioning of, the mind or brain’ required by section 2(1) of the MCA



Understanding: s.3(1)(a)

LBL v RYJ, VJ [2010] EWHC 2665
(COP), Macur J held (at paragraphs [24]
& [58]):

The threshold of understanding is quite low, requiring an ability to understand the "*salient details*" but not necessarily "*all peripheral details*"

Retaining the Information: s.3(1)(b)

Section 3(1)(b) must be read in conjunction with s.3(3) which reminds us that the ability to retain information *"for a short period only"* does not disqualify a person from being regarded as able to make the decision in question.

Paragraph 4.20 of the Code also helpfully confirms that **"the person must be able to hold the information in their mind long enough to use it to make an effective decision."** But section 3(3) states that people who can only retain information for a short while must not automatically be assumed to lack the capacity to decide – it depends on what is necessary for the decision in question. *Items such as notebooks, photographs, posters, videos and voice recorders can help people record and retain information."*

Use and Weigh the information: s.3(1)(c)

In *PCT v P, AH and The Local Authority* [2009] COPLR Con Vol 956 at [35] Hedley J described the ability to use and weigh information as “the capacity actually to engage in the decision making process itself and to be able to see the various parts of the argument and to relate one to another”

It is not necessary for a person to use and weigh every detail of the respective options available to them in order to demonstrate capacity, merely the salient factors (see *CC v KK and STCC* [2012] EWHC 2136 (COP) at [69]).

Use and Weigh the information: s.3(1)(c)

Kings College Hospital NHS Foundation Trust v C and V [2015] EWCOP 80 (at para [38])

“What is required is that the person is able to employ the relevant information in the decision making process and determine what weight to give it relative to other information required to make the decision. **Where a court is satisfied that a person is able to use and weigh the relevant information, the weight to be attached to that information in the decision making process is a matter for the decision maker.** Thus, where a person is able to use and weigh the relevant information but chooses to give that information no weight when reaching the decision in question, the element of the functional test comprised by section 3(1)(c) will not be satisfied. Within this context, **a person cannot be considered to be unable to use and weigh information simply on the basis that he or she has applied his or her own values or outlook to that information in making the decision in question and chosen to attach no weight to that information in the decision making process**”

Communicating the decision: s.3(1)(d)

This includes obvious situations such as unconsciousness or those individuals in a vegetative state or those who have the condition known as "locked-in syndrome".

Paragraph 4.24-4.25 of the Code make plain that:

Before deciding that someone falls into this category, it is important to **make all practical and appropriate efforts to help them communicate**. This might call for the involvement of speech and language therapists, specialists in non-verbal communication or other professionals. Chapter 3 gives advice for communicating with people who have specific disabilities or cognitive problems.

Remember.... Decision Specific



Determination of capacity is always **'decision specific'** having regard to the **clear structure provided by sections 1 to 3 of the MCA** (*PC v City of York Council* [2014] 2 WLR 1 at [35]). Thus capacity is required to be **assessed in relation to the specific decision at the time the decision needs to be made and not to a person's capacity to make decisions generally**

Remember..... Steps to be taken

- ✓ 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** (section 1(3) MCA)
- ✓ Paragraph 4.49 of the Code
- ✓ Assessors should make sure that they **understand the nature and effect of the decision to be made**. They may need access to relevant documents and background information
- ✓ they may need other relevant information to support the assessment (for example, healthcare records or the views of staff involved in the person's care)

Remember..... Steps to be taken

- ✓ family members and close friends may be able to provide valuable background information. But their personal views and wishes about what they would want for the person must not influence the assessment
- ✓ they should again explain to the person all the information relevant to the decision. The explanation must be in the most appropriate and effective form of communication for that person
- ✓ check the person's understanding after a few minutes. The person should be able to give a rough explanation of the information that was explained. There are different methods for people who use non-verbal means of communication (for example, observing behaviour or their ability to recognise objects or pictures)

Remember..... Steps to be taken

- ✓ avoid questions that need only a 'yes' or 'no' answer (for example, did you understand what I just said?). They are not enough to assess the person's capacity to make a decision. But there may be no alternative in cases where there are major communication difficulties. In these cases, check the response by asking questions again in a different way
- ✓ skills and behaviour do not necessarily reflect the person's capacity to make specific decisions. The fact that someone has good social or language skills, polite behaviour or good manners doesn't necessarily mean they understand the information or are able to weigh it up
- ✓ Repeating these steps can help confirm the result

Remember.... Unwise Decisions

Peter Jackson J in
Heart of England NHS Foundation Trust v JB
[2014] EWHC 342 (COP) at para 7:



*'The temptation to base a judgment of a persons capacity upon whether they seem to have made a good or bad decision is absolutely to be avoided. That would be to put the cart before the horse or, expressed another way, **to allow the tail of welfare to wag the dog of capacity**. Any tendency in this direction risks infringing the rights of that group of persons who, though vulnerable, are capable of making their own decisions. **Many who suffer from mental illness are well able to make decisions and it is important not to make unjustified assumptions to the contrary**'*

Remember... Protection Imperative

PH v A Local Authority [2011] EWHC 1704 (COP), Baker J observed as follows at [16]:

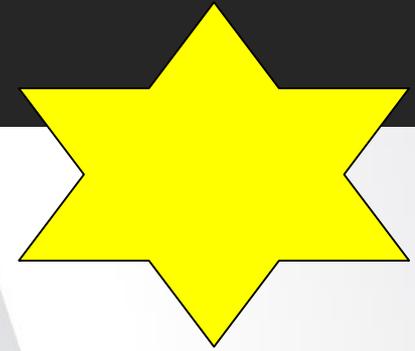
“In assessing the question of capacity, the court must consider all the relevant evidence. Clearly, the opinion of an independently-instructed expert will be likely to be of very considerable importance, but in many cases the evidence of other clinicians and professionals who have experience of treating and working with P will be just as important and in some cases more important. In assessing that evidence, the court must be aware of the difficulties which may arise as a result of the close professional relationship between the clinicians treating, and the key professionals working with, P.... Equally, in cases of vulnerable adults, there is a risk that all professionals involved with treating and helping that person – including, of course, a judge in the Court of Protection – may feel drawn towards an outcome that is more protective of the adult and thus, in certain circumstances, fail to carry out an assessment of capacity that is detached and objective.”

Remember Capacity Reports

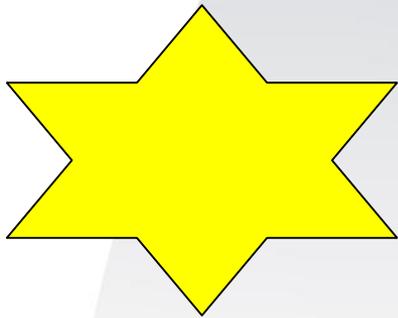
- ✓ Set out relevant tests as per sections 1-3 MCA
- ✓ Set out your knowledge / involvement with P
- ✓ What are decision(s) to be made by P?
- ✓ Set out what information you considered before assessment and the content of discussions with others
- ✓ Set out what steps taken to ensure P's engagement in assessment (time of day, support for P, what assessor wears, P feeling unwell, communication aids)
- ✓ Set out what information you considered relevant to decision being made and how this information was discussed and presented to P

Remember Capacity Reports

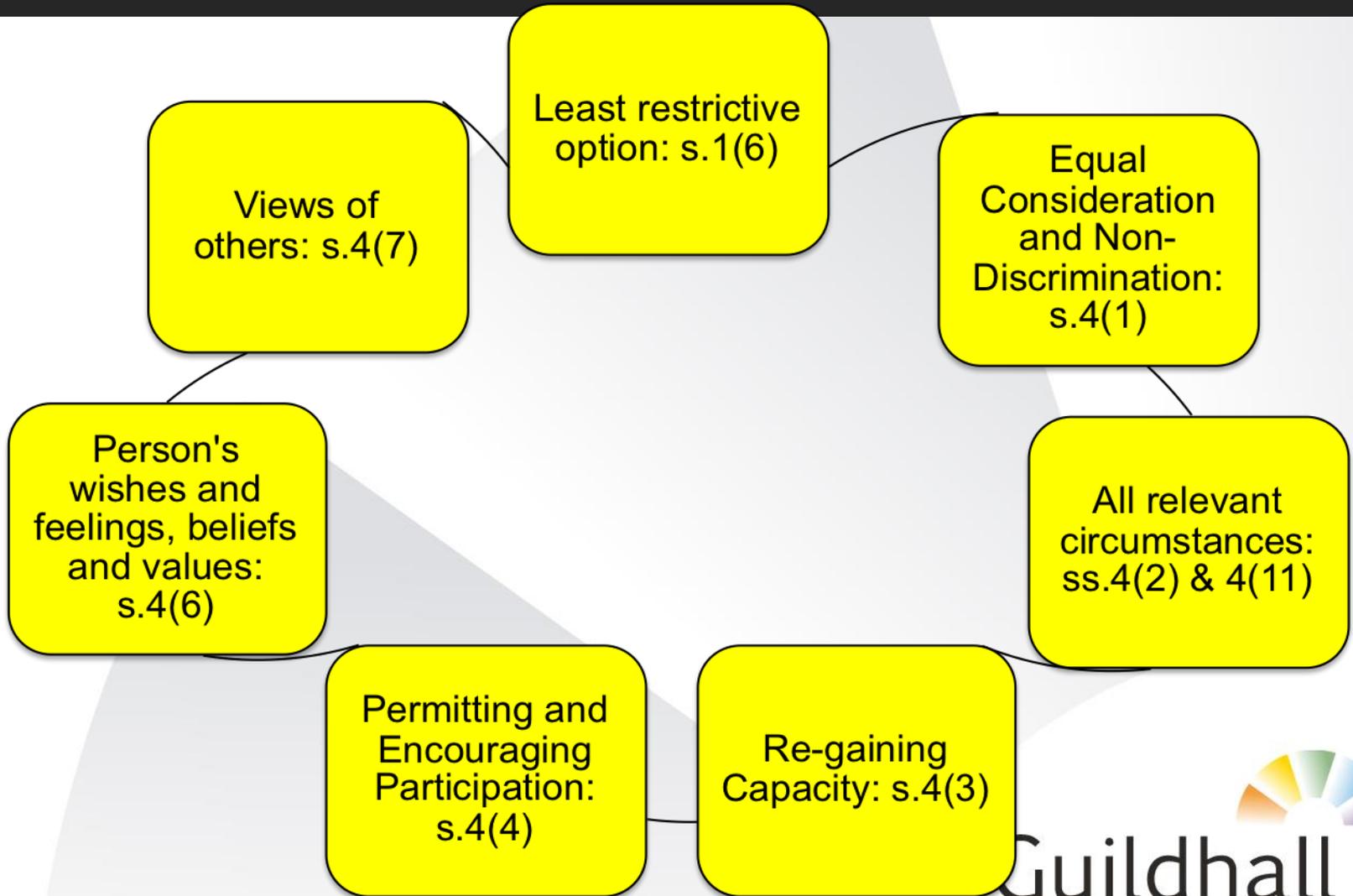
- ✓ Does P have an impairment of, or a disturbance in the functioning of, the mind or brain? What impairment?
- ✓ Can P not undertake one of the four functional aspects, with reference to the specific decision being made and if so, why?
- ✓ Is there a causal connection between P's inability and his impairment of or disturbance in the functioning of the mind or brain?
- ✓ Set out verbatim (as much as possible) discussions had with P
- ✓ Keep handwritten notes



Best Interests



Best Interests: OVERVIEW



Best interests: section 4

The MCA enshrines the concept of "best interests" as the basis for decision making

The term is not defined by the MCA as each case must be specific to its individual factual matrix

In summary, it attempts to combine respect for the wishes and feelings of the incapacitated adult whilst also preferring a climate of minimum intervention

BEST INTERESTS

The MCA prescribes a statutory checklist of factors (no hierarchy) which must be taken into account. It is always fundamental to remember that s.4 must be read in conjunction with the statutory principle enshrined in s.1(6), namely:

*"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**"*



Equal Consideration and Non-Discrimination: s.4(1)

The wording in s.4(1) mirrors that contained in s.2(3). Sections 2(3) and 4(1) were proposed amendments made during the Bill's Report stage in the House of Lords and were intended to:

"reinforce the belief, shared across the House, that no-one should be assumed to lack capacity, excluded from decision-making, discriminated against or given substandard care and treatment simply, for example, as a result of disability" (as per House of Lords debate, 15 March 2005).

Thus decisions about best interests must not be influenced by prejudices, preconceived ideas or assumptions that older people or people with disabilities experience a different value or quality of life than those who do have disabilities and are able to make decisions for themselves.

All relevant circumstances: ss.4(2) & 4(11)

The requirement here is to identify the issues that are most relevant to the person who lacks capacity in the context of the decision to be taken. The decision maker does not need to make an exhaustive inquiry to investigate every issue that may have some relevance and must identify and consider those which:

- the person making the determination is aware; and
- it would be reasonable to regard as relevant.



Re-gaining Capacity: s.4(3)

This factor respects the statutory principle enshrined in s.1(3) namely that *"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"*.

When considering best interests, the decision maker must therefore consider whether the individual concerned is likely to have capacity to make the particular decision in the future, and if so, when that is likely to be. If this is the case, it may be possible to put off the decision until a time when the person can make the decision himself. During this time, further support can be provided to enable the person to make the decision himself.

Permitting and Encouraging Participation: s.4(4)

- This requirement also respects s.1(3) and the need to ensure help and support is provided to enable people to make their own decisions. The importance of involving the incapacitated adult in the decision-making process should also be at the forefront of the decision-maker's mind and the incapacitated adult should therefore be both permitted and encouraged to participate, and to improve his ability to participate as fully as possible.
- The person will of course be consulted (unless it is impossible to do so), which has both two advantages: (i) this will encourage the development of decision-making skills; and (ii) will provide a contribution when determining best interests

Permitting and Encouraging Participation: s.4(4)

The Code has an entire Chapter (Chapter 3) which is dedicated to providing guidance and support as to how a person can be encouraged and permitted to become involved with decision making. Each case will obviously depend on its individual facts. In summary, practical steps include:

- Providing relevant information*
- Communicating in an appropriate way*
- Making the person feel at ease*
- Supporting the person*



The incapacitated person's wishes and feelings, beliefs and values: s.4(6)

Aintree University Hospitals NHS Foundation Trust v James and others [2013] UKSC 67 (at paragraph [45]):

*"Finally, in so far as Sir Alan Ward and Arden LJ were suggesting that the test of the patient's wishes and feelings was an objective one, what the reasonable patient would think, again I respectfully disagree. **The purpose of the best interests test is to consider matters from the patient's point of view.** That is not to say that his wishes must prevail, any more than those of a fully capable patient must prevail. We cannot always have what we want. Nor will it always be possible to ascertain what an incapable patient's wishes are. Even if it is possible to determine what his views were in the past, they might well have changed in the light of the stresses and strains of his current predicament. In this case, the highest it could be put was, as counsel had agreed, that "It was likely that Mr James would want treatment up to the point where it became hopeless". **But in so far as it is possible to ascertain the patient's wishes and feelings, his beliefs and values or the things which were important to him, it is those which should be taken into account because they are a component in making the choice which is right for him as an individual human being.**"*

The incapacitated person's wishes and feelings, beliefs and values: s.4(6)

The issue of wishes and feelings was carefully considered by Peter Jackson J in *Wye Valley NHS Trust v B* [2015] EWCOP 60

The learned judge clearly highlighted that the utmost importance should to be placed on the wishes and feelings of an incapacitous person in circumstances where their beliefs and values are an inextricable part of their personality structure, and that without such consideration, a person would be looked at in the abstract which is as meaningless as speaking of “an unmusical Mozart” (Peter Jackson J, paragraph 13.)

Wishes and Feelings



■ In *ITW v Z, M & Various Charities* [2009] EWHC 2525 (Fam) Munby J (as he then was) set out a number of features which may be important when assessing P's wishes and feelings

1. The degree of P's incapacity (the nearer the borderline, the more weight must in principle be attached to P's wishes and feelings)

2. The strength and consistency of the views being expressed by P

Wishes and Feelings



- 3. The possible impact on P of knowledge that their wishes and feelings are not being given effect to
- 4. The extent to which P's wishes and feelings are, or are not, rational, sensible, responsible and pragmatically capable of sensible implementation in the particular circumstances
- 5. (crucially) The extent to which P's wishes and feelings, if given effect to, can properly be accommodated within the court's overall assessment of what is in their best interests

Section 4(6): Beliefs and values and other factors

Beliefs and values can include any social or psychological factors, political affiliations, cultural background, spiritual and religious beliefs, subscriptions to charitable causes or known past behaviour.

Reference to *"other factors that he would be likely to consider if he were able to do so"* provides a "substituted judgment" element to the best interests test and can include emotional ties, family obligations, altruistic motives or concerns for others

"what good is it making someone safer if it merely makes them miserable?" (per Munby J (as he then was) in *X v MM & KM* [2007] EWHC 2003 (Fam), as paragraph 21).

Re IH (Observance of Muslim Practice) [2017] EWCOP 9, Cobb J

Section 4(7): consultation

The duty to consult must be balanced against P's right to confidentiality and therefore consultation should only take place where relevant and with people whom it is appropriate to consult. Thus it would be inappropriate to consult with anyone whom P has previously indicated should not be involved.

The Code neatly underlines the purpose and duty of consultation as follows:

Purpose (see paragraphs 5.53 & 5.54)

The decision-maker should try to find out:

- what the people consulted think is in the person's best interests in this matter, and
- if they can give information on the person's wishes and feelings, beliefs and values.

Interesting Cases



- *Y v A Healthcare NHS Trust* [2018] EWCOP 18
- *Re D (Medical Treatment)* [2017] EWCOP 15
- *Kings College Hospital NHS Trust v C & Anor* [2015] EWCOP 80
- *Wye Valley NHS Trust v B* [2015] EWCOP 60

Court of Protection: Procedural Rules

Court of Protection Rules 2017 (with effect from 1 December 2017)

Rule 1.2

1) The court must in each case, on its own initiative or on the application of any person, consider whether it should make one or more of the directions:

(a) P should be joined as a party;

(b) P's participation should be secured by the appointment of an accredited legal representative to represent P in the proceedings and to discharge such other functions as the court may direct;

Court of Protection: Procedural Rules

(c) P's participation should be secured by the appointment of a representative whose function shall be to provide the court with information as to the matters set out in section 4(6) of the Act and to discharge such other functions as the court may direct

(d) P should have the opportunity to address (directly or indirectly) the judge determining the application and, if so directed, the circumstances in which that should occur

(e) P's interests and position can properly be secured without any direction under sub-paragraphs (a) to (d) being made or by the making of an alternative direction meeting the overriding objective.



**THANKS
FOR
LISTENING**