

# *Two dilemmas in Medical Treatment*

3 July 2023

**Vikram Sachdeva KC**

# Capacity – the MCA

The MCA states as follows:

## *“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.

# Capacity – the MCA

## *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 – the MCA

## *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).
- (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.

# Ss2 – 3 MCA : A Local Authority v JB [2021] UKSC 52

- (1) The test of capacity applies to all decisions, whatever their character: [63].
- (2) The core determinative provision within the statutory scheme for the determination of whether P lacks capacity is s2(1): [65].
- (3) Section 2(1) requires the court to address 2 questions, the first being whether P is unable to make a decision for himself in relation to the matter, and the second being whether that inability to make a decision is “because of” an impairment of, or a disturbance in the functioning of, P’s mind or brain;
- (4) Capacity may fluctuate over time, so that a person may have capacity at one time but not at another time. The “material time” within s2(1) is decision-specific; the question is whether P has capacity to make a specific decision at the time when it needs to be made: [64]
- (5) Since the assessment of capacity is decision-specific, the court is required to identify the correct formulation of “the matter”: [67]-[68].
- (6) The correct formulation of “the matter” leads to a requirement to identify “the information relevant to the decision” under s3(1)(a) which includes information about the reasonably foreseeable consequences of deciding one way or another or of failing to make the decision: [69].
- (7) The court must identify the “information relevant to the decision” “within the specific factual context of the case”: [70].

# Relevant Information

The information relevant to the decision includes information about the reasonably foreseeable consequences of a decision, or of failing to make a decision. These consequences are not limited to the “reasonably foreseeable consequences” for P, but can extend to consequences for others: [73].

There should be a practical limit on what needs to be envisaged as the “reasonably foreseeable consequences” of a decision or of failing to make a decision so that “the notional decision-making process attributed to the protected person... should not become divorced from the actual decision-making process carried out in that regards on a daily basis by persons of full capacity”: [75].

P’s ability to use or weigh information relevant to the decision as part of the decision-making process “should not involve a refined analysis of the sort which does not typically inform the decision... made by a person of full capacity”: [77].

Once the information relevant to the decision has been identified, P is unable to make a decision for himself in relation to the matter if he does not satisfy any one of the limbs of s3(1) eg if he is unable to understand or use or weigh the information as part of the process of making the decision: [76].

The question for the court is not whether the person's ability to take the decision is *impaired* by the impairment of, or disturbance in the functioning of, the mind or brain but rather whether the person is rendered *unable* to make the decision by reason thereof (*Re SB (A Patient: Capacity to Consent to Termination)* [[2013\] EWHC 1417 \(COP\)](#) at §38).

# North East London NHS Foundation Trust v Beatrice [2023] EWCOP, 17 Mostyn J

- 50 year old lady
- Trust applied for order declaring lawful the cessation of active treatment and referral to palliative care
- “She is a highly intelligent woman. She has under- and post- graduate degrees. She has a social media presence, including her own YouTube channel... she has recently unsuccessfully sought judicial review of the Government’s initiative to require restaurants to display calorific values on their menus...”
- “This case is only about Beatrice’s struggle with anorexia. She has bravely battled this terrible condition for 36 years. She now says that she cannot continue the fight.”



# Beatrice

26. The relevant information is described in paragraph 4.16 of Chapter 4 of the Code of Practice as including the nature of the decision, the reason why the decision is needed, and the likely effects of deciding one way or another or making no decision at all. The weighing process was described by Hedley J in *PCT v P, AH and The Local Authority* [\[2009\] EW Misc 10 \(EWCOP\)](#), [2009] COPLR Con Vol 956 at [35] 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”.

# Beatrice

“28. In my judgment, the evidence shows **there is no doubt at all that Beatrice cannot weigh the information relevant to a decision about the options for her care and treatment.** The weighing process requires her to recognise that into the scales go the stark fact that if she does not eat and hydrate normally, and very soon, she will die. I agree with Mr Sachdeva KC that for the purposes of the test there is nothing else to weigh. There are, *pace* Hedley J, no various, inter-relating, parts of the argument. There is nothing to put on the side of the scales objectively in favour of starvation.

29. Yet Beatrice cannot and does not undertake this weighing exercise because of the anorexia nervosa. The experts explained to me graphically and eloquently that the condition impairs Beatrice’s mind by taking it over and creating delusions that she is overweight, with a fat, ugly body rather than being skeletal and at death’s door.” (emphasis added)

# Litigation Capacity: Beatrice

36. As for the second declaration [Litigation capacity] **I remain convinced, as a matter of logic (I forebear from saying common sense), that if Beatrice is robbed by the condition of the key element in the decision making process of weighing the relevant information, then she will be equivalently disabled from formulating and making submissions to a judge as to how he or she should undertake that very weighing exercise:** see *An NHS Trust v P (by her litigation friend, the Official Solicitor)* [\[2021\] EWCOP 27](#) at [33].

37. The test for litigation capacity surely has to be premised on Beatrice acting in person for, if that were not so, there would have to be an invidious debate as to the quality of the legal team hypothetically engaged by her. I am not getting into that in this case as I am completely convinced that Beatrice, even if represented, would not be able to formulate valid instructions to her lawyers by virtue of the impact of the condition to which I have referred above.

# Litigation Capacity

38. In *Lancashire and South Cumbria NHS Foundation Trust v Q* [\[2022\] EWCOP 6](#) at [24] Hayden V-P posited that when determining whether P lacked capacity to conduct litigation the court could take into account when analysing a hypothetical instruction by P of hypothetical lawyers that P would not be “required” to instruct her advisers in a particular way, and that “like any other litigant, in any sphere of law, [she] may instruct [her] lawyers in a way which might, objectively assessed, be regarded as contrary to the weight of the evidence”.

**39. I confess to finding the intellectual process which I should undertake under this formulation to be extremely difficult. I think it is being suggested that even though I have found that the anorexia has robbed Beatrice of the ability to weigh the relevant information she nonetheless may have the capacity to litigate that very issue because she has the facility to give completely unrealistic and objectively untenable instructions to her hypothetical lawyers.** I do not accept that this is a valid or useful exercise for the purposes of the decision I have to make. I think the exercise is difficult enough without having to go down what I regard as an intellectual cul-de-sac.

# Northamptonshire Healthcare NHS Foundation Trust v AB [2020] EWCOP 20, Roberts J

28 year old woman suffering from anorexia nervosa

“10. ...**In this case, it is accepted that AB has *litigation capacity***. She instructs specialist solicitors on her own account and the Official Solicitor has no role to play in these proceedings.”

13. ... Having spoken to AB prior to the hearing, Ms Gollop QC reported that she was well able to communicate her views about the proceedings in a manner which was thoughtful, intelligent, articulate and insightful. She was able to appreciate the difference between her ability to instruct a solicitor to represent her views in proceedings about her future treatment and whether or not she should have treatment.

“64. It seems to me that, given the chronic nature of AB's illness and its current clinical presentation, **her decisions in connection with food, calorific intake and consequent weight gain are so infected and influenced by her fixated need to avoid weight gain at all costs that true logical reasoning in relation to these specific matters is beyond her capacity or ability.**”