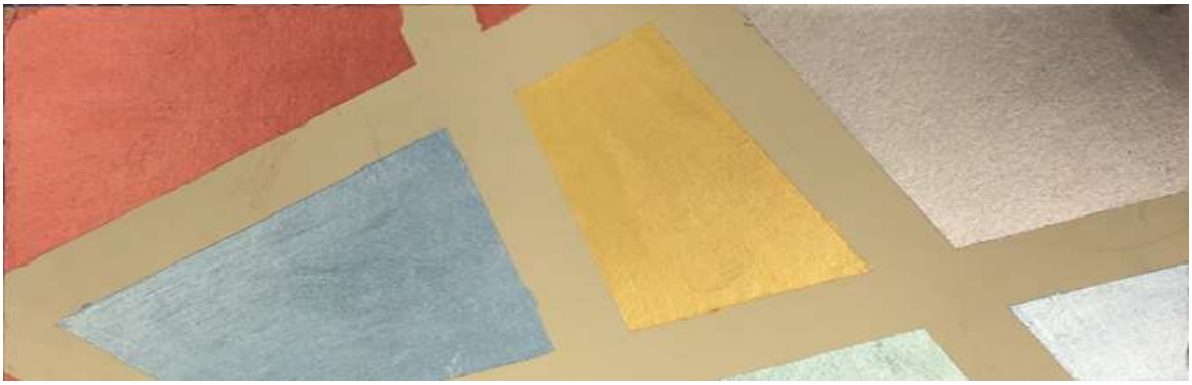
FLUCTUATING CAPACITY IN CONTEXT

December 2021



1. Fluctuating capacity can be a difficult concept to apply. We provide guidance about it in our guidance note on capacity, available here. The purpose of this short note is to help put the question in its bigger context.

2. This document cannot take the place of legal advice. In any case of doubt as to the principles or procedures to apply, it is always necessary to consult your legal department. Nor does it take the place of the MCA Code of Practice, to which professionals must have regard.

3. The consequences of fluctuating capacity will depend upon the context. There may be situations in which a person's fluctuating capacity will solely impact upon the extent to which they can be held to the legal consequences of their actions (for instance in relation to property and affairs); there may also be situations in which their fluctuating capacity will impact upon the ability of others to rely upon their consent.

4. In many cases, it is necessary to see the consequences in the context of obligations on health and social care professionals which do not arise under the Mental Capacity Act 2005, but rather from statutory obligations (for instance under the Care Act 2014 or Social Services and Well-Being (Wales) Act 2014) and positive obligations under Articles 2, 3 and 8 European Convention on the Human Rights. The British Institute of Human Rights provides invaluable guidance for professionals about the operation of the European Convention on Human Rights.

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Disclaimer: This document is based upon the law as it stands as at December 2021; it is intended as a guide to good practice, and is not a substitute for legal advice upon the facts of any specific case. No liability is accepted for any adverse consequences of reliance upon it.

The picture at the top, "*Colourful*," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

5. At any given moment, a relevant professional who is required to take reasonable steps to secure those obligations will have to ask themselves as to the basis upon which they are acting. In the case of a person with fluctuating capacity, there will at any moment be three possibilities:

    a. The person does not have the capacity to consent to the intervention in question. At that point, the provisions of s.5 MCA 2005 (described by Lady Hale as a 'general authority'[3]) mean that the act could be carried out if the professional doing so reasonably believed that the person lacked capacity to consent, and that they were acting in the person's best interests.[4]

    b. The person has the capacity to – and does – consent to the intervention in question. At that point, the act could be carried out on the basis of consent;

    c. The person has the capacity to – and does not – consent to the intervention in question. At that point, and absent special circumstances (for instance compulsory medical treatment for mental disorder under the Mental Health Act 1983), the act could not be carried out because it would give rise to an interference with the person's bodily integrity, and hence tortious and criminal liability, as well as – in the case of a person discharging a function of a public authority – liability under the Human Rights Act 1998.

6. From this perspective, two main problems therefore present themselves in the context of fluctuating capacity:[5]

    a. A person is misidentified as having the material decision-making capacity, purports to refuse the act, and the act is not carried out on the basis of the apparently capacitous refusal, and the person either suffers serious adverse consequences or dies;

    b. B person is misidentified as lacking the material capacity, and an act is carried out in the face of what is, in fact, a capacitous refusal, giving rise to a breach of their Article 8 ECHR rights and liability on the part of the professionals concerned.

7. Outside the court setting, it will always be for relevant professionals to make the decision whether the person has, or lacks, the relevant capacity at the time that treatment is being recommended or offered. In a situation of risk, and given the operational duties imposed by Articles 2, 3 and 8 ECHR, there is likely to be an obligation in a case of fluctuating capacity on the relevant professional to explain why in relation to any given decision they determined that the person in

[3] *N v ACCG* [2017] UKSC 22, [2017] AC 549 at para 38 per Lady Hale.
[4] And so long as there was no bar to action in the form of a valid and applicable advance decision to refuse medical treatment proposed or a decision to the contrary by an attorney or deputy.
[5] Another problem is where the person in fact lacks capacity to make the decision but incapacitously assents to whatever it is that the professional is proposing. That gives rise to other issues, but for present purposes, our focus is on where there is not this alignment.

question had capacity to refuse a necessary intervention.[6]

8. Especially if the stakes are high, legal advice should be sought to help think through:

   a. Whether is really a case of fluctuating capacity, or a situation where there is a temporary problem with which the person can be supported (as required by s.1(3) MCA 2005);

   b. If it is a case where the person's capacity fluctuates, what measures can be taken to support them undertake advance planning to help work out what course of action should be taken at the points when they do not have the capacity to make the decision(s) in question;[7]

   c. If is genuinely a case of fluctuating capacity, whether it is appropriate to rely upon the informal approach set out above (combined with advance planning) or whether the Court of Protection should be involved; or

   d. Whether – unusually – this is a 'contingency' case where the person currently has capacity to make the relevant decision but is likely to lose it under very specific circumstances. An example of this is the case of *GSTT v R* [2020] EWCOP 4 (involving birth arrangements): it is extremely important in such a situation that the court is involved as early as possible.

Useful resources

9. Useful free websites include:

- www.39essex.com/resources-and-training/mental-capacity-law – database of guidance notes (including as to capacity assessment) case summaries and case comments from the monthly 39 Essex Chambers Mental Capacity Law Report, to which a free subscription can be obtained by emailing marketing@39essex.com.
- www.mclap.org.uk – website set up by Alex with forums, papers and other resources with a view to enabling professionals of all hues to 'do' the MCA 2005 better.
- www.mentalhealthlawonline.co.uk – extensive site containing legislation, case transcripts and other useful material relating to both the Mental Capacity Act 2005 and Mental Health Act 1983. It has transcripts for more Court of Protection cases than any other site (including subscription-

[6] This reflects, amongst other things, the concern expressed by the House of Lords Select Committee conducting post-legislative scrutiny of the MCA 2005 (HL Paper 139 (March 2014)): "[t]*he presumption of capacity, in particular, is widely misunderstood by those involved in care. It is sometimes used to support non-intervention or poor care, leaving vulnerable adults exposed to risk of harm. In some cases this is because professionals struggle to understand how to apply the principle in practice. In other cases, the evidence suggests the principle has been deliberately misappropriated to avoid taking responsibility for a vulnerable adult*" (para 105). For an analysis of the position in relation to the presence of suicide risk, see this blog post by Alex.

[7] For practical help in the context of those with bipolar, see the work of Workstream 3 of the Mental Health and Justice Project.

only sites), as well as an extremely useful discussion list.

- www.scie.org.uk/mca-directory/ - the Social Care Institute of Excellence database of materials relating to the MCA

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