

Autonomy, capacity and best interests

Fiona Scolding KC

A recap : capacity

- Presumption of capacity: a guiding principle (s1). Burden of proof on lack of capacity lies with party asserting such.
- Guiding principle that an unwise decision is not to be treated as being unable to make that decision (s1)
- Must take all practical steps to help decision making (s1)
- The concept of autonomy is a central rationale to the introduction of the MCA and is enshrined in the domestic and international law on those who may lack capacity.
- Must take reasonable steps to assist individuals to make decision (entire Chapter 3 of the MCA Code of Practice). E.g. choosing best location, waiting for capacity to improve, using intermediaries/other to aid communication, consider cultural or other factors, working with family (where appropriate).

A recap 2 (capacity)

- Burden of proof lies on those who assert lack of capacity
- Standard of proof is balance of probabilities
- The material time – is the time that the decision has to be made (and in cases of fluctuating capacity, may want to whether it is possible to make the decision when that person does have capacity).
- Make sure that not label people because of age, appearance or preconceived ideas of their abilities – s2(3) MCA 2005.
- Test can be said:
 - (a) Is person unable to make a decision ?
 - (b) Is there an impairment/disturbance in the functioning of the brain
 - (c) Is that person's inability to make the decision because of the identified impairment/disturbance? Must be a nexus between the inability to make the decision and the impairment .

Section 2

Section 2 is “the single” test for deciding capacity, but should be interpreted by applying the descriptors in s2 and s3 (*JB v A Local authority* [2021] UKSC 52 at [64 - 78]).

- (1) Is P unable to make a decision? Test for capacity is decision specific . But what is the matter for which the decision to be made? (JB at [68]) .
- (2) The matter then leads to a requirement that the person understands the information relevant to the decision which includes the reasonable foreseeable consequences of deciding or not making the decision (JB at [69] and s3(1) and 3(4) of the MCA 2005) .
- (3) Can be either general or (if involves another person” person specific depending on the characteristics of th eperson.

A recap 3 – Functional test: understanding information

- S3 of the MCA 2005 – the “functional test” for lack of capacity : emphasis upon personal nature of the decision. 4 grounds:

Ground 1: Understand information relevant to the decision

- (a) Level of sophistication of the decision (see *Re S: D v R* [2010] EWHC 2405 where the decision related to capacity to continue litigation – required “a good deal of information and self awareness” [144].
- (b) Does the decision include the reasonably foreseeable consequences of that decision? (*LA v A* [2010] EWHC 1549 COP) – test of capacity to have sex does not include ability to understand what caring for the potential baby which may result would involve. But the test does involve reasonable consequences for others ([73] of *JB* (supra) - in which the consequence was a prison sentence for non consent)
- (c) But in financial decision making, should or is there de factor reasonable foreseeable consequences of making such given that the outcome may be identified? (DH guidance on assessment of financial capacity)

Function test – understanding information – gravity of consequences

- SC identifies that P’s ability to understand decision is specifically affected by whether there are serious or grave consequences which flow – again the emphasis upon the specific factual consequences (JB at [74]).
- But also practical limit on what needs to be envisaged as “reasonable foreseeable consequences” – so should not make them need to have greater powers of insight and decisions making than people would undertake on a day to day basis (JB at [75] citing M (and adult) at [80]).

A recap 4: Retaining the information

Ground 2: Retaining that information

- Can be trained for only a short period (s3(3) of the MCA 2005) to make that choice.
- But has to be practical (eg if marrying someone, a short period can't mean for 5 minutes if one is then married to someone for the rest of their life or to whom) – *A LA v AK* [2012] EHC B29.
- Judge's have sometimes made a “qualified” declaration – i.e. that sometimes they do and sometimes they do not, and so will need contemporary medical evidence asserting capacity – *A, B and C v X and Z* [2012] EHC 2400) – not sure that it is very helpful.

A recap 4: use or weigh the information

- Ground 3: Using or Weighing information
- Focus upon the personal ability of the individual to make a particular decision – such as weighing risks and the processes followed when making that decision . It is the “capacity to engage in the decision making process itself and to be able to see the various parts of the argument and how they related to one another”
- An alternative explanation has been employe the relevant information and decide what weight to give it relative to others : cannot be held not to use and weigh information because they have used their own values to make the decision and chosen to attach no weight to a particular factor (*KCHNHS v C and V* [2015] EWCOP 80)
- Can be subject to abuse – in particular, make sure that you do not impose your values onto others (eg the King’s College case – Mrs. Sparkle)

A recap : Unable to communicate

- Very small numbers where this is the case – eg PVS, locked in.
- Must make strenuous efforts to facilitate communication – eg eye gaze etc.

Fluctuating capacity

- There are 2 different forms of fluctuation:
 - Something inherent in a disorder – eg bipolar. This depends on the cycle of fluctuation and the the nature of the decision. Financial decisions – eg management of property and affairs (*A, B v X* [2012] EWHC 2400). Need to be practical.
 - Something temporary (eg urinary tract infection). Can the decision wait? If it cannot wait, then the minimum number of steps should be taken for best interests.

Testamentary capacity? What is the test?

- MCA test for capacity applies in all Civil Procedural Rules decisions (Rule 21)
- Any MCA decision (eg statutory will) requires .
- But what about for wills?
- Recent decision: how does the *Bankes and Goodfellow* test (1870) interact with s2 and s3 of the MCA 2005. *Baker v Hewston* [2023] EWHC 1145 (Ch).
- Two contrasting views:

Chancery practice textbook (Theobald) says it is the common law test unaffected by the MCA 2005.

COP handbook: fulminates that this is the wrong test and that any common law test must be read in the light of the MCA 2005.

Judge says that both have merits .

Baker v Hewston (2)

- Judge devises an approach which tries to accommodate the two recognizing that:
 - *ss.2-3 MCA do not strictly apply to testamentary capacity in Probate cases;*
 - *ss.2-3 and general common law on capacity are aligned (and consciously so);*
 - *ss.2-3 are broadly consistent with the common law on testamentary capacity;*
 - *ss.2-3 and the Banks criteria are consistent and can 'accommodate' each other;*
 - *ss.2-3 are 'appropriate', in a similar sense to be included by analogy within the common law approach to testamentary capacity in Probate cases.*

The judge then sought to use the case as a worked example of this.

Thank you for listening

© Copyright Landmark Chambers 2021

Disclaimer: The contents of this presentation do not constitute legal advice and should not be relied upon as a substitute for legal counsel.

London

180 Fleet Street
London, EC4A 2HG
+44 (0)20 7430 1221

Birmingham

4th Floor, 2 Cornwall Street
Birmingham, B3 2DL
+44 (0)121 752 0800

Contact us

✉ clerks@landmarkchambers.co.uk
🌐 www.landmarkchambers.co.uk

Follow us

🐦 @Landmark_LC
📺 Landmark Chambers