

Fluctuating Capacity
*One off and repeated decisions, pause for
thought, and a Route map*

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Outline

- First Principles
- Fluctuating Capacity
- One off decisions
- Repeated decisions
- Key considerations
- Authorities

First Principles

- Fluctuating capacity is **not** a concept expressly addressed or provided for in the MCA, although it is referred to in the Code of Practice.
- **S.1(2)**: A person must be assumed to have capacity unless it is established that he lacks capacity;
- **S.1(3)**: P 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.
- **S.1(4)**: P is not to be treated as unable to make a decision merely because he makes an unwise decision;
- **s.1(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;
- **S.1(6)**: before an 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 freedoms.

Fluctuating Capacity

- Some people's ability to make decisions fluctuates because of the nature of a condition that they have. This fluctuation can take place either **over a matter of days or weeks** (for instance where a person has bipolar disorder), or **over the course of the day** (for instance a person with dementia whose cognitive abilities are significantly less impaired at the start of the day than they are towards the end).
- There may be some scenarios where a symptom and feature of a person's diagnosis is that they have **frequent periods** of emotional dysregulation, causing them to be unable to make a decision.
- Some cases have involved "**meltdowns**", which are infrequent, but severe and cause the person to lack capacity.

One off Decisions

- If a decision is a '*one off*' decision, then it may be possible to time that decision around the impact of the person's condition.
- At that point, the decision should be recorded, and there should be a clear recording as to why the person was considered to have capacity at the time the decision was made **A, B and C v X and Z [2012] EWHC 2400 (COP)** grant of a will and grant of a power of attorney).
- If it not possible to put the decision off, then the minimum action necessary should be taken to '*hold the ring*' pending the person regaining decision making capacity.

Repeated Decisions

- Some decisions are not one off and need to be repeated over a period of time.
- The management of property and affairs: **A, B and C v X and Z [2012] EWHC 2400 (COP) [37]**

*“In the light of Dr Poz’s evidence, I am satisfied, on balance, that he lacks capacity to manage his own affairs. In so finding, I acknowledge, as I have done in relation to the other matters, that there would be **times when a snapshot of his condition would reveal an ability to manage his affairs**, but the general concept of managing affairs is an ongoing act and, therefore, quite unlike the **specific act of making a will or making an enduring power of attorney**. The management of affairs relates to a continuous state of affairs whose demands may be unpredictable and may occasionally be urgent. In the context of the evidence that I have, I am not satisfied that he has capacity to manage his affairs.” [41]*

- The management of a physical health condition which requires a multitude of '**micro-decisions**' over the course of each day.
- When is the **material time**? If the reality is that there are only limited periods during the course of each day or week that the person is able to take their own decisions, then it will usually be appropriate to proceed on that they lack capacity.
- The court's have shown themselves increasingly willing to take this approach: Cheshire West and **Chester Council v PWK [2019] EWCOP 57**

Key considerations

- Is there **really** a case of fluctuating capacity, or a situation where there is a temporary problem with which the person can be supported: s.1(3) MCA.
- If capacity **does** fluctuate, what measures can be taken to support them to undertake advance planning to help work out what course of action should be taken at the points that they do not have capacity to make the decision.
- If it is **genuinely** a case of fluctuating capacity, whether it is appropriate to rely upon the informal approach above, combined with advance planning, or whether the Court of Protection should be involved.
- Is it a '**contingency**' case, where the person currently has capacity but may lose it under very specific circumstances, for example, a woman who may lose capacity during childbirth: **GSTT & SLAM v R [2020] EWCOP 4**

Micro vs Macro

- **RB Greenwich v CDM [2019] EWCOP 32**
- CDM was a 64 year old woman with a range of diagnosed personality disorders and physical health problems who was deprived of her liberty against her wishes in a care home.
- She was considered to have fluctuating capacity as to the management of her diabetes.
- The court heard long and complex evidence from experts.
- The ultimate question for the court was whether the correct approach was to consider CDM's ability to make decisions as macro or at micro level...
- Should the distinct parts of treatment be considered separately, or should the treatment be considered as a whole?

- The experts agreed that the decisions needed to be considered at a **macro level**, as a group of micro decisions, because the decisions had to be consistent and coherent with each other over time.
- The Official Solicitor argued that the diabetes management decisions should not be treated as one decision, as do to so would **over-ride her capacitous micro- decision making**.
- Newton J: *“a)On the assessment of capacity to make decisions about diabetes management, in all its health consequences, **the matter is a global decision**, arising from the inter dependence of diet, testing her blood glucose and ketone levels; administration of insulin; and, admission to hospital when necessary in the light of blood glucose levels, and b) **that CDM lacks the capacity to make those decisions, and having regard to the enduring nature of her personality disorder which is lifelong and therefore unlikely to change.**”*

- It was acknowledged that there may be occasions when CDM has the capacity to make micro-decisions in respect of her diabetes and occasions when she does not, **thereby acknowledging that her capacity does in fact fluctuate.**
- However, the court concluded that “...***logically, legally and practically, it is a macro decision, and CDM lacks capacity to take the macro-decision, the issue of fluctuating capacity simply does not arise.***”

The longitudinal approach

- **Cheshire West & Chester Council v PWK [2019] EWCOP 57**
- PWK, aged 24
- Diagnoses of autism and mild learning disability
- His package of care included 2:1 support and amounted to a deprivation of his liberty.
- The issues related to PWK's capacity to make decisions in relation to residence; care and support needs; contact with others; social media and the internet; property and affairs; and use or possession of his car.
- The common view of the professionals was that PWK lacked capacity in all areas, the court appointed expert disagreed. In her third revised report, the expert confirmed that he did in fact lack capacity.

- *“As Dr Rippon’s evidence proceeded, the true difficulty became clear. When PWK was relaxed and in a good place he might well be regarded as having capacity. However, when he became anxious his position could be very different. Moreover, there were many things that could trigger anxiety and quite often his carers would be confronted with irrational behaviour that could be difficult to manage.” [9]*
- *As I have said, PWK is a man with multiple disadvantages but who can and does function remarkably well within the constraints of his care package. Dr Rippon was clearly impressed by his abilities to think and express himself in interview, as I was by his ability to handle himself in Court. Yet there is another side to the picture when PWK is overwhelmed by anxiety and speaks and behaves in a way he rapidly comes to regret. **That anxiety is often but not always predictable and is liable to affect every part of his life and not just the issue of the moment, whatever that may be. It is the unpredictability of that anxiety and the seriousness and breadth of its impact which is decisive in this case in overturning the legal presumption of capacity.** Although its effect is principally in Section 3(1)(c), it does often extend to the earlier matters too. **It is, in applying a longitudinal perspective to this, that highlights the incapacity.** [25]*

Anticipatory Declarations

- **Wakefield MDC and Wakefield CCG v DN and MN [2019] EWHC 2306 (Fam)**
- DN was a 25 year old man described as having a severe form of autism, a general anxiety disorder and traits of emotionally unstable personality disorder.
- He was 'not significantly impaired' and was 'capable of clear thinking'.
- DN was vulnerable to have 'meltdowns', during which he would lose the capacity to manage his behaviour and make considered decisions.
- As part of a mental health treatment requirement under the Criminal Justice Act 2003, he was required to live at a supported living placement.
- DN was deprived of his liberty.

- It was accepted that DN had capacity, the MCA was not relied on, and the application was for orders authorising the deprivation of DN's liberty under the inherent jurisdiction of the High Court.
- Cobb J held that DN was not a person of unsound mind, nor a '*vulnerable adult*'. He was able to give genuine consent for the care arrangements.
- The court accepted however that at times when he was having a '**meltdown**' he could and most likely would, lack capacity under the MCA, and his deprivation of liberty could be authorised in advance by the court.

- *“... all parties agree that I could or should make anticipatory declarations as to DN’s capacity to make decisions about residence and/or care.... Under sections 15 and 16 of the Mental Capacity Act 2005, to cover occasions when he has ‘meltdowns’ and is at the point (it is agreed) unable to make capacitous decisions. It seems to me that the outcome of an anticipatory declaration would provide a proper legal framework for the care team, ensuring that any temporary periods of deprivation of liberty are duly authorised and thereby protecting them from civil liability.” [51]*

Fluctuating Capacity, a Route Map...

- **A Local Authority v PG & Ors [2023] EWCOP 9**
- PG was a 34 year old woman, who had a diagnosis of an intellectual disability in the moderate range, and autism spectrum disorder.
- She was also diagnosed as having “trauma based mental illness with Emotionally Unstable Personality Disorder traits.”
- The parties agreed that she has capacity to make decisions about where she lives, but they disagreed about whether she has capacity to make decisions about her care, including when she is within the home, the community and at times of heightened anxiety, and about her contact with others, at times of heightened anxiety.

- Lieven J considered it to be clear from the medical evidence: ***“that the law’s desire for clear lines as to both what decisions she does and does not have capacity to make, and in what circumstances she loses, does not fit with the reality of PG’s presentation.”*** [19]
- There were disputes as to the times that PG lacked capacity and the causes, it was difficult to unpick whether her inability to make decisions was caused by her alcohol intake, or whether it was caused by her impairment, or both.

- Lieven J said that the court was faced with a choice between making orders that follow the line of Sir Mark Hedley in PWK, and thus taking a “**longitudinal view**”, or that of Cobb J in DN and making **anticipatory declarations** in respect of when PG has the equivalent of a ‘**meltdown**’.
- Lieven J: “*How an individual P’s capacity is analysed will turn on their presentation, and how the loss of capacity arises and manifests itself. **Both the decisions in issue here are ones that arise on a regular basis and often not planned or controlled situations.** That will influence how decisions about capacity are approached.*”
- Whilst it was noted that there may well be times that PG’s decision making was impacted by alcohol consumption: “*the evidence is clear that her decision making is impacted by her mental impairment under s2(1) and not simply consuming excessive alcohol*”

*“In the light of these findings, I consider that the appropriate approach is to take the **“longitudinal view”**. An anticipatory order would in practice be close to impossible for care workers to operate and would relate poorly to how her capacity fluctuates. **The care workers would have to exercise a complicated decision making process in order to decide whether at any individual moment PG did or did not have capacity.** This might well vary depending on the individual care worker, and how much of the particular episode they had witnessed or not. The result would fail to protect her, probably have minimal benefit in protecting her autonomy and in practice make the law unworkable.” [43]*

In my view, the more practical and realistic approach is to make a declaration that PG lacks capacity in the two key respects, but also make clear that when being helped by the care workers they should so far as possible protect her autonomy and interfere to the minimum degree necessary to keep her safe.” [44]

CONCLUSION

- Is there **really** a case of fluctuating capacity, or a situation where there is a temporary problem with which the person can be supported: s.1(3) MCA?
- If capacity does fluctuate, what measures can be taken to support them to undertake advance planning to help work out what course of action should be taken at the points that they do not have capacity to make the decision?
- If it is genuinely a case of fluctuating capacity, whether it is appropriate to rely upon the informal approach, combined with advance planning, **or whether the Court of Protection should be involved??**
- Is it a 'contingency' case, where the person currently has capacity but may lose it under very specific circumstances, for example, a woman who may lose capacity during childbirth: **GSTT & SLAM v R [2020] EWCOP 4**

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