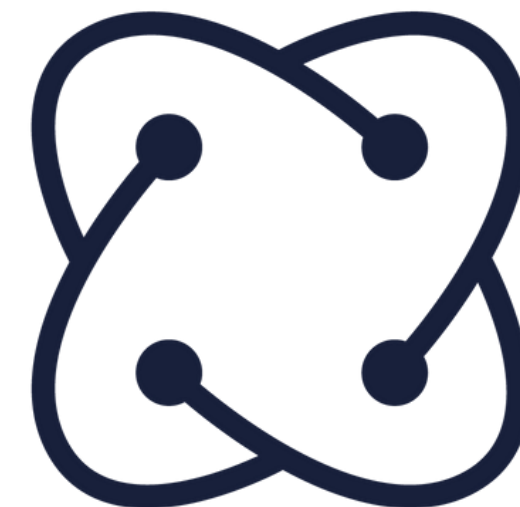


WEBINAR

MENTAL CAPACITY FOR EXPERTS – THE ESSENTIALS

NRC Medical Experts in conversation
25 JANUARY 2023



NRC

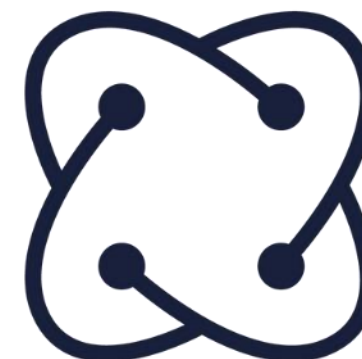
MEDICAL EXPERTS



WELCOME

Dr Edmund Bonikowski

Founder of NRC Medical Experts and Consultant in
Rehabilitation Medicine



NRC
MEDICAL EXPERTS



SPEAKER

Huw Ponting

Partner, Enable Law

huw.ponting@enablelaw.com



ENABLELAW

My practice

- Litigation - TBI 24 years
- Deputyship - 20 years +
- Volunteering - Headway, Carer Support Wiltshire. RNHRD, Bath

Topics to be covered today

1. Reprise the Mental Capacity Act
2. Share my experience as to how experts have dealt with this historically
3. Look at some recent developments – particularly around Health and Welfare issues
4. Consider how we, and experts, will need to address this area going forward
5. Spoiler alert – this area of my practice has changed most radically over the last 5 years
6. Time for questions at the end



TAKE PART

Use the Q&A functionality to write a question or comment, which will be addressed at the end of the webinar.

Mental Capacity Act 2005: The Basics



Mental Capacity Act 2005

Section 1 Principles:

- Assumption of capacity unless evidence of lack of capacity
- Take all practicable steps to help some make a decision before treat as lacking capacity
- Don't assume a lack of capacity merely because of an unwise decision
- Acts / decisions under the MCA must be in Ps best interests
- Acts / decisions must be the least restrictive of Ps rights / freedoms

Section 2 Test:

- A person lacks capacity to make a decision if at the material time they can't make a decision for themselves on a specific matter due to an impairment of, or a disturbance in the functioning of the mind or brain.



Section 3 – Inability to make decisions:

- A person is unable to make a decision if they are unable to:
- Understand the information relevant to the decision
- Retain that information
- Use / weigh that information as part of the decision making process
- Communicate that decision by any means

Section 4 – Best interests:

- Best Interests should not merely be based on age / appearance / behaviour
- Consider all relevant circumstances
- Must consider if likely to regain capacity and decision can be delayed
- So far as reasonably practicable permit / encourage participation by P
- Wishes, feelings & beliefs
- Views of others.

Historical approach by experts (and Solicitors)

- Often at the end of the report – gives the impression of afterthought?
- Tends to be restricted to Finance and Property; sometimes also Litigation Capacity, but not wider issues of capacity
- Limited evidence
- Variable forensic analysis – is there the time to do so?
- Defs – don't consider the evidence available to able to say that the presumption of capacity has not been displaced

Recent developments in my practice

- Infinitely more complex
- Hugely contentious
- Now much more involved than the standard topics – Finance and Property, Litigation, Testamentary
- Now increasingly also seeing issues around Health and Welfare issues: social media, care and accommodation, contact with others, sex and more
- This impacts upon: evidence gathering, instructing experts and the costs that it adds to claims

Mental Capacity – Obtaining H&W Capacity Assessments Approach of Court of Protection



- **Re ACC & Others [2020] EWCOP 9 – HHJ Hilder**
- **Para 54.6**
- *“A property and affairs deputy’s authority relates only to property and affairs; it does not encompass seeking advice on welfare issues. It extends no further than meeting the deputy’s responsibility to draw to the court’s attention that there is or may be a welfare issue for determination be seeking directions as to how such (potential) issue may be addressed. Without a successful application being made and granted, the deputy proceeds at risk as to costs.”*
- H&W capacity assessments can include care / support, residence, contact with others, social media / internet, sex, contraception, medical treatment etc

Obtaining H&W Capacity Assessments - Approach of Court of Protection



Example 1 – 25.09.2020

“It is declared pursuant to Section 15 of the Mental Capacity Act 2005 that:

1. AR lacks capacity to make decisions as to his internet and social media access;
2. It is lawful and in AR’s best interests for FATCL to convene a best interests meeting to determine AR’s best interests in respect of his access to the internet and social media;
3. It is lawful and in AR’s best interests for FATCL to alert the local authority in the event that the internet and social media plan fails to mitigate the risks posed to AR by others;
4. It is lawful and in AR’s best interests for FATCL to expend AR’s funds in respect of paragraphs 2, 3, 5 and 6 of this order.”

Obtaining H&W Capacity Assessments - Approach of Court of Protection



Example 2 - 27.11.2020:

“In light of the decision in Re ACC, JDJ and APP [2020] EWCOP9, the deputy is specifically authorised to instruct Dr Tracey Ryan-Morgan, Consultant Clinical Neuropsychologist, to undertake mental capacity assessments in respect of various health and personal care matter in relation to KF”

Obtaining H&W Capacity Assessments - Approach of Court of Protection



Example 3 – 15.05.2021:

“The Deputy is authorised, with retrospective effect as necessary, to instruct Foot Anstey LLP to advise and assist in relation to health and welfare issues concerning NH, including authorisation of deprivation of liberty and safeguarding matters(.....this provision does not extend to the issue or conduct of proceedings in respect of health and welfare issues, or limit the Deputy’s general authority to seek directions from the Court of Protection in respect of welfare issues.)

The Deputy is authorised to obtain Counsel’s opinion (including by conference, and including paying the costs of attendance at such conference by Anita Pascoe of West Country Case Management) on matters relating to NH’s health and welfare, and to his property and affairs....”

Obtaining H&W Capacity Assessments - Approach of Court of Protection



Example 4 – 05.06.2021

“The court considers that the primary responsibility of the property and affairs deputy in the situation as described in the application is to alert the bodies with statutory responsibilities – here the responsible social services authority which appears to be East Sussex County Council, so that they can take appropriate action.

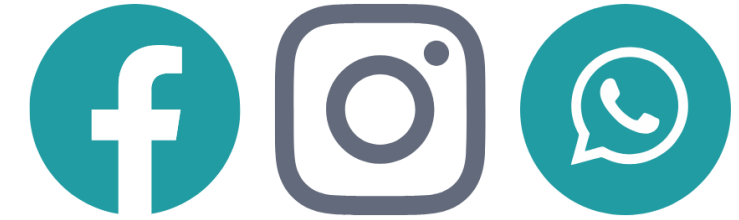
If a statutory body were not to act on its statutory responsibilities, the property and affairs deputy should draw its concerns to the court’s attention by way of COP9/COP24 so that the court can take action.....

The deputy is authorised to attend and participate in any meetings concerning AH that it considers in the best interests of AH to do so.....

Within 28 days of service of this order on the, East Sussex County Council.....is ordered to send a report to the court, copied to the deputy, under section 49 Mental Capacity Act responding to the deputy’s concerns.....”

H&W Capacity

– Internet / social media



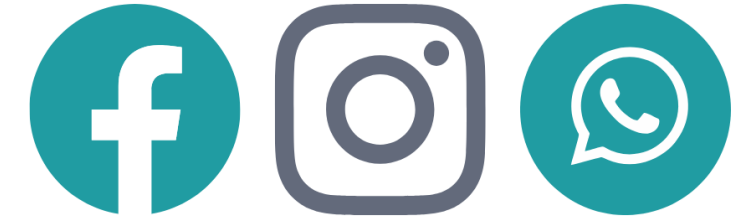
Re A (Capacity: Social Media and Internet Use : Best Interests) 2019 EWCOP 2;
Re B (Capacity : Social Media : Care and Contact) 2019 EWCOP 3

“...there is a risk that if social media use and / or internet use were to be swept up in the context of care or contact, it would lead to the inappropriate removal or reduction of personal autonomy in an area which I recognise is extremely important to those with disabilities”

“I am conscious that a determination that a person lacks capacity to access and use the internet imposes a significant restriction upon his or her freedom.”

H&W Capacity

– Internet / social media as an example



The relevant information P needs to be able to understand, retain, use and weigh are:

1. Information / images you share online can be shared more widely by people you don't know.
2. It is possible to limit the sharing of personal information by using privacy settings.
3. If you place rude / offensive material online, people may be upset / offended
4. Some people who communicate with you online may disguise / lie about who they are.
5. Some people who communicate with you online may pose a risk to you / exploit / take advantage of you (sexually, financially, emotionally, physically)
6. Sharing rude / offensive images / material may be a criminal offence

H&W Capacity

– Internet / social media - GDPR



Use of Spyware for Safeguarding under GDPR

1. The general authority of a P+F Deputy does not extend to H+W decisions
2. Age of consent for online activity in the UK is 13 years – taking monitoring action without clear evidence on capacity on those issues should not be taken.
3. Spyware constitutes personal data under the GDPR and DPA.
4. If the Deputy makes this BI decision, they are the Controller + need a valid legal basis for processing P's personal data
5. If P has capacity then they must provide consent (free and unambiguous)
6. If P lacks capacity then Deputy would need an Order to establish processing personal data was necessary to comply with a legal obligation
7. Can only rely on necessity for the protection of the vital interests of the data subject on grounds of life / death
8. Documentation / compliance records incl. processing arrangements with carers / CM

H&W Capacity

– Sex



A Local Authority v JB [2021] UKSC 52

- Consent to or engage in sexual relations?
- Roberts J held at first instance that for the purposes of the MCA, relevant information does not include information concerning consent of the other party.
- Court of Appeal disagreed. Relevant information includes that the other person must have capacity and consents before and throughout the sexual activity.
- Matter then went to the Supreme Court
- The reasonably foreseeable consequences of a decision include consequences to others.
- “Although the Court of Protection’s principal responsibility is towards P, it is part of the wider system of justice which exists to protect society as a whole”.
- JB not in a relationship so Court looked at a generalised forward-looking evaluation of sex with any male.
- Capacity to re sexual relations can be person specific eg where it involves 2 individuals who both have impairments of the functioning of their minds. Can then include different factors.

In practice?

Case Study: 'Louise'



- Accident 2012 – pedestrian v's car
- Aged 12
- Severe TBI – lengthy hospitalisation before discharge home into care of family
- Family instructed a web based solicitor – would not transfer his papers on our being instructed
- Little progress over many years
- Deputy appointed was very “old school”
- Case Manager appointed in 2018
- Case transferred to us in 2019
- Admission of liability obtained
- Starting from scratch with experts and evidentially



Louise: Case Study continued



- Current presentation
 - Walking wounded with some physical deficits, but
 - EHCP (currently to be appealed) – specialist school
 - Significant cognitive, executive and behavioural issues
 - Extremely vulnerable
 - Little statutory support at school
 - Safeguarding and DOLs issues
 - Recent sexual abuse by stepfather who then took his own life
 - Many capacity issues (see shortly)
- Proceedings recently commenced
- £10m offer on table (up from £1.5m made <6m's ago)

Louise: Case Study

Involvement of the Mental Capacity team



- FATCL appointed 10.12.2020
- Application 11.03.2021
 - Authority requested for various capacity assessments inc residence, care / support, contact with others, social media / internet, sex / relationships with others & contraception.
 - AH 16th b'day on 28.02.2021
 - Safeguarding concerns raised – AH displaying increasingly vulnerable behaviours (sexual behaviour / sharing inappropriate content online)
 - Supporting evidence from case manager / neuropsych etc.
- Order 05.06.2021 (see above – example 4)
 - No authority for Deputy to obtain capacity assessments
 - Deputy to report to LA
 - LA to file statement responding to safeguarding concerns within 28 days of service of Order
- Order 13.08.2021
 - Made at request of LA
 - Extended time for compliance to 01.09.2021

Louise: Case Study

Involvement of the Mental Capacity team



- **Order 17.12.2021:**
 - Unless LA complies with Order of 02.06.2021 by 06.01.2022 the Chief Executive / Director of SS of the LA will be required to attend a hearing.
- **Order 13.05.2022:**
 - LA has filed an assessment of capacity re care / residence and a witness statement from the social worker confirming they will provide the additional documents “as soon as possible” to comply with the Order of 02.06.2021
 - The additional documents have not been provided.
 - The Court requires further information to be satisfied no personal welfare issues arise for the court’s decision.
 - Order of 17.12.2021 discharged
 - LA to provide a further COP24 confirming whether they consider there are any personal welfare issues for the Court’s consideration by 08.07.2022
- **COP24 06.07.2022 – social worker**
 - Appends various capacity assessments. Does not consider the Court needs to make any H+W decisions
 - Agrees LA “must give active consideration to making an application” re DOLS.

Louise: Case Study

Involvement of the Mental Capacity team



- Capacity assessments of social worker:
 - Accommodation / care - AH has capacity
 - Social media / internet – AH lacks capacity
 - Unsupervised contact with others – AH lacks capacity
 - Sexual relations – AH lacks capacity
- Currently:
 - Best interests meeting re social media / internet 08.03.2022 – not concluded. Further meeting required – LA chased but still pending. AH 18 next month and still unauthorised restrictions in place re social media / internet use.
 - DOLS application yet to be made – continually assured will be made.
 - AHs treating neuropsych disagreed with Social Workers capacity assessments re accommodation / care
 - New Social Worker assessed AH as having capacity re sexual relations with her then boyfriend.
 - Subsequently agreed AH is sexually vulnerable in the community following sexual assault.
 - Nearly 22 months following March 2021 application (in KF case made application on 10.07.2020, Order 27.11.2020, detailed capacity assessments 02.03.2021 = approx. 7 months)

Louise: Case Study

Involvement of the Mental Capacity team



Deputy costs:

- Deputy application / pre appointment costs - £4,698.90
- 1st management year – 10.12.2020 > 09.12.2021 - £31,119.50
- 2nd management year – 10.12.2021 > 09.12.2022 - £30,818.15
- Current management year – 10.12.2022 > 09.12.2023 - £6,489.40 YTD
(approx. £70k pa!)

Note therefore: the costs associated with consideration of these issues within a Deputyship are very considerable indeed.

Louise: Case Study

Approach to statements/evidence



- Statements obtained from
 - Louise herself on her future wishes
 - Mother and Stepfather (latter cannot be updated)
 - School
 - Wider family
 - Case manager – to summarise input as case is very document heavy. And we have two as the workload is too great
 - May also look at Support Worker(s) in due course
- Issues identified then explored in depth – vulnerability, safeguarding etc. all goes to need for support. Def's have already suggested the “pendant alarm approach” to support...
- Statements flow – planned, headings, topics, use of examples - supplemented by MedBrief functionality, some take several “sittings”
- Separate statements around a move into more suitable accommodation
- Additional factors – two experts for Deputyship/Cop evidence. One for F&P and one for H&W

Your approach to Capacity



So...where do you start with your report?

- What are you being instructed to consider?
- Clarify your instructions
- What are the legal tests applicable?
- What evidence is available?
- What has been happening “on the ground” as in Louise’s case?
- Where will you see the Claimant?
- How much time will you need?
- Will you need to revisit?
- How do you prevent exposing yourself to criticism?
- What does this do to your costs estimate for the work?

In short – you need to be considering all these issues with those instructing you very carefully before you embark on seeing the Claimant and writing your report.

Disputes on capacity from the Solicitor's perspective?



- Beware of addressing capacity too late
- Once you have evidence from D as to retained capacity the CoP will usually refer making an order appointing a Deputy until the issue is resolved in the High Court
- Best option – early evidence then pass over to Men Cap team
- Alternatively Pt 8 Proceedings just to resolve Capacity or, if issued, split trial on Capacity issue
- Another option around assessing capacity (if experts have a long waiting list, and you don't want to be at the mercy of the time the CoP will take to make the first order) might be to have the case manager commission an assessment of Capacity



Questions

Use the Q&A functionality to write a question or comment



THANK YOU

You can watch the webinar again, along with the other NRC webinars at www.nnrc.org.uk.