NRC Medical Experts Webinar: Mental Capacity: Sexual Relations & Social Media

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SPEAKERS
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Dr Edmund Bonikowski:

Good afternoon. I'm Dr. Edmund Bonikowski, founder of NRC medical experts, specialising in neurological rehabilitation for expert witness work. We have rehab physicians, neuro psychiatrists, and nurse psychologists and have been operating for about eight years. I'm joined by my friend and colleague, Huw Ponting from Enable Law, with whom I've collaborated many times, primarily on the issue of capacity. Huw's vast experience in capacity has always been enlightening and beneficial for my work. Huw, would you like to introduce yourself?

Huw Ponting:

Thank you, Dr. Bonikowski. I'm Huw Ponting, head of the personal injury team at Enable Law. While most of my time is dedicated to litigation, I'm also a court-appointed deputy for numerous clients. Today's audience comprises primarily solicitors, case managers, and some medical experts. I hope to provide insights relevant to everyone.

Our discussion will mainly revolve around mental capacity concerning sexual relations and social media. These are challenging subjects frequently encountered in our profession. To set the stage, let's first delve into the Mental Capacity Act. While I won't dwell on every detail as many are familiar with the Act, I'll touch upon its essential principles, such as the assumption of capacity, the importance of assisting someone to make a decision, and understanding the difference between lacking capacity and making an unwise decision. It's vital to recognize that certain decisions cannot be made on P's behalf if they're deemed lacking capacity, like consenting to sexual relations or marriage.

Fluctuating capacity is a crucial aspect we'll further explore. It's noteworthy that applications to the court take months, affecting the flow of many cases. Most deputies typically oversee finance and property, but health and welfare decisions often surface. These health and welfare issues usually emerge when a deputy is involved early in litigation or when a case manager identifies issues on the ground.

Every client is unique, necessitating our continuous vigilance. It's imperative to determine at which juncture we might need to make an application, be it for a deputy or regarding specific domains of mental capacity. We'll later delve into the intersection between mental capacity, lack thereof, and deprivation of liberty.

Identifying the issues is paramount. I rely heavily on my multi-disciplinary team (MDT) for individual clients and also engage with the families. Often, families are wary of the Court of Protection and external involvement in decision-making for their loved ones.

Of course, one must bear in mind the timing, especially given the prolonged delays often experienced with the court. It's essential to anticipate when an application would be most suitable for a particular client. I'll delve deeper into the potentially inconsistent approaches by the court regarding who should initiate the process concerning health and welfare issues and determining a client's capacity in these areas.

When a client is believed to lack capacity in multiple areas, significant practical considerations arise. For adolescents, involvement from schools may be pertinent. For adults, there might be unique arrangements to consider based on their specific circumstances. Notably, some of my clients have undergone capacity assessments that spanned many hours, days, and even months. This contrasts starkly with the medico-legal process, where experts might only engage with the client for a few hours. It's also crucial to think about the implications this has on litigation. Ideally, if experts have differing opinions on capacity issues, having those issues resolved on the ground can provide the High Court with a clearer picture, potentially cutting through the noise created by conflicting expert opinions.

In terms of health and welfare issues, determining who will commission the capacity assessment is crucial. The decision in "Re ACC" was a game-changer, reinforcing that a property and affairs deputy's authority is restricted solely to property and affairs, excluding advice on welfare matters. Any deputy investigating these issues without first turning to the Court of Protection risks not recovering their costs.

I've provided four examples that illustrate the Court of Protection's varied approach to who they deem responsible for overseeing the investigation into these different domains:

- Regarding internet and social media access, the court, upon application, emphasized that it's primarily the duty of the State Trust Corporation, instructing the deputy to hold a best interest meeting.
- In another instance, the deputy was authorized to employ a clinical neuropsychologist to execute mental capacity assessments concerning health and personal care.
- Similarly, another deputy was authorized to engage a particular LLP to offer advice on health and welfare issues.
- Contrastingly, in another case, the court determined that local authority bodies holding statutory responsibility should handle health and welfare issues and subsequently commission the necessary assessments.

Next, I'd like to focus on the challenging domains of sexual relations and social media. Fortunately, the court has provided ample guidance on these topics. Focusing on sexual relations, the landmark cases, particularly "Re A B" and the Supreme Court decision in "JB", have provided much clarity. The "JB" ruling

firmly established that the test for assessing a person's (referred to as "P") capacity in this realm isn't about their choice of partner but their ability to decide to engage in sexual relations. Within the "JB" considerations:

The partner (not "P") should be capable of providing consent both prior to and during the sexual act. This raises the question: what if the partner also has cognitive challenges?

- "P" must comprehend the sexual nature and mechanics of the act.
- "P" should be able to provide or withdraw consent at any point.
- They must understand potential consequences, such as pregnancy, and recognize health risks and preventative measures.

The "JB" case has sparked extensive online discourse, offering more insights into its implications.

So, the focus is very much on a generalized test, not specific to a particular sexual partner. However, exceptions recognized by the court include cases where both parties have cognitive impairment or where it involves a couple in a long-standing relationship, one of whom has an impairment of the mind or brain, such as traumatic brain injury or dementia. Here, a person-specific assessment may differ from a general one. Factors like pregnancy may not be relevant in same-sex couples, and the risk of STIs might not apply in long-term, monogamous relationships.

If "P" (the person in question) is determined to lack capacity to engage in sexual relations, it's crucial to note that others cannot make a "best interest" decision on their behalf. Furthermore, if P is deemed to lack capacity, local authorities have a duty to supervise P, ensuring that the opportunity for sexual relations is removed. The Court has specified that moral or emotional aspects, as well as an understanding of child-rearing, risks to P during pregnancy, or future children, and the potential limitations on sexual partnerships should not be considered as part of the capacity assessment.

Another complex area is the facilitation of commercial sexual services for P by deputies or case managers. It's important to clarify that directly facilitating P's access to sex workers is unacceptable and potentially criminal. However, if a case manager facilitates an environment where a relationship might naturally form, such as attending a nightclub, and if it happens as an unintended consequence, that is permissible.

Moving on to the domain of social media and the internet, the landmark case here is "A." This decision recognized the significance of the internet and social media for disabled individuals while acknowledging potential risks. It underlines that determining an individual's incapacity regarding internet use is a serious restriction on their freedoms.

Practical guidance from this case emphasized the importance of understanding that shared information can be disseminated widely, that one can limit sharing through settings, and that offensive or inappropriate content can be harmful or illegal. It also notes the risks of interacting with unknown individuals online.

The judge in the "A" case also restated tests related to assessing capacity concerning residency, care, contact with others, and sexual relations, making this judgment an invaluable resource for practitioners.

Now, let's delve into a case study that brings these principles to life:

Louise suffered a traumatic brain injury in a pedestrian-car accident in 2012 when she was 12. After a lengthy hospital stay, she was discharged without subsequent rehabilitation. The family first hired a web-based solicitor, who made little progress on the case, even regarding the admission of liability. Upon changing representation in 2019, the first task was to address liability, which was ultimately admitted.

So Louise, in some respects, is remarkable, but in other respects, not she is quite significantly impaired cognitively. Physically, she has very few deficits. She has been attending a specialist school, facing challenges involving the EHCP which the deputy and case manager have to address. I've highlighted significant cognitive, executive, and behavioural issues. Louise remains extremely vulnerable, particularly with social media use. She used to play a game with an online chat function and would trust individuals based on their word. She got into difficulty several times, once mistaking a middle-aged man in a distant country for a 13-year-old boy. The school hasn't always been as supportive as they should be, and there are several other safeguarding and deprivation of liberty concerns.

It was discovered she was abused by her stepfather, previously perceived as supportive. He later took his own life, causing Louise internal conflict. She feels guilty, thinking her reporting of the abuse led to his death, but she also recognizes what he did was wrong. This scenario presents complex challenges for the case manager and touches on various aspects of capacity we discussed.

The claim's value is significantly more than 10 million. Concerning the Court of Protection's intervention, they looked into health and welfare issues, prompted by her nearing 16th birthday and her desire for a sexual relationship. This led to an urgent application. The Court's response took time, however.

The Court's proceedings have been extensive. By October 2023, Louise was determined to lack capacity in certain areas: social media use, unsupervised contact, and sexual relationships. But she was found capable in decisions about accommodation and care. Numerous discussions continue about her needs and required support.

From a litigation standpoint, managing 12 experts is challenging, especially as Louise can only tolerate one medico-legal appointment every two weeks. This process, of which capacity assessment is a part, takes considerable time.

In this case, having the local authority lead, as decided by the Court of Protection, may not have been the best choice. If the deputy had been in charge, we might have seen quicker progress. When instructing experts, it's essential to be clear about the capacity areas to be reviewed. Many medico-legal experts often address capacity towards the report's end, which can be inadequate. When it comes to sharing Court of Protection material in high court litigation, confidentiality issues arise.

For Louise's case, the High Court permitted us to employ two Court of Protection experts – one from finance and affairs, the other from health and welfare.

In wrapping up, capacity is a complex subject and affects professionals like experts, case managers, or solicitors in nuanced ways.

Dr. Edmund Bonikowski:

Thank you very much indeed for that whistle-stop tour through an extremely complicated domain. Every time I hear talk about capacity, it seems to grow more intricate and alarming. We've had relatively few questions, and we're unsure why. Perhaps it's the challenging nature of the topic. I'll start with a few quick ones. Anonymous asks, "If a client has been assessed as having fluctuating capacity, does a capacity assessment need to be carried out for each decision?"

Huw Ponting:

Not quite. We always assume capacity unless there's evidence to the contrary. So, I would say no. But it's essential to note that every client is different. For a client with fluctuating capacity, there should be substantial documentary evidence to help guide decisions. A common query is whether it's appropriate for someone with fluctuating capacity to have a deputy. It varies with each client, but often, having a deputy is suitable. The deputy's role might be more hands-off in such cases, supporting the client in decision-making when they have the capacity. It's a multifaceted area.

Dr. Edmund Bonikowski:

Janet asks, "Thank you for the talk. I was keen to know who initiates the Court of Protection process and how a deputy for health and welfare is introduced, especially when there's resistance."

Huw Ponting:

Firstly, health and welfare deputyships are rare. Typically, the court prefers a property and affairs deputy, addressing health and welfare issues as they emerge. Remember, a property and affairs deputy has no power to make health and welfare decisions. Health and welfare deputyships are exceedingly uncommon. Most cases involve a property and affairs deputy addressing health and welfare issues on a case-by-case basis, seeking the court's guidance.

Dr. Edmund Bonikowski:

Mr. Hale inquires, "Are there guidelines on assessing fluctuating capacity due to drug use? For instance, could someone be considered capable when sober but not when under the influence or craving drugs?"

Huw Ponting:

Good question. In short, yes, it's plausible that someone might be deemed capable when sober but not when under the influence or experiencing severe withdrawal symptoms.

Dr. Edmund Bonikowski:

Any resources people can reference?

Huw Ponting:

In such situations, involving the local authority might be beneficial. Assessing capacity would require professionals like clinical or neuropsychologists to observe the individual in different states – sober and otherwise – and determine capacity in those contexts. If they lack capacity and engage in risky behaviours, it's a challenging situation. But, likely, this is where you'd want local authority involvement.

Dr. Edmund Bonikowski:

It underscores the intricacy of the issue. I wonder, are there standardized approaches or tools for assessing capacity? And regarding expertise, how familiar should one be with the domain they're assessing?

Huw Ponting:

While there isn't a definitive list, emerging case law is providing guidance. For instance, Mr. Justice Cobb's judgment regarding social media and sexual relations offers insights. However, when stepping outside one's expertise, it's crucial to acknowledge limitations. In medico-legal settings, asserting expertise in unfamiliar domains can be risky. It's vital to recognize when a situation requires specialized knowledge and when a witness is vulnerable. Courts should give special consideration to how vulnerable witnesses are handled.

Dr. Edmund Bonikowski:

From your experience, which professions are best suited for capacity assessments? Does the court prioritize certain opinions? For instance, would a social worker's view hold more weight than a psychologist's?

Huw Ponting:

Individual judges might have preferences, but these aren't explicitly documented. It depends on the situation. For instance, a case manager with a social work background once told me that she had conducted capacity assessments incorrectly before her case manager role. My personal hierarchy would place neuropsychologists and neuropsychiatrists, especially when mental health is a factor, at the forefront. However, some experts might be told not to consider capacity if others have addressed it. It's vital to avoid "dabbling" in unfamiliar areas.

Dr. Edmund Bonikowski:

I've often come across instructions that specifically ask us not to provide comments. There seemed to be a brief interruption in our connection earlier. Could you please refer back to the slide discussing 'what is excluded'? It mentioned understanding the responsibilities of caring for a child, could you provide more details?

Huw Ponting:

Certainly. The context of that statement relates to sexual relations. The assessment primarily looks at the basic understanding of the act, rather than its potential consequences. While some prospective parents may contemplate the responsibilities of raising a child post-birth, others might not. This test doesn't require an individual to have a deep understanding of post-birth responsibilities. Furthermore, it doesn't account for the potential risks tied to pregnancy.

Dr. Edmund Bonikowski:

But just to dig into that a little more, because I find it quite confusing. So if somebody with a significant cognitive impairment has sexual relations, and we say they have capacity to do that, and then they have children whom they cannot themselves look after. Is that a legitimate part of the claim? To say, well, they're they have capacity to have children, they're entitled to have children. And just because they can't look after them, doesn't mean say they shouldn't. Does it go to the same point?

Huw Ponting:

Yeah, you're quite right. So if a client is going to require a significant uplift in their care and support, because they have a child, and they've been deemed as having capacity to have sexual relations And then that is something that the defendant is just going to have to compensate.

Dr Edmund Bonikowski

It's helpful just to be able to have this kind of direct dialogue, which I appreciate there are sort of probably several 10s of other people watching. But for me, it's great to be able to tease out these issues directly with you as one expert to an expert in your professionals in the legal sector, which we're just about to wrap up here.

In one of your cases, you mentioned the involvement of a web-based solicitor. This reminds me of a concerning trend I've noticed in my clinical practice. A particular instance that stands out involves an NHS Trust with which I'm associated. An online solicitor firm approached this Trust, promoting their services with literature, and proposed to distribute it to all patients with acquired brain injuries. The Trust, without due consideration, agreed.

It only came to light when Headway presented the material to me for feedback. I was taken aback. Our Trust management had sanctioned this without consulting specialists, and our clients were receiving, in many cases, unsuitable advice. This raises alarm about such unchecked practices continuing. Fortunately, organizations like Headway are vigilant in these matters, flagging concerns to specialist clinicians like us.

I want to emphasize the importance of due diligence. Our clients might not always have immediate access to the level of expertise required, and I've observed such lapses multiple times in recent years.

Huw Ponting

Now, it's, it's a real challenge, I think for families. And some are relatively sophisticated in the due diligence that they do before they instruct a solicitor and others less so. And that could obviously have a profound impact then on outcome.

Dr Edmund Bonikowski

Thank you very much for your contribution today. It has been excellent. As always, I'm sure everybody else would agree with that. We're getting some very positive comments coming through. So thank you for your

time and your consideration. I hope you've all found that helpful. Thank you all for attending. Do come to our next webinar, which is on functional neurological disorder if you find that interesting. And until then, I wish you all well for the evening.