



The Mental Capacity Act 2005

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(A) THE MENTAL CAPACITY ACT 2005 IN PRACTICE

(i) **Substantive issues**

1. Assessments of capacity

- a. No requirement for doctor or professional
- b. Assessment by person making the decision
- c. By a professional if complex/disputed decision or assessment is legal requirement
(Code at paras. 4.42, 4.53-4.54)
- d. Confusion in practice

2. Refusal of assessment of capacity

- a. If the person is capable and refuses consent or is incapable and resistant, cannot be forced to participate in the assessment (Code para 4.59)
- b. Can use persuasion
- c. Could resort to use of Mental Health Act but need to meet the requirements – simply refusing an assessment of capacity is not sufficient grounds for MHA assessment

3. Application of capacity test by Court

- a. *Saulle v Novet* [2007] EWHC 2902 (QB)
- b. *Local Authority X v MM and KM* [2007] EWHC 2003 (Fam)

4. Best interests checklist

- a. Difficult cases (paras. 5.62-5.69 of Code)
- b. *Westminster City Council v IC and others* [2007] EWHC 3096 (Fam) at 125-134 (before MCA in force)
- c. Third party interests (paras. 5.47-5.48 of Code)
- d. Life sustaining treatment (paras. 5.29-5.36 of Code)

(ii) **Procedural Issues**

5. Court of Protection Rules

- a. Based on Civil Procedure Rules
- b. Terminology

6. Serious medical treatment (PD 9E)

a. *Definition*

Treatment involving providing, withdrawing or withholding treatment in circumstances where:

single treatment – fine balance between benefits to P and burdens and risks it is likely to entail;

choice of treatments – decision is finely balanced; or

treatment, procedure or investigation proposed would be likely to involve serious consequences for P.

*Serious consequences are those which could have a serious impact on P, either from the effects of treatment, procedure or investigation or its wider implications. May include those which:
cause, or may cause, serious and prolonged pain, distress or side effects;
have potentially major consequences for P; or
have a serious impact on P's future life choices.*

b. *Allocation*

- i) Proceedings must be heard in High Court by nominated Judge (including permission, directions) (PD 12A). If involves lawfulness of withholding/withdrawing ANH from person in PVS or involves ethical dilemma in untested area – must be heard by President or nominee of President.
- ii) Note the Judge to whom a case is allocated in accordance with PD12A (i.e. a serious medical treatment case or case where declaration of incompatibility sought under HRA) may determine that the matter is one which can be dealt with by a Judge other than designated High Court Judge (para. 5, PD 12A)..

c. *Procedure if urgent*

- i) If “exceptionally urgent” can go to High Court without filing application form at COP first. Will be required to issue application form at COP afterwards (PD 10B, para. 9).
- ii) If have already issued application form at COP and an urgent application needs to be made, ordinarily required to file/serve a COP9 application notice in advance but if exceptionally urgent matter, can do this later (PD10, para. 8).

d. *Parties*

- i) PD9E states organisation responsible for care and treatment should usually be named as respondent (para. 9). Does not say that P should usually be named as respondent on application form but suggests this is something to be considered

at the first directions hearing (paras. 9, 14). If urgent case, suggest P named as respondent straight away and OS invited to act/other person as litigation friend.

e. *Notice*

- i) PD10B states that the applicant should take steps to advise the respondent by telephone or in writing of an urgent application unless justice would be defeated by so doing (para. 5)

7. Allocation in cases not covered by PD 12A

- a. High Court Judge, Circuit Judge or District Judge?
- b. No published criteria
- c. Applicant can indicate in application notice that case should be dealt with by particular level of Judge (PD10A, para. 17).

8. Urgent applications (PD12B)

- a. *Practicalities of obtaining urgent hearing:*
 - i) At Archway - no urgent applications DJ;
 - ii) RCJ;
 - iii) Before Circuit Judge?
- b. *Difficulty of indicating to COP that case is urgent*
 - i) No urgent application form;
 - ii) Covering letter/telephone;
 - iii) Indicate urgent in an application notice (COP 9) (PD 10B, para. 13).

c. *When to make application*

- i) Where possible apply within court hours. If out of hours, call security office at RCJ (telephone numbers in paras. 2-3 of PD10B);

d. *Pre-issue of application form*

- i) If “exceptionally urgent” can go to Court without filing application form at COP first (although where time permits application to be in writing – on application form??). Will be required to issue application form at COP (Archway) afterwards (PD 10B, para. 9);

e. *Post-issue of application form*

- i) If have already issued application form at COP and an urgent application needs to be made, ordinarily required to file/serve a COP9 application notice in advance with evidence in support and draft order but if exceptionally urgent matter, can do this later but should provide draft order at hearing (PD10, para. 8).

f. *Notice*

- i) Applicant should take steps to advise respondent of application unless justice would be defeated if notice were given (PD10B, para. 50)

9. Semi-urgent cases

- a. No need for immediate hearing but hearing some time soon.
- b. File permission form (COP 2) (if required) /application form (COP1) and application notice (COP9) or letter indicating need for hearing/decision soonish at Archway.
- c. Delays in dealing with permission/issue/listing for hearing.

10. Permission

- a. *Required unless* applicant is:
- i) a person who lacks or is alleged to lack capacity (or if that person is not yet 18, anyone with parental responsibility¹ for him);
 - ii) the donor or donee of an LPA to which the application relates (the application to the Court must, therefore, relate to the LPA);
 - iii) a deputy for a person to whom the application relates;
 - iv) a person named in an existing order of the Court, if the application relates to the order;
 - v) the Official Solicitor or Public Guardian;
- or application concerns:
- vi) P's property and affairs save for certain applications listed in Rule 52 (which do require permission);
 - vii) A LPA which is, or purports to be created, under the Act (in other words it is not only donors or donees of a LPA who do not need permission); or
 - viii) An instrument which is, or purports to be, an EPA;
 - ix) Or where an application is made in accordance with part 10 (applications within proceedings);
 - x) Or where a person files an acknowledgement of service or notification in accordance with Part 8 or Part 9 for any order proposed that is different from that sought by the appellant.

- b. *Procedure* (rule 54 and PD8A):
- i) The applicant must file the permission form (COP2) and must file with it the following documents:
 - (1) A draft of the application form using form COP1;
 - (2) An assessment of capacity form using form COP3¹.
- c. *No need to complete annexes to COP1*, but can do (PD8A, para. 7).
- d. *Inability to complete assessment of capacity*
- i) File a witness statement if unable to get assessment of capacity form completed explaining why, attempts made and why the person knows/believes person lacks capacity in relation to subject of proposed application (PD8A, para. 7).
- e. *Factors to be considered by Court in deciding whether to grant permission*(s.50(3))
- i) the applicant's connection with the person to whom the application relates;
 - ii) the reasons for the application;
 - iii) the benefit to the person to whom the application relates of a proposed order or directions; and
 - iv) whether the benefit can be achieved in any other way.
- f. *Timescale*
- i) Decision on permission application within 14 days (could be to fix for hearing) – rule 55

¹ Not needed for applications concerned the court's powers under section 22 and 23 (powers in relation to LPAs) or Schedule 4 (EPAs) (PD8A, para. 5)

- g. *Acknowledgement notification of permission hearing*
 - i) Need to acknowledge notification in order to have a right to take part in permission hearing – rule 57

- h. *Issue*
 - i) Court will not issue application until after a grant of permission, if required (Rule 61(3) – applicant will usually need to lodge amended application/further documents

11. Parties to proceedings

- a. *Persons named in application form:*
 - i) Distinction between respondents (reasonably believes ought to be heard) and persons to be notified (i.e. interest only in knowing about proceedings) (Rule 63);
 - ii) PD9B deals with who ought to be notified – includes persons/bodies reasonably think ought to be heard e.g. organization responsible for care of P where application relates to provision/withdrawal of treatment/accommodation from P.

- b. *Parties*
 - i) Unless otherwise directed, parties are the applicant and respondent who had filed an acknowledgment of service (COP5) in respect of application form (Rule 73).

- c. *P*
 - i) P must not be named a respondent unless the court orders otherwise (Rule 73(4));
 - ii) But P required to be notified of certain matters if not made a party e.g. issue of application form, date of hearing for disposing of application (Part 7 of Rules);

- iii) If P not a party, bound by orders as if he/she were (Rule 74);
- iv) Court has discretion to hear P even if not a party (Rule 88).

12. Section 49 reports:

- a. Court can require Public Guardian or Court of Protection Visitor to report to it on such matters as Court directs;
- b. Court can also require local authority or NHS body to provide report from officer or such other person as the authority/NHS body considers appropriate;
- c. Rules 117-118 and PD14E gives detailed guidance on duties of person reporting, application to put questions to person reporting and contents of report and draft directions for order requiring a report;
- d. Note also CPR type controls on expert evidence (Part 15 of Rules).

13. Procedural guidance in pre-MCA cases

- a. Charles J in *NA v MU* (5th June 2007) unrep. Suggests parties should prepare position statements identifying
 - i) the approach in law to be taken,
 - ii) the relevant issues and thus the relevant risks, and how they maintain they could or should be dealt with, and
 - iii) the factual issues they maintain should be determined and the witnesses who should be called as to them.

B. WHAT ROLE IS THERE FOR THE INHERENT JURISDICTION NOW?

14. Vulnerability and Munby J in *A Local Authority v (1) MA (2) NA and (3) SA* [2005] EWHC 2942:

“...it can be seen that the inherent jurisdiction is no longer correctly to be understood as confined to cases where a vulnerable adult is disabled by mental

incapacity from making his own decision about the matter in hand and cases where an adult, although not mentally incapacitated, is unable to communicate his decision. The jurisdiction, in my judgment, extends to a wider class of case.

It would be unwise, and indeed inappropriate, for me to attempt to define who might fall into this group in relation to whom the court can properly exercise its inherent jurisdiction. I disavow any such intention. It suffices for present purposes to say that, in my judgment, the authorities to which I have referred demonstrate that the inherent jurisdiction can be exercised in relation to a vulnerable adult who, even if not incapacitated by mental disorder or mental illness, is, or is reasonably believed to be, either (i) under constraint or (ii) subject to coercion or undue influence or (iii) for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent” (paras. 76-77)

15. Otherwise disabled category: overlap with MCA. Whether impairment or disturbance in functioning of mind or brain to be given narrow definition? Behavioural difficulties?

16. To what extent are the categories of people Munby J is referring to, namely, those “(i) *under constraint or (ii) subject to coercion or undue influence or (iii) for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent*” covered by the definition of incapacity in the Act?:
 - a. **S. 2 – impairment** or disturbance in functioning of mind or brain. Note in *Re MB* – Lady Justice Butler Sloss also referred to “impairment or disturbance of mental functioning. This has been interpreted to cover:
 - i. **Organic disorder**: brain damage
 - ii. **Non-organic disorder**: personality disorder
 - iii. **Phobia**: *Re MB* concerned fear of needles “*Fear may paralyse the will and thus destroy capacity*”

- iv. **Misconception of reality:** *Mrs T* (Charles J [2004] EWHC 1279) – self harm by cutting – thought blood was evil. Found to lack capacity because misconception of reality was disorder of the mind.
- v. **Temporary lack of capacity:** *Re T* – CA – [1993] Fam 95 – Woman 34 weeks pregnant in car accident, emergency caesarean and refusing blood transfusion. Held entitled to override her refusal of treatment because she had not made a genuine decision due to her medical condition and because she was subject to undue influence of mother, a Jehovah’s Witness. Lord Donaldson stated:
 1. capacity may be deprived or reduced by temporary factors such and unconsciousness, confusion, effects of shock, severe fatigue, pain or drugs being used in treatment
 2. incapacity may be temporary (s. 2(2) of MCA)
 3. Code refers to physical or medical conditions which cause confusion, drowsiness or loss of consciousness, delirium, concussion and symptoms of alcohol or drug abuse (para. 4.12).
- vi. **Undue influence:** will overborne by others – not a true decision (*Re T* – Lord Donaldson). Butler Sloss LJ – issues of capacity and genuine consent/refusal are separate but there may be overlap e.g. someone in weakened condition can be subject to undue influence when would not have been if fit. Staughton LJ – says cases on undue influence in law of property/contract are not applicable re. consent to treatment.

17. Munby J’s categories:

- a. **Other disabling circumstances** – many actually lack capacity under Act – disturbance/impairment in functioning even if temporary makes someone unable to make decision

- b. **Undue influence/coercion cases** – probably not covered MCA – not satisfy diagnostic test. Although note can be overlap with temporary factors making someone incapable. Suggested this category ought to be recognised as separate basis for court intervention. Well established relief from court at law/equity in relation to doctrine undue influence in contracts, set aside contract– related concept;
- c. **Misinformation/deception.** Links to undue influence. Another equitable doctrine – catching bargains and unconscientious bargains “*whenever one party to an transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect ability to conserve interests and another unconscientiously takes advantage of the opportunity*” transaction can be set aside. Analogous concept developed this jurisdiction.
- d. **Constraint** – incarceration or limits on freedom. Habeas corpus is a flexible doctrine and would be legal basis for intervention: *Re C (Mental Patient: Contact)* [1993] 1 FLR 940.

Adopting Munby J’s approach: what are the proper limits?

- 18. In SA – orders made to ascertain true wishes/whether SA able to exercise free will (i.e. find out true state of affairs) and orders designed to ensure decision taken is what SA wants (para. 126).
- 19. Justifies making of orders which enable person to make own decision?
- 20. Use to take steps to investigate whether a person has capacity.

Where to bring vulnerability cases?

- 21. Court of Protection (COP) is a superior court of record (s. 45(1)) which means that nothing is beyond its jurisdiction unless expressly shown to be so. It has same

powers, rights, privileges and authority as High Court (s. 47(1)). Hence, such cases can be dealt with in inherent jurisdiction of COP – would probably want to go to High Court in such a case in any event.

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