

The functional model of capacity - some thoughts from England & Wales

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Caveats

- ▶ A personal view only
- ▶ NOT asserting that the law or approach in England & Wales is perfect

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The concept of capacity in the Mental Capacity Act 2005

Section 1: The Principles

The following principles apply for the purposes of this Act.

- (1) A person must be assumed to have capacity unless it is established that he lacks capacity.
- (2) A person 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
- (3) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

[...]

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The statutory test (1)

Section 2: People who lack capacity

- (1) For the purposes of this Act, a person lacks capacity **in relation to a matter** if **at the material time** he is **unable to make a decision** for himself in relation to the matter **because of an impairment of, or a disturbance in the functioning of**, the mind or brain.

Section 3: Inability to make decisions

- (1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable
 - (a) to **understand** the information relevant to the decision,
 - (b) to **retain** that information,
 - (c) to **use or weigh** that information as part of the process of making the decision, or
 - (d) to **communicate his decision** (whether by talking, using sign language or any other means).

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The statutory test (2)

▶ Key points:

- ▶ Not status based (at least in principle)
- ▶ Time- and decision- specific

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Mental capacity in action (1)

- ▶ *Barnet Enfield And Haringey Mental Health NHS Trust & Anor v Mr K & Ors [2023] EWCOP 35* - treatment of infected venous leg ulcers of man with long-standing mental health condition

Mr R, the Manager at B Home has provided an alarming level of detail of concern. He states that in his opinion Mr K's wounds are severely infected and malodorous. He says "the ankle bone is visible and seriously infected skin is hanging down his leg". He thinks the wounds have not been dressed [for a month]. He states that Mr K screams in pain, mainly at night. Notwithstanding this, Mr K refused assistance from B Home staff and from tissue viability nurses and will "never allow anybody to touch his leg and will retaliate with force if someone tries". Paramedics have been called in May and June but Mr K refused to engage.

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Mental capacity in action (2)

I accept the written evidence of Dr M following his recent assessment that Mr K is unable to weigh the relevant information in respect of the treatment for his ulcers. This is largely because of his paranoid preoccupations and obsessions. Mr K is reported to be screaming at night in pain, yet will not permit a tissue viability nurse to assess his malodorous wounds. [...] His ability to understand and weigh the necessary relevant information has been undermined by his irrational preoccupations and his distrust of professionals. The 'matter' before him is the urgent investigation, assessment and treatment of his ulcers. The relevant information plainly includes the facts that: i. his wounds are in a very poor state; ii. his ulcers have not been assessed for weeks; iii. there is a high risk the wounds are infected; iv. there is a need for urgent assessment and treatment; v. without this he is at risk of severe infections which may compromise his venous and arterial systems and may lead to the necessity of amputation (if that is even possible given his cardiac presentation)

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The functional test and the CRPD (1)

- ▶ CRPD itself is silent about **mental** capacity - solely focused on **legal** capacity
- ▶ CRPD Committee challenge to mental capacity in General Comment 1 (and following) on the basis of concerns about specific practices - e.g. involuntary psychiatric treatment.
- ▶ BUT
 - ▶ Do those concerns merit abolition of a concept that is equally relevant following a car crash?
 - ▶ Does a functional concept of mental capacity represent a legitimate **response** to a situation, rather than a tool for removing rights?

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The functional test and the CRPD (2)

- ▶ “with appropriate safeguards, and a rights emphasis, there is no ‘discriminatory denial of legal capacity’ necessarily inherent in a functional test – provided the emphasis is placed principally on the support necessary for decision-making and that any appointment is for the purpose of protecting the person’s human rights.”

Australian Law Reform Commission:
Equality, Capacity and Disability in
Commonwealth Laws (2014)

- ▶ CRPD Committee Concluding Observations on Australia 2019:
“Australia should implement a nationally consistent supported decision-making framework, as recommended in the Australian Law Reform Commission’s 2014 report”

To learn more: a reading list about legal
and mental capacity



Thank you!

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