

Calibrating capacity for care providers

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Consideration of capacity as a statutory requirement

- Health and Social Care Act 2008 (Regulated Activities) Regulations 2014
 - Regulation 9 – person-centred care
 - Regulation 11 – consent, or MCA 2005
 - Regulation 13 – key (for here) deprivation of liberty
 - Regulation 17 – good governance
- CQC cracking down: £8,000 fixed penalty notices against NHS Trust for breaches of Regulation 11 and ‘learning from safety’ [incident report](#) January 2023
- And Human Rights Act 1998 in many contexts: Article 8 ECHR above all

When to think about capacity (1)

- **Principle 1:** A person must be assumed to have capacity unless it is established that he lacks capacity.

The presumption of capacity is important; it ensures proper respect for personal autonomy by requiring any decision as to a lack of capacity to be based on evidence. Yet the section 1(2) presumption like any other, has logical limits. When there is good reason for cause for concern, where there is legitimate doubt as to capacity [to make the relevant decision], the presumption cannot be used to avoid taking responsibility for assessing and determining capacity. To do that would be to fail to respect personal autonomy in a different way.

Royal Bank of Scotland Plc v AB [2020] UKEAT 0266_18_2702.

- The key: a presumption does not mean a licence not to investigate

When to think about capacity (2)

Principle 3: A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

If P has capacity to make a decision then he or she has the right to make an unwise decision and to suffer the consequences if and when things go wrong. In this way P can learn from mistakes and thus attain a greater degree of independence.

A Local Authority v JB [2021] UKSC 52

Capacity: the three questions

(1) Is the person able to make a decision? If not:

(2) Is there an impairment or disturbance in the functioning of the person's mind or brain? If so:

(3) Is the person's inability to make the decision because of the identified impairment or disturbance?

(I.e. please don't keep following what the Code says: it is **WRONG**: *A Local Authority v JB* [2021] UKSC 52)

For more: [Capacity – the key points – Mental Capacity Law and Policy](#)

Capacity assessment

- Be careful with your language:
 - Assessment is the process of thinking
 - You assess for as long as you need to be able to reach a conclusion
 - Determination (or some other word) is the process of writing up your thinking
 - Please, please don't say “MCA assessment” for the recording of your thinking

Capacity determinations

- Nb, outside DoLS, the MCA 2005 itself does not require capacity determinations to be written up
- The [MCA Code](#) doesn't either:

“Assessments of capacity to take day-to-day decisions or consent to care require no formal assessment procedures or recorded documentation” (para 4.60)

- Story doesn't end there, but that is the starting point

How many capacity assessments do you need?

- No statutory requirement to record capacity in 2014 regulations, but CQC's 2015 [provider guidance](#) (to which you have to have regard) require
 - “A record must be kept of all assessments, care and treatment plans, and decisions made by people who use the service and/or those acting on their behalf. See Regulation 17 (Good governance)” (accompanying Reg 9(3)(d)) and
 - “Decisions made on behalf of a person who lacks capacity must be recorded and provide evidence that these have been taken in line with the requirements of the Mental Capacity Act 2005 or, where relevant, the Mental Health Act 1983, and their associated Codes of Practice” (accompanying Reg 17)
- This is not the same as completing endless capacity assessments

How many capacity assessments do you need?

- The courts do not salami-slice down into every conceivable decision that a person could need to take
 - Rather they look at the key areas, e.g. residence, care, contact, social media / internet (where relevant) medical treatment, consent to confinement (not the same as care / residence)
- The courts want to see assessments conducted by those who know the law, and the person
- If that's what the courts want, shouldn't that be what care providers are doing – which may mean a 'core' assessment to which others make reference
- And remember whose responsibility it is – e.g. medical treatment is the responsibility of the prescriber
- Keeping under review – remember [fluctuating capacity](#) is a 'last resort'

If you are writing it up

Given the number of capacity assessments that are required to be carried out on a daily basis in multiple arenas, it would obviously be too onerous to require a highly detailed analysis in the document in which the capacity decision is recorded. However, a careful and succinct account of the formulation of the matter to be decided and the formulation of the relevant information in respect of that matter, together with a careful and concise account of how the relevant information was conveyed and with what result, would seem to me to be the minimum that is required.

North Bristol NHS Trust v R [2023] EWCOP 5

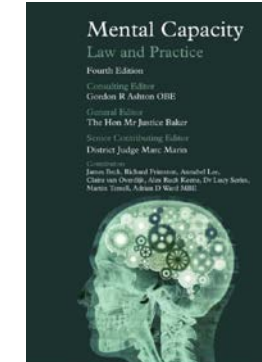
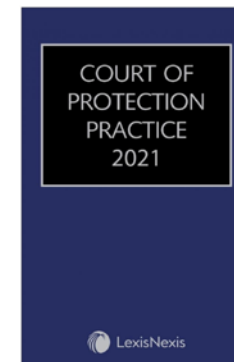
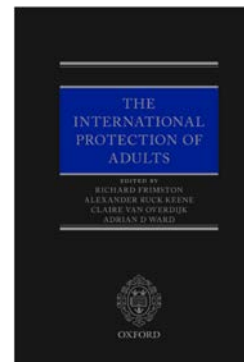
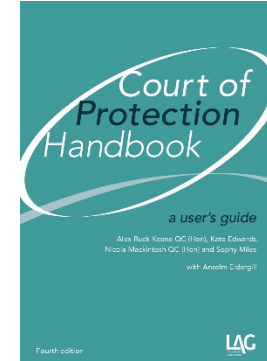
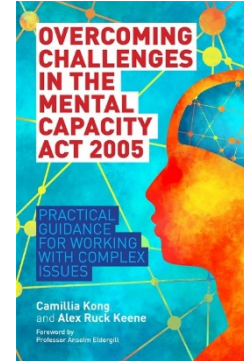
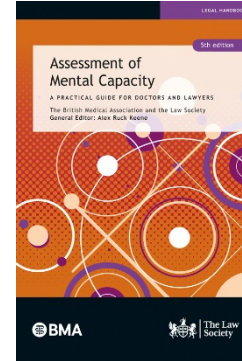
Three resources which may be of assistance

- Wellcome-funded work on contested capacity assessment: <https://capacityguide.org.uk/>
- 39 Essex Chambers guidance note on [carrying out and recording capacity assessments](#)
- 39 Essex Chambers guidance note on [relevant information for different categories of decision](#)



More resources

- [39 Essex Chambers Mental Capacity Law Resources](#)
- [Mental Capacity Law and Policy](#)
- [MCA Directory | SCIE](#)
- [Mental Health Law Online](#)
- [Open Justice Court of Protection](#)



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