

5th edition

# Assessment of Mental Capacity

A PRACTICAL GUIDE FOR DOCTORS AND LAWYERS

The British Medical Association and the Law Society

General Editor: Alex Ruck Keene

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**The Law Society** is the independent professional body for solicitors. It exists to be the voice of solicitors, to drive excellence in profession and to guard the rule of law. The Law Society's Mental Health and Disability Committee reviews and promotes improvements in law, practice and procedure for disabled people, including those who have mental health needs, and people in vulnerable circumstances.

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*Family relationships*

Nothing in MCA 2005 permits a decision to be made on someone's behalf:

- consent to marriage or a civil partnership;
- consent to have sexual relations (see further Chapter 12);
- consent to a decree of divorce on the basis of two years' separation;
- consent to the dissolution of a civil partnership;
- consent to a child being placed for adoption or the making of an adoption order;
- discharge parental responsibility for a child in matters not relating to the child's property; or
- consent under the Human Fertilisation and Embryology Act 1990<sup>64</sup>

*Mental Health Act matters*

Where a person who lacks capacity to consent is detained in hospital under the MHA 1983 and is being given medical treatment under the provisions of MCA Part 4, nothing in MCA 2005 authorises anyone to:

- give the person treatment for mental disorder; or
- consent to the person being given treatment for mental disorder<sup>65</sup>

In other words, the consent to treatment provisions and safeguards in MCA Part 4 will in principle 'trump' the provisions of MCA 2005 in relation to the consent for mental disorder of patients liable to be detained under MHA 1983.

The key aspects of the interface between mental health and mental capacity legislation are given in Chapter 17.

*Voting rights*

MCA 2005 does not permit a decision on voting (at an election for an office or at a referendum) to be made on behalf of a person who lacks capacity to vote (see Chapter 11 on questions relating to voting).

*Unlawful killing or assisting suicide*

For the avoidance of doubt, it is made clear in MCA 2005 that the Act does not affect the law relating to unlawful killing such as euthanasia, murder, manslaughter or assisted suicide.<sup>66</sup>

<sup>64</sup> Although note *Y v. A Healthcare NHS Trust & Ors* [2018] EWCOP 18; [2019] 1 All ER 1011 in which the Court of Protection held that a man's wife could sign the relevant consent form on her husband's behalf on an urgent application for authority to remove sperm following a road traffic accident.  
<sup>65</sup> MCA 2005, s.28.  
<sup>66</sup> MCA 2005, s.62.

CHAPTER 4

**The legal principles: capacity and evidence**

4.1	Capacity and the role of the courts	4.4	Doctors receiving instructions from solicitors
4.2	Capacity and the law of evidence	4.5	Witnessing documents
4.3	Solicitors instructing doctors		

**4.1 CAPACITY AND THE ROLE OF THE COURTS**

Whether a person has or lacks capacity to do something is a question that must generally be decided by reference to the framework set out in the Mental Capacity Act (MCA) 2005 (see Chapter 3). Some common law tests of capacity may require additional or different considerations, for example in relation to testamentary capacity (see Chapter 7). In some cases, it may ultimately be a question for a court to answer. Where a court becomes involved, the final decision rests with the judge, although evidence from a wide range of sources (including the views of family members, of care home staff, a solicitor, health or social care professionals or other expert witnesses) may be of assistance in enabling a court to arrive at its conclusions.<sup>1</sup>

In practice doctors, solicitors, social workers and carers make decisions about capacity every day of the week and very few cases ever get as far as a court. The vast majority of steps taken in relation to care and treatment of those with impaired decision-making capacity, for instance, are governed by MCA 2005, s.5. This requires the person to have a reasonable belief that the individual they are wanting to assist lacks capacity in relation to the matter. By making a decision on capacity, anyone with authority over an individual can deprive that person of some civil rights and liberties enjoyed by most adults and (in some cases) safeguarded by the Human Rights Act (HRA) 1998<sup>2</sup> (see

<sup>1</sup> See (under the common law) *Richmond v. Richmond* (1914) 111 LT 273; *Masterman-Lister v. Jewell*; *Masterman-Lister v. Brutton & Co* [2002] EWHC 417 (QB); and *Masterman-Lister v. Brutton & Co*; *Masterman-Lister v. Jewell* [2002] EWCA Civ 1889; [2003] 1 WLR 1511. The same principle applies in relation to the Court of Protection: see *CC v. KK and STCC* [2012] EWHC 2136 (COP); [2012] COPLR 627.

<sup>2</sup> HRA 1998, which came into effect in October 2000, incorporates into UK law the bulk of the substantive rights set out in the European Convention on Human Rights (ECHR).

also Chapter 5 for the impact of the United Nations Convention on the Rights of Persons with Disabilities (CRPD)). Alternatively, such a decision may permit the person lacking capacity to do something, or carry on doing something, whereby harm or serious prejudice could result either to the person lacking capacity or to others.

Doctors and lawyers should always bear in mind that if they conclude that a person has or lacks capacity to make a decision or enter into a transaction, they may have to justify to a court their reasons for that conclusion. It is helpful to know what effect an opinion as to someone's capacity could have on the individual concerned. For example, it could restrict, protect, or empower the individual.

If a case does go to court, the judge has to:

- decide what the background facts are;
- apply the law to those facts; and
- come to a decision as to the person's capacity to make the decision in question.<sup>3</sup>

Others involved in making decisions about capacity are likely to need to follow the same steps.

## 4.2 CAPACITY AND THE LAW OF EVIDENCE

### 4.2.1 Presumption of capacity

To keep any investigation of the facts within manageable bounds, courts apply various rules of evidence. These are based on conclusions (presumptions) that must, or may, be drawn from particular facts. Presumptions are either irrefutable or rebuttable:

- If a presumption is irrefutable, it is not open to challenge and the court must arrive at a particular conclusion, regardless of any evidence to the contrary.
- If a presumption is rebuttable, the court has to assume that certain facts are true until the contrary is proved. The most well-known rebuttable presumption is the presumption of innocence: that anyone charged with a criminal offence is presumed to be innocent until proved to be guilty.

One important rebuttable presumption that applies to mental capacity is the presumption of capacity, now enshrined as one of the statutory principles of MCA 2005.<sup>4</sup> An adult is presumed to have the mental capacity to make a particular decision, until the contrary is proved. The burden of proof rests on those asserting that the individual does not have the capacity to take the particular decision in question.<sup>5</sup>

Since capacity must always be assessed in relation to a specific task at a particular time, it may need to be reviewed frequently. The Mental Capacity Act 2005 Code of Practice (MCA Code of Practice)<sup>6</sup> explains that it is important to review capacity from time to time, as people can improve their decision-making capabilities. Someone with an ongoing condition may become able to make some, if not all, decisions. The Code (under review at the time of writing) states that:

... capacity should always be reviewed:

- whenever a care plan is being developed or reviewed
- at other relevant stages of the care planning process, and
- as particular decisions need to be made.<sup>7</sup>

Prior to the implementation of MCA 2005 it was considered that there was also a presumption of continuance, i.e. once it has been proved that someone lacks capacity, this state of affairs is presumed to continue until the contrary is proved. On its face, this presumption is difficult to square with the time-specific and issue-specific nature of capacity enshrined in MCA 2005, and it is unlikely that the courts would uphold the presumption in this form. Rather, it is suggested that:

- Outside the court setting, it will be easier for a person to establish the necessary reasonable belief in a lack of relevant decision-making capacity<sup>8</sup> once it has been established that the person lacked capacity in relation to that or a similar decision at another time.
- Where a court has made a determination that a person has or lacks capacity in a particular regard, that this should be approached by analogy with the position that pertains under the *Von Brandenburg*<sup>9</sup> principle in the mental health setting. In other words, a declaration of incapacity (or capacity) should continue to apply.

<sup>4</sup> MCA 2005, s.1(2).

<sup>5</sup> Strictly, the burden of proof, in an evidential sense, applies only in legal proceedings. MCA 2005, s.5 only requires (where it applies) that the person have a reasonable belief that the other lacks capacity. However, if the person is challenged, they would have to be able to point to the steps they have taken to establish the person's capacity to make the decision in question and the grounds which justified a reasonable belief of lack of capacity; this must include that they have directed themselves by reference to the statutory presumption of capacity in MCA 2005, s.1(2).

<sup>6</sup> Office of the Public Guardian (2007) *Mental Capacity Act 2005 Code of Practice*, available at [www.gov.uk/government/publications/mental-capacity-act-code-of-practice](http://www.gov.uk/government/publications/mental-capacity-act-code-of-practice). The Code is under review at the time of writing, so references and/or precise wording may change.

<sup>7</sup> Office of the Public Guardian (2007) MCA Code of Practice, para.4.29

<sup>8</sup> For the purposes of MCA 2005, s.5.

<sup>9</sup> After *R (von Brandenburg) v. East London and the City Mental Health NHS Trust & Anor* [2003] UKHL 58; [2004] 2 AC 280. See in this regard also, by analogy, *An NHS Trust v. AF* [2020] EWCOP 55; [2021] COPLR 63.

<sup>3</sup> For a review of how the Court of Protection undertook this task in relation to decisions about capacity in the first 10 years of its new incarnation under MCA 2005, see A Ruck Keese-Kim and G Owen, 'Taking capacity seriously? Ten years of mental capacity decisions from England's Court of Protection' (2019) 62 *International Journal of Law and Psychiatry* 101-110.

to be viewed as binding unless there is a material change of circumstances which the court could not have been aware of.

#### 4.2.2 Fluctuating capacity

Some people's ability to make decisions fluctuates because of their condition that they have. This fluctuation can take place either over days or weeks (for instance, where a person has bipolar disorder) or over the course of the day (for instance, a person with dementia whose cognition is significantly less impaired at the start of the day than they are at the end).

At common law, a deed or document signed by someone who lacks capacity to do so is void and of no effect. However, if it is signed during a fluctuation when they had capacity to do so, it may be valid. This will almost certainly need to be confirmed by medical evidence, and the courts have emphasised the importance of obtaining contemporaneous evidence in such cases (expensive and time-consuming) disputes after the event.<sup>10</sup>

The concept of fluctuating capacity is not a concept expressly provided for in MCA 2005, although it is referred to in the MCA Code of Practice.<sup>11</sup>

How to approach the situation will depend upon the nature of the decision.

##### One-off decisions

If it is a one-off decision, it may be possible to put it off until the person's condition upon their decision-making abilities has diminished. At that point, the person's decision should be clearly recorded, and, at least where there may be a challenge later to the decision on the basis that the person lacks capacity, confirmation recorded that the person had capacity to make the decision. Depending upon the context, it would also be prudent to record what the person would want in the event that they lose capacity in future to make similar decisions. This means that, if further decisions then need to be taken in their interests, those decisions can be taken in knowledge of what they would want.

If it is not possible to put the decision off, then the minimum action necessary should be taken to 'hold the ring' pending the person regaining decision-making capacity.

##### Repeated decisions

Some decisions are not one-off and need to be repeated over a period of time. Examples include the management of property and affairs,<sup>13</sup> or the management of a condition such as diabetes, which includes a multitude of 'micro-decisions' over the course of each day. Although capacity is time-specific, in such a case, it will usually be appropriate to take a broad view as to the 'material time' during which the person must be able to take the decisions in question. If the reality is that there are only limited periods during the course of each day or week that the person is able to take their own decisions, then it will usually be appropriate to proceed on the basis that, in fact, they lack capacity to do so.<sup>14</sup> This is particularly so where the consequences for the person are very serious if they are taken to have capacity when, in reality, this is only true for a very small part of the time.

If the approach taken here is adopted, it is necessary (a) to have particular regard to the person's wishes and feelings at points where they appear closer to having capacity to make the decision(s) in question; and (b) to keep the person's decision-making ability under review. It is also necessary to reassess if it appears that the balance has tipped such that they have, rather than lack, capacity to take the relevant decision(s) more often than not.

#### 4.2.3 The burden of proof

Generally, if someone alleges something before a court, that person has to prove it. In cases involving mental capacity the burden of proof is affected by the operation of the presumption of capacity. So the burden of proof is on the person who alleges that someone *currently* lacks capacity (because capacity is presumed until the contrary is proved). As noted above, where someone has been shown to lack capacity in relation to a particular decision, it may be easier to discharge the burden of proof in relation to a subsequent similar decision.

The propositions set out above apply at the point where the question is whether the person currently has capacity. However, courts will often have to consider whether the person *had* capacity at some earlier point.

Where the common law applies (for instance, in relation to wills or lifetime gifts), if a *prima facie* case has been established – i.e. proper grounds have been shown – that the person lacked the relevant capacity at the relevant time, then the

<sup>10</sup> See, in particular, *A, B and C v. X and Z* [2012] EWHC 2400 (COP). [2013] 1 All ER 1001 (grant of a lasting power of attorney (LPA)).

<sup>11</sup> Office of the Public Guardian (2007) MCA Code of Practice, para 4.26. The Code is also referred to in the Code of Practice to the Deprivation of Liberty Safeguards 8.24: Ministry of Justice (2008) *Mental Capacity Act 2005: Deprivation of Liberty Safeguards* at [https://webarchive.nationalarchives.gov.uk/ukgwa/20130104224411/http://www.dh.gov.uk/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_085476](https://webarchive.nationalarchives.gov.uk/ukgwa/20130104224411/http://www.dh.gov.uk/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_085476)

<sup>12</sup> *A, B and C v. X and Z* [2012] EWHC 2400 (COP) (grant of a will and grant of a lasting power of attorney).

<sup>13</sup> *A, B and C v. X and Z* [2012] EWHC 2400 (COP).

<sup>14</sup> See in this regard, *Royal Borough of Greenwich v. CDM* [2019] EWCOP 32; [2019] COPLR 465 and *Cheshire West and Another v. PWK* [2019] EWCOP 57.

evidential burden shifts to those person(s) seeking to establish that capacity was present.<sup>15</sup>

The position in relation to MCA 2005 has not been the subject of judicial determination. It is often assumed that the presumption of capacity under MCA 2005, s.1(2) applies in retrospect, so the burden would always fall on the person asserting that the individual lacked capacity at the material time. However, it is not obvious that this assumption is correct. MCA 2005, s.1(2) in the present tense: '[a] person must be assumed to have capacity unless it is established that he lacks capacity' (emphasis added). I looked at the case law and it is clear that MCA 2005 is, in fact, silent as to the approach that is required in respect of the past assessment of capacity, even in those sections which specifically empowers the Court of Protection to consider questions of capacity of the person.<sup>16</sup> And there could well be situations where the interests of the person could be actively harmed if the court is prevented from taking account proper doubts about the person's capacity by the operation of the presumption.<sup>17</sup>

It is therefore suggested that the proper approach under MCA 2005 is analogous to that at common law: in other words, for the court to proceed on the basis of a retrospective assessment of a person's capacity as if it were bound by the presumption in MCA 2005, s.1(2) unless proper grounds are identified to it to consider that the person may have lacked capacity. At that point, the burden then shifts to the person seeking to rely upon the person's capacity at the material time to make a decision.

#### 4.2.4 The standard of proof

Those on whom the burden of proof rests must prove their case to a certain standard. There are two standards of proof:

- 'beyond reasonable doubt', which only applies in criminal proceedings and
- 'the balance of probabilities', which applies in civil proceedings.

In deciding whether or not someone has capacity to enter into a particular action or make a particular decision, the standard of proof is the civil standard.

<sup>15</sup> See, e.g., *Gorjat v. Gorjat* [2010] EWHC 1537 (Ch) at para.139 (lifetime gifts). The burden of proving lack of mental capacity lies on the person alleging it. To put the point another way, every adult is presumed to have mental capacity to make the full range of decisions until the reverse is proved. MCA 2005, s.1(2), which came into force after the decision under consideration in this case, put the presumption of mental capacity on a statutory basis. The evidential burden may shift from a claimant to the defendant if a *prima facie* case of lack of capacity is established: *Williams v. Williams* [2003] WTLR 1371 at 1383.

<sup>16</sup> For instance, MCA 2005, s.26(4)(a) (empowering the Court of Protection to decide on an advance decision regarding medical treatment exists): see 14.7.

<sup>17</sup> This is clearly what Peter Jackson J (as he then was) had in mind in the context of decisions to refuse treatment in *A Local Authority v. E* [2012] EWHC 1639 (COP) at [41].

the balance of probabilities (confirmed by MCA 2005, in cases to which that Act applies).<sup>18</sup> In practical terms this is the most important rule of evidence in assessing capacity. Having decided what the facts are, and having applied the law to those facts, the assessor must then decide whether on balance the individual is more likely to have capacity, or more likely to lack capacity to do something.

#### 4.2.5 Character evidence and similar fact evidence

In criminal cases, evidence about a person's character or past events which are similar to those under consideration may only be admitted in certain circumstances, in an effort to avoid unfair prejudice to a defendant. In civil cases, however, a person's psychiatric history is usually highly relevant to the question of capacity and is therefore almost always admissible.

The court may also take into account other witness or documentary evidence which is relevant to the person's capacity to take the decision in question. For example, in the *Masterman-Lister* case<sup>19</sup> (see also 4.2.6) the court gave detailed consideration to Mr Masterman-Lister's diaries, letters and computer documents. In *Saulle v. Nouvet*<sup>20</sup> the court took into account witness statements and oral evidence from family members as well as home videos of Mr Saulle. The court must, however, be alive to the fact that [it is] ... investigating ... capacity not to be determined by the court, although of course outcomes can often cast a flood of light on capacity.<sup>21</sup>

#### 4.2.6 The evidence of the person themselves

In layperson's terms, the evidence of the person themselves as to their own abilities would appear logically to be the most important evidence as to their capacity to take a particular decision or decisions. However, 'evidence' has a particular legal definition, and whether the person who is the subject of proceedings before the Court of Protection (perhaps the most likely forum in which capacity will fall to be determined) is capable of giving evidence as to their own capacity is a question that has yet conclusively to be determined by the courts.

There are a number of legal complexities that arise, including as to whether 'P' – as the subject of Court of Protection proceedings is known – is in any given case competent to give evidence (see further Chapter 9). Before the Court of Protection, most of these complexities have in practice now been removed by amendments to the Court of Protection Rules (COPR), which provide much greater formal latitude to the Court of Protection to admit and act upon 'informa-

<sup>18</sup> MCA 2005, s.2(4).

<sup>19</sup> *Masterman-Lister v. Brutton & Co; Masterman-Lister v. Jewell* [2002] EWCA Civ 1889; [2003] 1 WLR 1511.

<sup>20</sup> *Saulle v. Nouvet* [2007] EWHC 2902 (QB); [2008] WTLR 729.

<sup>21</sup> *Masterman-Lister v. Brutton & Co; Masterman-Lister v. Jewell* [2002] EWCA Civ 1889; [2003] 1 WLR 1511 at para.54.

tion' from P, whether or not P is capable of giving evidence on circumstances under which P was living in their home environment. It remains a question as to whether P's assertions about their own capacity can be said to be 'evidence' as to their capacity.

Judges of the Court of Protection, in particular, have shown an increasing willingness to hear from P, and it is clear that they have taken what they hear into account in their decision as to whether P has or lacks the material decision-making capacity.<sup>23</sup> Encouraging the participation of P in the proceedings to determine their capacity in material regards is also entirely in line with the provisions of MCA 2005, the ECHR<sup>24</sup> and the CRPD (as to which, see Chapter 5). A former Vice-President of the Court of Protection also issued guidance encouraging the participation of P and vulnerable persons in Court of Protection proceedings.<sup>25</sup>

The courts have yet to pronounce definitely, however, upon precisely what a judge is doing when they are hearing from P in this context, nor is the guidance to be found in the relevant procedural rules or associated Practice Directions. Are they conducting their *own* capacity assessment when they hear from P? Or is the information that they gain from the person simply part of the information that they are required to take into account when reaching their decision as to whether the person has or lacks the material capacity for purposes of MCA 2005, s.2(1)? It is likely that it is the latter, but it is also likely that this issue will be the subject of further judicial scrutiny (and, most likely, guidelines issued by higher courts) in due course as judges more regularly meet and hear from the person concerned in contested capacity cases.

#### 4.2.7 Opinion evidence and expert evidence

In court proceedings, witnesses are usually confined to stating the facts they have seen or heard – and are not permitted to express their own opinion. An exception is made in the case of expert witnesses who are entitled not only to state what they have seen and heard but also to express the opinion they form on the result.

<sup>22</sup> See Court of Protection Rules 2017, SI 2017/1035, rule 14.2(e), which provides that a judge may 'admit, accept and act upon such information, whether oral or written, from P, if the judge considers sufficient, although not given on oath and whether or not it would be admissible as a matter of law apart from this rule'.

<sup>23</sup> Particularly clear examples being the decisions of Baker J in *CC v. KK and STCC v. STCC* [2013] EWHC 2136 (COP); [2012] COPLR 627 and Holman J in *Re SB (A Patient: Capacity: Termination)* [2013] EWHC 1417 (COP); [2013] COPLR 445.

<sup>24</sup> See, in particular, the Strasbourg cases analysed by Dr Lucy Series (2014) in *The Role of the Relevant Person in Proceedings in the Court of Protection: A Briefing Paper on the Human Rights Requirements*, available at <http://sites.cardiff.ac.uk/wccop/the-role-of-the-relevant-person/>.

<sup>25</sup> Reissued by the current Vice-President, Hayden J, as an annex to his *Guidance on Judicial Visits to 'P'* [2022] EW COP 5.

There is no formal definition as to what constitutes 'expertise'. In general, people will be treated as experts if they have devoted time and attention to the particular branch of knowledge involved, or if they have had practical experience of it and, in some cases, if they have acquired a reputation for being skilled in it.

The law has traditionally regarded registered medical practitioners in relevant fields as *de facto* experts on mental capacity, and therefore considered them entitled to express an opinion as to whether a person is or was capable of understanding the nature and effects of a particular transaction. Prior to the coming into force of MCA 2005, the Court of Appeal had confirmed that in almost every civil case where a court is required to make a decision as to capacity, it would need medical evidence to guide it, although this would not necessarily be given greater weight than other relevant evidence.<sup>26</sup>

In the majority of contested capacity cases (whether before the Court of Protection or otherwise), it remains the case that it is likely that the court will call upon medical expertise. However, it should not be assumed that this will always be the case, and Court of Protection judges in particular have increasingly emphasised the extent to which other professionals – especially social workers – are capable of giving evidence as to capacity.<sup>27</sup> They have also, on more than one occasion, preferred the evidence of professionals with familiarity with the individual concerned over the evidence of a medical expert who is (on paper) better qualified to give evidence as to capacity.<sup>28</sup>

A doctor should therefore not necessarily assume that a court will accept their evidence as to an individual's capacity *merely because* they are medically qualified. In giving an opinion on capacity, it is therefore important that they should set out their particular qualifications and experience which may have a bearing on their expertise in assessing capacity and on applying MCA 2005 and the MCA Code of Practice. The British Medical Association (BMA) issues guidance for doctors who act or are considering acting as expert witnesses.<sup>29</sup>

A very helpful summary of what the Court of Protection expects by way of an expert report upon capacity was given by Poole J in *AMDC v. AG and Another*.<sup>30</sup>

<sup>26</sup> *Masterman-Lister v. Brutton & Co; Masterman-Lister v. Jewell* [2002] EWCA Civ 1889; [2003] 1 WLR 1511 at para.29.

<sup>27</sup> See, in particular, *A Local Authority v. SY* [2013] EWHC 3485 (COP); [2014] COPLR 1 at para.22. See also COP3 Assessment of Capacity form (and accompanying guidance notes) at Appendix F, required for any application to the Court of Protection so as to establish that the person in question lacks the necessary decision-making capacity. That form was revised in 2013 to make it clear that such evidence can be provided not just by doctors, but also by social workers or nurses. The form is available at [www.gov.uk/government/publications/make-a-report-on-someones-capacity-to-make-decisions-form-cop3](http://www.gov.uk/government/publications/make-a-report-on-someones-capacity-to-make-decisions-form-cop3).

<sup>28</sup> See, e.g., *PH v. A Local Authority* [2011] EWHC 1704 (Fam); [2012] COPLR 128 where Baker J emphasised the apparently superficial nature of the assessment and the report of the (highly qualified) expert psychiatrist.

<sup>29</sup> BMA (2007) *Doctors Working as Expert Witnesses*, available at [www.bma.org.uk](http://www.bma.org.uk).

<sup>30</sup> [2020] EW COP 58; [2021] COPLR 177, at para.28.

mental impairment. Where it is considered that the client was not capable of understanding a contract made previously, which is now being challenged, the doctor should also be asked whether in their opinion the client's lack of capacity should have been obvious to the other party when the contract was made.

Solicitors should also be aware of the possibility that a vulnerable client has been pressured into entering into a contract by way of coercion or undue influence. Steps can be taken to set aside contracts on this basis, which are beyond the scope of this work.<sup>16</sup>

<sup>16</sup> See, generally, Law Society Guidance Note: Meeting the Needs of Vulnerable Clients (2020), available at [www.lawsociety.org.uk/en/topics/client-care/meeting-the-needs-of-vulnerable-clients](http://www.lawsociety.org.uk/en/topics/client-care/meeting-the-needs-of-vulnerable-clients)

## CHAPTER 11

### Capacity to vote

11.1 'Capacity to vote'	11.5 At the polling station
11.2 Entitlement to vote	11.6 Postal and proxy voting
11.3 Legal incapacity to vote	11.7 Conclusion
11.4 Registration	

#### 11.1 'CAPACITY TO VOTE'

This chapter addresses questions of capacity relating to voting. The concept of 'capacity to vote' is, however, misleading because it conflates two different matters:

1. legal incapacity to vote, which is a technical concept having nothing (per se) to do with mental incapacity; and
2. mental capacity to cast a vote, a test that may once have had relevance, but would appear now very unlikely to be a test that can ever properly be applied.

Because misconceptions as to the law are rife in this area, the chapter breaks the issues relating to voting down into stages, from entitlement to vote, to registration, to attending at the polling station. It then addresses questions of postal and proxy voting.

#### 11.2 ENTITLEMENT TO VOTE

It is commonly believed that any degree of learning disability or mental health problem renders a person ineligible to vote. The truth is in fact quite the reverse. The majority of people with mental health problems or learning disabilities do indeed have the right to vote in parliamentary and local elections.

Those entitled to vote as electors in parliamentary elections in any constituency, or in local government elections, are defined by statute as those who, on the date of the relevant poll:

- have their name on the electoral register for the constituency;
- are not subject to any legal incapacity to vote (apart from by virtue of their age);
- are either Commonwealth citizens or citizens of the Republic of Ireland;
- are of voting age (aged 18 or over).<sup>1</sup>

The main factors which determine whether a person with a learning disability or a mental disorder can vote are whether the person:

- is subject to any *legal* incapacity to vote; and
- has an address for registration purposes.

As far as voting is concerned, the main limiting factor on those suffering from learning disabilities or mental health problems is misconception regarding the law. Wrongful beliefs as to their eligibility can prevent people from registering to vote; a failure to register will mean they are certainly ineligible to vote. This is fundamentally discriminatory, and the importance of ensuring that those with learning disabilities or mental health problems are enabled to participate in the political process has been emphasised both by the European Court of Human Rights (ECtHR),<sup>2</sup> and also in the United Nations Convention on the Rights of Persons with Disabilities (CRPD) (see **Chapter 5**).<sup>3</sup>

### 11.3 LEGAL INCAPACITY TO VOTE

Legal incapacity to vote was defined in *Stowe v. Jolliffe* as applying to individuals who 'from some inherent or for the time irremovable quality in themselves have not, either by prohibition of statutes or at common law, the status of parliamentary electors'.<sup>4</sup> This definition still applies today. It cannot be emphasised enough that legal incapacity in this context is *not* the same as mental incapacity.

There are various categories of people who are subject to a legal incapacity to vote; that is, are disqualified from voting by law. They are:

- members of the House of Lords;<sup>5</sup>
- detained convicted prisoners;<sup>6</sup>
- offenders detained in a mental hospital;<sup>7</sup>
- persons found guilty of certain corrupt or illegal practices.<sup>8</sup>

It was previously the case at common law that a person suffering from severe mental illness (an 'idiot') was considered to lack capacity to vote at elections,<sup>9</sup> save for periods of lucidity – a '*lucidum intervallum*' – during which the incapacity might be lifted.<sup>10</sup>

However, since the coming into force of Electoral Administration Act (EAA) 2006, s.73, a person's mental health problems or learning disabilities *cannot*, by themselves, constitute a ground to disqualify them from voting. In other words, even if – in practice – the person is not capable because of those difficulties of deciding for whom to cast their vote, that functional inability does not constitute a ground to prevent them from casting their vote. It is in this regard important to note what Lord Rix, who introduced what became EAA 2006, s.73, said in moving the relevant amendment to the (then) Electoral Administration Bill:

Amendment No. 188 would abolish any common law rule which links a person's incapacity to vote to his mental state. That is what currently ties the language of 'idiots' and 'lunatics' to electoral law, and has led to disabled people being denied the right to vote as the result of unjustified assumptions about their mental capacity being made by election officials and members of the public. Abolishing the common law rule would make disabled people subject to exactly the same eligibility criteria as everyone else.

The other amendments clarify the language used about disabled people in election law by replacing 'incapacity' with 'disability'. Incapacity is an important concept in the law around disabled people's decision making ... Yet it has a different meaning in electoral law, for it means legal disqualification from voting, rather than a physical or mental condition which makes voting difficult. For the purposes of this Bill, it seems best to avoid suggestions that disabled people have any kind of incapacity.<sup>11</sup>

<sup>1</sup> Representation of the People Act (RPA) 1983, ss.1–2 (as amended by Representation of the People Act (RPA) 2000, s.1(1)).

<sup>2</sup> See *Kiss v. Hungary* (2013) 56 EHRR 38.

<sup>3</sup> See CRPD art.29, by which states guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others. The Committee on the Rights of Persons with Disabilities has emphasised that mental incapacity does not serve as a proper basis upon which to restrict voting rights: see *Zsolt Bujdosó and Five Others v. Hungary: Views Adopted by the UN Committee for the Rights of Persons with Disabilities at its 10th session, 2 to 13 September 2013*, on Communication No.4/2011 (CRPD/C/10/D/4/2011).

<sup>4</sup> *Re Petersfield Election Petition; Stowe v. Jolliffe* (1874) LR 9 CP 734, at that point including women.

<sup>5</sup> The House of Lords Act 1999 removed the incapacity to be a parliamentary elector from hereditary peers unless they continue to sit in the House of Lords. The incapacity relating to sitting members does not extend to local elections, where members of the House of Lords are entitled to vote.

<sup>6</sup> RPA 1983, s.3(1).

<sup>7</sup> RPA 1983, s.3A.

<sup>8</sup> RPA 1983, s.160(4)(a)(i).

<sup>9</sup> *Bedford (County) Case, Burgess' Case* (1785) 2 Lud EC 381.

<sup>10</sup> *Okehampton Case, Robin's Case* (1791) 1 Fras 29, 162. *Bridgewater Case, Tucker's Case* (1803) 1 Peck 101.

<sup>11</sup> Available at <https://publications.parliament.uk/pa/ld200506/ldhansrd/vo060515/text/60515-35.htm>.

## 11.4 REGISTRATION

## 11.4.1 Individual registration

In order to exercise the right to vote in an election, the voter must first be registered on the relevant electoral roll. Since the coming into force in June 2014 of the Electoral Registration and Administration Act 2013, it is necessary for each voter *themselves* to apply to be registered.<sup>12</sup>

The effect of the introduction of the new regime has – it would appear inadvertently – been to introduce a hurdle to enabling those with mental health or learning disabilities to enjoy the right to vote that had been secured by the passage of EAA 2006, s.73 (the abolition of the common law provision that a person is subject to legal incapacity by reason of their mental state). That hurdle takes the form of a requirement that the relevant Electoral Registration Officer (ERO) be satisfied that the individual applicant has made the declaration of truth that must accompany the application for registration.<sup>13</sup> As interpreted by the Electoral Commission,<sup>14</sup> this means that the declaration of truth must be completed either by:

- The applicant, even though it may in some cases be necessary to provide them with substantial assistance to enable them to do so. An ERO can accept a declaration of truth from an applicant unable to sign or mark a paper application ‘in some other way (for example, by telephone or in person) as long as they are satisfied that the declaration is being made by the applicant and is genuine and true’.<sup>15</sup>
- If the applicant does not have the capacity to make the declaration of truth (the test for which is not specified), an attorney under a power of attorney with powers wide enough to cover making an application for registration.<sup>16</sup>

<sup>12</sup> Replacing the old ‘head of every household’ system under which one individual had been able to take control of who was registered to vote in a particular property.

<sup>13</sup> The requirement for a declaration of truth arises from the Representation of the People (England and Wales) Regulations 2001, SI 2001/341, reg.26(1)(j), as amended by the Representation of the People (England and Wales) (Description of Electoral Registers and Amendment) Regulations 2013, SI 2013/3198, reg.10.

<sup>14</sup> See the Electoral Commission (2014) *Guidance on Assisted Applications in England and Wales*, available at [www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0011/176168/IER-Guidance-on-assisted-applications-in-England-and-Wales.pdf](http://www.electoralcommission.org.uk/_data/assets/pdf_file/0011/176168/IER-Guidance-on-assisted-applications-in-England-and-Wales.pdf).

<sup>15</sup> Electoral Commission (2014) *Guidance on Assisted Applications in England and Wales*, paras.1.9–1.12. See also the Electoral Commission’s guidance for care home staff: *Supporting Care Home Residents in England and Wales to Register to Vote*, available at [www.electoralcommission.org.uk/media/2620](http://www.electoralcommission.org.uk/media/2620).

<sup>16</sup> See paras.1.13–1.18.

It is not entirely clear what forms of powers of attorney the Electoral Commission has in mind, but it is suggested that it is likely that the Commission has in mind powers of attorney for property and financial affairs (see Chapter 6). It is important to note that an attorney cannot cast a vote on behalf of the donor.<sup>17</sup>

As noted above, precisely what is required to have capacity to make the required declaration of truth is not clear. It is also unclear why the Electoral Commission did not in its guidance provide for the ability of a deputy appointed by the Court of Protection to make the application and complete the declaration of truth, and it is suggested that there is no proper reason why such a deputy should not also be able to do so if the scope of their powers extended sufficiently wide.

In its concluding observations on the initial report of the United Kingdom (UK) on compliance with the CRPD, the Committee on the Rights of Persons with Disabilities specifically highlighted its concern at:

... the insufficient information on accessibility and reasonable accommodation for persons with disabilities at all stages of the electoral cycle aimed at facilitating the exercise of the rights to vote, to vote in private and to be assisted by an assistant of one’s own choice.<sup>18</sup>

On their face, both the Commission’s guidance and the Representation of the People (England and Wales) Regulations 2001 (as amended) would appear ripe for stress-testing as to whether they genuinely represent such reasonable accommodation.

## 11.4.2 Place of residence

The Representation of the People Act (RPA) 2000, which came into effect in September 2001, introduced changes in electoral procedures and registration intended to make it easier for disabled people to register and to vote. Under previous electoral legislation, people were only able to register if they could establish their place of residence on a specific qualifying date each year. There were special rules relating to the voting rights of patients in ‘mental hospitals’ (see below) as such hospitals could not be used as a place of residence for the purpose of electoral registration. RPA 2000 removed the annual qualifying date, and introduced ‘rolling’ electoral registration to enable people to be added to (or

<sup>17</sup> Because of the bar in MCA 2005, s.29(1) which provides that ‘nothing in this Act permits a decision on voting at an election for any public office, or at a referendum, to be made on behalf of a person’. The Electoral Commission distinguishes between a decision on voting at an election and registration: *Guidance on Assisted Applications in England and Wales*, at para.1.15 notes that ‘registration is an administrative step that enables a person to exercise their voting right; it is not a decision on voting’.

<sup>18</sup> Committee on the Rights of Persons with Disabilities (2017) *Concluding Observations on the Initial Report of the United Kingdom of Great Britain and Northern Ireland*, CRPD/C/GBR/CO/1, para.60, available at [www.ohchr.org/en/documents/concluding-observations/crpd-cgbrcol-committee-rights-persons-disabilities-concluding](http://www.ohchr.org/en/documents/concluding-observations/crpd-cgbrcol-committee-rights-persons-disabilities-concluding).

## Capacity and personal relationships

12.1 Right to form relationships	12.5 Capacity to separate, divorce or dissolve a civil partnership
12.2 Family relationships	12.6 Conclusion
12.3 Sexual relationships	
12.4 Capacity to consent to marriage or to enter into a civil partnership	

### 12.1 RIGHT TO FORM RELATIONSHIPS

Every person has fundamental rights which may not be infringed unless there are special and widely agreed grounds justifying such an infringement. Respect for individual rights in those matters which people can decide for themselves is embodied in national and international agreements. For example, the United Nations Universal Declaration of Human Rights of 1948 articulates the rights of adults to freedom and equal treatment. Also, the European Convention on Human Rights (ECHR), incorporated into United Kingdom (UK) law under the Human Rights Act (HRA) 1998, states:

Everyone has the right to respect for his private and family life, his home and his correspondence ...<sup>1</sup>

and:

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

More recently, the United Nations Convention on the Rights of Persons with Disabilities (CRPD) (see **Chapter 5**) requires states to take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships.<sup>3</sup>

A balance must be maintained between respecting individual rights to family relationships, friendships, sexual relationships, marriage and parenthood on the

<sup>1</sup> ECHR, art.8.

<sup>2</sup> ECHR, art.12.

<sup>3</sup> CRPD, art.23.

one hand, and the duty of society (the state, parents, carers and others) to protect adults at risk of abuse or neglect on the other. These two facets (respect for rights, and protection from abuse and exploitation) have traditionally been reflected in the differences between the civil and the criminal law, which have taken different approaches in relation to the capacity of people to embark on intimate relationships.

Whereas the civil law has provided for the private rights of all citizens to enjoy family contact and personal or sexual relationships, the criminal law has concentrated on providing an effective deterrent aimed at protecting people at risk from abuse, including sexual abuse. The provisions of the criminal law relating to sexual relations are discussed in **Chapter 13**. In this chapter, by contrast, the focus is on the civil law.

In the context of family relationships, questions of influence very often arise, and in the case of an individual who has an impairment, difficult questions may arise as to whether their apparent inability to make decisions stems from that impairment or from the influence of a family member or family members. In this context, the dividing line between those whom the law considers to lack capacity, and those whom the law considers to have capacity but to be vulnerable, becomes very important (see further 3.5).

### 12.2 FAMILY RELATIONSHIPS

For most people, it is important to maintain family relationships (which of course vary in degree and intensity) at least with close relatives. In the context of family proceedings where children are minors, there is a general presumption of a right to a relationship between a parent and child, which should be protected so long as this is in the child's best interests. The welfare of the child is always the paramount consideration in such cases.<sup>4</sup> Where there is a disagreement between the parents, the right to a relationship with a child can be enforced through a contact order under the provisions of the Children Act 1989.<sup>5</sup>

Once children reach the age of 18 the right to a relationship with their parents, or with other family members, extends for only so far as the people involved consent to it. There are no means, in legal proceedings or otherwise, of enforcing a relationship between adult family members who have capacity to decide they no longer wish the relationship to continue. Nevertheless, the courts have been asked to intervene in cases where disputes have arisen between family members about contact with adult relatives who lack capacity to make their own decisions, or to resolve disagreements about where such individuals should live. Questions of residence or contact are clearly important in enabling a relationship to con-

<sup>4</sup> Children Act 1989, s.1.

<sup>5</sup> Children Act 1989, s.8.

tinue, although it should always be remembered that there is a right to respect for family life, not an obligation to undergo it.<sup>6</sup>

Under the Mental Capacity Act (MCA) 2005, the Court of Protection has the power to make declarations and make decisions in respect of the personal welfare of those lacking capacity<sup>7</sup> (for further discussion of the role and powers of the Court of Protection, see **Appendix B**). However, the Court of Protection cannot make decisions on behalf of a person lacking capacity on any of the following matters:

- consenting to marriage or a civil partnership;
- consenting to have sexual relations;
- consenting to a decree of divorce on the basis of two years' separation;
- consenting to the dissolution of a civil partnership;
- consenting to a child being placed for adoption or the making of an adoption order;
- discharging parental responsibility for a child in matters not relating to the child's property; or
- giving consent under the Human Fertilisation and Embryology Act 1990 and the Human Fertilisation and Embryology Act 2008.<sup>8</sup>

### 12.2.1 Capacity to make decisions about family or personal relationships

When the Court of Protection is considering capacity to make decisions about family or personal relationships, it must apply the test set down in MCA 2005 (discussed further in **Chapter 3**).

Capacity is issue-specific, so if the question before the court is a multifaceted one (for instance, as to both residence and contact with particular family members), the question of capacity must be approached in a similarly multifaceted way, addressing each question separately. Of course, there will be some decisions which overlap – for example, a decision whether to reside in a particular place may also involve a decision whether to live with or apart from a particular person.

The most obvious overlap is, perhaps, the overlap between decisions as to contact and decisions as to sexual relations. For several years prior to 2021 (as set out 12.3),<sup>9</sup> it had been understood that decisions about sexual relations were not person-specific. In other words, a person's capacity to make decisions about sexual relations in general should be assessed, not their capacity to make a decision in respect of a particular individual. On the other hand, decisions about con-

<sup>6</sup> As pithily put by HHJ Burrows in *ZK (Landau-Kleffner Syndrome: Best Interests)* [2021] EWCP 12 at para.30.

<sup>7</sup> MCA 2005, ss.15 and 16.

<sup>8</sup> MCA 2005, s.27.

<sup>9</sup> In particular following the decision of the Court of Appeal in *IM v. LM* [2014] EWCA Civ 37; [2015] Fam 61.

tact with another person may well be person-specific, since without taking into account information about the other person and any particular risks they pose, the assessment of capacity will have nothing to bite on.<sup>10</sup>

This meant that it may be the case that a person had capacity to make a decision about engaging in sexual relations in general, but lacked capacity to decide whether to have contact with a particular person. In such cases, difficult questions arose about what support or restrictions could be imposed, and legal advice was recommended where the intention was to facilitate a sexual relationship between the two individuals even though it was not in the incapacitated person's best interests to spend unsupervised time with the other person. The courts made declarations in some cases that a person had capacity to consent to sexual relations but lacked capacity to assess whether a potential partner poses a risk or is 'safe', and accordingly authorised care arrangements that provided support to the person in assessing whether or not to enter into a relationship.<sup>11</sup>

The position is now more nuanced, given the decision of the Supreme Court in *A Local Authority v. JB*<sup>12</sup> in 2021 (discussed at 12.3), which may mean that there are situations where it is possible for the courts to reach a 'personalised' determination of a person's ability to have contact with, and engage in sexual relations with, a specific person. The implications of the Supreme Court's decision are likely to take some time to work themselves out. It is important, therefore, for both lawyers and doctors to keep abreast of the case law in this area (see **Appendix J** for useful resources).

The courts have also made it clear that – in general – a person's ability to make decisions about internet and social media use should be considered separately from their ability to make decisions about contact.<sup>13</sup> However, there may be situations in which the person is using the internet and/or social media as a means to maintain contact with a particular person or group of persons, in which case their decision-making capacity in relation to the use of the internet and/or social media needs to be analysed through the prism of the fact that they are using it as the equivalent of a telephone directory or letter.<sup>14</sup>

### 12.3 SEXUAL RELATIONSHIPS

Deciding to enter into a sexual relationship with another individual is a personal decision which does not generally require any formal contract or test of capacity. Men and women can give legal consent to either opposite-sex or same-sex rela-

<sup>10</sup> *City of York Council v. C* [2013] EWCA Civ 478; [2014] Fam 10.

<sup>11</sup> See, for example, *A Local Authority v. TZ (No.2)* [2014] EWCP 973; [2014] COPLR 159.

<sup>12</sup> [2021] UKSC 52; [2021] 3 WLR 1381.

<sup>13</sup> As to the information relevant (and irrelevant) to decisions about the use of internet and social media, see *Re A (Capacity: Social Media and Internet Use: Best Interests)* [2019] EWCP 2.

<sup>14</sup> See *Re EOA* [2021] EWCP 20 at para.53.