Practice Guidance

Fluctuating capacity and the law: quick guide

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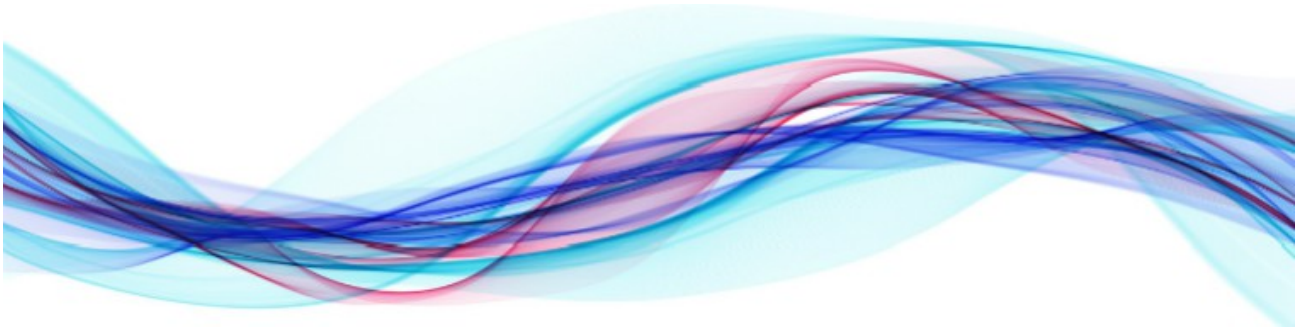

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What is fluctuating capacity?

Fluctuating capacity refers to situations where a person's decision-making ability varies. The person may lack capacity at the time of one assessment, but the result may be different if a second assessment is undertaken during a lucid interval. There are many different conditions where fluctuating capacity may occur, for example, as a result of mental illness, dementia or an acquired brain injury (for more information on the latter see Inform Adults' guide on working with adults with an acquired brain injury).

The capacity test

The test for capacity in the Mental Capacity Act 2005 (MCA) is contained in section 2, which sets out that for the purpose of the 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 explains that being "unable to make a decision" means that the person is unable to:

- understand the information relevant to the decision;
- retain that information;
- use or weigh that information as part of the process of making the decision; or
- communicate their decision (whether by talking, using sign language or any other means).

> There are other relevant provisions about capacity in sections 1 and 2 of the MCA:
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> - section 2(2) adds that it does not matter whether the impairment or disturbance is permanent or temporary;
> - section 1(2) directs that a person must be assumed to have capacity unless it is established that they do not;
> - section 2(4) says that any question of whether a person lacks capacity must be decided on the balance of probabilities; and
> - section 1(4) adds that a person is not to be treated as unable to make a decision merely because they make an unwise decision.

These provisions reflect the long-established principle that capacity is "decision specific" and must be assessed in relation to the particular decision that needs to be taken, rather than any assessment being made of the person's ability to make decisions generally. It follows that a person may lack capacity in relation to one matter but not in relation to another. Capacity is also "time specific" and must be assessed at the time the decision needs to be made.

While the test for capacity in section 2 appears relatively straightforward and easy to understand, in reality the assessment of capacity can sometimes be extremely difficult, especially when the person's capacity fluctuates.

Difficulties associated with fluctuating capacity

Fluctuating capacity can be a major concern for health and social care professionals. A person with fluctuating capacity can be inconsistent and unpredictable in their decision making. Issues surrounding fluctuating capacity often take up a disproportionate amount of time and resources, for instance, by increasing the number of assessments and reviews that need to be undertaken. Decisions should be time and situation specific but there is often not the time to continually be assessing someone's capacity and recording outcomes. There may also be a limit on how long decision making can be deferred.

The difficulties arise generally in relation to the MCA, but there are specific issues in relation to deprivation of liberty. A strict application of the Deprivation of Liberty Safeguards (DoLS) would mean that if it appears that a person who is subject to a standard authorisation has regained capacity, this should trigger a review and, if recovery of capacity is confirmed, the supervisory body must terminate the authorisation. But if the person then loses capacity (perhaps a short time afterwards), a new authorisation might be required, and the whole assessment process would need to start again. A person with fluctuating capacity could easily be subject to an ongoing cycle of re-assessments and discharges. Clearly, if decision makers followed the statutory provisions to the letter the DoLS would be entirely impracticable and unworkable.

Advance care planning can also be rendered problematic in cases of fluctuating capacity. For instance, a person may, during periods of lucidity, recognise the need for protection and actively welcome the arrangements being made for them, but when they lose capacity become more resistant. This pattern of behaviour can occur on a daily, or even hourly, basis – for instance, in the phenomenon known as "sundowning" where a person's level of capacity may deteriorate, and their restlessness or agitation increases, in the late afternoon and early evening.

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Good care planning in such cases may include assisting the individual during any lucid period to make a record of their views so that they can be reminded of them when they are less well.

It is also instructive that practitioners can sometimes approach fluctuating capacity from different starting points. The Law Commission's consultation on deprivation of liberty (see paragraph 9.43 of its final report) found that some health and care professionals felt that where a person had fluctuating capacity they should (as a general rule) be assessed as lacking capacity, in order to ensure that the person received the benefit of the safeguards in the MCA. But others felt that such a person should (as a general rule) be assessed as having capacity, in order to protect their rights to autonomy and to make unwise decisions.

Sometimes a more sophisticated and nuanced approach may be required to support a person with fluctuating capacity to make decisions, and when undertaking capacity assessments. A longer-term view of incapacity might be required in some cases of fluctuating capacity, rather than a one-off decision at a particular time. For instance, capacity to manage financial affairs may need the assessor to consider the person's decision-making ability over a period of time. But it will also be important to consider whether a decision can be delayed until the person has regained capacity, particularly if the decision will have serious consequences for them.

The legal framework

Fluctuating capacity is not a concept expressly addressed or provided for in the MCA. The act's code of practice addresses fluctuating capacity very briefly in paragraphs 4.26 and 4.27. It recognises that some people have fluctuating capacity as a result of "a problem or condition that gets worse occasionally and affects their ability to make decisions" (the examples given are "manic depression", a psychotic illness and certain temporary factors). The code of practice indicates that a person with fluctuating capacity may be supported to make the decision (paragraph 4.26) and it may be possible to put off the decision until the person has the capacity to make it (paragraph 4.26).

The statutory framework for the DoLS – as set out in Schedules A1 and 1A to the MCA – also does not expressly cover the position where a person may have fluctuating capacity to consent to their care home or hospital accommodation in circumstances where they are deprived of liberty. The DoLS code of practice does not provide guidance on how to deal with fluctuating capacity at the initial authorisation stage, but instead focuses on fluctuating capacity during an authorisation (paragraphs 8.22 to 8.24). It states that:

In the context of DoLS, where a relevant person's capacity to make decisions about the arrangements made for their care and treatment fluctuates on a short-term basis, a balance needs to be struck between:

- the need to review and terminate an authorisation if a person regains capacity, and
- spending time and resources constantly reviewing, terminating and then seeking fresh deprivation of liberty authorisations as the relevant person's capacity changes.

Each case must be treated on its merits. Managing authorities should keep all cases under review: where a person subject to an authorisation is deemed to have regained the capacity to decide about the arrangements made for their care and treatment, the managing authority must assess whether there is consistent evidence of the regaining of capacity on a longer-term basis. This is a clinical judgement that will need to be made by a suitably qualified person.

Where there is consistent evidence of regaining capacity on this longer-term basis, deprivation of liberty should be lifted immediately, and a formal review and termination of the authorisation sought. However, it should be borne in mind that a deprivation of liberty authorisation carries certain safeguards that the relevant person will lose if the authorisation is terminated. Where the regaining of capacity is likely to be temporary, and the authorisation will be required again within a short period of time, the authorisation should be left in place, but with the situation kept under ongoing review.

Therefore, the two codes of practice address different considerations. The MCA code of practice is, in reality, more focused on when to assess an individual's ability to make a single decision, and how to ensure that they are best supported to enable them to do this. The DoLS code of practice focuses on what should happen where an assessment is required of a person's ability to make decisions on an ongoing basis; essentially, it tries to ensure a more pragmatic approach by suggesting that an authorisation can remain in place where the regaining of capacity is likely to be temporary, and the authorisation will be required again within a short period of time.

Perhaps surprisingly given the difficulties associated with fluctuating capacity, there is little case law that deals specifically with this subject. The case of *Re G* [2004] EWHC 2222 (Fam Div) provides an early example of how the courts deal with fluctuating capacity. The case concerned a woman ("G"), aged 29, with a history of mental illness and who had suffered as a result of an abusive relationship with her family, particularly her father. When proceedings had commenced, G had lacked the relevant capacity, and a number of orders were put in place regulating her parents contact with her. By the time of the final hearing, she no longer lacked capacity. The reason for this was to the effect that her capacity was severely compromised when under the influence of her father's powerful character, but she regained capacity when protected from that influence.

The judge rejected the argument that because G currently had capacity, the court could not continue to provide a protective framework. The consequences of withdrawing this protection being that G's mental health would deteriorate and she would become incapacitated, thus requiring court proceedings again being instigated. Consequently, the judge made orders to ensure the continuing protection of the court.

This case was decided before the enactment of the MCA and was determined under the High Court's inherent jurisdiction (but was endorsed by the Court of Appeal subsequently to the passage of the MCA in *Re DL* [2012] EWCA Civ 253). However, in reality, this case related more to a situation where the individual's capacity to make a decision was impacted by

external factors (in this case the actions of her father), rather than by factors intrinsic to the person's condition.

The case of *A v X* [2012] EWHC 2400 (COP) decided after the enactment of the MCA, concerned an older man with dementia ("X") who – following the death of his wife of some 56 years – had formed a relationship with a woman who was employed as his full-time carer.

Photo: leszekglasner/Fotolia

His three adult children, who had subsequently become estranged from their father, sought determinations of his capacity to marry, make a will, create an enduring power of attorney and manage his affairs. The judge accepted that in some respects X's capacity may fluctuate.

It was held that X did not lack capacity to marry. However, it was found that X had fluctuating capacity to make a will and execute an enduring power of attorney. The judge therefore made a declaration that X had a "qualified capacity" in respect of both. In doing so, the judge gave a warning that any attempt by X to make a will or create an enduring power of attorney would, if unaccompanied by contemporary medical evidence, be seriously open to challenge (paragraphs 37 to 38).

The judge also considered whether X had capacity to manage his affairs. In doing so – and in contrast with the one-off actions of making a will or an enduring power of attorney – the judge held at paragraph 41 that:

"There would be times when a snapshot of his condition would reveal an ability to manage his affairs, but the general concept of managing affairs is an ongoing act and, therefore, quite unlike the specific act of making a will or making an enduring power of attorney. The management of affairs relates to a continuous state of affairs whose demands may be unpredictable and may occasionally be urgent. In the context of the evidence that I have, I am not satisfied that he has capacity to manage his affairs."

In this case, therefore, the court dealt with X's fluctuating capacity by delineating between decisions for which a one-off capacity decision would be appropriate, and decisions for which capacity could be seen as an ongoing act. Even when it came to one-off capacity decisions, the judge felt he needed to make a qualified declaration and issue warnings about future developments.

The case of *X v A Local Authority* [2014] EWCOP 29 concerned a retired lawyer ("X") who suffered from Korsakoff's syndrome and was living in a care home. He was subject to a standard authorisation under the DoLS and had challenged that authorisation before the Court of Protection. The issue for the court was whether he lacked capacity to make decisions as to residence, and medical and care needs.

His social worker and psychiatrist had concluded that he lacked capacity in these respects. However, the DoLS assessors felt that X's capacity could fluctuate and they needed to look at him "at his best", and having done so, concluded that he did not lack the relevant capacity.

After also hearing evidence from X, the judge concluded (at paragraph 15): "So having reviewed the evidence in a complex case and applying the legal principles that I have set out during the course of this judgment, I come to these conclusions. I have no doubt that X suffers from mental impairment as a result of his alcohol related mental illness and that, therefore, section 2 [of the Mental Capacity Act] is met, and I have no doubt that he wholly lacked mental capacity as to decisions regarding residence, et cetera, in late 2013...My second conclusion is that this is a man who now can take decisions as to where he should live, what care he should have and as to his medical treatment. He is able to identify the factors relevant to making the decisions. He has identified the decision he needs to make, finding a rented property with the help of an agent or living with his ex-wife, even though that may be unrealistic. He understands what he has to do, even if his plans are not yet concrete, He was not able to identify the precise details of what he needs to do but that is not a legal requirement that he would do so. He understands the salient details..."

This case illustrates the importance of assessing the person when they are at their best. Such an approach reflects the guidance contained in the MCA code of practice which advises that "it is important to assess people when they are in the best state to make the decision, if possible" (paragraph 4.46). In cases of fluctuating capacity this may mean delaying the assessment – which reflects the second principle of the MCA that all practicable steps be taken to help the person make the decision for themselves.

In *Derbyshire County Council v AC* [2014] EWCOP 38 the local authority sought declarations in respect of a range of issues relating to a 22-year-old woman ("AC") with a significant learning disability. In respect of her capacity to consent to sexual relations, a psychiatrist had concluded that AC "probably has fluctuating capacity" and "is currently probably capacitous in this domain" (paragraph 31). Her fluctuating capacity had probably been caused, in part, by periods when she failed to take her prescribed medication for depression, and/or her hyperthyroidism not being adequately treated.

The judge agreed with the professional consensus that AC currently had capacity in this regard although, given the fluctuating nature of her capacity, he urged those who have continued responsibility for AC "to keep this issue under careful review" (paragraph 36).

MB v Surrey County Council [2017] EWCOP B27 was the culmination of a series of judgments dating back to 2007. It was concerned with MB's capacity to make decisions about his residence, care and contact arrangements. MB had learning disabilities, epilepsy and autistic spectrum disorder and previously, the judge and experts in the field had accepted that MB lacked the relevant capacity. But in 2017, during further litigation, an independent psychiatrist concluded that MB had capacity to make residence, care and contact decisions but would "from time to time, in circumstances that could not be accurately predicted, lose capacity to make decisions about his immediate wellbeing".

The loss of capacity could be for a matter of hours or even days (paragraph 3). This view was supported by a second psychiatrist. In a joint statement they set out that MB's capacity could fluctuate "during times of seizure activity but also when his level of anxiety rises and he becomes distressed because of environmental triggers" (paragraph 5). The parties did not want to challenge the expert evidence and submitted a consent order to bring the proceedings to an end on the basis that the court lacked jurisdiction over MB. This was approved by the judge. The local authority indicated that it would continue to provide support to MB.

In this case, the recognition of fluctuating capacity effectively ended the court proceedings. It was not clear from the judgment the extent to which MB's care package helped to ensure that he gained decision-making capacity and if it were refused or withdrawn, whether he might lose capacity. On this point, the briefing from 39 Essex Chambers makes the following comment:

"There are cases in which it is only after a period of time in which a care package has been imposed on P via the MCA (in respect of a non-compliant diabetic for example), that P is able to make capacitous decisions. Once P has regained capacity to make decisions about care (and makes the unwise decision to refuse all care), P's health declines and P again loses the capacity to make decisions about care. We suggest that the court must have power in a case of that nature to put in place a regime that kicks in once P loses capacity, and we have had – unreported – experience of the court making 'contingent' declarations/decisions to cater for sufficiently foreseeable circumstances."

Greenwich Council v CDM [2018] EWCOP 15 concerned a 63-year-old woman ("CDM") with a personality disorder and multiple health conditions, including type 2 diabetes. She had lived in extreme squalor and failed to comply with the care and treatment regime for her diabetes. This had led to several hospital admissions, and eventually her lower right leg had been amputated, which had substantially increased her health and care needs.

Photo: Christian Delbert/Fotolia

CDM was moved to a care home and a standard authorisation under the DoLS was granted. An independent psychiatrist concluded that there would inevitably be variation in her mental state due to the fluctuations in her sugar level as a result of poorly controlled diabetes and in the context of her personality disorder.

The judge found that CDM lacked capacity to make decisions about her residence; she was unable to recognise the risks of returning home and not willing to take steps to reduce those risks, due to her personality disorder. In terms of care and property and affairs decisions, he found that she did not lack capacity. In relation to treatment (her ability to manage her diabetes), he concluded she had fluctuating capacity. When it came to fluctuating capacity, the judge recognised that there were a number of options open to the court including refraining from making any declarations at all and instead providing a plan to determine CDM's capacity from time to time. He said (paragraph 48):

"My view is that if I find that there is a fluctuating capacity, it is my duty to declare that is the case…I accept that this may cause complications until such time as a framework is

established so that the loss of capacity can be recognised and calibrated as and when it occurs. That may require further evidence and consideration at another hearing."

The Official Solicitor on behalf of CDM asked the court to rule that questions of capacity have to be made prospectively and said that the MCA would not be workable if professionals had to assess daily whether someone had the capacity to make a particular decision. This was rejected by the judge in respect of the decisions in this case. In doing so, he reiterated that capacity assessments are time and decision specific and not the person's ability to make decisions in general. He also said (in paragraph 51):

"I accept that in some examples, for instance, the capacity to consent to sexual relations, the capacity albeit fluctuating will be one that will either be present or not present. But management of her diabetes is a different matter. It covers a wide range of different situations which may arise frequently or infrequently. The treatment required may be of very different natures. I cannot see that this particular form of fluctuating capacity can properly be managed other than by a decision being taken at the time that the issue arises."

However, the Court of Appeal declined to hear argument on this issue because further evidence had emerged (including a report from a psychologist) which had not been judicially considered. The case was therefore remitted back to the Court of Protection for primary determination.

By the time of the second Court of Protection hearing (*Greenwich Council v CDM* [2019] EWCOP 32), CDM had been admitted to hospital following a deterioration in her condition. But while she was medically fit for discharge, there was no agreement as to the place of her discharge. However, this was not the matter brought before the court. The main question was whether the assessment of capacity to make decisions about diabetic management was a macro decision which encompasses all of the many micro decisions, or, whether capacity should be assessed in respect of each micro decision or group of micro decisions.

In support of the macro approach, it was argued that the individual decisions could not easily be separated, and it would be impractical to expect professionals to assess CDM's capacity in relation to every micro decision. The psychologist (who had supplied the report at the Court of Appeal stage) explained that in the context of diabetes:

"... for example, the concept of eating a carrot or not eating a carrot was in the context of what had happened already and what was to happen. So that for the notion of specific decision-making, there were so many elements, all of which fluctuated over time and were or might be related, and where each was a multi-factorial. There were simply too many factors to be brought to bear." (see paragraph 34)

On the other hand, the Official Solicitor argued that the macro approach could mean that a person who has the capacity to make many decisions about their diabetes management is treated as lacking that capacity, and is inconsistent with the code of practice which

emphasises the decision- and time-specific approach to assessing capacity, not the person's ability to make decisions in general.

The judge, however, concluded that:

- On the assessment of capacity to make decisions about diabetes management, the matter is a global decision, arising from the inter-dependence of diet, testing her blood glucose and ketone levels, administration of insulin, and admission to hospital when necessary in the light of blood glucose levels.
- CDM lacks the capacity to make those decisions and having regard to the enduring nature of her personality disorder which is lifelong and therefore unlikely to change.

In doing so the judge recognised that there may be occasions when CDM has the capacity to make micro decisions and occasions when she does not (ie that her capacity does in fact fluctuate). But he also pointed out that it is a macro decision, and CDM lacks capacity to take the macro decision, and therefore the issue of fluctuating capacity simply does not arise.

The original decision in the CDM case emphasised the time- and decision-specific nature of the capacity assessment when it comes to fluctuating capacity. However, the second decision adopted a more pragmatic approach, setting out that when it comes to decisions about diabetes management, a macro approach can be adopted. The judge was also keen to emphasise that each case will have its own unique circumstances, and the relationship between the micro and macro decisions will still need to be decided.

The case of *Re B (Capacity: Social Media: Care and Contact)* [2019] EWCOP 3 concerned a woman ("B") in her 30s with learning disabilities who had formed a relationship via social media with a convicted sex offender. The court considered her capacity in relation to a number of decisions including care, contact, sexual relations and use of social media. It was noted that a number of capacity assessments had been undertaken by care professionals covering different aspects of B's decision making and inconsistent conclusions had been reached. For example, at one point she had been shown to lack capacity in relation to consenting to sexual relations but later assessed as having capacity.

While her learning disability and cognitive functioning was not fluctuating, the judge felt that the reason for the inconsistency might have included that the education programme in relation to sexual relations had been effective. There may also have been a lack of clarity on the part of the assessors about the application of the MCA, and/or an inconsistency due to assessments being undertaken by different assessors. In relation to capacity to consent to sexual relations, the local authority had proposed some education for Miss B in this area, with a view to reassessing the capacity question once she has had that practicable help. An interim declaration was therefore made, pending the completion of the delivery of this practicable help.

This judgment illustrates how the courts often address fluctuating capacity through the use of interim declarations when the provision of practicable help and support may enable the

person to acquire capacity.