



The case for joined-up thinking

Some issues concerning access to justice for adults who may lack capacity



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Access to justice is a bedrock principle of the rule of law

Fair and unimpeded access to justice is a bedrock principle of the common law :

"access to a court; access to legal advice; and the right to communicate confidentially with a legal adviser under the seal of legal professional privilege" are rights that are "inherent and fundamental to democratic civilised society."

R (Daly) v Secretary of State for the Home Department [2001] UKHL 26, [2001] 2 AC 532 see Lord Cooke of Thorndon at paras [30]-[31].

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Civil law protects those who may lack litigation capacity

- "the policy underlying the Civil Procedure Rules is clear: that children and protected parties require and deserve protection, not only from themselves but also from their legal advisers."

Dunhill v Burgin [2014] UKSC 14

- See also Sir Ernest Ryder, giving the judgment of the Court of Appeal implying a common law power to appoint a litigation friend into the Immigration & Asylum Chamber Tribunal procedure rules:

AM (Afghanistan) v SSHD v Lord Chancellor [2017] EWCA Civ 1123.

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When is a capacity inquiry triggered under the MCA?

- "Assessing capacity correctly is vitally important to everyone affected by the Act. Someone who is assessed as lacking capacity may be denied their right to make a specific decision - particularly if others think that the decision would not be in their best interests or could cause harm. Also, if a person lacks capacity to make specific decisions, that person might make decisions they do not really understand. Again, this could cause harm or put the person at risk. So it is important to carry out an assessment when a person's capacity is in doubt."

MCA Code of Practice §4.34

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Supported decision-making



- As described by Baker K in *KK v STCC* [2012] EW COP 2136 (26 July 2012) per Baker J (and set out in the MCA Code of Practice):
- “The person under evaluation must be presented with detailed options so that their capacity to weigh up those options can be fairly assessed. ...The statute requires that, before a person can be treated as lacking capacity to make a decision, it must be shown that all practicable steps have been taken to help her to do so. As the Code of Practice makes clear, each person whose capacity is under scrutiny must be given “relevant information” including “what the likely consequences of a decision would be (the possible effects of deciding one way or another)”.

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What kind of decision requires an assessment of capacity?



“Section 1(5) of the Act applies to ‘an act done, or decision made ... for or on behalf of a person who lacks capacity’. Its decision-making criteria and procedures are designed to be a substitute for the lack of independent capacity of the person to act or take decisions for him or herself. They come into play in circumstances where a person with capacity would take, or participate in the taking of, a decision.”

R (ota Chatting) v LB Wandsworth [2012] EWHC 3595 (Admin) at §100.

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What are ‘safeguarding duties’?



- Care Act 2014 – duty of enquiry, safeguarding boards
- Risk of exploitation, abuse and neglect
- Local authority duties to vulnerable adults
- Duties do not apply in prisons (see s 76 Care Act 2014)
- But see PSI 16/2015

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Criminal defendants – the ‘fitness to plead’ test



- ‘Pritchard’ test (1836) for unfitness to plead focuses on a defendant’s intellectual/cognitive abilities and their ability to understand the processes of a criminal trial. (Disorders of mood? Delusional belief?)
- PACE Code C ‘Mentally vulnerable’ applies to any detainee who, because of their mental state or capacity, may not understand the significance of what is said, of questions or of their replies.
- Appropriate adult – role and effectiveness in police interviews
- See eg *R v Rashid*: the test applied by the officer: “I was able to engage with him. I was able to talk to the young man. He was not withdrawn. He was cooperating with me and answering my questions.”

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Intermediaries in criminal trials



- No statutory framework governing the triggering of an assessment of capacity to access or engage in the criminal process and no statutory entitlement to specific support to access the process (save s 47 Police & Justice Act 2006 - evidence via a link).
- Hence the authorities addressing these issues tend to be a backward-looking assessment of overall 'fairness' of a conviction not an up-front assessment of capacity factors affecting engagement
- Lack of a statutory framework has not prevented judges from allowing certain defendants to be assisted by an 'intermediary' under the court's inherent jurisdiction to ensure that the defendant has a fair trial and Article 6 ECHR.

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- See eg C v Sevenoaks Youth Court [2009] EWHC 3088 (Admin); R v Dixon [2013] EWCA Crim 465, where the Court of Appeal highlighted the responsibility of trial judges to actively ensure the effective participation of vulnerable defendants.
- In the result - divergent, inconsistent approaches which do not reflect MCA principles.

For a more detailed discussion on intermediaries for defendants see P Cooper and D Wurtzel, (2013) 'A day late and a dollar short: in search of an intermediary scheme for vulnerable defendants in England and Wales', *Criminal Law Review* (1), 4 - 22.

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Vulnerable Migrants - the risks of non-engagement



- Liability to detention, which may be lengthy
- Denial of essential services, funds, treatment
- Denial of banking facilities, driving licences
- Removal
- Deportation
- No right of appeal
- Out of country appeals
- Pressure to sign waivers/voluntary removal forms
- Prosecution
- Threats of removal of children into care
- Inaccurate and wrong immigration information from social workers, nursing staff, family members

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Detention and article 5(4) the right to a 'speedy review'



- No automatic review of lawfulness of indefinite immigration detention
- Access to court contingent on capacity to litigate
- Home Office policy of detaining under the Immigration Acts those with serious mental illness
- No policy means of identifying detainees who lack or lose capacity or are vulnerable and need support to engage in immigration matters
- Right of appeal is now contingent on having expressly raised a human rights claim: s 82 Nationality Immigration & Asylum Act 2002 (amended in 2014)
- See R (ota MDA by his litigation friend the OS) v SSHD [2017] EWHC (Admin)

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