

Assessment of Mental Capacity – Guidance for Doctors and Lawyers (2nd Edition)

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This is an outstanding book which should be read and retained by all lawyers, doctors and any other professionals, including social workers, who work with those vulnerable to mental disorder or incapacity.

It is nine years since the first edition and the law has developed in several crucial areas since that time. Once more it has a distinguished list of contributors drawn essentially from both the legal and medical professions¹. The book is jointly published by both the Law Society and the BMA. The aim of the book primarily is to assist doctors and lawyers to apply capacity tests in a series of “real-life” situations.

As with the first edition, the book is very clearly written without the use of jargon. Wherever technical terms are used they are clearly explained and, again as in the first edition, the book is designed for busy professionals to dip into the relevant section without the need to trawl through a complicated index to find what they want; although a clear index is also available. The application of this approach is made clear in the introduction and although this necessarily leads to some duplication, this is far outweighed by the convenience of quick use.

The book starts with a precise and basic outline of the principles behind the assessment of mental capacity. Here the book explains that the law adopts a “functional” approach to capacity tests with the need for an assessment in relation to a particular decision at the time it needs to be made. So the legal understanding for any decision depends on the ability to comprehend the necessary complexity of the relevant decision and, additionally, to apply any relevant test of capacity that exists.

However, before exploring basic legal principles further, the book carefully places the role of both doctor and lawyer in the context of applied ethics for both professions. Thus solicitors are gently reminded that they would be acting negligently if they did not satisfy themselves of a client’s capacity before accepting instructions. Issues of confidentiality are reviewed here and the principle of generally retaining this, or at least only releasing the minimum amount of information required to complete a capacity assessment. Here not only is the narrow test arising in *W v Egdell*² referred to but also the more recent case of *R (on the application of S) v Plymouth City Council*³ and the comments of Lady Justice Hale (as she then was) regarding disclosure to a mother of social services records in a case involving the mental impairment of her son.

Lawyers are further reminded of the “golden rule” set down in *Kenward v Adams*⁴ of obtaining approval, or witnessing, of a will of an aged or potentially unwell testator. Again the prospect of a negligence action hovers over those who do not comply!

1 The Managing Editor of the book is Penny Letts, Policy Consultant to the Mental Health Act Commission, former Law Society Policy Advisor on Mental Health and Disability, and a contributing author to both this edition and the first edition of 1995.

2 [1990] 1 All ER 835

3 [2002] EWCA Civ 388

4 (1975) *The Times* 29/11/75

As part of its “practical approach” in the application of proper ethics in this area, the book offers an excellent range of ways in which “the right environment” can be created for the subject of an assessment. Thus, for example, an assessor should try to:

- “minimise stress and anxiety”;
- consider if factors leading to incapacity could be treated or whether otherwise capacity is likely to improve;
- consider the side-effects of any medication;
- consider cultural issues or language problems;
- consider the best time of day for the assessment;
- consider the role of background noise, and the avoidance of rapid repetition of cognitive tests or interruptions (such as from mobile phones).

This list alone, which was not included in the 1995 edition, should be compulsory reading for all doctors required to assess capacity. It was developed by Denzil Lush, Master of The Court of Protection, and is aimed to protect the highly vulnerable likely to be the subject of a capacity test. It shows great sensitivity for such subjects and its proper application could make the difference as to whether someone is found to lack capacity or not, with all the prospective and dramatic life-changing implications arising from such decisions. This list is supplemented by a useful “model letter” of instruction covering various situations.

In its useful summary of ethical issues for lawyers, the book obviously takes the opportunity of applying the 8th Edition of the Law Society’s “*Guide to Professional Conduct*” published in 1999.

In its review of legal principles the book again takes a practical approach. It reminds instructing lawyers that not all doctors are experts; furthermore even those who are will need to be asked the correct questions to make a proper assessment. Here there are also invaluable sections outlining “practical suggestions” for the instructing of doctors. There is a straightforward review of the legal position with regards to the rebuttable assumption of capacity. This is expanded to include a review of any “ongoing” lack of capacity, if that has been found initially, and the arising of any “lucid period” of capacity; potentially important in the field of mental health law given the fluctuating nature of some mental illnesses. A brief consideration of the standards of proof and evidence is included.

There is an introduction (expanded upon in the “medical treatment” section) of the need to make decisions as to capacity and resulting “best interest” actions on a daily basis without the intervention of a Court. Here, and throughout the book, the opportunity is included to add reference to the latest caselaw, for example *Re MB (Medical Treatment)*⁵, together with the role of the *Human Rights Act 1998* and relevant post-Act cases such as *R (on the application of Wilkinson) v Broadmoor Special Hospital Authority & Others*⁶. As in the earlier edition a “Sample” certificate of Capacity is included.

Once it has completed its consideration of the “basics” the book moves on to expand on the application of capacity tests in particular areas. These are the same as those in the 1995 edition and cover effectively what most doctors and lawyers will face in practice.

5 [1997] 2 FLR 426

6 [2001] EWCA Civ 1545

At the top of the list comes the issue of financial affairs. Again the book assumes no specialised knowledge, commencing with a review of the powers of attorney, both ordinary and enduring. However, with regards to application of the latter the book is able to add the important new case of *Re K, Re F*⁷ and the “four factors” which any person creating an enduring power of attorney (EPA) should understand; that is the complete authority over the donor’s affairs; the range of this power over any property; the permanence on arising incapacity; and its irrevocability, without the confirmation of the Court of Protection. The importance of registering the EPA is outlined and the statutory form explained. Here, as throughout the book, reference is made to the impending new legislation in relation both to Mental Capacity and Mental Health, together with their potential implications; these, of course, include the wider definitions of mental disorder requiring the involvement of the Court of Protection. That Court’s role and functions (in its less expansive existing form) is given a useful outline. For social workers there is a valuable summary regarding Appointeeship. Finally, the implications of the phrase “capacity to manage property and affairs” is now expanded in light of the case of *Masterman-Lister v Brutton & Co*⁸, including the comments of Lord Justice Kennedy in that case. Thus legal capacity is based on *understanding* rather than wisdom; it is essentially *functional and subjective* and that *background personal information* including family and social responsibilities should be considered. Such capacity remains essentially “issue specific”.

Another much used application of the capacity test will be that applying to the creation of Wills. A useful checklist is included, broken down into the *nature* of the act; the *effect* of the act; the *extent* of the property; and the *claims* of others. In addition to classic cases such as *Parker v Felgate*⁹, more recent cases (such as *Buckenham v Dickinson*¹⁰) are included, again reminding lawyers of the importance of the “golden rule” (*supra*).

No list of specific capacity tests would be complete without the inclusion of those applying to the ability to consent to, or refuse, medical treatment. Again the book adopts a systematic and basic approach in explaining the position: first setting out the general proposition of the need for patient consent and then moving to explore the question of capacity in relation to that. Two critical cases have, of course, arisen in the area since the first edition: *Re C (Adult: Refusal of Medical Treatment)* (1994)¹¹ and *Re MB (Medical Treatment)*¹². Thus, of course, in *C* the evolution of the test for capacity as applied to a patient from Broadmoor suffering from schizophrenia is clearly spelt out as set down by the then Mr. Justice Thorpe; that is *understanding and retention; believing; and weighing in the balance for a decision to be made*; in turn illustrating the difference between the common law capacity test and that required for detainability under the *Mental Health Act 1983*. This test was essentially confirmed in *Re MB* by the Court of Appeal, here allowing that a phobia of needles might render a patient incapable.

The book then clearly follows the familiar path set down in *Re F (Mental Patient: Sterilisation)*¹³ in clarifying the doctrine of necessity applicable in incapacity cases, including temporary unconsciousness cases, in order to carry out treatment to ensure improvement or prevent deterioration in health. The duty to act by way of necessity is then coupled with an explanation of the ‘best interests’ concept, confirmed by the recent case of *Re S (Sterilisation: Patient’s Best Interests)*¹⁴. Thus doctors are reminded to consider a range of factors, including the patient’s wishes

7 [1998] 1 All ER 358

8 [2003] 3 All ER 162

9 (1883) 8 PD 171

10 [1997] CLY 661

11 [1994] 1 All ER 819

12 [1997] 2 FLR 426

13 [1990] 2 AC 1

14 [2000] 2 FLR 389

and values, the effectiveness of treatment, the least restrictive option, the views of those close to him, together with his cultural and religious values. There is then an explanation as to how the Court would view a range of situations, including those rare ones where intervention would be required and those day-to-day ones which require doctors to act under the existing common law. Adapted guidelines include the incorporation of the case of *St Georges Healthcare NHS Trust v S*¹⁵ and updated BMA Guidance.

The important and evolving area of “advance statements”, including the proposals for legal reform in this area, are then considered, including of course, an analysis of the implications of *Re T (Adult: Refusal of Treatment)*¹⁶. Finally important practical advice is given to the role of the *Data Protection Act 1998*, again a new development subsequent to the first edition.

Other specific tests of capacity covered include the capacity to consent: to sexual relations (including a consideration of sexual offences); to research; to vote; to litigate; and to enter into contracts.

The book ends with two important chapters on practical guidelines for both doctors and lawyers in assessing capacity. For doctors, critical issues regarding the application of the capacity are outlined, including the requirement to properly clarify the role of the assessment and a lawyer’s instructions. For lawyers, the need to fully outline the factors required in the assessment are stressed as well as the need to choose the appropriate expert. A model letter of instruction is included in the appendix as well as illustrative case studies. These are accompanied by updated Guidance Notes and Practice Directions from the Official Solicitor and from the Court of Protection. Useful resources, and addresses, including website details, complete the book.

This is certainly a book which is required reading for all doctors and lawyers; and not just for those who are “regulars” in the field. This second edition builds on the highly successful format of the first edition with even greater emphasis on practical application and with succinct coverage of legal developments and their implications. Questions of capacity could arise at any time for both types of practitioner and failure to act in the manner outlined in this book could well lead to successful negligence suits and perhaps even gross misconduct actions. However, perhaps more importantly the book could prevent serious exploitation and miscarriages of justice with its very clear guidance for entrusted professionals to properly carry out their duties towards this highly vulnerable group of people, a group which could well include our family or friends and, in the future, ourselves.

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The book can be obtained from BMJ Bookshop, c/o John Smiths Medical Bookshop, 399–401 Oxford Road, Manchester, M13 9BL; alternatively e-mail: orders.bmj@johnsmith.co.uk.

15 [1998] 3 All ER 673

16 [1992] 4 All ER 649