Is mental capacity in the eye of the beholder?

Introduction

The law, at least in England and Wales, divides adults [1] into those who have the mental capacity to make decisions and those who do not. This distinction is crucial, and underpins health and social care practice, not least as it answers the questions: (1) can I rely on this person's consent to an action that I want to carry out; (2) can I override this person's refusal to consent to an action that I want to carry out; or (3) can I proceed even though the person does not appear to be able to give me consent? In theory, applying the law in England and Wales the Mental Capacity Act 2005 ('MCA 2005'), will always tell us the answers to these questions, and gives health and social care practitioners the sound basis that they need to carry out their tasks.

The reality, however, is much messier, because people are messier. Indeed, the Committee on the Rights of Persons with Disabilities has said starkly that:

> "Mental capacity is not, as is commonly presented, an objective, scientific and naturally occurring phenomenon. Mental capacity is contingent on social and political contexts, as are the disciplines, professions and practices which play a dominant role in assessing mental capacity." [2]

This article, written by a practising barrister specialising in the MCA 2005, surveys law and practice in England and Wales with a view to sketching out a preliminary answer as to whether it can be said there is, in fact, any legally defensible concept of mental capacity. It is, of necessity, only a partial and impressionistic tour d'horizon: an editorial more than an in-depth analysis, but it does serve as a reflection on the best part of a decade spent grappling with the MCA 2005 in and out of the court room, a decade increasingly informed by and challenged by the requirements of the Convention on the Rights of Persons with Disabilities ('CRPD').

The current law in England and Wales

A person who lacks capacity in relation to a matter is defined under s.2(1) MCA 2005 as being a person who at the material time:

> *'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 the brain.'*

Section 2(1) has been called by the Court of Appeal the "*core determinative provision*" (*PC and NC v City of York Council* [2013] EWCA Civ 478, [2014] Fam 10 at paragraph 56). It is supported by the remainder of s.2 and s.3, which flesh out what are traditionally called the two limbs of the capacity 'test', i.e. asking:

- whether the person is 'unable to make a decision for himself' (functional); and
- whether that inability is because of 'an impairment of, or a disturbance of the functioning of, the mind or the brain' (diagnostic).

Section 3(1) sets out what it means to be unable to make a decision, namely to be unable:

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

Often overlooked in practice but equally important to the operation of the MCA are the principles set down in s.1, of which the relevant ones for purposes are that:

- a person must be assumed to have capacity unless it is established that he lacks capacity (s.1(2));
- a person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success (s.1(3));
- a person is not to be treated as unable to make a decision merely because he makes an unwise decision (s.1(4)).

There are a number of critiques that can be made of the Act even on its face, without looking at how it is applied in practice.

First, the model upon which it is predicated is a strongly cognitive one, and does not take into account the fact that some impairments impact upon the person's executive functions. In other words a person may in the abstract be able to give answers to questions that show that they appear to be able to use and weigh relevant information, but are not (often because of such a deficit as an acquired brain injury) actually carry forward in the decision in practice. It is not immediately obvious how such executive deficits are to be understood within the scheme of the Act, save by "levering them" into the existing provisions of s.3(1) (most often by a conclusion that the person is unable to understand, use or weigh the fact that they would not be able to carry into effect in the decision).

Second, there is very little in the balance of the Act to reinforce or give effect to the "support principle" contained in s.1(3). It is for this reason that I often call this principle the "orphan" principle, and the provisions of the MCA 2005 can usefully be contrasted with a very much more developed provisions of the recently enacted Mental Capacity Act (Northern Ireland) 2016 ('MCA (NI) 2016'), which has a specific section (s.5) setting the steps must have been taken before a person can be regarded as having been given all practicable steps to support them to take the decision.

Third, we might question whether it is necessary to have the so-called "diagnostic" element in the test. There are two reasons for this. The first relates to the demands of the UNCRPD (discussed further below). The second is that having a diagnostic element in the Act does lead to considerable difficulties when faced with a person who has both a cognitive impairment of some kind and to be enmeshed in a social situation that appears to be preventing them from making un-coerced or uninfluenced decisions. For the courts in England and Wales, this means seeking to identify whether the "real" cause of the person's problems with decision-making is their impairment or their social situation. Depending upon the answer, the court is then directed down one of two very different jurisdictional routes, either that under the MCA 2005 or the exercise of the inherent jurisdiction [3]. Again, this is a matter which is easy to state in principle but far from easy to identify in practice. It is perhaps striking that the Singaporean Court of Appeal, in applying the provisions of the Singaporean Mental Capacity Act (which is very similar to the MCA 2005) has taken a very robust and broad view of mental capacity and held in *Re BKR* [2015] SGCA 26 that it is legitimate to take into account the actual situation in which an individual with a relevant impairment is seeking to exercise their decision-making in determining whether or not they lack capacity for purposes of that Act. This might either be seen as a creative and pragmatic approach, or a recognition that the diagnostic test is not altogether helpful.

Fourth, even if we were not to remove the diagnostic test, we could make it much clearer that the requirement that a person have an impairment of or disturbance in the functioning of their mind or brain it is not be equated with having a diagnosis to be found in one of the recognised psychiatric manuals such as DSM-V or ICD-10. This is already clear from a proper reading of the MCA 2005: a person could lack capacity to take a specific decision because, for instance, they are temporarily unconscious following a car crash. But it could be made clearer in statute, as in the MCA (NI) 2016,

which provides that it does not matter whether the impairment or disturbance is caused by a disorder or disability or otherwise than by a disorder or disability (s.3(3)). Such would serve to ensure a greater focus upon the nature of the impairment or disturbance, and to avoid both the 'hijacking' of the concept by medical professionals [4] and the all too easy move from a diagnosis of (say) schizophrenia to a finding that the person lacks capacity to make material decisions, without stopping to investigate the causative nexus.

All of the matters set out immediately above are in principle capable of being tackled by way of amendments to the MCA 2005. They could also lead to an Act which looked quite different and one which required health and social care practitioners (as well as lawyers and judges) significantly to amend their practice. And for my part it seems to me clear beyond peradventure that more should be done to put flesh on the bones of the "support principle."

But what I want to do here is look to see whether the much more fundamental challenge posed by Committee on the Rights of Persons with Disabilities is one that has merit and should cause us to question the very concept of mental capacity. It is to this that I now turn.

The Committee's challenge

In order to understand the Committee's challenge, it is necessary to sketch out briefly the requirements of Article 12 of the CRPD [5]. The CRPD was concluded in 2006 and ratified by the United Kingdom in 2009. The Convention seeks to bring about a radical change in the approach adopted in the social, political and legal arenas to those suffering from disabilities (and, indeed, to the very concept of disability). Among other provisions, it seeks to bring about a fundamental shift away from the taking of decisions on behalf of individuals on the basis of an asserted lack of mental capacity. It does so primarily by article 12 which provides (in article 12(2)) that states parties to the Convention "*shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life*."

There is a considerable debate as to the precise meaning of Article 12 and its implications for national legislatures, in particular those of the countries which are also bound by obligations under the ECHR [6]. It is also the case that the CRPD more broadly, as well as its implications also remains only a glimmer on the horizon for many front line health and social care practitioners.

Nonetheless, while the CRPD has not been incorporated into domestic law, it is has been referred to by courts up to and including the Supreme Court as an aid to interpretation, [7] and has been referred to, essentially in passing, in a number of cases before the Court of Protection [8]. It is therefore beginning to make its mark in the jurisprudence of the English courts [9].

As foreshadowed above, and discussed in greater detail in the 2014 Essex Autonomy Project Report "*Achieving CRPD compliance*," [10] it is arguable that the "diagnostic" element of the MCA 2005 does not comply with the anti-discrimination requirements of Article 5 of the Convention on the Rights of Persons with Disabilities, either because it constitutes direct discrimination against those with disability or because it disproportionately impacts upon those with a disability, and that disproportionate impact cannot be justified. In this regard, it is noteworthy that the Assisted Decision-Making (Capacity) Act 2015 passed in the Republic of Ireland, an Act which was drafted with a view to achieving CRPD compliance, contains a capacity test without a "diagnostic" element.

The 2014 Essex Autonomy Project report authors concluded that the MCA 2005 was "remediably non-compliant" with the CRPD, and that, in this regard, it could be made compliant by removing the diagnostic element. The authors also provided a philosophical defence of the objective nature of mental (in)capacity [11], but for present purposes I want to tease out further the implications of the

challenge posed by the statement from the General Committee set out at the beginning of this article (in the course of a General Comment on the requirements of Article 12).

The challenge posed by the statement undoubtedly has force in relation to legal models in which a person can be "incapacitated": i.e. declared on an essentially once for all basis not to have the mental, and hence the legal, capacity to act. There is in such a system a very high risk of such a declaration being made on the basis of an assessment of mental capacity which reflects, as much as anything else, a failure to give adequate support to the person to enable them to function in a "normal" fashion within society.

It could, though, legitimately be said to be absurd, at least within a model such as that operating in England and Wales, in which mental capacity is decision- and time- specific. It is obvious that there are times and situations whereby any measure a person could not be said to have the mental capacity (or mental ability) to take a specific decision. The most obvious example is a situation where a person is in a coma. There are undoubtedly mechanisms by which a person in such a situation can be enabled to exercise legal capacity (for instance by way of an advanced decision to refuse treatment, or through the operation of a power of attorney), but to my mind it is simply impossible to say that such a person can have the mental capacity to make any relevant decision whilst they are in that coma.

However, I do not think that it is possible then simply to dismiss the Committee's challenge outright in respect of the model of mental capacity enshrined within the MCA 2005. There is now a substantial body of case-law which indicates the extent to which the drawing of the line between capacity and incapacity might be said to show as much about the person conducting the assessment as it does about the person being assessed.

One particularly obvious example of the way in which this plays out is in the context of decisions made by a person which appears to health and social care professionals to go against the interests of the individual, most clearly where the person concerned wishes to refuse medical treatment considered to be necessary and appropriate by doctors, or where a person persists in the course of action which is extremely risky to them.

In *Kings College NHS Foundation Trust v C and V* [2015] EWCOP 80, [2016] COPLR 50, MacDonald J arguably put his finger on the real issue here, at paragraph 38 of his judgment, addressing the "use and weigh" requirement set out in s.3(1)(c) MCA 2005:

> Where a court is satisfied that a person is able to use and weigh the relevant information, the weight to be attached to that information in the decision making process is a matter for the decision maker. Thus, where a person is able to use and weigh the relevant information but chooses to give that information no weight when reaching the decision in question, the element of the functional test comprised by s 3(1)(c) will not be satisfied. **Within this context, a person cannot be considered to be unable to use and weigh information simply on the basis that he or she has applied his or her own values or outlook to that information in making the decision in question and chosen to attach no weight to that information in the decision making process** (emphasis added).

MacDonald J was undoubtedly entirely correct to hold as he did in *C*, but the implications of his judgment are profound for practice. As Hedley J had previously held in *PCT v P, AH and The Local Authority* [2009] COPLR Con Vol 956 (at para 35), "*the really difficult* [capacity] *cases* [are those] *where the attention is principally on subs (c), that is to say the capacity actually to engage in the decision-making process itself and to be able to see the various parts of the argument and to relate the one to another*."

Legitimate questions can undoubtedly be asked as to the extent to which how realistic it is to ask assessors to undertake the fine-grained analysis of the person's own values and outlook required to understand whether they are deliberately and legitimately disregarding factors that other "reasonable" persons would take into account, or whether their disregard reveals the workings of some impairment or disturbance of the mind or brain. This is so both within the context of the court room just as much as in the context of front-line clinical and social work practice.

In fairness, judges have recognised the extent which those assessing and determining capacity in such cases – including the judges themselves – must beware the "protective impulse." As Baker J noted in *PH v A Local Authority* [2011] EWHC 1704 (Fam) [2012] COPLR 128 (at para 16(xiii)):

> In *Oldham MBC v GW and PW* [2007] EWHC136 (Fam) [2007] 2 FLR 597, a case brought under Part IV of the Children Act 1989, Ryder J referred to a "child protection imperative", meaning "the need to protect a vulnerable child" that for perfectly understandable reasons may lead to a lack of objectivity on the part of a treating clinician or other professional involved in caring for the child. Equally, in cases of vulnerable adults, there is a risk that all professionals involved with treating and helping that person – including, of course, a judge in the Court of Protection may feel drawn towards an outcome that is more protective of the adult and thus, in certain circumstances, fail to carry out an assessment of capacity that is detached and objective.

In *Heart of England NHS Foundation Trust v JB* [2014] EWHC 342 (COP), (2014) 137 BMLR 232 Peter Jackson J put the matter a different way (at paragraph 7):

> The temptation to base a judgement of a person's capacity upon whether they seem to have made a good or bad decision, and in particular upon whether they have accepted or rejected medical advice, is absolutely to be avoided. That would be to put the cart before the horse or, expressed another way, to allow the tail of welfare to wag the dog of capacity. Any tendency in this direction risks infringing the rights of that group of persons who, though vulnerable, are capable of making their own decisions. Many who suffer from mental illness are well able to make decisions about their medical treatment, and it is important not to make unjustified assumptions to the contrary.

It is difficult, notwithstanding these self-directions, to avoid the impression that there are at least some cases where judges have reached the conclusion that a person lacks capacity so that they are in a position to afford them the relief that they consider that they need. Conversely, and as discussed in greater detail by Victoria Butler-Cole another article in this special issue, it is also difficult to avoid the impression that the courts have deliberately set the bar for "using and weighing" very low in the context of cases concerning capacity to consent to sexual relations because of their concern at the practical implications of a finding that a person lacks that capacity.

A further consequence of the "slipperiness" of the "use and weigh" test set down in s.3(1)(c) MCA 2005 is that it is difficult to escape the impression that the chances that a person will be found to lack capacity not just where they are making decisions which seem unwise to the assessor, but also where they come from within a very different cultural or socio-economic background to the assessor. If, as at one level they must be [12],capacity assessments constitute conversations between assessor and assessed, then it is legitimate to note that it is human nature to find a conversation easier where there is (or appears to be) common or familiar ground between the interlocutors.

We can test this, in part, by looking at circumstances where assessments of capacity have had to take account of the fact that a stated reason for a decision is the religious belief of the individual being

assessed. A particularly good example of this is to be found in *A County Council v MS & RS* [2014] EWHC B14 (COP). As it is perhaps less well known than some of the other cases noted above, it merits discussion in a little more detail. The case concerned a Mormon man, MS, who was mentally unwell and whose property and affairs were managed by his local authority as his deputy. He wished to tithe 10% of a recent inheritance (amounting to just under £7,000) to the Church of the Latter Day Saints. On an application to the Court of Protection to determine whether he had the capacity to tithe, District Judge Eldergill approached the issue of religious beliefs by reference both to the question of whether he had an impairment of the mind or brain, and whether (if he did) that impairment rendered him unable to make the decision.

As to the first, District Judge Eldergill noted that it was common ground that MS had "*strong and sincere religious beliefs and values and that what he sees as religious zeal others interpret as beliefs held with delusional intensity*" (paragraph 85). As he continued "[t]*he beliefs and actions interpreted by others as evidence of mental illness include his belief that a fellow resident was the devil and his belief that the only people more powerful than him were God, Jesus Christ and the Holy Ghost*" (paragraph 86). District Judge Eldergill continued:

> 87. I accept that sometimes it can be difficult to distinguish between a religious delusion and a particular religious belief or practice. There is a risk of pathologising religious beliefs when listening to content alone. It is important to look at the degree of conviction, the pervasiveness of beliefs, the context of the individual's spiritual history and deviations from conventional religious beliefs and practices when determining whether a religious belief is authentic or delusional.

However, on the evidence before him, and not least because MS accepted "*he has a problem establishing on evidence that he is a prophet and the first outside the Godhead. The way he put it was that he has a 'Mount Everest of a credibility problem,'*" District Judge Eldergill found that MS had an impairment of, or a disturbance in the functioning of, the mind or brain.
However, District Judge Eldergill went on to hold that he preferred the evidence of the Special Visitor that it could not be demonstrated that MS's desire to give this money to the Mormon Church was part of his delusional belief system. In reaching this conclusion, he placed particular emphasis upon the fact that: "[t]*he fact that a person has a grandiose belief with a religious content does not demonstrate that the whole of their religion is delusionally-based and caused by mental illness. It may simply be that the content of their belief-system when they become ill reflects and accentuates pre-existing interests, concerns and pre-occupations, in this case a concern with religious and moral themes*" (paragraph 105); that "[t]h*e fact that relatively few people now tithe is neither here nor there. Nor does it matter whether a person's belief in tithing is a core belief required of members of a particular religion or a deviation and a matter of individual conscience*" (paragraph 111); that "[i]*t is not sufficient that other people think his proposed tithe is unwise, a misinterpretation of a religious text or is misguided by reference to their own secular beliefs and values*" (paragraph 112); and that MS's belief was a matter of faith (paragraph 113).

District Judge Eldergill went on to consider two possible objections to MS's capacity. The first was that "*MS's belief or hope that a tithe may be followed by God's financial bounty demonstrates that his capacity to understand the foreseeable consequences of the tithe, and the weight attached by him to objections that he cannot afford it, is compromised by mental illness*" (paragraph 116). He noted that the evidence was ambiguous, but (in a possibly unprecedented piece of judicial decision-making) placed some emphasis upon the fact that the belief or hope was founded upon a correct quotation from a particular passage in the Bible. The evidence was, in District Judge Eldergill's opinion, "*insufficient to displace the presumption of capacity. He may hope or have faith that a material reward will follow but his belief in the duty to tithe is not dependent on this*" (paragraph 119).

The other possible objection was that MS's "*decision-making capacity has been undermined by mental illness in a more general but equally fundamental way: It is the form rather than the content of his thought that has been affected with the result that he is unable to think clearly or straight about the matter. This type of objection is associated with concepts such as concrete thinking, tangentiality of thought, loosening of associations, etc*" (paragraph 120). As District Judge Eldergill noted:

> 121. There is a single reference to MS having a concrete black and white understanding of the Bible. However, many religious people take a literal view of their religious texts. There are also references to thought processes that are parenthetical or 'rambling' at times. However, the case was not argued in this way and the deputy's objection is based on the content of his thought not its form. […]
>
> 122. The issue is finely balanced. In my view the presumption of capacity has not been displaced and the 'invisible weight of the presumption' tilts the scales in his favour.

This decision is set out in some detail not least because it represents the exercise of a degree of empathy on the part of the assessor (in this case, a judge) which rises to the level of the challenge set by MacDonald J in the *C* case.

We might, though, legitimately ask how often it is likely that such is replicated in other settings (or, indeed, by other judges). Further, to take a flippant example, would a decision based on a professed status as a Jedi be seen as in some way "respectable" and worthy of serious consideration in terms of analysis as to whether the person had capacity?

Peter Jackson J in the case of *Wye Valley NHS Trust v B* [2015] EWCOP 60, [2015] COPLR 843 showed that he for one would be willing to respect a distinctly idiosyncratic belief structure, but that was in the context of a situation where he had already found that the individual in question lacked the relevant capacity. It might therefore be thought to have been rather easier for him to have professed such respect because he was making a decision on Mr B's behalf and in his best interests.

This last observation possibly opens the way to one solution to the dilemma that faces us at present in the context of capacity assessment. The more one moves towards a true focus on the wishes, feelings, beliefs and values of the person in question, and the more decisions taken on a so-called best interests basis will actually reflect a genuine empathic attempt to reach the decision that they would have taken, the more the sting of incapacity is drawn. Peter Jackson J put this well in the *Wye Valley* case where he emphasised that a loss of capacity is not to be seen as an "off-switch" for a person's rights and freedoms. Lady Hale has also been at pains to emphasise the extent to which best interest decision making should take as its core purpose the attempt to put oneself into the shoes of the person with a view to making a decision which is right for them as an individual human being (see *Aintree University Hospitals NHS Trust v James* [2013] UKSC 67, [2014] AC 591 at paragraph 45).

We can no doubt take this approach further, and the Law Commission of England and Wales in its current Mental Capacity and Deprivation of Liberty project has provisionally proposed amending s.4 MCA 2005 so that the wishes and feelings of the person lacking capacity should be assumed to be determinative of his best interests unless there is good reason to depart from the assumption (Law Commission consultation paper No. 222, proposal 12.2). If we did this, we would undoubtedly go a long way, in my view, to meeting the challenge of the CRPD to provide mechanisms to allow all to exercise their legal capacity on an equal basis.

This would particularly be so if we also took appropriate steps to give effect to the "orphan principle" of supporting people to take their own decisions, as well as strengthening the tools that can be used

by an individual to secure the exercise of their legal capacity at points when they are unable to take their own decisions, for instance powers of attorney and advance decisions to refuse treatment. The importance of such "autonomous measures" has been reinforced in the recent revision of the Yokohama Declaration of the International Guardianship Network, an international statement of intent as to best practice in the protection of adults with impaired capacity [13]. One avenue further to explore here is to enable individuals to specify in advance under what circumstances they may require assistance by way of so-called "self-binding directives," and even in the context of such directives, to set down the circumstances under which they consider that they would lack decision-making capacity [14].

However, it is right and proper to acknowledge that all of these (to my mind) promising developments are all broadly situated within a framework which allows, and indeed is predicated, upon situations in which others will determine that a person does not have the requisite mental capacity to make the relevant decision or take the relevant action.

One answer to this is the one which appears to be suggested by the Committee on the Rights of Persons with Disabilities, namely to abandon any model which allows for mental capacity at all. I have sketched out above some of the reasons why it seems to me that this model is simply unrealistic. A further – even more fundamental – reason is that it seems to me that without a person either at the material time or in advance having had very basic level of understanding of a situation or decision, it is simply not possible to talk of a person being able to have any meaningful form of "will" which can form the basis of the supported exercise of legal capacity [15]. The more work that is done to flesh out what CRPD-compliant conceptions of those aspects of the law where a particular primacy is placed upon the meeting of minds; for instance, contract law or the law relating to capacity to consent to sexual relations the more insuperable this difficulty appears, at least to me [16].

It is important also to note that a similar difficulty will arise even if we sought to recast our working model to proceed by reference to a model which looks solely to what support is needed to allow the person to exercise their legal capacity. If a person is unable to understand, even at the most basic level that they may require assistance, any form of "support" that is given to them must (if we are being rigorous) be seen as imposed, even if it is done in their name and for the better good. In other words, others will still be making judgments about the individual, judgments which take a different character but which nonetheless represent external views of the person, with all the dangers of preconceptions that that bring.

Conclusion

The answers to some of the questions set out immediately above are as much philosophical as they are legal, but for my part it seems to me that absent some philosophical *deus ex machina* we are in a position that where it never escapes the potential that other actors will have to judge in any given situation whether a person presently has or lacks some form of basic functional cognitive ability (or had that ability at some previous stage).

In other words, it seems to me that it is right, and inescapable, to say that mental capacity is in the eye of the beholder, and will remain so even if we seek to recast our legislative provisions. Absent major developments in neuroscience, it will inescapably remain a concept which requires judgments based on interactions between the assessor and the assessed [17] But that is not thereby to say that it is an irremediably relative and flawed concept upon which we cannot place any weight. Such would be both a counsel of despair and would also, by essentially denying the existence of cognitive impairments, fail to ensure that proper supports are put in place to respond to the circumstances within which those with substantial cognitive impairments find themselves, and to enable them to exercise their legal capacity on as equal basis as possible with others.

Rather – and perhaps ironically – the conclusion set out above means that we need to look less at the person being assessed, and more at the person doing the assessing. We also need further to look at the process of assessment so as to ensure that those who are required to carry it out are self-aware and acutely alive to the values and pre-conceptions that they may be bringing to the situation. Such will serve not just to ensure that, insofar as possible, we keep people out of incapacity, but also, where they can properly be said to lack mental capacity, any decisions which are made in their name or actions taken on their behalf start from their right position: namely, what is of importance to them, not what is of importance to the assessor. Valuable work has already been done in this area; [18] other work is just starting, [19] but if there is one obvious and, dare I say objective truth, it is that complacency is not an answer.

Endnotes

[1] In fact, it divides those aged 16 and over into these two categories, as the presumption of capacity applies in relation to those aged 16 and over. However, there are complexities in relation to decision-making in relation to those aged 16 and 17 which this article does not address, concentrating solely on those aged 18 and above.

[2] Paragraph 14 of the General Comment No 1 (2014) issued by the Committee on the Rights of Persons with Disabilities ('the Committee') entitled 'Article 12: Equal Recognition before the Law' ('the General Comment'), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en [accessed 24 January 2017]

[3] See, in particular, *London Borough of Redbridge v G, C and F* [2014] EWHC 485 (COP); [2014] COPLR 292.

[4] There being no express requirement in the MCA 2005 that a capacity assessment be carried out by a medical professional, and clear evidence that in many cases others, such as social workers, are just as good as, if not better, at the task: see *A Local Authority v SY* [2013] EWHC 3485 (COP); [2014] COPLR 1 at para 22.

[5] A good guide to the CRPD and its implications for English law can be found in Series (2014). See also the report by the Essex Autonomy Project Three Jurisdictions Project entitled Towards Compliance with CRPD Art. 12 in Capacity/Incapacity Legislation across the UK (2016), available at http://autonomy.essex.ac.uk/eap-three-jurisdictions-report [accessed 24 January 2017].

[6] See, for instance, Fenell and Khaliq (2011).

[7] See *Cheshire West and Chester Council v P* [2014] UKSC 19; [2014] AC 896 at para 36; and *R (JS) v Secretary of State for Work and Pensions Supreme Court* [2015] UKSC 16; [2015] 1 WLR 1449 at paras 119, 142, 212.

[8] The first being *An NHS Trust v DE* [2013] EWHC 2562 (Fam), [2013] COPLR 531.

[9] As well as the European Court of Human Rights: see *Glor v Switzerland* (Application No 13444/04) (unreported) given 30 April 2009 at para 53.

[10] Available at http://autonomy.essex.ac.uk/uncrpd, see in particular section 5. I participated in the workshops leading to the production of that report, but was not a member of the core research team. I was a member of the core research team for the EAP's second project, and a co-author of "Towards

Compliance with CRPD Art. 12 in Capacity/Incapacity Legislation across the UK (also available at http://autonomy.essex.ac.uk/uncrpd), which endorsed the 2014 report's conclusions in respect of the MCA 2005, extending them also to consideration of the legislation in Scotland and Northern Ireland.

[11] Essex Autonomy Project 2014 report at pages 20-22.

[12] Absent potential further developments in neurosciences which would enable assessment to take place not on the basis of interactions but on the basis of reliably identifiable responses within the brains of the person being assessed. There are very tentative indications that at least some form of decisions may be amenable to such analysis: see, for an introduction to the neuroscience of meta-cognition, Fleming and Dolan (2011). This work will be extended as part of the major Wellcome Trust funded project entitled Mental Health and Justice of which I am a part.

[13] Available at http://www.wcag2016.de/fileadmin/Mediendatenbank_WCAG/Tagungsmaterialien/Allgemeine_Infos/Draft_Yokohama_2016_International_Part_0829.pdf [accessed 24 January 2017].

[14] See in this regard Gergel and Owen (2015). This work will be being taken forward as part of the Wellcome Trust project noted above. It may also go some way to answer the real question as to the extent to which it is possible to bring autonomous measures within the scope of Article 12 insofar as they are predicated upon being operative at a point where the person is said (by others) to lack the material decision-making capacity.

[15] A core obligation of Article 12 being contained in Article 12(4), providing that "States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person" (emphasis added).

[16] Perhaps the most significant work in terms of 'operationalising' the CRPD in relation to these difficult areas is being done under the auspices of the ERC Voices project at the National University of Ireland (see https://ercvoices.com/). I am on the steering group for the project, but do not suggest that all those involved with the project would share the views expressed here. Indeed, they may actively disagree with them.

[17] And even with major developments in neuroscience, questions might ultimately be asked as to whether the proof that is obtained is that a person's responses are neuro-typical, with a further judgment to be made as to what should be done if they are not.

[18] See, for instance, Camillia Kong, *Mental Capacity in Relationship: Decision-making, Dialogue, and Autonomy* (Cambridge University Press, forthcoming).

[19] Most obviously the Wellcome Trust project noted above, which will include a major project on contested capacity assessment.

References

Fennell, P. and Khaliq, U. (2011) Conflicting or complementary obligations? The UN Disability Rights Convention, the European Convention on Human Rights and English law, *European Human Rights Law Review,* Volume 6 pp. 662–674.

Fleming, S and Dolan, R. (2012) The Neural basis of metacognitive ability *Phil. Trans. R. Soc. B* Volume 367, pp. 1338-1349.

Gergel, T. and Owen, G. (2015) Fluctuating capacity and advance decision-making in Bipolar Affective Disorder – Self-binding directives and self-determination, *International Journal of Law and Psychiatry*, Volume 40, Pages 92-101.

Series, L (2014) Comparing old and new paradigms of legal capacity *Elder Law Journal* 4 (1), p. 62.