CAPACITY ASSESSMENT

The myth that capacity assessment entails a two stage test

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It is disappointing that the BMJ perpetuates the myth that capacity assessment entails a two stage test.1 McFarlane made clear in the case PC & NC v City of York Council [2013] EWCA Civ 478 that the Mental Capacity Act specifies a single test: “For the purposes of this 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.” Mental Capacity Act (2005) section (s) 2(1).

As McFarlane states: “Section 2(1) is the single test, albeit that it fails to be interpreted by applying the more detailed description given around it in ss 2 and 3. The detail within ss 2 and 3, outside that within s 2(1), does not establish a series of additional, free-standing tests of capacity . . . There is, however, a danger in structuring the decision by looking to s 2(1) primarily as requiring a finding of mental impairment and nothing more and in considering s 2(1) first before then going on to look at s 3(1) as requiring a finding of inability to make a decision. The danger is that the strength of the causative nexus between mental impairment and inability to decide is watered down.”

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