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# Court of Appeal finds there is no requirement for "belief" in the Mental Capacity Act functional test

14 August 2024 Katie Viggers

In the recent case of *Hemachandran & Thirumalesh v University Hospitals Birmingham NHS Foundation Trust* [2024] EWCA Civ 896, the Court of Appeal looked closely at certain aspects of the test for capacity, as set out in sections 2 and 3 of the Mental Capacity Act 2005 (MCA).

Two important points of law were made in this judgment as follows:

- Under s.3 MCA, a person will be unable to make a decision for himself if he is unable to understand information relevant to a decision, retain that information, use or weigh the information as part of the decision-making process and communicate his decision. This is commonly known as the "functional" test for capacity. The Court held that there is no specific requirement for a person to **believe** the information relevant to a decision, and that a refusal or inability to believe relevant information does not mean that they will invariably fail the functional test for capacity. If P does not believe or accept the relevant information to be true, it may be that they are unable to understand it and/or use or weigh it, but it is not a foregone conclusion.
- Under s.2 MCA, for a person to lack capacity in relation to a matter, there must be an impairment of, or disturbance in the functioning of, the mind or brain. This is known as the "diagnostic" test. Previous case law has established that there is no need for a formal or professional diagnosis for the diagnostic test to be satisfied, and despite an argument to the contrary, the Court of Appeal upheld this principle.

We take a closer look at this case, including what it meant for Sudiksha Thirumalesh ("Sudiksha") – the now deceased lady at the centre of the proceedings.

## Background

By way of very brief background, Sudiksha was a 19 year old woman who was born with a rare mitochondrial disorder – a chronic degenerative disease with no known cure. In August 2022 she was admitted to the Intensive Care Unit (ICU) at the Queen Elizabeth Hospital in Birmingham. She was mechanically ventilated via tracheostomy and fed by a percutaneous endoscopic gastrostomy tube. Following a significant deterioration in her condition in July 2023, the NHS Trust providing treatment to Sudiksha made an urgent application to the Court of Protection asking the court to approve a palliative care plan for Sudiksha and for her life sustaining treatment to be withdrawn. However, Sudiksha refused to accept her death was imminent and did not want to be put on the palliative care pathway. She and her family wanted to try experimental nucleoside treatment outside of the UK, as she wanted to "*die trying to live*".

## Court of Protection proceedings

The primary issue before the Court of Protection judge was Sudiksha's capacity to make decisions in relation to her medical treatment. The judge considered that Sudiksha was aware of her disease, that it was progressive and that at some point she would die. However, the Judge found Sudiksha was unable to make a decision for herself in relation to her future medical treatment, including the proposed move to palliative care, "*because she does not believe the information she has been given by her doctors. Absent that belief, she cannot use or weigh that information as part of the process of making the decision.*" Sudiksha therefore "failed" the functional test for capacity.

Despite Sudiksha not having a recognised psychiatric or psychological illness, the judge found her to have an impairment of, or a disturbance in the functioning of, her mind or brain. She found that the trauma of Sudiksha's lengthy stay in ICU, together with her inability to contemplate the reality of her prognosis, had resulted in such an impairment.

The judge's view therefore was that Sudiksha lacked capacity to make decisions about her future medical treatment. However, before any best interests decisions could be made by the court, Sudiksha very sadly died. It is important to note that her end of life care was provided under the terms of a treatment plan, that had been agreed with Sudiksha's parents.

# The Court of Appeal's findings

Notwithstanding Sudiksha's death, Sudiksha's parents and the Official Solicitor (on behalf of Sudiksha) were given permission to appeal the Court of Protection decision. The Court of Appeal found the following:

1. There is no specific requirement of belief in the functional test for capacity – whether subsumed into the general requirement of understanding or in the ability to use and weigh information or otherwise. In the previous case of *Local Authority X v MM* [2007] EWHC 2003 (Fam), it had been held that "*If one does not "believe" a particular piece of information then one does not, in truth, "comprehend" or "understand" it, nor can it be said that one is able to "use" or "weigh" it.*" However, the Court of Appeal held that this test was wrong – there was no requirement for "belief" under section 3 MCA. The Court of Protection judge (through no fault of her own) had therefore made an error of law by following it, and by regarding the absence of belief as determinative of the functional test.

The Court of Appeal held that Sudiksha's belief as to her prognosis and the likelihood of her receiving effective nucleoside treatment was relevant, but not determinative as to whether she was able to make a decision under section 3 MCA and therefore satisfy the functional test. As one of the experts in the case had concluded, Sudiksha's belief that she could live was "*completely understandable in the social context in which [she] found herself*" and she was not delusional.

2. The Court of Protection judge also fell into error in rejecting the unanimous expert evidence as to capacity. In Sudiksha's case, two experts gave evidence, both of whom concluded that she had capacity to make decisions as to her medical treatment. Whilst initially one of the experts considered Sudiksha lacked capacity in relation to her treatment, he later concluded (after having assessed her) that she did have capacity. The Judge rejected the expert evidence, but failed to give sufficient reasons as to why she disagreed with it.

3. The Court of Appeal however rejected an argument that there needed to be a professional or formal diagnosis, before an impairment of the mind or brain could be established.

Accordingly, the Court of Appeal set aside the declaration made by the Court of Protection that Sudiksha lacked the capacity to give or withhold her agreement to medical treatment, including palliative care.

# What are the key takeaways from this case?

- If a person does not believe relevant information given to them by the clinical team, this does not mean that they will automatically lack capacity to make a decision. Believing the information is not determinative of the functional test, or a necessary ingredient in order for a person to be regarded as having understood the information or having been able to use or weigh it.
- If a person does not believe or accept information to be true, it *may* be that they are unable to understand it and/or unable to use or weigh it, but it is not a foregone conclusion. There may be a rational basis for the lack of belief, which needs to be explored.
- There is however no requirement for a formal or professional diagnosis in order for an impairment of the mind to be established.

# How can we help?

Assessing capacity can be a complex process, and it's important to ensure that the appropriate test is used. We regularly support healthcare organisations with complex mental capacity issues so if you or your team require any assistance with capacity assessments or best interests decision making, please feel free to reach out to us. We're here to help and provide guidance whenever you need it.

# Key contacts

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