

Producing robust capacity assessments and the approaches to assessing capacity

09 June 2025  Lynette Wallace

The case of [Calderdale MBC v LS \[2025\] EWCOP 10 \(T3\)](#) considered capacity in various areas (litigation, residence, care, contact, internet and social media, and sex) for a vulnerable 31-year-old woman, referred to as 'Stitch' at her request, in reference to her favourite Disney character. Stich has mild intellectual disability, ADHD, and dysfunctional attachment style.

Court proceedings initially started in 2019, at the end of which Stich was declared to have decision-making capacity in most areas of her life. However, the case was revisited shortly after due to a deterioration in Stich's presentation and concerns from the local authority about her capacity in various areas.

Further capacity assessments and expert evidence were gathered, and following a hearing in January 2025, Mr Justice Cobb declared Stich to lack capacity to conduct proceedings and to make decisions about residence, care, contact with others, internet and social media use and engaging in sexual relations.

Mr Justice Cobb found neither the capacity assessments undertaken by the independent expert or the local authority to be satisfactory and the importance of rigorous capacity assessments was emphasised. The Judge also determined that decision-making capacity cannot be contingent on there being compulsory care plans or support in place. Finally, the complex areas of fluctuating and longitudinal capacity were explored. We take a more detailed look at the Judge's findings in this article.

Formal capacity assessments and the need to tell P that they are being assessed

Following the declaration in June 2023 that Stich had decision-making capacity in various areas of her life, she was given more autonomy and allowed unrestricted use of her mobile phone and social media. However, she found this overwhelming and began to engage in risk taking and harmful behaviour. Ms A, a social worker, re-assessed Stich's capacity over approximately eight visits during a five-week period and reported in August 2023 that Stich no longer had capacity in these areas.

Mr Justice Cobb however questioned Ms A's assessment process, describing it as "*unorthodox*" and lacking the necessary rigour:

"I find that Ms A failed to spell out clearly the purpose of the questions for Stich during the eight or so visits in the summer of 2023, and did not specifically advise Stich that her capacity in several areas was being assessed.

I wish to emphasise that this does not fatally undermine the integrity of Ms A's assessment altogether which contains some useful insights, but I am bound to treat the evidence which emerged from these discussions with more caution than if this had been a more formal capacity assessment..."

The Judge took the view that for capacity assessments to be reliable, they must be rigorous and formal, and practitioners should inform individuals that their capacity is being assessed.

A formal capacity assessment was considered necessary for Stich's case, but it is worth bearing in mind that there could be circumstances where undertaking a less formal capacity assessment, where P is not informed that the assessment is taking place, could

be justified e.g. where P refuses to engage in an assessment of their capacity or where knowledge of such assessment is likely to cause P significant harm.

Can a finding of capacity be made if it is contingent on there being a compulsory support plan in place?

The Official Solicitor suggested that the court could make “*contingent orders*” that Stich had capacity to make decisions about residence and care, provided that a compulsory support plan was always in place. Similarly, regarding decisions about contact with her mother, Stich could be found to have capacity provided she had a compulsory support plan and the support and presence of carers. The Official Solicitor asserted that this approach aligned with a core principle of the Mental Capacity Act (MCA), namely, to support individuals in making decisions for themselves.

However, Mr Justice Cobb said that decision-making that could be called capacitous only when P was ‘contained’ by a continuous and compulsory framework of protections, supports and restrictions, lacked autonomy or self-determination, which were essential characteristics of capacitous decision-making. Adopting the Official Solicitor’s approach would lead to the conclusion that Stich had capacity only when she was compulsorily contained or supported and lost capacity whenever she made her own unsupported decisions. That did not suggest that she had capacity or even that her capacity fluctuated; rather, it suggested that she was unable to make her own decisions.

The Judge’s view was that decision-making capacity cannot be contingent on continuous compulsory care plans or support.

Fluctuating vs longitudinal capacity

In the judgment, there is a lot of discussion about fluctuating and longitudinal capacity. Mr Justice Cobb recognised that this was not a typical ‘fluctuating’ capacity case, as Stich did not have periodic psychotic and/ or dysregulated episodes. The parties disagreed as to whether Stich’s capacity to decide on care and residence fluctuated and on what approach should be taken:

- **Approach 1: Anticipatory declarations** catering for fluctuating capacity where there are temporary periods of dysregulation (anticipatory declarations were considered in *Wakefield MDC v DN & MN* [2019] EWHC 2306 (Fam)); or
- **Approach 2: Take a ‘longitudinal’ approach** catering for those decisions taken regularly or repeatedly (sometimes at short notice) as opposed to isolated decisions (the longitudinal approach was considered in *Cheshire West v PWK* [2019] EWCOP 57). E.g. the management of a health condition. Repeated decisions may make it appropriate to take a broad view as to the ‘material time’ during which the person should be able to make the decisions in question.

Mr Justice Cobb found that there were times when Stich could articulate a level of understanding and reasoning that suggested she had capacity, however at other times she showed such a clear and marked lack of understanding or reasoning about her residence and care needs that she could not be viewed under any circumstances as having capacity. Taking a longitudinal perspective on her capacity, he declared her uncapacitous in these areas. The same longitudinal approach was adopted in relation to contact.

Factors relevant to the approaches to assessing capacity

Assessing capacity requires a multifaceted approach. There are number of factors we have observed to be relevant when determining the best approach for an assessment of capacity:

- Diagnosis.
- How loss of capacity arises or manifests.
- Predictability e.g. specific periods or changeable depending on the situation.
- Current presentation.
- Relevant information to be considered under each domain e.g. care, residence, contact.
- Regularity of decisions e.g. how often.
- Workability of solution: is a long and arduous process required to consider whether the person lacks capacity in the given moment dependent on place, time, duration etc? If so, it may be better to make a declaration that the person lacks capacity.
- Protection of the person’s autonomy (interference to the minimum degree necessary to ensure safety).

Tips for producing a robust capacity assessment

1. **Decision specific:** Identify the specific decision to be assessed.
2. **Timing:** Assessments should be conducted at the time the decision is to be made. However, the timing of the assessment itself is important and should, if possible, be conducted when best suited to the service user.
3. **Formality:** The documentation should be formal and there is a need to tell people that their capacity is being assessed but the style or approach may need to be less formal or at least flexible and tailored to the person whose capacity is being assessed.
4. **Engagement:** Take all practicable steps to ensure that every effort is made to assist the person to engage with the assessment e.g. simple words, support from a carer to ask questions, Makaton, time of day, location, visual aids, story boards.
5. **Non-engagement:** Is the person unwilling or unable to undergo a capacity assessment? What can be changed to aid engagement? It is not possible to force someone to undergo an assessment and, in such cases, it may be appropriate to rely on triangulating evidence to come to a reasonable belief as to whether person lacks capacity. In such situations an application to the court may well be necessary to make the ultimate decision. If this situation arises, please do get in touch with our [Court of Protection](#) lawyers who are experienced in advising on capacity assessments and Court applications.
6. **Recovery:** consider whether there is any prospect of the person regaining capacity and whether the decision could be safely postponed until the person can make it themselves.
7. **Relevant information:** The information to be discussed with the person varies depending on the nature of the decision to be made. Please get in touch with us for specific guidance on the relevant information for each capacity domain.
8. **Ask open ended questions.**
9. **Tangible options:** Ensure concrete details can be given of any options available (e.g. living in a care home vs living at home with a package of care).
10. **Executive function:** Consider real-world evidence of their ability to plan, organise and initiate actions.
11. **Evidence base:** Gather information from people who know the person well to gain an insight into the person's decision-making patterns and abilities. Consider the broader context of the decision making.
12. **Identify the salient factors** where there is an assessment that the person lacks capacity. The best assessments will identify specifically what aspect the person could not understand, comprehend, weigh up, retain or communicate in relation to the particular decision.
13. **Conclusion:** state your conclusion as to whether P has capacity to make specific decisions, and the reasons.
14. **Document:** the assessment (including the questions asked and the person's responses) on the appropriate form. E.g. capacity assessments are to be documented on a COP3 form for the Court of Protection.

Contact

Lynette Wallace

Associate

lynette.wieland@brownejacobson.com

+44 (0)115 976 6520

Related expertise

Sectors

Health and life sciences

Local government

