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**Article (Published version)
(Refereed)**

Original citation:

Chiu, U (2017) *A robust restatement of the presumption of capacity under the Mental Capacity Act 2005: WBC (Local Authority) v Z, X, Y*. [LSE Law Review](#), Vol 2, pp. 93-99. ISSN 2516-4058

DOI: <http://dx.doi.org/10.21953/lse.1q96d2d7j1vj>

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Available in LSE Research Online: May 2018

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A robust restatement of the presumption of capacity under the Mental Capacity Act 2005: *WBC (Local Authority) v Z, X, Y*

Urania Chiu*

Introduction

In the recent judgment of *WBC (Local Authority) v Z, X, Y*¹ a twenty-year-old woman with Asperger Syndrome and a borderline learning disability was declared to possess legal capacity, both to participate in the litigation and to make decisions regarding her residence, social contacts and care. This judgment is important because it recognises a strong presumption of capacity under the Mental Capacity Act 2005 (MCA 2005) and provides a comprehensive example of the Act's application to a complex and finely balanced set of facts.

Background

The applicant in the case, the local authority in whose area Z lived, initiated proceedings in the Court of Protection in June 2014. It sought a declaration that Z lacked capacity under the MCA 2005 to make decisions as to:

- (i) choosing her residence;
- (ii) making contacts with others;
- (iii) dealing with her care; and
- (iv) litigating in the proceedings.

The local authority had for several years been involved in caring for Z, whom Cobb J described as in many ways 'typical of a young person her age'. She was, among other things, 'fascinated by celebrity status' and enjoyed 'social media, through which she recently met a partner.' Cobb J also considered that 'Z has, as my judgment reveals, taken many risks in the past in the way she has lived her life and made her relationships; some of that risk-taking has probably caused her harm.'²

The hearing, in which Cobb J considered the gateway issue of whether Z possessed capacity to engage in the litigation, took place 18 months after the Local Authority initiated proceedings. The questions to be answered were:

- (i) whether Z's risk taking indicated a lack of capacity as opposed to merely evincing the type of conduct typical of adolescence; and
- (ii) whether, since the commencement of proceedings, Z has matured to the extent that she now enjoys capacity.³

General Principles

Cobb J began by setting out the relevant principles under the MCA 2005 governing the test for capacity, including the presumption of capacity under section 1(2), the requirement to consider both the 'diagnostic' and the 'functional' elements of capacity under sections 2 and 3, respectively, and the time and matter-specific nature of the capacity test under section 2(1). Cobb J reiterated that a person is not to be treated as 'unable to make a decision' unless 'all practicable steps to help [her] have been taken without success' (section (1)(3)) or 'merely because [she] makes an

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[2016] EWCOP 4.

² *WBC v Z, X, Y* (n 1) [2].

³ *ibid.*

unwise decision’ (section 1(4)). These principles are supplemented by those set out in case law,⁴ including that it is not necessary for a person to use and weigh every detail of the respective options available in order to demonstrate capacity but merely the salient factors.⁵ Further, even though a person may be unable to use and weigh some information relevant to the decision in question, they may nonetheless be able to use and weigh other elements sufficiently to be able to make a capacitous decision.⁶

Cobb J emphasised that the question for the court is ‘not whether the person’s ability to take the decision is impaired by the impairment of, or disturbance in the functioning of, the mind or brain but rather whether the person is rendered *unable* to make the decision by reason thereof’ — an important point clarified in *Re SB*.⁷ Finally, he stated that the burden of proof lies with the person asserting a lack of capacity, which in this case was the local authority seeking a declaration as to Z’s capacity in relation to the matters mentioned above.⁸

As there was no dispute that Z did suffer from an impairment of, or a disturbance in the functioning of, the mind or brain under section 2 of MCA 2005 by reason of her being diagnosed with Asperger Syndrome and a learning disability, Cobb J focused on the ‘functional’ element of the capacity test. Under this limb, Cobb J considered whether Z was ‘unable to make a decision for [herself],’⁹ due to an inability to ‘use or weigh’¹⁰ information about risk to herself.

The Time and Decision-Specific Nature of Capacity

Because section 2(1) stipulates that capacity is to be assessed ‘in relation to a matter’ and ‘at the material time’, the capacity test is time and decision-specific. The assessment does not concern a person’s capacity to make decisions generally, but rather whether at the time of the assessment, a person was unable to make the relevant decision.¹¹ This aspect of the test was particularly relevant in Z’s case, given the 18-month delay between the commencement of proceedings and the capacity assessment.¹² Thus, while Cobb J acknowledged that ‘the Local Authority was perfectly justified in initiating proceedings in June 2014’, when Z ‘probably did lack capacity to make decisions *on matters under review at that time*’,¹³ this had no bearing on the question of Z’s capacity at the time of the hearing.

Cobb J concluded that the local authority had not rebutted the presumption of Z’s capacity in relation to the matters in question. As the question turned on *current* capacity, he relied upon new evidence available to the court to reach his conclusion. A majority of Cobb J’s discussion of the evidence is focused on how Z had learnt from her past mistakes, as well as how she had made improvements in understanding and weighing information relevant to living independently and making social contacts, between the start of the proceedings and the date of the hearing. For example, Cobb J found that, although Z may have shown an ‘unusual’ degree of interest in fame and celebrity in the past, more recent discussions showed that she had a ‘good degree of awareness’ of the deficiencies of her unsuccessful talent show audition, and a ‘more realistic appraisal of her quest for fame’.¹⁴

The Information Relevant to the Decision

Under section 3(4) of the MCA 2005, the information which needs to be understood, retained, and used or weighed by an individual as part of the process of making the decision, includes information about the reasonably foreseeable

⁴ *WBC v Z, X, Y* (n 1) [11].

⁵ *CC v KK* [2012] EWHC 2136 (COP).

⁶ *Re SB (A Patient) (Capacity to Consent to Termination)* [2013] EWHC 1417 (COP).

⁷ *WBC v Z, X, Y* (n 1) [15] (emphasis added).

⁸ *ibid* [10]-[16].

⁹ MCA 2005, s 2(1).

¹⁰ MCA 2005, s 3(1)(c).

¹¹ *WBC v Z, X, Y* (n 1) [14].

¹² *ibid* [59].

¹³ *ibid* (emphasis added).

¹⁴ *ibid* [64].

consequences of deciding one way or another, or failing to make the decision. Cobb J further cited the finding in *CC v KK* that it is not necessary for a person to use or weigh every detail of the respective options available to determine capacity, but merely the salient factors. Applying this construction of section 3(4) of the MCA 2005, he was satisfied that Z was able to ‘use or weigh’ the evidence relevant to decisions related to residence and making social contacts. The rationale underlying the decision in *CC v KK* is to bolster ‘the fundamental principle enshrined in [section] 1(2) of the 2005 Act – that a person must be assumed to have capacity unless it is demonstrated that she lacks it’.¹⁵ It would be unrealistic to expect an ordinary person to apprehend the nuances of every option open to her, especially if the decision involves complicated, technical details about medical care. Such an approach to section 3(4) would render the protection of autonomy afforded by the presumption of capacity futile, because it would be too hard to prove that information had been used or weighed sufficiently in the decision-making process.

Unwise Decisions and Incapacity

Cobb J introduced his judgment with the following statement: ‘It is well known that young people take risks. Risk-taking is often unwise. It is also an inherent, inevitable, and perhaps necessary part of adolescence and early adulthood experience.’¹⁶

This statement set the tone for Cobb J’s assessment of Z’s capacity: he reiterated several times in his judgment the principle under section 1(4) of MCA 2005 according to which a person is not to be treated as unable to make a decision merely because she makes an unwise decision.¹⁷ Pointing in particular to the fact that Z was a young woman of twenty years old, Cobb J stated that it was necessary to distinguish between evidence indicating unhealthy, dangerous, or unwise adolescent risk-taking, and evidence revealing a lack of capacity. In Cobb J’s opinion, some of Z’s behaviour, seen as risky by the expert psychiatrist Dr Rippon, was only ‘risky to some extent, but not more than usually risky for a young person who is in love’.¹⁸ Therefore, he did not find her incapable of making decisions.

This interpretation of section 1(4) of MCA 2005, incorporating a robust presumption of capacity, is consistent with case law. In *The Mental Health Trust v DD*, an earlier case also decided by Cobb J, he ruled that the person in question lacked capacity, not just because her decision-making was ‘unwise’, but because it ‘lacks the essential characteristic of discrimination which only comes when the relevant information is evaluated, and weighed.’¹⁹ In the more recent and much-reported case of *Kings College Hospital NHS Foundation Trust v C*, MacDonald J decided that the fact that others in society might consider the person’s decision to be unreasonable, illogical or immoral, was not evidence of a lack of capacity.²⁰ This is because a competent individual is entitled to make decisions based on her own value system and personality without conforming to societal expectations.²¹ Such a strict application of section 1(4) of MCA 2005 is to be welcomed, as the freedom for competent individuals to make whatever decision they like, whether it be irresponsible, irrational, or seemingly morally reprehensible, must be protected if their autonomy is to be respected. This freedom cannot be protected unless a clear line is drawn between the assessment of capacity and normative judgement of the perceived reasonableness of someone’s decision.

Expert Opinion

Although Cobb J referred to Dr Rippon’s expert opinion in great detail in his judgment, it is notable that he differed in his opinion from Dr Rippon’s at many points. He questioned the usefulness of relying solely on expert reports – having read Dr Rippon’s reports several times, he was ‘left unsure that [he] had received a complete or rounded picture

¹⁵ *CC v KK* (n 5) [74].

¹⁶ *WBC v Z, X, Y* (n 1) [1].

¹⁷ *ibid* [67].

¹⁸ *ibid* [66].

¹⁹ [2014] EWCOP 11 [86].

²⁰ [2015] EWCOP 80 [30].

²¹ *ibid*.

of what Z was saying'.²² Moreover, he considered that some of the responses used to illustrate a lack of capacity on Z's part could just as easily be interpreted to have shown naivety, immaturity, diffidence, or embarrassment, which, as explained above, did not necessarily evidence a lack of capacity.²³ While admitting that expert opinion in these cases would often likely be of considerable importance, Cobb J's approach was to weigh the expert evidence against his findings on other evidence, particularly his own assessment of Z when she gave evidence in court herself.

The weight accorded by Cobb J to Z's performance in court cannot be understated. Contradicting Dr Rippon's scepticism about Z's ability to understand the evidence to be given in court, and to use the information to instruct her counsel appropriately, Cobb J believed that Z showed a high degree of attention to the evidence, gave instructions to her counsel, and answered questions well. Moreover, he was of the opinion that Z 'impressed as someone who was more than just aware that "people should treat you with respect", apparently mindful that people had not done so in the past'.²⁴ These two personal assessments on Cobb J's part about Z were crucial to his finding that the presumption of capacity had not been rebutted by the local authority in the case.

Cobb J's approach is consistent with Baker J's decision in *CC v KK*. In that case, Baker J explained in detail the approach that a court must take in considering evidence in an assessment of capacity. This includes considering not only the views of the independent expert, but all evidence, such as: evidence from other clinicians and professionals who have treated and worked with the patient, evidence from family and friends, and direct evidence from the patient herself if available.²⁵ The underlying rationale is to guard against what was described in *CC v KK* as the 'protection imperative', namely the possibility that professionals and the court may be unduly influenced by the desire to protect a vulnerable person and be drawn towards an outcome that is more protective, thus failing to carry out a 'detached and objective' assessment of capacity.²⁶ This is not to say that direct evidence from the person in the proceedings must automatically be given primary importance. After all, one's performance in court may not always be a reliable indicator of one's capacity to make decisions regarding many other areas of life. The point is that, instead of invariably according priority to expert opinion, a court must pay due regard to all available evidence in order to reach a satisfactory decision as to capacity.

Conclusion: A Robust Restatement of the Presumption of Capacity

The judgment of *WBC v Z, X, Y* is significant in that it comprehensively summarises the statutory principles required by the MCA 2005 to be applied in an assessment of capacity, as well as the supplementary principles developed in the case law. These principles include: only requiring that individuals are able to use or weigh the *salient* factors in their decision-making process, separating the assessment of capacity from a judgment of 'good' or 'bad' decisions, and not giving undue deference to expert opinion. These are all important in establishing a robust presumption of capacity, which, in turn, is crucial to protecting individuals' autonomy. As Cobb J concluded in his judgment, while it might be tempting for a court to take a paternalistic or overly risk-averse approach to cases involving vulnerable individuals such as Z, it would have been 'unprincipled and wrong' to do so.²⁷

²² *WBC v Z, X, Y* (n 1) [41].

²³ *ibid.*

²⁴ *ibid* [64].

²⁵ *CC v KK* (n 5) [24].

²⁶ *ibid* [25].

²⁷ *WBC v Z, X, Y* (n 1) [70].