MANCHESTER 1824

The University of Manchester

The (mis)Assumption of Capacity

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Introduction….

- Materials have been emailed to you.
- To Record ???
- **13:30 to 14:30**: Time to discuss (+ comfort break)
- This is meant to be interactive- please vote and talk to me!
- Please use your Teams hand-up to contribute.
- Use of Chat
- Break-out rooms

Intended Learning Objectives

1/ To review research findings to identify and challenge some common myths and institutional bad practices 😱 *

2/ To consider what good (defensible?) practice

Starter for 10….

Where in the Mental Capacity Act statute do we find the "assumption of capacity"?

Mental Capacity Act 2005

What is the *one* mental health condition about which the Courts have found an "*absolute presumption*" that a person will lack capacity to make treatment decisions?

There must be a “**trigger**” in order to

consider whether a person has capacity?

True / False

- Kanya is a 78-year-old widow who normally lives alone is her own flat.
- She has been admitted to hospital for treatment a fractured hip following a fall. During the admission she has been successfully treated for a UTI but appears to have a mild memory impairment, including forgetting visitors names and being unable to recall the name of the street she lives on.
- She is now medically fit for discharge and she has been referred for a social care assessment as her family have reported some concerns about that he self-care and home environment have deteriorated.
- Kanya is keen to be discharged home and does not think that she requires any support. Upon interview, she is orientated to the day and month. She states that he is fully able to look after herself, including cooking, cleaning and taking medication.
- **Would you complete a “Mental Capacity Assessment” for Kanya at this stage?**

Local Government Association

Analysis of Safeguarding Adult Reviews

April 2017 – March 2019

Findings for sector-led improvement

Final report

This report was commissioned by CHIP - the sector-led Care and Health Improvement Programme, co-produced and delivered by the Local Government Association and the Association of Directors of Adult Social Services in England.

"SARs comment on how reliance on the assumption of capacity served to close down awareness of the need to monitor decision making ability in the face of escalating risk and frailty".

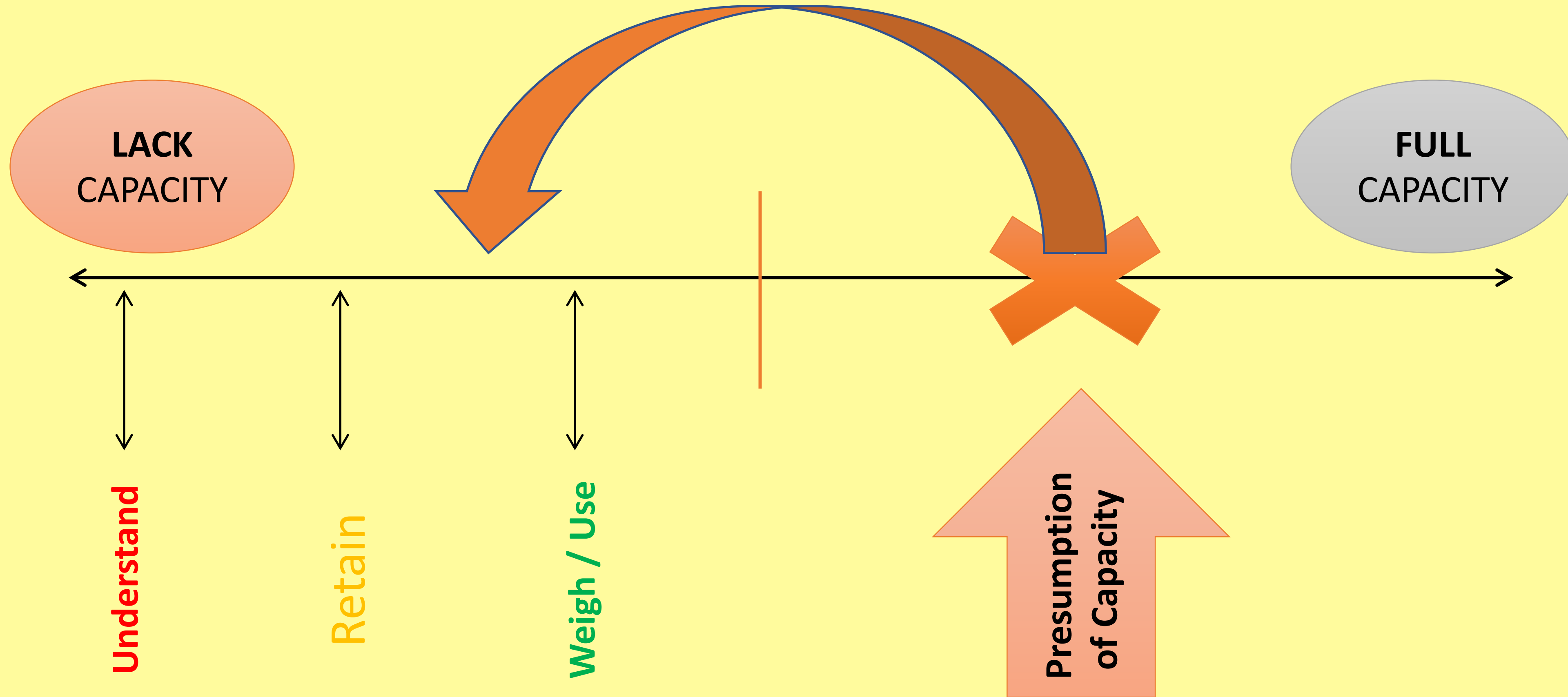
"There were numerous mentions of failure to assess mental capacity when to do so was warranted. These included examples in which mental capacity was assumed, and other in which it was simply not considered even in the face of chaotic choices and persistent risk".

"A striking feature of this case was that in face of the evidently unwise decisions, increasing risk and self-neglect by X…. how readily professionals both assumed he had mental capacity to make those decisions and avoided actively engaging with him in more probing discussions about the decisions and their consequences".

"There was a lack of recognition that X was unable to carry out his own good intentions … Instead there was a presumption of mental capacity throughout, even when he was clearly not coping or when sepsis and other infections were present."

“Degrees of Capacity” … Continuum.

Is there any evidence to **“rebutt the presumption of capacity?”**



Mental Capacity "Triage"

Consider

Stage 1: In **<u>every</u>** referral to adult health or social Care, there should be a written record of <u>consideration</u> about the person's ability to process key information about key decisions.

*Is there **any reason to doubt** capacity?*

Mental Capacity "Triage"

Consider

Stage 1: In **every** referral to adult health or social Care, there should be a written record of consideration about the person's ability to process key information about key decisions.

*Is there **any reason to doubt** capacity?*

yes

Assess

Stage 2: Complete formal MC Assessment using **organisational template-** starting point is **s1(2) Presumption of Capacity**

Recording the ***consideration*** of capacity

Interview with Kanya on 4/11/22. She appeared orientated to the social careassessment process.

She appeared to be fully aware of the concerns about her health, including the fractured hip and recent UTI. She acknowledged "my memory has deteriorated recently- I need to see my GP". She was aware of the option of domiciliary support- "my children are worried that I'm struggling to look after myself, but I am able to look after myself, just not as well as when I was younger". She added that sometimes she does forget to eat.

According to discussions with staff on the ward Kanya is able to manage her self-care without prompting and appears aware of when she needs to take medication.

Based on this discussion, there is no reason to doubt her capacity.

Draft MCA / LPS Code (2022)

DRAFT

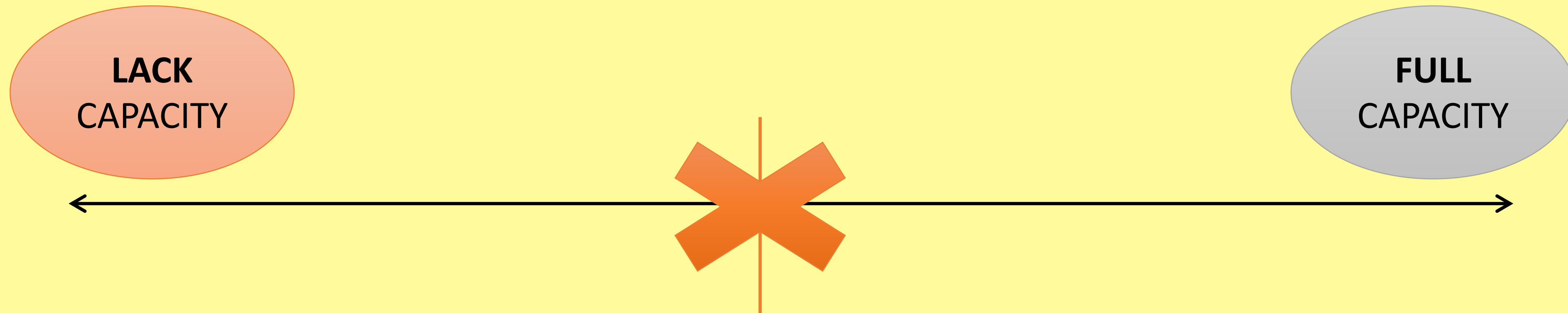
When should capacity be considered?

4.5 There is a presumption that people have the capacity to make their own decisions. However, it may be necessary to consider whether a person has capacity to make a specific decision if:

- The decision the person is proposing to take is significantly out of character;
- The decision the person is proposing to take appears to be unwise, especially if they are putting either themselves or others at risk;
- It has already been shown that the person lacks capacity to make other decisions in their life as a result of an impairment or disturbance that affects the way their mind or brain works;
- A deprivation of the person's liberty is necessary for the person's care or treatment (see chapter 12).

4.6 Considering a person's capacity is not the same as assessing their capacity. It is asking whether there is a proper reason to doubt that the person has the capacity to make the decision in question. Failure to consider this can be just as harmful for the person as an overly hasty decision that they lack capacity to make the decision.

What if it is **<u>not possible to reach a conclusion</u>** about whether Maxwell has capacity?



Is there any evidence to **“rebutt the presumption of capacity?”**

LACK
CAPACITY

FULL
CAPACITY

Understand

Retain

Weigh / Use

Presumption of Capacity

Mental Capacity "Triage"

Consider

Stage 1: In **<u>every</u>** referral to adult health or social Care, there should be a written record of consideration about the person's ability to process key information about key decisions.

*Is there **<u>any reason to doubt</u>** capacity?*

yes

Assess

Stage 2: Complete formal MC Assessment using **<u>organisational template</u>-** starting point is

s1(2) Presumption of Capacity

Is it <u>not</u> possible to reach a conclusion & the risks are high++?

yes

Refer

Stage 3: Consider external support (specialist expertise), including an application to the **Court of Protection** for determination of capacity

Salford Safeguarding Adults Board

1. Introduction

1.1. Eric[1], a White British man aged 81, died in Salford Royal Hospital on 16th October 2019, having been admitted two days previously. He had been referred by his GP to the District Nursing service for end of life care on 23rd September. Between that date and his admission to hospital, Eric had fairly consistently refused food and water, had remained in bed and had refused treatment and care.

1.2. This was not the first episode of its kind. Three years previously Eric had experienced a period of depression, anxiety and weight loss. Previously, he has been described as happy, loving and outgoing, but a private family man who enjoyed sport. More recently in August 2019 he had refused to eat and drink, and to take prescribed medication.

1.3. Eric lived with his wife who, along with their only daughter, was his main carer.

1.4. Greater Manchester Police (GMP) investigated the circumstances surrounding Eric's death and concluded that there was nothing suspicious. A Coroner's inquest was held in March 2020. Greater Manchester Mental Health (GMMH) had been asked to provide a statement for the inquest and conducted a root cause analysis. Salford Royal Foundation Trust (SRFT) conducted a rapid review and found no evidence of harm being caused by the hospital. The Coroner ruled that the medical cause of death was starvation. The Coroner could not conclusively determine whether or not Eric had capacity but felt that he probably did not have capacity based on the evidence that had been presented at the inquest.

A person with an Emotionally Unstable Personality Disorder (EUPD) will generally have capacity to make (“unwise”) decisions about care and treatment?

True or False?

Research PDF Available

"If you are not a patient they like, then you have capacity": Exploring Mental Health Patient and Survivor Experiences of being told "You Have the Capacity to End Your Life"

April 2022

DOI:10.13140/RG.2.2.34386.84163

Authors:

Wren Aves

- An online questionnaire was shared with people known to MH Services on Twitter and Facebook in December 2021 with MH services users.
- 211 valid responses. The majority of respondents were cis-gendered women (78%) aged 18-29 (42%), with a diagnosis of mood disorder (72%) and/or personality disorder (63%)
- The respondents indicated that MH professionals often used the "**presumption" of capacity as a reason to withhold capacity assessments**, then used the (presumed and unassessed) capacity as a reason to withhold care.
- Overall, the phrase "**you have the capacity to end your life**", was experienced negatively. Respondents frequently described increased worthlessness and suicidal feelings.

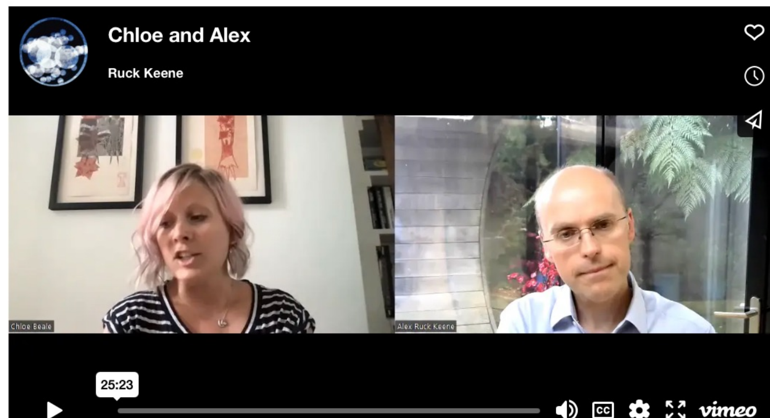
- Often people were told they <u>had capacity over the phone</u>, (without face-to-face assessment), and this decision appeared to continue for years in their mental health records, with no re-assessment.
- A significant proportion of respondents (**83%**) reported that after being told they had capacity, they had care withheld from them. This included instructions from mental health services for other services (i.e. police and paramedics) to withhold appropriate care.

Mental Capacity Law and Policy

Suicide and the (mis)use of capacity – in conversation with Dr Chloe Beale

July 12, 2022 *Alex RK*

In this conversation, I talk to Dr Chloe Beale about the uses and misuses of capacity in the context of responding to suicide risk. Warning, we do get quite deep into the issues involved.



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CULTURAL REFLECTIONS

Magical thinking and moral injury: exclusion culture in psychiatry

Chloe Beale[1,2]

BJPsych Bulletin (2022) **46**, 16–19, doi:10.1192/bjb.2021.86

[1]East London NHS Foundation Trust; [2]Homerton University Hospital NHS Foundation Trust, London, UK

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Summary This is an article about exclusion. We might not like to admit it – even fail to realise it – but National Health Service (NHS) mental health service structures have become increasingly focused on how to deny people care instead of help them to access it. Clinicians learn the art of self-delusion, convincing ourselves we are not letting patients down but, instead, doing the clinically appropriate thing. Well-meant initiatives become misappropriated to justify neglect. Are we trying to protect ourselves against the knowledge that we're failing our patients, or is collusion simply the easiest option? Problematic language endemic in psychiatry reveals a deeper issue: a culture of fear and falsehood, leading to iatrogenic harm. An excessively risk-averse and under-resourced system may drain its clinicians of compassion, losing sight of the human being behind each 'protected' bed and rejected referral.

Keywords Education and training; ethics; risk assessment; stigma and discrimination; suicide.

MCA Myth

“The presumption of capacity means that I do not have to do a capacity assessment”