



The Facilitate Factor

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Newsletter
November 2022

An update from Claire

Hi everyone,

Welcome to the November newsletter.

I am so pleased to be able to finally reveal what we have been working on. [Our new Expert Witness Panel!](#)

For a while now we have been chasing your outstanding fees and helping with practice management for a select few experts. The service is in demand so we decided to utilise our full skill set and provide marketing/promotion services together with practice management for those who need it.

Most of you will also know that we run a Barristers Chambers too alongside our Expert Witness business. This means that all of our Solicitor contacts are relationships formed over many years – as opposed to agencies who mail shot your details out to drum up work.

Our panel numbers will remain small to ensure we continue to deliver the excellent service we are renowned for. Applications are open now so I would invite anyone interested in joining the panel to contact me. There are no joining fees and you simply pay 12.5% upon payment received for any case you get through us. We have revamped the website to reflect the additional services [so please take a look](#).

In this month's edition we have Ryan Aguiar, Consultant Clinical Neuropsychologist who speaks to us about the dilemma of the right to make an unwise decision. Thanks Ryan for contributing your article.

Enjoy Guys. I'll be in touch before Christmas.

Claire,
Practice Director



Claire Labio
Director

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“I know too much drinking is not good for my health...”

The dilemma of the right to make an unwise decision

Mr Ryan Aguiar, Cpsychol, AFBPsS

BA, MA, PGDip App Neuropsychology, Consultant Clinical Neuropsychologist

The imperative to protect a service user from foreseeable harm is strong enough for a clinician to nudge their patients away from activities that have the potential to risk their health and welfare. While this may be paternalistic, the intention is essentially a well-intentioned and kind one. But it is precisely this good intention that can take clinicians – and services - into what Lord Justice McFarlane observes as ‘the space’ between an unwise decision and one that is lacking in capacity, in which personal autonomy operates [PC v City of York (2013) EWCA Civ 478]. This is most pertinent when questions arise whether a person understands the risk associated with their excessive drinking and whether they lack the capacity to make such a decision.

Assessing capacity to make decisions about drinking is fraught with difficulty. The very issue – drinking to excess – that gives rise to concerns of risk to the person, is the behaviour the person must change if that risk is to be revised. This is irrespective of whether the decision to drink is a capacitous one or not. Expecting an alcohol dependent person to modify or regulate their drinking as a test of capacity may lead to setting the standard too high and not one that is expected of people in general. It is well recognised that people with alcohol dependence often deny, minimise, and rationalise their drinking. It is after all at the heart of every alcohol dependent person’s predicament and so, expectedly, the person may not modify their behaviour. It does not automatically follow that they reach the test threshold. They may not share their clinician’s assessment of the severity and immediacy of the risk.

This was exactly the sentiment expressed to me by Eric¹ a 43-year-old man living with the legacy of a severe traumatic brain injury. Eric said to me, “I know too much drinking is not good for my health, but I don’t drink that much. I’ll give you, I occasionally drink more than I should and I know I shouldn’t but that is very rarely and no more than my mates would, and no one says anything to them...” Eric had previously elucidated the risks to health and welfare, and the financial and social consequences of excessive drinking. Contrary to the evidence, he also believed he was in full control of the amount he drank and that no harm would come to him even though he acknowledged it had the propensity to cause him long term damage. That is the nature of alcohol dependence. In this respect, Eric was no different to those who make an informed decision to engage in a high-risk activity such as bungee jumping; the belief that nothing untoward will happen.

So clinician’s assessing capacity on issues connected to an alcohol dependent individuals decision to continue drinking, must be doubly cognizant of their susceptibility to unconscious biases that may lead to a drift away from the principles set out in the Act.

HH Justice Hayden reminds us that:

“The professional instinct to achieve that which is objectively in P’s best interests should never influence the formulation of the criteria on which capacity is assessed.”

Further, “The healthy and moral human instinct to protect vulnerable people from unwise, indeed, potentially catastrophic decisions must never be permitted to eclipse their



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fundamental right to take their own decisions where they have the capacity to do so. Misguided paternalism has no place in the Court of Protection;”

And, “The criteria for assessing capacity should be established on a realistic evaluation... The bar should never be set unnecessarily high.” [PB v London Borough of Tower Hamlets (2020) EWCOP 34]

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1 Name changed to protect his identity



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If your answer to any of the above questions is YES then we can help you!



We also run a **Barrister Practice Management** business. This links together nicely with Facilitate as we use some of our experts for **Seminars, Mock Inquests, Trials** etc. If you would like to be considered please contact us > claire.labio@completecounsel.co.uk

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