

MENTAL CAPACITY IN RELATIONSHIP

Recent legal developments challenge how valid the concept of mental capacity is in determining whether individuals with impairments can make decisions about their care and treatment. Kong defends a concept of mental capacity but argues that such assessments must consider how relationships and dialogue can enable or disable the decision-making abilities of these individuals. This is thoroughly investigated using an interdisciplinary approach that combines philosophy and legal analysis of the law in England and Wales, the European Convention of Human Rights, and the UN Convention on the Rights of Persons with Disabilities.

By exploring key concepts underlying mental capacity, the investigation concludes that both primary relationships, and capacity assessments themselves must display key competencies to ensure that autonomy skills are promoted and encouraged. This ultimately provides scope for justifiable interventions into disabling relationships and articulates the dialogical practices that help better situate, interpret, and understand the choices and actions of individuals with impairments.

CAMILLIA KONG is a lecturer in philosophy at the University of Kent and research associate at the Ethox Centre, University of Oxford. Her research interests include philosophical issues surrounding mental disorder, mental capacity, and the ethics of psychiatry. She was awarded funding for research into this book from the British Academy.

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This series of books was founded by Cambridge University Press with Alexander McCall Smith as its first editor in 2003. It focuses on the law's complex and troubled relationship with medicine across both the developed and the developing world. Since the early 1990s, we have seen in many countries increasing resort to the courts by dissatisfied patients and a growing use of the courts to attempt to resolve intractable ethical dilemmas. At the same time, legislatures across the world have struggled to address the questions posed by both the successes and the failures of modern medicine, while international organisations such as the WHO and UNESCO now regularly address issues of medical law.

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MENTAL CAPACITY IN RELATIONSHIP

Decision-Making, Dialogue, and Autonomy

CAMILLIA KONG
University of Kent



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**For
Sophie and Nelson
and
Ava – always beloved**

We are not signs,
we do not live in spite of
or because of our facts,
we live with them, around them, among,
like we live around rivers, my cane,
your warts, like we live among animals,
your heart, my brace, like we live
with each other.

– Jim Ferris, “Facts of Life”

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LIST OF STATUTES

The Adult Guardianship and Co-decision-making Act, SS. 2000
European Convention on Human Rights
Health Care Consent Act, 1996, S.O. 1996
Mental Capacity Act 2005 in England and Wales
Mental Capacity Act Singapore
Substitute Decisions Act, 1992, S.O. 1992
United Nations Convention for the Rights of Persons with Disabilities

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- A, B, & C v X & Y* [2012] EWHC 2400 (COP)
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A Local Authority v DL & Ors [2011] EWHC 1022 (Fam)
A Local Authority v E & Ors [2012] EWHC 1639 (COP)
A Local Authority v M & Ors [2014] EWCOP 33
A Local Authority v WMA & Ors [2013] EWHC 2580 (COP)
A Local Authority X v MM & Anor (No. 1) [2007] EWHC 2003 (Fam)
A Primary Care Trust v P & Ors [2009] EW Misc 10 (EWCOP)
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Malette v Shulman [1990] (Ont. C.A.) 72 OR (2d) 417
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Re SB (A Patient; Capacity to Consent to Termination) [2013] EWHC 1417 (COP)
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Saulle v Nouvet [2007] EWHC 2902 (QB)
SCC v LM & Ors [2013] EWHC 1137 (COP)
Sheffield City Council v S [2002] EWHC 2278 (Fam)
V v R [2011] EWHC 822
W v M, S, NHS Primary Care Trust [2011] EWHC 2443 (Fam)
Wandsworth Clinical Commissioning Group v IA [2014] EWCOP 990
Westminster City Council v Manuela Sykes [2014] EWHC B9 (COP)
Wye Valley NHS Trust v Mr B [2015] EWCOP 60
XCC v AA & Anor [2012] EWHC 2183 (COP)