



# Supporting good court craft

## Court craft resources for practitioners

### Key messages

- > Court craft is a core competency for practitioners, and confident practice can be developed with the right knowledge and support.
- > The role of reflective supervision, and the support of managers, is essential in developing the skills needed for good court craft.
- > Being legally literate is part of court craft, but it is not enough on its own.
- > A cornerstone of good court craft is defensible decision-making.
- > Understanding what excellent practice looks like - in terms of recording, writing and presenting for court - helps the development of court craft skills.
- > Good relationships - between the practitioner and the person, and the supervisor and supervisee - can support the practitioner to feel confident in preparing for and appearing in court.
- > Tools and case law examples can be used to reflect on legal literacy, decision-making and to prepare for the court process.

### Introduction

This resource, and its accompanying tools **grouped at the end of the resource from page 16**, supports people working in adult social care to:

- > develop their skills and knowledge in relation to writing for, and appearing at, court
- > feel more confident in their court craft
- > enable practice and decision-making which is transparent, evidence-informed, supportive of strengths-based practice and less open to challenge.

It does *not* provide detailed guidance on social care law or replicate guidance issued by the courts.

It provides:

- > An overview of the different types of court and the common circumstances or reasons why practitioners may be expected to attend.
- > Explanation of the different roles of the practitioner in court.
- > Guidance for everyday practice that supports defensible decision-making.
- > Guidance on writing statements and reports for court, including looking at the burden and standard of proof.
- > An overview of some of the key learning from case law related to social work practice.

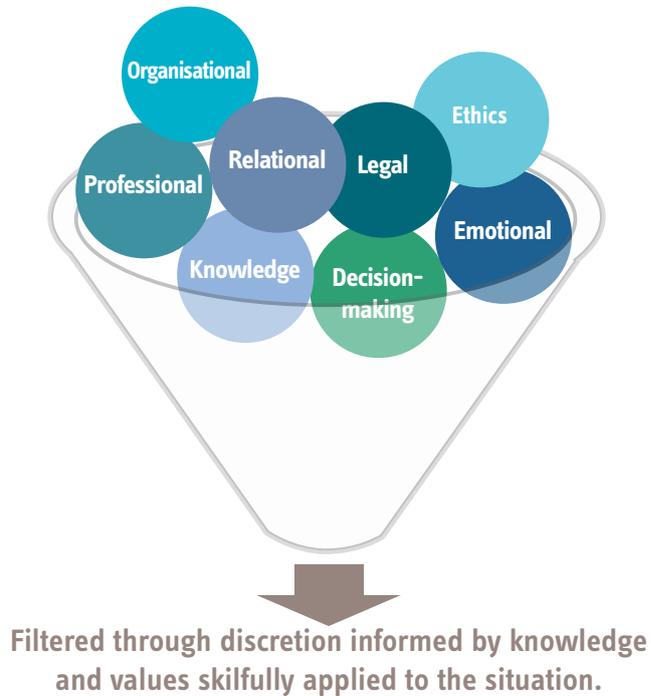
The accompanying tools offer guidance, templates and tips to support the professional development and maintenance of court craft skills and knowledge. They are relevant to all social care practitioners who may need to write for or attend court. There is also an accompanying briefing for managers and supervisors to support the development of good court craft - *Supporting good court craft: Supervisors' Briefing*:

[www.ripfa.org.uk/resources/publications/supervisors-briefing/supporting-good-court-craft-supervisors-briefing-2019](http://www.ripfa.org.uk/resources/publications/supervisors-briefing/supporting-good-court-craft-supervisors-briefing-2019)

## What do we mean by 'court craft'?

'Court craft' can be defined as the skills and knowledge required to assess, analyse and present information to court. 'Legal literacy' is a related term and refers to the ability to connect relevant legal rules with the professional priorities and objectives of ethical practice.

Court craft encompasses a wide range of literacies, skills and knowledge. Braye and Preston-Shoot (2016c) identify eight individual areas key to court craft.



Adapted from Braye and Preston-Shoot (2016b)

# Context

## Why is court craft important?

Court craft is of direct importance to the lives of people who use social care. Practitioners and organisations who are legally literate and skilled in court craft will help the courts to make timely and person-centred legal decisions. Many of the skills associated with good social work are also associated with good court craft (Braye and Preston-Shoot, 2016c) and court craft rests on the abilities of practitioners to gather and analyse information, placing the person's rights and wishes at the heart of decisions.

There may be times when practitioners are required to attend court, and to provide a written statement and/or to give evidence in relation to legal proceedings in the following arenas:

- > Court of Protection.
- > First-tier tribunals (for example Mental Health Tribunals).
- > Coroner's Court.
- > County Court (for example in relation to displacement of a nearest relative under the *Mental Health Act 2007*).
- > Family Court.
- > Administrative Court (for example as part of a judicial review).
- > High Court (for inherent jurisdiction).

The contexts in which a practitioner may be involved in court work are varied, but are mainly related to:

- > Deprivation of Liberty Safeguard (DoLS) applications to the Court of Protection.
- > Orders made under the *Mental Capacity Act 2005* (MCA).
- > Challenges to decisions *made by public bodies* which are generally dealt with via the administrative court.
- > Coroner's Court.
- > As witnesses in cases where a person with whom they have had professional involvement where there are allegations (for example) of domestic violence, coercive control or other forms of abuse.

## Court craft and social work capabilities

The literacies, skills and knowledge needed for good court craft align closely to the Professional Capabilities Framework (PCF) - core capabilities practitioners need to be able to demonstrate, maintain and develop throughout their careers. The following table illustrates how court craft literacies, skills and knowledge map against the PCF domains and themes.

### Court craft literacies, skills and knowledge identified in the Research in Practice for Adults *Legal literacy: Practice Tool* (Braye and Preston-Shoot, 2016a) adapted and mapped against the Professional Capabilities Framework (PCF)

Court craft literacies, skills and knowledge	PCF domain	PCF theme
<p><b>Legal literacy:</b> Knowledge and skilled application of primary and secondary legislation and statutory guidance. Understanding legal duties or requirements: for example, on assessment, eligibility, care and support, capacity, safeguarding, human rights and information-sharing.</p> <p><b>Ethical practice:</b> Reflective and critical consideration and application of values and ethics: for example, when balancing respect for autonomy with a duty of care and the requirements of codes of ethics and conduct. Promotion of human rights, social justice and addressing inequality in society.</p>	<p><b>RIGHTS, JUSTICE AND ECONOMIC WELLBEING:</b> Advance human rights and promote social justice and economic wellbeing.</p> <p><b>DIVERSITY AND EQUALITY:</b> Recognise diversity and apply anti-discriminatory and anti-oppressive principles in practice.</p> <p><b>VALUES AND ETHICS:</b> Apply social work ethical principles and values to guide professional practices.</p>	Purpose
<p><b>Decision-making skills:</b> Gathering and analysing information: for example, thinking critically and explicitly weighing the evidence for choosing one option over another, working towards shared decision-making and giving reasons for decisions or actions. Supporting representation, advocacy and consultation, and sharing information appropriately.</p> <p><b>Knowledge base:</b> Drawing on different sources of knowledge or expertise, practice and research, including the lived experience of people with social care needs, their families and carers: for example, working effectively with people with specific conditions or disabilities, being aware of the outcomes of different interventions and understanding the context or the social factors which may influence outcomes.</p> <p><b>Relational/interpersonal skills:</b> Building relationships and engaging with the biographies and lived experience of people who use adult social care: for example, seeking to understand people's concerns and perspectives, demonstrating curiosity, care and respectful challenge. Developing skills of active listening, observation, communication, and relationship-based social work.</p> <p><b>Emotional intelligence/resilience:</b> Being emotionally intelligent and emotionally resilient supports practitioners to thrive, to deal with the stresses and anxieties of the job, and to support colleagues - for example, acting with courage, resilience, integrity and respect in the face of strong emotions or challenge from colleagues and people who use adult social care.</p>	<p><b>CRITICAL REFLECTION AND ANALYSIS:</b> Apply critical reflection and analysis to inform and provide a rationale for professional decision-making.</p> <p><b>INTERVENTION AND SKILLS:</b> Use judgement, knowledge and authority to intervene with individuals, families and communities to promote independence, provide support, prevent harm and enable progress.</p> <p><b>KNOWLEDGE:</b> Develop and apply relevant knowledge from social work practice and research, social sciences, law, other professional and relevant fields, and from the experience of people who use services.</p>	Practice

<p><b>Professionalism:</b> Understanding the professional role, task and purpose, and observing the standards of practice set out by relevant regulatory or professional bodies - for example, Health and Care Professions Council Standards, the Professional Capabilities Framework and Knowledge and Skills Statements.</p>	<p><b>PROFESSIONALISM:</b> Identify and behave as a professional social worker, committed to professional development.</p>	
<p><b>Organisational knowledge:</b> Understanding accountability within an organisational context - for example, internal policies, procedures and practice, working practices, organisational culture and decision-making processes. Challenging these where they compromise standards or make error more likely.</p>	<p><b>PROFESSIONAL LEADERSHIP:</b> Promote the profession and good social work practice. Take responsibility for the professional learning and development of others. Develop personal influence and be part of the collective leadership and impact of the profession.</p> <p><b>CONTEXTS AND ORGANISATIONS:</b> Engage with, inform and adapt to changing organisational contexts, and the social and policy environments that shape practice. Operate effectively within, and contribute to the development of, organisations and services, including multi-agency and inter-professional settings.</p>	<p><b>Impact</b></p>

Please note, in terms of the KSS, these court craft literacies, skills and knowledge map onto the 'practice' theme of the PCF. This includes knowledge, critical reflection and analysis, interventions and skills, and focuses on what practitioners should know (and be capable of doing) in specific practice settings (BASW and Romeo, 2018). All Research in Practice for Adults resources are mapped against the KSS and you can access these here:

[www.ripfa.org.uk/resources/kss-main](http://www.ripfa.org.uk/resources/kss-main)

## The role of practitioners in court

The core role of a practitioner, regardless of the type of court setting, is to provide information and evidence to help the court reach a decision. To do this effectively requires robust day-to-day practice which reflects the literacies, skills and knowledge outlines in the previous table.

The result should be high quality evidence that draws together the following:

- > Information about the person's life.
- > The person's needs, views, wishes, feelings and beliefs.
- > The facts of the case.
- > The practitioner's professional opinion, underpinned by research.

These should all be set within the framework of statute and case law, and written clearly with confidence and authority.

This resource will support continuing professional development (CPD) in this area of practice by providing information, guidance, templates, tools and tips for the development and maintenance of court craft literacies, skills and knowledge. It will be useful for newly-qualified workers, those who have not done court work for some time, and also as an aid for experienced workers to reflect on their own practice (and to help model good court craft for others). It may be helpful to start by completing the *Court craft skills audit tool* on **page 16** to reflect on current practice and to provide a baseline for CPD.

### Tool 1: Court craft skills audit

This focuses on the skills and knowledge needed for good court craft. It is designed to support practice self-audit and can be used to identify strengths or areas for improvement.

This resource is grouped into the following sections:

#### **Building your knowledge base**

Understanding the legal, professional and organisational aspects needed for good court craft. Getting and staying up-to-date.

#### **Writing for court and appearing in court**

Understanding what good practice looks like in relation to court craft, including good recording and writing for court. Tips on preparing for, and appearing in, court. Using research, thinking critically, being analytical and making defensible decisions.

#### **Relational and interpersonal skills**

Resources to support emotional intelligence, resilience and relationship-based practice.

#### **Resources for managers and supervisors**

Focusing on how to ensure that they, and their staff, develop and maintain their court craft.

## Building your knowledge base

This section contains resources to help you develop the legal literacy, professionalism and organisational knowledge needed for good court craft. This includes:

- > The professional requirements for your role.
- > Relevant legal and ethical frameworks, and case law.
- > The legal justice system and the role of the practitioner within this.
- > Research, policy and case law across the sector.
- > Local requirements, expectations, policies and procedures which apply to court work in your organisation.

Whilst there is a requirement that you have a good knowledge of the law and its application in practice, your legal team will advise you on whether a case is ready to go to court.



**Tool 2a: Court craft and case law (page 18)**

**Tool 2b: Good decision-making (page 22)**

**Tool 3a: Keeping up-to-date with legislation and case law (page 23)**

**Tool 3b: Legal literacy – legislation and statute (page 25)**

**Tool 3c: Applying Human Rights principles in practice (page 26)**

**Tool 3d: Developing your knowledge and confidence for court (page 27)**

**Tool 3e: Knowledge literacy - areas of knowledge and expertise (page 31)**



### Further resources

#### Legal literacy

*Legal literacy: Strategic Briefing* (Braye and Preston-Shoot, 2016b)

[www.ripfa.org.uk/resources/publications/strategic-briefings/legal-literacy-in-adult-social-care-strategic-briefing-2016](http://www.ripfa.org.uk/resources/publications/strategic-briefings/legal-literacy-in-adult-social-care-strategic-briefing-2016)

*Legal literacy: Practice Tool* (Braye and Preston-Shoot, 2016a)

[www.ripfa.org.uk/resources/publications/practice-tools-and-guides/legal-literacy-practice-tool-2016](http://www.ripfa.org.uk/resources/publications/practice-tools-and-guides/legal-literacy-practice-tool-2016)

Research in Practice for Adults Case Law Summaries

[www.ripfa.org.uk/latest-news/new-case-law-summaries](http://www.ripfa.org.uk/latest-news/new-case-law-summaries)

#### Ethical practice

*Embedding human rights in adult social care: Leaders' Briefing* (Elliott, 2017)

[www.ripfa.org.uk/resources/publications/leaders-briefings/embedding-human-rights-in-adult-social-care-leaders-briefing-2017](http://www.ripfa.org.uk/resources/publications/leaders-briefings/embedding-human-rights-in-adult-social-care-leaders-briefing-2017)

#### Professionalism

KSS resource mapping:

[www.ripfa.org.uk/resources/kss-main](http://www.ripfa.org.uk/resources/kss-main)

*Training Transfer: Getting learning into practice* (Pike, 2012)

[www.ripfa.org.uk/resources/publications/practice-tools-and-guides/training-transfer-getting-learning-into-practice-review-2012](http://www.ripfa.org.uk/resources/publications/practice-tools-and-guides/training-transfer-getting-learning-into-practice-review-2012)

*Good decision-making: Practitioners' Handbook* (Nosowska and Series, 2013)

[www.ripfa.org.uk/resources/publications/practice-tools-and-guides/good-decision-making-practitioners-handbook-2013](http://www.ripfa.org.uk/resources/publications/practice-tools-and-guides/good-decision-making-practitioners-handbook-2013)

HCPC Standards of proficiency:

*Social workers in England*

[www.local.gov.uk/sites/default/files/documents/standards-proficiency-soc-906.pdf](http://www.local.gov.uk/sites/default/files/documents/standards-proficiency-soc-906.pdf)

Occupational therapists

[www.hcpc-uk.org/standards/standards-of-proficiency/occupational-therapists](http://www.hcpc-uk.org/standards/standards-of-proficiency/occupational-therapists)

The British Association of Social Workers (BASW):

[www.basw.co.uk](http://www.basw.co.uk)

Professional Capabilities Framework (PCF)

[www.basw.co.uk/professional-development/professional-capabilities-framework-pcf](http://www.basw.co.uk/professional-development/professional-capabilities-framework-pcf)

## **Knowledge base and keeping up-to-date**

Research and Policy Updates

[www.ripfa.org.uk/my-ripfa/support-for-link-officers/link-officer-resources-container/lo-rpu](http://www.ripfa.org.uk/my-ripfa/support-for-link-officers/link-officer-resources-container/lo-rpu)

Case Law Summaries

[www.ripfa.org.uk/latest-news/new-case-law-summaries](http://www.ripfa.org.uk/latest-news/new-case-law-summaries)

## **Organisational knowledge**

*How to get learning into practice: Practice Tool* (Pike and Wilkinson, 2013)

*Good assessment: Practitioners' Handbook* (Nosowska, 2014)

[www.ripfa.org.uk/resources/publications/practice-tools-and-guides/good-assessment-practitioners-handbook-2014](http://www.ripfa.org.uk/resources/publications/practice-tools-and-guides/good-assessment-practitioners-handbook-2014)

## Writing for court and appearing in court:

This section contains information, tools and resources which demonstrate what good practice looks like in relation to court craft, including good recording and writing for court. There are also some hints and tips on preparing for, and appearing in, court.

Whether writing for court or appearing in court, the ability to use research, to think critically, to be analytical and to utilise the skills and knowledge derived from evidence-informed practice underpin defensible decision-making. Getting this right in day-to-day practice will ensure that the relevant information is readily available if needed for court.

### Recording

A key part of preparing for court is drawing upon and analysing existing documentation and records. This emphasises the importance of good recording in day-to-day practice. Any record is only as good, or as useful, as the information it contains.

Recording should always be treated as a professional activity; practitioners should aim to develop their writing skills in the same way they would any other professional requirement (Johnstone, 2017). However, while there is a requirement for you to write professionally, this does not mean you need to use legal terminology in (for example) assessments of need. It is more important to ensure your writing is clear, unbiased and reflects the person's wishes and feelings.

The evidence you draw on to prepare for court may be records you have made, or those of other professionals who have been involved. Sound professional judgement should have guided their recording and they should have weighed up the risks before deciding what level of detail to record. It is unlikely records will capture every detail. However, in general, records should:

- > Reference relevant legislation and guidance – for example, around mental capacity or coercive control.
- > Reference other relevant assessments or reports which have been undertaken – for example, Best Interests or Capacity assessments.
- > Distinguish between fact, opinion, professional judgement and hearsay.
- > Use appropriate language that is non-judgemental and unambiguous.
- > Clearly state the hypotheses - why you think X or Y, rather than A or B.
- > Explain how a decision was arrived at by showing the 'working out' – in other words, be defensible.
- > Consider the level of risk in conjunction with the person's desired outcomes.

(Johnstone, 2017)

You can use this as a checklist for records, assessments, statements or reports to ensure you have provided a comprehensive and transparent account. If recording is of a good standard and follows the framework above, then preparing for court will be much easier.



### Further resources

*Good recording: Practice Tool* (Johnstone, 2017)

[www.ripfa.org.uk/resources/publications/practice-tools-and-guides/good-recording-practice-tool-2017](http://www.ripfa.org.uk/resources/publications/practice-tools-and-guides/good-recording-practice-tool-2017)

Recording outcomes-focused conversations: Webinar

[www.ripfa.org.uk/resources/webinar-recordings/recording-outcomesfocused-conversations](http://www.ripfa.org.uk/resources/webinar-recordings/recording-outcomesfocused-conversations)

## Writing for court – using evidence, analysis and critical thinking in assessments and reports

Good assessment is key to better outcomes for adults and families. Without it, practice is likely to lack focus and a clear sense of purpose. Poor assessment may result in a person's needs, wishes and aspirations being overlooked or misunderstood, with serious consequences for their wellbeing. It may even result in them being unlawfully deprived of their liberty.

### Davey v Oxfordshire

A particular example of good practice from case law, Davey v Oxfordshire, demonstrates how essential it is that practitioners clearly 'show their working out' - the analysis and critical thinking in their assessment. Here, the courts found that the practitioner really listened to Mr Davey, his family and his team. Their views were recorded without allowing personal confrontation or heated argument to take over decision-making. This was important, because the detail of the assessment was closely scrutinised during the case and subsequent appeal.

An evidence-informed decision-making approach involves five stages. You can test out your decision-making by asking these questions at each stage.

#### 1. What is the decision for?

(What is the issue? What do I need to know?)

#### 2. What evidence do we have?

(What evidence do I already have? Where else might I need to look to find evidence?)

#### 3. What does the evidence mean?

(Where did it come from? How clear is it? How does it relate to the situation?)

#### 4. What needs to happen?

(Where do we want to go? How will we get there?)

#### 5. How will we know we are making progress?

(What does success look like? How will we measure it?)

(Nosowska and Series, 2013)

Doing this well is fundamental to quality of the reports and evidence you submit to the courts and, as a result, the quality of the decisions made by them.

Using research to support your decision-making is good practice and locates your decision-making in the wider knowledge base. Any research used should be clearly linked in to the decision-making process (explaining how it influenced your professional opinion), properly cited, and you would normally also include a copy of the research as an appendix (or exhibit) to your report or statement.



**Tool 4a: Using research in assessment and reports (page 34)**

**Tool 4b: Using research in court - some do's and don'ts (page 36)**

**Tool 4c: Preparing for court - writing a statement or court report (page 38)**

**Tool 5: Preparing for court - giving evidence (page 40)**



**Further resources**

*Good decision-making: Practitioners' Handbook* (Nosowska and Series, 2013)

## Decision-making skills

When scrutinising decisions, the courts do not focus solely on the decision itself but on whether or not the correct approach to the specific decision was used (and, therefore, whether it is lawful). Therefore, both a practitioner's decision-making skills, and the professional processes that lead up to them, are key to good court craft.

The process of applying research evidence, analysis and critical thinking, and accurate recording of rationale and decisions should begin from the very first contact with an individual or family, and be consistently practised throughout all professional involvement. This is not only ethically and professionally right, it ensures that decisions are clearly documented, justifiable and defensible. It should also make preparing statements, reports and appearing in court easier as the relevant information and evidence will already be documented and readily accessible.

However, adult social care is complex, people's situations can shift, and people's preferences may not always be clear-cut. This means there is a need for processes and skills to help navigate the uncertainty. This is summarised in the concept of defensible decision-making.

Defensible decision-making is the foundation of good court craft. **Defensible decisions meet reasonable expectations of standards of practice. They are not the same as defensive decision-making, which is more about 'covering your back'** (Nosowska and Series, 2013).

An action or decision would be deemed 'defensible' if an objective group of professionals would consider that:

- > all reasonable steps are taken
- > reliable methods are used
- > information is collected and thoroughly evaluated
- > decisions are recorded and carried through
- > agency processes and procedures are followed
- > practitioners and managers are investigative and proactive.

In terms of expected standards of practice, the *HCPC Standards of Proficiency - Social Workers in England* state that practitioners should 'understand the need to promote the best interests of service users and carers at all times' and are 'able to keep accurate, comprehensive and comprehensible records in accordance with applicable legislation, protocols and guidelines' (HCPC, 2017). These standards are all relevant to court craft.

*Please note: As of Spring 2019, Social Work England will take over as the regulatory body for social workers and the standards of practice referred to in this resource are likely to change. Occupational Therapists will remain under the remit of the Health and Care Professions Council. Managers and supervisors need to be aware of the relevant regulator and standards for different staff in their teams.*



### Tool 6: Mental Capacity and Best Interests (page 42)

### Tool 7: Risk and Bias (page 45)

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## Further resources

*Good decision-making: Practitioners' Handbook* (Nosowska and Series, 2013)

*Good assessment: Practitioners' Handbook* (Nosowska, 2014)

*Making Decisions on Capacity and Best Interests: Strategic Briefing* (Series, 2013)

[www.ripfa.org.uk/resources/publications/practice-tools-and-guides/making-decisions-on-capacity-and-best-interests-strategic-briefing-2013](http://www.ripfa.org.uk/resources/publications/practice-tools-and-guides/making-decisions-on-capacity-and-best-interests-strategic-briefing-2013)

## Relational and interpersonal skills

Your relationships with the adults and families you work with are central to your practice. Trust, rapport, consistency, responsiveness and supportiveness all influence outcomes.

Communication skills are pivotal to facilitating the kind of conversations that lead to better understanding of people's strengths, outcomes, and what is needed to promote their wellbeing and improve their quality of life. The content of these conversations, the information gleaned from them and the analysis of this, become the basis of decisions and actions that have great significance to the people involved. They are the source of the views, wishes, feelings and beliefs of the person. The quality of the information gathered and how well it is written up is central to this: practitioners need skills of observation and active listening, and confidence to ask probing or difficult questions in order to build an accurate picture of the situation.

It is important for practitioners to be aware of their own emotional resilience, and to have professional avenues to discuss stresses and difficulties in their work. Court work can feel especially challenging and the emotionally supportive role of reflective supervision may take on particular importance here.

Reflective supervision is also effective in building interpersonal skills such as empathy, emotional intelligence, curiosity and optimism. Supervision has a significant role in reducing isolation, demystifying the court process, considering the possible impact of court on your relationships with the person you're working with, and relieving the pressure that you can feel when preparing for court.

Although the courts expect professionalism and clear, defensible decision-making, case law examples show that judges are not unsympathetic to the complex nature of social work and are aware of its pressures. In *R (Ireneschild) v Lambeth LBC*, Judge Hallett stresses that:

'One must always bear in mind the context of an assessment of this kind. It is an assessment prepared by a social worker for his or her employers. It is not a final determination of a legal dispute by a lawyer which may be subject to overzealous textual analysis. Courts must be wary, in my view, of expecting so much of hard-pressed social workers that we risk taking them away unnecessarily from their frontline duties' (available online at [www.bailii.org/ew/cases/EWCA/Civ/2007/234.html](http://www.bailii.org/ew/cases/EWCA/Civ/2007/234.html)).

The resources below aim to support relationship-based practice, outcomes-focused conversations and emotional resilience.



### Further resources

#### Outcomes microsite

An online set of resources to support working in an outcomes-focused way - [outcomes.ripfa.org.uk](http://outcomes.ripfa.org.uk)

*Good recording: Practice Tool* (Johnstone, 2017)

Supports practitioners to develop their recording skills.

*Working with complexity: Evidence Review* (Baim et al, 2018)

A four-chaptered evidence review which includes a chapter on working with the *Mental Capacity Act*.

## Resources for managers and supervisors

*Supporting good court craft: Supervisors' Briefing* (Page and Johnstone, 2019)

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## Tool 1: Court craft skills audit

This tool focuses on the skills and knowledge relating to court craft. It is designed to help you to audit your practice. It can be used to identify strengths or areas which you would like to improve.

**How confident are you in your skills and abilities in the following aspects of court craft?**

	1-5 (1=low)	Comments
Gathering evidence from internal sources such as case files and assessments.		
Gathering evidence from external sources such as GP reports or other agencies assessments.		
Searching for relevant research evidence, for example on working effectively with people with specific conditions or disabilities, evaluating intervention outcomes or understanding the impact of social factors.		
Appraising evidence for reliability and robustness, identifying potential limitations and bias.		
Identifying issues of significance from a range of sources such as legislation, statutory guidance and case law.		
Synthesising the findings of research, drawing out the key messages and articulating how these relate to the case or point in question.		
Making evidence-informed decisions.		
Documenting evidence-informed decisions.		
Preparing evidence for a report for the court.		
Differentiating between, for example, fact, opinion, professional opinion, assumptions, presumptions or hearsay.		
Documenting and presenting your professional opinion/expertise.		
Ensuring the views, wishes and feelings of the person are clear in your writing.		
Ensuring you have made clear what is most important to the person and why.		
Writing a witness statement.		
Writing a report for court which is clear, concise and relevant.		
Ensuring your writing is balanced and unbiased.		

Using empowering strengths-based language which is non-judgemental, respectful and free from bias.		
Managing your own emotional resilience in situations where there may be challenge or strong emotional reactions from others; for example, in multi-agency discussions, in discussions with people with care needs and their families, when presenting in court.		
Presenting a report in court.		
Presenting your decisions, and the rationale behind them verbally.		
Being cross-examined.		
Consulting and instructing lawyers.		
Challenging colleagues' decisions, legal interpretation or options.		
Challenging other professionals' or agencies' decisions, legal interpretation or options.		
Identifying and applying relevant legal rules to cases that come to your attention.		

**How confident are you in your knowledge of the following aspects of court craft?**

	1-5 (1=low)	Comments
Primary and secondary legislation, and statutory guidance.		
Case Law.		
Internal policies, procedures or practice guidance on writing for court.		
Internal policies, procedures or practice guidance on recording.		
The structure and roles of the legal system in the UK.		
The workings of the Court of Protection.		
The professional standards applicable to your role.		
The role of the practitioner in court.		
Values and ethics of social work, occupational therapy and health professionals.		
How and why to use legal powers and discretionary duties.		

(Adapted from Bray and Preston-Shoot, 2016b)



## Tool 2a: Court craft and case law

### Exercise 1

This case law example illustrates the context of these literacies and some of the multiple interdependencies between them.

#### **Davey R (on the application of) v Oxfordshire County Council & Ors [2017]**

[www.bailii.org/ew/cases/EWCA/Civ/2017/1308.htm](http://www.bailii.org/ew/cases/EWCA/Civ/2017/1308.htm)

#### **Case synopsis:**

A disabled man lost his challenge against having his care package extensively cut. This case is his appeal against that judgement. It hinges on the crucial public law point of how to apply the *Care Act 2014* in practice and particularly addresses the question of how far a local authority should consider the wishes and feelings of the person, and what it means for it to work within the wellbeing principle. It also highlights the skills and knowledge which demonstrate good social care practice and court craft.

In this case the court paid keen attention, not only to how closely the practitioner assessments had regard to the duties of the local authority under the *Care Act 2014* (*legal literacy*), but also meticulously explored the evidence within them (*knowledge literacy*) which formed the basis on which decisions had been made (*decision making literacy*), and how these decisions had been recorded (*professional and organisational literacy*).

The social worker in this case had admirably listened to Mr Davey, his family and his team and recorded their views (*professional and organisational literacy*) without allowing personal confrontation or heated argument to take over her decision-making (*relational and emotional literacy*).

It demonstrated that records must show exactly how each decision is reached (*professional and organisational literacy*) to demonstrate that balance had been struck between the wishes of the person and the duty of care of the local authority (*ethical literacy*).

This case also demonstrated the importance of organisations supporting their practitioners when, for example, they need to make decisions that could be perceived as counter-intuitive and that will affect people's lives. It emphasised that they must be enabled to develop the relevant literacies required to practice confidently and effectively.



### Questions for reflection

Practitioners need to understand the importance of case law if they are to practice effectively, provide information for court or be credible witnesses in court settings. If you were asked to review the assessment and support plan for someone in the same situation as Mr Davy:

- > What legal rules would you expect to see having underpinned the initial assessment and decision-making?
- > What principles would you expect to see having been used?
- > What decision-making processes would you expect to find documented in the records and why?

## Exercise 2

**Read the synopsis below and reflect on how each of the literacies which make up court craft might have come in to play.**

The judgement made in [2015] EWCOP 1 Essex County Council and – RF (1), PN (2), JN (3), CP (4) (by his litigation friend, the Official Solicitor):

[www.bailii.org/ew/cases/EWCOP/2015/1.html](http://www.bailii.org/ew/cases/EWCOP/2015/1.html)

### Case synopsis

A retired civil servant CP (P), aged 91, lived quietly with his cat in the home he had formerly shared with his parents and sister, until their deaths. Following a safeguarding alert, he was removed from home and taken to a locked unit in a care home; he was detained under the authority of the deprivation of liberty safeguards (DoLS). He was an ardent member of his local church, where he had many friends; one friend, RF, pursued the challenge to P's DoLS authorisation which prevented him achieving his fervent wish to return home.

### Case summary

#### The facts

P was always a generous man. He was now living with dementia, and an allegation was received by the local authority of possible financial abuse. In disputed circumstances, but which were very traumatic for P, he was removed without warning to a care home. At least two subsequent capacity assessments found no evidence that he lacked capacity to decide where to live, but these were, it would seem, rapidly overruled by assessments that he did lack capacity for this decision.

Close friends have proved essential in fighting for the rights of people, as with P, whose unlawful detention was challenged by his friend RF. If she had not done so, it is almost certain that he would have remained for the rest of his life in a locked unit.

In this case one of the breaches of Article 8 identified by the court was that P was prevented from going to his church freely or having contact with his friends. It is extremely serious that, even after a long period in a locked dementia unit, P was, when his case came to court, found to have capacity to make his own decisions on contact.

Many of us know at first-hand the intense bond that is created by a relationship with a pet. As well as noting the importance to P of his friends and the church of which is he a part, the judge in this case highlighted P's relationship with his cat, Fluffy, and noted how gratified P was when he was able to return home with his pet.

The Judge found that, in relation to P, ECC had failed to:

- > heed the presumption in favour of his capacity
- > adopt the course of action which was less restrictive of P's rights and freedom of action
- > have regard to the independent evidence of P's capacity by either ignoring it or immediately countermanding it
- > take seriously or act upon his consistently expressed wish to return home
- > appoint an IMCA for him
- > refer the matter to the court
- > make a Deprivation of Liberty Safeguards application.

By the time of his return home P had been deprived of his liberty for well over a year, and his wishes to return home ignored. He was awarded a significant compensation package from the local authority and the court also ordered the authority to repay to him the costs of the care home fees which he had been made to pay during his confinement.

## Implications for practice

- > In taking action following a safeguarding alert, social workers must seek the option that is the least restrictive of the person's rights and ensure that investigations are carried out in a timely way to explore if there is evidence to substantiate allegations. In this case, timely exploration of his capacity to make his own financial decisions may well have led to a finding that there was no evidence he lacked capacity. If he did lack such relevant capacity on the balance of probabilities, action such as arranging a deputy would have provided protection from abuse while enabling him to remain in his own home.
- > The wishes and feelings of the person are of great importance in making a best interests decision; and the closer a person is to having capacity for a decision (which at the very least applies to P, who may well have had capacity when first detained) the greater the weight that his views should have in decision-making.
- > Social workers must be alert to the individual circumstances of someone's life, and not underplay the importance to a person, perhaps somewhat reserved, of a quiet life with friends, a strong faith, and his pet.

(Case Law and Legal Summary, May 2017)

## Discussion

There are several significant failings highlighted in this case and, whilst we do not have access to the evidence presented, these raise obvious questions about the practice within the organisation. **Use the table below to reflect on how each of the different literacies might have resulted in different outcomes for P, for the practitioners involved and for the organisation:**

<b>Legal</b>	<b>Legal literacy</b> , for example, should have ensured that the principles of the <i>Mental Capacity Act 2005</i> were adhered to and have given regard to P's Human Rights (Articles 5 and 8).
<b>Ethical</b>	
<b>Professional</b>	

<b>Knowledge</b>	
<b>Organisational</b>	
<b>Relational</b>	
<b>Emotional</b>	
<b>Decision-making</b>	



## Tool 2b: Good decision-making

	How far is this embedded (1 low-5 high)?	Action	Who?	When?
The willingness to make decisions in conditions of uncertainty (ie risk-taking) is a core requirement of all staff in social care.				
Maintaining or achieving the wellbeing of individuals and communities is a primary consideration in risk decision-making.				
Risk-taking involves judgement, with decision-makers required to consider the value and likelihood of the possible benefits of a particular decision against the seriousness and likelihood of possible harms.				
Harm can never be totally prevented. Risk decisions should, therefore, be judged by the quality of the decision-making, not by the outcome.				
Taking risk decisions, and reviewing others' risk decision-making, is difficult so account should be taken of whether the decision was made during a crisis, was affected by other circumstances, or responsibility was shared with others.				
A reasonable decision is one that staff with similar roles, learning and experience would have taken in similar circumstances.				
Whether to record a decision is a risk decision itself which should, to a large extent, be left to professional judgement. The decision of whether or not to make a record, however, and the extent of that record, should be made after considering the likelihood of harm occurring and its seriousness.				
To reduce risk aversion and improve decision-making, social care needs a culture that learns from successes as well as failures. Good risk-taking should be identified, celebrated and shared.				
Since good risk-taking depends upon quality information, social care will work with partner agencies and others to share relevant information, where appropriate, about risk.				
Staff in social care who make decisions consistent with these principles should receive the encouragement, approval and support of their organisation.				



## Tool 3a: Keeping up-to-date with legislation and case law

Legislation, statutory guidance and case law are dynamic subjects. However, keeping up-to-date will help you feel more confident when writing for, or appearing in court, and will help avoid possible criticism from the judge and other legal representatives.

### Where can I find copies of legislation?

All primary legislation from 1998 to current is available online at: [www.legislation.gov.uk](http://www.legislation.gov.uk)

If there are changes to the legislation pending this will be highlighted. Secondary legislation, for example, statutory instruments or regulations are also available online.

Associated statutory guidance and codes of practice are normally located on the relevant departmental website at: [www.gov.uk](http://www.gov.uk)

### How can I keep up-to-date?

- 1) Training on new and updated legislation will often be made available via your organisation, particularly when significant changes or updates occur. You can also sign up to get bulletins or updates from gov.co.uk so, for example, you know if the Department of Health and Social Care update the statutory guidance on the *Care Act 2014*. You may be able to access external training online from external sources such as Research in Practice for Adults or Skills for Care. You could also raise your awareness generally via sector-led magazines and social media.
- 2) Make contact with your legal team or your local lead on the *Mental Capacity Act 2005* and find out if they produce updates. Ask them to join your team meeting to update you on recent developments nationally or locally.
- 3) Add 'case law and legal updates' to the agenda of your team meeting and/or individual supervision sessions, so that you can maintain awareness of new or changing legislation and case law and open up a discussion about how others achieve this.
- 4) If your organisation has a library/information service, they may also be able to assist.
- 5) Read updates such as the Research in Practice for Adults Case Law and Legal Summaries - [www.ripfa.org.uk/resources/case-law-summaries](http://www.ripfa.org.uk/resources/case-law-summaries). Add it to your list of favourites to make it easy to navigate to the newest cases.

### How can I use case law?

The best way to understand case law is to read the case in its entirety and note the judge's reasoning for the decision made. The British and Irish Legal Information Institute (BAILII) website - [www.bailii.org](http://www.bailii.org) - gives open access to judgements from across the range of UK courts and includes some tribunal decisions too.

Reading the full judgement is recommended and will in some cases be essential. However, for maintaining awareness generally, or for identifying specific cases which have relevance to a person or family you are working with, you can also access online case law summaries. There are lots available, including:

- > Research in Practice for Adults:  
[www.ripfa.org.uk/resources/case-law-summaries](http://www.ripfa.org.uk/resources/case-law-summaries)
- > 39 Essex Chambers:  
[www.39essex.com](http://www.39essex.com)
- > Cornerstones:  
[www.cornerstonebarristers.com/news](http://www.cornerstonebarristers.com/news)
- > Disability Rights UK:  
[www.disabilityrightsuk.org/how-we-can-help/benefits-information/law-pages/case-law-summaries](http://www.disabilityrightsuk.org/how-we-can-help/benefits-information/law-pages/case-law-summaries)

Understanding of case law can:

- > Enhance your understanding of both the relevant law and the judge's likely approach to the key issues.
- > Provide practical guidance on how to approach a particular issue, which you can apply to your case.
- > Reduce the likelihood of your statement being criticised for failing to take into consideration issues already highlighted by the courts in other similar cases.
- > Strengthen your practice - case law can be used to strengthen an argument at court, pre-empt issues the judge is likely to focus on and, similarly, can also be used to undermine the other party's case.

However, it is important to be mindful when using case law – each case will have specific circumstances and decisions will have been made in a specific jurisdiction and thus the legal rules or tests applied may differ (Preston-Shoot, 2014).

If you become aware of a reported case that might be relevant to a person or family you are working with, contact your in-house legal team and discuss the best approach. This should help you identify whether the specific legal rule, test or question in the case is relevant and whether your evidence to the court will need to address this. Your legal representative should be able to advise you about how best to do this.

(Adapted from Baynes and Cook, 2017)



## Tool 3b: Legal literacy - legislation and statute

You can use this tool to audit your own, or your team's, legal literacy:

Self-audit: How confident are you in your knowledge of these legal rules?	Not at all	Not very	Fairly	Very
<i>Human Rights Act 1998</i>				
<i>Equality Act 2010</i>				
<i>Data Protection Act 1998</i>				
<i>Care Act 2014: Core principles</i>				
<i>Care Act 2014: Integration</i>				
<i>Care Act 2014: Prevention</i>				
<i>Care Act 2014: Market shaping</i>				
<i>Care Act 2014: Assessment, eligibility</i>				
<i>Care Act 2014: Personal budgets, care planning</i>				
<i>Care Act 2014: Adult safeguarding</i>				
<i>Care Act 2014: Advocacy</i>				
<i>Mental Health Act 1983</i>				
<i>Mental Capacity Act 2005: Core principles</i>				
<i>Mental Capacity Act 2005: Assessing capacity</i>				
<i>Mental Capacity Act 2005: Best interests decisions</i>				
Deprivation of Liberty Safeguards				
Role and remit of the Court of Protection				
Inherent jurisdiction of the High Court				
The legal rules on Health and Wellbeing Boards				
<i>Modern Slavery Act 2015</i>				
The legal rules for work with self-neglect				
The legal rules for work with sexual exploitation				
The legal rules for work with hate crime				
The legal rules for work with domestic violence				
<i>Counter-Terrorism and Security Act 2015</i>				
The legal rules for work with asylum seekers				



## Tool 3c: FREDA - Applying Human Rights principles in practice

A good way to embed human rights within an organisation is to use the core principles of **f**airness, **r**espect, **e**quality, **d**ignity and **a**utonomy (FREDA) as a framework to link procedure and practice to particular values. These are powerful values which can serve to clearly articulate how what is done in practice can promote and protect human rights as well as how it can impinge upon them. The FREDA principles can be applied with either a strategic or operational practice focus.

**As a team, or individually, reflect on examples from your practice which demonstrate the FREDA principles have protected or promoted human rights.**

Principle	Value	Example practice
Fairness	Balancing risk with the person's quality of life, rights and choice.	
Respect	Decisions from assessments should be communicated effectively with relevant individuals.	
Equality	Assessments should take into account the person's age, race, religion, culture, gender, sexual orientation, disability, communication needs.	
Dignity	Adults who lack capacity should be protected from significant harm, using the least restrictive interventions.	
Autonomy	Adults who lack capacity are supported to judge potential benefits as well as potential harms of a situation; services promote risk-taking in a planned and controlled way.	

(Adapted from Mersey Care NHS Trust, 2008)



## Tool 3d: Developing your knowledge and confidence for court

You can build your knowledge and confidence in the court environment by learning about the justice system generally and by studying activity in your nearest courts. The sections below set out some resources you can use to structure your ongoing development activity in this area.

### Understanding the justice system

- > You can read about the justice system in the UK on the Courts and Tribunals Judiciary website - [www.judiciary.uk/about-the-judiciary/the-justice-system](http://www.judiciary.uk/about-the-judiciary/the-justice-system). This includes information about the history of the justice system, traditions of the court, judicial roles and court dress.
- > You can also access helpful diagrams illustrating the structure of the court system - [www.judiciary.uk/wp-content/uploads/2012/08/courts-structure-0715.pdf](http://www.judiciary.uk/wp-content/uploads/2012/08/courts-structure-0715.pdf) - and the tribunal system - [www.judiciary.uk/publications/tribunals-organisation-chart](http://www.judiciary.uk/publications/tribunals-organisation-chart).

The jurisdictions pages explain how different cases are dealt with, and which judges deal with them. They include pages on:

- Civil
  - Criminal
  - Family
  - Tribunals
  - Coroners
- > Once you have gained an overview of the justice system as a whole it may help to gain an understanding of the courts within your area. You can do this using the GOV.UK Court and Tribunal finder: <https://courtribunalfinder.service.gov.uk>
  - > There are 92 separate coroners' jurisdictions within England and Wales. You can locate your nearest coroner's office using the Coroner's Society of England and Wales Coroner search: [www.coronersociety.org.uk/coroners](http://www.coronersociety.org.uk/coroners)
  - > Explore what facilities are available in each court for both the public and professionals.
  - > The Courts and Tribunals Judiciary has produced a handbook for litigants in person - [www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/A\\_Handbook\\_for\\_Litigants\\_in\\_Person.pdf](http://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/A_Handbook_for_Litigants_in_Person.pdf). This is aimed at those going to court without legal representation but provides useful information on preparing for and presenting at court. Other useful resources that may help you prepare are:
    - Crown Prosecution Service website - Going to court: [www.cps.gov.uk/going-court](http://www.cps.gov.uk/going-court)
    - Home Office guidance for their staff on giving evidence in court: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/638784/Giving-evidence-in-court-v3.0ext.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/638784/Giving-evidence-in-court-v3.0ext.pdf)
    - Courts and Tribunals Judiciary information on judicial review: [www.judiciary.uk/you-and-the-judiciary/judicial-review](http://www.judiciary.uk/you-and-the-judiciary/judicial-review)
    - Courts and Tribunals Judiciary information on court of appeal: [www.judiciary.uk/you-and-the-judiciary/going-to-court/court-of-appeal-home/procedure-rules-for-the-court-of-appeal](http://www.judiciary.uk/you-and-the-judiciary/going-to-court/court-of-appeal-home/procedure-rules-for-the-court-of-appeal)
    - Browne Jacobson - the role of a social worker within an inquest: [www.brownejacobson.com/insurance/training-and-resources/guides/2016/01/a-guide-to-the-role-of-a-social-worker-within-an-inquest](http://www.brownejacobson.com/insurance/training-and-resources/guides/2016/01/a-guide-to-the-role-of-a-social-worker-within-an-inquest)
  - > Find out who is your organisational representative or lead for legal matters. Ask them to keep you informed of the issues under discussion or review.
  - > Liaise with your legal department about any recent case law that has implications for your practice. Ask to see a copy of the summary of any judgements so that you can draw on lessons to be learned for practice. (A superficial understanding may lead to false assumptions.)

- > Access the monthly Research in Practice for Adults Case Law and Legal summaries - [www.ripfa.org.uk/resources/case-law-summaries](http://www.ripfa.org.uk/resources/case-law-summaries) - and share information with colleagues. Add these to your list of favourites so you can refer back to them quickly and easily.
- > Identify what issues of concern there are within your service area or team.
- > Reflect on your own practice and the extent to which you can make a positive contribution to addressing these issues. You can use the Court craft skills audit Tool to help identify your strengths and any learning needs.
- > Ensure you are aware of your organisation's policies, procedures and practice.
  - Read the Research in Practice for Adults *Legal Literacy: Practice Tool* and *Legal Literacy: Strategic Briefing* and the rest of these court craft resources and encourage colleagues to do the same.
    - [www.ripfa.org.uk/resources/publications/practice-tools-and-guides/legal-literacy-practice-tool-2016](http://www.ripfa.org.uk/resources/publications/practice-tools-and-guides/legal-literacy-practice-tool-2016)
    - [www.ripfa.org.uk/resources/publications/strategic-briefings/legal-literacy-in-adult-social-care-strategic-briefing-2016](http://www.ripfa.org.uk/resources/publications/strategic-briefings/legal-literacy-in-adult-social-care-strategic-briefing-2016)
- > Attend public court hearings to shadow colleagues, particularly those where they are expecting to be cross-examined. To attend a private hearing that you are not directly involved with, you will need the permission of all the parties and the court. Remember also that in some cases a heavy presence of social workers may be perceived as overwhelming or inappropriate. Familiarising yourself with the court environment, how hearings are conducted, and the roles/behaviours of those present, can help you feel less nervous or intimidated when you need to attend.
- > Talk to colleagues about their experience of court. Debate what lessons are to be learned from good and bad experiences and how practice can be improved.
- > Use supervision sessions to discuss the evidence you will present and any of your concerns about how this will be challenged.

## Who's who in court?

The legal justice system has developed over hundreds of years and has its own culture, rules, roles and professional terminology. Some of the key roles are set out below.

- > **High Court judge**  
A High Court judge is a lawyer with significant experience, often including previous judicial experience as a circuit judge. Judges who sit in the High Court can hear all cases relating to children; often hearing the more complex cases and appeals from certain decisions in the family court. The High Court is separated into three Divisions (the Queen's Bench Division; the Chancery Division and the Family Division). You refer to a High Court judge as 'My Lord' or 'My lady'.
- > **Circuit judge**  
An experienced lawyer who will generally also have been a Recorder or a District Judge. Circuit judges are appointed to one of seven regions in England and Wales. This region is known as 'a circuit'. Some circuit judges are authorised to hear public and/or private family law cases. You refer to a circuit judge, both male and female, as 'Your Honour'.
- > **Recorder/Assistant Recorder**  
Recordership is often the first step on the 'judicial ladder' to appointment as a circuit judge. The workload of a recorder is broadly similar to that of a circuit judge, but they will generally hear less complex or serious matters. You refer to a recorder, both male and female, as 'Your Honour'.
- > **District judge/Deputy district judge**  
The work of a district judge involves a wide spectrum of civil cases and they deal with the majority of cases in the county courts. On appointment a district judge is assigned to a particular region in England and Wales. You refer to a male district judge as 'Sir' and a female district judge as 'Madam/Ma'am'.
- > **Magistrates (also known as Justices of the Peace)**  
Volunteer judicial officer holders. Magistrates can be appointed from aged 18 and retire at 70. Magistrates do not require legal training or qualifications and are supported in court by a trained legal advisor to guide them on points of law and procedure.
- > **Clerk**  
There are two different types of clerk:
  - 1) Legally qualified clerks who will sit with, and provide legal advice to, the magistrates.
  - 2) Non-legally qualified clerks who will sit with a legally qualified judge and assist with the smooth running of the hearing.

> **Coroner**

A Coroner is an independent judicial office holder, appointed by the local authority. Coroners are usually lawyers who work within a framework of law passed by Parliament. The Chief Coroner heads the Coroner service and gives guidance on standards and practice (Coroners' Society of England and Wales).

> **Usher**

The court usher is not legally qualified. Their role is to register the arrival of the parties at court and to make a note of the name of any legal representatives. The usher will inform the judge when all the parties have arrived and that the case is ready to commence. Once inside the court building, it is important you make yourself known to the usher for your allocated court.

> **Local authority lawyer – barrister/solicitor/paralegal**

A lawyer is a generic title encompassing any professional with a legal qualification. Most local authorities have their own in-house legal team and a local authority solicitor will be allocated specific cases. For some court hearings, the local authority solicitor may instruct a barrister (also known as counsel) to represent the local authority. A barrister has specific expertise in presenting cases to the court.

Whilst a barrister is advising their client and presenting to the court, they are unable to organise witnesses, take notes of the evidence and deal with other procedural that may arise during the hearing. As a result, a paralegal or a trainee solicitor may attend court with a barrister to 'sit behind' the barrister and assist.

> **Litigation friend**

A litigation friend is a person appointed to make decisions about a court case for either an adult who lacks the mental capacity to manage their own court case, either with or without a solicitor, or a child. They do not act as the person's lawyer. The court case can be any of the following:

- a civil case, except a tribunal
- a family case
- a Court of Protection case.

[www.gov.uk/litigation-friend](http://www.gov.uk/litigation-friend)

> **Independent Mental Capacity Advocate (IMCA)**

An IMCA is someone who supports people who can't make or understand decisions by stating their views and wishes or securing their rights (DHSC, 2007). IMCAs are mainly instructed to represent people where there is no one independent of services, such as a family member or friend, who is able to represent the person (SCIE, 2010).

> **Independent Mental Health Advocate (IMHA)**

The role of an IMHA is to help people get their opinions heard and make sure they know their rights under the law. Access to an IMHA is a statutory right for people detained under most sections of the *Mental Health Act*, subject to Guardianship or on a community treatment order (CTO) (SCIE, 2015).

> **Relevant person's representative (RPR)**

An RPR is a person, normally a friend or relative but sometimes an independent person, who is appointed by the Best Interests Assessor to represent a person who lacks capacity once a DoLS authorisation has been granted.

(Adapted from Baynes and Cook, 2017)

## The role of the practitioner in court

Practitioners may be required to provide written and/or verbal evidence in a range of court settings:

- > Magistrates, County or Crown Courts (sometimes these are sited together as Combined Courts)
- > Tribunals
- > Coroner's Court.

The contexts in which a practitioner may be involved in court work are varied but in the main would be in relation to:

- > Deprivation of Liberty Safeguard (DoLS) applications to the Court of Protection of which there were 3,955 in 2017 (Ministry of Justice, 2018).
- > Orders made under the *Mental Capacity Act 2005* (MCA) of which there were 38,945 in 2017 (Ministry of Justice, 2018).
- > Challenges to decisions made by public bodies which are generally dealt with via Health, Education and Social Care Chamber Tribunal proceedings.
- > Coroner's Court.
- > As witnesses in cases where there are allegations, for example, of domestic violence, coercive control or other forms of abuse involving a person with whom they have had professional involvement.

The role of the practitioner in all of these contexts is to assist the court in reaching a reasoned decision via the provision of written and/or verbal information on matters related to the case. This is true regardless of the type of court or tribunal being attended. The expectation is that any report, statement or verbal evidence will:

- > provide a factual account of matters relevant to the case
- > use relevant research evidence acknowledging contrasting findings if applicable
- > set out your opinion and professional judgement based on the facts and research evidence
- > be balanced and fair, acknowledging the positives and negatives from both your perspective and that of the person or family
- > answer points as directed by the court
- > address the decision the court is being asked to make.



## Tool 3e: Knowledge literacy - areas of knowledge and expertise

### What areas of expertise does an adult social care practitioner have?

Many practitioners specialise in different areas as they become more qualified and/or experienced. This highlights the need to qualify your expertise and knowledge, particularly when writing for court.

This tool is an aid to self-reflection, which you might use:

- > To identify individual or team expertise.
- > To support reflective practice, for example as part of an annual self-assessment.
- > To support learning needs analysis and guide continuing professional development.

It may also help you identify when you need additional expert opinion in relation to a case to ensure your analysis is the best it can be.

The length of this list reflects the broad spectrum of the role of adult social care and it is unlikely you will score highly in all areas. For example, an expert may only score 5 in one or two areas.

### How to rate your areas of expertise:

**1:** I have a basic knowledge and/or experience in this area from early education/training, but I don't feel confident enough to be able to talk about this in any depth and have little or no experience of this in practice.

**2:** I have a basic knowledge and have had specific education/training/experience in this area although it was some time ago and I feel that my knowledge/experience is not very up-to-date.

**3:** I have had recent knowledge/training/experience in this area and I would feel able to talk about this topic to colleagues, although I would need to familiarise myself with practice/policy/research to feel competent to give good evidence in court.

**4:** I have an interest in this particular area and I have studied the evidence base at post-qualifying level and/or have developed particular professional competence in this area in which I regularly practice. I am aware of the current research/policy/ practice in this area and I would feel confident in being able to apply my knowledge analytically in giving evidence in court.

5: All of 4 applies and, in addition, I have a Master’s level or above in this area and/or I am highly knowledgeable about the practice/policy procedure in this area, being seen by colleagues as having expertise. I would feel highly confident in giving evidence in court around this topic as my competence is endorsed by qualifications/professional standing.

	1-5 (1=low)
Asylum-seekers	
Attachment in adults	
Abuse: Emotional	
Abuse: Financial	
Abuse: Physical	
Abuse: Sexual	
Abuse: Domestic violence	
Abuse: Coercive control	
Acquired brain injury	
Assisted Technology/Telecare	
Autism	
Best interest assessments	
Carers	
Communicating with people with cognitive impairments which affect their ability to communicate their views and wishes	
Communicating with people with sensory impairments which affect their ability to communicate their views and wishes	
Communicating with people with physical impairments which affect their ability to communicate their views and wishes	
Community asset building	
Conflict (dealing with)	
Dementia	
Deprivation of Liberty Safeguards	
End of life care	
Equipment and adaptations	
Equality and diversity	
Ethics	
Evidence-informed practice	
Exploitation of adults	
FREDA principles	
Health and wellbeing – including the impact of illness or disability	
HIV and AIDS	
Housing	

	1-5 (1=low)
Integrated and multi-agency working	
Learning disabilities	
Legal literacy	
Mental capacity	
Mental health	
Outcomes-focused practice	
Parental responsibility (rights and duties)	
Parenting capacity (and capacity to change)	
Physical disability	
Problem-solving	
Relationship-based practice	
Report writing	
Resilience	
Risk assessment and management	
Safeguarding	
Self-harm	
Self-neglect	
Service user engagement and involvement	
Social exclusion	
Social policy	
Social work theory	
Strengths-based working	
Substance misuse	
Transition	
Theories of adult learning	
Therapeutic interventions	
Young carers	
Other (please state):	



## Tool 4a: Using research in assessments and reports

Assessment is central to adult social care (Nosowska, 2014). Good practice in assessment is discussed in the Research in Practice for Adults resources the *Good assessment: Practitioners' Handbook* (Nosowska, 2014) and the *Supporting good assessment: Practice Tool* (Nosowska, 2014a).

[www.ripfa.org.uk/resources/publications/practice-tools-and-guides/good-assessment-practitioners-handbook-2014](http://www.ripfa.org.uk/resources/publications/practice-tools-and-guides/good-assessment-practitioners-handbook-2014)

[www.ripfa.org.uk/resources/publications/practice-tools-and-guides/supporting-good-assessment-practice-tool-2014](http://www.ripfa.org.uk/resources/publications/practice-tools-and-guides/supporting-good-assessment-practice-tool-2014)

Using research evidence effectively in everyday practice demonstrates professionalism and lends authority and weight to the quality of analysis, critical thinking, professional judgement and decision-making. These are critical in empowering the person and, in relation to court work, providing the court with an informed opinion to enable them to make an informed judgement in the case.

This is true whether the report is in relation to, for example, a court of protection application or is required as a result of challenge to a decision via judicial review at tribunal. In all cases it is likely that information from assessments will be closely scrutinised and will form the main part of any statement or report presented to court.

### Tips for using research in assessment and reports

- > Use research right from the start to help you decide what questions to ask, who to talk to and what information you need. Avoid looking for information which only backs up your position, argument, opinion or preferred outcome. Instead, take a broader view and acknowledge different perspectives using research to test out hypotheses, assumptions and conclusions.

Doing this will ensure you are well informed and can present clear and well-reasoned explanations to the court which highlight any discrepancies, alternative hypothesis and opinions.

- > Rather than relying on individual research studies, where you can, try to use up-to-date research reviews that have brought together multiple studies and provide you with the key messages. Research reviews should draw out and explain the consistencies and any inconsistencies across the studies - and will make comment on the reliability, robustness and limitation of the studies included. You can then cite the review to highlight this as evidence which supports your thinking. Research in Practice for Adults evidence reviews can help with this: [www.ripfa.org.uk/resources/publications/evidence-reviews](http://www.ripfa.org.uk/resources/publications/evidence-reviews)
- > Where research reviews are not available, individual studies can be used. However, you need to reassure yourself the study is robust and reliable, that its findings are replicated or validated in other similar studies and that it hasn't been superseded by more recent research.
- > Make sure you understand all research you cite or refer to; you may be asked to explain in more detail why you feel it is relevant. Failure to be able to explain could affect the court's confidence in your evidence. Context is extremely important, and you should ensure the research you are using is relevant and applicable to the case in question. Think about, for example, whether the samples in the research reflect the characteristics of the case in terms of age, level of need, health conditions or disabilities affecting the person.

- > Remember that research cannot be used as a determinate of fact. For example, just because research suggests that a proportion of people with dementia are subject to financial abuse does not provide that P's grandson stole money from her home. Neither does it often provide simple answers to cause and effect or prove a direct causal relationship with risk. For example, P may have a diagnosis of dementia and keep large quantities of money in her home and so be at risk of financial abuse, but this doesn't mean that money will be stolen from her.

Make clear how you feel the research relates to the facts and so underpins your professional opinion. Avoid using sweeping statements which use research to generalise and, instead, articulate the different options.

- > Remember that, in most cases, there may be more than one answer to a research question. You should be able to explain why you have given greater weight to one over another in the context of the case or point in question. Research is constantly occurring; new theories and findings emerge all the time and this can mean that research you choose to use may well be contested. Be clear if there may be more than one explanation for your findings. Do also acknowledge any gaps in the research base.
- > Your writing should demonstrate 'structured professional judgement' by making use of high-quality research and research-based tools to support your analysis, conclusions and recommendations. You should combine this with your own practice experience and the views of the individual(s) concerned in the case to ensure the best possible understanding of the circumstances. If there are factors which determine your view, rather than just contribute to it, then make this clear.
- > Reference the research you have used appropriately so that it is traceable and the court, and other parties, can read it too. The style of referencing you use may be determined by your organisational style guidelines or by your legal team. If not, then use a well-known referencing convention such as Harvard.
- > **Although it is important to be aware of key messages from research you should focus on the messages that need explanation.** It is generally unnecessary to quote research in relation to widely accepted knowledge; for example, coercive control is now recognised as the behaviour that underpins domestic abuse. Quote the nuanced messages which have specific relevance to the case or point in question.



### Practical tips:

- > Avoid using jargon.
- > If you use abbreviations make sure you explain the meaning of these in full the first time you use them.
- > Reference research appropriately.
- > Be clear about what is fact, what is research and what is opinion.
- > Be clear about your expertise, knowledge and experience.
- > Re-read your report or statement and check for accuracy.



## Tool 4b: Using research in court - some do's and don'ts

Using research is fundamental to the quality of the reports put before the court:

- > Practitioners should be encouraged to produce evidence-informed reports that give a thorough analysis of the issues.
- > Local authority solicitors and legal advisors need to be aware that research use is expected, but also that it must be used properly.
- > It should be recognised that in some cases specialist assessments will be required but that expert witnesses act on behalf of the court to provide independent, unbiased analysis on issues that are outside the scope of knowledge of the court.

These 'do's and don'ts' apply to citing research in written reports and referring to research in oral evidence. Alongside these it is important to be aware the court will often be prompted by what is, and what is not, in the report. A good report that is analytical and informed by relevant robust research is likely to reduce the need for oral evidence and cross-examining.

DO	DON'T
<p><b>Reflect on your local court's practice:</b> There is real value in consulting colleagues and other professionals involved in your local court about what effective use of research looks like.</p>	
<p><b>Make sure you have the support of your organisation and lawyers:</b> The supervision process should be used throughout the case to test out and strengthen the use of research. It is also good practice to discuss the research evidence with the lawyer – in plenty of time before the hearing.</p>	
<p><b>Prepare for cross-examination through case discussion:</b> Your supervisor can help you prepare by challenging you in a respectful and constructive way during supervision, with the aim of supporting you to consider and analyse a range of alternative hypotheses. Your in-house legal team should be undertaken to 'test' evidence and highlight salient points or likely questions before going to court.</p>	
<p><b>Make sure you are familiar with the expertise used in other reports:</b> It is important to show that you have a level of understanding of the reports submitted by other professionals. You will need to demonstrate you have considered how their assessments, decisions and recommendations relate to your own. You will be expected to articulate if, how and why opinions differ. Be clear about what is fact and what is professional opinion, and make sure you can substantiate and articulate these.</p>	<p><b>Go beyond your expertise in the research you cite or evidence you give:</b> Just as when quoting from research within your realm of expertise as a social worker, it's important you fully understand the methods (weaknesses as well as strengths) and theoretical basis of any work you draw on from other disciplines. It isn't acceptable to put forward evidence you can't expand upon in relation to the case you are representing. Don't make presumptions or assumptions or rely on hearsay as evidence.</p>
<p><b>Ensure you're familiar with the research you use or reference:</b> You should be prepared and able to explain why the research is relevant in the specific case. You may well be questioned, challenged or cross-examined on the findings and their relevance and so it is essential you know it well.</p>	<p><b>Edit the research presented to make it fit for purpose:</b> Editing quotes or altering the meaning of research through your own interpretation is unethical. It would nullify the whole basis of any argument and leave you exposed in court.</p>

<p><b>Use established, up-to-date sources and reference them accurately:</b> You are less likely to be challenged if you draw on research that uses robust methodology, relevant to the circumstances of the case and that is current. You should ensure any research you include has direct relevance to the case and has been used to inform your argument rather than reflecting the evidence base generally.</p> <p>Remember to reference the research correctly. Ensure you take copies of the full text of any research you cite with you to the court, so you can clarify any points of detail that may be raised. Append them to your statement or report so the court can read them.</p>	<p><b>Use the court to test out new hypotheses:</b> Some expert witnesses have come unstuck when using theory or research that hasn't been tested or accepted in practice. To do so would be unethical and is liable to leave you open to challenge and cross-examination, and may discredit your report as a whole.</p>
<p><b>Use synthesis of evidence as well as individual studies:</b> Where you can you should synthesise the findings of a range of research – drawing out the key messages and any inconsistencies.</p>	<p><b>Forget the nature of research and let this lead you to make assumptions or presumptions:</b> Research findings are a generalisation made based on data collected, for example, over a specified population using a particular methodology. Therefore, the findings indicate what might be likely but are not predictors of fact.</p> <p>Compare the similarities and differences with your case, analysing how you feel they do, or do not, apply. This shows you have considered the individual needs and circumstances of the person and sought to understand these in an evidence-informed way.</p>
<p><b>Acknowledge opposing arguments:</b></p> <p>Rarely do facts or evidence point decisively to only one conclusion. Remember, the burden of proof in criminal cases is 'beyond reasonable doubt' and in civil cases is 'a preponderance of the evidence'. It is the practitioner's role, for example, in Court of Protection applications to help the court make the right decision in the best interests of the person. It is important to acknowledge and balance all opinions, views or arguments, whilst making clear why you favour one over the others.</p>	<p><b>Seek to evidence only one side of an argument:</b></p> <p>Avoid presenting research, circumstances or professional opinion that supports your position whilst ignoring that which presents a different perspective. Approach each case as open-mindedly as possible and use theory and research to widen your perspective and avoid forming a view on too little information or analysis.</p>
<p><b>Keep your points simple and avoid jargon:</b> Keep messages simple. Try and present research evidence and your analysis of it in a clear, logical way that is easy to follow. Avoid using jargon and ensure you explain any acronyms or abbreviations in full the first time they appear in the report.</p>	<p><b>Try and include too much detail or context about the research you are using in the report:</b> You may be questioned about the relevance and reliability of the research you cite so do be prepared, for example, to be able to explain sample size, methodology, strengths or limitations, but don't over-complicate the report by including this. Concentrate on the salient points and how they relate directly to the case or point in question.</p>
<p><b>Ensure you include an outline of your expertise at the beginning of your report:</b></p> <p>This should cover all relevant qualifications, posts and experience, including relevant dates or time spans. Also include details of any relevant specialisms and/or any experience gained outside of the social care sector which may be also be relevant.</p>	
<p><b>Prepare a bibliography:</b> If you are including research evidence to support a view you should prepare a bibliography and file this as an annex to relevant submissions to court. If necessary, seek advice from your organisation and lawyers on where to include it.</p>	<p><b>Use statistics unless they are helpful:</b> You risk undermining your argument if you add statistics that are confusing or have no direct relevance to the case or point in question. You must appraise their relevance and reliability in the same way as for any other research you use. If you do use them make sure you fully understand them and can explain them to others.</p>
<p><b>Identify your sources and take full copies of cited research to the court:</b> You should cite the author date, title of the research and where it is published.</p>	



## Tool 4c: Preparing for court - writing a statement or court report

The written court statement or court report is likely to be the first opportunity a practitioner has to introduce themselves to the judge and the legal representatives of the parties. It is important to start by setting out your expertise, knowledge and experience. This is so that the court is clear about what is within your level of expertise.

**The format that any statement of report needs to take may differ depending on the organisation you work for, the reason the statement or report is needed, or the specific nature of the court.** You should check with your legal team for any guidelines or house style. Presented below is a suggested template that would be useful in most circumstances.

Information:	Example:
Name	Josephine Bloggs
Job title	Advanced Practitioner: Learning disabilities and autism team
Work address	
Length of time in post	2008-present
Prior experience	My previous experience includes...
Professional qualifications	I qualified in 1998 as...
Post qualifying awards or qualifications (if applicable)	
HCPC registration	Reg No: XXXXX. I have been registered since 19/20XX
Authority to make statement	I am authorised to make this statement on behalf of XXX Council and I do so from facts within my knowledge and information obtained from my colleagues or departmental records.
Statement of truth	The information contained within this statement is true and correct to the best of my knowledge and belief.
When allocated the case/ involvement in case	I have been the allocated practitioner for P since April 2017.
Clarify evidence base for decision-making in the case.	<p>Divide these into:</p> <ul style="list-style-type: none"><li>&gt; Relevant professional qualifications - studied the evidence base at post qualifying/Masters level or training.</li><li>&gt; Relevant professional expertise - have developed professional competence in this area in which I regularly practice.</li><li>&gt; Understanding of research evidence.</li></ul> <p>Qualifications and expertise should be evidenced by qualifications or professional standing.</p>



### Practical tip:

#### Prepare a chronology

This is a good way to help you look at events and evidence as objectively as possible. It should also help you identify any missing documents, information or gaps in your evidence. Guidance from the Courts and Tribunals Judiciary (Undated) suggests structuring your chronology in three columns:

(1) Date	
(2) Event	
(3) Reference – i.e. where the information in the first two columns originated from. This might be, for example, from an assessment, case notes, letter or a diary entry, but could also be your own recollection of events or that of a third party – something that will form part of your reports or statement in due course.	

You can then use the chronology to prepare an account of events, adding detailed notes of relevant facts. This can then be used as the basis for your report or statement (Judiciary, undated). You should make sure your chronology includes information relevant to any matters as may have been directed by the court.

Your organisation may also have a preferred template or house style. It is important to check with your legal team and refer to the courts guidance. The following example is based on the guidance from Section 49 of the *Mental Capacity Act* on expert reports but is a useful and logical structure to use for most purposes.



### Practical tip:

Section 49 of the *Mental Capacity Act* makes provision that the court can require the preparation of a report ‘dealing with such matters relating to P as the court may direct’. It is the duty of the person preparing the report to help the court on the matters within their expertise. You should always check your report covers the matters the court has directed you to address.

To ensure your report is clear you should approach report-writing in a structured way. The following is a suggested structure for a report:

- 1. Your details as the person who prepared the report.**  
Including your name, occupation, qualifications and expertise. This section should also clarify whether you are acting as a nominee of a local authority or, for example, as a Special Visitor or Public Guardian (see template statement above).
- 2. P’s details.**  
Including their name, date of birth and demographic information such as their gender, nationality, cultural and religious persuasion, deemed to be appropriate and having bearing on matters being dealt with by the report. Also key here is inclusion of any other person(s) who play a significant role in the life of P and a summary of P’s medical history.
- 3. The matters and material considered in preparing the report.**  
This section is likely to be the most detailed and would include details of any interviews, examinations, reports, assessments, records and any other materials which were relied upon in preparation of the report. It should also contain a summary of any key life events or information that might have a direct bearing on the matters covered within the report.

What is important here is that there is a clear picture of matters relating to P and their circumstances. It should be possible for the court to be able to recognise what is fact and what is opinion, as well as knowing the source of these. This is particularly key if there is a range of opinions.

- 4. The conclusions reached and/or recommendations made.**



## Tool 5: Preparing for court - giving evidence

### Practical tips to prepare for court:

- > Double-check which court the hearing is being held at and what time you need to be there. Think about how you will get there and how long it will take. Allow plenty of time.
- > Re-read your assessment, statement or report and any other key documents.
- > Make sure you have the correct and final version of all paperwork (often referred to as the court bundle).
- > Make sure you have copies of any research or tools you are referring to.
- > Speak to your in-house legal team about what to expect, especially if it is your first experience in court. Ask them what questions you might expect to be asked.
- > Familiarise yourself with how you should address the judge or magistrate. Decide whether you will take an oath or will affirm.
- > Find out if it is possible, or necessary, to have a meeting with your in-house legal team and any barrister that may have been instructed.
- > Only discuss the case with relevant people, normally these will be colleagues within your organisation. **Never make reference to any case or court proceedings on social media.** If you are approached by the press take advice from your in-house legal and/or media team.

### Practical tips on the day of court:

- > Dress appropriately. Court is a formal setting and you are a professional representing your organisation. Make sure you are comfortable (and be aware you may have to stand for an extended period) but dress smartly.
- > Make sure you have all the papers you need.
- > Take enough change for transport or parking – plan ahead and think about the length of time you may be at court, so you don't have to worry about missing your train home or parking fines.
- > Take something to eat and drink with you just in case, for example, you need to remain in the court building at lunchtime. You won't be able to eat or drink in the courtroom itself however.
- > Have something to eat before you go to keep your energy levels up and prevent embarrassing tummy rumblings.

### Inside the court building:

- > When entering the court building you are likely to be subject to a bag search and some courts have a scanner like that used at airport security. You may also be asked to take a sip of any drink you have with you.
- > On arrival find your legal representative and check for any changes since you last spoke.
- > The waiting areas at court can be busy areas. It is likely all parties and their legal representatives will be present in the same room. There may also be people there attending other unrelated cases.
- > Be mindful that this can be a difficult time for individuals and their families, be respectful of their feelings but do acknowledge them.

### In the witness box:

- > Where there is no jury you should address your answers to the judge or magistrate. Where there is a jury you should address them. However, do also acknowledge any person asking the question, the judge or magistrate for example, when being cross-examined.
- > Speak clearly and slowly – take a couple of deep breaths to steady your voice if you are feeling nervous.
- > Pause and gather your thoughts before answering. Take time to think through what you have been asked and formulate your answers. If you need to you can ask for the question to be repeated.
- > Avoid using jargon or abbreviations.
- > Be respectful of the views of the other parties even when these differ to your own. Demonstrate you are open-minded to these but clearly explain the basis on which your opinion has been formed, including any research which has informed it.
- > Acknowledge the complexities of the case and the decisions being made. Be measured and thoughtful in your responses.
- > Be clear if you have changed your mind at any point in response to new information.
- > If you are asked the same question repeatedly stick to your answer.
- > Try to recognise leading questions and avoid being steered away from your point.
- > Remember that you are not on trial. Your job is to provide factual information and professional opinion to enable the court to reach a decision. Try not to take the questions personally.

Adapted from *Social work practice in the family court: Practice Tool* (Baynes and Cook, 2017)



## Tool 6: Mental Capacity and Best Interests

The following *Capacity tool* has been developed to take into account lessons from research and the CC vKK. In particular

- that capacity assessors often do not clearly present the available options (especially those they find undesirable) to the person being assessed
- that capacity assessors often do not explore and enable a person's own understanding and perception of the risks and advantages of different options
- that capacity assessors often do not reflect upon the extent to which their 'protection imperative' has influenced an assessment, which may lead them to conclude that a person's tolerance of risks is evidence of incapacity.

The tool allows you to follow steps to ensure you support people as far as possible to make their own decisions and that you record what you have done.

It is important to refresh our understanding of these steps, even if we are not routinely working with people who may not have capacity. They reflect good practice in promoting control over decision-making for the person whose decision it is.

### How to use the Capacity tool

The numbers below correspond to boxes in the tool.

1. Specify the decision that needs to be made as clearly as you can.
2. Specify the different options for meeting care and support needs, including where the person could live and how they would be supported. Include all options, even ones that are regarded as risky or undesirable. However, do not include an option if it would not actually be possible to do it because there are no resources.
3. Now apply your professional judgement to what you think the benefits and risks of each option are, and the likelihood of those occurring. Include emotional welfare and relationships, as well as any physical or medical risks and benefits. Record your views.
4. Choosing the optimal time and place for this, discuss each option with the person. Take time to enable the person to understand the options. You can use some of the other tools in this handbook to help gather information

or promote their understanding. Also, discuss the risks and benefits you perceive for each option. Ask them about their feelings and views on the benefits and risks of each option. Record the person's views.

5. If you and the person disagree over the risks and benefits of each option, reflect on the reasons for this. Be clear about: how strong the objective evidence for believing a risk or benefit exists is; whether the person understands that a risk or benefit exists; whether the person thinks that a risk or benefit is more or less important than you do. If the person has a mental disorder which could impair their decision-making, consider whether:
  - \* a. They understand the alternatives available to them – they do not need to understand every detail, only the details that affect the decision.
  - \* b. They can 'use or weigh' the relevant information about each option – different people weigh risks and benefits differently.

A person will need to be able to retain the information long enough for this process; be careful not to impose an arbitrary limit on how long they must be able to remember the relevant information for.

Record your conclusions about why people have different views.

6. Clearly record the outcome of your decision as to whether or not a person has mental capacity. Only progress to the 'best interests' decision steps below if you conclude that they lack mental capacity. If you conclude that the person has capacity then you must let them choose their preferred option.

If you conclude that the person lacks capacity then a 'best interests' decision must be made.

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## \* Good practice suggestion

### How might you use it in practice?

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- Involving service user.
- To inform person's understanding of risks and benefits so they can make choices.
- Enable them to make their own decisions (wise or unwise).
- Enables practitioners to explicitly state their views and opinions.
- Shows contentions and allows robust reflection.
- Offers reassurance to other practitioners about protection and helps prevent risk-averse practice.
- Quick check list or in-depth process in circumstances where there is conflict or challenge.
- Informs assessment process.

### How might it help you?

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- Prevent risk-averse practice.
  - Clarify thinking behind Mental Capacity Act, particularly when there is disagreement.
  - Shows all choices explored.
  - To help service user and family reflect on options.
  - Transparent decision-making process.
  - To increase confidence in decision-making.
  - Helps to standardise practice – equity.
  - Learning for other colleagues and students.
  - Helps to ensure all steps and options are recorded and weighed.
  - Provides evidence that service user has been consulted and informed.
  - Provides audit trail.
  - Can share with multi-disciplinary team to show you have considered views.
  - Can be used as evidence in court.
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## Further reading

CC v KK and STCC [2012] EWHC 2136 (COP)

Research in Practice for Adults (2013) *What is the Mental Capacity Act 2005? Customer Guide*

Research in Practice for Adults (2013) *What are the Deprivation of Liberty Safeguards? Customer Guide*

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# Capacity tool

## 1. What is the decision about?

		Benefits		Risks - including likelihood and severity of risks		Critical reflection on differing perspectives on risks and positives	
2. Options		Benefits		Risks - including likelihood and severity of risks		Critical reflection on differing perspectives on risks and positives	
Location (if relevant)	Support that would be made available	3. Assessor's view	4. Person's own view	3. Assessor's view	4. Person's own view	5. Self-awareness: Assessor's reasons for their view	6. Empathy: Person's reasons for their view
Option A							
Option B							
Option C							

## 6. Conclusion – Does the person have capacity?

Signature of assessor:  Date:

Signature of person:  Date:

## Tool 7: Risk and Bias

When we are making decisions we can be biased in the way that we understand risk.

Assessing and weighing up risk is difficult because risk is politically contested, socially and culturally constructed and an essential part of subjective human experience (Titterton, 2011). We cannot separate risk in social care from perceptions of risk and uncertainty in everyday life.

Research shows that judgements made by individual professionals can vary significantly when using the same risk assessment tools (Littlechild and Hawley, 2010).

Taylor (2010) lists several heuristics, or factors, which influence our perceptions, beliefs and decisions. These factors bias our decision-making around risk and, therefore, we need to be aware of them when we are making decisions. The factors are:

- **Repetition bias** – believing what we have been told most often and by most sources.
- **Credibility bias** – being more likely to accept a statement as true from somebody we like than from a person or organisation we have a bias against.
- **Adjustment bias** – selectively processing information to support judgements we have already made. This links to the danger that practitioners simply proceed with one hypothesis, seeking out information which confirms it and avoiding information which contradicts it.
- **Availability or recall bias** – overestimating the likelihood of events that are familiar to us or excessively reported by the media, for example attacks by people with mental health problems.
- We might also be influenced in our judgements by seeking to avoid conflict or criticism by others
- And, of course, we are all susceptible to prejudice – bias from unconscious stereotyping.

### Reflective point

How do I test out my decisions with others so that I can identify how my judgements differ from theirs?

### Risk influences tool

The *Risk influences tool* is based on the factors that Taylor identifies. It sets out what these are and then allows you to consider each one.

It provides reflective questions for you to consider whether you are influenced by the factor.

### How to use the Risk influences tool

- On your own or in a group, consider an important decision that you have to make. Ask yourself each question in turn and answer as honestly as you can. It may help to consider how you would answer the question from a different viewpoint, for example if you were the carer or if you were the budget holder.
- You can also use the tool to consider how other agencies will respond to the decision. What would influence them?
- When you identify influences on your thinking, it is important to consider how you will overcome these – perhaps by increasing your knowledge or by testing out your thinking with others.

### \* Good practice suggestion

#### How might you use it in practice?

- Use in supervision to identify influences.
- Use in training sessions to increase self-awareness.
- Use as part of anti-oppressive practice or rights training.
- Provides an effective checklist to help keep the focus on good decisions.

#### How might it help you?

- Provides direct, powerful questions to challenge you.
- Identifies how you bring a bit of yourself to all interactions with people.
- Support people's thinking.
- Aide memoire for likely biases.
- Critical reflection in practice.

# Risk influences tool

**The aim of this tool is to identify how common concerns about risk are affecting your decisions**

Research points to factors which influence our perceptions, beliefs and decisions about risk. You can use this tool to identify how these affect your thinking about a particular decision. Ask each question in turn and note how this is influencing you. Then think about how you can overcome the influence.

## Background

Evidence shows that people don't think rationally about risk. Instead, we are affected by a range of influences that impact on how we perceive risk and how risky we think things are.

It is important for practitioners to understand these influences so that you can reflect on what might be affecting how risky or safe you think a situation is.

## Risk influences

Risk influences, also called heuristics, are particular ways of thinking about risk that stop us from being objective and rationally weighing up the likelihood of risk and its consequences.

Some of the main influences are set out below (Taylor 2010).

**Repetition bias: Believing what we have been told most often and by most sources.**

Where have I heard about this kind of situation before?

**Credibility bias: being more likely to accept a statement from someone we like, or less likely to believe people, groups or organisations we have a bias against.**

What is my relationship with the person/people who told me about this situation?

**Adjustment bias: Selectively processing information to support judgements that have already been made.**

Have I already made up my mind about this situation?

**Availability/recall bias: Overestimating the likelihood of events familiar to us, or events excessively reported by the media.**

Does this situation seem familiar?

**Wariness of lurking conflict: Anxiety that a decision may impact negatively on working relationships or lead to complaints, criticism or assault.**

Am I worried I might upset someone in this situation?

**Prejudice: Bias from conscious or unconscious stereotyping.**

How do my values and beliefs affect my view of this situation?