

The Mental Capacity Act 2005; a short guide for the carers and relatives of those who may need support

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Agenda

- Overview of the MCA
- The 5 Principles and the legal definition of mental capacity
- How and when is mental capacity assessed, and by whom?
- Best interests decisions
- What the Act demands of professionals
- Resolving disagreements about mental capacity and decisions
- Lasting Powers of Attorney, Court Appointed Deputies and the Court of Protection

The 5 Principles of the MCA

1. A person must be assumed to have capacity unless it is established that he lacks capacity.
2. A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success
3. A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
4. An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests
5. Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action

See Page 19 of the Code of Practice

The 2 stage test

1. Is there an impairment of or disturbance in the functioning of the mind or brain?

Yes or No?

If No, the person is the decision maker.

If Yes;

2. Is that impairment sufficient that it affects the person's ability to make the specific decision at the time it needs to be made?

- UNDERSTAND THE INFORMATION
- RETAIN LONG ENOUGH TO
- WEIGH UP OR USE THE INFORMATION
- AND COMMUNICATE THEIR DECISION.

Enabling the person to decide

If, despite all efforts, the person can't do any one of these 4 things because of the mental impairment, then on a balance of probabilities she or he will not have the mental capacity to make the specific decision at the time it needs to be made.

Does the person understand the decision they have to make?

The person needs only to understand the pertinent details and these must be communicated in a way which will enable the person to understand. Ask the person to explain in their own words what their understanding of the decision is.

Is the person able to retain the information long enough?

Use prompts, write things down if need be. It is not really a test, more a conversation. If the person cannot recall the relevant details long enough, repeat them, try to find a way of enabling him or her to remember them.

Is the person able to use or weigh the information to make the decision?

Can the person assess the consequences of the decision or of not making the decision? Can they see all parts of the argument and relate one to the other?

Can the person communicate their decision?

More about assessing capacity

- Where and when should the assessment happen and who should be present?
- Is there a role for family members / friends / carers at the assessment?
- Risk assessing with the person
- What is 'fluctuating capacity'?
- What if the person says one thing to the assessor but you know that he or she will do something else?

More about assessing capacity

- Is an assessment needed for every decision every time?
- Who should assess mental capacity and when?
- Can the professional ask another person to assess capacity or to help with it?
- Decision specific and time specific; to say a person 'lacks capacity' has no meaning in law
- What if the person is under coercion or duress?
- What if the person refuses the assessment?

39 Essex Chambers' top tips for professionals

1. Be clear about the decision to be made
2. Ensure you and the person have all the details about the choices available
3. Identify the salient points the person needs to make the decision
4. Avoid wanting to protect the person
5. Evidence how you enabled the person to make the decision
6. What is the impairment, why was the person unable to understand / retain / use or weigh / communicate?
7. Why is it an incapacitated rather than an unwise decision?

Making a decision in a person's best interests

- Making a decision in a person's best interests is only done if the person can't make it because of a mental impairment and the assessor has done all he or she can to enable them to do so
- Concluding that a person lacks the mental capacity to make a decision does not automatically give professionals any right to make risk averse decisions
- The decision maker must have considered the person's wishes and feeling, for example, by considering what would they normally decide to do in that situation? Has the person made any written statements? Have they spoken to anyone else about what they would want?
- Is the proposed decision proportionate to the degree of harm that might otherwise be caused?

More about best interests decisions

- What have those who know the person best got to say?
Professionals must consult with people known by or identified by the person, or with an interest in the welfare of the person, about what the person would want.
- Professionals should consider what would happen if they didn't make the decision? Does it have to be made at all? Can it be delayed until the person might be able to make the decision?
- Recording how is the decision in the person's best interests and the least restrictive in terms of rights and freedoms
- The person must be involved as much as possible. They may not be able to make a big decision but might still advise on smaller issues which are part of the decision.
- 'No meeting about me without me'

What does the 2005 Act demand of us?

- Paid health and social care staff and attorneys under Lasting Power of Attorney and Court Appointed Deputies etc 'must have regard' for the what is in the MCA Code of Practice
- “However, the Act applies more generally to everyone who looks after, or cares for, someone who lacks capacity to make particular decisions for themselves. This includes family carers or other carers. Although these carers are not legally required to have regard to the Code of Practice, the guidance given in the Code will help them to understand the Act and apply it. They should follow the guidance in the Code as far as they are aware of it.” *(MCA Code of Practice)*
- This can create misunderstanding between professionals and family members (often with regards 'next of kin')
- Section 5 of the Act; protection from liability
- How can disagreements be resolved?
- How can disagreements be avoided?
- A word about Section 44 of the Act

The Gail Platt effect

“Anyone who has sat in the family jurisdiction for as long as I have, spends the greater part of their life dealing with the consequences of unwise decisions made in personal relationships. The intention of the Act is not to dress an incapacitous person in forensic cotton wool but to allow them as far as possible to make the same mistakes that all other human beings are at liberty to make and not infrequently do.”

Justice Hedley, An NHS Trust v P [2013]



A few other things

- Lasting Powers of Attorney (can only be created by person over 18)
- Court Appointed Deputies
- The Court of Protection
- Independent Mental Capacity Advocates
- Further information / resources / contact

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