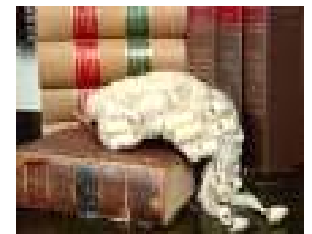




MENTAL CAPACITY ACT 2005

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Introduction

- The Mental Capacity Act sets out a framework for acting and making decisions on behalf of adults aged 16 years and over who lack the capacity to make decisions for themselves.
- The Act represents the legal framework and is accompanied by a Code of Practice that provides guidance and information.
- The Act applies to everyone who looks after or cares for someone who lacks capacity, including informal carers and family members.
- The Act places a duty on those acting in a professional capacity to have regard to the Code.
- Those acting in a professional capacity must be able to demonstrate that they are familiar, in broad terms, with the Code.
- Reasons will need to be given for any departure from the Code.
- Failure to comply with the Code can be used as evidence in civil/criminal proceedings, if relevant.

Introduction

The Act deals with the following issues-

- Rules as to adjudging capacity.
- Lasting Powers of Attorney.
- Court-appointed deputies.
- Advance decisions to refuse treatment.
- Research.
- Independent Mental Capacity Advocates.
- Court of Protection.
- Public Guardian.
- Court of Protection visitors.

The 5 Key Principles

- “*Presumption of capacity*” - a person is assumed to have capacity unless established otherwise.
- “*Maximising decision making capacity*” - a person should not be treated as unable to make decisions unless all practicable steps to assist them to do so have been taken without success.
- “*Unwise decisions*” - a person should not be treated as unable to make a decision merely because they make an “unwise” decision.
- “*Best interests*” - any act done or decision made on behalf of a person under the Act must be in their best interests.
- “*Least restrictive alternative*” - before any decisions are made, or actions taken, thought must be given as to whether such decisions or acts can be taken in a way less restrictive of a person’s rights and freedom of action.

The Capacity Test

- Presumption of capacity (1).
- Burden of proof will fall on the person who asserts that the capacity is lacking.
- A Court must be satisfied, on the balance of probabilities, that capacity has ***been shown*** to be lacking.
- It is sufficient to hold a “reasonable belief” that a person lacks capacity i.e. have reasonable grounds and objective reasons.

The Capacity Test

- 2 stage test - a person lacks capacity under the Act if at the material time they are unable to make a decision for themselves due to an *impairment of, or a disturbance in functioning of, the mind or brain* – [*“Diagnostic threshold”*].
- Doesn't matter whether the impairment or disturbance is temporary or permanent.
- A lack of capacity cannot be determined merely by reference to –
 - ✓ A person's age/appearance
 - ✓ A condition or aspect of behaviour that may lead others to make unjustified assumptions about a person's capacity.
- Does not apply to those under 16 save with regard to matters concerning either welfare and/or property as long as the Court feels that the person will continue to lack capacity when they reach 18.

The Capacity Test

A person is unable to make a decision for themselves if they are unable –

- ✓ to understand the information relevant to the decision,
- ✓ to retain that information,
- ✓ to use or weigh that information as part of the process of making the decision, or
- ✓ to communicate their decision (whether by talking, using sign language or by any other means).

Understanding the information relevant to the decision

- Every effort must be made to provide the information and explanation in a way that is most appropriate for the individual.
- Information to be given will include the particular nature of the decision in question, the purpose for which the decision is needed and the likely effects of making or not making a decision.
- The explanation should be given in broad terms and simple language. It will not always be necessary to explain all the minutiae.

Retaining the information relevant to the decision

- The ability to retain information for a short time only should not automatically disqualify the person from making the decision. Depends on what is necessary for the decision in question.
- Videos and voice recorders may be used to assist in the retention and recording of information.

Using or weighing the information as part of the decision making process

The ability to weigh all of the relevant information in the balance and then use that information to arrive at a decision.

E.G. *A person suffering from anorexia may be able to understand rationally the consequences of not eating, but lack the capacity to weigh them against the desire not to eat and will decide not to eat regardless of whether they feel hungry, time of day etc.*

Inability to communicate a decision

- Very few people will fall into this criterion i.e. those affected by “locked-in syndrome”.
- “Strenuous” efforts should be made to assist and facilitate communication.
- Professionals with specialised skills in verbal and non-verbal communication will be required.
- Communication by simple muscle movements i.e. blinking an eye/squeezing a hand, should be sufficient to indicate capacity.

Maximising the decision making capacity (2)

The ways that people may be assisted and supported to make decisions will vary depending on the decision to be made, the timescale for making the decision and the individual circumstances of the person making the decision.

Maximising the decision making capacity (2)

Take time to explain anything you think may be relevant or might help the person to make a decision, but –

- ✓ Try not to burden the person with more information than is required.
- ✓ Describe any foreseeable consequences of making or not making the decision.
- ✓ Explain the effects of the decision on the person and those who have a close relationship to them.
- ✓ If there is a choice, provide the information in a balanced way.

Maximising the decision making capacity (2)

- Consult family members, carers and others close to the person as to the best way to communicate with them.
- Use simple language and, where appropriate, pictures and objects rather than words.
- Speak at the right volume and speed with appropriate vocabulary and sentence structure.
- Enlist the help of others known to and trusted by the person.
- Be aware of any cultural or religious factors that may have a bearing on a person's decision making process.
- Consider whether the services of an independent advocate would help.

Maximising the decision making capacity (2)

- Use any aids that may be helpful – pictures, photographs, pointing boards, symbols, objects, videos or tapes.
- Find out what form of communication the person is used to.
- For those with hearing difficulties, consider using appropriate visual aids or sign language.
- Consider the use of mechanical devices such as voice synthesisers.
- In extreme cases consider the assistance of another professional such as a clinical neuropsychologist.

Maximising the decision making capacity (2)

- Whilst being constrained to talk to people whilst in hospital, choose a location where the person feels most at ease. A quiet location where interruptions are unlikely may be best.
- Choose the time of the day when the person is most alert.
- If the persons capacity is likely to improve for whatever reason i.e. after receipt of medication, wherever possible wait until it has done so.
- If medication affects capacity, wherever possible wait until such an effect has subsided.
- Take one decision at a time, if appropriate.
- Don't rush.
- Be prepared to abandon the first attempt and try again.

Unwise or unusual decisions (3)

Whilst different people will always make different decisions based on the same facts, there may be cause for concern if –

- an individual repeatedly makes unwise decisions that would put them at risk,
- a person makes a particular decision that defies all notions of rationality and/or is markedly out of character. In these situations, look at a persons past decisions.

Such decisions should raise doubts about capacity and catalyse further investigation.

The Capacity Test

- If a person is known to have a fluctuating capacity then it would be best to wait until the point when the person has sufficient capacity to make a decision.
- Capacity should be reassessed at regular intervals.

Who should assess capacity?

- In simple and obvious cases, the clinician in charge of the persons treatment as long as they are content to make such a decision.
- Otherwise, it may be appropriate to take in to account the following when adjudging whether or not to involve a Consultant Psychiatrist/Psychologist with appropriate experience –
 - ✓ the gravity of the decision and/or its consequences,
 - ✓ where a finding of incapacity is disputed,
 - ✓ where the person is expressing different views to different people,
 - ✓ where the persons capacity may be subject to challenge in the future,
 - ✓ where there may be legal consequences of a finding of incapacity, or
 - ✓ where the person involved is repeatedly making decisions that put them at risk of preventable suffering or damage.

Best Interests (4)

- What is in a person's best interests cannot be determined merely by reference to –
 - ✓ A person's age/appearance.
 - ✓ A condition or aspect of behaviour that may lead others to make unjustified assumptions about what might be in a person's best interests.
- All of the relevant circumstances must be considered.
- Acting in a person's best interests simply means doing what is best for him or her in the particular circumstances that arise.
- When considering the best interests of the patient it is the duty of the court "to assess the advantages and disadvantages of the various treatments and management options, the viability of each such option and the likely effect each would have on the patient's best interests and, I would add, his [her] enjoyment of life".
- A person need only have a "reasonable grounds for believing that what they are doing or deciding is in the best interests of the person" having applied the "The Checklist of Relevant Circumstances".

The Checklist of Relevant Circumstances

Regaining capacity

- Is the person likely to regain capacity and, if so, when?
- Can the decision be put off until the person regains capacity?
- How will the person regaining capacity in the future affect the decision made?

The Checklist of Relevant Circumstances

Permitting and encouraging participation

- A person must, as far as is reasonably practicable, be both permitted and encouraged to participate, or attempts must be made to improve their ability to participate, as fully as is possible.
- This is so even if a person is adjudged to lack capacity on the basis that he/she may have views that either affect the decision itself or what outcome would be preferred.
- Consider use of a trusted relative, friend or independent advocate to assist a person in expressing their wishes.

The Checklist of Relevant Circumstances

The persons wishes and feelings

- The following, so far as is reasonably ascertainable, must be taken into account –
 - ✓ The persons past and present wishes and future feelings,
 - ✓ The beliefs and values that would be likely to influence their decision if they had capacity, and
 - ✓ The other factors that they would be likely to consider if they were able to do so.
- Wishes may be expressed through feelings or behaviour - expressions of pleasure or distress and emotional responses are relevant.
- A persons values and beliefs are important - indicated by cultural background, known past behaviour and expressions, advance decisions and informal expressions to relatives/carers.
- Consider factors that you feel the person would consider if able such as altruistic motives and concern for others as well as duties and obligations towards dependant relatives or future beneficiaries

The Checklist of Relevant Circumstances

The views of other people

- If practicable and appropriate the views of the following must be taken into account –
 - ✓ Anyone named by the person as someone to be consulted,
 - ✓ Anyone engaged in caring for the person or interested in his welfare.
 - ✓ Any donee of a lasting power of attorney granted by the person, and
 - ✓ Any person appointed as a deputy by the Court.
- If one of the above is not consulted reasons will have to be given.

The Checklist of Relevant Circumstances

The views of other people

- Where there are conflicting views –
 - ✓ Try to seek a consensus,
 - ✓ If no consensus is possible a decision must be taken having considered the Checklist,
 - ✓ In difficult decisions an application may be made to the Court of Protection for the court to decide.
- Preserve the patient's confidentiality. Only share information if it is in the persons best interests or if there is another strong reason to override confidentiality i.e. public interest.

The Checklist of Relevant Circumstances

Life sustaining treatment

- Where the determination relates to life sustaining treatment a decision maker must not be motivated by a desire to bring about a person's death.
- Life sustaining treatment means treatment which in the view of the person providing healthcare to the person concerned is necessary to sustain life.
- Life sustaining treatment can be given pending an order from the Court

Least Restrictive Alternative (5)

- Before any act is taken or decision made on behalf of a person lacking capacity, the person taking the action or making the decision must consider whether it is possible to decide or act in a way that would interfere less with the other person's rights or freedoms.
- This means that people will fundamentally need to consider whether there is actually a need to act at all or make a decision.

Acts in connection with the care or treatment

- The act provides protection from liability for acts considered to be in a persons best interests.
- The Act does, however, contain restrictions and limitations on such protection.
- Protection only applies when the provisions of the Act are followed.

Acts in connection with the care or treatment

- Act specifies that “treatment” covers diagnostic or other procedures -
 - ✓ diagnostic examinations and tests,
 - ✓ medical and dental treatment,
 - ✓ other healthcare procedures (taking of blood or other bodily samples, chiropody, physiotherapy etc.)
 - ✓ nursing care.
- The Act covers acts done “in connection with the care or treatment of another person”.

Acts in connection with the care or treatment

There are two steps required to ensure protection from liability –

- Reasonable steps must be taken to ascertain whether the person concerned has the capacity in relation to the matter in question.
- Where there are reasonable grounds for believing that the person lacks capacity, consideration must then be given as to whether there are reasonable grounds for believing that it will be in the persons best interests that the act be done.

Acts in connection with the care or treatment

- In circumstances where it is necessary to give emergency medical treatment in order to save life or prevent serious harm what are reasonable steps and reasonable grounds for belief will be “adjusted” accordingly.
- The Act does not provide a defence against negligent acts.
- Professionals must act in accordance with an advance directive provided it was made when the patient had capacity, is valid and is applicable to the proposed treatment.
- Where formal powers already exist, these will take precedence i.e. LPA, order of the court, save where it is felt that a person is acting outside of the scope of their power and/or contrary to the best interests of the person involved.
- The courts will still need to be involved in cases involving the proposed withholding or withdrawal of ANH from patients in a PVS as well as those involving the proposed non-therapeutic sterilisation of a person lacking the capacity to consent.

Limitations

Use of restraint

- The Act defines restraint as using, or threatening to use, force to do an act which a person resists, or which restricts the liberty of movement of someone who lacks capacity whether or not he/she resists. Includes verbal and physical restraint from shouting at a person to holding them down or locking them in a room. May also include chemical restraint i.e. sleeping pills or other sedative.
- Any act intending to restrain a person lacking capacity will NOT attract protection from liability except in circumstances where –
 - ✓ The person taking action reasonably believes that it is necessary to do an act which involves restraint in order to prevent harm to the person lacking capacity.
 - ✓ That the act is a proportionate response (in terms of both degree and duration) to the likelihood of the person suffering harm and the seriousness of that harm.

Limitations

- The onus is on the person doing the act to identify reasons which objectively justify his/her belief that the person being cared for is likely to suffer harm.
- The Act does not define harm.
- Where restraint is necessary only the minimum force may be used for the shortest possible duration.

What is a “proportionate response”?

- A proportionate response is a response commensurate with the desired outcome, using the minimum necessary force or intervention for the shortest possible time.

***E.G.** A carer may need to hold the arm of a person with learning disabilities whilst they cross the road, but it would not be a proportionate response to stop the person going outdoors at all. It may be appropriate to have a secure lock on a door leading out to the road, but it would not be a proportionate response to lock someone in a bedroom at all times just because they have a tendency to wander out onto a busy main road.*

- Special care is needed when dealing with those who have particularly challenging behavioural problems.

DoH & DfEE guidance on the use of physical interventions for people with learning disability and the autistic spectrum disorders.

<http://www.dca.gov.uk/menincap/legis.htm>