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- Mental Capacity Act -

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## Introduction

Within the framework of the Mental Capacity Act (MCA), 'mental capacity' refers to an individual's ability to make decisions. Several factors, such as stroke, dementia, learning disabilities, or mental illness, can influence a person's capacity to make decisions. Importantly, having a mental illness does not automatically imply a lack of capacity, although severe mental illnesses may lead to temporary difficulties in making decisions regarding one's care and treatment. Furthermore, a person's capacity can vary over time and depending on the nature of the decision to be made. Other factors, such as physical conditions, unfamiliar environments, trauma, loss, and health problems, can also impact capacity. Additionally, individuals who are unconscious or barely conscious due to accidents, anaesthesia, or substance use also fall under the category of temporary lack of capacity.

### **These are five fundamental principals that must be adhered to:**

- It must always be originally assumed that said patient DOES have capacity, unless established otherwise
- You cannot assume a patient is unable to make their own decisions based on their unwise decisions
- A person can only be deemed without capacity if all possible attempts to help them make decisions have resulted in failure
- Decisions made for those who lack capacity must be made with their best interests in mind
- When making decisions, you must stop to consider whether this decision achieves said purpose in the least restrictive way for the patient

## Which personnel will be affected by the Mental Capacity Act?

The Mental Capacity Act (MCA) pertains to people making decisions for or on behalf of those who may lack the capacity to make specific decisions. Employees who are legally obligated to adhere to the Code of Practice when dealing with individuals who may lack capacity include:

- Paid caregivers or support providers, including care assistants, home care workers, support workers, and staff working in supported housing
- Researchers involved in studies that include individuals unable to make decisions about their participation
- Professionals in various fields, such as doctors, nurses, social workers, dentists, psychologists, and psychotherapists
- Individuals appointed as deputies by the Court of Protection
- IMCAs (Independent Mental Capacity Advocates) acting on behalf of individuals lacking capacity.
- Prison officers and paramedics

## What is the rationale behind the necessity for the Mental Capacity Act?

The Mental Capacity Act (MCA) has been formulated to amalgamate existing legal requirements and create consistency in making decisions concerning the care and treatment of individuals lacking the capacity to make their own choices.

While the Act draws heavily from established common law as determined by court judgments, it also introduces important innovations, including new criminal offenses, the introduction of Independent Mental Capacity Advocates (IMCAs), the establishment of a new Court of Protection, and the creation of the Office of the Public Guardian.

The fundamental purpose of the MCA is to safeguard the rights of individuals and empower vulnerable adults. Historically, people with conditions like dementia, learning disabilities, and severe mental illness may have been marginalised, and their right to participate in decision-making might not have been properly acknowledged.

The MCA addresses a wide spectrum of decisions, ranging from everyday choices like clothing and food preferences to more significant matters such as living arrangements, medical procedures, and financial affairs. By encompassing such a broad scope, the act aims to provide comprehensive protection and support to individuals in need.

## What does it mean to lack capacity?

An individual is deemed to lack capacity if they are incapable of making a specific decision due to a temporary or permanent impairment of the mind or brain at the time the decision is required. The Mental Capacity Act (MCA) outlines key components that must be considered when evaluating an individual's capacity to make a decision:

- Their capability to process and utilise that information during the decision-making process
- Their capacity to retain the information related to the decision
- Their ability to convey their decision, which can be done through various means, such as blinking an eye or squeezing a hand
- Their ability to comprehend the relevant information

Capacity is subject to the specific time and decision at hand. In general, most people can make most decisions most of the time. However, a person's capacity can fluctuate over time, and they may have the capacity to make some decisions but not others.

## What initiates the need for an assessment?

As per the principles outlined in the Mental Capacity Act (MCA), the primary approach should always be to assume an individual's capacity. However, doubts regarding a person's ability to make a certain decision can arise due to various factors:

- Their current circumstances
- The person's behavioural patterns
- Concerns expressed by other individuals

Additional significant triggers may include the relocation or passing of a caregiver responsible for the person's well-being, or when a referral is made to an adult protection coordinator. Any uncertainties should be assessed in the context of the specific decision to be made. It is essential to note that making an unwise choice does not necessarily imply a lack of capacity.

### What inquiries are necessary when evaluating someone's capacity?

When evaluating an individual's capacity, there are two essential questions that must be asked:

Is there any impairment or disturbance in the functioning of the person's mind or brain? If so, is the impairment or disturbance significant enough to render the person unable to make a specific decision at the given time?

It is crucial to follow this two-stage test and be able to demonstrate its application. It is important to note that a person's unwise decision alone does not indicate a lack of capacity. In many cases, individuals, even with certain labels or diagnoses, can still make decisions effectively, which is a vital principle that should not be overlooked.

The assessment process needs to be transparent and accountable, involving input from staff across various organisations providing support, and incorporating the perspectives of family and caregivers. In situations where there is no authorised person to make decisions on behalf of the individual, an independent mental capacity advocate (IMCA) may be appointed, especially for significant medical treatment choices or changes in accommodation.

Alternative advocates may also provide aid, representation, or guidance, and staff should be knowledgeable about localised services and know how to contact them. Throughout the assessment, all professional staff should maintain thorough records that clearly explain the basis for determining whether or not the individual has decision-making capacity.

### Practical approaches to capacity assessment

When evaluating someone's capacity to make a decision, it is essential to assess them based on their optimal level of functioning for that specific decision. This can be achieved through approaches similar to those mentioned below. Considering the following factors will help determine the kind of assistance a person might require to reach a decision. Remember that the range of factors to be considered is specific to each individual and their circumstances, and the two-stage test of capacity must be applied every time.

Factors to be taken into account during the assessment:

- Attention and focus
- Information processing - how the individual interprets information
- Linguistic ability
- Ability to remember
- Reasoning
- Rational ability
- Social context
- Cultural influences
- Ability to communicate effectively

You do not need to consider all of these components in every capacity assessment, even though several of these aspects may be relevant for formal evaluations. However, an assertion of a person's lack of capacity for a specific decision should be supported by observations and judgments related to some of these factors. Each capacity assessment will differ based on the nature of the decision and the individual's unique circumstances.

### Who will conduct the capacity assessment?

Those involved in caring for or supporting a person who may lack capacity could participate in the assessment. It is essential to consider the person's capacity in relation to each decision, such as care home staff. For significant decisions, multiple professionals are likely to be involved.

### To assist a person in making a decision, consider the following steps, while always keeping the five core principles in mind:

- Provide relevant information without overwhelming the person, including details about the potential consequences and alternative options.
- Consult with family and those familiar with the person on the best communication approach, such as using pictures or signing, and identify someone skilled in communicating with the individual.
- Be mindful of cultural, ethnic, or religious factors that might influence the person's decision-making. Consider whether an advocate or a member of their religious or community group could offer assistance.
- Choose an appropriate time for the person, taking into account the effects of any medication or treatment. If certain medications cause drowsiness, meet with them before or after the effects wear off.
- Take a patient and considerate approach. Make one decision at a time, avoid rushing, and be willing to make multiple attempts if necessary.

## Legal examinations according to common law and other legislations

Although MCA unifies existing common law and constitutes the way in which capacity must be determined, certain decisions will continue to be dealt with under common law - law which is pertained through conclusions drawn by courts in singular cases. Where potential legal decisions are concerned, staff must be completely conscious of which decisions are covered by the MCA, and which are covered by common law or similar legislation.

Various capacity tests have been ongoingly produced following court cases verdicts. These tests are referred to as common law tests.

### They encompass the capacity to:

- Engage in legal proceedings
- Create a will
- Enter into matrimony
- Bestow a gift

When administering tests of capacity under common law, the involvement of alternative professionals may be required. For instance, it is recommended to consult a legal practitioner to obtain legal advice when individuals who may lack capacity are drafting a will. Additionally, registrars are necessary to determine whether someone has the required ability to comprehend the marriage vows.

The MCA's definition of lacking capacity has been incorporated into other acts, like the 'Juries Act 1974', which now disqualifies individuals lacking capacity from serving on a jury.

If you believe you require more information on common law tests and their implementation, consult the book "Assessment of Mental Capacity-Guidance for Doctors and Lawyers, Second Edition" by the British Medical Association and Law Society. Make sure to use the most recent edition, as legal developments and case-specific decisions may result in changes to the guidance.

### Certain decisions fall outside the scope of the MCA, including:

- Consent for sexual relations
- Consent for divorce or the cessation of a civil partnership
- Consent for giving a child up for adoption, as well as making an adoption order
- Casting a vote

It is unlawful for these decisions to be made on behalf of another individual, regardless of the person's inability to make these decisions themselves, due to the complexity of the matters.

## What type of documentation will staff be required to maintain?

### Day-to-day records:

If a person is deemed to lack capacity for day-to-day care decisions, detailed record-keeping is not mandatory. However, one should keep in mind that if their judgement is contested, the practitioner must be able to explain the rationale behind their reasonable belief of the person's incapacity. Hence, it is still essential that the decisions regarding one's capacity, and how this conclusion was drawn are always documented in the person's case notes or file.

While daily recording is not required, the record should indicate the decision and mention that regular reviews will take place. This method of recording decisions helps staff demonstrate their firm belief in the person's lack of capacity, as it shows a lack of ingenuity. Some employers may have specific policies regarding the required documentation for such cases.

### Professional records:

When professionals like occupational therapists, nurses, social workers, psychologists, or doctors are involved in the person's care, it is considered good practice to conduct a thorough capacity assessment and record the findings in the relevant records. These records can be valuable for other individuals involved in the person's care, or in case any challenges are presented to the practice about their decisions. Daily notes on the individual's care should be incorporated into this process, following local agency protocols and procedures.

### Reports for the Court of Protection/Office of the Public Guardian:

In specific situations, the 'Court of Protection' or 'Office of the Public Guardian' may require formal reports or access to records. Therefore, it is crucial to maintain and keep records up to date in case this is requested.

### Decisions based on best interests:

Under the Mental Capacity Act (MCA), any decision or act made on behalf of a person lacking capacity must be in their best interests. Such decisions may be made by appointed individuals, including attorneys, deputies, and the 'Court of Protection'. However, in many cases, staff involved in the person's care and treatment will make the decisions.

When essential, staff members can also determine care or treatment decisions on behalf of a person lacking capacity, however, when this is the case, it is fundamental those acts are deemed to be in said patient's best interests.

The term 'best interest' has not been explicitly defined by the MCA, but it essentially outlines numerous factors which must be considered when making decisions on behalf of those who lack the capacity to do so themselves. Deciding someone's best interests involves several steps.

It is important to note that the decision should not be based on age, appearance, or unjustified assumptions related to the person's condition.

When assessing best interests, all relevant circumstances should be considered, including those known to the decision maker and those reasonably regarded as relevant.

### Regaining capacity - Can the decision be postponed until the person regains capacity?

- Consider the person's past wishes, feelings, beliefs, and values - Particularly any written statements made by the person when they **were** capable of making such decisions.
- Special considerations for life-sustaining treatment - The person making the best interest's decision must not be motivated by a desire to cause the person's death.
- Allowing and encouraging participation - This may involve finding suitable means of communication or involving others to assist the person in the decision-making process.
- Taking into account the opinions of others - Consider the viewpoints of family members, informal caregivers, or individuals appointed to act on the person's behalf.

### Acts in connection with care and treatment:

When carrying out acts of care and treatment in the best interests of a person who lacks capacity, staff are legally safeguarded. This protection is under Section 5 of the MCA, except in cases of negligence. The staff will be protected if they:

- Have taken reasonable steps to assess the person's capacity to consent to the specific act.
- Reasonably believe that the person lacks the capacity to consent.
- Reasonably believe that the act they are performing is in the person's best interests.

**However, staff will not be protected if they act negligently.**

### Acts related to personal care may include:

- Assisting with physical care, such as bathing, dressing, using the toilet, and managing catheters and colostomies.
- Assisting with travel.
- Accompanying for shopping and handling bill payments.
- Providing support with eating and drinking.
- Engaging in household maintenance.
- Engaging with community care services



## Acts connected to healthcare and treatment may include:

- Administering medication.
- Administering diabetes injections.
- Conducting diagnostic examinations and tests.
- Facilitating medical and dental treatments.
- Providing nursing care.
- Implementing emergency procedures.

It is important to consider whether the care or treatment could be provided in a less restrictive manner. For instance, if a person can manage to take a shower independently, it may be preferred over supervised bathing. The three '**acts in connection to care and treatment**' (above) must also be met in order for these acts to be carried out.

## In health and social care services, who holds the authority to make decisions?

The term 'decision maker' refers to the person responsible for determining whether to provide care or treatment to an individual who lacks the ability to consent. The identity of the decision maker may vary based on the person's circumstances and the type of decision at hand. Social care staff often act as decision makers for day-to-day situations and may also make longer-term decisions regarding the care of individuals lacking capacity. They are provided some protection under section 5 of the MCA Act.

Health professionals, on the other hand, serve as key decision makers for medical treatments, including dental care and physiotherapy. The term 'Treatment' encompasses the use of necessary x-rays and procedures such as surgeries and injections. It is not the doctors role to make decisions concerning social activities or daily care. Nurses lead nursing care. It is crucial to note that the ultimate decision to proceed with recommendations, even if prescribed by someone else, lies with the person administering the treatment or nursing care.

While decisions may involve discussions with other professionals or the medical/nursing team, the individual providing the treatment or care for someone lacking ability bears the responsibility of making the final decision in the person's best interests. Family members, as well as unpaid caregivers who reside with the individual's lacking capacity, frequently serve as decision makers for routine matters such as food and clothing selections.

## Restrictions on using constraint

When circumstances necessitate the use of restraint, employees responsible for restraining an individual classified as 'lacking capacity' will be shielded from legal liability, such as criminal charges, provided that certain conditions are met, and the act is carried out in an appropriate manner – this can vary depending on the situation at hand. Specific guidelines govern the application of restraint, be it verbal or physical, and the restriction or deprivation of liberty.

When someone has been restrained by staff, the employee must be able to justify their actions, as well as explain why they were led to believe the person at hand lacked the capacity to consent to the action in question – the restraint in this example. It is also mandatory that the procedure engaged acts in the best interest of the person in question, whilst also protecting them from harm. Moreover, the restraint must be proportionate and appropriate in response to the likelihood and seriousness of the potential harm the person may face.

Restraint factors in restricting the persons freedom of movement, physical restraint, as well as verbal warnings, but must not involve depriving an individual of their liberty. Additionally, under common law, restraint may be used in situations where there is a risk that the person lacking capacity might cause harm to someone else.

The 'Code of Practice' emphasises the prompt and cost-effective resolution of any disputes related to the best interests of a person lacking capacity. Whenever possible, alternative solutions to disputes should be considered before resorting to any application to the 'Court of Protection'.

When an application is submitted, the Court will evaluate whether appropriate alternatives have been explored. Certain groups, such as those lacking capacity or deemed to lack capacity, have an automatic right to apply to the Court. In other instances, the Court has the right to decide which applications to accept.

#### **Alternative approaches to resolving disputes include the following:**

- Disputes or disagreements among family members may be addressed through informal discussions or mediation.
- Conflicts regarding medical, societal, or welfare services can be resolved through either informal or formal complaint processes, such as the Patient Advice and Liaison Services (PALS) within the NHS in England or other recognized complaint systems. Advocacy services may also be helpful in resolving some issues.

#### **Making decisions ahead of time:**

The Mental Capacity Act (MCA) lays out specific requirements for making advance decisions. It is essential for those who are responsible for the care of an individual who lacks capacity to distinguish between an advance decision to refuse treatment and other expressions of the individual's desires and preferences.

An advance decision to refuse treatment allows an adult to make treatment choices in the event of losing capacity in the future. When properly made, such a decision is as valid as a contemporaneous decision (made at the time), and it **has** to be followed, regardless of whether it could result in the person's death. If an advance decision pertains to refusing life-sustaining treatment, it must be in writing, signed, and witnessed. However, if this isn't the case, advance decisions can be verbal and would not require signing or witnessing if they are written down.

Even in the absence of an advance decision, people's views and wishes, whether written or not, should be taken into account to plan appropriate care for the individual and make decisions in their best interests. Such expressions of wishes and feelings are significant, particularly if they are documented, but they do not hold the same legal binding as advance decisions.

### When are advanced decisions considered valid and applicable?

#### **An advance decision is considered valid when:**

- It is made while the person possesses capacity.
- The person who made it has not revoked it.
- The advance decision is not overridden by a subsequent Lasting Power of Attorney pertaining to the specified treatment in the advance decision.
- The person has acted consistently with the advance decision.

#### **An advance decision is applicable when:**

- The individual who made it lacks the capacity to consent to or refuse the specific treatment in question.
- It explicitly refers to the treatment in question.
- The circumstances under which the refusal of treatment is mentioned are present.

#### **An advance decision to refuse life-sustaining treatment is applicable when:**

- It is in written form, either written directly by the person or recorded in their medical notes on their behalf.
- It contains the signature of the individual who made it (or on their behalf if they are unable to sign). This must have been done in the presence of a witness who has also signed it.
- It explicitly states, either in the advance decision or in a separate statement (which must be signed and witnessed), that it applies to the specified treatment, even if it involves the risk of life.

A decision made in advance is not valid if there are rational grounds to believe that the person would have changed their decision if they had known about certain unforeseen circumstances that have arisen since the time the advance decision was made, such as the availability of new treatment. Additionally, if the person's actions raise doubts about or contradict their advance decision, it is also not valid.

Staff must possess the ability to identify when an advance decision to refuse treatment is both valid and applicable. Even a best interest's decision to provide treatment cannot supersede a valid and applicable advance decision that rejects that treatment. Ignoring a valid and applicable advance decision may void the protection from liability.

If an attorney acts under a registered 'Lasting Power of Attorney' that permits them to consent to or refuse the specified treatment, their decision will take precedence over an advance decision made after the 'Lasting Power of Attorney'. Specific rules apply to individuals detained under the 'Mental Health Act 1983', as their refusal of treatment for a mental disorder might be overridden under certain circumstances.

It is also important to note that although someone may have made an advanced decisions whilst having capacity, it may be voided if they then later engage in actions that contradict their advanced decision.

To empower service users, staff should create ways to support, execute, and record advance planning. NHS trusts and user groups are creating guidance on using advance decisions and expressions of wishes.

## Advocates for Mental Capacity Independence

The MCA mandates that the NHS and local authorities engage an IMCA in certain decisions. This ensures that when a person is unable to make a decision and has no representative, and serious medical treatment or a move to accommodation arranged by the local authority or NHS body is being considered, an IMCA is appointed.

For a person who lacks the ability to make decisions, the IMCA has a duty to provide support for them, as they have been granted the rights to make decisions on behalf of individuals whose care or treatment is being arranged by the NHS or another local authority. Furthermore, they are authorised to access the patient's personal information, including the appropriate health-and-social care records.

## The responsibilities of an IMCA include:

### **The following steps are taken to support a person who lacks capacity:**

1. Advocating for the views and interests of the person lacking capacity to the decision maker.
2. Obtaining and evaluating information through interviews with the individual and by reviewing relevant records and documents.
3. Gathering feedback from professionals and paid caregivers who provide care or treatment for the person lacking capacity.
4. Identifying alternative options.
5. Seeking a second medical opinion, if necessary.
6. Preparing a report that must be considered by the decision maker.

In England, regulations have broadened the role of IMCAs, allowing them to represent individuals who lack capacity in a range of cases involving allegations or evidence of mistreatment or neglect, either towards or by the person lacking capacity. Even in adult protection cases, an IMCA can be appointed, regardless of whether the individual has family or friends.

Likewise, the regulations allow IMCAs to participate in reviews for individuals who have been in accommodation arranged by the local authority or NHS body, or who have been hospitalized for more than 12 weeks and have no one else to represent them.

The MCA introduces new criminal offenses of ill-treatment or wilful neglect, which may apply to the following:

- Individuals responsible for the care of a person lacking capacity.
- Attorneys acting under a Lasting Power of Attorney or Enduring Power of Attorney.
- Deputies appointed by the Court.

Where allegations are applicable, they can be reported either to police or the 'Office of the Public Guardian'. Similarly, they can also be addressed through adult protection procedures via social services departments. Where found guilty, penalties for these criminal offenses may involve substantial fines and/or imprisonment exceeding to five years.

#### Children under the age of 16:

Generally, the MCA (mental capacity act) is not applicable to individuals younger than 16 years. In such cases, those with parental responsibility hold authority to make informed choices on behalf of their child under the common law.

Yet, despite this, the Court of Protection **does** have the authority to pass judgement concerning the property and affairs of a person under 16 years, if the individual lacks capacity regarding the MCA, and if it is probable that the person will still lack capacity to make such decisions when they reach the age of 18.

#### Young people aged 16 and 17:

The MCA intersects with provisions laid out in the Children Act 1989 in certain situations. There are no fixed criteria for determining which path to follow. For instance, the MCA might be employed when it is in the best interests of the young person to appoint a parent or an independent individual as a deputy to make financial or welfare decisions on their behalf.

This scenario could arise when a young person receives compensation, and a solicitor is appointed as a property and affairs (financial) deputy to collaborate with a care manager and/or family members to ensure that the compensation is wisely invested to meet the young person's needs across the course of their life.

## Data sharing

When it comes to instances involving individuals make decisions on behalf of those who harbour insufficient capacity, it often becomes necessary to share personal information about the person lacking capacity. This sharing of information is essential to ensure that decision-makers act in the best interests of the individual.

**Before disclosing information, the following considerations must be taken into account:**

- What category of information is being requested? Is it appropriate for the given circumstances?
- Is the person who is requesting the disclosure of information acting on behalf of the individual who lacks capacity?
- Is the information divulged in the utmost interests of the person lacking capacity?

**Disclosure and access to information are governed by various regulations, including, but not limited to:**

- Professional codes of conduct.
- The common law duty of confidentiality
- The Human Rights Act 1998
- The Data Protection Act 1998

Attorneys granted 'Lasting Power of Attorney' have the right to access information just like how the individual without capacity themselves would. 'Court of Protection' visitors are entitled to access records, and independent mental capacity advocates (IMCAs) can also access **relevant** parts of a person's records concerning the decision in question.

Court of Protection deputies may also have access to a person's records if granted such authority by the Court in certain circumstances.