

The Mental Capacity Act 2005

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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 or go online for a free pdf copy

The 2 stage test

1. Can the person make the specific decision (with or without support) at the time it needs to be made?
2. If not, is that because of a mental impairment?

If the person can make the decision, then they are the decision maker (they do not lack capacity) regardless of any mental impairment.

If the mental impairment is such that it means the person cannot make the decision, then, on a balance of probabilities, they will lack capacity to make that decision and the decision will need to be made for them in their best interests.

The 2 stage test



A person is unable to make a decision if they cannot do one or more of these things because of a mental impairment:

- Understand the relevant information about the decision to be made explained to them in a way they will better be able to understand
- Retain that information in their mind long enough to make the decision
- Use or weigh that information as part of the decision-making process,
- Communicate their decision (by talking, using sign language or any other means).

The Mental Capacity Act 2005 section 2(3)

“A lack of capacity cannot be established merely by reference to –

(a) a person's age or appearance, or

(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.”

What the legislation says

“For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.”

There must be a causative nexus, that is, a connection between the mental impairment and the inability to make the decision. A finding of incapacity must be shown (on a balance of probabilities) to be because of the mental impairment.

If not, the person has the mental capacity to decide what is in his or her best interests.

Enabling the person to make the decision

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

Does the person understand the information relevant to 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, find a way of enabling him or her to remember them.

Is the person able to use or weigh the information as part of the process of making 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?

39 Essex Chambers' top tips

1. Be clear about the decision.
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 do it - because of a mental impairment - and you have done all you can to enable them to do so.
- Concluding that a person lacks the mental capacity to make a decision does not automatically give us any right to make a risk averse decision. The further from doing what the person wants to do, the greater the burden of evidence on us.
- Must have considered the person's wishes, what would they normally decide to do in that situation? Have they made any written statements? What is important to the person; what is *most* important to the person?
- What is the least restrictive way of achieving the same thing?

Making a decision in a person's best interests

- If an incapacitous person's wishes are risky, can they be modified to reduce the risk?
- How is your decision in the person's best interests? You must be very clear about this
- Is the response proportionate to the degree of harm?
- 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.
- What have those who know the person best got to say? We must consult with people known by or identified by, or with an interest in, the welfare of the person, about what the person would want.