

## A question of capacity

The Mental Capacity Act 2005 (MCA) seeks to protect the most vulnerable members of society and to ensure that medical treatment and welfare decisions are made in their best interests, following consultation with interested parties.



The Act is supported by a code of practice, designed to help those making best-interest decisions. Under the MCA, mental capacity is presumed unless the contrary is established. However, where a person does lack capacity, the Act empowers their carers, family members and healthcare professionals to assist in the resolution of issues on their behalf. While only prescribed people can actually make decisions for those lacking mental capacity, the Act makes it clear that a number of interested individuals ought to be consulted before any final determination.

If an individual believes there may come a time when they will lose the capacity to make decisions, the Act enables them to plan ahead to ensure that someone is put in place to decide matters on their behalf.

The MCA encourages medical practitioners to support individuals in making decisions on their own. For example, if such a person is in hospital, and a doctor is explaining a recommended treatment option to them, the doctor should be aware of the potential anxiety and stress the patient may be under. This may affect the patient's ability to think rationally and all reasonable means should be used to make them feel as comfortable as possible before making treatment decisions.

If there are communicational or linguistic problems, the doctor should try to overcome these by using, for example, an interpreter or consulting a member of the family. Medical professionals will also need to take into account any cultural, ethnic or religious factors that may have a bearing on a person's thinking.

### Assessing capacity

It is not enough for a doctor to suspect that a patient lacks capacity. A two-stage assessment must be undertaken:

(1) It must be established that there is an impairment of - or a disturbance in the functioning of - the patient's mind or brain.

(2) It must be established that the impairment or disturbance is sufficient to render the person incapable of making a decision. That is to say, as a result of the impairment or disturbance, the patient must be unable to:

- understand the information relevant to the decision;
- retain the information;
- use or weigh that information as part of the process of decision-making; and
- communicate their decision to others.

When establishing capacity, a medical practitioner should consider talking to the patient's friends or family. When discussing personal details, the importance of confidentiality must be taken into account. If the person lacks the capacity to agree to the information being shared, and/or refuses to consent at the time, a balance must be struck between public and private interests in deciding whether or not to permit disclosure.

### Best interests

When considering a person's best interests, the following factors should be assessed:

- the individual's past and present wishes and feelings (including, for instance, any relevant written statements made by the individual when they had mental capacity);
- any beliefs and values that may influence the person's decision if they had capacity; and
- any other factors the patient would consider if they were able to do so.

The MCA encourages discussion by practitioners with all interested parties, whenever that is both practicable and appropriate. One interested party might be a donee under a lasting power of attorney (LPOA).

### Lasting power of attorney

For the first time, the Act allows a prescribed individual to consent to treatment on behalf of another adult. An LPOA makes provision for any subsequent loss of capacity. It is a mandate signed by a donor who has mental capacity at the time of signature. The mandate allows the person named - the attorney - to act on the donor's behalf in those matters listed in the power from the time when the donor loses their mental capacity. With such lasting power comes lasting responsibility.

Anyone can make a LPOA. It is thought that elderly people - perhaps with a prognosis of dementia or who have a diagnosed degenerative condition - are the most likely people to make this kind of arrangement.

A donee must be authorised under a LPOA, which must be registered with the Office of the Public Guardian. The donee must make decisions that are in the best interests of the donor, having carried out a reasonable assessment of the options available and of the patient's best interests in the light of those circumstances. The donee must take account of the decision they believe the patient would have made if they had mental capacity. This may be a very complicated exercise, particularly if there are many different treatment options.

Before a donee considers what decision to make, they should make sure they understand the patient's personal circumstances. They should then take advice from doctors and carers as to what they think is the best course of action. Where appropriate, the donee should seek advice on alternative courses of action - just as the patient would do, if they had capacity.

There may be conflicts between donees and doctors over what is in the patient's best interests. If those conflicts cannot be resolved, then the Court of Protection should be consulted. Similarly, there may be conflicts of interest between the donee and donor. For instance, a donee under a LPOA may have a vested interest in the donor's property, if they are also a beneficiary under the will. That may constitute a conflict of interest, when it comes to making end-of-life decisions. Again, this may necessitate an application to the Court of Protection.

All decisions made under a LPOA must be reached after taking reasonable steps to determine that the patient really does lack capacity. The donee must believe the patient lacks capacity and then make a decision in the patient's best interests. If a court later rules that a decision made on behalf of a patient was not a reasonable

one - or that the patient was ill-treated or wilfully neglected - the decision-maker can be held criminally liable, an offence that carries a maximum sentence of five years imprisonment.

### Advance Decisions

A further means of planning ahead is given through Advanced Decisions. These enable capable over 18 year olds the option to communicate a refusal treatment. They must specify, in lay terms if necessary, specific treatment they will refuse and the particular circumstances in which the refusal will apply. The person cannot have withdrawn the decision at any time when he/she had the capacity to do so, nor can they have done anything clearly inconsistent with the decision - e.g. appointed an attorney.

Advance Decisions can be oral or in writing but the refusal will only apply to life sustaining treatment where it is in writing, signed and witnessed and contains a statement that is to apply even where life is at risk. They cannot be used to refuse basic care (warmth, shelter and hygiene measures).

### Independent advocates

Where no family or next of kin can be found and the patient is incapacitated, the NHS Trust can instruct an independent mental capacity advocate (IMCA) to act on the patient's behalf. Such an advocate cannot make decisions on behalf of the patient, but they can step into the shoes of the patient's next of kin and discuss treatment options with doctors. If they disagree with the doctor's assessment of the patient's best interests, an IMCA can apply to the Court of Protection for a declaration. IMCAs came into existence in April 2007 and Kennedys were involved in what we believe to be the first case of this kind, involving a patient on life support who had no known family. Before a definitive treatment plan was agreed, an IMCA was instructed to advocate on behalf of the patient and discuss his best interests with the medical staff.

### Court of Protection

The new Court of Protection is staffed by judges and has a broad jurisdiction regarding matters relating to incapacity. The court can make:

- declarations about whether a patient has capacity;
- declarations about whether an act was done lawfully;
- decisions regarding a patient's property, business and financial dealings, and general welfare; and
- decisions on LPOAs and whether donees have acted appropriately.

It can also determine the validity and scope of advance decisions.

The Civil Procedure Rules have been updated to incorporate changes brought about by the MCA. Specifically, rule 21 has been amended, replacing the word “patient” with “protected party”. This is to ensure individuals who require a litigation friend are restricted only to those individuals who lack capacity for the specific issues in hand. Capacity is issue based and it would only be deemed necessary to term the individual a “protected party” in need of a litigation friend if they lacked capacity to bring the claim and make decisions in respect of the litigation. If at any point the “protected party” regains capacity, the litigation friend’s role would continue until a Court Order states otherwise. Where there is a “protected party”, the title of a claim will now be, for example, “A.B. (a protected party by C.D. his litigation friend)”. The rule also introduces “Protected Beneficiaries” who are protected parties who lack capacity to manage and control any money recovered by them or on their behalf or for their benefit in the proceedings.

## Summary

- When a person is undergoing medical treatment, it is presumed that they have mental capacity.
- If it is thought they may lack such capacity, all reasonable means should be used to make them feel as comfortable as possible before a practitioner decides this.
- Where treatment is proposed, the patient must give consent. If the patient lacks the capacity to give such consent, treatment must be given in line with their best interests, following consultation with all relevant individuals, including donees under an LPOA. If there is no next of kin, healthcare body should consider instructing an IMCA.
- During any such consultation, the confidentiality of a patient’s personal details must be taken into account.
- An act carried out in relation to a patient’s care and treatment is not authorised if it conflicts with the decision of an attorney acting within the scope of their power.
- The Court of Protection may be consulted if required.

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