



@mcadorset
#dorsetmca2020



Mental Capacity Act and Assessing Capacity



Dorset
Council

Aim of this session:

This session will focus on the MCA test of capacity and the complexities and challenges of assessing capacity.

What will you leave with?

- What do you need to know to complete the assessment?
- Where do you set the bar?
- Who do you need to consult with?
- What problems are you likely to encounter?



Five Statutory Principles of the Mental Capacity Act

1. **A person must be assumed to have the capacity unless it is established that they lack capacity.**
2. **A person is not to be treated as unable to make a decision unless all practicable steps to help him/her to do so have been 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/her 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.**

MCA Test of Capacity (S.2(1) MCA)

'at the material time he is unable to make a decision for himself...because of an impairment of, or disturbance in the functioning of, the mind or brain'

The MCA Test of Capacity



Is the person unable to make the decision?



Does the person have an impairment of, or disturbance in the functioning of the mind or brain?



Is the inability to make the decision because of the identified impairment or disturbance?

To be able to make a decision a person must be able to:

Understand the information relevant to the decision

Retain that information
(long enough to make the decision) and

Use & weigh the information
(as part of the decision-making process) and

Communicate
the decision (in any recognisable way)

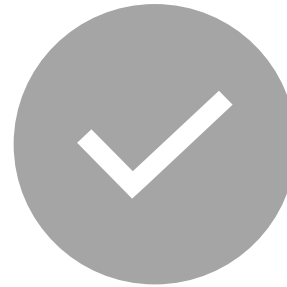
Failure on any one point, means the person lacks capacity to make the specific decision

Functional Test

Understanding Relevant Information



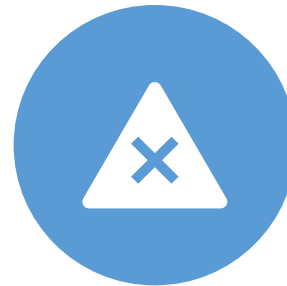
What is the relevant information?



Are the available options clearly identified?



How much understanding is required?



Is there any specific guidance relating to this decision?

Functional Test

Retaining the Information



How long do they need to remember the information?



What prompts can help?



If the assessment is repeated, is the outcome the same?

Functional Test - Using & Weighing



‘to engage in the decision making process itself and to be able to see the various parts of the argument and to relate the one to the other’
(The PCT v P, AH & The Local Authority {2009])



recognising the reasonably foreseeable consequences



Involves the person’s values, beliefs & what’s important to them

(not my idea of what’s important!)

Functional Test Communicating



Remember Principle 2



Be imaginative



Prepare props beforehand



Get help from others

The MCA Test of Capacity



Is the person unable to make the decision?



Does the person have an impairment of, or disturbance in the functioning of the mind or brain?



Is this because of the identified impairment or disturbance??

Diagnostic Test



IS THERE A FORMAL
DIAGNOSIS?



IF NOT, WHAT'S THE LIKELY
IMPAIRMENT OR
DISTURBANCE?



WHAT'S THE EVIDENCE TO
SUPPORT THIS?

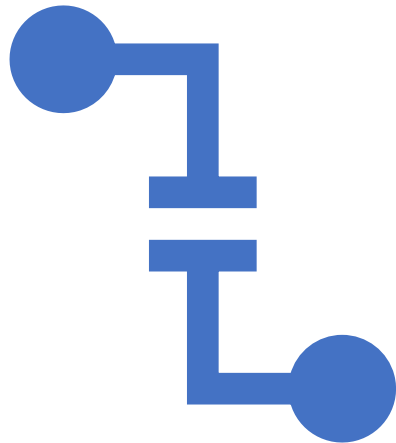
The MCA Test of Capacity

Is the person unable to make the decision?

Does the person have an impairment of, or disturbance in the functioning of the mind or brain?

Is this because of the identified impairment or disturbance??

Causal Nexus



- Explicit link between the impairment/disturbance and the person's inability to make the decision
- How does the impairment/disturbance prevent them doing this?
- Do you need 'expert opinion' to help with this?



Case Study

Helga Heindrik

Common Issues

Person refuses to engage in assessment

- can the decision be postponed? Will they engage with someone else? Do they understand the implications of the assessment & possible consequences?

Lack of Information

- How to establish history & context

Fluctuating Capacity

- understanding during periods of capacity & ability to forward plan
- micro v macro decisions (Royal Borough of Greenwich v CDM [2019])

Common Issues

Pressure from Others

- Disagreements/fears of consequences
 - Be clear in your rationale, get support, Principle 3
- Coercion, control, grooming
 - Very difficult! Impairment? Causal nexus? Inherent jurisdiction?

Conflating Capacity & Best Interests

- ‘Tail of welfare wagging the dog of capacity’, ‘protection imperative’

Common Issues

Preserved social skills masking superficiality

- avoid yes/no answers, ask same thing in different ways, raise concerns & ask for person's understanding of them, look for specifics rather than generalities

Person understands theoretical risks but does not accept that they could apply to them

- reasonably foreseeable consequences in the current situation, don't set bar too high, belief isn't in the test!

Common Issues

'Executive Capacity'

- Agreeing with action but not being able to put it into practice (hoarding); explanations of problems, acknowledgement of inaction
- Be clear about the decision to be made
- Evidence of impairment (causal nexus)

Other reasons for not making the decision

- denial, mistrust of services, prevarication, wish to please, etc.

Top Tips

Take time to prepare

- history & context
- person's past values, beliefs, etc.
- what are the available options
- what is the decision to be made
- what causes doubt as to the person's capacity (is there an agreed impairment/disturbance? What concerns have led to the assessment?)

Have a view as to what the person needs to understand

- follow existing guidance
- Make sure the person has received all relevant information and only proceed when they have
- don't set the bar too high

Plan how you'll conduct interview(s)

Top Tips continued



Have a view as to what
'using & weighing' looks
like in this context

risks v benefits, previous
similar decisions, views of
others



Have a plan about how
you'll conduct interview(s)

where, when, with whom,
communication, props



Allow enough time

visit more than once?



Ask the person about the decision explicitly



Know your limits & when to ask for help

Top Tips Continued



Use your professional skills to carry out interview: you do this all the time and are (almost certainly) good at it!



We don't have to be certain – 'balance of probabilities'



Trust your professional judgement



We don't have to be right – just 'reasonable' 😊

Write a good report



Appropriate detail for the decision



Include your details & in what role you are completing the assessment



Cover all the elements of the capacity test (even where no difficulty)



Record the evidence in a logical order



Back up any opinions with evidence

Write a good report



Use the person's own words where possible



Use contemporaneous documentation if you can



Outline attempts to maximise capacity



Distinguish between incapacitous and unwise decisions, especially where this is a borderline issue



Include any differing views (& why you disagree with them)



Explicitly state your opinion that, on the balance of probability, the person either does or doesn't have the capacity to make the decision in question



Helpful Resources



www.copcasonline.com – database of case summaries and case comments from the monthly Thirty Nine Essex Street Mental Capacity Law Newsletter, to which a free subscription can be obtained by emailing marketing@39essex.com.



www.mclap.org.uk – website with forums, papers and other resources with a view to enabling professionals of all hues to 'do' the MCA 2005 better.



www.mentalhealthlawonline.co.uk – extensive site containing legislation, case transcripts and other useful material relating to both the Mental Capacity Act 2005 and Mental Health Act 1983. It has transcripts for more Court of Protection cases than any other site (including subscription-only sites), as well as an extremely useful discussion list.



www.scie.org.uk - Social Care Institute of Excellence, including good practice guidance in a number of areas relating to mental capacity and related law as well as a guide (Guide 42) to accessing the Court of Protection.

Helpful Resources



[Case law around different capacity assessments](#)



[Extremely useful resource from the GMC designed in the first instance for doctors, but of much wider application, with particularly useful practical guidance upon communication techniques](#)



[lastquangoinalifax](#)

Thank you for coming!

You will be emailed your evaluation form, please complete and then your certificate will be emailed



A white rectangular card with a checklist of five items. The first item, 'Excellent', has a red checkmark in its checkbox. The other items are 'Very good', 'Good', 'Average', and 'Poor', each with an empty checkbox.

- Excellent
- Very good
- Good
- Average
- Poor