

The Mental Capacity Act exists to safeguard patients who lack mental capacity to make decisions for themselves and the health professionals who care for them

Understanding and using the Mental Capacity Act

Learning points...

- ▶ Patients should be assumed to have mental capacity unless it has been proven with a legal, mental capacity assessment that they do not
- ▶ Consent is not given when someone agrees to an intervention but when they agree to it taking place, having understood and weighed up its purpose, process and implications
- ▶ A diagnosis alone cannot be used to determine mental capacity

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Abstract Mughal AF (2014) Understanding and using the Mental Capacity Act. *Nursing Times*; 110: 21, 16-18.

The Mental Capacity Act aims to safeguard patients who lack mental capacity to make decisions about their treatment or care, and gives legal protection to the health professionals who care for them. It must be adhered to whenever there is doubt about a patient's mental capacity and a decision is required about their care or treatment. All health professionals working in hospitals and care homes should understand when and how the act should be used and feel confident doing so. This article explains the main points of the act, and when and how to use it.

The Mental Capacity Act 2005 (HM Government, 2005) is all about consent. For consent to be valid, the person giving it must have the mental capacity to understand what they are consenting to; it is the same as any other contract or agreement. Anyone buying a car would want to understand which car they were buying, how much it would cost and how it was to be used – the same applies to health and social care.

However, not all patients needing medical care and treatment know what it will involve or why they need it, even after

detailed explanation. This is not because they are being badly advised or misled by health professionals, but because they have a condition or an impairment in the functioning of their mind or brain (MCA s.2(1)) that is limiting their ability to understand or weigh up information involved in making the decision. For example, a patient with dementia may need a blood test but not understand what it will involve or why it is necessary.

The majority of patients are able to consent to care and treatment, and this must

BOX 1. PRINCIPLES OF THE MENTAL CAPACITY ACT

- Assume the patient has mental capacity unless it is proven otherwise by undertaking the mental capacity assessment
- Take all practical steps to support the patient with the assessment before you decide they lack mental capacity
- A patient should not be judged to lack mental capacity just because they make an unwise decision
- Any decision made on behalf of a patient lacking capacity should be made in their best interests
- Consider whether any best interests decision may be achieved in a less restrictive way

Source: Mental Capacity Act 2005, s.1

5 practice points

1 Always follow the principles of the Mental Capacity Act

2 If there is any doubt about mental capacity, a legal mental capacity assessment should be undertaken when a decision is needed and recorded

3 Mental capacity assessments should be done by the person directly concerned with the patient at that time

4 Patients should be given as much help as possible to complete stage 1 of the assessment

5 A patient who lacks mental capacity cannot give or refuse consent; the person concerned with their care must make a best interests assessment



Signing a form may mean a patient is complying but not giving consent

be a default assumption for health professionals; section 1 of the MCA states that people must be assumed to have mental capacity unless it is proved otherwise.

Unfortunately, there is a risk that patients who lack mental capacity merely comply with health professionals when asked to consent to an intervention, and are recorded as having consented without a mental capacity assessment having been carried out. In other cases, patients' next of kin may be given a consent form to sign, even though they have no power to authorise treatment or care on the patient's behalf; family members or friends only have such a power if they have a valid and applicable personal welfare lasting power of attorney or deputyship.

In 2013, the House of Lords Select Committee on the MCA (2013) scrutinised how the act was being applied in practice. The committee heard about a case in which an older man had had a severe stroke. Although it was recorded contemporaneously in his patient notes that his eyes were closed and that he was unresponsive and uncommunicative, the notes also said he had consented to having a nasogastric tube inserted. The MCA does not say that everyone who has a stroke automatically lacks mental capacity – it is clear that a diagnosis alone cannot be used to judge mental capacity (MCA s.2(3)(b)). However, in this case, the contemporaneous notes suggest that the effects of the stroke in this patient's case left him unable to give or refuse consent. Unfortunately, no mental capacity assessment had been recorded.

Significance of the Mental Capacity Act

Every time they touch a patient, nurses and other health professionals need legal protection; in the majority of cases, that legal protection comes from the patient's consent. In other words, the patient has the mental capacity to give the nurse valid informed consent, for example, to take a blood sample. This means the patient broadly understands why the blood test is necessary and what it will involve.

A patient who lacks mental capacity may be compliant when being offered treatment, for example by extending an arm for a blood sample to be taken. However, compliance should not be confused with consent. If a patient lacks capacity about a decision at the time it needs to be made, you cannot record that you have obtained their consent, even if the patient complies. Instead, a "best-interests decision" needs to be made (see below).

Decisions about mental capacity are

BOX 2. MENTAL CAPACITY ASSESSMENT

The assessment is time and decision specific, and should be repeated each time consent is needed. However, it may not have to be recorded each time if the person's capacity has not recovered and their care plan covers the decision (MCA Code of Practice, p104) (DCA, 2007).

Stage 1

The patient must be capable of all the following:

- Understanding the information relevant to the decision, for example the reason for taking a blood test, benefits and disadvantages, and what it will involve
- Retaining that information (only long enough to make the decision – they

could forget it a short while later)

- Using/weighing up that information (accepting it and taking it into account)
- Communicating their decision (in any way, such as gestures or behaviour)

Stage 2

- Has the patient failed the assessment (due to being unable to complete any part of stage 1) because of an impairment of or disturbance in the functioning of the mind or brain (for example, dementia, learning disability, brain injury, intoxication, confusion, however caused, or loss of consciousness)? If yes, they will be said to lack mental capacity. A best interests decision should now be made for them.

made using the MCA; when working with the act, the principles in Box 1 must be followed. Health professionals assessing mental capacity do not have to be 100% sure about the outcome of their assessment; the act simply requires that they have a reasonable belief on the balance of probabilities. In other words, they must have carried out the legal assessment and have decided what is most likely to be the right outcome.

BOX 3. BEST INTERESTS ASSESSMENT

- Consider all relevant circumstances
- Consider the patient's reasonably ascertainable past and present wishes/statements, their beliefs and values, plus any other factors they would take into account
- Consult others – for example carers, relatives, attorneys and deputies – as practicable and appropriate to do so
- Consider if the same result could be achieved in a less restrictive way
- Will the patient have capacity some time in the future in relation to the matter? Can the decision wait for the patient to make it for themselves?
- Encourage and permit the patient to participate in the decision making
- Do not base the best-interests decision solely on the patient's age, appearance, behaviour or condition
- If the decision is about life-sustaining treatment, do not be motivated by a desire to bring about the patient's death.

Assessing mental capacity

Mental capacity is tested by using a legal (not psychiatric) assessment described in sections 2 and 3 of the MCA.

A person cannot be judged to lack mental capacity simply because they make an unwise decision. Incapacity can only be shown or evidenced by carrying out the mental capacity assessment. The assessment may be carried out by anyone who needs a patient's consent if they are concerned about the patient's mental capacity to give that consent. Health professionals must record their mental capacity assessments in patient notes and be able to justify them if required to do so later.

The first step is to clarify the decision for which the patient's consent is needed (for example, that a blood test is necessary) and then check whether at the time consent is needed, the patient is capable of all the processes in stage 1 of the assessment (Box 2). A patient able to complete stage 1 has mental capacity (about that specific decision, at that time); inability to complete any of the four processes in stage 1 means the patient lacks mental capacity if this is because of an impairment of or a disturbance in the functioning of the mind or brain (because of delirium, intoxication, dementia, learning disability or unconsciousness for example). This two-stage mental capacity assessment follows the order recommended by the Court of Appeal in the case *PC & Anor v City of York Council* [2013] EWCA Civ 478, although many staff complete it the other way around by checking for an impairment or disturbance first.

Where necessary, patients should be

assisted to complete the processes in stage 1 as far as possible, through practical steps such as assistance with communication methods, giving them more time or offering other support.

The practical steps and time taken to assess capacity will be very brief in emergencies; patients fail the assessment immediately if they are unconscious and therefore unable to understand the information relevant to the decision.

Assessing best interests

Even if a patient does not have the mental capacity to give or withhold consent, you may still take a blood sample for testing or deliver other treatment/care if you assess this to be in the patient's best interests.

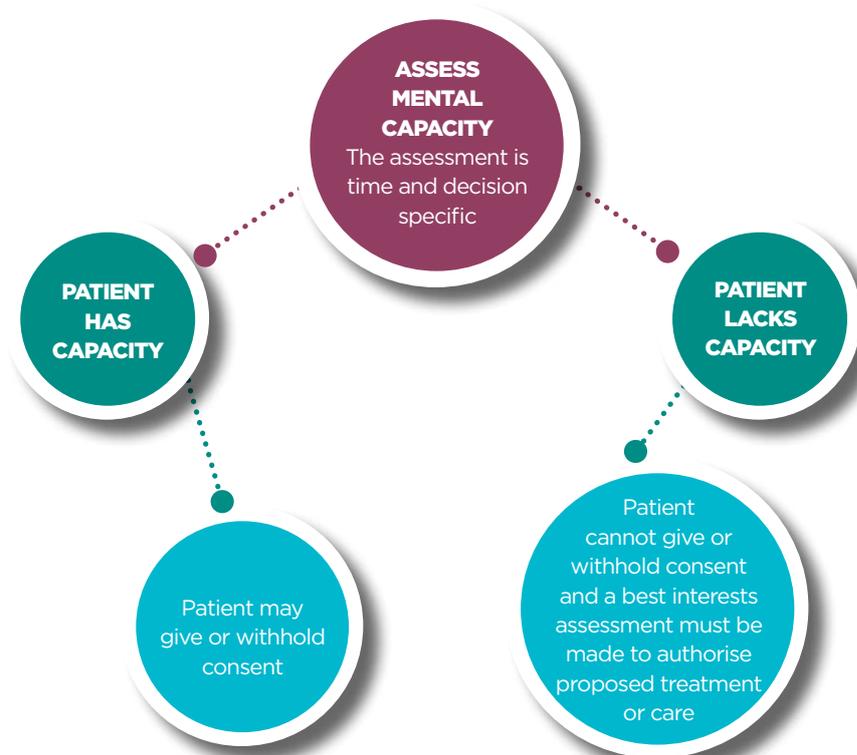
The legal criteria for a best-interests assessment are in section 4 of the act and summarised in Box 3. Again, in emergencies, this will be a very brief assessment.

Training

Staff in hospitals and care homes should receive training on the MCA; there is no legal requirement to be a member of a particular profession to assess mental capacity, providing the act is complied with.

The code of practice accompanying the act (Department for Constitutional Affairs, 2007) says at paragraph 4.38 that the mental capacity assessment should be carried out by the person directly concerned with the patient when the decision needs to be made (for example, a nurse who needs to take a blood-pressure reading). More guidance on this is available in paragraphs 4.39-4.43 of the code of practice.

FIG 1. THE MCA PROCESS



Record keeping

Although there are no statutory forms to be used to record mental capacity assessments, the code of practice reminds staff to record assessments and best interests decisions in, for example, care plans, patient notes or computerised systems. Staff members need to ensure the legal criteria in Boxes 1-3 are covered. Many hospitals and care homes use pro formas to help staff with this.

Problems in practice

Despite the fact that the MCA has been in force since October 2007, a number of staff in hospitals and care homes admit they do not use it or do not record its use.

As a legal trainer, I often hear from staff who do not realise that the act must be used for all decisions where a person is suspected to lack mental capacity, not just in cases of dispute or where the person refuses care or treatment.

FURTHER INFORMATION AND RESOURCES



Mental Capacity Act App

An interactive guide with definitions, a multiple-choice quiz and detailed diagram.

Search for "Mental Capacity Act" in the App Store or Google Play

Deprivation of Liberty Assessment Tool

Available for free download from www.bookswise.org.uk; free email updates on the latest editions available

Training on the Mental Capacity Act

Edge Training and Consultancy
Email: admin@edgetraining.org.uk
Follow it on Twitter: @edgetraining1

Wallcharts

The following wallcharts are on sale:

- Consent
- The Mental Capacity Act 2005
- The Mental Health Act 1983
- The Deprivation of Liberty Safeguards

Books

Richards S, Mughal AF (2009) *Working with the Mental Capacity Act 2005*. North Waltham: Matrix Training Associates.

Richards S, Mughal AF (2010) *Working with the Mental Health Act 1983*. North Waltham: Matrix Training Associates.

These resources are produced by Aasya Mughal and her colleague Steven Richards.
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Conclusion

In summary, before patients can consent to care or treatment, they must have mental capacity. If they lack mental capacity, they cannot give or withhold consent (even if they comply with health professionals); in such cases, a best interests decision must be made for them. Fig 1 illustrates the process of correctly using the act.

This article is not a substitute for the Mental Capacity Act 2005 or case law. Nothing in it is intended to be or should be relied upon as legal advice. **NT**

References

- Department for Constitutional Affairs (2007) *Mental Capacity Act 2005: Code of Practice*. London: the Stationery Office. tinyurl.com/MCA2005-code
- HM Government (2005) *Mental Capacity Act 2005, Chapter 9*. London: The Stationery Office. legislation.gov.uk/ukpga/2005/9/contents
- House of Lords Select Committee on the Mental Capacity Act (2013) Reports and Associated Evidence. tinyurl.com/MCACcommittee-evidence