

Best interests tests

MPS



**For medicolegal advice
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The **best interests principle** in The Mental Capacity Act 2005 (the Act) states that any act done or decision made on behalf of an adult lacking capacity must be in their best interests. This can cover financial, health and social care decisions. The person making the decision is the “decision-maker” and is likely to be the person caring for the patient on a day-to-day basis, the doctor or other member of the healthcare staff responsible for carrying out the particular treatment or procedure, or an LPA or Court of Protection deputy.

The best interests test

The Act sets out what you must consider when deciding what is in the best interests of your patient. You should take into account:

- past and present wishes and feelings
- beliefs and values that may have influenced the decision being made, had the person had capacity
- other factors that the patient would be likely to consider if they had capacity.

You must have objective reasons for any decision you make. You must also be able to show that you considered all circumstances relevant to the decision in question.

In trying to assess the best interests of a person lacking capacity, you should:

- **Encourage the person lacking capacity to participate in the decision.**

To do this, it may be necessary to use specific communication methods; for example, simple language or pictures, or by using a specialist to help communicate.

- **Avoid discrimination.**

The Act specifically states that decisions cannot be based on a person's age, appearance or condition or any aspect of the person's behaviour. The appearance can refer to all aspects of a person's physical appearance, while the condition can include learning difficulties, age-related illnesses or temporary conditions (such as unconsciousness or drunkenness).

- **Try to identify all the issues most relevant to the person who lacks capacity and to the specific decision to be made.**

These will vary from case to case, depending on the capacity of your patient and the decision needing to be made.

- **If possible, defer the decision if the patient is likely to regain capacity.**

In emergency situations, it may not be possible to wait for the patient to regain capacity.

Under S.4(9) a person (healthcare professional) cannot be found liable if they have complied with subsections 1-7, ie, complied with best interests test.

Life-sustaining decisions

It is a fundamental rule that **decisions regarding life-sustaining treatment must not be motivated by a desire to bring about the person's death**. As the healthcare professional, you must decide whether or not the treatment you are giving is life-sustaining in each particular situation. Before selecting the treatment, you should consider all the options, including the factors in the best interest tests. You should take into account any statements the patient may have previously made, and the views of family and carers.

This factsheet provides only a general overview of the topic and should not be relied upon as definitive guidance. If you are an MPS member, and you are facing an ethical or legal dilemma, call and ask to speak to a medicolegal adviser, who will give you specific advice.

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You are not under an obligation to provide life-sustaining treatment that is not in the best interests of the patient. If there is a dispute about this, contact MPS for advice. The Court of Protection may also be approached to make decisions about what is in the person's best interests.

In some cases, the patient may have made an advance decision to refuse life-sustaining treatment – there is further information on this in the MPS factsheet – *Mental Capacity Act 2005 – Advance Decisions*.

Take into account a person's past and present wishes

The Act specifies that, as far as reasonably ascertainable (considering all possible information in the time available, such as differences between an emergency and a non-emergency situation) the following issues should be considered:

- the person's past and present wishes and feelings – for example, if a person had strongly-held views in the past, this may shape their treatment.
- there might be written statements that provide information about an individual's wishes of how they would like to be cared for. Written statements are different to advance decisions to refuse treatment.
- the beliefs and values that would be likely to influence their decision if they had the capacity – evidence of this can be found by looking at an individual's cultural background, religious beliefs, political and moral convictions or past behaviour or habits.
- other factors that they would be likely to consider if they were able to do so – for example, the effects of such a decision on other people, eg, dependents.

You should also seek the views of the people closest to the individual who lacks capacity, as well as the views of an LPA or Court of Protection appointed deputy.

Whom should you consult?

You have a duty to consult with other people close to the patient. Where appropriate, include those named by the individual when they had capacity. You should also consult any LPA and, where appropriate, the Court of Protection attorney or deputy. If there is no-one to discuss the individual's best interests, the incapacitated individual may qualify for an Independent Mental Capacity Advocate (IMCA). See the MPS factsheet – *Mental Capacity Act 2005 – Independent Mental Capacity Advocates* for further information.

Duty of confidentiality

You need to balance the duty to consult with other people with the patient's right of confidentiality. In situations where this is unclear you should contact either the Information Commissioner or MPS for further advice.

Records

Keep good records of how and why the decision about the person's best interests was reached, who was consulted, and the factors that you did or did not take into account. This should include witnesses of the individual's capacity to make the decision.

Exceptions to the principle

There are two exceptions to the best interests principle:

- If the patient made an advance decision to refuse certain medical treatment whilst they had capacity and there is no reason to believe they subsequently changed their mind.
- Involvement in research (chapter 11 of the Mental Capacity Act Code of Practice).

Further information

- MPS factsheets, Mental Capacity Act series – www.medicalprotection.org/uk/factsheets
- Mental Capacity Act – www.legislation.gov.uk/ukpga/2005/9/contents
- Safeguarding Vulnerable Groups Act 2006 – www.legislation.gov.uk/ukpga/2006/47/contents
- Mental Capacity Act 2005 Code of Practice, Chapter 9 – www.legislation.gov.uk/ukpga/2005/9/pdfs/uk/ukpgcacop_20050009_en.pdf
- Department of Health – www.dh.gov.uk
- The Office of the Public Guardian – Mental Capacity Act 2005 – www.justice.gov.uk/about.opg

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