

# Assessing capacity



Advice correct as of June 2016

The Mental Capacity Act states that a person lacks capacity if they are unable to make a specific decision, at a specific time, because of an impairment of, or disturbance, in the functioning of mind or brain. This factsheet sets out the things to look for when assessing the capacity of a patient.

## Mental capacity

Mental capacity is the ability to make a decision. If a person lacks capacity, they have an impairment or disturbance that leaves them unable to make a decision.

The loss of capacity could be partial or temporary. It is possible for a person to lack capacity to make one specific decision but not about another.

The reasons for questioning if a person has capacity to make a decision at a particular time may be that:

- The person's behaviour or circumstances raise doubt as to whether they have the capacity to make a decision.
- Concerns about a person's capacity have been raised by someone else; for example, a family member or a healthcare worker.
- The person has previously been diagnosed with a condition causing an impairment to the performance of their mind or brain, and it has already been shown that they lack capacity to make other decisions.

## Assessing capacity

If you think that an individual lacks capacity, you need to be able to demonstrate it. You should be able to show that it is more likely than not – ie, a balance of probability – that the person lacks the capacity to make a specific decision when they need to.

An assessment that a person lacks capacity to make decisions should never be based simply on the person's age, appearance, assumptions about their condition (includes physical disabilities, learning difficulties and temporary conditions (eg, drunkenness or unconsciousness), or any aspect of their behaviour.

It is important to document any decisions you make in assessing capacity, and any reasons for the clinical judgement that you come to.

## Decision-making

Assessing a person's capacity accurately is important; otherwise, a person might be denied the right to make a decision because it is unwise and not in their best interests.

The starting assumption should always be that the person has capacity. The Act details a two-stage test of capacity:

- 1. Does the person have an impairment, or a disturbance in the functioning, of their mind or brain?** This can include, for example, conditions associated with mental illness, concussion, or symptoms of drug or alcohol abuse.
- 2. Does the impairment or disturbance mean that the person is unable to make a specific decision when they need to?** You should offer all appropriate and practical support to achieve this before applying this stage of the test.

## Functional tests of capacity

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

- Understand the decision to be made and the information provided about the decision. The consequences of making a decision must be included in the information given.
- Retain the information – a person should be able to retain the information given for long enough to make the decision. If information can only be retained for short periods of time, it should not automatically be assumed that the person lacks capacity. Notebooks, for example, could be used to record information which may help a person to retain it.
- Use that information in making the decision – a person should be able to weigh up the pros and cons of making the decision.

- Communicate their decision – if a person cannot communicate their decision – for example, if they are in a coma – the Act specifies that they should be treated as if they lack capacity. You should make all efforts to help the person communicate their decision before deciding they cannot.

You will need to assess a person's capacity regularly, particularly when a care plan is being developed or reviewed.

## Other points

Capacity is dynamic and a specific function in relation to the decision to be taken.

This will need to be regularly assessed in relation to each decision taken, and carefully documented.

## Further information

- MPS factsheets, Mental Capacity Act series – [www.medicalprotection.org/uk/factsheets](http://www.medicalprotection.org/uk/factsheets)
- Mental Capacity Act – [www.legislation.gov.uk/ukpga/2005/9/contents](http://www.legislation.gov.uk/ukpga/2005/9/contents)
- Mental Capacity Act (2005), Code of Practice – [www.gov.uk/government/publications/mental-capacity-act-code-of-practice](http://www.gov.uk/government/publications/mental-capacity-act-code-of-practice)
- Ministry of Justice – [www.justice.gov.uk](http://www.justice.gov.uk)
- DH – [www.dh.gov.uk](http://www.dh.gov.uk)
- The Office of the Public Guardian, *Making Decisions: A Guide for People Who Work in Health and Social Care Booklet 3*, Mental Capacity Act 2005 – [www.publicguardian.gov.uk](http://www.publicguardian.gov.uk)
- GMC, *Decision Making when Patients Lack Capacity, Toolkit* – [www.gmc-uk.org/Mental\\_Capacity\\_flowchart](http://www.gmc-uk.org/Mental_Capacity_flowchart)

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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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