Assessing capacity – legislation and core principles

Mental capacity is the ability of a person to make their own decisions. Doctors regularly assess patients' capacity, and should be familiar with the principles of such assessment.

In England and Wales, the assessment of capacity is set out in the Mental Capacity Act (MCA) 2005, together with the code of practice. It applies to anyone who is 16 years or over and who lacks the ability to make decisions for themselves.

In Scotland, the Adults with Incapacity (Scotland) Act 2000 sets out the framework for regulating intervention in the affairs of adults who have (or may have) impaired capacity.

In Northern Ireland decisions about capacity and treatment and care are considered by reference to the Mental Capacity Act (NI) 2016 which commenced in 2019.

This note provides an overview of the core principles of the relevant legislation, followed by practical advice on how these principles should be applied in day to day practice.

England and Wales: The Mental Capacity Act 2005

The Act is underpinned by five key principles (Section 1, MCA).

Principle 1: A presumption of capacity

Every adult has the right to make their own decisions, and must be assumed to have capacity to do so, unless proven otherwise. Capacity is decision and time-specific. A person's capacity should be assessed according to the decision that needs to be made at a particular time, rather than on the basis of illness or disability.

It should not be assumed that a person cannot make a decision for themselves just because they lack capacity to make other decisions. A person may lack capacity to make major decisions that would have life-changing consequences, while still retaining the capacity to make smaller decisions.

Someone who lacks capacity will be unable to do one or more of the following:

- understand information given to them about a particular decision
- retain the information given for long enough to make a decision
- weigh up the information sufficiently to make a decision
- communicate their decision.

Principle 2: Individuals being supported to make their own decisions

A person must be given all practicable help before anyone treats them as not being able to make their own decisions. Every effort should be made to give an individual the help and support that they might need to enable them to make the decision for themselves. If a lack of capacity is established, it is still important that the individual is involved as far as possible in making decisions.

Principle 3: Unwise decisions

People have the right to make decisions for reasons that others might regard as unwise or eccentric. You cannot treat someone as lacking capacity for this reason (even if they have an impairment of the functioning of the brain or mind). Everyone has their own values, beliefs and preferences which may not be the same as those of other people.

Principle 4: Best interests

If a person does lack capacity to make a specific decision, then decisions should be made on their behalf. If there is an advanced directive, then this should be followed. If there is a lasting power of attorney or deputy in place, then they would become the person's decision maker. Otherwise, decisions taken on behalf of the patient by the medical team should be made in the person's best interests.

Principle 5: Decisions should achieve the purpose in a way that is less restrictive to the person's rights

Decisions taken on behalf of a person should have regard to achieving the purpose through the least restrictive course. Someone making a decision or acting on behalf of a person who lacks capacity must consider whether it is possible to decide or act in a way that would interfere less with the person's rights and freedoms of action, or whether there is a need to decide or act at all. Any intervention should be weighed up in the particular circumstances of that decision.

When adhering to these principles there may be further considerations or adaptations that may help patients be involved in decisions.

These could include:

- Does the person have all the relevant information needed to make the decision? If there is a choice, has information been given on the alternatives?
- Could the information be explained or presented in a way that is easier for the person to understand? Help should be given to communicate information wherever necessary. For example, a person with a learning disability might find it easier to communicate using symbols, pictures, photographs, videos, tapes, Makaton or sign language.
- Are there particular times of the day when a person's understanding is better or is there a particular place where they feel more at ease and able to make a decision? For example, if a person becomes drowsy soon after they have taken their medication this would not be a good time for them to be asked to make a decision.

- Can anyone else help or support the person to understand information or make a choice? For example, a relative, friend or an advocate.

Scotland: Adults with Incapacity (Scotland) Act 2000 (AWIS Act)

The law in Scotland generally presumes that adults (aged 16 or over) are legally capable of making personal decisions for themselves and managing their own affairs. That presumption can be overturned in relation to particular matters or decisions on evidence of impaired capacity. In cases of medical treatment and research, the AWIS Act provides a statutory framework for regulating intervention in the affairs of adults who have (or may have) impaired capacity.

Key Principles

Incapacity is not an "all or nothing" concept – it is judged in relation to particular decisions

A person performing an intervention undertaken under the functions of the Act must:

a) Ensure that the intervention is of overall benefit to the individual who lacks capacity.
b) Ensure that the intervention is the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention.
c) Where possible, take into account the individual's past and present wishes and feelings.
d) Consult with relevant others including the individual's family, power of attorney (POA), guardian, carers, any person the courts have appointed or any other person who may appear to have an interest in their welfare. Confidentiality should be considered, as should financial motives and/or differences of opinion between family members.
e) Encourage the individual to exercise any residual capacity to engage in decision making where possible.

Northern Ireland: Mental Capacity Act (Northern Ireland) 2016

The Northern Irish Mental Capacity Act commenced in stages, in December 2019. The Act fuses together mental capacity and mental health legislation, and applies to anyone who is aged 16 or over.

Principles: Capacity.

The following key principles are to be complied with where a determination falls to be made of whether a person who is 16 or over lacks capacity in relation to a matter:

a) The person is not to be treated as lacking capacity unless it is established that they lack capacity. A person lacks capacity if they are unable to make a decision for themselves about a matter because of an impairment or disturbance in the functioning of the mind or brain.

b) Whether the person is, or is not able to make a decision for themselves about the matter is not to be determined merely on the basis of any condition the person has, or any characteristic which might lead others to make unjustified assumptions about their ability to make a decision. It is to be determined solely by reference to whether the person is or is not able to:

- Understand the information relevant to the decision
- Able to retain the information for the time required to make the decision
- Able to appreciate the relevance of that information and to use and weigh that information as part of the process of decision making
- Communicate their decision

c) A person is not to be treated as unable to make a decision for themselves about the matter unless all practicable help and support to enable them to do so have been given without success. This can include the provision of all the information relevant to the decision, in a way appropriate to his or her circumstances, at a time and environment likely to help the person make a decision, and with involvement from persons who are likely to help and support them to make a decision.

d) A person is not to be treated as unable to make a decision for themselves about the matter merely because they make an unwise decision.

Principle: Best interests

Where a decision is made for or on behalf of a person 16 or over who lacks capacity to make the decision, this must be done in the person's best interests. The individual making the determination must not make it merely on the basis of the person's age or appearance or any other characteristic, including any condition the person has, which might lead others to make unjustified assumptions about what might be in their best interests.

Insofar as is practicable, the decision maker must encourage and help the person participate as fully as possible in the determination of what would be in their best interests.

The individual making the decision on behalf of another person must also have regard to their past and present wishes, feelings, beliefs and values and anything else the person would have considered. So far as is practicable they should also consult the relevant people, for example someone engaged in caring for their welfare, or an attorney, about what would be in the person's best interests, and take into account these views.

UK-WIDE CONSIDERATIONS

Assessment of capacity

The assessment of capacity must be made in relation to a particular decision or action. An adult assessed as incapable in relation to one matter should not, without proper assessment, be assumed to be incapable in relation to other matters. Every possible assistance must be given to the adult to understand their own medical condition and the decision that is required in relation to treatment.

The GMC is clear that assessment of capacity is a core clinical skill. While starting from the presumption that an adult patient has capacity, you should be alert to signs that patients may lack capacity.

A person has capacity if they can do all of the following:

a. Understand information relevant to the decision in question.
b. Retain that information
c. Use the information to make their decision.
d. Communicate a decision.

If you believe that a patient may lack capacity, you must then undertake an assessment according to the relevant legislation. In England & Wales, this will involve following Chapter 4 of the MCA Code of Practice and in Scotland, reference should be made to Part 5 of the Adults with Incapacity (Scotland) Act and para 1.22 of the Scottish Government's Code of Practice.

The English and Northern Irish legislation makes clear that assumptions about capacity should not be made on the basis of a patient's age, appearance, assumptions about their condition or any aspect of their behaviour.

The Scottish Code of Practice is similarly clear that an adult does **not** have impaired capacity simply by virtue of:

- being in community care
- having a psychotic illness
- having dementia, particularly in the early stages
- having difficulties with speech or writing
- having an addiction
- disagreeing with the treatment or those offering it
- having learning difficulties or disabilities
- being vulnerable or at risk from him or herself or others
- behaving irrationally
- being promiscuous
- having a brain injury
- having a physical disability
- having a history of offending
- having an acquired or progressing neurological condition.
- declining to accept the practitioner's advice
- rejecting a recommendation for treatment on emotional rather than rational grounds

The individual's baseline should be considered. This is helpful in cases of psychotic illness, dementia, acquired brain injury or a progressive disease which can involve deteriorating capacity in its later stages. In acquired conditions, what is normal for the adult should be the baseline for assessment of incapacity, not any societal norm. The practitioner should draw on their own knowledge of the patient, as well as information from relatives, carers and other professionals, to assess whether there has been a deterioration in the patient's capacity, and the likely duration of that deterioration.

Ultimately, however, the central issue is whether the adult retains adequate capacity to take the decision or decisions in question.

Fluctuating capacity

Patients with fluctuating capacity (for example resulting from delirium or hypomanic conditions) can present particular issues. If a decision can reasonably be deferred until the adult is likely to regain sufficient capacity then it must be deferred. In this scenario in Scotland, a certificate of incapacity should be of short duration to ensure that the patient's freedom is not restricted more than necessary.

In some cases involving diminishing or fluctuating capacity it may be helpful to ask whether the patient wishes to consider granting someone power of attorney relating to their personal welfare. [See separate factsheet on POAs]

Undue influence

Practitioners should be alert to signs that an adult, although apparently participating in decision-making, is unduly suggestible, as others may have a vested interest in asserting that the adult is, or alternatively is not, capable of making decisions.

Carers and relatives will have valuable information about the patient's present and past wishes and feelings but be mindful of potential undue influence. The GMC provides further guidance on what to do if you are concerned that a patient can't make a decision freely (para 69-75 of the Consent Guidance).

Identifying the patient's wishes

To take account of present and past wishes and feelings of the adult, any means of communication appropriate to the adult should be used (including full MDT, family members, visual aids and/or interpreters where necessary).

Independently appointed advocates should be consulted and consider appointing one where the adult has no family/friends to act as a 'natural advocate' or in circumstances where there is disagreement between interested parties as to the views of the adult.

Top Tips – UK wide:

- Start from the presumption that all adult patients have capacity to make decisions about their treatment and care, but remain alert to signs that a patient may not have capacity.
- Do not be tempted to reach a definitive view about a patient's capacity ahead of time. While it may be useful to start thinking about any factors in advance that may affect capacity, a patient can only be judged to lack capacity to make a specific decision after appropriate assessment at the relevant time.
- Where a patient has a condition that is likely to impair their capacity as it progresses, the GMC advises that you should sensitively encourage them to think about what they might want to happen if they become unable to make decisions. This may involve discussing the patient's preferences about future options for care and who else they may wish to nominate to make decisions on their behalf (in which case you should suggest that they seek support and independent advice about how to formalise their wishes).

- Where a patient lacks capacity, any treatment provided in line with the relevant legislative framework must be of overall benefit to them, and decisions should be made in consultation with those who are close to them or advocating for them. Clearly record your discussions with the patient in this regard and, if possible, give them the opportunity to review your record and share it with others involved in their care.
- In an emergency, you should presume that a conscious patient has capacity and seek consent before providing treatment. If a patient is unconscious or you otherwise conclude that they lack capacity and it is not possible to find out their wishes, you can provide treatment that is immediately necessary to save their life or prevent a serious deterioration. Any treatment you do provide should be the least restrictive of the patient's rights and freedoms, including their future choices.

Further guidance

- legislation.gov.uk. Mental Capacity Act 2005: http://www.legislation.gov.uk/ukpga/2005/9/contents
- Mental Capacity Act Code of Practice: https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice
- legislation.gov.uk. Adults with Incapacity (Scotland) Act 2000: http://www.legislation.gov.uk/asp/2000/4/contents
- gov.scot. Adults with incapacity: code of practice for medical practitioners: https://www.gov.scot/publications/adults-incapacity-scotland-act-2000-code-practice-third-edition-practitioners-authorised-carry-out-medical-treatment-research-under-part-5-act/
- legislation.gov.uk. Mental Capacity Act (Northern Ireland) 2016 https://www.legislation.gov.uk/nia/2016/18/contents/enacted
- GMC – Decision making and consent https://www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/decision-making-and-consent
- GMC Factsheet: Key legislation and case law relating to Decision making and consent: https://www.gmc-uk.org/-/media/documents/factsheet---key-legislation-and-case-law-relating-to-decision-making-and-consent-84176182.pdf?la=en&hash=78BE028B7DA0EBE83F28E6A8C3B3C29A5D36550E