
The Mental Capacity Act

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Introduction

- What is Mental Capacity?
- How do you assess capacity?
- If a person lacks capacity, what actions can be done, or medical treatment given in their “best interests”?

Why does this matter to you?

- MCA is all about your patients capacity to make decisions for themselves
- The relevance to the consent process - remember compliance is not the same as consent
- The implications of getting this wrong:
 - Assault
 - Negligence
 - Complaints

What is Mental Capacity?

- Mental Capacity Act 2005 came into force October 2007
- It deals with whether a person has the ability (“capacity”) to make a decision on his or her own behalf
- Decision and time specific
- Includes decisions about medical treatment
- Also includes day to day decisions such as where to live, what to wear, what to eat
- Act sets out:
 - How you decide whether a person has capacity to make those decisions, and
 - What you do if they lack that capacity

Basic principles

- Presumption of capacity unless it is established otherwise
- Should not treat someone as unable to make a decision unless all practicable steps have been taken to help the person to make a decision



Mental Capacity Act 2005

How do you decide whether a person has capacity?

- Common law test (Re C)
- Is the person able to
 - Understand, in simple language, what treatment is proposed?
 - Understand the likely benefits and risks of the treatment (and the consequences of not treating)?
 - Retain information for long enough to weigh it in the balance and arrive at a decision?

The Test for Capacity in the MCA

- A person lacks capacity if he is “*unable to make a decision for himself*” in relation to the matter because of an impairment of or a disturbance in the functioning of, the mind or brain
- Can be permanent or temporary

“Unable to make a decision for himself”

s3 MCA - a person is “unable to make a decision for himself” if he is unable:

- To understand information relevant to the decision
- To retain that information
- To use or weigh that information in the decision making process, or
- To communicate his decision
- Note the similarity to re C

Competent adults can make unwise decisions...

- Cannot treat someone as lacking capacity just because their decision is an unwise one



The test for Capacity in Practice:

- Re MB (1997)
- Refusal of caesarean section due to needle phobia
- Fear of needles such that “at the moment of panic, her fear dominated all”
- At that moment she was incapable of making a decision at all and was temporarily incompetent



Remember a competent patient can refuse treatment

- Re B (2002)
- Competent patient entitled to refuse artificial ventilation
- Following haemorrhage of spinal column patient tetraplegic and placed on a ventilator.
- Patient requested withdrawal of ventilation notwithstanding clear advice she would die
- Psychiatric assessment that patient had capacity, but despite this treatment continued
- Court held the treatment was unlawful

Helping people to make decisions

- Does the person have all relevant information?
- Could the information be presented in a way that is easier for the person to understand? For example, a patient with a learning disability may find it easier to communicate using pictures
- Are there particular times of day when a person's understanding is better?
- Could a friend or relative help the person to understand information and make a choice?



Case Study

- Michael had a stroke 3 years ago. He has been unwell and is admitted for tests involving a general anaesthetic.
- M gets anxious when Dr discusses this with him and repeatedly asks why he needs the GA. Dr is concerned that M does not seem to understand or remember what he has been told.
- Dr consults M's wife. She explains that when he is away from home and people familiar to him he becomes anxious.
- Dr discusses GA again with M when his wife is present. She explains that she will be there when he wakes up, and he will not need to stay in hospital long.
- With the help of his wife, M is reassured and understands what the Dr is saying, and is able to make a decision and consent to the tests.

Recording capacity assessments

- Capacity assessments should be recorded in the patient's notes
- Note should record why the patient is deemed to lack capacity
- Include reference to capacity test
 - Can patient:
 - Understand information?
 - Retain that information?
 - Use information as part of decision process?
 - Communicate his/her decision?

Recording capacity - an example

- Ridwaan has dementia and lives in a residential care home. His mental capacity fluctuates.
- On most days he can make all basic decisions about daily living (washing, eating, drinking etc). However, sometimes he lacks capacity to make the most basic of decisions.

Recording Capacity - an example cont

- On these occasions a possible entry in the notes would read:
- *“at lunchtime today Ridwaan lacked capacity to decide what to eat, so a decision about this was made in his best interests. At each mealtime we will assess his capacity to decide what to eat”*

Best Interests - What do you do if a person lacks capacity?

- Any act done, or decision made, on behalf of a person who lacks capacity, must be done in that person's **best interests**
- That principle applies whether the person making the decisions is a family carer, a paid care worker, or a healthcare professional
- Key principle of the MCA

How do you assess best interests?

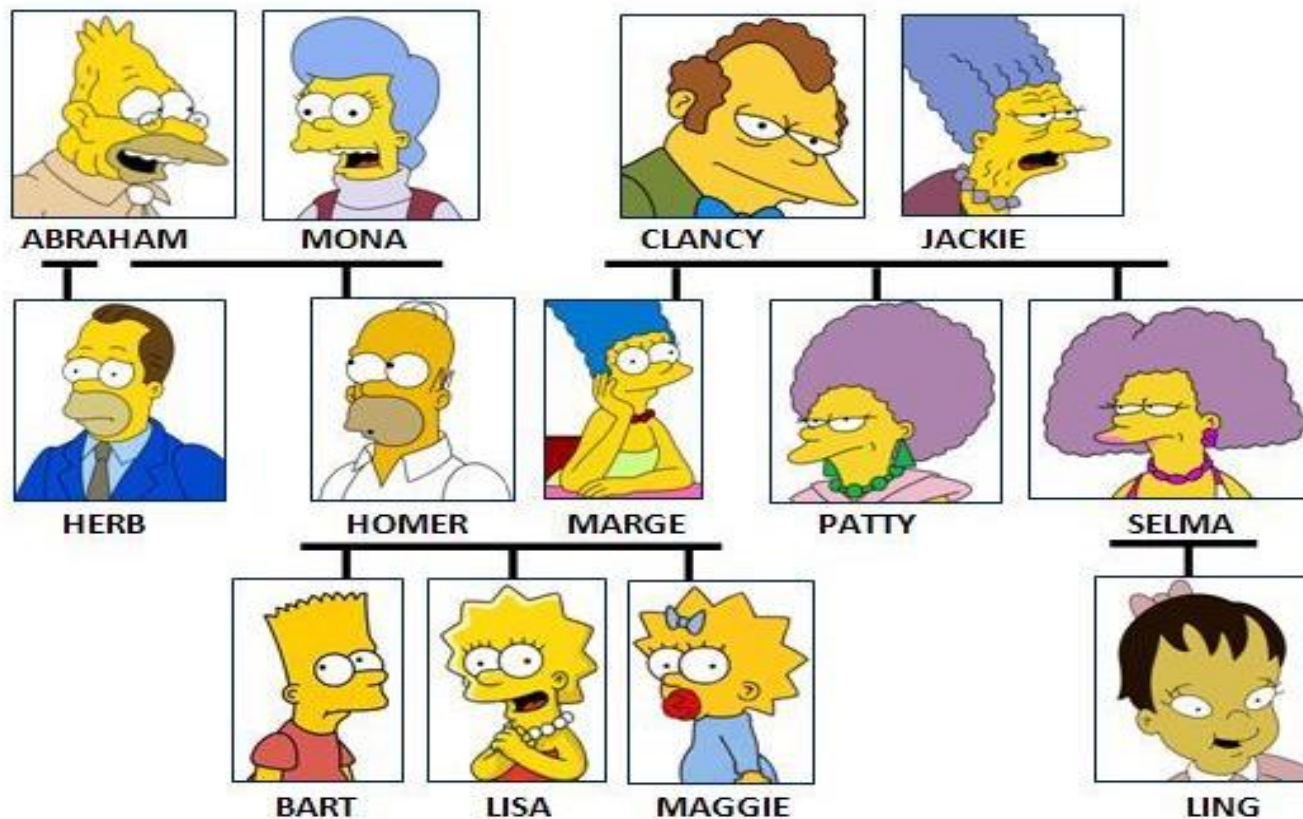
Under the MCA, the decision maker must consider:

- The person's past wishes and feelings
- Any beliefs and values (eg religious moral or cultural) that would influence the person if they had capacity
- Advance Directives - but is it *valid* and *applicable*?

Consulting others:

- Nobody can consent / refuse on behalf of an incompetent adult (but see Lasting Power of Attorney or Court of Protection appointed Deputy)

“Next of Kin” ?



Consulting others

- But, you must take into account, if practical:
 - Anyone named by the patient as a person to be consulted
 - Anyone engaged in caring for the patient, including close relatives
 - Anyone with a Lasting Power of Attorney or a Court appointed Deputy for personal welfare issues
 - If appropriate, an IMCA

The role of the IMCA

- An IMCA is a specific type of advocate who will only have to be involved if there are no family or friends who can be consulted.
- **IMCA is not the decision maker.**

Lasting Powers of Attorney - a very brief overview

- S9 MCA 2005 introduced “Lasting Powers of Attorney”
- LPA can authorise donee to make decisions about:
 - A donor’s welfare; and/or
 - A donor’s property and affairs
- Must be made while donor has capacity
- Can include refusal of or consent to medical treatment, provided express provision is made to that effect
- **Only applies when the donor no longer has capacity**
- **Must be registered with Public Guardian before use**
- www.guardianship.gov.uk / www.publicguardian.gov.uk

Best Interests - Case Study (from Code of Practice)

- P has severe learning disabilities and lives in a care home
 - Dental problems are causing him pain, but P refuses to clean his teeth or open his mouth for carers to clean
 - He is experiencing significant dental pain
 - Staff suggest occasional general anaesthetic to allow a dentist to clean and treat
 - Mum suggests strong painkillers as an alternative as this would be less stressful for all involved
-

Best Interests - Case Study (from Code of Practice)

- While carers views are important, the decision must be taken in P's best interests
- Dentist considers painkillers, mouthwashes etc
- Dentist concludes that it would be in P's best interests for:
 - A proper investigation to be carried out under a GA
 - Options for future dental care can then be reviewed by the care team

Assessing Best Interests

- Note the Code of Practice to the Mental Capacity Act 2005
- Code of Practice can be found at:

<http://www.dca.gov.uk/menincap/legis.htm#codeofpractice>

Case Study - the heparin case

- Elderly lady with dementia post op for Fractured Neck of Femur
- Standard dose of prophylactic heparin prescribed
- 4 week post of dies of a PE
- On checking the drug charts it transpires that over half the doses of heparin were omitted by nursing staff, who noted that the patient was agitated and “refusing” medication



Case Study - the heparin case

- Could this lady refuse?
- What should have happened?

MHA v MCA

- House of Lords Select Committee:
“the interface issues challenge even the most astute and knowledgeable”
- See new MHA Code of Practice (published 15 January)
- Usually only one regime is applicable, but sometimes both may be
- Someone “sectioned” under MHA may still have capacity to consent (or refuse) treatment for physical illnesses (unless connected to MH condition)

Case Study

- V has Borderline Personality Disorder
- She has swallowed razor blades and is refusing treatment - she says she wants to die
- The Drs feel she may well have capacity to make decisions about treatment - MCA not available
- She needs physical treatment so MHA usually not available
- Sufficient connection between physical treatment and MH condition? Conclusion was yes, but not clear cut.

Disputes

- The Court of Protection



Kidney failure patient forced to have dialysis

Doctors have been given the power by a court to force a man dying of kidney failure to have dialysis against his will.



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DH NHS Foundation Trust v PS

(2010) EWHC 1217 (Fam)

- 55 years old, suffering from advanced cancer of the uterus
- Hysterectomy indicated. Alternative is spread and death.
- PS had "a significant impairment in intellectual functioning as a consequence of a learning disability" and thus lacks the capacity to make decisions about her healthcare and treatment.
- Best interests?
- PS had a hospital phobia, sedation would be required
- Application made to Court of Protection made due to the difficulties faced and the intricacies required
- Permission obtained to not only operate, but take necessary steps to sedate preoperatively and restrain post operatively

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Cancer patient forced by judge to have surgery

A cancer patient is to be forced to undergo life-saving treatment against her wishes after a landmark ruling by a judge.



Surgeons at the woman's local hospital applied for permission to force the surgery on her. Photo: GETTY IMAGES

By **Martin Beckford** and **Stephen Adams**

10:42PM BST 26 May 2010

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Doctors will be allowed forcibly to sedate the 55-year-old woman in her home and take her to hospital for surgery. She could be forced to remain on a ward afterwards.

The case has sparked an intense ethical and legal debate. Experts questioned whether lawyers and doctors should be able to override the wishes of patients and whether force was ever justified in providing

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Page last updated at 12:34 GMT, Thursday, 27 May 2010 13:34 UK

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Hospital phobia woman ordered to have surgery

A cancer patient who has a phobia of hospitals should be forced to undergo a life-saving operation if necessary, a High Court judge has ruled.

Sir Nicholas Wall, sitting at the Court of Protection, ruled doctors could forcibly sedate the 55-year-old woman, who has learning difficulties.

The woman lacked the capacity to make decisions about her health, he said.

Doctors at her NHS foundation trust had argued she would die if her ovaries and fallopian tubes were not removed.

Evidence presented to Sir Nicholas, head of the High Court Family Division, said the woman - referred to as "PS" - was diagnosed with uterine cancer last year.

'Entirely right'

It was slow growing but would, without surgery, ultimately spread and kill her, he heard.

The woman, who is said to have a "significant impairment in intellectual functioning", has failed or refused to attend hospital for treatment. She has a needle phobia as well as a hospital phobia.

In his ruling, Sir Nicholas said if persuasion failed, doctors could sedate PS in order to get her to hospital - and to detain her there while she recovered after the operation.

He said he was "entirely satisfied" that it was "right to make the declarations sought by the trust".



The woman has failed or refused to attend hospital for treatment

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3 Key Messages

- Remember:
 - Capacity is time and *decision* specific
 - Don't just think "lacks capacity" - refer to the test and which of the 4 limbs (understand, retain, weigh communicate) is engaged
 - Have you done everything you can to help P to make the decision themselves?

Deprivation of Liberty - the 2 minute version

- Meaning of DOL - “Acid Test” - **continuous supervision and control and not free to leave**
- Not lawful unless:
 - under DOLS (by a local authority)
 - Court of Protection Order
 - Necessary for life sustaining treatment / vital act while a decision is sought from the Court

Deprivation of Liberty - the 2 minute version

- The following are not relevant:
 - Relative normality
 - Compliance
 - Quality / appropriateness of care
 - Reason or purpose of placement
- (“a gilded cage is still a cage”)



Questions ?



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