

Mental Capacity from a Legal Perspective – Rachel Stow July 2011

Good afternoon – I'm not entirely convinced that having a lawyer do the last shift is wise – however - my, hopefully, not too “legal jargon”, summary will present an overview of the Mental Capacity Act 2005, which is important to legal, health and social care in practice.

Consent and Capacity are 2 huge areas to cover in one remit and so, I am going to speak about The Mental Capacity Act 2005, in short MCA, which forms the backbone of the subject of mental capacity and I think illustrates how the legal system is keen to approach itself in modernising its view, moving away from simply institutionalising someone who appears “not quite the full shilling” as older acts and statutes did, to looking at the obstacles created by society and finding a framework to overcome those obstacles.

The MCA has been in force since 2007 and applies to England and Wales.

The primary purpose of the MCA is to promote and safeguard decision-making within a legal framework.

Its key messages are as follows:

- The Mental Capacity Act 2005(MCA) supports everyone – including those that have capacity and simply choose to plan for their future – this encompasses everyone in the general population who are over the age of 18.
- The MCA then also applies to everyone involved in the care, treatment and support of people aged 16 and over, living in England and Wales, who lack capacity to make all or some decisions for themselves.

- The MCA is designed to protect and restore power to those vulnerable people who lack capacity.
- All professionals have a duty to comply with the MCA Code of Practice. It provides support and guidance for carers.
- The Act's five statutory principles are the benchmark, and must underpin all acts carried out and decisions taken in relation to the Act.

It is important to remember when dealing with an individual with a brain injury that one symptom of their injury is likely to be impulsiveness and whilst to all intents and purposes they may seem like they have regained capacity and understanding within their rehabilitation this trait could mean that protection is still paramount.

For example I have a gentleman client who has come a long way in his recovery from a brain injury sustained in a motorbike collision. We are about ready to settle his claim and we have an offer on the table of £ 250 K his instructions are settle settle settle with some urgency however his claim is worth twice this sum and so we have to be alive to the fact that in spite of seemingly giving very clear and firm instructions his impulsiveness is affecting his capacity in relation to this decision. It is vital we assess this in order to ensure we are acting in his best interests.

- Anyone caring for or supporting a person who may lack capacity and could be involved in assessing capacity must follow a two-stage test.
- The MCA is designed to empower those in health and social care with good professional training to assess capacity themselves,
- If capacity is lacking, it is important to follow the checklist described in the Code to work out the best interests of the individual concerned.

Understanding and using the MCA supports practice for any of us involved with vulnerable people who lack capacity.

As I mentioned the primary purpose of the MCA is to promote and safeguard decision-making within a legal framework.

. It does this in two ways:

- Firstly by allowing people to plan ahead for a time in the future when they might lack capacity.
- But also by empowering people to make decisions for themselves wherever possible, and by protecting people who lack capacity by providing a flexible framework that places individuals at the heart of the decision-making process but support them with decision makers who take a balanced view.

About two million people in England and Wales are thought to lack capacity to make decisions for themselves. They are cared for by around six million people, including a broad range of health and social care staff, plus unpaid carers. Those working in health and social care include: doctors, nurses, dentists, psychologists, occupational, speech and language therapists, social workers, residential and care home managers, care staff and support workers.

A lack of mental capacity could be due to:

- a stroke or brain injury
- a mental health problem
- dementia
- a learning disability
- confusion, drowsiness or unconsciousness because of an illness or the treatment for it

The act therefore has a huge part of play in facilitating decision making for people lacking capacity.

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

Five key principles

Principle 1: A presumption of capacity – every adult has the right to make his or her own decisions and must be assumed to have capacity to do so unless it is proved otherwise. This means that you cannot assume that someone cannot make a decision for themselves just because they have a particular medical condition or disability.

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. This means you should make every effort to encourage and support people to make the decision for themselves. If lack of capacity is established, it is still important that you involve the person as far as possible in making decisions.

Principle 3: Unwise decisions – people have the right to make decisions that others might regard as unwise or eccentric. You cannot treat someone as lacking capacity for this reason. Everyone has their own values, beliefs and preferences which may not be the same as those of other people. This must be differentiated from impulsive decisions as I mentioned before.

Principle 4: Best interests – anything done for or on behalf of a person who lacks mental capacity must be done in their best interests.

Principle 5: Consider a less intrusive option – 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 make a decision or act at all.

So what is mental capacity and when might you need to assess capacity?

Having mental capacity means that a person is able to make their own decisions.

You should always start from the assumption that the person has the capacity to make the decision in question (principle 1).

You should also be able to show that you have made every effort to encourage and support the person to make the decision themselves (principle 2).

You must also remember that if a person makes a decision which you consider eccentric or unwise, this does not necessarily mean that the person lacks the capacity to make the decision (principle 3).

Under the MCA, you are required to make an assessment of capacity before carrying out any care or treatment – the more serious the decision, the more formal the assessment of capacity needs to be.

When should capacity be assessed?

You might need to assess capacity where a person is unable to make a particular decision at a particular time because their mind or brain is affected by illness or disability.

Lack of capacity may not be a permanent condition.

Assessments of capacity should be time- and decision-specific. When a individual has a brain injury each stage of rehabilitation will be different and so each decision will therefore be different.

There are different tests for different purposes e.g.:

Conducting litigation / getting married / signing a will

There is no universal test..... and most importantly -

You cannot decide that someone lacks capacity based upon age, appearance, condition or behaviour alone.

The antiquated adage of “the lights are on but no one is home” are long gone.

The test to assess capacity is a two-stage functional test

In order to decide whether an individual has the capacity to make a particular decision you must answer two questions:

Stage 1. Is there an impairment of or disturbance in the functioning of a person’s mind or brain? If so,

Stage 2. Is the impairment or disturbance sufficient that the person lacks the capacity to make a particular decision?

The MCA says that a person is unable to make their own decision if they cannot do one or more of the following four things:

- understand information given to them
- retain that information long enough to be able to make the decision
- weigh up the information available to make the decision

- communicate their decision – this could be by talking, using sign language or even simple muscle movements such as blinking an eye or squeezing a hand.

Every effort should be made to find ways of communicating with someone before deciding that they lack capacity to make a decision based solely on their inability to communicate.

Also, you will need to involve family, friends, carers or other professionals.

The assessment must be made on the balance of probabilities – is it more likely than not that the person lacks capacity?

As professionals, it goes without saying that, in addition you should be able to show in your records why you have come to your conclusion that capacity is lacking for the particular decision.

I am often asked – must a doctor be involved – strictly the answer is no, however in my experience it is wise because they of course can diagnose cause and effect.

Returning to the principles then, if a person has been assessed as lacking capacity then any action taken, or, any decision made for or on behalf of that person, must be made in his or her best interests (principle 4).

The person who has to make the decision is known as the ‘decision-maker’ and normally will be the family member or carer responsible for the day-to-day care, or a professional such as a doctor, nurse or social worker where decisions about treatment, care arrangements or accommodation need to be made.

Solicitor where decisions relate to litigation.

What is 'best interests'?

The Act provides a non-exhaustive checklist of factors that decision-makers must work through in deciding what is in a person's best interests. A person can put his/her wishes and feelings into play, which the person determining capacity must consider. In addition, people involved in caring for the person lacking capacity have to be consulted concerning a person's best interests.

Quote: "If a person has been assessed as lacking capacity then any action taken, or any decision made for or on behalf of that person, must be made in his or her best interests"

There is far more detailed information in the Code of Practice, but the components are:

- All relevant circumstances – a checklist approach is always useful, I find an excel spreadsheet works perfectly to note everything down and make sure nothing is missed
- Each aspect weighed in balance – again the excel spread sheet means you can note everyone's views, although there is an argument here that this creates an opportunity for too many differing opinions.
- Allow the individual to participate but that is only part of the picture – don't overlook protection, but balance this with empowerment.
- And be aware - don't make unjustified assumptions, if you do there is a danger of applying a substituted resolution to a decision.

This can work both ways – we recently acted for a client, a little old lady who was involved in a head on road traffic accident, her story was that she was proceeding normally and the third party vehicle strayed onto her lane, the third party story was exactly the same –

that our client had veered into their lane. Who was to be believed, our old lady was very genuine, very articulate and capacity was not questioned, the matter went all the way to court, in conference before the hearing the barrister for the other side came to us to make full offers of settlement at 100%, we asked why the sudden change of heart, the answer was that the third parties version of events had omitted to state that they were alleging that our client had a dog on her knee in front of the steering wheel, we laughed, of course that wouldn't be the case she was a very switched on old lady with a convincing story. We settled the case in full, in her favour and she was delighted, telling us that she couldn't wait to get home and tell Horris – Her husband we asked, no the dog she replied!

The MCA is well supported too with new roles, bodies and powers

Attorneys appointed under Lasting Powers of Attorney (LPAs)

– the Act introduces a new form of Power of Attorney which allows people over the age of 18 to formally appoint one or more people to look after their health, welfare and/or financial decisions, if at some time in the future they lack capacity to make those decisions for themselves. This is something we advise all our clients to do when they are making or changing their will, after buying a house, or indeed after being involved in an accident. You choose who you want to look after your decisions if you become unable to.

Court of Protection and Deputies – the MCA created a new court and a new public official to protect people who lack capacity and to supervise those making decisions on their behalf. The Court is able to appoint a Deputy, for example, because a person has an ongoing lack of capacity. The Court will tailor the powers of the deputy according to the circumstances of the individual.

Highly useful in a case where the carer is also the decision maker. For example a case of a 2 year old child who sustained a brain injury in a car accident, the car being driven by his mother, the accident being her fault, she was killed in the collision.

The father supported by his parents obviously had the care of the child and an action was taken against the mother's insurers. 2 years later the father was on his way to work on his motorbike when someone pulled out of a side road and he too was killed.

It's all the grandparents can do to function day to day.

We are just about to settle the claim against the mother's insurers and it will follow that we will settle the claim against the negligent party in the father's accident, both in the High Court. The support and advice a deputy can give in this situation is vital.

The Public Guardian – the role of the Public Guardian is to protect people who lack capacity from abuse. The Public Guardian is supported by the Office of the Public Guardian (OPG). The OPG maintains a register of LPAs and EPAs. It also maintains a register of the Court-appointed Deputies and is responsible for supervising them.

Independent mental capacity advocate (IMCA) – IMCAs are a statutory safeguard for people who lack capacity to make some important decisions. This includes decisions about where the person lives and serious medical treatment when the person does not have family or friends who can represent them.

Advance decisions to refuse treatment – the Act creates statutory rules with clear safeguards so that people may make a decision in advance to refuse treatment if they should lack capacity in the future.

A criminal offence – the Act introduces a new criminal offence of ill treatment or wilful neglect of a person who lacks capacity.

I have referred to the Code of Practice

The Code explains how the MCA works on a day-to-day basis and provides practical guidance to those working with people who may lack capacity. The Code explains the key features of the MCA in more detail, as well as some of the practical steps that people using and interpreting the law need to take into consideration.

If you work with people who lack capacity and you are a professional and/or you are paid for the work you do then you have a legal duty to have regard to the Code.

It is also relevant to unpaid carers who will be helped and guided by it.

I hope the above has been interesting and informative, its always difficult to break down such a complex area of law into an over view – I hope to have illustrated that the law is keeping up with modern attitudes and the days of thinking that without capacity a person has no rights are long gone.

I hope that the main points have been covered, obviously if you have any specific questions then I am happy to advise by email or phone and my contact details are in the info...

Thank you for listening.