


**MENTAL CAPACITY ACT (2005) & DoLS (2009): Overview**



Statutory principles, assessing capacity, Best Interests decisions

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**Mental Capacity Act Lead**



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**Agenda Items**

- Understanding Mental Capacity
- A focus on the five principles of the MCA 2005
- Assessment of Mental Capacity
- How to assess and determine someone's decision-making capacity
- Identifying the information relevant to different decisions
- Best Interests decisions
- Deprivation of Liberty and the Safeguards

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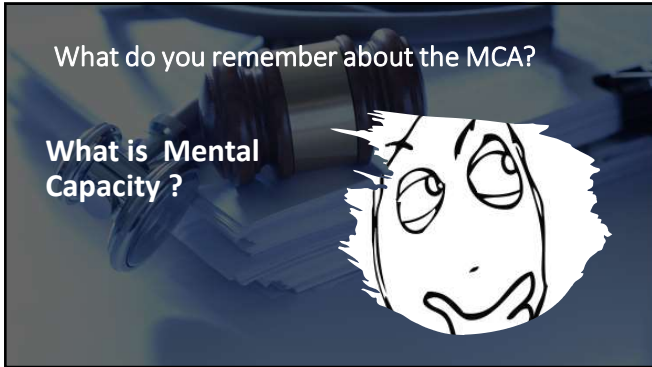
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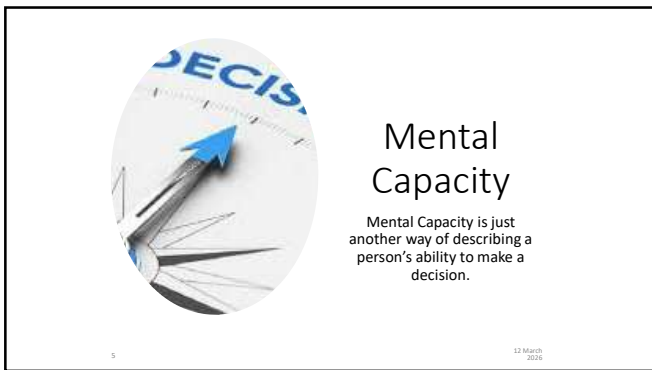
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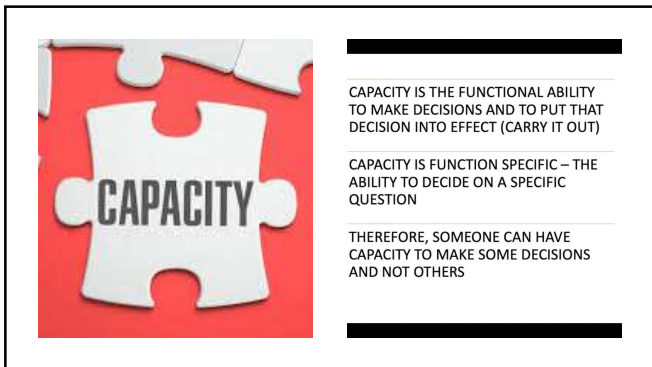
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### Introduction

The primary purpose of the **MCA 2005** is decision making and deciding whether someone has or lacks capacity to make their own decision. For those who do not have capacity to decide for themselves, the Act supplies a framework for making decisions for that person, based on whether the proposed action will be in the person's best interest or not. This might include decisions in relation to medical treatment.

[Using the Mental Capacity Act](#)

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### Where do we get the law from?

#### Sources of law in England and Wales

- **Legislation:** Laws are created by Parliament, which is made up of the House of Commons, the House of Lords, and the king. All parts of Parliament must agree to a law before it can be passed.
- **Case law:** Decisions made by higher courts, or "courts of record", are binding on lower courts and must be followed.

England and Wales operate a common law system which combines the passing of legislation but also the creation of precedents through case law.

- Common law – Judge made law so named because it was common to all the kings courts across England
- Statute Law – is made up of Acts of Parliament, which are laws created by the UK Parliament e.g. The Mental Capacity Act
- Law works as a framework not a substitute for professional judgement we have caselaw that often challenges what is written down in the act.

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Always remember the context

- The MCA never explains why you are doing what you are doing, it explains how you can do what you need to do
- Why you need to act (or not act) always has another basis – from legal perspective, most often the Human Rights Act 1998: Human rights as a balancing exercise – positive duties vs negative obligations

**So: Stop and think – why are actions being taken?**

- How is the person's capacity relevant to what is being done?
- Is there another legal framework which is relevant?
- And in most cases you will be operating in conditions of uncertainty: the critical question is how to use that uncertainty justly (and what systems can do to support that)

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What do we mean by uncertainty in decision-making?

In cases involving mental health and capacity, professionals frequently need to rapidly determine whether an individual is able to make their own care decisions or if they are being influenced by others. When a person is found to lack capacity, the relevant legal frameworks, like the Mental Health Act 1983 or the Mental Capacity Act 2005 in England and Wales, direct the subsequent actions. Looking ahead, the use of Advance Choice Documents may become more common to honor treatment preferences in situations of cognitive impairment.

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A variety of uncertainties can influence these situations, such as;

- The deadline for making the decision
- The facts used to inform the decision
- Possible results of the decision
- Clear value conflicts (e.g., balancing competing priorities)
- Hidden value conflicts (e.g., gut feelings or hesitation)
- The fairness and accuracy of the judgment (e.g., biases, incentives, fear of blame)

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Applying the Mental Capacity Act (MCA): Key Principles for Practice

- **Being honest about uncertainty**
- It is **okay not to know** everything.
- Professionals may feel pressure to be “right” — this can lead to rushing or avoiding uncertainty.
- Acknowledging uncertainty:
  - Encourages **reflection and discussion**
  - Opens up **alternative options**
  - Can lead to **better decisions** for the person

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**Respecting individuality (Will and Preference)**

- Every person is **unique** — decisions must be person-centred.
- Always prioritise the person's:
  - **Will** (what they want)
  - **Preferences** (what matters to them)
- Consider:
  - Past wishes (written or verbal)
  - Current views (even if they've changed)
- Apply this even when:
  - The person has **no family or friends**
  - Their communication or presentation is unusual
- Their values differ from those of staff

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**Getting the timing right ("Goldilocks" approach)**

- Decisions should be:
  - **Not too slow** → avoids leaving people in limbo
  - **Not too fast** → avoids unnecessary risk
- When the situation is **not urgent**:
  - Take time to gather information
  - Allow emotions to settle
  - Step out of "emergency mode"
- More time often leads to **clearer thinking and better outcomes**

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**Informed participation**

- Decision-making should be **collaborative**.
- Involve all relevant people unless there is a clear reason not to:
  - The person themselves
  - Family, friends, advocates
  - Relevant professionals
- Ensure everyone:
  - Understands the process
  - Has information in an accessible format
  - Has emotional or psychological support if needed

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**Objectivity and impartiality**

- Decisions must be:
  - **Fair**
  - **Non-discriminatory**
  - **Based on evidence**, not personal values
- Capacity assessments must:
  - **Be separate from best-interest decisions**
  - **Not depend on whether the person agrees** with professionals
- Disagreeing with clinicians ≠ lacking capacity
- **The MCA is about respecting people, supporting decision-making, and staying curious rather than certain.**

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**Adequate resourcing – “Getting it right from the start”**

- Good MCA decision-making **takes time and resources**.
- This includes:
  - Completing proper capacity assessments
  - Supporting the person to understand and participate
  - Gathering views from family, advocates, and professionals
- While resources are always limited:
  - Decisions should be based on **protecting the person's rights**, not convenience
- Early decisions matter:
  - An initial capacity decision can affect access to further support and services
- Investing time and resources **up front** can:
  - Prevent disputes
  - Reduce escalation
- Avoid costly legal action later

If you can't explain or justify a decision, it probably needs re-thinking

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**Transparency, clear reasoning, and the right to challenge**

- The decision-making process should be:
  - **Clear**
  - **Open**
  - **Understandable**
- Everyone involved should know:
  - How decisions will be made
  - Who is responsible
  - What evidence is being considered
- All decisions should be:
  - Clearly explained
  - Properly documented
  - Open to questions or challenge
- This includes decisions **not to act** (e.g. deciding not to assess capacity or not to refer)

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## Flexibility and learning

- People's situations **change over time**.
- Decision-making should:
  - Be flexible
  - Respond to new information
  - Be reviewed when circumstances change
- Capacity is **decision-specific and time-specific**:
  - A decision made today may not apply tomorrow
- Feedback is important:
  - Share outcomes with the person and others involved
  - Reflect on what worked and what didn't
- Ongoing communication builds trust and improves practice
- **Training message:**
- MCA is not a one-off event — it is an ongoing process.

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## The five statutory principles

- 1 Presume Capacity**  
Start by thinking the person can make the decision
- 2 Support individuals to make their own decisions**  
Do all you can to help the person make the decision
- 3 The right to make unwise decisions**  
You must not say a person lacks capacity just because their decision seems unwise
- 4 Decisions in best interest**  
Use a best interest checklist if the person can't make a decision
- 5 Least Restrictive option**  
Check that the decision made does not stop the individual's freedom more than needed

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## Unnecessary problem (1): misunderstanding the presumption of capacity

- Principle 1: A person must be assumed to have capacity unless it is established that he lacks capacity.
- *He said the law requires a person "must be assumed to have capacity unless it is established that they lack capacity". In the absence of a capacity test, he said it was right for Havering Council to treat Mrs Wolff as having capacity.*
  - Romford mother lived in squalor after mental health 'failings', court hears | Romford Recorder
- *The presumption of capacity is important; it ensures proper respect for personal autonomy by requiring any decision as to a lack of capacity to be based on evidence. Yet the section 1(2) presumption like any other, has logical limits. When there is good reason for cause for concern, where there is legitimate doubt as to capacity [to make the relevant decision], the presumption cannot be used to avoid taking responsibility for assessing and determining capacity. To do that would be to fail to respect personal autonomy in a different way.*

\*Royal Bank of Scotland Plc v AB\* [2020] UKCAT 0266\_18\_2702.

- **The key: a presumption does not mean a licence not to investigate**

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**Unnecessary problem (2):  
relying upon a 'right' to make unwise decisions**

- Principle 3: A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
- If P has capacity to make a decision then he or she has the right to make an unwise decision and to suffer the consequences if and when things go wrong. In this way P can learn from mistakes and thus attain a greater degree of independence.*
- *A Local Authority v JB [2021] UKSC 52*

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**Unnecessary problem (3):  
not asking the right question**

- Asking about capacity to make decisions around (for instance) drinking in isolation is not a helpful question
- *Ms Catherine Rowlands submits that the approach of the Official Solicitor is misconceived. She contends that Ms Morris, by concentrating on PB's understanding of his dependency on alcohol, has conflated the issues and has, accordingly, blurred the questions that require to be considered. I think Ms Rowlands is correct to refocus on the central issue in question i.e. whether PB has the capacity to take decisions concerning his residence and care, recognising that PB's drinking is a relevant factor.*
  - *London Borough of Tower Hamlets v PB [2020] EWCO P 34*
- Asking the right question means you can then focus on what the relevant information is

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**fluctuating capacity**

- The key: taking a sensible approach to 'the decision': *RB of Greenwich v CDM [2019] EWCO P 32*
- *CD v London Borough of Croydon [2019] EWHC 2943 (Fam)*
- *A Local Authority v PG & Ors [2023] EWCO P 9*
- keep in mind the broader duties regarding fluctuating capacity in context.

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The key:  
Taking a  
sensible  
approach to  
"the  
decision"

- Be clear about **what the specific decision is**
  - Avoid being vague or over-broad
  - Focus on *this decision, at this time*
- Remember:
  - Capacity is **decision-specific**
  - Capacity is **time-specific**
- Ask:
  - What decision **needs to be made now?**
  - Is this decision **urgent or can it wait?**
- Break complex situations into:
  - Smaller, manageable decisions where possible
- Avoid:
  - Making global judgements (e.g. "they lack capacity for everything")
  - Rushing decisions because of pressure or workload
- Ensure the person is:
  - Given the right support to understand the decision
  - Involved as much as possible
- **Key message for staff:**
- Get the decision right first — everything else follows from that.

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Case CD v London Borough of Croydon [2019] EWHC 2943 - Summary

<p>CD lives alone and has diabetes, epilepsy, poor mobility, and incontinence.</p>	<p>He has significant alcohol misuse and is often intoxicated at home.</p>	<p>He is unable to:</p> <ul style="list-style-type: none"> <li>• Manage personal care</li> <li>• Maintain his home</li> <li>• Take medication consistently</li> <li>• Complete most activities of daily living</li> </ul>	<p>His home environment deteriorated severely, becoming:</p> <ul style="list-style-type: none"> <li>• Soiled with faeces and urine</li> <li>• Dirty and uninhabitable</li> <li>• A high infection risk</li> </ul>
<p>Care agencies were <b>unable</b> to enter the property due to health and safety concerns.</p>	<p>Multiple attempts at:</p> <ul style="list-style-type: none"> <li>• Deep cleaning</li> <li>• Commissioned care packages were unsuccessful.</li> </ul>	<p>As a result, CD frequently:</p> <ul style="list-style-type: none"> <li>• Called ambulance and police services</li> <li>• Attended A&amp;E at local hospitals</li> </ul>	<p>He has <b>no meaningful support network</b> and associates mainly with others who misuse alcohol.</p>
<p>Professionals agreed:</p> <ul style="list-style-type: none"> <li>• Community care had failed</li> <li>• Housing could not meet his needs</li> </ul>	<p>CD was <b>unwilling to move</b> to a safer environment or change his lifestyle.</p>	<p>The case was escalated to the <b>Court</b>, where it was found that CD continued to self-neglect despite significant risks to himself and others.</p>	

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Outcome of  
the Case

- The Court **did not authorise long-term compulsory removal or placement** of CD at this stage.
- Instead, **Cobb J made an interim order under section 48 of the Mental Capacity Act 2005.**
- This allowed the **local authority to enter CD's flat**, clean it, and **provide necessary care** to make it safe and fit for human habitation. [\[mentalhealthlaw.co.uk\]](http://mentalhealthlaw.co.uk)
- Cobb J was **not yet satisfied** that there had been a **full and proper capacity assessment** in relation to the relevant decisions.
- Therefore, the Court used **MCA s48** to authorise **temporary, proportionate protective measures** while further assessments were carried out. [\[mentalhealthlaw.co.uk\]](http://mentalhealthlaw.co.uk)

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**DL v A Local Authority [2012] EWCA Civ 253**

- Concerned **elder abuse and undue influence** by an adult son over his parents.
- The parents were **assessed as having capacity** under the MCA.
- Their decision-making was **overborne by coercion and fear**, not cognitive impairment.
- The key issue was whether the court could act **outside the MCA**. [\[mentalhealthlaw.co.uk\]](http://mentalhealthlaw.co.uk)
- In **DL**, the MCA could not be used at all because the adults **did not lack capacity as defined by the Act**

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**DL v Local Authority**

- The Court of Appeal confirmed that the **High Court's inherent jurisdiction survives the MCA**.
- It can be used as a **"great safety net"** where:
  - The person has capacity
  - But their autonomy is compromised by coercion or undue influence [\[mentalhealthlaw.co.uk\]](http://mentalhealthlaw.co.uk)
- Injunctions were upheld to **restrain the son's behaviour**. [\[39essex.com\]](http://39essex.com)
- Court affirmed that **autonomy can be protected by intervention** where it is being undermined by others [\[mentalhealthlaw.co.uk\]](http://mentalhealthlaw.co.uk)

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- The inherent jurisdiction exists to protect adults whose choices are:
  - Not truly free
  - Shaped by fear, control, or pressure
- Intervention can be **autonomy-enhancing**, not autonomy-removing. [\[mentalhealthlaw.co.uk\]](http://mentalhealthlaw.co.uk)

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impaired executive capacity

- A clinical concept –needs to be mapped onto the law: *Warrington Borough Council v Y & Ors*[2023] EWCOP 27
- The key: triangulating what the person says against what they do
- The question: does the person understand / can they use and weigh the impact of their own deficits?
- See for more The person seems to say one thing and to do another -Capacity guide

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POWER OF DECISION MAKING AND HOW DECISIONS AFFECT YOUR LIFE

# YOU

# DECIDE

MANAN VEDMA

## The Mental Capacity Act (2005)

The Act applies to everyone involved on the care, treatment and support people aged 16 and over living in England & Wales who are unable to make all/some decisions for themselves.

The MCA is designed to protect and restore power to those vulnerable people who lack capacity.

Everyone working with (or caring for) any person from the age of 16 who may lack capacity must comply with the Act

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Capacity assessment in practice involves a structured approach to determine whether an individual can make a specific decision at a particular time.

Here are the key steps as written in the act:

**Understanding the Decision:** The assessor explains the decision that needs to be made, ensuring the individual understands the nature, purpose, and consequences of the decision.

**Two-Stage Test**

- **Stage 1:** Diagnostic element: Determine if there is an impairment of the mind or brain. *This could be due to conditions like dementia, mental health issues, brain injury, or the effects of drugs or alcohol.*
- **Stage 2:** Functional element. *Assess if the impairment means the person is unable to make the specific decision when required!*

**Functional Test of Capacity:** This involves evaluating whether the person can:

- **Understand** the information relevant to the decision.
- **Retain** that information long enough to make the decision.
- **Use or weigh** that information as part of the decision-making process.
- **Communicate their decision by any means** (e.g., verbally, sign language, etc.).

• We later added causation as Stage 3: is there a casual link between 1& 2 it means that for someone to be considered as lacking capacity to make a decision, their inability to do so must be directly caused by a mental impairment or disturbance

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Since the Mental Capacity Act (MCA) 2005, several changes and updates have been proposed and implemented to improve the assessment process because of caselaw.

- Functional Test First: Case law (A Local Authority v JB [2021] UKSC 52) established that assessors should carry out the functional test before the diagnostic test. This means assessing whether a person can make a specific decision , before determining if a mental impairment is the cause.
- If we begin with a functional approach, we can better practice supported decision making
- Support can be targeted appropriately i.e. to help them understand the information relevant to the decision, or to use and weigh it
- These changes aim to enhance the clarity, effectiveness, and fairness of the capacity assessment process




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The case of **A Local Authority v JB [2021] UKSC 52** brought significant clarity to the process of capacity assessment under the Mental Capacity Act (MCA) 2005. Here's a deeper look into the implications of this case:

**Functional Test First**

The Supreme Court in this case emphasised that assessors should first determine whether an individual can decide (the functional test) before considering if a mental impairment is the cause (the diagnostic test). [This approach ensures that the focus is on the individual's ability to make a specific decision at the time it needs to be made.](#)

**Key Points from the Case- Is the person able to make the specific decision**

- 1. Functional Test:** Assessors must evaluate if the person can:
- Understand the information relevant to the decision.
  - Retain that information long enough to make the decision.
  - Use or weigh that information as part of the decision-making process.
  - Communicate their decision by any means.
- If they cannot do one or more of these things, they may lack capacity




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**2. Diagnostic Test:** This stage checks if the inability to make the decision is due to an impairment or disturbance in the functioning of the person's mind or brain. This could be due to conditions like dementia, mental illness, or the effects of drugs or alcohol

**Only after determining that the person cannot make the decision should the assessor consider whether this inability is due to an impairment of, or a disturbance in, the functioning of the mind or brain.**

**3. Causative Nexus:** This final stage establishes a direct link between the impairment or disturbance and the person's inability to make the decision. It ensures that the lack of capacity is specifically caused by the identified mental condition if so, is this impairment the reason that they cannot make the decision.

- If not , does the person have an impairment or disturbance in the functioning of the mind or brain.




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### Implications of the Ruling

- Non-Discriminatory:** This approach helps prevent assumptions that a person lacks capacity solely based on the presence of a mental impairment. It ensures that individuals are not unfairly judged and that their rights to make decisions are respected.
- Focus on Decision-Making Ability:** By prioritising the functional test, the assessment process becomes more focused on the individual's actual decision-making abilities rather than their medical diagnosis.
- Legal and Ethical Alignment:** This ruling aligns with the principles of the MCA, which aim to protect individuals' autonomy and ensure that any decisions made on their behalf are in their best interests.




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### Assessing Capacity



- **The presumption** – is there reason to question / suspend the presumption of capacity?
- **Specific decision** – what is the (“matter”) decision you are asking the person to make?
- **Relevant information** – what does the person need to understand, retain and use and weigh to make the decision? This includes the reasonably foreseeable consequences of deciding one way or another, or failing to make the decision.
- **Stage 1 – Functional Test** – Can the person make the decision?
  - **Understand** the information relevant to the decision,
  - **Retain** the relevant information,
  - **Use and Weigh** the relevant information as part of the process of making the decision, and
  - **Communicate** their decision to you (by any means)
- **Stage 2 – Diagnostic Test** – Is there a disturbance / impairment in the functioning of the mind or brain?
- **Stage 3 – Causative Nexus** – If the person cannot make a decision, is this because of an identified disturbance / impairment of the mind or brain?

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Being able to decide means having the capacity to make choices and take actions based on those choices. It's a fundamental aspect of our daily lives and involves several key elements:

- 1. Recognising the Need for a Decision:** Understanding that a choice needs to be made is the first step. This could be anything from deciding what to eat for dinner to making a significant career move.
- 2. Gathering Information:** Collecting relevant information to make an informed decision. This might involve researching options, seeking advice, or reflecting on past experiences.
- 3. Weighing Options:** Evaluating the pros and cons of each option. This can include considering the potential outcomes, risks, and benefits.
- 4. Making the Choice:** Selecting the option that best aligns with your goals, values, and the information you have gathered.
- 5. Taking Action:** Implementing the decision and taking steps to follow through with it.
- 6. Reflecting on the Outcome:** After making a decision, it's important to reflect on the results and learn from the experience, whether the outcome was positive or negative.




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## Case 1: John

John has a diagnosis of schizophrenia and has been admitted to a mental health unit due to severe psychotic episodes. He has been receiving treatment including antipsychotic medication and therapy, to manage his condition. During his stay at the mental health unit, John develops a chest infection. He starts experiencing symptoms such as persistent coughing, fever and difficulty breathing. The nursing staff quickly assess his condition and determine that he needs further medical evaluation and treatment. The clinician conducts an initial assessment and suspects that John has developed pneumonia. He decides to transfer him to an acute hospital for further evaluation and treatment. John declines, stating he would know when things were bad enough that he needed admission.

You explain the potential risks of this decision, and he replies he would want to be admitted if he was unwell and it was necessary, but currently it is not.

He does not appear to understand the potential implications of his decision not to go to hospital.

- **What are your next steps?**



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## Instigating an assessment

**ASSESSMENT**



- If there is no reason to question the presumption of capacity. If you wish, you can also record that there was no reason to question the presumption of capacity. **Do not** record 'patient has capacity'.
- An assessment should take place **whenever there is a reason to question** the presumption of capacity.
- You should record a 'formal' capacity assessment (using the RiO form) "in respect of significant, complex or controversial decisions, decisions which would involve placing the incapacitated person at risk, or where the mental capacity of the person is disputed"
- You must be prepared to justify a decision not to carry out an assessment where, there **appeared to be a reason** to consider that the person could not take the relevant decision.

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## The Assessment

**Specific decision** – what is the decision you are asking the person to make?



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The key decision he needed to make ; was whether John can consent to being transferred to the acute hospital for further evaluation and treatment.

• **Relevant information** – what key things does the person need to understand, retain and use and weigh to make the decision? This must include the reasonably foreseeable consequences of deciding one way or another, or failing to make the decision.

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### Relevant Information

- 1. **Understanding the Severity:** John needed to understand the severity of his chest infection and the potential risks if left untreated, such as worsening pneumonia and respiratory complications.
- 2. **Balancing Mental and Physical Health:** John needed to consider how the transfer and treatment at the acute hospital would impact his ongoing psychiatric care and whether his mental health needs would continue to be met during his stay at the acute hospital.
- 3. **Consent to Treatment:** Ultimately, John had to give his informed consent to the transfer and subsequent medical treatment, ensuring he understood the benefits and risks involved. This was obtained having given John all of the relevant information the team supported John in making this decision by providing clear information, addressing his concerns, and ensuring he felt comfortable with the proposed plan.



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### Preparing to carry out the functional test

- 1. Make sure that you understand the nature of the decision to be made;
- 2. Make sure you understand the range of options available;
- 3. Make sure you consider and prepare the information that may be relevant to the decision;
- 4. Establish whether there is a donee of a Lasting Power of Attorney, or a Deputy appointed by the Court and arrange for them to be involved;
- 5. Consider any need that you may have for additional support (based on your own skills and abilities);
- 6. Consider any support the person may need during the assessment;
- 7. Read any information that is available to you that could indicate the practicable steps that could support the person to make their own decision;
- 8. Establish how the person is currently supported to make decisions and the kind of decisions they are able to make; and
- 9. Establish if any information has already been given to the person, what this was and how it was received



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### Location, timing and presence of others

- When a person is at ease, they are better placed to think things through and make an informed decision.
- You should take practicable steps to ensure that the person is supported to make the decision:
  1. In a place that they feel at ease;
  2. At a time when they are best placed to make the decision; and
  3. In the presence of people in whose company they feel at ease.

**Location**  
Wherever possible the person should be supported to decide at a location where they feel most comfortable, even if this is at the inconvenience of others.




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### is P able to understand the relevant information?




The courts have repeatedly emphasised that the level of understanding required must not be set too high.

Further, you must not start with a 'blank canvas.' In other words, you must present the person you are assessing with detailed options so that their capacity to use and weigh those options can be fairly assessed. This is particularly important where a person's particular impairment may make it more difficult for them to envisage abstract concepts. But it is also important to give the person sufficient information about the options that they are being asked to choose between that they are given the opportunity to understand (if they are capable of doing so) the reality of those options. In other words, and to take a common example, you should not simply seek to assess a person's ability to decide between living at home and living in a care home in the abstract, but rather by reference to what continuing to live at home would be like (for instance, what care package would the relevant local authority provide) and what living in an actual care home would be like.

- The ability to understand also extends to understanding the reasonably foreseeable consequences of reaching a decision or failing to do so (s.3(4)).

**Inability example quote from court practice:**

- *[P] has barely an inkling of the health risks involved. She was unable to link sex to pregnancy, indeed she had virtually no idea how her babies came to be in her tummy (as she put it)*




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### The Assessment

For medical treatment decisions the relevant information is **likely** to include:

- the nature of their diagnosis and prognosis;
- the nature and purpose of the proposed treatment;
- the anticipated benefits of the treatment;
- the potential risks associated with the treatment;
- the risks and benefits associated with not having the treatment;
- any alternative treatment options and the risks and benefits of those.

**ASSESSMENT**



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Outcome

- 1.Coordination:** The mental health team coordinates with the acute hospital to ensure a smooth transfer. They provide detailed information about John's mental health condition, current medications, and the suspected chest infection .
- 2.Admission to Acute Hospital:** John is admitted to the acute hospital's emergency department. The medical team there performs a thorough examination, including chest X-rays and blood tests, and confirms the diagnosis of pneumonia .
- 3.Treatment:** John is started on antibiotics to treat the infection. The medical team is aware of his schizophrenia and ensures that his psychiatric needs are also addressed during his stay. They collaborate with the mental health unit to manage his antipsychotic medication and provide a supportive environment .
- 4.Post-Treatment Care:** After the initial treatment, John is monitored closely for any complications. The acute hospital's psychiatric liaison team works with the mental health unit to plan his post-treatment care and eventual return to the mental health unit



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**Case Record Menu**

- [-] Case Record
  - [D] Document View
  - [+] Clinical Documents
  - [-] Mental Capacity Assessment and Gillick
    - [D] Best Interests Assessment (NEW)
    - [D] Extension to Urgent Authorisation
    - [D] Gillick Competency Assessment
    - [D] Mental Capacity Assessment
    - [D] Archive

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*What to write? The Good, the Bad...*

- EVIDENCE - what is the evidence a person lacks capacity to make this particular decision? What did they say? A simple and effective way to evidence a person could not understand is to record verbatim quotes- ensure accuracy!
- Terms such as 'it is more likely' or 'on balance' can be useful to explain your conclusions.
- Ensure you don't confuse the application of the four functional stages in Section 3 MCA ie do you really mean they cannot understand or is it that they cannot use/weigh?
- Don't forget the causative nexus- they are not unable to understand because they need translation




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### Capacity Elements in Plain English

1. Receive Information
2. Understands the basic facts surrounding a decision
3. Appreciates the personal impact of the decision including one's capabilities and limitations – relative to their own values and contexts
3. Have a reasoning process for comparing the options and predicting the consequences of choices
4. To be able to make a choice; make a decision commit to a decision and communicate a decision.




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### Key Questions to Ask to Determine Capacity of your client:

- Does your client UNDERSTAND the treatment or plan and proposed options for care:
  - What is your understanding of your condition?
  - What are the options for your condition/situation.
  - What is your understanding of the benefits of this treatment or plan and what are the odds that this will work for you?
  - What are the risks of this plan and what are the odds you may have a side effect or a bad outcome?
  - What is your understanding of what will happen if nothing is done?




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### Questions to Ask to Determine Capacity of your client:

Ability of your client to COMMUNICATE and EXPRESS a choice clearly:

You have been given a lot of information about your condition. Have you decided what options is the best for you right now?

We have discussed several choices, what do you want to do?




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“I have done the capacity assessment but I am not sure 100% sure the person has capacity...”

- **Reasonable belief** – sufficient for the person doing the assessment to hold a ‘reasonable belief’ about the outcome on the balance of probabilities. The Act protects you – you don’t have to be 100% sure. You must decide what is more likely.
- **What if the person does not cooperate with the assessment....?”** People unable to engage in the assessment – support the person but the assessment could still take place. Perhaps give more time/use alternative staff/enlist support of family/carers. Difficult cases may go to court. Is a court application (Section 48 MCA) necessary? Seek legal advice [www.edgetraining.org.u](http://www.edgetraining.org.u)

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**Sample Case Study- DN's**

- Patient: Mr Arthur Jones
- Age: 78
- Living situation: Lives alone in sheltered housing
- **Diagnosis:**
- Mixed dementia (Alzheimer's / vascular)
- Type 2 diabetes (insulin-dependent)
- Hypertension
- **Care involvement:**
- District nursing team for insulin administration
- GP and memory clinic involved
- Daughter lives 90 minutes away and visits fortnightly

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### Recap -The Assessment

- **Specific decision** – what is the decision you are asking the person to make?
- **Relevant information** – what key things does the person need to understand, retain and use and weigh to make the decision? This must include the reasonably foreseeable consequences of deciding one way or another or failing to make the decision.
- **Stage 1 – Functional Test** – Can the person make the decision?
- **Understand** the information relevant to the decision,
- **Retain** the relevant information,
- **Use and Weigh** the relevant information as part of the process of making the decision, and
- **Communicate** their decision to you (by any means)
- 
- **Stage 2 – Mental Impairment Test** – Is there a disturbance / impairment in the functioning of the mind or brain?
- **Stage 3 – Causative Nexus** – If the person cannot make a decision, is this because of an identified disturbance / impairment of the mind or brain?



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**Presenting Situation**

Mr Jones is usually visited **twice daily** by the district nursing team for insulin administration.

- Over the past **two weeks**, nurses have noticed:
  - Increasing **confusion in the mornings**
  - Variable engagement with care
  - On several visits, Mr Jones has **refused his insulin**, stating:
    - “I don’t need it”
    - “You’re trying to poison me”
- “I already had it” (no evidence this is true) At other times, particularly later in the day, he:
  - Accepts insulin
  - Can explain he has diabetes
  - States insulin “keeps my sugar right”
  - This suggests **fluctuating capacity**.




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- **The Decision to Be Assessed**
- **Specific decision:**
  - *Does Mr Jones have capacity to decide whether to accept insulin at this visit?*
- Key point for staff:
  - This is **not** a global capacity assessment
  - It is **time-specific and decision-specific**
- **Initial MCA Principles Applied**
- The district nurse considers:
  - Presumption of capacity
  - Support to make the decision
  - Respect for unwise decisions
  - Least restrictive approach
  - Best interests only if capacity is lacking




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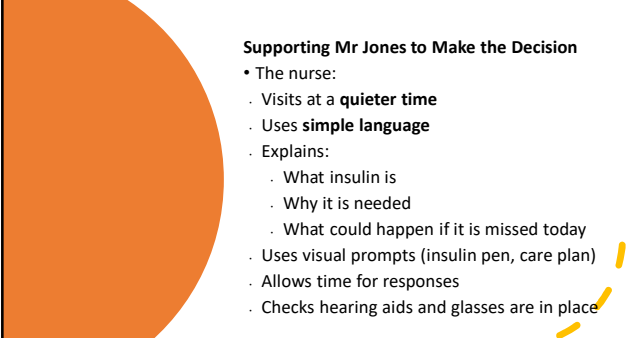
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**Supporting Mr Jones to Make the Decision**

- The nurse:
  - Visits at a **quieter time**
  - Uses **simple language**
  - Explains:
    - What insulin is
    - Why it is needed
    - What could happen if it is missed today
  - Uses visual prompts (insulin pen, care plan)
  - Allows time for responses
  - Checks hearing aids and glasses are in place




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**Capacity Assessment (MCA s.3)**

- **1. Understanding**
  - Mr Jones can say:
    - "It's for diabetes" But cannot explain:
      - What diabetes does
      - Why insulin is needed today
  - Partial understanding
  - Not sufficient
- **2. Retention**
  - Within minutes, he forgets the explanation
  - Repeats "I don't have diabetes"
  - Unable to retain information long enough to decide
- **3. Use or Weigh**
  - Unable to weigh:
    - Risk of hypoglycaemia / hyperglycaemia
    - Consequences of refusal
  - Focuses on belief that staff are "interfering"
  - Unable to use/weigh information
- **4. Communication**
  - Can communicate refusal clearly

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**Best Interests Decision (If Capacity Lacking)**

- The nurse considers:
  - Serious health risk of missed insulin
- Mr Jones's **previously expressed wishes**:
  - "I know I need my insulin"
- Pattern of accepting insulin later in the day
- Least restrictive option
- **Action taken:**
  - Insulin administered in Mr Jones's best interests
  - Calm explanation given throughout
  - No restraint used
  - Decision documented clearly

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**Follow-Up Actions**

- The district nurse:
  - Alerts GP and memory clinic
  - Documents **fluctuating capacity**
- Recommends:
  - Review of insulin timing
  - Consideration of capacity-related care planning
  - Best interests framework for future refusals
- Discusses concerns with daughter (with consent / best interests basis)

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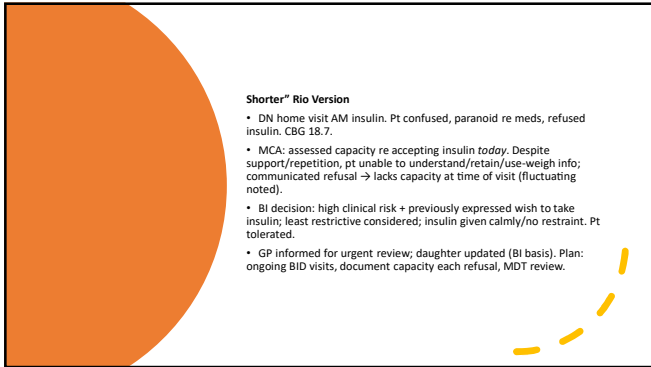
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**Shorter\* Rio Version**

- DN home visit AM insulin. Pt confused, paranoid re meds, refused insulin. CBG 18.7.
- MCA: assessed capacity re accepting insulin today. Despite support/repetition, pt unable to understand/retain/use-weigh info; communicated refusal → lacks capacity at time of visit (fluctuating noted).
- BI decision: high clinical risk + previously expressed wish to take insulin; least restrictive considered; insulin given calmly/no restraint. Pt tolerated.
- GP informed for urgent review; daughter updated (BI basis). Plan: ongoing BID visits, document capacity each refusal, MDT review.

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**FINANCIAL CAPACITY**

**Knowledge** – ability to describe facts, concepts related to financial activities such as knowledge of currency, bank statements, investments, personal financial data.

**Skills** – ability to demonstrate practical procedures important for financial management such as making change and writing a check.

**Judgement** – ability to make reasonable sound financial decisions in social situations such as being aware of fraud, invulnerable to coercion and prudent in making investments.

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**Mental Capacity Video in Practice**  
[Using the Mental Capacity Act in the community](#)

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### MCA in 2 Minutes

- Assume individuals can make decisions unless a Capacity Assessment indicates otherwise.
- Define the question and relevant details clearly.
- Provide support to increase the chances of success.
- The assessment checks if an individual can make choices (Functional test URWC).
- They should understand the likely outcomes of their decisions.
- A thorough evaluation of capacity is crucial.
- Don't rely solely on verbal responses as evidence.
- Consult people who know the individual well and discuss their views.
- Their answers can reveal their capacity level.
- Assessments may take time, especially for ongoing decisions.
- Evaluate the relationship between any mental impairment and their ability to perform tasks.
- Confirm the presence of a mental impairment that affects decision-making capacity per URWC.

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### Guidance on Mental Capacity assessments from the Court AMDC v AG & Anor (2020) EWCOP 58

- A 69 year old woman- numerous mental capacity assessments required. Expert witness Dr Q- struggles with the assessment partly due to a lack of engagement from P. Judge critiques the expert's evidence as follows:
- Paragraph 4.16 of the Code of Practice states, " It is important not to assess someone's understanding before they have been given relevant information about a decision. Every effort must be made to provide information in a way that is most appropriate to help the person understand". **The expert's reports did not provide sufficient evidence either that AG had been given the relevant information in relation to each decision, or of the discussions the expert had had with P about the relevant information**

**Court of Protection**

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### Guidance on Mental Capacity assessments from the court AMDC v AG & Anor (2020) EWCOP 58

- It is not a criticism of an expert that at different times they have reached different conclusions about a person's capacity.
- Capacity can change and new evidence may come to light. However, in this case significantly different conclusions had been reached at different times without clear explanations of why the conclusions had changed or how the evidence as a whole fitted together.
- The change in opinion between reports was without any further face to face assessment.
- The expert's final conclusion had been reached on a broad-brush basis rather than by reference to each decision under consideration

**Court of Protection**

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### Guidance on Mental Capacity assessments from the Court AMDC v AG & Anor (2020) EWCOP 58

- A lack of information to show how AG had been assisted to engage when the expert had "hit a brick wall" in his attempts to have a discussion with her.
- The lack of information left doubt as to whether AG was incapable of understanding the purpose of the interview whether she had been given adequate support to engage, or whether she had simply chosen not to talk to the expert.
- A lack of a cogent explanation for why the presumption of capacity had been displaced. Conclusions were stated but not clearly explained.



Court of Protection

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### Lack of Engagement – *Tips from the judge.*

- If... P does not engage with the assessor- they are not required mechanically to ask P about each and every piece of relevant information if to do so would be obviously futile or even aggravating.
- Record what attempts were made to assist P to engage and what alternative strategies were used.
- If the assessor hits a "brick wall" with P then they might want to liaise with others to formulate alternative strategies to engage P.
- Consider what further bespoke education or support can be given to P to promote P's capacity or P's engagement in the decisions



Court of Protection

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Mental Capacity Act 2005

### SO HOW DOES THE MCA 2005 & CODE OF PRACTICE HELP?



- Provides a **statutory framework/guidance** to enable decisions to be made on behalf of people who lack decision-making capacity
- It provides **guidance on how to assess Mental Capacity** appropriately.
- It **guides how we should record and account** for any decisions made ensuring we have made considered judgements that stand up to scrutiny.
- Puts the **needs and wishes of a person** who lacks Mental capacity to make certain decisions at the centre of any decision-making process.
- Remember : both **Mental Capacity Act & Deprivation of Liberty Safeguards** come with a **Code of Practice** – It complements our working practice by providing more detailed information which informs our practice

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**CODE OF PRACTICE**

The Code of Practice provides guidance to anyone who is working with and/ or caring for adults who may lack capacity to make decisions. It is not possible for a Code of Practice to create the law, as opposed to reflect what the law says. Still awaiting a revised Code of Practice.

*Remember :Can be downloaded onto your desktop*

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Don't overthink it – it's not rocket science.

- The most important aspect of supported decision-making is informing, listen, and allow the individual time to process the information, and give them space to ask questions. Authentic communication is the biggest asset in this area – as it is in so many areas – and is often an undervalued tool.
- This will mean considering how the individual best communicates, such as their first language, whether they use sign language, or written forms of communication, and whether they need some form of augmentative technology to support them. As well as recognising any sensory impairments such as hearing or vision loss.

Other ways to support decision-making may include:

- Give time and space to consider and respond, remembering we all process information at different speeds
- Ask open questions to support reflection
- Provide and use easy-read leaflets, that have accessible language and images to aid understanding
- Use objects of reference to support explanations,
- Demonstrate or explain options with the use of pictures/videos, or physically show if applicable.
- Work through scenarios using visual examples

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Domains of Vulnerability or What raises a red flag for you!

- Decline in self care behavior and self protection – activities of daily living such as bathing, grooming, ambulation, feeding
- Live in unsafe settings – routine maintenance, appropriate repairs, home environment ( e.g. presence of animal waste electrical hazards, uncollected garbage)
- Frequent exacerbations of chronic conditions – medical self-care ( includes managing medications, self monitoring of blood pressure or glucose, wound care). Also includes assessment of the way an individual handles acute problems ( chest pain) or practical obstacles ( running out of medications).
- Activities of independent living – shopping, meal preparation, laundry, cleaning, using telephone, transportation
- Everyday financial management

Kim SHY et al. Psychiatr Serv 2002;53:1322-4

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How is the person's capacity relevant to what you are doing?



Understanding capacity is crucial for informed consent, ensuring that patients are fully aware and capable of making decisions about their own health care.

Care must only be provided with proper consent from the individual.

For service users aged 16 or older who cannot consent due to lack of capacity, we as health professionals must adhere to the 2005 Act's requirements.

The **Mental Capacity Act 2005 (MCA)** provides a framework for making decisions on behalf of individuals aged 16 or older who lack the capacity to consent.

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### Mental capacity In practice

Principle	In Practice
1 A person must be assumed to have capacity unless it is established that they lack capacity.	Every person from the age of 16 has a right to make their own decisions. If they have the capacity to do so, practitioners and carers must assume that a person has capacity to make a particular decision at a point in time unless it can be established that they do not.
2 A person is not to be treated as unable to decide unless all practicable steps to help him to do so have been taken without success.	People should be supported to help them make their own decisions. No conclusion should be made that a person lacks capacity to decide unless all practicable steps have been taken to try and help them decide for themselves.
3 A person is not to be treated as unable to decide merely because he makes an unwise decision.	A person who decides that others think is unwise should not automatically be labelled as lacking the capacity to decide.
4 An act done or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.	If the person lacks capacity any decision that is made on their behalf, or subsequent action taken must be done using Best Interests, as set out in the Act.
5 Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.	If the decision or action remains in the person's Best Interests, it should be the decision or action that places the least restriction on their basic rights and freedoms.

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**Principle 2:**  
 "A person is not to be treated as unable to make a decision unless all practicable steps to help him do so have been taken without success" MCA 2005 s1 (3)

1

People must be supported to make their own decisions.

2

Create the best environment.

3

Treat each decision separately.

4

Equal access – using communication equipment, interpreters, SaT support.

- Provide relevant information
- Provide options
- Encourage the person to become involved
- Make the person feel at ease
- Involve the family or any carers

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• [MCA principle 2 – Supported Decision Making \\*MV \(youtube.com\)](#)

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**Need to know**

An unwise decision is any decision made by the person that you, or anyone else thinks is not the best decision for them.

It is important you recognise that every decision a person makes will be influenced by their:

1. Attitudes;
2. Beliefs;
3. Values; and
4. Preferences.

It is not your place (or the place of anyone else) to judge whether:

1. A person's attitudes, values, beliefs or preferences are right or wrong; or
2. Whether the decision that a person makes based on them is wise or unwise.

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• [Mental Capacity Act principle 3: Unwise decisions \(youtube.com\)](#)

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**Principle 4**  
 "An act done, or a decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests"  
 MCA 2005 s1 (5)

Any decision you make for someone must be *right for them*.

Section 4 MCA sets out a process to determine best interests.

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[Mental Capacity Act principle 4: Best interests \(youtube.com\)](#)



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**Principle 5**  
 "Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action" MCA 2005 s1 (6).

Anything done or decided in a person's best interests must be proportionate.

Is it possible to decide or act in a way that would interfere less with the persons rights and freedoms?

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**Making a Best Interest Decision**  
**Consider the options and weigh up the pros and cons**

- Encourage participation
- Identify all relevant circumstances
- Find out the person's views
- Avoid discrimination
- Assess whether the person may regain capacity
- Consult others
- Least restrictive decision
- Is the person happy? (Consider emotional wellbeing)




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[Lancashire & South Cumbria NHS Foundation Trust & Lancashire County Council & AH \[2023\] EWCOP 1 - Court of Protection Hub](#)

- **Best interests' decision concerning AH, a female who may die if she mismanages her diabetes but who wants to return home from her current placement where she is unhappy**

AH has been the subject of a previous judgment: [2022] EWCOP 45 and the background to these proceedings is set out there. In this judgment, HHJ Burrows has to determine AH's best interests, deciding whether she should stay in her current placement, which AH dislikes but where her medication is properly administered, or be allowed to return home with medication provided by district nurses. The current arrangement, approved by the judge earlier in proceedings, was that AH would remain in the placement but be allowed out during the day and stay at her home one night a week.

In the light of various funding and logistical challenges, that hybrid approach was unsustainable so the options available to the judge was either a full-time placement at the home (and in which case AH would lose her flat) or to allow AH to go home despite the risks. He reviews various cases and cites in particular *Re M (Best Interests: Deprivation of Liberty)* [2013] EWHC 3456 (COP) where Peter Jackson J comments:

*"The right to life and the state's obligation to protect it is not absolute and the court must surely have regard to the person's own assessment of her quality of life"*

In HHJ Burrows eyes, this is the nub of the matter in this case so, in that light and despite the risks, at [65] he concludes that AH has

*"the right to her liberty and to remove it from her would be a devastating blow to her and would not properly recognise her right as a disabled person to be afforded respect and dignity for the way she wishes to live her life."*

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Kings College Hospital NHS Foundation Trust-v-South London & Maudsley NHS Foundation Trust-anor-2024-ewcop-20

**Capacity and best interest's decision concerning GF and whether he should have his ulcerated leg amputated.**

F is 60 and has a history of paranoid schizophrenia. He was admitted to hospital via A&E after being taken there by his niece, AB, and GF was reported to be disorientated. His niece had noticed sores which he said were caused by lasers and Wi-Fi but, on examination, were caused by infection and necrotic. Without amputation, the sores would be fatal. A mental health review found GF to be delusional.

After reviewing the law on capacity and best interests, Henke J first decides GF lacks capacity and then notes the medical evidence is unanimous that an above the knee amputation is the only feasible route to save GF's life. She therefore decides the surgery is in GF's best interests partly as he has expressed a desire to live. She also sets out her reasons for publishing the judgment at [13] one of which is so that GF has a record of why his leg has been amputated.




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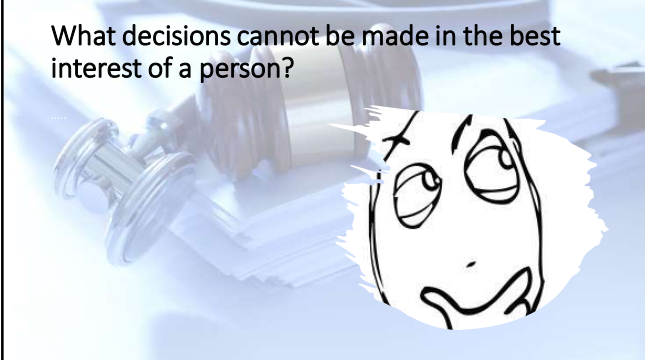
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What decisions cannot be made in the best interest of a person?



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Decisions that cannot be made in Best Interests

- consenting to marriage or a civil partnership
- consenting to have sexual relations
- consenting to a decree of divorce being granted on the basis of two years' separation
- consenting to a dissolution order being made in relation to a civil partnership on the basis of two years' separation
- consenting to a child's being placed for adoption by an adoption agency
- consenting to the making of an adoption order
- discharging parental responsibilities in matters not relating to a child's property
- giving a consent under the Human Fertilisation and Embryology Act 2008

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**Powers and Bodies introduced**

**Mental Capacity Act**  
The Mental Capacity Act is a legal framework in the UK that provides a statutory framework for decision-making on behalf of individuals who lack the capacity to make their own decisions.

- Court of Protection
- The Office of Public Guardianship
- Advance decisions to refuse treatment
- Lasting Power of Attorney/ Court Appointed Deputies
- The IMCA Independent Mental Capacity Advocate Service

[Using the Mental Capacity Act \(youtube.com\)](#)

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**For a person to make their own decision they must be able to demonstrate all the following:**

1. A general understanding of the decision to be made;
2. A general understanding about why the decision needs to be made;
3. A general understanding about the effects of deciding one way or another, or of making no decision at all.

It is important not to assess a person's understanding until they have been:

1. Provided with all of the relevant information to the decision; and
2. All practicable steps have been taken to support them to understand it.

*Please note: One person being supported to decide about medical treatment may need to know the general purpose of treatment, the nature of the treatment and the likely consequences of either accepting or refusing the treatment, but*

*Another person may also want to know who will be carrying out the procedure, what ward they will be on, how many people will be involved, and other finer details.*

**DECISION MAKING**



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**Sample questions to ask to help determine Capacity - Following information giving.**

*\*The kind of support people might need to help them decide varies. It depends on personal circumstances, the kind of decision that must be made and the time available to make the decision i.e.*

**Does P understand the treatment or plan or proposed options of care?**

- What is your understanding of your condition?
- What are your options...
- What is your understanding of the benefits of this treatment or plan?
- What are the risks ?
- What is your understanding of what will happen if nothing is done?

• Ability of P to reason with that information in a manner that is supported by the facts and P's values – ...you have been given a lot of information, have you decided what options are best for you and why?  
Remember - think about simplifying language, visuals, key words, written words. Recap information and ask questions to check understanding.



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**Difficulty in engaging the person in the assessment**

1. A problem that can be encountered in practice is where it is difficult to engage the person in the process of assessment.
2. It is important to distinguish between the situation where the person is **unwilling** to take part in the assessment, and the one where they are **unable** to take part. As Hayden J emphasised in Re QJ: "[i]t is important to emphasise that lack of capacity cannot be established merely by reference to a person's condition or an aspect of his behaviour which might lead others to make unjustified assumptions about capacity (s.2(3) MCA). [In this case, a]n aspect of [the person's] behaviour included his reluctance to answer certain questions. It should not be construed from this that he is unable to. There is a good deal of evidence which suggests that this is a choice." [1]
3. However, you do not need mechanically to keep asking the person about each piece of relevant information if to do so would be obviously futile or even aggravating.[2]

**What you need to do is:**

- To consider what steps could be taken to assist the person to engage in the process; and
- To record what steps were taken and what alternative strategies have been used.

4. It is also important to think of ways in which you can persuade the person to take part, for instance by explaining to them that helping you – the assessor – is likely to help them, because it will maximise the chances that you will find that they are able to make the decisions.

[I am finding it difficult to engage the person - Capacity guide](#)



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### Who is best placed to undertake assessment

A carer or support worker may assess the person's capacity to choose whether to have a bath or what to eat.	A district nurse may assess their capacity to consent to having a dressing changed.	A dentist may assess their capacity to consent to having a filling.	A GP may assess their capacity to take a certain medication.	A Deputy appointed by the Court may assess their capacity to manage finances.
A social worker/care coordinator may assess their ability to make a decision where to reside.	An Occupational Therapist may assess their ability to use a specific piece of equipment safely.	A consultant may assess their ability to consent to major surgery.	If the decision relates to a legal transaction, it is the responsibility of a solicitor or legal practitioner to assess capacity.	

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### What are the challenges of undertaking an MCA assessment?

Nothing is too trivial .

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### Need to know:

The decision to be tested must be clearly recorded on the formal record of the mental capacity assessment and, wherever possible set out in line with the first 3 statutory principles. You start by thinking they can make a decision, you support, and you understand their right to make a decision even if it seems unwise.

For example: you're recording on an assessment in relation to accommodation needs to look like this..

1. Is Jonathan Jones able to make a decision about where to live?; and not
2. Does Jonathan Jones lack capacity to make a decision about where to live?

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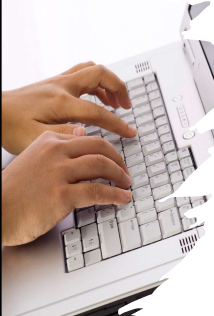
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## Recording the Assessment



A formal record of the assessment and determination should be recorded as soon as possible after it has been carried out. The record must demonstrate that the statutory principles of the Act have been applied, and each element of the functional test assessed.

The record should contain all the following:

- Be clear about the capacity decision that is being assessed.
- Ensure P (and you) have the concrete details of the choices available (e.g. options between living in a care home and living at home with a realistic package of care).
- The evidence that has been used to confirm the presence of an impairment or disturbance of the mind or brain;
- The relevant information that has been provided to the person;
- The practicable steps that have been taken to support the person to make their own decision;
- The outcome of each element of the functional test of capacity;
- The reason that the person has been deemed to have, or to lack capacity to make the decision for themselves; and
- Where the person has been deemed to lack capacity, the consideration that has been given to delaying the decision.

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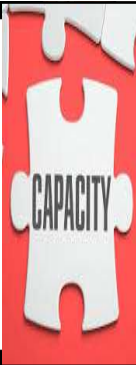
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## ? Good Interview Questions :

- Have client explain his/her medical issues and medications. How do you know when to see a doctor? What would happen if you stopped taking your medications?
- What steps would you take if you ran out of your medications?
- How long have you lived in your home? Who else lives with you?
- Can you tell me how you manage your bills - how they budget, pay bills, balance your check book? Do you need help?
- Have then describe a routine day and how they get their meals and take their medications
- If in the home, ask them to bring you a glass of water
- Ask judgement questions: What would you do if you smelled smoke? What would you do if you were having chest pain? What is the number for emergency? What would happen if you did not pay a bill?
- Always also include information from family members, caregivers or other qualified informants.



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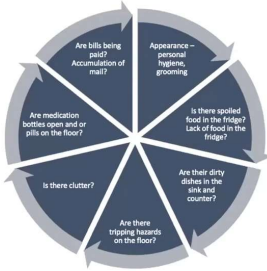
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## Pay attention to clues at a home visit:



- Are bills being paid? Accumulation of mail?
- Appearance – personal hygiene, grooming
- Are medication bottles open and or pills on the floor?
- Is there spoiled food in the fridge? Lack of food in the fridge?
- Is there clutter?
- Are their dirty dishes in the sink and counter?
- Are there tripping hazards on the floor?



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### Good capacity assessment and recording

- Where there are concerns about a patient's capacity to make a decision, a capacity assessment should be documented in the patient record.
  - For most simple events such as obtaining a patient's consent to ongoing treatment, or helping a patient with their self-care, this can be recorded in the progress notes under the heading MCA related issues.
  - For more major events, or where there is doubt about a patient's capacity to consent to an intervention, you should complete the Mental Capacity Assessment form in RiO
- Remember where there are no doubts about capacity there is no need to document a capacity assessment

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### CAPACITY

#### COGNITIVE

- Learning & Memory
- Language
- Attention
- Judgement
- Reasoning
- Speed of processing
- Perceptual-motor

#### EXECUTIVE

- Planning
- Decision making
- Working memory
- Responding to feedback
- Inhibition ( impulse control)
- Mental flexibility
- Task initiation
- Organization and regulation activities




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### Executive Capacity

Does the client have the ability to execute – carry out/implement – decisions regarding personal needs, health and safety i.e. does the person have the capacity for self care and self protection.

It is the process of putting **one's decision into effect /into action** either alone or by delegating responsibilities to another more physically able individual.

Execution of one's decisions is predicated on having a predetermined plan, adapting the plan in response to changing or unexpected circumstances and delegating these responsibilities to appropriate surrogates when one is physically unable to carry out the plan.




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MCA & EXECUTIVE FUNCTIONING  
CASE LAW

Phobia or fear - for example MB (Caesarean Section) [1997] EWCA Civ. 1361

A pregnant woman with a needle phobia refused anaesthetic necessary for a C section. The court ruled that at the point of treatment her phobia overwhelmed her, and she was unable to use and weigh relevant information to that particular treatment.

Compulsive Disorders – such as Anorexia Nervosa. E.g. The NHS Trust v L and Ors [2012] EWHC 2742 (COP)

Judge stated, 'Ms L's judgement is critically impaired by a profound and illogical fear of weight gain.'

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IMCA:  
INDEPENDENT  
MENTAL  
CAPACITY  
ADVOCATES

- **Eligibility:**
  - A person who lacks capacity AND
  - Has no family or friends other than paid carers to represent them AND
  - When decisions are being made about serious medical treatment or significant changes of residence:
- **This can include**
  - A stay in hospital longer than 28 days, or
  - A stay in care home for more than 8 weeks.
  - When an application is submitted under 'Deprivation of Liberty safeguards'

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Who makes the decision?

- If there is a valid and applicable Advance Decision to Refuse Treatment, the person themselves is the decision maker even though they don't have capacity. Their decision cannot be overridden by others on the basis that it is not in the person's best interests.
- If there is a Lasting or Enduring Power of Attorney or a Court has appointed a Deputy, the Attorney or Deputy will be the 'decision maker' for decisions within the scope of their powers.
- The Court of Protection can also make decisions on behalf of someone who lacks capacity to decide

If there is conflict or doubt about whether a decision is truly in the individual's best interest (including if a professional believes an Attorney or Deputy is not acting in their best interests) the decision will need to be looked at by the Court of Protection.

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Who makes the decision?

Otherwise,

- The decision maker will vary depending on the individual's circumstances and the type of decision involved.
- Health professionals will be decision makers for medical and related treatment, such as dental care and physiotherapy.
- Family members and unpaid carers who live with or care for people who lack capacity to make decisions will often be the decision makers for many day-to-day acts such as what people eat or wear.

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Who makes the decision?

Have a look at the statements below and consider if you believe them to be true or not.

- A parent of an adult son or daughter with a learning disability can give consent on their behalf.
- A wife whose husband is in a coma can consent to a life support machine being switched off.
- A "next of kin" has the right to tell a care worker how care and support should be provided.

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Regard to less restrictive options

The Mental Capacity Act says that restraint is when:

- someone uses force - or threatens to use force - to make a person do something they are resisting, or when
- someone restricts a person's freedom of movement, whether they are resisting or not.

Where possible we should try to avoid restrictions and restraint but sometimes it will be in a person's best interests to use restraint.

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Lawful restraint?

If you are intending to restrain a person who lacks capacity to consent, you must:

- **Reasonably** believe the restraint is necessary to **prevent** harm to the person
- Use the **minimum** amount of force and for the shortest time necessary
- The restraint must be in the **best interests of the individual** who lacks capacity
- Your response must be **proportionate** to the likelihood and seriousness of harm.

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## Conclusion

**Understanding Mental Capacity**  
By understanding the definition and significance of mental capacity, as well as the various factors that can influence it, we can provide better care for individuals with impaired capacity.

**Assessment and Legal Frameworks**  
By examining the assessment methods and tools, ethical considerations, and legal frameworks and rights involved in cases involving mental capacity, we can ensure that these individuals are treated with respect and dignity and that their autonomy is protected.

**Case Studies and Best Practices**  
By examining case studies and real-world scenarios, we can learn valuable lessons about best practices and effective approaches to navigating issues related to mental capacity.

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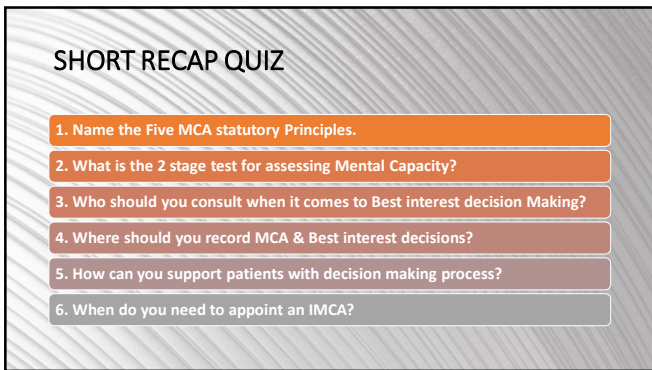
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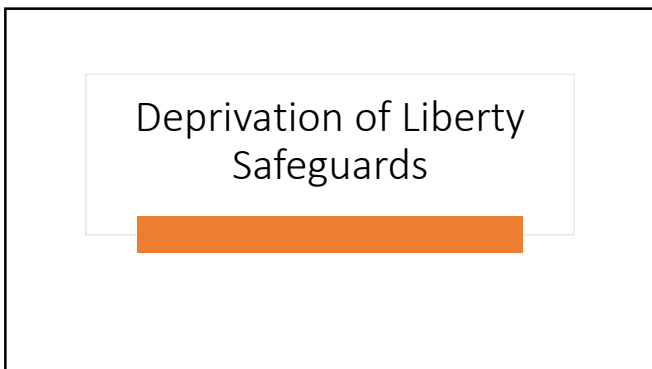
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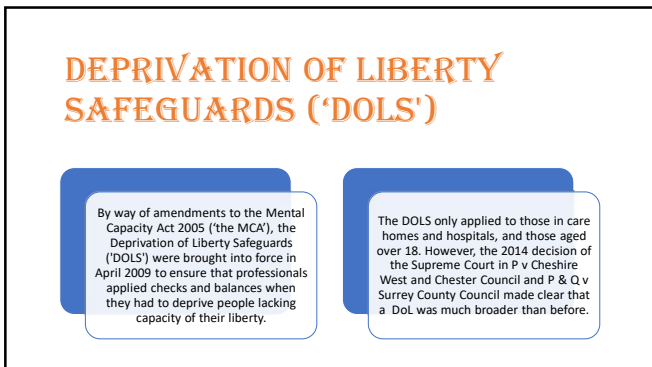
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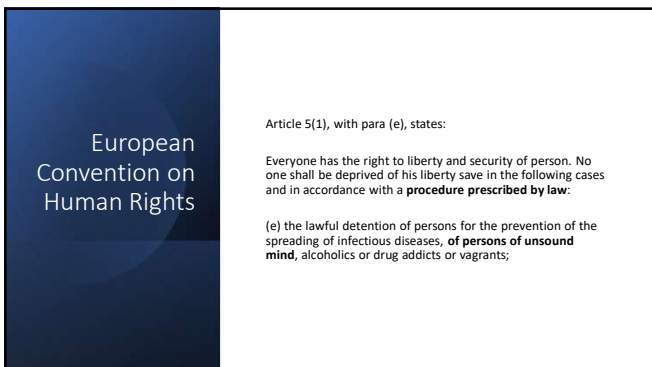
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## The evolution of DoLS

- The European Court of Human Rights in its October 2004 judgment in the *Bournewood* case (HL v UK) highlighted that additional safeguards are needed for people who lack capacity and who might be deprived of their liberty.
- Introduced into Mental Capacity Act 2005 (MCA) through the Mental Health Act 2007
- Safeguards are to protect service users who need to be deprived of their liberty and give them representatives, rights of appeal and for the "deprivation" to be reviewed and monitored.
- Safeguards cover people in hospital and care homes registered under the Care Standards Act 2000



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## MAIN AIM OF DOLS

- To focus additional scrutiny on the care arrangements for those vulnerable adults who may be deprived of their liberty.
- Avoid unnecessary restrictions being imposed on vulnerable adults.
- To ensure that when a deprivation of liberty, needs to occur, there is a lawful basis for doing so.

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## Who is covered by DoLS.

The safeguards apply to anyone:

- Aged 18 and over
- Who suffers from a mental disorder or disability of the mind
- Who lacks capacity to give informed consent to the arrangements made for their care and/or treatment, and
- For whom deprivation of liberty (within the meaning of Article 5) is considered after an independent assessment to be necessary in their best interests to protect them from harm.

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**RELEVANT DOLS MCA matters**

- As part of MCA assessment Patients have to understand below. (note that this is not an exhaustive list) case link below.
- That P is in hospital to receive care and treatment for a mental disorder;
- That the care and treatment will include varying levels of supervision (including supervision in the community), use of physical restraint and the prescription and administration of medication to control her mood;
- That staff at the hospital will be entitled to carry out property and personal searches;
- That P must seek permission of the nursing staff to leave the hospital, and, until the staff at the hospital decide otherwise, will only be allowed to leave under supervision;
- That if P left the hospital without permission and without supervision, the staff would take steps to find and return her, including contacting the police.

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**Defining deprivation of liberty – The acid test**

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**Seeking authorisation**

1. Identification of a potential DoL
2. Written application to the Supervisory Body
3. Urgent authorisation can be self-granted – maximum 14 days
4. Managing Authority responsible for informing family / carer / IMCA
5. Supervisory Body commission assessments

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### How does it work

A managing authority (Oxleas) must grant itself an urgent authorisation when it identifies a DoLS (7 days with an automatic request for a 7 day extension).

- applies for the authorisation to: a supervisory body who then
- Consider requests
- Commission assessments

A standard authorization should also be requested at the same time to facilitate external scrutiny by the managing authority.

*Remember: anybody who is subject to a standard authorisation is entitled to the right of immediate access to the Court of Protection that can review the lawfulness of their deprivation of liberty.*

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### Supervisory Body assessments

Age	No refusals	Mental Capacity	Mental Health	Eligibility	Best Interests
<ul style="list-style-type: none"> <li>• Is P over the age of 18?</li> </ul>	<ul style="list-style-type: none"> <li>• Is there a valid and applicable advance decision to refuse the treatment being provided?</li> <li>• Has a Deputy or Attorney refused the authorisation?</li> </ul>	<ul style="list-style-type: none"> <li>• Does the person lack capacity to consent to the arrangements for their care and treatment?</li> </ul>	<ul style="list-style-type: none"> <li>• Does the person have a mental disorder within the meaning of the MHA (Art 5(1)(e) persons of unsound mind).</li> </ul>	<ul style="list-style-type: none"> <li>• DoLS cannot authorise if P objects to being in hospital for treatment/ would object if they were able to or if they fall within the scope of the MHA.</li> </ul>	<ul style="list-style-type: none"> <li>• Is the person deprived of their liberty and is this in the person's best interests?</li> </ul>

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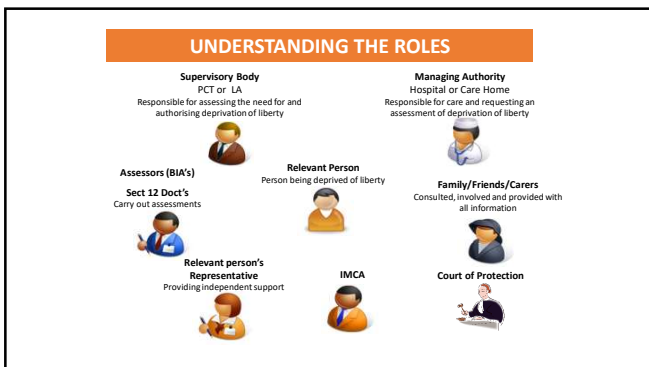
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Key safeguards in DoLS

**Relevant person's representative (RPR)**  
 The RPR has two important powers:

- They can insist on having the standard authorisation reviewed by the supervisory body.
- They can challenge the deprivation of liberty in the Court of Protection. This would not cost them anything.

**The Court of Protection**  
 Anybody who is subject to a standard authorisation is entitled to the right of immediate access to the Court of Protection that can review the lawfulness of their deprivation of liberty.

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Authorisation otherwise by :

- Court of Protection (CoP) application
- Mental Health Act 1983 (MHA) in hospital where criteria met

*Complex interface with MCA/DoLS at times leading to potential for gaps (in practice rather than legal gaps?)*

- Court orders
- Inherent jurisdiction (a vast power that the court has to protect children in areas where statutory remedies are inadequate)

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Proper recognition of the jurisdiction of each statute by those responsible for using them is key - **whatever you do.. DOCUMENTATION IS PARAMOUNT!**

Recap:

**Hospital**

- *What treatment is hospital admission/detention meant to achieve? mental health? physical health treatment and what is the patients consenting capacity?*

➤ **and if for mental health purposes**

- ❖ *what is the 'compliance status' of the patient as per:*
- *i) The compliant capacitated – Voluntary/Informal (s131 MHA)*
- *(ii) The compliant incapacitated – Possibly MCA*
- *(iii) The non-compliant capacitated – MHA*
- *(iv) The non-compliant incapacitated - MHA*

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Final Questions?



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Further Information

- This video by Alex Ruck Keene, explaining the concept of capacity: [Capacity – the key points – Mental Capacity Law and Policy](#)
- The Code of Practice to the MCA 2005: [Mental Capacity Act Code of Practice – GOV.UK \(www.gov.uk\)](#)
- The easy read version of the MCA 2005 prepared by Care England: [Mental Capacity Act 2005: An easy read guide \(careengland.org.uk\)](#)
- The British Institute of Human Rights’ “Know your Human Rights: Mental Health and Mental Capacity” tool: [Know your human rights | British Institute for Human Rights](#)
- Updated Guidance – The Law Society - including clarification of the position of: [Changes to the Mental Capacity Act code of practice – Law Society response | The Law Society](#)

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Further Information

- [The “you’ve got the capacity to choose to kill yourself” phenomenon, and what we can do about it | The Small Places \(wordpress.com\)](#)
- [YouHaveCapacity.pdf](#)
- [Mental Capacity Toolkit](#)

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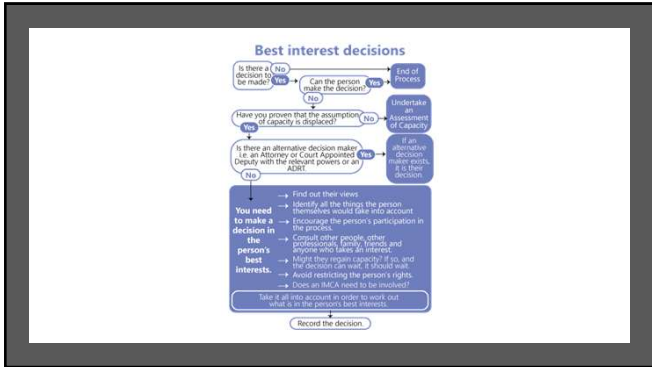
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