

# Leicester, Leicestershire and Rutland ‘How to’ assess Mental Capacity in specific situations

## How to: Assess mental Capacity to decide upon contact with others

Mental capacity to decide upon contact with others usually arises as a result of safeguarding concerns, when an adult at risk is in an abusive relationship or at risk of exploitation by others. The assessment may consider whether a person has mental capacity for contact with a specific individual or more generally with any people (to recognise the potential risk in others). The type of contact may also be considered such as mental capacity to use social media to contact others.<sup>1</sup>

### The presumption of mental capacity and practicable steps

The starting point of the MCA is to presume a person has mental capacity to make a decision, including consenting to or refusing the intervention/assessment. Before concluding that a person lacks mental capacity to decide, it is important to take all practical and appropriate steps to enable the person to make the decision themselves (2<sup>nd</sup> principle of the MCA). Chapter 3 of the MCA Code of Practice gives detailed guidance on the steps that could be taken to support a person make a decision for themselves including: providing relevant information, communicating in an appropriate way, making the person feel at ease and supporting the person.

### Relevant information

The Court of Protection has given guidance on the relevant information that a person needs to understand, retain and use or weigh to have contact with others. One frequently cited case is [LBX v K, L, M \[2013\] EWHC 3230](#),<sup>2</sup> in which the court was asked to decide whether ‘L’, a man with learning disabilities, had capacity to decide on contact with others. The judge identified the following as information relevant to the decision:

- *The nature of the relationship between L and the person he has contact with.*
- *What sort of contact L could have with the person. This includes different locations, differing durations and arrangements such as the presence of a support worker.*
- *The positive and negative aspects of having contact with the person, based on L’s own evaluations. These evaluations will only be irrelevant if they are based upon false beliefs. For example, if L believed that a person had assaulted him when they had not.*
- *Past positive and negative experiences.*

The judge decided that the following information was **not** relevant to the decision: ‘...abstract notions, like the nature of friendship and the importance of family ties...the long-term possible effects of contact decisions...and risks which are not in issue.’

The above list is frequently cited in case-law<sup>3</sup>, however it is intended as guidance only and therefore needs to be adapted to the facts of the particular case. It is therefore necessary to obtain as much collateral information as possible about the relationship between the adult and the person causing them harm, including documentary evidence of any incidents that have occurred.

### Carrying out the assessment

A capacity assessment is a dynamic process of providing the relevant information to the person and then asking the person questions to assess their ability to understand, retain, use or weigh that information, and communicate their decision. It may be necessary to provide the relevant information more than once and in different formats. For example, if a person doesn’t understand something the first time, it would be appropriate

<sup>1</sup> See [Re A \(Capacity: Social Media and internet use: Best interests\) \[2019\] EWCOP 2](#)

<sup>2</sup> Paragraphs 45-47

<sup>3</sup> See [Re B \(Capacity: Social Media: Care and Contact\) \[2019\] EWCOP 3](#)

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to explain it in a different way using a different method. It may therefore be necessary to assess capacity over more than one visit.

It is fundamental to the assessment process that the person is informed of the purpose of the assessment.<sup>4</sup> This could simply involve informing the adult that there are concerns about their relationship with the person(s) causing them harm and you are going to assess whether they are making an informed decision to have contact with the person.

### Understanding the relevant information

The case law is clear that *‘It is not necessary for a person to demonstrate a capacity to understand and weigh up every detail of the respective options, but merely the salient factors.’*<sup>5</sup> Similarly, assessors *‘...must guard against imposing too high a test of capacity...because to do so would run the risk of discriminating against people suffering from a mental disability.’*<sup>6</sup>

After giving the adult the relevant information listed above, potential questions to ask to assess the person’s ability to understand it could include:

- *What is your relationship with the person?*
- *Where do you have contact with the person?*
- *Who else is present when you have contact with the person? Is this always the case?*
- *How long do you see the person for?*
- *What do you like about having contact with the person?*
- *Is there anything you don’t like about having contact with the person?*
- *Has the person ever harmed you? If so how?*
- *Do you have the right to refuse contact with the person?*

Depending upon the adult’s answers to the above questions, you may need to ask further probing questions or explain the relevant information in a different way. If the person struggles to understand your questions or has communication difficulties limiting their ability to answer open questions, it would then be appropriate to switch to closed questions. For example:

- *Is the person your friend or boyfriend?*
- *Do you spend time alone with the person or with someone else?*
- *Do you see the person at home or in a public place?*
- *Do you see the person for a short time or a long time?*
- *Do you feel safe or unsafe when you are with the person?*
- *Has the person ever harmed you?*
- *Does it make you happy or sad to spend time with the person?*

It is important when asking closed questions to check the consistency of the person’s replies. For example:

- If the person being assessed replies *“boyfriend”* to the question, *“Is the person your friend or boyfriend?”* ask a short while later, *“Can I just check, is the person your brother?”*
- If the person being assessed replies *“safe”* to the question *“Do you feel safe or unsafe when you are with the person?”* ask a short while later, *“Can I just check, do you feel unsafe when you are with the person?”*

### Examples from case law:

1. A young woman with a learning disability and history of abusive relationships with men. The judge found she lacked mental capacity to make decisions to contact other people and stated: *‘These relationships have not, I*

<sup>4</sup> Paragraphs 47-49 of [LB Wandsworth v M & Ors \[2017\] EWHC 2435](#)

<sup>5</sup> Paragraphs 22 & 69 of [KK v STCC \[2012\] EWCOP 2136 \[2012\]](#)

<sup>6</sup> Paragraph 16 of [PH v A local authority \[2011\] EWCOP 1704](#)

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*am satisfied, simply been the product of unwise choices; AC has no real understanding of the consequences of decision-making in this respect; she has limited concept of time, and cannot therefore process whether something has happened in the recent past or some time ago.’<sup>7</sup>*

2. A man with learning disabilities and autism and a history of abusive relationships through contacting men via social media. The judge found he lacked mental capacity to make decisions for contact with others and stated: *‘Even the short extracts of AW’s relevant history above give an indication of AW’s poor understanding of social boundaries and the risks involved in him meeting strangers, particularly after a very short introduction on the web, without having made any rudimentary assessment of those risks. AW’s vulnerability is further underlined by him sending inappropriate pictures of himself to strangers.’<sup>8</sup>*
3. A woman with mild learning disability and frontal lobe dementia. The judge found she lacked mental capacity around contact with others but did have mental capacity for contact with her husband. The judge referenced the medical evidence: *‘Given the deficits in SF’s frontal lobe functioning, it is likely that she has difficulty interpreting the subtle verbal and non-verbal cues of others which will have an impact on her ability to process information and appraise the appropriateness and safety and behaviour of others, in order to make a decision about her interactions with them...’<sup>9</sup>*

### Retaining the relevant information

Section 3(3) of the Mental Capacity Act 2005 states that *‘The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.’* Therefore, if information can be retained long enough for the adult to make the decision, that is sufficient, even if they cannot then retain that information for a longer period. To assess the adult’s ability to retain information, it is likely that the same methods and tools used to provide the relevant information and assess understanding will need to be used again. For adults’ who have good verbal communication, it would be appropriate to ask them to recite the key points of the relevant information. For adults’ with communication difficulties, it would be appropriate to use written words or visual aids to establish whether the person recalls the key information a short while after it has been provided.

### Use or weigh the relevant information

This part of the assessment will build upon questions asked to assess the adult’s understanding of the relevant information. The aim is to determine whether the person is *‘...able to **employ** the relevant information in the decision-making process and determine **what weight to give** it relative to other information required to make the decision.’<sup>10</sup>* It is therefore necessary for the adult to be able to **apply the relevant information** to themselves and weigh the pros and cons of unsupervised contact, supervised contact or ceasing contact altogether with the person(s) causing them harm. Another way of putting it is, can the person having understood the information, take account of it?

#### Potential questions to ask to assess the person’s ability to use or weigh the information:

- *Why is the person important to you?*
- *Why do you think others are concerned about you having contact with the person?*
- *How has the person harmed you? Can you give me some examples?*
- *How would you feel about having someone else present when you have contact with the person (e.g. support worker)? What are the pros and cons of supervised contact?*
- *How would you mitigate risks when you have contact with the person?*

<sup>7</sup> See paragraph 27 of [Derbyshire CC v AC, EC & LC \[2014\] EWCOP 38](#)

<sup>8</sup> See paragraph 13 of [A Local Authority v AW \[2020\] EWCOP 24](#)

<sup>9</sup> See paragraph 17 of [A local authority in Yorkshire v SF \[2020\] EWCOP 15](#)

<sup>10</sup> See paragraph 38 of [Kings College Hospital NHS Trust v C and V \[2015\] EWCOP 80](#)

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- *How would you feel if you couldn't see the person again?*
- *What actions would you take if you felt unsafe or wanted to stop contact with the person?*

There are two common areas of difficulty in assessing whether a adult can use or weigh information. The first is where a person denies factual information about a situation. For example, denying or refusing to believe that a person has harmed them. Here it is important to ensure that the evidence of harm is presented objectively, to support the person's acceptance of it (e.g. providing documentary evidence of where appropriate). If denial persists, it may be necessary to then respectfully question or challenge false beliefs or assumptions. If they continue to refute the evidence, then this would point to an inability to use or weigh relevant information. Conversely, if the adult accepts the relevant information, the weight they attach to that information is a matter for them and will depend on their own values or outlook.<sup>11</sup> This may result in the adult making an unwise but capacitated decision.

The second area of difficulty is where the adult gives coherent answers to questions but is then unable to translate their intentions into actions due to executive dysfunction. The person says one thing but then does something else in practice. Executive functioning was recently described by a judge as, *'...the ability to think, act, and solve problems, including the functions of the brain which help us learn new information, remember and retrieve the information we've learned in the past, and use this information to solve problems of everyday life.'*<sup>12</sup>

It may be necessary to gather further collateral information and ask further probing questions if there appears to be a mismatch between a person's words and their actions. It would be legitimate to conclude that a person lacks capacity to make a decision if they are unaware of, or deny the fact that they cannot implement their stated intentions, or deny that when needed they are unable to bring to mind the information needed to implement a decision (e.g. due to impulsivity). However, it would only be legitimate to reach such a conclusion where there is clearly documented evidence of repeated mismatch.<sup>13</sup> For example, if the adult has previously stated that they no longer want to have contact with the person causing them harm but then does the opposite, it would be appropriate to ask the person the reasons why and explore the mismatch between their words and actions. If they are aware of and accept their difficulties and the associated risks, but choose to continue with contact, then this would be deemed an unwise decision rather than a lack of capacity.

### Example from case law

A woman with mild learning disability and personality disorder with a history of abusive relationships. The judge found she lacked mental capacity for contact with others and in relation to her personality disorder stated it: *'...impacts on her ability to **use or weigh** information as it causes her to deny, dismiss or minimise information relevant to risks, especially when put to her by professionals as it challenges her pathological way of thinking. She may acknowledge the relevant information about risk but then dismiss it out of hand – i.e. pathological denial.'*<sup>14</sup>

### Communicate the decision

The adult needs to be able to communicate their decision to have continued contact with the person or if relevant, their consent for supervised contact or ceasing contact. This is an area where it is particularly important to show that you have taken practicable steps to facilitate communication. For example, reproducing as best as possible the manner by which they usually communicate, providing all necessary tools and aids, and enlisting the support of carers, friends or professionals who may be able to facilitate communication.

### After the assessment

Reflect upon the following points:

- Do you have enough information to displace the presumption of capacity?
- Do you need to carry out further visits to make a judgment?

<sup>11</sup> See paragraph 38 of [Kings College Hospital NHS Trust v C and V \[2015\] EWCOP 80](#)

<sup>12</sup> See paragraph 39 of [A Local Authority v AW \[2020\] EWCOP 24 \(20 May 2020\)](#)

<sup>13</sup> [39 Essex Street - Carrying out and recording capacity assessments \(June 2020\)](#)

<sup>14</sup> See paragraph 18 of [Leicester City Council v MPZ \[2019\] EWCOP 64](#)

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- Remember the assessment of mental capacity is made on the balance of probabilities.
- Have you established the causative nexus (e.g. the causal link between inability to decide and the identified impairment of or disturbance in functioning of the mind or brain)? A formal diagnosis is not required.

### Outcomes

#### **1. The person has mental capacity for contact with others**

That is the end of the MCA at this point and the person can make decisions about who they have contact with. Staff can still support and provide advice and guidance, but the person can decide who they have contact with. Mental capacity can be fluid however, so it may be appropriate to re-assess a person's mental capacity as new situations arise or the person's condition changes. An example would be where a person has dementia. If the adult has *mental capacity* to decide upon contact, have you considered whether their decision making is affected by coercion, constraint or undue influence? If so, it may be possible for the local authority to bring proceedings under the Inherent Jurisdiction of the High Court. Speak to your manager about this.

#### **2. The person lacks mental capacity for contact with others**

A best interests decision is then required. Where you are proposing to limit or supervise contact between people you must seek further guidance from your line manager. If any of the people involved (including the person lacking mental capacity) are unhappy with any of the restrictions on contact that are proposed, further legal advice should be sought for consideration of an application to the Court to Protection for a contact order.