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The Mental Capacity Act and the Code of Practice, provides a framework for assessing capacity, deciding what to do if someone lacks capacity for a particular decision, and how to go about resolving disputes.

It must be assumed that a person has capacity, unless it is established otherwise.

“Capacity” means being able to make a particular decision – and so capacity is only meaningful for a particular decision at a specific time. The starting point to assess capacity is always “what is the decision that needs to be made, and when?”

Everything reasonably possible must be done to support and enable a person to make each decision for themselves before they can be assessed to lack capacity – the MCA is as much about empowerment and autonomy as it is about protection and paternalism. Only rarely will a decision truly need to be made immediately and investment of time and effort in this empowerment is especially important for more significant decisions with longer term consequences.

The legal test is that a person is unable to make a particular decision for himself if, because of “an impairment of, or a disturbance in the functioning of, the mind or brain”, he is unable:

- A. To understand the information relevant to that decision, or
- B. To retain that information, or
- C. To use or weigh that information as part of a decision making process, or
- D. To communicate his decision by any means.

So a capacity cannot be generic, but must relate to a particular decision. The information relevant to that decision must be clear, and this means the pros and cons of each option actually available (not just the option preferred by professionals), and the consequences of each option, including of not making a decision at all.

This also means that, while specialist input from a health professional such as a psychiatrist or psychologist may be helpful, according to the nature of the person’s disability, at face value the person best placed to assess capacity is the professional proposing the particular treatment or care being offered, as they understand best the information which is relevant to that specific decision.

In difficult or significant cases it can be appropriate to get a second opinion and, in some cases, independent expert evidence on capacity if need be.

It is reasonable to take a proportionate approach to assessment and documentation of capacity, according to the complexity and consequences of the decision. But of course in significant decisions, or difficult cases, for example: where there is uncertainty whether the person can retain the relevant information for long enough to make a decision, it is especially important that this is considered carefully and well documented.

Timing of the decision and “fluctuating” capacity

If a person’s level of cognition varies over time, whether throughout the day or more generally, it is tempting to readily describe this as “fluctuating capacity”, but this should be treated very carefully.

Capacity means the ability to make a decision when it needs to be made, and we must support people to make decisions when they are most able.

If a person is most able to make decisions in the morning, for example, and a particular decision can be made then, when the person has capacity to do so, then the person should be supported and enabled to make the decision in the morning. The fact that they may be less able to make the same decision at other times is irrelevant, and does not mean that they lack capacity, or that their capacity for that decision is “fluctuating”.

There can be a practical problem if someone, having made a capable decision in the morning, then tries to contradict this in the afternoon, when their capacity has been lost. In principle, the answer to this should be to plan in advance as much as possible, and get the person’s capable decision in the morning about what should happen all day, including when they behave differently later on. At the very least, the person’s capable decision in the morning should have a very strong influence on any “best interests” decision made in the afternoon, if they lose capacity in the meantime.

Remember that if someone has full capacity, they are perfectly entitled to change their mind about what they consent to or refuse. If a person changing their mind on a particular decision, as capacity comes and goes, causes too much of a problem in practice, and this cannot be overcome by advance care planning, then seek advice and support, and the Court of Protection is available as a last resort.

Even if the person is only able to understand, retain, use, and communicate the information relevant decision for a short period of time that does not mean that he should be regarded as lacking capacity. The test is whether he had capacity long enough to reach a decision, though the more serious the consequences of the decision, the longer it is expected the relevant information has to be retained.

Bear in mind, always, that the person may have already made the decision for themselves, before losing the capacity to do so, in an Advance Decision to Refuse Medical Treatment. It is prudent to seek advice on this situation, if in any doubt.