



The Mental Capacity Act 2005: Module 2

By Professor Anthony Holland

Introduction

The Mental Capacity Act (MCA) 2005 came into force in two stages during 2007 and was fully in force from 1st October 2007. All those in a professional or caring capacity with someone 16 years or older who is 'unable to make a decision for himself in relation to the matter because of an impairment of, or disturbance in the functioning of, the mind or brain' (MCA Section 2(1)) must have 'regard to the Act and to its Code of Practice'.

In this module we addressed the following:

Section 1

- The determination of a person's decision-making capacity (a pivotal issue for the MCA). Essentially, the Act requires a judgement to be made with respect to the person on two specific matters:
 - Does he/she have an impairment of, or a disturbance in the functioning of, the mind or brain?
 - Is he/she unable to make the decision in question?
- The MCA's precise definition of the 'inability to make a decision'.
- The starting presumptions required when seeking consent for an intervention. Specifically, that the person has the capacity to consent or not to this intervention.
- The nature of the information that needs to be given when seeking consent, and, in the situation where there may be doubt about a person having the capacity to make this decision for him/herself, the need to elicit from him/her in simple terms what has been explained to him/her.
- The case-scenario of Mr 'R' along with the author's interpretation of the application of the MCA under given hypothetical situations.
- That a person's decision-making capacity should not be seen as static or fixed, but can be optimised and maintained. We looked at the various internal and external factors in relation to the individual that should be considered when trying to achieve optimisation of their decision-making capacity.

Section 2

- The person requiring the decision to be made must have a reasonable belief on the balance of probabilities that the person concerned lacks the capacity to take the decision in question.
- He/she can then act in that person's best interests, determined as directed by the MCA and the Code of Practice, and in accordance with any valid and applicable advance directive to refuse treatment, or in accordance with instructions from a donee of a valid Lasting Power of Attorney or deputy appointed by the Court of Protection.
- Providing that the person taking the decision has acted in accordance with the Act and where possible with the Code of Practice, he/she will be protected from liability. Where it is not possible to follow the guidance in the Code, this needs to be justified (e.g., it was a decision that had to be taken urgently).

Section 3

- People who may lack the capacity may at times require restraint or to have their freedom of movement limited. Such restraint and limitations of movement require justification, however the MCA allows those caring for people to use restraint providing it is in the person's best interests and certain specified conditions are met.
- The functions of the MCA 2005 and the MHA 1983, in so far as where a person is found to meet the requirements for 'detention for assessment or treatment of a mental disorder in hospital' under the MHA, the provisions of that Act 'trumps' those of the MCA. In other words, the MHA could be used to over-ride a person's capacitous refusal, but only for the treatment of a person's mental disorder, not a physical disorder.
- Incorporated into the MCA, the right to advocacy under very specific situations. We considered the circumstances and the roles and responsibilities of the Independent Mental Capacity Advocate (IMCA) – to act in accordance with the principles of the MCA, to be independent of the person making the decision and to be there to support the person lacking capacity to make the decision in question.
- Two new offences incorporated into the MCA – that of ill-treatment and wilful neglect. These offences can apply to anyone caring for a person who lacks capacity. For a person to be found guilty he/she has to be found to have ill treated and/or wilfully neglected a person lacking capacity or to have been reckless in the way they were ill-treating the person or not. Options available including reporting to the police, involving local 'Protection of Vulnerable Adult (POVA) Procedures, and/or reporting to the Court of Protection.
- The conditions required for the involvement of a person lacking capacity in research. This section of the MCA is concerned with what is referred to as 'intrusive' research, i.e., research that would normally require the consent of the person concerned. This Section does not cover clinical trials which are covered by the European Clinical Trials Directive.
- Through video we also reflected on the case of Mrs Wilson, a patient with dementia being assessed for her decision-making capacity with regards to consenting to a blood-test for anaemia.