

In an emergency treat if this is likely to succeed and benefit the individual

Assume the individual has capacity for this specific decision

If the individual has an impairment of, or a disturbance in their mind or brain function, this may indicate they lack capacity to make a specific decision. In this situation, test their capacity as follows:

1. Can they understand the information?
The carer must make every effort to make this information clear and accessible
2. Can they retain the information?
This only needs to be long enough to use and weigh the information
3. Can they use or weigh up that information?
The individual must demonstrate that they are able to consider the benefits and burdens of the proposed treatment and the alternatives available
4. Can they communicate their decision?
The carer must try every method possible to enable this

If the individual can do all of the above they have the capacity to make this specific decision at this time. Document the result of each of the above, ideally by quoting the individual.

**Does the individual have the capacity to make this decision?
or
Might they regain capacity?**

YES

- Ask the individual for consent
- If they likely to regain capacity wait for this to happen, but start treatment if the need is urgent.
An eccentric or unwise decision does not imply a lack of capacity

NO

Is there an Advance Decision to Refuse Treatment and/or a Personal Welfare Lasting Power of Attorney?

YES

- Investigate the validity and applicability of the ADRT or Personal Welfare (Health & Welfare) LPA
- The most recent order takes precedence as long as it is valid and applicable to this situation.

NO

Appoint a decision maker (usually the clinician responsible for the patient) who should

Set up a best interests meeting to plan for the future to consider the following:

1. Is an IMCA needed?
2. Have you avoided making assumptions merely on the basis of age, appearance, condition or behaviour?
3. Have you identified everything the individual would have taken into account when making the decision?
4. Have you considered if the individual is likely to have capacity at some date in the future and if the decision can be delayed until that time?
5. Have you done whatever is possible to permit and encourage the individual to take part in making the decision?
6. Where the decision relates to life sustaining treatment, have you ensured that the decision has not been motivated in any way, by a desire to bring about their death?
7. Has consideration been given to the least restrictive option for the individual?
8. Have you considered factors such as emotional bonds, family obligations that the person would be likely to consider if they were making the decision?
9. Having considered all the circumstances, what is the decision/action to be taken in the best interests of the individual?

Record the decisions and agree the next review dates

If there are unresolved conflicts, consider involving the local ethics committee. If a solution is proving difficult consider the Court of Protection, possibly through a Court Appointed Deputy (CAD)

Additional information

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(Numbers in brackets refer to chapters in the MCA Code of Practice)

An Advance Refusal of Treatment (ADRT) (Ch 9)

- Can be made only by an individual while they still have capacity, but becomes active only when they lose capacity
- Applies only to a refusal of treatment
- **An ADRT is invalid if any of the following apply:**
 - the person withdrew the decision while they still had capacity to do so
 - after making the advance decision, the person made a Personal Welfare Lasting Power of Attorney (LPA) giving authority to make the same treatment decisions
 - the person has done something that clearly goes against the advance decision which suggests that they have changed their mind
 - the person has been detained under the Mental Health Act and requires emergency psychiatric treatment.
- **An ADRT is not applicable if any of the following apply:**
 - the proposed treatment is not the treatment specified in the advance decision
 - the circumstances are different from those that may have been set out in the advance decision
 - there are reasonable grounds for believing that there have been changes in circumstance, which would have affected the decision if the person had known about them at the time they made the advance decision.

When an advance decision is not valid or applicable to current circumstances:

The healthcare professionals must consider the ADRT as part of their assessment of the person's best interests if they have reasonable grounds to think it is a true expression of the person's wishes, *and* they must not assume that because an advance decision is either invalid or not applicable, they should always provide the specified treatment (including life-sustaining treatment) – they must base this decision on what is in the person's best interests.

Capacity (Ch 4)

- Is assumed to be present, unless the two stage test shows otherwise
- Is assessed by applying the two stage test (see algorithm)
- The capacity to make a decision is assessed by four functional tests (see algorithm)
- Depends on the decision being made, eg. an individual may have capacity for simpler decisions, but not complex issues.
- Can change with time and needs to be monitored

Communication (Ch 4)

- Carers have to take all practicable steps to help an individual understand the information and communicate their decision
- Professionals should take all practicable steps to include the individual in the decision

Liability (Ch 6)

The MCA does not have any impact on a professional's liability should something go wrong, but a professional will not be liable for an adverse treatment effect if:

- Reasonable steps were taken to establish capacity

- There was a reasonable belief that the individual lacked capacity
- The decision was made in the individual's best interests
- The treatment was one to which the individual would have given consent if they had capacity

Personal Welfare Lasting Power of Attorney (LPA) (Ch 7)

- Replaces the previous Enduring Power of Attorney
- Must be chosen while the individual has capacity, but can only act when the individual lacks capacity to make the required decision
- Must act according to the principles of best interests (see algorithm)
- Can be extended to life-sustaining treatment decisions (Personal Welfare LPA including health), but this must be expressly contained in the original application
- Only supersedes an advance decision if the LPA was appointed after the advance decisions, and if the conditions of the LPA cover the same treatment as in the ADRT

NB. Holders of LPA for Property and Affairs have no authority to make health and welfare decisions

Court of Protection and Court Appointed Welfare Deputies (CADs) (Ch 8)

- The Court of Protection makes single decisions itself, but deputies may be appointed where a series of decisions are required.
- CADs are helpful when a individual's best interests require a deputy consulting with everyone
- CADs can make decisions on the individual's behalf, but cannot refuse or consent to life-sustaining treatments.
- Are subject to the principles of best interests (see algorithm)

Independent Mental Capacity Advocates (IMCAs) (Ch 10)

- Are part of a new statutory consultation service
- Must be involved in specific circumstances when an individual without capacity has no relative or partner who can be consulted
- Are advocates for the individual and not decision makers, so they cannot refuse or consent to life-sustaining treatments.
- Can be bypassed if an urgent clinical decision is needed

Resources

- Any professional making decisions on behalf of a person without capacity is required by law to have regard to the Mental Capacity Act Code of Practice:
<https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice>
- Office of Public Guardian:
<http://www.justice.gov.uk/forms/opg>
- Court of Protection: <https://www.gov.uk/court-of-protection>
- IMCA service:
<https://www.justice.gov.uk/downloads/protecting-the-vulnerable/mca/making-decisions-opg606-1207.pdf>
- ADRT information and training programme:
www.adrtnhs.co.uk