

The Mental Capacity Act 2005 in Practice



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Aims

- Identify the core aspects of the MCA 2005.
- Recognise good practice when assessing capacity and making best interests decisions.
- Detect some common ethical issues and challenges.
- Acquire confidence to apply the MCA 2005 in practice

The purpose of the MCA

- How to work with someone aged over 16 where there are concerns about their decision-making related to health and welfare (not for literally all decisions –e.g. wills covered separately);
- What to do when acting in someone's best interests when they lack capacity;
- Seeks to protect a person's rights and limit overly restrictive and controlling influence of others.
- Sections 1-4 are **essential** to know, but the MCA covers much more.....Court of Protection, LPAs/Deputies, IMCAs. [see Appendices] .

Pop Quiz



Are these the 5 key principles?

1. A person must be **assumed** to have capacity unless it is established that they lack capacity.
2. A person is not to be treated as unable to make a decision **unless all practicable steps** to help them to do so have been taken without success
3. A person should be treated as unable to make a decision because they make an **unwise** decision
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 the person's **best interests**.
5. Before 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 **most restrictive** of the person's rights and freedom of action

Are these the 5 key principles? **Not quite!**

1. A person must be **assumed** to have capacity unless it is established that they lack capacity.
2. A person is not to be treated as unable to make a decision **unless all practicable steps** to help them to do so have been taken without success
3. A person should **[NOT]** be treated as unable to make a decision because they make an **unwise** decision
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 the person's **best interests**.
5. Before 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 ~~most~~ **[LEAST]** restrictive of the person's rights and freedom of action.

SEE APPENDIX 2

Anything wrong with this?

“Mr. Jones lacks capacity”

For what decision? Capacity is decision and time specific (s2 of the MCA 2005).

Has a capacity assessment actually been carried out?
Remember, evidence is needed to rebut principle 1?

Is this right?

“You need to be certain the person lacks capacity”

No, you don't. *“Any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities” (S2 of the MCA 2005).*

Could this be problematic?



“No need to assess capacity because of Principle 1. We have to assume she can make the decision, so let’s leave her to it.”

Principle 1 doesn’t mean we don’t need to assess capacity.

Decision needs to be made + there are doubts the person can make the decision = assess capacity (particularly when the risks are more serious).

Being clear about what principle 1 actually means

Principle 1 - *“A person must be assumed to have capacity unless it is established that he lacks capacity”* – **This doesn't justify not assessing capacity!**

How it works:

- The starting point is that the person is viewed as capacitous. (discriminatory if everyone is automatically viewed as lacking capacity in law).
- The only way you can say someone lacks capacity is by assessing in line with the MCA 2005.
- Age, appearance, diagnosis and behaviour alone can't be used to make justifications about capacity – evidence is needed to rebut Principle 1.
- Any overturning of principle 1 is down to the assessor, not the person. They have nothing to prove.



What about this?

“We should only assess capacity to show someone lacks capacity”

A capacity assessment can also determine that someone can make the decision.

Don't have an outcome in your mind before assessing capacity.

Is this correct?

“Mrs. Bento doesn’t agree with my viewpoint; she’s still making risky choices. It’s clear they lack capacity to make the decision”

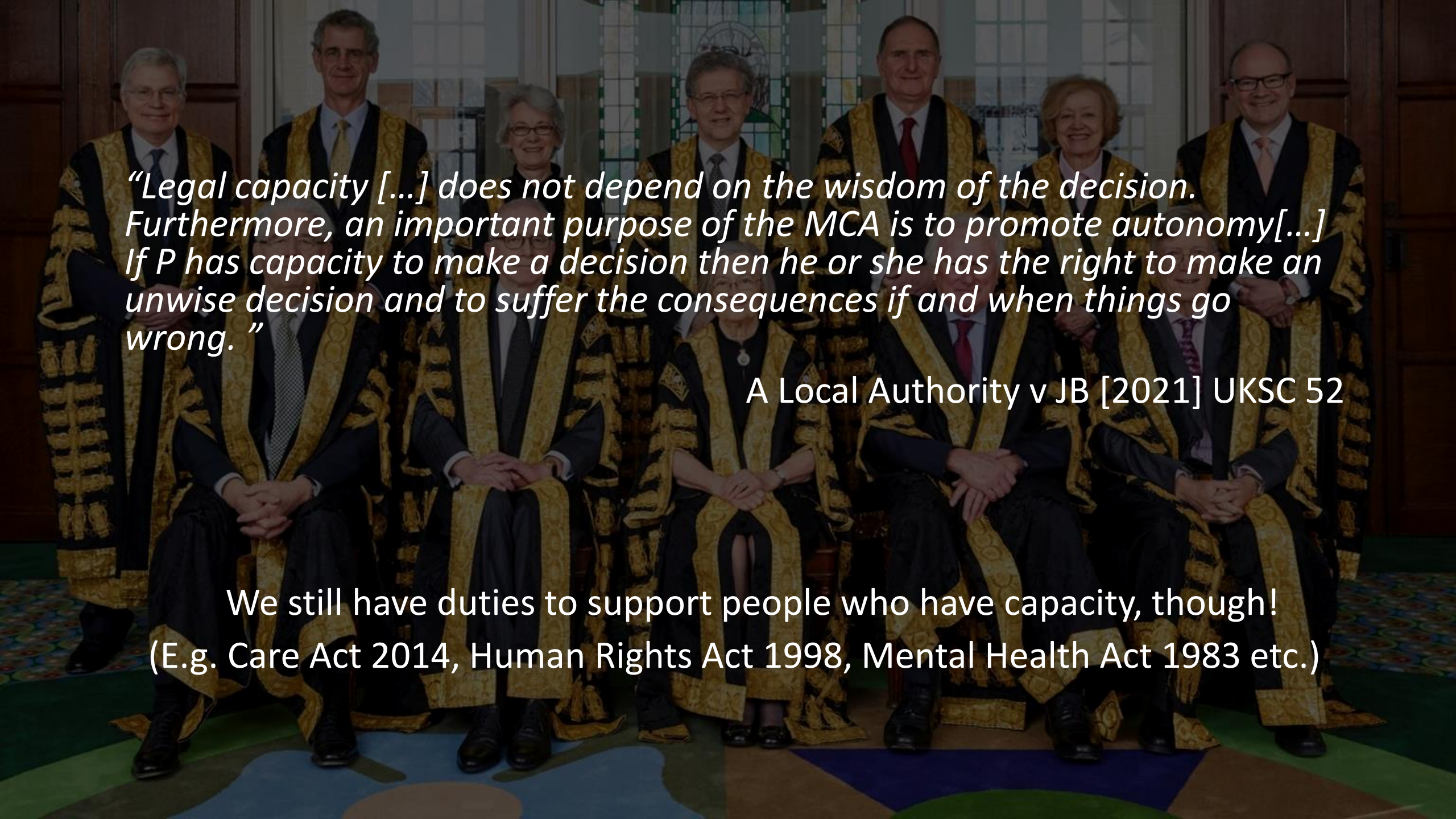
NO – this doesn’t mean they lack capacity!

Unwise decisions (Principle 3)

- How many of us make unwise decisions?
- Taking risks and making unwise choices doesn't mean someone lacks capacity (but may be grounds for a capacity assessment).
- It's the thought process that matters:
"The outcome of the decision made is not relevant to the question of whether the person taking the decision has capacity". North Bristol NHS Trust v R [2023]
- Think of the causative nexus – is the impairment the reason why the person can't make the decision?



“Paternalism has no place; protection of individual autonomy is the magnetic north of this court.”



“Legal capacity [...] does not depend on the wisdom of the decision. Furthermore, an important purpose of the MCA is to promote autonomy[...] 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. ”

A Local Authority v JB [2021] UKSC 52

We still have duties to support people who have capacity, though!
(E.g. Care Act 2014, Human Rights Act 1998, Mental Health Act 1983 etc.)

Is this right?

“As NOK I am legally able to make all best interests decisions”

Next of kin has no legal basis. The decision maker is usually the person who has assessed capacity and proposes to take/facilitate the action in question (except when there is a valid LPA/deputy).

But, still consult family.

Whose best interests?

“I want the person to go into care as it would
stop me worrying”

What is in the person's best interests? It's not
about what is in the best interests of others.

When to assess capacity?

1. Does a consent-based decision need to be made OR is the person's decision making putting them at risk of harm?

If so....

2. Is there proper reason to doubt someone's ability to make the decision?

- You have concerns the person can't make the decision (i.e. concerns about their actions/presentation); or
- The person has been assessed as lacking capacity to make other decisions; or
- Someone else questions the person's capacity.

(Para 4.35 of the MCA CoP)

**Decision making not in doubt = no need for a capacity assessment.
(But still record the conversation you had and the person's
decision)**

What decisions does the MCA apply to in Adult Social Care?

Is a decision being proposed requiring the person's consent?

- Care and support
- Residence
- Provision of equipment, adaptations etc (OTs)
- Etc.

OR concerns someone is making decisions putting them at risk of harm (think s42 of the Care Act 2014):

- Financial management
- Contact with others
- Sex
- Self-neglect etc.

What decisions wouldn't ASC staff assess capacity for?

So....

- You've identified a decision needs to be made (providing care and support)
OR the person's decision making could cause real risk of harm (contact etc)

AND

- You have legitimate reason to doubt the person's ability to make the decision

THEREFORE

- It's time to move on to the next stage....

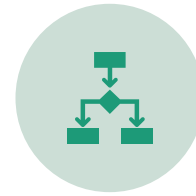
Pre-capacity assessment checklist



Is there a live issue?
What's the actual
decision?



Are the grounds for
a capacity
assessment met?



Identify the relevant
information (inc.
options); provide to
the person.



Identify practicable
steps to support the
person.



Commence the
capacity assessment

The importance of the 'relevant information'



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Mental Capacity Act 2005

3

Inability to make decisions

- (1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—
- (a) to understand the information relevant to the decision,
 - (b) to retain that information,
 - (c) to use or weigh that information as part of the process of making the decision, or
 - (d) to communicate his decision (whether by talking, using sign language or any other means).

What is the ‘relevant information’?

This is the information someone would need to know to make a specific decision. This should always be provided to the person before and as part of the capacity assessment.

- Case law guides us for many decisions (care, residence, sex etc.)
- Where there is no case law, what is the **essential** information someone would need to make the decision?
- S3(4) of the MCA 2005 tells us the relevant information should include:
 - “the reasonably foreseeable consequences of—*
 - (a)deciding one way or another, or*
 - (b)failing to make the decision”*

NB - The relevant information can be tailored - don't raise the bar too high! Avoid imposing requirements that are higher than those of many capacitous people making the same decisions.

Relevant information for a capacity assessment on care and support

- With what areas the person needs support?
- What the name of the assessor is?
- The colour of their front door?
- What sort of support they need?
- How care staff are recruited and regulated?
- Who will provide such support?
- That carers may not always treat the person being cared for properly, and that they can complain if they are not happy.
- What would happen without support, or if support was refused?

(Taken from LBX v KL and M [2013])

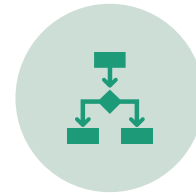
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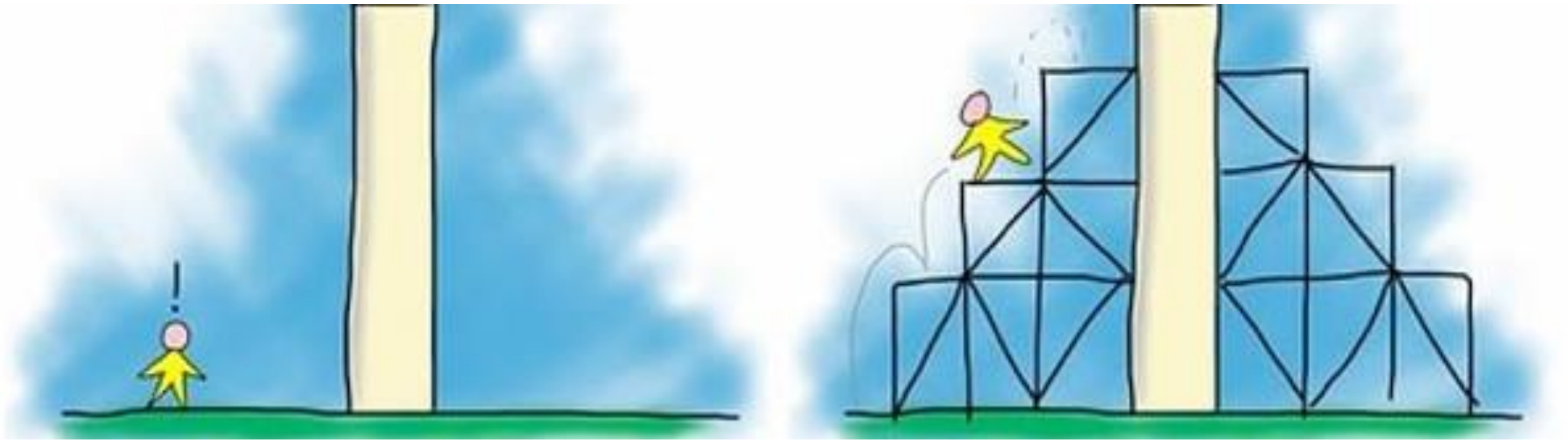
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the person.



Identify practicable
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person.



Commence the
capacity assessment



Practicable steps (Principle 2)

- Communicating the relevant information to the person in way that they can best make sense of.
- Involvement of others (trusted person, MDT etc.).
- Environmental adjustments.
- Time of day.
- Addressing power imbalance (reassurance, rapport).
- Delaying the decision.
- And more.....

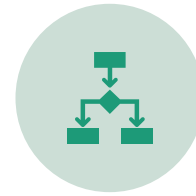
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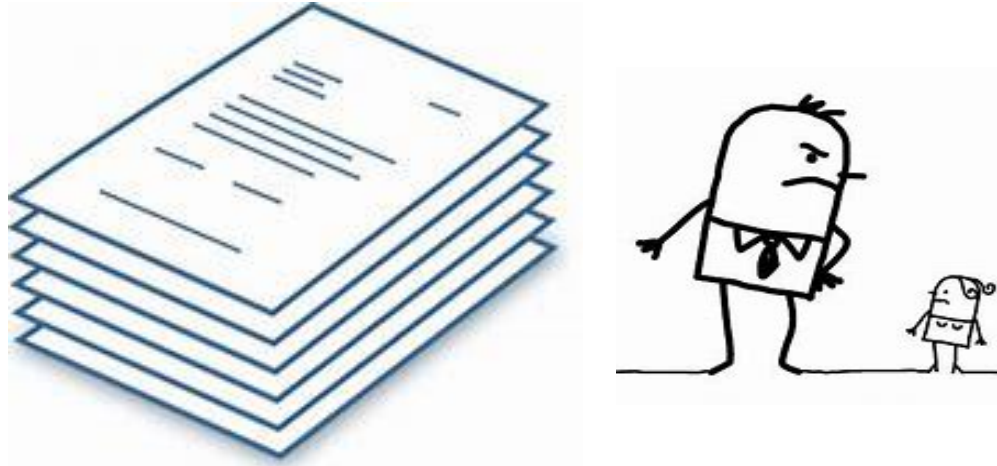


Identify practicable
steps to support the
person.



Commence the
capacity assessment

What does a capacity assessment look like?



What do I actually do in a capacity assessment?

“A capacity assessment is, in many ways, an attempt to have a real conversation with the person on their own terms, and applying their own value system”

Essex Chambers, 2023

A reminder of the legal definition of mental capacity

“a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.”

(Section 2(1) of the MCA)

1. Functional stage



3. 'Causative nexus'



2. So-called 'diagnostic' stage



The functional stage

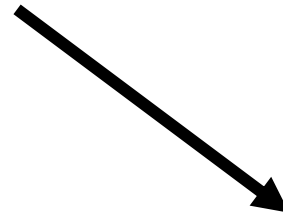
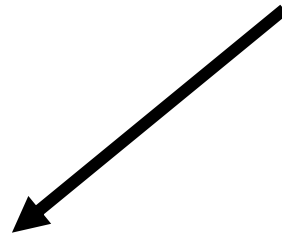
1. Can the person make the decision? Having taken all practicable steps to support the person can they:

UNDERSTAND the information relevant to the decision?

RETAIN that information?

USE and WEIGH that information?

COMMUNICATE a decision?



If the person can do all of these, then the capacity assessment is complete – the person is viewed as able to make the decision.

If the person **CANNOT** do just one of these, move to the next stage.

The so-called 'diagnostic' stage and the 'causative nexus'

2. Is there an impairment or disturbance in the functioning of the mind?

Can be temporary or permanent. No formal diagnosis is needed...but you need to be able to explain what the impairment is.

IF SO....

3. Is the person's inability to make the decision because of the identified impairment or disturbance? (AKA the 'causative nexus')

Needs to be a clear link between the cognitive impairment and how/why this means the person can't make the decision. "P can't make the decision because of dementia" – is this adequate?

PLEASE NOTE: If there is no impairment or disturbance in the functioning of the mind or the causative nexus isn't met, but the person can't make the decision, then the MCA 2005 doesn't apply.

What could cause the inability to make the decision in these scenarios?

Minimum standards of a capacity assessment record...

North Bristol NHS Trust v R [2023], tells us a capacity assessment should:

- Identify the question of capacity
- Identify the relevant information for the decision
- Provide a clear account of how you gave the relevant information to the person and their ability to understand, retain, use and weigh this up to communicate a decision.
- If the person can't do any one of understand, retain, use and weigh up the information, what is the cognitive impairment and provide a clear reason why this means they can't make the decision.

Applying the logic from the North Bristol NHS Trust v R judgement [2023], what are your thoughts on the example capacity assessment?

Capacity assessment – Key Points



Have you taken all practicable steps?



Don't set the bar too high



Evidence - Quotes, sources, doing/rather than talking?



Avoid the protective imperative

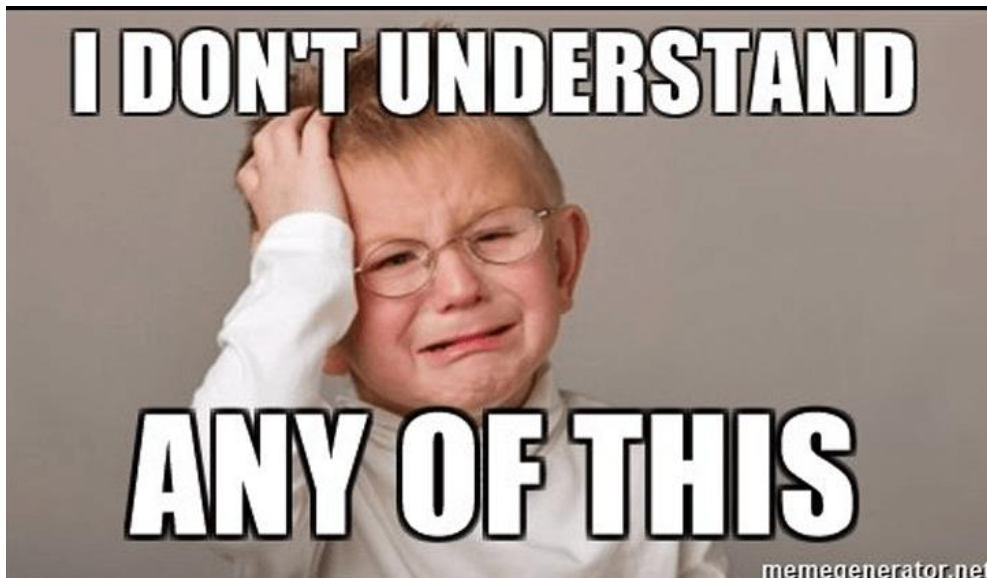


Outline the causative nexus



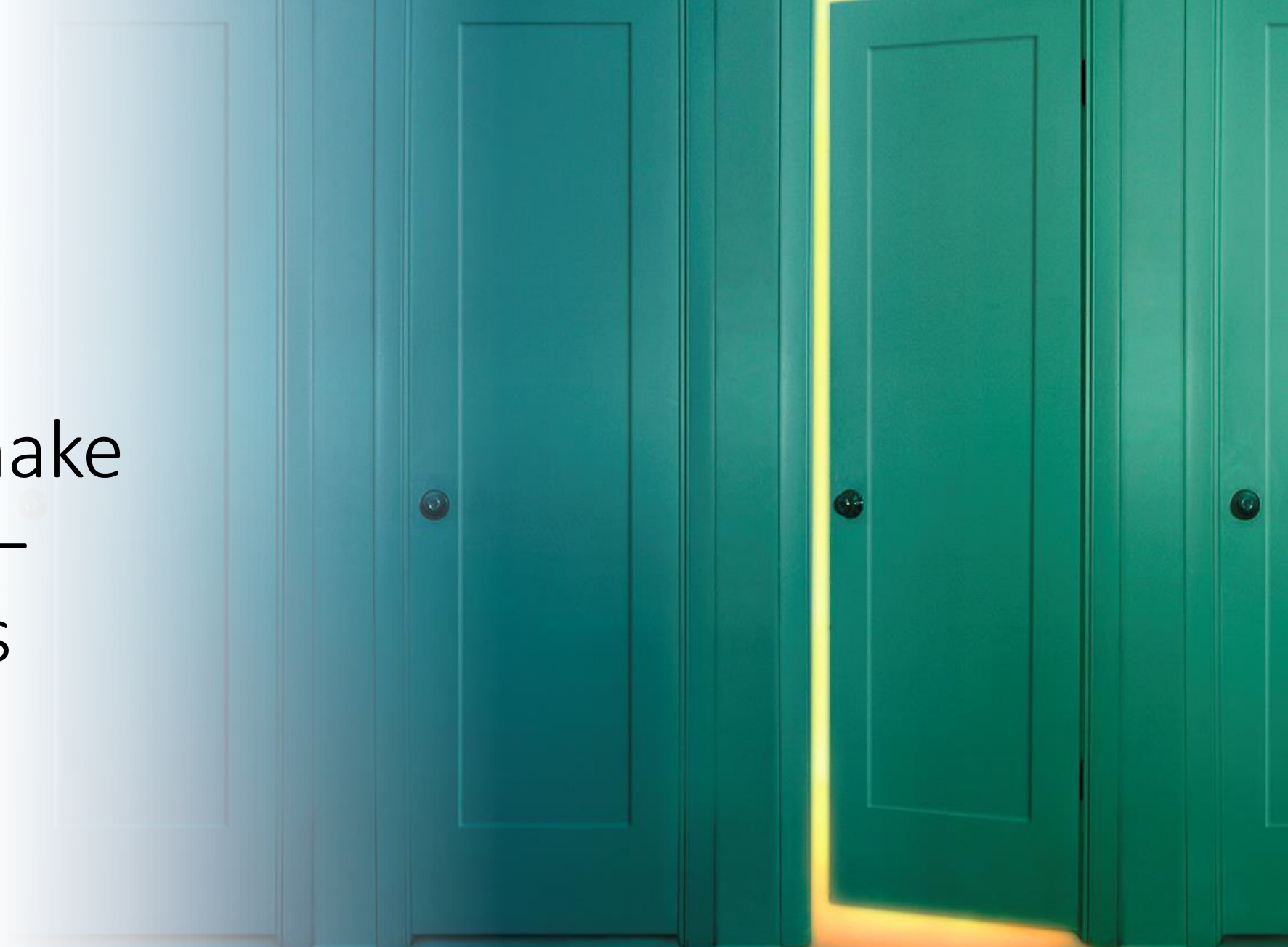
Review (where necessary)

Capacity FAQs



- Fluctuating capacity
- Non-engagement
- “Executive dysfunction”
- How much sense does the person need to make?
- “Insight” and “belief”(Re: Sudiksha Thirulamesh [2024] EWCA Civ 896)

When the
person lacks
capacity to make
the decision –
Best Interests



What is a Best Interests Decision?

- Only done if the person can't make a decision (because of a mental impairment) and you have done all you can to enable them to do so.
- Best Interests decisions aren't defined in the MCA 2005 – the s4 checklist outlines the 'must-dos'.
- If the person can't make the decision themselves there needs to be an identified decision maker.

Who is the decision maker?

Usually the person who will take or facilitate the decision (but check for valid LPAs or is there a court appointed deputy?)

Prescribing medication, surgery, health treatments



Doctor, nurse, health professional etc.

Assessment, support, residence etc. (social care)



Social worker, CCO etc.

Daily smaller care tasks (personal care etc)



Care worker, family member etc

Almost all decisions



Lasting Power of Attorney or Court Appointed Deputy (if one in place).

NB just because someone is a family member doesn't give them the right to make a decisions

Certain serious and contested decisions



A judge

The section 4 checklist

Consider all relevant
circumstances

Will the person regain
capacity?

Involve the person

The person's past and
present views, wishes,
beliefs and values

Consult those the
person requests and any
other interested party

Do not discriminate or
make assumptions
about what the person
would want based on
their characteristics

Do not be motivated by
a desire to end the
person's life if the
decision is about life
sustaining treatment.

Explore the least
restrictive option.

Section 4 – Best Interests



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*“In the case of an act done, or a decision made, by a person other than the court, **there is sufficient compliance with this section if** (having complied with the requirements of subsections (1) to (7)) he reasonably believes that what he does or decides is in the best interests of the person concerned”.*

S4(9) of the MCA 2005

“decision-makers...must try and put themselves in the place of the individual patientThe purpose of the best interests test is to consider matters from the patient's point of view. That is not to say that his wishes must prevail, any more than those of a fully capable patient must prevail. We cannot always have what we want.”

Aintree University Hospitals NHS Trust v James
[2013] UKSC 67



Best Interests Case Study - Ahmed

Looking at the case examples for Ahmed, has the section 4 checklist been considered?

Has his:

- participation been promoted?
- views, wishes, beliefs and values been thought about?
- have the views of all interested parties been sought?

What would you have done differently? What is good or bad about these?

CAUTION.....



- Has the s4 checklist been followed?
- What if there are disputes about what is in someone's best-interests?
- There are some decisions that can't be made (marriage, sex etc) s27-29
- Remember when to get an IMCA (appendix 5)

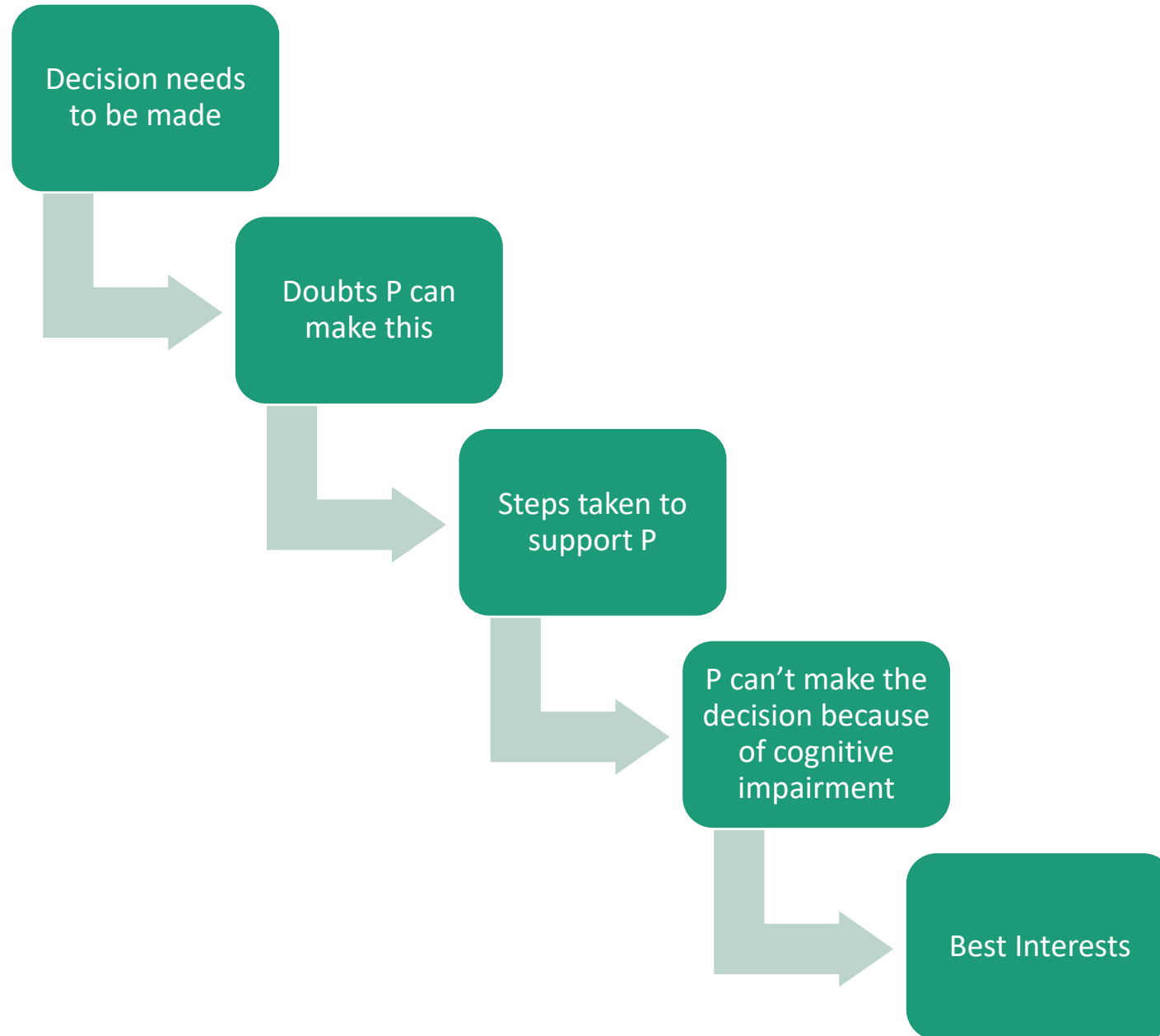
Best- Interests Key points

- Lack of capacity does not give us any right to make a risk averse decision. Further from doing what the person would want = more justification needed from the decision maker.
- Can only explore available options.
- Is the response necessary and proportionate to the risk of harm?
- Use a balance sheet and identify issues of magnetic importance.
- Follow the s4 checklist (involve the person and others).
- Whose best interests is the decision actually in? - Avoid making a BI decision that fits with an outcome you/others think is best.

Final thoughts on using the MCA 2005...

- The person should be at the heart of the process throughout.
- Record your rationale and be explicit. Why does someone lack capacity to make a decision? Why is a decision in someone's best interests?
- Is the intervention actually going to have a positive impact on the person? If not, why are you doing it?

MCA Recap – Appendix 1



The 5 key principles explained – Appendix 2

What the MCA 2005 says	What this means
1. A person must be assumed to have capacity unless it is established that he lacks capacity	<ul style="list-style-type: none">• Don't jump to conclusions that someone lacks capacity.• Can only rebut Principle 1 with evidence, from assessing capacity.• Overturning Principle 1 is down to the assessor, not the person – they have nothing to prove.
2. A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success	<ul style="list-style-type: none">• What steps can you reasonably take to help the person make the decision?• Only when you have done this, and the person still can't make the decision, can you say the person lacks capacity.
3. A person is not to be treated as unable to make a decision merely because he makes an unwise decision	<ul style="list-style-type: none">• Just because someone does something we wouldn't do/don't agree with doesn't mean they lack capacity.• It's the thought process, not outcome, that matters.
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.	<ul style="list-style-type: none">• Follow the checklist in section 4 of the MCA 2005.• Decisions made shouldn't be in the interests of professionals or family/friends.• Aintree v James [2013] – seeing things from person's POV.
5. Before the act is done.... [can it be] effectively achieved in a way that is less restrictive of the person's rights and freedom of action.	<ul style="list-style-type: none">• What is the least restrictive option available?• If this can't be taken, why not?• Why is it necessary and proportionate to be more restrictive?

Some key MCA functions – Appendix 3

It provides:

- The 5 principles (s1)
- Definition of capacity (s2(1))
- Test of capacity (s3)
- Best interests checklist (s4)
- A defence for those making decisions on behalf of others (s5)
- Definition of restraint (s6)
- LPA/Deputies (the creation of the OPG) and Advanced Decisions
- Court of Protection (and associated powers, s15, 16 etc)
- Advocacy (s35-41)
- DoLS (Schedule A1)
- Criminal offence to neglect someone who lacks capacity (s 44)

IMCAs- Appendix 4

An independent mental capacity advocate (IMCA) **must** be instructed for people in the following circumstances:

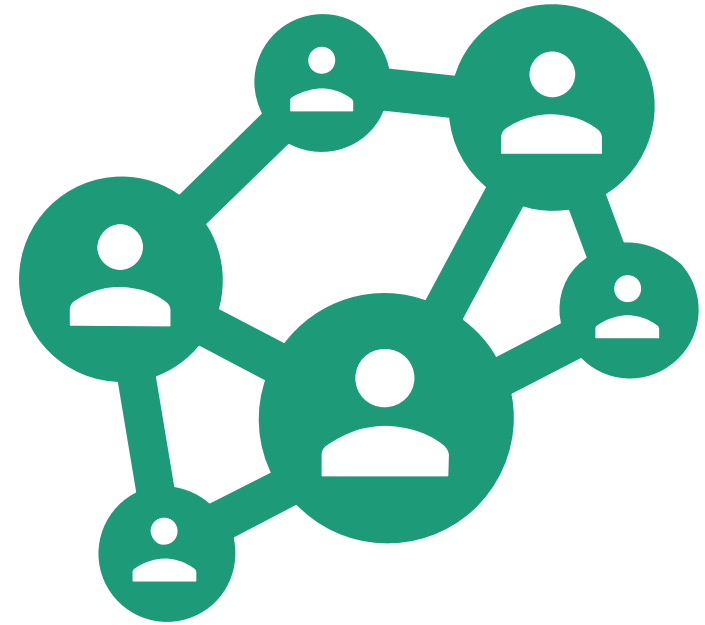
- The person is aged 16 or over;
- Decision about long-term change in accommodation or serious medical treatment,
- The person lacks capacity to make that decision, **and**
- There is no one independent of services, such as a family member or friend, who is “appropriate to consult”.

An IMCA **may** also be provided to people for other decisions concerning:

- Care Reviews (when no friends or family involved);
- Adult Protection (an IMCA may be instructed even where family members or others are available to be consulted)

Resources and further reading

- Please refer to the resources, procedures and guidance available on the MCA and DoLS and Legal Interface sections of ASC Policy Portal, which contains MCA and BI guidance templates.
- Social Care Institute for Excellence (SCIE) - <https://www.scie.org.uk/mca>
- 39 Essex Chambers – Further specialist resources - <https://www.39essex.com/resources-and-training/mental-capacity-law/>



Get in touch...



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