

ABSTRACT

Mental capacity is assessed according to the ability of a person to make a specific decision at the time the decision needs to be made. Assessment should be carried out when a person's capacity is in doubt and he has to make a particular decision. Different individuals may be involved in assessing a person's capacity for different decisions. A professional, such as a lawyer, or the donee of an LPA may seek a formal assessment where they have doubts about the person's capacity and the decision the person has to make is an important one.

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INTRODUCTION

“For the purpose of this Act, 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 4(1) *Mental Capacity Act*].

It does not matter whether the impairment or disturbance is permanent or temporary.

DISORDERS AFFECTING MENTAL CAPACITY:

- Neurological disorders, e.g. stroke, tumour, head injury, dementia, infection, etc,
- Mental disorders, e.g. depression, schizophrenia, and mania, and
- Intellectual disabilities.

TYPES OF MENTAL INCAPACITY

There are three types of mental incapacity and some examples of each of the types are given below.

1. Permanent incapacity

- A persistent vegetative state
- End stages of Alzheimer's disease

2. Temporary incapacity

- Drunk or drug abuse
- Affected by prescribed medication drugs
- Delirium from toxic and metabolic effects of acute

infections e.g. septicaemia, pneumonia, cholecystitis or cholangitis, or urinary tract infection

- Cerebral infections without irreversible damage to the brain
- Cerebral vascular accidents which are able to recover
- Head injury without irreversible damage to the brain

3. Fluctuating capacity

- Early stage dementia
- Clinical depression
- Schizophrenia

ASSESSMENT OF MENTAL CAPACITY

Mental capacity is assessed according to the ability of a person to make a specific decision at the time the decision needs to be made. 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. The information relevant to a decision includes information about the reasonably foreseeable consequences of deciding one way or the other, or failing to make the decision.

In order to make a decision on best interests, the following factors will need to be considered:

- Is the person likely to regain capacity and if so when?
- What are the past and present wishes of the person?
- What are the person's beliefs and values, and are there other relevant factors?
- The views of carers and other nominated or appointed persons should be sought on the beliefs of the person lacking capacity.

A person may have capacity to make some decisions but not others. Mental capacity may fluctuate, improve or deteriorate over time. Lack of mental capacity cannot be based only on his age, appearance, e.g. Down's syndrome, physical or intellectual disabilities, and behaviour, e.g. talking to oneself, shouting and gesticulating.

PSYCHIATRIC ASSESSMENT

A thorough assessment includes a detailed history, mental state examination and physical examination – if indicated, investigations should be done.

A comprehensive guide on how to conduct a psychiatric assessment for family doctors has been written by Professors Goh Lee Gan and Kua Ee Heok (Kua EH & Goh LG, 2004).

The pertinent questions are :

1. Is the person suffering from an impairment of, or disturbance in the functioning of the mind or brain?
2. If yes, does the impairment or disturbance cause the person to be unable to make a decision when he needs to?

A person is unable to make a decision when he cannot do one or more of these things in relation to making a specific decision at the time it need to be made [Section 5(1) *Mental Capacity Act*]:

1. Understand the information
2. Remember the information
3. Weigh up the information
4. Communicate the decision

The first three things should be applied together. If a person cannot do any of these three things, he or she will be treated as unable to make the decision. The fourth thing only applies in situations where the person cannot communicate his or her decision in any way. [Comment: taken from the British version of COP – URL: <http://www.publicguardian.gov.uk/docs/mca-code-practice-0509.pdf> page 46]

1. Understand the information

To help him to understand the information, it may be necessary to explain it in a way that is appropriate to his circumstances, such as using simple language, visual aids or some other means. The person should not be rushed or pressured to make a decision but given time to understand the information.

- Nature of the decision to be made
- Reasons the decision needs to be made
- Options available, if there is more than one regarding the decision to be made
- Consequences that can be expected if he chooses each of those options
- Consequences if no decision is made

2. Remember the information

It is sufficient if the person remembers the information for a short period of time as long as he can remember it long enough to understand it, weigh it up and communicate his decision.

3. Weigh up the information

The person must be able to weigh up the information and use it to make a decision. Sometimes people may understand the information but an impairment or disturbance of the mind or brain prevents them from using it. The impairment or disturbance leads them to make decisions without understanding or using the information.

4. Communicate the decision

The person must be able to communicate his decision. Some people find it difficult to communicate and need help to do so. All practicable steps should be taken to help the person to communicate, e.g. by using sign language, by writing or some other means. Sometimes it is not possible for a person to communicate, e.g. a person who is unconscious or in a coma.

WHO CAN ASSESS MENTAL CAPACITY

As assessment should be carried out when a person's capacity is in doubt and he has to make a particular decision. This doubt may arise for various reasons, e.g. because of the person's behaviour or circumstances or because the person was previously diagnosed with an impairment of or disturbances in his mind or brain and lacked capacity to make some other decision.

Different individuals may be involved in assessing a person's capacity for different decisions. The assessor is usually the individual directly concerned with the person at the time the decision needs to be made.

1. Informal Assessment

These assessments are appropriate for most day-to-day decisions, e.g. whether the person can go out alone. The assessor is likely to be the person's caregiver. The assessor must apply the statutory principles and give all practicable help to the person to make his own decision. If the person lacks capacity to make the decision, the caregiver will make the decision on behalf of the person.

Section 7 of the *Mental Capacity Act*:

- Take reasonable steps to determine whether the person lacks capacity about the matter in question before doing the act, and
- Reasonably believe that the person lacks capacity and the act to be done is in the person's best interests when doing the act.

If the decision concerns medical treatment, the healthcare professional will assess the patient's capacity to consent to or refuse treatment. If the healthcare professional is uncertain whether the patient has the capacity to make the decision, he may request a formal assessment of capacity. In complex cases, a multi-disciplinary team may be involved in making the assessment.

2. Formal Assessment

An accredited GP or specialist can conduct the assessment. To avoid any conflict of interest, the assessor should not be related to the person being assessed or the individual seeking the formal assessment of the person.

A professional, such as a lawyer, or the donee of an LPA may seek a formal assessment where they have doubts about the person's capacity and the decision the person has to make is an important one. E.g. of such decisions are:

- Moving house
- Selling assets or
- Transferring assets to another individual or organization

An individual or an organization such as a bank, that deals with a donee of an LPA on a matter relating to the property of the donor, may require the donee to produce a certificate from an registered doctor stating that the donor's lack of capacity relating to the matter is likely to be permanent (section 13(10) Mental Capacity Act). To obtain this certificate, the donee must first get the donor's capacity formally assessed.

CONCLUSION

A person cannot be forced to undergo a formal assessment of mental capacity. If the person lacks the capacity to decide whether to have the assessment or not, he can be taken for the assessment. This is acceptable as long as the decision to have the assessment is made in his best interests. An individual claiming another person lacks mental capacity must be able to show that it is more likely than not that the person lacks capacity to make the specific decision.

The person to be assessed or the individual who is seeking the formal assessment for the person must complete Part A of the Mental Capacity Assessment form by providing personal, medical and other information about the person to be assessed. The accredited GP [or specialist] will complete Part B of the form.

REFERENCE

Kua EH & Goh LG (2004) Psychiatric Interview. In: Psychiatry for Doctors (3rd edition). Editors: Kua EH, Tan CH, Ko SM, Fones C., Armour Singapore.

LEARNING POINTS

- **Mental capacity is assessed according to the ability of a person to make a specific decision at the time the decision needs to be made.**
 - **Assessment should be carried out when a person's capacity is in doubt and he has to make a particular decision.**
 - **A professional, such as a lawyer, or the donee of an LPA may seek a formal assessment where they have doubts about the person's capacity and the decision the person has to make is an important one.**
 - **A person is unable to make a decision when he cannot do one or more of these things in relation to making a specific decision at the time it need to be made -- understand the information, remember the information, weigh up the information, and communicate the decision,**
 - **Assessments can be informal or formal.**
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