

Enablement in dementia

Understanding and applying the law

The Mental Capacity Act (MCA) 2005: Key points

1. Assume people can make their own decisions unless proven otherwise - don't make assumptions just because they have dementia or because of their age.
2. Make every effort to support people to make the decision for themselves.
3. Everyone has the right to make unwise or unusual decisions – this, in itself, does not mean a person lacks capacity.
4. Capacity to make decisions fluctuates; decisions about capacity are specific to that time and that decision – lacking capacity is not a permanent label.
5. A person lacks the mental capacity to make their own decision if one or more of the following conditions are evidenced (it is for us to demonstrate that someone lacks capacity, not for them to demonstrate they have it).
They are unable to:
 - a. understand information given to them
 - b. retain that information long enough to be able to make the decision
 - c. weigh up the information available to make the decision
 - d. communicate their decision (by talking, sign language, muscle movement, blinking or squeezing a hand).
6. If someone is assessed as lacking capacity, we must make the decision in their best interests (drawing on their personal history, preferences and the sorts of decisions they have typically made in the past) and continue to involve them as much as possible in the process.¹
7. If this decision involves a 'Deprivation of Liberty', for example in which a person will be subject to continuous supervision and control and/or is not free to leave a place², and the person is in a care home or hospital, the local authority must authorise this under the DoLS (Deprivation of Liberty Standards). We must always aim to find the least restrictive option.



Further reading

- > *The MCA 2005: Code of Practice* - www.gov.uk/government/uploads/system/uploads/attachment_data/file/224660/Mental_Capacity_Act_code_of_practice.pdf
- > SCIE's MCA online directory - www.scie.org.uk/mca-directory

¹This is also reflected in the UN's *Convention on the Rights of Persons with Disabilities*

²Definition set out by the Supreme Court Judgement of March 2014: www.gov.uk/government/uploads/system/uploads/attachment_data/file/300106/DH_Note_re_Supreme_Court_DoLS_Judgment.pdf

The law in practice

The House of Lords (2014) pointed out that the *Mental Capacity Act* has ‘suffered from a lack of awareness and a lack of understanding...The empowering ethos has not been delivered’.

The courts usually rule in favour of the least restrictive option for a person. In *Cardiff County Council v Mrs Peggy Ross* (2011) the Court of Protection considered whether Mrs Ross (who was living in a care home with a diagnosis of dementia) had the capacity to decide to go on a 16-day cruise with her partner of twenty years. The care home was reluctant to let Peggy go and had delayed making a decision. The couple had been on many cruises together and professionals felt she understood that she was due to go on a cruise and what this meant but that she ‘cannot retain this information and does not have the ability to weigh up this information to make an informed decision’.

The judge ruled that Mrs Ross should go on the cruise: “Even if others believe that to decide to go on this cruise is an unwise decision, that in itself is insufficient to demonstrate that she is unable to make the decision.”

Professionals had focused too much on what might go wrong and not taken sufficient account of the potential benefits of going on this cruise, for what might be the last time. He felt Mrs Ross was sufficiently familiar with the layout and routine of cruising and that her partner was well-placed to care for her while aboard.

He concluded that:

“...this is not a life-changing decision, or a choice between two evils or a decision over which an elderly person without Mrs Ross’s impairment would be likely to agonise. It is a choice of whether to go on holiday or not, in familiar circumstances, with one’s companion of the past two decades.”

The full judgement is available at: www.mentalhealthlaw.co.uk/media/Cardiff_Council_v_Peggy_Ross_%282011%29_COP_28-10-11_12063905.pdf