

Mental Capacity update

With the Mental Capacity Act (MCA) 2005 now in force, now is a good time to examine the main features of the Act and the associated Code of Practice.

The scope of the Act

This legislation is relevant whenever there is an issue about the ability of anyone aged 16 or over to make a decision. It is worth bearing in mind that:

- In this context, "decision" embraces everything from deciding whether or not to go shopping, to deciding on such matters as making a Will or undergoing medical treatment
- The Act will need to be taken into account by those who provide services in care homes, hospices, private hospitals and NHS establishments
- A person is assumed to have capacity, unless and until the contrary is established

Keystones of the arch

The fundamental principles are set out in Sections 1 - 4 of the Act. These principles include the following:

1. A person is assumed to have capacity in the first instance
2. "All practicable steps" must be taken to help a person to make a decision
3. An unwise decision does not equate to lack of capacity
4. The "least restrictive" way should be found to achieve the purpose for which a decision is required

The way in which these principles can be applied in practice is explained in the MCA Code of Practice, which contains illustrations of situations in which those responsible for the welfare of others will be expected to act.

For example, the Code of Practice discusses in Chapter 2 Sections 2.6 - 2.8, the question of assisting a person to make a decision with the help of a sign-language interpreter,

providing information in a form accessible to the person concerned or, over a longer term, helping a person to acquire new skills which will enable him or her to make decisions for themselves.

Is a formal assessment of capacity necessary?

If by "formal assessment" we mean the obtaining of an opinion from a medically qualified person, the answer is - by no means always. The Act imposes what may be called a functional test i.e. it poses the question whether an individual has the capacity to make "a particular decision at the time when it needs to be made" (Code of Practice, Chapter 4).

It follows that the question of whether a person has capacity depends on:

- The nature of the decision to be taken
- Whether that decision needs to be made now, or can be deferred until later on

It also follows that whether or not a formal assessment of capacity is required depends in large measure on the nature of the decision which a person is being asked to make. It would be absurd to expect a private individual to go to the lengths of asking a doctor or nurse every morning to determine whether his/her elderly aunt could decide to have cereal or porridge for breakfast.

On the other hand the more complex a decision, and the more serious the consequences of that decision for the person concerned, the more carefully we need to proceed. Paid carers and healthcare staff are much more likely to need to be able to show that they have taken into account the Code of Practice.

How is capacity assessed?

This is usefully summarised in Chapter 4 of the Code of Practice, which demonstrates the functional nature of the test. In particular, a person might lack capacity to make a decision about one issue (e.g. whether or not to make a Will) but not about another (e.g. whether to have cereal or porridge for breakfast).

There may need to be particular care in the case of younger adults. The Family Law Reform Act 1969 presumes legal capacity in relation to medical treatment, on the part of any person over the age of 16. The MCA provides that a person lacks capacity if he

cannot make a decision because of an impairment or disturbance in the functioning of his mind or brain. As already explained, a person is nevertheless not to be treated as unable to decide merely because he makes an unwise decision.

What then if we are dealing with an articulate 27 year old who decides not to eat? This person may be putting his or her life at risk, but the same might equally be said of mountaineers and potholers. In the case of the 27 year old there will need to be a formal assessment to allow time for consideration to be given to the need for an application to be made to the Court of Protection. An assessment in these circumstances must apply the tests set out in Section 3 of the MCA, i.e.

- a. Can the person understand the information relevant to the decision
- b. Can he or she retain that information
- c. Can he or she use or weigh that information, as part of the decision making progress

The Court of Protection

The MCA expands the role of this Court, which will now decide on matters affecting healthcare and welfare issues, as well as property and financial affairs.

The Court of Protection will, therefore, have the jurisdiction to make a declaration or decision concerning (for example) the nutrition of a 27 year old who refuses to eat, if it is satisfied that this refusal can be attributed to lack of mental capacity.

Rules concerning applications to, and procedures in, the new Court were laid in Parliament in July of this year. These rules came into force on 1 October 2007, and number just over 200 in all. Their overriding objective is to "enable the Court to deal with a case justly", which includes "ensuring that the parties are on an equal footing" (Rule 3).

Court permission is required to make an application to the Court in all but certain specified cases (Rule 50). In many cases, an assessment of capacity must be filed with the "permission form". Any person with sufficient interest may apply to the Court to be joined in as a party (Rule 73). In general, Court of Protection hearings will be in private. Provision is made for expert evidence to be heard in appropriate circumstances (Rule 123).

Lasting Powers of Attorney

From the point of view of healthcare staff and all those who have paid responsibilities to look after the health and welfare of persons who lack capacity, the most significant innovation in the Act is the creation of Lasting Powers of Attorney which enable the donee of a power to make decisions regarding a person's welfare. It will be recalled that the existing Enduring Powers of Attorney can only deal with financial affairs.

As a result, the donee of a Lasting Power of Attorney may be duly authorised to make decisions about consenting to medical treatment on behalf of a person who no longer has the capacity to do this for himself.

Training materials

The Department of Health has issued five sets of training materials for use by those employed in the relevant areas of Primary Care Trusts, Acute Hospitals, residential care homes and in the community care sector. These publications can be accessed on the Department of Health website.

Future developments

Perhaps somewhat surprisingly, the 2005 Act is already going to be subject to amendment as a result of the passing of the Mental Health Act 2007. The principal amendment concerns the codification of what has come to be known as the Bournemouth Guidelines.

Conclusion

The Mental Capacity Act does much to confirm the law relating to those who lack mental capacity, as it had already been developed at common law. Perhaps the most significant changes relate to the new Court of Protection and also to the introduction of Lasting Powers of Attorney. It would be particularly important to ensure that in those cases where persons who lack capacity are being dealt with in the institutional setting, professionally employed staff are able to demonstrate that they have paid due regard to the Act and to the Code of Practice.

**For more information, please contact
Simon Tait on 0115 976 6559 (stait@brownejacobson.com)
or Richard Slack on 0115 976 6590 (rslack@brownejacobson.com)**