
**Effective Expert Evidence
to Prove Capacity:
Legal and Clinical Perspectives**

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Mental Capacity Act 2005

...empower people to make decisions for themselves wherever possible, and protect people who lack capacity by providing a flexible framework that places individuals at the very heart of the decision-making process. It will ensure that they participate as much as possible in any decisions made on their behalf, and that these are made in their best interests.

Lord Falconer, Foreword to the Code of Practice

The Five Principles – Section 1 of the Act:

- *A person must be assumed to have capacity unless it is established that he lacks capacity.*
 - *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.*
 - *A person is not to be treated as unable to make a decision merely because he makes an unwise decision.*
 - *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.*
 - *Before the act is done, or 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 less restrictive of the person's rights and freedom of action.*
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The Diagnostic Test – Section 2 of the 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.

Functional Test – Section 3 of the Act:

a person is unable to make a decision for himself if he is unable –

- to understand the information relevant to the decision,*
- to retain that information,*
- to use or weigh that information as part of the process of making the decision, or*
- to communicate his decision (whether by talking, using sign language or any other means).*

An inability to satisfy any one of the 4 conditions would render the person incapable.

Best Interests – Section 4 of the Act:

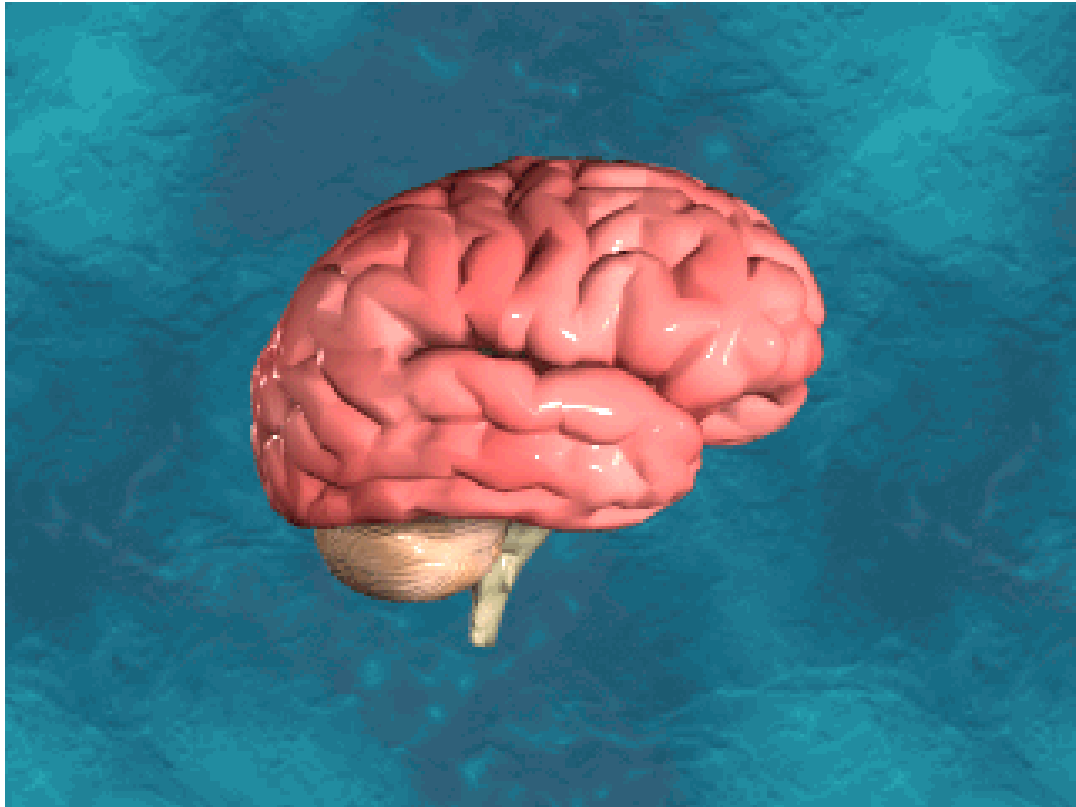
The decision maker must:

- *consider whether it is likely that the person will at some time have capacity in relation to the matter in question;*
 - *permit and encourage the person to participate as fully as possible in any act done for him and any decision affecting him;*
 - *consider the beliefs and values that would be likely to influence his decision if he had capacity, and the other factors that he would be likely to consider if he were able to do so;*
 - *take into account the views of others (e.g. those named by the person, involved in their care, any deputy or donee)*
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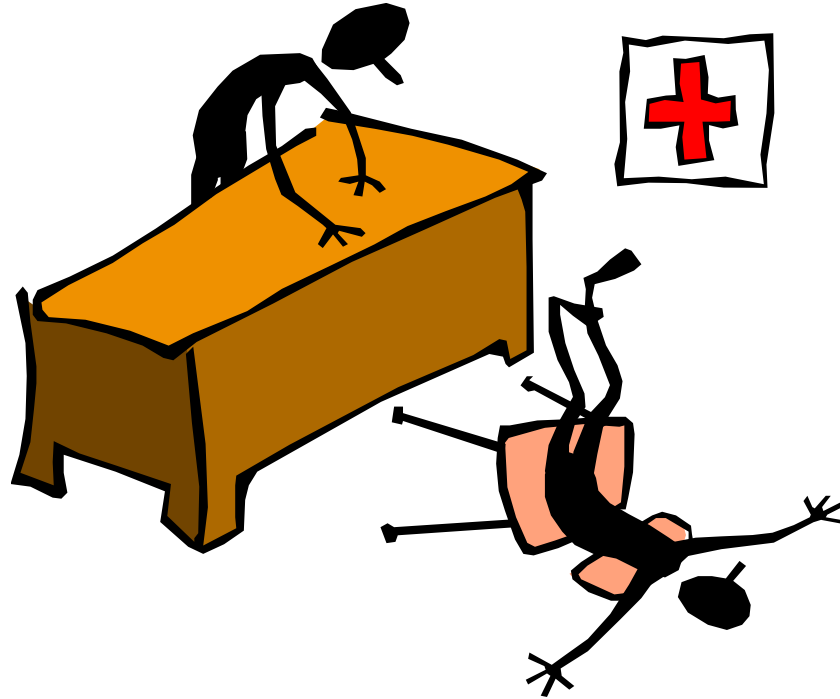
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Dr Bruce Scheepers

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RISK



VULNERABILITY



5 Key Principles of MCA 2005:

1. A presumption of capacity
 2. The rights of the individual to receive support to make their own decisions
 3. The right to make what might be seen as an eccentric or unwise decision
 4. Best interest
 5. Least restrictive of basic rights and freedoms
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2 Stage Test:

Clinical Test:

1. Is there some disturbance affecting the way the person's mind or brain works?

Evidentiary Test:

2. Does the impairment mean that the person is unable to make the decision in question at the time it needs to be made?
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Conclusions:

- Effective communication between lawyer and experts
 - Clear instructions
 - Pertinent and detailed evidence
 - Family
 - Friends
 - Carers
 - Colleagues
 - If have concerns, express them
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