Mental Capacity Assessment in complex scenarios involving substance use

Barney Wells and Helen Kelsall, Enabling Assessment Service London.

Introduction

Background to request

Reservations!

Who we are

Sam’s questions:

“What to do when people will not engage with mental capacity assessment on account of challenging behaviour?”

“What to do when you have assessed mental capacity around a specific issue, and have concerns, but the patient is then sent to A&E and is discharged with ‘has capacity’ written in their notes, and you feel they haven’t been assessed properly ?”

“At what point would chronic severe addiction be judged to be effecting someone’s capacity? ”

Approach to Overall Goal of session

Brief consideration of background and history of MCA

Principles of MCA

Capacity Assessment

Best Interest Assessment

Mechanisms

Strategies

Background to Mental Capacity Act (MCA)

‘The existing law relating to decision-making on behalf of mentally incapacitated adults is fragmented, complex and in many respects is out of date. There is no coherent concept of their status, and there are many gaps where the law provides no effective mechanism for resolving problems’

(Law Commission 1991)

“The Mental Capacity Act (MCA) was introduced to ensure that when someone is, temporarily or more permanently, unable to make a particular decision for themselves at a particular time appropriate substitute decision making processes are used.

The central theme is for substitute decision-makers to make the decision that the person would have made themselves if they were able to do so, rather than making a decision that seems sensible to the assessor, or least risky”

MCA - Overview

A functional test of capacity

“Best Interest” approach to decision making

Powers of Attorneys / Advance decisions

Court of Protection

Independent Mental Capacity Advocates

MCA - The Principles 1

- 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.

MCA –The Principles 2

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.

Mental Capacity 1

We shouldn’t make decisions on behalf of another adult unless the answer to both these questions is YES

1) Is someone unable to make the decision in question at the time it needs to be made?

2) Is this inability as a result of an impairment of, or disturbance in the functioning of the mind or brain?

If you believe that this might be the case then further assessment is indicated

The Decision

What is the decision is that the person needs to make?

The MCA relates to a person's ability to make a particular decision at a particular time, and capacity should never be considered as an overall concept.

Blanket statements such as 'this person lacks capacity', and it doesn't relate to a specific decision at a specific time are legally incorrect.

You can have capacity to make one decision but not another.

Mental Capacity 2

1) Does the person have an understanding of the key points of the decision that needs to be made, and why they need to make it?

Do they understand the likely consequences of making the decision, or not

making it?

2) Is the person able to use and weigh the information relevant to the decision?

3) Is the person able to retain the information relevant to the decision for long enough to make the

decision?

4) Is the person able to communicate the decision by any means?

Best Interest Assessment

If you carry out a capacity assessment, and conclude that someone does not have capacity to make a particular decision, you MUST then proceed to carry out a Best Interests assessment.

This is a process to ensure that the substitute decision-makers, makes the

decision that the person would have made themselves if they were able to do so, rather than making a decision that seems sensible to the assessor, or least risky.

Best interest checklist – 1

1. Encourage the person to take part as much as possible
2. Identify all relevant circumstances
3. Find out the person's past and present wishes, feelings, beliefs, values and any other factors they would be likely to consider if they had capacity, including any advanced statements
4. Do not make assumptions based on the person's age, appearance, condition or behaviour
5. Assess whether the person might regain capacity

Best interest checklist – 2

6. If the decision concerns life-sustaining treatment then the best interests decision should not be motivated by the desire to bring about the person's death

7. Consult with others where it is practical and appropriate to do so. This includes anyone previously named as someone to be consulted; anyone engaged in caring for the person; close friends, relatives or others with an interest in the person's welfare; any attorney and any Deputy appointed by the Court.

8. Avoid restricting the person's rights by using the least restrictive option

9. Abide by any valid advanced decision

Deprivation of Liberty Safeguards (DoLS)

In some circs MCA allows restraint and restrictions

Extra safeguards are needed if the restrictions and restraint used will deprive a person of their liberty. These are called the Deprivation of Liberty Safeguards.

DoLS can only be used in a care home or hospital. In other settings the Court of Protection can authorise a deprivation of liberty.

Care homes or hospitals must ask a local authority if they can deprive a person of their liberty. This is called requesting a standard authorisation.

There are six assessments which have to take place before a standard authorisation can be given.

Urgent authorisations can be granted by the managing authority itself. There is a form that they have to complete and send to the supervisory body.

DoLS

Introduced in 2007 –

In 2014 **Supreme Court** made reference to the 'acid test' to see whether a person is being deprived of their liberty, which consisted of two questions:

Is the person subject to continuous supervision and control? *and*

Is the person free to leave? – with the focus, being not on whether a person seems to be wanting to leave, but on how those who support them would react if they did want to leave.

- Led to v significant increase in number of applications

Liberty Protection Safeguards

Mental Capacity (Amendment) Bill passed by Parliament in Feb 2019, not yet enacted

Simpler process

? At the expense of safeguards?

Saving Lives Project

Screening tools and guidance for street outreach teams

Followed Recommendations of a SCR following the death of a rough sleeper in Lambeth in 2010

THE MENTAL CAPACITY ACT SCREENING TOOL

1

What is the decision the person you are concerned about needs to make, and why do they need to make this decision now?

Decision he needs to make

- Whether to accept shelter

Why now

- placing himself at immediate risk through sleeping rough with insufficient bedding … temperature is due to remain below freezing over coming days
- appears to have significant physical health problems that he is not addressing … may be a hernia

2

Is there reason to believe that the person may lack mental capacity to make the decision due to a known/suspected mental health problem, learning disability, brain injury, dementia or intoxication?

Yes, on balance of probability

Specifically when asked about his welfare, he is unable to maintain eye contact and his speech becomes broken

In relation to other issues he has made odd statements that suggest paranoia – for example he has said that a local café (in an area he is new to) had poisoned his sister

He is drinking alcohol heavily in a way that suggests dependence (although concerning statements above have been made at times when not acutely intoxicated)

He has had past psychiatric assessment which whilst not conclusive found him to be guarded

3

Has sufficient information been given to the person to help them understand the decision?

Yes – he has been offered more than one form of shelter, with details about their location.

He has also had the risks of remaining sleeping outside explained to him at length.

4

Have all practicable steps been taken to support the person to make the decision?

Yes, given the urgent time-frame. Outreach team has been visiting him at different times of day, on a daily basis over past two weeks. It has been possible to establish some rapport, more with some workers than others. He has been offered transport and accompaniment to shelters.

We have left him written information too.

5

Is it felt that the person is free from external pressures to make their decision?

To the best of our knowledge.

He appears to be on his own almost all the time, those people who do interact with him appear to be expressing concern for his welfare.

It is not clear that anyone else would benefit whether or not he accepts shelter

6

Can the person understand in simple language the information involved in making the decision?

English is Darren's first language – he appears to understand the information given to him but this is difficult to be certain about this as he struggles to give answers.

In relation to other matters, of less immediate concern, he is entirely fluent.

7

Can they retain the information long enough to make the decision?

There is nothing to suggest or indicate that he has difficulties retaining the information necessary.
He recognizes different workers and refers back to past conversations.

8

Can they use or weigh up the information to make the decision?

No. He does not appear able to weigh up the information necessary to make the decision.
He does appear to understand and acknowledge the concerns which we have expressed about his immediate situation, but there appears to be something (possibly paranoid ideas?) that is stopping him from being able to accept this help.

9

Can they communicate their decision (whether by talking, using sign language or any other means)?

Probably. He does appear able to indicate that he does not want to go to, or visit even, shelter – albeit that he cannot express his reasons for this.

10

The decision: does the person on the balance of probabilities have the capacity to make the specific decision at this particular time?

No. We feel that some form of mental impairment – likely to be paranoid beliefs – is stopping him from being able to weigh up the information needed to make a decision about accepting accommodation.

11

How did you decide what was in the person's best interests?

We believe that the immediate risks to his well-being, life even, of remaining in his current situation makes it in his best interest to be

a) inside
b) have his mental health more fully assessed.

At this time it has not been possible to ascertain what his previous (when capacitous in relation to this decisions) wishes would have been – however there are no indications that he would have “chosen” to place himself at the current level of danger.

We have not been able to identify any family members or carers to consult with despite efforts.

We are not basing our views on his age, appearance, condition or behaviour and have made significant efforts to identify his own wishes.

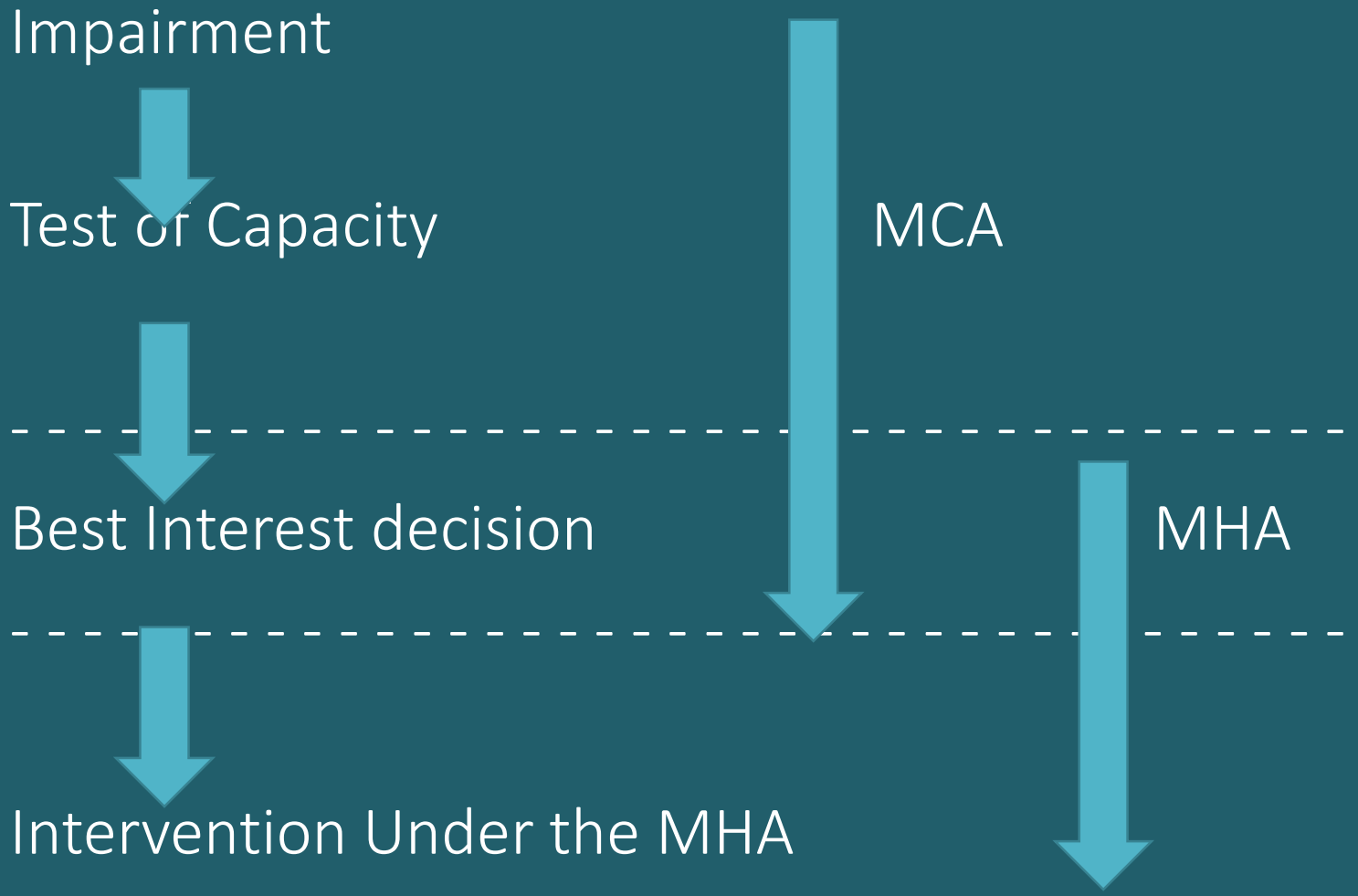
The course of action we are seeking, further, assertive assment, is the least restrictive option available.

12

What action should be taken in the person's best interests?

We would request that mental health professionals formally assess Darren and consider whether the grounds are met for him to be subject to admission to hospital (either under the Mental Health Act 1983 or the Mental Capacity Act 2005).

MCA Tool:-Interaction with MHA



Case Law from Court of Protection - DM v Y City Council

Judge: Bodey J

Citation: [2017] EWCOP 13

Summary

Mr DM was a 69 year old man who had a long history of alcoholism and a longstanding diagnosis of Korsakoff's syndrome. He neglected himself to a significant degree necessitating admission to hospital and was discharged to a 'dry' care home, apparently with his agreement. By the time of the proceedings he had been residing in a care home for 5 years without access to alcohol. For the previous 2 years he had been subject to 24 hour one-to-one supervision and was not allowed to access the community when he chose, after an incident when he purchased alcohol. DM had no relatives and was reported to have only one friend, another resident of the care home. DM wished to leave the care home and to consume alcohol and brought proceedings challenging his deprivation of liberty under s.21A MCA 2005.

Bodey J decided that it was not in DM's best interests to move to another care home where the consumption of alcohol was permitted, despite this being DM's expressed wish and his acceptance of the risk that it would shorten his life, noting that '*everybody has to die sometime*'. There was medical evidence that if DM resumed drinking he would become very unwell, as he had advanced liver disease, and had a life expectancy of about 7 years if not drinking and 3 years if drinking even a relatively modest amount. DM had no recollection of the events that had led to his admission to the care home.

DM v Y City Council 2

The court's decision was described as 'finely balanced' and the judge admitted that on first reading the papers his view was that DM should be allowed to move to a care home where he could consume alcohol. In the end, the judge concluded that DM should remain in the care home for a number of reasons:

It was not clear that DM would be happy in a new care home as his alcohol consumption would not be unlimited, and he would suffer a faster decline in his mental and physical health.

Even though DM had a compulsive wish to drink, when he had been taken to visit the alternative care home, he said that he didn't know if he wanted to move there and would need to live there for a month or so before deciding. This suggested his wish for drink was not as strong as might have been thought.

DM would lose his only friendship if he moved and it was far from certain that if DM changed his mind, he could return to the same placement.

The judge also concluded there was therefore no benefit in a trial period in an alternative home as this would just give DM a renewed taste for alcohol and it would be cruel to expect him to revert to a dry environment if the trial failed.

Bodey J concluded his judgment by noting that DM would not welcome the decision and saying that the transcript of his decision should be made available so that it could be considered in the event that DM brought a further s21A challenge because his continued residence at the care home was causing him real ongoing frustration and unhappiness.

DM v Y City Council 3

Comment

This decision is an example of a relatively common scenario that arises in the Court of Protection in respect of people with long histories of alcohol misuse. It is perhaps unsurprising that the judge did not consider DM's wishes determinative given the evidence of serious harm to his mental health, as well as his physical health, if he resumed drinking, meaning that the assertion that acceding to DM's wishes would make him happy was too simplistic.

Whatever one's views of this decision, comparison of the reasoning in this case with that of the Court of Appeal in the RB case demonstrates just how far we have come since 2014 as regards engagement with the principle that constructing a best interests decision starts with the individual.

RB v Brighton & Hove Council 1

Citation: [2014] EWCA Civ 561

Summary: In June 2007 RB sustained a serious brain injury in an accident. He was treated for eight months in hospital and then transferred to a care home, S House. In 2011 RB ceased participating in rehabilitation programmes and proposed to leave S House. The staff at S House considered that RB was not capable of independent living. Because of his physical and mental disabilities he was likely to (a) resume his former chaotic lifestyle, including using alcohol to excess and (b) to suffer serious or fatal injuries in consequence.

Initial decision – Judge accepted that although RB's wish to consume alcohol pre-dated his brain injury, he was unable to weigh up information to make a decision because of his brain injury, and was therefore in a different position to a non-brain injured alcoholic. It was in his best interests to remain in the care home despite his objections.

RB 2

This was appealed on the grounds that:

RB's inability to control his drinking was the same now as it was before the accident. RB's brain injury is not the cause of his propensity to injure himself through excessive drinking. Furthermore the judge erred in applying s.3(1) MCA 2005: the third of the specified skills, namely using and weighing information, does not and cannot be expected to come into operation when an alcoholic is considering whether to have a drink.

Reliance was placed upon the fact that RB preferred S House to alternative accommodation which was offered at a place called V, and RB had capacity to make that decision.

As a separate strand of argument it was pointed out that by 2013 RB had ceased participating in rehabilitation at S House. Therefore the "care and treatment" referred to in the mental capacity requirement could only be day to day personal care. RB was aware that he needed that. He had capacity to decide that he wished to receive that in a flat, rather than at S House.

RB 3

But

The Court of Appeal rejected RB's case, holding that:

"70. The decisions which RB wishes to make require a process of using and weighing up relevant information. On the basis of the expert evidence and of the district judge's findings of fact, RB is not capable of carrying out that mental process. The difficulties which RB has in using or weighing information and making consequent decisions accord closely with the situation described in paragraphs 4.21 and 4.22 of the Code of Practice. RB is unable to appreciate and weigh up the risks which he will run if he resumes his former way of life and goes out on drinking bouts. Therefore, applying MCA section 3(1)(c), RB does not have capacity to make this decision.

The Court of Appeal went on to hold that all appropriate steps had been taken to assist RB to make a capacitous decision, and that it was clearly in his best interests to remain deprived of his liberty in the care home despite his objections.