

Understanding mental capacity



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Introduction and guidance

Introduction and guidance

This free badged course, *Understanding mental capacity*, lasts eight weeks with approximately three hours' study time each week. You can work through the course at your own pace, so if you have more time one week there is no problem with pushing on to complete a further study session.

You'll start the course by looking at what mental capacity – and the lack of it – means. You will be introduced to various groups of people who are more likely to lack mental capacity, but you will also learn why it is relevant to everyone. You will look at what can be done to help someone to make a decision themselves and the principles and steps that enable people to judge, fairly, whether someone has capacity or not. You will be introduced to the legislation in the UK and will see how it supports and protects people who may lack capacity.

In the latter half of the course, you look more closely at mental capacity in relation to three groups: children and young people, people with disabilities and older people. You finish by reviewing what you have learnt and identifying if and how you would like to take the subject further.

As part of the course, you will undertake a number of quizzes, of which Weeks 4 and 8 will provide you with an opportunity to earn a badge to demonstrate your skills. You can read more on how to study the course, and about badges, in the next sections.

After completing this course, you should be able to:

- explain what is meant by mental capacity
- apply your knowledge about mental capacity to different scenarios and outline how to support and/or assess capacity for decision making in each case
- outline what is involved in a mental capacity assessment
- identify what you would like to do next in relation to mental capacity in your personal life and/or career.

Moving around the course

In the 'Summary' at the end of each week, you will find a link to the next week. If at any time you want to return to the start of the course, click on 'Course content'. From here you can navigate to any part of the course. Alternatively, use the week links at the top of every page of the course.

It's also good practice, if you access a link from within a course page (including links to quizzes), to open it in a new window or tab. That way you can easily return to where you've come from without having to use the back button in your browser. You can do this

by holding down the 'CTRL' key (or CMD on a Mac) and left clicking the mouse button; or right click and 'open in new tab'.

What is a badged course?

While studying *Understanding mental capacity* you have the option to work towards gaining a digital badge.

Badged courses are a key part of The Open University's mission *to promote the educational well-being of the community*. The courses also provide another way of helping you to progress from informal to formal learning.

To complete a course you need to be able to find about 24 hours of study time, over a period of about eight weeks. However, it is possible to study them at any time, and at a pace to suit you.

Badged courses are all available on The Open University's [OpenLearn](#) website and do not cost anything to study. They differ from Open University courses because you do not receive support from a tutor. But you do get useful feedback from the interactive quizzes.

What is a badge?

Digital badges are a new way of demonstrating online that you have gained a skill. Schools, colleges and universities are working with employers and other organisations to develop open badges that help learners gain recognition for their skills, and support employers to identify the right candidate for a job.

Badges demonstrate your work and achievement on the course. You can share your achievement with friends, family and employers, and on social media. Badges are a great motivator, helping you to reach the end of the course. Gaining a badge often boosts confidence in the skills and abilities that underpin successful study. So, completing this course should encourage you to think about taking other courses.



Getting a badge is straightforward! Here's what you have to do:

- read each week of the course
- score 50% or more in the two badge quizzes in Week 4 and Week 8.

For all the quizzes, you can have three attempts at most of the questions (for true or false type questions you usually get only one attempt). If you get the answer right first time you will get more marks than for a correct answer the second or third time. Therefore, please be aware that for the two badge quizzes it is possible to get all the questions right but not score 50% and be eligible for the badge on that attempt. If one of your answers is incorrect you will often receive helpful feedback and suggestions about how to work out the correct answer.

For the badge quizzes, if you're not successful in getting 50% the first time, after 24 hours you can attempt the whole quiz, and come back as many times as you like.

We hope that as many people as possible will gain an Open University badge – so you should see getting a badge as an opportunity to reflect on what you have learned rather than as a test.

If you need more guidance on getting a badge and what you can do with it, take a look at the [OpenLearn FAQs](#). When you gain your badge you will receive an email to notify you and you will be able to view and manage all your badges in [My OpenLearn](#) within 24 hours of completing the criteria to gain a badge.

[Get started with Week 1.](#)

Week 1: What is mental capacity?

Introduction

Welcome to Week 1 of the free badged course *Understanding mental capacity*. You may be interested in this course because you want to support a family member or a friend, or because you volunteer in a care setting, or because aspects of your work require you to understand it. You may not think about mental capacity in terms of its relevance to you personally. You may even feel rather daunted by the term 'mental capacity' as it can sound complicated and legalistic.

Mental capacity is simply the ability of a person to make decisions for themselves. Such a decision might be one that is taken daily, like what to have for breakfast, or one that concerns something more significant, like where to live. Where this ability is absent a person is said to lack capacity and may need help to make decisions.

One of the main themes running through this course is the idea that all adults need to understand what mental capacity means and its importance in their own lives.

Watch the animation below which illustrates this point.

Video content is not available in this format.



mental capacity



applies to us all...

There are differences between nations in the United Kingdom (UK) in how the law on capacity has come about and it would not be easy to produce a short course that covers all these variations or the reasons behind them. However, there are many points of comparison and it is useful to consider why the differences exist and what they tell us.

You begin this course by finding out what is meant by mental capacity. You will explore the definitions that exist and examine why understanding capacity is important and for whom. You will also consider why this is a contemporary important issue.

By the end of this week you should be able to:

- define mental capacity
- explain why understanding mental capacity is important and for whom
- describe mental capacity in terms of how it can change and fluctuate over time.

Before you start, The Open University would really appreciate a few minutes of your time to tell us about yourself and your expectations of the course. Your input will help to further improve the online learning experience. If you'd like to help, and if you haven't done so already, please fill in this [optional survey](#).

1 What is mental capacity?

Mental capacity is not just a concept that is important for people using social and healthcare services. They are in need of health- or social care for reasons which may also mean they need support with decision making. Mental capacity is relevant to everyone else too. All of us are likely to need care when we are older. Many of us will be diagnosed with dementia and will find our ability to make decisions for ourselves declines. Even before old age, accidents and unforeseen illnesses can occur that can reduce our mental capacity. Life is unpredictable. Making sure we understand the implications of not having mental capacity while we have it can make a big difference to our lives and to those around us if we lose it.

Activity 1 What does mental capacity mean?

Allow about 15 minutes

Search online to find different definitions of mental capacity. Try to find a medical definition and a legal one, and copy and paste the definitions into the text box below. Then consider the similarities and differences between the two definitions. Identify words that are similar and different in the table below:

Similar words	Different words
<input type="text" value="Provide your answer..."/>	<input type="text" value="Provide your answer..."/>
<input type="text" value="Provide your answer..."/>	

Now try to compose your own definition of mental capacity. This may be difficult at this stage but you can return to it at the end of the course and see if your thinking has changed.

Provide your answer...

Comment

Following are three example definitions of mental capacity, a dictionary definition, a medical definition and a legal definition. You may have found something like this.

Your capacity for something is your capacity to do it, or the amount of it you are able to do (Collins dictionary) – physical, financial, emotional, sensory - the technical facility, etc.

The power to hold, retain or contain, the ability to absorb (online medical dictionary)

Legal – the ability, capability or fitness to do something – a legal right, power, or competency to perform some act – an ability to comprehend both the nature and consequences of an act (online legal dictionary)

When you looked at the definitions and filled in the table you may have noted that these vary in the language that is used. For instance the dictionary definition refers to the extent to which a person is able to do something and also it includes physical as well as mental ability. The medical definition on the other hand refers more specifically to a person's capacity to understand information and to retain this information. The legal definition meanwhile refers primarily to a person's rights, competence and understanding.

A useful definition of mental capacity which encapsulates its key features is:

Mental capacity is the ability to make a particular decision or to take a particular action by any person for themselves at the time the decision or action needs to be taken.

1.1 Three points about mental capacity

The following three points about mental capacity are particularly important and form the basis of this course:

- Mental capacity is a matter that relates to everyone, not just people with a disability or mental impairment.
- Mental capacity depends on the ability of the person and can change with time.
- Mental capacity, or the extent to which a person may lack it, involves an assessment and judgement of their ability to make a particular decision.

For the rest of this week you will consider the first two points.

1.2 Mental capacity and organisations: differences and similarities

A number of agencies offer advice and support to people who may lack mental capacity and to those who care for them.

Activity 2 Organisations and their understanding of mental capacity

Allow about 30 minutes

Go to the websites of the three organisations listed below and:

- try to find out what the organisation's role is
- type 'mental capacity' into the organisation's search box and find out how they explain it and what advice they give. Is this different between the three organisations? If so, does it relate to the people they support?

Use the table below to record what you find.

- [Alzheimer's Society](#)
- [Carers UK](#)
- [Sense](#)

Organisation and its role	How it defines mental capacity and the information it provides
<i>Provide your answer...</i>	<i>Provide your answer...</i>
<i>Provide your answer...</i>	<i>Provide your answer...</i>
<i>Provide your answer...</i>	<i>Provide your answer...</i>

Comment

You may have noticed that organisations choose slightly different forms of words when describing their role. Agencies such as the Alzheimer's Society apply the ideas and principles of mental capacity to the people they support, i.e. those with Alzheimer's disease and the people who care for them. The organisation Sense provides support and information, including on mental capacity, for people who are deaf and blind. Carers UK support a range of people who care, including children.

You might have noticed that all organisations use similar definitions of mental capacity and they all refer to the legislation that applies to this area. The legislation is both important and useful, as it supports and protects people who lack capacity and outlines who can make decisions on their behalf and how. The underpinning principles of the

legislation provide support for determining whether someone has capacity and for the process of making decisions on their behalf if they do not.

In England and Wales, the legislation is the Mental Capacity Act 2005. Scotland and Northern Ireland have different legislation. You will look at these and the differences between them in Week 3.

So far, you have looked at three different organisations and their role in supporting people who may lack mental capacity. You are now going to explore another two organisations.

Activity 3 Who is concerned with mental capacity?

Allow about 20 minutes

Take a look through the list below to get a sense of the range of organisations and people for whom mental capacity is relevant. Then choose two organisations, perhaps one that you are not familiar with and one that you were surprised to see in this list.

Visit to their websites using the links below and search for 'mental capacity'. See how they define it and what sort of information they offer. Use the table below to record your notes if you would find that useful. These notes will help you when you reflect on the learning you have done this week at the end of the course.

- [Rethink Mental Illness](#)
- [MIND](#)
- [Mental Health Foundation](#)
- [The Mental Welfare Commission for Scotland](#)
- [Mencap](#)
- [The Royal College of Psychiatrists](#)
- [The British Association of Social Workers](#)
- [Skills for Care](#)
- [Police](#)
- [Compassion in Dying](#)
- [Shelter](#)
- [Action on Elder Abuse](#)
- [Foundation for People with Learning Disabilities](#)

Organisation and its role	How it defines mental capacity and the information it provides
<i>Provide your answer...</i>	<i>Provide your answer...</i>
<i>Provide your answer...</i>	<i>Provide your answer...</i>

Comment

To compare two examples, the police deal with law enforcement and their language is quite technical, focusing on what the law does and does not allow police officers to do. On the other hand, campaigning agencies such as the Mental Health Foundation

undertake formal research into mental capacity and produce academic publications with a view to influencing government policy.

Now that you've seen which organisations are concerned with mental capacity, you'll move on to think about who is affected by mental capacity issues.

2 Who and how many lack mental capacity?

Mental capacity problems can affect many different sorts of people.

Activity 4 Who might lack mental capacity?

Allow about 5 minutes

In the text box below, make a list of people you think are most likely to lack mental capacity. Think about people you know, or have seen on television, or have read about in newspaper articles. They might lack mental capacity permanently or temporarily.

Provide your answer...

Comment

Your list might include:

- older people who have dementia
- adults and children with learning disabilities
- people who are using health and social care services
- people with a mental health illness
- people with eating disorders
- people who have had a stroke
- people with temporary loss of capacity through intoxication
- people with brain injuries.

However, understanding mental capacity is important for all of us as any of us, and our friends and family, may lack capacity in the future.

So how many people might lack mental capacity for some decisions? You look now at the numbers of people in some of the categories listed above.

People with dementia

At the time of writing (August 2017), there were an estimated 850,000 people with dementia in the UK (Alzheimer's Research UK, 2017). This is similar to the number of ceramic poppies that were installed in the Tower of London in 2014 to represent the number of British military fatalities in World War One.



Figure 1 Tower of London Poppies art installation by Cummins and Piper (2014)

See the NHS Choices page [About dementia](#) for more information on dementia.

People with learning disabilities

It has been estimated that just over a million people in England (2% of the population) have a learning disability. The numbers known to learning disability services are much smaller: an estimated quarter of a million people. (Figures taken from Public Health England, 2015.)

People with alcohol and drug problems

More than 9 million people in England drink more than the recommended daily amount (Health and Social Care Information Centre, 2017). In 2014 there were 8,697 alcohol related deaths in the UK (Health and Social Care Information Centre, 2017). People in this group are more likely to have impaired mental capacity because of resulting mental health issues, the temporary lack of capacity when drunk and the effect that severe addiction/craving has on decision making.

People who have suffered brain injury

Brain injury can occur at any age and from a number of causes.

People with mental health needs

Mental ill-health affects people in the UK and globally. Problems range from anxiety and depression to hearing voices and psychoses.

One in 50 people suffer from bi-polar disorder, and one in 100 from psychotic disorder (NHS Digital, 2014).

People in these groups may all have reduced mental capacity. Two million people in England and Wales are estimated to lack capacity (SCIE, 2016). But who else is affected as a result?

2.1 Who else is affected?

Alongside people who may lack mental capacity are those who are affected indirectly: people who live with and care for them, neighbours, and workers in shops, banks and solicitors' offices. They all need to be aware of the impact that a lack of mental capacity can have. As well as family and friends who offer informal care and support, some people have a **formal** role in responding. Who are they?

Activity 5 Formal support

Allow about 5 minutes

Take a look at the images in Figure 2. Who might they represent and why might they need to respond to a lack of mental capacity? Write your response in the box below.



Figure 2 Healthcare professionals in various settings

Provide your answer...

Comment

Professional people in many different roles need to understand what is meant by mental capacity. These include:

- staff in adult community care services
- hospital workers
- health visitors
- occupational therapists
- criminal justice workers
- people working with children
- general practitioners
- solicitors.

Some of these professionals have a role in the assessment of mental capacity to which you will return in Week 4.

You now conclude Week 1 by exploring the importance and impact of time.

3 How does time affect mental capacity?

Mental capacity is not static. People's ability to make decisions can fluctuate and is also affected by social constructions especially those relating to age.



Figure 3 Time, and more specifically age, is a consideration when analysing mental capacity

Activity 6 The impact of time

Allow about 10 minutes

Think about these questions and make notes in the boxes provided.

1. Think back to when you were a child. At what age were you considered old enough to make decisions for yourself? Did this age differ depending on the decision being made? Who helped you make decisions and why?

Provide your answer...

2. Think of families you know with children, either from when you were a child or that you have come to know as an adult. In what circumstances was the decision making different and why? Think about things like choice of food, religious observance, relationships and education.

Provide your answer...

Comment

Mental capacity is the ability to make one's own decisions. The extent to which children are allowed to make decisions for themselves is determined partly by their age and partly by their cultural and social environment. For instance, a parent may wish their child to follow a certain religion and bring them up to follow certain beliefs and practices relating to, for example, food, clothes and relationships. Other decisions may be driven by parental preferences; a parent who is vegetarian may also wish that their child does not eat meat. Parents may also decide which school their child goes to and which friends their child associates with.

You will explore the assessment of mental capacity in children in Week 5, but thinking about parental decision making is helpful in setting mental capacity in context more generally. What is it that prompts a parent to make a decision on behalf of their child? Is it the age of the child and the type of decision? For example, if a parent does not want their child to access social media online, they may decide not to purchase a device for their child until they reach a certain age. When and why does it stop being a parental decision only?

These are questions that do not always have set guidance and differ according to individual circumstances.

Please note the Age of Legal Capacity (Scotland) Act 1991 states:

The general ceiling for legal capacity at 16 years in s.1 of the Age of Legal Capacity (Scotland) Act 1991 has exceptions in s.2 e.g. allowing transactions 'commonly entered into' such as purchase of a bus ticket on "terms which are not unreasonable' and more specific instances such as a child over 12 years being afforded testamentary capacity. Capacity increases with a child's age (along with a corresponding reduction in parental rights and responsibilities). Under s.3 of the 1991 Act young people up to the age of 21 can have any prejudicial transaction entered into between 16 and 18 years of age set aside (in recognition of their contractual inexperience and possible vulnerability).

3.1 Mental capacity can fluctuate

In Week 1 so far, you have learned about the definition of mental capacity and have started to think about who is affected by it, both directly and indirectly. Mental capacity is however not a static matter. People's ability to make particular decision one day but not the next, and can then see their mental capacity return the day after. Why is this?

Activity 7 Reasons for fluctuating capacity

Allow 5 minutes

There are several reasons why a person's capacity might fluctuate. Look again at your list of people who you considered might be affected by mental capacity that you completed in [Activity 4](#) and try to think about how this capacity might change and for what reason. Add these thoughts to your list as this will help you in the quizzes.

People affected by mental capacity

Display of content entered previously

How capacity might change

Provide your answer...

Comment

The reasons why a person's mental capacity might fluctuate can include the stress of the situation which the person is in, the effects of medication and availability and access to clear information about the decision that has to be made.

This week's quiz

Check what you've learned this week by doing the end-of-week quiz.

Open the quiz in a new window or tab then come back here when you've finished.

[Week 1 quiz](#)

Summary

The main learning points of this week are that:

- Mental capacity is defined as the ability to make decisions.
- Mental capacity relates to a particular decision, at a particular time. The decision can be an everyday matter such as what to wear or a more significant matter such as where to live.
- When a person is judged to be unable to make a decision for themselves they are said to lack mental capacity.
- Everyone needs to understand the concept of mental capacity because even if you and your loved ones have mental capacity at the moment, it's quite possible this will change.
- People may lack mental capacity due to dementia, mental health problems, learning disabilities, brain injuries, substance misuse, illness or treatment of illness.
- A person's mental capacity can fluctuate from day to day.

You should now be able to:

- define mental capacity
- explain why understanding mental capacity is important and for whom
- describe mental capacity in terms of time and decision making.

Next week, you look at the central theme of mental capacity: decision making.

Week 2: Decisions, decisions

Introduction

How would it feel if you were unable to make decisions for yourself?



Figure 1 For some, making decisions is not an easy thing

We make decisions all the time without realising how important it is to us: relatively minor, everyday ones like what to wear in the morning or sometimes more significant, life-changing ones like where to live, or decisions between these two extremes. Where a person's mental capacity is in doubt, their ability to make a decision has to be given careful consideration before someone else makes the decision on their behalf. The nature and type of decision that is required usually requires intervention. Whatever the nature of the decision, some kind of support or intervention is required. This can be relatively straightforward and involve just the person and people closest to them or it can involve more formal assessment procedures and safeguards. The principle followed throughout is that, wherever possible, the person should be enabled to make their own decision.

By the end of this week you will be able to:

- describe different types of decision and the ones that no one else can make
- explain how decisions are made and what helps people make decisions
- explain what is meant by, and who is, the decision maker when a person lacks mental capacity or has fluctuating mental capacity
- describe in simple terms how decision makers decide
- describe in simple terms what is meant by an unwise decision.

1 Types of decisions

We all make decisions every day of our lives. Some of these decisions are relatively minor ones, others are bigger. Most of us are able to make these decisions by ourselves, although we may seek further information and advice for more important or complex ones. Decisions are made in different contexts. Some cannot be reversed; some decisions involve choosing between alternative courses of action; some are made in times of uncertainty.

Activity 1 What is a decision?

Allow about 20 minutes

Think about a normal day in your life. In the text box below, list some of the decisions you make during the day. Did you need help in making the decision and if so, what kind of help?

Provide your answer...

Comment

Decisions relating to a normal day in your life may have included those about what to eat or which clothes to wear. These decisions are what are known as *everyday* ones. Other decisions concerning your adult life include where you should live and what medical treatment you should seek. These are clearly different, *bigger* decisions.

You may feel able to make everyday decisions fairly easily; you might just need to know what the weather will be like, for example. For bigger decisions, you probably need to gather information over a longer period and discuss it with a friend or relative, before then relying on your own judgement to make the decision. In other words, you are able to, or have the mental capacity to, make a decision for yourself, albeit with additional information. This course is primarily concerned with people who no longer have this capacity or whose capacity fluctuates.

1.1 Exceptions

When a person lacks mental capacity, i.e. is unable to make a decision for themselves, or when their mental capacity fluctuates, other people can share in the decision making or make the decision on their behalf. You will explore how this works in a moment. Before you do this, it is important to note that there are certain decisions that cannot be made by another person on behalf of someone who lacks mental capacity. These can be governed by legislation. They include:

- getting married or entering into a civil partnership
- consenting to sex
- placing a child for adoption
- voting at an election.

1.2 How do we make decisions?

It is easy to take our ability to make a decision for granted, but a number of factors underlie it: information, confidence, experience and the knowledge of likely consequences of different courses of action.

In the video below, a man with learning disabilities discusses how he makes decisions about money with a social worker. Their discussion illustrates how someone in these circumstances can be supported to manage their own money.

Video content is not available in this format.



Interview with a social worker: making decisions about money

Box 1 lists some of the factors that enable someone to make decisions for themselves. Support should be provided in all these areas to ensure that all possible steps are taken to enable the person to make decisions for themselves.

Box 1 Factors that enable decision making

- Impartial advice: no bad influences or inappropriate pressure
- Information from trusted sources
- Ability to realistically appraise the options available
- An understanding of the consequences
- An understanding of the context
- Appraisal of prior decision making by self and others
- Previous experience of good and successful decision making
- The opportunity to put a decision into action.

A person should be given all the help they can, in an encouraging environment, to make decisions for themselves before they are judged as being unable to do so. But what if they make a decision that seems eccentric or even unwise? Should someone else make the decision for them?

2 Unwise decisions

Does making an unwise decision mean that you lack capacity? We can all think of examples of decisions of our own which, in retrospect, were unwise. But people may think of someone else's decision as 'unwise' for a number of reasons: because it makes them feel uncomfortable, or puts that person's welfare at risk, or just because that person is too old, mentally impaired, too young or commercially inexperienced. The video below illustrates the tensions that can arise when someone who is being cared for decides to do something that seems unwise to their carer.

Video content is not available in this format.

[A video about 'unwise decisions'](#)



The video also illustrates a key point about unwise decisions: people have the right to make decisions that others may consider unwise and should not automatically be judged as lacking the capacity to make decisions as a result.

Activity 2 Ironic and light-hearted unwise decisions

Allow about 5 minutes

In 2016 a social media hashtag #unwisedecisions was used to mark National Mental Capacity Action day. Take a look at some of the 'unwise decisions' in the feed [#unwisedecisions](#). They are light-hearted and range from eating the wrong sort of food, to not taking exercise, to getting a tattoo, to wearing the wrong kind of clothes in a particular social situation.

Some unwise decisions have very serious consequences. What if an alcoholic is judged to have capacity but decides to drink himself to death and refuse all treatment? Or an anorexic woman has signed an advanced directive to refuse treatment and wants to die?

In these circumstances it becomes difficult to know what best to do, especially when people have conflicting attitudes and values. It can be very difficult and painful for friends and family. You will now explore examples of these cases.

Activity 3 Unwise decisions that have serious consequences

Allow about 10 minutes

Read the three newspaper articles below that have appeared in *The Guardian* and which relate to the right to die, contraception and addiction. Consider the range of decisions that can arise when someone's capacity is in doubt and the difficulties with decisions that, for those not making the decision, seem unwise and harmful.

- Right to die: [‘As hard as it gets’: the case of anorexic E and the right to die](#)
- Contraception: [Mental disability, state power and the capacity to decide](#)
- Addiction: [How far can the NHS go to support addicts who won’t help themselves?](#)

Comment

An ‘unwise’ decision can have very serious consequences for the person making it. However, they should not be stopped from making that decision just because it seems unwise to the person helping them decide, and nor should they automatically be judged to be lacking capacity because of that unwise decision.

But what happens when a person lacks mental capacity or when their mental capacity fluctuates? Who is the ‘decision maker’ then?

3 Who is the decision maker?

The answer to the question 'Who is the decision maker?' can be expressed as a continuum as illustrated in the figure below.

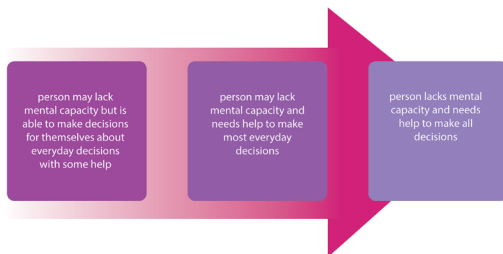


Figure 2 Who is the decision maker continuum

On one hand there are people who can make decisions for themselves given the right help. In other cases, more formal processes are needed. We consider these cases now.

3.1 Shared decision making

Shared decision making occurs when someone needs help with making some or all decisions. It concerns the continuous involvement of an individual other than the person whose decision it is. In terms of the decision making as it is being considered in this course, the person should be included as much as possible whether or not they have capacity. As far as possible, the decisions of a person who lacks mental capacity should be shared decisions, rather than decisions made on their behalf by someone else.

Box 2 gives examples of people who may be involved in helping someone who lacks mental capacity to make decisions. The primary decision maker is the person who lacks mental capacity. Usually, the more complex the decision, the greater the need to involve people with expertise in mental capacity, who are in the lower half of the list, although this is not a requirement.

Box 2 People who may be decision makers

- The individual with or without capacity
- Next of kin – if they have capacity
- Members of the wider family
- Friends
- Members of community groups, churches, social organisations
- Employers
- Care staff
- Care home staff
- Social workers and social work managers
- GPs and medical staff, dental staff

- Police
- Lawyers
- The Court of Protection

3.2 Who decides on your behalf?

Imagine you lack mental capacity. Perhaps you can recall what it felt like when you drank too much alcohol or you came around from an anaesthetic. Try to remember how this made you feel. Now try this activity about Doris.

Activity 3 Helping Doris

Allow about 20 minutes



Figure 3 Doris

Doris is an 89-year-old woman, living alone. You are a relative who lives some distance away and you're concerned that Doris is losing her memory, not looking after herself properly and is no longer able to make decisions for herself.

Visit the websites of two local authorities, one of your local area and one a different UK nation from your own. By looking at two different websites you get the opportunity to search a website that may not be as familiar to you. Find out:

- how you would report concern about Doris to social services
- what role you have as her relative.

Does the information that you have found help you to know if a decision maker is needed for Doris and if so, who might that be and for what decision?

Make notes in the box below.

Provide your answer...

If you have found it difficult to locate any required information you may wish to look at some other tools provided here:

[Social Care Institute for Excellence: Mental capacity assessment tools](#)

Comment

From the information you have found when searching the different websites you may have noticed that local authorities do not all use the same process for enabling you to

access the information. You may also have noticed that there will be different referral processes and not each authority asks the same information of you. This exercise may have been straightforward or you may have found this frustrating. Imagine what this might be like for Doris if she does not have a relative or someone else able to make these enquiries on her behalf.

3.3 How is a decision made on behalf of someone else?

According to an idea first put forward by a community learning disability nurse, Jenny White, there are at least seven principles that should be followed by someone who is making a decision on behalf of a person who lacks mental capacity (Mencap, n.d.). These are listed in Table 1 along with a mnemonic by which they can be remembered.

Table 1 The seven factors

R	Consider whether the person can R egain capacity
E	E ncourage and E nable participation of the adult throughout the decision
F	Take into account the adult's past and current F eelings about this decision
L	Is L ife-sustaining treatment an issue?
E	Show E qual consideration and non-discrimination
C	Consider all relevant C ircumstances
T	Take the views of others into account

3.4 Other types of decisions and supports

Other decision-making processes exist, the most common of which are: best interests decisions, advance decisions, appointees, deputies and lasting powers of attorney. A brief description of each is provided in Table 2.

Table 2 Some of the different types of decision making processes and roles

Best interests decision	A best interests decision is, as the name suggests, made in the person's best interests. One person's best interests may differ from another's. Best interests apply to decisions about finance, personal welfare and health care. A best interests assessor should be the most appropriate person involved in that decision except where a lasting power of attorney is in place.
Advance decision	An advance decision is a refusal of specific medical treatment in certain circumstances. It can be made by anyone over 18 who has the mental capacity to make the decision.
Appointee	If an adult does not have property or savings, their finances can be managed by someone called an appointee. Or, in Scotland a court appointed guardian under a guardianship order.

Deputy

A deputy is appointed by the Court of Protection and has legal authority to make particular decisions for someone who lacks capacity. This can be for a one-off decision or to take ongoing responsibility for making decisions on a person's behalf. A deputy is necessary for property and for complex financial matters and may be necessary for personal welfare where a series of decisions is needed over time or where family members and health and social care services disagree.

Scottish law provides for short-term or occasional (and thus generally less invasive) **interventions** by anyone with an interest in the property, financial affairs or personal welfare of the adult with incapacity. There are safeguards. For example the views of the '**named person**' The **Public Guardian** also supervises any person operating under the authority of an intervention order.

Lasting power of attorney

A person who has capacity can choose someone ahead of time to be their attorney with a lasting power of attorney. This person can then make decisions on their behalf should they lose capacity in the future. This could be decisions about their property and affairs or about their health and welfare, or both.

Independent mental capacity advocate

Someone who has been specially trained to represent and support people who are not able to make certain decisions and do not have family or friends who are able to speak for them. They provide information to make sure the decision is made in the person's best interests.

One further decision-maker is that of the independent mental capacity advocate. The video below illustrates what an independent mental capacity advocate does. It shows how one advocate decided how best to proceed when someone he was supporting was having difficulty eating.

Video content is not available in this format.

[The role of the Independent Mental Capacity Advocate](#)



In summary, there are various decision-making processes that support and protect people who may lack capacity to make certain decisions.

This week's quiz

Check what you've learned this week by doing the end-of-week quiz.

Open the quiz in a new window or tab then come back here when you've finished.

[Week 2 quiz](#)

Summary

The key learning points of this week are:

- Mental capacity relates to decisions that can be everyday decisions like what to wear or more significant decisions like where to live.
- There are ways of helping people to make decisions for themselves.
- People have the right to make decisions that other people might think unwise, but this does not mean they lack the capacity to make a decision.

You should now be able to:

- describe different types of decision and the ones that no one else can make
- explain how decisions are made and what helps people make decisions
- explain what is meant by, and who is, the decision maker when a person lacks mental capacity or has fluctuating mental capacity
- describe in simple terms how decision makers decide
- describe in simple terms what is meant by an unwise decision.

Week 3: Mental capacity and the law

Introduction

Mental capacity has a different legal framework in each UK nation. Despite the differences – such as the names and dates of the acts – each is underpinned by similar principles. This week you explore these principles and how they apply in real-life situations. To begin, you look at the historical background and how each of the acts developed.

By the end of this week you should be able to:

- name the mental capacity law that applies to each nation of the UK
- explain the principles of mental capacity as set out in law regardless of the UK nation to which they apply
- describe in some detail each of the main principles of mental capacity
- explain how the principles apply to real-life situations.

1 How the law developed

The legislation that applies specifically to mental capacity is relatively recent. Previously these matters were dealt with through various pieces of legislation and guidance rather than through specific mental capacity legislation.

The law relating to capacity has come about at different times in each of the UK nations. Each act has a slightly different title and date. The first of the acts to be implemented was in Scotland. It is called the Adults with Incapacity (Scotland) Act 2000 and came into force in that year. In England and Wales, the title changed while under development to refer to 'capacity' rather than 'incapacity'; the Mental Capacity Act 2005 was implemented in 2007. The most recent act is the Mental Capacity Act (Northern Ireland) 2016.

Differences in implementation are partly a result of [devolution](#). However, one of the most important differences is that in England, Wales and Scotland a separate mental health act has been retained and a new capacity act added, while in Northern Ireland the acts relating to both have been joined.

The following timeline provides a summary of the major developments in the law regarding mental capacity since the 1990s in England and Wales, Scotland and Northern Ireland. You will be introduced to key points in the timeline as you continue working through this course.

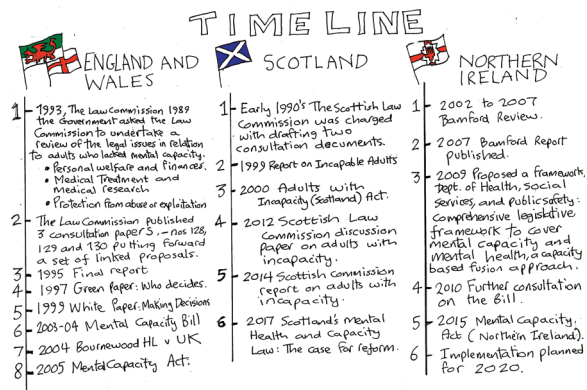


Figure 1 Major developments in the law regarding mental capacity since the 1990s in England and Wales, Scotland and Northern Ireland.

2 Mental capacity principles

You now look at the principles that underpin mental capacity legislation in each of the UK nations. What are they and how can they be applied in real life?

It is important to understand the principles upon which each of the acts are based and to begin to understand where these may differ but, as importantly, where they are the same.

The first act that you will consider is that which applies in England and Wales.

2.1 Mental capacity England and Wales

The main purpose of the Mental Capacity Act 2005 is to provide a legal framework for adults to make decisions about their lives. It is designed to protect and empower vulnerable people who lack capacity. It applies to all adults aged 16 and over living in England and Wales, although some parts only apply to adults when they are 18.



Mental Capacity Act 2005

Figure 2 The cover of the Mental Capacity Act 2005

The act echoes what you have learned in Weeks 1 and 2:

- Adults have a right to make their own decisions wherever possible.
- If someone is unable to make decisions, others may act for them.
- The act enables all adults to plan ahead for such a time when they may lack capacity and decisions need to be taken for them.

The video below features Baroness Finlay, chair of the Mental Capacity Forum, talking about the five principles of the Mental Capacity Act 2005. They are also summarised in Box 1 below. These principles are very similar to those in the law in Scotland and Northern Ireland.

Video content is not available in this format.

Mental Capacity Act principles



Box 1 The five key principles of the Mental Capacity Act 2005

Principle 1: A presumption of capacity

Every adult has the right to make his or her own decisions and must be assumed to have capacity to do so unless it is proved otherwise. This means that you cannot assume that someone cannot make a decision for themselves just because they have a particular medical condition or disability.

Principle 2: Individuals being supported to make their own decisions

A person must be given all practicable help before anyone treats them as not being able to make their own decisions. This means you should make every effort to encourage and support people to make the decision for themselves. If lack of capacity is established, it is still important that you involve the person as far as possible in making decisions.

Principle 3: Unwise decisions

People have the right to make decisions that others might regard as unwise or eccentric. You cannot treat someone as lacking capacity for this reason. Everyone has their own values, beliefs and preferences which may not be the same as those of other people.

Principle 4: Best interests

Anything done for or on behalf of a person who lacks mental capacity must be done in their best interests.

Principle 5: Less restrictive option

Someone making a decision or acting on behalf of a person who lacks capacity must consider whether it is possible to decide or act in a way that would interfere less with the person's rights and freedoms of action, or whether there is a need to decide or act at all. Any intervention should be weighed up in the particular circumstances of the case.

(Source: SCIE, 2016)

2.2 Mental capacity in Scotland

The principles of the legislation in Scotland and Northern Ireland are set out below. As you read through them, bear in mind two points that also apply to the Mental Capacity Act for England and Wales:

1. Respect for personal autonomy. This means that if a person has the mental capacity to make a decision, including decisions on their health, welfare and finances, this decision should be respected.
2. All adults are assumed to be capable of making decisions. This assumption can only be reversed on evidence of a lack of capacity. Adults do not have to prove capacity or have it certified. Rather, it falls to the person questioning a person's capacity to establish lack of it.



Adults with Incapacity (Scotland) Act 2000
2000 asp 4

Figure 3 Cover of Adults with Incapacity (Scotland) Act 2000

Section 1 of the Incapacity (Scotland) Act 2000 contains a set of general principles that apply to the whole act.

Box 2 Principles of the Incapacity (Scotland) Act 2000

Principle 1: Benefit

There shall be no intervention in the affairs of an adult unless the person responsible for authorising or effecting the intervention is satisfied that the intervention will benefit the adult and that such benefit cannot reasonably be achieved without the intervention [s.1(2)].

Principle 2: Minimum intervention

Where it is determined that an intervention [in the affairs of an adult under or in pursuance of the Act] is to be made, such intervention shall be the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention [s.1(3)].

Principle 3: Take account of the wishes of the adult

In determining if an intervention is to be made and, if so, what intervention is to be made, account shall be taken of –

... the present and past wishes and feelings of the adult so far as they can be ascertained by any means of communication, whether human or by mechanical aid (whether of an interpretative nature or otherwise) appropriate to the adult [s.1(4)(a)].

Principle 4: Consultation with relevant others

In determining if an intervention is to be made and, if so, what intervention is to be made, account shall be taken of–

the views of the nearest relative and the primary carer of the adult
the views of–

- i. any guardian, continuing attorney or welfare attorney of the adult who has powers relating to the proposed intervention
- ii. any person whom the sheriff has directed should be consulted,

the views of any other person [including the named person [1.(4)(b)]] appearing to the person responsible for authorising or effecting the intervention to have an interest in the welfare of the adult or in the proposed intervention, where these views have been made known to the person responsible, in so far as it is reasonable and practicable to do so [s.1(4)(b)-(d)].

Principle 5: Encourage the adult to exercise whatever skills he or she has

Any guardian, continuing attorney, welfare attorney or manager of an establishment exercising functions under this Act ... shall, in so far as it is reasonable and practicable to do so, encourage the adult to exercise whatever skills he [or she] has concerning property, financial affairs or personal welfare, as the case may be [s.1(5)].

Source: Adults with Incapacity (Scotland) Act 2000

2.3 Mental capacity in Northern Ireland

Mental health legislation in Northern Ireland is the most recent to be published.



Mental Capacity Act (Northern Ireland) 2016

Figure 4 Cover of Mental Capacity Act (Northern Ireland) 2016

The principles of the Mental Capacity Act (Northern Ireland) 2016 are set out in Box 3.

Box 3 Principles of the Mental Capacity Act (Northern Ireland) 2016

Principles: capacity

1.—(1) The principles in subsections (2) to (5) must be complied with where for any purpose of this Act a determination falls to be made of whether a person who is 16 or over lacks capacity in relation to a matter.

(2) The person is not to be treated as lacking that capacity unless it is established that the person lacks capacity in relation to the matter within the meaning given by section 3.

(3) Whether the person is, or is not, able to make a decision for himself or herself about the matter—

(a) is to be determined solely by reference to whether the person is or is not able to do the things mentioned in section 4(1)(a) to (d); and

(b) accordingly, is not to be determined merely on the basis of any condition that the person has, or any other characteristic of the person, which might lead others to make unjustified assumptions about his or her ability to make a decision.

(4) The person is not to be treated as unable to make a decision for himself or herself about the matter unless all practicable help and support to enable the person to make a decision about the matter have been given without success (see section 5).

(5) The person is not to be treated as unable to make a decision for himself or herself about the matter merely because the person makes an unwise decision.

(6) Nothing in subsections (1) to (5) removes any obligation that a person may be under in a particular situation to take steps to establish whether another person has capacity in relation to a matter.

Principle: best interests

2.—(1) The principle in subsection (2) applies where, under this Act—

(a) an act is done for or on behalf of a person who is 16 or over and lacks capacity in relation to whether the act should be done; or

(b) a decision is made for or on behalf of a person who is 16 or over and lacks capacity to make the decision.

(2) The act must be done, or the decision must be made, in the person's best interests.

(Source: Mental Capacity Act (Northern Ireland) 2016)

You will be exploring assessment of mental capacity in more detail in Week 4 but in this section you have also learned that in establishing whether someone lacks capacity, certain principles must be followed. Included amongst these are the following.

- All practicable help and support be provided for decision-making
- Making an unwise decision does not mean a person lacks capacity.
- No-one can be deemed to lack capacity on the basis of age, appearance, their condition or assumptions about behaviour.
- If a person is found to lack capacity to make a particular decision, even with support, the substitute decision maker needs to determine what is in the individual's best interests.

So, how are these principles applied in real life?

3 Applying the legal principles

To help people to apply the principles in the legislation, guidance was issued in the form of a Code of Practice. You will look at this now along with examples of real-life situations, and think about the influence of values and attitudes.

As you have learned in this week so far, each nation of the United Kingdom has its own mental capacity legislation, each accompanied by a Code of Practice. You will now learn what a Code of Practice is as it relates to England and Wales.

3.1 The Code of Practice

A Code of Practice is, in effect, a guide as to how an act should be applied in practice. It applies to everyone but is especially useful for professional staff who have a duty to follow it.

Lord Falconer, in his foreword to the Code of Practice that accompanied the Mental Capacity Act 2005, describes the act as:

a vitally important piece of legislation, and one that will make a real difference to the lives of people who may lack mental capacity.

(Department for Constitutional Affairs, 2013, Foreword)

Lord Falconer gave the following reasons for his statement, which also apply to the legislation in Scotland and Northern Ireland:

- It will **empower** people to make decisions for themselves wherever possible
- It will **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**
- It also allows people to **plan ahead** for a time in the future when they might lack the capacity to make decisions for themselves

(Department for Constitutional Affairs, 2013, Foreword)

In the next activity you consider how these principles are applied in practice.

Activity 1 Mental capacity law in practice

Allow about 20 minutes

Read the *Guardian* article ‘

[Experts say doctors over-keen on labels after woman died from refusing treatment](#)’.

Think about the following questions:

1. Consider the following principle from the Mental Capacity Act 2005 (England and Wales):

Principle 1: A presumption of capacity

Every adult has the right to make his or her own decisions and must be assumed to have capacity to do so unless it is proved otherwise. This applies to all adults whatever their ability or disability.

In the box below, answer the following questions:

- Do you think that the woman in this case had the right to make her own decision?
- Do you think that she had the capacity to do so?
- What did the judge decide? Do you agree?

Provide your answer...

2. Now remind yourself of the following principle:

Principle 3: Unwise decisions

Every adult has the right to make decisions that others might regard as unwise or eccentric. You cannot treat somebody as lacking capacity simply because you disagree with their decision.

In the text box below, answer the following questions:

- Do you think the woman in the article was making an unwise decision?
- How do your thoughts about her decision affect your assessment of her capacity?

Provide your answer...

Comment

Deciding whether a person has the capacity to make what others might think is an unwise decision is not an easy thing to do. In this case, you may have found yourself making a judgement about the woman's lifestyle and thinking about the consequences of her decision not just for herself but for her family. But when considering decisions that may be unwise, these feelings have to be put to one side. The important issue is that the person is empowered to make the decision. In this case, the woman's decision had serious consequences but she was nevertheless allowed to make it.

3.2 Values, attitudes and actions

In Week 2 you began to consider what impact people's values and attitudes can have on the actions people take either when making a decision, be that wise or unwise, and also the impact of any actions. Sometimes people's attitudes towards different lifestyles and behaviour can affect their views on whether someone should be allowed to make a particular decision. You end this week by thinking about values, attitudes and actions, and their importance for anyone dealing with mental capacity.

What do we mean by 'values' and 'attitudes'? Generally speaking a value is a belief about what is right and what is wrong. Some people also think of values in terms of what is important and what is unimportant. Mental capacity legislation is based on principles or, in

other words, principles, standards or qualities that should be cared about and should contribute to people's behaviour. Accepted values in society are usually supported by rules, mostly unwritten, about what is socially acceptable behaviour, both on a personal and an individual level.



Figure 5 Speech bubble of key words around our understanding of values, attitudes and actions

Activity 2 What are values?

Allow about 5 minutes

The figure above shows some examples of values. Identify the values you think you uphold, as well as those that go against what you believe in. Can you also identify any values that clash or contradict?

Make some notes in the box below.

Provide your answer...

Comment

Your personal values and attitudes can have an impact on your role in mental capacity. For example, they might affect your assumptions about what is best for a person who may lack mental capacity and your judgement about what is in their best interests, especially where they disagree. You may be trying to support someone who may lack capacity and whose values contradict yours. In such situations, it can be helpful to be aware of the values that you hold to be important.

Activity 3 What is important to you?

Allow about 10 minutes

Answer the questionnaire on personal values provided below.

It is best to do this fairly quickly without thinking about the statements too much, but if you want to spend more time on it – perhaps because the concept of thinking about values still feels strange – then do so. There are no right or wrong answers to these questions – it is designed merely to get you to reflect on your own values and what you hold important.

As you click through the questionnaire you will see longer lists of questions that fill the screen.

Interactive content is not available in this format.

Comment

The questionnaire enabled you to consider values that included:

- being the best and helping others to achieve
- caring and having compassion for others
- doing what is right and proper
- the importance of being part of a group or a community.

Based on your results, consider:

- how you might work alongside people whose values are different from your own
- what might happen if you are supporting someone who may lack capacity and who has different values to your own
- how your values might affect your assumptions about what is best for a person who may lack mental capacity and your judgement about what is in their best interests, especially where they disagree.

Values drive our actions

Thinking about how your values drive your actions will bring this week to a close. However, values are central to how matters relating to mental capacity are managed and you should keep them in mind as you continue with the rest of this course.

Some people think it is very important to help others, especially if they think they are in a vulnerable situation. Others think that getting involved is an intrusion on a person's privacy and that people who help are merely do-gooders, interfering where it may not be wanted. You may well have thought about these matters when you were looking at the images and also found yourself agreeing with some but not all.

As you learned in this section, actions that are driven by values and attitudes are complex and need to be robustly examined in matters that concern mental capacity. You will explore these in more depth in Weeks 5 to 7.

This week's quiz

Check what you've learned this week by doing the end-of-week quiz.

Open the quiz in a new window or tab then come back here when you've finished.

[Week 3 quiz](#)

Summary

The key learning points from this week are:

- England and Wales, Scotland and Northern Ireland have different legislation relating to mental capacity.
- All three acts are based on similar principles. Each act is a framework that enables decision making for those who lack mental capacity and that protects and empowers them to make decisions even when their decisions seem unwise to others.
- We need to be aware that people may have different values to our own and that our own values can affect how we view other people's mental capacity and decision making.

You should now be able to:

- name the mental capacity law that applies to each nation of the UK
- explain the principles of mental capacity as set out in law regardless of the UK nation to which they apply
- describe each of the main principles of mental capacity
- explain how the principles apply to real-life situations.

In summary, UK law lays out the principles relating to mental capacity, including those that should be followed when making decisions on someone's behalf. But who decides whether someone has mental capacity and on what basis? It is to the subject of mental capacity assessment that you now turn.

Week 4: Assessing mental capacity

Introduction

Before the mental capacity legislation, the assessment of whether a person had mental capacity and whether they could make their own decisions or would need another person to do so on their behalf was made by a professional, usually a doctor. This has now changed. The person who should do the assessment for everyday decisions is usually the adult most directly involved with the person at the time. This could be a family member or a paid carer. For bigger decisions such as those involving aspects of medical treatment, the doctor or other healthcare worker who will be providing that treatment is usually the assessor. This week, you undertake an assessment of mental capacity step by step through a case study. But first, how does a mental capacity assessment relate to other assessments in care settings?

By the end of this week you should be able to:

- explain what is meant by the assessment of mental capacity
- describe who undertakes an assessment of mental capacity
- describe the test for assessing mental capacity and how it is applied
- describe how an assessment might be undertaken.

1 Assessments in care

In care settings, assessment refers to the process of appraising someone's needs. This person may require help with daily living tasks, financial matters, health concerns, accommodation or relationship problems. An assessment is similar to finding the pieces of a jigsaw and fitting them together in a way that best suits the person being assessed.



Figure 1 Assessment in care settings is similar to finding the pieces of a jigsaw

Following the implementation of mental capacity legislation in all nations of the UK, all assessments have to take account of the person's mental capacity, whatever the type of assessment. These range from a care management assessment of need to the assessment of the needs of a child and their parent in a child protection situation or in a criminal justice setting. All assessments now need to screen for mental capacity.

1.1 Assessing mental capacity

There are a number of steps involved in a mental capacity assessment. These are shown in the box below.

Box 1 Five key steps to assessing mental capacity

1. **The starting point** – the principles of the presumption of capacity and respecting a person's entitlement to make unwise decisions with capacity are the starting point for any capacity assessment.
2. **Capacity is decision and time specific** – saying that someone lacks capacity is meaningless. You must ask yourself: "what is the specific decision that needs to be made at this point in time?" If you don't define this question before you start undertaking the assessment, the exercise will be pointless and may lead to the wrong outcome.
3. **Preparation** for capacity assessments – remember that a crucial step of assessing capacity is to prepare yourself for the assessment. Don't go in with a blank canvas.
4. **Take all practicable steps** – you have to ask yourself if there is something that you can do which might mean that an individual would be able to make the decision for themselves.
5. **Applying the test** – the MCA test for capacity has two aspects: the diagnostic element (that is, is there an impairment of, or a disturbance in the functioning of, the mind or brain?) and the functional element (is the person unable to make a decision because of the impairment?). Being unable to make a decision means

being unable to understand, retain or “use or weigh” information relevant to the decision, or to communicate their decision.

(Source: Valios, 2016)

Activity 1 Assessing mental capacity: the first four steps

Allow about 20 minutes

Watch the 'Assessing mental capacity' video.

Think through how you would apply steps 1 to 4 from the list in Box 1 as if you were doing an assessment of the man's mental capacity. (You first watched this video in Week 2 in relation to 'unwise' decisions.)

Video content is not available in this format.

[A video about 'unwise decisions'](#)



You may also wish to use any of the assessment documents that were introduced in Week 2, Activity 2, or use one of those provided on the [Mental Capacity assessment tools](#) page of the Social Care Institute for Excellence site. Work through the first four steps only at this point. You will return to the final step in the following activity.

Comment

When you were undertaking the assessment you may have noted that you:

- needed more information or felt uncomfortable balancing the wishes of the man with what you thought might be best.
- needed to protect the individual and could also empower him to make a decision despite the fact that you may have disagreed with it?
- thought that this was a relatively minor decision and making it may not have had too many severe consequences.

In fact, you may have crossed your mind that he actually gained a lot of enjoyment from the purchase of the lottery tickets. How difficult do you think this assessment would be if the situation had more serious consequences?

You now look at the fifth step in this list, which is the two-stage test for assessing mental capacity.

1.2 Applying the test for assessment of mental capacity

Before the implementation of mental capacity legislation, there was no specific clinical or legal procedure for assessing mental capacity.

Assessments, where they did take place, were based upon medical outcomes and diagnosis. Over the years, this method was increasingly replaced by what is known as a functional approach. However, for most health and social care workers and informal carers such as relatives and friends, formal guidelines did not exist. Meanwhile, the legal test that was usually applied was that contained within the case known as *Re C*, relating to a man with a diagnosis of schizophrenia who was deemed capable of making the decision to refuse the amputation of his gangrenous foot. The case is explained in Box 2.

Box 2 The case of *Re C* Adult and his refusal of medical treatment

The case: *Re C (Adult: Refusal of Medical Treatment)* [1994] 1 All E.R. 819

The judge in this case said that the test of capacity had three stages:

1. Does the patient comprehend and retain information?
2. Does the patient believe the information?
3. Does the patient weigh that information up, balancing risks and needs to arrive at a choice?

Even following the implementation of mental capacity legislation, it remains the case that there is no set procedure for the assessment of capacity. There are no specific forms that must be filled in, nor is there a certificate of incapacity (although in some cases in Scotland, general practitioners must complete a certificate). You will consider why this is shortly.

Nonetheless, a framework has been developed and this is known as the test of mental capacity.

1.3 The test for mental capacity

For situations where there may be reason to question a person's mental capacity to make a certain decision at a specific time, the Mental Capacity Act 2005 sets out a two-stage

test based on a combination of functional and diagnostic methods. The test is outlined in Box 3.

Box 3 The two-stage test of capacity

Stage 1: The diagnostic test of mental capacity

- Does the person have an impairment of, or disturbance in the functioning of the mind or brain (it does not matter if this is permanent or temporary)?

Stage 2: The functional test of mental capacity

- If the answer is yes, does it make the person unable to make the decision? This can be found out if, after all appropriate help and support to make the decision has been given to them, they cannot:
 - a. understand the information relevant to that decision
 - b. retain the information
 - c. use or weigh up that information
 - d. communicate their decision.

If any of these apply, the person lacks the mental capacity to make the decision.

The test of capacity involves a two-step process involving the diagnostic and the functional. It is also important to note that it is based on 'reasonable belief'. In other words, the assessment has to ascertain if it is more likely than not that the person lacks mental capacity.

Now that you've looked at *how* to assess capacity, the next question is: who should do it?

2 Who assesses?

There is no particular role with designated responsibility to undertake assessments of mental capacity, nor is there any legal requirement for assessments to be carried out by particular people. This remains the case despite the introduction of legislation and guidance. In practice, certain people are more likely to conduct mental capacity assessments than others, these can include social workers and doctors.



!Warning! not supported **Figure 2** There are no rules

Activity 2 There are no rules

Allow about 5 minutes

Why do you think there are no formal roles or procedures for assessing mental capacity? Write your thoughts in the text box below.

Provide your answer...

Comment

The reason there are no formal roles or procedures for assessing mental capacity in law is that the assessment process needs to be comprehensive in the decisions it may apply to, while at the same time practical in its application. The absence of such direction is meant to avoid 'blanket' assessments where a 'diagnosis' of lack of capacity could be applied to every decision.

Before the legislation, an assessment of capacity would have applied to both everyday and bigger decisions and perhaps only made by a doctor. Now, others such as a family carer can be involved. Capacity legislation covers all decisions, both the everyday decisions and more significant ones, and makes clear that the assessment of capacity must be in relation to a particular decision at a particular point in time. It is 'designed to empower those in health and social care to assess capacity themselves, rather than rely on expert testing' (SCIE, 2016).

2.1 What about more complex situations?

Where more complex or serious decisions need to be made, it may help to involve a professional with skills and experience in assessing mental capacity. They may be medical, financial or legal professionals. Their expertise tends to be very useful in deciding whether a person has capacity or not, including in diagnosing whether they have an impairment of or disturbance in the brain.

In making any decision on behalf of someone who lacks capacity, the best interests principle should be applied. This is that anything done for or on behalf of a person who lacks mental capacity must be done in their best interests.

For all circumstances a best interest checklist is provided, in this instance through the Mental Capacity Act for England and Wales, but this checklist is applicable in all the UK nations, see Box 4.

The list forms the basis of most mental capacity assessments.

Box 4 Best interests: a checklist

1. In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of—
 - b. the person's age or appearance, or
 - c. a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.
4. The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.
5. He must consider—
 - f. whether it is likely that the person will at some time have capacity in relation to the matter in question, and
 - g. if it appears likely that he will, when that is likely to be.
8. He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.
9. Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.
10. He must consider, so far as is reasonably ascertainable—
 - k. the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),
 - l. the beliefs and values that would be likely to influence his decision if he had capacity, and
 - m. the other factors that he would be likely to consider if he were able to do so.
14. He must take into account, if it is practicable and appropriate to consult them, the views of—
 - o. anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,
 - p. anyone engaged in caring for the person or interested in his welfare,
 - q. any donee of a lasting power of attorney granted by the person, and

- r. any deputy appointed for the person by the court, as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection(6).
- 19. The duties imposed by subsections (1) to (7) also apply in relation to the exercise of any powers which—
 - t. are exercisable under a lasting power of attorney, or
 - u. are exercisable by a person under this Act where he reasonably believes that another person lacks capacity.
- 22. In the case of an act done, or a decision made, by a person other than the court, there is sufficient compliance with this section if (having complied with the requirements of subsections (1) to (7)) he reasonably believes that what he does or decides is in the best interests of the person concerned.
- 23. “Life-sustaining treatment” means treatment which in the view of a person providing health care for the person concerned is necessary to sustain life.
- 24. “Relevant circumstances” are those—
 - y. of which the person making the determination is aware, and
 - z. which it would be reasonable to regard as relevant.

(Source: Mental Capacity Act 2005 c. 9 Part 1 Preliminary, Section 4)

3 Doing an assessment

The last section of this week provides an opportunity for you to observe a mental capacity assessment.

Activity 3 Assessing Roger's mental capacity

Allow about 30 minutes

You are now going to end Week 4 by taking a look at an assessment of Roger. You watched this video in Week 2, so you may want to just skim through it. This time, take note of how Tracey the social worker conducts the assessment and the skills she uses. Note also the environment in which the assessment takes place.

Make notes in the text box on how you think this helps her get a true picture of Roger's capacity to make decisions about money. Your notes will help you in this week's quiz.

Video content is not available in this format.

[Supporting Roger to manage money](#)



Comment

Tracey, the social worker in the film, demonstrated a number of skills:

- She involved Roger as much as she could. This added time to the interview.
- She planned the timing and the environment carefully.
- She assumed Roger had mental capacity throughout.
- She listened to what he was saying.
- It is likely that she reminded herself of the concept of reasonable belief.

The video shows a shortened version of what actually happened. It may be that in real-life situations the interview for assessing mental capacity happens on more than one occasion.

3.1 'Rules' for supporting and assessing

The so-called 'rules for assessing mental capacity' are summarised here:

1. Start by thinking I **can** make a decision.
2. Do **all** you can to **help** me make a decision.
3. You must **not** say I lack capacity just because my decisions seem unwise.
4. Use a **best interest checklist** for me if I can't make a decision.
5. Check the decision **does not** stop my freedom more than needed.

Activity 4 What does all this mean in practice?

Allow about 10 minutes

You will have perhaps noticed as you have learned about mental capacity, decision making and now the assessment of capacity that there are a number of issues that affect each stage. What do you notice about the rules provided above? Take a second look at these and, thinking about what you have learned so far make a note of three key things that occur to you.

Provide your issues in the following table:

Key issue one	Key issue two	Key issue three
<i>Provide your answer...</i>	<i>Provide your answer...</i>	<i>Provide your answer...</i>

When you have recorded your three issues, think about what this means when you need to deal with someone who lacks mental capacity and who may need your help in decision making.

There is one example provided in the table. Try to fill in two more.

Possible issue	What does this mean in practice?
Putting the person at the centre	Always remember to put the person first. The issue relates to and is about the individual.
<i>Provide your answer...</i>	<i>Provide your answer...</i>
<i>Provide your answer...</i>	<i>Provide your answer...</i>

Comment

A range of issues need to be taken into account at all stages of assessing and supporting someone who may lack mental capacity. These include:

- All adults are presumed to be able to make their own decisions unless they are judged as lacking the mental capacity to do so.
- Ensure that the primary consideration is that unless you can prove otherwise, the person can, with help, make their own decision.
- Try to understand what the person's preferences may be.
- Use language, other forms of communication and information that help the person understand the decision they are making and the risks and benefits of different outcomes.
- Try to put aside your own thoughts and feelings. If a person is making an unwise decision this does not mean that they lack capacity.

This week's quiz

Check what you've learned this week by doing the end-of-week quiz.

Open the quiz in a new window or tab then come back here when you've finished.

[Week 4 quiz](#)

Summary

Well done on reaching the end of Week 4!

So, what have you learned over the last four weeks? You now know that mental capacity is simply the ability to make decisions for yourself, and that the first three principles of mental capacity legislation say that regardless of a person's diagnosis or disability, they should be presumed to have mental capacity.

You also learned that as much support as possible should be given to a person to help them make a decision before it is decided that they lack the mental capacity to do so. These principles emphasise that assessment should be based on the *process* of decision making and not on the *content* of a decision.

You learned that what appears to be an unwise decision must not be taken as evidence that the person lacks mental capacity; nor should a person's age, appearance, condition or behaviour affect a judgement of their mental capacity.

Finally, you looked at how to assess mental capacity using the two-stage test and who can do this.

Over the next three weeks you look at three different types of people who may lack capacity.

You should now be able to:

- explain what is meant by the assessment of mental capacity
- describe who undertakes an assessment of mental capacity
- describe the test for assessing mental capacity and how it is applied
- describe how an assessment might be undertaken.

You are now half way through the course. The Open University would really appreciate your feedback and suggestions for future improvement in our optional [end-of-course survey](#), which you will also have an opportunity to complete at the end of Week 8. Participation will be completely confidential and we will not pass on your details to others.

Week 5: Children and young people

Introduction

Mental capacity is a complicated enough topic in relation to adults, for whom the presence or lack of capacity is often highly debatable. For children, however, and especially for young children, there is a general presumption of incapacity, not capacity. Of course, this evolves through childhood, but, as we all know, every child is different. While chronological age is important, it is not the only factor that determines whether decision making should be at the discretion of the parents or the children themselves. This week you explore these issues in greater depth.

By the end of this week you should be able to:

- describe how a child's presumed innate incapacity to make important decisions evolves through childhood to capacity
- explain when and how parental decision making may be shared with or delegated to 'competent' children
- explain how the age of 16 is an important threshold for asserting the legal presumption of capacity
- describe some of the difficulties and ambiguities relating to capacity for young people aged 16 and 17
- describe two examples of exceptional situations where the capacity of a child or young person may be especially compromised: child sexual exploitation and the interface with mental health services and law

1 Decisions, children and young people

Assessing mental capacity in children is undertaken routinely by parents, teachers, family members and a range of other people and professionals with whom the child may come into contact.



Figure 1 A young family

In this section you consider some of the areas of decision making for children where the presumption of capacity is made on the basis of age.

1.1 At what age is it legal?

The issue of mental capacity in children is complex. There is a natural and entirely appropriate acceptance in society that children have a different and usually more limited capacity to make safe and reliable decisions for themselves and others compared to adults. Their ability to make decisions depends on both their chronological age and level of development. Parents and carers therefore become used to making decisions on behalf of children.

The question of when a child's mental capacity is presumed and decision making handed over, and for which decisions, lies at the heart of the parenting relationship. Some decisions are interpreted differently in different cultures and different families, and can change through the generations. The age for some thresholds, however, is formally defined in law.

For example, the age of criminal responsibility – the age at which someone can be charged with a criminal offence and brought before a court – is a significant threshold. It is the age at which a child is considered to have sufficient maturity and mental capacity to know the difference between right and wrong in relation to criminal behaviour and thus to be legally accountable for their own actions. In England, Wales and Northern Ireland this age is set at 10 years. In Scotland it is 8 years, although the age at which a child can be prosecuted is 12. The United States and Mexico set their age of criminal responsibility at 6 years, Ireland 12 years, Italy 14 years, Portugal 16 years, and Argentina and Peru 18 years (NationMaster, 2014).

The assumptions that lie behind such legal thresholds are complicated and embedded in the history of each country's social legislation. However, in some way the age of criminal responsibility reflects each country's interpretation of the balance between welfare and justice. Societies in which children are seen as vulnerable and deserving of welfare even through the latter stages of childhood tend to have a relatively high threshold of criminal responsibility, as in Argentina and Peru. On the other hand, societies in which the emphasis is on protection and justice and where it is felt that even relatively young children should explicitly learn lessons of social responsibility tend to set the threshold for criminal responsibility earlier.

Many other age-related decisions have far less serious consequences than being charged with a criminal offence. These include transitions in education, viewing particular

films, taking on a part-time job, buying alcohol, getting married, buying a pet and making a will. All of these have legal age limits, whereby a child is not formally deemed to have capacity until a particular age, even though the child and/or their parents and carers may not necessarily agree.

Do you know from what age children can get a job, babysit, sign a passport themselves or take part in an acrobatics performance? In the next activity you can find out.

Activity 1 At what age can I ...?

This short quiz will raise your awareness of how certain behaviours become linked to certain ages. The quiz is really for fun, just to start you thinking about some of the issues.



Figure 2

At what age is it legal to drive a car in the UK?

- ☐ 16
- ☐ 17
- ☐ 18



Figure 3

At what age is it legal to buy a pet in the UK?

- ☐ 12
- ☐ 15

- 16



Figure 4

At what age is it legal to consent to having a tattoo in the UK?

- 14
- 16
- 18



Figure 5

At what age is it legal to adopt a child in the UK?

- 18
- 21
- 23



Figure 6

At what age is it legal to have sex in the Republic of Ireland?

- ☐ 16
- ☐ 17
- ☐ 18



Figure 7

At what age is it legal for men to marry in China?

- ☐ 18
- ☐ 20
- ☐ 22

Comment

Certain activities are regulated by law and are only 'allowed' once a young person is a certain chronological age. On the other hand, society may have mechanisms to help young people gain the autonomy and responsibility they need beyond the legal age; for example, for young people leaving care. This is recognised, for example, for young people leaving local authority care, where technically the leaving care age is 18, but legislation allows for and in some instances requires local authorities to provide support beyond that age.

1.2 Parental responsibility

You now look at the decision making that parents undertake on behalf of their child. The term used to describe this in England, Wales and Northern Ireland is parental responsibility. In Scotland, the concept of parental rights is linked directly with parental responsibilities.

Where the law in Scotland defines a person as a child that increases the protection that the law offers them but decreases the child's own personal freedoms. The law likes clear cut-off points. In Scotland there have always been a number of important ages at which a child increases their ability to take control of their own life. The age of 12 is important because a child can make a will at that age. A veto to an adoption order exists from the age of 12. The age of 16 is of crucial importance. At 16 a person may marry. 16 is the age at which compulsory education might come to an end. The age of 18 is of less importance. One of the few remaining consequences of reaching the age of 18 is the right to vote. The age of 25 is also important. (The Scottish Parliament, 2013).

Parental responsibility in practice...

Mother: Don't do that, Janice!

Janice (child): Why not?

Mother: Because I said so.

Below are some key facts about parental responsibility.

- Someone with parental responsibility for a child has the legal right to make decisions about them and their upbringing.
- Anyone who is considering making an important decision on a child's behalf must obtain the agreement of all who have parental responsibility.
- The term 'parental responsibility' refers to 'all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property' [Children Act 1989, s.3(1)].
- In Scotland, parental 'rights' relate to where the child shall live, the right to direct the child's upbringing and the right to maintain contact with them; and 'responsibilities' are vested in the child's mother and father, if they were married, and later for the unmarried father if they subsequently are registered as the child's father [Children (Scotland) Act 1995, ss.1-3]. This is also the case in England, Wales, and Northern Ireland.
- Parental responsibility can be acquired by others, but only through formal court procedures. This tends to be relatives, local authorities and adoptive parents.

The law is very careful to articulate the nature and parameters of parental responsibility and how it is administered in the best interests of children. Legal advice should always be sought if there is any uncertainty about who holds parental responsibility when significant decisions are about to be made. Also, the extent of parental control changes through childhood and generally diminishes to zero at the age of 18, with some exceptions to decision making which are defined by the courts through evolving case law.

Best interests

The authority acquired by having parental responsibility is based on the assumption that all individuals and public bodies holding it will always act in the best interests of the child. Disputes about whether or not a person with parental responsibility is acting with the child's best interests in mind are usually complex and ethically challenging, often requiring resolution in the courts. There are also some occasions when urgent action needs to be taken and the person with parental responsibility cannot be consulted. In such circumstances, it may be a defence legally to act without that consent, so long as it was in the child's best interests. However, such situations are rare and usually relate to medical emergencies.

1.3 Competence to give consent

Children may be in a position to make some decisions relatively independently, but there may be a question about whether they have the mental capacity to make others. For example, children under 16 are not necessarily considered legally competent to give consent to (or refuse) medical treatment. However, the person administering the treatment must assess whether the child has sufficient maturity to understand what is being proposed, even if they are under 16. If it is considered that they do and that the treatment is in the child's best interests, it may go ahead even if a person with parental responsibility does not agree. This is known as Gillick competency.

Victoria Gillick had four daughters. In January 1981 she wrote to her local health authority, West Norfolk and Wisbeach, asking them to confirm that her daughters would not be given any contraceptive advice under the age of 16 without her prior knowledge and consent. The health authority replied that it would be unusual to give this advice without involving a child's parents, but that ultimately the decision would rest with the medical practitioners involved and depend on their clinical judgement. There then commenced a protracted legal challenge initiated by Victoria Gillick. In 1984, her challenge was not accepted in the High Court, but later the Court of Appeal found in her favour. However, in 1985 the House of Lords reversed the Court of Appeal judgement (Scarman, 1985). In sum, it is now legal to decide whether a child is able to give consent to medical treatment on the basis of an assessment of the child's maturity and understanding of what is being proposed. This is known as an assessment of 'Gillick competency'.

Young people aged 16–17 years are deemed to be legally competent unless formally assessed otherwise. However, they cannot refuse treatment that is considered to be in their best interests by either a person with parental responsibility or the courts. They are therefore not in the same position as adults aged 18 and over who can refuse treatment if competent to do so.

Activity 2 Gillick competency

Allow about 25 minutes

1. Read the NSPCC page about [Gillick competency](#). Note some of the principal aspects of the Gillick judgement.
2. Then watch the video below from 1985 about the Gillick case. In the text box, note the key points about children's decision making and the clinical judgement of

doctors prescribing contraceptives to children under 16 without their parents' consent.

Video content is not available in this format.

[Gillick video](#)



Provide your answer...

Comment

Even at the highest level of the law in the UK, the Law Lords, there were considerable differences of opinion on the ability of young people to make decisions for themselves. However, the view proposed by the Gillick judgement prevailed. It remains the case today that if a child is competent to make an informed decision, then in certain circumstances contraceptive advice may be provided without the knowledge or consent of their parents. This decision will be made on the basis of the perception and judgement of the professional involved about what is in the child's best interests and whether they are capable of making up their own minds. On balance, it was deemed unrealistic to impose fixed age limits on matters that can vary enormously depending upon the maturity of the child and their circumstances.

In the next section you look at the kinds of decisions made by children and young people that may require some consideration of mental capacity.

2 Children, young people and decisions

You will now look in more detail at the different kinds of decisions that come up when working or engaging with children and young people.

Generally, Gillick competency is relevant when considering issues related to contraception and medical treatment for children under 16. However, the 16th birthday is an important legal threshold for children in matters of capacity, so in this section, pre-16 and post-16 issues are considered separately.

2.1 Children under 16

In England and Wales, the Mental Capacity Act 2005 does not apply to children under 16. In Scotland there are provisions in the Age of Legal Capacity (Scotland) Act 1991, with a similar change at age 16. A child under 16 is therefore generally presumed not to have capacity, although they may be assessed as 'Gillick competent'.

Activity 3 Decisions made on behalf of children under 16

Allow about 30 minutes

Making decisions on behalf of other people is not easy, especially if they are angry or distressed and therefore less able to understand what is being proposed, or if they are inclined not to tell the truth. But what kinds of decisions, other than about medical treatment, do professionals make about children, and how often do these involve an assessment of mental capacity?

Watch the video below about a social worker, Liz Curry, in a local authority children and families team. Look for examples of Liz's decision making.

Video content is not available in this format.

[What is social work? Children and families](#)



How often were the decisions related to assumptions about mental capacity, even though this term is not used? Make notes in the box below.

Provide your answer...

Comment

The video begins with Liz speaking by phone to a 12-year-old boy in a children's home who was not happy and wanted to leave. Liz listened to his concerns, discussed the issue with staff and managed to stabilise the situation.

Next there was a home visit to a 12-year-old boy with learning disabilities, where there were concerns about inappropriate sexual activity and substance abuse. Liz managed to establish a working relationship with the mother, in order to more accurately hear and understand the views of the boy and assess the support required.

Following a discussion with her manager about another case involving a teenage boy, in which they decided to convene a formal meeting, Liz spoke by phone to a foster carer dealing with a dilemma about whether to allow a teenage girl to see an elder sibling. Finally, Liz visited 14-year-old Paige, a looked-after child. Paige reflected on decisions Liz had taken on her behalf in the past and acknowledged that they had proved to be in her long-term interests.

Liz tried to work with the children and young people where appropriate and intervened with those who had parental responsibility.

2.2 Young people aged 16 and 17 years

Legally, a person aged 16 or over is presumed to have capacity, unless assessed otherwise. However, there are some situations – such as making a will, making an advanced decision to refuse treatment and particular medical procedures – in which a

young person aged 16 or 17 is not automatically assumed to have capacity. In these cases, other legislation may be invoked and assessments such as that of Gillick competency carried out, to allow for legally sound decision making.

Activity 4 Supporting the capacity of young people aged 16 and 17 years

Allow about 15 minutes

Watch the video below about three young people in Sheffield. As children under 16, they received treatment from Child and Adolescent Mental Health Services (CAMHS). At the age of 16, however, they were no longer eligible for a service from CAMHS and had to register with adult mental health services. They talk about their anxieties and concerns in making this transition.

Video content is not available in this format.



In the text box below, note what you think might have arisen for some of these young people had they not made a successful transition to adult mental health services. Imagine what kinds of outcomes might later bring into question the young people's capacity to make decisions for themselves.

Provide your answer...

Comment

In the video, it seemed that adult mental health services failed to engage successfully with the young people. This may make it more likely that, in the future, they are assessed as not having the mental capacity to make certain decisions. Affording as much opportunity to engage in services is consistent with the general principle in mental capacity legislation that people should be supported to make decisions themselves before an assessment of whether they lack capacity.

While every assessment of capacity must relate to circumstances at the time of the assessment, it is also important that services promote future opportunities for mental capacity to be assessed if needed.

2.3 Decisions in the Family Court and the Court of Protection

For decisions that children and young people may be able to make – depending on their age and the type of decision – their mental capacity may be in doubt or there may be conflict between them and their parents or carers. In such cases, decisions about their best interests are addressed in the courts.

Decisions in these cases are usually made through the Family Court in England and Wales or through a Children's Hearing in Scotland. There is no simple equivalence between legal systems here. In circumstances where children and young people have substantial and enduring lack of capacity, decision making can also be referred to the Court of Protection. This is an English court where decisions about financial matters are made for people who, because they lack capacity, cannot make them at the time they need to be made.

In Scotland, the Sheriff may make a Guardianship Order, appointing an individual to act for a person with incapacity on an ongoing basis. This is usually for three years or more and in principle can allow for wide-ranging powers over a person's affairs. The Office of the Public Guardian (Scotland) (2017) provide the example given in Box 1.

Box 1 Monika's story

Monika is 16 years of age and needs someone to help make decisions about her finances and healthcare. Monika has been awarded a large compensation payment because of an injury sustained at birth. The award will be used to pay for her on-going specialised care costs and for adapting the family home to allow Monika to continue to live there. Monika's parents have applied to the sheriff court for authority to make decisions over the next three years, about accessing and investing her finances and making healthcare and welfare decisions.

Source: Office of the Public Guardian (Scotland) (2017)

You now consider decision making and mental capacity in two particularly difficult areas: child sexual exploitation and mental health.

3 Exceptional situations

Mental capacity assessments of a child or young person often relate to routine decisions experienced by most children and young people in society. However, there are some situations where the capacity of a person is significantly and negatively affected by circumstances over which they may have very little control. You will now look at two such examples: child sexual exploitation, and mental illness.

3.1 Child sexual exploitation

Child sexual exploitation is defined by the UK government as follows:

Child sexual exploitation is a form of child abuse. It occurs where an individual or group takes advantage of an imbalance of power to coerce, manipulate or deceive a child or young person under the age of 18 into sexual activity (a) in exchange for something the victim needs or wants, and/or (b) for the financial advantage or increased status of the perpetrator or facilitator. The victim may have been sexually exploited even if the sexual activity appears consensual.

(Department for Education, 2017, p. 5)

Note that child sexual exploitation can involve anyone under the age of 18, even though 16- and 17-year-olds can legally consent to sex.

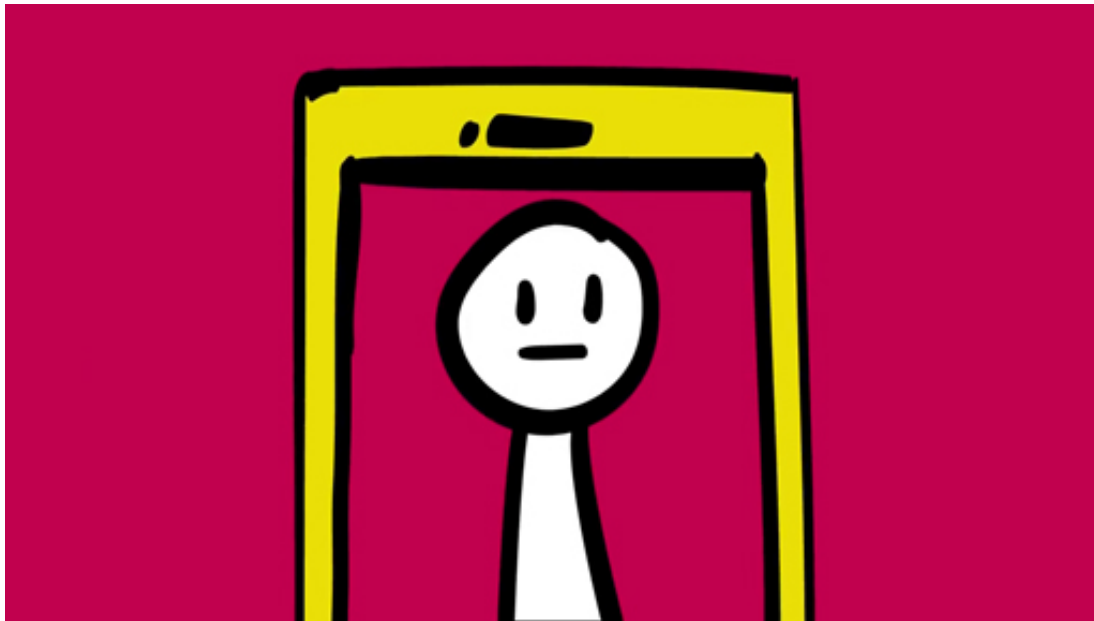
Activity 5 Child sexual exploitation

Allow about 20 minutes

Watch the animation below, which was produced by The Children's Society. It is about Taylor, the subject of child sexual exploitation. Note your feelings at the end of the video.

Video content is not available in this format.

[Taylor's experiences](#)



Provide your answer...

Comment

You might have felt angry with Taylor's girlfriend, who probably is the same age as Taylor. It seems that the young people in the Squad, with whom Taylor feels safe, are older than him and may or may not be a positive influence.

Taylor believed that his girlfriend was someone he could trust, but she too may have been exploited or pressurised by others to persuade Taylor to provide a photo. Taylor's sense of self is likely to have been damaged by this incident and the circulation of the photo is now beyond his control. It could be a trigger for a deterioration in his mental health and his capacity to make safe decisions.

3.2 Mental capacity, mental health services and the law

Sometimes children and young people demonstrate worrying or dangerous behaviour towards themselves or others. Usually support and treatment, can be provided with their cooperation and consent. Sometimes, however, they do not consent and family members and professionals have to make the difficult decision as to whether support and treatment should be given compulsorily. This will often involve admission to a residential care home or hospital from which the child or young person is not allowed to leave. It may also include the enforced administration of medication against their will. These decisions must be lawful and the least restrictive option available.

Mental health legislation for detaining a person requires a qualified person specified in law to make a judgement that the person – be they a child, a young person or an adult – has a mental disorder which requires treatment and compulsory detention. Such treatment must

be deemed to be in the best interests of the person and, in some cases, for the protection of others. The informal term used to describe this legal detention and treatment is ‘[sectioned](#)’, as it refers to a section of mental health law.

Mental capacity legislation generally has a broader remit. It is used when a person may be a risk to themselves or others usually due to impaired mental capacity to make autonomous or age-appropriate decisions as might be the case for someone with severe learning disabilities, for example. Some people may need to have their liberty constrained, such as in a locked or restricted care home. They may not have a mental illness that is treatable.

For children and young people under 16, those with parental responsibility are usually in a position to provide consent, unless a court determines otherwise. If it is necessary to deprive 16- or 17-year olds of their liberty, this should be done under mental capacity or mental health legislation. Such a decision requires a thorough knowledge of the law to ensure that any such detention and treatment are safe and lawful.

Activity 6 Being sectioned for anorexia nervosa

Allow about 15 minutes

Watch this video from [YouTube](#) in which a young person recounts ‘being sectioned’ because of her anorexia nervosa. She addresses the view expressed by other young people suffering from anorexia that they want to be sectioned. However, having been sectioned herself, she explains that it is far from glamorous and not something she wants to repeat.

In the text box below, note what this has taught you about the impact of being sectioned and how this might be confused with changes to mental capacity.

Provide your answer...

Comment

In the video, the young person’s capacity to make decisions was clearly impaired at the relatively young age of 14 or 15 years. This seems to have been related to issues relating to eating, self-image and self-harm rather than a general inability to function independently, although this is not clear from the video. She was diagnosed as having a treatable mental illness, sectioned and detained in hospital where she received life-saving treatment, probably against her will, at least initially.

This is an example of a temporary loss of mental capacity, where the law used to intervene in her best interests was mental health legislation, not mental capacity legislation.

This week's quiz

Check what you've learned this week by doing the end-of-week quiz.

Open the quiz in a new window or tab then come back here when you've finished.

[Week 5 quiz](#)

Summary

The main learning points from this week are that:

- The mental capacity of children and young people is a result of the interplay between their chronological age, their evolving maturity and the assumptions and responses of others. This means that their mental capacity always needs to be viewed in context.
- There are legally defined age limits for certain decisions and activities, which reflect societal assumptions about the capacity of children and young people.
- Parents have responsibilities and certain legal powers to act on behalf of their children. As children move through their teenage years, the power of parents to make decisions on behalf of a child is legally more negotiable, as evidenced by the Gillick case.
- At age 16, children achieve the legal status of presumed capacity and between 16 and 18, their decision-making powers are increasingly devolved to them.
- Abuse and exploitation can severely damage a child's capacity. Assessment of a child who may be subject to abuse or exploitation should take these risks and consequences into account.
- Capacity can be impaired by temporary or fluctuating periods of mental illness. This can usually be treated, although it can be unpleasant and frightening for the child or young person.

You should now be able to:

- describe how a child's presumed innate incapacity to make important decisions evolves through childhood to capacity
- explain when and how parental decision making may be shared with or delegated to 'competent' children
- explain how the age of 16 is an important threshold for asserting the legal presumption of capacity
- describe some of the difficulties and ambiguities relating to capacity for young people aged 16 and 17
- describe two examples of exceptional situations where the capacity of a child or young person may be especially compromised: child sexual exploitation and the interface with mental health services and law.

Next week, you look at the issue of mental capacity in relation to people with learning disabilities.

Week 6: Learning disabilities

Introduction

People of any age can have a learning disability. It may make it difficult for them to communicate their wishes and to be understood, which means that both mental capacity assessment and decision making on their behalf need to be done with particular care. This week you look at some of the features and needs of people with learning disabilities, and how they can be empowered to achieve a fulfilling life.

By the end of this week you should be able to:

- describe what is meant by 'learning disability'
- explain the importance of communicating and listening in assessing the wishes and feelings of people with learning disabilities
- describe some of the decisions that people with learning disabilities often need support making
- describe some of the legal opportunities for intervention and support
- give examples of high-stakes situations which feature enforced intervention in the lives of people with learning disabilities, including the deprivation of liberty.

1 Capacity and people with learning disabilities

Assessing the mental capacity of people with learning disabilities can be problematic due to some people's pre-conceptions that all learning disabilities require most decisions to be taken by others. However, people with a learning disability, even some with profound difficulties, are able to express preferences. Additional observational and listening skills, as well as extra time, is likely to be required for the mental capacity assessor.

Learning disability includes the presence of:

- a significantly reduced ability to understand new or complex information, to learn new skills (impaired intelligence), with;
- a reduced ability to cope independently (impaired social functioning);
- which started before adulthood, with a lasting effect on development.

(Department of Health, 2001, p. 14)

Activity 1 Definitions of learning disability

Allow about 30 minutes

1. Watch the video below, which shows what 'learning disability' means to different people. It was produced by Mencap, a charity promoting awareness of and quality of life for people with a learning disability. At the end of the video, the viewer is asked, 'What does learning disability mean to you?' Write your own answer to this question in the text box below.

Video content is not available in this format.

What does learning disability mean?



Provide your answer...

2. Mencap's mission is to 'transform society's attitudes to learning disability and improve the quality of life of people with a learning disability and their families'. Go to the [Learning disability explained](#) page on the Mencap website and note at least five things about learning disabilities that you didn't know and that may have surprised you. Write them in the text box below.

Provide your answer...

Comment

You may have been surprised at the wide range of conditions and syndromes that are included under the heading of learning disability. The complexity of the processes for diagnosis may also have been surprising. Many learning disability conditions have features and behaviours that are common to other conditions. Some are very specific, may be genetic and can be confirmed with a blood test. Others, such as global

developmental delay, may emerge more slowly through infancy and early childhood and can be much harder to identify in younger children.

A learning disability affects virtually all areas of a person's life and has a substantial impact on their ability to function independently. A learning difficulty, while significant, does not have such a comprehensive impact. The Foundation for People with Learning Disabilities (2017) note that, 'In general, a learning disability constitutes a condition which affects learning and intelligence across all areas of life, whereas a learning difficulty constitutes a condition which creates an obstacle to a specific form of learning, but does not affect the overall IQ of an individual. For example, Down's syndrome is classed as a learning disability, whereas dyslexia is classed as a learning difficulty, in that it only affects an individual's relationship to the processing of information, usually manifested in problems with reading, writing, and spelling.'

You may also have been surprised at the wide range of organisations and support services for people with learning disabilities. While there are many different types of conditions, a common feature is that people with learning disabilities and their carers continually face above average and often severe stress just to achieve a quality of life that many others take for granted. Learning disability is a life-long situation, requiring sustained and ongoing input.

Foundation for people with learning disabilities (2017), 'What is the difference between a learning disability and a learning difficulty?', Mental Health Foundation, <https://www.mentalhealth.org.uk/learning-disabilities/a-to-z/l/learning-disabilities> (Accessed 14 January 2018).

1.1 Learning disabilities and communication

Someone with a learning disability is more likely than other people to have impaired mental capacity for decision making in at least some areas of their lives. However, the legal and age-related presumption of capacity still applies. Assessors of mental capacity need to approach every case with an open mind, although it would be patronising and hurtful to parents and carers for assessors to start with exaggerated and overly-optimistic assumptions of mental capacity where clearly the person has profound mental impairment.

Whatever the level of impairment, establishing the best method for communicating is essential for maximising the possibility of hearing the person's views, both verbally (if possible) and non-verbally.

Activity 2 Communication and learning disability

Allow about 30 minutes

1. Watch the video below in which people with learning disabilities give their own advice on how to communicate better with them. The video is produced by CHANGE, a human rights organisation led by disabled people.

Video content is not available in this format.

[Communicating with people who have learning disabilities](#)



2. Now look at one of the resources below and in the text box below, note the non-verbal ways in which communication may be enhanced.

- Mencap's guide to [Communicating with people with a learning disability](#)
- Scope's [Resources to support children with communication impairments](#)

Provide your answer...

Comment

Clearly, communicating effectively with someone whose mental capacity you are assessing is essential. It is important to have a respectful, non-patronising and facilitating approach, to take time, to speak at a speed that matches the person's ability to understand, and, above all, be prepared to use a range of different methods.

1.2 Cultural issues

When assessing mental capacity, the cultural norms of the individual, their family and their community need to be taken into account. Some cultures have deeply held and culturally validated beliefs about the causes of developmental disabilities. This influences people's expectations about autonomy for their family member and can affect their willingness to seek external help from the services available.

Activity 3 Communication and cultural issues

Allow about 20 minutes

Read [Developmental Disability Across Cultures](#) on the Canadian Paediatrics website. This looks at cultural differences in attitudes towards developmental disabilities and ends with some practical tips for health practitioners.

Think about how your own cultural beliefs, values, and assumptions influence how you approach the subject of learning disability with someone from a different cultural background.

Comment

It would be hard to identify a cultural 'norm' in the UK against which other cultures can be compared. However, in some societies, people's religious attitudes are affected by cultural as well as religious beliefs. Some cultural and ethnic groups believe that a developmental disability represents some kind of religious judgement on or personal punishment for parents. In such groups, secrecy and feelings of shame are likely to be more pronounced.

Some cultures also hold firm beliefs about the community's collective responsibility for care and people may be less willing to use westernised or individualised services. These are based on presumptions of medial/organic causation and place a high value on rights and individual autonomy.

These issues are complex. When working with someone with learning disabilities from a different culture, you need to be as reflective and objective as possible about your own values, pre-conceptions and cultural assumptions.

You will now look at aspects of decision making associated with learning disabilities.

2 Decisions, rights and responsibilities

People with learning disabilities make decisions themselves, all the time. The issue of capacity is frequently implicit in how decisions are made. Sometimes it is addressed more explicitly or legally constituted.

In this section you consider issues of consent, parents who have a learning disability, decision making and resources, and the legal safeguards in place for depriving someone who lacks mental capacity of their liberty.

2.1 Decisions that require consent

People with learning disabilities are likely to have an impaired capacity to make independent decisions about themselves or others. When engaging with organisations in the community, a person with a learning disability may come up against barriers to their acceptance and their freedom to make a decision themselves.

This lack of freedom can occur in matters ranging from buying a bottle of beer in a supermarket to employment, accommodation, travel, money and relationships. It can also apply to decisions on health, such as dental and medical procedures, contraceptives and abortion. There is a whole raft of matters that involve some liability or risk and for which informed consent is needed.

The balancing of the rights of people with learning disabilities with the responsibilities of supporting agencies is particularly complex when people with learning disabilities have children of their own.

Stewart and McIntyre (2017, p. 3) argue that parents with learning disabilities can and do become 'good enough' parents when appropriate supports are in place, but that they often have complex needs as a result of issues such as poverty, discrimination, depression and poor self-esteem. 'Good enough' parenting skills include:

- the ability to provide a safe home environment, adequate nutrition and positive and nurturing interactions
- being able to recognise and treat medical emergencies
- having a basic understanding of child development.

Activity 4 Parents with a learning disability

Allow about 2 minutes

Think about why a careful assessment of capacity is especially important for parents with a learning disability.

In the text box below, note down some of your ideas.

Provide your answer...

Comment

If you are responsible for supporting the children of a person with learning disabilities, you need to be aware of their needs and ensure that clear representations for support

are made with them and on their behalf. Child protection risks are undoubtedly greater in such situations and support for the family must take into account the parents' strengths and weaknesses, their limitations, if any, and the potential for their mental capacity to fluctuate.

All parents engage with teachers, nursery staff, their GP and other formal and informal agencies at some point during their children's upbringing, and information on the development of children of people with learning disabilities should be safely and appropriately shared on a regular basis, if necessary.

In order to minimise the risks of children being harmed and of stigmatisation of both the adults with learning disabilities and their children, a network of support should be built and sustained. This also ensures that protection agencies neither over-react or under-react to concerns.

2.2 Decision making and resources

Support for people with learning disabilities after a mental capacity assessment may be constrained by a lack of resources. This may be due to:

- the macro health or otherwise of national and international economies
- political decisions on priorities in social care
- local authority priorities and inaccurate forecasting of need
- an unfortunate combination of circumstances where, for a period of time, the right resource or the money to pay for the right resource, is just not there. In such circumstances, a person's vulnerability, which is assessed as being directly related to their impaired mental capacity, is knowingly compromised.

In the next activity you look at one such case, involving a young person called Matthew Garnett.

Activity 5 Matthew Garnett believes he is in prison

Allow about 15 minutes

In 2016, Matthew Garnett was aged 16. He has autism, attention deficit hyperactivity disorder (ADHD) and learning disabilities. He has complex and profound needs and is behaviourally challenging.

Read the BBC article below from February 2016. Then click through and listen to the audio [01:40 to 06:32], from the [BBC Radio 4 programme 'File on 4'](#), first broadcast on 13th September 2016.

[Campaign to help autistic boy, Matthew Garnett, who thinks he's in prison](#)

If you were Matthew's mother or father, what would your primary concerns for the future be? How would you ensure that his capacity to make decisions is enabled?

Provide your answer...

Comment

Matthew's parents were very concerned that the longer he stayed in a psychiatric hospital, the worse his behaviour became and the less likely it was that he would be transferred to a more suitable placement.

They are also likely to have worried that if he was sent home too soon or without support, their physical safety would be at risk, which would only serve to complicate things for him in the long run.

They had clearly lobbied effectively on his behalf; the petition they set up attracted a huge number of signatures in support of a swift resolution of Matthew's situation.

However, they must have felt despondent. Eventually, in March 2017, after 18 months in a psychiatric hospital, Matthew and his parents were informed that he was at last being transferred to a specialist autism unit.

2.3 Deprivation of liberty

It is not unusual for many people with learning disabilities to be deprived of their liberty, in that they are not free to choose where they live, who they see or where they go. In most democratic societies, such deprivations are exceptional and subject to substantial legal protections, including for people with learning disabilities.

Bournewood psychiatric hospital is situated in Chertsey, Surrey. HL, an autistic adult male with profound learning disabilities, was admitted voluntarily to the hospital in July 1997. However, due to his substantial lack of mental capacity, he was not in a position to provide consent to his admission. While he did not make subsequent attempts to leave, the medical staff believed it was in his best interests to remain in hospital. They did not allow his foster carers to visit him in case they discharged him home.

In response, the foster carers commenced legal proceedings. This resulted in the legal judgement that HL had been illegally deprived of his liberty, even though HL himself had not attempted to leave; this became known as 'the Bournewood gap'. The judgement highlighted the situation for many compliant but incapacitated adults in care homes and hospitals, and are now an amendment of the Mental Capacity Act 2005 in England and Wales. New provisions known as the 'deprivation of liberty safeguards' (DoLS) were incorporated and came into force in April 2009.

Later clarification of the deprivation of liberty was provided by a case known in shorthand as *Cheshire West* (2014). This case established that assessing whether someone is deprived of their liberty comprises two central questions, referred to as the 'acid test':

1. Is the person subject to continuous supervision and control?
2. Is the person free to leave?

These questions are not subject to whether the person is compliant with or objects to their situation, or to the placement's relative normality, or to the reason for the particular placement. If the two elements of the acid test are judged to be true, then the person *is* deprived of their liberty.

2.4 Deprivation of liberty safeguards (DoLS)

The aim of DoLS is:

to ensure that adults who lack capacity to consent to being accommodated in a hospital or care home for the purpose of being given care and treatment are only deprived of liberty if it is considered to be in their best interests ... by establishing an administrative process for authorising a deprivation of liberty and a means to challenge any such deprivation.'

(Law Commission, 2017, p. 41)

However, in 2017, the Law Commission published a report highlighting the over-complicated and highly bureaucratic real-world application of the DoLS, especially in the light of the Cheshire West ruling. At the time of writing (July 2017), recommendations are in place for reviewing the DoLS to make them more workable in practice. Suffice it to say here that whatever the outcome of these developments, regulatory supervision of this contentious area is still needed to ensure that the most vulnerable people are protected and only deprived of their liberty by fully regulated, transparent and accountable individuals and systems.

Next, you will look at some areas where issues of decision making and capacity for people with learning disabilities may be said to be somewhat exceptional.

3 Exceptional situations

The issue of mental capacity frequently arises for people with learning disabilities as their decision making skills are commonly compromised in some way. This tends to be permanent with little potential for development. However, learning disabled people should not be defined by their disabilities. They have a right to maximise their potential and engage fully in family, social and community life if they choose. To do this they need to be given opportunities to explore the options available and make a choice.

3.1 Marriage, hate and death

Sometimes, the choices people with learning disabilities make bring them into conflict with social norms and strongly held beliefs.

Activity 6 Marriage, hate and death

Allow about 40 minutes

In this activity, you consider three choices that may be made by people with a learning disability. After reviewing the material for each choice, note down anything that you feel strongly about.

1. Marriage

Read [Couples with learning disabilities face unfair wedding bar](#) from *The Guardian* in 2014.

2. Disability hate crime

Watch the short video below about a young person with Down's syndrome who has been subject to bullying.

Video content is not available in this format.

[Bully for You](#)



3. Assisted dying

Read the article [Assisted dying bill overwhelmingly rejected by MPs](#) from 2015. It remains illegal in the UK to assist in someone's suicide. Can a young man with a learning disability have capacity to make such a decision

Provide your answer...

Comment

- Clearly, it was an unambiguous and carefully considered decision by Sarah to marry Daniel. The decision was not seen as so clear-cut by the local authority's mental capacity assessor. Initially, Sarah was deemed not to have the capacity to enter into a marriage where both parties had severe learning disabilities. Sarah's mother believes that Sarah 'had the right to fall in love like anyone else'. The local authority was concerned about the risk of abuse and exploitation. These are difficult decisions.
- Some might call what happened to Ben 'bullying'. However, it seems more serious than that and more like a series of assaults. It seems that Ben is attending a mainstream school, with support for his additional learning needs. This choice by Ben and his mother has brought him into contact with the 'bullies'. Would it have been better for him to have chosen to attend a special school? These are the kinds of dilemmas faced by parents and carers of young people with learning disabilities. Most people would say that it is for the bullies to be punished and not Ben. However, some parents may not want to take the risk of their child being bullied. That, too, would be their choice.
- Assisted suicide is controversial and remains illegal in the UK. However, if it were legalised, it is highly debatable as to whether learning disabled people with a terminal illness should be precluded. Should it be based on an assessment of their mental capacity to choose the time and manner of their death? Opponents of assisted suicide may argue that choosing suicide is de facto evidence of

incapacity in and of itself, for anyone, not just for a person with a learning disability.

3.2 Extreme measures

In a democratic society, for the state to forcibly and permanently take away a person's capacity to reproduce is by any measure an extreme act, and potentially an intrusion on their freedom and human rights. These are complex matters, and are most usually only addressed through the courts.

In the next activity you consider two cases of forced sterilisation.

Activity 7 Forced sterilisation

Allow about 20 minutes

Read the two short newspaper articles from the *Guardian* below about forced sterilisation.

- [Judge authorises sterilisation of mother-of-six with learning disabilities](#)
- [Man with learning difficulties to be sterilised in unprecedented court ruling](#)

Do you think that forced sterilisation is ever acceptable, even when attempts to manage the situation through support and supervision have failed?

Comment

The issue of forced sterilisation strikes at the heart of mental capacity. The judges had to make extremely difficult judgements in both these cases. The judgement in the first hinged on the high risk to the life of the woman if she got pregnant again. In the second, the judgement was made in the best interests of the man and in light of the importance of his relationship to his stability and well-being. The point is made that these were exceptional cases.

This week's quiz

Check what you've learned this week by doing the end-of-week quiz.

Open the quiz in a new window or tab then come back here when you've finished.

[Week 6 quiz](#)

Summary

The key learning points of this week are:

- Having a learning disability can involve a combination of many different problems, behaviours and difficulties.
- The nature of learning disabilities means that it is more likely that the person's capacity to make safe decisions for themselves or for others is impaired.
- People with learning disabilities often have capacity for making decisions in many areas of their lives.
- When supporting their decision making or assessing capacity, great care should be taken to listen to and communicate with the person with the learning disability. Extra time and extra visits should be planned: a reliable decision cannot be made after just one conversation.
- When people with learning disabilities exercise choice in some aspects of their lives, they may come into conflict with the prejudices and anxieties of others. It is therefore important to work with the person and their parents or carers and the professionals in their lives, to ensure that their 'best interests' can be honestly determined and actually delivered.

You should now be able to:

- describe what is meant by 'learning disability'
- explain the importance of communicating and listening in assessing the wishes and feelings of people with learning disabilities
- describe some of the decisions that people with learning disabilities often need support making
- describe some of the legal opportunities for intervention and support
- give examples of high-stakes situations which feature enforced intervention in the lives of people with learning disabilities, including the deprivation of liberty.

Further reading

- [Deprivation of Liberty Safeguards \(DoLS\) at a glance](#)
- [Mental Capacity and Deprivation of Liberty \(Law Commission's reform proposals 2017\)](#)
- For more on marriage and people with learning disabilities: see the [UK government's online guidance about Forced marriage](#), which also applies to people who cannot give consent.
- For more on disability hate crime, see the [Crown Prosecution Service's prosecuting policy on disability hate crime](#).
- For more on assisted suicide, see the briefing paper [Assisted suicide and disabled people](#), produced by the DAA, the international disability and human rights network.
- For more on forced sterilisation, see this [article about the sterilisation of men with learning disabilities](#).

Week 7: Older people

Introduction

Most older people have a lifetime of experience in making decisions for themselves and others, as parents, carers, employees and citizens. To be assessed in later life as no longer having the mental capacity to function in this way is likely to be disorientating and distressing. This week you consider the mental capacity of older people.

By the end of this week you should be able to:

- explain some of the attitudes towards and expectations of older people in UK society
- explain how assessing mental capacity often involves balancing risk and safety against choice and wellbeing
- define what it means to be a 'person'
- describe three common issues for older people that are linked to mental capacity: driving vehicles, daily living routines and living alone
- outline three mechanisms where decision making is delegated or wholly assumed by others: power of attorney, advanced decisions and the Court of Protection.

1 Getting old

You will begin this week by thinking about some of the general issues related to getting old: popular assumptions about old age, risk and well-being, and life in residential care for people with dementia.



Figure 1 Looking in the mirror: Old age presents a number of challenging life issues

There are deeply rooted cultural assumptions in all societies about the perils and the opportunities of growing old. Old age can be positively associated with experience, perspective and wisdom. It can equally be linked with decay, declining mental agility,

decreasing cultural relevance and dwindling social expectations of the need for the views of older people to be taken into account. Unlike children who start with very little mental capacity and usually acquire more through their childhood, it tends to be assumed that older people will lose, not gain, mental capacity as they get older. The risks of inadvertently reinforcing negative stereotypes of older people lacking mental capacity are considerable.

The universal reality is that the older a person is, the more likely they are to have physical health problems and the less likely they are to be able to undertake the physical activities that they did when young. However, declining physical health should not be conflated with declining mental capacity. The two issues must be examined separately, even though they interact. This is especially the case for the range of conditions known by the generic term 'dementia'. Dementia is particularly relevant to mental capacity.

1.1 Getting old: what do we expect?

Poetry is a way of expressing subtle and sometimes complex ideas that are less easy to grasp when articulated in other ways. For example, the poem in Box 1, 'When I am old' by Margaret Sangster, was written in the nineteenth century and looks forward into old age. It touchingly captures the likely mixture of longing and regret. It also seems to anticipate and perhaps accept the inevitability of the passing of the years, hoping for clarity and wisdom in older age.

Box 1 When I am old

When I am old and drenched in worlds of sadness,
And wear a lacy cap upon my head;
When, looking past the future's singing gladness,
I linger, wistful, in the years long dead.
When I am old, and young folk all about me,
Speak softly of religion, when they speak,
When parties are a grand success without me;
And when my laugh is fluttering and weak.

Will I then be content to raise my glances,
Serenely to the cloud-entangled sky?
And will I be content to watch at dances,
Without a heartbreak, as the hours pass by?
Or when I see young lovers fingers twine,
Will I remember, dear, your lips on mine?
Margaret Elizabeth Sangster (1838–1912)

Activity 1 Poems of old age

Allow about 15 minutes

Spend a few minutes searching online for poems about old age. You will find that this generates a large amount of material. Read at least two of these poems and note down some of the insights they give you about older people.

Provide your answer...

Comment

Poems about old age often incorporate elements of regret, along with a sense of things settling and resolving over time. Frequently there is humour about the loss of faculties such as memory and mobility, along with relief at being far less concerned by the value judgements of others and an acceptance of at last being comfortable with who they are.

Some poems reflect on the youth of the day, asking them to appreciate that one day they too will be in the position of looking back, musing on their own lives. But this is usually with an acknowledgment that the innocence and privilege of youth make it less likely that they will look that far ahead.

1.2 Balancing risk with well-being

Graham (2016) argues that mental capacity legislation is increasingly used for its safeguarding measures, 'inasmuch that people are often assessed in relation to health and social care outcomes when elements of risk to the person are deemed to be present ... the ability to make a decision is a central tenet to well-being in older adults' (Graham, 2016, p. 152). This suggests that, in the care of older people who may lack mental capacity, safety is commonly prioritised over personal preferences and choices, especially when they want to make what may seem to be an unwise decision.

The person assessing the capacity of the older person to make a decision must make sure that disagreeing with the person's choice is not interpreted as meaning that the person lacks capacity. A balance must be struck between what may be in a person's best interests, especially in terms of their safety, and allowing the person to make their own decision.

One important part of undertaking a capacity assessment of an older person is to understand the narrative about how they have lived their lives. The unique 'story' for each person contains clues that give both context to their current choices and evidence of previous decision making. It can reveal what they think contributed to their well-being in the past.

Mental capacity legislation incorporates and celebrates these person-centred approaches, but in the daily realities of providing care, especially when a person's mental capacity is generally poor or fluctuates (as is commonly the case with dementia), sometimes the 'person' themselves can become lost. This is a particular risk in residential care, where the many organisational and administrative tasks demanded of staff can divert attention away from person-centred relationships. You see a glimpse of this in the next activity.

Activity 2 Capacity in residential dementia care

Allow about 30 minutes

Watch the video below which is a clip from the 2009 BBC series *Can Gerry Robinson Fix Dementia Care Homes?*

In the video, Gerry Robinson – a management guru with a wealth of business experience – visits a residential care home for older people with dementia in Torquay. Gerry attempts to engage with the residents but is alarmed to find that the range of activities in the home is very limited and apparently driven more by institutional routines than the expressed choices of the residents.

Video content is not available in this format.

[The lack of activity in residential care for older people](#)



List the ways in which it might be possible to engage more successfully with the residents in this home. Try to think of ways of ensuring that any decisions are based on the best possible opportunity for residents to express their views and wishes. Make notes in the box below.

Provide your answer...

Now watch the video below, another clip from the same series, which gives a more positive picture.

Video content is not available in this format.

[Residential care for older people: some positive experiences.](#)



How might the care arrangements in this home make it easier to make a more accurate assessment of the capacity of the older people compared to those in the first video? Make notes in the box below.

Provide your answer...

Comment

In the first video, the residents have very little to occupy themselves and are not very engaged with either the staff or each other. Gerry Robinson hinted that this might be related to the institutional need to prioritise safety above the quality of people's lives. The staff may also not be aware of the variety and richness of the backgrounds of the residents, which makes it even harder for the staff to engage with them.

The exception seems to be Daisy, shown at the beginning of the second video. Daisy's husband Don maintains substantial daily care and commitment, keeping her connected and contented. The residential home in Warwickshire, in contrast to the first home, showed staff and residents collaborating to run the home together, providing structure and 'order' reflecting the needs and rhythms of the residents, rather than of the managers and staff. This makes good business sense as well as emotional sense, creating a place where residents and staff want to be.

In the next section, you will consider more particularly issues of decision making and older people.

2 Decision making and older people

This section begins with a discussion of personhood, the starting point for assessing the needs of someone whose mental capacity is a cause of concern. You then look at three situations where the capacity of an older person is commonly brought into question: driving, daily-living routines and living alone.

2.1 The concept of personhood

The concept of personhood relates to everyone, including children, people with learning disabilities and older people. Older people are likely to have lived their lives with a relatively intact sense of themselves as individual people, but the process of ageing and dementia in particular can put that sense of self at risk. More importantly it can change other people's perceptions of them. It is important therefore to think about the personhood of whoever needs help making a decision. You will learn what personhood is in a minute. A 'person' is someone who is worthy of our moral consideration in our dealings with them; this includes every human being. Personhood, however, is a central element for debate in moral philosophy.

Activity 3 Personhood

Allow about 20 minutes

Watch the video below about personhood. Would you ever consider someone to have greatly diminished personhood or not to be a person at all?

What is personhood?

This is especially relevant in relation to older people, who have lived long and varied lives and whose personhood has never before been in question. Assessing their mental capacity often brings into focus how much their personhood is accepted by others. Write your thoughts in the text box.

Provide your answer...

Comment

It is useful to reflect on and make a conscious choice about the nature of each individual's 'personhood' and how this is defined, even though this may seem a rather difficult or even an alarming prospect.

You should never assume that older people with impaired capacity have surrendered any of their personhood. Mental capacity legislation clearly indicates that every assessment must be founded on the basis that every individual is presumed to have capacity. Any subsequent deterioration can only be addressed through the courts, for example where someone is in a persistent vegetative state with an irreversible loss of brain function, and where a court may legally authorise a medical team to withdraw treatment, leading to the death of that person.

2.2 Three common decisions

Some decisions commonly emerge when an older person's capacity is in question. You now look at three of them: driving, daily living routines and living alone.

Activity 4 Driving and older people

Allow about 20 minutes

Watch the video below about aged drivers. How do *you* feel about drivers who are elderly?

[Driving and older people](#)

Comment

It would only be natural for anyone who uses public roads to be concerned about drivers aged 100 and over. Safety issues might be raised in terms of eyesight, hearing, mobility, undiagnosed or poorly managed medical conditions, short-term memory, poor awareness of the traffic conditions and personal limitations. The list of risk factors is extensive. However, the drivers in the video clearly have no such concerns and appear to show a reasonable capacity to make the decision as to whether they can drive safely. For more on this, look at the Age Concern webpage [Drivers over 70](#).

In the UK, when a person reaches the age of 70 they have to reapply for their licence every three years. There's no test or medical examination but the driver does have to make a medical declaration. If this raises concerns, the Driver and Vehicle Licensing Agency (DVLA) make further investigations. Sometimes medical practitioners report drivers about whom they are concerned.

Activity 5 Daily living routines

Allow about 15 minutes

Visit [Eldercare at Home: Problems of Daily Living](#) on the HealthinAging site in the USA. Read about at least two aspects of personal care under the heading 'What you can do to help'.

Then try to think of some older people who have difficulties with some daily-living tasks. List five examples of when a particularly careful assessment of an older person's mental capacity would be needed.

Provide your answer...

Comment

It is important for older people to have some sense of control over their daily living routines, wherever possible. For people with physical or mental difficulties, this control will be limited. Assessments should be made, reviewed and updated continuously. The review process is often time-consuming, but it is part of the reality of effective mental capacity assessment and empowerment that the detail is important.

Many older people live alone. This is usually in a familiar home that feels comfortable and private. The prospect of surrendering their independence to go into assisted-living or residential care can be unwelcome and is often vigorously resisted.

Some form of supported accommodation usually needs to be considered when the older person shows signs of forgetfulness, confusion, the early stages of dementia, decreasing standards of personal hygiene, changes in personality or conditions that are hard to self-manage. This decision will usually be considered after a prolonged period of providing support within the home and at a point when such support could no longer guarantee the person's safety – and when the family was at its limit in the support it could provide. Often a search for alternative accommodation is preceded by a number of falls, hospital admissions and episodes of wandering.

For the older person, moving into residential care is probably one of the most difficult decisions they have ever had to make. It is at such times that an especially careful assessment of mental capacity is required.

Activity 6 Living alone: Catherine

Allow about 20 minutes

Imagine that you have a close relative, Catherine, aged 89. She lives alone and has been diagnosed with dementia. You are concerned that she is not coping and is increasingly at risk. You don't know Catherine very well and don't see her very often, but as her only surviving relative you feel some responsibility for her.

Yesterday Catherine's GP telephoned you and asked to talk with you about the possibility of residential care for Catherine. You have made an appointment to meet the GP but before then, you decide to look on the internet for information about dementia care assessment and residential care in your local area, so that you are better informed in advance of your discussion with the GP.

1. Search online for 'dementia assessment' in your local authority area, county, borough, or city.
2. Explore the search results with Catherine in mind. Look for information about how an accurate appraisal of her situation might be made.
3. If Catherine were to move into residential care, where might that be in the area you have researched and how much would it cost?

Comment

You will have found that a great deal of information, from national organisations, local authorities and local groups. You probably realised that for Catherine, a quick online search is likely to be the beginning of a very long journey. Anyone seeking to help her would need considerable help and advice from a wide range of social care, medial, and financial sources. It is a complicated process when attempting to find the right resources as every person is unique.

Next, you'll consider more complex decisions that have serious implications for older people and their families.

3 Exceptional situations

Every situation is important when issues of mental capacity are at stake. Most potentially difficult situations are resolved satisfactorily between family members, professionals and other people who care about the person whose mental capacity is in doubt. However, the presumption of cooperation, competence to act on behalf of another person and goodwill cannot always be taken for granted.

You will now look at some of the formal legal processes that can be invoked as safeguards for protecting a person's best interests.

3.1 Power of attorney

While a person has mental capacity, they can give someone they trust the legal authority to act on their behalf should they lose their capacity in the future. This process is known as giving power of attorney. There are various forms of these delegated powers, divided in most UK nations into *financial* power of attorney and *welfare* power of attorney. Part 2 of the Adults with Incapacity (Scotland) Act 2000 provides for, essentially, the same anticipatory mechanism. The term refers to a power of legal representation conferred by one person on another by means of a contract of mandate or agency. Future authority, in the event of a subsequent loss of capacity, to act on the individual's behalf, in both welfare and financial decisions, can be delegated to one or more trustworthy people.

If someone has lost mental capacity but has not arranged for any power of attorney, an application may be made to the Office of the Public Guardian to be appointed as a 'deputy' to act on that person's behalf. This might be a friend or relative, a solicitor, a representative of a local authority, or any other person acceptable to the application.

Activity 7 Catherine: the legal authority to act on her behalf

Allow about 30 minutes

Think once again about Catherine, the lady with dementia from Activity 6. Imagine that you have had the interview with her GP and it is clear that the concerns about Catherine's care and future welfare are well-founded. The GP has suggested that you explore the options of acquiring legal authority for Catherine, for both her financial and welfare needs. The GP will arrange a formal assessment of her dementia, but has suggested that you take legal advice in order to assist Catherine. Rather reluctantly, because you don't know Catherine that well, you agree, and you subsequently arrange an appointment with a local solicitor.

1. Search online for 'power of attorney'. It will be relevant to include your nation in the search term, such as 'power of attorney England' or 'power of attorney Scotland', because the terminology and legislation is different.

- a. What are the implications for Catherine if she agreed to give you power of attorney?
- b. What are the implications if Catherine is deemed not to have capacity and you want to be appointed?

Write some notes in the box below.

Provide your answer...

2. Now, note down some questions you would want to ask the solicitor about the implications for you if Catherine agreed to give you power of attorney or, if she were assessed as not having capacity to give power of attorney, if you applied to be appointed as her deputy (England and Wales), or under a Guardianship Order (Scotland), or Controllership (Northern Ireland), to act on her behalf.

Provide your answer...

Comment

There are detailed and explicit legal steps to go through in order to be granted a power of attorney. This is because giving someone else the authority to deal with your affairs and make decisions on your behalf is a major change and should not be taken lightly. There are real risks of some people exerting undue influence upon others for financial gain or emotional control, and these risks should be minimised through full and transparent legal scrutiny.

3.2 Advance decisions

When a person has lost mental capacity, it can be difficult to be sure what their intentions were when they did have capacity. Mental capacity assessments explore these issues in detail, to achieve the most accurate possible interpretation of wishes and feelings.

When a person's mental capacity is intact, they can state their wishes in order to guide decisions should they lose capacity in the future. This is known as making a statement of 'advance decisions'.

In the next activity, you hear from Lesley, who discusses her advance decision in relation to her long-standing mental health problems.

Activity 8 Lesley's advance decisions

Allow about 30 minutes

Lesley Murray has had bipolar affective disorder for many years. This has meant that she has often temporarily lost the capacity to make decisions for herself.

In the video you hear Lesley talking about how, since her diagnosis, she has made a statement of advance decisions. This has helped put her illness and its management in better perspective, and she feels that she is now much more in control in the long term should things deteriorate again.

Watch the [Mental Welfare for Scotland comission video](#) of Lesley talking about her advance decisions statement. Think about the deterioration in Lesley's mental state and what might have helped her to make longer term decisions.

Now look at one of the following documents. You may choose to look primarily at a version that relates more to a UK nation that is of particular interest to you, rather than at all three options.

- [A Guide to Advance Statements](#) (for Scotland)
- [Advance decisions, advance statements and living wills](#) (for England and Wales, a factsheet by Age UK)
- Northern Ireland [here](#).

How might such a statement have benefited Catherine, the lady with dementia in Activities 6 and 7? Write your ideas in the text box below.

Provide your answer...

Comment

Catherine's situation is perhaps less clear cut than Lesley's. Lesley is younger and has lost and gained mental capacity a number of times. She might find it easier to contemplate her future than Catherine. We don't know much from the case study details, but Catherine's mental deterioration may have been gradual and accompanied by diminishing contact with her few remaining relatives. There may have been no one around to discuss longer term arrangements that take account of her advancing years and declining capacity.

3.3 Legal authority and the courts

The Court of Protection (England and Wales), the Sheriff Court (Scotland) or the High Court (Northern Ireland) are where matters of legal authority ultimately rest when there are concerns or disputes about the financial or welfare matters of people lacking mental capacity. These courts deal with issues of decision making on behalf of someone else where that person is assessed as not having the capacity to represent and manage matters for themselves.

Watch the video below, which is a brief introduction to the Court of Protection (England and Wales). It is produced by a commercial law firm. It is not presented here as an endorsement of or recommendation for this firm. In the future the default position will be for public not private hearings.

Video content is not available in this format.

[A brief Introduction to the Court of Protection \(England and Wales\)](#)



Certain situations are beyond the remit of family members and local professionals to resolve on their own. The law makes this very clear and courts are authorised to arbitrate and direct options in such circumstances.

This week's quiz

Check what you've learned this week by doing the end-of-week quiz.

Open the quiz in a new window or tab then come back here when you've finished.

[Week 7 quiz](#)

Summary

The key learning points from this week are:

- When supporting older people to make decisions or when making decisions on their behalf, risk needs to be balanced with well-being and personal choice.
- Personhood is a useful concept for challenging our assumptions and attitudes in relation to older people and mental capacity; in law, everyone is considered a 'person' and worthy of moral consideration.
- Social pressures and practical realities can impinge on older people's lives, even though they may have capacity, for example in driving, their daily living routines and whether they live alone.
- The law can intervene in disputes or where risks can be anticipated and decisions made while capacity is intact. Measures include power of attorney, advance decisions and the intervention of the Court of Protection may be brought into play.

You should now be able to:

- explain some of the attitudes towards and expectations of older people in UK society
- explain how assessing mental capacity often involves balancing risk and safety against choice and wellbeing
- define what it means to be a 'person'
- describe three common issues for older people that are linked to mental capacity: driving vehicles, daily living routines and living alone
- outline three mechanisms where decision making is delegated or wholly assumed by others: power of attorney, advance decisions and the Court of Protection.

Further reading

For more on power of attorney, see [Office of the Public Guardian](#), [Scotland's Office of the Public Guardian](#) or [Northern Ireland's Office of Care and Protection](#).

Week 8: Mental capacity: the future

Introduction

Congratulations on reaching the final week of the course.



Figure 1 Finishing line

Hopefully you have developed an understanding of mental capacity and gained useful insight into who is affected by this issue and how. You have also thought about how mental capacity is relevant to you.

This week you will explore how the way in which mental capacity is managed through the law may change in the next ten years. You will also consolidate your learning and think about your next steps.

By the end of this week you should be able to:

- describe possible changes in mental capacity law and outline key themes
- describe some of the particularly useful or surprising things you have learned on this course
- start to make plans for your future learning, your personal situation and any professional development needs you have
- identify whether you wish to make any plans for your own situation in relation to mental capacity and if so, how.

1 How the law is changing

Mental capacity as it is understood and managed through the law may change in the next 10 years. This is affecting legislation in England, Wales, Northern Ireland and Scotland. You now hear from some of the people who are closely involved with changes to mental capacity law in the UK and consider the possible future of mental capacity law in the UK. Brendan Kelly has an in-depth understanding of matters as they are currently affecting the Republic of Ireland. In the audio below he talks about revisions to mental capacity law in the Republic of Ireland which were incorporated in the Mental Capacity Bill of 2015. (A bill is a proposal for a new law, or a proposal for a change to existing law, that is presented for debate in Parliament.) Brendan discusses whether the different models of decision making defined in the law can help those who may lack mental capacity. He also suggests how legislative advances can be made in this area in the future.

Looking at countries other than your own in this way can bring different perspectives. As you listen consider what changes might happen and why they are occurring.

Audio content is not available in this format.

[Audio of Brendan Kelly: Revising, reforming and reframing](#)

Now listen to three short audios that talk about changes in legislation in England and Wales, Northern Ireland and Scotland. Tim Spencer-Lane talks about England and Wales, Gavin Davidson about Northern Ireland and Colin McKay about Scotland.

Audio content is not available in this format.

[Audio of Tim Spencer Lane](#)

England and Wales:

Tim discusses the Mental Capacity 2005 which covers England and Wales and in particular two important principles: the assumption of capacity and supported decision making. He discusses the challenges the Act has faced especially around its poor implementation and suggests that there are likely to be big changes in next ten years to address the need to include much more provision for recognising people's wishes and feelings as driven by United Nations Convention on Rights of People with Disability and also to address the Deprivation of Liberty Safeguards which are not working properly

Audio content is not available in this format.

[Audio of Gavin Davidson: Incapacity law in Northern Ireland – proposed frameworks](#)

Northern Ireland: The current law has both strengths and limitations. The proposed new framework was passed in May 2016 but may not be implemented for three to four years. Will replace the relevant common law and Mental health Order with a capacity based law. Will it introduce the use of more formal processes in decision-making?

Audio content is not available in this format.

[Audio of Colin McKay: Incapacity law reform in Scotland: a chance to lead again?](#)

Scotland: was progressive principle-based legislation but there are now significant concerns about its practical application in particular the interpretation of the Deprivation of Liberty safeguards. Following a consultation more reforms are being suggested including a new form of 'graded guardianship' and the possibility of a fused mental health and mental capacity law.

Activity 1 How the different nations are changing

Allow about 5 minutes

Think about the information and opinions you've just heard. Are there similarities between the different UK nations or is each country different?

The four interviewees summarise what practitioners think may happen in the next ten years. Are these developments the same in each country? Is there anything that surprises you when they were talking? Make a note of your thoughts in the box below which will help you in this week's quiz.

Provide your answer...

Comment

Similarities

Similarities between the different nations include the principles upon which the legislation and subsequent processes are based – these were outlined in Week 3.

For all nations, proposals to change legislation are affected by case law such as the Cheshire West case.

Differences

Differences included the fact that the mental capacity and mental health legislation in Northern Ireland has been fused. This may be something that Scotland will adopt.

Most of the differences between nations tend to be in the use of language. The dates of legislation are also different.

2 What have you learned?



Figure 2 Reflecting on what you have learned

There is a range of possible reasons why you wanted to study this course. Perhaps you are considering volunteering in a setting that provides care for people who lack mental capacity. Perhaps you are already working in such a setting and wanted to build up your knowledge. Perhaps you care for a relative or friend who lacks mental capacity or wanted to know more about making decisions on behalf of others. Decisions concerning mental capacity might be affecting you at the moment or may do so in the future.

Whatever your reasons for doing the course, reflecting on what you have learned will help you think about your next steps. This might be looking for a new course to study or looking at options for your professional development. You might want to identify future plans for yourself or think about those for someone for whom you are caring.

Reflection is an integral part of learning and throughout this course you have had a lot of practice in applying key ideas to your own experience. You may already have made a note of questions you want to think about further or topics that particularly interested you. In the next activity you will go back over the topics you've covered and remind yourself what you found particularly interesting or relevant. There may have been some ideas or activities that you found more challenging than others that you want to look at again.

Activity 2 Reviewing the topics and activities

Allow about 30 minutes

Table 1 reminds you of the topics you covered in each week. Identify those you feel confident about and those you would like to look at again. You might want to revisit the activities associated with each topic to remind yourself. Reviewing the material in this way will help you when you come to the compulsory quiz at the end of the week.

Table 1 Topics covered on this course

Week	Key topics	I am confident about these	I would like to learn more about these
1.	defining mental capacity	<input type="text" value="Provide your answer..."/>	<input type="text" value="Provide your answer..."/>
2.	understanding decision making	<input type="text" value="Provide your answer..."/>	<input type="text" value="Provide your answer..."/>

3.	<i>Provide your answer...</i>	<i>Provide your answer...</i>	<i>Provide your answer...</i>
4.	<i>Provide your answer...</i>	<i>Provide your answer...</i>	<i>Provide your answer...</i>
5.	<i>Provide your answer...</i>	<i>Provide your answer...</i>	<i>Provide your answer...</i>
6.	<i>Provide your answer...</i>	<i>Provide your answer...</i>	<i>Provide your answer...</i>
7.	<i>Provide your answer...</i>	<i>Provide your answer...</i>	<i>Provide your answer...</i>
8.	<i>Provide your answer...</i>	<i>Provide your answer...</i>	<i>Provide your answer...</i>

Comment
Completing this table will have given you a sense of what you have achieved so far. You might have noted some topics that particularly interested you and that you want to study further.

Next you will develop these thoughts and think about putting them in to action.

Activity 3 What do you want to study next?
Allow about 10 minutes

Identify three areas that you would like to know more about. This may be through further study, your work or in your personal life. Try to make your ideas quite specific. So, instead of writing 'look again at doing an assessment', write something like 'practise using the assessment documents.'

Note down whether you think this is something you could do now or would be best done in the future, and whether you would like to do it through more learning.

Table 2 has been partially filled to show the kind of information you need to capture.

Table 2 Priority areas

Priority area	Why?	What I want to do	How I might do it
Practise doing a mental capacity assessment	To make sure I understand what a mental capacity assessment is	Look again at the forms and complete them as if it was my work role	Discuss this when I am looking at my development needs in work
Consider my financial circumstances	To ensure that others understand my wishes should I lose mental capacity	Look again at the information concerning making decisions about money	Revisit the section on decision making and search other resources
<i>Provide your answer...</i>	<i>Provide your answer...</i>	<i>Provide your answer...</i>	<i>Provide your answer...</i>
<i>Provide your answer...</i>	<i>Provide your answer...</i>	<i>Provide your answer...</i>	<i>Provide your answer...</i>

Provide your answer...

Provide your answer...

Provide your answer...

Provide your answer...

When you have identified your priorities, you will be in a good position to decide on your next steps. These could involve further learning in your personal life or in your current or future workplace.

3 What do you want to do next?

Having reviewed what you have learned about mental capacity and identified areas you would like to learn more about, now is the time to clarify your thoughts before deciding on your next steps.



Figure 3 What's next?

If you did this course for personal interest you may not have any next steps. You may be happy with what you now know and may not wish to do any further learning. If, however, you are thinking about what to do next, the following activity will help you work through some decisions.

Activity 4 Clarifying your thoughts

Allow about 20 minutes

Read through the list of questions below and make some notes. The questions are divided into topics related to learning, personal circumstances and professional development. They are designed to prompt your thinking. As there may be quite a lot to consider here, you might want to make detailed notes and reflect upon them before moving on to your next decision.

Learning

- Did you enjoy learning online? What are the best aspects and what did you find challenging?
- Did you enjoy learning about mental capacity?
- Were there topics you wanted to know more about that were not covered by this course? If so, what were they?
- Do you want to do another course? If so, which subject area?

Personal circumstances

- How do you think that issues of mental capacity apply to you?
- Have you considered what you might do now or in the future in relation to your own mental capacity?

- You may be caring for someone who permanently or periodically lacks mental capacity. Has the course helped you to understand the implications of this? If so, how might you use this knowledge to help the person you are caring for?
- If a lack of mental capacity is affecting you or someone you care about, do you want to learn more about the support that's available?

Professional development

- If you are already working with people who lack mental capacity, do you want to stay in your current role?
- What do you like best about your current role and what do you like least?
- If you want to stay in your current role, what would improve it?
- What further skills or knowledge do you need to acquire?

Provide your answer...

[Comment](#)

Reflecting on these questions should have helped you clarify what you want to change, if anything, or how you want to progress. You might have found that you are happy with your current situation and do not wish to do any further learning or make any changes.

If you do wish to change or progress things, read through your notes again and summarise what you would like to do next.

For example, 'I would like to learn more about what might happen if I lost mental capacity in the future' or 'I want to develop my understanding of mental capacity in order to further my career in social care.'

Provide your answer...

[Comment](#)

You might have a lot of ideas about what to do next. Think about one at a time. Be realistic. You need to think about the time you have available to plan and implement any changes. Your ideas may be a mixture of short-term and long-term ones. The next section will help you with planning some of these steps.

Having reviewed your learning and clarified your ideas about possible future steps, you are now in a better position to think about how to achieve what you want to do next. You will do this in the next section. Even if you do not want to take the subject any further, you will still find this section useful.

4 Next steps

The next activity helps you to build on what you have learned about mental capacity during the course and gives you an opportunity to think ahead. It is divided into the three areas you considered in the previous activity: learning, personal life and professional development. You may wish to think about all three or choose the one that is most relevant. As you will have learned when you study mental capacity through legislation there are slight differences depending on the UK nation where you live or work. You are reminded to bear this in mind for your next steps.

Activity 5 Next steps

Allow about 30 minutes

1. Learning: Many courses on mental capacity are available. Type 'mental capacity training' into a search engine and browse through the results, making notes if necessary. Look at what the courses cover (including which nations of the UK), who they are aimed at and whether they cost or are free of charge.

Comment

You probably noticed that your search brought up a range of courses. Some are free, others charge. Most are aimed at those already working in social care settings. However, this is not always the case; some courses are equally relevant to people who study in relation to their personal circumstances.

When I searched, the courses that appeared first related to the Mental Capacity Act 2005 which refers to England and Wales only. You may want to look for courses that apply to the country where you live and work.

Some courses offer a more in-depth look at mental capacity. For example, some refer to 'deprivation of liberty', which has not been covered in any depth in this course. Deprivation of liberty is a specialist and fast-changing area of mental capacity. You may feel that you now have enough knowledge to learn about it in more detail.

Apart from courses, there is also much written material on mental capacity. This is often available through libraries and some of it can be accessed online. Some suggestions are also be found here

Adams, J., Leshone, D. (2016) *Active Social Work with Children with Disabilities* Northwich Critical Publishing Ltd.

Barber, P., Brown, R., Martin, D. (2017) *Mental Health Law in England and Wales - a guide for mental health professionals*, 3rd ed., London Learning Matters, Sage

Brown, R. (2016) *The Approved Mental Health Professional's Guide to Mental Health Law*, London, Sage.

Brown, R. A., Barber, P., Martin, D (2015) *The Mental Capacity Act 2005: A guide for practice*, 3rd ed., London, Sage.

Department for Constitutional Affairs (2007) *Mental Capacity Act 2005, Code of Practice*, London, The Stationary Office

Department of Health. (2017) *Care Act (2014) Statutory Guidance*, London HM Government.

Jones, R. (2014) *Mental Capacity Act Manual*, 6th ed., London, Sweet and Maxwell.

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Ruck Keene, A., Edwards, K., Eldergill, A. and Miles, S. (2014) *Court of Protection Handbook: A User's Guide*, London, Legal Action Group.

Ruck-Keene, A., Butler-Cole, V., Allen, N., Lee, A., Bicarregui, A., Edwards, S. (2016) *A brief guide to carrying out Best Interests assessments*, London, 39, Essex Chambers,

Sinson, J. (2017) *Applying the Mental Capacity Act 2005 in Education (a practical guide for education professionals)* London Jessica Kingsley Publishers

Social Care Institute for Excellence (SCIE). (2017) *Mental Capacity Act (MCA) Directory*,

Valios, N. (2017) *Five key steps to assessing capacity* London Community Care.

2. Your personal life: If you want to look at how a decline in mental capacity might affect you, type 'mental capacity and how it affects me' into a search engine.

[Comment](#)

This time your search will have returned links to agencies that provide advice and support, and links to bodies that regulate social care services such as the Care Quality Commission. You may want to look in more detail at these links and the help that is on offer. It is helpful to use the thoughts that occurred to you in [Activity 3](#) to make sure that you are not overwhelmed by the different choices that might appear.

3. Your professional development: If you are already working either as a volunteer or in a paid capacity in a social care setting, you may already have access to training on mental capacity. This course and your reflections this week may have given you further ideas about training that could be provided. You may want to show parts of this course to others or look into training that relates to mental capacity. Your agency should have a training area where you can find details of courses like this.

Future opportunities might include those offered for 'named' social workers (to be called 'approved mental capacity professionals' in the future). You may also wish to explore how mental capacity interacts with other pieces of legislation such as on mental health or care. If you do wish to develop your skills and knowledge in this way, discuss it in your place of work.

To finish this week take a look at this [transcript](#) in which a current practitioner discusses their thoughts about mental capacity. Take a note of the main issues they discuss.

This week's quiz

You are now ready to take the final quiz, which counts towards your badge. It is similar to the quiz that you took in Week 4, with 15 questions in total. As with all the other quizzes, you have three chances to answer each question.

If you are not successful the first time, you can attempt the quiz again in 24 hours.

Take your time reading the questions and possible answers to give yourself the best chance of showing all your knowledge and understanding.

Open the quiz in a new tab or window (by holding ctrl [or cmd on a Mac] when you click the link).

[Week 8 compulsory badge quiz](#)

Summary

This week you have reviewed and reflected on the learning you have done in this course and identified any further steps you would like to take. You have also listened to practitioners talk about what mental capacity means for the general public and for practice as it is applied in each nation of the UK. The language used and the timing of legislative changes might differ slightly, but overall, matters of mental capacity in all four nations are based on the same principles, values and attitudes. In turn these principles underpin actions, central among which are the assessment of mental capacity and supporting someone who may lack capacity or whose capacity fluctuates. The course finishes with the same message with which it began: mental capacity is relevant to us all.

You should now be able to:

- describe possible changes in mental capacity law and outline key themes
- describe some of the particularly useful or surprising things you have learned on this course
- start to make plans for your future learning, your personal situation and any professional development needs you have
- identify whether you wish to make any plans for your own situation in relation to mental capacity and if so, how.

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[Nutritional psychiatry is the future of mental health treatment](#)

[Investigating links between pesticides and mental health](#)

[Homeland, Carrie and how mental health is portrayed on-screen](#)

Audio

[Mental Health Lennox Castle](#)

Tell us what you think

Now you've completed the course we would again appreciate a few minutes of your time to tell us a bit about your experience of studying it and what you plan to do next. We will use this information to provide better online experiences for all our learners and to share our findings with others. If you'd like to help, please fill in this [optional survey](#).

Further reading

For more on power of attorney, see [Office of the Public Guardian](#), [Scotland's Office of the Public Guardian](#) or [Northern Ireland's Office of Care and Protection](#).

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Acknowledgements

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Week 3

Text

Box 1: extract from: Social Care Institute for Excellence (2016) *Mental Capacity Act 2005 at a glance*. www.scie.org.uk/mca/introduction/mental-capacity-act-2005-at-a-glance ⁷⁰

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Week 4

Text

Box 1: Extract from, Valios, N. (2016) 'Five steps to assessing capacity', Community Care, 1 July 2016, Community Care. London..

www.communitycare.co.uk/2016/07/01/five-key-steps-assessing-capacity

www.communitycare.co.uk. Courtesy Natalie Valios.

Box 4: extract from, Mental Capacity Act 2005 c. 9 Part 1 Preliminary, Section 4.

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Week 8

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