Wigan Safeguarding Adults Board

Mental Capacity Practitioners Guide

Our Mission:

Working together with our communities, helping people live safer, happier lives.

Wigan Safeguarding Adults Board

Contents

Timely and robust assessments of mental capacity are vital to effective safeguarding work. The Mental Capacity Act 2005 applies to people from the age of 16. This briefing is aimed at all professionals and volunteers to improve confidence and knowledge. Packed with hyperlinked resources and practice guidance.

What is Mental Capacity to Make a Decision?

Decisions are sometimes simple and sometimes complex. But the activity of making decisions, for all people, in all situations, requires the same key abilities:

- To understand relevant information, including the foreseeable consequences of the decision
- To retain the relevant information for long enough to reach a decision
- To weigh and use the relevant information in reaching the decision.
- A person needs to be able to do all these things at the moment they actually need to make and enact the decision.

Mental capacity is decision-specific and time-specific. This means people can have capacity to make one decision but not another, and their capacity can change over time.

Key Findings From Safeguarding Adults Reviews

Safeguarding Adults Reviews take place when an adult with care and support needs has died as a result of abuse and neglect, or has suffered serious abuse. These reviews look at the work of all involved agencies and professionals to identify learning that can be used to improve practice for other adults at risk.

The Five Principles of the Mental Capacity Act 2005

Principle	In Practice
Principle 1: A person must be assumed to have capacity unless it is established that s/he lacks capacity	When applying this principle, it is vital to know when to set aside the assumption and take steps to assess capacity
Principle 2: A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.	This is usually going to be more than one conversation and will often require respectful challenge and frank discussion about risks.
Principle 3: A person is not to be treated as unable to make a decision merely because he makes an unwise decision.	Nonetheless, unwise decisions can indicate a reason to doubt capacity. Risky decisions should not be written off as "lifestyle choice" without exploration and challenge.

Principle 4: An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in their best interests.	Challenge anyone who is not acting in the persons best interests, including those with Lasting Power of Attorney or a court appointed deputy.
Principle 5: Any act done in a person's best interests must consider whether the same outcome could be achieved in a less restrictive way.	Compare options and consider which is least restrictive. For example, care and treatment at home versus care and treatment in hospital.

Mental Capacity Toolkit: Bournemouth University and Burdett Trust for Nursing have developed a Mental Capacity Toolkit. Find more information about the principles and applying them in practice by clicking here or on the icon.

When to doubt capacity

Principle 1 says a person must be assumed to have capacity unless it is established that s/he lacks capacity.

But what does this actually mean in practice? Are we getting it right?

The House of Lords Select Committee found that the assumption of capacity "is widely misunderstood by those involved in care. It is sometimes used to support non-intervention or poor care, leaving vulnerable adults exposed to risk of harm... this is because professionals struggle to understand how to apply the principle in practice."

You do NOT need to know of a diagnosis of mental disorder or impairment BEFORE you doubt someone's capacity. This is a common misconception that hampers best safeguarding practice. Important note: to doubt capacity is not the same as deciding that someone lacks capacity. What sort of behaviour or circumstances cause doubt about someone's capacity?

Setting the threshold for doubt too high puts people at unacceptably high risk of harm.

The Mental Capacity Act Code of Practice sets the threshold for doubting capacity quite low.

We can doubt capacity if:

- The person's behaviour or circumstances cause doubt as to whether they have the capacity to make a decision, e.g. unwise decisions, especially those that expose the person to risk. It is not sufficient to assume such decisions are "lifestyle choices" without respectful challenge and exploration of the person's reasoning and background information.
- Somebody else says they are concerned about the person's capacity, e.g. a family member, another care giver or professional.
- The person has previously been diagnosed with an impairment or disturbance that affects the way their mind or brain works, and it has already been shown they lack capacity to make other decisions in their life, eg where someone who has been found to lack capacity to decide what care they need, doubt is cast on their ability to make financial decisions.

You DO NOT need to know a diagnosis of a mental disorder or impairment BEFORE you doubt someone's capacity. This is a common misconception that hampers best safeguarding practice.

What sort of behaviour or circumstances cause doubt about someone's capacity?

- *Fred is signing ownership of his house over to a virtual stranger.*
- *Ade refuses to throw out any of his rubbish and it is piling up in his home.*
- *Priti falls a lot but is refusing help from a physiotherapist.*
- *George misuses his insulin and is refusing help to check the dose and administer it.*
- *Eva refuses help with applying for benefits even though she has no money for food or rent.*
- *Sue is refusing nursing care despite worsening pressure sores.*

***Important note: to doubt capacity is not the same as deciding that someone lacks capacity.**

What To Do When You Doubt Someone's Mental Capacity To Make a Decision.

Whatever your professional role, it is important to start by taking all practical steps to help them to make that decision themselves.

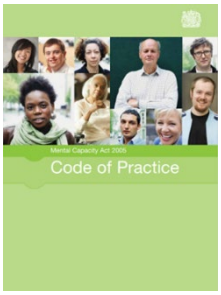
The sort of steps you should take will be specific to the person's individual circumstances and needs.

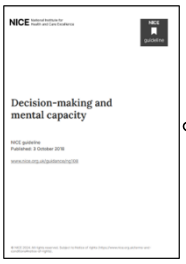
Think about:

- ✓ Their communication needs,
- ✓ What information they need
- ✓ The best way to present the relevant information to them
- ✓ How to help them feel most at ease
- ✓ Someone who knows them well who can assist them.
- ✓ The best time and place to talk to them
- ✓ Ask yourself: Are they likely to recover their ability to make decisions at some point in the future? Can the decision be delayed until then?

You may need to involve a Speech and Language Therapist or an interpreter in a different language or sign language.

Chapter 3 of the Mental Capacity Act Code of Practice gives lots of guidance and ideas on how to support some one to make their own decisions.





NICE Guidelines also have information on supporting people to make their own decisions.

- ✓ If you've taken steps to support someone to reach a decision for themselves and you still doubt their ability to understand, retain and weigh and use relevant information then a Mental Capacity Assessment is needed.
- ✓ You must not assume that someone else will do this. Take responsibility for ensuring that an assessment takes place.

Who Should Assess Mental Capacity?... It depends on the decision and the context!

For **day-to-day decisions**, such as what to have for lunch or what to wear, the person providing direct care at the time should be assessing capacity at the time the decision needs to be made.

For **medical decisions**, the doctor or relevant healthcare professional who proposes a treatment or an examination, eg GP, district nurse, dentist, must assess the person's capacity to consent to that. Best practice: When you make a referral, please provide as much information as you can about the reasons for your concern, the steps you have taken to explore the issue with the person and the decision(s) to be made. **Tip: If you doubt someone's capacity to make a medical decision, inform the relevant medical professional of your concerns.**

For **legal matters,** such as making a will, a solicitor or legal practitioner must assess the client's capacity to instruct them. They must assess whether the client has the capacity to satisfy any relevant legal test. In cases of doubt, they should get an opinion from a doctor or other professional expert.

There are a range of other decisions, particularly those which have a significant impact on someone over time, which need someone with more experience and relevant expertise to assess mental capacity, such as a social worker.

Sometimes, where there is a dispute about an assessment of capacity, independent experts need to be consulted, and in rare cases the determination of capacity needs to be made by a judge in the Court of Protection.

Chapter 4 of the Mental Capacity Act Code of Practice gives guidance on who should assess capacity in any given situation.

If you doubt someone's capacity to make a decision about:

- Safeguarding support
- Housing/accommodation
- Financial decisions
- Care and support, such as help with
- Personal care or meal preparation

Please refer your concerns to Wigan Adult Social Care

✓ **Best practice**: When you make a referral, please provide as much information as you can about the reasons for your concern, the steps you have taken to explore the issue with the person and the decision(s) to be made.

How to Assess Mental Capacity.

The Mental Capacity Act (MCA) uses a two-stage test to decide whether a person lacks capacity to make a specific decision.

Stage One: Functional Test (Section 3)

The first step is to look at whether the person can make the specific decision at the time it needs to be made. This means checking whether the person can:

- ✓ Understand the relevant information
- ✓ Retain that information long enough to decide
- ✓ Use or weigh the information as part of the decision-making process
- ✓ Communicate their decision (by any means)

At this stage, practitioners should focus only on the decision itself, not on the person's diagnosis.

What does "weigh and use" mean? The Mental Capacity Act Code of Practice (para 4.21) says: 'For someone to have capacity, they must have the ability to weigh up information and use it to arrive at a decision. A person must accept the information and take it into account. A person may appear to be able to weigh facts while sitting in an interview setting but if they do not transfer those facts to real life situations in everyday life (executing the plan) they may lack mental capacity.'

Stage Two: Diagnostic Test (Section 2)

If the person cannot make the decision, the next step is to consider why. The practitioner must decide whether the inability is caused by:

- ✓ An impairment of the mind, or
- ✓ A disturbance in the functioning of the mind or brain

There must be a clear causal link between the impairment and the person's inability to make the decision.

Examples of impairments or disturbances of the mind or brain include:

- Phobias
- Learning disability
- Alcohol related brain damage
- Anxiety
- Depression
- Brain damage
- Personality disorder
- Schizophrenia
- Demetia
- Infection/ Illness

Best practice:

- ✓ You may need to proactively make enquiries about diagnosis, or raise concern about the need for a clinical assessment if there is no diagnosis.
- ✓ Professional curiosity and interdisciplinary communication is critical to this assessment.

Guidance from the Courts
Case law has reinforced this approach:

In PC v City of York, the court warned against making assumptions based on diagnosis alone. A diagnosis should not automatically mean a person lacks capacity.

The Supreme Court in JB confirmed that practitioners should first clearly define the decision and assess the person's ability to make it, before considering whether any impairment caused the inability.

Best Practice
How you find answers to these questions will vary from assessment to assessment. You may need to speak to the person once, or several times. You should consider information from other sources including people who know the person and take account of relevant background information too.

The determination of capacity must be made on the balance of probabilities - is it more likely than not that the person lacks capacity?

You must record how and why you have come to the conclusion that the person lacks capacity to make the particular decision. *Remember it is the responsibility of the assessor to prove that a person lacks capacity and not the other way around.

Tricky Issues and Challenges

There are sometimes confusing and complex challenges for practitioners when assessing capacity. These challenges often surface in cases of self-neglect such as hoarding and refusal of care and support.

Fluctuating capacity

Some people's mental capacity fluctuates because of the nature of a condition that they have. For example, people with dementia are often more lucid in the morning than the evening. Depending on the condition, fluctuation can take place over a matter of days or weeks, or even over the course of the day.

When does the decision need to be made

To establish how to apply the Mental Capacity Act when someone has fluctuating capacity it is important to establish when and how often the decision needs to be made. Is it a one off or a repeat decision? NB The decision does not usually need to be made at the point of an assessment interview, but rather at the point a decision needs to be executed.

With repeated decisions, such as management of property and affairs, or managing diabetes day to day, requiring multiple 'micro-decisions' each day, if there are only limited periods during the course of each day or week that the person is able to make their own decision, then it will usually be appropriate to conclude they lack capacity to make the repeated decision.

"Executive Capacity" - what does it mean? How do we assess it?

Sometimes a person can give coherent reasonable answers to questions during assessment that indicate they can understand, retain, and weigh and use relevant information in the abstract. However, they may be unable to execute the decision in a real world situation. This can happen if their executive function is impaired. There is an important distinction between decisional capacity, when considering the decision in the abstract, intellectually, and the executive capacity to execute or act on the decision in the real world at the material time the decision needs to be made. In the moment, abilities to recall and weigh and use relevant information can be significantly impaired by conditions such as acquired brain damage, stroke, dementia, and rapidly fluctuating conditions.

Executive functioning is not a separate legal test. However, where executive dysfunction means a person cannot use or weigh information in real-world decision-making at the material time, this may indicate a lack of capacity under the existing functional test.

In order to have mental capacity to make a decision a person needs both decisional AND executive capacity. Insufficiently detailed capacity assessments can expose the person to substantial risks. In complex, risky or contentious situations, such as self-neglect and hoarding, an interview-only approach is not sufficient to assess executive capacity. Take account of information about the person's real-world behaviour from family, care givers and other third party information sources.

Practical Examples:
Finances: A person explains risks of loan scams but repeatedly gives bank details to strangers the same day—suggesting an inability to use/weigh risks in practice.
Care/meds: A person agrees to carers and understands consequences, but never opens the door or consistently forgets meds—raising doubt about their capacity for care/medication decisions due to executive dysfunction

Executive capacity Key take Aways

- Can the person carry out/enact the decision over time?
- Not a separate legal test;
- Look for consistent patterns between stated intentions and real-world actions.

Useful Resources
Lancashire safeguarding Grab Sheet on Executive Capacity

Making Decisions in Someone's Best Interests

One of the key principles of the Act is that any act done for, or any decision made on behalf of a person who lacks capacity must be made in that person's best interests. That is the same whoever is making the decision.

To support participation there are some decisions that require you to arrange an Independent Mental Capacity Advocate (IMCA).

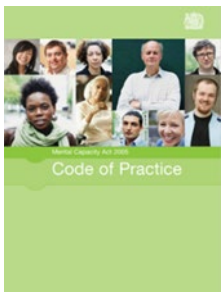
For decisions about major medical treatment or where the person should live, including a move to a care home or supported accommodation, and where there is no-one suitable to consult in their informal network, an IMCA must be consulted. There are a number of advocacy services here in Wigan by visiting this WSAB webpage.

Who makes a best interest decision?

The decision maker should be the person in a position to enact the decision. A doctor will be the decision maker about a medical exam or treatment. A nurse will be the decision maker about a wound dressing. A social worker will decide on what care package to provide. If a decision is complex or controversial it is best practice for a group of professionals to make a collective decision.

However, if the person has a Lasting Power of Attorney (LPA) for Health and Welfare or Property and Affairs, best interests decisions should be made by the person with the relevant power of attorney. They are under the same duty as everyone else to act in the best interests of the person.

If you suspect they are not adhering to best interests decision making they must be challenged and their LPA could be revoked. The same applies to any court appointed deputy. Click here to report concerns about an attorney, deputy or guardian to the Office of The Public Guardian. Some decisions are so complex or disputed they need to be made by the Court of Protection.



Chapter 8 of the Mental Capacity Act Code of Practice specifies the circumstances when decisions MUST be referred to the court of protection.

Best Interest Decision making: you MUST take account of ALL these factors

- ✓ Consider whether the person might regain capacity and the decision could be delayed.
- ✓ Identify all relevant information and circumstances that should be considered in the decision.
- ✓ Find out the person's views, wishes, and feeling about the decision – just because they lack capacity, their views are still vital for establishing their best interests.
- ✓ What is the least restrictive intervention, which is still in their best interests.
- ✓ If the decision concerns life-sustaining treatment the decision should not, in any way, be influenced by a desire to bring about the person's death.
- ✓ Avoid discrimination - don't make assumptions about someone's best interests based on the person's age, appearance, condition or behaviour. Do not make assumptions about the person's quality of life
- ✓ Consult other relevant people - for their views about the person's best interests and to see if they have any information about the person's wishes and feelings, beliefs and values.

Further Reading

Mental Capacity Act Code of Practice

The General Medical Councils interactive decision-making tool for when you doubt someone's mental capacity to make a decision about medical care and treatment.

WSAB website has information on local advocacy services across the borough.

Bournemouth University The Mental Capacity Tool Kit

Royal College of General Practitioners Safeguarding Tool Kit

British Medical Association Toolkit

Practical Guidance

The information below may be used to assist in the practical steps required to plan, assess and record. You may wish to consider this guidance as a framework to support your practice and in clearly evidencing the decision which needs to be made, the practical steps taken to maximise capacity, and a summary of your findings which evidence Defensible Decision Making.

Decision to be made

What is the decision to be made?	There must be a separate Mental Capacity assessment completed and recorded for each decision. Any assessment of capacity must be related to a specific issue. Where there is more than one issue, more than one capacity assessment must be carried out. It might help you to consider at this stage, if there were to be a best interests decision, what would that decision be. It may also assist you to consider whether the person needs to consent to something? **Example:** *Whether Mr John Doe has the mental capacity to consent to the administration of prescribed antipsychotic medication (Olanzapine) for the treatment of paranoid schizophrenia.*
Please detail the relevant information needed in order for the person to have capacity	What must the individual understand, remember, and consider to demonstrate capacity? **Example:** *In order for Mr. Doe to have the capacity to consent to the administration of prescribed antipsychotic medication (Olanzapine) for the treatment of paranoid schizophrenia, he would need to understand the purpose of the medication, the necessary steps involved in its administration, and the potential risks associated with not receiving this treatment and not taking his medication:* • *The purpose of the medication (Olanzapine – for treating psychosis)* • *The intended outcomes (reduction of hallucinations and delusions, improvement in functioning)* • *Possible side effects (e.g., weight gain, drowsiness, increased risk of diabetes)* • *Risks of not taking the medication (continued deterioration, increased risk of harm to self/others, longer hospital stay)* Take time to explain to the person anything that may help them make their decision.

	Do not give or expect more detail than needed; for example, Mr. Doe may be aware that he is taking medication to support his mental health but not know the specific name of the medication. Before 'understanding' can be tested it is necessary to identify what someone would need to understand in order to make the specific decision. It is good practice to identify some of the salient points in this section. For example, you might say "In order to make this decision Mrs Smith would need to understand where she lives, what kind of establishment it is, what care she needs and receives and why she is there." (ADASS, 2016). You must consider decisional vs. executive capacity (consider tell me, show me questions, or modelling). Decisional capacity considers the ability to understand and reason through the elements of the decision that needs to be made, through a conversation with the person. Decisional capacity does not consider the person's ability to realise when that decision needs to be made. An example would be a person who tells you how they manage their personal care and that they do this every day, however you are able to see that they have not changed their clothes or had a wash over many days. **The burden of proof is on the professional to prove the lack of capacity not the person that they have capacity.**

Section 2:

Practical steps

Please confirm how you have given consideration to the location and timing of the Capacity Assessment (Equality Act 2010)	Describe here what you have considered; time and place as well as hearing and sight impairments. Consider the time of your visit, does the person respond better at a certain time of day. **Example:** *Mr. Doe has no known hearing or sight impairments. Prior to the assessment, I consulted with Mr. Doe to determine the most suitable time for our meeting and to identify the time of day when he is most alert and engaged, in order to maximize his capacity. Mr. Doe indicated a preference for afternoon appointments. The assessment was conducted at Mr. Doe's home, a familiar environment. To ensure privacy and minimize distractions and noise, the assessment took place in the living room.*

Please confirm how you have given consideration to the relevance of the information communicated; the communication method used e.g. sensory needs; and other people's involvement in the Capacity Assessment	Describe the communication you have explored with family and/or provider. Have you considered potential communication difficulties and any tools or strategies you have used? Providing accessible information is essential; consider input from SALT, OT, or other specialists. Are there any communication assessments to consider? Can carers, family members, or friends offer advice on communication? Reflect on the volume and pace of your communication. Identify which records you may have reviewed to inform your decision. It may be necessary to rephrase or repeat information. Assess whether a referral to a cultural advocate might be appropriate. Ensure you have consulted with relevant individuals. **Example:** *As part of the information gathering process, I contacted Mr. Doe's social worker to clarify details regarding his previous medication management. Mr. Doe was asked if he would like his daughter to be present, given their frequent contact, as this might help maximize his capacity. However, Mr. Doe declined this offer.* *I am not aware of any communication needs for Mr. Doe. During the assessment, he was provided with information in clear, straightforward language. Visual aids in the form of leaflets were also given, and information was repeated as needed to support his understanding.*
Please confirm how you have given consideration to the cultural influences, or social context that may affect the person's ability to make an informed choice	Please consider the individual's ethnicity, cultural background, and social influences, as these factors may impact their decision-making process. For example, members of certain religious groups, such as Jehovah's Witnesses, may decline specific medical interventions based on their religious beliefs. Consider family ties and relevant living circumstances that may impact the persons decision. Reflect on the records you have reviewed to inform your decision.

	Consider whether a referral for a cultural advocate may be appropriate. Consider who you have consulted. **Example:** *Consideration was given to any cultural and social factors that may influence Mr. Doe's ability to make an informed decision. I discussed Mr. Doe's beliefs regarding medication with his social worker and was informed that he generally prefers to avoid taking medication, favouring more natural remedies. It was important to keep this in mind during the assessment to ensure that Mr. Doe's responses were understood within this context, as well as to consider how these beliefs may impact his perception of risks and benefits related to his medication management.*

Section 3:

The Functional Test

To assess capacity, the individual must be able to:

1. Understand relevant information
2. Retain that information
3. Use or weigh that information as part of the decision-making process
4. Communicate their decision

Note: A person is considered unable to make the decision if they fail any one of the above criteria.

Functional assessment

Do you consider the person is able to understand the information relevant to the decision, and that this information has been provided in a way that the person is most likely able to understand?	This is the space you should use to 'set the scene' where you met the person and information you gave the person. It is also important to ask the specific question that you are assessing the person's capacity to make. The level of understanding must not be set too high. The test is looking at their understanding of the key points which you will need to have identified first. If the person is unable to understand relevant information, please be sure to explain why you believe this is the case. Give some examples of how you provided the relevant information, and the individual's responses to this information that has led you to believe that the person was unable to make the decision. The rationale for your conclusions is very important as they may also justify why there is less detail recorded in the other functional

	areas. For some people their impairment may be so complex and their understanding so limited that the evidence that you record here, also provides evidence as to why the other functional areas of "retaining" and "using or weighing" do not meet the functional test. (ADASS, 2016). **Example:** *I met Mr. Doe at his home, a familiar and comfortable setting for him. The environment was quiet and free of distractions. Mr. Doe received accessible, clear, and repeated explanations as needed covering:* • *The purpose of the medication (Olanzapine – for treating psychosis)* • *The intended outcomes (reduction of hallucinations and delusions, improvement in functioning)* • *Possible side effects (e.g., weight gain, drowsiness, increased risk of diabetes)* • *Risks of not taking the medication (continued deterioration, increased risk of harm to self/others, longer hospital stay)* *Despite this, Mr. Doe was unable to coherently explain what the medication is for. He stated, "The tablets are to stop them watching me through the windows" and claimed, "I don't have an illness, they're just trying to poison me." This indicates a lack of understanding of the nature and purpose of the medication.* *He demonstrated no insight into his condition and rejected the rationale for medication. Attempts to explore the information further were met with paranoia and suspicion.* *Conclusion: Mr Doe is unable to understand the information relevant to this specific decision.*
Do you consider the person is able to retain the information for long enough to be able to make the decision?	Be aware that there is a subtle distinction between 'retain' and 'remember'. To 'retain' something means that the person is able to hold onto it long enough to be able use it at the material time. Whereas to 'remember' is the ability to pull information back from their memory banks. A person may need aids to support their retention. This does not mean they will not meet this element of the functional test. If the person is unable to retain key information be sure to explain why you believe this is the case. Give examples. Some workers will tell the person their name in order to test this element and later ask them to remember it. If the person fails to do so they will refer to this as evidence the person is unable to retain information. This is not advised as the information is not relevant to the decision.

	It is important to remember that the test is based on the person retaining information in order to make a decision at the material time. If a further visit is necessary, the assessor may consider leaving material behind that can support the person's retention of the relevant information. (ADASS, 2016) **Example:** *Mr. Doe was able to repeat back some basic information (e.g., reason for the medication) immediately after explanation. However, when asked five minutes later, he stated:* *"I don't know what you're talking about. I'm not on any meds."* *His ability to retain and hold the information long enough to use it in a meaningful decision-making process is absent.* *Conclusion: Mr. Doe is unable to retain the information required to make the decision.*
Do you consider the person is able to use or weigh that information as part of the process of making the decision?	Be clear about what the relevant information is and consider how the person can engage with the decision-making process. Consider their ability to see various sides of the issue and to understand the reasonably foreseeable consequences of making a decision or failing to do so. It is important here not to consider someone as unable to make a decision because they are making an unwise or irrational choice. Equally bear in mind that the person may have applied his or her own values or outlook to the relevant information in making the decision and chosen to attach no weight to that information. That does not mean that he is unable to use or weigh it. Within this stage be sure to consider executive functioning – Does the persons ability match what they are saying they can do. Consider Occupational Therapy or other specialist input if required. If the person is unable to use or weigh salient information be sure to explain why you believe this is the case. Please give examples. (ADASS, 2016) **Example:** *Mr Doe's responses suggest he is unable to weigh up the potential benefits and risks. When the benefits of symptom reduction were discussed, he said:* *"There's nothing to reduce; you're the ones who are sick."* *Mr. Doe's values and beliefs regarding medication were explored prior to the assessment. Mr. Doe did not mention his previous*

	preference for natural remedies over prescribed medication as a reason for his reluctance to take medication. He interprets medication as a threat and believes staff are part of a conspiracy. His views are dominated by delusional beliefs, and he cannot consider the consequences of taking or refusing medication in a rational or reality-based manner. *Conclusion: Mr Doe is unable to use or weigh information relevant to this decision.*
Do you consider the person is able to communicate their decision?	If a person is able to understand, retain, and use/weigh, it would be rare for them to lack capacity on the sole basis that they cannot communicate their decision. This category exists only to pick up those people where communication is completely lacking. There is no requirement to describe at length the person's communication abilities here unless they fail to meet this requirement due to them. (ADASS, 2016) The Code of Practice (2007) states: 4.23 Sometimes there is no way for a person to communicate. This will apply to very few people, but it does include: - people who are unconscious or in a coma, or - those with a very rare condition sometimes known as 'locked-in syndrome', who are conscious but cannot speak or move at all. 'Locked-in syndrome' does not automatically deem someone to have capacity, it is about using effective communication tools with the person. If a person cannot communicate their decision in any way at all, the Act says they should be treated as if they are unable to make that decision. You should further document communication methods you tried if this if the person is unable to communicate. **Example:** *Mr Doe can verbally articulate and able to communicate his thoughts. However, the content of his communication is distorted by psychosis, which renders his expressed preferences unreliable in this context.* *Conclusion: Mr. Doe is able to communicate.*

Section 4:

Diagnostic Test

Is there an impairment of or disturbance in the functioning of the person's mind or brain?	The impairment/disturbance will usually be diagnosed by a clinician, although a formal diagnosis is not necessarily required. It can be temporary or permanent. The worker should highlight where the mental impairment is likely to be temporary. (ADASS, July 2016). Here you must include the causative nexus. The person lacks capacity because of their impairment. **Example:** *Mr. Doe has a diagnosed mental disorder (paranoid schizophrenia). He is currently experiencing active psychotic symptoms, including auditory hallucinations, persecutory delusions, and thought disorganisation. Because of his impairment he lacks capacity in relation to the specific decision.*

Section 5:

Summary

Do you think that the person has the capacity to make this informed decision at this time? Explain why the person is unable to make the specific decision because of the impairment of, or disturbance in the functioning of, the mind or brain	The person can only be proven to lack capacity if their inability to do one or more of the functional elements is 'because of' the impairment/ disturbance (as opposed to something else). There must be a causal connection [the causative nexus] to prove incapacity. (ADASS, 2016) **You only need to believe on the 'balance of probability' the person lacks capacity.** *Example:* *Mr. Doe lacks capacity to make an informed decision about his prescribed medication. He does not demonstrate sufficient understanding of the purpose, benefits, or risks of the treatment, is unable to retain the information consistently, and cannot weigh it meaningfully due to delusional thought processes related to his mental illness, his active symptoms are interfering with decision-making ability.* *On the balance probability, the lack of capacity is causally linked to his mental disorder (schizoaffective disorder), and the assessment complies with the Mental Capacity Act 2005.*

Record Evidence — Not Assumptions	Avoid: "They lack insight." "They don't understand." Without evidence, this is poor practice. Instead document: ✓ Exact quotes ✓ Observed behaviour ✓ Concrete examples **Better Recording Example:** "Mr X stated, 'I don't have diabetes,' when shown his insulin pen and asked what it is for."
Document Consideration of Unwise Decisions	You must show you did not assume lack of capacity due to an unwise choice.[scie.org.uk] **Good Recording Example:** *"Although Mrs Z wishes to spend most of her pension on gifts, she can explain consequences and alternatives. This is an unwise but capacious decision."*
Show How You Tested for Undue Influence or Coercion	If relevant, record: ✓ Who was present ✓ Any concerns ✓ Attempts to speak to the person alone The Capacity Guide highlights the importance of documenting concerns and seeking legal advice if coercion is suspected.
Do you need to complete a best interest decision?	If the individual lacks capacity, a best interests decision must be made. This decision can be guided by collecting the following information: • When reasonably identifiable, there is an obligation to consider the individual's past and present views, wishes, beliefs, and values. • The perspectives of all those consulted regarding the individual's past and present wishes and feelings. • The contributions of all involved in determining what may be in the individual's best interests. • Where applicable, the views of any IMCA concerning all relevant matters related to the decision. • The risks and benefits associated with all available options that best meet their needs. • The least restrictive option that effectively addresses the individual's needs should be prioritised. While formal best interests meetings are not a mandatory requirement under the Mental Capacity Act,

	they can be valuable in making decisions that are complex or have significant consequences for the individual. In urgent situations that involve immediate risks and cannot be deferred for a formal meeting, it is essential to consult with the multidisciplinary team involved in the individual's care and other key persons to the individual to make an interim decision until a formal best interests meeting can be arranged. Please refer to the Best Interests guidance for further details. BMA Toolkit- https://www.bma.org.uk/advice-and-support/ethics/adults-who-lack-capacity/best-interests-decision-making-for-adults-who-lack-capacity-toolkit SCIE Best Interest Principles - https://www.scie.org.uk/mca/practice/best-interests/

Best Practice in Positive Risk-Taking in Adult Safeguarding

Positive risk-taking is about balancing safety with autonomy, supporting adults to make choices that improve quality of life while managing associated risks. It aligns strongly with Making Safeguarding Personal , The Human Rights Act 1998 and the wellbeing principle in the Care Act 2014.

The 4 stages of Positive Risk Management

Positive risk management is about balancing **safety** with **independence**, making sure people can live fulfilling lives while staying protected from harm.—this has been adopted by Gloucestershire.gov.uk

Stage 1 — Risk Identification *(What are the risks, benefits, and wishes?)*

Key Principles Integrated

✓ Person-centred foundations
✓ Capture the adult's voice
✓ Explore what matters most
✓ Recognise both benefits and harms
✓ Gather history, observations, and input from carers/support network
✓ Understand the individual's narrative, trauma history and lived experience
✓ Identify early concerns before they escalate

What Practitioners Do

- Talk with the adult to understand their goals, worries, identity, and preferences in their own words.
- Gather information from family, carers, advocates, professionals, police, housing, and health (proportionately).
- Look at past incidents, safeguarding concerns, trauma history, and any patterns.
- Identify **positive** risks (opportunities) as well as potential harms.

Examples

- **Mary** wants to continue walking to the shop despite recent falls. You record her exact words ("It keeps me independent"), alongside her daughter's concerns, noting both viewpoints while keeping Mary's wishes central.
- **John** wants to manage his medication again. Benefits (self-esteem, independence) and harms (past overdoses) are clearly identified.

Stage 2 — Risk Assessment *(How serious is the risk? What is the likelihood and impact?)*

Key Principles Integrated

✓ Assess likelihood and impact
✓ Explore strengths, vulnerabilities, routines, and protective factors
✓ Assess mental capacity for the specific decision
✓ Respect unwise decisions where the person has capacity
✓ Support participation in decision-making
✓ Utilise expertise of families, carers, and the person
✓ Consider legal frameworks & safeguarding principles

What Practitioners Do

- Determine the adult's **mental capacity** for the specific decision.
- Score risks based on evidence, history, and patterns.
- Identify what the adult can do well, what helps them stay safe, and who is in their support network.
- Involve multi-agency partners **when proportionate** to the level of risk.
- Consider how rights, independence, and dignity weigh against potential harm.
- Apply the six safeguarding principles (Empowerment, Prevention, Proportionality, Protection, Partnership, Accountability).

Examples

- **Lina**, who has a learning disability, wants to cook independently. Strengths (enjoys cooking), protective factors (daily support worker, smart plugs, smoke alarm, easy-read steps) are identified to inform the assessment.
- **Ali** refuses help with finances but has capacity and understands the consequences. His decision is respected, and optional budgeting support remains available.
- **Multi-agency case:** An older adult chooses to remain friends with someone known to pose a risk. Police, housing, and GP are consulted proportionately to build a shared understanding of risk.

Stage 3 — Supporting Positive Risk Management *(How do we maximise independence while minimising harm?)*

Key Principles Integrated

✓ Co-produce a plan with the adult
✓ Focus on empowerment, resilience, and prevention
✓ Use the **least restrictive** approach
✓ Build on what works
✓ Introduce proportionate safety measures
✓ Include contingency and crisis plans
✓ Clarify multi-agency roles and responsibilities
✓ Ensure risk management actions match the person's chosen outcomes

What Practitioners Do

- Develop a **clear, co-produced plan** that sets out what risks are being taken and how safety will be supported.
- Introduce protective measures that do **not override autonomy**—only restrict when necessary.
- Consider advocacy or IMCA if the person lacks capacity.
- Ensure partners (health, police, community organisations, family) know their roles.
- Document rationales, alternatives, and decision-making pathways.

Examples

- **Martin**, who had alcohol-related falls, still wants to go to the pub.
  Instead of restricting him, the team creates safer options: he goes with a neighbour, sets a spending limit, and checks in by text.
- **Sarah**, who wants to continue seeing her partner despite domestic abuse concerns.
  A positive risk-taking plan is created: regular check-ins, safety code word, named support worker, and a short review cycle. She signs the plan.

Stage 4 — Ongoing Monitoring and Review *(Is the plan working? Are risks changing?)*

Key Principles Integrated

✓ Regular review dates
✓ Transparent, objective recording
✓ Update plans as the person's situation, health, or capacity changes
✓ Share updates with all partners and the adult
✓ Record evidence behind decisions
✓ Monitor whether protective factors remain effective

What Practitioners Do

- Review outcomes and incidents regularly.
- Amend plans if risks have decreased, increased, or changed.
- Reduce restrictions as confidence, skills, or resilience grow.
- Document progress, setbacks, professional judgments, and new information.
- Ensure the adult remains central to the review.

Examples

Staff report that an adult has fewer incidents and increased confidence after four weeks.
The support plan is updated to **reduce** support but keep periodic check-ins.

- Detailed notes show:
  - options discussed
  - why the adult chose a route
  - what safety measures were agreed
  - who was involved across agencies
    This supports transparent, defensible decision-making

Document Control

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