

MENTAL CAPACITY ACT FACTSHEET

WHAT PROTECTION DO PEOPLE HAVE WHEN CARING FOR THOSE WHO LACK CAPACITY TO CONSENT?

Every day millions of acts are done to people who lack capacity.

Such acts range from everyday tasks of caring to life-changing events (for example, serious medical treatment or arranging for someone to go into a care home).

In theory, many of these actions could be against the law.

Legally, people have the right to stop others from interfering with their body or property unless they give permission. But what happens if someone lacks capacity to give permission?

Carers who dress people who cannot dress themselves are potentially interfering with someone's body without their consent, so could theoretically be prosecuted for assault. A neighbour who enters and cleans the house of a person who lacks capacity could be trespassing on the person's property.

Section 5 of the Act provides '**protection from liability**'.

It protects people who carry out these actions. It stops them being prosecuted for acts that could otherwise be classed as civil wrongs or crimes.

The Act allows necessary caring acts or treatment to take place as if a person who lacks capacity to consent had consented to them. People providing care of this sort do not therefore need to get formal authority to act.

Importantly, section 5 **does not** give people caring for or treating someone the power to make any other decisions on behalf of those who lack capacity to make their own decisions. Instead, it offers protection from liability so that they can act in connection with the person's care or treatment.

The power to make decisions on behalf of someone who lacks capacity can be granted through other parts of the Act (such as the powers granted to attorneys and deputies).

What type of actions might have protection from liability?

Section 5(1) provides possible protection for actions carried out *in connection with care or treatment*. The action may be carried out on behalf of someone who is believed to lack capacity to give permission for the action, so long as it is in that **person's best interests**.

Actions that might be covered by section 5 include:

Personal care

- helping with washing, dressing or personal hygiene



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- helping with eating and drinking
- helping with communication
- helping with mobility
- helping someone take part in education, social or leisure activities
- going into a person's home to drop off shopping or to see if they are alright
- doing the shopping or buying necessary goods with the person's money
- arranging household services (for example, arranging repairs or maintenance for gas and electricity supplies)
- providing services that help around the home
- undertaking actions related to community care services (for example, day care, residential accommodation or nursing care)
- helping someone to move home (including moving property and clearing the home).

Healthcare and treatment

- carrying out diagnostic examinations and tests
- providing professional medical, dental and similar treatment
- giving medication
- taking someone to hospital for assessment or treatment
- providing nursing care (whether in hospital or in the community)
- carrying out any other necessary medical procedures (for example, taking a blood sample) or therapies (for example, physiotherapy or chiropody)
- providing care in an emergency.

These actions only receive protection from liability if the person is reasonably believed to lack capacity to give permission for the action. The action must also be in the person's best interests.

ACTIONS WE NEED TO TAKE TO BE PROTECTED FROM LIABILITY

Section 5 of the Act allows carers, healthcare and social care staff to carry out certain tasks without fear of liability if they have considered the following:

When acting in connection with the care or treatment of someone who lacks capacity to consent consider the following:



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Check the person has capacity to consent

- Is the action to be carried out in connection with the care or treatment of a person who **lacks capacity** to give consent to that act?
- Does it involve major life changes for the person concerned? If so, it needs special consideration.
- Have all possible steps been taken to try to help the person make a decision for themselves?
- Has the two stage test been applied?
- Are there reasonable grounds for believing the person lacks capacity to consent/ make their own decision?

Act in the person's best interests

- Has the best interests checklist been applied and all relevant circumstances considered?
- Is a less restrictive option available?
- Is it reasonable to believe that the proposed act is in the person's best interests?

Understand possible limitations on protection from liability

- If restraint is being considered, is it necessary to prevent harm to the person who lacks capacity, and is it a proportionate response to the likelihood of the person suffering harm – and to the seriousness of that harm?
- Could the restraint be classed as a 'deprivation of the person's liberty'?
- Does the action conflict with a decision that has been made by an attorney/deputy?

Paying for necessary goods and services

- If someone wishes to use the person's money to buy goods/pay for services for someone who lacks capacity to do so, are those goods/ services necessary and in their best interests?
- Is it necessary to take money from the person's bank or building society account or to sell the person's property to pay for goods or services? If so, formal authority will be required.

Who is protected from liability by section 5 of the Mental Capacity Act?

Section 5 of the Act is most likely to affect:

- family carers and other kinds of carers
- care workers
- healthcare and social care staff, and



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- others who may occasionally be involved in the care or treatment of a person who lacks capacity to consent (e.g., ambulance staff, housing workers, police officers and volunteer support workers).

Section 5 does not:

- give one person more rights than another to carry out tasks
- specify who has the authority to act in a specific instance
- allow somebody to make decisions relating to subjects other than the care or treatment of the person who lacks capacity, or
- allow somebody to give consent on behalf of a person who lacks capacity to do so.

To receive protection from liability under section 5, all actions taken must be related to the care or treatment of the person who lacks capacity to consent.

Before taking action, we must first reasonably believe that:

- the person lacks the capacity to make that particular decision at the time it needs to be made
- the action is in the person's best interests
- the person making the assessment and decision has evidenced they have used the statutory principles of the Act

THE FIVE STATUTORY PRINCIPLES

Presume Capacity- assume capacity unless you can prove otherwise

Less Restrictive- decisions must be the least restrictive option

Unwise decisions-unwise decisions don't always mean lack of capacity

Maximise Capacity- always support the person to make decisions

Best Interests- any decisions must be in the person's best interests



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SCENARIOS

Scenario: Working with a care plan

Margaret, an elderly woman, has serious mental health and physical problems. She lives in a nursing home and a care plan has been prepared by the multi-disciplinary team, in consultation with her relatives in deciding what course of action would be in Margaret's best interests. The care plan covers the medication she has been prescribed, the physiotherapy she needs, help with her personal care and other therapeutic activities such as art therapy. Although attempts were made to involve Margaret in the care planning process, she has been assessed by the doctor responsible for her care as lacking capacity to consent to most aspects of her care plan. The care plan can be relied on by the nurse or care assistant who administers the medication, by the physiotherapist and art therapist, and also by the care assistant who helps with Margaret's personal care, providing them with reasonable grounds for believing that they are acting in her best interests. However, as each act is performed, they must all take reasonable steps to communicate with Margaret to explain what they are doing and to ascertain whether she has the capacity to consent to the act in question. If they think she does, they must stop the treatment unless or until Margaret agrees that it should continue.

Scenario: Protecting multiple carers

Mr Rose, an older man with dementia, gets help from several people. His sister sometimes cooks meals for him. A district nurse visits him to change the dressing on a pressure sore, and a friend often takes Mr Rose to the park, guiding him when they cross the road. Each of these individuals would be protected from liability under Section 5 of the Act-but only if they take reasonable steps to check that he lacks capacity to consent to the actions they take and hold a reasonable belief that the actions are in Mr Rose's best interests.

