

Determining Capacity Fact Sheet

How do you decide if a person has, or has lost, capacity?

General Information

Presumption of Capacity

A presumption of capacity is explicit in the Mental Capacity Act 2005 (the England & Wales version of the Scottish Adults with Incapacity Act 2000 (AWI)) but it is not explicitly mentioned in the AWI, perhaps because there is in common law a presumption that all adult persons have capacity.

The start point therefore should be one of presuming the individual has capacity, to make whatever the decision it is that is required to be made. You must not assume that an individual lacks capacity to make a decision solely, for example, because of their age, any disability, appearance, behaviour, medical condition (including mental illness), their beliefs, or their apparent inability to communicate.

You are required to give a person all appropriate help and support to enable them to make their own decisions, or to maximise their participation in any decision-making process. There is a separate Fact Sheet on Supporting Decision Making.

Capacity is not all or nothing

Capacity is not all or nothing, it is not black or white, there is often a large grey area. Capacity is not a spectrum, with capacity at one end and incapacity at the other, where, at some point on that journey, one passes from capacity to incapacity. A person may be capable, on some days (or time of day) of making some decisions, then not capable on another day of making the same decisions and vice versa.

Capacity is not linear

Capacity is not linear. It is not a case of someone being able to make lower grade decisions but incapable of making more complex decisions. It can be very variable,

affected by many factors, such as time of day, emotion, pain, previous experience etc.

Capacity is Decision Specific

You will see from this that capacity is decision specific and should be assessed concurrent with the decision which has to be made. There should be no assumption that the person cannot make the decision just because they typically cannot.

Unwise Decisions

We may not always agree with a decision that a person makes, we may think it unwise, risky, not thought through properly, but if the person is capable [of making this decision] then any one of us is permitted to make an unwise decision. There should be no assumption that someone must be incapable because they are making a decision which most people would see as unwise.

Law Society of Scotland Guidance

The Law Society of Scotland has guidance on both taking instruction on PoAs and taking instruction generally from vulnerable clients which solicitors must ensure they are familiar with but are a valuable read for any audience.

The Legal Definition

This is set out in section 1(6) of the AWI.

There is what is sometimes referred to as a 'gateway entry' which is, that the person must have a mental disorder or impairment of the mind or brain, at the time the decision needs to be made. Thus, the AWI cannot / does not apply to someone who does not meet this entry threshold.

There is criticism of this entry threshold, of its fairness, of whether there is sufficient protection for people who lack capacity for other reasons. There is a view that the AWI should be reworked to focus on an individual's ability to make decisions rather than a legal capacity test. It is likely that, longer term, the Act will be amended but for now the position it is as stated below.

Legally, a person is incapable if they cannot

- Understand the decision
- Make a decision

- Retain the memory of the decision
- Communicate the decision
- Act – be this on the decision or otherwise to safeguard their interests

It only requires one of these factors to be absent for the person to be considered incapable ie one or more of them may be present but the person could still be incapable because one is absent.

Assessing Capacity

Assessing capacity isn't easy, people with many years' experience will still encounter difficulty in some cases. Assessing capacity is a case of applying the legal test above to the particular decision – capacity being decision specific.

Let us use the example of a person with dementia wishing to grant a Power of Attorney, do they have capacity to do this? How do we assess this?

Can they understand the decision?

In the case of deciding on a PoA, the very least you would expect the proposed granter to know is that this is a legal document which allows the person they select to look after things if, or when, they are no longer able to do so for themselves. You would expect them to have a basic understanding of what the grant of the various powers meant ie that to give financial powers would mean their attorney would have access to their money and information about their finances that they may consider confidential; or that to grant welfare powers would mean the attorney would potentially be able to decide on where the granter lived, on medical treatments, as well as on day to day matters eg what they ate or what they wore.

You would expect the person to understand why a decision [on the given matter] is needed and to appreciate the reasonably foreseeable consequences of them taking, or not taking, the decision - so in the case of a PoA that with a PoA they have someone, of their choice, who is in place to support and administer things for them should they become unable to do so, and if they decided not to do a PoA that things could be problematic if and when they need support.

The level of understanding is that of 'the man in the street'. A person only needs to know what the average person would be expected to understand in the same situation. They do not need to have an understanding at expert level.

To aid the person's understanding, every effort must be made to provide, or present, information in a way that meets the person's needs and circumstances eg with use of interpreters including sign language.

In order to assess if a person is considering things in an appropriate way [for them], it may be necessary to know relevant things about their situation. For instance, in the case of the grant of a PoA, you would need to know the family set up – how many children do they have, where do they live, what is their relationship with each other? This allows you to assess if the person's decision on who should act as their attorney is taking appropriate cognisance of the family dynamics.

Are they able to make a decision?

In order to make a decision an individual needs all the [relevant] facts, to be aware of the disadvantages as well as the advantages, must be able to weigh up the pros and cons, risks and benefits, giving each due consideration as they apply, or may apply, to their situation. Where there are options you would expect the person to a) appreciate there were alternatives and b) be able to weigh up the pro and cons of the alternatives v the decision they are primarily considering.

There are many, many, factors which affect one's ability to make a decision; for example one may need time, a quiet environment or support. In the case example we are using, of the person with dementia, if they only received their diagnosis a short time ago and have now have been whisked to the solicitor to get a PoA sorted, they may present as disorientated when in fact it is simply a case of too much too quickly; leaving things a few weeks, seeing the person in their own, familiar, surroundings may be all it takes to resolve the earlier confusional state.

Are they able to retain the memory of the decision?

Ability to retain the memory can link to how this information was presented. When the off side football rule was explained to me I wouldn't have been able to repeat it to you but once it was explained to me in terms of buying a pair of designer shoes it all become clear.

So in assessing a person's ability to retain information you must first be satisfied that they have understood the information that was given to them.

This person does not have to be able to retain the memory of their decision for ever more, or even necessarily for any lengthy period. They must be able to retain the memory, or be able to recall it if prompted, for as long as it takes to make the decision. Items such as notebooks, photographs, posters, videos and voice recorders can help people record and retain information.

Their ability to retain information must be specific to the decision not just a test of their ability per se. So asking them to recall an address given earlier in the

conversation for example is no test of their ability to retain the memory of a decision about a PoA.

More complex decisions tend to take longer, need more thinking about, so will, usually, require the person to be able to retain the memory for a lengthier period, whereas with lower grade matters the decision may be able to be made very quickly and in which case the retention period is less.

In the case of the PoA, you can ask them to recap by way of double checking, so for example some time earlier in the conversation they may have decided on their daughter as their attorney. On recap you ask 'so let me double check, who are we putting in as attorney?' If they then say their daughter and son [or son in law] you would have to explore further their retention ability. Even if they recalled the decision was their daughter you would still double check a couple of other key aspects with them to satisfy yourself that their ability to retain the conversation was sufficient.

Can they communicate the decision?

For there to be capacity the person must be able to communicate their decision. This need not be verbally, it may be by drawing, by non-verbal signs or signals, or with use of communication aids for example. A person is not incapable if they can't communicate if this deficiency can be rectified by human or mechanical means.

You need to be particularly cautious if someone is speaking for the person. This is not necessarily to suggest the respondent is malignly manipulating the situation, although of course this could be the case, it maybe because they are lovingly supporting the person and know full well what their response would be – but this does not allow us to assess the capacity of the person against the requirement for them to be able to communicate their decision.

Ensure you do not conflate lack of ability to communicate with lack of understanding for example many of us can grasp enough of a foreign language to understand the drift of the conversation but cannot communicate sufficiently to participate.

Are they able to act to, in this case, effect the decision to grant a PoA?

A person must then be able to action the decision they have made; or be able to act to safeguard themselves. For example, a person who is under the coercive control of another may be able to make a decision, retain the memory of this, communicate this etc, so on the face of it may seem capable, but the coercive control may prevent them from being able to act on their decision.

The common capacity assessing errors

- *The decision against which capacity is being tested is erroneous*

A common example is the conflation of ability to manage one's own affairs with the ability to grant a PoA. It is not uncommon when a professional is asked "is this person capable of granting a PoA" for the reply to be, "no, they can no longer manage their own affairs". The test of capacity is not the same for these two matters. They may no longer be capable of managing their affairs but may be capable of granting a PoA. Ensure you test capacity for the actual decision to be made.

- *There is a presumption of incapacity*

"Mrs X has dementia so she won't be able to make that decision" or an assumption that the person is incapable in respect of all decisions, simply because they are incapable in respect of many.

- *The wrong test is used*

Most typically if the wrong test is used it will be the use of the mini mental state examination eg getting people to count backwards, recall an address, draw a clock face – or versions of such exercises.

This has nothing to do with assessing the person's ability / capacity to make the particular decision in question. The test is that set out above, the statutory test provided for by the AWI.

- *Flawed assumptions are made*

This root cause of this is usually the failure to validate the information properly. In an actual case example, the lady said she wished her daughter to be her PoA, all seemed to be in order in every way until the solicitor went to get the daughter's willingness to act only to find the daughter had died some years before. On reflection he concluded his information gathering and questioning to validate this was why he had not established this key fact sooner. Revisiting it all with the lady and asking his questions in an open way, not making any assumptions, he concluded that in fact she was not capable when previously he had been quite satisfied of her capacity.

- *Making the facts fit*

We are all guilty of this from time to time, we want a certain outcome so we try and make the position get us to that outcome. No matter how tempting, when you are capacity assessing remember it is a factual test.

Conclusion

I recognise that offering the objective and factual position as this is simplifying what can often be a challenging judgment call. Feel free to get in touch if you wish to chat over a particular difficulty.