

# Mental Capacity after Brain Injury:

A clinical perspective



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# Coming up . . .



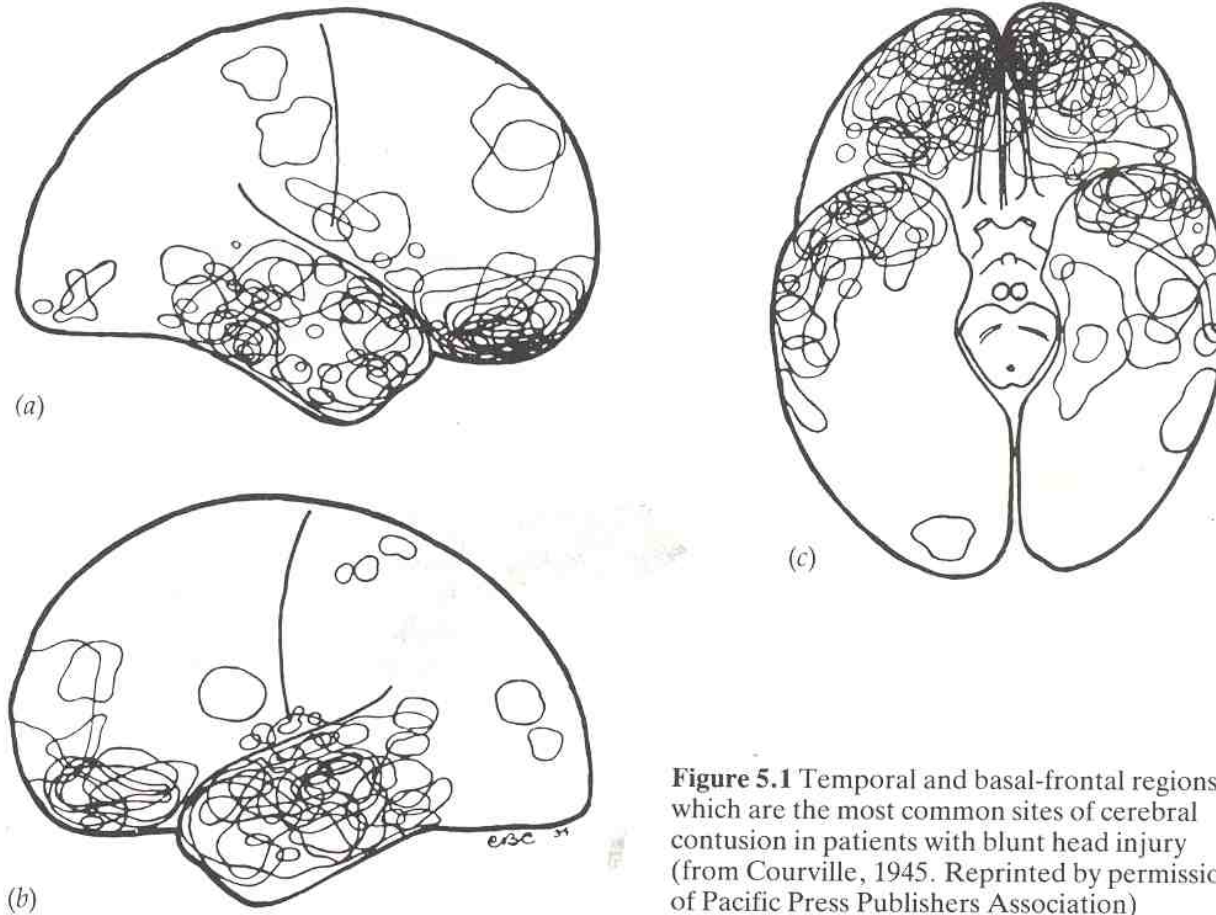
- Typical capacity questions in clinical practice
- Challenges after brain injury
- Who decides about mental capacity?
- How to assess mental capacity?
- Who should be consulted?
- How to tackle determining best interests?
- Keeping your practice consistent with the principles of the mental capacity code of practice

# Typical clinical issues

- Consent to treatment
- Eating with a PEG
- PEG placement in end of life care
- Weekend leave
- Return to drug and alcohol use
- Self discharge
- Long term placement
- Managing money
- Making / altering a will
- Sexual relationships
- Refusing medication



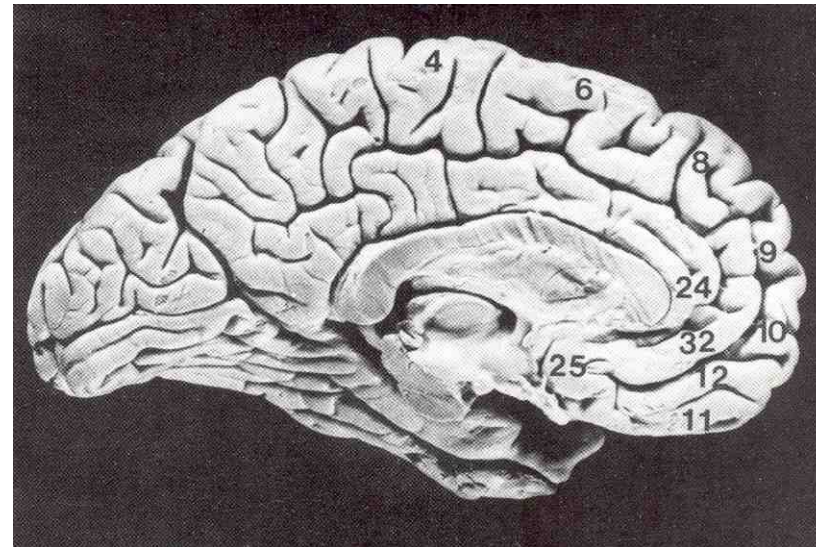
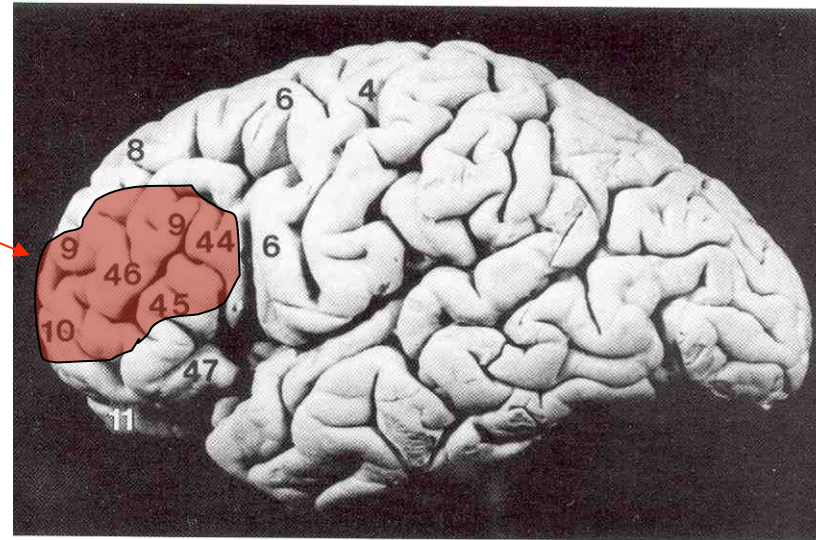
# Trauma



**Figure 5.1** Temporal and basal-frontal regions which are the most common sites of cerebral contusion in patients with blunt head injury (from Courville, 1945. Reprinted by permission of Pacific Press Publishers Association)

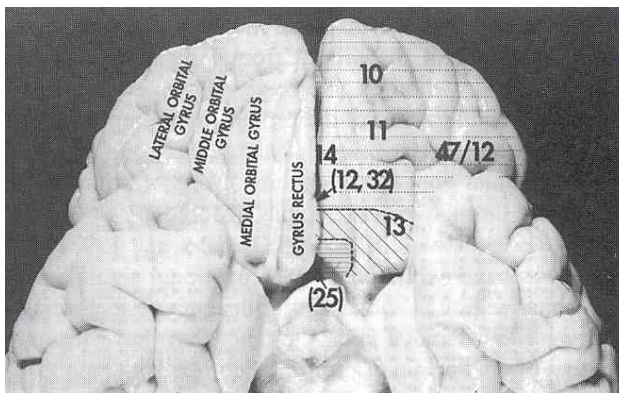
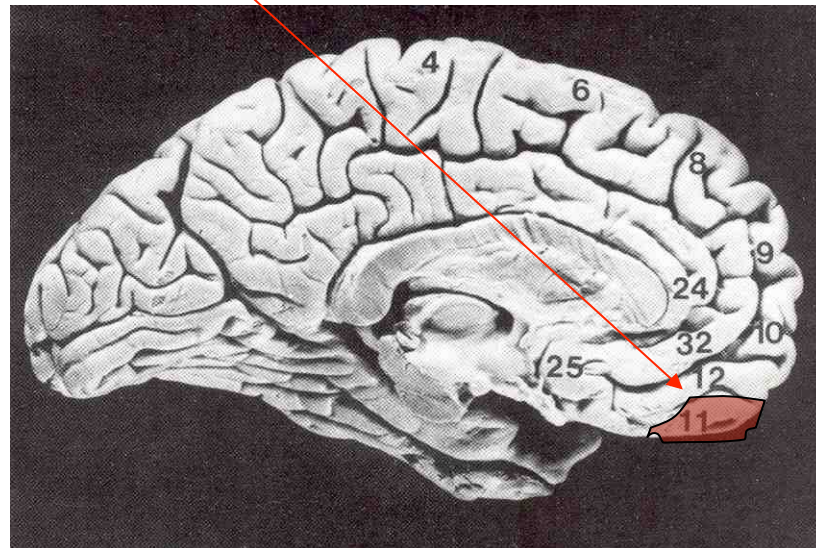
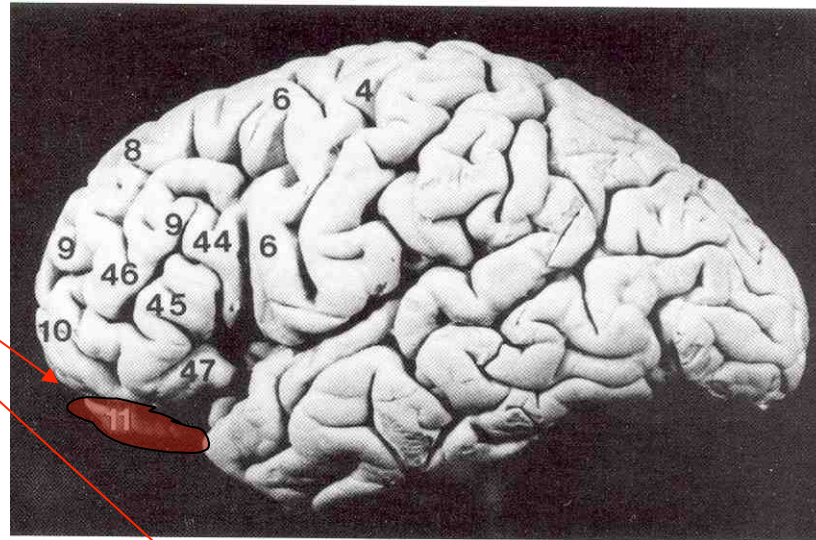
Reasoning,  
abstract thinking,  
planning, problem  
solving, working  
memory

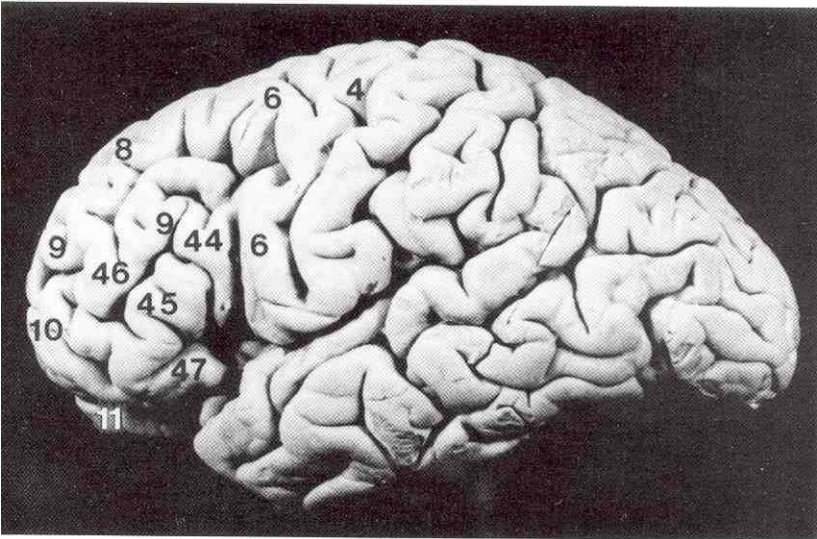
- Dorsolateral
- Orbitofrontal
- Mesial



Social function,  
Emotion related  
learning

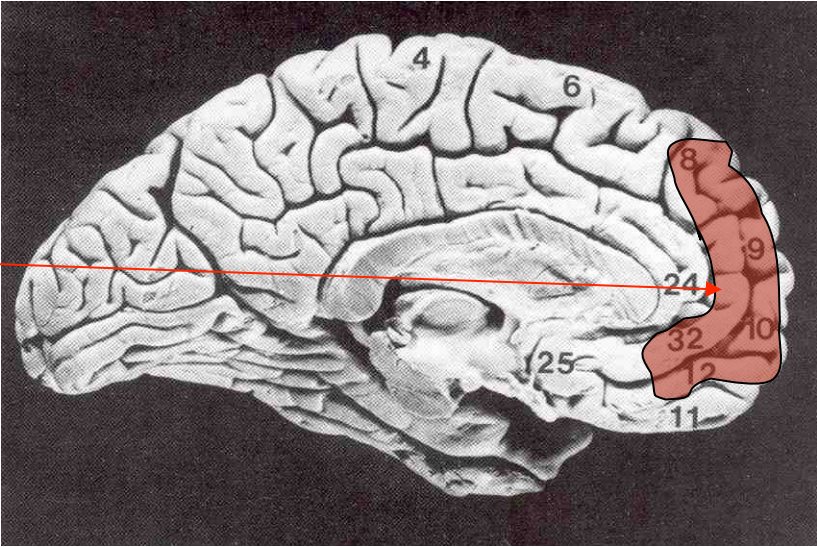
- Dorsolateral
- Orbitofrontal
- Mesial





- Dorsolateral
- Orbitofrontal
- Mesial

affect, emotional processing and motivation



# Brain injury challenges



- Present well
- Distilling the key points
- Awareness and insight
- Memory
- Communication
- Risk awareness and management
- Vacillation
- Initiation
- Impulsivity

# Who determines capacity?

- Legal not clinical entity – so final judgment is made by the **Court**
- In practical terms the act refers to the “**decision maker**”
- What this means is that a range of different decision-makers may be involved with a person who lacks capacity to make different decisions.
- More complex decisions are likely to need more formal assessments.
- A professional opinion on the person’s capacity might be necessary (ie psychiatrist, psychologist, a SLT, OT or social worker).
- **The final decision about a person’s capacity must be made by the person intending to make the decision or carry out the action on behalf of the person who lacks capacity** – not the professional, who is there to advise.



# Who decides?

- THE DECISION MAKER
- If a Lasting Power of Attorney (or Enduring Power of Attorney) has been made and registered, or a deputy has been appointed under a court order, the attorney or deputy will be the decision-maker, for decisions within the scope of their authority.
- For most day-to-day actions or decisions, the decision-maker will be the carer most directly involved with the person at the time.
- Where nursing or paid care is provided, the nurse or paid carer will be the decision-maker.
- Where the decision involves the provision of medical treatment, the doctor or other member of healthcare staff responsible for carrying out the particular treatment or procedure is the decision-maker.



# The basic principles of the MCA 2005



1. 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;

2. The right for individuals to **be supported to make their own** decisions: people must be given all appropriate help before anyone concludes that they cannot make their own decisions;

3. That individuals must retain the **right to make** what might be seen as **eccentric or unwise** decisions;

4. Anything done for or on behalf of people without capacity must be in their **best interests**;

5. Anything done for or on behalf of people without capacity should be the **least restrictive** of their basic rights and freedoms

# What is the question?



- Confer on who is the “decision maker” for this issue
- Determine who are the most appropriate assessors
- Refine from the clinical issue what the capacity question really is
- Determine if it is an excluded decision

# What is excluded?



Some decisions can never be made on someone else's behalf:

- Marriage and civil partnership
- Divorce
- Sexual Relations
- Adoption
- Consent to fertility treatment
- Voting

# What is the question? ....



- Establish why this has to be assessed now
- Establish if there is already legal precedent on the components required for the decision
- Common Law on:
  - Capacity to make a will
  - Capacity to make a gift
  - Capacity to enter into a contract
  - Capacity to litigate
  - Capacity to enter into marriage

# What is the question? . . .

- Think carefully about what a person really has to understand and decide on
- Decide on how to maximise the persons decision making abilities and timing of the assessment
- Determine if the MCA is the right act to use



# MCA vs MHA

If decision making is impacted by illness (eg psychosis or anxiety) then the appropriate act is the Mental Health Act

## **28 Mental Health Act matters**

(1) Nothing in this Act authorises anyone—

(a) to give a patient medical treatment for mental disorder,  
or

(b) to consent to a patient's being given medical treatment  
for mental disorder,

if, at the time when it is proposed to treat the patient, his  
treatment is regulated by Part 4 of the Mental Health Act.

(2) “Medical treatment”, “mental disorder” and “patient”  
have the same meaning as in that Act.



# Bear in mind the context



- Interpersonal
- Influence
- Vulnerability
- Suggestibility
- Deference and Acquiescence
- Social / communication skills
- Assertiveness
- Cultural factors

# How detailed should assessments be?



- Formal written assessments of capacity
- As the significance of a decision increases (judged for each person individually) should become more detailed
- Records of assessment and best interests decisions might become part of formal proceedings in the CoP if challenged.

# Significant consequences

- Disagreements about capacity
- When capacity may be challenged by someone
- When it is a decision about life sustaining treatment or significant other medical treatment
- When decisions not to resuscitate are being considered
- Reporting abuse or crime
- When others may be at risk
- Moves to new accommodation
- Decision has legal complications or consequences such as for liability
- Financial or property issues



# 2 stage test of capacity



**First Stage: Does the person have an impairment of, or a disturbance in the functioning of, their mind or brain?**

- The Act makes it clear that the inability to make a decision must be caused by an impairment of, or disturbance in the functioning of, the mind or brain. This could cover a range of problems, such as psychiatric illness, learning difficulty, dementia, brain damage or even a toxic confusional state.
- The Act also makes it clear that a lack of capacity cannot be established merely by reference to a person's age, appearance, or any condition or aspect of a person's behaviour which might lead others to make unjustified assumptions about capacity.

# Functional Test

2nd Stage: **Does the impairment or disturbance mean that the person is unable to make a specific decision when they need to?**

Four reasons are given why a person may be unable to make a decision:

- If they are unable:
  1. To comprehend the information relevant to the decision;
  2. To retain this information for long enough to make a decision;
  3. To use and weigh it to arrive at a choice;
  4. To communicate the decision in anyway.



# How?

- Information from records, from direct assessment and/or investigations as to the nature and severity of mental disability;
- Interviews with client and relevant others with respect to life experiences, suggestibility, and his/her abilities in this and other areas of decision making;
- A structured functional assessment to determine the person's specific abilities (as listed above) with respect to the decision in question;
- Standardised measures where available and relevant to establish cognitive ability and/or mental state.



# The Checklist . . .

- Right timing of assessment
- Background info from people and records
- Interviews with relevant parties
- Check on cognitive and communication ability
- Attempt to compensate for cog / com / emotional support needs
- Formal common law assessments as needed
- Identify emotional aspects that may affect assessment



# The Checklist . . .



- Identify if insight impacts on ability to understand information relevant to the decision and the foreseeable consequences
- Identify if they can retain information relevant to the decision (long enough to make an effective decision only required)
- Identify weighing of the risks and benefits
- Sufficient time to assimilate issues that have arisen – psychological aspects of change issues
- Could they make the decision if given more time

# The Checklist . . .

- Impact of religious / cultural beliefs and values
- Checks on consistency of responses
- Evidence of suggestibility / social influences in responses
- If so, address this and take into account
- Can capacity be enhanced and how
- Report info about assessment process
- Report issues of reliability and validity that may affect opinion
- Distinguish fact from opinion and balance ethical principles, value judgments (autonomy vs protection)



What if we all don't  
agree?

If everyone is thinking  
alike,

then somebody isn't  
thinking.

George S. Patton



# The code of practice suggests:

Para 5.68 'If someone wants to challenge a decision-maker's conclusions, there are several options:

- Involve an advocate to act on behalf of the person who lacks capacity to make the decision.
- Get a second opinion.
- Hold a formal or informal 'best interests' case conference.
- Attempt some form of mediation.
- Pursue a complaint through the organisations formal procedures.
- Ultimately, if all other attempts to resolve the dispute have failed, the Court of Protection might need to decide what is in the person's best interests.



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Unwise decisions?....



## Unwise decisions...

We ALL make unwise decisions

We all take risks...

Some of us are more comfortable with risk than others.

Protected in law to make unwise decisions

Lack of knowledge vs. lack of assertion



SHOW ME THE MONEY!!



# People with capacity ....

- What are the skills in the general public?
- What is an investment?
- Relationship endings
- Money provided without support to manage it
- High net worth management training
- Illusion of wealth and disposable income



# Finances

- Basic money handling skills – complex financial judgments
- Money management skills in general
- Understanding of current financial arrangements
- Awareness of income and expenses
- Knowledge of day to day expenditure
- Access money independently or not
- How much regularly purchased items cost
- Wishes for the future

SULLO, I., CLARE, I. & HOLLAND, A. (2001). *Financial decision making: Guidance for supporting financial decision making by people with learning disabilities*. Kidderminster: BILD Publications.



# Sexual activity

- Who allowed and not allowed to have sex with
- Where allowed and not allowed
- Consequences of sexual activity
- Abilities for self protection
- Can you say No, can they and how
- Power issues
- Pro's and cons of various contraception options



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# Best interests (see Chapter 5 of the Code of Practice)

- Whether and/or when the person is likely to regain capacity and whether the decision or the act to be undertaken can wait;
- Least restrictive
- Err on permission
- Practical and pragmatic
- Past and present wishes and feelings, beliefs and attitudes
- Factors they would have been likely to consider if they had capacity
- Respect advance decisions to refuse treatment



# Who else should be consulted?

- Consult with those caring for and interested in the welfare of the person or who has been appointed by the court
- MDT – those caring for the person
- Anyone the person has asked to be consulted
- Anyone interested in their welfare
- IMCA
- LPA
- Court Appointed Deputy



# Document it!



- Any staff involved in the care of a person who lacks capacity should make sure a record is kept of the process of working out the best interests of that person for each relevant decision, setting out:
  - how the decision about the person's best interests was reached
  - what the reasons for reaching the decision were
  - who was consulted to help work out best interests, and
  - what particular factors were taken into account.
- This record should remain on the person's file

# What do I need to do in my day to day practice?



- Can you confirm your clients are properly involved in making decisions?
- Do your records show this?
- Can relevant supporters confirm that they have been consulted and the person is properly involved in making decisions?
- Are care, treatment and support staff aware of how people should be included in making decisions?
- Be familiar with the MCA and your responsibilities

# Where to find out more . . .

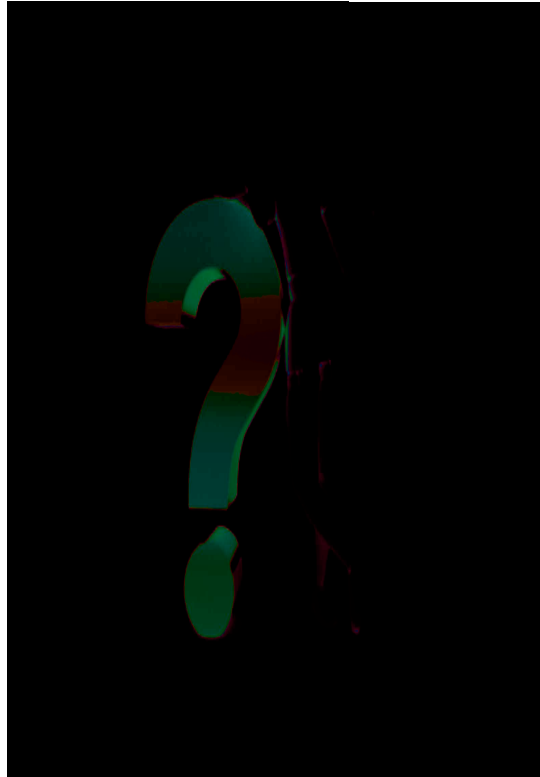
- **The Act:** [www.legislation.gov.uk/ukpga/2005/9/contents/enacted](http://www.legislation.gov.uk/ukpga/2005/9/contents/enacted)
- **Code of practice:** [www.publicguardian.gov.uk/mca/code-of-practice.htm](http://www.publicguardian.gov.uk/mca/code-of-practice.htm)
- **Ministry of Justice webpage on the Act.** You can download leaflets and guidance on the Mental Capacity Act and a copy of the codes of practice:  
[www.justice.gov.uk/guidance/mental-capacity.htm](http://www.justice.gov.uk/guidance/mental-capacity.htm)
- **Department of Health's webpages on the Act:**  
<http://webarchive.nationalarchives.gov.uk/+www.dh.gov.uk/en/SocialCare/Deliveringadultsocialcare/MentalCapacity/index.htm>
- **Office of the Public Guardian's website for links to information on the Act and code of practice, including easy-read guidance:** [www.publicguardian.gov.uk](http://www.publicguardian.gov.uk)
- **Act on CQC's website:** [www.cqc.org.uk/guidanceforprofessionals/adultsocialcare/guidance.cfm?widCall1=customWidgets.content\\_view\\_1&cit\\_id=34918](http://www.cqc.org.uk/guidanceforprofessionals/adultsocialcare/guidance.cfm?widCall1=customWidgets.content_view_1&cit_id=34918)
- **Information about the Act on CQC's website:** [www.cqc.org.uk/\\_db/\\_documents/RP\\_PoC1B2B\\_100563\\_20100825\\_v3\\_00\\_Guidance\\_for\\_providers\\_MCA\\_FOR\\_EXTERNAL\\_PUBLICATION.pdf](http://www.cqc.org.uk/_db/_documents/RP_PoC1B2B_100563_20100825_v3_00_Guidance_for_providers_MCA_FOR_EXTERNAL_PUBLICATION.pdf)
- **Department of Health's webpages on end-of-life care:**  
<http://www.dh.gov.uk/en/Policyandguidance/Organisationpolicy/Endoflifecare/index.htm>
- **The Mental Health Act code of practice:** [http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_084597](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_084597)



# Where to find out more:



- **BPS Guidance on Determining Best Interests:**  
[www.pmlnetwork.org/resources/bps\\_best\\_interests\\_guide.pdf](http://www.pmlnetwork.org/resources/bps_best_interests_guide.pdf)
- BPS, Royal College of Psychiatrists and DoH: **Short Reference Guide for Psychologists and Psychiatrists:**  
[www.bps.org.uk/sites/default/files/documents/mental\\_capacity\\_act\\_2005\\_-\\_short\\_reference\\_guide\\_for\\_psychologists\\_and\\_psychiatrists.pdf](http://www.bps.org.uk/sites/default/files/documents/mental_capacity_act_2005_-_short_reference_guide_for_psychologists_and_psychiatrists.pdf)
- **BPS Interim Guidance on Assessing Capacity in Adults** (2006). [www.bps.org.uk](http://www.bps.org.uk)
- **BPS Audit Tool for Mental Capacity Assessments** (2010): [http://www.bps.org.uk/sites/default/files/documents/audit-tool-mental-capacity-assessments\\_0.pdf](http://www.bps.org.uk/sites/default/files/documents/audit-tool-mental-capacity-assessments_0.pdf)
- **Assessment of Mental Capacity: Guidance for Doctors and Lawyers** (2004) (2nd ed.). British Medical Association and The Law Society. BMJ Books.
- Grisso, T. & Appelbaum, P.S. (1998). **Assessing Competence to consent to treatment: A guide for physicians and other health professionals.** New York: Oxford University Press.



Observations?  
Comments?  
Queries?



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