The Mental Capacity Act 2006 and the management of challenging behaviours: Applications to the Northern Ireland Capacity Bill

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The Mental Capacity Act

- Allow adults to make as many decisions as they can for themselves
- Answers the question- Who decides?- for people who cannot in the areas of personal welfare, healthcare and finance.
- Have safeguards in place
- Provide protection against legal liability for carers and professionals.
Principles of the Act

- With any service user who we may consider using mechanical restraint we start with the presumption that they have capacity
- Can the service user be supported in any way to make a decision
- The service user has the right to make unwise decisions
Mental Capacity Act (2005) England & Wales

A person is unable to make a decision for themselves if:

“at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of the mind or brain”
MCA(2005) test of capacity

A person is unable to make a decision for himself if he is unable to:

1. Understand the information relevant to the decision
2. Retain the information
3. Use and weigh the information relevant to the decision
4. Communicate the decision
Understand the information relevant to the decision

- Explanation in broad terms what the intervention is.
- Must include information about the consequences of deciding one way or another, or of failing to make a decision.
Retain the information

- Information should be retained for the time it takes for the decision to be made
- The fact that a person can retain information for a short period only does not prevent him from being able to make the decision.
Use and weigh the information relevant to the decision

- The information must be believed
- Is the persons thinking dominated by fear, a phobia or compulsive disorder.
- Is the person under undue influence?
Communicate the decision

This can be by

- Talking
- Using signs
- Or any means
The use of force

• When immediately necessary
• Only so long as needed
Example 1: Helen (Scie, 2008)

- Helen is a 50 year old woman with a learning disability.
- She lives in a supported house.
- She communicates with simple language. In most cases her support workers think that Helen has capacity to make her own decisions.
- She has told her support worker that she thinks she has found a lump in her breast. When Helen’s support worker explains that this is something that should be checked by a doctor Helen changes her mind and says that she has always had the lump and that it will be OK.
- Helen has had a bad experience at the doctor’s surgery before. She doesn’t like the waiting room there and thinks that the doctor isn’t kind to her. Helen’s support worker is not sure what to do next.
Helen

• Focus groups commented on this example.
• Consensus was that she should be assisted to make this decision.
• The group felt that they would try to remove the barriers of fear which surround a visit to the doctor’s surgery. It might be possible for the doctor to visit at home, for instance.
Making Good and Bad Decisions

- Enshrined in the legislation is the idea that people have a right to make bad decisions if they pass a capacity test.
- In practice this is difficult to achieve.
- Here are two examples
Jane

- Jane is a 38 year old woman with intellectual disabilities. She resides in a supported living scheme.
- Jane has 30 hours of support provided by community organisation. Jane has issues with alcohol and at times will have 'unprotected' sex with men in her house.
- An independent psychologist deemed that she had passed the decision making test and that she understood the consequences of having unprotected sex 'I would like to have a baby'
The recommendations were that Jane did have capacity, but, her staff should continue to encourage her to practice safe sex.

It was made clear that she was an adult and was probably making a bad decision.

Jane has not had a baby.

The community organisation we happier that their role was to 'encourage' good decision making.
Andy

- Andy is 35 years old and lives in a group home facility. Andy has a younger brother Michael who he is close to who regularly visits him. His brother 'dave' is 19 and currently unemployed. Andy will often give his brother money he 'likes' to be supportive. Andy still has money most weeks to pay his bills.

- Questions were raised by his support staff if this constituted financial abuse.
Andy

- Using a consensus approach. That is consulting key people in his life it was determined that Andy was only occasionally left short and he always paid his bills.
- Andy actually said 'sometimes I leave myself short but, I like to help him out'.
- What would you conclude?
Outside Influences (Simon)

- Simon is a 36 year old man who has a mild/moderate ID and lives in a group home setting. Simon likes to socialise and once per week he goes to a pub with a support worker and is 'allowed' 2 drinks.
- Simon has money and in the past has been recorded as being drunk.
- Simons elderly mother insists that he can only have two drinks and the staff have complied with her request for years.
- Simon wants to go out 2 to three times a week.
Simon

• Some staff give him 'shandy' others comply with 2 beers.
• On 2 occasions (out of 31) Simon has become angry and refused to leave the pub.
• Simon appears to have a good grasp of the consequences SOR alcohol consumption.
• 'I am not an alcoholic'
• 'why can't I go to the pub on my own?'
• 'Its my choice'
Who decides England and Wales

- The decision maker (The person carrying out the intervention)
- PI and MR are usually multidisciplinary decisions involving relatives, professionals and carers
Best interest principle

• If a person can not make a decision then they may act in the person’s best interest or do what is reasonable (MCA)

• The intervention will benefit the adult (AISA)
Best interest principle

- Anything we do for or on behalf of service users who do not have capacity must be done in their best interest.
- Anything done for or on behalf of service users who do not have capacity should be the least restrictive of their rights and freedom of movement.
Best interest

• The professional or parent/carer must consider whether the person is likely to regain or gain capacity
• They must encourage the person to participate in the decision
• They must consider the person’s past and present wishes and feelings
• The beliefs and values that would be likely to influence his decision if he had capacity
• The other factors that he would be likely to consider if he were able to do so.
Best interest

The decision maker must, if practicable and appropriate, consult with:-

• Anyone named by the person to be consulted
• Anyone engaged in caring for the person or interested parties
• In some circumstances a Independent Mental Capacity Advocate or a deputy appointed by the Court of Protection.
• In Scotland the guardian, welfare attorney or authorised person.
Best interest

- The person or body that intervenes on behalf of the person must believe that their act or decision is in that person’s best interests and that belief must be reasonable.

- It is advisable when considering mechanical restraint to make decisions within a multidisciplinary context with relatives/carers.
Independent Mental Capacity Advocates (England and Wales)

- Becomes involved if there are no relatives or in disputes where serious medical treatment is to be provided.
- Can interview the person
- Must act in the person’s best interest
- May seek second opinion
- Cannot make the best interest decision
- If advice not accepted may go to Court
Protection

The Acts provide protection for acts done if the person is established as being mentally incapacitated and the intervention is in the person’s best interest. However, this does not effect criminal liability arising from negligence.
MCA (2005) Section 6 defines restraint as the use or threat of force where the person resists, and any restrictions on the person's liberty of movement, whether or not the person resists.
Restraint is only permitted if the person using it:-

- Believes that it is necessary to prevent harm to the person; and
- If the restraint is a proportionate response to the likelihood and seriousness of the harm.
John (Real life scenario)

- John is a 30 year old man with autism. He is extremely tactile defensive. John's family have a history of high blood pressure, and early onset diabetes. John has been significantly gaining weight. There is a view from family and some of his support staff that he should have a health screen to have blood taken.
- This will require restraint.
- John refuses to see a doctor.
Deprivation of Liberty (Human Rights Act)

Restraint which results in the person being deprived of his liberty within the meaning of Article 5 (1) of the Human Rights Act cannot be an act which the Acts provides any protection.
Reducing Restrictive Practices

• “When people are given a power of last resort it quickly becomes the power of first resort” (Stone, 2004)
Day to day decisions

• It is too easy to concentrate on the larger issues such as restraint.
• Day to day decisions about basic choices are often made without any form of consent.
• As a rule ‘No’ means ‘No’
• Encouraging good decision making can be a lengthy process.
Assessment is not a static process

- “Assessing someone’s capacity is not like an exam, it is having a conversation with an individual after you’ve given them the right support and information about the decision to be made. It is having a conversation and from that drawing out whether they’ve understood the information given to them, whether they’ve remembered it and, importantly for people with learning disabilities, that they’ve used it as well.” (Steve Hardy)
Outcome Research (Mental Health Foundation)

- The research found that in 17% of cases staff used a person’s impairment, diagnosis, behaviour or poor decision making as the main reason for deciding on a lack of capacity. “The Act says that those are not reasons for deciding someone lacks capacity,” Williamson notes. “You might take those into account, but the assessment of capacity must be made primarily on a person’s ability to make a particular decision at a particular time.”
Useful Sources

• ‘Listen to what I want' The potential impact of the Mental Capacity Act (2005) on major life decisions by people with learning disabilities
• Report for the Social Care Institute for Excellence July 2008
• http://www.bristol.ac.uk/norahfry/research/completed-projects/listen.pdf
Parliamentary Select Committee 2014

• This was supportive of the Act but highlighted implementation issues.
• A fundamental change of attitudes among professionals is needed in order to move from protection and paternalism to enablement and empowerment. Professionals need to be aware of their responsibilities under the Act, just as families need to be aware of their rights under it.
Risk Assessment

• Analysis of data
• Identifying likelihood of future harm.
• Identification of risk reduction strategies (including strengthening resilience).
• Deciding on risk level.
• Implementation of monitoring risk management strategies
Clinical Risk

- Clinical risk assessment is a means of responding to an identified clinical risk in a manner that reduces the likelihood of future harm.
- Clinical risk focusses on behaviour from an individual and/or service.
When is CR required?

- CR can be either reactive or proactive.
- Reactive usually focusses on something that has happened.
- Proactive CR focusses on a planned or future event.
- Proactive CR is more open to abuse. That is, staff may 'crystal ball gaze'
Reactive Clinical Risks: Examples

- We have a member of staff who has been seriously injured (off sick for a week).
- We need to develop a clear risk reduction plan.
Judging Risks

- Risk assessment has enshrined within its framework a 'judgement about risk'
- Risk assessment has to be based on evidence and not just speculation.
- Actuarial risk is based on general probabilities
Biases in risks judgements.

- A person has a degree in social sciences.
- They have their own house.
- What are the chances that they are a building site worker? (50/50???)
- What are the chances that they are a librarian? (Tversky, 2011).
- We sometimes overestimate risk by our assumptions.
Examples in our area.

- John is on the autism spectrum.
- John has 2 incidents of threatening behaviour per month of challenging behaviours.
- He has assaulted staff twice after threatening to do this in the last year.
- Last month he threatened staff 6 times with no physical aggression.
- Has the risk of challenging behaviours increased or decreased?
Proactive Clinical Risk.

- A person may be going to undertake an activity with a genuine risk of harm.
- A service user is going to a new place on holiday.
- There is historical evidence with evidence that on a previous holiday there was an incident with a member of staff.
- There was no incident previously.
Restrictive practices and risks.

- To manage risks we may implement risk control measures that restrict a person's freedom of liberty?
- Risk control measures require consent of the person or advocates where possible.
- A risk control procedure should have a time limit.