



Hampshire  
County Council

# **HSAB Multi-Agency Risk Management Framework**

## **Mental Capacity Act 2005**

### **Capacity and Decision Making**

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# HSAB Multi-Agency Risk Management Framework

- Self neglect
- Refusal or disengagement from services
- Care by multiple agencies
- Harm to others

“the intention of the Act is not to dress an incapacitated person in forensic cotton wool but to allow them as far as possible to make the same mistakes that all other human beings are at liberty to make and not infrequently do.”

Hedley J in *A NHS Trust v P*  
[2013] EWHC 50 (COP)

# It's a Free Country (almost)

- Criminal Law
- Civil Law
- Contracts/Service Agreements
- Social values/pressures

Within those limits.....it's a free country and adult autonomy reigns. State responsibility is governed by the Human Rights Act (1998)

# Principle 1

## *A presumption of capacity -*

- A person must be assumed to have capacity unless it is established that he lacks capacity.

(MCA 2005 S1(2))

# The flip-side of Principle 1

A lack of capacity cannot be established merely by reference to—

- a person's age or appearance, or
- a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.

(MCA 2005 S2(3))

# Principle 3

## *Unwise decisions:*

- A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

(MCA 2005 S1(4))



# Presuming Capacity (-)

*“The empowering ethos of the Act has not been widely implemented.....The concept of unwise decision-making faces institutional obstruction due to prevailing cultures of risk-aversion and paternalism.”*

(House of Lords, 2014; para. 2)

# Presuming Capacity (+)

*“The presumption of capacity...is widely misunderstood...It is sometimes used to support non-intervention or poor care, leaving vulnerable adults exposed to risk of harm.”*

(House of Lords, 2014; para. 105)

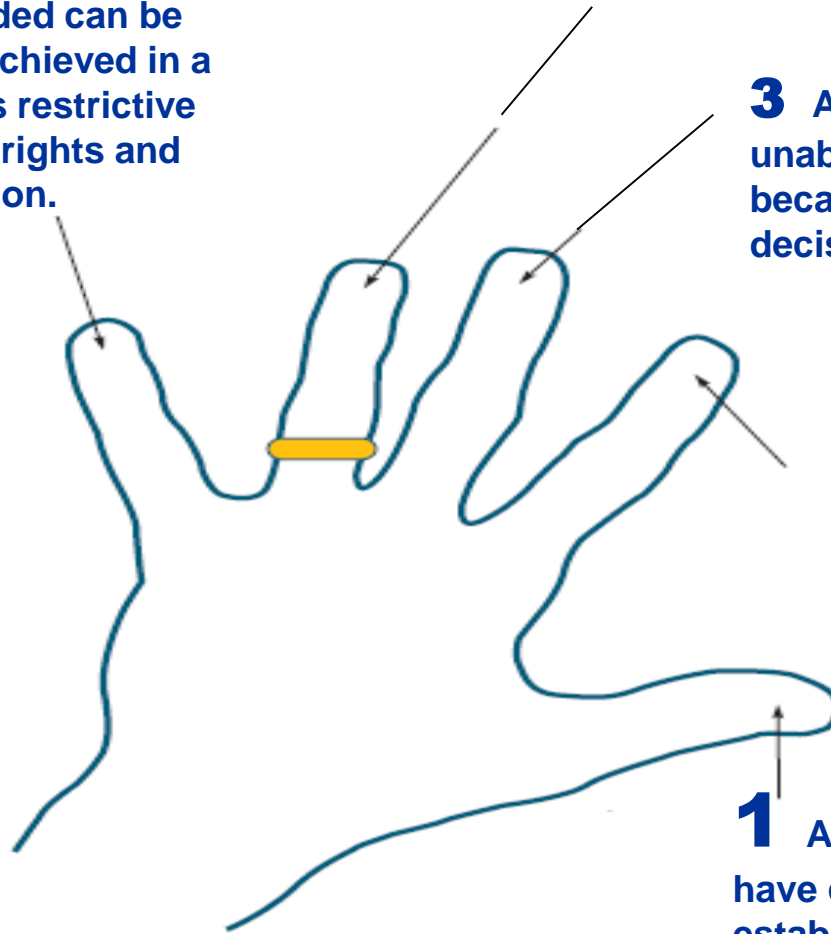
**5** Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the persons rights and freedom of action.

**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 his best interests

**3** A person is not to be treated as unable to make a decision merely because he makes an unwise decision

**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.

**1** A person must be assumed to have capacity unless it is established that they lack capacity.



Statutory  
Principles –  
Section 1  
MCA

# People who lack capacity

- A person lacks capacity in relation to a matter 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 disturbance of the functioning in the mind or brain.

MCA (2005) S2(1)

# Inability to make decisions—

For the purposes of section 2, a person is unable to make a decision for himself if he is unable—

- a) to understand the information relevant to the decision,
- b) to retain that information,
- c) to use or weigh that information as part of the process of making the decision, or
- d) to communicate his decision (whether by talking, using sign language or any other means).

(MCA 2005 S3(1))

# Decisional and/or Executive Capacity?

- Law does not distinguish between them (so tread very carefully to avoid offending Principle 3)
- **But** capacity does have both a decisional and executive aspect
- Assessment of capacity **must be robust** and include ‘executive function’ (e.g. “do I understand the limits of my own ability?”)

# Adult Autonomy or Best Interests

- Adhere to Making Safeguarding Personal
- Comply with the HRA (1998)
- ‘Adult Autonomy’ cannot require you to act negligently
- Likewise ‘Best Interests’ provides no protection for negligence

# Risk Management Framework

## ***Stage 1 – concern raised:***

- Consider mental capacity
- Carry out capacity assessment on the specific issue
- Lack of Capacity likely to lead to S42 enquiry duty



# Risk Management Framework

## ***Stage 2 & 3 – multi-agency planning/review***

- Consider outcome of mental capacity assessment
- Consider legal remedies potentially available
- Keep mental capacity under review

# Court of Protection

- Can be asked to determine capacity (a Judge may require a reluctant person to be assessed)
- High Court Judge sitting in the C of P can also exercise ‘inherent jurisdiction’

<https://autonomy.essex.ac.uk/resources/vulnerable-adults-and-the-inherent-jurisdiction-of-the-high-court/>

# Risk Management Framework

- Involvement and the offer of support does not hinge on a request by the adult or anybody else...and is not negated by...refusal (p121)
- This framework promotes an active rather than passive approach...(p122)

# Risk Management Framework - Recording

...should include a record of the efforts and actions taken by all agencies involved to provide support (p123)

- Ensures 'active' approach
- Creates a clear picture if needed in Court
- Keeps action plan defensible

# Questions

