

Mental Capacity Legislation

Second Edition

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2nd Edition
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Mental Capacity Legislation

Principles and Practice

Second Edition

Edited by

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Contents

List of Contributors vi
Foreword vii
George Szmukler
Preface ix
Rebecca Jacob, Michael Gunn and Anthony Holland
Editors' Note x

1	Introduction	1	5B	Mental Capacity Act Application: Social Care Settings	82
	Rebecca Jacob and Anthony Holland			Michael Dunn and Anthony Holland	
2	The Assessment of Mental Capacity	13	6	Mental Capacity and End of Life Decision-Making	91
	Benjamin Spencer and Matthew Hotopf			Annabel Price and Caroline Barry	
3	Best Interests	34	7	Clinical Ambiguities in the Assessment of Capacity	102
	Charlotte Emmett and Julian C. Hughes			Elizabeth Fistein and Rebecca Jacob	
4	Deprivation of Liberty Safeguards: Past, Present and Future	56			
	Susan F. Welsh				
5A	Mental Capacity Act Application: Hospital Settings	74			
	Elizabeth Fistein				

Index 116

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Foreword

From the Foreword to the First Edition

The contrast between the underlying assumptions of the Mental Capacity Act (MCA) 2005 and the Mental Health Act (MHA) 1983 (and amended in 2007) is stark. The former aims to support the patient's autonomy and permits non-consensual treatment only when the person's decision-making capacity is impaired and the intervention is in the person's 'best interests'. Even then, the person must be supported as far as possible to participate in the treatment decision. 'Best interests', though variously defined, emphasises the patient's perspective, asking, for instance, what the patient's decision would have been regarding their current predicament if their capacity had been retained. Previous preferences, wishes or values expressed by the patient should be explored, including consultation with those who know the patient well and who might be able to cast light on the question.

The MHA, on the other hand, permits involuntary treatment for those with a 'mental disorder' on the basis that the person suffers from such a disorder, and that treatment is warranted in the interests of the person's health or safety, or for the protection of others. This conceptual disparity can easily lead to confusion in psychiatric practice. The MCA applies to all patients, those with a 'mental disorder' as well as those with a 'physical disorder', but if the MHA is invoked, its provisions trump those of the MCA. If a person suffers at the same time from both a mental disorder and a physical disorder and lacks capacity, different rules pertain to the non-consensual treatment of each. If one type of disorder is a significant cause of the other, whether one of the legal regimes may be considered to cover both conditions may become a conundrum. When the question of a 'deprivation of liberty' arises, the relationship between the provisions of the MHA and the 'Deprivation of Liberty Safeguards' under the MCA seems tortuous.

The Second Edition

The second edition of this book adds detailed treatment of significant changes in the interpretation of the MCA. However, the book's orientation remains one that will help the clinician and others to apply these changes in their daily practice, based on a solid understanding of their conceptual bases.

Key areas of development include the following. The extent to which regard should be paid in the determination of 'best interests' to the incapacitous person's beliefs and values, both past and present, is moving generally in the direction of assuming stronger emphasis. The Supreme Court's 2014 decision in *Cheshire West* ('a gilded cage is still a cage') characterising situations entailing a 'deprivation of liberty' has had huge implications for practice across medicine and social care. We are presently in the midst of attempts to develop a schema for 'liberty protection safeguards' that is both practical and fit for purpose. Reconciliation of the MCA with the UN Convention on the Rights of Persons with Disabilities (UNCPRD) meets serious philosophical obstacles. An authoritative (though controversial) interpretation of Article 12 given in its *General Comment No.1* in 2014 by the UN CRPD Committee maintains that decision-making capacity should not be a basis for 'substitute decision-making', and that, in any case, such decision-making is in

viii	George Sz mukler
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breach of the Convention. The problematic interfaces with the MHA remain, as in the case of deprivation of liberty provisions, which are being reviewed as an important element in a proposed reform of the MHA. End-of-life decisions involving capacity and best interests continue to present some of our thorniest ethical problems.

As I stated in the foreword to the First Edition: The clinician badly needs a helping hand in coming to terms with the implications of the MCA for his or her practice. This volume should certainly rank near the top on any list of guides to understanding this new dimension of practice.

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Preface

The purpose of this book is to provide health and social care professionals' guidance when faced with challenging medico-legal dilemmas that require an understanding of the mental capacity statute. Our intention is to produce a user-friendly guide to the Mental Capacity Act 2005 (MCA) to be read in conjunction with the MCA Code of Practice.

The second edition of this book is published more than a decade after the implementation of the statutory framework of the MCA by health and social care practitioners. We have taken the opportunity to draw upon clinical experience, case law and the developing research literature regarding its use. The authors of the different chapters include both clinicians as well as medical and legal academics, chosen to ensure that practical as well as theoretical and research considerations pertaining to the statute are taken into account.

An impetus for publishing this second edition relates to emerging case law in the clinical application of the MCA, specifically of DoLS legislation. This has resulted in the Government's recently published Mental Capacity (Amendment) Bill in July 2018. The Supreme Court Judgement of *Cheshire West* attempted to clarify the definition of a deprivation of liberty by introducing an 'acid test'; 'where lack of capacity to consent to arrangements for care and treatment, continuous supervision and control, and a lack of freedom to leave are all present together, the test for deprivation of liberty is met'. Nonetheless, a degree of uncertainty continued to surround the use of the DoLS, leading to the development of the *Liberty Protection Safeguards*, discussed in some detail in chapter 4. A new and topical chapter has been introduced; the relevance of the MCA in end-of-life decision-making, focusing on supporting vulnerable and terminally ill adults when planning ahead. We have also described the growing literature and case law pertaining to applications of the MCA in hospital settings and the differences in its use in social care settings.

The MCA is not the only legislation in flux: in May 2018, *an Interim report into the Independent Review of the Mental Health Act 1983* was published highlighting, amongst many other areas, how deprivation of liberty might relate to those with mental disorder. The overlapping and differentiating aspects in the use of the Mental Health and Mental Capacity Acts are highlighted in Chapter 1.

We hope the issues covered will assist health and social care practitioners, both in gaining a better understanding of the historical background and fundamental principles underpinning mental capacity legislation, as well as in its everyday practice.

RJ
MG
AH
April 2019

Editors' Note

All the case study patients in this book are fictional but based upon the authors' collected experience of many patients with similar histories, needs and outcomes.