

ADULTS PEOPLE 18 AND ABOVE

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Capacity in adults is presumed, but this may be challenged on the basis of a reasonable belief that they are incapacitated. Incapacity in England and Wales is established (in those aged 16 years and over) by a two-stage test. First, the functional test for incapacity is employed: is the person unable to make the relevant decision? If they are able to make the decision, the presumption of capacity endures. If they are unable to make the decision, then the second (diagnostic) stage must be employed: is there an impairment or disturbance of the mind or the brain? If so, the two stages in combination result out and the entire structure of this area of law is set out in the Mental Capacity Act (MCA) 2005 Code of Practice. This is essential reading, and must be available to clinicians in all UK National Health Service (NHS) hospitals. Capacity is not synonymous with (Gillick) competence, but that is a topic for further reading. Capacity and incapacity are the significant binary measure by which the capability of young people and adults is judged, but be aware of the notion of the vulnerable patient, who may possess capacity but risks falling victim to predatory actors. Capacity may be erased by psychiatric illness, but even in circumstances where patients have been legally detained for compulsory psychiatric care it by no means follows that such patients are unable to provide consent for surgical care. Their capacity should be presumed and consent should be sought. Only if it is established that such patients also (in addition to or as a consequence of their mental illness) lack capacity to provide consent for surgery can therapy then proceed in their best interests. However, if possible postpone treatment until, as a result of their psychiatric care, patients become able either to consent or to refuse. If this timely recovery is not predicted, then legal steps using the authority of the MCA 2005 must be taken to make elective surgery lawful. It would be unlikely that treatment for physical illness could be authorised under the Mental Health Act 1983. As with children, respect should always be shown for as much autonomy as is present.

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