

# Capacity and best interests

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# Capacity in the court room – 10 year report

- Wellcome-funded study of all reported cases where capacity has been disputed as part of project to develop educational tools: <https://mhj.org.uk/>
- Key findings so far:
  - Failures to consider practicable steps
  - Failures to consider ‘causative nexus’
  - Failures to identify which functional inability was relied upon
  - ‘Use and weigh’ as the most problematic area
  - The ‘translation’ gap

# Capacity – further help

<http://www.39essex.com/mental-capacity-law-guidance-note-brief-guide-carrying-capacity-assessments/>

## Best interests: process

- Is it a best interests decision at all?
- What options are actually on the table? *N v ACCG* [2017] UKSC 22
- The role of wishes, feelings, beliefs and values:
  - Investigation
  - Assessment
  - Reliability
  - Clash between past and present
- Medical treatment decisions: see BMA/RCP Guidance on CANH:  
[www.bma.org.uk/canh](http://www.bma.org.uk/canh)

## Making decisions about clinically-assisted nutrition and hydration (CANH) in England and Wales for patients who lack capacity – what is in the patient's best interests?



### Who should I involve?

The Mental Capacity Act 2005 states that "anyone engaged in caring for the patient or interested in his welfare" should be consulted. This could include:

- Family members and friends
- Members of the healthcare team caring for the patient (i.e., doctors, nurses, therapists)
- Carers (paid or unpaid)
- Anyone else who might have information about the patient (e.g. neighbours, colleagues)
- Court appointed deputies (if applicable)
- If there is no one who can represent the views of the patient, an independent mental capacity advocate (IMCA)

N.B. If there is a lasting power of attorney (LPA) with appropriate powers, that person will be the decision-maker.



### What type of information should I consider?

#### Clinical

- What is the patient's current condition?
- What is their prognosis? What is the level of uncertainty around this?
- How aware are they of their current condition and their environment?
- How will their condition affect how they participate in activities or interests that are important to them?
- What will happen if CANH is continued? What will their life be like?
- What will happen if CANH is withdrawn? What end-of-life care will be provided if it is?

#### Personal

- What was the patient like before becoming ill?
- What was their job? What were their hobbies?
- What did they like or dislike? What was important to them?
- Have they ever said or done anything which shows how they might feel about their current situation?
- Did they write anything down which shows how they might feel (e.g. in a diary, in letters or e-mails, on social media)?
- Did they have any religious, spiritual, or moral beliefs?
- Would the patient have wanted CANH provided or continued? Why or why not?



### How is it used?

You should accumulate enough information so you can form a clear view as to what the patient would have wanted if he or she were able to make the decision.

This decision must always be made against the backdrop of a strong presumption that it will be in the patient's best interests to prolong life.



### What next?

Document the decision, and the process followed - including your thoughts and analysis, and the discussions you had, with whom. You should ensure a plan is in place to implement the decision. If the decision is to withdraw CANH, this will include an end-of-life care plan and seeking a second opinion. If the decision is to continue CANH, a date should be set for review.

For more detailed information and guidance:

[www.bma.org.uk/CANH](http://www.bma.org.uk/CANH)



# Keeping yourself up-to-date

- <http://www.39essex.com/resources-and-training/mental-capacity-law/>
- <http://www.scie.org.uk/mca-directory/>
- [www.mclap.org.uk](http://www.mclap.org.uk)
- [www.mentalhealthlaw.co.uk](http://www.mentalhealthlaw.co.uk)
- [www.courtofprotectionhandbook.com](http://www.courtofprotectionhandbook.com)
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