

Introduction to the Mental Capacity Act, 2005

Tony Holland
University of Cambridge

Outline of talk

- Background
- Principles
- Substitute D-M
- Decision-making capacity
- Best interests
- Bournewood

Common Law

- An adult has the right to determine for him/herself what should happen to his/her body – principle of autonomy (self-determination) (*Mr C: Ms MB; Ms B*)
- In case of healthcare consent enables investigation and treatment to lawfully take place
- Consent requires that a person is adequately informed, has the capacity to make the decision for him/herself, and makes the decision voluntarily
- Exception to the principle of autonomy - treatment of mental disorder under MHA

Key Issues

Developmental or acquired neurological or psychiatric disorders may result in an impaired ability to make a decision or to communicate a choice

- Under what circumstances should there be substitute decision-making and what principles should apply when making a decision on behalf of another?
- How to achieve a balance between individual rights vs protection against neglect, abuse, and/or exploitation?

Why new legislation?

- To provide a statutory framework to enable decisions to be made on behalf of people who lack decision-making capacity because of a mental disability.
- By means of this framework to establish guidance - determination of capacity and of 'best interests'.
- To provide the means of challenge when decisions about capacity and/or best interests are disputed (e.g., as in Mr L vs Bournewood NHS Trust).

General points

- Sets the standards by which those involved in making decisions on behalf of those lacking capacity should be judged;
- Parliament intended the Act to be empowering not restricting;
- Balance between respect for autonomy and need for care/treatment.

Developments

- Expanded Court of Protection
- Establishment of the Office of the Public Guardian
- Establishment of a Code of Practice
- Inclusion of research involving people lacking capacity

Principles

Part 1 MCA

- Assumption of capacity
- All practical steps taken to help him/her make the decision
- Unwise decisions by themselves not to be taken to indicate incapacity
- Act in the 'best interests' of the person with incapacity
- Least restrictive of rights or freedom of action

Options

- Acts in connection with care or treatment
- Lasting Powers of Attorney (LPA)
 - Donor (P) appoints a donee (D)
- General Powers of the Court of Protection
 - To make decisions
 - To appoint deputies
- Advanced decisions to refuse treatment

LPAs

The donor (P) confers on the donee (or donees) authority to make decisions about all or any of the following:

- a) P's personal welfare or specific matters concerning P's personal welfare, and
- b) P's property and affairs or specific matters concerning P's property and affairs
- Special issues
 - Restraint
 - Life-sustaining treatment (express provision)

Advanced decisions to refuse treatment

A decision made after reaching 18 years of age and when he has the capacity to do so - stating what specific treatment he refuses or would wished to be discontinued if at that material time he was lacking the capacity to make that decision for himself

- Can be withdrawn at any time
- Decision must be valid and applicable to the treatment in question

Determination of a person's decision-making capacity

To be determined by the person requiring the decision to be made

Assessment of capacity

- Evidence of disability that might affect capacity
- Functional approach (rather than determined by 'status' or 'outcome')
- Decision-making capacity is decision and time specific

Incapacity

2(1) ...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 in the functioning of, the mind or brain.

Lack of capacity

2 (2-4)

- Does not matter whether impairment or disturbance is permanent or temporary;
- Not judged solely on age or appearance or behaviour;
- Decided on balance of probabilities

Potential causes of incapacity

Capacity is decision-specific & assessed functionally

- Unconsciousness
- Sedation
- Dementia and other severe brain disorders
- Severe learning disability
- Mental illness (e.g., depression, psychotic illness)
- Anxiety disorders (e.g., phobias)
- Dyphasia (e.g., inability to communicate)
- Post head injury (e.g., confusional state, brain damage)
- Intoxication

Inability to make decisions

3(1) Unable to make a decision for himself if:-

- a) He is unable to understand the information relevant to the decision
- b) He is unable to retain the information relevant to the decision,
- c) He is unable to use or weigh the information relevant to the decision as part of the process of making the decision' or
- d) He is unable to communicate the decision (by talking, sign language, or other means)

Inability to make decisions

3 (2 - 4)

- Needs to understand information given in a way appropriate to the circumstances (using simple language, visual aids or other means)
- Only able to retain for a short period does not prevent him from having capacity to make the decision in question;
- Information required on consequences of choice one way or another

Decision-making Capacity

What information must be given?

- Nature of the decision
- Purpose of the decision
- Risks associated with the potential outcomes of a decision
- Other options
- Voluntariness

ASSESSING UNDERSTANDING OF RELEVANT INFORMATION

- Grisso et al. (1991)
 - ◆ *Paraphrasing* information – presented in a block
 - ◆ *Paraphrasing* information – presented in chunks
 - ◆ *Identifying* sentences as the ‘same’ or ‘different’ as the information
- Wong et al. (2000)
 - ◆ *Paraphrasing* information – presented in a block
 - ◆ *Paraphrasing* information – presented in chunks
 - ◆ *Identifying* sentences as the ‘same’ or ‘different’ as the information
 - ◆ *Recognising* items as relevant to the treatment

RETAINING AND USING RELEVANT INFORMATION

Is the person able to:

- Acknowledge the relevance or significance of information for his or her own situation, and
- Demonstrate that the information has been processed in reaching a decision?

At present, mainly assessed through detailed interview trying to elicit beliefs and reasoning

‘SOMEONE LACKS CAPACITY’

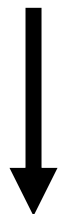
It's a *judgement* – which must be open to review – and therefore fully documented

- About *this* decision at *this* time
- Based on the *balance of probabilities* - it's a 'reasonable belief'
- Having *assessed* the relevant aspects
- And after having *attempted all practicable means* for providing treatment and support for the person

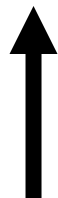
Maximising Capacity

- The nature of the 'impairment' or 'disturbance' of the brain or mind
 - Fluctuating
 - Likely response to treatment
 - Comfort, control of pain etc
- Presentation of information
 - How and in what form information is given
 - Use of communication aids
 - Circumstances (calm, lighting etc)

Person's functional abilities



'Capacity'

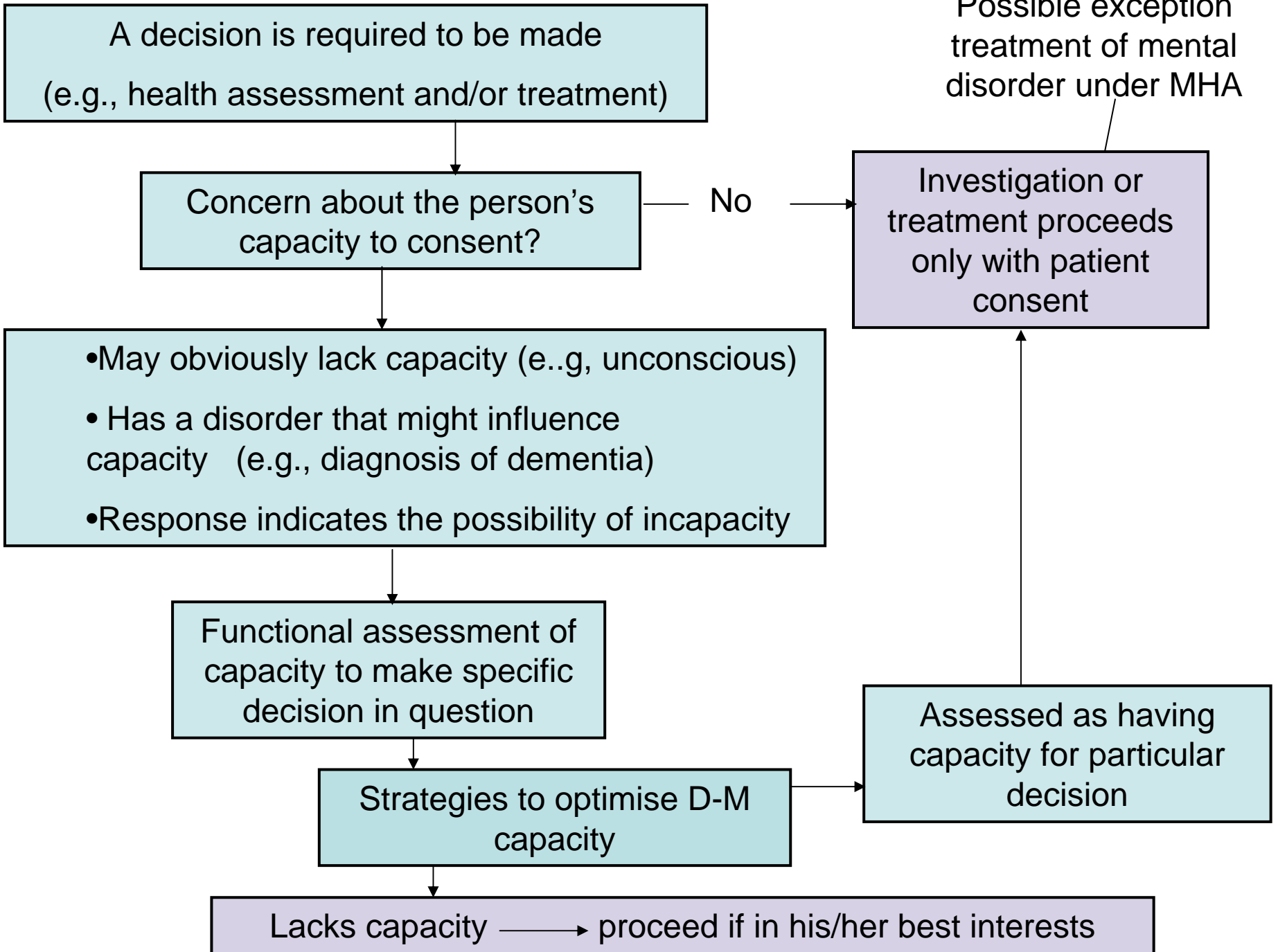


Demands of decision-making task

D-M capacity assessment

Process

- What information about this particular decision must he/she know and understand?
- Is there reason to suspect mental disability and ‘incapacity’? (capacity is otherwise presumed)
- Does he/she have the capacity to make this particular decision?
- In what way can his/her capacity be improved?



The determination of
'best interests'

Best interests

The person making the determination must consider all the relevant circumstances and, in particular take the following steps –

- Consider whether the person may have capacity in the future – when that is likely to be;
- As far as reasonably practicable, permit and encourage the person to participate, as fully as possible in any act done for him and decision affecting him;
- Life sustaining treatment – not motivate by a desire to bring about his death

Principles of 'best interest'

He/she must consider:

- The person's past and present wishes and feelings (in particular any written statement made when having capacity);
- The beliefs and values that would be likely to influence his decision if he had capacity;
- Other factors that he would be likely to consider if able to do so.

Principles of 'best interest'

Take into account if practicable and appropriate to consult:

- Anyone named as someone to be consulted;
- Carer for the person or interested in his/her welfare;
- Donee of an LPA
- Deputy appointed by the Court

As to best interest

Acts in connection with care or treatment

Person is found to lack the capacity to make a healthcare decision that is required to be made

Advocacy

Urgency of the decision
Seriousness of the decision

Is D-M capacity likely to improve?
If yes, can the decision wait?

How can the person concerned be involved?
What is known about his/her past and present wishes and values that are relevant to this decision

Independent Mental Capacity Advocate (IMCA)

Who else should be consulted?
Is an Independent MC advocate required?

What is in his/her best interests?

Independent MC Advocates (IMCAs)

35 to 41

Appointment of an IMCA if:

- No one who can advocate for the person in question;
- Serious medical treatment;
- Provision of accommodation.

- Access to records

- Evaluating relevant information
- Wishes and feelings of person concerned
- Alternative options
- Seek second opinion

Research

- Concerns 'intrusive' research (not clinical trials);
- Approved by 'an appropriate body';
- Impairing condition or its treatment
- Could not be carried out on those with capacity;
- Potential benefit to 'P' or those 'with a 'similar condition';
- Negligible risk, will not interfere with P's freedom of action or be unduly invasive or restrictive.
- Consult carers (LPAs etc) (some exemptions);
- Assent, right to withdraw.

Mr L

- Adult with severe LD and autism living with paid carers admitted informally to hospital following an altercation at his day centre. He was presumed to lack the capacity to consent to admission.
- Questions raised:
 - Informal admission of an assenting (not dissenting) adult;
 - Capacity to appeal and means of appeal;
 - Whose opinion ‘trumps’.

Bournemouth

5th October 2004 the European Court of Human Rights ruled in the case of HL v. the UK.

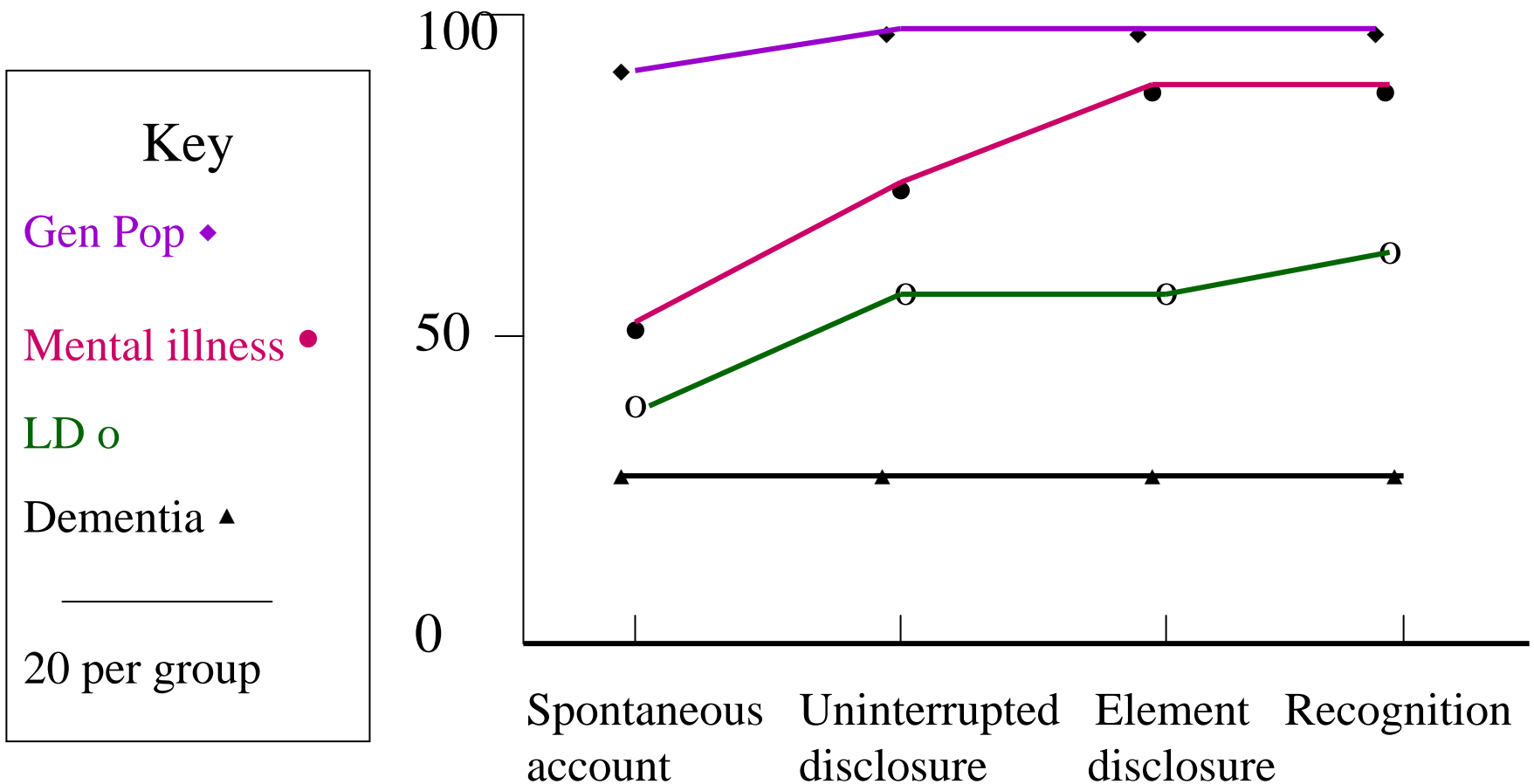
- Mr HL had been deprived of his liberty contrary to Article 5(1) of the ECHR because his admission was not '***in accordance with a procedure prescribed by law***' and because he was unable '***to take proceedings by which the lawfulness of his detention shall be decided speedily by a court.***'

Government proposals

- Protective care approach
- Amend MCA and add to Code of Practice
- Hospitals and care homes
- Guidance on what is deprivation of liberty
- Court of Protection for appeals
- Carer or independent person (IMCA)
- Existing procedure for care review

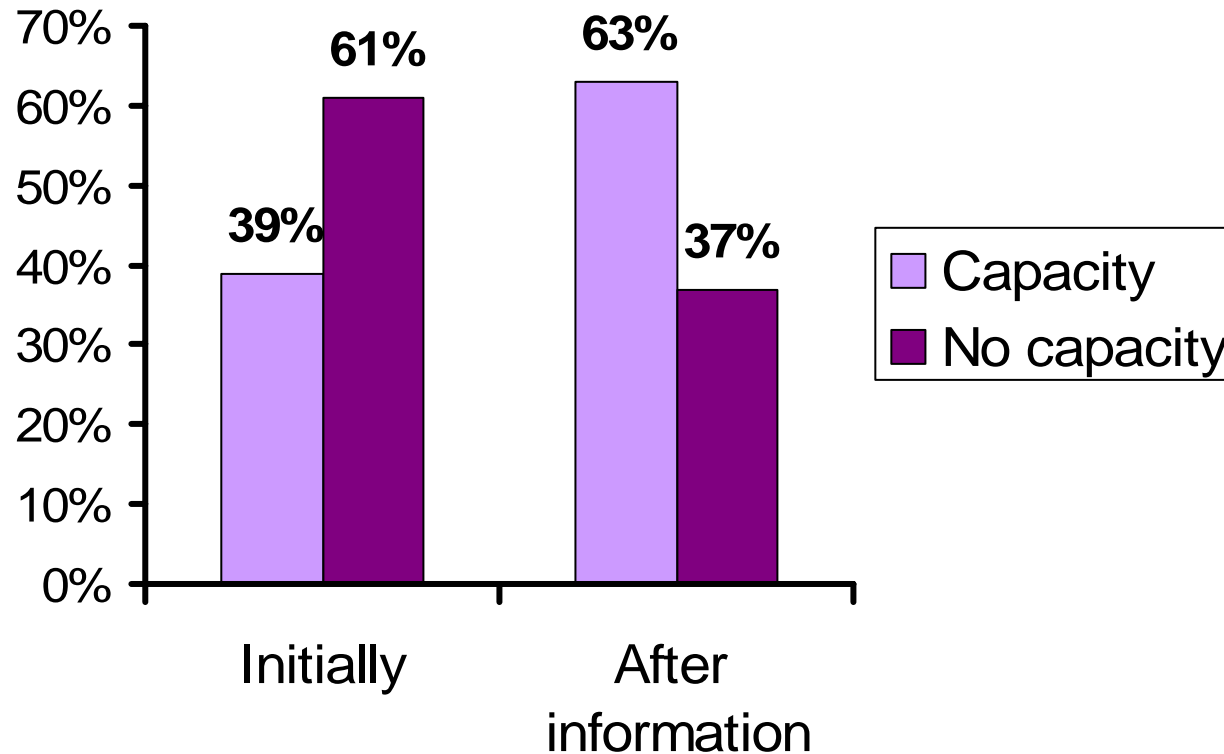
Maximising capacity

capacity to consent to venepuncture

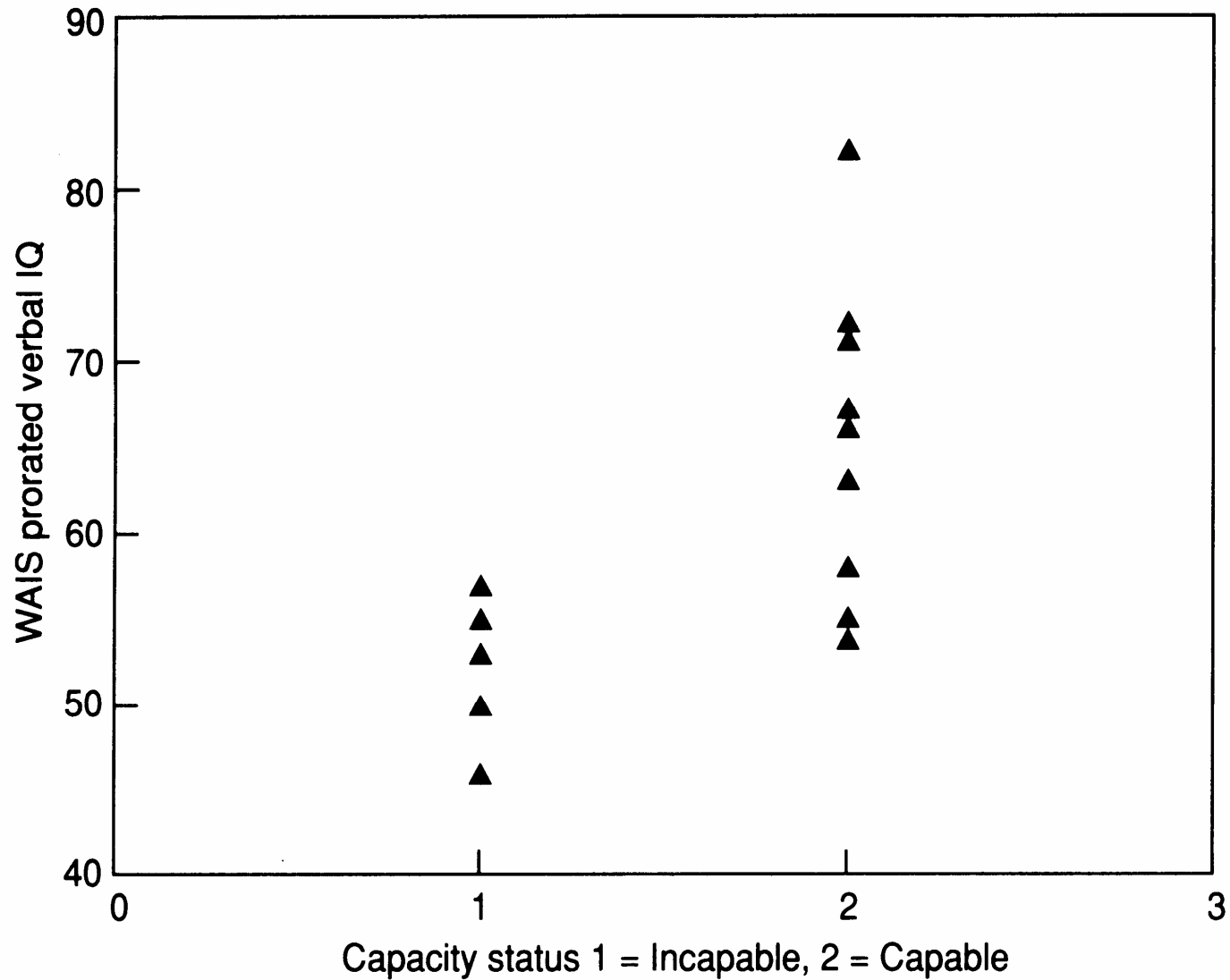


EFFECT OF PRESENTING INFORMATION DIFFERENTLY

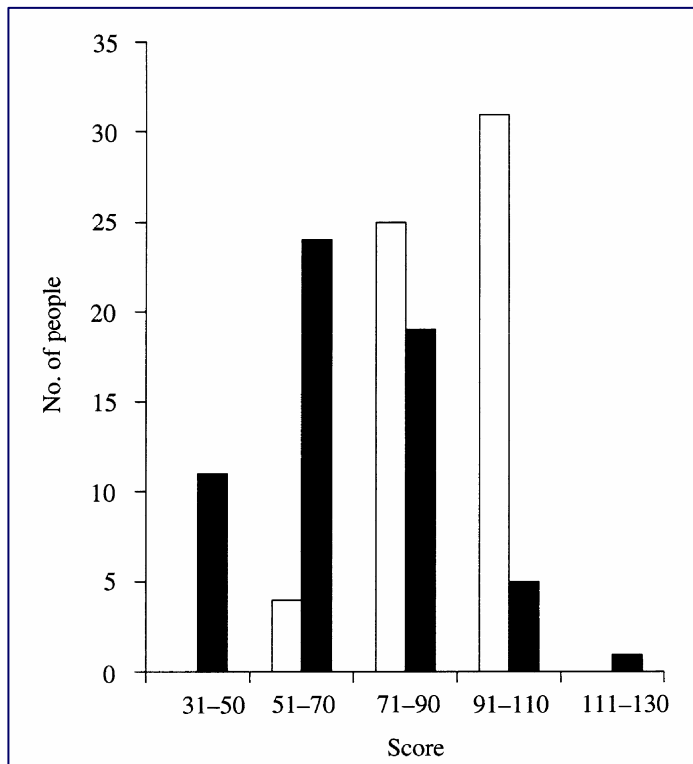
(Jacob et al., 2005)



INTELLECTUAL ABILITY AND CAPACITY (Gunn et al., 1999)



UNDERSTANDING OF CONSENT AND ABUSE



Total scores understanding consent and abuse for adults with

(■) intellectual disabilities

(□) and young people

Murphy and O'Callaghan
(2004)

Conclusions

MCA

- Assessment of capacity increasingly significant in day-to-day practice;
 - General principles
- Decision-making capacity can be reliably assessed;
- Determination of ‘best-interests’
 - Checklist
- Maximising capacity
- Dispute resolution