

Appendix 1: Advice on how to undertake the 2-stage test for mental capacity

Question	Supporting prompts
Stage 1	
Understanding: can the person understand the information relevant to the decision?	<ul style="list-style-type: none">• Explain why you are assessing their mental capacity to make the decision and the decision you will make based on this.• Has the individual been given all the information they need to help them make the decision?• Use simple language: avoid jargon and complex terms. Break down information into manageable parts.• Visual aids – diagrams, pictures – or written notes to help explain concepts.• Identify the key details that the person needs to understand.• Check their comprehension: ask open-ended questions. Instead of yes/no questions, ask them to explain the information in their own words – for example, “Can you tell me what you understand about this treatment?”• Summarise and reflect: summarise what the person has said and ask the if you have correctly understood. This helps confirm their understanding• Repeat and rephrase: repeat important information and rephrase it if necessary. This can help reinforce understanding.• Use different approaches: if the person is struggling to understand your explanation, try a different method or analogy.
Retaining: can the individual retain that information for long enough to make a decision?	<ul style="list-style-type: none">• Short-term recall: after a brief period, ask the person to recall the information. This checks if they can retain it for long enough to make a decision.• Prompting: provide gentle prompts if needed, but don’t compromise the person’s ability to show they can recall the core information independently.• MCA 2005 section 3(3) states that people who can only retain information for a short time must not automatically be assumed to lack the capacity to make decisions – it depends on what is necessary for the decision in question.• Tools such as notebooks, photographs, posters, videos and voice recorders can help people record and retain information.

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Using and weighing up information: can the individual use or weigh up the information as part of the decision-making process?	<ul style="list-style-type: none">• Ensure the individual has been given clear details of the choices available to them and the implications of each option (the risks and benefits). Ask them to consider the pros and cons of the different options: “What do you think are the benefits and risks of this choice?”• Can the individual demonstrate that they are using the relevant information provided to them to make the decision? This can be undertaken by having a discussion with the person about the decision, impact, choices they have etc.• Consider if the individual is being influenced by the views of others.• An individual’s inability to reach a decision could indicate they cannot weigh up the information.• If the individual can describe the risks and benefits of each option but cannot relate these to their circumstances, they could be deemed unable to weigh up the information.
Communicating: Can the individual communicate their decision?	<ul style="list-style-type: none">• Be aware of the individual’s communication needs and make reasonable adjustments.• Decisions can be communicated by any means possible – for example, verbal or sign language, gesture, drawing, writing

Stage 2

The ‘diagnostic test’: is the person’s inability to make the decision the result of an impairment or disturbance in the functioning of their mind or brain?	<ul style="list-style-type: none">• The impairment or disturbance in the functioning of the mind or brain can be temporary or permanent, and can manifest in signs and symptoms such as confusion, drowsiness and concussion. Drug or alcohol abuse can also affect functioning.• Stage 2 is sometimes referred to as the ‘diagnostic test’ but this can be misleading because a formal diagnosis of an impairment or disturbance is not always necessary, providing there is clear evidence of such.• It is not sufficient for the assessor simply to state that the person has a disturbance or impairment of mind. They need to show how this disturbance or impairment of mind means it is impossible for the person to make the decision(s) in question. This is sometimes referred to as the ‘causative nexus*’.• Is the impairment or disturbance in the functioning of mind or brain temporary or permanent?
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* In the context of mental capacity assessments, a “causative nexus” refers to the direct, demonstrable link between a person’s mental impairment or disturbance and their inability to make a specific decision