

MENTAL CAPACITY ACT 2005

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Persons Who Lack Capacity

Preliminary

Section 5: Acts in connection with care or treatment

37. This provides statutory protection against liability for certain acts done in connection with the care or treatment of another person. If an act qualifies as a “section 5 act” then a carer can be confident that he will not face civil liability or criminal prosecution. Civil liability could involve being sued for committing a tort such as battery, false imprisonment or breach of confidence. Criminal prosecution might be for an offence against the person (assault or causing actual bodily harm) or for an offence against property (theft).
38. A qualifying “section 5 act” may be performed by a range of people on any one day. The key requirements are that the person (“D”) acts in connection with the care or treatment of another person (“P”) and that D has formed a reasonable belief as to P’s lack of capacity and best interests.
39. D will not incur any liability which would not have arisen if P, with capacity to do so, had in fact consented to D’s act. Consent is a complete defence to a wide range of torts (battery, false imprisonment, trespass to land or goods, breach of confidence) and to many offences against the person or against property. Many people who are fully capable will regularly consent (expressly or impliedly) to others touching them, locking the doors of a car or dealing with their property. If a person takes someone else’s unwanted clothes to a charity shop he could, in the absence of the owner’s consent, in principle face civil liability for trespass to goods or criminal prosecution for theft. This section offers protection against liability where the owner is unable to give a valid consent, as long as the step is taken in connection with caring for him and is in his best interests.
40. Consent is not a defence to a claim in the tort of negligence. There are some offences which depend on a finding of negligence as defined in civil law (most notably, manslaughter where the element of unlawful killing may be made out by grossly negligent behaviour, whether an act or an omission to act in breach of duty). Consent might be relevant to issues of contributory negligence. *Subsection (3)* therefore makes it clear that liability for negligence is unaffected by the section.
41. This section does not affect the operation of advance decisions to refuse treatment, as covered by *sections 24* to *26*. If a person has made a valid and applicable advance decision then that takes priority over the rules in this section.