

MIDNIGHT LAW



Pitfalls In the Assessment of Mental Capacity

SITUATION

A patient has been ventilated for pneumonia. A discussion has been held with them surrounding the insertion of a tracheostomy to aid weaning from the ventilator. They have declined a tracheostomy but appear to be delirious.

WHAT IS CAPACITY?

Capacity is the ability to make a decision. The *Mental Capacity Act 2005* provides the legal framework in England & Wales through which to determine whether an adult has capacity to make a decision for themselves. Assessment of mental capacity requires asking two questions:

1. Can the person understand the information relevant to making the decision, retain that information for long enough to make it, use and weigh the information, and communicate the decision?
2. If they cannot, then why not? They will only lack capacity to make the decision for purposes of the *Mental Capacity Act 2005* if they cannot make the decision because there is an impairment or disturbance in the functioning of the individual's mind or brain? (for example, delirium, stroke, intoxication, traumatic brain injury).

Capacity assessments should be recorded in sufficient detail, including the reasons for doubt, contents of the assessment, findings and how decisions have been reached in the individual's best interests.

PITFALLS IN ASSESSMENT

- **A diagnosis of dementia, mental illness or learning disability does not automatically mean the individual lacks capacity for all medical decisions.** Tools used for assessing cognition (e.g. MMSE) are not appropriate methods for determining capacity.
- **Capacity is time specific:** Having been assessed as lacking capacity to make a decision on one occasion does not mean that the individual will lack capacity on the next. Drugs, alcohol or organic illness (including delirium) may all cause capacity to fluctuate. Can the decision wait?
- **Capacity is decision specific:** Capacity is not "all or nothing" but is decision specific. It should not be assumed that an individual who lacks capacity for one medical decision lacks capacity for ALL medical decisions.
- **Has the individual been provided with relevant and meaningful information to make the decision?** Can the information be given in other formats the individual may prefer? Has information been tailored to the individual's level of understanding? Has the individual's ability to understand been maximised? (e.g. glasses, hearing aids). Does the individual need resources or explanations in their first language? Has family or friends been involved in discussions to aid effective communication?
- **Can the individual's ability to communicate be maximised?** Remember that communication need not just be by words: it could be gestures, body language, communication boards or apps. Consider involvement of speech and language therapists.
- **Is the individual subject to external pressures?** There are circumstances in which an individual may be particularly suggestible, or subject to undue influence or frank coercion. The individual may feel pressurised into making decisions to please others (e.g. family, friends, religious leaders, care givers or health care professionals). Even if they have capacity, this may not be the end of the concern, and you will need to find ways in which to identify whether the decision being made is truly the patient's own.
- **Disputes surrounding capacity assessment.** Where an assessment of capacity has been challenged options include: a case conference to discuss concerns, second opinion, involvement of an independent expert in assessing capacity, support from advocates, mediation and, as a last resort, application to Court of Protection for a declaration.

GUIDING PRINCIPLES

1. It must always be assumed that individuals have capacity to make decisions for themselves unless it is proven otherwise. But a proper reason for doubt should trigger an appropriately rigorous consideration of capacity.
2. Every effort should be made to support the individual to make a specific decision for themselves.
3. A capacitous patient has the right to make an irrational or unwise decision.

NORTHERN IRELAND

The same broad principles as set out here apply, but the *Mental Capacity Act (Northern Ireland)* is not yet fully in force to provide a formal framework.

KNOW THE LAW

1. Mental Capacity Act 2005
2. Mental Health Act 1983, 2007
3. Human Rights Act 1998
4. Equalities Act 2010

FURTHER READING

1. GMC: Decision Making & Consent
2. Mental Capacity Act Code of Practice
3. Social Care Institute for Excellence: MCA & Find an IMCA
4. www.mentalcapacitylawandpolicy.org.uk

