

Assessing Capacity for Medical Treatment

As a doctor, you must presume that every adult patient has the mental capacity to give or withhold consent to any examination, investigation or treatment unless the contrary is proven. This is clearly set out in the Medical Council's *Guide to Professional Conduct and Ethics for Registered Medical Practitioners* (available on the Medical Council website).

Most of the time, assessing a patient's capacity to make decisions is part of every encounter with the patient and the process is generally spontaneous and straightforward. During a consultation the doctor confirms the ability of their adult patients to understand their medical condition and options for care. For some patients however, the assessment may not be straightforward and you may have to assess a patient's decision-making capacity more carefully than usual.

There are a number of clinical scenarios where this may occur in practice including where:

1. The patient has an abrupt change in mental status. This change may be due to infection, medication, an acute neurological or psychiatric process or other medical problem;
2. The patient has a known history of impaired decision-making such as a chronic neurological or psychiatric condition, or an intellectual disability.

The ability of a patient to make a decision may depend on the nature and severity of their condition, or the difficulty or complexity of the decision. Some patients may be able to make simple decisions but may have difficulty if the decision is complex or involves a number of treatment options. Other patients may be able to make decisions at certain times but not others because of fluctuations in their condition. Assessment of mental capacity, therefore, should always be a 'decision-specific' test, ie, whether a person lacks capacity to take a particular decision at a particular time. You must not assume that because a patient lacks capacity to make a decision on a particular occasion, they lack the capacity to make decisions at all, or will not be able to make similar decisions in the future.

These patients may require careful assessment but may still be able to make their own decisions.

Legislation - Capacity

The Assisted Decision-Making (Capacity) Act 2015 (the "Act") was signed into law on 30 December 2015. However, the majority of the Act has not yet commenced*.

The Act helpfully defines capacity as the "*ability to understand, at the time that a decision is to be made, the nature and consequences of the decision to be made by him or her in the context of the available choices at that time*". There is a presumption of decision making capacity unless the contrary is shown.

Under the Act, a person lacks capacity to make a decision if they are unable:

- to understand the information relevant to the decision,
- to retain that information long enough to make a voluntary choice,
- to use or weigh that information as part of the process of making the decision, or
- to communicate his or her decision (whether by talking, writing, using sign language, assistive technology, or any other means)

* Medisec will keep this under review and provide an update when necessary.

Legislation – Other Updates

Other important updates under the Act include:

- Provision of tiered legal frameworks providing for the appointment of a "Decision-Making Assistant", a "Co-Decision-Maker" and a "Decision-Making Representative".
- Placement of a legal requirement on service providers to comprehensively enable a person make a decision through the provision of a range of supports and information appropriate to their condition.
- Abolition of the Wards of Court system.
- Review of all existing Wards resulting in either discharging them fully or transitioning to the new structure those who still need assistance.
- Establishment of a more modern regime for Enduring Powers of Attorney made after the commencement of the Act which may relate to a donor's property and/or personal welfare, and which may now include healthcare matters.
- Provision of the first legal framework facilitating the making of legally binding Advance Healthcare Directives.

Assessing Capacity

Assessments of mental capacity should only be carried out where there is a legitimate doubt about a patient's capacity and not because the doctor disagrees with the patient or thinks their particular decision irrational.

In making decisions regarding a patient's capacity you must always act in their best interests. Ensure that the patient is given every assistance to make decisions. Discuss treatment options in a place and at a time when the patient is able to understand and retain the information. Seek advice from family or friends of the patient around the best way of communicating with your patient if necessary, taking account of confidentiality issues and use communications aids if necessary. If a patient has difficulty retaining information, give him or her written record of your discussions, detailing what decision was made and why.

If your assessment leaves you in doubt about a patient's capacity to make a decision you should seek advice from others involved in the patient's care or those close to the patient who may be aware of the patient's usual ability to make decisions. You may also need to seek advice from colleagues with relevant specialist experience such as psychiatrists. If you are still unsure about a patient's capacity to make a decision you should seek legal advice with a view to asking a court to determine capacity.

The Medical Council Ethical Guide states in paragraph 10.6:

If there is no-one with legal authority to make decisions on the patient's behalf, you will have to decide what is in the patient's best interests. In doing so, you should consider:

- *which treatment option would give the best clinical benefit to the patient;*
- *the patient's past and present wishes, if they are known;*
- *whether the patient is likely to regain capacity to make the decision;*
- *the views of other people close to the patient who may be familiar with the patient's preferences, beliefs and values; and*
- *the views of other health professionals involved in the patient's care.*

If you have any specific queries in relation to assessing a patient's capacity, please contact a member of the Medisec team.

"The contents of this publication are indicative of current developments and contain guidance on general medico legal queries. It does not constitute and should not be relied upon as definitive legal, clinical or other advice and if you have any specific queries, please contact Medisec for advice".