

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, 9th Edition, 2024* (available on the Medical Council website).

Assessing a patient's capacity to make decisions is part of almost every encounter with a 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/treatment. For some patients; however, the consultation may not be straightforward and may require a more thorough assessment of their decision-making capacity.

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' and 'time specific' test, i.e., 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, that 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 a more thorough capacity 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 and came into effect on 26 April 2023.

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***”.

Under the Act, capacity is to be assessed on a functional basis. 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 through the means most appropriate to their communication needs (whether by talking, writing, using sign language, assistive technology, or any other means).

Legislation – Additional Updates

Additional important updates under the Act include:

- Provision of a tiered legal frameworks providing for the appointment of a: -
 - Decision-Making Assistant
 - Co-Decision-Maker
 - Decision-Making Representative.
- Placement of a legal requirement on service providers to comprehensively enable a person to make a decision through the provision of a range of supports and information appropriate to their condition.
- Abolition of the Wards of Court system. Since the introduction of the Act, it is no longer possible for a person to be made a Ward of Court, however, existing Wards of Court remain in Wardship until such time as they have been discharged by the High Court.
- Review of all existing Wards resulting in either discharging them fully with no substituted decision-making arrangement in place or transitioning those who still need assistance to the new structure. There is a statutory deadline in place of October 2027 for this review process.

- Establishment of a more modern regime for Enduring Powers of Attorney made after the commencement of the Act (26 April 2023) which can include decisions about personal welfare, property and affairs, or both.
 - Personal welfare decisions can include, for example, decisions about where a patient may live, employment, education, training, social activities or other decisions about their wellbeing.
 - Property and affairs decisions can include, for example, decisions about a patient's property, money, assets, belongings, or applying for social services.
 - An enduring power of attorney cannot include decisions about consenting to or refusing medical treatment. (If a patient wants to plan ahead for those decisions, they may wish to consider making an advance healthcare directive.)
 - The Act does not affect the validity of Enduring Powers of Attorney entered into under the previous statutory regime.
- 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 may be irrational. In making decisions regarding a patient's capacity a doctor must always act in their patient's 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 best able to understand and retain the information. Seek advice from family members or friends of the patient where appropriate, having regard to confidentiality, around the best way of communicating with your patient, and use communications aids if necessary. If a patient has difficulty retaining information, give him or her a 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 particular 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/geriatricians. 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's Ethical Guide states in paragraph 14.7:

Where a person lacks capacity to make their own decision, you:

- *Must give effect, as far as is practicable, to the patient's past and present will and preferences.*
- *Must consider the patient's beliefs and values and any other factors the patient would be likely to consider if they were able to do so.*
- *Must consider the views of any person named by the patient as a person to be consulted, and any decision-making supporter or person with legal authority to act on behalf of the patient.*
- *May also consider the views of any carer of the relevant person, anyone who has a bona fide interest in the welfare of the relevant person, or healthcare professionals.*
- *Must act in good faith and for the benefit of the person.*
- *Must act in a manner that minimises the restriction of the person's rights and freedom of action.*
- *Must have due regard to the rights of the person to dignity, bodily integrity, privacy, autonomy, and control over his or her financial affairs and property.*
- *Must consider the likelihood of the patient recovering capacity and the urgency of making the intervention prior to, or to promote, such a recovery.*
- *Must ensure that decisions you make are proportionate to the significance and urgency of the situation and are as limited in duration as is possible in the circumstances.*

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

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.

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