

Assessing capacity for medical treatment

Síle O'Dowd and Mary Davin-Power discuss what steps to take and the extent to which the views of family members and carers may be considered when assessing capacity to consent to or refuse treatment

EVERY ADULT PATIENT is presumed to have the mental capacity to give or withhold consent to any form of medical examination, investigation or treatment, unless the contrary is proven. In general practice, assessing a patient's capacity to make decisions occurs during all consultations and is generally straightforward.

The Assisted Decision-Making (Capacity) Act 2015 (which is not yet fully commenced) defines capacity as the "ability to understand, at the time that a decision has to be made, the nature and consequences of the decision to be made by him or her in the context of available choices at that time". In summary, it is a time-specific and issue-specific assessment.

Right to refuse treatment

In the same context that an adult patient has a right to consent to treatment, if an adult patient has capacity and understands the consequences of their decision and makes a clear choice to refuse treatment, their views must be respected. In these circumstances, a doctor should explain clearly to the patient the possible consequences of refusing treatment and where appropriate, offer the patient a second medical opinion. A careful note should be kept of the conversation.

Any assessment of mental capacity to make decisions regarding medical treatment should 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 is unreasonable.

Assessing capacity

A person's capacity to provide consent can be affected by long-term or permanent conditions as well as short-term illness and in these situations, a doctor may need to assess a patient's decision-making capacity more carefully. The Assisted Decision-Making (Capacity) Act 2015 provides that a person lacks the capacity to make a decision if they are unable to:

- Understand the information relevant to the decision
- Retain that information long enough to make a voluntary choice
- Use or weigh that information as part of the process of making the decision
- Communicate his or her decision (whether by talking, writing, sign language, assistive technology, or any other means).

The Medical Council's *Guide to Professional Conduct and Ethics for Registered Medical Practitioners*, in reflecting this position, provides the following criteria should be considered in assessing a patient's capacity:

- The patient's level of understanding and retention of the information they have been given

Table 1: Practical steps in assessing capacity

- Ensure the assessment is conducted in an optimal setting such as a quiet room, free from distractions and at an appropriate time. Many elderly patients are more alert in the morning, and a late evening appointment may not see them at their best
- Consider if it is appropriate to liaise with family members or those close to the patient around the best way of communicating with the patient, taking account of confidentiality issues
- Explore whether the patient might prefer to have a companion or family member with them for the assessment and decision-making process
- Consider the use of communication aids such as printed material and pictures if necessary.
- Consider issues such as hearing, eyesight, language and literacy difficulties, and how they may affect the patient's ability to take in information
- Consider whether the patient's capacity is permanent, or likely to improve

- Their ability to apply the information to their own personal circumstances and come to a decision
- Their ability to communicate their decision, with help or support where needed.

In making decisions regarding a patient's capacity, the doctor should ensure the care of the patient is the primary concern and that their best interests are central to the decision-making process. Steps should be taken to ensure that the patient is given every assistance to make decisions, particularly with elderly patients (see *Table 1*).

If your assessment leaves you in doubt about a patient's capacity to make a healthcare decision, a doctor could consider seeking the views of 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. In certain complex cases you may consider seeking advice from colleagues with relevant specialist experience in psychiatry or intellectual disability.

With all assessments, the doctor should carefully document the consultation and record the steps taken to assess capacity, as well as any findings as to whether the patient has capacity and understands the consequence of any decision to accept or refuse treatment.

Making decisions about healthcare interventions where the patient lacks capacity

Assessments as to capacity are time- and issue-specific, and the fact that a patient has been found to lack capacity to make a healthcare decision on a particular occasion does not mean that they lack capacity to make any decisions at

all, or that they will not be able to make similar or other decisions in the future.

If, following assessment, the doctor concludes that there is a lack of capacity, reasonable steps should be taken to find out if anyone else has lawful authority to make decisions on a patient's behalf and if so, you should seek that person's consent to the proposed treatment.

Lawful authority

Family members, friends, carers or those close to patients cannot, without lawful authority, give consent on behalf of patients. Doctors sometimes assume that those listed as next-of-kin have legal authority to consent to treatment on a patient's behalf; however, this is not the case.

Currently, in advance of the commencement of the Assisted Decision Making Capacity Act 2015, there are limited circumstances where a person can make a healthcare decision on behalf of another, for example where the patient is a ward of court. If the patient is a ward, the request for consent is referred by the committee of the ward to the President of the High Court, who has the authority to make the decision.

Until the relevant provisions of the Assisted Decision Making (Capacity) Act 2015 come into effect, an enduring power of attorney only allows decisions to be made regarding a patient's personal care which do not at present extend to healthcare or end-of-life decisions.

Where there is nobody with legal authority to make decisions on behalf of the patient, the Medical Council guidance specifies that the treating doctor should decide what is in the patient's best interests. In doing so, the doctor 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.

Role of family and friends in the decision-making process


The HSE National Consent Policy acknowledges the role of family and friends in assisting in the decision-making process, stating: "it may be helpful to include those who have a close, ongoing, personal relationship with the service user, in particular anyone chosen by the service user to be involved in treatment decisions". This is not so the friend or family member can make the decision, but rather they may be able to provide insight into the previously expressed views and preferences of the patient.

Urgent situations

Where there is a critical illness in need of urgent treatment, the patient lacks capacity to consent to a lifesaving healthcare intervention, and time is of the essence, the HSE National Consent Policy provides that "the necessary treatment may be administered in the absence of the expressed consent of the service user. The application of this exception is limited to situations where the treatment is immediately necessary to save the life or preserve the health of the service user".

Conclusion

When it comes to significant healthcare decision-making for a patient, the key points to bear in mind are:

- All patients should be presumed to have capacity to make that decision
- If assessment of capacity is deemed necessary, the patient should be given every opportunity to optimise the conditions to enable their maximum capacity to make that decision
- If the patient is found to lack the capacity to make that decision, timing, urgency and opinions of those close to the patient should all be considered in deciding what is in the patient's best interests
- Where any doubt arises with regard to consent in the absence of capacity, consider consulting with colleagues for a second opinion and contacting your indemnifier for advice regarding how to proceed. 

Sile O'Dowd is a legal counsel and Dr Mary Davin-Power is senior clinical risk advisor, both with Medisec Ireland

Call for Mentees for ICGP Mentorship Pilot

The ICGP is running a pilot GP Mentorship Programme. The aim of this is to evaluate the need and demand for such a programme, which would be open to all members.

An initial panel of mentors has been drawn up. The pilot will run for 12 months and will allow feedback from mentees to assess the programme. Members who would like to be mentees in the programme should indicate their interest by email at mentorship@icgp.ie. All mentee requests are treated confidentiality.

If you wish to discuss the above informally before indicating your interest, please Email: mentorship@icgp.ie

Information on the programme is available on www.icgp.ie

