Opinion Medico-Legal

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Managing patients with uncertain decision-making capacity

***Mr Kevin Healy** outlines the issues to consider in terms of assisted decision-making*

Doctors frequently encounter patients whose capacity to make treatment decisions or other decisions is called into question or may be compromised in the near future. Since April 2023, the legal framework dealing with legal capacity is the Assisted Decision-Making Capacity Act (2015) (the '2015 Act').

When faced with such situations, doctors should be aware of their ethical and legal obligations, and, in particular, the provisions of the 2015 Act.

The Council Guide

The Medical Council's *Guide to Professional Conduct and Ethics for Registered Medical Practitioners* deals with capacity and assisted decision-making in Paragraph 14, notably:

14.1 "*In some situations, you may have concerns about a patient's ability to make an informed decision such as where a patient is unable to communicate a clear and consistent choice, where their decision goes against their previously expressed wishes, or is out of character for them, or where it seems objectively unwise.*

14.3 *A determination that a patient lacks capacity to make a decision must only be based on an appropriate assessment of their capacity having taken all reasonable steps to optimise their ability to participate as fully as possible in decision-making relating to their care.*

14.5 *An assessment that a patient lacks capacity to make a particular decision does not imply that they are unable to make other decisions or that they will be unable to make this or other decisions in the future.*

14.6 *Adults who are considered not to have decision-making capacity are entitled to the same respect for their dignity and personal integrity as any other person. You must seek and listen to their views and involve them in decisions about their healthcare to the extent that they are willing and able to be involved.*"

Assessing capacity

Where a doctor has a concern about a patient's capacity to make treatment decisions, they must first assess the patient's capacity to make that particular decision. Under the 2015 Act, a person's capacity is to be construed functionally; that is to say, capacity is both decision and time specific. A person may be said to lack capacity if they are unable to do one of the following:

- Understand the information relevant to a decision.
- Retain that information long enough to make a voluntary decision.
- Use and weight the information in the process of making a decision.
- Communicate their decision (in whatever means is appropriate to their needs, eg, verbal, sign language, picture boards, etc).

Section 8 of the 2015 Act sets out guiding principles and those should be taken into account when assessing capacity. Of note are the following:

- The presumption in favour of capacity.
- An unwise decision does not equal a lack of capacity.
- Consider the likelihood of the person recovering capacity and the urgency of the intervention required in advance of such recovery.
- All practicable steps should be taken to enable a person to make a decision before determining that they lack capacity.

Decision-making supports available under the 2015 Act

Where a doctor has assessed a patient to lack capacity in respect of a particular decision(s) or considers that the patient may lack capacity in the near future, they should consider whether any of the supports available under the 2015 Act are in place or may be of assistance. If so, it is important to check the scope of the arrangement to ensure the particular decision is covered.

Decision-making assistant

A decision-making assistance agreement is an agreement a person enters into with another person where they require assistance with making certain decisions. A person must have capacity to make the decisions set out in the agreement and to enter into the agreement itself. Where a person enters such an agreement, they continue to make their own decisions, with the support of their assistant.

Co-decision-maker

Similarly, a co-decision-maker is appointed by way of agreement between a person who requires assistance with decision-making and their chosen co-decision-maker. Again, a person must have capacity both to make the decisions set out in the agreement and to enter into the agreement itself. Where this support differs is that the specified decisions are made jointly by the person and their co-decision-maker. On its face, it would appear that a co-decision-maker has a veto in respect of the specified decisions; however, the 2015 Act sets out that they shall not withhold their consent unless it is reasonably foreseeable that to do otherwise would cause serious harm to a person.

Decision-making representative

A decision-making representative (DMR) is a form of substituted decision-making, which is only available where a person has lost capacity to make a particular decision. An application to the Circuit Court is required to appoint a DMR. Where a DMR is appointed, the Court is required to review a person's capacity within three years from the date of appointment.

It is important to note that the above three arrangements may include personal welfare decisions, within which falls healthcare decisions. The Decision Support Service's code of practice for DMRs sets out that a DMR must not refuse treatment that will save or sustain the life of the relevant person or consent to the withdrawal of life-sustaining treatment.

Enduring power of attorney

An enduring power of attorney (EPA) is a legal instrument which a person executes, whilst they have capacity, appointing another person (attorney) to make certain decisions on their behalf should they lose capacity. Since the commencement of the 2015 Act, EPAs are governed by two separate pieces of legislation: Those created post-commencement, and those created under the previous statutory regime, the Powers of Attorney Act (1996). EPAs created prior to commencement of the 2015 Act continue to be valid so long as they were executed in accordance with the requirements of the 1996 Act.

An EPA is created in a two-stage process. Firstly, the EPA is executed at a time when a person has capacity, and it is later enacted when they lose capacity. An attorney has no authority under the EPA until it has been registered and notified to the relevant authority: The Office of the Wards of Court in the High Court (1996 Act) or the Decision Support Service (2015 Act).

It should be highlighted that an EPA, irrespective of the statute it was created under, does not permit an attorney to make treatment decisions. However, an EPA may still be of assistance in matters of personal welfare, such as where a person resides.

Advance healthcare directive

An advance healthcare directive (AHD) is an instrument created by a person with capacity to express their wishes in respect of treatment should it be required at a time that they lack capacity. When creating an AHD, a person may appoint a designated healthcare representative, whose role is to ensure that the person's wishes are adhered to.

An AHD should set out treatment which a person does not wish to receive and it cannot be used to compel a doctor to provide a particular treatment. However, where an AHD does indicate a patient's preference for a particular treatment, that should be taken into account.

To be valid, an AHD must be executed in accordance with the statutory requirements under the 2015 Act and a doctor should seek advice to confirm validity when presented with an AHD.

To complicate matters, the 2015 Act sets out that an AHD will not be valid where the person who has made it has acted inconsistently with the AHD following its execution while they still had capacity. For example, a patient has continually undergone chemotherapy since creating an AHD stating they do not wish to receive it.

Under the 2015 Act, an AHD will not apply to life-sustaining treatment unless it explicitly states that it is to apply even if the person's life is at risk.

Measures outside of the 2015 Act

Emergency intervention

Where time is of the essence to preserve a patient's life, safety, health and welfare, and it is not possible to check if any of the aforementioned arrangements apply, treatment should be provided to the patient. In such circumstances, a doctor should only provide treatment immediately necessary in the circumstances of the emergency.

Wardship

Since the commencement of the 2015 Act, it is no longer possible to make a person a Ward of Court. Those individuals who were previously brought into wardship remain in wardship until discharged by the High Court. The deadline for discharge from wardship has recently been extended to 25 October 2027. A Ward of Court's decisions will be made by their committee (akin to a DMR) or, where necessary, the High Court.

Mental Health Act (2001)

The Mental Health Act (2001) provides a statutory basis for the involuntary admission of patients to acute psychiatric facilities known as approved centres. This Act sets out specific criteria which a patient must meet and procedural safeguards to protect patients admitted involuntarily. Simply because a patient has been assessed to lack capacity does not necessarily mean that they will meet the threshold for involuntary admission and vice versa. The 2015 Act explicitly prohibits a DMR from consenting to a person's detention.

Inherent jurisdiction of the High Court

A detailed discussion of the High Court's inherent jurisdiction is outside the scope of this article; however, the 2015 Act explicitly states that nothing in that Act shall limit the High Court's jurisdiction to make orders relating to the care, treatment, or detention of persons who lack capacity.

> *When faced with such situations, doctors should be aware of their ethical and legal obligations and, in particular, the provisions of the 2015 Act*

If you have concerns about managing a patient with uncertain capacity, you should contact your indemnifier for specific advice.