CAPACITY

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WHO DOES IT APPLY TO?

-Individuals who are aged 16 years or over (18 years for Advance Directives)

-Habitually resident in England or Wales

-Lack the mental capacity to act or make decisions for themselves

WHEN SHOULD YOU CONSIDER IT?

- Everyone working with and/or caring for people who lack capacity must comply with the Act and Code of Practice (or be prepared to give reasons why you did not comply with the Code)

- Enshrined in statute what was common law regarding treatment “in best interests”

- Criminal offence of ill treatment/wilful neglect of a person lacking capacity (up to 5yr imprisonment)

5 UNDERPINNING PRINCIPLES

- Presumption of capacity
- Not treat a person as incapable of making a decision unless you have tried all practicable steps to try to help them
- Allow people to make what may seem to you an unwise decision
- Always do things, or take decisions for people without capacity, in their best interests
- Ensure that any act or decision must be the least restrictive option to the person in terms of their rights and freedom of action

2-stage test of capacity

- Does the person have an impairment of the mind or brain, or is there some sort of disturbance affecting the way the mind or brain works?

- If so, does that impairment or disturbance mean that the person is unable to make the decision in question at the time it needs to be made?

To be deemed to have capacity

The individual must be able to:

- Understand the information relevant to the decision
- Retain the information
- Use or weigh that information as part of the process of making the decision
- Communicate his/her decision either by talking, signing or any other means

CASE HISTORY

- 75 yr woman on Section 2 MHA
- 60 yr history of untreated psychosis – probably paranoid schizophrenia. Floridly psychotic and takes to her bed.
- Persistently hypertensive BP 210/120mmHg
- Takes her antipsychotic, but refuses her antihypertensive and other physical medication
- What do you do?

- Does she have a mental disorder?
- What is the question you want to assess capacity for?
- Does she understand the information you give her?
- Can she remember it for long enough?
- Can she weigh up the pros and cons of different courses of action?
- Can she tell you her decision?

The Patient has capacity?

- Patient is making an informed treatment choice
- This choice must be respected even if unconventional or unwise
- Record your capacity assessment
- Record the decision taken by the patient

The patient lacks capacity for this question only?

- Decision is made by the responsible care team (social services, health…) under the MCA principle of best interests (using best interest checklist)

Best Interests Checklist

- All decisions must be made in the best interests of the patient, taking into account:
  - Involve the person who lacks capacity
  - Be aware of the persons past and present wishes and feelings
  - Consult with others who are involved in the care of the person
  - Do not make assumptions based solely on the person's age, appearance, condition or behaviour
  - Is the person likely to regain capacity to make the decision in the future? Can you delay the decision to that point?
  - Record your decision and the decision-making process

Best Interest Determination

- Consider spiritual and cultural factors
- Relatives can inform the process but cannot make the decision for the patient unless valid LPA registered with Office of Public Guardian(OPG)
- Does valid, applicable advance decision to refuse treatment exist?
- Support and inform patients about the decision
- Is there a need for an IMCA?

Useful tip

- If you are finding it difficult to decide what is in someone's best interests, take a moment to gauge your response to considering an alternative potential course of action e.g. – do "nothing" and leave things as they are

- Your instinctive response will sometimes give you a hint about what needs to happen next

CASE HISTORY

- 64 year old lady X who has been bedbound for 6 years due to impaired executive function secondary to long term alcohol abuse, living in squalor, not mobilising independently but can drag herself around her bedroom – callouses on her hands, doubly incontinent, never gets dressed. Has a partner who has ASD and cannot support her with personal care during his visits.
- Flat is "too dirty" for a care package to be put in place, even though X knows she needs help and would like to have some support.
- Has an episode of D and V over a weekend, found in a bed of urine and faeces, has not drunk or eaten for several days, is pyrexial and dehydrated.
- GP visits and recommends admission. Paramedics arrive. X refuses to get in the ambulance.
- What do you do?

INDEPENDENT MENTAL CAPACITY ADVOCATE (IMCA)

- For the "friendless" incapacitated person i.e. lacks capacity and has no relative, friend or unpaid carer

- Must be involved when:
  - - An NHS body is proposing:
    - Serious medical treatment (provide, withhold or stop)
    - A stay of more than 28 days in hospital or 8 weeks in a care home
    - Change to a person's accommodation to another hospital for more than 28 days or more than 8 weeks in a care home
  - - A local authority is proposing:
    - To change or to provide residential or supported accommodation for more than 8 weeks

IMCAs

- Are instructed by the “decision maker”
- Will seek least restrictive options and suggest alternative course of action if more consistent with expressed wishes
- Not part of the decision making process, but the information they provide must be taken into account when determining best interests (or you must clearly document why this is being disregarded)
- Can be involved in adult protection cases whether or not there are family or friends involved
- Can be involved in care reviews where there is no one else available to consult
- Can challenge the best interest decision– in the Court of Protection if necessary

Exceptions to IMCA involvement

- An IMCA need not be involved in situations where an emergency situation is required e.g.
- To provide emergency life-saving medical treatment
- Where the person would be homeless unless they were accommodated in a care home

Lasting Power of Attorney

- Legal document that allows you to appoint a "proxy" decision maker to act on your behalf. 2 types :
  - Health and welfare – only used once capacity is lost, gives attorney the ability to consent to and refuse treatment
  - Property and finance – can be used even when you still have capacity
- Age 18 or over
- Once completed and witnessed, is lodged with the Office of the Public Guardian
- If there is a valid Advance Directive to refuse treatment, an attorney can't override this decision unless the LPA was made after the advance directive and has specifically given the attorney authority to refuse or consent to the treatment.
- Includes a certificate (signed by an independent third party) confirming that you had capacity at the time this was completed, and were not under undue coercion.
- You can put restrictions onto the attorney's powers e.g. limiting their abilities to maybe sell your house, consent to or refuse medical treatment
- If the donor is detained under the MHA, the attorney can't make decisions refusing or consenting to that treatment

ADVANCE DIRECTIVES

- Must have capacity to make one and be over 18
- Is as valid as a contemporaneous refusal to treatment
- About refusal of treatment in the future – you cannot request specific treatment
- You must specify the treatment to be refused, which cannot include basic needs (oral food/warmth/hygiene), and must specify "even if life is at risk" if it applies to life sustaining treatment
- If it involves life sustaining treatment, then this must be in writing, signed and witnessed

WHEN DOES AN ADVANCE DIRECTIVE NOT APPLY?

- If you still have capacity
- It must be valid at the time when you need to use it
- It is not valid if you have withdrawn your decision whilst you still had the capacity to change your mind
- If you have subsequently appointed a LPofA with the power to make decisions about refusing treatment mentioned in your advance directive
- If your actions are clearly inconsistent with your advance directive

If the Advance Directive is valid, what then?

- Does it apply to the situation?
- Is the proposed treatment specified in the AD?
- Are the specific circumstances described in the AD applicable?
- Are there reasonable grounds to believe that unforeseen circumstances have arisen which would have affected the decision made?
- If the AD is valid and applicable – health professional should abide by it
- If there are genuine doubts and reasonable beliefs, then you can treat whilst seeking an urgent decision from the Court of Protection

CASE HISTORY

- 87year old man previously unknown to mental health services but well known to social services. Born in the house he currently lives in having never married. Currently in a "safe haven" bed in a local residential home following a fire in his house caused by a candle falling into the piles of accumulated rubbish in his sitting room. He is very fed up and wants to go home.

- Social worker wants an assessment of his capacity and in the meantime has arranged for the rubbish to be cleared and his electricity and gas to be updated. He is very angry about this.

- On examination there is no evidence of psychosis or mood disorder – he scores 25/30 on MMSE.

- How do you proceed?

BACKGROUND

- Able to give a clear account of recent events – including trying to put the fire out and the fire brigade being summoned
- Says he's always been a bit lazy around housework, but has a carer who brings him ready meals and he is happy with this plan. Puts the rubbish in bags in the living room as "can't be bothered to get rid of them". Happy for carer to help him.
- Remembers the house being rewired many years ago, and agrees that the electricity needs seeing to, but he would like to arrange the son of the old electrician to do it
- Agrees that he needs a new gas oven and fire – but would have like to choose his own

CASE HISTORY

- You are asked to see an 85 year old man following an annual yuletide visit by his nephew who was “shocked by the deterioration in him … He`s not coping” He was widowed last year. The couple were childless. He has been on medication for heart failure but has only been seen by the practice infrequently.

  - On approaching the house you notice that both it and the garden have not been maintained. He answers the door looking dishevelled, gaunt and bearing a bruise over his eyebrow. He is a little suspicious but eventually permits you entry. His home is untidy and rather smelly. During your interview with him he seems miserable and muddled. However he does not think that he needs any help.

- What would you do?