



Royal College  
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# Consent and mental capacity in emergency cardiac care 2008

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# Elements of a valid consent (common law)

- Legally competent
- Suitably informed
- Freely given
- Fundamental principle: right to consent or refuse treatment

# When is consent unnecessary?

- Emergencies (doctrine of ‘necessity’)
- Mental Health Act 1983
- Incompetent adult and the Mental Capacity Act 2005

# Who is competent?

- Age of capacity (Mental Capacity Act 2005)
- Under 16 years? Gillick v West Norfolk and Wisbech AHA (1985) - (Fraser guidelines)  
'sufficient understanding and intelligence to *understand fully what is involved*'
- R (on the application of Axon) v Secretary of State for Health and the Family Planning Association [2006] EWHC 372 (Admin)

# Mental Capacity Act 2005 - overview

- 10 years of deliberation; 68 sections; 7 schedules
- Code of Practice
- Key principles: presumption of capacity; support in making decisions; individual autonomy even if unwise; best interests test; least restrictive of basic rights and freedoms
- Test for capacity (understand, retain, use, communicate)
- ‘Best interests’

# Five statutory principles

- A person must be *assumed to have capacity* unless it is established that he lacks capacity
- A person is not to be treated as unable to make a decision unless all *practicable steps* to help him to do so have been taken without success
- A person is not to be treated as unable to make a decision merely because he makes an *unwise decision*
- An act done, or decision made, under the Act for or on behalf of a person who lacks capacity must be done, or made, in his *best interests*
- Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is *less restrictive* of the person's rights and freedom of action

# Capacity

- Presumption of capacity
- *Does the person have an impairment of the mind or brain, or is there some sort of disturbance affecting the way their mind or brain works?*
- If so, does that impairment or disturbance mean that the person is unable to make the decision at the time it needs to be made?
- Who assesses? Person who is directly concerned with the individual at the time the decision needs to be made
- *Reasonable* belief of lack of capacity

# Determining capacity

- Understand treatment information (nature, purpose, consequences of)
- Retain treatment information
- Use or weigh it in the balance to arrive at a decision
- Able to communicate their decision
- Remember: *lack of capacity means a person who lacks capacity to make a particular decision or take a particular action for themselves at the time the decision or action needs to be taken*

## ‘Best interests’ at common law

- encompasses medical, emotional and all other welfare issues
- evaluation of those interests akin to a *welfare* appraisal
- health professionals have a duty to act in accordance with a responsible body of relevant professional opinion. However, they also have a second duty: they have to act in the best interests of their mentally incapacitated patients.

Dame Elizabeth Butler-Sloss (R-B (A Patient) v Official Solicitor (2000))

# Best interests and the MCA 2005

- Not defined
- Checklist of common factors that must always be considered:
- Encourage participation; identify all relevant circumstances; find out person's views; avoid discrimination; assess whether person might regain capacity; life-sustaining treatment safeguards; consult others; avoid restricting person's rights
- Exceptions: prior advance decision; research

# Providing care or treatment

- Protection for actions carried out in connection with care or treatment
- Person believed to lack capacity
- In person's best interests
- Keep in mind the statutory principles
- Reasonable steps to find out whether person has capacity
- Reasonable grounds for believing that the action is in the person's best interests
- Limitations on protection from liability (restraint, negligence)

# Lasting power of attorney

- Differ from enduring power of attorney
- 18 years or over
- Written document in statutory form
- Prescribed information
- Signed
- Identify people to be contacted on registration or say none
- Attorney/s signature/s
- Certificate by independent third party
- Anyone (18+) can be asked to be an attorney
- Before acting LPA registered with Public Guardian
- Follow statutory principles when acting

# Advance decisions

- 18+ and has capacity
- Refusal of specified medical treatment at some time in the future when they may lack capacity
- Must be valid and applicable to current circumstances
- Protection of health care professionals when acting in accordance with an advance decision
- Refusal of life-sustaining treatment advance decision must be in writing, signed and witnessed and state clearly that it applies even if life is at risk
- Withdrawal/change of mind
- Oral or in writing

# Single orders of Court of Protection

- Role of Court
- Deciding on capacity; declarations, decisions or orders on financial or welfare matters; appointment of deputies to make decisions; deciding whether LPA or EPA is valid; removal of deputies or attorneys.
- Serious healthcare and treatment decisions (e.g. withdrawing ANH from patients in PVS; organ donation; non-therapeutic sterilisation)
- Deputies should not generally be paid care workers (conflict of interest)

# Independent mental capacity advocates

- Independent safeguards for people lacking capacity
- Must be instructed and consulted for people lacking capacity who have no-one else to support them (other than paid staff) whenever:
- NHS body proposing to provide serious medical treatment (e.g. chemo, ECT, major surgery, major amputations etc)
- NHS body or LA proposing to arrange accommodation or change of accommodation in hospital or care home and
- Person will stay in hospital > 28 days or
- Will stay in care home for > 8 weeks
- May be instructed on care reviews and adult protection cases

# Relevant legislation, guidance etc

- Mental Capacity Act 2005
- Mental Capacity Act 2005 Code of Practice ([www.dca.gov.uk/legal-policy/mental-capacity/publications.htm](http://www.dca.gov.uk/legal-policy/mental-capacity/publications.htm))
- Decisions relating to cardio-respiratory resuscitation: joint statement from BMA, RC (UK) and RCN 2007