Assessing Mental Capacity in primary care

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Charlotte Emmett, Associate Professor, Northumbria Law School
Nele Demeyere, Associate Professor of Experimental Psychology, University of Oxford
Terry Quinn, Stroke Association / CSO Senior, Clinical Lecturer, University of Glasgow,
Overview

• Legal basis of consent and capacity

• How to assess capacity

• Area of advanced care planning (incl. Lasting Power of Attorney)

• Challenges and complexities (Nele)

• Case examples for discussion (Terry)
Patient autonomy

“... Every adult has the right and capacity to decide whether he will accept medical treatment, even if a refusal may risk permanent injury to his health or even lead to premature death...it matters not whether the reasons for the refusal were rational, or irrational, unknown or non-existent.” (para 663)

...Lord Donaldson in Re T [1992] 4 All ER 649
Lawful Treatment

Valid Consent

• Capacity Re C (Adult: Refusal of Treatment) [1994] 1 WLR 290; [1994] 1 All ER 819

• Information Montgomery v Lanarkshire Health Board [2015] UKSC 11

• Freedom from coercion Re T (Adult) [1992] 4 All ER 649

• Consent is continuing
Legal framework

- Mental Capacity Act (Northern Ireland) 2016
- Adults with Incapacity (Scotland) Act 2000
- Mental Capacity Act 2005
Capacity under MCA 2005

Sections 2 and 3 MCA govern capacity assessment

Capacity Test at section 2:

A person will lack capacity for the purposes of the Act if, at the material time, the person is unable to make a decision because of an impairment or disturbance in the functioning of the person’s mind or brain.

See: *PC and NC v City of York Council* [2013] EWCA Civ 478 (causative nexus)
Section 3 – functional capacity test

In order to be attributed mental capacity, the patient needs to be able to

1. understand the information given,
2. retain the information,
3. weigh up the information, and
4. communicate the decision made.

Understanding      Retaining      Weighing Up      Communicating
Capacity under MCA 2005

Presumption of capacity

- Capacity assessment is time and decision specific (Re T) - Will the person regain capacity? (s4(3)(a))

- All practical steps need to be taken to help a person make his/her own decision (s1(3) MCA) (incl communication support)

- Capacity will be assessed in relation to the gravity of decision (Re T) (proportionality)
Relevant Information: what is it?

Heart of England NHS Foundation Trust v JB [2014] EWHC 342 Peter Jackson J:
Gangrene in foot

• “[w]hat is required here is a broad, general understanding of the kind that is expected from the population at large. JB is not required to understand every last piece of information about her situation and her options... It must also be remembered that common strategies for dealing with unpalatable dilemmas – for example indecision, avoidance or vacillation – are not to be confused with incapacity. We should not ask more of people whose capacity is questioned than of those whose capacity is undoubted.”
...it is for the Trust to displace the presumption that JB has capacity on a balance of probabilities. It is important that the right question is asked. ...Dr O approached matters on the basis that JB was ‘unable to clearly show that she had considered the option’ of amputation. Similarly ..., Dr B remarked that ‘one needs to be certain of her capacity’ while Dr O recorded that JB “is unable to fully understand, retain and weigh information...’. These formulations do not sit easily with the burden and standard of proof contained in the Act.”

...I depart from the assessment of Dr O ... her analysis demands more of JB than the law requires. It is not for JB to understand everything, or to prove anything.
Advanced care planning – terms used

• Advance decisions refusing treatment (living wills, advanced directives)

• Advance statements (not legally binding)

• Lasting Powers of attorney
What is a Lasting Power of Attorney?

A *Lasting Power of Attorney* is a legal document that allows an adult (the donor) to confer powers on another trusted individual (the attorney, or donee) to make financial and/or health and welfare decisions on the donor’s behalf in their best interests, should the donor lose capacity in the future.

In Scotland, broadly similar provisions under AWIA: ‘Continuing and Welfare powers of attorney’ made by the ‘grantor’.
A GP may be asked to act as Certificate Provider.

If the donor’s capacity is in doubt, a registered medical practitioner may be asked to certify that:

- That the patient understands the purpose, the nature and the extent of the LPA
- That the patient is not acting under undue influence or pressure
- There has been no fraud involved in the making of the LPA
- That there is nothing else that will prevent the creation of the LPA

In Scotland, a GP as a ‘prescribed person’ may carry out similar certification.
Capacity to make an LPA

Reference must be made to ss2 and 3 MCA - assess the donor’s ability to understand relevant information, retain it, weigh it and communicate a decision.

The GP might want to explore a donor’s understanding of:

- What an LPA is and its effect
- Why the donor wants to make the LPA
- Who the attorney(s) are and why they have been chosen
- What powers the attorney(s) will have under the LPA
Mental capacity in primary care: complexity & challenges
Challenges in mental capacity assessments

- 34% medical patients may lack capacity \(^1\)
- Assessment is subjective, complex \(^2\)
- Current practice is inadequate \(^3\)
- Inaccurate assessment risks excluding people from autonomous decision-making / asking people to make uninformed decisions

\(^1\) Lepping et al. (2015)
\(^2\) Ripley et al. (2008)
\(^3\) House of Lords Select Committee on the Mental Capacity Act 2005 (2014)
Complexities and Challenges

Typically short, **qualitative**, mostly non-structured interviews

(Emmet et al. 2013; Jacoby and Steer 2007, Dunn et al. 2006)

**Highly variable** clinical judgments
Low Interrator agreements 56% – 72%

(Marson et al, 1997; Mackenzie et al 2008)

**Disjointed** from cognitive assessments.
Sometimes MMSE cited, but not made for the 4 elements and concerns raised about unwarranted conclusions of ‘no capacity’

Kim and Caine 2014; Patchet, Astner and Brown 2010;
Mezey et al. 2000; Marson et al. 1996

**More research** needed to develop and evaluate tools (NICE 2018)
Complexities and Challenges

Not always clear how to **assess and interpret**

- Understanding
- Retaining
- Weighing up
- Communication

Need for extra information – from environment, from changes over time, from cognitive assessments

Need for correct, complete and accurate **reporting** in case of legal challenge
CASE studies for discussion
Brian is a 75 year old musician

His medical history includes: Osteoarthritis, Chronic renal impairment, Sensorineural hearing loss, Stroke

Discovered to have iron deficiency anaemia
Requires bidirectional endoscopy
You call him in to the surgery to discuss the need for tests
Brian doesn’t seem to understand what you are saying
He is getting frustrated
• You turn on his hearing aid
• He then fully understands the procedures and risks.
Michael is a 73 year old musician

Previous ischaemic stroke residual communication problems and hemiparesis. Lives alone with carers.

He is found to have atrial fibrillation and needs anticoagulation. You call him in to discuss this.

He seems to have difficulties following your descriptions. Tells you he doesn’t want new medications but struggles to articulate why.

• What is the decision?
• Why is this person’s capacity being assessed?
• What is the relevant information the person needs to know about the decision?
Michael is a 73 year old musician
Previous ischaemic stroke residual communication problems and hemiparesis. Lives alone with carers.

He is brought to the surgery by his daughters. They want to apply for legal powers to manage his welfare and financial affairs. They need a doctor to say he has capacity.

Michael seems uncomfortable in the surgery. His daughters dominate the discussion.

- What is the decision?
- Why is this person’s capacity being assessed?
- What is the relevant information the person needs to know about the decision?
Richard is a 77 year old musician
Rapidly progressive cognitive decline
Now struggles to mobilise
Requires constant care

Frequent admission with aspiration pneumonia and unsafe swallow. While in hospital he repeatedly pulled out nasogastric tubes. He has a history of resisting any medical intervention or admission. Speech therapists feel his swallow is still unsafe. Family say he must be admitted for PEG or he will ‘starve to death’.

• What is the decision?
• Why is this person’s capacity being assessed?
• What is the relevant information the person needs to know about the decision?
Thank you