

GUIDANCE FOR GPs: LEGAL IMPLICATIONS REGARDING CAPACITY

- “Capacity” means the ability to make a particular decision at a particular time.
- “Lack of capacity” means the inability to make a particular decision at a particular time due to an impairment or disturbance in the functioning of the brain or mind.
- The law governing this area is the Mental Capacity Act 2005
<http://www.legislation.gov.uk/ukpga/2005/9/contents> which should be read in conjunction with the Mental Capacity Act Code of Practice <http://www.justice.gov.uk/downloads/protecting-the-vulnerable/mca/mca-code-practice-0509.pdf>.

Key principles of the MCA

- I. **A person must be assumed to have capacity**
 - e.g. Joe has a diagnosis of Alzheimer's Disease he must still be assumed to have capacity to make the decision in question.
Note that a person may not have an actual diagnosis but may lack capacity to make the particular decision at the time the decision needs to be made.
 - a. **A person may have capacity to make some decisions and not others.**
 - e.g. Les may be able to decide whether or not to have a flu jab but not give consent to a hip replacement.
- II. **A person is not to be treated as unable to make the decision in question, unless all practicable steps to help him to do so have been taken without success.**
 - a. An explanation must be given in a way your patient will understand about the decision and the consequences of making different decisions or none at all.
 - b. All practicable steps to help your patient to communicate the decision must be made e.g. by speech, sign language.
- III. **A person is permitted to make an unwise decision.**
 - a. Provided your patient has basic ability to consider the options and made choices, you should NOT intervene against his or her will.
 - b. Respect for a person's autonomy is central to the MCA
- IV. **Any act done or decision made for the person lacking capacity must be done or made in his best interests.**
 - a. This is central to the MCA.
 - b. Guidance is found in the Code of Practice in making a decision on behalf of a person lacking capacity.
- V. **Before the act is done or decision made, regard must be had to whether the purpose for which it is needed can be as effectively be achieved in a way that is less restrictive of your patient's rights and freedom.**

BEST INTEREST: factors to consider

You must take into all the relevant circumstances including:-

- i. Your patient's past and present wishes and feelings
- ii. Beliefs and values
- iii. Any expression of wishes made to you
- iv. Any future care plan written by your patient
- v. The views of those caring for your patient- family, but **note** that the family does not have legal authority to make a decision for the person who lacks capacity.
- vi. The least restrictive course of action must be taken.
- vii. Avoid discrimination
- viii. Will capacity be regained? Can the decision wait?

CAPACITY: factors to consider

- i. Defining lack of capacity is a medico-legal question. A lack of capacity means that your patient is unable to make the decision in question at the material time because of an impairment of or a disturbance in the functioning of the brain or mind.
- ii. Capacity is decision specific and time specific and the inability to make the decision must be because of an impairment of or a disturbance in the functioning of the mind or brain.
- iii. The impairment or disturbance may permanent or temporary.
- iv. The matter is decided on the balance of probabilities.
- v. Capacity may fluctuate. If the decision can wait until capacity may be regained, then it should wait, this encourages and enables autonomy of decision making.

ASSESSMENT of capacity

In assessing capacity your patient must be able to:

- i. Understand the information relevant to the decision.
- ii. Retain the information for as long as it takes to make the decision.
- iii. Use or weigh the information as part of the decision making process.
- iv. Communicate his or her decision to you.
- v. Understand the consequence of making a particular decision or no decision at all
- vi. Note that a particular diagnosis does not automatically mean your patient does not have capacity and your patient must be supported and given every help to make the decision for herself/himself.

CASES OF DISPUTE

- i. If there is a dispute regarding what constitutes a person's best interests the matter will be referred to the Court of Protection.
- ii. The Court of Protection is a special Court which deals with issues to protect those who do not have capacity.

LASTING POWERS OF ATTORNEY (LPA)

- i. There are two types of LPA (i) one dealing with money and property and (ii) the other which deals with Health & Welfare and which is relevant to GPs.
- ii. In an LPA for Health & Welfare a person appoints another person or persons as the attorney to make decisions about personal care if the person is mentally incapable of making the particular decision for him or herself at the time the decision needs to be made.
- iii. Decisions include:
 - Consent to medical treatment
 - Consent to life sustaining treatment (if stated in the LPA)
 - Nursing care
 - Where the person should live, who visits them, what they should wear, what they should eat and so on
 - Remember that capacity is decision specific and time specific.
- iv. **When the person tells you they have a "Power of Attorney" you MUST SEE THE ORIGINAL SEALED LPA FOR HEALTH & WELFARE. Note that a General Power of Attorney or an Enduring Power of Attorney or an LPA for Property & Finance does not give the person any authority whatsoever in relation to medical or personal care.**
- v. The original LPA is stamped by the Office of the Public Guardian and there is an indented stamp at the bottom of each page.
- vi. The documents are quite easy to forge and you must see the original.
- vii. The LPA for Health & Welfare then gives the attorney legal authority to make the decision on your patient's behalf but only if your patient does not have capacity to make the decision in question at the time the decision needs to be made.
- viii. Remember that help and support must be given to the person to make the decision.
- ix. In the case of fluctuating capacity, the decision should wait until your patient has capacity unless interests are prejudiced by so waiting.

CERTIFICATE PROVIDER

As a separate issue, you may be asked to be the certificate provider in the creation of an LPA.

- i. If you act as a certificate provider in your capacity as a GP:-
- ii. You must see your patient and satisfy yourself that he or she understands the purpose of the LPA in the scope of the authority granted.
- iii. There is no fraud or undue pressure to induce your patient to create the LPA e.g. You must see him or her on their own and in the absence of any third party.
- iv. There is nothing else which would prevent the LPA from being created e.g. if you know that the attorney is dead or incapacitated.
- v. Note that the LPA for Health & Welfare will override any advanced decision to refuse life-sustaining treatment (Living Will) if in the LPA; your patient has given the attorney authority to make decisions about life sustaining treatment.

This is a basic guide in which I have endeavoured to address points relevant to GPs and please contact me if you require any further information.

FURTHER INFORMATION

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