Consent and mental capacity

A quick guide

The law states that every person has a right to make decisions about their own life and care

Only in very specific circumstances can we make decisions on someone's behalf which deprive them of a choice

These circumstances are defined by the Mental Capacity Act

The law states that everyone must be assumed to *have* capacity to make their own decisions unless proven otherwise…

…and that lack of capacity to make one decision does *NOT* mean you lack capacity to make a different decision

For example, a patient with dementia may lack capacity to deal with their bank accounts, but can still make a decision on what to have for breakfast or what to wear.

Capacity is decision specific.

So, how do we establish who has capacity to make a particular decision?

1 – We must establish whether the person has a temporary ***or*** permanent disturbance of the brain *or* mind

For example:

- a severe head injury
- advanced dementia
- learning disabilities
- delirium from fever
- unconsciousness

Then, *IF* we can establish a disturbance through taking a history or observing the patient, we can progress to the 4 functional tests…

A – Can the person understand information you give them?

You MUST try every possible, practical route to give them this information. For example speech, writing or demonstrating.

B – Can the person retain the information?

They only need to retain it long enough to make a decision, e.g. “I think you need to go to hospital because you have an infection and without treatment it will get worse and you could die. Can you tell me why I think you need to go to hospital?”

C – Can the person weigh up the information?

e.g. Are they able to consider the risk of death from this infection?

D – Can they communicate their decision back?

You MUST accept any form of clear communication, e.g. speech, writing, gesture, signal etc.

If the answer to *any* of A-D is NO, then they can be said to lack mental capacity for that decision

You MUST document how you established lack of capacity as it is fundamental to human rights to respect capacity.

If a person lacks capacity you may make a decision in their best interests, in the least restrictive way that is safely possible

You should repeat the functional tests for each decision that affects their care.

Give information at all stages in the best way possible for the person.

Examples of least restrictive safe approaches:

Allowing someone with mobility to walk themselves rather than be assisted… if safe

Allowing someone to hold a hand for guidance rather than have arms around them… if safe

Allowing someone to place a blanket on their shoulders rather than be wrapped with their arms inside

Allowing someone to walk and pace rather than have to sit in a chair all day

Consent and capacity

Someone *with* capacity MUST consent to any care

Consent relies on you communicating what you would like to do so a person can make a decision if they are happy or not

Consent can be verbal or non-verbal

Consent and capacity

Someone *without* capacity can still consent to any care

Non verbal examples:

Holding arm out for blood pressure

Opening mouth for drink

Nodding in agreement

A person *with* capacity can withdraw consent at any time and you must stop

A person *without* capacity who withdraws consent needs a best-interests decision made.

Always think whether an invasion or procedure is worth the risk of going against their consent.

Do you NEED that blood pressure now?
Do they NEED that medicine now?
Do they NEED that blanket now?

Remember that capacity and consent can change over time (minutes/hours/days)

You MUST continue to monitor capacity for all decisions and factor in consent

Do NOT act against consent unless it is in the patient who lacks capacity's best interest, and it is the least restrictive way to achieve a *necessary* outcome.

Can you achieve safety in another way?

And remember… someone who passes all the functional tests and has capacity is entitled to make **bad** decisions if they want.

Example: Depressed person found to be hypothermic, can converse normally and make decisions, refuses a blanket and warm drink.

We can’t force them.