Mental Capacity Assessment and Consent in Cancer Care

DR ALEX ORCHARD, CLINICAL PSYCHOLOGIST

DR TIM BULLOCK, CONSULTANT PSYCHIATRIST

The Mental Capacity Act 2005 provides a statutory framework to empower and protect vulnerable people who are not able to make their own decisions.

It makes it clear who can take decisions on behalf of others, in which situations, and how they should go about this.

It enables people to plan ahead for a time when they may lose capacity.

The Act sets out a single clear test for assessing whether a person lacks capacity to take a particular decision at a particular time.

It is a “decision-specific” test. No one can be regarded as lacking capacity to make decisions in general.

The Act makes it clear that a lack of capacity cannot be established merely by reference to a person’s age, appearance, or any condition or aspect of a person’s behaviour which might lead to unjustified assumptions about their capacity.

The treatment of cancer presents a challenge in compliance with the Act.

- Patients face decisions to be made based on changing information and risk/benefit calculations.
- Cancer and its treatment can lead to changing function of mind and brain.
- Decision makers may be numerous in a cancer pathway.

5 Key Principles

- A presumption of capacity - every adult has the right to make his or her own decisions and must be assumed to have capacity to do so unless it is proved otherwise;
- The right for individuals to be supported to make their own decisions - people must be given all appropriate help before anyone concludes that they cannot make their own decisions;
- That individuals must retain the right to make what might be seen as eccentric or unwise decisions;
- Best interests – anything done for or on behalf of people without capacity must be in their best interests;

  and

- Least restrictive intervention – anything done for or on behalf of people without capacity should be the least restrictive of their basic rights and freedoms.

Assessing Ability to Make a Decision

- Does the person have a general understanding of what decision they need to make and why they need to make it?
- Does the person have a general understanding of making, or not making this decision?
- Is the person able to understand, retain, use and weigh up the information relevant to this decision? (you decide+questions)
- Can the person communicate their decision. Would help in doing so be useful?

Assessing and Documenting Capacity

- 2 Stage Test
  - Does the person have an impairment of, or disturbance in, the functioning of their mind or brain (broad category)
  - Does the impairment or disturbance mean that the person is unable to make decisions when they need to.
    - Cannot understand information about the decision to be made.
    - Cannot retain that information in their mind
    - Cannot weigh or use that information as part of the decision making process, or
    - Cannot communicate their decision

Factors which may (intermittently) affect capacity

- Cognitive Impairment
- Mental Health, e.g. anxiety/depression
- Adjustment disorder
- Learning Disability
- Pain
- Medication, e.g. morphine, steroids

- The presence of any of these factors does not mean people do or not have capacity but they may affect how and when you assess capacity and the adjustments you need to make to support people's decision making

Who Assesses Capacity

- The Decision Maker (Oncologist, Surgeon, Radiotherapist)
- Anyone who may improve the persons ability to make a capacitous decision:
  - Carer, Family member, interpreter, signer
- Psychiatrist, LD specialist.

- The decision maker will be the provider of the treatment

For Those Who Lack Capacity

ALL DECISIONS AND CARE ACTS MUST BE IN THE PERSON'S BEST INTEREST.

Best Interest Decision

- Encourage Participation
- Identify all Relevant Circumstances
- Find out the Person's Views
- Avoid Discrimination
- Assess Whether the Person Might Regain Capacity
- Consult Others
- Avoid Restricting the Person's rights
- If the Decision Concerns Life-Sustaining Treatment
- Take All of this into Account

Other inputs into Best Interest Decisions

- Written statement
- Advance Decision

  (to refuse treatment, signed and witnessed to refuse life-sustaining treatment)
- Lasting Powers of Attorney
- Court Appointed Deputy
- Independent Mental Capacity Advocate (IMCA)
- Court of Protection

Best Interest Decisions

- Making best interest decisions is a process
- During the course of treatment it is important to acknowledge that a patient has lost capacity and that you are acting in their best interest
- The nature of capacity assessment and assuring best interest is proportionate to the urgency and gravity of the situation.
- Reasonableness, practicability and appropriateness all apply
- Establishing information about preferred carers and some understanding of preferences at the beginning of cancer treatment for capacitous patients is preferable.

If a Public Body is not making a treatment available it is not a choice to be considered in a best interest decision and is not adjudicated by the court of protection.

Capacity vs Competence

The Mental Capacity Act covers the assessment of capacity which is not to be confused with competence.

- It is possible for people to have capacity to make a decision about treatment – wise or otherwise
- Clinicians may want to think about patient's ability to engage with and tolerate treatment **outside** the Mental Capacity Act

Factors below may affect a Clinician's assessment of competence

- Cognitive functioning
- Learning disability/needs
- Clinic attendance
- History of treatment adherence
- Pain
- Mental health needs
- Homelessness

Case of Mr Ali

65 year old man with a diagnosis of prostate cancer

Lived with his wife and brother whom he regularly had arguments with and sometimes physical altercations

Case of Mr Ali

March 2017: Dx prostate cancer
- **Plan:** chemotherapy then surgery

- 1st psychology review whilst in police custody on ward
  - initially reluctant, brightened and agreeable
  - Wishes to progress treatment
  - not depressed

March – Nov 2017
- Intermittently attends clinic, often arrives without an appointment, regularly misses chemotherapy doses, cancer is progressing
- Team and family pushing Mr Ali to attend

Case of Mr Ali

Nov 17

- Cancer has progressed thought to be sue to poor compliance
- Psychology Ax on ward:
  - Notable anxiety
  - Hyper vigilant of mum's reactions
  - Stress about being pushed to come for Tx
  - ? Learning needs?

Jan 18

- High dose Chemotherapy at another hospital declined due to hx
- Recommendations from psychologist to Consultant and team re: family and learning needs

Case of Mr Ali

May 18

- High Dose Chemo at another hospital – Mr Ali under shared care

Section 2 of MHA

- Hospital team refuse to provide ongoing care due to non-compliance/competence

June 18

- Deemed not capacitous, best interest decision process begun
- Prognosis re-assessed, no longer hope of cure
- Least restrictive options chosen and discharged home with appropriate care