

RadcliffesLeBasseur



Healthcare Briefing

September 2009

Summary Guidelines on Consent to Treatment

General Principles

An adult patient has the right under common law to give or withhold consent to medical examination or treatment. The courts have ruled that a *mentally competent* person has an absolute right to refuse medical treatment for any reason, rational or irrational, or for no reason at all, even where the decision may lead to the patient's own death. The Mental Capacity Act 2005 (MCA) states that a person is not to be treated as unable to make a decision because he is regarded as making an unwise decision. A person who is *mentally competent* can appoint another person to exercise a Lasting Power of Attorney (LPA) to make decisions about his/her future healthcare in the event that the person appointing the Attorney later loses capacity.

Obstetric Cases

A woman who is *mentally competent* to make a treatment decision may choose not to have medical intervention, even though the consequences may be the death or serious handicap of the child she bears, or her own death. In such cases the court does not have jurisdiction to declare medical intervention lawful. In cases of the woman's capacity being in doubt an application should be made to the Court of Protection and the woman must be represented.

Children

Those over 16 can consent to treatment on their own behalf. For those under 16, the person(s) with parental responsibility has the power to make treatment choices for the child, unless the child is "Gillick competent" in which case the child has the right to make the decision. If there is a dispute between the parents or between the parents and the child, legal advice should be sought.

If a Gillick competent or a child over 16 refuses treatment, legal advice should also be sought.

An advance decision can only be made by a person who has reached the age of 18 years.

Psychiatric Patients

Competent patients with mental illness or disability have the same rights as other patients. However, patients detained under the Mental Health Act can be treated without consent under the direction of the Approved Clinician in charge of the treatment provided that the treatment is for their mental disorder or the symptoms of it (S.63 Mental Health Act), or in respect of certain treatments under S.62.

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Is the Patient Mentally Competent?

In determining if a patient is *mentally competent*, and therefore whether he/she has capacity to consent to, or to refuse treatment, the patient must be assessed as being able to

- understand the information relevant to the decision
- retain that information
- use or weigh that information as part of the process of making the decision and
- communicate his decision (by talking, sign language etc).

Only if the patient satisfies all the above will he be capable of consenting.

Treating without Consent

Except for the psychiatric cases referred to above, only if the patient is not *mentally competent* can treatment proceed without consent. The MCA provides that 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.

Where a person lacks mental capacity to make treatment decisions, the person responsible for making the treatment decision must be satisfied that the proposed treatment is in the patient's best interests. The decision maker should consult various people in accordance with the MCA, such as members of the patient's family and any person with a Lasting Power of Attorney, in the course of making the decision regarding the proposed treatment if it is practicable to do so.

An appropriately appointed Attorney or Deputy of the Court of Protection may consent on behalf of an incompetent patient.

Informed Consent

Patients are entitled to receive full information in a way that they can understand about proposed treatments, possible alternatives and all significant risks and adverse outcomes (which may be special in kind or magnitude or special to the patient). They should be given sufficient time to enable them to digest the information and make a balanced judgment.

Disclaimer

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Application to the Court of Protection

If the patient's competence is unclear, or his best interests are uncertain, the Court can declare that a proposed treatment is lawful, even if the patient does not consent. Such declarations should be sought before treatment and can be obtained urgently at short notice.

The judge will require information about the patient's mental capacity and a psychiatric opinion is usually necessary.

The Court can also direct that another healthcare professional take over responsibility for the patient's care.

Legal Advice

If in doubt, legal advice may be obtained 24 hours a day on

RadcliffesLeBrasseur Health Law Helpline
07802 506306

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