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# Does my patient lack competence?

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This article discusses what a healthcare practitioner should do if they suspect that their patient may lack competence in decision making. It discusses competence and how competence is assessed before outlining some actions a healthcare practitioner may take if they are unsure of their patient's competence.

Note: this article is only concerned with patients aged 18 and over.

**Keywords: Healthcare; competence; incompetence; assessing competence**

## **A legal perspective on competence**

In healthcare competence is often talked about in relation to healthcare practitioner's ability to perform their role or not. The practitioner who can fulfil their role is said to be competent, those that cannot are said to be incompetent. Competence can therefore be said to be related to a person's ability, are they able to do X or not.

When discussing decision making and consent competence still relates to a person's ability but it is their ability to be able to make a decision or not. The patient who can make their decisions regarding their healthcare needs is said to be competent. Those who cannot make their own decisions are said to be incompetent.

Consent as part of healthcare practice is a key ethical and legal concept related to a person's autonomy, that is their ability to make their own decisions and determine what happens to their body. Without the ability to make their own decisions the person is unable to be autonomous.

Because of its importance competence is paramount within the key piece of legislation that deals with consent and decision making, the Mental Capacity Act 2005. Prior to the introduction of the Mental Capacity Act 2005 the legal principles for consent and competence were based on common law, that is in judgments from cases heard in the courts. Those common law principles now form the basis for the principles in the Mental Capacity Act 2005.

The legal definition of competence is concerned with a person's ability to understand information that they are given, their ability to retain that information, to believe it and to make a decision based upon that information. If someone can do these four things they are considered legally competent, if one or more is missing then they will be considered incompetent.

*Principles on competence within the Mental Capacity Act 2005*

The first thing to note is that the Mental capacity Act 2005 does not provide a definition of competence. Rather it discusses individuals who lack competence and defines incompetence.

The primary principle within the Act is that everyone is assumed to be competent unless and until it is proved that they lack capacity.

The fact that someone makes a decision that others may think is unwise, or is not one that they would make, does not mean that the person is incompetent.

Someone cannot be declared to be incompetent because of their age or their appearance.

A person is not to be deemed to be incompetent until all reasonable steps have been taken to assist them in their decision making.

If a person is assessed as being incompetent, any action taken on their behalf must be done in their best interests.

Competence does not have to be an all or nothing situation. The Act makes it clear that whilst someone may be incompetent, it is possible that others may have varying levels of competence so that they are unable to make life changing decisions, but are able to make decisions about lesser matters. Others may lack competence at a specific point in time, but their competence may come back at a later time.

A key principle is that if a patient is to be deemed to be incompetent the assessment needs to occur as near to the time that the decision has to be made, and that just because a patient is deemed to be incompetent at one point in time does not mean that they should not be involved in the decision making process as far as they are able, even if they cannot make the actual decision.

### **How competence is assessed**

Declaring someone to be incompetent is a major decision because it takes away a person's autonomy, their ability to make decision on their own behalf. Because of this the process for assessing a person's competence is quite detailed and involved.

## Marc Cornock: Does my patient lack competence?

Incompetence is defined within the Mental Capacity Act 2005 as 'a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain' (section 2(1)).

Further, that someone is unable to make a decision for themselves if they are unable :

- a. 'to understand the information relevant to the decision,
- b. to retain that information,
- c. to use or weigh that information as part of the process of making the decision, or
- d. to communicate his decision (whether by talking, using sign language or any other means)' (section 3(1)).

Therefore, to assess someone's competence a two stage test is used.

The first stage is to determine whether the person has 'an impairment of, or a disturbance in the functioning of, the mind or brain'. This is often referred to as the diagnostic stage or diagnostic test. It is only if an impairment or disturbance in the brain or mind's functioning is found does the assessment proceed to the second stage. If no impairment or disturbance is found then the person cannot be assessed as being incompetent and they remain legally competent.

The second stage assesses whether the person is able to fulfil the four characteristics necessary to make a decision. The assessment is not about where the person makes a decision or what decision they would make, but on their ability to make a decision.

Only if someone is unable to make a decision for themselves can they be assessed as being incompetent. As noted above being unable to make a decision means being unable to do one or more of the following:

- understand the information relevant to the decision,
- retain that information,
- use or weigh that information as part of the process of making the decision, or
- communicate their decision, after any reasonable adaptations to assist them

So even if someone has an impairment or disturbance in the brain or mind's functioning, so long as they are still able to undertake each of the four steps in making a decision then they cannot be assessed as being incompetent. To be assessed as incompetent both stages of the test must be met: the person must have an impairment or disturbance in the brain or mind's functioning AND must be unable to make a decision.

### **When a healthcare practitioner is unsure of their patient's competence**

If a healthcare practitioner has any concerns about a patient's competence they should speak to another healthcare practitioner and seek their advice and guidance. Ideally, someone more senior who is able to initiate an assessment if it is deemed to be necessary.

If the care or treatment in question is non-invasive and more toward the trivial end of practice then the healthcare practitioner may feel able to assess if the patient is able to make that decision themselves.

The Mental Capacity Act 2005 does not state who has to undertake the assessment of a patient to determine if they are incompetent. However, as noted in the previous section, the outcome of an assessment can have serious consequences for the patient and the assessment has to include a determination of whether the patient has 'an impairment of, or a disturbance in the functioning of, the mind or brain'. Thus, the more severe the consequences of the decision the more likely it is that the assessment should be undertaken by someone who is experienced in cognitive assessment, such as psychologist or psychiatrist.

Any assessment of the patient's competence and its outcome should be recorded in the patient's notes.

It is important to remember that until a patient has been assessed as being incompetent, the legal position is that they are competent to make their own treatment decisions.

### **When a patient is incompetence**

If a patient has been assessed as being incompetent all the usual facets of healthcare treatment continue, and the healthcare practitioner should still involve them with their care and treatment as far as the patient is able to participate and as much as they want to. The only change is that the decision making no longer rests with the patient.

For a discussion of decision making for patients who have been assessed as being incompetent please see the following article in this issue of Orthopaedic & Trauma Times, *Treating patients who lack competence*.

### **Reference**

Mental Capacity Act 2005