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Treating patients who lack competence

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This article discusses the principles of treating a patient who lacks the competence to make their own treatment decisions.

It begins with an examination of competence and incompetence before moving on to the legal basis by which incompetent patients may be treated. Both adult and child patients are considered.

Keywords: competence; consent; incompetence

Competence and incompetence

Consent is an essential element of healthcare treatment. It is a permission given by a competent patient to the healthcare practitioner for the healthcare practitioner to provide care or treatment to them. One of the key ethical and legal aspects of consent is that the patient has the autonomy to make their own decisions and to refuse to provide consent where they do not wish to receive the proposed care or treatment. For a fuller discussion on consent see Cornock M (2020) *Revisiting informed consent*.

A patient can only be autonomous where they have the competence to make their own decisions. In relation to consent and healthcare treatment, competence relates to the ability of a person to be able to make their own decisions.

If a patient does not have the competence to make their own decisions they are said to be incompetent. Not all patients who are incompetent are the same. It is possible for a patient to be unable to make a decision regarding a major intervention, such as a hip replacement operation because they are not able to understand or retain the information about possible complications or the recovery process. Yet, at the same time, the patient may be competent to make decisions about their physiotherapy needs.

Other patients may lack competence to make decisions at a particular point in time but the following hour or day they may be competent to make that decision because they have fluctuating levels of competence.

The rest of this article will assume that the patient has had their competence assessed and it has been determined that the patient lacks the necessary competence for the decision in question.

There are two groups of patients that need to be considered, adult and child patient. This is because the legal principles that apply to each are slightly different. From a legal perspective an adult is someone aged 18 and over, below 18 they are classed as a child (section 105 of the Children Act 1989).

Adult patients

It is a well-recognised tenet of law that once someone reaches the age of 18 no-one can provide consent on their behalf. Therefore, if an adult patient is deemed to be competent it is not possible to obtain consent from someone else on their behalf.

However, there are two ways in which an adult patient may be treated when they are unable to provide their own consent.

Lasting Power of Attorney

A Lasting Power of Attorney (LPA) is a legal document that is registered with Court of Protection that gives authority to a person chosen by the patient (called the attorney but is not necessarily a lawyer) to act on behalf of the person giving the power (the donor).

LPAs were introduced by the Mental Capacity Act 2005. It is this Act which provide the details on how LPAs have to be made and the powers that an attorney can have.

When a valid LPA exists, it allows the attorney to act on behalf of the patient (donor). In effect it is an exception to the legal principle that no-one can provide consent on behalf of someone aged 18 or over. Any decision that is made by the attorney has the same effect as if it had been made by the donor.

Because LPAs can cover different areas of the donor's life, for instance their welfare needs or their financial situation, it is important to ensure that the correct LPA is in place before acting upon it and seeking permission from the attorney for a proposed course of treatment. Additionally, a donor can specify the areas within which the attorney can make decisions. For instance, the donor may state that the attorney can make decision regarding general care and treatment but not life-sustaining care and treatment. Thus, it is also important to ensure that the proposed treatment is one that falls within the scope of the attorney's powers before seeking permission from them.

If an appropriate LPA is in place then the attorney can give permission for a proposed course of care and/or treatment to proceed. The permission from the attorney has the same legal effect as if the patient had given their own consent.

Best interests

Not all patients will have an LPA and so many patients who are assessed as being incompetent are not able to be treated by permission given by an attorney acting under an LPA. However, this does not mean that these patients cannot be treated because it is not possible to obtain their consent.

The legal doctrine of *the principle of necessity* provides the legal authority for treating an incompetent patient where there is no LPA in place. Lord Goff stated that the *principle of necessity* allows healthcare practitioners to do what is necessary in order to 'to preserve the life, health or well-being' of the patient (F v West Berkshire Health Authority [1989] at page 565).

What this means is that there is a legal presumption that healthcare practitioners will act in the best interests of their patients where by so doing they are preventing the patient's condition from deteriorating or actively improving the patient's condition or their well-being.

So, if a patient is deemed to be incompetent, and there is no LPA in place, a healthcare practitioner can care for and treat a patient where it is deemed to be in their best interests to receive that care or treatment.

There are three points to consider before acting in a patient's best interests. Firstly, if a patient has previously stated, when they were competent to make a decision, that they did not want a particular treatment it would be unlikely that it is in their best interests to receive that treatment when they become incompetent.

Secondly, if there is any doubt as to whether a particular aspect of care or treatment is in a patient's best interests, discussion needs to be had with other healthcare practitioners to decide if it is in the best interests or not. It is also good practice to consult the patient's relatives and next of kin to obtain information about the patient and their lifestyle and beliefs and values, to help determine whether the patient would be likely to have accepted the treatment themselves. It should be made clear to the relatives that they are not making the decision but providing information upon which the decision will be made.

The final point to be made about acting in the best interests of incompetent patients is that healthcare practitioners should only do the minimum necessary to meet the patient's healthcare needs.

Wherever possible treatment decisions should be left until the patient regains their competence. This is especially so where the patient has fluctuating levels of competence, for instance some patients who have dementia will have fluctuating levels of competence.

Child patients

Because someone has to be 18 or over to make an LPA, child patients are unable to make an LPA. This does not mean that it is not possible to seek permission from someone other than the child patient. Two possible means exist, permission from someone with parental responsibility and acting in the child's best interests.

Parental responsibility

Parental responsibility as defined within the Children Act 1989 'means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property' (section 3(1)). One of the rights and responsibilities is that of ensuring the child's well-being.

From a practical healthcare perspective, this means that a person acting with parental responsibility is able to make treatment decisions for the child. Where a patient is deemed to be incompetent regarding their own treatment decisions, it is possible to obtain consent for their care or treatment from someone with parental responsibility for them.

Permission given by someone acting with parental responsibility provides legally valid consent for that care or treatment to proceed.

Parental responsibility is usually held by the parent of a child, but also legal appointed guardians may have it, as will local authorities if a court order for residence or protection has been made in respect of the child.

In order to legally care for or treat a child consent is only needed from one person with parental responsibility. Unless the proposed action is non-therapeutic when it will be required from all those exercising parental responsibility for that child.

For a fuller discussion of consent in relation to child patients and who may have parental responsibility see Cornock M (2015) *The child and consent*.

Best interests

Acting in a patient's best interests is the same whether for a child or an adult patient. All the points made under best interests for an adult patient above apply to the child patient. The main difference is that for adult patients an attorney acting under an LPA takes precedence over acting in the patient's best interests. Whereas for a child patient it is someone with parental responsibility that takes precedence over acting in a child's best interests.

Conclusion

Wherever possible best practice is to obtain a patient's consent before proceeding with any care or treatment for that patient. However, there are instances where it is not possible to obtain the patient's consent because they are not competent to make a decision regarding their care or treatment. In these situations, permission for the care or treatment to proceed may be obtained from someone acting under an LPA (the attorney) for adult patients or someone with parental responsibility for a child patient.

Where no LPA exists or it is not possible to obtain consent from someone with parental responsibility, it is possible to act in an adult or child patient's best interests.

References

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