CLINICAL DECISION MAKING – THE LAW

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MENTAL CAPACITY ACT 2005 PURPOSE

‘An Act to make new provision relating to persons who lack capacity; to establish a superior court of record called the Court of Protection …….. to make provision in connection with the Convention on the International Protection of Adults signed at the Hague on 13th January 2000; and for connected purposes

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5 PRINCIPLES

1: A presumption of capacity

2: Individuals being supported to make their own decisions

3: Unwise decisions – people have the right to make decisions that others might regard as unwise or eccentric.

4: Best interests – anything done for or on behalf of a person who lacks mental capacity must be done in their best interests.

5: Least restrictive option

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1. Presumption of capacity

- Everyone should be presumed to have capacity unless proved otherwise – **for that particular decision**
- It does NOT follow that someone who does not know where they are, or what year it is, cannot make a simple decision if the facts are carefully presented

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2. Individuals being supported

- All reasonable attempts must be made to help people make a decision
- This could include the use of information presented in different forms, interpreters, using non-verbal methods of communication etc

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3: Unwise decisions

- People have the right to make what some might see as an unwise or eccentric decision
- This does not in itself mean that they lack mental capacity to make that decision
- Example: climbing Everest

  without oxygen!

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4: Best interests

- If a person cannot make their own decision then the decision must be made in their best interests by the appropriate person using all available information
- Example: an operation on someone who is unconscious. The surgeon would make the decision in consultation with people who know the patient

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4: Best interests

- The Act puts an obligation on those making decisions to take reasonable steps to consult with those close to the patient – family, care workers, friends.

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5: Least restrictive option

- This requires those making best interests decisions to consider the options that least impinge on freedoms and rights
- Example: action to take with a patient who has dementia and osteoporosis and is at risk of falls. Restrict to bed? 24 hour care? Hip protectors? Simple environmental measures? Pressure alarm on seat and bed?

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DEFINES CAPACITY

Initial question: has the person an impairment of, or disturbance, in the functioning of mind or brain?

If so:

Person must be able to demonstrate that they:

- understand information given to them
- retain that information long enough to be able to make the decision
- weigh up the information available to make the decision
- communicate their decision – this could be by talking, using sign language or even simple muscle movements such as blinking an eye or squeezing a hand.

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LASTING POWER OF ATTORNEY

- Replaces (but does not invalidate) previous enduring power of attorney
- 2 types:
  - welfare and health decisions
  - financial affairs
- Only LASTING power of attorney for health and welfare gives powers to make health and social care decisions.
- The donor can limit these powers – you need to see the full document

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ADVANCE DECISIONS TO REFUSE TREATMENT

- Sets out how these must be written in order to be legally binding
- Gives guidance to professionals on how to assess validity and applicability

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ADVANCE DECISIONS TO REFUSE TREATMENT

To be valid:

- If for life sustaining treatment – in writing
- Name
- Signature
- Date
- Witness name, signature and date
- Treatments and circumstances are specific (can use layman's language)

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ADVANCE DECISIONS TO REFUSE TREATMENT

To be valid:

- Acknowledge ‘risk to life’ of relevant refusals
- No suggestion the person has changed mind while they still had capacity
- No changes of circumstances that might have caused person to change mind (eg: pregnancy)
- No subsequent appointment of LPA

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ADVANCE DECISIONS TO REFUSE TREATMENT

Applicable

- Only if person lacks capacity for THIS decision
- The treatment under consideration and the current circumstances match those in the ADRT

(but remember Principle 5 ‘least restrictive option’)

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NEW CRIMINAL OFFENCE

- Introduces a new criminal offence of ill treatment or wilful neglect of a person who lacks capacity.
- This has been used to prosecute healthcare workers who slept on duty or failed to provide appropriate care (eg: CPR)

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DEFINES ROLES OF BODIES AND INDIVIDUALS

- Independent Mental Capacity Advocates (IMCA)
- Court of Protection
- Office of the Public Guardian
- Court Appointed Deputies

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TRACEY JUDGEMENT

- Concluded that an NHS Trust was in breach in Article 8 when it failed to involve Mrs Tracey in a DNACPR decision.
- Clarified that default is to discuss decisions with patient
- Potential of causing ‘distress’ alone is not sufficient cause to avoid discussion
- Must believe that the distress is likely to cause harm

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COMMON LAW, CASE LAW and ETHICS

- Consent and dissent must be INFORMED
- Eg: people specifying a wish for CPR must be properly informed about what it would entail, likelihood of success and the possible harms
- Someone refusing a specific treatment must have the same information
- Someone expressing a wish for home care at the end of life needs to be aware of what care and support would be feasible.

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MENTAL HEALTH ACT

- ADRTs can be overruled for people treated under the Mental Health Act in some circumstances.
- EXCEPT in relation to electro-convulsive therapy

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NB: HBs have Mental Capacity Advisers (Chris Sayer in HDUHB, Ceri Jones for Pembrokeshire)

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