



The Mental Capacity Act

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The Critical Care Capacity Act

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The Capacity Act



- ◆ Introduction
- ◆ Historical Background
- ◆ The Mental Capacity Act 2005
- ◆ Assessing Capacity
- ◆ Implications for practice

Introduction

- ◆ Capacity an essential part of practice
 - You've been doing this for years
 - Over 2 million incapacitated patients
- ◆ Has always been an issue
- ◆ Certain areas more aware than others
 - Paediatrics
 - Old age
 - Learning Disability
 - Psychiatry
- ◆ Especially important now
 - New laws



Please Note...



The management accept no responsibility for any disasters which happen because you were foolish enough to believe and act on what Dr Barnes – who after all is a psychiatrist and not in any way a lawyer – told you today.

We recommend you double if not triple check everything the unreliable fool said with proper legal counsel.

Historical Background

- ◆ Mental Health Act 1983
 - Update on earlier legislation
 - Due a further update next year
- ◆ Criteria for admission without consent
- ◆ Criteria for treating without consent
- ◆ Without consent not same as against their will
- ◆ Incapacitated patients in uncertain position
 - Not a problem for about 15 years

Bournewood

- ◆ Patient HL
- ◆ Learning disability
- ◆ Admitted to hospital
 - Informally
- ◆ Carers wish to take him home
 - Not allowed
- ◆ Carers question legality of his detention

'The Bournewood Decision'

- ◆ Defines detention
- ◆ Detention unlawful unless covered by law
 - Criminal justice system
 - Mental Health Act
- ◆ Patients unable to consent must have rights protected
- ◆ Incapacitated patients need to be detained
- ◆ Oh bloody hell!

The Bournemouth Appeal

- ◆ Bournemouth encouraged to appeal
- ◆ House of Lords
- ◆ Appeal successful, Bournemouth overturned
- ◆ Incapacitated compliant patient
 - Need not be sectioned
- ◆ Granted leave to appeal
 - Appeal appealed

The European Court

- ◆ Overturning overturned
- ◆ Bournewood gap patients
- ◆ Post-Bournewood position untenable
- ◆ Must resolve situation
 - Given time in which to do it
- ◆ ?Europe-wide issue
- ◆ The Mental Capacity Act 2005

The Mental Capacity Act 05

- ◆ Introduced to address incapacity
- ◆ No “powers” (as they exist in MHA 1983)
- ◆ Clarifies current law mostly
- ◆ Extends some powers
 - Powers of Attorney
 - Court of Protection
- ◆ Gives us new friends to work with

Capacity Defined under MCA

- ◆ To have capacity, must be able to
 - Understand relevant information; and
 - Retain information long enough; and
 - Weigh up information; and
 - Communicate their decision
- ◆ With regard to a particular issue
- ◆ At a particular time

Lasting Power of Attorney

- ◆ Replaces and supersedes EPoA
- ◆ Two types
 - Property and affairs
 - Personal welfare
- ◆ Made when you have capacity
- ◆ Allows consent on another's behalf
- ◆ Cannot make 'life-and-death' decisions
 - Unless LPA specifically provides for it

Advance Decisions

- ◆ Statutory rules
- ◆ Clear safeguards
- ◆ Legally valid
- ◆ Conditions necessary to preserve life
 - Usually don't apply
 - May do though
- ◆ Check carefully (with legal advice if needed)
 - Whether there is one
 - What it says

IMCAs

- ◆ Role to advocate for patient
 - Attempt to ascertain their views
 - Ensure their views are expressed
- ◆ Not there to act as arbitrator
- ◆ Not there to make decisions
 - Need a “decision maker”
- ◆ Involved with decisions about
 - Medical treatment
 - Long-term placement



Assessing Capacity



Please Note....

The New Mental Capacity Act
is essentially a **GOOD THING!**

Underlying Principles

- ◆ Assumption that capacity is present
- ◆ All reasonable attempts to involve patient
- ◆ Unwise decisions not evidence of incapacity
- ◆ Decisions should be made in “Best Interests”
- ◆ Use least restrictive means

When to Consider Capacity

- ◆ Every time!
- ◆ Certain areas more than others
 - Children
 - Elderly
 - Cognitive impairment
 - Intellectual impairment
 - Impaired consciousness
 - Big important decisions

Emergency Situations

- ◆ Law recognises time constraints
- ◆ Practical difficulties with formal processes
- ◆ Doctrine of medical necessity
- ◆ Still expected to apply the law
 - Still expected to consider capacity issues
- ◆ Document your reasons

Most Important Capacity Facts

- ◆ Capacity assumed to be present
- ◆ Need evidence of its absence
- ◆ If absent, try to get it back
 - “...all practicable steps...”
- ◆ Specific for an event
- ◆ Specific for time

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Not Evidence of Incapacity

- ◆ Unwise decisions
- ◆ Decisions you don't agree with
- ◆ Diagnosis
- ◆ Age
- ◆ Appearance
- ◆ Condition
- ◆ Behaviour

Please Note...

- ✦ Once you believe a patient lacks (or may lack capacity), you have to follow the Mental Capacity Act
 - ✦ That's what it's there for
- ✦ The Act tells you what to do
 - ✦ You have to do it
- ✦ It's not a criminal action to fail to follow the Act, but if something goes wrong, you'll have to defend your actions
 - ✦ You may find it difficult if you haven't
- ✦ All the old bets are now off



“Best Interests”



- ◆ Not just medical interests
- ◆ Wishes and beliefs when competent
 - Advance decisions
 - Lasting Power of Attorney
- ◆ Current wishes
- ◆ General well-being
- ◆ Spiritual and religious welfare

Who Might be Consulted?

- ◆ Patient
- ◆ Next of kin
- ◆ Family
- ◆ Carers
- ◆ Donee under LPA
- ◆ Deputy under CoP
- ◆ Other staff/colleagues
- ◆ IMCA

Simple Plan for Capacity

- ◆ Establish incapacity
- ◆ Establish urgency
- ◆ Seek information
 - Advance decisions
 - LPoA / CoP
- ◆ Establish best interests
 - Get everybody together
 - Not just one person's opinion
- ◆ 'Decision maker' makes decision
- ◆ Do the thing



Useful Reading

- ◆ DoH website
- ◆ Various “useful summaries”
- ◆ The Code of Practice



How Will This All Affect Me?



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