Consent and Capacity

Dr Richard Barnes
Mossley Hill Hospital
Liverpool
Please Note…

• My assumptions
• My limitations
• Medico-legal geographical bias
• Learning goals
• Opportunity for discussion
• Time limitations
Lecture Options

• General Points on Consent
• Questions on Consent
• Information on ECT
  – Including side effects
• Overview of Capacity Act
• MHA and MCA overlap
General Points on Consent
Legal Points on Consent

• Common Law
• Process, not an event
• Manner is irrelevant
  • Written or verbal or…
• Law assumes competence
• May be competent for some but not for others
• Information
• Absence of duress
Interesting ECT Consent Facts

• 75% of patients consenting
• 40% of detained patients consenting
• Only ~50% felt they were fully informed
  • 50% of psychiatrists agree with this figure
• ?higher rate of side effects in non-consented
• ?Number consented by treating doc (?<5%)
Questions on Consent
Some Questions on Consent

• What is “valid consent”?  
• What is “undue influence”? 
• Who is responsible for consent?  
• Who seeks consent? 
• How long does consent last? 
• Who checks consent? 
• What goes on the paperwork?
What is “valid consent?”
Valid Consent

• Valid consent depends on…

• Being given voluntarily and freely

• Sufficient information

• Patient capacity*
Montgomery v Lanarkshire Health Board

• Legal standard is no longer the ‘Bolam Test’
• Montgomery decision
  – Material risks
  – Reasonable Alternatives
  – Reasonable care to ensure patient aware
• Individual situation and risks to them
“Material Risk”

• A risk which…
  – A reasonable person *in the patient’s position* would be likely to attach significance to
  – A doctor knows – or should reasonably know – would probably be deemed of significance *by this particular patient*
This Particular Patient

• Material risk may vary
  • Percentage risk may not help
  • e.g. ocular surgery
• Pro forma approach may not help
• Dialogue between patient and doctor
• Knowing the patient
• Problems with understanding
  • Severity of illness
  • Other factors
“There is something unreal about placing the onus of asking upon a patient who may not know there is anything to ask about”
Exceptional Circumstances

- Patient would rather not know
- Telling might cause serious harm
- Doctrine of necessity
  - Unconscious
  - Lacking capacity
What is “undue influence”? 
Who is responsible for consent?
Who seeks consent?
How long does consent last?
Who checks consent?
What goes on the paperwork?

The Consent Form
What do we tell?

Information
Information and ECT
Information on ECT

- What information to give?
- When to give it?
- Who should give?
- In what form?
- Time to consider it
- Alternative sources?
What Information to Give?

• Process of ECT
• Advantages of ECT
• Disadvantages of ECT
  • Including side effects
• Advantages/disadvantages of no ECT
• The ECT controversy
Side Effects of ECT

• Short term

• Long term
  • Memory
  • Personality
  • Brain damage
  • Death

• Side effects of no ECT
  • As above
Capacity and ECT
Capacity Defined under MCA*

• Someone lacking capacity is unable to
  – Understand relevant information; or
  – Retain information long enough; or
  – Weigh up information; or
  – Communicate their decision
• With regard to a particular issue
• At a particular time
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
Capacity Guidelines

• If someone is incapacitated, then a decision has to be made for them

• Wishes, feelings, values, needs, services
  – Past and present

• Consult as appropriate

• Act in patients “Best Interests”
“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
MHA 07 vs MCA 05

• Part 4 compulsory powers trump…
  – Lasting Powers of Attorney
  – Advance decisions to refuse
  – Decisions made by Court of Protection deputy
• Also no need to involve IMCA
• Except in the case of ECT
MHA 07*

- If a patient has capacity and refuses
  - ECT cannot be given
- If patient lacks capacity
  - Can be given provided not in conflict with
    - Advance directive
    - Decision of a donee
    - Decision of Court of Protection
- SOAD must approve ECT in under 18s
  - Whether consenting or not
  - Whether detained or not
- Except in an emergency
Para 13.30: Code of Practice MHA 07

“Clinicians treating people for mental disorder under the MHA cannot ignore a person’s capacity to consent to treatment.

As a matter of good practice (and in some cases in order to comply with the MHA) they will always need to assess and record:

- Whether patients have capacity to consent to treatment, and
- If so, whether they have consented to or refused that treatment”
What does this Mean?

• Need to review capacity of detained patients having ECT
• Once they regain capacity, they must consent
  – Get a consent form
• If they have capacity and refuse, cannot treat
Capacity in the ECT Suite

- Capacity can be a moving target
- Can change from ward to suite
- Certainly from ward round to suite
- Capacity time specific
- Clinical team know patient best
- Importance of communication
MCA and MHA
Suggested Plan of Attack

• Capacity first
  • Capacitated
  • Incapacitated

• Then MHA status
  • Informal
  • Detained

• Then consent
  • Consenting
  • Refusing

• Then compliance
  • Compliant
  • Non-compliant
Capacitated, Informal

- Consenting
  - Seek informed consent
  - Treat

- Refusing
  - You can’t treat
Capacitated, Detained

• Consentinng
  – Seek informed consent
  – Complete paperwork (section 58A)
  – Treat

• Refusing
  – You cannot treat
  – “Except in an emergency”
Incapacitated, Informal

• Establish Incapacity

• Establish “Best Interests”
  • Remember to do all necessary consulting

• If not in best interests, don’t give

• If ECT in best interests, assess compliance
Incapacitated, Informal, Compliant

- May need to test for compliance
- If compliant, give ECT
- You are covered under Mental Capacity Act
- Need to reassess capacity
  - Before every treatment
- Once capacitous, seek consent
  - Can only treat with it
Incapacitated, Informal, Non-compliant

• Detain under Section 3
  • MCA no longer applies
  • Unable to use less restrictive option

• SOAD

• Give ECT

• Need to reassess capacity
  • Before every treatment

• Once capacitous, seek consent
  • Can only treat with it
Incapacitated, Detained

- In emergency (S62 MHA 83 criteria) can give
- If not emergency, can give if
  - Over 18, capacititated, consenting (S58); or
  - Under 18, SOAD approved, consenting (S58); or
  - SOAD confirms in writing
    - Incapacitated
    - ECT appropriate
    - No advance directive or decision from donee/deputy