Assessing capacity & deprivation of liberty: case discussions

Jim Bolton
Consultant Liaison Psychiatrist
St Helier Hospital, London
Introduction

- Capacity is the ability to make a specific decision at a particular time
- Different jurisdictions
- MCA & MHA
- Case examples to illustrate use
  - Refusal of treatment
  - DoLS
  - Overdose
Why can assessing capacity be a problem?

- Capacity is a legal concept
- Law – black & white
- Medicine – shades of grey
- Dealing with people and human behaviour is often complex and uncertain
- Capacity issues often arise when treatment is refused
Case 1: Refusal of treatment
Case 1: Refusal of treatment

- 68 year old man
- GI bleed
- Cancer of the colon
- Declining potentially curative surgery
- Does he have the capacity to refuse treatment?
Capacity to consent to or refuse medical treatment

• For consent or refusal to be valid, a patient must:
  – Be provided with enough information
  - Act voluntarily
  - Have capacity to take that decision
Mental Capacity Act

- A legal framework for decision making on behalf of adults who lack capacity to make decisions for themselves
  - Financial
  - Personal welfare
  - Healthcare
Five “statutory principles” that guide assessment and decision making

1. Adults are assumed to have capacity unless shown otherwise
2. All practical steps must be taken to help an individual make a decision
3. A person is not to be treated as unable to make a decision merely because they make an unwise decision
Five “statutory principles” that guide assessment and decision making

4. An act done or decision made on behalf of a patient who lacks capacity must be done in their “best interests”

5. … and in the least restrictive way
Assessing capacity

An adult can only be considered unable to make a particular decision if:

1) They have “an impairment of, or disturbance in, the functioning of the mind or brain” (permanent or temporary)
Assessing capacity

2) They are unable to undertake any of the following steps:

- **Understand** the information relevant to the decision
- **Retain** the information
- Use or **weigh** the information as part of the process of making the decision
- **Communicate** the decision
Understand the information

• Risks and benefits of the treatment
• The implications of not having it
• Alternatives
• Level appropriate to the individual
Retain the information

- Deficits often apparent during the assessment
- Cognitive testing may help
- Can the patient recall or paraphrase the discussion?
Weigh up the information

• Can the patient:
  – Appreciate the wider consequences of the decision?
  – Apply the information to their own situation?
  – Weigh up the risks and benefits of options?
Case 1: Refusal of treatment

- Personal and family history of post-operative complications
- No evidence of psychiatric disorder that might interfere with capacity
- Able to understand & retain information
- Weighing up influenced by previous experience of surgery
Capacity assessment is not a test of reasonableness

- Statutory principle: A person is not to be treated as unable to make a decision merely because they make an unwise decision
- People are entitled to make their own decisions based upon their own value systems
- Even if this is considered to be irrational by the assessor
- Explore reasons, and provide information where necessary
Case 1: Refusal of treatment

- Judged to have capacity to decline surgery
Patients with capacity who refuse treatment

Advice to hospital colleagues:

• Don’t take it personally!
• Remain involved and offer alternative treatment, e.g. symptom relief
• Give patient opportunity to reconsider
• Psychiatry not routinely required to assess capacity
When might a psychiatric opinion be required?

• Complex & uncertain cases, especially when a second opinion would be helpful
• When mental health issues may compromise judgement
• But treatment decisions rest with the health professional delivering care
Case 2: Refusal of treatment
Case 2: Refusal of treatment

- 46 year old man
- Known to have chronic schizophrenia
- Admission following GI bleed
- Refusing OGD
- Does he have the capacity to refuse treatment?
Capacity & mental disorder

- Capacity may be affected by chronic disorders...
  - e.g. dementia, depression, psychosis
- ...and transient mental states
  - e.g. intoxication, panic, shock, fatigue
- Mental disorder does not automatically make someone incapable of making health-care decisions
Assessing capacity

An adult can only be considered unable to make a particular decision if:

1) They have “an impairment of, or disturbance in, the functioning of the mind or brain”

2) They are unable to undertake any of the following steps:
   - Understand the information relevant to the decision
   - Retain the information
   - Use or weigh up the information as part of the process of making the decision
   - Communicate the decision
Case 2: Refusal of treatment

• Psychotic thinking significantly impaired ability to understand and weigh up information
• Judged *not* to have capacity to consent to or refuse OGD
• What happens if someone lacks capacity to make a treatment decision?
Can capacity be improved?

- Involve family & carers
- Minimise anxiety
- Repetition of information
- Strategies to improve communication
- Fluctuating capacity
- Improve mental state
- But if this is not successful, or in urgent situations…
What about the Mental Health Act?

• Primarily regulates the treatment of mental, but not unrelated physical health problems

• Mental Health Act have the same rights as others regarding decisions about physical health-care
What about the Mental Health Act?

• The MHA allows medical treatment for mental disorder to alleviate or prevent a worsening of
  – the mental disorder
  – or one of its manifestations

• Examples
  – Parenteral feeding in anorexia nervosa
  – Consequences of self harm
  – IV fluids in severe depression
Case 2: Refusal of treatment

- Chronic schizophrenia
- GI bleed
- Refusing OGD
- Lacks capacity to consent to or refuse treatment
- Could he be treated under the MHA?
Case 2: Refusal of treatment

- Chronic schizophrenia
- GI bleed
- Refusing OGD
- Lacks capacity to consent to or refuse treatment
- Could he be treated under the MHA?
- No – so what happens next?
What happens next?

- Has the patient made provision for future loss of capacity?
- If not...

Statutory principles:
- An act done or decision made on behalf of a patient who lacks capacity must be done in their “best interests”
- … and in the least restrictive way
Provision for future incapacity

- Lasting Power of Attorney
- Advance Decision to refuse treatment
- Informal statements about future wishes are not legally binding, but should be considered in an assessment of “best interests”
What are “best interests”? 

• Not strictly defined 
• More than medical considerations 
• Take into account the wider social and welfare issues: 
  – Physical 
  – Psychological 
  – Social 
  – Spiritual
Assessing “best interests”

• Are they likely to regain capacity? Can the decision wait?
• Optimise the patient’s participation
• Consider past and present wishes, values & beliefs
• Involve those close to the patient
Independent Mental Capacity Advocates (IMCAs)

- Patient lacks capacity
- No family, friends, carers
- Duty to appoint IMCA
- Informs “best interest” decisions
- Local authority employees
Refusal of medical treatment

Capacity

Yes
Respect patient’s decision

No
Provision for future incapacity?

Yes

No
Best interests
Case 2: Refusal of treatment

- Judged not to have capacity to consent to or refuse OGD
- No provision for future incapacity
- Judged that OGD was in patient’s “best interests”
- OGD under GA
Court of Protection

- Patient lacks capacity
- Difficult or contentious decisions
- Application made to Court of Protection
- Court Appointed Deputy for ongoing decisions
Case 3: Deprivation of Liberty Safeguards (DoLS)
DoLS

- The MCA allows us to use reasonable restraint or restriction of liberty in a patient’s best interests
- But not to deprive them of their liberty
DoLS

• Designed to bridge gap between:
  • A) Detention under MHA, with its legal safeguards
  • B) Restriction of liberty in best interests under MCA
• i.e. those who do not require A, but require greater restriction of liberty than permitted by B
DoLS

• Urgent authorisation for 7 days (with possible extension of 7) made by the “managing authority” (e.g. hospital)
• At the same time, application for standard authorisation made to the “supervisory body” (e.g. local authority) which commissions the required assessments
Case 3: DoLS

- Mr H a 56 year old man
- Fall and head injury
- Significant cognitive impairment
  - disoriented, thought in an office (with beds!)
  - poor short term memory
- Occasionally trying to leave the ward
- Or not wishing to leave when required
Case 3: Question

- Do DoLS apply in this case?
DoLS

• When does restriction of liberty in a patient’s best interests become “deprivation of liberty” that requires DoLS?
• DoLS Code of Practice & court cases provide guidance on interpreting the law

Restriction?  Deprivation?
The following would not by themselves constitute deprivation of liberty:

- “Benign force” to take a confused patient to hospital
- Feeding, dressing or providing medical treatment
- Dissuading a confused patient from leaving a ward, even if this happens on more than one occasion
- Use of physical restraint or medication in an emergency to respond to disturbed behaviour
DoLS

The following are more likely to constitute deprivation of liberty:

• Restraint and sedation to admit a resistive patient
• Complete control over care and movement for a significant period
• Refusal of carers’ request for person to be discharged into their care
• Individual unable to maintain social contacts because of restriction on access to other people
DoLS

• Restriction or deprivation of liberty?
• Consider the nature, degree, frequency and consequences of measures
• Most likely to apply to a small number of patients with chronic cognitive impairment in long-term care
Case 3: DoLS

- 56 year old man
- Head injury
- Significant cognitive impairment
- Occasionally trying to leave ward
- Do DoLS apply?
Case 4: Overdose
Case 4: Overdose

- 26 year old man in ED
- Overdose of 70 paracetamol tablets
- Refuses assessment, investigation and treatment
- Wishes to leave
Case 4: Overdose

- Of what use is the Mental Health Act?
- Does the patient have the capacity to refuse treatment?
Of what use is the Mental Health Act?

- Patient may require assessment &/or treatment under the MHA for a mental disorder
Of what use is the Mental Health Act?

- The MHA allows medical treatment for mental disorder to alleviate or prevent a worsening of
  - the mental disorder
  - or one of its manifestations
- Includes consequences of self harm
- However, may be too time consuming to complete the MHA assessment...
Refusal of medical treatment

Yes
- Respect patient’s decision

Capacity

No
- Provision for future incapacity?
  - No
    - Best interests
Does the patient have capacity to refuse treatment?

• Assessment of uncooperative patients:
  – Presumption of capacity?
    vs.
  – Sufficient evidence of lack of capacity to act in their best interests?
Is the patient likely to have capacity to refuse treatment?

- Capacity *may* be affected by chronic disorders…
  - e.g. dementia, depression, psychosis
- …and transient mental states
  - e.g. intoxication, panic, shock, fatigue
- Take into account
  - Urgency of proposed treatment
  - Evidence for a mental disorder likely to effect capacity
What happens in practice?

- Patients often accept treatment after careful explanation and persuasion
- Many are relieved to hand over responsibility to health professionals
- A 2nd opinion &/or senior opinion should be sought
To consider...

• Would I prefer to have a living patient sue me for assault & battery for saving a life they said they did not want in a highly emotional state...

• … or have the grieving relatives of a dead patient sue me for negligence?
Record keeping

- Capacity issues may be contentious
- Keep clear, precise and legible records
- Document your assessment of capacity
Conclusions

• Use legal principles to guide complex assessments
• Dealing with people & human behaviour is complex and uncertain
• Discuss &/or seek a second opinion where necessary
• Record assessment & conclusions
• Further information in handouts
Further information

- Mental capacity and the law, Royal College of Psychiatrists leaflet for patients and carers: www.rcpsych.ac.uk/expertadvice/problemsdisorders/mentalcapacityandthelaw.aspx
Further information
