Mental Incapacity for Treatment Decisions: Where do Doctors Stand?

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In 2018, the first systematic Irish study of mental capacity for treatment decisions examined 300 randomly selected medical and surgical hospital inpatients in Dublin and Portlaoise.1 Over one quarter (27.7%) lacked the mental capacity for key treatment decisions. This figure is broadly consistent with findings in other jurisdictions and indicates a significant clinical issue in Irish hospitals.

The Medical Council, in its “Guide to Professional Conduct and Ethics for Registered Medical Practitioners”, states that “every adult patient is presumed to have the capacity to make decisions about their own health care”.2 A person lacks such capacity “if they are unable to understand, retain, use or weigh up the information needed to make the decision, or if they are unable to communicate their decision, even if helped”. Those who lack mental capacity “are entitled to the same respect for their dignity and personal integrity as anyone with full capacity”. Their views and involvement remain a key part of decision-making.

If no one else “has the legal authority to make decisions on the patient’s behalf” (e.g. through Ward of Court or enduring power of attorney arrangements), the Medical Council advises that “you [the doctor] will have to decide what is in the patient’s best interests. In doing so, you should consider: which treatment option would give the best clinical benefit to the patient; the patient’s past and present wishes, if they are known; whether the patient is likely to regain capacity to make the decision; the views of other people close to the patient who may be familiar with the patient’s preferences, beliefs and values; and the views of other health professionals involved”.

In other words, where a patient lacks the mental capacity to provide consent, and no one else is explicitly legally empowered to decide for the patient, it is up to the doctor to follow the Medical Council
guidelines and decide what is in the patient’s best interests.

HSE National Consent Policy
The HSE National Consent Policy emphasizes that “no other person such as a family member, friend or carer and no organisation can give or refuse consent to a health or social care service on behalf of an adult service user who lacks capacity to consent unless they have specific legal authority to do so” (e.g. if the person is a Ward of Court or is the subject of a relevant enduring power of attorney). In emergency situations, however, where a service user is deemed to lack capacity, “consent is not necessary”.

Consistent with the Medical Council guidelines, the HSE policy notes that “Irish case law, national and international guidelines suggest that in making decisions for those who lack capacity, the health and social care professional should determine what is in their best interests, which is decided by reference to their values and preferences if known”.

In making this decision, “the health and social care professional should: consider whether the service user’s lack of capacity is temporary or permanent” (obtaining consent during lucid periods if possible); “consider which options for treatment would provide overall clinical benefit”; “consider which option, including the option not to treat, would be least restrictive of the service user’s future choices”; “support and encourage service users to be involved”; “seek any evidence of the service user’s previously expressed preferences” (e.g. advance statements, previous wishes and beliefs); “consider the views of anyone the service user asks you to consult”; “consider the views of people who have a close, ongoing, personal relationship with the service user”; and “consider involving an advocate to support the service user”. The policy emphasises that “even in the presence of incapacity, the expressed view of the service user carries great weight”.

Assisted Decision-Making (Capacity) Act 2015
The landscape in which all of this occurs is due to change significantly over the coming year or two with the implementation of the Assisted Decision-Making (Capacity) Act 2015. This legislation has been passed by the Dáil and Seanad and signed by the President, and preparations are underway for implementation.

Once commenced, the new Act will place the “will and preferences” of persons with impaired mental capacity at the heart of decision-making about “personal welfare” (including healthcare) and “property and affairs”. Mental capacity is to be “construed functionally”. This means that while a person might lack mental capacity in relation to one area (e.g. healthcare) they might still have mental capacity in relation to another (e.g. finance). And while a person might lack mental capacity at one time they might
All interventions under the new Act will be made “in good faith and for the benefit of the relevant person”. The Act presents a set of principles that includes a presumption of mental capacity, provision of information and assistance, identifying clear necessity for any intervention, minimisation of restriction, dignity, bodily integrity, privacy and autonomy. Making “an unwise decision” will not indicate lack of mental capacity.

The Act will introduce three levels of supported decision-making for people with impaired mental capacity: a “decision-making assistant” will be someone who helps with information and discussions but will not actually make a decision for someone else; a “co-decision-maker” will be a joint decision-maker; and a “decision-making representative” will be a substitute decision-maker. Arranging some of these supports will involve the Circuit Court. The legislation will also introduce new and revised procedures for “advance healthcare directives” (directing future care) and “enduring powers of attorney”.

Until such time as the 2015 Act is commenced in full, however, the Medical Council guidelines and HSE National Consent Policy remain the key guiding documents. In practice, these can be challenging to implement, especially when next-of-kin or families presume that they have the right to make treatment decisions for a relative who has lost mental capacity.

The guidelines are, however, clear that next-of-kin or families do not have such a right unless there is a specific legal arrangement in place to that effect (such as Ward of Court or enduring power of attorney arrangements). Their views should be listened to with care, and might well provide important insights about the patient’s own wishes and beliefs, but in situations where the patient lacks mental capacity and there is no specific legal arrangement governing decision-making, the final decision about treatment still lies with the health professional.

**Conflict of Interest**
None

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