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Assessment of Mental Capacity By Healthcare Professionals – A Study of the Mental Healthcare Act (2017), India and Mental Capacity Act (2005), Uk and Its Relevance to Medical Practice in India

Dr. Satishchandra Kale[1], Dr. Mahaveer Prasad Mali[2]

[1]LL.M, M.S, FRCS, Ph.D. Scholar at NIMS School of Law, NIMS University, Jaipur, India
[2]Ph.D., Assistant Professor at NIMS School of Law, NIMS University, Jaipur, India

Abstract:
The healthcare professional must make sure that every patient has all the information they need to make a decision about their treatment. The information must be presented in a way that is easy for the patient to understand - for example, by using patients own language or if required an interpreter or translator, using simple language and avoiding too many technical words or jargon, and/or by use of videos, diagrams and other visual aids. It is an ethical and professional duty upon the healthcare professional to make a legible and timely record in the clinical notes outlining the processes he went through in determining capacity. The healthcare professional must not make any assumptions of capacity or lack thereof before the patient is well evaluated and make note of any living wills, advanced directives, lasting power-of-attorney (LPOA`s) or any advanced decisions refusing treatment (ADR`s). Every attempt must be made to communicate with the next of kin in evaluating the best interest of a person who lacks in capacity. If the patient indeed lacks capacity, record in the notes the basis on which a decision to treat, or not which was made in the patient's best interests, and the steps taken arrive at that decision.
Further, as discussed above, there are certain lacunae in the Indian Mental Healthcare Act (2017) which may benefit from future inclusions of certain provisions from The Mental Capacity Act (2005), as exists in England today. The healthcare professional will benefit from going through the detailed provisions of both aforementioned Acts and by routinely assessing and documenting patient`s mental capacity in a day-to-day setting.

Keywords: The Mental Healthcare Act 2017, Mental Capacity Act (2005), Capacity, Best Interests

Meaning of `Capacity`

Every individual has a right to decide what happens to our bodies and this power is vital to our sense of independence and wellbeing. In doctor-patient relationships this right is the duty or moral obligation on doctors to show respect for persons and their autonomous choices howsoever unwise the patient decision may seem. This right, and the obligations arising therefrom are at the moral centre of medical practice. Respect for persons includes both respect for their choices and a valid concern for their wellbeing. When

someone becomes incapable of making important decisions, their lack of decision-making ability gives rise to concern for their welfare. To conclude that a person someone lacks that `capacity` is indeed a serious decision which involves taking away that person`s fundamental freedom and choices, but with an aim to eventual benefit and for the wellbeing of that person. In contrast, failure by a healthcare professional to test and/or identify that someone lacks the capacity for independent and free choice can also expose them to serious harm.

The Mental Health Care Act 2017[1] was passed by India on 7 April 2017, and, came into force from 29 May 2018. The act was effectively brought in to decriminalize attempted suicide which was punishable under Section 309 of the Indian Penal Code. The law was described in its opening paragraph as "An Act to provide for mental healthcare and services for persons with mental illness and to protect, promote and fulfil the rights of such persons during delivery of mental healthcare and services and for matters connected therewith or incidental thereto." This Act superseded the previously existing Mental Health Act, 1987 that was passed on 22 May 1987.
It states that mental illness be determined "in accordance with nationally and internationally accepted medical standards (including the latest edition of the International Classification of Disease of the World Health Organization) as may be notified by the Central Government." Additionally, the Act asserts that no person or authority shall classify an individual as a person with mental illness unless in directly in relation with treatment of the illness.

Shortcomings of The Mental Healthcare Act (2017), India

Though MHCA is a powerful act with lots of progress representative of the advances over the years, there are a few shortcomings regarding its ease of practical implementation in regular clinical settings, outside of mental health services.

1. The MHCA deals primarily with psychiatric illness and treatments which is inherent in the wordings of the Act itself, which states that, *“to provide for mental healthcare and services for persons with mental illness and to protect, promote and fulfil the rights of such persons during delivery of mental healthcare and services and for matters connected therewith or incidental thereto."*
2. The Act neither implicitly nor explicitly extends or seeks to extend nor encompass other areas of medical treatments like consent for, examination in the general hospital setting or consent for non-mental diagnostic testing and/or surgical interventions.
3. It relies and provides a duty for mental health professionals, but alas provides no guidance for the Registered Medical Practitioner to rapidly assess `patient capacity` in any other areas of healthcare.

Mental Capacity Act 2005[2] **(England and Wales)**

The Mental Capacity Act 2005, is a law that protects vulnerable people over the age of 16 around decision-making. It states that, `Every adult, whatever their disability, has the right to make their own decisions wherever possible. People should always support a person to make their own decisions if they can and wherever possible`. The Mental Capacity Act 2005 is a law that protects vulnerable people over the age of 16 around decision-making. It states:
This might mean giving such persons in need of treatments, information in a format, language or plain language that they can understand or by explaining something in a different way. But if a decision is too

complicated for that person to make despite provision of appropriate information and support, then people supporting them must make a 'best interests' decision for them.

What is `Lack of Capacity`

Before adults can be assessed as lacking capacity two things have to be established. First, it has to be shown that the adult is suffering from some sort of impairment or disturbance of the mind or brain. This is known as the 'diagnostic' criteria. It can include factors such as mental illness or the cognitive decline associated with Alzheimer's disease, dementia or it may also include short term factors such as extreme intoxication by drugs or alcohol.

Without the evaluation and thus documentation of existence of such an impairment an adult cannot be declared as `lacking capacity`. Having identified the impairment it then has to be established that it prevents the individual from making the relevant decision. This involves identifying whether the person:

- is able to understand the information relevant to the decision which needs to be made
- is able to retain the information long enough to be able to make the decision necessary
- is able to use or weigh the information so provided to arrive at his decision
- is able to communicate his decision back to the healthcare professional at the required time

If an individual is unable to do any one of these then he or she is deemed to lack decision-making capacity. The above 4 identifiers thus test the person for Decisional Capacity which involves four dimensions or criteria i.e. (a) Understanding, (b) Appreciation, (c) Reasoning, and (d) Expression of a Choice[3,4]

Main principles of the Mental Capacity Act

The MCA (2005) outlines simple principles to use the provisions of the Act in a regular setting. They are as follows:

Always assume that the person is able to make the decision until you have proof they are not. Try everything possible to support the person make the decision themselves.

Do not assume the person lacks capacity just because the person makes a decision that the healthcare professional may think is unwise or wrong. A person has a right to refuse diagnostic intervention or treatment even if it can damage him further.

If a decision is made by a healthcare professional for someone who cannot make it themselves, the decision must always be in their best interest of that person.

Any decisions, treatment or care for someone who lacks capacity must consciously, always be the least restrictive of their basic *rights* and freedoms.

Making a `best interest decision`

After all steps have been taken to support someone to make their own decision, if the person is assessed as lacking capacity to make that particular decision, then a 'best interests' decision must be made. The person who makes the 'best interests' decision is called the 'decision maker' and is usually a qualified healthcare professional responsible for that treating that person. For other day-to-day decisions the 'decision maker' is likely to be the person who is supporting the person such as next of kin, professional caregiver or such information may already have been expressed by the person in their LPOA (Lasting power of attorney) or by way of advanced directives. The legal documentations, if any must always be reviewed and considered before any diagnostic interventions or treatments are carries out in a person `lacking capacity`.

The 'best interests' test

A best interests test is an objective test of what would be in the person's actual best interests, taking into consideration all relevant factors. A best interests test is not a 'substituted judgment' test. A `substituted judgment` test seeks to identify what the patient would have wanted and to decide accordingly. A best interest test takes the patient`s wishes into account where they are known, but they may not be determinative.

Factors that need to be taken into account when making a best interest test include the following:

- the extent of the patient`s ability to participate in the decision, howsoever limited must be considered
- the likelihood that the person will regain capacity in sufficient time to be able to decide personally may be a factor in non-emergent treatments
- the person's past and present wishes and feelings may be a reasonable guide
- his or her beliefs – moral, religious or ethical or values where they would be relevant to the decision
- the benefits and burdens of the decision
- Where possible, a discussion with those close to the individual in order to try and establish those things that were important to the patient and which may have an impact on the decision.

Under the provisions of the Mental Capacity Act (2005), a healthcare professional cannot be found liable if they have complied with subsections 1-7, i.e., complied with best interest test.

Who has the responsibility to assess capacity

There is a presumption in English law that all adults have the capacity to make decisions relating to their life. Where there are doubts about capacity and consent to medical treatment is required, the health professional proposing the treatment needs to decide whether the patient has the capacity to consent. When there are grey areas in decision making, an expert advice from a psychiatrist or psychologist with particular experience in assessing capacity must be sought. The overall responsibility remains, however, with the health professional proposing and carrying out the treatment.

Always assess `Capacity` in line with the relevant national laws

Always assess a patient's capacity to make a particular decision at the time it needs to be made. Don't assume that because a patient lacks capacity to make a decision on a particular occasion, they lack capacity to make any decisions at all now or in the future. Always record your actions and decision clearly. Start from the assumption of capacity

Make No assumptions that patient lacks capacity, in the following situations:

- Patient is in severe pain, discomfort or agitated
- Patient is unable to communicate verbally – assess if the person can write their wish or take cue from non-verbal commands or signs or gestures.
- has dementia or alcohol dependence
- Patients with head injuries
- If patient makes a conscious decision you disagree with
- has a learning disability or is suffering from a mental disorder
- is under arrest or in prison
- has a terminal illness

It is important to always start with the assumption that the patient does have capacity.

Deprivation of liberty:

A decision made about `lack of capacity` in a patient has serious ramifications and it is important to appreciate that such a decision curtails and deprives certain liberties of that person and is not to be judged lightly. Thus, a decision to curtail or deprive one`s liberty:

- Should be avoided whenever possible
- Should only be authorised in cases where it is in the relevant person's best interests and the only way to keep them safe
- Should be only for a particular treatment plan or course of action
- Should be for as short a time as possible

Advance decisions refusing treatment

Competent adults can document their wish to refuse specified treatment for a time in the future when they may lose capacity. This is called an advance decision refusing treatment, sometimes known colloquially as a living will or advanced directive. Patients can only `refuse future treatment` by means of an advance decision, they `cannot demand future treatment` in advance.

The Advance decisions refusing treatment or Advanced directives are legally binding upon the healthcare professional where:

- the person had capacity and was aged 18 or over when he or she made it
- it specifies, in lay terms, if necessary, the specific treatment to be refused and the particular circumstances in which the refusal is to apply
- the person making the decision has not subsequently withdrawn the decision or appointed a proxy to make it
- the person has not subsequently done anything clearly inconsistent with the decision
- if the decision relates to life-prolonging treatment it must be in writing, signed and witnessed and contain the statement that the decision is to apply even if life is at stake.

Summary

The healthcare professional must make sure that every patient has all the information they need to make a decision about their treatment. The information must be presented in a way that is easy for the patient to understand - for example, by using patients own language or if required an interpreter or translator, using simple language and avoiding too many technical words or jargon, and/or by use of videos, diagrams and other visual aids. It is an ethical and professional duty upon the healthcare professional to make a legible and timely record in the clinical notes outlining the processes he went through in determining capacity. The healthcare professional must not make any assumptions of capacity or lack thereof before the patient is well evaluated and make note of any living wills, advanced directives, lasting power-of-attorney (LPOA`s) or any advanced decisions refusing treatment (ADR`s). Every attempt must be made to communicate with the next of kin in evaluating the best interest of a person who lacks in capacity. If the patient indeed lacks capacity, record in the notes the basis on which a decision to treat, or not which was made in the patient's best interests, and the steps taken arrive at that decision.

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