

# MIDNIGHT LAW: Scotland



## Pitfalls in the Assessment of Mental Capacity

### WHAT IS CAPACITY?

Capacity is the ability to understand, use, and communicate information in order to make a decision. Capacity can be impaired temporarily or permanently, by mental impairment (e.g. delirium, brain injury and other organic conditions) or by the inability to communicate, because of a physical disability.

In Scotland, the **Adults with Incapacity (Scotland) Act 2000** provides the legal framework to determine whether an adult (age >16) has capacity to make a decision for themselves. In assessing and documenting capacity, the clinician should consider whether the adult:

- understands the nature of what is being proposed and why
- has knowledge of the risks and benefits involved, and any alternative treatments
- is aware of their right to refuse, how to do so and the consequences of refusal
- has memory abilities that allow the retention of information
- is capable of making and communicating their choice
- is not under undue influence from another person

Capacity assessments should be recorded in sufficient detail, including the reasons for doubt, contents of the assessment, findings and how decisions have been reached to attain maximal benefit for the person.

### PITFALLS IN ASSESSMENT

- **A diagnosis of dementia, mental illness or learning disability does not automatically mean the individual lacks capacity for all medical decisions.** Tools used for assessing cognition (e.g. MoCA) are not appropriate methods for determining capacity.
- **Capacity is time specific.** Drugs, alcohol or organic illness (including delirium) may all cause capacity to fluctuate. Can the decision wait until the patient regains capacity?
- **Capacity is decision specific.** It should not be assumed that an individual who lacks capacity for one medical decision, lacks capacity for ALL medical decisions.
- **Has the individual been provided with relevant and meaningful information to make the decision?** Can the information be given in other formats the individual may prefer? Has the individual's ability to understand been maximised? (e.g. glasses, hearing aids). Does the individual need resources or explanations in their first language? Have family or friends been involved in discussions to aid effective communication?
- **Can the individual's ability to communicate be maximised?** e.g. via use of gestures, body language, communication boards or apps. Consider involvement of speech and language therapists.
- **Is the individual subject to external pressures?** There are circumstances in which an individual may be particularly suggestible, or subject to undue influence, or frank coercion. The individual may feel pressurised into making decisions to please others (e.g. family, friends, care givers or health care professionals). Even if they have capacity, this may not be the end of the concern, and you will need to find ways in which to identify whether the decision being made is truly the patient's own.
- **Disputes surrounding capacity assessment.** Where an assessment of capacity has been challenged options include; a case conference to discuss concerns, second opinion, involvement of an independent expert in assessing capacity and mediation. Advice from the Central Legal Office may be required and as a last resort, an application to the Court of Session (NB lack of legal precedent in Scotland).

### GUIDING PRINCIPLES

1. **Benefit:** any intervention must benefit the adult.
2. **Least restrictive:** any intervention should restrict the adult's freedom as little as possible.
3. **Take account of wishes of the adult:** account shall be taken of the present and past wishes/feelings of the adult as far as they can be ascertained.
4. **Consultation with relevant others:** the views of the relatives/carers of the adult should be considered, as should those of any guardian or attorney with powers relating to the proposed intervention.
5. **Encourage residual capacity and development:** to exercise whatever skills the adult has and to develop new skills.
6. **A capacitous adult has the right to make an irrational or unwise decision.**

### KNOW THE LAW

1. Adults with Incapacity (Scotland) Act 2000
2. Mental Health (Care and Treatment) (Scotland) Act 2003
3. Adult Support and Protection (Scotland) Act 2007
4. Age of Legal Capacity (Scotland) Act 1991

### FURTHER READING

1. GMC: Decision Making & Consent
2. Adults with incapacity: code of practice for medical practitioners
3. Mental Welfare Commission: Treatment under section 47 of the Adults with Incapacity Act