

Patient Capacity to Consent

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A doctor at a hospital goes ballistic upon learning that a houseman had treated a patient against the advice of her consultant surgeon and the patient's wishes. Luckily, this chaotic scene was fictional. Hero complex aside, this had me thinking about patient consent during medical treatment.

Patient consent is paramount and its necessity is stressed by the Malaysian Medical Council.¹ Where no consent is obtained before the commencement of treatment, the doctor will be committing trespass to a person (e.g. battery or assault) and risks disciplinary inquiry or legal action. The snag in this supposedly simple concept is the fact that a legally valid consent requires more than just the utterance of the word "yes" by the patient. For there to be a genuine agreement to receive treatment, the patient must have capacity to consent to the treatment and must have exercised such capacity.

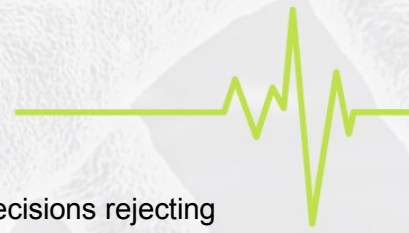
Although the issue of capacity is usually raised only during litigation, assessing patient capacity on a day-to-day basis (and keeping records) prior to treatment would save doctors a lot of heartache. In most instances, an individual above the age of 18 is deemed to have capacity to make his or her own medical decisions. Thus, where the patient is a competent adult, only he or she can provide consent. In practice, it is common for patients to say, "*Doctor, I will go with whatever treatment you think is best for me*", and in these circumstances, the delegated consent by the patient is presumably permissible.²

The handling of capacity

In the UK, there exists the Mental Capacity Act 2005 (**MCA**) designed to protect and empower people (aged 16 and over) who may lack the mental capacity to make their own decisions about their care and treatment. Thus, if a patient lacks mental capacity, he or she can be provided with treatment that is in his or her best interests. For example, if a patient suddenly collapses and loses consciousness, medical professionals can provide treatment if that is in his or her best interests. An unhappy relative can always seek a court declaration as to the legality of the treatment. Further, the following steps can be taken under the MCA to circumvent the impasse caused by lack of capacity:

- (a) An individual who fears losing capacity is empowered to create a lasting power of attorney which enables the appointed individual (donee) to make decisions on the patient's behalf.
- (b) The court may appoint a deputy to make certain decisions on behalf of a person who has lost capacity.

¹ Malaysian Medical Council Guideline: Consent for Treatment of Patients by Registered Medical Practitioners
² J Herring, *Medical Law and Ethics* (OUP, 7th Ed).



- (c) Most importantly, the MCA permits an individual to make advance decisions rejecting treatment in the event he or she loses capacity.

In Malaysia, we have the Mental Health Act 2001 (**MHA**), but this piece of legislation differs vastly from the MCA as it concerns admission, detention, lodging, care, treatment, rehabilitation, control and protection of persons who are mentally disordered.³ Although mental incapacity includes individuals with certain mental health disorders, it is not to be confused with mental disorders.

How to determine capacity?

Considering the lack of clear statutory provisions in Malaysia on the determination of a patient's mental capacity, a prudent doctor should make it a practice to question whether the patient lacks capacity in relation to a matter if, at the material time, he is unable to make the decision for himself because of an impairment of, or a disturbance in the functioning of, the mind or brain.⁴ A doctor may deduce that a person is unable to make a decision for himself where it can be observed that the latter is unable to understand the information relevant to the decision; to retain that information; to use or weigh that information as part of the process of making the decision; or to communicate his decision.⁵

According to the Malaysian Medical Council, impairments to reasoning and judgment which may make it impossible for someone to give informed or valid consent include factors such as basic intellectual or emotional immaturity, high levels of stress, severe mental retardation or illness, intoxication and severe sleep deprivation.⁶ When encountered with such an incapacitated patient in an emergency situation, doctors are advised to follow procedures as outlined for emergency treatment or management.

In other non-emergency circumstances where consent cannot be obtained from a patient due to his or her incapacity, the doctor may obtain consent from the patient's legal guardian in the case of a minor, or a relative in the case of an adult or two psychiatrists (one of whom shall be the primary or attending psychiatrist), if the guardian or relative of the patient is unavailable or untraceable and when the patient himself is incapable of giving consent.⁷

Conclusion

It is always worth bearing in mind that courts have the benefit of 20/20 hindsight. Obtaining valid consent from a patient is among the basic things that can be carried out by doctors to protect themselves in everyday practice.

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³ Mental Health Act 2001

⁴ Mental Capacity Act 2005, s 2(1)

⁵ *Ibid*, s 3(1). These are mere suggestions which are not exhaustive in nature.

⁶ Malaysian Medical Council Guideline: Consent for Treatment of Patients by Registered Medical Practitioners

⁷ *Ibid*