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Old Age Module

Medico Legal Issues in Old Age Psychiatry

Developing people
for health and
healthcare

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Expert Led Session

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Overview

- Mental Capacity Act
- Capacity assessment
- Best Interests/LPA/Court of Protection
- Ethical issues in Old Age Psychiatry
- DOLS(Deprivation of Liberty Safeguards)
- Case scenarios

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Mental Capacity Act 2005

- Common law lacked consistency
- *Mental Capacity Act 2005* (England and Wales) came into force in 2007
- Enshrines in statute common law principles
- Provides the legal framework for making decisions on behalf of individuals who lack the capacity to make that particular decision themselves.
- Inability to make decisions could be due to dementia, learning disabilities, stroke etc.
- New Court of Protection to resolve complex issues

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MCA 2005 Five Main Principles

- A person must be **assumed to have capacity** unless it is established otherwise
- All **practicable steps** to help the person make the decision, e.g.: Providing information in a more accessible form- pictures
- A person is not to be treated as unable to make a decision merely because he/she makes an **unwise decision**
- The decision made for a person lacking capacity must be in their **best interests**
- Must be least restrictive

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Capacity

- Ability to make a decision

- Do not assume that person lacks capacity because of their
  - Age
  - Appearance
  - Assumptions about their condition
  - Any aspect of their behaviour

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Capacity

- Capacity assumed, unless proven otherwise
- The presumption of capacity is fundamental to the Act(MCA)
- The burden of proof of lack of capacity always lies upon the person who is challenging it
- Patient may make unwise decision
- Important to acknowledge the difference between unwise decisions which a person has the right to make and incapacitous decisions

Capacity

- Issue and time specific
- Any decision that a person lacks capacity must be based on a ‘reasonable belief’ backed by objective reasons
- Standard of proof is on the balance of probabilities
- In case of disputes which cannot be resolved, the Court of Protection can be asked for a judgement

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Capacity Assessment- Three components

1) Diagnostic Test

- Person has an impairment of the mind or brain eg: some forms of mental illness, dementia ,significant learning disabilities , delirium

2) Functional Test

- Is unable to make a decision at the time it needs to be made if they cannot:
- understand information about the decision to be made
- retain that information
- weigh that information
- communicate their decision

3) Causative nexus

The inability to make the decision must be **because** of the impairment or disturbance of the mind or brain

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Capacity Assessment

- Be clear about the decision to be made and what the options may be

- Consider carefully how best to give relevant information including:
  - The decision needed
  - Why it is needed
  - Likely effects of deciding one way or another and
  - Alternative options

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Capacity Assessment

- **Understand information:**
  - Use broad terms and simple language
  - Not always necessary to explain everything in great detail
  - ‘Salient factors’ relevant to the decision.
  - Understanding needs to be proportionate to complexity of decision
  - Ask patient to explain in their own words

- **Retain information:**
  - The person must be able to retain enough information long enough to use it to make an decision

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Capacity Assessment

- **Weighing up / Use the information:**
  - To be able to see the various parts of the argument and to relate the one to another
  - Look for deliberation and logical reasoning
  - Whether their choice follows logically from their explanation

- **Able to communicate decision by any means:**
  - If a person cannot communicate their decision in any way at all, they should be treated as if they are unable to make that decision

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How can psychiatric illness affect decision-making?

- Presence of a psychiatric disorder, albeit a risk factor, does not predetermine whether a patient has capacity
- Cognitive effects (Schizophrenia, depression and dementia)
- Paranoia: fear of negative effects (e.g., of meds)
- Affective states: hopelessness, lack of concern re: own well-being
- Lack of insight : Presence or severity of illness itself

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Mental capacity in psychiatric patients: Systematic review

- Mental capacity not associated with any socio-demographic variable apart from advancing age
- Generally patients with psychotic disorders were more likely to have impaired capacity compared to those with non psychotic disorders.
- Individuals who refused treatment were more often considered to be lacking capacity compared with those who accepted it
- Frequency of incapacity in voluntary patients when consenting to admission was remarkably high(and as many as 50%)

Okai D, Owen G, McGuire H, Singh S, Churchill R, Hotopf M. Mental capacity in psychiatric patients: Systematic review. Br J Psychiatry. 2007 Oct;191:291-7.

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MCA 2005-Best Interests

- The Act doesn’t define best interests but does give a checklist.
- You must :
  - involve the patient who lacks capacity
  - have regard for past and present wishes, beliefs, values, especially written statements.
  - consult with others who are involved in the care of the patient (carers, anyone interested in welfare, donee of LPA, deputy , IMCA)

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Independent Mental Capacity Advocate (IMCA)

- Extra safeguard for particularly vulnerable people in specific situations

- For people who have no friends or family with whom it is practicable to consult

- **When to refer for an IMCA?**

  Decisions are being made about serious medical treatment or significant changes of residence e.g. moving to a care home

Doctrine of Necessity

Treat immediately to:

- preserve life
- ensure improvement
- prevent deterioration

  especially if delay / omitting treatment might potentially / seriously affect chances of later treatment working

- Treatment should be the least restrictive / invasive option and not go beyond what is immediately essential

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Protection from liability

- MCA 2005 provides ‘protection from liability’
- Cannot be prosecuted for actions taken in person’s best interests such as
  - Personal care
  - Health care or treatment
- Must have followed MCA 2005 principles

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Lasting Power of Attorney(LPA)

- A person gives another person(the attorney or donee) authority to make a decision on their behalf.
- Health care, personal welfare, property and financial decisions
- Must be registered with Office of Public Guardian (OPG)
- Attorney / donee must act in person's best interests
- Life sustaining treatment must be covered expressly in the LPA

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Advance decisions to refuse treatment

- Allows patients to refuse specified medical treatment in advance
- Must be made when a patient still has capacity
- Comes into effect if they lack capacity
- It must be clear about which treatment it applies to and when
- More formal if it applies to life-sustaining treatment
- Doctors can provide treatment if they have any doubt that the advance decision is not valid and applicable

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Court of Protection

- A specialist court that deals with decision-making for adults who may lack capacity
- Court of Protection can make :
  - Complex or difficult health/welfare/financial decisions
  - Simple one-off financial decisions
  - Declarations on whether someone lacks capacity
- May appoint deputies - when a series of decisions are needed and a single court order is insufficient
- The deputy must make decisions in the patient's best interests

Testamentary Capacity

- Capacity to make a will

- The person making the Will :
  - Should understand the nature and effects of making a will
  - Should understand the extent of his or her property
  - Must be aware of the persons whom he would usually be expected to provide(even if he chooses not to) e.g.: spouse, children, grandchildren
  - Have no disorder of mind that influences the way the property is disposed of (who the property is given to)
  - Not be subject to coercion

Ethical issues in Old Age Psychiatry

- Aging is not a disease.
- Old age does not necessarily imply physical and intellectual deterioration.
- The principles of medical ethics that apply to younger patients also apply to patients in older age groups.
- Some ethical issues are unique to the psychiatric care of the elderly.
- Psychiatrists are often asked to make judgments about a cognitively impaired patient's capacity to make decisions about his or her medical /social care.

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Dementia: Ethical issues

- End of life issues, Do Not Attempt to Resuscitate decisions, ‘ceilings of care’
- Treatment issues: Covert medication, with-holding treatment
- Research

Background to DOLS

European Convention on Human rights (ECHR) Article 5

- Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law e.g. convicted by a court, detained in hospital under Mental Health Act

Bournewood Case

- Mr L, a 48-year-old man with autism, learning disability
- Unable to speak, with no ability to communicate consent or dissent to hospital admission
- Became agitated at his day center, banging his head violently and repeatedly against the wall.
- Mr L was admitted to Bournewood hospital's behavioral unit, did not resist admission
- Carers applied to the Court for judicial review seeking a declaration that his detention was unlawful
- High court → Court of appeal → House of Lords → European courts

Bournewood Gap

- Patient is admitted informally and treated as it is judged to be in his or her best interests
- Compulsion is regarded as a measure of last resort, so that as many patients as possible would be treated, without the stigmatisation of formal procedures
- Basis for this practice is equating lack of resistance with active consent to treatment
- The issue is whether a person without capacity must give active consent to treatment and admission, or whether absence of dissent is enough

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Why was DOLS introduced?

- Ensure compliance with Article 5 of ECHR
- No one should be detained except by means of a “procedure prescribed by law”
- Everyone who is deprived of his liberty shall be entitled to an appeals process
- Implemented in April ’09

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Cheshire West Case

- 38 yrs old with Cerebral Palsy and Down's
- Lived with mother until 37 but she could no longer cope
- Moved to a spacious bungalow - not a care home
- Staff present 24 hours
- Additional 98 hours 1:1 support
- Day centre - 4 days a week
- Went to hydrotherapy pool, pubs, shops, Home visits to mother
- Wore body suit to prevent him eating his incontinence pads
- Physical restraint sometimes used

P & Q-Sisters with LD

P

- Moderate/Severe LD
- Limited road safety
- Lived with foster mother; “mummy”
- Needed intensive support for ADL
- Went on regular trips/holidays with foster mother
- Never attempted to abscond but would be brought back if did
- Foster mother used physical restraint if necessary

Q

- Mild/moderate LD
- Moved to residential NHS facility (for adults with complex needs) as foster mother couldn’t cope
- Required physical restraint at times
- Cannot go out unaccompanied
- Not free to leave
- Was under continuous supervision and control

Supreme Court Judgment (Mar'14)

A person is deprived of liberty if:

Objective element:

"Acid test"

- under continuous supervision and control
- not free to leave

  "A gilded cage is still a cage"

Subjective element:

- Not validly consenting to the confinement

State responsible

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DOLS Assessment: Process

- Urgent authorisation - valid for 7 days
- Standard authorisation - up to a year
- ‘managing authority’ (i.e. hospital or care home) seeks authorisation from a ‘supervisory body’ (Local authority) in order to lawfully deprive someone of their liberty
- Supervisory body (LA) then gets a Mental Health assessor and a Best Interests assessor (BIA) to assess the patient

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DOLS Assessment: Process

- Age Assessment
- No Refusals Assessment
- Capacity Assessment
- Mental Health Assessment
- Eligibility Assessment
- Best Interests Assessment

Case Scenario 1

- Telephone call regarding a 24 year old female who self presented to A&E after taking an overdose of 40 paracetamol tablets. Known to suffer from borderline personality disorder. She is refusing treatment and is trying to leave the department

- Do you stop her leaving, if yes under what legal framework?

- What do you do about the paracetamol?

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Case Scenario 2

- Eileen,82 years old, long h/o Schizophrenia and more recently dementia. Number of medical problems like diabetes and atrial fibrillation. Currently in a care home. Recurrent falls with sometimes serious injuries. Suffers from falls as will not use zimmer or wait for staff to help her mobilise.

- **Does she have capacity to refuse help for her mobility?**

- **How can this situation be managed?**

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References and Further Reading

- MCA 2005
- MCA 2005 Code of Practice
- DOLS Code of Practice
- Assessment of Mental Capacity- Guidance for Doctors and Lawyers- BMA/Law Society
- Dementia: ethical issues- Nuffield Council on Bioethics

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MCQs

1. Which is of the following is not a core principle of MCA 2005
   A. Everyone is assumed to have capacity
   B. All Practical steps needs to be taken to help the person to make the decision
   C. Any decision made on behalf of a person lacking capacity should be in their best interests
   D. Person cannot make a unwise decision
   E. Decision made on behalf of a person lacking capacity should be least restrictive

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MCQs

2. A person should be able to do the following to be able to make a decision :

A. Understanding the information relevant to the decision
B. Retain the information
C. Weighing up the pros and cons of the decision
D. Communicate the decision
E. All of the above

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MCQs

2. A person should be able to do the following to be able to make a decision :

A. Understanding the information relevant to the decision
B. Retain the information
C. Weighing up the pros and cons of the decision
D. Communicate the decision
E. All of the above

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MCQs

3. Lasting Power of Attorney (LPA) can potentially cover the following areas:

A. Property
B. Finances
C. Health care decisions
D. Personal welfare decisions such as where a person lives
E. All of the above

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MCQs

3. Lasting Power of Attorney (LPA) can potentially cover the following areas:

A. Property
B. Finances
C. Health care decisions
D. Personal welfare decisions such as where a person lives
E. All of the above

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MCQs

4.Which of the following is false regarding the legal rights of an attorney with a LPA for healthcare decisions:

A. cannot consent to or refuse treatment if the donor has capacity to make the particular healthcare decision
B. cannot make a decision relating to life-sustaining treatment if it is not explicitly specified in LPA
C. cannot demand medical treatment that healthcare staff do not believe is necessary or appropriate
D. cannot consent or refuse treatment if donor is detained under the Mental Health Act
E. need not always make decisions in the donor's best interests.

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MCQs

4.Which of the following is false regarding the legal rights of an attorney with a LPA for healthcare decisions:

A. cannot consent to or refuse treatment if the donor has capacity to make the particular healthcare decision
B. cannot make a decision relating to life-sustaining treatment if it is not explicitly specified in LPA
C. cannot demand medical treatment that healthcare staff do not believe is necessary or appropriate
D. cannot consent or refuse treatment if donor is detained under the Mental Health Act
E. need not always make decisions in the donor's best interests.

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MCQs

5. The following are true about Deprivation of Liberty Safeguards(DOLS) except:

A. The safeguards apply to only people who lack capacity

B. A DOLS authorisation in itself authorises specific treatment

C. A person can only be deprived of their liberty if its in their own best interests to protect them from harm

D. DOLS can only be authorised if it is a proportionate response to the likelihood and seriousness of the harm

E. Applies only to people aged 18 and over

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MCQs

5. The following are true about Deprivation of Liberty Safeguards(DOLS) except:

A. The safeguards apply to only people who lack capacity

B. A DOLS authorisation in itself authorises specific treatment

C. A person can only be deprived of their liberty if its in their own best interests to protect them from harm

D. DOLS can only be authorised if it is a proportionate response to the likelihood and seriousness of the harm

E. Applies only to people aged 18 and over

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Any Questions?

Thank you

Please provide feedback/suggestions on this presentation to the module lead anthony.peter@lancashirecare.nhs.uk