

## The Mental Capacity Act: Implications for Patients and Doctors Faced with Difficult Choices

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### Abstract

The Mental Capacity Act (MCA) came into effect in March 2010 but the impact of this groundbreaking legislation on the doctor-patient relationship has not yet been studied in Singapore. It is evident that communication between healthcare professionals, patients and their loved ones has never been so critical. Translating this into practice, healthcare professionals must identify the decision-maker to obtain consent from the correct person. Consent for healthcare and treatment must be obtained from the patient with capacity or the patient's legally appointed proxy decision-maker under a Lasting Power of Attorney (LPA) where the patient lacks capacity. However, the doctor is the decision-maker for patients lacking capacity in matters of life-sustaining treatment or treatment to prevent a serious deterioration of the patient's health. All decisions made on behalf of persons lacking capacity must be made in their best interests. Capacity assessments must be properly conducted and if a patient has the capacity to make the decision then healthcare professionals must take practicable steps to help them make a decision.

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The way doctors engage with patients who may lack capacity, family members and others connected with the patient's care must be modified in light of the recent enactment of the Mental Capacity Act (MCA).<sup>1</sup> It is a common misconception that the patient's relatives have the right to make decisions on behalf of the patient who may lack mental capacity. They have no such legal right.<sup>2</sup> However, as a matter of good practice and common sense, doctors should involve the patient's relatives in the treatment decision-making process if the patient is agreeable. Furthermore, if the patient has lost the capacity to make treatment decisions, the patient's relatives should be consulted as part of the best interests decision-making process under the MCA.<sup>3</sup>

Everyone dealing with a person who may lack capacity must apply the 5 Statutory Principles of the MCA:

1. Assume a person has capacity unless the opposite is proven.

2. Take all practicable steps to help a person make their own decision.
3. A person has the right to make an unwise decision.
4. Always act in the person's best interests.
5. Choose the less restrictive option.<sup>4</sup>

### Assuming Capacity, Helping Patients Make Decisions and Test for Capacity

The MCA states that capacity cannot be determined based solely on a person's age, appearance, condition or aspect of behaviour.<sup>5</sup> Therefore, doctors cannot automatically assume that a patient with a condition such as mild dementia or Down's syndrome lacks capacity to make decisions because the test for capacity is a functional one. During a consultation, the doctor should focus on the patient and determine whether he or she has the mental capacity to make the specific decision, applying the test as laid out in

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the MCA.<sup>6</sup> This 2-stage test requires the doctor to determine whether:

1. The patient is suffering from an impairment or disturbance that affects the function of the brain or mind, and
2. That impairment or disturbance causes the patient's inability to make a decision at a particular time.

Expanding on the second element of the test, a person is unable to make a decision if he or she cannot:

- understand the information,
- weigh up the information,
- remember the information, or
- communicate the decision.<sup>7</sup>

The application of this clinical and functional test can be formal or informal. Trained specialists or accredited general practitioners should conduct formal mental capacity tests. A formal capacity test would be required for important decisions such as moving home, selling property or undergoing major surgery.<sup>8</sup> An informal test can be used for everyday decisions, such as whether to have the flu vaccination or what to have for lunch.<sup>9</sup>

Capacity is usually assessed on a case-by-case basis depending on the nature of the decision to be made.<sup>10</sup> There is no agreed capacity assessment tool for formal or informal mental capacity tests in Singapore. In the United Kingdom (UK) and the United States (US), one of the well known validated tools to assess capacity is the MacArthur Competence Assessment Tool for Treatment (MacCAT-T).<sup>11</sup> That assessment tool uses the 4 aspects of capacity (understanding, remembering, weighing up and communicating) as outlined in the MCA. Another test commonly used in the UK is the FACE Mental Capacity Assessment.<sup>12</sup> The Singapore MCA was based on the English Mental Capacity Act and the test for determining capacity is identical in both statutes.<sup>13</sup> The FACE tool was devised specifically for clinicians applying the MCA test where detailed clinical assessment was unnecessary.<sup>14</sup> A number of National Health Trust (NHS) Trusts in the UK have adopted the FACE tool.<sup>15</sup> Perhaps Singapore healthcare institutions should also consider adopting a validated tool to develop a consistent protocol for assessing capacity.

The MCA and the Code of Practice do not state how informal capacity assessments should be conducted. However, the Code of Practice states that non-professionals, such as caregivers, may perform such tests because the decisions concern daily routines such as what to wear and eat.<sup>16</sup> As caregivers are usually laypersons, the standard they

will be held to when conducting informal capacity tests will be pegged to that of an ordinary layperson. Doctors may have to conduct an informal capacity assessment during a consultation with a patient. They should apply their professional judgment when determining the appropriate informal assessment to conduct. All decisions made on behalf of persons who lack capacity must be made in their best interests. As a matter of good practice, these decisions and the process used to reach these decisions should be recorded in the patient's notes.<sup>17</sup>

Doctors should not presume that elderly persons do not want to make healthcare decisions or want their relatives to make decisions on their behalf. Elderly patients often visit the doctor with a relative who pays for the medical fees. Although their family's financial resources may limit a patient's treatment options, the relative paying for the treatment has no legal right to consent to treatment on behalf of the patient. The question is whether the patient has the capacity to make decisions about the proposed treatment. It is a functional test that is time and decision specific. If the patient can, then the doctor should support the patient by taking practicable steps, such as explaining to the patient in terms appropriate to the level of the patient's understanding, to help the patient make a decision.<sup>18</sup> If the patient asks the relative to make a decision on her behalf, even when she has capacity, then arguably she has the right to do that because it is an exercise of her own autonomy. However, doctors should be cognisant of situations when the patient may be unduly influenced by others, or coerced into going along with decisions that seem to run contrary to the patient's best interests.

### **Lasting Powers of Attorney and Verifying the Donee's Healthcare Decision-Making Authority**

The MCA empowers persons to legally appoint a proxy decision-maker for healthcare decisions.<sup>19</sup> A Lasting Power of Attorney (LPA) is a legal document that a person (Donor) with mental capacity completes appointing one or more persons (Donees) to make decisions on his/her behalf if he/she loses the capacity to do so in the future. However, if the treatment is to prevent a serious deterioration in the patient's condition or life-sustaining treatment, then the power shifts from the Donee to the doctor.<sup>20</sup> Therefore, the decision-maker in most serious medical situations is the doctor regardless of whether the patient has made a healthcare LPA.

The Office of Public Guardian (OPG) issues identification cards to Donees once the LPA has been validated.<sup>21</sup> The Donee card contains the Donee's and the Donor's names and identification numbers, the Donee's photo, the unique Donee number, the LPA reference number and date of

registration. So, the doctor inspecting the person's Donee identification card would not be able to immediately ascertain whether the person accompanying the patient is authorised to make healthcare decisions. The doctor should require the Donee to produce a certified true copy of the validated LPA conferring the power on the Donee to make such decisions. Even when a person has this document, the doctor must check the LPA registration number against the list of revoked LPAs.<sup>22</sup> The unique Donee identification number must also be checked against the list of revoked unique Donee identification numbers maintained on the OPG website.<sup>23</sup>

If a doctor accepts the authority of a relative regarding a non-emergency healthcare decision (which is not life-sustaining treatment or treatment to prevent a serious deterioration of the patient's condition), and it turns out that the patient has made a valid LPA conferring authority on another person to make healthcare decisions on his or her behalf, the doctor could be sued because there was no informed consent. In these circumstances, the doctor should not have accepted the relative's authority to make decisions for the patient before checking to see if there was a valid LPA appointing a Donee to make healthcare decisions. Similarly, a doctor could also run into difficulties by accepting the consent of a person purporting to be a Donee of a healthcare LPA and it turned out that the Donor previously revoked the Donee's authority or the LPA.

Note that the OPG in a statement on the relevant pages of their website has disclaimed all responsibility for the accuracy and validity of the information on their website and recommend that the persons relying on the information on their website to verify it themselves.<sup>24</sup> This complicated Donee and LPA verification process is time-consuming and burdens doctors. To improve the process, it would be desirable to develop an automated online verification system that could be securely accessed by authorised healthcare professionals.

## Conclusion

The enactment of the MCA has directed the spotlight on capacity issues. It provides a statutory framework for assessing capacity and decision-making for people lacking capacity. Doctors should familiarise themselves with the MCA and the accompanying Code of Practice to ensure compliance with its requirements. It is critical that doctors ensure they are obtaining consent from the correct person before commencing treatment. All decisions made on behalf of persons lacking capacity must be made in their best interests and should be recorded in the patient's notes.

A doctor may disagree with the Donee about a healthcare decision. If the doctor believes that the Donee is not acting

in the best interests of the patient, he or she should contact the OPG (supervisory body for Donees) for advice.<sup>25</sup> If the OPG believes a Donee has failed to act in the donor's best interests, they can apply to court to remove the Donee's authority.

## REFERENCES

1. Cap 177A, 2010 Rev Ed Sing.
2. Re T (Adult: Refusal of Treatment), [1992] Fam 95 at 103.
3. Section 6(7b) Mental Capacity Act.
4. Section 3 Mental Capacity Act.
5. Sections 3(2) and 4(3) Mental Capacity Act.
6. Section 4(1) Mental Capacity Act.
7. Section 5(1)(a-d) Mental Capacity Act.
8. Mental Capacity Act Code of Practice, Singapore: Office of the Public Guardian, Ministry of Community Development, Youth & Sports; 2010. Paragraph 4.8.3.
9. Mental Capacity Act Code of Practice, Singapore: Office of the Public Guardian, Ministry of Community Development, Youth & Sports; 2010. Paragraph 4.8.2.
10. Mental Capacity Act Code of Practice, Singapore: Office of the Public Guardian, Ministry of Community Development, Youth & Sports; 2010. Paragraph 4.3.2.
11. MacArthur Research Network on Mental Health and the Law. The MacArthur Competence Study. Available at: [www.macarthur.virginia.edu/treatment.html](http://www.macarthur.virginia.edu/treatment.html). Accessed 10 July 2012.
12. Face Recording and Measurement Systems. Available at: [www.face.eu.com](http://www.face.eu.com). Accessed 10 July 2012.
13. Mental Capacity Act 2005 (UK), c 9.
14. Letts P, editor. Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers. 3rd ed. London: Law Society Publishing, 2009.
15. Face Recording and Measurement Systems. Our Customers. Available at: [www.face.eu.com/our-customers/face-users](http://www.face.eu.com/our-customers/face-users). Accessed 10 July 2012.
16. Mental Capacity Act Code of Practice, Singapore: Office of the Public Guardian, Ministry of Community Development, Youth & Sports; 2010. Paragraph 4.8.2.
17. Mental Capacity Act Code of Practice, Singapore: Office of the Public Guardian, Ministry of Community Development, Youth & Sports; 2010. Paragraph 6.6.
18. Section 3(3) Mental Capacity Act.
19. Section 13(6) Mental Capacity Act.
20. Section 13(8a-b) Mental Capacity Act.
21. Office of Public Guardian. Guide to the Lasting Power of Attorney. Available at: [www.publicguardian.gov.sg/Resources/Flipbooks/Guide\\_to\\_LPA\(English\).pdf](http://www.publicguardian.gov.sg/Resources/Flipbooks/Guide_to_LPA(English).pdf). Accessed 10 July 2012.
22. Office of Public Guardian Resources. Revoked LPAs. Available at: <http://www.publicguardian.gov.sg/Resources/RevokedLPAs.aspx>. Accessed 10 July 2012.
23. Office of Public Guardian Resources. Revoked Donee UID Number. Available at: <http://www.publicguardian.gov.sg/Resources/RevokedDoneeUIDNumber.aspx>. Accessed 10 July 2012.
24. Office of Public Guardian Resources. Revoked Donee UID Number, Disclaimer. Available at: <http://www.publicguardian.gov.sg/Resources/RevokedDoneeUIDNumber.aspx>. Accessed 10 July 2012.
25. Office of Public Guardian. Available at: [www.publicguardian.gov.sg](http://www.publicguardian.gov.sg). Accessed 10 July 2012.