UK LEGAL GUIDE

Medical law

Fifth edition

Kennedys

Contents

Introduction

Welcome to the fifth edition of Kennedys' medical law guide.

As we gradually start to emerge from the fog of the past few years, we can begin to reflect on the huge impact medical law continues to have in our society. The COVID-19 pandemic highlighted numerous medical legal issues – including best interest decision making in a resource stretched health service; the importance of judicial reviews as a means to challenge decision making; and the vital importance of Advance Decision making for those lacking capacity in ICUs and elsewhere. Brexit continues to impact on this area of law and we are living through the development of GDPR legislation, Mental Health Act reforms and changes to Human Rights law.

Our team has been at the forefront of medical law for over 35 years. We have been working in partnership with our healthcare clients during the pandemic on some of the most profound and heart-wrenching matters, and continue to be humbled by the devotion and dedication healthcare providers always display even in the most trying of times.

This fifth edition of our medical law guide looks at the main issues case handlers will encounter, examines their practical implications and draws on our experiences of dealing with similar situations. We have introduced a chapter on the treatment of people with Prolonged Disorders of Consciousness and updated our chapters on all areas to reflect this dynamic area of law. As with earlier editions, the aim is for this to be a simple guide to the main issues encountered in medical law. It is not possible to set out comprehensively all of the legal and practical matters but we are on hand if you would like to discuss any areas in more detail. I hope that you continue to find this guide helpful.

As ever, your feedback is always welcomed and will be taken on board in any future editions. A continued thank you to everyone in the amazing team of lawyers we have at Kennedys who have contributed to this fifth edition.

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Capacity

Mental capacity is the ability to make decisions. It is always presumed that a patient has mental capacity unless otherwise established.

Dementia, mental health challenges, learning disabilities or brain injury may lead to difficulty in making decisions. This may be temporary or permanent. However, simply because a patient may have some of these symptoms does not necessarily mean they lack mental capacity. A person must be assumed to have capacity unless it is established that they lack capacity (Section 1, paragraph 2 of the Mental Capacity Act 2005).

Any decision made on behalf of an individual who lacks capacity must be in their best interests.

Assessment

Capacity is both time and issue specific. An individual may lack capacity to make a particular decision at a specific time, or they may have capacity to make some decisions but not others. Accordingly, capacity must be determined in relation to the specific decision in question each time that decision is to be made.

To decide if an individual lacks capacity to make a particular decision, always ask:

1. Is there an impairment of, or disturbance in the functioning of, the individual's mind or brain?
2. Is that impairment or disturbance sufficient to render the individual incapable of making the decision?

To help in answering this question, ask the following:

- Does the individual understand the information relevant to the decision?
- Can they retain the information?
- Can the individual use or weigh that information as part of the process of decision making?
- Can they communicate the decision?

If the answer to questions 1 and 2 is yes, then the patient does not have capacity for the decision in question. However, before coming to that conclusion, ensure that all appropriate help and support is given to the patient to enable them to make their own decision and to maximise their participation in any decision making.

When assessing capacity, care should be taken to ensure:

- The patient is comfortable so as to minimise anxiety or stress, e.g. offer them a cup of tea if appropriate; take them to a quiet area; wait a while if possible before asking a difficult question or perhaps speak to them in the presence of someone they are comfortable/familiar with.
- Communication or language problems are overcome (with speech therapy, an interpreter or by help from the family).
- Cultural, ethnic or religious factors are taken into account, e.g. is the individual comfortable talking to someone of the opposite sex?
- Consider if the patient has periods of lucidity at different times of the day and arrange to assess the patient's capacity at these specific times.

Regular capacity assessments should be performed in relation to the issue in question and detailed written records must be kept explaining why it is more likely than not that this patient lacks mental capacity in relation to a specific issue.

Best interests

Where a patient lacks capacity to make a particular decision, clinicians must make the decision on the patient's behalf in what is deemed to be the patient's best interests.

When trying to work out the best interests of the person who lacks capacity the starting point should be to encourage participation of the patient in the decision to be made and do whatever is possible to improve their ability to take part.

Consideration should be given as to whether the patient might regain capacity after receiving treatment and, if so, can the decision wait until then.

In deciding what is in a patient's best interests, detailed written evidence must be included in a patient's medical notes explaining:

- Attempts made to involve the patient in the best interest decision, where feasible.
- Details of who was consulted as part of the best interest decision.
- Past and present wishes/feelings and whether any written statements were made by the individual prior to lack of capacity.

- If there is time and it would not unnecessarily breach patient confidentiality, clinicians may consider discussing the patient with their family and friends, if known, and perhaps their GP or a religious elder, where appropriate, and persons involved in caring for the patient.
- Beliefs/values of the individual which would have influenced any decision if the individual had capacity.
- Any other factors that the individual is likely to consider if they were able to do so.

In addition, capacity and best interest decisions should be under constant review:

- Whenever a care plan is being developed or reviewed.
- At other relevant stages of the care planning process.
- As particular decisions need to be made.

If there is time, reasonable effort must be taken to find out if a patient has signed a lasting power of attorney (LPA) and/or an Advance Decision. Evidence ought to be available in the patient's medical records or GP notes. Otherwise, the public guardian will be aware of registered LPAs and family or friends of the patient may assist.

If in doubt about a treatment decision, best interests, the validity of an Advance Decision or the existence of a LPA, immediate and necessary treatment should be provided to stabilise or prevent further deterioration until other matters are resolved.

In the case of *Barts Health NHS Trust v (1) Shalina Begum (2) Muhhamed Raqeeb (3) Tafida Raqeeb (by her Children's Guardian) (4) XX* [03.10.19], although the High Court ultimately accepted it was medically futile to continue active medical treatment, it confirmed that the assessment of best interests was not limited to medical considerations, but included taking into account likely beliefs, wishes and feelings.

The judge in this case gave weight to the evidence of:

- Tafida not being in pain.
- The burden of treatment being low.
- The fact there was a privately funded care plan.
- A number of children in similar circumstances within the jurisdiction were receiving such treatment, and the treatment proposed was consistent with religious and cultural tenets by which Tafida had been raised and having regard to the sanctity of life.

Although best interest decisions will still rely on medical evidence, this judgment highlights that the decision making process is not merely confined to medical matters and the wishes and feelings of the patient. The matters for consideration are far wider and the patient's family, and particularly those with parental responsibility, have a vital role in guiding that evidence.

Court

The Court of Protection has jurisdiction on matters relating to incapacity. In particular, it can:

- Declare whether or not a person has capacity to make a particular decision.
- Make decisions on issues concerning serious medical treatment.
- Make decisions concerning property and financial affairs.
- Appoint a deputy (who may be a friend, relative or professional) to have ongoing authority to make decisions in relation to the welfare or finance, as specified by the court. The deputy cannot, however, make life or death decisions.
- Make decisions concerning the validity of LPAs and enduring powers of attorney.

In conjunction with the list above, certain best interest decisions concerning patients who lack capacity which involve serious medical treatment should be brought to court, and these include:

- Certain terminations of pregnancy.
- Cases involving organ or bone marrow donation of a person who lacks capacity.
- Cases involving non-therapeutic sterilisation.
- Where the procedure or treatment must be carried out using a degree of force to restrain the patient.
- An experimental or innovative treatment.
- A case involving an ethical dilemma in an untested area.

Media

If there is likely to be media attention to a patient's condition and treatment, it is advisable to prepare a press statement. Any statement should be limited in content and be sensitive to issues around a patient's confidentiality. Material facts must be accurate and should be kept concise. The patient's family should be consulted closely before anything is released to the media, where appropriate, and strong cooperation with the family is encouraged. Sometimes, cooperation with the family may not be feasible if there is a dispute with the family regarding the best interest decision.