

CONSENT TO MEDICAL TREATMENT: WHAT ABOUT THE ADULT PATIENT WHO IS INCAPABLE OF PROVIDING A VALID CONSENT?

Adwedaa EO

Head of Anesthesiology and Director of Perioperative Services, Cypress Regional Hospital, Saskatchewan, Canada; Clinical Assistant Professor, Department of Academic Family Medicine, College of Medicine, University of Saskatchewan, Canada; Visiting Associate Professor of Anaesthesia and Pain Management, University of Cape Coast School of Medical Sciences, Ghana.

Introduction

Consent to medical treatment is a principle that is increasingly gaining attention in health care systems across the world. For consent to be valid, five essential elements must exist. The patient must have the mental 'capacity' to provide consent, he or she must receive adequate and accurate information, understand the information disclosed, make a decision voluntarily and without coercion, and then authorize the treatment¹.

In an article on 'consent to medical treatment' in a previous edition of this journal, I outlined how the Ghanaian courts may resolve consent related information disclosure disputes². That article dealt with the provision of information to the adult patient who has the mental capacity to provide lawful consent to medical treatment. A likely question that an interested reader of that article may ask is; 'what are the legal provisions in Ghana for treating patients who lack the capacity to provide lawful consent to medical treatment as a result of factors such as a young age^{3,4}, disease⁵, severe brain or mental illness or incapacity such as occurs in severe dementia, severe learning disabilities⁶, and being unconscious?'^{7,8}.

The purpose of this article is to attempt to answer such a question. The scope of the article is limited to the management of the adult patient without the mental capacity to consent to medical treatment, which for the purpose of this article, in Ghana, refers to any individual aged 18 years or older who lacks the mental capacity.

The legal provisions and considerations for obtaining consent for treating the 'minor' will be dealt with in a separate article.

A changing world and consent to medical treatment

The world is increasingly becoming smaller as interactions between people from different parts of the

world increase. Issues that previously posed no problems to medical practice in Ghana are beginning to, and may continue to pose dilemmas as they become dilemmas for medical practitioners in other countries, and also as medical litigation increases in Ghana^{9, 10}. It is interesting to note that until nearly thirty years ago the question of the legality of treating patients who lack mental capacity to consent to medical treatment was not an issue that many gave much thought about even in some developed countries. Doctors and family simply went ahead and treated such patients on the basis of what the doctor thought best¹¹. Now, with increased recognition by society of individual freedoms and liberty¹², the question of who provides consent for the patient who lacks the mental capacity has presented legal disputes to the courts in some countries¹³. It is likely to do the same in Ghana sooner or later. It is important, therefore that the doctor is aware of the legal provisions in Ghana for treating such patients. Although this article provides general guidance to the doctor on treating the patient without capacity to consent to medical treatment, it is not meant to replace legal advice on the issue if required.

Legal provisions for treating patients who lack mental capacity in Ghana

Currently, in Ghana, Article 30 of the 1992 Constitution of the Republic of Ghana is the legislation that makes provision for consent to medical treatment in the adult patient without the ability to provide his or her own consent. Article 30 of the 1992 Constitution states that:

'A person who by reason of sickness or any other cause is unable to give his consent shall not be deprived by any other person of medical treatment...by reason only of religious or other beliefs'.

This legislation recognizes that there may be situations where individuals may lack the capacity to provide their own 'consent' to medical treatment. What it fails to do, however, is provide details on how the determination of the inability to provide 'consent' should be made, other than say that the individual is unable because of sickness. If confirmed that the patient indeed lacks the capacity to provide his or her own 'consent' to medical treatment, the legislation does not say who provides 'consent' on behalf of the patient. It has also not taken into account the fact that

Corresponding Author: Adwedaa EO

Cypress Regional Hospital, 2004 Saskatchewan Drive, Swift Current, SK, S9H 5M8, Canada

Email Address: ejoaa@doctors.org.uk

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sometimes treatments may not be in a patient's 'best interest', and does not, therefore, provide for how the 'best interest' of a patient should be determined.

As the law stands, any dispute involving the authorization of treatment in a patient without the mental capacity to provide his or her own consent in Ghana is likely to be resolved in case law. Issues such as; whether or not the patient possesses the appropriate mental capacity to provide his or her own consent, how the determination of 'capacity' is made, who provides consent if the patient is deemed to lack 'capacity' and what constitutes the patient's 'best interest' may be raised in the courts.

The Patient Charter¹⁴ and the Code of Ethics of the Ghana Health Service¹⁵ make some provision on the matter which the courts may interpret in the context of a particular situation. Although The Patient Charter of the Ghana Health Service provides that 'recognized' and 'accredited' individuals can make decisions on behalf of other adults who are incapable of making their own decisions, it does not provide guidance on how the 'recognized' and 'accredited' individuals should make those decisions, other than that the decisions must be in the interest of the patient. When dealing with issues without specific clarification in legislation or precedents in Ghanaian law, Ghanaian judges just like judges in other common law jurisdictions refer to precedents from other common law jurisdictions such as the UK, South Africa, Australia, USA, and Canada¹⁶ in making their rulings.

What principle should guide decision-making for the patient without mental capacity?

The principles that have been applied to make healthcare decisions for adults without capacity elsewhere include 'best interest'¹⁷, and substituted judgment¹⁸. Best interest requires that decision makers consider the overall welfare of the patient and make a decision in accordance with that, whereas 'substituted judgment' requires an attempt at ascertaining what the patient would have chosen were he or she able to make the decision himself or herself¹⁹. Interestingly in the determination of 'best interest', there is a requirement to make a reasonable effort to ascertain as far as possible what the patient without 'capacity' would have chosen or done.

In the UK, the law on consent to medical treatment is such that no other person, unless granted such powers by the court can provide lawful consent for another adult, although health care professionals can provide treatment to such a patient in the patient's 'best interest'^{21 22}. In that jurisdiction not even the next of kin or other family members, can provide lawful consent for the medical treatment of an adult who is incapable of providing his or her own consent to medical treatment. The Mental Capacity Act 2005 in England and Wales, and the Adults with Incapacity (Scotland) Act 2000 currently provide regulation on the

issue and guidance to doctors and others as to how to go about providing lawful treatment to patients who lack the capacity to provide their own consent to medical treatment in a way that respects the patient's autonomy and dignity. In other countries, such as Canada^{23, 24, 25, 26, 27} and some states in the USA²⁸, the law allows the next of kin and recognized others such as spouses and other family members to make decisions on behalf of adults who lack mental capacity to do so. In these jurisdictions the substitute decision maker is expected to make the decision for the patient based on the principle of substituted judgment or if they are unaware of what the patient would want in the particular situation, to make the decision based on the 'best interest' of the patient. The Health Care Consent Act, together with similar Provincial Acts, regulate the provision of care to patients who lack the capacity to do so and provide guidance for health care and other professionals in this area in Canada.

An important development in health care law in Ghana is the enactment of The Mental Health Act 2012²⁹. This Act provides regulation for the management of patients with mental illnesses in a way that respects the autonomy and dignity of individuals with mental illnesses. It makes provision for treating mental illness in patients with mental illness without the capacity to provide consent. It provides for compulsory detention and treatment if the patient is deemed to lack the capacity to consent to treatment of his or her mental illness. It does not however, make provision for treating conditions other than mental illnesses, such as a surgical operation, in mentally ill patients who lack the capacity to provide consent for such treatment. Many mentally ill patients do not lack the mental capacity to provide consent for their medical treatment. A number of patients who lack the mental capacity to consent to medical treatment do not suffer from a mental illness. The Mental Health Act 2012 although very useful for managing mental illness, does not provide the solution for dealing with patients without a mental illness who lack the capacity to provide their own consent to medical treatment.

It may be time for the Ghanaian parliament to consider a Mental Capacity Act in Ghana or a similar Act to provide regulation and guidance on the matter. Until such time that such a legislation is enacted it may be prudent to revise the Patient Charter of the Ghana Health Service to include detailed guidance on how to go about the management of the patient who lacks the mental capacity to provide a valid consent to medical treatment. Alternatively, the Medical and Dental Council of Ghana could produce a guidance document on the issue.

Determining the lack of mental capacity

As there is no specific guidance in the law on how mental capacity is determined in Ghana in relation to 'consent to medical treatment' one has to look to how other countries with similar jurisdictions to the

Ghanaian legal jurisdiction determine mental capacity in relation to consent to medical treatment. In other common law jurisdictions such as the UK and Canada, a person is said to have capacity to consent to medical treatment if he or she is capable of understanding the information relevant to making a decision about the treatment and able to appreciate the reasonably foreseeable consequences of a decision or a lack of a decision. He or she must be able to weigh the relevant information and thus the competing factors in the process of arriving at his or her decision to accept or refuse treatment. A person lacks capacity in relation to a matter if at the material time he or she is unable to make a decision for him or herself in relation to the matter because of an impairment of or disturbance in the functioning of the mind or brain. A person is unable to make a decision for himself or herself if he or she is unable to understand the information relevant to the decision, to retain the information, to use or weigh that information as part of the process of making the decision, or to communicate his or her decision (whether by talking, using sign language or any other means)³⁰. Generally, a doctor may assume that a patient is capable of providing his or her own consent to medical treatment unless there are reasonable grounds to believe otherwise. Reasonable grounds could be something in the patient's history or behaviour that would make the doctor question the patient's capacity to consent. It is however important to note that an unwise decision by the patient does not necessarily imply lack of capacity to consent³¹. In general, if a patient knows who and where he or she is, what medical intervention is being proposed, and the consequences of the decision he or she is being asked to make, it is safe to assume that he or she has capacity³². Illiteracy and a language barrier per se do not imply a lack of capacity. It is also important to note that the lack of capacity may be temporary or permanent. It is not static and it is specific to the situation or treatment in question. It can change over time and be different depending on the nature and complexity of the specific treatment decision. What is determined in relation to consent to medical treatment is whether the patient has the ability to understand the nature and effect of the particular treatment being proposed, and not whether 'globally' he or she has the capacity to make decisions.

The Patient Charter of the Ghana Health Service which requires that patients are provided with adequate and accurate information about their health condition and their consent obtained prior to treatment, also provides that other 'accredited' and 'recognized' individuals can lawfully authorize treatment on behalf of another adult patient who for whatever reason is unable to provide consent to medical treatment, provided that the treatment is in the patient's interest.

Determining a patient's best interest

Best interest in relation to consent to medical treatment is very difficult to determine because it is not limited only to 'medical best interest'. It is generally accepted that the doctor may proceed to treat a patient without the capacity to consent to treatment in an emergency situation in the 'patient's best interest', which in an emergency situation is often to save the patient's life or prevent the patient from coming to serious harm. Best interest in the non-emergency situation however is not always easy to determine. For example, although it is a crime in Ghanaian law to have sexual relations with a lunatic, criminals do exist and women with severe mental disability could be impregnated. The family of a patient with mental disability who are concerned about her getting pregnant may present her to a doctor to get her sterilized to potentially stop her becoming pregnant³³. An argument could be raised as to whether surgical sterilization is the best course of action and whether that is in the best interest of this patient. The dilemma then is how should the 'best interest' decision in this instance be made?

The Mental Capacity Act 2005 in England and Wales, and The Adult with Incapacity (Scotland) Act 2000 provide very helpful principles on how to determine a patient's best interest, which in my view and in the view of the Medical Protection Society of the UK³⁴ are almost universally applicable, regardless of one's country. It is these principles that I outline next.

The key focus in best interest determination, as has been alluded to by the Medical Protection Society in the UK, is that the focus should be on what the patient will consider his or her best interest, not what the doctor would consider his or her best interest if he or she were in the same position. In trying to determine the 'best interest' of a patient, the doctor should encourage as much as possible the patient without capacity to take part in the decision making and make reasonable efforts to improve the patient's capacity to do so. He or she should try as much as possible to identify all the things that the patient would take into account if he or she were making the decision himself or herself. The doctor should try to ascertain as much as possible the views of the patient which may include his past and present wishes and feelings which may have been expressed either in writing, behaviour or habits, any beliefs and values such as religious, cultural, political or moral beliefs or any other factors that would be likely to influence the decision in question if the patient were making the decision for himself or herself. The doctor should not make any assumptions about a patient's 'best interest' simply on the basis of the person's age, appearance, condition or behaviour.

The doctor should not make assumptions about the person's quality of life and he or she should not be motivated in any way by a desire to bring about the death of the patient. The doctor needs to consider whether the patient is likely to regain capacity at any stage, such as after initial treatment, and if so whether the other decisions can wait until then in order to give the patient the opportunity to make it or at least participate in it. If it is practical and appropriate to do so, the doctor should consult other relevant people who know or have an interest in the patient for their views on the patient's best interest. The doctor may also seek information from them about the patient's feelings, wishes, beliefs and values. In particular, the doctor may consult any person previously named by the patient as someone to be consulted on the issue in question or similar issues. He or she may also consult anyone engaged in caring for the patient, close relatives, friends and anyone with an interest in or powers to intervene in the welfare of the patient. Anybody appointed by a court to make decisions on behalf of the patient may also be consulted. When consulting, the doctor should remember that the patient still has a right to keep his affairs private and therefore it will not be right to share every piece of information with everyone.

The decision or treatment should be the most effective option that is least restrictive of the patient's rights. If the patient has never been competent and his wishes and feelings are unknown the 'best interest' may be assumed to be the same as that of the 'reasonable person'. In addition the proposed intervention must be necessary and beneficial to the patient, and must be the minimum necessary to achieve the purpose.

If substitute decision makers are making the decision on behalf of the patient, as the Patient Charter of the Ghana Health Service allows, their decision making should follow the same pattern as outlined above and the doctor may need to guide them as they make the decision to ensure that the patient's best interest is served.

Conclusion

In conclusion, to treat a patient without the mental capacity to consent to medical treatment, the doctor needs to make a determination that the patient lacks the capacity. Then he or she should request a 'recognized' or 'accredited individual' to make a decision for the patient, whilst ensuring that the decision is in the patient's best interest. The doctor may go ahead and treat the patient in the patient's best interest without consent in an emergency.

A patient lacks the mental capacity to consent to treatment if he or she is unable to understand, retain and weigh the information provided to him or her in coming to a decision, or is unable to communicate his or her decision. Acting in a patient's best interest means making a reasonable effort to ensure that

proceeding with the proposed treatment is what the patient would like if he or she were able to make the decision himself for herself. Best interest also requires that the proposed procedure is beneficial to and consistent with the overall welfare of the patient. It also requires that the procedure is the minimum necessary to achieve the purpose of the treatment.

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