Defining mental capacity and power of attorney

Jonathan Ryan and Caroline Williams look at mental capacity, making patients wards of court and granting power of attorney

A 63-YEAR-OLD GENTLEMAN was recently bought into the surgery by his younger brother and his wife. Following their return from abroad they found that the man, Mr FM, was no longer at home but had been brought into the care of the local psychiatric services and was living in hostel accommodation. This had happened much to the dismay of his immediate family who couldn’t understand how such an event had happened. His younger brother, Chris, called him every week in order to see how he was, and would be given the cheery reply of “I’m fine” without fail.

Concerns had been raised in relation to Mr FM’s personal care, which had been neglected despite the efforts of the community nurse and community psych team. Additionally, Mr FM had been approached by an individual who had suggested buying the house and land, both of which legally belonged to Mr FM, for one-tenth of its true value. The family were concerned that Mr FM would be “taken advantage of”. They also worried about his last will and testament – was he mentally capable of making a will? Should someone be given power of attorney? And what was the difference between power of attorney and enduring power of attorney?

Mental capacity

Mental capacity relates to a person’s ability to make a decision. Unfortunately, there is no clear-cut diagnostic test which will definitively show that a patient lacks capacity, as capacity is applicable to the decision being made at hand. For example, a person may have the capacity to decide if they want tea or coffee for breakfast in the morning, yet this does not necessarily mean that they have the capacity to decide how best their estate may be divided in a will.

The Medical Protection Society (MPS UK) provides guidelines in relation to the assessment of capacity, stating that if you believe an individual lacks capacity then it must be demonstrated – it should be shown that it is more likely than not that the person lacks the capacity to make a specific decision when they need to.

The decision on whether a person lacks capacity should not be made on a person’s appearance, age or any aspect of their behaviour. Additionally, it should always be assumed that a person has capacity, as this will allow a fair assessment and avoid any undue prejudice.

In order to demonstrate capacity a person must be able to make a decision. In order to do this a person must:

- Understand that there is a decision to be made, having been given the information in relation to the decision, as well as understand the consequences of the decision
- Be able to retain the information provided long enough for a decision to be made
- Apply the information provided in relation to making a decision, eg. they should be able to weigh up the pros and cons of the decision to be made
- Communicate their decision.

It should not be assumed that because a patient is only able to retain information for a short period of time that they cannot make a decision. All findings in relation to the above should be noted in the patient’s records carefully.

Mental Capacity Bill

The main purpose of the Mental Capacity Bill is to reform the existing wards of court system in so far as it applies to adults, and effectively replace it with a modern statutory framework governing decision-making on behalf of persons who lack capacity. The Bill will replace the Lunacy Regulation (Ireland) Act 1871, which is currently the chief legislation in this area.

A fundamental change from existing legislation proposed by the Bill is in relation to what constitutes lack of capacity. The focus of capacity will be on the particular time when a decision has to be made and on the particular matter to which a decision relates.

This is in contrast to the prior view that if a patient is mentally incapable of making a single decision, they are incapable of making any decision or any legal transaction.

The Bill will focus on principle, in keeping with the Law Reform Commission’s recommendations, with the guiding principle being that any act done, or decision made, on behalf of a person (who is deemed to lack capacity) is made in that person’s best interest. Additionally, the Bill further provides that any act or decision made on behalf of another is made in such a way to ensure that they are minimally restrictive to that person’s rights.

The Bill establishes that when a person is assumed to have capacity, then no decision will be made on behalf of that person until all steps in helping them reach a decision have been taken without success. When this avenue has been exhausted, the Bill provides that the court (or guardian appointed by the court) will act as a substitute to make decisions on that person’s behalf.

Testamentary capacity

A will is a witnessed legal document indicating the distribution of the deceased’s property and possessions (called their ‘estate’) after death. It is generally drawn up by a solicitor and is witnessed and signed by two witnesses, who themselves cannot gain from the will at the time of their
attestation. Another criterion for making a legally binding will is having a sound mind at the time of making.

Testamentary capacity is the legal term used to describe a person’s legal and mental ability to make a will. In order to make a valid will the testator must be aware of:

- The extent and value of their property
- The persons who are the natural beneficiaries
- The disposition they are making
- How these elements relate to form an orderly plan of distribution of property.

**Power of attorney**

A power of attorney allows the appointed attorney to make a wide number of decisions on the donor’s behalf in relation to financial affairs, business and estate. Two types of power of attorney exist under Irish law:

- General power of attorney: This power ceases once the donor becomes incapacitated
- Enduring power of attorney: This power takes effect once the donor becomes incapacitated

A general power of attorney can be created when the necessary legal document is signed by the individual (the donor) or at their direction, while in the presence of a necessary legal document is signed by the individual (the donor).

**Ward of court**

A ward is the legal term use to describe an individual under the placement of a legal guardian. When a person becomes unable to manage their assets due to mental incapacity an application may be made to the courts for the individual to be made a ward of court.

Once an application is made the court must make a decision as to whether the person is able to manage their assets or their own benefits (and as applicable, the benefit of their dependents). If it is decided that they are incapable, then a committee is appointed to control the assets in the best interest of the ward.

Application involves a petitioner asking the High Court to hold an enquiry in relation to the person (known as the respondent) to determine whether the said person is of unsound mind and also to ascertain whether they are capable of managing their own person or property. Most commonly the applicant is made by a family member.

Formal application is made through a solicitor as the petitioner must sign an affidavit and must include the opinion of two doctors (one of these doctors is usually but not necessarily a psychiatrist). Alternatively, if an individual does not want to be involved in the application process, the Registrar of Ward of Courts may be contacted to initiate proceedings. In either method of application the following information must be provided:

- Information in relation to their current medical condition
- Information about their family and next of kin
- Information regarding their assets as well as their income.

Once this information has been provided and a formal application is made, the president of the High Court will decide whether or not an inquiry must be made. If it is, the proposed ward is examined by a doctor appointed by the High Court.

**Conclusion**

In relation to Mr FM, a consultant psychiatrist had previously reviewed the patient. Having carried out a full evaluation it had been determined that he was unable to care for himself independently and an application had been made that he become a ward of court.

Jonathan Ryan is a third year registrar with the Eastern Regional GP Training Programme and Caroline Williams is a registrar in age-related healthcare at Tallaght Hospital, Dublin

Reference on request