

# Ethical, professional, and legal obligations in clinical practice: a series of discussion topics for postgraduate medical education

## Topic 2: consent and legal competence

D M Gore

*This is the second discussion topic in a series of five dealing with ethical, professional, and legal obligations of clinical practice. Junior doctors tend to lack confidence in these subjects, and thus I organised a series of informal discussions in our surgical unit on which these articles are based. The sessions were prepared with reference to non-academic literature readily available from the General Medical Council (GMC) and the medical defence organisations. While our unit dealt with these issues from a surgical perspective, the obligations of clinical practice apply to all practitioners and the series could be easily modified for other clinical specialties.*

When a patient is able to comprehend neither the nature, risks, nor alternatives of a procedure, that patient is incapable of giving informed consent and is considered legally incompetent. These difficulties may arise in adults in acute or chronic confusional states and in children.

A adult patient's autonomy must be respected: a previous diagnosis of confusional state or learning disability never excuses the doctor responsible from assessing a patient for capacity to give informed consent. In cases where legal incompetence is clear, it is a common misconception that consent can be sought from the next-of-kin. A person over 18 can have no proxy for consent to medical treatment in England, Wales, and Northern Ireland (the law is slightly different in Scotland).<sup>1</sup> Therefore the next-of-kin has no legal right to either give or refuse approval for a relative's medical treatment. Rather it is well established in case law that a doctor acting in good faith may proceed with whatever is in the patient's best interests, and this principle is moreover a professional obligation endorsed by the GMC.<sup>1,2</sup> Next-of-kin should nevertheless normally be kept informed of the nature and risks of any procedures which are planned. Their views should be sought and any difference of opinion explored. Due consideration should be given to the feelings of relatives and carers; lack of communication is at the root of most complaints.

### What if the patient's best interests are not clear?

The views and input of family and carers are particularly important in this case. Their views should be considered along with those of involved healthcare professionals (general practitioner, district nurse) in assessment of a patient's quality of life and best interests.<sup>1</sup>

### Should a consent form be used?

Problems arise when there is conflict among relatives or when they object to a procedure which is clearly in an adult patient's best interest. While these situations are uncommon, they do occur. The apparently benign transgression of having next-of kin sign patient consent forms as the supposed proxy should be avoided; if that is the prevailing unit practice there will come a time when proxy consent is sought in volatile circumstances. If proxy consent is refused, the doctor is still bound ethically, professionally, and legally to proceed in the patient's best interests: seeking relatives' explicit written consent yet ignoring their ensuing refusal will cause much resentment. There are various alternatives to using a patient consent form for documentation (see case 1 below).

### Patients "under section"

If the patient is not in a confusional state then his/her autonomy must be respected. The Mental Health Act 1983 does not permit non-psychiatric procedures without consent.

### Case 1

Mrs C is 78 and severely demented. She is incapable of any daily activity, does not recognise anyone, and lies curled up in bed all day. Her right leg is gangrenous and seems to be very painful. She has been admitted for above-knee amputation. No relatives are present. What ought be done about the consent form?

● It would seem that an amputation is in the patient's best interests in terms of pain control and ease of nursing. Mrs C is legally incompetent and so the operation ought to proceed in accordance with the best interests principle. Nevertheless, as good practice requires, reasonable efforts should be made to advise the patient's next-of-kin beforehand. There is no place for the signing of a consent form by the next-of-kin. If a consent form must follow the patient to theatre the surgeon should write upon it: "PATIENT LEGALLY INCOMPETENT, NO CONSENT AVAILABLE. PROCEDURE TO BE DONE IN PATIENT'S BEST INTERESTS. NEXT OF KIN INFORMED". Alternatively a form declaring legal incompetence such as that in Appendix C of the Medical Defence Union's *Consent to Treatment* should be used.<sup>2</sup> Our group felt that a written and signed statement of acquiescence on the part of the next-of-kin is also desirable. This should be recorded separately in the notes and should not be documented on a patient consent form lest this perpetuate confusion.

Craigavon Area  
Hospital, Northern  
Ireland  
D M Gore

Correspondence to:  
Mr D M Gore, Department  
of Surgery, University of  
Liverpool, 5th Floor UCD  
Building, Daulby Street,  
Liverpool L69 3GA, UK  
dmgore@liverpool.ac.uk

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## Children

Persons less than 18 years old may be legally competent. The Family Law Reform Act 1969 states that an individual can give consent to medical treatment at 16 years old. However, if an individual of 16 or 17 is unable to give informed consent on account of a confusional state or learning disability, a parent or guardian must give consent to the procedure. Since the Gillick case a child aged less than 16 can give his/her own informed consent for treatment if he/she demonstrates a clear understanding of the nature and risks of the treatment. If this is so then the individual is "Gillick competent".<sup>2</sup> Likewise he/she can insist on confidentiality.

If a minor is legally incompetent, written informed consent of a parent/guardian should be obtained. If the parent/guardian is distant, repeated and documented oral consent by telephone is satisfactory.

### WHAT IF THE CHILD IS UNWILLING?

An unwilling young child may be coerced into having a procedure for which a parent/guardian gives informed consent and which is manifestly in the child's best interests. This conflict should be avoided where possible by counselling and persuasion lest the child be imprinted with a dread of hospitals and doctors! Generally if the procedure is not urgent it should be deferred until such a time as the child is agreeable.

### WHAT IF PARENTAL WISHES CONFLICT WITH BEST INTERESTS?

If the parent/guardian refuses consent for a vital procedure for a legally incompetent child, careful consideration is necessary. If the procedure is clearly in the child's best interests and indicated as a matter of urgency then doctors should seek legal advice if time permits. There may be a case for a legal sanction which overrules the parents. If the procedure is truly an emergency and needs to be done within seconds or minutes, the doctors must make a judgment there and then.<sup>2</sup>

### PARENTAL RESPONSIBILITY

The term parent/guardian refers to an individual with parental responsibility as designated in the Children Act 1989.<sup>2</sup> Married parents both have parental responsibility, while

only the mother has automatic parental responsibility if the parents are unmarried. The father or other persons may acquire parental responsibility within the terms of this act by agreement with the mother or by court order.

### Case 2

Damien is 11 years old and has appendicitis. He needs it out—he has a fever of 38.1°C and has severe tenderness in the right iliac fossa. Mum and Dad left before you arrived. The theatre porter is waiting. Should you proceed?

- No. Although the procedure needs to be done urgently this is not a case requiring action that minute and therefore you ought to try to contact the parents, advise them of the necessity and get oral consent at least, confirmed by another doctor or nurse. The appendicectomy should be deferred until this is done, or until all reasonable efforts have been made.

### Case 3

Sharon is 14 years old and presents with a foreign body in her rectum, self inserted. Her elder sister, Karen (16), is present and both are adamant that their parents should not be contacted. Sharon needs a general anaesthetic to have the foreign body removed. Karen offers to sign a consent form for Sharon. Is this acceptable?

- No. Sharon should be encouraged to have her parents told that she is in hospital. If, however, she is adamant and Gillick competent then her own consent is acceptable and her request for confidentiality must be respected. There is no place for Karen to sign a consent form—the Gillick ruling does not make allowance for anyone to act *in loco parentis* if the parents have not been informed.

With thanks to Mr C Weir FRCS and Mr I Stirling FRCS, Craigavon Area Hospital.

1 General Medical Council. *Seeking patients' consent: the ethical considerations*. London: GMC, 1998.

2 Medical Defence Union. *Consent to treatment*. London: MDU, 1997.