General Osteopathic Council

Obtaining Consent

Patients' capacity to give consent: guidance for osteopaths practising in Scotland

Effective from 17 October 2013

Contents

1. Introduction

1.1 The law on consent is complex and varies between the different countries of the United Kingdom (UK). **This guidance is for osteopaths practising in Scotland**. Separate guidance is available for osteopaths practising in other parts of the UK.

1.2 This guidance expands upon that given at Standard A4 of the *Osteopathic Practice Standards* (OPS). It is an extension of the guidance given at paragraphs 11, 13 and 18, which support Standard A4. It has the same status as that guidance and should always be read in conjunction with the full guidance provided in the OPS.

1.3 Standard A4 requires you to have your patient's valid consent before you examine or treat your patient. For the consent to be valid it must be given by a patient who has the capacity to consent.

1.4 On occasion, however, you may be asked to examine or treat a patient who does not have the required mental capacity to consent. This may be because of the patient's age or illness.

1.5 The law properly provides a number of safeguards for patients who fall into this category and need medical care. This document explains this law as it relates to the practice of osteopathy in relation to:

a. examining and treating adults who may not have the capacity to consent

b. receiving consent for the examination or treatment of young people and children.

1.6 This guidance cannot cover all eventualities. You may occasionally need to supplement this guidance with full independent legal advice.

1.7 As the law may change, this guidance will be provided in an electronic form only. The current and up-to-date version will be available on the General Osteopathic Council's website, www.osteopathy.org.uk

2. Adult Patients and Capacity

2.1 The presumption of capacity

2.1.1 'Capacity' refers to the ability of your patient to understand and retain information that is relevant to his or her condition and the treatment that you are proposing.

2.1.2 It also includes the ability of the patient to weigh the various options available (including the consequences of not having treatment) and to make decisions about his or her treatment.

2.1.3 A person with capacity has the right to refuse treatment. You must respect this decision even if you believe treatment would be beneficial to that person.

2.1.4 A person with capacity may withdraw consent to treatment at any time.

2.1.5 The starting point is a presumption of capacity.

2.1.6 Patients aged *16 years and over* have the capacity to make their own decisions which have legal effect, unless they lack the appropriate mental capacity[1].

2.1.7 Although not a legal requirement, and unless the patient specifically wants to exclude them, it is good practice to encourage 16 and 17 year olds to involve their family in the decision they make about treatment.

2.2 Lack of capacity

2.2.1 The law sets out certain circumstances in which your patient is deemed to lack capacity.

2.2.2 Your patient will not have capacity if he or she is incapable of acting; or is incapable of making, communicating, understanding or remembering decisions[2].

2.2.3 The cause of the 'incapacity' must be a mental disorder or an inability to communicate because of a physical disability (unless the disability can be made good by human or mechanical aid).

2.2.4 The definition of incapacity includes adults who are unconscious.

2.3 Assessing capacity

2.3.1 When assessing a patient's capacity to consent, you should make your assessment on the patient's ability to make a decision about the specific intervention you are proposing.

2.3.2 Your patient may be capable of making a decision on some aspects of their healthcare, but incapable in relation to other more complex aspects.

2.3.3 Your assessment should be objective and you should bear in mind the principle that, where possible, patients should be assisted to make their own decisions about their healthcare.

2.3.4 Care should be taken not to underestimate the capacity of a patient with a learning disability. Many people with learning disabilities have the capacity to consent if time is spent explaining to the individual the issues in simple language, using visual aids and signing if necessary.

2.3.5 Your patient's capacity may be temporarily affected by factors such as shock, panic, confusion, fatigue, pain or medication. The patient's capacity may also be affected by illegal drugs or alcohol.

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[1] Section 1 of the *Age of Legal Capacity (Scotland) Act 1991*
[2] The *Adults with Incapacity (Scotland) Act 2000*

2.3.6 In these circumstances you should not assume that the patient does not have capacity. Instead it may be appropriate to defer the decision until the temporary effects subside and capacity is restored.

2.3.7 Decisions by a patient that are unusual or are not what you would have chosen to do if you were the patient, do not mean that the patient lacks capacity.

2.3.8 You should ensure that your assessments, decisions and conclusions are based on all available evidence and are recorded in your patient's notes.

2.4 Treating adult patients who lack capacity

2.4.1 If you conclude that your patient lacks capacity, you cannot lawfully treat that patient unless the treatment is authorised by a Certificate of Incapacity[3].

2.4.2 Certificates of Incapacity can only be issued by a medical practitioner (such as the patient's general practitioner) or by certain other categories of healthcare practitioner set out in legislation who have had their knowledge of the assessment of capacity certified by a prescribed Scottish further or higher education institution or by NHS Education for Scotland[4].

2.4.3 A template for the Certificate can be obtained from: www.scotland.gov.uk/Resource/Doc/254430/0086221.pdf

2.4.4 Before you decide whether or not to commence treatment, it is good practice to contact the prospective patient's general practitioner and any other relevant healthcare professional to ensure that the Certificate of Incapacity is signed by the most appropriate health care professional.

2.4.5 When liaising with another health care professional about the Certificate of Incapacity, you should provide an outline of the consultation process, the proposed intervention and expected outcome, the treatment protocols to be followed, and an estimate of the number of consultations likely to be required for the prospective patient.

2.4.6 You must exercise your professional judgement in deciding whether or not to provide treatment to adults who lack capacity, bearing in mind the five principles set out below, which the law[5] requires you to observe.

2.4.7 The principles start with the policy of 'no intervention', unless this will benefit the adult and the benefit cannot otherwise be achieved.

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[3] Section 47 of the *Adults with Incapacity (Scotland) Act 2000*

[4] The *Adults with Incapacity (Requirements for Signing Medical Treatment Certificates) (Scotland) Amendment Regulations 2012 SSI 2012/170*.

[5] Section 1 of the *Adults with Incapacity (Scotland) Act 2000*

2.4.8 The principles are that all decisions made on behalf of a patient with incapacity should:

a. be for the benefit of the patient

b. be the minimum necessary to achieve the desired benefit

c. take into account the patient's present and past wishes

d. take into account the views of the nearest relative, primary carer, proxy and relevant others, where it is reasonable and practicable to do so

e. encourage the patient to exercise residual capacity.

2.4.9 If you are unsure about how the law applies in a particular situation, you should consult your defence body or professional association, or seek independent legal advice.

3. Children aged 15 and under

3.1 Assessment of capacity

3.1.1 A child may have legal capacity to consent to treatment if, in the opinion of a qualified medical practitioner attending the child, that child is capable of understanding the nature and possible consequences of the procedure or treatment[6].

3.1.2 Establishing whether or not a child has capacity to consent is a matter for professional judgment. This will involve consideration of factors such as:

a. the age and maturity of the child

b. the complexity of the proposed intervention

c. the likely outcome of the intervention

d. the risks associated with the proposed intervention.

3.1.3 Where it is established that a child has capacity, it is good practice to encourage the child to involve their family in the decision-making process.

3.1.3 The decision of a child with capacity regarding consent to treatment should be respected, even if it differs from the view of his or her parents.

3.2 Children without capacity

3.2.1 Where the child is not capable of understanding the nature of the intervention or its consequences, consent to treatment must be sought from a parent or guardian.

[6] Section 2(4) of the *Age of Legal Capacity (Scotland) Act 1991*

3.2.2 If the parent or guardian who has parental responsibility is not available and the intervention cannot be deferred until you can speak to them, a person who has care and control of the child, but has no parental responsibility, has the power to do what is reasonable in all the circumstances to safeguard the child's health, development and welfare.[7]

3.2.3 This provision does not apply to teachers and others who may have care and control of a child in school.

3.2.4 People who have parental responsibility include[8]:

Children child born before 4 May 2006	**Children born on or after 4 May 2006**	**In relation to children born on or after 6th April 2009, parental responsibility may be exercised by the following persons in addition to those mentioned on the left.**
If the child's mother and father were married to each other at the time of birth (or got married later), then both parents. If the child's mother and father are not married, then the child's mother only.	The child's mother. The child's father, if he was married to the mother at the time of birth (or got married later). Both parents provided that they have registered the child's birth together. The child's father, if he fills in a form called a Parental Responsibilities and Parental Rights Agreement (PRPRA) provided the mother agrees, or if granted parental responsibility and rights by the Court. Other people (such as grandparents, step-parents, aunts or uncles) if they are given parental responsibility and rights by a Court.	Where the child's mother was in a civil partnership at the time of treatment for assisted reproduction (e.g. IVF), the other party to the civil partnership is to be treated as a parent of the child. Where the child's mother was in a same sex relationship (but not a civil partnership) at the time of IVF, if the woman is registered as a parent of the child she will have parental responsibility.

[7] Section 5 of the *Children (Scotland) Act 1995*

[8] Part 1 of the *Children (Scotland) Act 1995*

4. Sources of further guidance:

- *Reference guide to consent for examination or treatment*, Second Edition (Department of Health) 2009
- *A Good Practice Guide on Consent for Health Professionals in NHS Scotland* (Scottish Executive Health Department), 2006
- *Code of Practice for Part 5 of the Adults with Incapacity (Scotland) Act 2000*
- *www.gov.uk/parental-rights-responsibilities/who-has-parental-responsibility*