



Obtaining Consent-Capacity to Consent – practical information

Introduction

1. This document has been designed to accompany the guidance set out in Obtaining Consent-Patient's Capacity to Give Consent.
2. The intention is to provide practical information to registrants on how they might deal with issues about a patient's capacity to give consent which arises within a clinical setting.
3. Obtaining consent is a fundamental requirement for the provision of osteopathic treatment.
4. As such, it is the registrant's responsibility to ensure that they comply with Standard A4 of the Osteopathic Practice Standards and that they are aware of the legal requirements for obtaining consent in the UK country in which they are practising.

Scenario 1

Mr Philip Caddenet, an existing patient of osteopath, Jana Daley, made an appointment with her, for his two-week old son. When she gave him a reminder call on the morning of the appointment, he tells her that that his son's crying was "depriving both of us of sleep and driving us mad."

Twenty minutes after the appointment time, the bell rings and a distraught woman who Jana has never met, staggers into her consultation room carrying a baby in a baby carrier. She says "I'm Lucy - Phil couldn't make it."

Jana explains that she needs to take a case history from Lucy and examine the baby. Lucy hands Jana the baby and slumps in a chair at the side of the room. She says "all I know is that he's hasn't stopped crying since day one. It's got to stop. Please just do whatever it takes to sort the problem out."

Jana begins to take a case history, but Lucy seems tired, distracted, and is difficult to gain information from. Eventually, Jana feels she has enough detail to proceed to examine the baby, and explains to Lucy what will be involved. She asks if Lucy has any questions, but Lucy says, "no – you do what you need to do". During the examination, Jana notices that Lucy's eyes are shut, and she has fallen asleep. She coughs to wake her, and explains what she thinks might be contributing to the baby's discomfort, talks her through the treatment options, and asks for consent.

Lucy seems rather distant and distracted still. "No problem", she says, "just sort him out".

What are the issues?

Jana's patient is an infant and therefore does not have legal capacity to consent to any examination or treatment.

Who is Lucy? Does she have the right to provide consent on behalf of the child to examination or treatment?

Even if Lucy does have the right to provide consent, might her capacity to provide this be temporarily affected by issues such as a lack of sleep? She does seem very distracted, and falls asleep during the examination.

What does the guidance say?

Where a child lacks capacity to consent, this must be sought from a person with parental responsibility¹

Osteopaths should ensure that it is the person with parental responsibility, who is giving consent on behalf of the child and that they:

- a. have capacity to consent to the examination and/or treatment
- b. are acting voluntarily
- c. are appropriately informed.

The child's welfare or best interests must be paramount.

How should Jana deal with the situation?

There are a number of steps that she should consider:

- Ask Lucy who she is, and seek clarification about whether or not she has parental responsibility for the child.
- Contact Mr Caddenet to clarify Lucy's involvement with the baby.
- Consider, even if she does have parental responsibility, whether Lucy is able to provide valid consent at this time. Has she sufficiently understood what Jana has explained to her? If Jana's judgement is such that Lucy may not have capacity, she must not treat the baby.
- Seek clarification about whether or not the woman really understands the treatment proposed, and the potential risks of such treatment.

¹ See the guidance for the relevant UK country for a list of persons who may exercise parental responsibility in a particular jurisdiction.

If in doubt, she should suggest that Lucy returns with the baby on another occasion.

In addition, if Jana has concerns for the safety of the child, she should consider:

- contacting Mr Caddenet and asking him to come and collect the child
- contacting social services or the police.

Prior to the appointment, it might have been useful for Jana to explain to Mr Caddenet that she would need to see documents confirming parental responsibility for the child, before she could undertake any examination or treatment. In future she might want to include a question as part of the appointment booking process to ascertain who will be bringing the child to the appointment.

Osteopaths should always remember to record their actions and conclusions (with reasons) as to a patient's capacity to consent or who is actually giving consent, in the osteopathic treatment records.

Scenario 2

Mr Lorenc, a gentleman who has moved to the UK recently, comes to see you. He is a senior citizen presenting with severe arthritis and aching neck pain.

You find the process of taking a history from Mr Lorenc rather difficult. Mr Lorenc seems to take quite a while to respond to any questions that you ask him, and when he does reply, he speaks very slowly.

You ask Mr Lorenc to remove some of his clothing and when he takes off his hat, you realise that he is wearing a hearing aid. As you continue with your examination, Mr Lorenc becomes increasingly erratic. He repeats some answers several times, and at times appears a little disorientated.

Slowly and carefully, you explain the treatment that you intend to provide and ask Mr Lorenc whether he is happy to go ahead. Mr Lorenc nods and smiles happily.

You begin the treatment.

Five minutes later, Mr Lorenc asks you what he is doing in your office.

What are the issues?

Does Mr Lorenc have capacity to consent, in the sense of being able to:

- a. understand and retain information that is relevant to his condition and the treatment proposed
- b. weigh the various options available (including the consequences of not having treatment)

c. communicate his decision (whether by talking, signing or any other means)

Does Mr Lorenc have a good understanding of English? Is an interpreter required?

Is Mr Lorenc's hearing aid working properly?

Is Mr Lorenc suffering from some impairment (whether temporary or permanent) which affects the way his mind or brain works, and which means that he is unable to make a decision?

What does the guidance say?

The starting point is a presumption of capacity.

In Scotland, your patient will not have capacity if he or she is incapable of acting; or is incapable of making, communicating, understanding or remembering decisions.

In the rest of the UK, the test is slightly different. A patient will be deemed to lack capacity if he or she is not able to understand and retain information; weigh the treatment options; or communicate their decision.

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

The patient may be capable of making a decision on some aspects of their healthcare, but not others.

In some circumstances, you may be able to examine and treat a patient who lacks capacity, if it is in their best interests to do so. The guidance sets out more detail on what matters should be taken into account in determining a patient's best interests.

In Scotland, patients who lack capacity may only be treated if such treatment is authorised by a Certificate of Incapacity issued by a doctor². In addition, the law in Scotland establishes a number of statutory principles which must be observed before deciding whether or not treatment should be provided to a patient who lacks capacity.³

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

How should I deal with the situation?

Seek to establish whether there are any difficulties arising from the hearing aid (is it on the correct setting?) or from language barriers.

² Section 47 of the Adults with Incapacity (Scotland) Act 2000

³ Section 1 of the Adults with Incapacity (Scotland) Act 2000

If ability to understand English is an issue, consider asking Mr Lorenc whether he would prefer to come back, accompanied by someone who can act as an interpreter.

Consider the use of more simple language, visual aids and signing.

If you assess Mr Lorenc as lacking in consent, you may wish to discontinue any treatment and consider referring him to another healthcare practitioner.

You should be cautious in deciding to treat a patient who lacks capacity, and in deciding who is best placed to make a decision on what is in the patient's best interests.

Consider asking Mr Lorenc to allow you to make direct contact with his GP, others involved in his medical care, and family members.

Consider seeking legal advice or advice from your professional body.

Always remember to record your actions and conclusions (with reasons) as to a patient's capacity to consent, in the osteopathic treatment records.

Scenario 3

You receive a telephone call from Ms Black. She says her son Steven has hurt his back playing rugby and the doctor has suggested that she should take him to an osteopath.

Ms Black turns up at the appointment and insists on being present during your consultation with Steven. She has a habit of speaking before Steven can, and intervening to answer questions that you ask him, on his behalf.

While you are examining Steven, Ms Black explains that she is not actually Steven's birth mother. However, her civil partner (who is Steven's birth mother) had to go to work today, and so Ms Black has come instead.

After making your diagnosis, you explain the treatment that you intend to provide to Steven, and the potential risks of such treatment. Ms Black felt that the risks of manipulation were too great and expressed her concerns. Ms Black declines treatment on Steven's behalf.

The next day, Steven turns up alone. He says he doesn't care what anybody else thinks, he's looked up HVT on Google briefly and fast-forwarded through a video he found on YouTube, and it all seems ok. In any event, he is very keen to get back to playing rugby as quickly as possible, and so wants to go ahead with the treatment.

What are the Issues?

How old is Steven? Has he reached the legal age at which consent can be given?⁴

If not, does Ms Black have parental responsibility and is she able to provide consent on his behalf?⁵

If Steven has capacity, can his wishes be overridden by Ms Black?

What does the Guidance say?

Young persons over the age of 16 are able to consent to medical treatment unless they lack capacity.

Children under the age of 16 may be able to consent if they have sufficient maturity and intelligence to enable them to understand what is involved in the proposed intervention or treatment.

However, in Scotland, a doctor must certify that the child is capable of understanding the nature and possible consequences of the procedure or treatment, before any treatment can be undertaken⁶.

The level of understanding required for different treatments may vary.

Establishing whether a child has capacity to consent is a matter of professional judgment. This will involve consideration of issues 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.

The criteria for capacity are the same as that for assessing capacity in adults.

It is good practice to encourage patients who are under 17 years of age to involve their family in decisions about their treatment.

In England and Wales, and in Northern Ireland, where a young person with capacity has been provided with appropriate information and voluntarily gives his or her consent to treatment, that consent cannot be overridden by a person with parental responsibility.

⁴ Young persons aged 16 years and above can consent to treatment unless they lack capacity. See section 8 of the Family Reform Act, 1969, England and Wales; section 1 of the Age of Legal Capacity Act (Scotland 1991); and section 4 of the Age of Majority Act (Northern Ireland) 1969.

⁵ See footnote 1 above

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

However, where a young person with capacity refuses consent to treatment, that decision may be overridden by a person with parental responsibility or by a Court in certain circumstances.

The legal position is less clear in Scotland, and you should seek legal advice.

How should I deal with the situation?

Prior to the appointment, it would have been useful to explain to Ms Black that you would need to see documents confirming parental responsibility for the child, before you could undertake any examination or treatment.

Where parental responsibility is claimed by a civil partner who is not a birth parent, the date of the child's birth will be a factor in determining whether or not the civil partner does indeed have parental responsibility.

It is important that you clarify the issue of parental responsibility at the outset of the consultation.

Consider asking Ms Black to wait outside while you consult with your patient. Or make it clear to her, that it is important for you to obtain answers and information directly from your patient.

You may wish to consider inviting Steven, Steven's birth mother and her civil partner to another appointment to discuss your proposed treatment plan and the risks of treatment.

In these circumstances, it might be appropriate to charge a fee for your time.

Only consider treating Steven if you are satisfied that he has capacity to consent and that his consent is fully informed and valid. In these circumstances, you should explain to him that it would be helpful to keep his parents informed of the situation, whilst acknowledging the confidentiality of the patient-osteopath relationship.

Consider obtaining legal advice or advice from your professional association.

Always remember to record your actions and conclusions (with reasons) as to a patient's capacity to consent, in the osteopathic treatment records.