Recommendations

Consent from patients who may have been seriously assaulted

The medico-legal guidelines and recommendations published by the Faculty are for general information only. Appropriate specific advice should be sought from your medical defence organisation or professional association. The Faculty has one or more senior representatives of the MDOs on its Board, but for the avoidance of doubt, endorsement of the medico-legal guidelines or recommendations published by the Faculty has not been sought from any of the medical defence organisations.

Introduction

A Forensic Physician (FP) has a responsibility to consider the issue of consent before undertaking an examination of a patient who may have been seriously assaulted. In the majority of cases the examination will have both therapeutic and forensic components, for example treating an injury as well as documenting it in detail for the purposes of a subsequent medico-legal statement.

The General Medical Council ‘requires doctors to be satisfied that they have consent from a patient, or other valid authority, before undertaking any examination or investigation, providing treatment, or involving patients in teaching and research.’ Doctors are expected to follow the detailed guidance on consent produced by the General Medical Council.¹ Failure to obtain consent for an examination, ‘whatever the motive, may constitute an assault for which the practitioner may incur liability for damages in the law of tort*, or may even constitute an offence in criminal law’.² Alternatively the patient (or their representative) may lodge a complaint with the General Medical Council.

In England and Wales FPs must work in accordance with the five statutory principles of the Mental Capacity Act 2005 (MCA 2005) as detailed in the Code of Practice. ³ The first principle is that all adults (aged 16 or over) must be assumed to have capacity to make decisions for themselves unless it can be established that they lack capacity. The second principle is that people must be given all appropriate help and support to enable them to make their own decisions or to maximize their participation in any decision making process. A person’s capacity to make a decision depends on them being able to understand and retain relevant information; they must then be able to consider that information as part of the decision-making process and communicate their decision.

These guidelines offer advice to FPs who are confronted with a situation where a person who may have been seriously physically or sexually assaulted lacks capacity to consent to a forensic examination. A delay in obtaining the relevant forensic samples could lead to a loss of material that might have assisted with the medical care of the patient and identification and apprehension of the assailant(s). In these circumstances, the FP has a responsibility to give due consideration to proceeding with a forensic examination without the consent of the patient. Such decisions will only be justifiable where there is strong supporting evidence that the patient has been seriously physically or sexually assaulted and that the examination is deemed to be in the best interests of that patient. Best interests are not confined to medical interests but encompass emotional, social and welfare considerations.
**Adults who lack capacity**

An adult (over 16 yrs) should not be considered to lack capacity unless:

- They have an impairment (temporary or permanent) of the mind or brain, or is there some sort of disturbance affecting the way their mind or brain works and;
- That impairment or disturbance means that the person is unable to make the decision in question at the time it needs to be made.  

Section 4 of the MCA requires the decision-maker to consider:

- Whether the individual concerned is likely to regain the capacity to make that particular decision in the future, and;
- If so, when that is likely to be.

**Temporary loss of capacity due to intoxication**

Patients who are intoxicated due to alcohol or drugs may temporarily lose their capacity. In such circumstances, the forensic assessment should normally be deferred until the patient’s capacity has returned. The period for the deferment will depend on the type, time, amount and quantity of the substances that have been consumed. It may be necessary to assess the patient repeatedly within a given period to determine if the patient’s capacity has returned. FPs may wish to remind police to consider using an early evidence kit.

**Serious injury**

On occasions patients are seriously injured during a physical or sexual assault and the ensuing injuries may result in loss of capacity (for example where the patient is unconscious).

In such circumstances it is often impossible to predict the likely duration of this incapacity. If the FP confirms that the patient lacks capacity to consent and believes this incapacity will persist for a considerable time, the forensic examination may be undertaken if the FP considers that it is in the best interests of the patient. In these circumstances the FP should:

1. Inform the consultant who is responsible for the medical care of the patient of the nature and purpose of the proposed examination to ensure that he/she has no objections to it being undertaken.

2. Consider speaking to people close to the patient** about the nature and purpose of the proposed examination in order to determine the person’s past and present wishes or feelings, beliefs and values so that these can be taken into account.  

3. Consider obtaining the views of other people** who are close to the patient as well as, if relevant, the views of an attorney or deputy.  

4. Document all of the above steps clearly in the medical records and record why the FP thinks the patient lacks capacity and the specific decision is in the patient’s best interests.

5. Ensure that the patient is informed what has been done, and why, as soon as the patient is sufficiently recovered to understand.
Mental disorder

Whenever possible, when asked to examine a patient with a mental disorder, the assessment of that person’s capacity to consent to the forensic examination should involve other relevant health professionals. If it is confirmed that the patient lacks capacity to consent, the forensic examination may only be undertaken if the FP considers that it is in the best interests of the patient. In these circumstances the FP should:

1. Inform the consultant who is responsible for the medical care of the patient of the nature and purpose of the proposed examination to ensure that he/she has no objections to it being undertaken.

2. Consider speaking to people close to the patient** about the nature and purpose of the proposed examination in order to determine the person’s past and present wishes or feelings, beliefs and values so that these can be taken into account.³

3. Consider obtaining the views of other people** who are close to the patient as well as, if relevant, the views of an attorney or deputy.³ Where the patient is an adult (over 18yrs), a family member is not able to consent or refuse on the patient’s behalf unless they are an attorney appointed by the patient under a pre-existing Lasting Power of Attorney.

4. Document all of the above steps clearly in the medical records and record why the FP thinks the patient lacks capacity and the specific decision is in the patient’s best interests.

5. Whenever possible have a family member or carer who knows the patient well present during the examination in order to facilitate communication. If the patient does not comply the examination must be stopped.

6. When relevant, ensure that the patient is informed what has been done, and why, as soon as the patient is sufficiently recovered to understand.

Children

Section 8 of the Family Law Reform Act, l969, allows for persons aged 16 or over to give informed consent to surgical or dental treatment. Although there is no decided legal authority it is presumed that this applies to examinations and assessments undertaken for forensic purposes.

The Law Lords have determined that ‘the ability of a child under the age of 16 to make his own medical decisions is evaluated according to chronological age, considered in conjunction with the child’s mental and emotional maturity, intelligence and comprehension⁴, this concept is known colloquially as Gillick competence.

If the child/young person (under 18 years) lacks Gillick competence to consent to the forensic assessment then consent is required from a person who holds parental responsibility for the child/young person.

If there is no one with parental responsibility available then there are a number of possible alternatives, namely:
1. The local authority may use the Children Act, 1989 to seek a court order to give them parental responsibility for the child (e.g. an Emergency Protection Order or Section 31 of the Children Act).

2. A relative or other person may seek a residence order and parental responsibility for the child or any person may seek a specific issue order with the leave of the Court.

3. There is the provision under Section 3(5) of the Children Act, 1989 for:
   ‘A person who –
   a. does not have parental responsibility for a particular child; but
   b. has care of the child to do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child’s welfare’.

However, lawyers advise caution with regard to using this section of the Act when the case is not urgent.

In all cases where the examination is carried out under the auspices of a court order the doctor should ask to see a copy of the order before conducting the assessment. This is because the order can contain details regarding the place and time of an examination, the person(s) to be present, the person(s) to conduct the examination, and the person(s) or authorities to whom the results should be given.

‘In England, Wales and Northern Ireland the law on parents overriding young people’s competent refusal is complex’ and the General Medical Council advises doctors to ‘seek legal advice if they think that treatment is in the best interests of a competent young person who refuses’.5

In practice it would be very difficult to undertake a forensic assessment without the co-operation of the child/young person and the Faculty of Forensic and Legal Medicine does not support the use of sedation to ensure compliance unless there are concurrent medical needs which require an examination under anaesthetic/sedation.

Doctors must always act in the best interests of the child and they cannot be compelled, by a parent, court or other person, to undertake an examination.

**Scotland:**

Here, legislation has gone somewhat beyond Gillick with the Age of Legal Capacity (Scotland) Act 1991, where it clearly states in section 2(4) that children under the age of 16 have legal capacity to consent to any surgical, medical or dental treatment or procedure so long as that child is capable of understanding the nature and consequences of the proposed treatment or procedure.

Importantly, this section protects the child’s rights to refuse examination or treatment (presuming he has capacity under the legislation) even when a Sheriff’s warrant has been granted or a children’s hearing makes a supervision requirement that the child submits to such an examination or treatment.

Under section 55 of the Children (Scotland) Act 1995, there is provision for a Child Assessment Order (CAO) to determine whether the local authority’s suspicion of abuse or neglect is justified. This may be used, for example, to authorise the medical examination of the child in...
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the face of parental opposition. However, the 1995 Act preserves the right of a child to consent to medication examination (s.90). Thus, as stated above, the wishes of a child who has the capacity to refuse cannot be overridden.

Release of information and forensic samples to police
Following a forensic examination of a person who lacks capacity the FP will need to consider whether to release details of the examination findings to the police or other appropriate agencies (e.g. social services). In addition they will also need to decide if they are going to give the samples to the police for analysis or store them securely (normally only possible in Sexual Assault Referral Centres) until the patient is able to consent to their release for analysis, or the police obtain a court order compelling the FP to release the samples. Again each decision will need to be made on a case by case basis and FPs must be prepared to justify their decisions.

Although, in common with all medical practitioners, FPs owe their patients a duty of confidence, they can disclose information to appropriate persons or authorities in the public interest if the benefits which are likely to arise from the release of information outweigh the patient’s interest in keeping the information confidential and society’s interest in maintaining trust between doctors and patients.

‘Disclosure of personal information about a patient without consent may be justified in the public interest if failure to disclose so may expose others to a risk of death or serious harm... Such a situation might arise, for example, when a disclosure would be likely to assist in the prevention, detection or prosecution of serious crime, especially crimes against the person.’

References
5. General Medical Council (15 October 2007) 0 – 18 years: guidance for all doctors. General Medical Council, London.

* Law of delict in Scotland
** The clinician must be mindful that it in some cases it may be a member of the family or ‘close’ friend who is the perpetrator. In other cases there may be sensitive information about an incident that the patient would not wish to be disclosed to friends and/or family. Therefore, the FP must decide whether it is in the patient’s best interests to speak to the available family etc.