

ONLINE SUPPLEMENT

Extract from the *Approved Medical Practitioners – Mental Health (Care and Treatment) (Scotland) Act, 2003 Training Manual: Section 12. Appendix – Significantly impaired decision-making ability*¹

Introduction

Significantly impaired decision-making ability (SIDMA) is not the same as ‘incapacity’ under the Adults with Incapacity (Scotland) Act 2000.

SIDMA occurs when a mental disorder affects the person’s ability to believe, understand and retain information, and to make and communicate decisions. It is consequently a manifestation of a disorder of mind.

SIDMA arises out of mental disorder alone; ‘incapacity’ can also arise from disease of the brain or impaired cognition, and can include physical disability.

SIDMA is not the same as limited or poor communication, or disagreements with professional opinion.

The vast majority of people with mental illnesses retain their ability to make decisions throughout the course of their illness. All adults are assumed to have a decision-making ability or capacity as a starting point.

The ‘Bournewood Gap’

This relates to an important case in English law in which a House of Lords decision to overrule a judgement that all patients incapable of offering consent had to be detained was itself overturned by the European Court of Human Rights. The ramifications of this reversal are still to reveal themselves, but the 2003 Act provides for application to the Tribunal in relation to unlawful detention of an informal patient.

Issues arising

The Millan Committee clearly stated that: ‘It should not be the function of mental health law to impose treatment on those who are clearly able to make decisions for themselves.’ Further information on the Millan Committee is available at www.scotland.gov.uk/Topics/Health/care/15216/1444.

The new law in Scotland recognises that patients with mental disorder may have impaired capacity which, while damaging their ability to make decisions, does not render them entirely incapable. For example, a mentally ill person may have significantly impaired decision-making ability with regard to his or her treatment plan, but might well be able to continue to manage his or her financial affairs competently.

English case law has been influential in this regard, particularly the case of *Re C* (1994). This determined that capacity could fluctuate, and that the essential components of capacity were an ability to:

- Comprehend information
- Retain information
- Believe the information presented
- Arrive at a choice based on the above, whilst understanding the implications of not agreeing to a particular suggested treatment.

That is the ability to reason and weigh evidence before arriving at a decision, and the ability to communicate a decision by talk, sign, or other means is also important.

It is well known that non-consensual emergency treatment can be administered under common law. In Scotland, however, this is under-developed and generally a defence of ‘necessity’ – in other words, that it was necessary to act in an emergency situation in the patient’s best interests – is invoked.

It is worth noting that significant impairment in decision-making ability is required only to be ‘likely’ for emergency and short-term detention orders. This means that the medical practitioner or AMP need only be satisfied that this criterion is met on the balance of probabilities (51% or more). The sophistication of the assessment of decision-making ability is, of course, dependent on the circumstances of assessment.

With a CTO, the Tribunal is required to be ‘satisfied’ that the individual in question has significantly impaired decision-making ability.

It is also worth noting that there is no precise threshold for significantly impaired decision-making ability. It is understood, however, to be more than just a deficiency in communication, or a disagreement with the treating professionals. As noted above, it is separate from incapacity, but is based on similar factors: an ability to believe, understand and retain information pertaining to treatment.