

Station Number

AFFIX CANDIDATE
LABEL HERE

CANDIDATE No:.....

Instructions for Candidates

Scenario

You have been asked to see Adam Jones, a 34-year-old man, by the orthopaedic team. He has a history of schizophrenic illness but has been well for a number of years, and is currently working.

He has been admitted with a fractured leg after being hit by a car. The orthopaedic surgeons want to take him to theatre to operate on his leg. He is refusing to have internal or external fixation and says that his leg will get better by itself.

Instructions

Interview him, and assess his capacity to make such a decision.

**PLEASE REMEMBER TO HAND YOUR IDENTITY LABEL TO THE
EXAMINER**

Station Number

AFFIX CANDIDATE
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Communication Skills: Assessing Capacity

CANDIDATE No:.....

Instructions for Patients

Answer questions based on the following scenario.

Do not volunteer information unless asked.

This station tests the candidate's ability to determine whether a patient has the capacity to make a decision about his or her medical treatment.

You are Adam Jones, a 34-year-old man.

Key Attributes

You are a young man, who has a little pain from your leg (making you a little uncomfortable), but is otherwise pleasant, cooperative, and willing to speak to the doctor. You are, however, a little aggrieved that the orthopaedic surgeons asked a psychiatrist to see you.

Key Dialogue

- The first thing that you should ask the candidate when you realise that they are a psychiatrist is, "Are you here to make me have surgery for my leg?"
- Your accident was caused by being careless and intoxicated with friends when out drinking in town. You were joking with friends at traffic lights, when you fell backwards into the path of a car which was pulling away.
- You don't want a general anaesthetic because you don't trust NHS surgeons to get it right. You have seen lots of TV programmes about medical errors. One of your friends had surgery and got an infection which required extensive plastic surgery. You don't want that.
- You have no particular paranoid or specific beliefs about your surgical team – you just don't trust them to operate. You don't mind being in hospital and are perfectly happy to stay in traction to see if that will help. You had a friend whose leg was in traction and it turned out fine.
- You are willing to have physiotherapy (you mention that you think that the physiotherapist fancies you).
- You are reluctant to take the medication (pain killers) prescribed as you think that the doctors will get money from the drug companies. Anyway, you can put up with the pain and the nurses can give you paracetamol and ibuprofen when you need it.

Past psychiatric history

- You have had been diagnosed with schizophrenia for the last 10 years, but you don't really think that you have schizophrenia (because it's a made up concept)
- You are willing to take your olanzapine because it has stopped you hearing voices and has kept you out of hospital. Your last admission was 2 ½ years ago. You also

have a CPN. The olanzapine helps you to sleep, although you have gained some weight.

Mental State

- You have very few active psychotic symptoms. Your injuries were not intentional and you have not had any thoughts of self-harm.
- You sometimes feel that social work has access to your psychiatric notes as they keep sending you letters about your benefits. You don't think that they have any bearing on you being in hospital, or your treatment.
- You have not heard voices for a few years. You are generally compliant with medication, but don't like your CPN (you feel as though they are hassling you all the time) and think that your psychiatrist gets money from the drug companies for you being on olanzapine.

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Communication Skills: Assessing Capacity

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Instructions for Examiners

***REMEMBER TO ASK THE STUDENT FOR THEIR IDENTITY LABEL AND
AFFIX IT TO THE TOP OF THE MARK SHEET.***

To pass, the candidate will need to:

1. Demonstrate an understanding of the issues regarding capacity
2. Be able to tactfully and sensitively probe and challenge the patient to determine their particular beliefs
3. Be able to assess clearly whether any abnormal thinking has an influence on the patient's capacity to make a decision over their medical treatment

Station Number

Examiner's Name:

.....

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Communication Skills: Assessing Capacity

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Marking Sheet

Please circle the appropriate mark for each criterion. The standard expected is that of a psychiatric Senior House Officer.

Criterion	Performed competently	Performed, but not fully competent	Not performed
Approach to the patient – Rapport, empathy, and style	2	1	0
Clear explanation of why they are seeing the patient	1	½	0
Brief History of car accident, ruling out possibility of self-harm in the context of mental disorder	2	1	0
Assesses patient's reasons for refusing treatment	2	1	0
Assesses patient's awareness of the consequences of his decision	2	1	0
• Clear discussion of possible consequences	1	½	0
Assesses patient's ability to retain this information and make a reasoned decision	2	1	0
• Suggests that they come back at another time to review the situation	1	½	0
Asks about presence of psychotic symptoms	2	1	0
• If psychotic symptoms are present, it is important to determine if they affect his decision-making about his leg	1	½	0
Overall Approach to Task	4	3	2
		1	0

Score (Max 20)

Overall Grading of station

Clear Pass

Borderline

Clear Fail

Station Number

Examination Skills: Assessing Capacity

Requirements for this station

The following should be made available for this station:

1. Ideally, the simulated patient should be in a hospital bed, and the surrounding area should look like a hospital side-room.
2. Charts, flowers, etc. would complete the simulation.

Trickcyclists' Tip Sheet

It may be helpful to read the Adults With Incapacity (Scotland) Act 2000 (Scottish Parliament, 2000) to see how incapacity is dealt with in current UK (Scottish) legislation. The definition is as follows:

“incapable” means incapable of-

- (a) acting; or
- (b) making decisions; or
- (c) communicating decisions; or
- (d) understanding decisions; or
- (e) retaining the memory of decisions,

as mentioned in any provision of this Act, by reason of mental disorder or of inability to communicate because of physical disability; but a person shall not fall within this definition by reason only of a lack or deficiency in a faculty of communication if that lack or deficiency can be made good by human or mechanical aid (whether of an interpretative nature or otherwise); and “incapacity” shall be construed accordingly.

In order to assess capacity, you therefore need to ‘tick the boxes’ of each of the components above. As usual, the more structured your approach, the better it will look.

In Scotland the above legal definition is the one that governs capacity. In England and Wales, there is no definition in statute, and the *Re C (Adult: Refusal of Treatment)* (1994) case is generally taken to be the legal definition. In English and Welsh law, an adult has the capacity to consent [or refuse consent] to medical treatment if he or she can:

1. Understand and retain the information relevant to the decision in question;
2. Believe that information, and;
3. Weigh that information in the balance to arrive at a choice.

These principles were further set out in *Re MB (Adult: Medical Treatment)* (1997).

In terms of people under the age of 18, the principles derived from *Gillick v West Norfolk and Wisbech Area Health Authority* (1985) are generally applied.

Case Synopses

***Re C (Adult: Refusal of Treatment)* [1994] 1 WLR 290**

The patient, C, was detained in Broadmoor high-security mental hospital. He had developed gangrene in his right leg, and the doctors treating him believed that he required amputation in order to save his life. C refused amputation. He had a history of paranoid schizophrenia and believed that he was a world-famous doctor. He sought an injunction to prevent doctors from amputating his leg.

He was successful and in making the judgement, Justice Thorpe stated that his mental illness did not make him automatically incapable of making decisions about his medical treatment. The three criteria given above have been cited in other cases, and have been referred to as the '*Re C Test*'.

***Re MB (Adult: Medical Treatment)* [1997] 8 Med. L.R. 217 at 224**

Taken verbatim from: World Legal Information Institute
(<http://www.worldlii.org/int/cases/ICHRL/1997/15.html>)

A health authority applied for a High Court declaration that it would be lawful to undertake an emergency caesarean operation on MB whose foetus was found to be in the breech position after MB agreed to have the operation theoretically but refused in practice due to her fear of needles. The declaration was granted, and that same night, MB appealed on the ground that, *inter alia*, the judge was wrong to find that MB lacked the capacity to consent or refuse treatment.

Held that:

There is a rebuttable presumption that every person has the capacity to consent to or to refuse medical treatment and it is a criminal or tortious assault to carry out invasive medical treatment without consent. A competent woman who has the capacity to decide may, for any reason, whether rational or irrational, refuse treatment, even if this may cause her or her foetus's death, unless some impairment or disturbance of her mental functioning renders her unable to understand or to make a decision. Therefore, the unborn child up to the moment of birth does not have any separate interests capable of being taken into account by the court and the court cannot order medical intervention to protect the unborn child even at the point of birth. If a woman is capable of understanding and making a decision, whatever the outcome of that decision, to force medical treatment would be an unwarranted invasion of the woman's right to decide. Nonetheless, temporary factors may operate to such a degree that the woman is unable to decide and careful scrutiny must be undertaken of the evidence in such cases. In the present case MB wanted and consented to a caesarean operation, but immediately preceding the operation she was overcome with such panic that her decision making capability was disabled. The judge's decision to grant the declaration was justified in the circumstances and the appeal is dismissed.

***Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402**

England's Court of Appeal, Civil Division, ruled that parents had the right to prevent a

physician at the local health authority from prescribing contraceptives to girls under the age of 16 without parental consent. Since a girl was legally incapable of giving valid consent in other matters before that age, neither could she give valid consent to contraception or abortion. A doctor, who provided contraception or abortion treatment to a girl under 16, except in an emergency or with permission of the court, would infringe on the legal rights of the parents. An appeal was taken to the House of Lords.

The decision in the House of Lords (Taken from http://www.hrcr.org/safrica/childrens_rights/Gillick_WestNorfolk.htm) was:

Having regard to the reality that a child became increasingly independent as it grew older and that parental authority dwindled correspondingly, the law did not recognise any rule of absolute parental authority until a fixed age. Instead, parental rights were recognised by the law only as long as they were needed for the protection of the child and such rights yielded to the child's right to make his own decisions when he reached a sufficient understanding and intelligence to be capable of making up his own mind. Accordingly, a girl under 16 did not, merely by reason of her age, lack legal capacity to consent to contraceptive advice and treatment by a doctor. A doctor who in the exercise of his clinical judgment gave contraceptive advice and treatment to a girl under 16 without her parents' consent did not commit an offence under s 6(1) or s 28(1) of the 1956 Act, because the bona fide exercise by the doctor of his clinical judgment negated the mens rea which was an essential ingredient of those offences. It followed that a doctor had a discretion to give contraceptive advice or treatment to a girl under 16 without her parents' knowledge or consent provided the girl had reached an age where she had a sufficient understanding and intelligence to enable her to understand fully what was proposed, that being a question of fact in each case. It also followed that the department's guidance could be followed by a doctor without involving him in any infringement of parental rights or breach of the criminal law.

References

Gillick v West Norfolk and Wisbech Area Health Authority [1985] 3 All ER 402

Re C (Adult: Refusal of Treatment) [1994] 1 WLR 290

Re MB (Adult: Medical Treatment) [1997] 8 Med. L.R. 217 at 224

Scottish Parliament (2000) Adults with Incapacity (Scotland) Act 2000. London: HMSO.

Additional reading

British Medical Association (1995) Assessment of Mental Capacity: Guidance for doctors and lawyers. A report of the British Medical Association and The Law Society. pp. 56-66. London: BMA.

Tan, J. O. A. & McMillan, J. R. (2004) The discrepancy between the legal definition of capacity and the British Medical Association's guidelines. *Journal of Medical Ethics*, **30**, 427-429.