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The test for decision-making capacity in common law countries is not the test outlined by Zhong *et al*

In the UK and common law countries the legal test for decision-making capacity is not the test outlined by Zhong *et al*.[1] That test is derived from literature that emanates from the USA.

In common law jurisdictions, adults are presumed to have decision-making capacity, but this presumption can be rebutted for particular decisions if the person has some impairment or disturbance of mental functioning that renders him or her either: unable to comprehend and retain the information that is material to the decision, or; unable to use and weigh the information as part of the process of making the decision.[2] This common law test was codified into the Mental Capacity Act 2005 (UK) s3(1).

Contrary to Zhong *et al*'s rendering, the common law test does not incorporate an ability to 'appreciate' information. Indeed 'appreciation' was specifically rejected by the UK Law Reform Commission.[3] To the extent that appreciation might be relevant it should be considered as part of the ability to comprehend. The 'use and weigh' arm of the common law test does not require that information be 'rationally manipulate[d]'.[1] A competent person must have their decision respected even if his or her reasons are 'irrational'.[2,4] Choices need not be 'consistent' over time, although if a person were to constantly change his or her mind that might be reason to question the usual presumption of decision-making capacity.[2,5] The bar for decisional ability does not rise as the risk of harm or complexity of the decision rises – it remains as described in the second paragraph above. However: as the risk increases, the more we should be concerned that the person has capacity, and; as the complexity increases, the more difficult it will be to attain the understanding of the relevant information required to demonstrate capacity.[5]

It is also worth highlighting that although the USA has not ratified the United Nations Convention on the Rights of Persons with Disabilities, almost all other countries, including the UK, have. Article 12 of the Convention places a duty on those who are assessing capacity to assist the person as much as possible to attain that capacity. This changes the process from one of objectively assessing the patient's abilities to one that determines whether the assessor can assist the patient to achieve those abilities.

1 Zhong R, Sisti DA, Karlawish JH. A pragmatist's guide to the assessment of decision-making capacity. *Br J Psychiatry* 2019; **214**: 183–5.

2 *Re MB (Medical Treatment)* [1997] EWCA Civ 3093.

3 Law Reform Commission (UK). *Report No 231: Report on Mental Incapacity*. HMSO, 1995.

4 Ryan C, Szmukler G, Large M. Kings College Hospital Trust v C: using and weighing information to assess capacity. *Lancet Psychiatry* 2016; **3**: 917–9.

5 Ryan CJ, Callaghan S, Peisah C. The capacity to refuse psychiatric treatment – a guide to the law for clinicians and tribunal members. *Aust N Z J Psychiatry* 2015; **49**: 324–3.

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Authors' reply

Dr Ryan's comparison of UK and Commonwealth jurisdictions versus American jurisdictions highlights important differences in the letter of the law. He rightly states that the 'four abilities model' arises from American case law.[1] The UK and Commonwealth nations have independently developed tests of capacity. Fortunately for medical practitioners who must navigate the difficult waters of comparative jurisprudence, the underlying concepts remain essentially the same.

In the 'four abilities model,' understanding is the ability to 'grasp the fundamental meaning of information communicated by [the] physician'.[2] It is analogous to the Mental Capacity Act's test of 'comprehend[ing] and retain[ing] the information' that is material to the decision.[3] Indeed, the Oxford English Dictionary gives 'to comprehend' as one definition of grasp.[4]

Appreciation is the ability to 'acknowledge [the] medical condition and likely consequences of treatment options'.[2] Another common description of appreciation is that the person must be able to apply information meaningfully to his or her own situation.[5] Although it is true that the UK Law Reform Commission specifically rejected the word 'appreciation', the Commission went on to say that a person lacks capacity if 'he or she is unable to make a decision based on the information relevant to the decision, including information about the reasonably foreseeable consequences of deciding one way or another'.[3] Making decisions based on relevant information and foreseeable consequences is equivalent to acknowledging a condition and the consequences of treatment and applying that information to oneself when making a choice. Whether this ability is termed 'appreciation' or 'knowing' or some other synonym is less significant.

Reasoning or rational manipulation refers not to the idea that decisions must appear rational to outside observers but that the patient has the ability 'to compare treatment options and consequences and to offer reasons for selection of [an] option'.[2] Furthermore, 'this criterion focuses on the process by which a decision is reached, not the outcome of the patient's choice, since patients have the right to make 'unreasonable' choices'.[2] In short, individuals who exhibit the ability to reason in this way are using and weighing information as part of the process of making the decision.

We agree with Dr Ryan, who, together with colleagues, has rightly argued that 'Decision-making capacity is decision- and time-specific'.[6] Their example was a person with mania who simultaneously has capacity to choose between different mood stabilisers but lacks the capacity to decline mood stabilisers altogether.[6] The decision-specific nature of capacity gives rise to a sliding scale

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