

## 8. Consent to Healthcare and Forensic Medical Examination

### 8.1 Consent

Doctors are expected to follow the detailed guidance on consent produced by the General Medical Council (GMC). The GMC guidance says doctors must be satisfied that they have consent (or other valid authority) before:

- carrying out any examination or investigation;
- providing treatment; or
- involving patients in teaching or research.

See: GMC (2008) [Consent: patients and doctors making decisions together](#).

Clinicians must consult the most up to date guidance from the GMC.

A fundamental ethical principle guiding medical practice is that no examination, diagnosis or treatment of a competent adult should be undertaken without the person's consent. In order for consent to be 'valid' the individual must have been given sufficient, accurate and relevant information. The individual must have the competence to consider the issues and to reach a decision and that decision must be voluntary in terms of not being coerced (FFLM 2017).

When seeking consent to treatment, the question of whether the information given to a patient is adequate is judged from the perspective of a reasonable person in the patient's position. For the purposes of consent, the ruling from Montgomery in 2015 replaces the previous tests founded in Bolam and refined in Sidaway. Doctors have a duty to take reasonable care to ensure that patients are aware of 'material risks'.

Under new legislation from the General Data Protection Regulation (GDPR) consent must be a freely given, specific, informed and unambiguous indication of the individual's wishes. There must be some form of clear affirmative action. GMC guidance is that doctors can still rely on implied consent as long as the conditions set out in the guidance are met (GMC 2018 [Five things to know about our Confidentiality guidance and the GDPR](#))

Consent must also be separate from other terms and conditions, and healthcare professionals need to provide simple ways for people to withdraw consent. Further information is available on the Information Commissioner's [website](#).

The purpose of a forensic medical examination should be explained to the patient in a way that they can understand. The patient should be fully informed throughout the process, allowing them make informed choices about their care. A person's consent should be given freely, voluntarily and without coercion providing that s/he is of the legal age and has the mental capacity to consent. The patient is entitled to be accompanied during any such discussion by an advocate / support worker of their choice. Consent is voluntary and is an on-going process and the patient can

withdraw consent at any stage. An example consent form can be found in Appendix D.

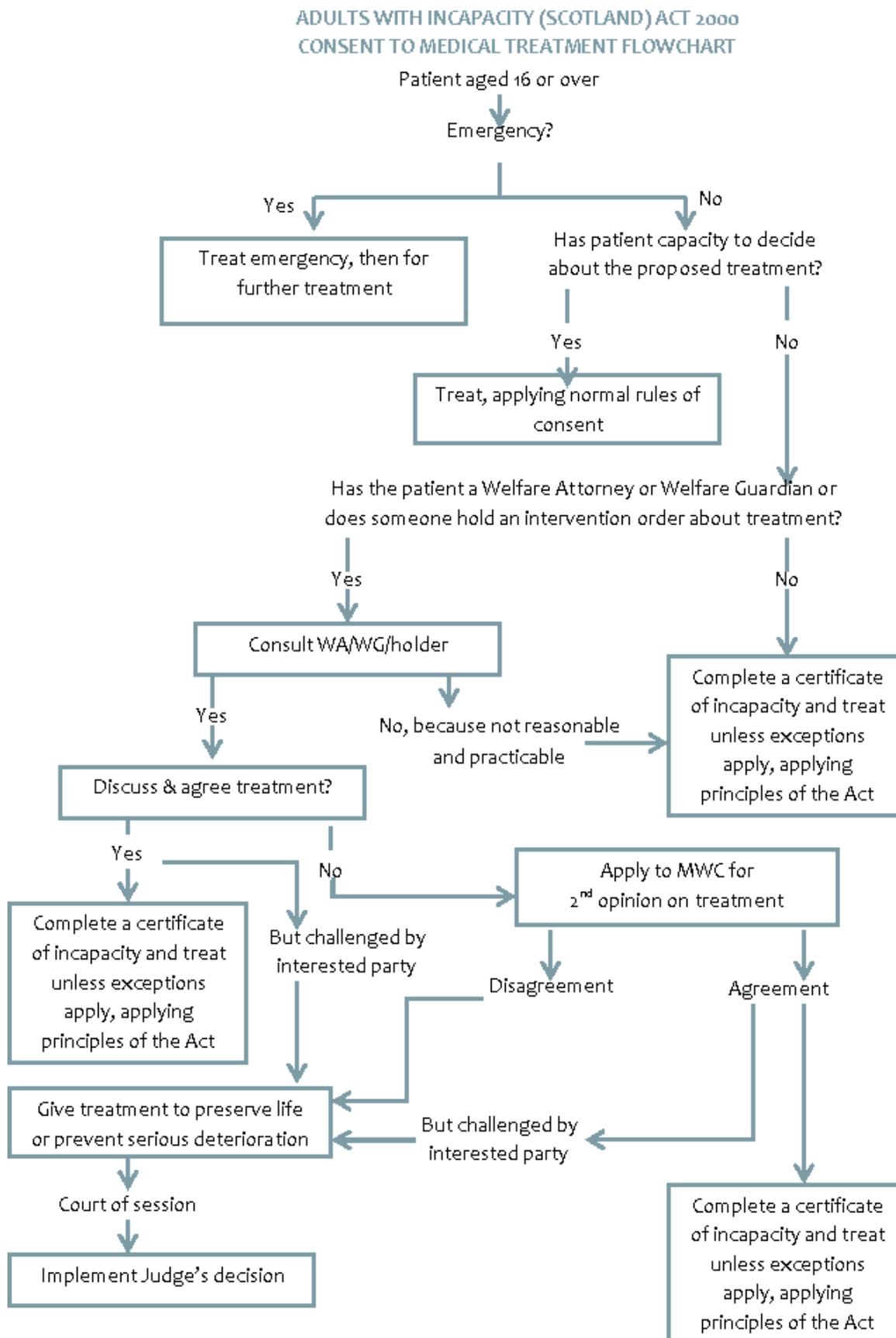
## **8.2 Adults with Incapacity**

In Scotland the [Adults with Incapacity \(Scotland\) Act 2000](#) and any recent updates, defines individuals as incapacitated if they cannot make decisions, or communicate them, or remember their decisions. Where this applies, the FP should take account of the best interests of the patient following initial assessment. The impairment may be due to a mental disorder or a physical inability to communicate in any form.

Doctors must assess a patient's capacity to make a particular decision at the time it needs to be made. Doctors must not assume that because a patient lacks capacity to make a decision on a particular occasion, they lack capacity to make any decisions at all, or will not be able to make similar decisions in the future. See: GMC: [Consent Guidance: Assessing capacity](#)

The flow chart below outlines the process for the provision of medical care for Adults with Incapacity under the Adults with Incapacity (Scotland) Act 2000.

## Flow chart 1: Adults with (Scotland) Act 2000 – Consent to Medical Treatment Flowchart



### 8.2.1 Areas Which may Affect Capacity or Ability to Consent

Forensic Examiner should be cognisant of other impairments or language barriers, which may affect an individual's ability to consent.

Use of interpreters or sign language interpreters may be appropriate and NHS Board guidance should be consulted. Interpreters may be provided by other agencies such as Local Authorities. **Family members, friends or partners of the patients should not be used.**

### 8.2.2 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 deferment will depend on the type, 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.

Clear and precise reasons for deferring a forensic medical examination should always be recorded.

### 8.2.3 Patient with Serious Injury/Unconscious Patient

On occasions patients are seriously injured during a rape or sexual assault and the ensuing injuries may result in loss of capacity (for example where the patient is unconscious). The FFLM's recommendations on [Consent for patients who may have been seriously assaulted](#) advise that any attendance in an acute care setting to carry out a forensic medical examination on a seriously ill/unconscious patient should be with the prior knowledge and permission of the Consultant in charge of that patient's medical care who should also be informed of the nature and purpose of the proposed examination to ensure that he / she has no objections to it being undertaken (FFLM 2014).

Each patient and their condition should be evaluated on an individual basis with consideration always given to the rights of the patient namely:

- The right to life
- The right to bodily integrity
- The right to privacy
- The right to self-determination

The Forensic Examiner must also act on the basis of good professional practice and forensic medical examination should be undertaken if it is considered to be in the best interests of the patient. The rationale behind any decisions, the factors considered and the judgements made need to stand up to any future scrutiny. All steps taken and decisions made must be clearly documented.

In assessing best interests, the Forensic Examiner should 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.

**The Forensic Examiner must be mindful that in some cases it may be a member of the family or a close 'friend' who is the perpetrator.**

In other cases there may be sensitive information about an incident that the person would not wish to be disclosed to friends and / or family. Therefore the Forensic Examiner must decide whether it is in the patient's best interest to speak to the available family.

The Forensic Examiner should consider obtaining the views of other people who are close to the patient as well as consulting any legally appointed welfare attorney or welfare guardian attorney.

The Forensic Examiner should ensure that the patient is informed what has been done and why as soon as the patient is sufficiently recovered to understand.

In complex cases further advice and guidance should be sought from relevant senior colleagues.

### **8.3 Refusal of any Elements of the Examination**

Every adult or adolescent with capacity is entitled to refuse medical treatment, and their refusal must be respected. A person cannot be deemed to lack decision making capacity simply because there is a risk that he or she might make what seems an unwise decision.

If a patient chooses not to have a forensic medical examination, then they should do so with a clear understanding of the implications of the choice they are making and that choice should be respected.

Individual may consent to the healthcare elements of the examination or vice versa and if individual refuses for they should still be offered health aftercare.

## Useful Resources

[\*Adults with Incapacity \(Scotland\) Act 2000\*](#)

General Medical Council (2008) [\*Consent: patients and doctors making decisions together.\*](#)

General Medical Council GMC: [\*Consent Guidance: Assessing capacity\*](#)

General Medical Council (2018) [\*Five things to know about our Confidentiality guidance and the GDPR\*](#)

Faculty of Forensic and Legal Medicine (2014) [\*Consent for patients who may have been seriously assaulted\*](#)

Information Commissioner (2018) [\*Guide to the General Data Protection Regulation \(GDPR\)\*](#)