

# CCSG REPORT: LEGAL ISSUES INVOLVED IN USING A PERSONAL ASSISTANT

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## Case study

A young adult male has a spinal cord injury as a result of a road traffic accident. He has secured direct purchase payments for his own care and now employs his own personal assistant (PA). The PA is to perform the bowel care currently undertaken by the district nursing team. This includes the administration of suppositories followed by digital removal of faeces. What are the legal issues of this increasingly common situation?

## Responsibility

All healthcare professionals have a duty to ensure that their standards of care are in accordance with the best research-based practice. However, problems can arise when instead of being the direct provider of that care, the healthcare professional finds that the patient wishes to employ a third party to carry it out.

## Mental capacity of the patient

If the patient has the requisite capacity to make decisions about the delegation of work, then that is his right. There is a presumption in law that a person has the requisite mental capacity unless there is evidence to the contrary. If it is established that the patient lacks the necessary mental capacity, then decisions have to be taken for him in his best interests. We shall assume for the purposes of this case study that there is no evidence to contradict the presumption that the patient has the necessary capacity to make decisions about the role of the PA and that the direct payments scheme is there to maintain his autonomy.

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## Duty of care and standard of care

Healthcare professionals have a duty to take 'reasonable' care of the patient. Reasonable means that they must act according to the accepted approved practice of their profession in a given situation. They are not permitted in law to overrule the refusal of a mentally competent person, but they must take all reasonable care to ensure that he/she will be safe.

In this case, the first requirement would be to assess the PA to ascertain if he/she would be capable of carrying out the necessary tasks and what training would be required. The assessment would also ascertain if there were any activities which, in spite of training, the PA would be unable to undertake on his/her own. This assessment would lead to a day-by-day analysis of all the care the patient received, the training that would be required and those activities that the healthcare professional, in this case the nurse, would carry out.

The second stage would be for the necessary training to be carried out. The third stage would be to discuss the future strategy with the patient and PA, including warnings about the need to involve the registered nurses in activities outside the PA's competence. The details and care plan should be put in writing for the PA, the patient and the nurses.

## The law and delegation

Most of the activities undertaken by a registered nurse can be delegated to a non-registered practitioner, provided that the latter is competent and can perform the activities to the standard required of a registered practitioner. There are very few nursing activities that the law requires to be

undertaken by a registered practitioner. Prescribing specified medicines is one such activity and the PA would not be legally eligible to receive the necessary training to become a prescriber. He/she could, however, administer medicines prescribed by the doctor or by the independent nurse prescriber.

## Ongoing support and monitoring

It would be advisable for the nursing team to carry out regular monitoring visits to the patient, to check that his care is being properly provided and to ascertain whether there are any unmet needs. These visits would not remove the legal responsibility of the PA, but would provide support and encouragement for him/her.

## What if the PA harms the patient?

If the registered nurse practitioner has taken all reasonable care in ensuring that the PA is competent to care for the patient and warned him/her of those activities which he/she should leave to the registered nurses, and yet in spite of these warnings the PA injures the patient, is the nurse liable for those injuries? The answer in law is no. In taking reasonable care of the patient's safety, the nurses have fulfilled their duty of care to the patient and there would be no negligence.

Clearly the nurses' documentation of the actions they have taken, the advice and warnings they have given and the training that has been provided would be essential in showing that they have acted reasonably. The patient's claims would be against the PA, but unless the PA has insurance cover, he/she would probably be unable to pay any compensation for the harm that has arisen from his/her negligence. **CUK**