

Significant health decisions – on who's authority?

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NASCA meeting
1 September 2016

Overview

- The role of capacity
- Prospective decision-making
- Substitute decision-making

Case Study

- Gail is 94 years old. She has been living at home, but recently had a fall. She lay on the floor after she fell for close to 14 hours before her neighbour found her, at which time she was taken to hospital by ambulance. The MDT involved with Gail's care in hospital are collectively of the view that it is not safe for Gail to return home. Gail is adamant that she wishes to return home, and is clear that under no circumstances will she agree to live in a rest home.

Case Study

- What more do you need to know in this situation?
- What legal and ethical considerations are relevant?



Principle of Autonomy

- "Every human being of adult years and sound mind has a right to determine what shall be done with his own body"

(Schloendorff v Society of New York Hospital 105 NE 92 (NY, 1914), p93)



But - it all hinges on capacity

Capacity

- Presumption of competence:
 - the Code of Rights (Right 7(2))
 - PPPR Act (ss5 and 93B)
- Age is not determinative of decision making capacity
- Suffering from a particular condition (e.g. dementia), or being subject to orders under the Mental Health (Compulsory Assessment and Treatment Act) 1992, are not determinative of decision making capacity

It's not all or nothing

- Capacity is decision specific
- So – you can have capacity to make some decisions and not others



For example

- Someone may have capacity to appoint an EPOA, but not make a decision about where they live/whether or not they wish to go ahead with a particular treatment



It's a continuum

- Every consumer has the right to make informed choices and give informed consent, to the extent appropriate to his/her level of competence (Right 7(3) of the Code of Rights)

Making a decision for you You make the decision
Supporting you in making a decision



The legal test

- A person will be competent to make a particular decision if they can (*KR v MR* [2004] 2 NZLR 847; *Re C* [1994] 1 All ER 819):
 - communicate a choice
 - understand relevant information, such as the nature and purpose of proposed treatment
 - believe relevant information
 - appreciate the situation and likely consequences; and
 - manipulate information, following a logical sequence of thought in order to reach a decision

● ● ● Stupidity isn't enough



● ● ● Back to Gail

YOU REALLY
CAN DO
WHATEVER
YOU WANT

● ● ● Case study

- Brian is suffering from a chronic illness. He is very clear that in certain circumstances, he would not want proactive treatment. He expresses his views to his wife, and to his GP.
- What should you do if those circumstances arise?
- What legal and ethical considerations are relevant?

● ● ● Prospective decision-making



● ● ● How?

- Expression of wishes
 - Advance Care Planning
 - Discussion with health professionals, family, EPOA
- Legally binding
 - Advance Directives
 - Parameters around the future actions of an Enduring Power of Attorney



● ● ● Advance Directives

- "Advance directive" means a written or oral directive-
 - by which a person makes a choice about a possible future health care procedure; and
 - that is intended to be effective only when he or she is not competent
- "Choice" means a decision to receive, refuse or withdraw consent to services
- A valid advance refusal of treatment is legally binding

Establishing validity



Establishing validity

- Was the person **competent** to make the particular decision at the time the advance directive was made?
- Was the advance directive made **voluntarily**?
- Was the person **sufficiently informed** to make the advance directive?
- Did the person intend the advance directive to **apply in the present circumstances**?

Practical problems

- Identification – How do you know that a person has an advance directive?
- Generality – Does it apply to this treatment, in this situation?
- Applicability – How do you know that the advance directive is still applicable, that the person has not changed his/her mind?
- Lack of prior relationship with person/family can lead to problems in identifying the existence of an advance directive and in determining validity

Sometimes....

- People find it difficult to accept an advance directive is what a person wanted/it's not what they themselves want or would want



That's why.....

- Advance care planning
- Communication generally
- Talking it through
- Looking at alternatives
- Working through the detail



Back to Brian

- Was Brian **competent** to make the particular decision at the time the advance directive was made?
- Was the advance directive made **voluntarily**?
- Was Brian **sufficiently informed** to make the advance directive?
- Did Brian intend the advance directive to **apply in the present circumstances**?

• • • | A quick word about EPOAs

- Can incorporate into an EPOA:
 - what the EPOA can and can't consent to
 - Who the EPOA must consult with

• • • | Substitute decision-makers



"He'll take a dozen long-stemmed roses."

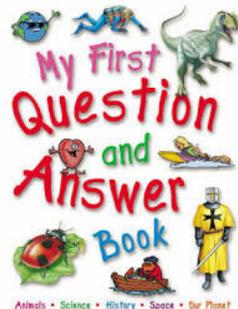
• • • | Case Study

- Margaret has been a resident in a rest home for a number of years. Her daughter, who lives overseas, has returned for a holiday. Her daughter is of the view that Margaret is not to go out walking any more because she is too frail. She also thinks that Margaret is not receiving appropriate care. She raises these concerns with you.

• • • | Considerations

- What legal and ethical considerations apply?
- What can/should you do?

• • • | What's the first question?



• • • | Legal status of family



● ● ● Person lawfully entitled

- The people who may be lawfully entitled to make decisions on behalf of an incompetent adult are:
 - An **enduring power of attorney ("EPOA")** for personal care and welfare or an enduring power of attorney for property (depending on the type of decision to be made)
 - A **welfare guardian or property manager**, depending on the type of decision to be made
 - Another person appointed under a **court order**

● ● ● Limit to powers

- Is not activated for personal care and welfare unless certificate of incapacity
- Cannot refuse standard medical treatment
- Can apply for review of EPOA decision if concerns about best interests

● ● ● Right 7(4)



● ● ● Right 7(4)

- Under Right 7(4) services may be provided if:
 - A consumer who is not competent to make an informed choice AND
 - There is no person entitled to consent AND:
 - Services are in the **best interests** of the consumer; **and**
 - Reasonable steps to ascertain **consumer's views**; and
 - **Views of consumer or other suitable person** taken into account



● ● ● Limits of Right 7(4)

- There is a lack of clarity about the competence of the person to make decisions relating to their personal care and welfare
- There is an EPOA/welfare guardian in place
- The person is violently opposed to what is proposed and restraint may be necessary
- The family have differing views from the staff involved in providing care with respect to what is in the best interests of the incompetent person

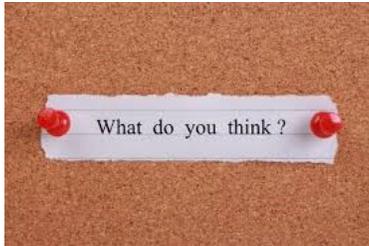


● ● ● What about long-term detention?

- Right 7(4) broad enough to extend to long-term detention
- But – lack of appeal process/mechanism to ensure detention appropriate/protection of rights



So should we use it for long-term detention?



In practice....

- Varies across the country
- Some NASCs/aged care providers require EPOA/Welfare Guardian
- Probably 1000s of people who lack capacity without EPOA/Welfare Guardian who are detained (whether in residential care or community)

Policy

- As a matter of policy, could require EPOA/Welfare Guardian/personal orders, but problematic:
 - Whose responsibility (i.e. who applies)?
 - Cost (of appointing EPOA/seeking court orders)
 - Delay (Family court – up to 26 weeks, maybe more)

Does it address the problem?

- Only partially:
 - Lack of understanding of role as legal guardian
 - No checking of suitability of EPOA
 - No checking once appointed



Legal and regulatory controls

- Further legal and regulatory controls are required to ensure that the rights of people who lack capacity are protected



In the meantime...

The man who moves a mountain begins by carrying away small stones

Confucius



• • • | Questions?

A collage of several colorful sticky notes in shades of blue, yellow, pink, and orange. Each sticky note has a large black question mark printed on it. The notes are overlapping and scattered across the lower half of the slide.

• • • | Contact Details

The logo for VIDA LAW NEW ZEALAND. It features a circular emblem composed of small black dots arranged in a ring. Below the emblem, the text "VIDA LAW" is written in a bold, sans-serif font, with "NEW ZEALAND" in a smaller font underneath.

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