Legal and Ethical Issues for Medical Students

Dr Robyn McGregor – Rozelle Hospital
and
Dr. Bob Russell – R.N.S.H.
CAPACITY TO DECIDE

WHAT IS CAPACITY?

• Capacity, or competence, is the ability to make a particular reasoned decision at a specific time or in a specific situation.

WHAT IS NEEDED TO BE ABLE TO DECIDE?

• The person needs to know the particular decision that needs to be made.
• The person needs to understand and retain the information relating to the decision.
• The person needs to weigh up the information presented and consider the options relating to a particular decision in a rational way.

CAPACITY IS SPECIFIC FOR A PARTICULAR DECISION

• Capacity has to be re-evaluated for each important decision.
DECISION MAKING CAPACITY

• All decisions do not require the same capacity.
• Decisions range from
  • simple – what clothes to wear
  • to complex - how to dispose of one’s estate.
• The Mental Health Act is based primarily more on diagnosis and risk of harm, rather than capacity.
• Involuntary patients may have decision-making capacity but have no right of refusal of treatment
THE PROCESS OF CONSENT TO TREATMENT

VALID CONSENT REQUIRES
• autonomy
• capacity
• adequate Information
• freedom from coercion

VALID CONSENT INVOLVES
• a process of communication between the doctor and the patient
• written documentation

DIFFERENT DECISIONS
• by the patient from those advocated by the doctor does not mean the patient does not have capacity
• may reflect different values eg Jehovah’s Witness refusal of blood transfusion
DECISION MAKING CAPACITY CAN FLUCTUATE

Capacity can be influenced by many factors

eg mental state
• physical illness
• medication effects
• presence of others
• skill of the assessor

Mental State Factors

• delusional beliefs
• deficits in verbal fluency / receptive and expressive dysphasia
• executive dysfunction
• reduced insight / denial
• memory and recall
CONSENT, NON-REFUSAL, REFUSAL.

NON-REFUSAL

• compliant elderly without the capacity to consent may accept treatment - but not legally acceptable (consult person responsible).

REFUSAL

• patients with capacity cannot be treated without consent regardless of the reason for their refusal.

• by patients without capacity – consider if treatment is really necessary.

• **Special circumstances** of covert administration of medication - Guardian consent
REFUSAL OF TREATMENT

- informed refusal is as important as informed consent.
- is the person competent to make this decision?
- was the consent process undertaken adequately?
- does the patient understand the immediate and potential consequences of refusal of treatment?
- if all of the above: you must respect autonomy.
GUARDIANSHIP

WHAT IS A GUARDIAN?

• A person legally appointed to make decisions on behalf of another who is no longer able to make reasoned decisions about important matters. Must act in the best interests of the person and consult them where possible.
• Guardians cannot consent to ECT (Mental Health Review Tribunal)
• Guardians cannot consent to special treatments (defined by the Guardianship Act)

HOW IS A GUARDIAN APPOINTED?

• By application to The Guardianship Tribunal.

WHAT IS THE GUARDIANSHIP TRIBUNAL?

• A legal tribunal with the power to appoint guardians and financial managers for people aged 16 years and over who are unable to make decisions themselves because of a disability.
GUARDIANSHIP

GUARDIANSHIP TRIBUNAL hears the evidence

GUARDIANSHIP ORDER requires

   NEED and INCAPACITY and DISABILITY

• lists the decisions the guardian is able to make.
• limited time period then reviewed.
• may be a coercive order: i.e. the person must accept the terms of the order even if he/she wishes to refuse e.g. hostel care instead of living at home.
GUARDIANSHIP

PUBLIC GUARDIAN

- if no relative or friend able or willing to be guardian.
- if concerns about the proposed guardian.
- if family members have significantly different views.

ENDURING GUARDIAN

- a person chosen to make decisions when the person appointing them becomes no longer able to do so.

- cannot override objections to medical treatment.

- objections to decisions must be referred to the Guardianship Tribunal.
PERSON RESPONSIBLE

• The person identified as usually caring for and being responsible for the patient (this does not necessarily mean the next of kin).

• Legal authority under the Guardianship Act is to provide substitute consents to specified treatments and to make care and accommodation decisions in the absence of objection by the patient.

• The person responsible cannot consent on behalf of the patient to admission as a voluntary patient to a gazetted bed in a psychiatric hospital.
TESTAMENTARY CAPACITY

• The person must understand that a will is to be made.
• The person must understand what that means.
• The person must be aware of the assets to be distributed.
• The person must be aware of those who might reasonably expect to be beneficiaries.
• The person must be able to consider the options for distribution of assets in a rational way.
• The closer in time the assessment of capacity is to the making of a will, the less likely the will can be subject to legal challenge.
POWER OF ATTORNEY

WHAT IS A POWER OF ATTORNEY?

• A legal document that appoints one person (the attorney) to act on behalf of another in relation to property and financial affairs.

• No medical treatment or care/accommodation decisions.

• **Ordinary**: ceases to operate when the person loses capacity to make financial decisions.

• **Enduring**: continues to have effect after the person has lost the capacity to make financial decisions.

• **Both** cease with bankruptcy or death of either party.
ADVANCED HEALTH CARE DIRECTIVE

- often referred to as a “living will”
- the effect continues when the person has lost capacity to make decisions
- specifies what treatments or interventions one will not have
- cannot specify what treatments one will have (no doctor can be made to provide futile treatments)
- not currently valid in all States
- in principle reasonable, but not well established for a number of reasons
ASSESSMENT OF SAFETY AND PROTECTION

• includes risk of deliberate harm to self or to others
• to self – thoughts of / plans to suicide
• to others – often based on delusions that others intend harm / are stealing
• by neglect – not eating / drinking
• by forgetfulness – leaving gas on, door open
• by intent of others – elder abuse
• by exploitation - financial
DRIVING A MOTOR VEHICLE

Complex Task
• requires judgement, perception, sequential organisation, response time and physical ability

Consider
• behavioural aspects of illness (e.g. mania)
• effects of medications
• physical limitations/impaired
• cognitive impairment

Dementia
• reaction time affected early
• consider stage of dementia and degree of impairment

Balance
• preserving independence v. protection of others and patient
DRIVING A MOTOR VEHICLE

• role of doctor (medical report age 80-85 years)
• compulsory yearly driving assessment 85 years plus

Strategies In significant cognitive Impairment
• encourage voluntary cessation of driving

If patient unco-operative consider
• disconnection or draining of battery
• loss of keys
• Unsafe Driving Report notification (indemnity)
• Driving examination (RTA test, Driving Examination Centre)
END OF LIFE DECISIONS IN DEMENTIA

- death with dignity v. “life at all costs”
- differences between not using measures to prolong life and euthanasia and murder
- consider patient’s views if known
- involvement of palliative care?
- discuss with guardian and family members – important they do not feel they have the power of life or death
- carer information and support
- document decisions made
- document reasons for decisions
ETHICAL ISSUES

• **Principle**: all people have equal intrinsic value.

• **Conflict**: between autonomy and need to restrict that of incompetent people to protect their best interests (duty of care issues).

• **Justice** in allocation of resources.

• **Budget** constraints and prescribing of expensive drugs.

• **Research** with dementia sufferers (Guardianship Tribunal Guidelines).

• **Feeding tube use** in moderate to severe dementia when swallowing is severely impaired.
References

- RANZCP Code of Ethics
- Guardianship Tribunal – a Guide (Training and Information Branch)