Capacity Assessment

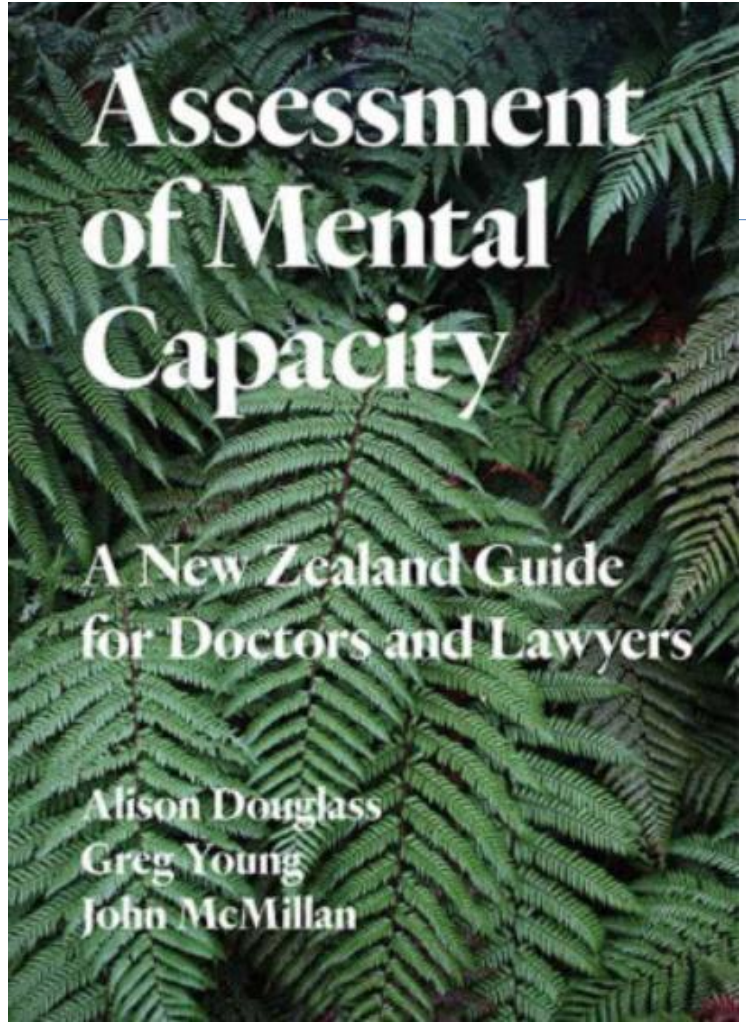
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Mental Capacity

”an idea with medical, legal and social elements that we have come up with, to do a particular job”

(Alex Ruck-Keen KC)

Mental Capacity

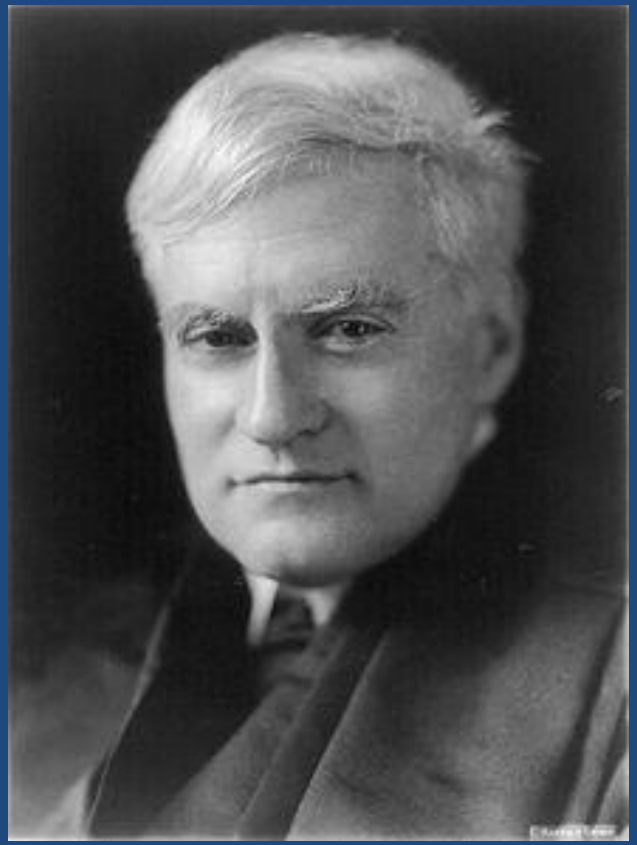
Protection

1. People's right to make decisions despite difficulties
2. People's right to protection from risk of adverse outcomes from a decision they would not have made had they had their cognitive abilities
3. Other people's right to protection from adverse consequences of a person's decisions where that person's cognitive abilities are impaired

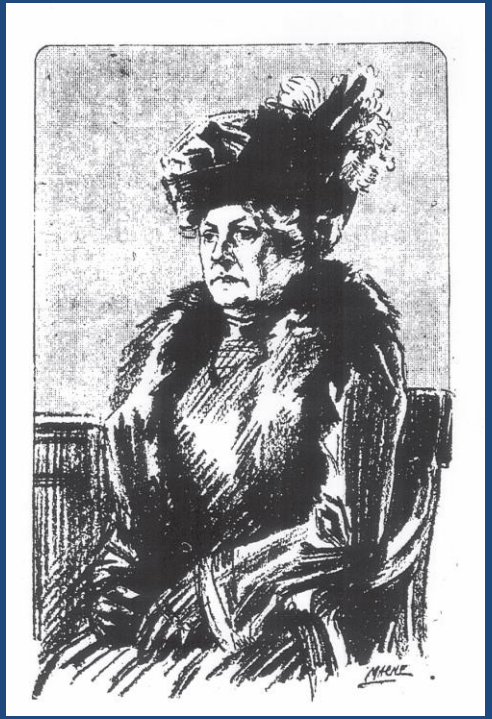
Schloedorff vs Society of New York Hospital, 1914

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

Judge Benjamin Cardoso



Mary Schloendorff



Informed Consent: 1955

- Disclosure of information by doctor
  - Nature, purpose, benefits, risks, alternatives
  - Standard of disclosure
- Voluntary choice by patient
  - No “undue influence”, but reasonable persuasion is ok
- Patient required to be competent to decide

Salgo v Leland Stanford Jr, and Board of Trustees of Stanford University Hospitals and Dr Frank Gerbode, California Appeal Court

Mental Capacity and Incompetency: a psycho-legal problem: 1961

- People leaving asyla were presumed incompetent
- Mezer and Rheingold argued for a specific tests for each decision or type of decision
- Psychosis does not of itself preclude capacity

Mental Capacity and Incompetency: A Psycholegal Problem; Mezer and Rheingold; American Journal of Psychiatry, 1962

Specific Decisions

- Medical treatment
- Marriage
- Will
- EPOAs
- Finances/business contracts
- Instruct/litigate
- Care and welfare decisions
- Residential decisions

Definition and Assessment of Competence Freedman 1981

- Reasonable result test
- Ability to express a choice or decision
- Rational reasons test
- Ability to understand (generic)
- Actual understanding of specific information

Competence, Marginal and Otherwise: Concepts and Ethics, Benjamin Freedman, International Journal of Law and Psychiatry 1981

Competence in Protection of Personal and Property Rights Act 1988

- Able to understand the nature of decision
- Foresee the consequences of decision or of not making decision
- Communicate decision
- Not incompetent simply because of imprudence
- Not incompetent because a compulsory MHA patient

Assessing Decision-Making Capacity

- Capacity or competency is a legal category
- Patient autonomy (vs duty of care, best interests)
- Sliding scale of risk
- Legal versus clinical standards
- Practical considerations
- Making decisions for incapacitated patients

Lo B, Law, Medicine and Health Care, 1990

“Re C” 1994

- 68 year old man with chronic schizophrenia
- Gangrenous ulcer, needing amputation
- He refused, saying “I would rather die with two feet than live with one”
- Doctors disagreed about his capacity to refuse life-saving surgery

“Re C” 1994

- Eastman Test:
- Take in information
- Believe it
- Weigh it all up, considering the risks and benefits

RE C Legal principles

Every adult has the right to decide to consent to or refuse medical treatment, irrespective of the consequences of their decision.

2. It does not matter if the reasons “were rational or irrational, unknown or even non-existent.”

3. However, the initial presumption that the person has capacity is rebuttable.

4. If the person does not have capacity, the doctors should provide treatment that is, in their clinical judgement, in his best interests.

5. If a person declines consent for treatment, the doctors need to consider what level of capacity the person had; the level of capacity and the seriousness of the outcome will assist in determining how to proceed.

6. Treatment refusal may take the form of a “declaration of intention never to consent in the future”.

MacArthur Competence Assessment Tool for Treatment: MacCat-T : 1998

- Express a choice
- Understand information
- Appreciate significance of information
- Able to reason

Assessing Competence to Consent to Treatment: A Guide for Physicians and other Health Professionals : Grisso and Appelbaum 1998

Prevalence of mental incapacity in medical inpatients and associated risk factors: a cross sectional study

- 159 Admitted patients with a mean age 64.2 yrs
- 90% had no psychiatric disorder
- 67% had more than 1 medical diagnosis
- 98% were on medication
- 50/159 did not have capacity
- Clinicians thought 38/50 did have capacity : correctly identified 12/50

Raymont et al, Lancet 2004

The Four Elements – Mental Capacity Act 2005 EW

- **Understand** the situation/problem and options
- **Retain** that information
- **Use or weigh** that information as part of the reasoning process for making the decision
- **Communicate** the decision

Triggers to question capacity

- Risky decision taken against advice
- Change in character with respect to decision
- Abnormal state of mind through illness or dementia
- Concerns expressed by family

Rates of Incapacity

(Sessums et al 2011)

- Healthy elderly: 2.8%
- Mild Cognitive Impairment: 20%
- Medical Inpatients: 26%
- Nursing Home Residents: 44%
- Parkinson’s Disease: 42%
- Alzheimer’s Disease: 54%
- Learning Disabled: 68%

A TOOLKIT FOR ASSESSING CAPACITY



A Douglass, G Young and J McMillan♦

CHECKLIST FOR ASSESSING CAPACITY

This toolkit is a clinical, legal and practical guide for health practitioners (clinicians) when assessing an adult's capacity to make decisions. The checklist is a summary of the toolkit. It is intended to assist clinicians who do capacity assessments infrequently. Each bullet point is hyperlinked to the main Toolkit or to external websites and resources to provide more information. There is more information on the legal framework at the end of the toolkit.

Who should assess?

- Every clinician who does an intervention
- Lawyers
- Doctor or clinical psychologist
- Geriatricians and Psychogeriatricians
- Psychiatrists

Capacity assessment by lawyer vs by clinician

- Similar: understanding; reasoning; appreciation; communication
- By lawyer: focuses on the relevant *legal* test
- By clinician: also focuses on *legal* test, but (with consent) clinician may access medical reports and request medical procedures, complete cognitive testing. May access family members more readily.
- Referral letter to clinician needs to explicitly detail the relevant legal tests

Medical Capacity Assessment

- Doctor will need instructions if it is not a medical decision
- Assessment will be of health, cognitive functioning and the four elements of capacity for the decision
- Support is good but the assessment is of the person's ability to decide autonomously
- May need to repeat the assessment to check consistency
- A good assessment can save a lot of expense later

Problems with capacity assessment

- Cognitive-rational model of decision making; does not factor in values, emotions, religious faith
- People have different appetites for and perception of risks and benefits
- Autonomy as an individual or as an individual who is part of a group?

Supporting Autonomy

- Medical and psychiatric treatment
- Optimize medication
- Hearing, visual and other aids
- Information
- Time and environment for discussion
- Appropriate people to support decision making
- Early diagnosis and Advance directives

Conclusions

Capacity assessment is based on the idea that the person's autonomy is most important, and measures need to be put in place to support autonomy when the person is no longer able to exercise it.