Assessing Capacity to Consent to Health Care

Article by Paul Bielgler and Cameron Stewart
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Adapted by Karen Williams for Queensland Health

Health professionals may be faced with situations whereby they are concerned that a person is unable to consent to health care particularly when a patient refuses treatment. These situations involve a conflict of legal and ethical principles, between the professionals desire to treat the person and the person's right to make their own decisions. This conflict intensifies if the treatment on which the is agreement is based is seen as life-saving. The lawful way through this dilemma is to firstly determine whether the person is capable of making the decision for themselves, or not.
It is important to understand that providing treatment against a person's wishes, not only violates a person's autonomy but it is actually a "battery" under our civil law. On the other side of the coin, if a health professional abides by the decision of someone who lacks capacity to make the decision for themselves, they risk breaching their duty of care, leading to allegations of negligence. Capacity is the key to understanding when a person can make their own decisions (even with assistance) and when they may ultimately require a substitute decision maker.

Capacity

Capacity is a legal term, ultimately determined by courts and tribunals. Health professionals give expert opinion to inform courts and tribunals in most matters. In Queensland it is defined in schedule 4 of the *Guardianship and Administration Act 2000* as;
capacity, for a person for a matter, means the person is capable of:

(a) understanding the nature and effect of decisions about the matter; and
(b) freely and voluntarily making decisions about the matter; and
(c) communicating the decisions in some way.

When approaching the issue of whether a person has capacity for a decision, the courts and health professionals are required to presume that the person has capacity. This presumption is rebuttable, requiring evidence that the person no longer has capacity before their decisions can be ignored or overturned.

Example

An example of how an English court approached the question is found in the case *Re C.*
Mr C was a 68 year old man with schizophrenia who was involuntarily detained in a mental institution. He developed gangrene in his foot and surgeons recommended amputation. C refused this treatment but accepted debridement and skin grafting. C requested that his surgeons undertake to never perform amputation, which they would not give. C applied for an injunction preventing this surgery. C said he would prefer to die with two legs than live with one. The doctors questioned his capacity to decide. C suffered from delusions. Despite this the judge found he had capacity to decide in relation to surgery as he could comprehend and retain relevant information, understand it and weigh the information in order to make his own choice, and that the delusions did not interfere with his ability to do this.
(Referenced from http://www.euthanasia.cc/cases.html#re_c & http://www.ethics-network.org.uk/ethical-issues/conscent/legal-considerations)

Understanding

The person should understand the nature of the illness, the proposed treatment and the associated risks, benefits of treatment, as well as other possible treatments and the risks of no treatment at all. They are also required to demonstrate a stable understanding of these issues over time and able to retain the information in their minds to enable them to make meaningful use of it – that is to be able to reach a decision.

Reflection

The person needs to be able to appreciate the reality of their situation and realise the options available for them. Various mental illnesses such as delusional disorders and depression can prevent this from occurring. The existence of an illness or a disorder is not sufficient, it must clearly interfere with the ability of a person to reflect on their situation and realistic options that are available. For example, if C had believed that the gangrene in his foot was “dirt” his delusions have interfered with his ability to receive, register and reflect upon the clinical information in relation to his position.

Reason

When examining the person’s reasoning process, the premise or basis of a person’s reasoning process should be firstly examined. For example a delusion or a grossly distorted view of self that may occur if the person is depressed. The difficulty can occur for people with strongly held religious beliefs that are unable to be tested. In order to test the difference between religious and delusional beliefs, the following is recommended:

- It can be established that the person’s religious beliefs predate the illness.
- The religious beliefs are also common to others and not uniquely held views.
- The person has previously acted in accordance with those beliefs.
- There also needs to be a rational thought process that attaches to the starting premise.

Consider the following reasoning process.

- My father died following a blood transfusion.
- Therefore I will die if I have the suggested blood transfusion.
- Therefore I will refuse the transfusion.

This is not a logical thought process. It cannot be stressed enough that the presence of an illness or condition that affects the mind does not mean that the person cannot make their own decisions for some or all matters.

When to formally assess

The following list of situations and conditions should raise suspicion that a person may lack decision making capacity.

- Head injury
- Drug or alcohol intoxication
- Dementia
- Delirium
- Depression
- Schizophrenia
- Bipolar disorder

Also, sometimes people's individual response to pain, fatigue, emotional shock and fear can be sufficient that for a point in time they are not capable of making a rational decision.
The case of *Re MB* demonstrates this. A woman had decided to refuse an emergency caesarean section based on her fear of needles. An English court found that she did not have capacity to make that decision and overrode her refusal.
Another aspect to consider is whether the will of the person is being "overborne" by another. In another English case involving a woman refusing a blood transfusion, it was found that this was a consequence of influence by the mother and not her own decision.

Suggested questions

1) Understanding

Ask the person to restate and recall the information presented to them so far, including current diagnosis and treatment options.

2) Reflection

Ask them to state:

- what they believe is wrong with them
- whether they need treatment or not
- what is the likely result of that treatment
- why do you think it will have that effect
- what do you believe will happen if you are not treated
- why do you think a particular treatment has been recommended for you.

3) Reasoning

How did they reach a decision?

- What were important factors in reaching that decision?
- How do you balance those factors?

4) Choice

What have you decided?

How to proceed if the person is not capable

Go the legal framework for substitute decision making. As there are potentially several decision makers, the legislation contains an order of priority to assist in the decision making, as outlined in section 66 of the *Guardianship and Administration Act 2000*.

Adult with impaired capacity—order of priority in dealing with health matter

(1) If an adult has impaired capacity for a health matter, the matter may only be dealt with under the first of the following subsections to apply.
(2) If the adult has made an advance health directive giving a direction about the matter, the matter may only be dealt with under the direction.
(3) If subsection (2) does not apply and the tribunal has appointed one or more guardians for the matter or made an order about the matter, the matter may only be dealt with by the guardian or guardians or under the order.
(4) If subsections (2) and (3) do not apply and the adult has made one or more enduring documents appointing one or more attorneys for the matter, the matter may only be dealt with by the attorney or attorneys for the matter appointed by the most recent enduring document.

(5) If subsections (2) to (4) do not apply, the matter may only be dealt with by the statutory health attorney.

The legislation allows for urgent health care to be provided in situations where it has not been possible to gain the appropriate consent of the substitute decision maker. This provision is contained in s 63 that allows for health care when a person has impaired capacity and there is an imminent risk to life and health, or there is significant pain and distress and the health care provider is not aware of any advanced health directive and the decision and reasons of the health care provider are documented in the medical record.

There are common law doctrines of necessity and emergency that allow for a proportionate response to override a person's consent if the situation is an emergency and an immediate response is required. This response is time limited, once the situation is under control, you cannot continue to make decisions for the person.

Conclusion

Capacity is determined individually based on the actual decision that is required to be made. A diagnosis may raise suspicions about a person's capacity, but everyone is entitled to the presumption of capacity, so a diagnosis, from a legal perspective is at best a guide. It is ultimately a legal concept, and as such some situations will require application to the Queensland Civil and Administration Tribunal in order to make a final determination