Vulnerability and decision-making

Dr Mike Delaney
EDTNA/ERCA : Person-centred care.
30th-31st October 2016
Doctors 'forced' to allow suicide

Doctors were forced to allow a suicidal woman who had swallowed antifreeze to die, because she refused medical help.

Kerrie Wooltorton, 26, of Norwich, had also made a "living will" requesting no intervention if she tried to take her own life, a Norwich inquest heard.

Doctors would have risked breaking the law by treating her, the coroner said.
Key themes

- Consent
- Autonomy/capacity
- Vulnerability ethics
- Public policy for care-giving
The law makers...
Fundamentals of consent

• Information disclosure
• Understanding
• Capacity
• Autonomy
• Voluntary
• Assent i.e. give an active consent
Fundamentals of consent

- Ensures dignity and right to self-determination
- Should help with adherence to treatment
- Has value in avoiding claims for negligence and battery
- Is tested in refusal of treatment cases
“The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good ... is not a sufficient warrant.

....In the part [of a person’s conduct] which merely concerns himself, his independence is, of right, absolute....”
Bio-ethical principles

• Autonomy
• Beneficence
• Non-maleficence
• Justice

• Avoid: Paternalism:

The policy or practice of restricting the freedoms and responsibilities of subordinates or dependants in what is considered or claimed to be their best interests.
Re T. (Adult: Refusal of Treatment)

• per Lord Donaldson,
• Every adult has right to decide whether to accept treatment...presumption of capacity,...is rebuttable
  – Brain injury and temporary factors
    • LOC, or confusion, effects of fatigue, shock, pain or drugs
      Refusal of consent, ? Reduced capacity
  Capacity overborne

1992 Fam.
Legislation

• Human Rights Act 1998
• Mental Capacity Act 2005
• Adult Safeguarding Statutory guidance, Care Act 2014 (Statutory Guidance).
• Serious Crime Act 2015, includes
  – Domestic Abuse
    • Section 76 Controlling or coercive behaviour in an intimate or family relationship
Mental Capacity Act 2005

• Adults (>16 y) in England & Wales
• Ethical *presumption* of capacity
• Has full *legal capacity* to make decisions for themselves
  – People have the right to make decisions that others might think are unwise
• Need support to make the decision at the particular time required
• If lack capacity then act in best interests
Mental Capacity Act 2005

• Two-stage assessment test
• 1. impairment of the mind or brain
• 2. unable to make the decision in question at the time it needs to be made
MCA 2005

- Inability to make decisions, section 3
  - Understand the information
  - Retain
  - Use or weigh that information
  - Communicate the decision

- The assessment is difficult!
  - The MCA has been subject to a Select Committee review during 2014
  - 39 recommendations; need improve awareness of the Act and enhanced training for specialists
Acute setting

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

Vanessa Raymont, William Bingley, Alec Buchanan, Anthony S David, Peter Hayward, Simon Wessely, Matthew Hotopf

• 40 % found to lack capacity
• Passive acquiescence to doctor’s advice and treatment
• Medical team may go along with this if agree to the proposed intervention
• Risk of undesirable practice if not explicit in identifying and addressing fact of capacity (eg End-of-life care, DNACPR etc., care home placement)
• Are these patients ‘vulnerable’? And need protection

Acute setting

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<table>
<thead>
<tr>
<th>Age (years)</th>
<th>Adjusted odds ratio (95% CI)</th>
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<tr>
<td>≤50</td>
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<td>51–60</td>
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<td>61–70</td>
<td>5.4 (0.83–35.7)</td>
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<td>71–80</td>
<td>7.7 (1.3–45.8)</td>
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<td>≥81</td>
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<tr>
<th>MMSE</th>
<th>Adjusted odds ratio (95% CI)</th>
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<tr>
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<td>1.0</td>
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<tr>
<td>25–27</td>
<td>1.8 (0.5–6.1)</td>
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<td>21–24</td>
<td>4.8 (1.2–19.1)</td>
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<tr>
<td>≤20</td>
<td>25.8 (5.7–117.8)</td>
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<td>Relative thinks participant does not have capacity</td>
<td>3.1 (1.1–8.8)</td>
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Table 5: Associations of incapacity

Code of Practice to MCA

• Under-diagnosis of incapacity
  – Chronic physical illness
  – Among those who agree with a treatment plan
• 4.26 ...acute illness, severe pain, effect of medication, or distress after a death or shock...
• 4.27...assent to what is proposed does not necessarily mean they have capacity to make the decision
The vulnerability angle

- Presumption of capacity
- Incapacity not demonstrated or diagnosed
- Does capacity ensure autonomy in decision-making?
- Are there other factors that may invalidate the consent?
‘Vulnerable’

• late Latin *vulnerābilis* wounding

• OED Draft additions June 2012
  – Designating a person in need of special care, support, or protection (esp. provided as a social service) because of age, disability, risk of abuse or neglect, etc.

• Removed from Care Act 2014

• Not mentioned in MCA, although the Code includes ‘protecting vulnerable people from abuse, ill treatment or neglect’
Re T. (Adult: Refusal of Treatment)

- per Lord Donaldson:
  - the strength of the will of the patient...and the relationship of the ‘persuader’
  - The relationship may be parent, or other family member, or persuasion based on religious belief
  - ... ‘in other words the patient may not mean what he says’
“Under constraint, or subject to coercion or undue influence, or for some other reason deprived of the capacity to make the relevant decision, disabled from making a free choice or incapacitated or disabled from giving or expressing a real and genuine consent.”
“Vitiate consent
Deception, misinformation
Physical disability
Illness
Weakness (physical, mental or moral)
Tiredness
Shock, fatigue, depression, pain or drugs.
No doubt there are others”
Protecting vulnerable adults with capacity?

- DL, son of Mrs L
- Social services sought non-molestation injunction
- Mrs L was against the action
- Injunction granted
- Although had capacity as per MCA
  - Vulnerable adult
  - Needed protection

Re L (Vulnerable Adults with Capacity: Court’s Jurisdiction), (No 2) [2012] EWCA Civ 253
Feminist philosophy

• Autonomy: male hero
  – Narcissistic
• Relational autonomy: women: relationships, dependency, caring: pregnancy and child rearing...
• Universal vulnerability:
  – innate, situational and pathologic
• Society, the State, obliged to provide to build for resilience capabilities
  – Promotes autonomy
Care-giving and feminist philosophy

- Intermittent dependency
- 10% UK population receiving informal care giving
- The unseen cost of informal care giving estimated at £119 billion
- 1.2 million people aged >65 are providing care
- 10% of world population >65 y by 2025
- ‘Derivative dependency’
  - 84% of care givers are female (within the sector)
More male care workers needed, says providers' chief

By Lucinda Day
Today programme

31 August 2015 | UK | 📷

Ethics of care-giving and feminist philosophy

• Need for the degenderfication of care-giving
• “More male care workers are needed to look after older people, the chief executive of Care England has said
• Prof Martin Green told BBC Radio 4's Today programme that the government should do more to recruit men into front-line adult social care roles…”
Philosophy and practice (a)

- Consent
- Autonomy/Capacity

- Relational autonomy
- Vulnerability ethics
  - Reflective endorsement
  - Authenticity
  - Dialogical approach
  - Accountability condition

- Mature dialogue, patient centred, negotiation, sensitive
- ‘Particular patient test’
- Person/family support tools
- Time for reflection, family involvement
- Justify decision, person to take responsibility
Philosophy and practice (b)

- Vulnerability
  - Pathological
- Enhance resilience

- Ethics of Care

- Feminism
  - Derivative dependency

- Away from undue influence/coercion
  - Safeguarding
  - Serious Crime Act 2015
  - Inherent jurisdiction

- Care Act 2014 (support carers, protect from abuse)

- Degenderfication of care-giving
Do I care?

- Respect
- Recognising fellow humanity in another
- Listening to, an ensuring consent
- Treating the person in a dignified way
- Awareness of how the other person is experiencing the care

From, Jonathan Herring, Caring and the Law, 2013
“The spirit of ubuhti, that profound African sense that we are human beings only through the humanity of other human beings-is not a parochial phenomenon, but has added globally to our common search for a better world” Nelson Mandela
Acknowledgements

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