Wills and curators — decision-making in adults with impaired capacity

Those with impaired capacity need someone who is responsible to take decisions for them.

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There is an extended responsibility to the mentally ill vulnerable person over and above clinical care. The medical practitioner must recognise his or her involvement in making decisions pertaining to health and personal issues, which are dependent on the ability of the patient to function in various areas. Competence may be considered as the umbrella concept on which all other issues are dependent. The concept of competency is viewed differently from clinical and legal aspects. Some international jurisdictions have introduced more specific guidelines for recording mental capacity in legislature, indicating that legal guidelines are considered important. The ability to contract, including making a will, requires a satisfactory level of functioning.

Competence may be considered as the umbrella concept on which all other issues are dependent.

The procedures for curatorship and making of a will require an assessment of the clinical presentation of the patient within legal principles and patient rights. The evaluation of decision-making capacity broadly relates to ethical principles of beneficence, autonomy, informed consent and confidentiality.[1]

People with mental disorder, intellectual disability or organic brain dysfunction require a level of competence in various situations. The act and its consequences and the fact that there are different legal criteria for different acts should be understood in addressing different tasks assessed by a clinician.

Distressed families seek advice and guidance. Family members are concerned and frequently pressurised because of an often unavoidable and urgent choice. These decisions by the clinician and the family member must be reconciled for the patient's benefit and with the law. Personal autonomy brings an additional dilemma to all role players, who must consider the evaluation of both medical and non-medical considerations.

The care of patients without ability to make decisions is a daily occurrence in psychiatric practice. Decisions frequently need to be made by 'surrogates' governed by standards which again may differ from those in other branches of medical practice. The decisions are made more specifically in 'best interests' than according to prior known expressed wishes.

The contractual ability (entering into a contract) and the level of competence required for different contracts need to be considered in each clinical setting.

Concepts

Competency assessment

Does the patient have a rational and factual understanding of the situation and the ability to recall the action or discussion (working memory)? Decisions influenced by abnormal thought processes can affect the ability to negotiate and co-operate. It may be defined as the capacity to function in a particular way, as the ability to process and understand information and to make relevant well-circumscribed decisions based on that understanding. A competent person is a whole, rational agent free to assert self-determination and autonomy.[2] Competence is the ability to perform certain cognitive acts and as such is a process of self-determination. Competency is described in terms of cognition, judgement and insight.

The ability to contract, including making a will, requires a satisfactory level of functioning.

Decision-making capacity

Tests of decision-making capacity typically require a patient to be able to understand

the subject matter of the decision and to be able to weigh up the risks and benefits. Individuals may be assessed as either competent or incompetent. Total incompetence is less problematic than marginal decision-making capacity in various situations, which typically present more difficulties.

Mental state is not consistent or stable and varies over time. An individual's capacity can vary for a variety of physiological or psychological reasons and also in relation to the familiarity with the subject matter of the decision. Every effort should be made to help maximise an individual's performance, e.g. environment and language of preference at assessment. The situation may be different in the assessment of ability to make a single decision or a series of more complex decisions. An example of a series of complex decisions would be decisions relating to the care of a person's property in complicated estates. A range of possibilities become evident and an assessment of the person's ability to make decisions should be based on clinical condition and functioning in each task. Ability is not an all-or-none matter. It must be stressed that it does not include anything like 'ability to make the current or wisest choice'. Decisions do not fit into a single standard – they exist on a spectrum of a patient's mental state and must be considered specific to the individual patient and the situation at hand.

The doctor must remain aware of these issues and must ensure that all clinical decisions are made in a way that respects a patient's interests and increases the highest level of care of these vulnerable patients. The outcome is not based on a finding by a specific person or the court alone.
In the interface of the law and clinical practice the following general points are important:

- Must be function-based (i.e. ability to make specific decision at a specific point in time).
- One should consider fluctuant mental state and temporary incapacity.
- Competency is not equivalent to inability to communicate (e.g. deaf mute or speech deficits).
- Illiteracy is not regarded as inability to communicate or make decisions.
- Caution must be exercised when introducing interference in the lives of 'eccentric' persons.

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When considering the 'patient's best interest' remember that all curator decisions should follow these principles:

- The decision must be the least restrictive option.
- Only intervene if necessary and with regard to individual circumstances and needs.
- Adults must be encouraged to participate.
- Consider cultural environment, values and beliefs as far as is reasonable and practicable.
- Past and present wishes and feelings should be taken into account.
- Views of persons with an interest in the welfare of the adult or the proposed intervention should be consulted as collateral.

Curatorship

Decisions need to be made in daily life about personal welfare (including medical treatment) and financial affairs (property). A decreased ability may be as result of mental illness, intellectual disability, physical disability or ageing-related issues in general. Mental illness does not necessarily imply lack of capacity for this purpose. Legal decisions affecting the person and property rights (*curator bonis* or *personae*) aim at the lessened ability of the more severely disturbed mentally ill to competently manage their own affairs and to prevent potential abuse.

The proceedings are usually initiated by the medical information available and governed by the criteria for the appointment of a guardian.

Consideration must be given to the appointment of a *curator bonis* when the estate (or property) is of significant value. The appointment of an administrator in terms of the Mental Health Care Act should be followed in property of lesser value.

Curator bonis

This means the curator for the 'things, the possessions and the goods' of a person. This is an appointment following legal processes to an adult who is mentally ill or impaired in relation to entering into contracts, i.e. managing their own affairs. A *curator bonis* looks after the propriety interests of the patient and in practice is appointed more frequently than the *curator personae*. Appointment of a *curator bonis* occurs in the case of people with significant estates.

The court is requested to address three aspects in its enquiry:

- to declare the patient of unsound mind and incapable of managing his/her affairs
- to appoint a *curator ad litem*
- to appoint a *curator bonis* or *curator personae*, or both.

It is not essential that a person be declared mentally ill in terms of the Mental Health Care Act before a curator can be appointed to his/her estate.
The De Lunatico Inquerido, Rule 57 of the High Court, lays down the procedure to be followed when the court is requested to appoint a *curator bonis*. This provides that any person may apply (the applicant) to the Provincial Division of the High Court (by Notice of Motion) for an order declaring another person (the patient) 'to be of unsound mind and as such incapable of managing his affairs'.

This rule can be used to apply for a *curator personae* but is more usually used for property applications.

The Notice of Motion to the High Court should be supported by:

- an affidavit by a person well known to the patient (applicant)
- affidavits from two medical practitioners, one of whom shall be an 'alienist'. (An alienist is a psychiatrist, especially one

who has been accepted by a court to assess mental competence of those appearing in a court case.)

This report/affidavit must contain:
- details of the nature, possible duration and reasons why the patient is unable to manage his own affairs (or his person)
- a statement by the practitioners that they have no interest in the order and that they are unrelated to the patient.

After hearing the application, the court may appoint a *curator ad litem* or the court may also dismiss the application or make any other order it sees fit.

Personal autonomy brings an additional dilemma to all role players, who must consider the evaluation of both medical and non-medical considerations.

A *curator ad litem* is someone who manages a court case or court proceedings on behalf of another. The main function of the *curator ad litem* is to manage the patient's interests in court and in relation to the court proceedings on the patient's behalf, because the patient is by reason of mental illness unable to do so himself. This is as such a temporary process until formalisation of the *curator bonis*.

Curator personae

The definition of a *curator personae* is the curator 'over the person' of the patient and means the control over the patient's personal welfare. The usual decisions are those related to arrangements such as suitable accommodation for the patient or providing consent for an operation. In the case of the application for *curator personae* the request is that the patient be declared unable to see to personal needs. A *curator personae* is appointed with far less formality. He/she is in practice responsible for all decisions where money is not involved.

Termination of curatorship on recovery

A patient may apply to the court for an order that he is no longer of unsound mind and incapable of managing his own affairs. He must give the Master of the High Court 14 days' notice of his application. The Master must present a report to the court, which can make certain orders. The application should be accompanied by a medical certificate stating the findings that a medical examination has taken place in respect of the mental condition of the applicant as well as the present and expected future ability of the patient to manage his own affairs.

Administration of property in Mental Health Care Act 2002

- Chapter VIII provides for the care and administration of property of the mentally ill person or person with severe or profound intellectual disability.
- Provision is made for an administrator to be appointed to administer and manage the property of a mentally ill person when the need for this arises.
- There is a prescribed estimated property value and annual income.
- The estimated property value for purposes of section 60 of the Act is R200 000 or/and an annual income of R24 000.
- Application is made to the Master of the High Court.
- Any person over the age of 18 may apply to a Master of a High Court for the appointment of an administrator for a mentally ill person.
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The Master may:
- appoint an interim administrator pending the outcome of the investigation or
- appoint an administrator without conducting such investigation.

Power of attorney

It should be noted that a power of attorney terminates on incapacity of person, i.e. when the person becomes incompetent in law. This is often a source of misunderstanding and can result in unauthorised transactions being undertaken and potential personal liability of the holder of the legal power. A situation where financial undertakings are transacted when the power of attorney is invalid would illustrate this difficulty in practice.

Tests of decision-making capacity typically require a patient to be able to understand the subject matter of the decision and to be able to weigh up the risks and benefits.

Testamentary capacity

Testamentary capacity is the ability to execute a will/last testament. The testator must be of 'good sound and disposing mind and memory' and be able to know the nature of the act (i.e. aware that this is a will they are signing) and be able to describe the property and other possessions (extent of their estate) that they possess.[3]

Clinical assessment is recommended if there is any doubt as to decision-making capacity. The criteria for assessing testamentary capacity are legal and not clinical and

the question of competency is ultimately decided by the court.

Assessment procedure[4]

In evaluating the ability of a person to make a valid will:

- The person's mind must be clear ('lucid interval'), i.e. evaluate the mental state at the time.
- Always examine the patient alone (undue influence).
- Obtain collateral to check statements and compare with clinical records indicating possible delusional ideation.
- Check understanding of the nature of the act of making a will and its effects.
- Check that the person has a reasonable knowledge of the extent of his property.
- Ensure that the person knows and appreciates the claims to which he ought to give effect and the current relationships.
- Ensure that the person is not influenced in making his dispositions by any abnormal state or by any delusions.
- Apply the Mental State Examination to identify symptoms of major mental disorder, especially delusions, evidence of disorientation or impairment of memory.
- Review the content of the will with the patient.
- Consider if anyone is present at the time of writing of the will who may indicate undue influence.

A clinical report may be requested when a will is made or amended. A person can have the capacity to make a will even if he is otherwise incapable of managing his affairs. The will may be challenged or a psychiatric report may be required when the validity is challenged after death.

Conclusion

There is agreement that if there is dysfunction which removes the capacity to make a treatment decision, this becomes a clinical decision based on an assessment of psychiatric state and thus of competence. This is well illustrated in property issues such as curatorships and in wills.

It is important that all clinicians remain aware of the developments and extent of the current legislation and any ongoing changes.

The ability to make decisions is foremost in this area of clinical assessment. On this basis, the medical profession has been given the clinical responsibility for determining which individuals, on the basis of mental illness, may need to be deprived of autonomy and dignity.

This burden of responsibility and the exercise of judgement is a significant one and is required by society as well as the patient whose rights may be compromised. There is a clear role defined with concepts and assessment procedures to meet legal, clinical and ethical standards and principles. Patients are considered to be legally competent unless they are judged legally incompetent or temporarily incapacitated. Competency is an element of every aspect of decision-making and especially important in mental health systems. Mental competency is the capacity to make acceptable decisions. Often the phrase 'decision-making capacity' is preferred.

The concept must be consistent with medical ethics and law and interpreted in its relationship to medical and psychological concepts. There are implications for a range of situations and assessments and whether recognised or not, most clinicians assess their patients' decision-making abilities as part of every encounter.

References available at www.cmej.org.za

IN A NUTSHELL

- This discussion addresses the clinical approach and the legal issues related to decision-making by patients in relation to their property.
- The definition of competency depends on the approach by either the legal or psychiatric profession.
- The legal concept of capacity refers to an individual ability to carry out the task required, such as managing one's own affairs or making a will.
- Mental illness does not necessarily imply lack of capacity.
- Clinical assessment requirements are to be followed by practitioners to assist/advise in patient decision-making as to ability to enter into contracts and manage one's own affairs.

SINGLE SUTURE

Trainees say they are more efficient with an iPad

Trainee hospital doctors often complain that they spend more time looking for a computer than they do with patients. So one hospital department in the USA tried giving them all an iPad, a popular tablet computer that gave the trainees immediate access to patient records, publications, and paging systems.

The 115 trainees in internal medicine liked their new iPads and 100 reported using them regularly for clinical duties. Three-quarters of the trainees said the iPads made them more efficient, saved them about an hour a day, and reduced delays in patient care. More objective measures corroborated their reports. In a before-and-after study, on-call teams with iPads placed more care orders before the postcall ward round (38% v. 33%) and before they handed over and went home (64% v. 56%) than did similar teams working without iPads the year before. Both improvements were significant.

The authors couldn't tell whether patients got better any faster. But at least one observer believes the new technology is a force for good, and that it encourages doctors to spend more time with patients and possibly even protects confidentiality.

Patel BK, et al. Arch Intern Med 2012;172:437.