

Medical Jurisprudence

Behavioral Sciences Term
St. Georges University
School of Medicine

Visiting Professor
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Segment
3 of 8

Capacity & substitute Consent

Objectives

At the conclusion of
this unit, the medical
student should be able
to answer the
following 8 questions

1. What **kinds of surrogates** can make decisions for incapacitated patients
2. What are the **standards** by which surrogates should make treatment decisions

3. When is a minor **emancipated** (and treated like an adult)
4. When can an **un-emancipated** minor consent to treatment

5. When can a patient be involuntarily **detained**
6. When can a patient be civilly **committed**

7. What are the consequences of **civil commitment**
8. What is the **difference** between capacity, competence, commitment, and insanity

Capacity

Distinguish 3 related terms

Competence

Legal determination
(by a court)
Global (all decisions)

Insanity

Legal determination
Specific to whether person criminally responsible for actions

Capacity

Clinical determination
Decision specific

What is capacity

Ability to **understand** the significant benefits, risks and alternatives to proposed health care

Ability to **make and communicate** a decision.

Decision specific

Fluctuates over time

Patient might have capacity to make **some** decisions but not others

Patient might have capacity to make decisions in **morning** but not afternoon

Capacity is a **clinical** decision

With legal consequences

3 case examples

Lane v. Candura (Mass. 1978)

77yo Rosaria Candura

Gangrenous right foot and leg

Refuse consent for amputation



Doc thinks stupid decision

But she **understands** the diagnosis and the consequences

DHS v. Northern (Tenn. 1978)

Mary Northern 72yo

Gangrene both feet

Amputation required to save life



Does **not** appreciate her condition

“Believes that her feet are black because of soot or dirt.”

In re Maynes-Turner

(Fla. App. 1999)

Doc: “She might pose significant risks for herself on the basis of those decisions that she would make.” So no discharge home.

Doc: “Cognitively she does reasonably well. She would seem to possess the necessary knowledge that would be required for restoration.”

Significance of capacity

If patient’s decision is not impaired by cognitive or volitional defect, physician **must respect** decision

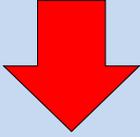
Otherwise, not honoring choice = **paternalism**, violation of patient autonomy

All patients are **presumed** to have capacity

Until the presumption is rebutted



Patient has capacity to
make the decision at hand



Patient decides **herself**

**BUT patients often lack
capacity**

1. Had but lost (dementia...)
2. Not yet acquired (minors)
3. Never had capacity
(mental disability)

**Adults
who lost
capacity**

If patient
cannot make
own decisions,
need a SDM

**3 main
types
SDM**

1st choice –
patient picks
herself

Usually in an
advance
directive

**“Agent”
“DPAHC”**

Patient knows who
(1) They trust
(2) Knows their
preferences
(3) Cares about her

2nd choice –
if no agent,
turn to default
priority list

“Surrogate”
“Proxy”

Most states
specify a
sequence

Agent
Spouse
Adult child
Adult sibling
Parent

3rd choice –
ask **court** to
appoint SDM
(rare)

“Guardian”
“Conservator”

**SDM
summary**

| Who appoints | Type of surrogate |
|----------------------------|-------------------------|
| Patient | Agent DPAHC |
| Physician (per statute) | Surrogate Proxy |
| Court | Guardian Conservator |

How does the
SDM decide?

Any type of SDM can usually make **any** decision patient could have made

Hierarchy

1. Subjective
2. Substituted judgment
3. Best interests



Subjective

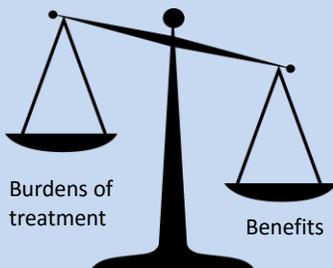
If patient left instructions addressing situation, follow those instructions

Substituted Judgment

Do what patient would have decide (if she could) using known values, preferences

Best interests

If cannot do substituted judgment



These are rules for patients who had, but lost, capacity

What about patients who **never** had capacity?

Minors

Minors
(<18 yo)
presumed
incompetent

Legal
presumption
means rarely
reach question
of capacity

Who is
the SDM

SDM for
children are
parents

Consent of just
one parent is
sufficient

How does
the SDM
decides

Parent must
act in child's
best interest

Cannot refuse
life-saving
treatment

Unless low chances of effectiveness and heavy burdens



Minors exceptions

1

Sometimes minors are **competent** to consent

“Emancipated” minors treated like adults

“Emancipated”

>13yo + 1 or more:
Married
Economic self-sufficiency (live alone)
Military service
Court order

2

Un-emancipated
minors can
consent to some
types treatment

Contraception
STD
Pregnancy

Alcohol &
substance
abuse

Public health
policy reason
to allow
consent

Requiring
parental
consent
would “chill”

3

“Mature”
minors can
consent in
some states

Any
treatment,
even LST

<18 but can
give consent
if mature
enough



**Never
competent
adults**

SDM must act
in patient's
best interest

**Civil
commitment**

Judges
"commit"

Physicians
can
"detain"

Up to 48 hours
Pending court
hearing

Danger to self
or others

**2 main
situations**

1

Infectious
disease (Ebola,
TB, measles)

2

Mental health

Still retain right to
consent / refuse
and conduct
affairs (e.g. vote,
contract)

Detained
patients **only**
loses right to
leave

California tuberculosis patient found, arrested

By The Associated Press

A California man who was charged after refusing treatment for his tuberculosis was found and arrested, a prosecutor said Tuesday.

Eduardo Rosas Cruz, 25, was arrested late Monday in Kern County, San Joaquin County Deputy District Attorney Stephen Taylor said. Before Rosas Cruz can be sent back to San Joaquin County, he has to be medically cleared, which could take weeks, Taylor said.

Authorities last week obtained an arrest warrant for Rosas Cruz, saying he was diagnosed with tuberculosis in March after going to San Joaquin General Hospital's emergency room with a severe cough.



This unit is a little
shorter

So, we will start unit 4
a little early

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