

Topic 1.1 – Principle Based Ethics

Beauchamp & Childress Approach: Principles of Biomedical Ethics (2001)

“A set of principles in a moral account should function as an analytical framework that expresses the general values underlying rules in the common morality. These principles can then function as guidelines for professional ethics... we defend four clusters of moral principles that serve this function. The four clusters are:

- **Autonomy:** People should be allowed to make their own decisions
- **Beneficence:** People should be altruistic and give care to others
- **Non-maleficence:** People should do no harm
- **Justice:** Goods and services should be allocated fairly

In the West and increasingly but variably in other regions of the world, this academic/social/political force has redirected the doctor-patient relationship away from traditional medical paternalism, and produced legislation and CL judgements which protect and defend individual human rights

Autonomy requires practitioners to:

- Respect the rights of the patients to make their own decisions in accordance with their own values.
- Allows competent patients to be informed and maintain control over the decisions that affect their health.
- Ensures that the decisions made by patients are voluntary and based on adequate information and decisions.
- Upholds the patients' trust and confidentiality

Beneficence requires practitioners to:

- Above all, value curing, helping and healing
- Engage in behaviour which benefits the patient
- Be competent and recognise the limits of their competence
- Analyse and evaluate risks and benefits associated with treatment
- Some argue that beneficence includes consideration of the wellbeing of all and not just individuals (i.e. allocation of scarce resources)

Non-maleficence requires practitioners to:

- Refrain from any behaviour which may cause a patient any harm
- Avoid any deliberate act which may be detrimental to a patient, including disregarding wishes of the patient or having insufficient skills for treatment
- Avoid emotional, physical, verbal or sexual abuse (including spiritual malaise or psychological harm)
- Refrain from treatment if practitioner function is impaired
- Non-maleficence and medical negligence are often related

Justice: “Standards and expectations which any society holds concerning relations between the members of that society; and the rights and services that are due to any member of that society. The word ‘justice’ suggests concepts such as fairness, rightness and equity.

- This imposes a duty for health care practitioners to act fairly and justly towards their clients
- This involves equality of treatment and non-discrimination
- Human rights are implicated in this principle

Exceptions to Confidentiality

Patients can expect that doctors and their staff will hold information about them in confidence unless required by the law (3.4 Good Medical Practice & 2.2.2 AMA Code of Ethics).

[Person/HP] will argue that the exception of [one of the below] apply, thus HP can disclose [information].

Consent/Waiver

Consent may be express or implied (s3(1) HRA; sch 1cl 6.1(a) PA).

Consent is required:

- In connection with the further treatment of a patient (s141(3)(e)(i) Health Services Act ('HSA')).
- To be shared between public hospitals for the treatment of a patient (s141(3)(e)(i) HSA).
- If an organisation reasonably believes that it is necessary to lessen or prevent a serious threat to an individual's life, health, safety or welfare (sch 1 2.2(h)(i) Health Records Act ('HRA'))
- If an organisation reasonably believes that it is necessary to lessen or prevent a serious threat to public health, public safety, or public welfare (sch 1 2.2(h)(ii) HRA)

D will argue that consent was given/waived in regard to [information] because P consented to the disclosure of information when... [facts].

- E.g., sending patient to a specialist or writing a prescription, informing relative where there is a sudden admission to hospital

Operation of Law

D will argue that [information] can be disclosed by operation of law, because the court has granted leave to compel the document to be produced as the information may have significant probative value, which outweighs harm that would ensue from disclosure (s32C(1) Evidence Act).

Otherwise, a doctor cannot divulge information in any civil proceeding about a patient which they acquired in attending that patient (s28(2) Evidence Act).

Urgency/emergency

D will argue that the information could be disclosed because [emergency] was an emergency and [consequence e.g., P may have died] if the information hadn't been disclosed.

Mandatory Statutory Disclosure

D will argue that the information must be disclosed as it is subject to mandatory statutory disclosure because the information relates to...

Birth/death registrations

A suspicious death, as defined under s4 Coroners Act. As D is a registered medical practitioner who was present at or after the death they must report the death to the coroner without delay otherwise D is at risk of 20 penalty units (s10 Coroners Act).

Topic 4 – Consent and Refusal of Medical Treatment

Topic 4.1 – Consent

Consent must be obtained to perform invasive medical treatment which must be given by the patient or a substitute decision maker. Otherwise, there must be some other lawful justification (e.g., emergency, court order or statutory authority). If consent is not obtained, treatment could constitute battery and result in civil, criminal or disciplinary consequences.

"Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages" *Schloendorff* per Cardozo J.

McDougall J in *Hunter and New England Area Health Service v A*: 'whenever there is a conflict between a capable adult's exercise of the right to self-determination and the State's interest in preserving life, the right of the individual must prevail'

Consent "transforms what would otherwise be unlawful into acceptable" - *Marion's Case*

Consent may be express, by written or oral, or implied (e.g. from conduct such as putting out arm for injection)

Consent requires:

1. Capacity to make treatment decisions
2. It must be free and voluntary
3. It must cover the act to be performed

1. Capacity

Where a patient is capable of understanding the nature and effect of the proposed treatment, they may be deemed as having sufficient capacity to provide consent. Capacity is assessed at the time the consent was sought.

There is a rebuttable presumption of capacity to consent to and refuse medical treatment, and the threshold for capacity is relatively low (*Re MB*).

Capacity may fluctuate in response to variations in the person's health and circumstances: capacity is time and subject specific.

Capacity is not about the outcome of the decision itself, but about the decision making *process*. A patient cannot be said to lack capacity simply because they make a decision that is apparently **irrational or ill-advised** (*Re T* per Lord Donaldson).

Note per Fiona: Some treatments require a higher degree of capacity.

Processing Information

To have the capacity to consent, P must be able to (*Re C*):

1. Take in and retain information about their treatment;

P was able/not able to take in and retain information because... [facts]

- They have short term memory (depending on how serious it is)

2. Believe the treatment information; and

P did/did not believe the treatment information because... [facts]

- Similar to Re C, P believed in the expertise of the practitioner treating him

3. Weigh the information (balance the risks posed with their own needs).

P could/could not weigh the information because... [facts]

- Similar to **Re C**, P was aware that they may die if they were not treated
- P feels a little uncomfortable with [delaying/agreeing to treatment], suggesting that they are capable of weighing the information (lect. problem).

The existence of a **psychological impairment** does not automatically preclude capacity to consent to medical treatment (**Re C**):

- P will argue that their case is analogous to **Re C** because although their capacity is impaired by [schizophrenia/other illness] they are still able to understand the nature, purpose and effect of the treatment. Furthermore, there is **no clear link** between their delusions and refusal.
- D (Doctor/medical practitioner) will argue that P's case should be distinguished from **Re C** because P's capacity is impaired by [schizophrenia/other illness] and there is a **clear link** between their delusions and refusal because... Thus, they are unlikely to be able to fully understand the nature, purpose and effect of the treatment.

The legally relevant enquiry is whether the patient is able to take in, process and apply the proffered advice. If so, then no matter the extent of any other impairment, P will be deemed to have sufficient capacity to consent to medical treatment.

Re C (Adult: Refusal of Medical Treatment) [2009]

Facts	• C was serving a prison sentence for stabbing his girlfriend • C diagnosed with chronic paranoid schizophrenia • Suffered from grandiose delusions which included a fabricated history of an international career in medicine • C's leg became grossly infected and the most appropriate course of action was a below-knee amputation • C refused, despite being informed that he only had a 15% chance of survival if not amputated • Still expressed complete faith in doctors treating him and openly accepted that he might die • C formed the view that dying with two feet was preferable to living with one
Issue	Did C have capacity to refuse?
Held	• Thorpe J emphasised the need to focus on the process of the decision making, and not the potential outcome that he might die. • Determination of capacity focuses on ability to comprehend and process information surrounding the proffered treatment • Thorpe J acknowledged that C was difficult to understand and suffered from grandiose delusions • Also noted that C did not exhibit 'inappropriate emotional expression'

	• Thorpe J observed and paid respect to the fact that C was possessed of 'a certain dignity of manner', and that there was no clear link between C's persecutory delusions and his refusal to undergo the treatment • Focus on his ability to take in, retain and process the information: • Had the requisite understanding of the nature of the treatment and the risks of refusal • Clearly lacked full legal capacity to make broader decisions • But in the confined circumstances of consent, he was possessed of sufficient understanding to make decisions • Capacity threshold is relatively low and does 'not require the patient to carefully consider the advantages and disadvantages of the situation or proposal' • The existence of a psychological impairment does not automatically preclude capacity to consent to medical treatment
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Understanding Nature of the Illness and Consequences

To have capacity, P must also be able to understand the specific nature of the illness and the consequences of their decision (*Re B*).

P will argue that they were able to understand the nature of the illness and the consequences of their decision because... [they were aware they would die because of the illness otherwise].

- *Re B*: B was paralysed from neck down for 10 years and requested for her respirator to be turned off. Hospital couldn't reach a conclusion on her capacity - she was on antidepressants but was not suffering from depression. B had capacity because emotions or strong disagreement did not cloud her judgement
- E.g. commented that she was glad the respirator had not been turned off

Therefore, P likely has/does not have capacity.

Re B (Adult: Refusal of Medical Treatment):

Facts	• B had a haemorrhage • Much treatment, 10 years later in total paralysis from the neck down and ongoing ventilation • B requested removal of ventilation, describing it an invasive treatment constituting unlawful trespass
Issue	Did B have capacity?
Held	• Conflict between autonomy and sanctity of life • Case not about her best interests but about her mental capacity • Held: she had decision making capacity • Placed a great deal of emphasis on B's ability to give a 'clear account of her reasoning and decision-making process' • This demonstrated mental competence, intelligence and ability, combined with the factual evidence of those treating Ms B • Fact driven enquiry found that she had demonstrated a sophisticated level of understanding about both the condition and the consequences of her decision.

2. Voluntary

A voluntary decision is one that is freely made by the patient in response to an understanding of the treatment options. The key to a truly voluntary decision is the absence of undue pressure, coercion, fraud or manipulation.

P will argue that consent was voluntary as there is no evidence of coercion, fraud or undue influence.

Coercion: consent must be voluntary and not coerced

Norberg: D will argue that the consent was not voluntary because [facts, e.g., coerced to have sex with doctor in return for prescription drugs].

Norberg v Wynrib (1992)

Patient was a drug addict and was coerced to have sex with doctor for prescription drugs

Fraud : consent can also be vitiated by fraud

Appleton: D will argue that consent was not voluntary due to fraud as it induced a mistaken belief in P about the [doctor's identity/nature/purpose of the treatment], when [fraudulent person] did [conduct, e.g., withheld information regarding treatment].

Appelton v Garrett (1997)

- Dentist gave patients unnecessary root canal treatment and crowns. Deliberately withheld information from patients, so they didn't know it was not needed. Failure to inform patients was beyond mere negligence
- Constituted fraud, which meant that consent was vitiated.
- Held liable for trespass
- Plaintiffs awarded aggravated damages

Influence and undue influence: cf b/w influence and undue influence

Consent is not voluntary if there was undue influence (**Re T**).

[party not wanting consent] will argue that consent was obtained under undue influence because... [facts].

- Was on a high dose of medicine, very sick at the time or had external influences from family members
- [person causing undue influence] was there at every appointment.

Note: third party may be family member, religion

Analogous to **Re T**, [patient] changed their mind only when [person causing undue influence] was present

- **Re T:** T did not want a blood transfusion despite being very sick. Consent was vitiated because when T refused the transfusion they were with their mother who is highly religious (Jehovah witness) - but T had previously mentioned they were no longer following the religion. Also, T was very sick and on a high dose of medicine.
- Father of the baby applied to the court for a declaration, said that consent was not vitiated as it was an independent decision

- Court of Appeal - abundant evidence about the influence of the mum... could vitiate decision, especially considering she was on a lot of drugs, pregnant, was just in a car accident

Consent must reflect the preferences of the patient. Preferences cannot represent an overriding of the patient's will by external interests, and care must be taken to ensure that support does not become undue influence.

Influence and assistance are to be distinguished from undue influence, the latter essentially involving a substitution of another person's wishes for those of the patient.

Re T: (Adult: Refusal of Treatment)

Facts	• The patient was vulnerable due to their illness • 34 weeks pregnant • Involved in a car accident • Diagnosed with pneumonia • Baby did not survive caesarean • T's background (relevant to the court's decision): • Parents separated when young • Mother a Jehovah's Witness • Father had no interest in religion • T lived with mother until 17 • In later part of life, re-established connection with father • In hospital, disoriented under influence of medication • On 2 occasions after private conversations with mother, spontaneously stated she did not want blood transfusions • Father believed her capacity was diminished due to the undue influence of the mother
Issue	Did she have capacity?
Held	• Vulnerability does not mean that the patient should be denied the support and input of others • On the contrary, it is essential that the patients are able to discuss important decision with, and seek guidance from, loved ones • Influence and assistance are to be distinguished from undue influence, the latter essentially involving a substitution of another person's wishes for those of the patient. • When differentiating between the two, the court will consider all the surrounding circumstances, including the condition of the patient and the nature of the patient's relationship with the influencing party • Court considered a number of factors, including: • Traumatic accident • T's concern for unborn child • Severe and constant pain • Under influence of medications • Appeared disoriented and detached • Mother's religious convictions • Relationship with mother and daughter, and her spontaneous mention of blood transfusions after discussion with mother • Held: valid consent undermined • The refusal was not a truly voluntary expression of T's will

3. Cover the Act Performed

Consent must be specific and cover the act performed. It is not appropriate for a doctor to step outside the confines of consent. The patient must set the boundaries of the treatment and all interventions must fall within those boundaries.

The nature of the enquiry is a relatively narrow one and confined to the specific nature of the medical treatment and the overarching purpose of that treatment.

S36 Consent (**Mobilio**... amended by **Crimes Act 1958**):

Consent means free agreement, there will be no consent where P is:

- incapable of understanding the sexual nature of the act
- mistaken about the sexual nature of the act
- mistaken about the identity of any other person involved in the act
- mistakenly believes that the act is for medical or hygienic purposes

The burden of proof lies on [practitioner] to prove that there was valid consent (**Phung**).

Misrepresentation/All Information given: For consent to cover the act, the nature of the procedure must not be misrepresented (**Phung**).

[person] will argue there was/was not a misrepresentation of the procedure because [doctor] told [patient] that the treatment was for [purpose] but it was actually for [other purpose].

- Doctor told patient that treatment was to [e.g., fix their teeth] but it was actually for their own sexual gratification (**R v Bas**)
- Person refuses chemotherapy because medication currently suffices, however was there a misrepresentation in that their cancer is worse than doctors thought, and medication does not suffice? (lect problem)

Motivation of the doctor: The court will consider [doctor]'s motive (**Phung**).

Note the different judgements:

R v Mobilio:

- Motivation behind intrusive treatment is not relevant to the question of consent
- Unless the activity consented to was 'essentially different in nature or character' then the radiographer's motive was irrelevant
- Where the patient has consented to the act in question, then the consent remains valid
 - Later amended by **Crimes Act 1958**

R v Bas:

- Different interpretation to **Mobilio**
- D has fraudulently misrepresented his purpose in touching his patients and this changed the nature of the act and vitiated consent
- Improper motivation thus legally alters the nature and character of the treatment
- The expectation that the consent covers the specific act performed extends to a consideration of the motivation for the performance of the act

Phung:

- The work was both unnecessary and ineffective with the primary motivation for the treatment being financial gain as opposed to therapeutic benefit to the patient
- Even if a patient consents to a specific treatment that is then provided, consent can be vitiated if it is concluded it had been obtained by fraud

- Consent was given for the therapeutic intervention and not for the unnecessary treatment actually provided

P will argue that there was no relevant consent as [Doctor] intended to [intention].

Peripheral elements: Where the treatment can provide a therapeutic effect, the core nature and necessary elements of the procedure must be distinguished from unnecessary / peripheral elements (Phung).

[person] will argue [aspect of the procedure] is/is not a peripheral element and is unnecessary to providing a therapeutic effect as [facts, e.g., it would not help with the procedure].

- **Phung:** Consent covered the necessary treatment and did not extend to peripheral element

Therefore, it is likely/unlikely that P consented to [procedure]. A lack of consent will transform the treatment into a battery, and D may be criminally liable.

Exception: the consent of one procedure can, in limited circumstance, be extended to cover further, unforeseen treatment. Usually are essential extensions of the necessity/emergency situation.

R v Mobilio [1991]

Facts	• Radiographer who performed a series of examinations involving the insertion of an ultrasound transducer into patient's vaginas • Alleged the radiographer's sole purpose for inserting the transducer was for personal sexual gratification as opposed to therapeutic benefit
Issue	Was this act beyond the bounds of consent?
Held	• Motivation behind intrusive treatment is not relevant to the question of consent • Unless the activity consented to was 'essentially different in nature or character' then the radiographer's motive was irrelevant • Where the patient has consented to the act in question, then the consent remains valid

R v BAS [2005]

Facts	• Court reviewed several counts of rape, sexual assault and indecent dealings committed under the guise of 'natural' or 'alternative' medicine.
Issue	Was this act beyond the bounds of consent?
Held	• Different interpretation to Mobilio • D has fraudulently misrepresented his purpose in touching his patients and this changed the nature of the act and vitiated consent • Improper motivation thus legally alters the nature and character of the treatment • The expectation that the consent covers the specific act performed extends to a consideration of the motivation for the performance of the act

Dean v Phung [2012]

Facts	• P received minor injuries to his front teeth at work • Treated by Dr Phung • Extensive repair work was undertaken (53 consultations to the cost of \$73,000) • Established the work was both unnecessary and ineffective with the primary motivation for the treatment being financial gain as opposed to therapeutic benefit to the patient
Issue	Was this beyond the bounds of consent?