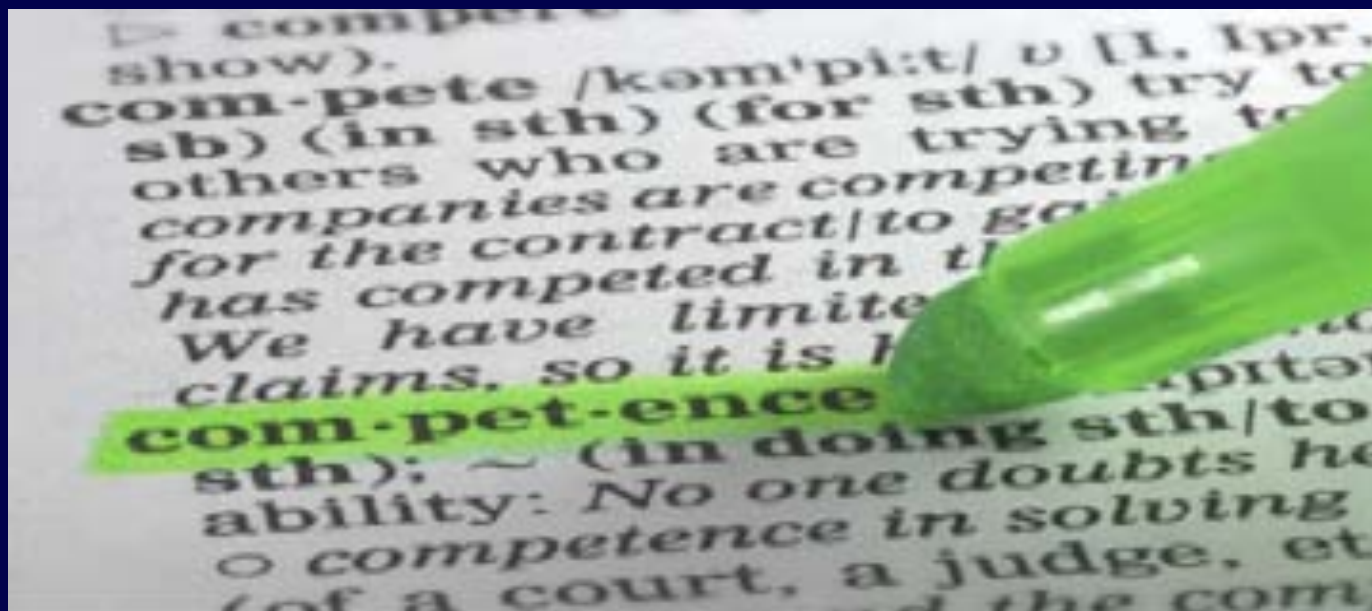


Adults' competence to give consent (or refuse consent) to medical treatment

NZASID 6th Annual Conference
26th and 27th August 2009



Elaine Henderson
Sharp Tudhope, Lawyers
Tauranga



When is a consumer not competent to give informed consent?



Who can provide legally effective consent for treatment of an adult who is incapable of consenting on their own behalf?

When can services be provided without receiving informed consent?

16

When is a consumer not competent to give informed consent?

- Right 7(2) of the Code – rebuttable presumption of competence
- Right 7(3) of the Code – diminished competence
- Right 7(7) of the Code – right to refuse services

Under Right 7(2) of the Code:

Every consumer **must be presumed competent** to make an informed choice and give informed consent, **unless there are reasonable grounds** for believing that the consumer is **not competent**.

Presumption of competence

(Section 5 of the Protection of Personal and Property Rights Act 1988)

Every person shall be presumed, until the contrary is proved, to have the capacity –

a. To understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her personal care and welfare;
and

b. To communicate decisions in respect of those matters.

Two English cases that have been particularly significant in setting out the test of capacity required to make a decision about medical treatment:

□ *Re C (Adult: Refusal of Treatment)* [1994] 1 All ER 819

□ *Re MB (Caesarean Section)* (1997) 38 BMLR 175 (CA)

The four factors from *X v Y [Mental Health: Sterilisation]* 2004 FRNZ are:

1. ability to communicate;
2. understanding of relevant information;
3. appreciation of the situation and its consequences; and
4. manipulation of information.

Are there reasonable grounds for believing that the consumer is not competent?



**diminished
competence**

not competent



Right 7(3) states that where a consumer has diminished competence, that consumer retains the right to make informed choices and give informed consent, to the extent appropriate to his or her level of competence.

The right to refuse medical treatment:

- Section 11 of the New Zealand Bill of Rights Act 1990
- Right 7(7) of the Code

Under Right 7(7) of the Code:

Every consumer has the right to refuse services and to withdraw consent to services.

When is a consumer not competent to give informed consent?



Who can provide legally effective consent for treatment of an adult who is incapable of consenting on their own behalf?

When can services be provided without receiving informed consent?

The law simply refuses to recognise that one adult may control the life of another, no matter how retarded, without express statutory or Court authority.

Kirby v Leather [1965] 2 All ER 441

When can an attorney act in relation to personal care and welfare of a donor?



When is a consumer not competent to give informed consent?



Who can provide legally effective consent for treatment of an adult who is incapable of consenting on their own behalf?

When can services be provided without receiving informed consent?

Under Right 7(1) of the Code:

Services may be provided to a consumer **only** if that consumer makes an informed choice and gives informed consent, **except** where any enactment or the common law, or any other provision of this Code provides otherwise.



Under Right 7(4) of the Code:

Where a consumer is **not competent** to make an informed choice and give informed consent, **and no person entitled to consent on behalf of the consumer** is available, the provider **may** provide services where –

a. It is in the **best interests** of the consumer;
and



Questions?