

Law, Ethics & Decision-making



Laura Tamblin Watts, LLB, SJD (cand)

lw@elderconcepts.com

647-969-6793

Today:

“To understand the laws and ethical obligations of allied health professionals relating to reporting elder abuse and neglect while balancing a senior’s right to live at risk with personal and professional concerns around safety and abuse.”

Ethics:

The law is the minimum ethic!

- Policy: What someone else wants you to do
- Ethics: What you ought to do
- Law: What you are obliged to do!

(m. handleman)

Working in the "Grey Zone"
Art or Science? Ethics or Law?

- Is hard
- Frameworks help
- Laws are not necessarily the answer
- teams

In BC...



The Problem



- Many actors involved
- Different responses
- Mental Health
- Criminal Justice
- Acute Care
- "Nothing we can do"
- "You have to sue"

The Vision



- Bring a coordinated approach
- Multi-actor
- First stage – common understanding

The Agenda



1. **What ?**
Confronting the new normal
2. **So What?**
Understanding capacity and vulnerability
3. **Now What?**
Integration into Practice

1. The “WHAT”




The new normal

- Aging (1:8)
- Mental Health and addictions (1:5)
- Dementia (1:5 over 65 and 1:2 over 85) and other capacity issues



ORIENTATION

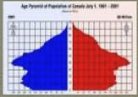


CANADIAN SERVICES NOT PREPARED

33 MILLION POP

1:8 OVER 65 NOW

1:4 BY 2041



Dementia Impacts:

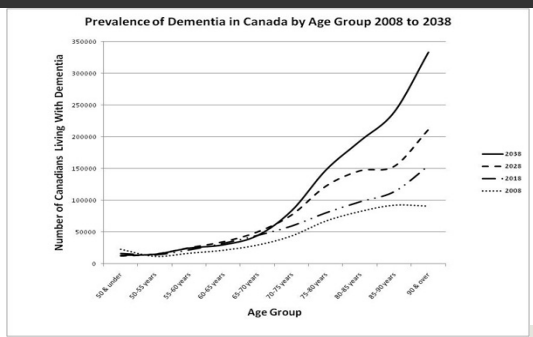
- **Now - 500,000 Canadians**
■ **Within a Generation - 1,100,000**

- **Now - \$15 billion**
■ **Within a Generation - \$153 billion**

- **Now - 231 million caregiving hours**
■ **Within a Generation - 756 million caregiving hours**



The Impact of Dementia



Awareness of Elder Abuse and Neglect

2009 - 71% awareness

2001 - 91% awareness

Have *services* matched demand and awareness?



The Bottom Line?



- Capacity Issues aren't going away
- There will be more in real numbers
- There will be more complicated cases
- Everyone will have to deal with these cases

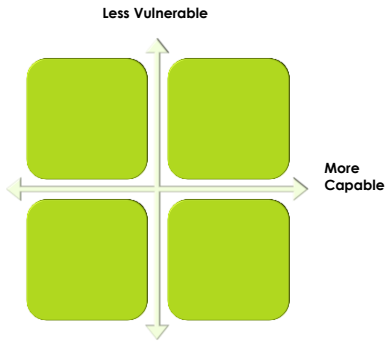
2. So What?



- Bring a coordinated approach
- Multi-actor
- First stage - common understanding

Capacity – Vulnerability Matrix

- Helps “plot”
- A “snapshot
- Key questions – along the capacity and vulnerability matrices
- Has *limits – not determinative



CAPACITY & CONSENT :
Legal Basics 101

What does it
mean in law
anyway?



What is "Legal Capacity" to decide?:

A capable person is able to:

- Understand information
- Evaluate data
- Appreciate consequences



Capability Continuum

Capable to do what?

- Degrees of capability
- Fluctuate, increase, decrease
- Focussed on specific decisions or kinds of decisions



"Informed" Consent

- "As a result of a CVA, your dad suffered anoxic brain injury leaving him PVS. We're going to palliate him, ok?"
- "If your dad's heart stops, do you want us to perform CPR?"
- "If your dad's heart stops do you want us to pound on his chest, probably breaking his ribs and sternum, against the 2% chance we can restart his heart so that we'll be able to break more of his ribs again tomorrow—because his heart will stop again and we can't cure him anyway...?"

Health Care Consent Act s4.(1)

"A person is capable with respect to a treatment, admission to a care facility or a personal assistance service if the person is **able to understand** the information that is relevant to making a decision about the treatment, admission or personal assistance service, as the case may be, and **able to appreciate** the reasonably foreseeable consequences of a decision or lack of decision.

Admissions (and other things...)

- "Decisional" Capacity, not
- "Functional" Capacity - more likely determined by an OT.
- A person aware of his/her functional limitations may be capable of assuming those risks.
- Testing awareness of limitations is part of assessing capacity.

Capacity is Always Presumed

Health Care Consent Act (HCCA), s.4(2):

- A person is presumed to be capable with respect to treatment, admission to a care facility and personal assistance services.

**A FINE
DISTINCTION**

The *ability*

- to understand the information
- & appreciate the consequences

Not simply

- whether or not the patient *actually* understands
- & appreciates.

Capacity is *not...

- ↳ Will in fact consent to a treatment
- ↳ Acquiescence
- ↳ Refusal
- ↳ Assent

Section 15(1) of the HCCA:

A person may be incapable with respect to some treatments and capable with respect to others.

- Every capacity assessment must concern a specific treatment decision
- "Treatment" may include a plan of treatment (HCCA, s.2).

Time Specific

Capacity can change over time.

HCCA, s. 15(2):

A person may be incapable with respect to a treatment at one time and capable at another.

- Every capacity assessment must assess a person's capacity to make a specified decision at that time.



PLANNING FOR FUTURE DECISIONS

- NEXUS OF CAPABILITY
- OFTEN A "GREY" ZONE - CHANGING CAPABILITY

CAPABLE	INCAPABLE
YOU DECIDE	SOME ONE ELSE DECIDES (SDM)

29



Planning for Future Decisions

Capable



You decide



Incapable



Someone else decides
(Substitute decision-maker)

Capacity Continuum



"Vulnerability"

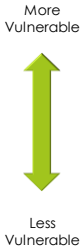


There are four main arguments **against** the term "vulnerable":

- 1. It is **vague, imprecise, and overbroad**: under the right conditions, any person may be vulnerable.
- 2. It **masks paternalism**, and is used to justify otherwise unwarranted intervention.
- 3. It defines a person based on assumptions associated with a **perceived disability or medical diagnosis**.
- 4. It renders factors **external** to the adult an **intrinsic** part of an **adult's individual identity**

Vulnerability Redefined

- **A social construct**
- **Not an inherent quality or individual flaw –**
- **Not a static concept**



What makes people vulnerable?

- Historical abuse
- Isolation
- Lack of social networks
- Isolation
- Lack of education
- Poverty
- Citizenship uncertainty
- Transportation barriers
- Immigration status
- Language barriers
- Mental health / other illness
- Disability
- Housing instability
- Gender / race / sexual orientation
- Aboriginal status
- Institutionalization

Vulnerability / Capability – not correlative

- Not static
- Not determinative of each other
- A person may be quite incapable without being particularly vulnerable, or very capable but highly vulnerable.



3. Now What?



- Case studies
- Vanguard matrix
- Implementation “Monday Morning”

Mary's Story

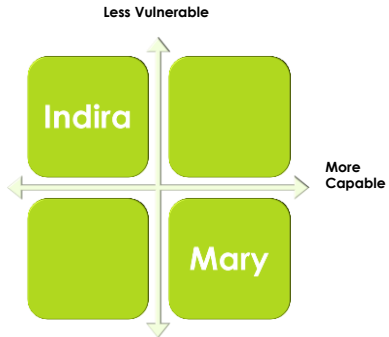


- 75 years old, rural community
- MS, but no cognitive impairments
- Long-time domestic abuse and violence – physical, sexual, gas-lighting
- Son takes advantage – POA – abuse
- Little control, little safety
- Highly vulnerable, but capable

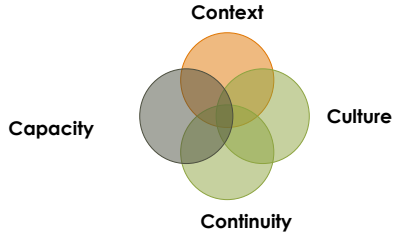
Indira's Story



- 80 years old, urban setting, excellent residential care home
- Friends and family – listen to her values, wishes, lifestyle
- Comfortable assets, held safely
- Low capability, low vulnerability



Dynamics



Vanguard Resources and Materials

1. Law Reform Report on Abuse and Neglect and Capacity Issues in Canada
2. Legal Matrix of Capacity Assessment Tools
3. Summaries of Assessment Tools Used in Other Jurisdictions
4. Vanguard Presentation Slides – Current and Future Laws Update
5. Tips for Good Practice for Lawyers: Capability and Vulnerability Issues
6. Housing and Capability Issues Background Paper
7. Immigration and Capability Issues Background Paper

This group of materials has been designed so that people can use as much or as little as they need

Helpful Resources

- National Initiative for Care of the Elderly
www.nicenet.ca
- Canadian Centre for Elder Law
www.bcli.org/ccel
- Advocacy Centre for the Elderly
www.aclelaw.ca
- Federal Gov't Canada
www.seniors.gc.ca

Laura Tamblyn Watts

- Principal
Elder Concepts
lw@elderconcepts.com
www.elderconcepts.com
647-969-6793

- Senior Fellow
Canadian Centre for Elder Law

- Vanguard and Counterpoint materials
available at: www.bcli.org/ccel