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Autonomy and Capacity: The Ethical and Legal Considerations

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Abstract.

This article discusses the important concept of autonomy and what this means for patients and their families. This concept is the first of the four ethical principles identified by Beauchamp and Childress (2019) and is an important legal issue. Firstly, the ethical position of autonomy will be explored before moving on to discuss the legal aspects. Next, definitions will be presented, and the relevant and pertinent parts of the Nursing Midwifery Council (NMC, 2018) code. Finally, closely linked to autonomy is capacity. This link will be discussed, highlighting the processes and considerations that need to be considered if a person's capacity is reduced.

Key Words: Autonomy, Capacity, Ethical Principles, Legal, Nursing Associates, Support Workers.

Introduction

The concept of autonomy is an important one for all patients, no matter their age. It has ethical and legal implications that must be considered when care is being planned and delivered. Griffith and Tengnah (2020:39) define autonomy as being about “self-rule with no control, undue influence or interference from other.” Gillon (1994) identified three components to autonomy; thought, will and actions. Autonomy of thought is concerned with using and weighing up all available information to decide on a course of action. Autonomy of will is about having the intention to follow through once a decision has been made. Finally, autonomy of actions is acting upon the decision.

NMC (2018) Code.

The concept of autonomy is featured in a number of places throughout the NMC (2018) code. Right at the very start of section 1 in ‘prioritise people,’ 1.3 states that we must “avoid making assumptions and recognise diversity and individual choice.” (NMC, 2018). 2.1 goes on to say that we must “work in partnership with people to make sure you deliver care effectively.” In 2.2, it adds that we must, therefore, “recognise and respect the contribution that people can make to their own health and wellbeing.” These codes highlight the partnership that must exist between the individual and the caregiver for care to be delivered at the highest standards. 2.3 and 2.4 talk about empowering people in decision-making and respecting the level of involvement they wish to have (NMC, 2018). Where the autonomy of a person is diminished or called into question due to their mental capacity, 4.3 states that we must be aware of the laws surrounding mental capacity. Furthermore, if a person

lacks capacity, their best interests and rights remain at the centre of the decision-making process (NMC, 2018).

Within the second section of the code 'practice effectively', in part 7 communicate clearly, it states the important need to ensure that communication is clear, that people's language and communications needs are met, and that understanding is checked (NMC, 2018). Without clear communication, autonomy cannot be assured. As well as presenting information in a clear and understandable way, we also need to listen to the person in front of us actively. We should get to know the real person, who they are, taking on board their wishes and personal circumstances and respecting their rights as human beings.

Adults

One of the United Nations (2015) Sustainable Development Goals is to ensure that good health and wellbeing is guaranteed for all, and in response to this, the NHS long term plan acknowledged the need for better services (NHS, 2019). However, given that "complexity is inherent in nursing work" (Jackson, Anderson, and Maben 2021:8), there is a tendency for nursing activities to be rushed, which negates the expectations of *the code* (NMC, 2018). Generally, fundamental values underpinning the 4P's of nursing, i.e., prioritising people, practising effectively, preserving safety, and promoting professionalism (NMC, 2018), acknowledges the need to swiftly adapt within clinical environments, which often have complex characteristics. Thus, to empower patients who are adults aged 16 and over, there is a requirement for a combination of proficiency, consciousness, and flexibility as it is of utmost importance to "always practice in line with the best available evidence" (NMC, 2018). Therefore, at the heart of this is the need to promote individuality, trust, independence and

demonstrate commitment and desist from stigmatisation. These are inextricable values needed to create a safe space for patients regarding intricacies associated with decision making and being autonomous.

Mental Capacity and the Mental Capacity Act 2005

Autonomy drives the decision-making processes. All professional care providers must acknowledge a patient's right to hold views, make choices, and act based on their values and beliefs to respect autonomy (Beauchamp and Childress, 2019). We all make decisions every day that could range from simple activities such as choosing outfits to complex activities such as the end-of-life care. Therefore, to protect vulnerable people over the age of 16 around decision making, the Mental Capacity Act (MCA, 2005) was enacted. However, it is important to state that MCA is only applicable in England and Wales and has been amended recently. The amended version (Mental Capacity (Amendment) Act, 2019) reformed the processes and complexities linked with Deprivation of Liberty (DoLS) and Liberty Protection Safeguards (LPS). However, concerns remain about the nature of safeguards, for instance, those afforded to people living in nursing homes and hospitals compared to those living in supported living accommodations (Series, 2020).

NMC (2018) section 4.3 asserts that the nursing workforce must remain up-to-date with legislation and processes to ascertain that individual rights and best interests of those without capacity is taken seriously. In this case, MCA (2005) is legislation that pertains to individuals who may lack capacity to make decisions due to 'impairment of, disturbance in, the functioning of mind or brain' (Williamson and Lawton-Smith, 2013:144). This description includes people living with mental health conditions, brain injuries, and those unable to make decisions because of some medical intervention(s).

Thus, alongside people living with mental health conditions and vulnerable adults who cannot make specific decisions, MCA (2005) can also enable people with capacity to think and plan for a time when they might lack capacity.

Main principles.

Five statutory principles of MCA (2005) were highlighted in section 1 (Williamson and Lawton-Smith, 2013).

- Presumption of capacity: Unless proven otherwise, every adult must be given the benefit of the doubt by assuming that they have capacity and have the right to make their own decisions.
- Adequate support for individuals to make their own decisions: unless all feasible options have been considered and offered, adults must not be deemed to lack capacity and unable to make decisions.
- Unwise decisions: making what might be conceived as an unwise decision must not be equated to lacking capacity to make decisions.
- Best interests: Decisions or actions taken on behalf of adults deemed to lack capacity must be made in their best interest.
- Least restrictive option: Decisions or actions taken on behalf of an adult deemed to lack capacity must not infringe on basic human rights and freedom.

Test of capacity.

Some variations must be respected as far as capacity assessment is concerned. Capacity assessment is time-dependent and decision sensitive as adults living with depression, who might not be able to decide about an intervention or treatment at a difficult time in life, could be able to do so following recovery. Also, an adult living with

dementia might not be able to make major decisions about end-of-life care but could be able to express preferences with regards to meals and clothing, for instance. Age, appearance, behaviour, perception, mood, emotions, judgement, and insight are not indicative of an adult that lacks capacity. As such, adults would only be deemed to lack capacity when they are unable to:

- Understand the information relevant to the decision
- Retain the information
- Use or weigh that information as part of the process of making the decision
- To communicate their decision (by any means)

In cases where adults lack capacity, considerations must be given in ways that could optimise the person's capacity. For example, consideration could include using pictures and objects to involve the person as much as possible; being mindful of place and time; engaging close family members/friends (Griffith & Tengnah, 2020); and involving specialists like a psychologist, psychiatrist, or interpreter, to aid the assessment. There is also a need to be mindful of religious or cultural factors (Williamson and Lawton-Smith, 2013).

Children

Even though children may not have the same mental capacity as adults, their autonomy should not be ignored. Children still need to take control of their treatment and can make their own decisions. For a toddler, this decision may be their choice of orange or blackcurrant juice to drink. Older children who have been deemed to have capacity can consent to their own medical treatment. Article 12 of the Convention on the Rights of the Child (United Nations Children's Fund n.d.) states that "children have the right to give their opinions freely on issues that affect them. Adults should

listen and take children seriously.” The convention also goes on to state in article 13 that children have the right to receive information in any medium of their choosing. Therefore, by including children as equal partners in decision making, appropriate to their age and mental capacity, giving them the correct information to help them make informed decisions respects their autonomy.

How You Can Help Your Patients to Make Decisions.

Griffith and Tengahan (2020) identify a range of ways in which a person can be assisted to make decisions for themselves. The use of simple language, avoiding complicated medical or professional jargon is one. Having the information presented to them in their first language is important. Utilising pictures and objects and asking someone who knows them best, who can advise on the best way to communicate with them. Choosing the place and time, when there are no distractions and they are able to concentrate. Mencap (n.d.) make it clear, it is about supporting the person, making them feel at ease. Providing them with relevant information which is communicated in an appropriate way. As Griffith and Tengahan (2020) state you may need to wait until a time when their capacity improves.

The Autonomy of the Support Worker and Nursing Associate

Up until now, this article has considered the autonomy of the person receiving care. However, it is important to recognise your own autonomy. As previously stated, every adult is deemed to have capacity and, therefore, autonomy. This is completely true in your everyday lives. You are free to make your own decisions. This is true up to a point, as there are laws governing what is deemed as acceptable behaviour in society.

Within the workplace, as a healthcare professional, this also applies. You still have free will and can make your own decisions and choices. However, policies and procedures govern what can and cannot be done. As Griffith and Tengnah (2020) state, you are accountable for your actions and will need to answer to a higher authority. The more highly skilled and trained healthcare workers become, for example, nurse specialists, the more advanced independent decisions they are able to make (Chadwick and Hughes, 2019).

If you are a nursing associate, then you are registered with the NMC. This will give you a certain amount of autonomy as long as you are practicing within the limitations of your role. As Hughes and Chadwick (2019:57) state, “the knowledge and skills developed during training will permit, once trained, some decision-making that will directly affect patient care within the limits of competence, local policy and the NMC Code of Conduct.” However, as stated by Health Education England (2017) in the Nursing Associate Curriculum Framework, nursing associates “while working under the leadership and direction of registered nurses, they will have a degree of autonomy and will use professional judgement to ensure that they always work within the parameters of their practice.”

Conclusion.

So, to conclude, this article has examined the important concept of autonomy. Support workers and nursing associates are the one group of clinical staff most able to ensure that a person in their care has their autonomy respected, no matter their age or level of mental capacity.

Key Points:

1. Respecting a person's autonomy is an important ethical and legal requirement.
2. Every person's autonomy must be respected
3. In cases where adults lack capacity, considerations must be given in ways that could optimise the person's capacity.
4. There are a range of things you can do to support someone in making decisions for themselves.
5. Children have the right to give their opinions freely on issues that affect them.

Reflective Activities for Your Continuing Professional Development

Either individually, or as part of a team from your clinical area, consider your patients and how you can respect further their autonomy. Are there things you can put in place to support individuals whose capacity may be reduced. Is the physical environment conducive to assisting in their decision making.

When workload allows spend time getting to know your patients, practicing active listening.

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