



# Informed Consent in Aged Care: Understanding the Law

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# Overview

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- Key principle
- The law relating to consent
- What obtaining informed consent means in practice
- When a person can no longer consent
  - Emergency Treatment
  - Right 7(4)
  - Enduring Powers of Attorney
  - Court Orders
  - Advance Directives

# Key Principle

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- “Every human being of adult years and sound mind has a right to determine what shall be done with his own body”

*(Schloendorff v Society of New York Hospital 105 NE 92 (NY, 1914), p93)*

# The Law Relating to Consent in NZ

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- Code of Health and Disability Services Consumers' Rights (“Code of Rights”)
- Common Law
- NZ Bill of Rights Act
- Crimes Act



# Code of Rights

- Right 5 – Right to effective communication
- Right 6 – Right to be fully informed
- Right 7 – Right to make an informed choice and give informed consent



# Common Law

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- “An individual patient must, in my view, always retain the right to decline operative investigation or treatment however unreasonable or foolish this may appear in the eyes of his medical advisers”



*(Smith v Auckland Hospital Board  
[1965] NZLR 191 (CA), p219, per T  
A Gresson J)*

# New Zealand Bill of Rights Act

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- Section 10 – “Every person has the right not to be subjected to medical or scientific experimentation without that person’s consent”



- Section 11 – “Everyone has the right to refuse to undergo any medical treatment”
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# Crimes Act

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- **Assault** – “means the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly....”
- Unless there is a lawful excuse – e.g. consent or other lawful basis for proceeding in the absence of consent



# What obtaining informed consent means in practice

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- A competent person...
- Making a voluntary choice...
- About information communicated effectively...
- Which is sufficient to make an informed decision.

# A competent person....

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- Every person is presumed competent unless there are reasonable grounds for believing that the patient is not competent (Right 7(2))
  - Determining competence:
    - Clinical assessment
    - Legal test – if person understands the nature, purpose, effects and likely consequences of the proposed treatment or of refusing treatment
  - Where a person has diminished competence, that person retains the right to make informed choices and give informed consent, to the extent appropriate to his or her level of competence (Right 7(3))
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## ...making a voluntary choice....

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- No undue pressure or coercion – includes ensuring time to understand information
  - Privacy for discussions of diagnosis and treatment options
  - Be sensitive to threats of the voluntariness of a decision, which may come from other sources
  - Note: professional duty to make recommendations as to the best course of treatment available
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## ...about information communicated effectively.....

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- Communication needs to be in a form, language and manner able to be understood by that person
  - Onus is on health professional to take reasonable steps to ensure person understands information given
  - Must allow opportunity for questions and time to digest information
  - Should facilitate environment conducive to effective discussions
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# ....which is sufficient to make an informed decision

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- Every person has the right to receive such information as a reasonable person in their circumstances would expect. This includes:
  - An explanation of their condition;
  - Expected side-effects, risks, benefits, options, costs;
  - Whether they will be involved in teaching or research;
  - Any other information required by legal, professional, ethical, and other relevant standards;
  - The results of tests and procedures;
  - When services will likely be provided.

## ....which is sufficient to make an informed decision

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- The test is what a reasonable person in that person's circumstances would find material to making a decision about the proposed treatment
- You can never tell a person every piece of relevant information but need to be alert to questions/concerns
- Not every known risk must be disclosed

# When a person is no longer competent to consent

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- Can family consent on a person's behalf?
- Emergency situations
- Right 7(4)
- Court Orders
- Enduring Powers of Attorney
- Advance Directives

# Can family consent on a person's behalf?

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- A family member **CANNOT** consent on a person's behalf unless they hold an Enduring Power of Attorney or have been appointed a Welfare Guardian



# Emergency Situations

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- Treatment can be provided in absence of consent in an emergency situation if such treatment is necessary to preserve life, health and well being and is in the best interests of a person
  - Treatment will not be justified if it is contrary to the known wishes of a competent person
  - The treatment must not be inconsistent with a valid Advance Directive given by a person
  - The treatment must be, and be no more than, what a reasonable person would expect to receive in all the circumstances
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# Right 7(4) of the Code of Rights

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- Applies where a person is not competent to make an informed choice and give informed consent, **and** no person entitled to consent on behalf of the person is available
- Services can be provided if:
  - It is in the person's best interests;
  - Reasonable steps have been taken to ascertain the views of the person;
  - If the views have been ascertained, that the provider believes, on reasonable grounds, that the provision of services is consistent with the informed choice the consumer would make if he or she were competent

# Right 7(4) of the Code of Rights

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- If the views have not been ascertained, that the provider takes into account the views of other suitable persons who are interested in the welfare of the consumer and available to advise the provider

# Enduring Powers of Attorney

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- The purpose of a power of attorney is to enable a person to grant someone else the power to act on their behalf in relation to their property and/or their personal welfare
- There is a difference between a power of attorney and an EPOA
- The prime characteristic of an EPOA is that it continues to have effect after the donor becomes mentally incapable



# EPOA - Property

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- May cover part or whole of property
- Donor may impose conditions
- May be effective while donor has capacity or only on incapacity, depending upon donor's instructions



# EPOA – Personal Care and Welfare

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- Donor may appoint one attorney to act in a general or specific manner in respect of personal care and welfare
- The donor may impose certain conditions and restrictions
- Only effective upon incapacity



# EPOA – Personal Care and Welfare

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- A personal care and welfare attorney may not refuse consent or give consent on certain matters:
  - Marriage
  - Adoption
  - Refusal of standard medical treatment to save life or prevent serious damage to the person's health
  - ECT
  - Brain surgery which destroys any part of the brain or brain function for the purpose of changing the person's behaviour
  - Experimental treatment

# The old regime (pre 26 Sept '08)

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- Vulnerable people insufficiently protected by legislation
- No legislative requirement to act in donor's best interests
- No checks and balances on:
  - capacity of a person to donate an EPOA
  - donor's incapacity and the authority of attorney to act
  - independence of witnesses to the making of an EPOA

# The new regime (post 26 Sept '08)

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- Came into force on 26 September 2008
- The purpose of the amendments was to better protect the welfare and rights of vulnerable people

# New Requirements - Donating an EPOA

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- EPOAs donated prior to 26 September 2008 remain valid
  - All EPOAs donated post 26 September 2008 are subject to the new requirements
  - An EPOA must be a written document signed by the donor (or some other person in the presence of the donor and at the direction of the donor)
  - It must be signed by the attorney
  - The donor and attorney must each have their signature witnessed by an independent lawyer, legal executive, or employee of a trustee corporation
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# New Requirements – Donating an EPOA

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- The witness must complete a certificate confirming that:
  - they have explained the effect of the EPOA
  - there is no reason to suspect incapacity of the donor
  - they are not acting for the attorney (i.e. they are independent)
  - they have provided required explanations to the donor (i.e. rights to suspend/revoke, to appoint more than 1 property attorney, to have a trustee corporation appointed as property attorney)

# Capacity to Donate an EPOA

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- Capacity to donate an EPOA is not defined
  - The donor is presumed to be competent until the contrary is shown
  - A person must not be presumed to lack competence just because of imprudent behaviour or because he or she is subject to compulsory treatment under the Mental Health (Compulsory Assessment and Treatment) Act 1992
  - It is likely that the law prior to the amendment to this Part of the PPPR Act applies – being that a donor has sufficient capacity if the donor is capable of understanding the nature and effect of the power, that is, the broad essentials of an EPOA (*Re 'Tony'* [1990] 5 NZFLR 609)
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# New Requirements – When a Property EPOA becomes effective

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- May be effective while donor has capacity or only on incapacity, depending upon donor's instructions
- If effective only when incapacitated, this comes into effect when a donor is not wholly capable of managing own property affairs
- The property attorney must not act unless a “relevant health practitioner” has certified (or the Court has determined) the donor is mentally incapable
- A “relevant health practitioner” is a registered health practitioner whose scope of practice includes the assessment of a person's mental capacity

# New Requirements – When a Property EPOA becomes effective cont

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- The certificate must be in prescribed form
- The new requirements as to when a Property EPOA becomes effective applies after 26 September 2008 regardless of when the powers were donated

# New Requirements – When a Personal Care and Welfare EPOA becomes effective

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- A donor will be mentally incapable and an attorney can act if the donor wholly lacks capacity to:
  - make a decision; or
  - understand the nature of decisions; or
  - foresee consequences of decisions or foresee consequences of failure to make decisions
  - Communicate decisions about matters relating to personal care and welfare
- Recognises incapacity as relevant to individual decisions rather than ‘global incapacity’

# New Requirements – Significant Matters

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- The attorney must not act on a ‘significant matter’ unless a “relevant health practitioner” has certified (or the Court determined) the donor is mentally incapable
  - A “relevant health practitioner” is a registered health practitioner whose scope of practice includes the assessment of a person’s mental capacity
  - A significant matter is one that has a significant effect on health, wellbeing or enjoyment (e.g. permanent change in residence, entering residential care, undergoing a major medical procedure)
  - A certificate in the prescribed form is required for each significant matter (except where certification is indefinite or during a specified period)
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# New Requirements – Insignificant Matters

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- For any matter that is not significant the personal care and welfare attorney must reasonably believe the donor is mentally incapable
- Belief on reasonable grounds - suggests that a medical certificate should be sought where there is doubt even on matters that are not significant

# New Requirements – Duties on Attorney

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- Obligation to act in the donor's best interests
  - Specific duties in relation to personal care and welfare attorneys include:
    - duty to encourage donor's independence
    - duty to re-integrate into community as much as possible
    - duty to consider donor's \$ situation when making decisions
    - duty to consult donor and any persons identified in EPOA
    - duty to provide information on request of listed person
    - duty to consult with property attorney regularly (mutual)
    - may have regard to a donor's advance directive subject to limitations on actions under s 98(4) (may seek assistance of Court)
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# New Requirements – Duties on Attorney

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- Specific duties in relation to property attorneys include:
    - duty to consult donor and listed persons
      - duty to provide information on request of listed person
      - duty to consult personal care and welfare attorney regularly (mutual)
      - duty to financially support the decisions of personal care and welfare attorney
      - must keep \$ records (offence/fine up to \$1,000 per transaction if failure without reasonable excuse)
  - A property attorney's ability to benefit self or others is limited to the extent that the donor has specified the power to act in the EPOA (unless authorised by the Court)
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# New Requirements – If EPOA is not acting in Donor's best interests or breach of duties

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- If health professionals have any doubt as to whether they should rely on the donor's own instructions, or whether due to the donor's incapacity they should rely on the attorney's instructions, legal advice should be sought and consideration given to asking the Court to make a determination (section 102 PPPR Act).
- If there is doubt as to whether the EPOA is being exercised in the best interests of the donor, legal advice should be sought and consideration given to asking the Court to make a determination (section 102 PPPR Act).

# Consequences for persons dealing with EPOAs

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- A person dealing with an EPOA in respect of any matter within the power of the EPOA:
  - does not have to inquire about whether the EPOA has obtained the agreement of the donor or any other person
  - is not affected by notice that the donor or any other person has not agreed

# Practical tips

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- Staff should request the relevant documentation relating to an EPOA for the patient's medical record
- Where there is concern about the validity of an EPOA donated pre 26 September 2008, this should be explored further by seeking further information/legal advice
- Staff need to know about the new requirements
- Staff should not act as a witness for a donor or an attorney (this will be invalid in any event)
- Any request from a donor's witness to assess the donor's capacity is a matter for a medical practitioner. It must be within their scope of practice to assess a donor's capacity. The assessment must be in accordance with the requirements of the PPPR Act.

# Court Orders

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- Where a person lacks mental capacity to manage their affairs the Court is empowered to make orders authorising certain actions or allowing others to manage those affairs e.g.
  - Personal Orders e.g. for treatment
  - Appointment of a Welfare Guardian



# Advance Directives

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- Everyone has the right to use an advance directive in accordance with the common law (Right 7(5) of the Code of Rights)
- “Advance directive” means a written or oral directive by which a person makes a choice about a possible future health care procedure that is intended to be effective only when he or she is not competent

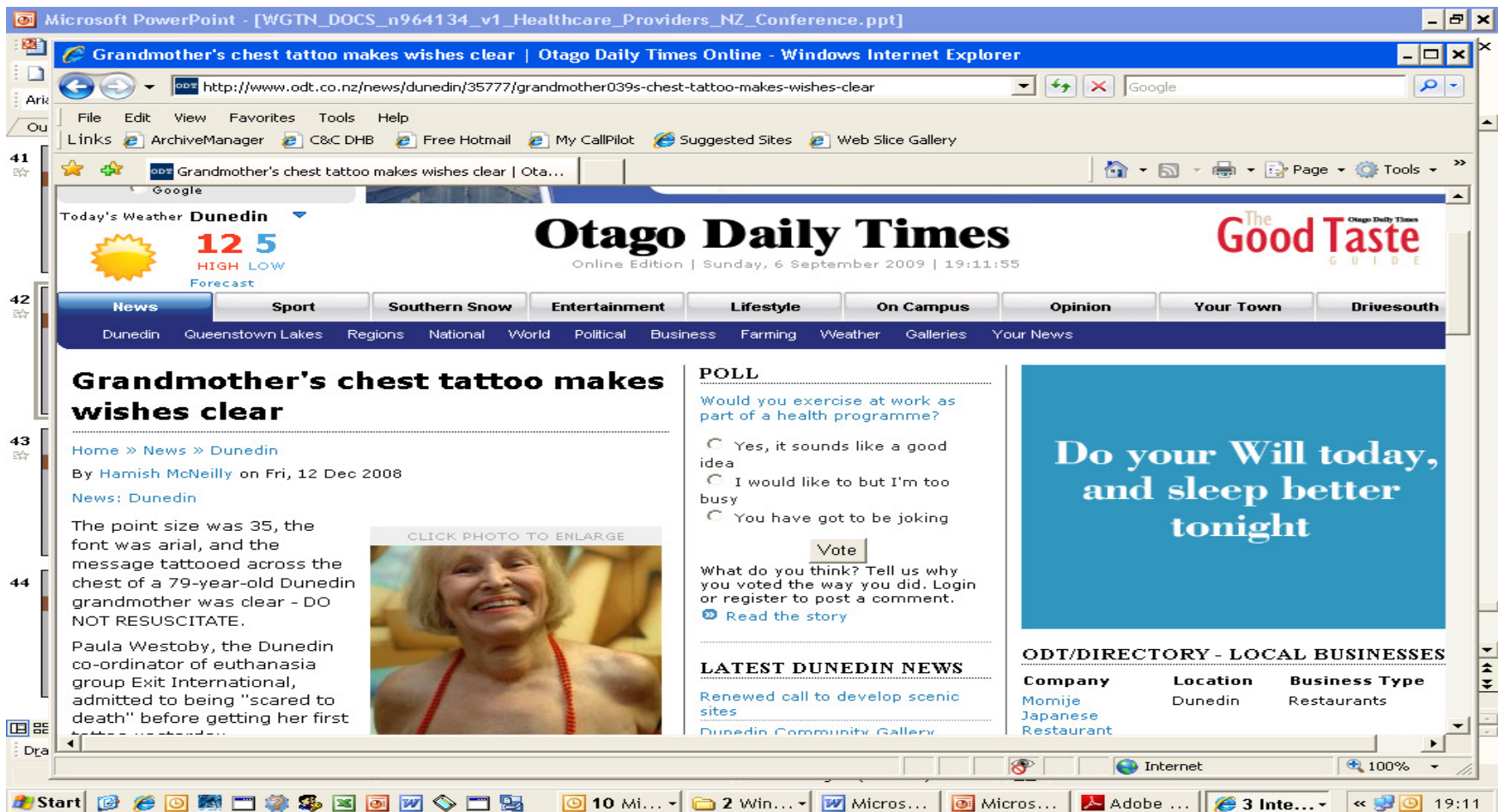


# Advance Directives

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- Law on Advance Directives still relatively untested in NZ
- Need to be sure about circumstances in which Advance Directive was provided where a patient is refusing treatment
- If no concerns about validity of Advance Directive, must comply

# Do Not Resuscitate Orders



# Do Not Resuscitate Orders

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- Resuscitation = cardiopulmonary resuscitation (CPR)
  - Chance of resuscitation being successful is very low, even in otherwise healthy adults
  - Misunderstanding by the public and by the sector
  - Confusion likely to have arisen from the recent shift to a general acceptance that a DNR order should be discussed with an individual and/or their family and not simply recorded on their medical record
  - If a person expressly states that he or she does not want to be resuscitated – this must be respected
  - If a person does want to be resuscitated, this is ultimately still a clinical decision
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# Do Not Resuscitate Orders

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- Put in place, as a matter of policy and process, a mechanism for discussing DNRs
- Record these discussions carefully
- Make sure this information is available where appropriate (e.g. if an ambulance is called)
- Discuss these issues across providers

# Questions

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