

RETHINKIN SEMINAR

VU AMSTERDAM, SEPTEMBER 12, 2016



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IS VERDER KIJKEN

ASSESSMENT OF MENTAL CAPACITY

ESTHER PANS



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STRUCTURE OF THE PRESENTATION

1. Societal context
2. Medical-legal approach
3. Definition 'mental capacity'
4. Guidelines doctors and notaries
5. Conclusion

SOCIETAL CONTEXT

- 2050: worldwide the number of people suffering from dementia will be **tripled**: 115.400.000 people (Dementia: a public health priority, Genève, WHO 2012, p. 2).
- Dutch government statistics 2012: approximately 30.000 elderly were a victim of some form of financial **abuse** (Blankman & Engelbertink 2013, p. 7).
- Project Dutch Ministry of Health "**In Safe Hands**" (2011) training for persons (such as caregivers) to signal elderly abuse or bad treatment of elderly.



SOCIETAL CONTEXT

Never in human history
so many people
have become so old
in relatively good health.

But: “elderly diseases” are
Still unavoidable,
they do manifest,
but at a higher age.

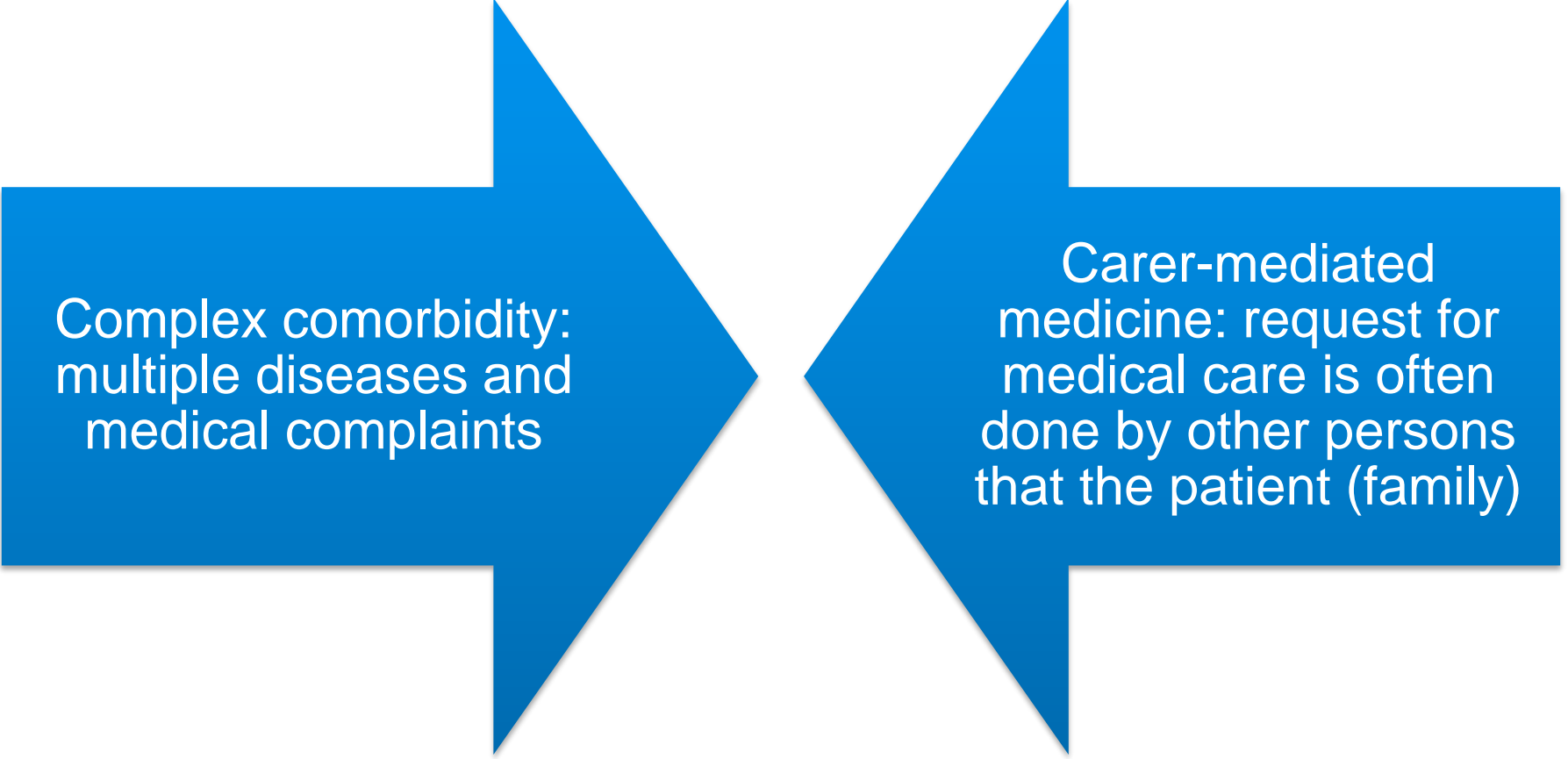


SOCIETAL CONTEXT

Dutch (European?) trends:

- Less publicly financed care;
- More focus on equity of elderly people (personal money);
- More focus on volunteer caregivers (family, friends);
- More severely (mentally/physically) ill people at home, with the assistance of adult guardianship measures (plenary/personal guardianship, protective trust).

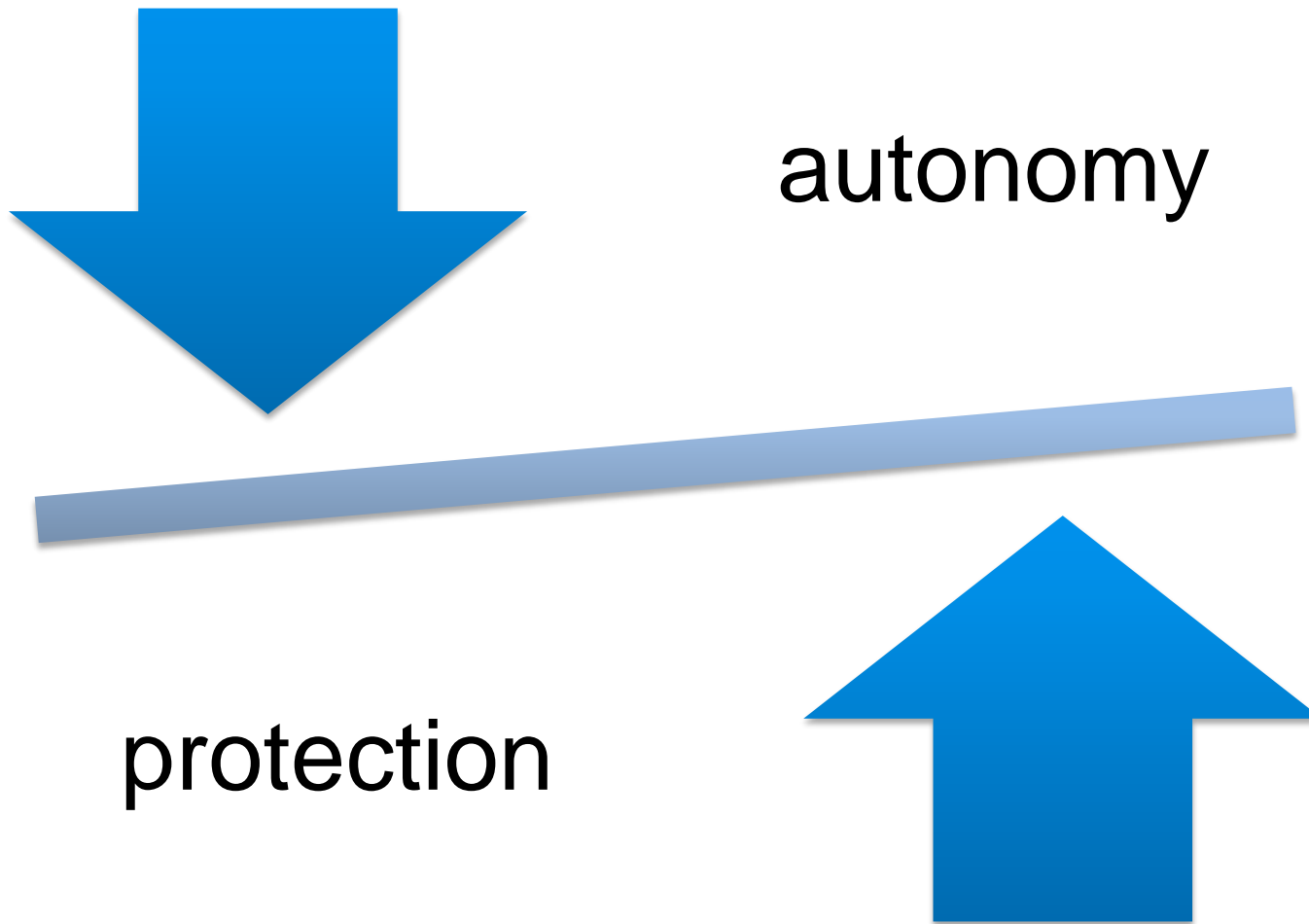
SOCIETAL CONTEXT: CHARACTERISTICS ELDERLY CARE



Complex comorbidity:
multiple diseases and
medical complaints

Carer-mediated
medicine: request for
medical care is often
done by other persons
that the patient (family)

SOCIETAL CONTEXT: CHARACTERISTICS ELDERLY CARE



ASSESSMENT OF MENTAL CAPACITY

Starting point medical-legal approach of mental capacity

A person is considered to have full mental capacity until the contrary has been proven.



RULES OF THUMB MENTIONED IN THE PARLEMENTARY HISTORY ON ASSESSMENT MEDICAL COMPACITY



- The doctor assesses the mental competence of the patient by observing the **total mental state** of the patient;
- Nature of the treatment versus mental state: **far-reaching medical decisions**;
- **Consultation** of family, legal representative or colleague;
- Final **responsibility**: doctor;
- Doctor's motivation must be able to **pass judge's assessment**.

(Kamerstukken II, 21 561, nr. 6, p. 53)

DEGREES OF MENTAL CAPACITY

Fully mental
competent

Legal starting
point

Partially
mental
competent

Certain decisions
or temporarily

Manical
depression,
severe pain, early
phase dementia

Fully mental
incompetent

Extreme cases

Coma, last phase
dementia

MENTAL INCOMPETENCE: DEFINITION

Recommendation (99)4 on principles concerning the legal protection of incapable adults by the Council of Europe:

Definition

‘Adults who, by reason of an impairment or insufficiency of their personal faculties, are incapable of making, in an autonomous way, decisions concerning any or all of their personal or economic affairs, or understanding, expressing or acting upon such decisions, and who consequently cannot protect their interests.’

MENTAL INCOMPETENCE: DEFINITION

Dutch Civil Code

(Book 1 Law of Persons and Family Law, Title 1.20
Protective mentorship for adults)

Article 1:450 Grounds for a protective mentorship
- 1. If an adult due to his physical or mental condition is temporarily or permanently unable or hindered to look after his own non-financial interests, the Subdistrict Court may order a protective mentorship on his behalf.

MENTAL CAPACITY: DEFINITION

Dutch Civil Code

(Book 7 Particular Agreements, Section 7.7.5, Medical Treatment Agreement)

Article 7:465

‘The patient cannot be regarded as being capable of making a reasonable appreciation of his interests in the matter’



PROFESSIONAL GUIDELINES FOR THE ASSESSMENT OF MENTAL CAPACITY

Doctors:

Royal Dutch Medical Association
Step-by-step Plan on the Assessment
of Mental Competence, Utrecht 2004



Notaries:

Royal Dutch Association of Civil-law
Notaries Step-by-step Plan on the
Assessment of Mental Competence,
The Hague 2006



STEP-BY-STEP PLAN (1-15) DOCTORS

1. Context-dependant term
2. Reason for assessment of mental capacity
3. Decision to start formal assessment
4. Instruct patient (on the assessment)
5. Inform patient (about the medical treatment)
6. Evaluate the patient's competence (four levels)
7. Possibility: psychiatric examination
8. Consultation with other professional caregivers

STEP-BY-STEP PLAN (1-15) DOCTORS

9. Consultation with representative
10. Assessment of mental competence
11. Inform the patient about the outcome
12. Is there a possibility to 'repair' the incompetence?
13. Ask if the representative agrees to the treatment
14. In case the patient protests against the treatment: are there less far-reaching alternatives?
15. Decide whether or not to perform the treatment.

STEP-BY-STEP PLAN (1-15) DOCTORS

Step 6: assessment mental capacity

Levels:

1. Ability to express a choice;
2. Understanding the relevant information;
3. Ability to appreciate the meaning of the information for the patient's own situation;
4. Ability to logical reasoning and to use information for taking into account several treatment options.



STEP-BY-STEP PLAN (1-7) NOTARIES



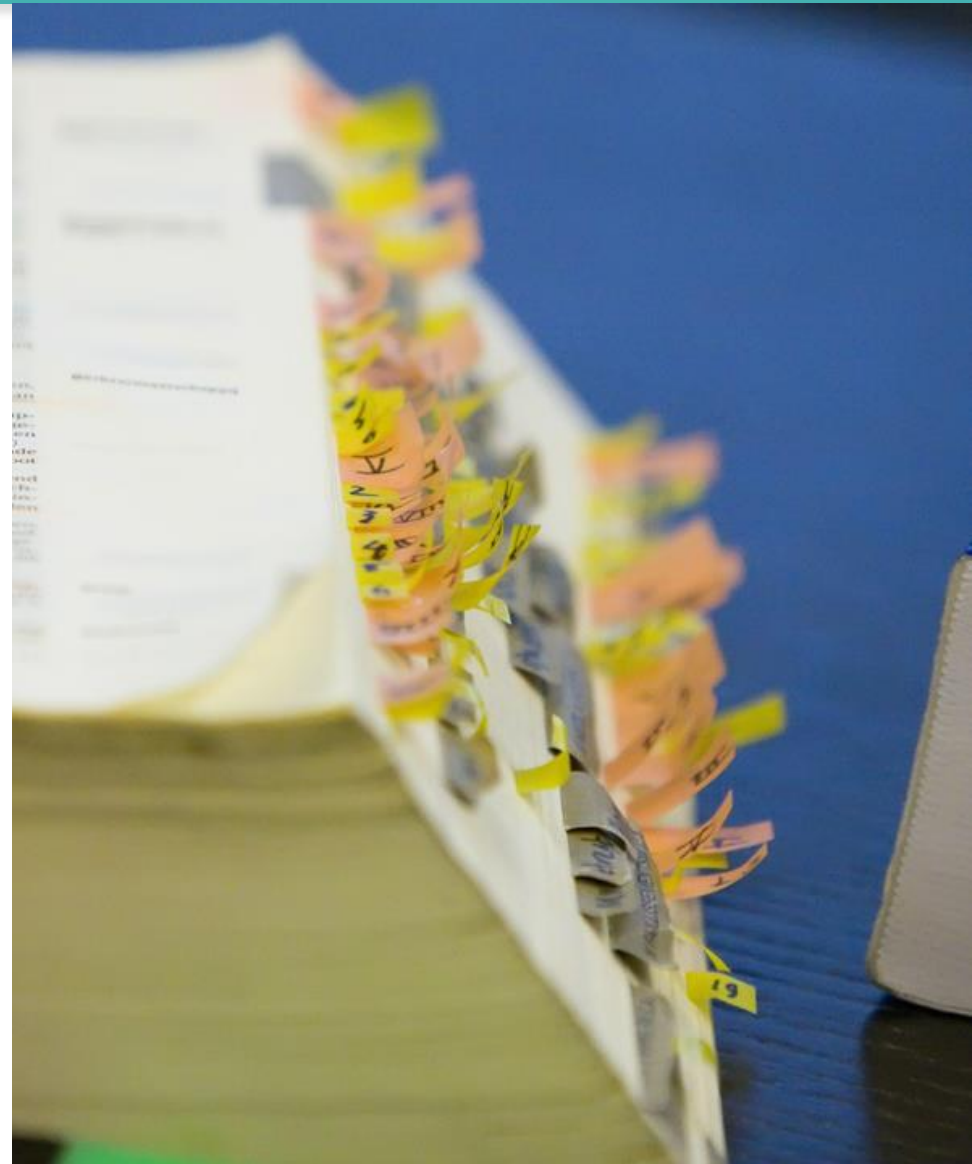
1. Reason for doubt?
2. Indications
3. Formal decision to start the assessment
4. Ask adequate questions (+ involvement of 2 colleagues)
5. Assessment of the mental capacity (4 levels)
6. Is this client competent for the requested professional service (if not and if this is not temporary, send the client to a doctor)
7. File the decision making process.

CONCLUSION PROFESSIONAL GUIDELINES OF THE ASSESSMENT OF MENTAL CAPACITY

- Doctors' guidelines are more extensive and more concrete than notaries' guidelines;
- Professional background related to assessment of mental competence of doctors versus notaries: knowledge gap?;
- Assessment notaries is largely based on 'professional intuition', leaves room for subjective judgments;
- Referral to doctor is in the hands of the notary;
- Assessment of competence has more safeguards in relation to non-financial interests than in relation to financial interests.

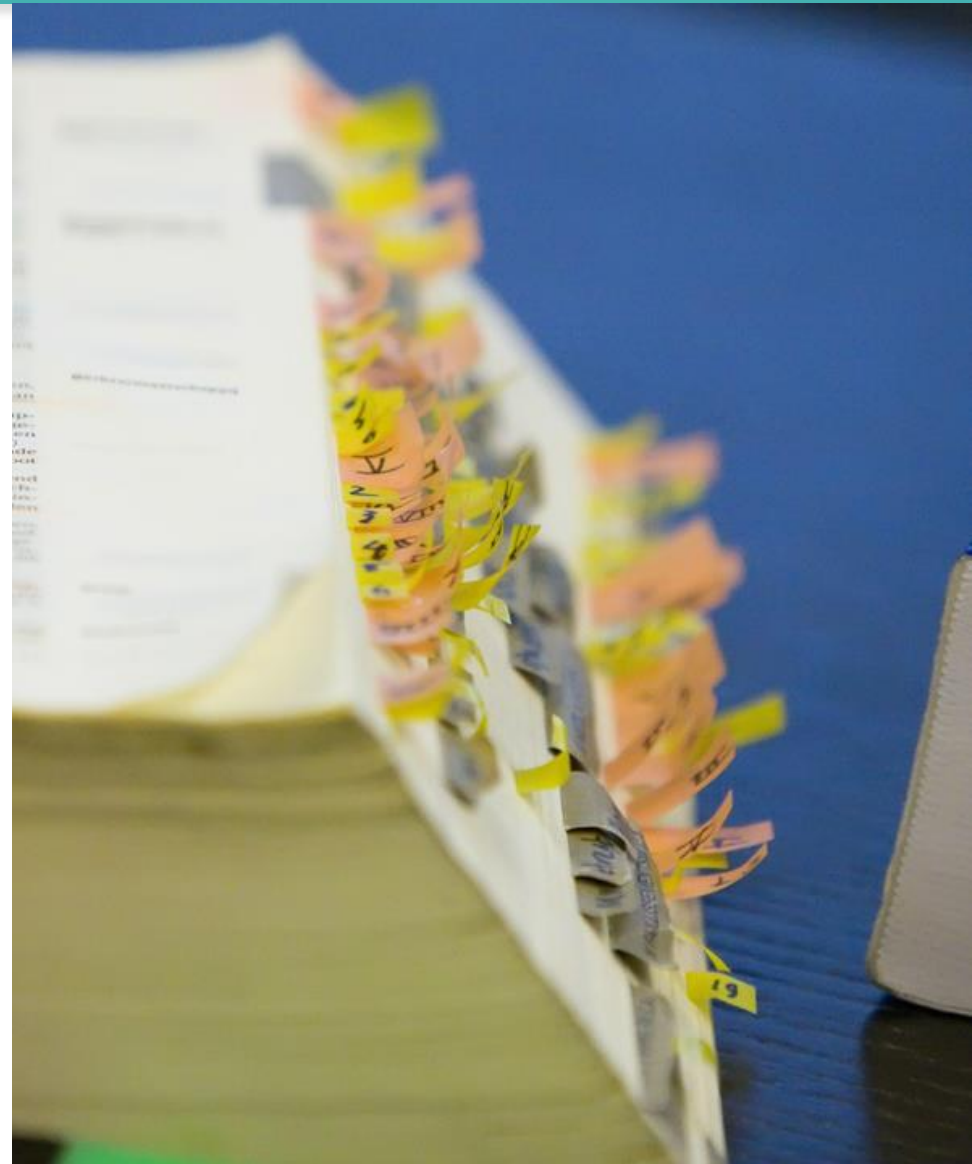
LEGAL APPROACH VS. REALITY

- **Law:** Ideal of autonomous, well informed person who makes choices in a situation of freedom.
- **Reality:** often poor understanding, incomplete knowledge, interaction between persons, situations of stress, pain, fear, dependence, etc.



LEGAL VS. MEDICAL APPROACH

- **Legal approach:** Ideal of autonomous, well informed person who makes choices in a situation of freedom. Focus on the individual.
- **Medical approach:** practice of informal decision making: 'collaborative decision making'. Focus on the community.



THANK YOU FOR YOUR ATTENTION



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