

Consent & Capacity

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Faculty/Presenter Disclosure

- Carole Cohen MD
- Dr. Cohen has received consulting fees from the Capacity Assessment Office, Ministry of the Attorney General, Province of Ontario



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- This program has **NOT** received in-kind support
- Potential for conflict(s) of interest: product(s) of the Capacity Assessment Office may be discussed in this program



Mitigating Potential Bias

The information presented in this CME program is based on recent information that is explicitly “evidence-based”.

This CME Program and its material is peer reviewed and all the recommendations involving clinical medicine are based on evidence that is accepted within the profession; and all scientific research referred to, reported, or used in the CME/CPD activity in support or justification of patient care recommendations conforms to the generally accepted standards



Learning Objectives

1. Define the concept of decision-making capacity
2. Identify a process for assessing decision-making capacity
3. Recognize that consent & capacity laws locally will determine how & when clinicians become involved in assessments

Not providing legal advice or training for expert witnesses



What are some common challenges you face when dealing with consent and capacity issues in your practice?



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Decision-making capacity

“Capacity is ...**the ability to use cognitive processes** to understand & identify options, appreciate consequences of different options & to follow through with chosen options...”*

A person is presumed to be capable unless there is evidence to override this presumption

*Pachet et al. 2007



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When May Capacity be in Question

Most Likely Questioned in Vulnerable Groups:

1. Intellectual disabilities
2. Psychiatric disorders
3. Neurodegenerative disorders
4. Acquired neurological disorders



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Capacity is...

1. Task specific
2. Situation/context specific
3. Jurisdiction specific



Capacity is not...

1. Lack of education about a decision
2. Score on MMSE/MoCA*
3. Agreement with clinician
4. Determined by diagnosis
5. Low risk behavior
6. “wishes”

*** Executive functioning, processing speed most predictive**



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Clinical vs. “Capacity” Assessments

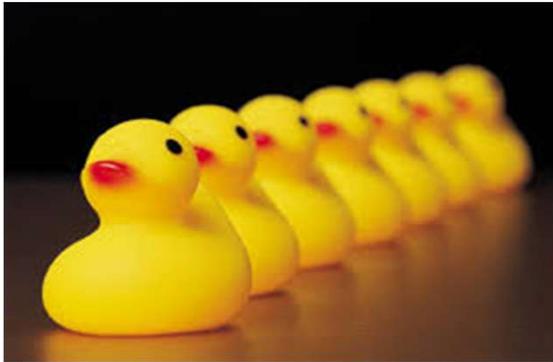
Clinical Assessment

- Diagnosis & treatment
- Solving problems
- Trying to do what is best for patient, ↑ ability to thrive
- Mental Status
- MMSE/MoCA
- Functional assessment

Capacity Assessment

- Capacity determination
- Determine if someone’s rights may be removed
- Specific questions regarding decisional capacity
- Assessment may have specific legal requirements

How will assessment of capacity help?



What tools or protocols do you use when assessing capacity in your practice or as part of legally mandated assessments in your province/territory?



Approach to Assessments of Capacity: Steps 1-9



Assessments of Capacity

1. Trigger

- a) what **domain**
- b) **why** an assessment is needed
- c) other options -least restrictive alternatives
- d) who should assess
- e) ? Specific legal requirements



Assessments of Capacity

2. Information from others

- a) situation/context/risk/options
- b) what are the demands for this situation/decision(s)
- c) information about cognition, function,
what has been tried & outcome



Assessments of Capacity

3. Involvement/education of client

proposed Rx, current \$\$, home care options

options: status quo → consequences

potential solution(s) → consequences



Assessments of Capacity

4. Optimize functioning during assessment

treat reversible conditions, attention to hearing, language, time of day ...



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Assessments of Capacity

5. Clinical considerations (which vulnerable group)

- a) **diagnosis**
- b) cognitive functioning
- c) functional abilities



Assessments of Capacity

6. Understanding of Preferences & Values

how do these affect current decision(s)?



Assessments of Capacity

7. Knowing when to consult

- communication difficulties
- legal questions
- help with specific populations
- “experts” in your region



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8. Decision-making Capacity

1. Understanding of information
2. Appreciating the relevance for the person (insight) – comparative & consequential
3. Rationally manipulate the information (reasoning)
4. Expressing a consistent choice



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8. Decision-making Capacity

- Know laws & procedures in your jurisdiction
- Usually ability to understand information and ability to appreciate consequences of a decision or lack of decision



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8. Decision-making Capacity

Gold Standard = Clinical Interview

Probe & Verify



Decision-making Capacity

**Decision-specific probing of insight & reasoning
Using specific examples from patient's situation**

Insight: appreciating that the problem affects them

Reasoning:

- a) Consequential: how will one choice affect their life
- b) Comparative: how is one choice advantageous over another



Assessments of Capacity

9. Documentation

- link (in)ability to understand/appreciate to diagnosis, cognitive, functional impairment
- link impairment in decision-making to actual or predictable inability to manage property or personal care
- Use language in relevant legislation “ability to understand; ability to appreciate” or the specific definition
- Provide evidence to confirm or override presumption of capacity

Direct Quotes



Assessing Capacity Re Rx.

Consider Aid to Capacity Evaluation (ACE)

- Ability to understand medical problem, Rx options (or lack of Rx)
- Ability to appreciate Rx (or lack of Rx) outcomes
- Rule out depression, psychosis

ACE – Etchells et al. Aid to Capacity Evaluation.

<http://www.jointcentreforbioethics.ca/tools/documents/ace.pdf>



Capacity to Manage Finances: Clinician's Role

1. Educate patients, families about the need for advance financial planning
2. Recognize signs of possible impaired financial capacity
3. Clinician assessment of financial impairment, financial abuse or both (in certain circumstances)
4. Practical interventions to help patient maintain financial independence (eg. direct deposit)
5. When to make medical/legal referrals

Widera et al. Finances in the older patient with cognitive impairment JAMA 2011 305(7): 698-706

Marson et al. 2000, (FCI Financial Capacity Instrument)



Capacity to Live Independently

- Not easily assessed in office setting
- Not determined by functional status or dependence
- Need collateral information about these
- Capacity determination may not “solve the problem” – how will it be used?
- Often not “black or white”



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Capacity to Live Independently

Explore 5 domains

1. personal needs & hygiene (ADL's)
2. home environment
3. iADL's
4. medical self-care
5. financial affairs

Skelton et al. Determining if an older adult can make and execute decisions to live safely at home: a capacity assessment and intervention model Archives of Gerontology and Geriatrics 2010 50: 300-305



Capacity to Live Independently

- Probe insight & reasoning with attention to decision-making capacity (versus objective functional abilities)
- Discuss options to minimize gap between demands & abilities
- “How will you know it is time to get help or move?”

What will this determination change or mean?

Lai & Karlawish, Assessing the capacity to make everyday decisions: A guide for clinicians and an agenda for future research Am J Geriatr Psychiatry 2007 15(2) 101-111.



Other Issues

- Fluctuating capacity
- Capacity & Risk
- Role of health care providers vs. others (lawyers, banking systems, home care etc.)



Other Resources

1. Assessing Capacity in Canada; Cross-Provincial Examination of Capacity Legislation

<https://welpartners.com/resources/WEL-Capacity-Legislation-Cross-Provincially-chart.pdf>

2. Capacity assessments: Understand the challenges for physicians
CMPA Perspective. December 2020 pages 7-9

<https://www.cmpa-acpm.ca/en/advice-publications/browse-articles/2020/capacity-assessments-understanding-the-challenges-for-physicians>



Other Resources

3. ABA/APA Handbook “Assessment of Older Adults With Diminished Capacity: A Handbook for Psychologists”. 2008

<https://www.apa.org/pi/aging/programs/assessment/capacity-psychologist-handbook.pdf>

4. Guidelines for Conducting Assessments of Capacity - Ontario

<https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacity/2005-06/guide-0505.pdf>

