

Assessments of Decisional Capacity

Who Does an Assessment and How is it to be done

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Capacity issues in Practice



- Instructional capacity
- Capacity for property decision making being questioned/ challenged
- Capacity for personal care (shelter, nutrition, health care, hygiene, safety, clothing) being questioned/ challenged
- Capacity for treatment decisions or admission into long term care being challenged
- Capacity to execute POAs and other similar documents

Capacity Issues in Practice



- Claim of incapacity by party in defense
- Capacity to testify as a witness
- Ignoring the senior as decision maker
- Turning to an SDM when the senior is still capable
- Requiring POAs as condition of service
- Requiring of “advance directives” as condition of service and wrongful use of ADs when patient still capable
- Contracts requiring “advance consent”

General Overview- all jurisdictions



- Need to know what decisional “capacity” is for a particular purpose (statute or common law)
- Need to know when an assessment is needed
- Need to know what is involved in the assessment and why
- Need to know who does assessment and why
- Need to know how to challenge assessments and the common flaws in assessments
- Watch your assumptions (so check the authority of why you think what you think)

Watch your assumptions



- Not all old people are incapable
- Physically frailty or disability should not put mental capacity in question automatically
- Just because someone is a doctor or another type of health professional doesn't mean that they understand how and when to determine decisional capacity
- Just because someone is a health professional does not mean that they are the right person to give an opinion of capacity for what you need or has the authority to give an opinion for the purpose you need
- Just because someone has a diagnosis of a mental health illness or dementia or Alzheimer's Disease or a related disorder does not mean automatically that they lack decisional capacity

Watch your Assumptions



- Just because there is a negative assessment doesn't mean that the person is incapable
- Just because there is an SDM (named in a POA) or even a guardianship order that the person is incapable for all purposes



Need to Understand

- The MMSE and its role or not in determining decisional capacity
- Lawyers obligation to determine capacity to instruct
- Acting for a person in a hearing where capacity is at issue - deemed capacity to instruct i.e. SDA s. 3(1)

Need to Understand in Your Jurisdiction



- Capacity specific to issue
- Presumption of capacity
- Capacity – caselaw
- Capacity – statutes



Legislation - Ontario

- Substitute Decisions Act
- Health Care Consent Act
- Mental Health Act

See “Laws” on the Ontario Government website
at www.gov.on.ca

Development of Provincial Law- Ontario



- 80s and early 90s
- Fram Committee – Attorney General’s Committee to Review Substitute Decision Making for Incapable Adults
- Weisstub Committee – Assessment of Mental Capacity
- O’Sullivan Committee – Review of Advocacy for Vulnerable Adults



SDA - Basic Principles

- Adults have the right to make decisions for themselves in respect to property and personal care
- If an adult is not mentally capable for a particular property or personal care decision then someone else, a **SUBSTITUTE DECISION MAKER**, may make decisions for him or her

HCCA - Basic Principles



- A consent or refusal of consent to treatment must be obtained from a patient before treatment is administered
- If the patient is not mentally capable in respect to treatment, the health practitioner must turn to the patient's SDM for the consent or refusal of consent to the treatment
- Everyone always has an SDM- Health Practitioners are not the decision makers



Who are SDMs?

- Property - Attorney in CPOAP, Statutory Guardian, Guardian, Trustee under OAS/CPP/Welfare legislation
- Personal Care - Attorney in POAPC, Guardian
- Health Care - Hierarchy List in HCCA

SDA and HCCA - Connection



- SDA – establishes two streams of decision making –
Property and Personal Care
(Health care is in personal care)
- SDA- Provides for POAs of each type to allow you to pick someone to be your decision maker if you become incapable for a particular decision
(You decide who will decide by making a POA)

SDA and HCCA- Connection



- HCCA – applies only to health care (part of personal care)
- In HCCA, Attorney named in a POA (that was created under SDA) is second highest in the SDM hierarchy

SDA and HCCA Connection



Property	Personal Care
SDA- all property	<p>SDA –all health, nutrition, safety, hygiene, shelter, clothing</p> <p>HCCA – all health – Treatment, admission to LTC and Personal assistance services in LTC</p>



Mental Capacity

- Mental Capacity is a socio-legal construct and its meaning varies over time and across jurisdictions
- Assessment / evaluation refers to a legal assessment not a clinical assessment
- Clinical assessments underlie diagnosis, treatment recommendations and identify or mobilize social supports
- Legal assessments remove from the person the right to make autonomous decisions in specified areas

Mental Capacity



- Not the score on the MMSE or any other test
- Not a Diagnosis

INCAPACITY TO MANAGE PROPERTY



- SDA S.6 incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

INCAPACITY FOR PERSONAL CARE



- SDA S. 45 a person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

DEFINITION OF CAPACITY IN RESPECT TO TREATMENT, ADMISSION TO CARE FACILITIES, AND PERSONAL ASSISTANCE SERVICES



- HCCA s.4
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 reasonable foreseeable consequences of a decision or lack of decision.

Capacity



Capacity is a cognitive test - not a functional test.

Indicators are:

- Ability to Understand (factual knowledge + problem solving ability)
- Ability to Appreciate (realistic appraisal of outcome + justification of choice)

The Capacity Assessment



- A decisional Test: does the person's decisional ability match the demands on them for decision that need to be made
 - Understand 1st - Factual knowledge base
and 2nd - Understanding of options
 - Appreciate 3rd - Appraisal of Outcome
4th - Justification of Choice
- Must pass all bases to be found capable



Understand - 1st Base

- Factual knowledge: preservation of old skills & knowledge
- Has the person had learning opportunities to acquire the relevant facts:
- Updated information re: medical status, new risks or limits in ADL functions?
- What does a "nursing home" mean to the person - has s/he ever visited one; what benefits might it offer; what risks?

Understanding Options - 2nd Base



- Able to comprehend information about options, risks to make an informed choice
- Able to attend to relevant stimuli, understand at conceptual level and retain essential information long enough to reach a decision
- Able to remember prior choices and express them in a predictable and consistent manner over time
- Able to problem solve around personal issues-probe specific example

Appreciate - 3rd Base



- Able to appraise potential outcomes of a decision
- Focus on reasoning process, explore the personal weights, values attached to each outcome
- Acknowledges personal limitations/shows insight
- Decision-making is reality-based, not being affected by delusions (fixed false beliefs) or skewed by emotional states (depression, hopelessness causing an undervaluing of survival issues)

Appreciate - 4th Base



Justification of choice:

- Shows evidence of rational (based in reality) manipulation of information - a "reasoned choice", not necessarily a reasonable choice
- Grounded in personal beliefs and values consistent with previous actions, expressed wishes, cultural or religious beliefs

Assessment Tool



- Quick Reference Tool – distributed by National Initiative for Care of the Elderly
- www.nicenet.ca

CAPACITY TO GIVE A CONTINUING POWER OF ATTORNEY



- SDA S. 8
- knows the kind of property he or she has and approximate value.
- Aware of obligations owed to dependents.
- Understands authority given to attorney
- Knows that may revoke.
- Knows that attorney must account.
- Appreciates property value may decline if not managed prudently.
- Appreciates that attorney could misuse authority.
- May be incapable to manage property but capable to grant a continuing power of attorney.

CAPACITY TO GIVE POWER OF ATTORNEY FOR PERSONAL CARE



- SDA s. 47(1)
 - (a) must have ability to understand that the proposed attorney has a genuine concern for person's welfare and
 - (b) appreciates the person may need the assistance of an attorney for personal care

Who Assesses Capacity?



- Sometimes defined by Statute (ie Capacity Assessors for capacity to manage property to trigger a statutory Guardianship, Health practitioners for treatment, Evaluators for Capacity for Admission)
- Sometimes in common law (ie contracts)
- Sometimes a variety of persons can provide opinions or evidence as to incapacity (ie “defense” assessments) SEE CHART

DEFINITION OF CAPACITY ASSESSOR



- SDA s. 1(1)
“assessor” means a member of a class of persons who are designated by the regulations as being qualified to do assessments of capacity.

Why Capacity assessor in legislation



- Original concept to develop expertise of assessment
- System originally set up partially dismantled in a year after proclamation
- Amendments in effort to improve quality of assessments

CAPACITY ASSESSORS

O.Reg.460/05



- S.2 (1) A person is qualified to do assessments if he or she,
 - a) satisfies one of the conditions set out in ss.(2) (Member of particular College) ;
 - b) has successfully completed the Qualifying course described in s.4
 - c) complies with s.5 (continuing education)
 - d) complies with s.6 (minimum annual number of assessments)
 - e) is covered by professional liability insurance of not less than \$1,000,000...
- NB Understand the limitations of these qualifications

CAPACITY ASSESSORS

O.Reg.460/05



- S.2 (2)
is a member of one of the following Colleges.
 - a) College of Physicians & Surgeons of Ontario.
 - b) College of Psychologists of Ontario.
 - c) Ontario College of Social Workers & Social Service Workers and holds a certificate of registration for social work.
 - d) College of Occupational Therapists of Ontario.
 - e) College of Nurses of Ontario.

When Capacity Assessors Used



- Limited role
- Required to be used to trigger Statutory Guardianship (SDA s. 16)
- Required to be used as default assessor if POA (property) states that does not come into effect until assessment of incapacity and POA document does not specify who must do assessment
- Required to be used if POAPC requires confirmation of incapacity before comes into effect for NON HEALTH decisions and POAPC document does not specify who must do the assessment

Opinions by Capacity Assessors



- Need to understand the difference between assessments required by statute and “opinions”

Assessment of Capacity for treatment decision making by Health practitioner offering treatment



- HCCA s. 10
No treatment unless:
 - a) HP of opinion person capable in respect to treatment and person has consented, or
 - b) HP of opinion that person incapable in respect to treatment and SDM gives consent
 - c) if CCB or court finds person capable although HP was of opinion person not capable, HP shall not treat and shall ensure treatment not administered unless person gives consent.

RIGHTS INFORMATION



- HCCA s. 17

Health practitioner shall in circumstances and manner specified in guidelines established by the governing body of the health practitioners profession provide to persons found by the health practitioner to be incapable with respect to treatment such information about the consequences of the findings as is specified in the guidelines

CONSENT TO ADMISSION TO CARE FACILITY ON BEHALF OF INCAPABLE PERSON



HCCA s. 40

1. Evaluator finds person incapable in respect to admission.
2. Consent required by law to admission.
3. Consent may be given or refused by SDM (same priority list as for SDM for treatment).

CONSENT TO ADMISSION TO CARE FACILITY ON BEHALF OF INCAPABLE PERSON(cont'd)



4. Principles for giving or refusing consent - wishes, then best interests.
5. Person may apply to CCB for review of finding of incapacity or to apply for representative. Other person may apply to CCB to be appointed as representative.



DEFINITION OF EVALUATOR

- HCCA s. 2(1)

A person described in clause (a), (l), (m), (o), (p), or (q) of the definition of the Health Practitioner or a member of a category of persons prescribed by the regulations as evaluators.



DEFINITION OF EVALUATOR (cont'd)

Members of College of:

- (a) Audiologist & Speech Language Pathologists
- (l) Nurses
- (m) Occupation Therapists
- (o) Physicians & Surgeons
- (p) Physiotherapists
- (q) Psychologists

Prescribed by Regulations - social workers (Member of the Ontario College of Social Workers and Social Service Workers who holds a certificate of registration for social work)

Amendments to Regulated Health Professions legislation may be adding Dieticians to Evaluators

Evaluators and Capacity Assessors

- Not the same



Of the matters that go to the
Consent and Capacity Board

- Evaluators do the Capacity for Admission
- Capacity Assessors do Property SDA s16 assessments to trigger Statutory Guardianships
- Training requirements – none for evaluators; Capacity Assessor have to take required course
- Fees – Evaluators cannot charge for evaluations whereas Capacity assessors charge fees



Evaluator's Questionnaire

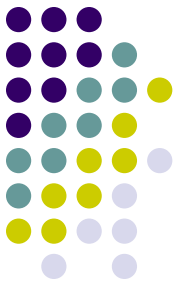
- Not legislated Questionnaire
- 5 Questions- Meant as a Tool, Not the only Questions to be asked
- Expected to “probe”
- Must Explain Purpose of Evaluation and Info person would require to make a decision about admission
- Expected to keep Records etc...



The Five Questions

1. What problems are you having right now?
2. How do you think admission to a nursing home or home for the aged could help you with your condition /problem?
3. Can you think of other ways of looking after your condition/problem?
4. What could happen to you if you choose not to live in a nursing home or home for the aged?
5. What could happen to you if you choose to live in a nursing home or home for the aged?

Issues



- As CCAC also does functional assessment sometimes confusion between capacity and function
- As see person in community living with risk, sometimes confuse capacity and risk
- As CCAC deals with community care, and the limitations of community care, danger of confusing capacity and best interests



Assessments by others

- Other evidence of incapacity
- Your own observations
- Observations by others
- Opinions by other health professionals, by persons who are not “capacity assessors”



Process of assessments

- Probe and verify – Re: Koch, 33 O.R.(3d) 485
- Context of the assessments- of the person, when done, how done, language, accommodations or not (hearing, sight, education level)
- Understanding by assessor of purpose of assessments, of the law etc,



- Understand YOUR Jurisdiction



Volunteers

- Are you interested in reviewing tools on capacity and consent for your jurisdiction?

If yes, contact Judith Wahl at ACE



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