

“I Just Need a Simple Letter Saying...” Capacity Made Easy

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Faculty/Presenter Disclosure

Faculty: Dr. Paul Ferner

Relationships with financial sponsors:

None



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Goals for the Talk

- ▶ Understand what Capacity is
 - ▶ Understand what legislation is relevant to Capacity
 - ▶ Understand what Powers of Attorney are and how they work
 - ▶ Get comfortable giving an opinion about a person's capacity
 - ▶ Get comfortable writing an opinion letter with regards to a person's capacity
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Mr. Jones

- ▶ Mr. Robert Jones is an 83 year-old farmer currently living with his son in London since 2012 following the death of his wife.
 - ▶ He has dementia which was diagnosed four years ago. Last MMSE a year ago for his Aricept was 20/30 – poor short term memory
 - ▶ A history of OA and DDD with decreased mobility and chronic back pain – walks with a cane
 - ▶ You see him with the son every 2 months
 - ▶ Very pleasant fellow
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Mr. Jones

At this last visit the son reports:

- ▶ Over the last year Dad is even more forgetful and is now refusing to bathe.
- ▶ He is talking about moving back to the farm. The farm was sold in 2013 after he moved to London. Dad does not believe that. He gets angry when the son corrects him.
- ▶ There was a problem with his taxes this year but the CRA will not speak to the son. Dad has no idea what is going on.
- ▶ He also has some investments coming due for renewal but the bank is not sure that he can sign for that anymore after going in one time and accusing them of stealing his money.

Who thinks he might not be capable managing decisions for
1) where he is going to live; and 2) managing his money?

Mr. Jones

- ▶ The son wants to move dad to a nursing home. He feels guilty and conflicted about that – he promised dad he could always stay with him
- ▶ He is exhausted as dad will not accept any kind of help and some nights he is up wandering around.
- ▶ Dad is not interested in “the home” and is going back to the farm.

The son has two questions:

- 1) Can you determine if he is capable of making a decision about where he should live so the son knows he is doing the right thing and feels less guilty about putting dad “in the home”?
- 2) Can you write a letter saying that he is incapable of managing his money so that the son can deal with TD Canada Trust and the CRA?

Who here is happy to:

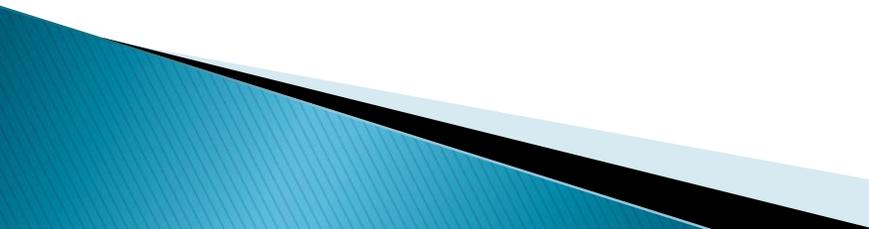
- 1) Tell the son that dad is incapable of deciding where he should live; and
- 2) Write a letter to the bank that dad is incapable of managing his financial affairs.

On what basis can you render an opinion?

Who here has ever done a capacity assessment?
(Trick Question)



What is 'Capacity' Anyway

- 1) It is a legal test, it is not a clinical test
 - 2) From the legal perspective, capacity is not linked directly to a diagnosis
 - The fact that a person has a particular diagnosis does not preclude capacity
 - Because a person has a diagnosis of dementia they are incapable – NOT
 - 3) The test for capacity examines the quality of thinking that goes into a decision
 - 4) The test for capacity has nothing to do with the rightness or wrongness of a decision being made
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Two Criteria to Test Capacity

- ▶ **Understand** – you must be able to understand your situation in terms of the matter being considered
- ▶ **Appreciate** – you must be able to appreciate the consequences of your actions in terms of the matter being considered

If you remember one thing from this talk it is this.



What is Capacity NOT Defined by?

- 1) A test result – it is not based on an MMSE or MoCA score.
- 2) An acute situation that likely will change – a delirium post pneumonia or an alcoholic binge

Why is Capacity a Big Deal??

If a person is found incapable, then we are removing their legal right to make decisions for themselves

This right is protected by law and enshrined in the Charter of Rights and Freedom

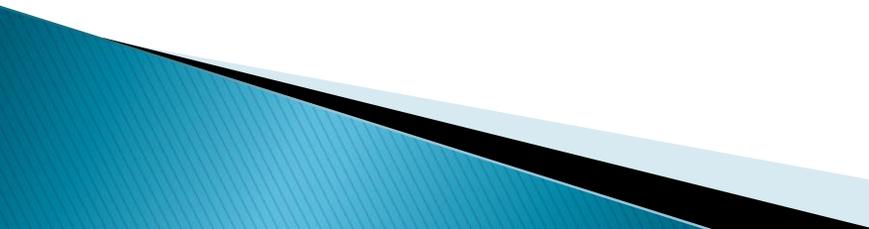


Relevant Legislation

There are four pieces of legislation in Ontario related to Capacity

- ▶ Mental Health Act
- ▶ Health Care Consent Act
- ▶ Substitute Decisions Act
- ▶ Public Hospital Act

Mental Health Act

- ▶ Applies to physicians only
 - ▶ Allows physicians to assess capacity to manage personal care and property if a person is suffering from a mental illness that is impacting on their decision making
 - ▶ The Act allows this to occur in an involuntary manner
 - ▶ Rights are protected by assigned rights advisors
 - ▶ The process to remove or reinstitute a person's right to control their lives is very strictly regulated in the Act.
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Health Care Consent Act (1996)

Applies to anyone providing medical treatments or services to patients – physician, nurses and allied health care staff

Focused on two areas:

- 1) Consent to Treatment
- 2) Admission to a Long Term Care Facility

For Treatment Consent

Q: Who here has ever done a capacity assessment?

A: We do capacity assessments every day in order to get consent for treatment!!

- ▶ The person proposing the treatment is responsible for getting the consent – to get the consent you do a capacity assessment!!
- ▶ Usually it is implied
- ▶ Three key elements for giving consent for a treatment:
 - 1) Informed
 - 2) Voluntary
 - 3) Without misrepresentation or fraud

Informed

Informed means:

- 1) Understand the risks and benefits – appreciate the consequences of having the treatment
- 2) Appreciate the consequences of not having the treatment

Voluntary and Without Fraud

Voluntary means:

- 1) Freely given by the patient
- 2) May be withdrawn at any time

Without misrepresentation or fraud means just that – you can't mislead or lie to the person in order to get consent

Admission to LTC Facility

- ▶ Same two criteria:

- 1) Be able to understand their current living situation in terms of the risks and benefits of where they are living and where they propose to live
 - 2) Be able to appreciate the consequences of decisions about where they are going to live
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Substitute Decision Maker

- ▶ Defined in the Health Care Consent Act
 - ▶ It is the person identified to make decisions for an incapable person
 - ▶ The role of the SDM is to act in the incapable person's place, to carry out their wishes, not to act for themselves and for their own wishes
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Hierarchy of SDMs

- ▶ Court Appointed Guardian
- ▶ Attorney on a POA
- ▶ Spouse
- ▶ Child or parent
- ▶ Brother or sister
- ▶ Anyone else related by blood or marriage
- ▶ Office of the Public Guardian and Trustee

Not the next door neighbor you have known for 40 years



Substitute Decisions Act (1992)

Covers Two Areas:

- ▶ Power of Attorney for Property
- ▶ Power of Attorney for Personal Care

POA for Property

- ▶ Gives the Attorney the legal authority to manage the incapable person's finances as if they are doing it themselves.
 - ▶ Does not allow the attorney to change the incapable person's Will
 - ▶ The test for granting a Power of Attorney for Property is high, you pretty much have to be able to manage your property on your own to be capable of granting a POA for Property
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Personal Care

- ▶ Divided into 6 domains:
Food, Clothing, Shelter,
Hygiene, Health Care and Safety

Each domain is assessed individually – a person may be capable of managing their clothing but not their health care

The test for granting a POA for Personal Care is very, very low

Back to Mr. Jones

The son has two questions:

- 1) Can you determine if dad is capable of making a decision about where he should live so the son knows he is doing the right thing and feels less guilty about putting dad “in the home”?
 - 2) Can you write a letter simply saying that he cannot manage his money any more so that the son can deal with the CRA and the bank?
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Capacity to Make Decisions for Shelter

- ▶ So the son wants us to give an opinion as to whether or not dad can make a decision about where he is living
 - ▶ If I think that dad is incapable then the son will go ahead and arrange something without feeling guilty about it
 - ▶ What kinds of questions would you ask dad?
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Questions to Ask

- ▶ Where are you living now? What do you like about where you are living now?
 - ▶ Are you having any challenges living where you are?
 - ▶ Your son has a concern about your ability to keep clean and to bathe, what do you think about?
 - ▶ Where would you move to if you are going to move? What do you have to do in order to move?
 - ▶ What are the benefits and risks of making a move, how would things change?
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Answers

- ▶ I live by myself in Ailsa Craig (actually lives with his son in London)
- ▶ I bathe all the time and don't need help
- ▶ I am moving back to the farm (it has been sold)
- ▶ Q: So if you couldn't move to the farm, and couldn't live with your son, what would you do?
- ▶ "I am able to live by myself on the farm, I don't need any help, my son is a pain in the ...!!"

Is Mr. Jones Capable of Managing Decisions with Regards to Shelter?

No

Why?

He fails to understand his current living situation and challenges and fails to understand and appreciate decisions he might have to make if he could not live with his son.



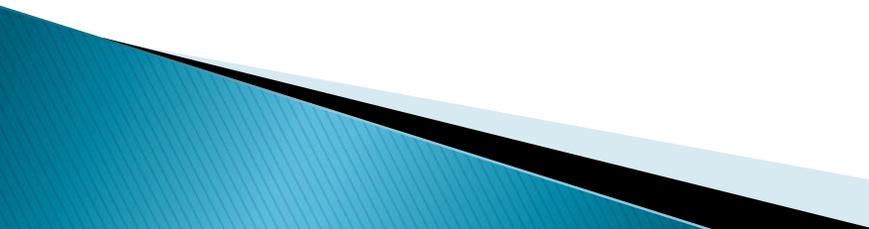
Capacity to Make Decisions With Regards to Property

- ▶ In this scenario you actually don't have to do a formal assessment to give an opinion
 - ▶ You know Mr. Jones well and how cognitively impaired he is
 - ▶ If you were going to ask some questions, what would you ask?
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Questions I Ask

- ▶ Where do you live? Rent or Own? If you own your house, what is it worth?
 - ▶ Do you have any income? Where does it come from and how much is it?
 - ▶ Do you have a bank account, where is it and tell me about your accounts
 - ▶ Do you have any money invested and how is it being managed? How are you managing risk in your investments?
 - ▶ Do you pay any bills and what happens if you don't pay your bills
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Answers

- ▶ Thinks he still owns the farm but will admit it was sold when told that
 - ▶ Knows he goes to “that TD bank in Ailsa Craig” and that he has an account there
 - ▶ No idea about money invested from the sale of his farm in 2013 or how it is being managed
 - ▶ Knows that he has bills to pay but “my son looks after all of that”. What if the bills are not paid – “my son looks after all of that”.
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Is Mr. Jones Capable of Managing his Finances and Property

No

Why?

He fails to understand his financial situation and to fails to understand and appreciate consequences of decisions to be made in terms of his finances.



On To the Letters – 4 Step Process

#1 – What Authority do you have to render an opinion?

#2 – What is your relation to the patient/client?

#3 – What are the challenges the patient has that makes you think that they are incapable?

#4 – Given what is going on in #3, what is your opinion as to their capacity?



Your Letter

#1 – Authority

“I am a family physician licensed to practice medicine in the Province of Ontario by the College of Physicians and Surgeons of Ontario.”
(Your credentials)

#2 – Relation to the client – your patient/client

“Mr. Jones has been in my practice since 2012 and I am currently his family physician. I have seen Mr. Jones regularly since he became my patient.”
(Shows that there is a relationship)

#3 – Challenges to Capacity – evidence of cognitive impairment by your interactions and/or testing

- ▶ Mr. Jones suffers from significant cognitive impairments with respect to his memory. Through my visits with him that he clearly has difficulty with both his short and long term memory. For that reason he is unable to understand his financial affairs in terms of his bank accounts, income and investments. **(There is a clear reason why the person is incapable)**

#4 – Opinion

“For that reason, my opinion is that he is incapable of managing his financial affairs.”

(Opinion)

Okay, so...

Who here is now more comfortable with the idea of giving an opinion about capacity?

Who here is now more comfortable writing a letter for a family to confirm that your patient/client is incapable of managing some specific part of their life?

Thank You

