

Capacity in Clinical Settings

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- **Medical decision-making capacity** (consent)
- **Financial capacity**
- **Personal capacity** (guardianship)
- Capacity to nominate a committee (PoA, Rep)
- Testamentary capacity (will)
- Capacity to stand trial (fitness)
- Tort liability

Other Types of Capacity

- Capacity to MARRY
 - Capacity to SEPARATE
 - Capacity for UNMARRIED SPOUSAL RELATIONSHIPS
 - Capacity to ADOPT a child
 - Capacity to be a FIT PARENT
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- Capacity to make a GIFT
 - Capacity to make a BENEFICIARY DESIGNATION
 - Capacity to enter into a CONTRACT
 - Capacity to retain LEGAL COUNSEL

Overview of Decision-Making

- **Valid consent**
 - Informed
 - Voluntary
 - Capable
- **“Capable”**
 - Choice
 - Understanding
 - Appreciation
 - Reasoning

Valid Consent I

- **“Informed”**
 - What a **reasonable person** would want to know
 - Nature of intervention
 - Anticipated outcome (benefit)
 - Risks
 - Common risks
 - Material risks (meaningful to the patient)
 - Rare, but serious (e.g. death, paralysis)
 - Alternatives and associated risks (including refusal)

Valid Consent II

- **“Voluntary”**
 - Free to **consent or refuse**
 - Not under duress or coercion
 - Consider external forces

Valid Consent III

- **“Capable”**
- “Decision-Making Capacity” (Applebaum 2007)
 - Understanding
 - Appreciation
 - Reasoning
 - Choice

1) Understanding

- Grasp fundamental **meaning of information**
 - Content of being “informed”
- Repeat information
 - Paraphrasing
 - “Tell me in your own words”

2) Appreciation

- Acknowledge
 - Medical condition
 - Likely consequence of treatment options
 - Insight
- How it applies to their **personal situation**
 - “What will happen to you if...”

3) Reasoning

- **Rational process** of manipulating relevant info
 - Focus on **PROCESS**, not outcome
- Ask patient to compare options and offer reasons
 - “How did you decide...”
 - “What makes this a better option...”

4) Choice

- Can **clearly indicate** preferred treatment option
- Ask directly, multiple times
 - Inconsistency may indicate lack of capacity

Consent → IMPLICIT or EXPLICIT

3 requirements for **VALID CONSENT**

- *Voluntary*
- *Informed*
- *Capacity*

DECISION-MAKING CAPACITY

1. Choice
2. Understanding
3. Appreciation
4. Reasoning

CAPABLE

- Reasonable efforts
- Second opinion
- Family involvement
- Document

NOT CAPABLE

- Still need consent
- 1) Mental Health Act (Form 5)
 - 2) SDM (Substitute Decision Maker)
 - a. Committeeship
 - b. Rep 9
 - c. Rep 7
 - d. Advanced Directive
 - e. Temporary SDM
 - 3) Urgent treatment (HC&CF Act)

UNABLE TO ASSESS

- Certifiable? → MHA
- Not certifiable? → Document

Personal Capacity I

- Similar framework to **medical decision-making**
- *Understanding of:*
 - **What personal care** is required/foreseeably required
 - **Why** is personal care required
 - Risks/benefits of receiving or not receiving personal care
 - Information about personal care
 - How it applies to their situation
- Ability to **execute or arrange** for provision of care

Personal Capacity II

- *Operationalization*
 - Current medical conditions
 - Current treatments + desired outcome
 - Risks of not treating
 - ADLs, IADLs
 - Recognition of danger
 - Response to danger
 - Ability to seek help
- Interpret **degree of risk and consequence** in context of the person's situation
 - i.e. not knowing function of meds, but willing to take

Financial Capacity

- *Understanding of:*
 - Nature of **financial affairs** (approximate value)
 - Assets, debts
 - Income, expenses
 - Obligations to **dependents**
 - Reasonable management decisions
 - Risks and benefits of decisions
- Ability to execute decisions and transactions
 - Bills, banking, transactions

Capacity to Nominate Committee

- Power of Attorney
- Representation Agreement (Section 7 or 9)
- *General concepts:*
 - Desire to nominate
 - Understanding of scope of committee
 - Risks of committee's decision
 - "Trust" in committee

Criteria for Nominating PoA (BC)

- *Understanding of:*
 - Assets & approximate value
 - Obligations to dependents
 - **Scope of powers** being given to attorney
 - **Value may decline** if the attorney is not prudent
 - Attorney may misuse the authority
 - May revoke Power of Attorney if capable
- **Independently assessed** from Financial Capacity
 - i.e. may be financially INCAPABLE, but still CAPABLE to nominate a power of attorney

Power of Attorney (BC)

- **General Power of Attorney**

- Only active when person is capable
- **CEASES** to be active if person becomes incapable

- **Enduring Power of Attorney**

- Active while person is capable
- **CONTINUES** to be active if person becomes INCAPABLE

Testamentary Capacity (Will)

- *Understanding of:*
 - They are **making a will**
 - Function of a will
 - Nature + extent of property being disposed (**assets**)
 - Those who will have claim (**beneficiaries**)
 - Not delusional

References

- VAC Capacity Guide (2012)
- BCLI Common Law Test of Capacity (2013)
- OR2019
- BC Consent and Capacity
- Applebaum 2007