

# Mental Capacity – a medical perspective

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## **Who decides?**

- Can the patient/client decide?
  - Anything?
  - This issue?
- How do doctors determine capacity?
- How do lawyers determine capacity?
- How abiding are decisions?
- How do Guardianship Tribunals decide who needs assistance with decision making?
- How do courts decide?

## **Issues**

- Personal, minor or lifestyle decisions
- Health care - simple and complex
- Property, finance and contracts
- Power of Attorney
- Wills
- Advanced Health Directives

## **Capacity:**

From "When a client's capacity is in doubt: A Practical Guide for Solicitors, Law Society of NSW"

- Basic common law assumption that every adult person has legal capacity to make their own decisions
- Capacity is fluid
- Don't make assumptions that a person lacks capacity because of their age, appearance, disability or behaviour
- Assess a person's decision making ability - not the decision they make
- Respect a person's privacy
- Substitute decision making is a last resort

## **What is capacity?**

(From the book "Who Can Decide?" eds Darzins P, Molloy W and Strang D)

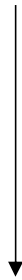
- "Capacity is determined by cognitive ability to understand and appreciate the context and decisions, not the actual outcomes of the choices made
- capacity assessments must balance the need to protect those who lack capacity against the need to respect individuals' rights and freedoms
- Ultimately, capacity is a legal decision

## **Evolution of Capacity Assessments**

- Global capacity: Completely capable or incapable of all decisions
- Domain specific capacity: Capacity in one domain, eg health care, but not another - eg finance
- Decision specific capacity: Range of complexity of decision making - eg simple financial decisions but not able to manage investments

## Hierarchy of Medical Decisions

Simple



minor analgesics  
Other non essential medication  
Blood tests  
Low risk, non invasive procedures  
Low risk, invasive procedures  
Chemotherapy  
Surgical procedures, low risk  
Surgical procedures, high risk, unproven, elective  
?research

Complex

## Six Step Capacity Process (from Who Can Decide?)

1. Trigger: assessment should only be done if necessary
2. Assent: assessment of capacity is intrusive
3. Information Gathering: background to the person and the decision required
4. Education: opportunity to learn the information needed
5. Assessment: does this person have capacity to make this decision?
6. Action: reports, referral etc

## What is Dementia?

Definition: DSM IV

1. Cognitive loss in two or more domains - including memory, language, calculations, orientation, judgment
2. Substantial impairment in social or occupational functioning
3. Deficits do not occur during the course of a delirium

or from Alzheimer's Australia website

Progressive decline in a person's mental functioning. This includes loss of memory, intellect, rationality, social skills and normal emotional reactions.

## Normal Ageing

- 20-50% of community dwelling older persons report memory loss
- Decreased mental processing speed
- Decreased memory for names
- Do not have an increased rate of dementia unless there is objective evidence of impaired performance
- Highly educated people may not show deficits on simple testing

## Mild Cognitive Impairment

(From Petersen RC et al Mild cognitive impairment: clinical characterization and outcome. Arch Neurol 1999;56:303-8.)

- Report (by the patient or an informant) of memory loss
- Abnormal memory performance for age
  - (score >1.5 SD below mean for age)
  - MMSE typically 24-28, with impaired short term recall
- Normal general cognition
- Normal activities of daily living
- Criteria for dementia not met
- \*\* about 15% per year progress to dementia

## How Common is Dementia?

Age	Moderate-severe dementia
>65	1 in 15
80-84	1 in 5
>85	1 in 4

- Prevalence doubles every 5 years
- Age is biggest risk factor, but dementia is not normal ageing

### Causes of Dementia

- Alzheimer's disease 50-75%
- Vascular dementia 10-20%
- Lewy Body Dementia 10-15%
- Frontotemporal dementia 5-15%
- Rare causes/ "reversible causes"
  - egHuntington's disease
  - Hypothyroidism
  - Parkinsonian syndromes
  - B 12 deficiency
  - Primary progressive aphasia / semantic dementia

### Diagnosing Dementia

- History of cognitive impairment, usually from carer/informant
- Impact on function
- Mental status questionnaire
- Physical examination
- Investigations to exclude other causes (blood tests, CT scan, MRI scan)
- +/- neuropsychology

### Guardianship and Administration Tribunal

See Website for Information

Including Medical Report

Criteria for a Power of Attorney

### Enduring Power of Attorney

- Do they know what it is? Eg "someone to manage my affairs, pay my bills"
- Do they know who they want to do this? Eg Some recognition of an appropriate person
- Do they know that they could sell their house?
- Do they know that the attorney is not automatically the health care decision maker?

### Consent

If the patient does not have the capacity to consent to, or to refuse treatment, consent is required from one of the following (in order of priority):

- Advanced Health Directive
- Guardian appointed by the Guardianship and Administration Tribunal

- Person appointed as an attorney for health matters under an Enduring Power of Attorney or Advance Health Directive
- Statutory health attorney, that is:
  - spouse (includes de facto and same sex partners) in a continuing relationship
  - adult who has care of the person (not a paid carer)
  - adult who is a close friend or relation (not a paid carer)
- the Adult Guardian

#### **Disputes over EPOA, Consent**

- Family conflict
- Decision which is not “in keeping with good medical practice”
- Concern about relationship between patient and the attorney

#### **Advanced Health Directives**

- This takes precedence over Statutory Health Attorneys
- Doctors are required to follow the AHD
- However, be aware that this may cause distress to families
- Often some ambiguity in real situations
- Some AHP's are not in accord with “good medical practice” or may be contradictory

#### **Wills and Testamentary Capacity**

1. The testatrix had to have understood the nature of the act of making a will, and the effect of his/her making a will.
2. The testatrix had to have understood the extent of the property of which he/she was disposing.
3. The testatrix had to be able to comprehend and appreciate the claims to which he/ she ought to give effect (...memory to recall the several persons who may be fitting objects of the Testatrix's bounty, and an understanding to comprehend their relationship to herself and their claim on him/ her)

#### **Summary**

- Capacity, in all its forms, is complex, and relates as much to the decision to be made, as to the person's cognition
- Complex family situations make for complex decisions and potential for conflict
- Protection/paternalism/duty of care has to be balanced against the person's rights, the rights of others responsible for them and the general community.