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Assessing Capacity to Consent to Treatment (in Ontario): Information for Primary Care



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Goals

- Review basics of capacity/consent
- Learn how to approach assessment of capacity
- Learn about the relevant legislation in Ontario, Canada for capacity/consent

Case Example

- A 26 year old male with a history of depression and past suicidal behaviour is admitted to hospital for abdominal pain and has been found to have terminal cancer
- Palliative treatment will likely only extend his life for an additional 3-6 months
- He refuses treatment
- His family physician calls the hospital as she is concerned he is depressed and suicidal and is not capable of making decisions regarding his treatment
- You provide him with the relevant information, after which:
    - He is able to repeat back to you what you have told him
    - He tells you he is aware he is aware he has cancer and believes it to be true.
    - He denies being depressed and denies any symptoms of depression
    - He tells you he is “at peace” with his condition especially as he has a strong belief in the afterlife
    - He says that he does not wish to go through the chemotherapy as it will give him many side effects and seriously undermine the quality of what remains of his life.

Q. Is your patient capable to make decisions regarding his treatment?

Introduction

- Physicians are required by law and medical ethics to obtain the informed consent of their patients before initiating treatment
- Valid informed consent is based on the disclosure of appropriate information to a competent patient who is permitted to make a voluntary choice
- When patients lack this competence a substitute decision maker must be sought

Definitions

- Competence is said to refer to legal judgments whereas capacity is said to refer to clinical judgments
- In practice however, the terms competence and capacity are used interchangeably

Types of Capacity

There are 3 main types of capacity:

1. Capacity for treatment
2. Capacity with respect to discharge to a long term care facility
3. Capacity for finances

Capacity for treatment

- A patient is not necessarily globally incapable for all treatment
- He or she may be capable to consent to some treatments and not others
- More important to thoroughly assess capacity when the patient's condition is more serious and treatment more dangerous
- In some cases the patient's capacity may fluctuate and require repeat assessments
- Generally speaking a person is presumed to be capable with respect to treatment unless reasonable grounds to suspect incapacity exist

How common is incapacity for treatment?

- One study of 302 medical inpatients with acute conditions estimated that as many as 48% were incompetent to consent to medical treatment
- The clinical team responsible for these patients had identified only approximately one quarter of this group as being impaired

Why is it important to assess capacity for treatment

- Incapacity is common
- Physicians have a legal and ethical responsibility to do so
- A significant number of complaints against physicians arise from situations in which the physician has misunderstood the law with respect to assessing capacity or making decisions without appropriate consent

What is the relevant legislation in Ontario regarding assessing capacity for treatment?

- In Ontario it is the Health Care Consent Act (HCCA) that governs health practitioners including physicians

What is the legal definition of the capacity to consent to treatment?

- A person is capable of consenting to treatment if the person is able to:

    1. "understand" the information that is relevant to making a decision about treatment, and
    2. "appreciate" the reasonably foreseeable consequences of a decision or lack of a decision

Who assesses capacity to consent to treatment?

- The HCCA stipulates that it should be the health practitioner proposing the treatment who must assess whether the person is capable of giving consent

Approach to assessing capacity regarding a treatment

1. Ensure that the patient has been given the information that is relevant to making an informed decision regarding treatment
2. Assess the patient's ability to understand this information
3. Assess the patient's ability to appreciate the situation and its consequences
4. Unless it is an emergency situation, if the patient is found incapable the physician must identify and contact the substitute decision maker who must make the decision on the patient's behalf

1) What information must be provided to the patient when assessing capacity?

Relevant information that must be provided

- Nature of the patient's condition
- Nature and purpose of the patient's treatment
- Risks and benefits of the proposed treatment
- Risks and benefits of alternative treatments including the option of no treatment at all

Providing information to the patient

- Must give relevant to the patient in their own language (using an interpreter if necessary) at a level they can understand

2) Assess patient's ability to "understand" the relevant information

- Essentially asks the patient to repeat back to you in their own words what you have told him or her about his or her condition and its treatment
- Clinician:
    - "Please tell me what I told you about:"
        - The problem with your health now
        - The recommended treatment
        - The possible benefits and risks of the treatment
        - Any alternative treatments and their risks and benefits
        - The risks and benefits of no treatment

Patient's ability to understand the relevant information is affected by deficits in attention, intelligence and memory

3) Assess the patient's ability to appreciate the situation and its consequences

- Ask the patient to describe his or her views of the medical condition, proposed treatment and the likely outcome

Questions to ask to assess patient's ability to appreciate

- What do you believe is wrong with your health now?
- Do you believe that you need some kind of treatment for it?
- What is the treatment likely to do for you?
- What do you believe will happen if you are not treated?
- What do you believe will happen if you are not treated?
- Why do you think I have recommended this treatment?

Patient's ability to appreciate is affected by denial on the basis of cognitive or affective impairment or on the basis of a delusion about the nature of the treatment or of those caring for the patient

4) Unless an emergency situation need to contact the substitute decision maker (SDM) to give him or her the relevant information regarding the patient's illness and its treatment

Case #1

- 86 year old woman from a nursing home with a diagnosis of dementia is admitted to hospital with a hip fracture.
- She requires hip replacement surgery
- On the morning after her admission the nurse says that she seems "confused"

Q. How would you assess her capacity to consent to hip surgery?

A. Provide her with relevant information about her hip condition and its treatment

Relevant information

- Nature of the patient's condition
- Nature and purpose of the patient's treatment
- Risks and benefits of the proposed treatment
- Risks and benefits of alternative treatments including the option of no treatment at all

2) Assess patient's ability to "understand" the relevant information

- Essentially asks the patient to repeat back to you in their own words what you have told him or her about his or her condition and its treatment
- After you provide her with the relevant information you ask her to tell you why she is here
- She tells she is here as she has to do some banking and asks you if you can help her with this
- She seems unaware she is in a hospital and tries to get up to leave as she wishes to go home
- On questioning she tells you she is at the "Bank of Nova Scotia" and the date is November (it is May) 1990

Q. Is this patient capable to make a decision about her hip surgery?

Approach

- Ensure that the patient has been given the information that is relevant to making an informed decision regarding treatment
- Assess the patient's ability to understand this information
- Assess the patient's ability to appreciate the situation and its consequences
- Unless it is an emergency situation, if the patient is found incapable the physician must identify and contact the substitute decision maker who must make the decision on the patient's behalf

Case # 2

- A 35 year old woman with a history of schizophrenia began to develop sores in her mouth but refused to see a doctor
- Eventually due to increasing pain in her mouth she reluctantly goes to the ER
- Blood work is done which indicates she likely has acute leukemia and she is admitted to hospital for further investigations and treatment
- Despite being told about the seriousness of her condition she continues to be ambivalent about staying in hospital and does not cooperate with all her investigation and treatment
- Nurses notes indicates she seems suspicious and mistrustful of their care

Q. How would you assess her capacity to make decisions regarding treatment of her presumed leukemia?

1. Provide her with relevant information regarding her condition and its treatment
2. Assess her ability to "understand" this information

- She is able to tell you that you have told her that she may have leukemia and requires further investigations and likely treatment with chemotherapy
- She tells you that you have told her she will likely require chemotherapy that has certain side effects and that she requires ongoing care in hospital

Q. Does she appear to “understand” the information you have provided her with?

What is the next step?

3) Assess the patient’s ability to appreciate the situation and its consequences

- Ask the patient to describe his or her views of the medical condition, proposed treatment and the likely outcome
- She tells you that she does not believe that she has leukemia and says she thinks doctors may be “making it up” in order to make money
- She goes on to say that she does not think that leukemia can cause sores in her mouth and does not think that chemotherapy will help with this and will only make her more sick
- She also tells you that the only reason that she is staying in hospital is because her husband and her family are pressuring her to do so but that she would like to leave

Q. Do you think she is capable to consent to treatment for her leukemia?

Q. What do you do now?

Approach

- Ensure that the patient has been given the information that is relevant to making an informed decision regarding treatment
- Assess the patient’s ability to understand this information
- Assess the patient’s ability to appreciate the situation and its consequences
- Unless it is an emergency situation, if the patient is found incapable the physician must identify and contact the substitute decision maker who must make the decision on the patient’s behalf

Substitute decision maker

- Must be given the same information about the patient’s medical condition and relevant treatment and are encouraged to make the decision on behalf of the patient based on what the SDM thinks he or she would want or if this is unknown based on what is in his or her best interest

In Summary

- Incapacity regarding treatment is quite common in acutely ill medical and surgical patients
- The HCCA provides the legal framework governing the assessment of capacity in Ontario
- Capacity assessment hinges on determining whether the patient is able to understand and appreciate the information provided to him or her about his condition and its treatment
- This assessment should be done by the treating physician in most cases

Reference

- Appelbaum PS. Assessment of Patients’ Competence to Consent to Treatment. NEJM 2007; 357:1834-1840

About this Document

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