

Capacity to Assess Capacity - A Review

Rounds MAHC Huntsville March 2026



No Disclosures
No Conflict of Interest

Objectives

- 1) Describe the elements of assessing capacity to consent.
- 2) List types of capacity assessment.
- 3) Describe when and where to acquire help in complex scenarios outside your scope.



Every action we take with a patient involves a decision regarding capacity



FLASH CARDS



(Who has the capacity to consent to a medical intervention?)

Probably Yes

Probably No

Need Help

Not my job

33 year old woman living with schizophrenia (stable) who needs a cholecystectomy

90 year old with early dementia with an ingrown toenail for removal (what about CABG?)

50 year old, longstanding delusion disorder (erotomania, target King Charles) who requires paracentesis for ascites

78 year old, with delirium and sepsis, to be transferred to ICU and be intubated

60 year old, acute episode depression, early stage carcinoma of the bowel, declining referral to Oncology

28 year old living with Sx who believes Elon Musk has implanted a chip in her brain, requires investigation for seizures

You're a Hospitalist and there's pressure to move an ALC Pt to LTC and Pt is resisting but you know that they can't go home independently

A Pt's second wife is fighting with his kids from a previous marriage about how the money is being spent; kids say Dad isn't "with it" (you agree to a point) and wife is taking advantage of him and want you to intervene; plus to send letter to bank.

A 14 yr old with vaccine-hesitant parents wants vaccines updated

An unaccompanied adult with Down's syndrome, can't reach Guardian, requires casting for a fracture

Definition from 1996 Ontario Legislation

Capacity is the ability to understand information relevant to a decision and the ability to appreciate the reasonably foreseeable consequences of a decision (or lack of a decision).

Types of Capacity Assessments

Personal & Health Care		Property and Finance
Consent to Rx, admission to hosp, Personal assistance (ex home care)	For what purpose?	Ability to make decisions regarding housing and money management
Treating HCP (MD, NP, or Psychiatrist)	Who is able to perform them?	Designated Capacity Assessor (MD, RN, OT, SW, Psychologist)
(For decisions re LTC, Evaluators from HC)		
Within Scope of Practice	Training Required?	Course run by the Ministry of the Attorney General's Cap. Ass. Office
Health Care Consent Act	Legal Framework	Substitute Decision Act
Handled by Consent and Capacity Board	Disputes	Health Care Consent Act. MH Act

As part of
establishing
Capacity to
Consent
you will have...

Offered diagnostic possibilities

Presented treatment options (including watch and wait or no treatment other than support)

Explained the risks and benefits of each option

Explained the desired outcomes

Explained potentials of NOT going ahead

Offered opportunity for clarification and concerns and helped with decision making based on patient preferences and goals

COMPONENTS of a CAPACITY ASSESSMENT

There is no such thing as a *global* assessment; capacity is decision or domain specific for the reason treatment is suggested;

Incapacity is not necessarily an enduring or permanent condition; it may fluctuate.

Capacity is about ability to consent, not whether the person wants to have Rx or not.

The elements involve:

- Being able to evidence a choice
- Have a factual understanding of the proposed treatment
- Have reasoning ability about choice
- Appreciation of the benefits and risks of both accessing and declining treatment

SPECIAL ASSESSMENT TOOL

Aid To Capacity Evaluation (ACE) Capacity

- Developed by Dr. E Etchells at Sunnybrook/Joint Centre for Bioethics
- Free to copy and use
- Training available

Sample Questions from the Ace

- General Medical: What problems do you have?; why are you here?: what is proposed Rx?; what are the options?; what could happen if you have/don't have; what are side effects;? will Rx help you live longer; what happens if you don't?
- Person affected by depression: Can you help me understand why you have decided to accept/refuse treatment?; do you feel you're being punished?; do you think you're a bad person?; do you have hope for the future?; do you deserve to be treated?
- Person affected by Psychosis: Can you help me understand why you have decided to accept/refuse treatment?; do you think anyone is trying to hurt/harm you? Do you trust your nurse/doctor?

If there are disputes...

For Personal/Health: the Consent and Capacity Board (CCB); an independent provincial tribunal; reviews findings that a person is incapable of consenting to treatment, admission to a care facility, or personal assistance services; also disputes about SDMs who may not be following HCC Act principles; appeals: Superior Court of Justice

For Property/Finance: Substitute Decisions Act (SDA), and responsibility is split between Superior Court of Justice; applications to appoint, remove or challenge guardians of property; disputes re POA Property, Directions re how finances managed, challenges to capacity to manage property; and limited role of the C C B in some situations (ex under M H A re guardianship by Public Guardian and Trustee)



SPECIAL
CIRCUMSTANCES
THAT MAY REQUIRE
SPECIFICALLY
TRAINED
ASSESSORS

Patients with dementia – does not preclude capacity depending on severity/what Rx

Patients with depression: acute severe depression may require psychiatrist weigh-in;

Patients with psychosis: a health care delusion may preclude consent; 80% *in pt* lacked capacity


Cultural and religious factors: various beliefs may require translation/language interpretation

Minors: no minimum age of consent in ON; at 16, presumed capable

Patients with developmental disabilities or other barriers to communication (ALS, deafness): may require specialized assessment help (such as OT, SLP, etc)

Request for Assessment of Capacity under Section 16

In Ontario, any person who believes someone may lack capacity to manage property, or the person themselves, can initiate a Form 4 — it is not limited to clinicians or institutions. The form is a request for a designated Capacity Assessor to conduct an assessment under section 16 of the Substitute Decisions Act.

 **Ontario** Ministry of the Attorney General

Request for Assessment of Capacity under Section 16
Form 4
Substitute Decisions Act, 1992, O. Reg. 26/95

1. I (Full name),
Last Name _____ First Name _____ Middle Initial _____
of the _____ (City, Town, etc.)
in the _____ (County, Municipality) request that an assessor perform
an assessment of (Full name of person to be assessed)
Last Name _____ First Name _____ Middle Initial _____
for the purpose of determining whether the Public Guardian and Trustee should become their statutory guardian of property.

Items 2, 3 and 4 are to be completed only if the request is made in respect of another person.

2. I have reason to believe that (Full name of person to be assessed)
Last Name _____ First Name _____ Middle Initial _____
of the _____ (County, Municipality) may be incapable of managing property.

3. I have made reasonable inquiries and I have no knowledge of the existence of any attorney under a continuing power of attorney that gives the attorney authority over all the property of (Full name of person to be assessed)
Last Name _____ First Name _____ Middle Initial _____

4. I have made reasonable inquiries and I have no knowledge of any spouse, partner or relative of (Full name of person to be assessed)
Last Name _____ First Name _____ Middle Initial _____
who intends to make an application under section 22 of the Substitute Decisions Act, 1992 for the appointment of a guardian of property for them.

Subsections 89 (6) and (8) of the Substitute Decisions Act, 1992 provide:

cc. 89 (6): No person shall, in a statement made in a prescribed form, assert something that he or she knows to be untrue or profess an opinion that he or she does not hold.

cc. 89 (8): A person who contravenes subsection (6) is guilty of an offence and is liable, on conviction, to a fine not exceeding \$10,000.00.

Dated _____, 20__.

Signature of person making the request

Last Name _____ First Name _____ Middle Initial _____
Unit Number _____ Street Number _____ Street Name _____ PO Box _____
City/Town _____ Province _____ Postal Code _____
Telephone Number (include area code) _____

To: (Name of assessor)
Last Name _____ First Name _____ Middle Initial _____

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Final Reminders

- Capacity is presumed
- Capacity is not determined by diagnosis alone (diagnosis does not equal incapacity)
- The fact that we disagree with a decision does not preclude capacity, i.e. being able to reason their choice is the key, not that it seems rational to us
- Capacity can change either way with time and circumstance; re-evaluate with *every* decision
- Deciding someone is incapable should have a very high bar as decision-making is a fundamental human right

If Capacity is lacking, what next ?

(Health Care Consent Act, and CPSO advisory)

1. Inform Pt of finding of incapacity
2. Identify the correct SDM by following the HCCA hierarchy *
3. Provide SDM with full, informed-consent information
4. Obtain consent/refusal from SDM
5. If Pt disagrees with the incapacity finding, Pt is informed of their right to apply to CCB for a review
6. If SDM is not acting in Pt's best interest, physician may apply to CCB for review
7. In an emergency, if SDM isn't available, physician may treat without consent to prevent harm

* Attorney for Personal Care – treating physician *must* see the actual document to confirm that the person attesting to being POA is that person and that there aren't specific conditions or restrictions. If no document, then fall back to the SDM hierarchy.

HELP!!!

Aid to Capacity Evaluation (ACE): [ace.pdf](#) for fillable on-line form.

Advanced Care Planning Ontario: <https://www.advancecareplanningontario.ca/substitutue-decision-makers/who-is-my-sdm> to review the SDM Hierarchy and determine who your SDM would be. This site is also endorsed by our MAHC ethicist, Dr. Rob Butcher, and the clinical ethics committee.

Hospital social workers are good resources. Julia Henderson, MSW, RSW at South Muskoka Site is a Designated Capacity Assessor; she cannot assess at our facilities due to potential conflict of interest, but is a great source of information.

Investigations Screening Unit, Office of the Public Guardian and Trustee (OPGT) - OPGT will conduct an investigation when it receives information that an individual that may be incapable and at risk of suffering serious financial or personal harm and no alternative solution is available or when POA/SDM is suspected to put the patient in harm's way. Information can be shared without consent.

Mental Capacity: [Mental capacity | ontario.ca](#) learn about mental capacity, how it is evaluated, who evaluates it and how to appeal a finding of incapacity.

For Personal/Health Care complex cases:

Colleagues with special areas of expertise, e.g. Psychiatry for developmental disorders, mental health. For geriatrics, Algonquin Family Health Team Geriatric Care Team, Muskoka Geriatric Team, NSM Specialized Geriatric Services.

Treatment Decisions Unit, Office of the Public Guardian and Trustee (OPGT) - OPGT is obligated to make treatment decisions for patients who are incapable and there is no one available to do this for them as per the HCCA Hierachy. Note that the OPGT is always decision-maker of last resort and can only approve/deny a proposed treatment (they will not initiate proposal as they are not physicians or clinicians).

Capacity and Consent Board (CCB) - To nominate a guardian and/or assist in settling disputes between POA/SDM. If it is felt that a POA/SDM is not making decisions in the best interest of your patient or is unfit for the role you can report to CCB.

For Property and Finances:

Capacity Assessment Office (CAO) – has a list of designated capacity assessors by region; usually organized by the requester because they are typically responsible for payment; financial assistance program for person requiring assessment and cannot afford to pay (must meet the income threshold (OW/ODSP/low-income seniors) , determined via application).