

**THE COMMUNITY-HOSPITAL HOMELESS HEALTH EDUCATION AND
LEARNING SERIES (C-HEAL) PRESENTS:**

CAPACITY ASSESSMENTS AND CONSENTS

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Overview of Presentation

- **Content** (40 minutes)
 - Informed consent & the legal framework for consent
 - What is “capacity” and the legislation that determines this
 - Definitions and responsibilities relating to decision-making on:
 - Financial Capacity
 - Psychiatric Treatment
- **Case studies** (20 minutes)
- **Q&A** (30 minutes)

Informed Consent and Legal Framework for Consent

Nicole Schroeder

A fundamental principle of health care in Ontario is that **treatment** shall not be provided to an individual without them providing ***informed consent***.

Information must be shared with an individual for there to be informed consent – this includes:

- The nature of the treatment
- Expected benefits of the treatment
- Material risks and side effects of the treatment
- Alternative courses of action
- Likely consequences of not having the treatment

What is informed consent?

- To demonstrate that a person has the ability to provide “informed consent” to a treatment, the person must have received the same information about a treatment that a reasonable person in the same circumstances would require to make a decision.

And

- The person has received responses to his/her requests for additional information about the treatment.

Capacity Assessment

Dr. Mark Lachmann

Capacity assessments relate to situations in which individuals cannot understand the information needed in order to provide **informed consent**.

What is capacity and how do we know if it should be assessed?

- A person's capacity determines the rights of the individual to make their own choices (where they live, what medications to take, what they do with their money).
- **If there are 'red flags of capacity', capacity must be assessed. Red flags include:**
 - **Confused & irrational thinking**
 - **Fluctuating wishes & alertness**
- *A person is presumed capable until proven otherwise.*

The Test for Capacity

- The test for capacity is set out in subsection 4(1) of the *Health Care Consent Act*. There is a presumption of capacity with respect to treatment - absent “reasonable grounds”, a health care practitioner can assume that a person is capable.
- Based on the statute, an evaluation of capacity involves a “two-part test” with consideration of the following:
 - A capable person:
 - Is able **to understand** the information relevant to making a decision about the proposed treatment;
 - Is able **to appreciate** the reasonably foreseeable consequences of their decision.

A person may be found incapable if he or she does not meet one part of the test, or both.

Decisions relating to assessing capacity are dictated by legislation, including:

- The Health Care Consent Act
- The Mental Health Act
- The Personal Health Information Protection Act
- The Substitute Decisions Act
- Part XX.I of the Criminal Code of Canada

What happens when a person is deemed “incapable”?

When a person is found to be incapable, the health care provider proposing treatment will look to their **Substitute Decision Maker (SDM)** to make decisions on their behalf.

There is a **specific hierarchy** for determining who may give consent/be the SDM on behalf of an incapable person.

Hierarchy of Substitute Decision Makers (this is the specific order)

- **A court appointed guardian** with the authority to give or refuse consent to treatment
- **An attorney for personal care** with the authority to give or refuse consent to treatment (i.e. a person named to be SDM on a Power of Attorney for Personal Care form)
- **A representative appointed by the Consent and Capacity Board (CCB)** with the authority to give or refuse consent to treatment
- **A spouse or partner**
- An adult **child** (16 years or older) or **parent** or a **Children's Aid Society** representative
- A **parent** who has only a **right of access** (parent does not hold custody)
- An adult **sibling** (16 years or older)
- **Any other relative** (biological, marital or related by adoption)
- **The Public Guardian and Trustee*** (PGT) is the decision-maker of last resort if no other person is capable, available or willing to give or refuse consent. *PGT is a government appointed representative

What happens if a person is assessed as being incapable and disagrees?

If the assessed person is a patient in an inpatient mental health unit, they will be given the option of having a formal hearing in the hospital with the **Consent and Capacity Board (CCB)**. The CCB is an independent body that holds hearings to consider a variety of things, including an individual's capacity to make decisions about health treatment, finances, or admission to a long-term care facility.

If the assessed person is outside of the hospital, they may ask the Consent and Capacity Board to review the finding. Information about the review process can be obtained from the Consent and Capacity Board at 1-866-777-7391.

Financial Capacity

Nicole Schroeder

Financial Capacity Assessments

Financial Capacity assessments are undertaken in order to provide a formal, independent **assessment** of an individual's **capacity** to make **financial decisions**. An assessment is generally requested when there are serious concerns about the person's ability to manage their funds.

- The assessor will try to determine whether the person's understanding of the issues is *factually correct*.
- The assessor will find out whether they can **accurately identify** their *income, assets, debts and other financial involvements*.
- The assessor will help the person being assessed by giving them relevant information and testing how much the person can retain, interpret and use that information. The person's responses are then analyzed to see whether they demonstrate an understanding of the information.
- Making poor decisions (i.e. deciding to spend funds on drugs, giving money away to other people) is not a ground for being deemed financially incapable.

Who completes Financial Capacity assessments?

- **A Capacity Assessor**
 - Someone who is trained and qualified to determine if an individual is mentally incapable of making certain types of decisions, as per the *Substitute Decisions Act*. Specific health care professionals are eligible to become capacity assessors following a registration process.
- **Attending Physicians in an inpatient psychiatric facility**
 - According to the *Mental Health Act*, all patients in an inpatient psychiatric facility must be examined by their attending physician regarding their abilities to manage their finances.

Summary Table

	Capacity to make psychiatric treatment decisions	Capacity to make financial decisions
What the assessment covers	Individual ability to provide informed consent – requires ability to understand information and appreciate consequences of decisions.	Whether an individual can accurately identify their income, assets, debts and other financial involvements.
Who can administer the assessment	Treating psychiatrist of the patient	1. Capacity Assessor 2. Attending MD in-patient psych
Process for obtaining assessment	Treating psychiatrist assesses patient and makes decision.	Contact designated Capacity Assessor or attending MD in-patient psychiatric unit.
Implications of assessment	Whether or not Hierarchy of Decision-makers must be used to engage another individual in decisions.	

Case Studies

Nicole Schroeder

Case Study 1: Financial Capacity - Betty

- Betty is 81 year old female who has lived in supportive housing for the last four years, following homelessness for many years previous. She has suspected mental health issues but does not have any diagnoses. She will only minimally engage with certain staff. Her income is a combination of CPP, GIS and OAS. She pays her rent in cash and will only do so with repeated prompting.
- In early 2019, Betty fell into arrears with her housing, as she became more reluctant to pay her rent and offered confusing explanations as to why (“the train hasn’t come” or “it’s in the vault in Hamilton”) Betty eventually stopped paying her rent altogether.
- Betty and housing staff called Canada Revenue Agency together. Betty could not pass the identifying questions but it was determined she had not filed her taxes for several years and was not receiving GIS and had exhausted her savings to pay her rent.
- Betty does not seem to understand the situation, what she needs to do to rectify the situation or the fact that she could be evicted for non-payment of rent.

Case Study 1: Financial Capacity – Betty

What next?

1. If Betty is admitted to an inpatient mental health unit, request that the inpatient Most Responsible Physician complete a formal financial assessment.
2. If Betty is in the community, someone involved in her care could contact the **Capacity Assessment Office**.

The Capacity Assessment Office trains eligible health professionals to be capacity assessors in accordance with the *Substitute Decisions Act*. It also maintains an up-to-date list of qualified capacity assessors. In most cases, the person requesting the assessment pays the assessor. If Betty is found incapable of making financial decisions, she can legally contest this finding of incapacity to the CCB.

Case Study 2: Capacity to consent to psychiatric treatment (while in an inpatient psychiatric unit) – John

- John has a diagnosis of schizophrenia and was brought to the ED by his worker for bizarre behavior (tampering with program site alarms, barricading doors). He has been hospitalized before for a similar presentation. John has shown improvement of his symptoms with medication during previous hospitalizations.
- John is transferred to the inpatient mental health unit. During his meeting with his psychiatrist, he demonstrates **he is able to understand the information about schizophrenia** and that it can affect some people. However, **he does not believe that he has this illness**, in spite of a two year history of symptoms consistent with schizophrenia, hospitalization and treatment. John is found incapable of making psychiatric treatment.
- *Why is this?*

Case Study 2: Capacity to consent to psychiatric treatment – John

What next?

- John has been found incapable to consent to psychiatric treatment.
- He has been placed on a Form 33 under the Mental Health Act, which allows him to be treated psychiatrically against his will.
- The doctor proposing treatment will look to their **Substitute Decision Maker** to make decisions pertaining to psychiatric treatment on their behalf.
- John can legally contest this finding of incapacity to the CCB. Until the hearing is held and a decision is made, John cannot legally be given any medications (unless there is an emergency situation).

Case Study 3: Capacity to consent to psychiatric treatment (while in an inpatient psychiatric unit) - Bill

- Bill is brought to hospital by police after demonstrating aggressive behaviors towards other people (accusing them of being spies). He had been using crystal meth prior to the incident. He was placed on a Form 1 by ED doctors due to being a danger to others.
- Bill is transferred to inpatient psychiatry. Following two days of sleeping and some PRN medications for agitation, he is significantly more organized.
- He meets with his psychiatrist and states he is aware his meth use caused him to become aggressive. At this time, he is calm, controlled, and denying all psychiatric symptoms. His diagnosis at this time is substance-induced psychosis. Bill is found capable to make psychiatric treatment decisions.

Capacity to consent to psychiatric treatment (while in an inpatient psychiatric unit). Patient deemed capable. What next?

- Bill has been found capable of providing informed consent to psychiatric treatment. He is told he can stay in hospital as a voluntary patient and begin an antidepressant for his chronic low mood.
- He has stated to the doctor that he does not want to take any psychiatric medications at this time and would like to leave hospital.
- Bill has been assessed and he has been deemed a capable patient to make psychiatric decisions. He does not at this time meet criteria of being an imminent risk to himself or other. He decides to leave the hospital and is therefore discharged by the Doctor Against Medical Advice (AMA).

Q&A