

## Our Aging Society Consent & Capacity

Dr. Barbara Collins, Ottawa  
Hospital  
Elder Abuse Education Day  
October 10<sup>th</sup>, 2013

## Mental Capacity

In the broadest sense, refers to the ability of an individual to make his/her own decisions



## Mental Capacity...



### Mental Capacity Is...

- A legal concept--IDs those conditions that authorize removal of charter rights
- Decision- or domain-specific
- Statute- and jurisdiction-specific
- Changing with society
- Judged on decision-making process, NOT decisions themselves

### Mental Incapacity Is Not...

- A medical or psychiatric diagnosis (dementia, schizophrenia, low IQ)
- A global attribute or trait of the person
- A willingness to take risks
- Socially deviant choices(e.g., based on an unusual value system)
- Eccentricity

## Legal Capacities in Civil Law

- Capacity to consent or refuse Tx
- Capacity to consent to LTC
- Capacity to manage property
- Capacity to make personal care decisions regarding safety, shelter and other domains
- Capacity to make or change a will
- Capacity to instruct counsel
- Capacity to enter into contracts
- Capacity to disclose medical records
- Capacity to grant/revoke a POA for property or personal care

## Threats to Capacity

- Unmet needs
- Delirium
- Intoxication/Sedation
- Delusions
- Intellectual, cognitive or memory impairment
- Extreme anxiety, fear, pain or stress
- Marked indecisiveness, inconsistent choices
- Mood disturbance resulting in distorted appraisal of outcomes
- Lack of insight/denial



*Red flags only—do not de facto constitute incapacity*

## A Capacity Assessment

### Is...

- A legal "rights" assessment (allows for removal of rights and SDM)
- Based on the reasoning process
- A threshold test

### Is Not...

- A clinical or functional assessment
- A "best interests" test
- Based on the reasonableness of the decisions

## Capacity Assessment

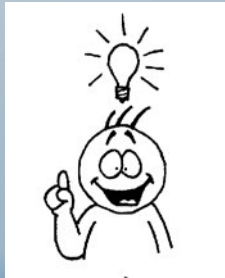
- Involves striking a balance between the right to self-determination and the need for protection
- Our society places premium on autonomy, rights of the individual
- Reflected in *presumption* of capacity
- Onus on assessor to prove incapacity
- In borderline cases, must err on side of capacity

## Capacity Assessment

- Specific test of capacity (criteria) defined in relevant statutes and varies according to type of capacity being assessed
- But, in most cases, a cognitive test focusing on reasoning ability
- 2-pronged: *Understand* and *appreciate*

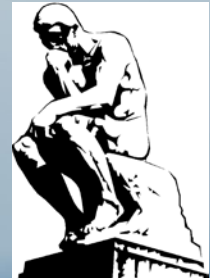
## I Ability to Understand

- Ability to process, understand and retain pertinent facts
- Ability to retain facts long enough to make a decision
- If person forgets, should come to same conclusion each time issue is discussed
- Understanding of options



## II Ability to Appreciate

- Evaluative aspect of decision-making (the reasoning process)
- Ability to weigh risks and benefits of different options in relation to personal circumstances
- Ability to manipulate information rationally
- Realistic appraisal of outcome
- Justification of choice
- Consistency of decision from moment to moment
- Consistency of decision with lifelong values and choices



## Reasoning NOT Reasonability

“The right knowingly to be foolish is not unimportant; the right to voluntarily assume risks is to be respected. The state has no business meddling with either. The dignity of the individual is at stake.” (Re Koch)

## Threats to Valid Assessment in Elderly

- Generational differences in values
- End-of-life shift in values and priorities
- Lack of education or experience
- Physical limitations or sensory loss
- Normal age-associated changes in cognition or mild degree of malignant memory loss or intellectual decline
- Temporary fluctuations in mental status due to treatable medical conditions

## SUBSTITUTE DECISIONS ACT (SDA)

## SDA

Addresses various aspects of capacity:

- Manage property (finances)
- Make personal care decisions (hygiene, nutrition, health care, housing, safety, clothing)
- Assign a power of attorney
  - POA for personal care
  - POA for property

## SDA

- Lays out process for seeking guardianship of the person or property through the courts
- Provision for statutory guardianship for property (Section 16)
  - \*\*no equivalent for personal care

## Power of Attorney for Property and Personal Care

- Two types of POA—can give one or other or both to same or different people
- SDA stipulates criteria for capacity to assign these POAs—different for personal care and property
- But, no prescribed capacity assessment
- POA assumed valid unless challenged

## Court Appointed Guardians

- Any concerned party can make a court application for guardianship of person or property, including PGT (Special Investigations Unit)
  - Summary Disposition
  - Open Hearing

## Statutory Guardianship

- Provision under S. 16 of the SDA whereby can have PGT assume guardianship for property without involvement of the courts
- Requires a finding of incapacity by a designated capacity assessor
- Can be requested by any concerned party by completing a Form 4 (including person to be assessed)
- Voluntary—only proceed if person being assessed does not dissent after clear rights advice
- Cannot be done if there is a POA for property in place or if known that a court application for guardianship is being filed

## Less Restrictive Alternatives

- Skills Training
- Joint account holder
- Assigning POA for Property
- Automatized banking
- Trusteeship
- Reversible guardianship under MHA

## Assessment of Capacity to Manage Property, Personal Care Under SDA

“Understand and appreciate” test

## HEALTH CARE CONSENT ACT

## HCCA

- Pertains to decisions regarding
  - Treatment
  - Admission to Prescribed Care Facilities
  - Personal Assistance Services (for individuals in LTC)
- Applies to all regulated health professionals
- Applies within or outside hospital setting

## Informed Consent



- Capacity is a requirement of informed consent
- For RHPs, administering treatment without *informed consent* can be grounds for professional misconduct, even battery

## Capacity under HCCA

- “Understand and appreciate” test applies
- HCCA recognizes that a person may be:
  - Incapable with respect to some treatment decisions, capable with respect to others
  - Incapable with respect to a treatment decision at one time and capable at another
  - Capable at any age (no minimum age requirement)

## HCCA

- Health care professional proposing treatment makes ultimate decision regarding patient's capacity to consent but may consult others for an opinion (e.g., neuropsychologist, psychiatrist, capacity assessor)
- If patient deemed incapable, must be given rights advice, including right to appeal
- SDM makes the decision at hand (not the treating team):
  - Guardian, attorney for personal care, representative appointed by the Consent and Capacity Board, spouse or partner, child or parent, brother or sister, any other relative, Public guardian (last resort)

**\*\* A SDM can be replaced if not acting in the best interest of the incapable person \*\***