

Capacity and Consent

Capacity: A person is incapable of giving or refusing consent to care or medical treatment if he/she is not able to understand the information relevant to the decision or if he/she is not able to appreciate the reasonably foreseeable consequences of such a decision. The health care professional proposing the treatment course of action assesses capacity. ⁽¹⁾

Consent has many elements such as lack of coercion, given by patient or legally authorized substitute decision maker, a reference to the particular administrator and treatment, and comes with full disclosure (e.g. risks, benefits, side effects, alternatives). ⁽¹⁾

Why is it important?

- The Health Care Consent Act (HCCA) is an Ontario law based on capacity to consent; it governs health practitioners, including physicians ⁽²⁾
- Ontario HCCA is also relevant to the Ontario Substitute Decisions Act- a person found to lack capacity for personal care would need a substitute decision maker ⁽³⁾

Common Causes

- 73 % of Canadians die from complex chronic diseases and some will lack capacity; for example, progressive dementing illnesses will affect the person's decision-making ability at some point ^{(1) (4)}

Key Considerations

- A person will be able to appreciate the consequences of the decision if the following occurs: ⁽¹⁾
 - Acknowledges that the condition for which treatment is being recommended can affect him/her
 - Understands how proposed action, or lack of action, can effect quality of life
 - Explain why he/she is making a decision in a way that aligns with previously expressed values (e.g. realistic expectations, can communicate choice, can manipulate information rationally ⁽⁴⁾
- If the person is found incapable to consent, he/she must be advised of legal rights (unless in emergency situations) and the health professional must follow procedures developed by the professional governing body
- The health professional must also notify the patient that a substitute decision maker will assist in the understanding of treatment and be responsible for final decisions ⁽⁴⁾
- Health professional should still involve the incapable person to the greatest extent possible ⁽⁴⁾
- If patient disagrees with current substitute decision maker, the physician must advise the patient of his/her options and assist in either finding another substitute decision maker or applying to the Consent and Capacity Board for a review of the finding of incapacity ⁽⁴⁾
- If a substitute decision maker does not exist, the physician should contact the Public Guardian and Trustee
- If a health professional does not believe the substitute decision maker is acting in the best interest of the patient or according to patient's prior wishes, then he or she can request a hearing with the Consent and Capacity Board ⁽⁴⁾
- For more information on determining capacity and consent, please consult the following guide for physicians: http://www.cpso.on.ca/uploadedFiles/policies/policies/policyitems/capacity_consent_july07dialogue.pdf
- Health care professionals can also consult OHA's Practical Guide to Mental Health and the Law in Ontario: <http://www.oha.com/KnowledgeCentre/Library/Toolkits/Documents/Final%20-%20Mental%20Health%20and%20the%20Law%20Toolkit.pdf>
- NICE also provides a tool on Capacity and Consent, Ontario Edition at: <http://www.nice-tools.ca/files/Capacity.pdf>

References

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