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Ethics FAQ   
**Assessing Capacity for Treatment Decisions**

This **Ethics Frequently Asked Question (FAQ)** guide has been prepared in collaboratione between **Regional Ethics Network** and Hamilton Health Sciences’ **Office of Clinical & Organizational Ethics** for the purpose of educating staff, physicians and learners. *It does not constitute legal advice.* For more information about the Regional Ethics Network, and other FAQs please visit our [website](http://regionalethicsnetwork.com/wp/). If you have questions about this topic as it applies to a specific case, you may contact **Regional Ethicsit** for support (Monday-Friday, 8am-5pm) or email [regionalethics@HHSC.CA](http://regionalethicsnetwork.com/wp/wp-content/uploads/2016/12/regionalethics@HHSC.CA).

**Scenario**

Mrs. Jones is 62-year-old patient who has been admitted to the hospital for the 5th time in the past 12 months. She suffers from COPD and is on oxygen at home. She continues to smoke, as she says “smoking is the only thing that makes me happy.” She was admitted with UTI, slightly confused, dehydrated and malnourished. The neighbor who drove her to hospital reports that Mrs. Jones’ house is really cluttered and foul-smelling. After 8 days in hospital, Mrs. Jones seems better and the team begins exploring discharge options. Several team members report that she provides rather bizarre responses to questions. For example, when asked when the last time was that she prepared a meal for herself, she responds, “Yesterday.” The team is concerned about Mrs. Jones’ cognitive status, and they wonder if she may be developing dementia. Today, Mrs. Jones woke up with severe pain in her stomach and the consulting physician, Dr. Lee, determined that she is suffering from gallbladder stones and will require surgery. Dr. Lee needs to determine if Mrs. Jones is capable to make decisions about her medical treatment.

**What does it mean to be a “capable patient” or to “have capacity” to consent?**

Capacity is a legal term that describes a person’s ability to make their own decisions. It is not a clinical diagnosis. If a person is capable, this means he/she meets the **legal test for capacity to make a particular decision**. There are different measures of capacity for different types of decisions, including: the capacity to make specific treatment decisions, financial decisions, decisions about shelter, decisions about receiving personal assistance, decisions about appointing a Power of Attorney, etc. Each type of decision has its own criteria for meeting the legal test for capacity.

**What is the test for capacity to make treatment decisions?**

The legal test for capacity to consent to treatment is outlined in the Ontario Health Care Consent Act (1996), Section 4(1). According to the *Health Care Consent Act*, a capable patient will be able to demonstrate:

* Understanding of the information relevant to the situation and the decision she is being asked to make
* Understanding of the reasonably foreseeable consequences of their choice, and what will happen if action isn’t taken or other choices are made

**How does a health care provider determine the capacity of a patient to consent to treatment?**

In Ontario, **all patients are presumed to be capable**, however, healthcare providers sometimes face situations when they are uncertain if their patient is capable to make decisions about a specific treatment. The healthcare provider proposing the treatment has the duty to evaluate the patient’s capacity. If multiple healthcare providers are involved, one person can be designated to assess capacity. Assessing capacity is fundamental to preserving the well-being and rights of patients. From a practical point, the healthcare provider has to be able to balance between the duty to respect the patient’s autonomy and the duty to protect the best interests of the patient, especially if the patient can’t really understand the situation.

**There is no specific test for assessing capacity, it can only be done through conversation with the patient.** A thorough review of the patient’s health record is necessary in order to determine any prior expressed wishes, or to identify medications/treatments/conditions that may be impairing the patient’s ability to communicate clearly. Steps can then be taken to mitigate these factors so the patient has the opportunity to make their voice heard, such as adjusting the patient’s sedation.

In the case of Mrs. Jones, Dr. Lee should determine if Mrs. Jones is able to “understand” the information that is relevant to making a decision about the treatment and “appreciate” the reasonably foreseeable consequences of a decision or lack of decision. The following guiding questions are useful for Dr. Lee to determine if Mrs. Jones is capable to provide consent for surgical intervention:

• Does Mrs. Jones understand the condition for which the surgical intervention has been proposed?

• Is she able to explain the nature of the treatment and understand relevant information, such as the risks and benefits?

• Is Mrs. Jones aware of the possible outcomes of treatment? Is she capable to determine the consequences of alternative treatment or lack of treatment?

• Are Mr. Jones’ expectations realistic?

• Is she able to make a decision and communicate a choice?

**What do I do if I am still uncertain about a patient’s capacity?**

Assessing capacity is especially difficult in those cases when the patient’s personal values and beliefs appear to go against her own best interests. If the healthcare professional proposing the treatment is still uncertain about the patient’s capacity, she should seek second opinion or interprofessional collaboration in making the determination of capacity. For example, if a patient has communication barriers, engaging SLP to support the conversation may be helpful. Similarly, if the patient is not fluent in English, accessing translation services could support the assessment process. Or if a patient seems more communicative when family members are in the room, the assessment could be done when the family comes to visit.

**What do you do if you find a patient incapable to make a treatment decision?**

If a healthcare professional finds a patient incapable to make a certain treatment decision, the provider must document this in the patient’s health record. The documentation must be detailed enough to describe the process of the capacity assessment (for example, describe the treatment that required the decision, what questions that were asked, etc.), as well as the evidence used to determine that the patient is incapable (for example, “Mrs. Jones didn’t understand that she could die without the surgery”). The healthcare provider has a duty to inform the patient about her findings as specified in guidelines for her profession. In this case, Mrs. Jones would be informed that she has been deemed incapable to consent to surgery, and that her Substitute Decision Maker would be approached for consent.

**What happens if the patient disagrees with the finding of incapacity?**

If the patient disagrees with the finding of incapacity, she has the right to make an application to the Consent and Capacity Board (CCB) of Ontario to challenge the decision. She can do this by contacting the CCB through their website: [www.ccboard.on.ca](http://www.ccboard.on.ca) If the patient chooses to challenge the finding of incapacity, the treatment must not begin until the hearing is completed, except in emergency circumstances.

**For more information:**

[A Practical Guide to Capacity and Consent Law of Ontario for Health Practitioners Working with People with Alzheimer Disease](http://www.champlainhealthline.ca/healthlibrary_docs/PracticalGuideConsent.pdf)

[Aid to Capacity Assessment](http://jcb.utoronto.ca/tools/ace_download.shtml)