
The Legal Framework of Decisional Capacity

Decision making is an important part of everyday life. What happens when a person's capacity to make decisions is in question? Who decides whether we are capable to make decisions and who assumes the responsibility when we are not? This article discusses Ontario's legal framework and its "check-and-balance" system for defining and assessing decisional capacity.

by *Judith Wahl, B.A., LL.B.*

What is decisional capacity?¹ Is the determination of decisional capacity a legal assessment or a medical assessment? Who determines decisional capacity?

These questions are often asked by health practitioners, staff at Community Care Access Centres, and other frontline workers who provide services in health facilities and in the community. Such inquiries arise in the normal course of the delivery of health services because health practitioners are required by law to obtain an informed consent from their patients before providing treatment. The informed consent must come from a capable person, which would be the patient if mentally capable, or from that person's "substitute decision maker" if that patient is not mentally capable. The

health practitioner must therefore determine the decisional capacity of the patient to obtain consent.

These questions also arise in other contexts not necessarily related to healthcare treatment or services. Other service providers usually need a consent or agreement to act before delivery of the service. This agreement can be formalized in a contract or may be a "deemed" contract, inferred by the relationship. This contract may be verbal or written and may or may not involve the exchange of funds. The basic legal principle is that before a valid contract exists, the parties entering into the contract must all be mentally capable for that purpose. A third party, or a "substitute," can stand in for a person mentally incapable of entering into that contract.

Decisional Capacity as a Legal Assessment

Simply put, the determination of decisional capacity is significant

for one primary purpose—to determine who is the decision maker (the person who will be the recipient of the treatment or services, or someone else who acts on that person's behalf as a decision maker or substitute). The determination of decisional capacity is a "legal" assessment based on the legal definitions of capacity. It is not a clinical assessment. "Clinical assessments underlie diagnosis, treatment recommendations and identify or mobilize social supports. Legal assessments remove from that person the right to make autonomous decisions in specified areas."²

Decision Making Under Canadian Law

The specific answers to the above questions may vary according to jurisdiction, as provincial law is not consistent across Canada. The basic principles are consistent across Canada because these are

Judith Wahl works at the Advocacy Centre for the Elderly, Toronto, Ontario.

derived from Common Law, and are also in the Quebec Civil Code, however the details of how mental capacity is defined and who assesses it varies by provincial statute. This article describes the legal framework for decisional capacity in Ontario, as set out in the *Substitute Decisions Act, 1992* and the *Health Care Consent Act*, as an example of how decisional capacity is defined and determined.³

What is Decisional Capacity?

In law, decision making is divided into two streams: property decision making and personal-care decision making. Property decisions include all decisions in respect to financial management such as banking, purchase and sale of real property, and investments. Personal-care decisions relate to decisions about health-care, nutrition, hygiene, clothing, shelter and safety. All the decisions in a person's life should be able to fit into one of these two broad categories.

A person is deemed "incapable" with respect to the management of property if that person "is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision."⁴ Incapacity for personal care has a similarly structured definition, also based

on the "inability to understand" relevant information to make a personal-care decision or the "inability to appreciate" the reasonably foreseeable consequences of a decision or lack of decision.⁵

The determination of decisional capacity is a "legal" assessment based on the legal definitions of capacity. It is not a clinical assessment.

Likewise, the definition of capacity to make a treatment decision or decision in respect to admission to a care facility is structured as "ability to understand" and "ability to appreciate."⁶

What Does "ability to understand" Mean?

The ability to understand focuses on a person's factual knowledge and problem-solving ability.^{7,8} Does the person have the ability to retain information and have the factual knowledge that he or she needs to consider when mak-

Obviously, a person is not incapable just because they have a lack of knowledge. They must be given the opportunity to learn the facts and then be assessed as to whether they understand and can retain that knowledge.

ing a decision? In the treatment scenario, does the person know that he or she has a health problem and what that health problem is? Does that person have the ability to understand the risks and benefits of the treatment

even if he or she does not accept the treatment offered or does not comply with the recommended healthcare plan? A person is not incapable just because he or she refuses treatments that could be

beneficial or disagrees with the health providers.

Obviously, a person is not incapable just because he or she has a lack of knowledge. A person must be given the opportunity to learn the facts and then be assessed as to whether he or she understands and can retain that knowledge. In the property context, does the person know what assets and income he or she has and the approximate value of these assets? Again this is contextual. If a person does not do his or her own financial management,

he or she may not know the details of the assets or be able to explain how much is paid for a particular expense. However, he or she may be able to explain his or her overall income and that expenses do not exceed income.

Table 1

Who Assesses Capacity and Under What Circumstances?

PROPERTY	Who Assesses Capacity
A. Contracts To make a contract	Parties to the contract (Common Law)
B. Continuing Power of Attorney for Property (CPOAP) To make a CPOAP	Person assisting person making the document
To activate a CPOAP	No assessment required—CPOAP is activated on signature unless it states otherwise
To activate the CPOAP if contains a clause that it is not to come into effect until incapacity	Person/professional named in the CPOAP to determine incapacity. If no one or no class of persons is named in the CPOAP to determine capacity, this would be done by a capacity assessor as defined by the <i>Substitute Decisions Act</i>
C. Statutory Guardianship	
Psychiatric inpatient: For property management on admission as an inpatient for care, observation or treatment for a mental health problem	Physician (<i>Mental Health Act</i> and s.15 <i>Substitute Decisions Act</i>)
Psychiatric inpatient: For property management on discharge from the psychiatric facility	Physician (<i>Mental Health Act</i>)
Person who is any place other than a psychiatric facility (own home, hospital, long-term care facility)	Capacity assessor (s.16 <i>Substitute Decisions Act</i>)
NOTE - for the Mental Health Act process to be used the patient must be an inpatient in a psychiatric facility and must be in the facility for care, observation, or treatment of the psychiatric disorder. This process does NOT apply to elderly patients in hospitals even if the hospital is defined as a "psychiatric facility" under the Mental Health Act unless that elderly patient is in that hospital for care, observation or treatment of a psychiatric disorder.	
D. Court-ordered Guardianship of Property	
Summary application (application to court that does not require an appearance before a Judge)	Capacity assessor and a person who knows the alleged incapable person (<i>Substitute Decisions Act</i>)
Full hearing before a Judge	Capacity assessors, other health professionals, others who know the alleged incapable person (<i>Substitute Decisions Act</i>)

Can the person understand information about options and risks to make an informed choice? The person may make a decision to live at risk but if he or she has the ability to understand and appreciate that risk, this is evidence of capacity. Can the person problem-solve around personal issues, such as how he or she will accomplish necessary tasks like getting groceries or paying bills or toileting and maintaining a level

of hygiene? Can the person retain information long enough to make a decision?

What Does "ability to appreciate" Mean?

The ability to appreciate is related to whether that person has a realistic appraisal of outcomes and can justify choices. Appreciation focuses on the reasoning process. Does the person demonstrate insight and can that person justify

his or her choices? Does the person show that he or she can make a reasoned choice? The choice does not necessarily need to be a "reasonable" one or the best one from the point of view of the observer, but can the person explain his or her choices and justify them? Can the person manipulate the information relevant to making a decision? A person may have delusions but if the delusions do not relate to the decision that

Table 2

Who Assesses Capacity and Under What Circumstances?

PERSONAL CARE	Who Assesses Capacity
A. Power of Attorney for Personal Care (POAPC)	
To make a POAPC	Person assisting person making the document (Common Law)
To activate POAPC for SDM to make treatment decisions	Health professional proposing treatment (<i>Health Care Consent Act</i>)
To activate POAPC for SDM to make decisions for admission to a LTCF	Evaluator
To activate POAPC for SDM to make decisions for personal assistance services in a LTCF	Evaluator
To activate POAPC for non-healthcare personal decisions where POAPC does not require an assessment before activation	Attorney named in the POAPC
To activate POAPC for non-healthcare personal decisions where POAPC specifies a method of assessment	Person/class of persons specified in the document to do the assessment
To activate POAPC where POAPC silent as to method preferred but does require an assessment before activation	Capacity assessor
B. Healthcare Consent	
Treatment	Health practitioner offering the treatment (<i>Health Care Consent Act</i>)
Admission to LTCF	Evaluator
Personal assistance services in a LTCF	Evaluator

SDM = substitute decision maker.
LTCF = long-term care facility.

needs to be made, that person may be mentally capable.

There is a presumption of capacity for any purpose and we are entitled to rely on this presumption unless we have reasonable grounds to believe that a person is incapable for the particular decision.^{9,10}

Capacity is also issue-specific. It relates to a particular decision. A person may lack capacity to manage property yet still be capable of making treatment decisions. As well, a person may be capable for some treatments (e.g., able to understand and appreciate information to seek out assistance

with a visible wound) but not capable for other treatments (e.g., surgery, as he or she lacks the ability to understand and appreciate something that is not visible or obvious).

Who Assesses Decisional Capacity?

This is a somewhat difficult question to answer as it depends on a number of factors.¹¹ It is necessary to look at what type of capacity is being assessed or what decision needs to be made. It is also necessary to look at whether the statutes, the *Substitute Decisions Act* or the

Health Care Consent Act, or any other statute, require a particular class of persons to assess the particular capacity.¹² If a statute does not require a particular class of persons to perform the determination of capacity, then the answer as to who assesses may be in the common law (Tables 1 and 2).

For health treatment, the health practitioner who proposes the treatment is responsible for assessing the capacity of the patient.¹³ The term “health practitioner” is defined in the *Health Care Consent Act* as including all persons who are

Table 3

Definition of “Capacity Assessor” as Stated in *Substitute Decisions Act*, Regulation 460/05

Subsection (1). A Person is qualified to do assessments of capacity if he or she:

- a) satisfies one of the conditions set out in subsection (2);
- b) has successfully completed the qualifying course for assessors described in section 4;
- c) complies with section 5 (continuing education courses);
- d) complies with section 6 (minimum annual number of assessments); and
- e) is covered by professional liability insurance of not less than \$1,000,000, in respect to assessments of capacity, or belongs to an association that provides protection against professional liability, in respect to assessments of capacity, in an amount not less than \$1,000,000.

Subsection (2). The following are the conditions mentioned in clause (1) a):

1. Being a member of the College of Physicians and Surgeons of Ontario.
2. Being a member of the College of Psychologists of Ontario.
3. Being a member of the Ontario College of Social Workers and Social Service Workers and holding a certificate of registration for social work.
4. Being a member of the College of Occupational Therapists of Ontario.
5. Being a member of the College of Nurses of Ontario and holding a general certificate of registration as a registered nurse or an extended certificate of registration as a registered nurse.

Subsection (3)

The requirement that the person hold a general certificate of registration as a registered nurse or an extended certificate of registration as a registered nurse, as set out in paragraph 5 of subsection (2), does not apply to a member of the College of Nurses of Ontario who, on November 30, 2005, is qualified to do assessments of capacity under Ontario Regulation 293/96 (Capacity Assessment) made under the Act.

Subsection (4)

Clause 1 b) does not apply to a person who, on November 30, 2005, is qualified to do assessments of capacity under Ontario Regulation 293/96 (Capacity Assessment) made under the Act.

members of any of the regulated health professions, such as physicians, nurses, psychologists, dentists, audiologists or physiotherapists, as well as naturopaths registered as drugless therapists under the *Drugless Practitioners Act*.¹⁴

The full list of health practitioners is in the definitions section 1 of that legislation.

If there is a plan of treatment for a person involving more than one health practitioner, one health practitioner on behalf of the team may determine the per-

son’s capacity in respect to the treatments in the plan.¹⁵

If the health practitioner determines that the person is incapable for the treatment proposed, he or she is required to inform that person of the consequences of that finding of incapacity,¹⁶ following the guidelines of their particular Health College. In general, the guidelines specify that the finding of incapacity must be communicated, along with the fact that the health practitioner will turn to the incapable person’s substitute decision maker for the consent or refusal of consent to the proposed treatment. As well, the person must be informed of the opportunity to challenge the finding of incapacity by way of a hearing before the Consent and Capacity Board. If the person does not challenge this finding then the health practitioner may proceed to get the consent or refusal of consent from the substitute.¹⁷

Capacity Evaluators

It is also a statutory requirement that capacity to make a decision in respect to admission to a long-term care facility must be assessed by an “evaluator.”¹⁸ An evaluator is defined in the statute as a member of one of the following Health Colleges:

- 1) College of Audiologists and Speech-Language Pathologists of Ontario;
- 2) College of Nurses of Ontario;

- 3) College of Occupational Therapists of Ontario;
- 4) College of Physicians and Surgeons of Ontario;
- 5) College of Physiotherapists of Ontario; or
- 6) College of Psychologists of Ontario.¹⁹

In addition to the various health practitioners listed in the statute, social workers are added as evaluators by Regulation 104/96 as amended by O.Reg. 264/00 under the *Health Care Consent Act*. The term “social worker” is defined as a member of the Ontario College of Social Workers and Social Service Workers who holds a certificate of registration for social work.

These health professionals were chosen to undertake this determination of capacity because they are the professionals most likely to be providing direct services to seniors (the primary users of long-term care in the community and in healthcare facilities).

Capacity Assessors

The Ontario legislation also provides for persons called “capacity assessors.” Despite this misleading title, capacity assessors are not required to be used for capacity assessments unless the statute so requires. For example, capacity assessors should not be used to determine capacity for treatment because this responsibility belongs to the health professional proposing the treatment.

Although capacity assessors are not required in all instances to determine capacity to manage property, they are required to assess capacity in respect to property to trigger a statutory guardianship under s. 16 of the *Substitute Decisions Act*. A statutory guardianship is a type of guardianship of property. A request may be made to a capacity assessor to perform this type of assessment if the person to be assessed is believed to lack capac-

“Formal” assessment by a health professional or capacity assessor or evaluator is not necessary in all circumstances to determine that a person is incapable and lacks decisional capacity. The formal assessments are required only if the statute so specifies for a particular purpose or a person has drafted this requirement into a power of attorney document.

ity to manage property, and has not executed a continuing power of attorney for property over all their property.²⁰

If a person has created a continuing power of attorney for property and drafted into it a requirement that the power of attorney should not come into effect until he or she has been assessed as incapable to manage property, and the method of assessment is not specified in that power of attorney document, then the *Substitute Decisions Act*, s.9 (3) specifies that a capacity assessor must be used to assess capacity. If the person had specified a different method of assessment, such as by a nurse, physi-

cian, or even a person that is not a health professional, that other method of assessment would need to be followed. The assessment by a capacity assessor is the default, as set out in the statute.

The term “capacity assessor” is defined in the *Substitute Decisions Act*, Regulation 460/05. Its regulations are outlined in Table 3.

Capacity assessors are required to conduct assessments in the manner and form described in the “Guidelines for Conducting

Assessments of Capacity” dated May 2005, available on the website of the Ontario Ministry of the Attorney General. Failure to comply with the prescribed guidelines may result in a complaint to the college of the regulated health profession of which the assessor is a member.

“Formal” assessment by a health professional or capacity assessor or evaluator is not necessary in all circumstances to determine that a person is incapable and lacks decisional capacity. The formal assessments are required only if the statute so specifies for a particular purpose or a person has

drafted this requirement into a power of attorney document. In other circumstances, for example, to trigger a power of attorney for property that does not specify a requirement for a formal assessment, the named attorney makes the determination of incapacity which would require him or her to take over management of the grantor's property.²¹

The Consent and Capacity Board

Where a finding of incapacity is made by a health practitioner for treatment, by a capacity assessor to trigger a statutory guardianship, or by an evaluator in respect to admission, the person found incapable has the right of a review of this finding in an application to the Consent and Capacity Board.²² The Consent and Capacity Board is an independent tribunal, created by the Ontario Provincial govern-

ment under the *Health Care Consent Act*. It conducts hearings under the *Mental Health Act*, the *Health Care Consent Act*, the *Personal Health Information Protection Act* and the *Substitute Decisions Act*. Board members are psychiatrists, lawyers and members of the general public appointed by the Lieutenant Governor in Council. The Board sits with one, three, or five members, and conducts a variety of types of hearings (as specified in the various statutes noted above, including the reviews of the findings of incapacity).

Conclusion

The statutory framework for decisional capacity has been structured with checks and balances, with a process for assessments of capacity, with responsibilities placed on particular persons, many of whom are health professionals, in respect to who conducts assessments and how they

are done, as well as opportunities for review of findings of incapacity. This framework was created in an effort to ensure fairness in the assessments, as well as to ensure that the right to make one's own decisions and control one's own life is removed only when appropriate, and only to the limited degree necessary over a particular decision or area of decision making.

It was also designed as a practical way of addressing incapacity and ensuring that substitute decision makers are able to step in when necessary to make decisions for incapable persons. It is a legal process that needs to be understood by lawyers and health professionals, and anyone else working with persons whose capacity may be at issue, so that the rights of these persons are respected and their needs, if any, for substitute decision makers are appropriately met.

References and Notes:

1. For the purposes of this article, I am using the terms "decisional capacity" and "mental capacity" interchangeably.
2. Dr. Janet Munson and Dr. Carole Cohen in materials used for training capacity assessors as defined under the Substitute Decisions Act, 1992, S.O., 1992, c.30.
3. Substitute Decisions Act, 1992, c.30 and Health Care Consent Act, 1996, c.2, Schedule A.
4. Substitute Decisions Act, 1992, S.O. 1992, c.30, s.6.
5. Substitute Decisions Act, 1992, S.O. 1992, c.30, s.45.
6. Health Care Consent Act, 1996, S.O. 1996, c.2, Schuedle A, s.4(1).
7. References should be made to the cases of *Starson vs. Swaze*, [2003] 1S.C.R. 722 and *Re: Koch*, 33 O.R. (35)485, [1997] O.J.No. 1487 for the discussion of these definitions and the assessment process.
8. The description of the terms "ability to understand" and "ability to appreciate" in this article is adapted from teaching materials and education sessions delivered by Dr. Janet Munson and Dr. Carole Cohen.
9. Substitute Decisions Act, 1992, S.O. 1992, c.30 s.2 and Health Care Consent Act, 1996, S.O. 1996 c.2, Schedule A, s.4 (2)
10. Health Care Consent Act, 1996, S.O. 1996, c.2, Schedule A, s.4(3).11. See Table 1 on Who Assesses Capacity Under What Circumstances.
12. An example of another statute that specifies who assesses capacity in respect to property is the *Mental Health Act*, R.S.O, 1990, c, M.7. S.54 of that Act requires that on admission of a patient to a psychiatric facility, a physician determine whether that patient is capable of managing property.
13. Health Care Consent Act, 1996, S.O. 1996, c.2 Schedule A, s.10(1)
14. Health Care Consent Act, 1996, S.O. 1996, c.2 Schedule A, s.1.
15. Health Care Consent Act, 1996, S.O. 1996, c.2 Schedule A, s.13.
16. Health Care Consent Act, 1996, S.O. 1996, c.2 Schedule A, s.17.
17. See also Health Care Consent Act, 1996, S.O. 1996, c.2, Schedule A, s.18.
18. Health Care Consent Act, 1996, S.O. 1996, c.2 Schedule A, s.40(1).
19. Health Care Consent Act, 1996, S.O. 1996, c.2 Schedule A, s.2(1).
20. Substitute Decisions Act, 1992, S.O. 1992, c.30, s.16
21. See Table 1.
22. Substitute Decisions Act, 1992, S.O. 1992, c.30, s.20.2, and Health Care Consent Act, 1996, S.O. 1996, c.2, Schedule A, s.32 and s.50.