



## PRACTICE ADVICE

# CAPACITY TO MAKE ADMISSION DECISIONS TO LONG-TERM CARE

DATE: 2011

---

## CAPACITY TO MAKE ADMISSION DECISIONS: WHAT IS THE ROLE OF SPEECH-LANGUAGE PATHOLOGISTS AND AUDIOLOGISTS?

*Alexandra Carling Rowland Ph.D. Director of Professional Practice and Quality Assurance*

### INTRODUCTION

According to the Health Care Consent Act (HCCA) every competent individual in Ontario has the right to decide whether or not to be admitted to a Long-Term Care facility. If the individual's ability to make such a decision is in doubt, then his or her capacity is evaluated. But what is specifically meant by capacity? Who can and should evaluate? Is the system fair for those we serve, people with acquired speech language and hearing issues? And what are the implications for our two professions? This article will attempt to answer these questions, illustrating points with relevant legislation and findings from appeals to the Consent and Capacity Board. It will also provide information on training in capacity evaluation to ensure that we are better informed to advocate for, and participate in the fair and just evaluation of capacity to make a decision on where and how to live.

### DEFINITION OF CAPACITY

The HCCA defines what is meant by 'capacity':

If the person is able to understand the information that is relevant to making a decision about the treatment, admission to a care facility or personal assistance service, as the case may be, and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision. (Sch. A., para 4 (1))

The key word is 'able' to understand and appreciate. In *Starson v. Swayze*, [2004] the presiding member pointed out:

"...the Act requires a patient to have the ability to appreciate the consequences of a decision. It does not require actual appreciation of those consequences. The distinction is subtle but important . . . A lack of appreciation may reflect the attending physician's failure to adequately inform the patient of the decision's consequences."<sup>1</sup>

In order to provide clarity, the Capacity Assessment Office, Ministry of the Attorney General of Ontario, has provided definitions of the key constructs:

To 'understand' refers to a person's cognitive abilities to factually grasp and retain information. To the extent that a person must demonstrate understanding through communication, the ability to express oneself (verbally or through symbols or gestures) is also implied.

The 'appreciate' standard attempts to capture the evaluative nature of capable decision making, and reflects the attachment of personal meaning to the facts of a given situation.<sup>2</sup>

These constructs are particularly pertinent to speech-language pathology (S-LP) and audiology. If an individual is living with a hearing or acquired communication deficit, his or her ability to accurately grasp and retain information and 'express oneself' demonstrating understanding is compromised. Erroneous determinations of capacity have been reported in findings of Consent and Capacity Board appeals and by S-LPs. To help overcome communication obstacles to revealing capacity, the evaluator needs to possess an in-depth knowledge of hearing, speech and language deficits, and the skills to enhance understanding and expressive communication.

Health practitioners eligible to evaluate capacity are members of specific regulated colleges, including CASLPO. In contrast to capacity 'assessors' for whom education to assess a person's capacity regarding property and personal care is mandatory, 'evaluators' are not required to receive special training.<sup>3</sup> They are considered qualified solely based on their membership in a designated college. A lack of mandatory training in capacity evaluation has resulted, with a few exceptions, in no training at all. Coupled with general misconceptions by all healthcare practitioners regarding consent and capacity, a lack of knowledge and clarity has resulted in S-LPs being either unaware of their role or a lacking in confidence and knowledge to participate in a process that has serious consequences.<sup>4</sup>

## CAPACITY EVALUATION PROCESS

A brief examination of the process will help to illustrate the potential complexities of evaluating capacity with people diagnosed with speech, language and hearing deficits. Before a capacity evaluation is administered, the patient must understand a significant amount of complex information:

- His or her capacity to make a decision regarding admission to long-term care is going to be evaluated
- Why the evaluation is taking place
- What is capacity
- His or her presumption of capacity to make this decision
- The potential consequences of a finding of incapacity, namely the patient's substitute decision maker will make the decision on his or her behalf
- The appeal process
- The right to ask questions and receive answers
- The right to give or withhold consent to evaluate capacity

Wahl (2006) sites Re: Koch case, where Mr. Justice Quinn stated that the evaluators should: ". . . inform the person being evaluated of the purpose and consequences of the evaluation, and should not evaluate if the person refuses."<sup>3</sup> p.18

## CURRENT CAPACITY EVALUATION

The Ministry of Health and Long Term Care developed a questionnaire to assist the process entitled "The Capacity to Make Admissions Decisions" (CMAD). The questionnaire comprises 5 questions:

- 1) What problems are you having right now?
- 2) How do you think admission to a nursing home or home for the aged could help you with your condition /problem?
- 3) Can you think of other ways of looking after your condition/problem?
- 4) What could happen to you if you choose not to live in a nursing home or home for the aged?
- 5) What could happen to you if you choose to live in a nursing home or home for the aged?

Questions 1) and 3) examine the patient or client's ability to understand relevant information, and questions 2), 4), and 5) the ability to appreciate the consequences of a decision. This questionnaire has come under a great deal of criticism for its simplified use.<sup>3</sup> It was not designed to be a pass or fail test, rather, a framework to guide the evaluator and provide a reference point for subsequent questions to help establish capacity.<sup>4</sup>

The CMAD questionnaire is largely inaccessible to people with communication barriers.<sup>5</sup> It uses an open-ended question format, does not provide visual material to help the individual to understand the capacity questions or communicate a response non-verbally. As mentioned earlier, it is the evaluator's responsibility to ensure that the patient knows about his or her medical condition, physical limitations and understands the nature of long-term care and how this type of accommodation would help him or her.<sup>3</sup> The majority of evaluators are case managers and social workers who may not have the specialized communication skills required to ensure a fair process. A recent research trial examining capacity evaluation of competent individuals with aphasia found that social work evaluators were unable to consistently reveal capacity. One competent person was found lacking in capacity, and 19% of the evaluators were unable to determine capacity either way.<sup>5</sup>

## PRESUMPTION OF AN INDIVIDUAL'S CAPACITY

It is important to explore the legal tenet of 'presumption of capacity' further. Although an individual may have been found lacking in capacity in one area, for example managing an investment portfolio, he or she may have the ability to understand and decide where to live. Consequently, the individual should be presumed competent for every new decision. The Capacity Assessment Office of the Ontario Ministry of the Attorney General states that there should be reasonable grounds to prompt an evaluation of capacity:

"Routine screening of whole classes of individuals cannot and should not be endorsed, as this prejudices an individual's capacity based on class

membership. For example, it is incorrect to assume that all intellectually disabled persons must be incapable by virtue of their disability."<sup>2</sup> p.6

This applies to people who have aphasia and cognitive communication disorders following a stroke or head injury. Just because he or she cannot easily understand verbal information or give a full verbal response does not automatically mean that they do not have decision-making capacity. With the right help and training capacity can be revealed.<sup>6,7</sup>

## DECISIONAL CAPACITY AND RISK

Capacity evaluation is a complex process that frequently puts health practitioners at odds with the patient. Rehabilitation professionals and case managers consider a patient's safety a high priority, especially regarding mobility and activities of daily living. When a competent patient makes a decision that puts him or her at risk, it is difficult for the healthcare team to accept that decision. However, as the Ministry of the Attorney General (2005) states:

"Unless there is clear and compelling evidence of impaired "ability to understand and appreciate", the assessor cannot use a finding of incapacity as a means to manage risk."<sup>2</sup> p.6

## SUMMARY

There are many common misconceptions regarding capacity evaluation in healthcare. This places a vulnerable population in an even more precarious position regarding the preservation of legal rights to decide where and how to live.

"A health practitioner who makes a finding that rebuts this presumption (of capacity) bears the onus of proving the lack of capacity. In my view, that onus extends also to proving that the assessment was procedurally fair." H.P. v. Lakeridge Health<sup>8</sup>

There is a strong argument to be made for S-LPs and audiologists to evaluate the capacity of individuals living with communication and hearing deficits in order to ensure evaluations are "procedurally fair". However, this requires in-depth training in the legislation and the evaluation process and the tools to overcome the barriers.

With training and our skills and knowledge S-LPs and audiologists will go far to protect people's legal and ethical rights.

## REFERENCES

1. Starson v. Swayze, [2004] 1 S.C.R. 722 Canadian Legal Information Institute [www.canlii.org/en/](http://www.canlii.org/en/)
2. Ministry of the Attorney General of Ontario (2005) Guidelines For Conducting Assessments Of Capacity. Capacity Assessment Office Ontario Ministry of the Attorney General.
3. Wahl, J (2006) Capacity and Capacity Assessment in Ontario. Advocacy Centre for the Elderly Publications. Toronto ON
4. Carling-Rowland. A and Wahl J. (2010) The Evaluation of Capacity to Make Admission Decisions: Is it a fair process for Individuals with Communication Barriers? Medical Law International Journal 10 (3)
5. Carling-Rowland A., Black S.E., McDonald L and Kagan A. (2011) Adaptation of the

Capacity Evaluation Process to make Admission Decisions: Increasing Access for People with Aphasia and other Communication Barriers Doctoral Thesis, Institute of Medical Science, University of Toronto

6. Kagan, A., Black, S., Duchan, J.F., Simmons Mackie, N. (2001). Training volunteers as conversation partners using 'supported conversation for adults with aphasia: A controlled trial. *Speech, Language and Hearing Research*, 44 624-638.
7. Rose T.A, Worrell L.E and McKenna K.T. (2003) The effectiveness of aphasia-friendly principles for printed health education materials for people with aphasia following stroke. *Aphasiology* 17 (10) 947-963.
8. H.P. v. Lakeridge Health [2007] TO-07-2862 Canadian Legal Information Institute [www.canlii.org/en/](http://www.canlii.org/en/)