

Clinical Capacity Evaluations & Legal Capacity Determinations

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MEDICINE of THE HIGHEST ORDER



Reasons for Capacity Evaluations

Evaluation of persons ability to manage finances (Need for Power of Attorney?)

Capacity to make medical decisions (Need for Health Care Proxy?)

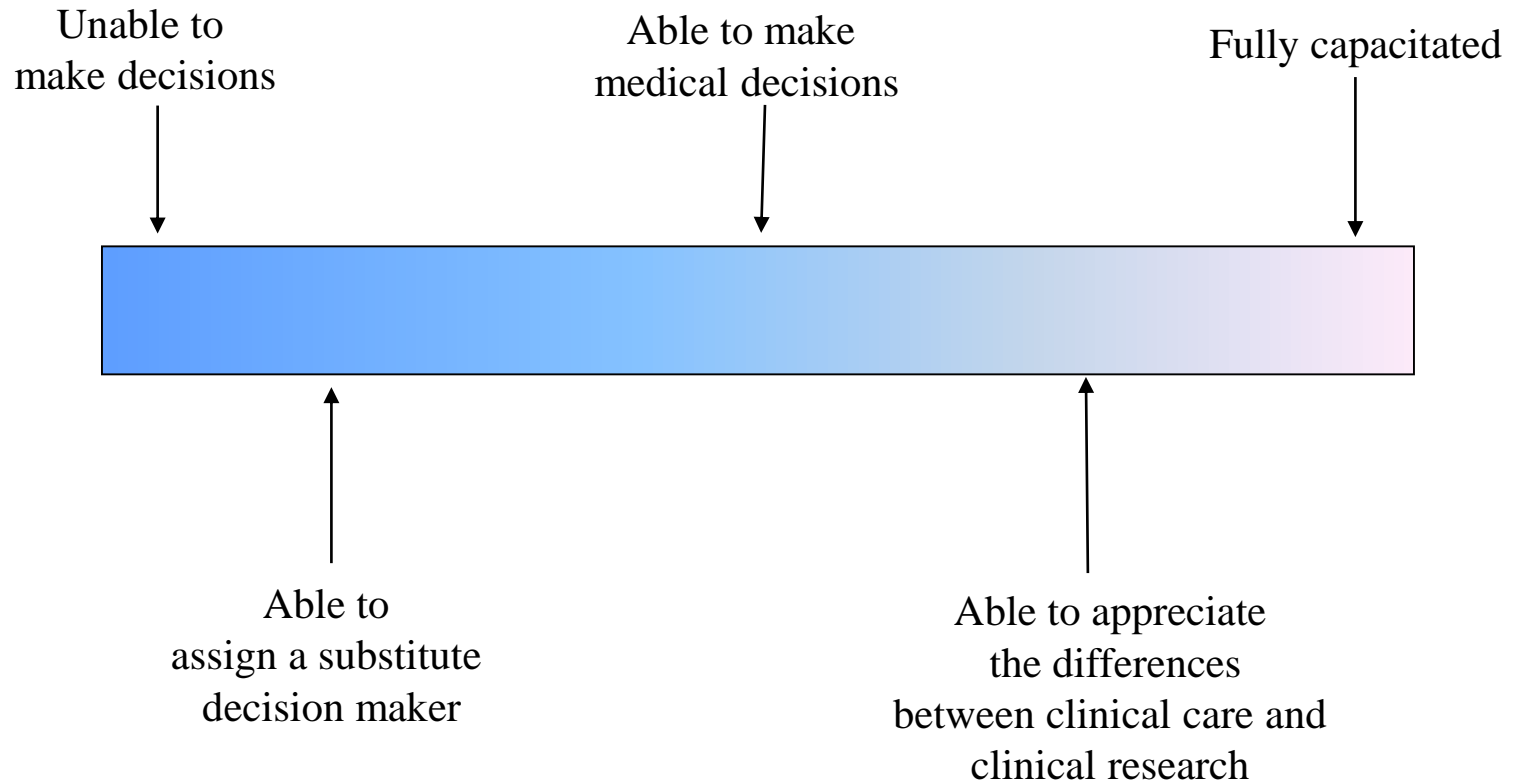
Safe and Appropriate Discharge Planning

Assess older adults vulnerability to abuse

Determine the need for a guardian

Civil or Criminal Proceedings

Continuum of Decision-Making Capacity



D.L.Rosenstein, FG Miller Textbook of Psychosomatic Medicine Ed by JLevenson
2005 American Psychiatric Press, pp55-65

Decisional Capacity vs Competency

Competency

- ◆ A misused term in clinical settings, is really a legal term
- ◆ Court may determine ‘*incompetence*’ based upon clinician testimony regarding impaired decision-making capacity.
- ◆ A clinician cannot determine ‘incompetence’

Decision-making capacity

- ◆ A clinical determination.
- ◆ Adults (including those with serious mental illness) are considered competent unless declared incompetent by court of law.
- ◆ Lacking capacity vs Incapacitated

Criteria For Determining Capacity

Criteria	Issues involved
1) Communicating choice	Can be affected by: impairment of consciousness, thought disorder, disruption of short term memory, and severe ambivalence
2) Understanding relevant information	Can be affected by deficits in attention, intelligence, memory - . memories for words, phrases, ideas, and sequences of information, reception, storage and retrieval. Must comprehend fundamental meaning
3) Appreciating the situation & its consequences	One can understand what one is told, without understanding specific implications that it carries for one's future. One must appreciate the illness♦, consequences of treatment or it's refusal, and likelihood of consequences
4) Manipulating the information rationally	One must use logical processes to compare the benefits and risks of various treatment options.

Impact of Depression on Capacity

Depressive Cognition	Clinical example
Overgeneralization	Medication is rejected on the basis of one side-effect
Mental Filter	View of treatment or prognosis is darkened by one negative detail
Jumping to conclusions	A merely possible side effect is viewed as a certainty
Emotional reasoning	Negative emotions such as hopelessness are assumed to reflect the state of reality
“Should” statements	“I should suffer.” Treatment is seen as interfering with deserved punishment

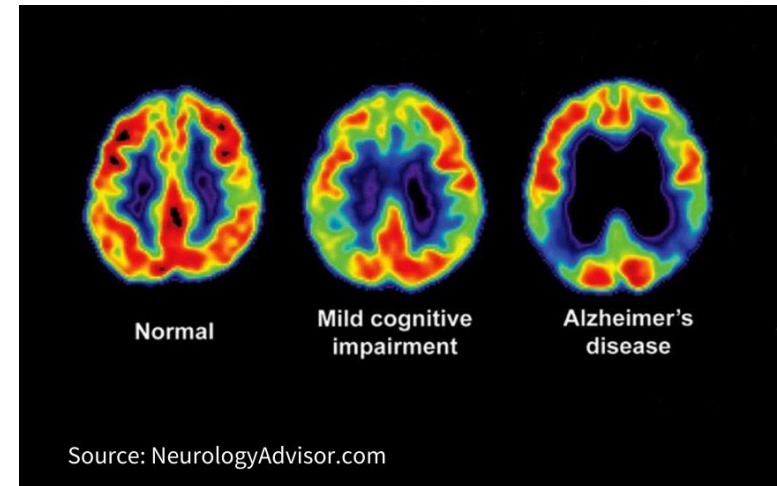
Mild Cognitive Impairment vs Dementia

Mild Cognitive Impairment:

- Minimal changes in cognitive function
- Daily function not affected
- Not all progress to dementia

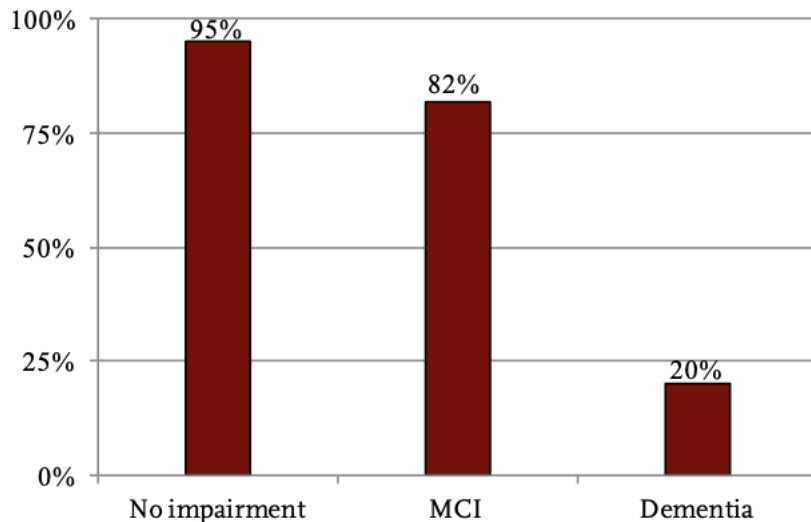
Dementia:

- Decline in more than one domain
- Does affect daily function
- Progressive decline



MCI and Financial Capacity

FIGURE 2. PERCENTAGE OF ADULTS CAPABLE OF MANAGING THEIR FINANCES, BY IMPAIRMENT STATUS



Note: The average age of participants across all groups was 70; financial novices were excluded.

Source: Recreated from Marson et al. (2009).

Figure 3. Amyloid PET Images of Two Cases

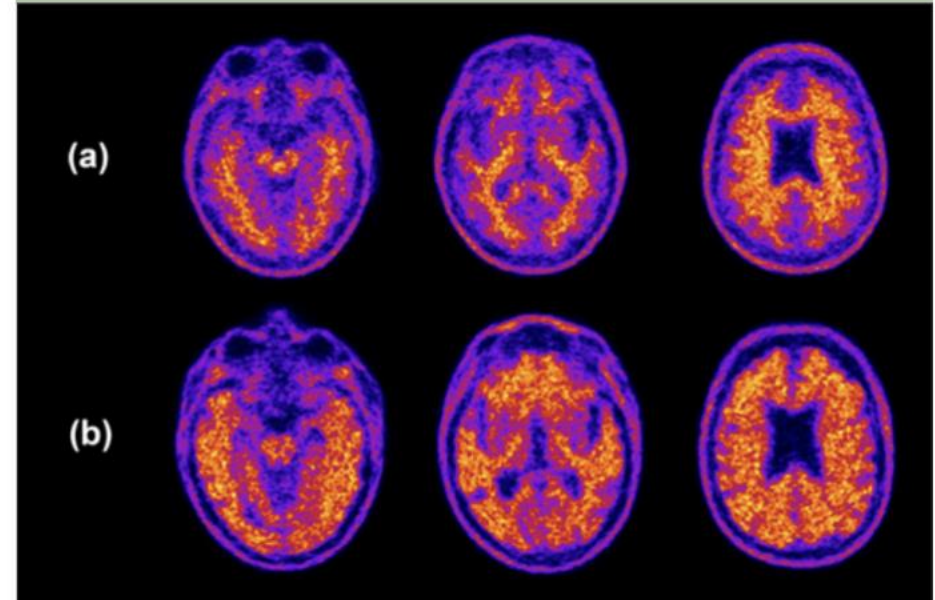


Figure 3a. 18F-Florbetapir PET image of a 74 year old normal control subject. PET scan is negative for β -amyloid. The subject had a normal financial capacity (FCI-SF Total Score=72); Figure 3b. 18F-florbetapir image of an 86 year old subject with mild Alzheimer's (MMSE=24). The PET scan is positive for β -amyloid. The subject had a significantly reduced financial capacity (FCI-SF Total Score=36).

Family Health Care Decisions Act

- Does not apply to decisions for incapable patients:
 - who have a health care agent
 - who have a court-appointed guardian under SCPA 1750b
 - for whom decisions about life-sustaining treatment may be made by a family member or close friend under SCPA 1750-b
 - for whom treatment decisions may be made pursuant to OMH or OMRDD surrogate decision-making regulations.

Decisions for Adult Patients by Surrogates

- Sets forth, in order of priority, the persons who may act as a surrogate decision-maker for the incapable patient, i.e.:
 - an MHL Article 81 court-appointed guardian (if there is one);
 - the spouse or domestic partner (as defined in the FHCDA);
 - an adult child
 - a parent
 - a brother or sister
 - a close friend.

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What if the HCP Lacks Capacity?

From McKinney's Public Health Law § 2992:
Special Proceeding Authorized

1. Determine the validity of the HCP
2. Have the agent removed:
 - Not reasonably available, willing and competent
 - Acting in bad faith
 - Subject of an order of protection, or caused the principals lack of capacity
3. Override the agents decisions about health care treatment:
 - Decision made in bad faith
 - Not in accordance with standards in section 2982

Unable to
make decisions

Able to make
medical decisions

Fully capacitated

Dementia ≠ Incompetent

Able to
assign a substitute
decision maker

Able to appreciate
the differences
between clinical care and
clinical research

Balancing Act

Balance between desires to protect persons from potentially harmful decisions and deeply held beliefs about the inviolability of individual choice.



Assessment of Decision-Making Ability in Cognitively Impaired Older Adults: A Medical and Legal Perspective *Michele A. Haber, MD, MSSW, MPH and Charles P. Sabatino, JD*

12

Factors that can affect Capacity

Stress, grief, depression

Reversible medical conditions or medications,

Hearing or vision loss

Educational, socio-economic, language or cultural background

Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers

Different Levels

Capacity depends on the task at hand.

The competence level for creating a will is much lower than competence needed to enter into a contract.

Other types of capacity:

Driving – Marriage- Medical Decisions

GUARDIANSHIP

The determination of incapacity shall be based on clear and convincing evidence and shall consist of a determination that a person is likely to suffer harm because:

1. the person is unable to provide for personal needs and/or property management; and
2. the person cannot adequately understand and appreciate the nature and consequences of such inability.

McKinney's Mental Hygiene Law § 81.02

GUARDIANSHIP

“The legislature finds that it is desirable for and beneficial to person with incapacities to make available to them the least restrictive form of intervention which assists them in meeting their needs but, at the same time, permits them to exercise the independent and self determination of which they are capable.”

The court should regard guardianship as a last resort and should assess the advantages and disadvantages of alternatives to guardianship, deciding on guardianship only when it clearly benefits the person who is the subject of the proceeding and when the alternatives are not sufficient and reliable to meet the needs of the person.

McKinney's Mental Hygiene Law § 81.01 & 81.02

16

ACTIVITIES OF DAILY LIVING (ADL)

"activities of daily living" means activities such as, but not limited to, mobility, eating, toileting, dressing, grooming, housekeeping, cooking, shopping, money management, banking, driving or using public transportation, and other activities related to personal needs and to property management.

McKinney's Mental Hygiene Law § 81.03

Short-Term Involuntary Protective Services Orders

1. Definitions. When used in this section unless otherwise expressly stated or unless the context or subject matter requires a different interpretation:
 - (a) “endangered adult” means a person, age eighteen or over who is:
 - (i) in a situation or condition which poses an imminent risk of death or imminent risk of serious physical harm to him or her, and
 - (ii) lacking capacity to comprehend the nature and consequences of remaining in that situation or condition, provided that:
 - a. refusal by the adult to accept protective services shall not in itself be sufficient evidence of such lack of capacity; and
 - b. mental illness shall not in itself be sufficient evidence of such lack of capacity.
 - (b) “**short-term involuntary** protective services” means those services set forth in section four hundred seventy-three of this article which are provided involuntarily pursuant to the procedures established by this title.

McKinneys Social Services Law § 473-a.

CASE STUDIES & QUESTIONS

Case Study - Phil

65 year old male wheel-chair bound post-accident with traumatic brain injury. No longer receiving TBI case support or aid service. Now presents with severe wounds to his feet. Refuses to go to hospital for care. States that he went to jail before and nursing facilities are no different and he wont go back. Physician made a home visit and changed bandages, wounds are life threatening but Phil has capacity pursuant to doctor and mental health worker. Phil would like aide service. Should involuntary intervention be pursued?

Case Study - Beth

60 year old female post stroke ready for discharge from a nursing facility but Beth will need assistance in the home with some personal care and home care due to resulting limited paralysis. Beth has a long mental health history with minimal supports and history of refusing/firing supports that are offered. Potential Hoarding issues in her apartment that Beth has continued to pay the rent. Does she need a guardian?

Case Study - Jeff

75 year old male with minimal health issues but possible developmental/intellectual disability. Recently retired after 30 plus years in the same position. Bank discovered large withdrawals from his account after a co-worker became his attorney in fact under a POA. He has no phone or television and leads a very simple life. Initially would not accept idea that POA had acted inappropriately but ultimately it was discovered that the attorney in fact co-worker had taken nearly \$100,000. Jeff has 1 estranged child and wants his money returned but doesn't want any other assistance and wants to be left alone. Does Jeff have capacity concerns and is this a case an EMDT could render any assistance?



MEDICINE *of* THE HIGHEST ORDER