

Understanding capacity for treatment decisions

Information for patients, residents and families

Read this handout to learn:

- What capacity to consent to treatment is
- When a person's capacity should be assessed
- How capacity is assessed
- What happens if a patient is incapable of giving consent
- What a patient can do if they disagree with a finding of incapacity

In this handout, you will find information about a person's **capacity to consent to treatment** and how this is assessed.

This handout does not discuss capacity for non-treatment decisions, such as:

- Managing property (finances)
- Sharing personal health information (medical information)
- Moving to a long-term care facility (nursing home)

For information on capacity to make those kinds of decisions, you can contact the Social Work or Ethics departments within the hospital.

What is capacity to consent to treatment?

Except in some medical emergencies, a health care provider is not allowed to treat a person without consent. To consent to or refuse a treatment, a person must be capable to make that particular decision.

In Ontario, being capable to make a particular treatment decision means:

- Being **able to understand the information** relevant to making that treatment decision, and
- Being able to **appreciate the reasonably foreseeable consequences** of consenting to or refusing treatment.

Ontario's Health Care Consent Act
www.ontario.ca/laws/statute/96h02

When should a person's capacity be assessed?

Under the law, everyone is presumed to be capable of making decisions about treatment. However, a health care provider may need to assess a patient's capacity if the patient is:

- Confused
- Having trouble remembering information
- Behaving in ways that seem out of character

It is sometimes obvious that a person is incapable of making treatment decisions (for example, an infant or an unconscious person).

In other situations, it can be very difficult to determine if the person has the capacity to make decisions for themselves (for example, when a patient diagnosed with a brain disorder is struggling to understand more complicated aspects of a procedure).

Does being elderly or having a mental health condition mean someone is incapable?

We cannot assume that someone is incapable just because of one of the following reasons:

- They are elderly
- They have a particular illness (such as a mental health condition)

Similarly, we cannot assume that someone is incapable because:

- They speak a different language than their health care providers, or there are communication barriers
- They have unique beliefs or disagree with the treatment being recommended

How is capacity assessed?

The health care provider proposing the treatment or plan of care is responsible for determining whether the patient is capable of making the decision.

The health care provider can assess capacity in different ways. They usually start by having a conversation with the patient. The health care provider may also:

- Consult with other clinicians
- Consult with caregivers
- Look at cognitive test scores
- Review the patient's chart

Any or all these approaches can help the health care provider in determining whether the person has the ability to understand the information relating to a treatment decision and appreciate the reasonably foreseeable consequences.

If a person's capacity is being assessed, health care organizations should provide supports so that the person is able to do their best in the assessment.

What happens if a patient is incapable of giving consent?

If a health care provider finds that a person is incapable to consent to a treatment, they will:

1. Explain this to the person, unless doing so would not be meaningful (for example, the patient is an infant or is unconscious).
2. Identify the person's **substitute decision-maker (SDM)**. The SDM is the person who will make the treatment decision for the incapable patient.
3. Ask the SDM to provide or refuse consent to the treatment.

For more information on substitute decision-making, please see the handout **Understanding substitute decision-making for treatment decisions**.

Special rules apply to a person 14 years of age or older who is admitted as a psychiatric patient. If they are found to be incapable of making a decision about psychiatric treatment, they must be given written notice of the finding of incapacity as well as rights advice from the Psychiatric Patient Advocate Office (PPAO): www.ontario.ca/page/psychiatric-patient-advocate-office.

How long does a finding of incapacity last?

A finding of incapacity applies only to the current treatment being offered at that moment in time.

- A patient may be incapable to make **one** treatment decision but capable to make **all other** treatment decisions.
- A patient may be incapable to make a treatment decision **now** but may be capable **at a later time**.

For these reasons, capacity may be reassessed over time.

What if the patient disagrees with a finding of incapacity?

If a patient disagrees with a finding that they are incapable of giving consent to treatment, they can apply to the Consent and Capacity Board (CCB) for a review.

The CCB is an independent body created by the government to resolve issues of capacity and consent. For more information, you can visit www.ccboard.on.ca/scripts/english/index.asp

To apply to the CCB, the patient needs to complete a Form A.

If you have any questions about the information in this handout, please speak to a member of your health care team. You can also consult the websites listed in this handout.

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