

Some Clinician Observations on Legal Capacity Determinations

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Background

- Ethical Principles
- Clinical Capacity Concepts
- Medical Decision-Making Capacity
- Clinical Capacity Assessment Exercise



Ethical Principles in Clinical Capacity Assessment

Ethical Principles in Clinical Practice and Research

- **Beneficence** (duty to promote the good of the patient)
- **Nonmalificence** (duty to “do no harm” to patient)
- **Autonomy** (right of patient to self-determination)
- **Confidentiality** (respect for patient privacy and control over personal information)
- **Veracity** (truth telling)
- **Justice** (fairness of distribution of goods and services)

Morris J. Conflicts of interest. *Alzheimer's Disease and Associated Disorders* (1994).

Competing Ethical Principles Underlying Capacity Assessments

AUTONOMY versus **PROTECTION**

- To what extent should we support a person's autonomy (find her capable to act independently)?
- To what extent should we protect an impaired person's (and ourselves) from risks/dangers caused by her impaired or failing capacities (find her incapable and restrict autonomy)?
- This tension informs most competency assessments

A Few Capacity/Competency Concepts

What is a Legal Competency?

“A threshold requirement, imposed by society, for an individual to retain decision making power in a particular activity or set of activities.”

Multiple Competencies:

- not a unitary concept or construct
- “competency to do what?”
- “in what context”?

Civil Capacities/Competencies

- **Capacity to live independently (guardianship)**
- **Capacity to manage financial affairs (conservatorship)**
- Contractual capacity: make a contract
- Donative capacity: make a gift
- Testamentary capacity: make a will
- Treatment consent capacity: make medical decisions
- Research consent capacity: participate in research
- Driving capacity: operate a motor vehicle
- Voting capacity: capacity to cast a ballot in election

Capacity vs. Competency?

- Related but not interchangeable terms

Capacity vs. Competency

- Capacity--Incapacity:
 - ◆ denotes a clinical status determined by clinician
 - ◆ clinician makes clinical competency judgment based on patient's functional, cognitive, and behavioral abilities
 - ◆ clinical judgment is "evidence" of legal competency
 - ◆ clinical judgment does not alter legal competency status
 - ◆ clinical judgment does not permit transfer of authority for decision making to another (exception: DPAs)

Capacity vs. Competency

■ Legal Competency--Incompetency:

- ◆ denotes a legal status determined by a judge
- ◆ judgment based on clinical/lay evidence, case/statutory law, principles of justice, and other non-clinical factors
- ◆ judgment of “incompetency” alters legal status by removing rights of self determination for specific matter
- ◆ judgment of “incompetency” requires transfer of decisional authority to a court appointed proxy: guardian/conservator

Diagnosis Does Not Constitute Incompetency

- *What does a diagnosis of vascular dementia tell you about a person's capacity to drive?*
- Diagnosis relevant to issue of driving capacity
- But not determinative of driving capacity issue
- **Key Inquiry: Have to examine functional abilities** constituent to driving

Cognitive Impairment Does Not Constitute Incompetency

- *What does a MMSE score of 25 tell you about a person's capacity to manage her finances?*
- Cognitive impairment is relevant to issue of financial capacity
- But not by itself determinative of financial capacity
- **Key Inquiry: Have to examine functional abilities constituent to financial capacity**

Clinical Evaluation of Competency

(Medical Decision-Making Capacity)

Capacity to Consent to Treatment

- Capacity to consent to, or refuse, treatment
- Specific competency under the civil law
- Crucial element of informed consent doctrine:
 - ◆ Informed
 - ◆ Voluntary
 - ◆ **Competent: does patient have the mental and emotional capacity to consent?**
- Implicates issues of professional liability

Functional Abilities Related to Treatment Consent Capacity

- “evidencing” a treatment choice
- “appreciating” personal consequences of choice
- “reasoning” about treatment; providing “rational reasons” for treatment choice
- “understanding” treatment situation and choices
- making “reasonable” treatment choice [discredited]

Standards for Capacity to Consent

- S1:** capacity simply to “evidence” a treatment choice
- S3:** capacity to “appreciate consequences” of choice
- S4:** capacity to reason about treatment; provide “rational reasons” for choice
- S5:** capacity to “understand” treatment situation, treatment choices, respective risks/benefits
- [S2]:** capacity to make “reasonable” treatment choice (when alternative is ‘unreasonable’)

Clinical Assessment Method

“Learn by doing”: Capacity assessment videotape: Mr. X

Framework:

- Review MMSE performance
- Review medical vignette
- Review performance on four consent abilities
- Evaluate Mr. X’s medical decision-making capacity

Judgment Outcome: capable, marginally capable, or incapable

Four Core Consent Abilities

- S5:** capacity to “understand” treatment situation, treatment choices, respective risks/benefits
- S1:** capacity simply to “evidence” a treatment choice
- S4:** capacity to reason about treatment; provide “rational reasons” for treatment choice
- S3:** capacity to “appreciate consequences” of choice

Who Is Mr. X?

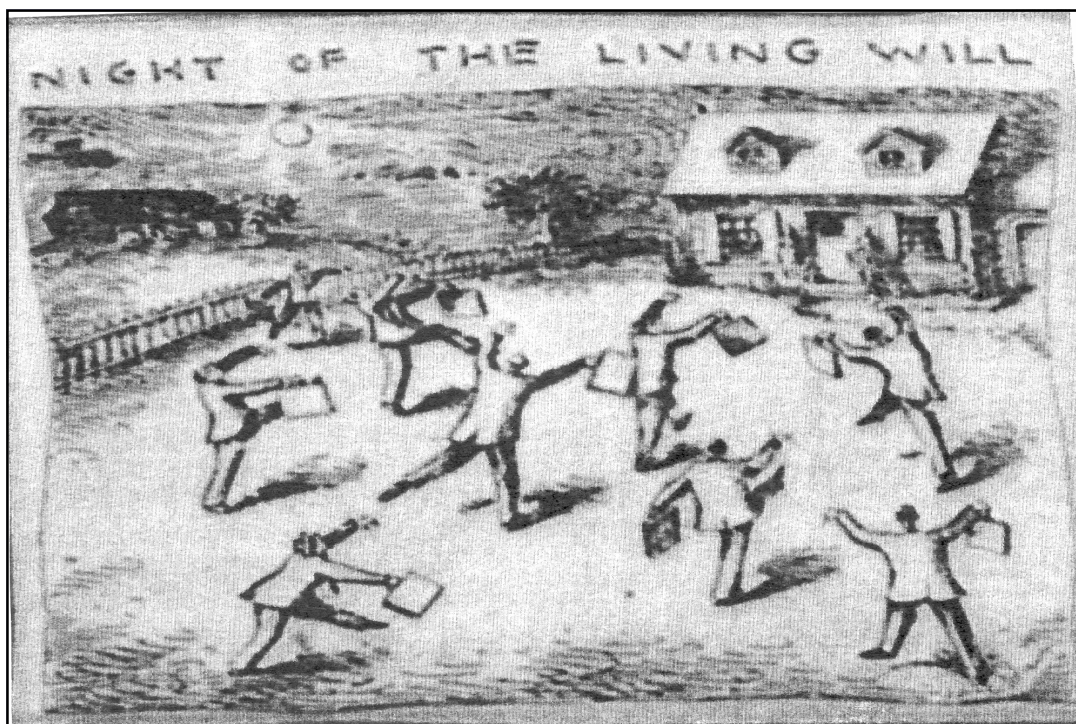
xx years old
Caucasian
x years of education
Married
MMSE of 19/30
Diagnosis of mild-moderate AD

Capacity Assessment Video #1:

Mr. X

Overall Judgment of Consent Capacity

- Determine treatment consent capacity
- Weigh all info from video
- Consider your judgments on the four consent abilities
- Make a capacity judgment:
 - Capable, Marginally Capable, or Incapable
- Briefly explain basis for your judgment



Collaborators

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Alzheimer's Disease Research Center (Harrell, PI)

A Longitudinal Study of Loss of Financial Capacity in
Alzheimer's Disease (ADRC Project 2) (Marson, PI)

Physician Judgments of Competency in AD
(Pilot Grant) (Marson, PI) (1994)

Functional Change in MCI (Marson, PI)

Alzheimer's Disease Cooperative Study (Thal, PI)

National Institute of Mental Health

Studies of Financial Capacity in Alzheimer Disease (1 R01-55247-A2) (Marson, PI)

Alzheimer's Association

The Competency of Alzheimer Patients to Make Informed Treatment Decisions (PRG 91-122)

Longitudinal Studies of Loss of Competency in Alzheimer's Disease (IIRG 93-051)