

Capacity and consent

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Claudia Woolf, Clinical Neuropsychologist, talks to James about patient capacity and consent. Together they'll go over the legal and professional responsibility of all clinicians regarding patient capacity and consent. Clinicians are required to [obtain consent](#) before treating any patient. In this podcast, we also discuss the questions raised regarding capacity and guardianship. These are often not well understood by clinicians.

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About Claudia Woolf

Claudia Woolf is a nationally endorsed Clinical Neuropsychologist. Claudia is a member of the Australian Psychological Society (APS) and College of Clinical Neuropsychologists. She is also a Ph.D. candidate enrolled at the University of Sydney under the supervision of Prof Naismith.

Claudia obtained her Bachelor of Psychology (Hons I) from the University of New South Wales in 2010. She followed that with her Master's Degree in Psychology (Clinical Neuropsychology) from the University of Melbourne in 2013. Since then, she has worked at the Dementia Collaborative Research Centre and the [Centre for Healthy Brain Aging](#) on sentinel projects in Psychogeriatrics. These projects include the [Sydney Memory and Aging Study](#) (MAS), the [Older Australian Twins Study](#), and the [Sydney Centenarian Study](#) as well as coordination of the International Centenarian Consortium. Claudia's academic track record includes the publication of a number of peer-reviewed manuscripts and international and national consumer and scientific presentations.

Claudia holds an appointment in the School of Psychiatry, Faculty of Medicine at the University of New South Wales as a Research Associate. She also has an appointment within the APS College of Clinical Neuropsychologists as the Early Career Representative. She currently works full-time as a Clinical Neuropsychologist within the Psychogeriatric Mental Health and Dementia Service at St Vincent's Hospital Sydney. Here, she recently headed-up the implementation of a group cognitive remediation program for older adults at risk of developing dementia.

Claudia is currently working toward the completion of her Ph.D. which investigates cognitive remediation in a clinical population of older adults with current [depressive symptoms](#). At St Vincent's Hospital, Claudia also works as the Project Officer for Psychogeriatric SOS (services-on-screen). This is a unique, clinician-to-clinician, e-health solution to provide specialist psychogeriatric expertise to older adults in rural and remote Australia. She has also been heavily involved in developing 'A Workshop on Capacity - Online Module for Junior Medical Officers'.

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Introduction

It is a legal and professional responsibility of all clinicians to obtain consent before treating any patient. Obtaining consent requires the patient to have a comprehensive understanding and be able to make an informed decision about the proposed treatment. Most patients are capable of understanding information and hence providing consent. However, with some patients this is not so. The following case raises questions regarding capacity and guardianship that are often not well understood by clinicians.

Case

You are the junior doctor on a surgical team and have been asked to consent an elderly male patient for a surgical procedure.

1. When is it important to obtain written consent?

- Often verbal consent is sufficient for simple procedures such as taking bloods and blood pressure
- Written consent is required when the risks of the treatment are significant, such as involving an anaesthetic

2. What is required to obtain informed consent?

- The patient must be provided with sufficient information such that they understand the procedure. Clinicians ought to explain:
 - What the patient should expect before, during and after the procedure
 - The risks and benefits of the proposed procedure
 - The alternative options available

The patient's notes show that he has a background history of dementia. The patient's wife is present.

3. Can this patient consent for himself?

- For a patient to be able to consent they must have capacity
 - Capacity - the ability to make a decision based on information provided
 - Having capacity implies that the person is able to understand the facts provided and what choices they have, weigh up the risks and benefits

of choices and appreciate how those may affect them AND communicate their decision-making process

4. How can we determine if this patient has capacity or not?

- There is no standardised method for assessing capacity
- Any clinician with confidence and experience in determining capacity may do so
- In less clear-cut cases, geriatricians, psychiatrists or neuropsychologists may be involved
- In this case, you as the junior doctor can provide information to the patient and ascertain their understanding by asking general questions (regarding risks, benefits, other options etc.)
 - This is not a memory test, any information the patient cannot recall should be offered
 - If you have any doubt regarding the patient's capacity, it should be communicated to a more senior member of your surgical team
- If there are doubts as to a patient's capacity, the mental state of the patient should be screened - for depression, delirium, psychosis - and if recognised, this may be treated first

Guiding principles for determining capacity

- Presume all individuals have capacity - do not assume someone lacks capacity because they have a particular diagnosis or appearance
- Capacity is decision-specific - a person's capacity can vary depending on the circumstances and the particular decision to be made
- A patient should be supported to make as many decisions themselves as possible
- A person cannot be deemed to lack capacity as a consequence of the decision they make, even if we (the clinicians) believe it to be wrong or reckless - patients have the right to take risks, may have different morals, and culture and religion may influence their decisions

5. If this patient does not have capacity, could their wife consent for them?

- Only if she is found to be the 'person responsible'
 - 'Person responsible' - someone who has the authority to give consent to treatment for an adult who cannot give consent for themselves for a particular medical or dental procedure
- The Guardianship Act details a hierarchy of people who can be the 'person responsible' (which varies subtly state-by-state)

- The 'person responsible' has the right and responsibility to be informed of and understand the proposed treatment, its risks, benefits and alternatives, and has the right to seek a second opinion
- In some cases, the wishes of the patient and the 'person responsible' may conflict:
 - If a patient lacks capacity but agrees to a procedure, the 'person responsible' can overrule and decline to give consent
 - If a 'person responsible' gives consent but the patient declines, it is illegal to proceed without obtaining coercive orders from the guardianship division of the state Civil & Administrative Tribunal (NCAT in NSW)

6. Is the 'person responsible' the same as the 'next of kin'?

- No - although 'next of kin' is often recorded in medical notes as a contact person, that specific title is not used in the context of giving consent and hence, does not carry any rights
 - Of course it may be the case that the person listed as the 'next of kin' also happens to be the 'person responsible' as determined by the Guardianship Act, but this needs to be checked

7. What is an 'enduring guardian'?

- 'Enduring guardian' - someone you appoint to make lifestyle or personal decisions on your behalf when you are not capable
 - You can specify which decisions you want them to make for you - called 'functions'
 - It is a way of formalising who will be the 'person responsible' in the event that you lose capacity - 'enduring guardian' is at the top of the hierarchy as per the NSW Guardianship Act and is usually the 'person responsible'
- Appointment comes into effect when a person loses the capacity to make decisions

8. Is a 'power of attorney' relevant in this circumstance?

- 'Power of attorney' (as defined in NSW) - a legal document appointing an individual to act on their behalf for financial matters for when they are unable to

make financial decisions for themselves

- In other states (e.g. Victoria), there may be a specific ‘medical enduring power of attorney’, however the standard financial ‘power of attorney’ does not have rights in this context

In this case the wife happens to be the enduring guardian for the patient (and hence the person responsible). The wife gives consent for the procedure and the patient agrees as well. The next morning, shortly before the operation is to take place the elder son of the couple turns up very concerned and is not happy for the operation to proceed.

9. Does this change the situation and how do we resolve this?

- No - this does not change the situation with regard to consent
- In such circumstances, it is often helpful to make the time to sit down with the concerned relative/person to provide information about the procedure in order help them feel included and better informed

Take home messages

- Patients have decision-making capacity unless proven otherwise
- Clinicians must do the utmost to respect the autonomy of patients even if they make decisions with which we disagree
- The Guardianship Division of each state’s Civil and Administrative Tribunal can be contacted for advice

References

- NSW Civil & Administrative Tribunal – NCAT Guardianship Division Person Responsible Fact Sheet.
(Available at: http://www.ncat.nsw.gov.au/Documents/gd_factsheet_person_responsible.pdf)
- Informed Consent – For Clinicians: Consent Forms & Patient Information Sheets
(Available at: https://www.health.qld.gov.au/consent/html/for_clinicians)

Related Podcasts

- [Communication and patient-centred care](#)

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