Determining Capacity vs Competency

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Overview of topics

- Capacity versus Competency
- History of patient decision making
- Determining Capacity
- Physician role in Competency Determination
- Case example

*Note: photos used depict models, not actual patients*
Capacity versus Competency

Capacity
- Functional assessment and clinical determination
- made by PHYSICIAN
- Can change over time

Competency
- global assessment and LEGAL determination
- made by a JUDGE
- Very difficult to change, requires new court case, evidence
Capacity vs competency

- Confusion exists between these two terms
- Capacity determination by a physician is required to determine competency
- Reflects conflict of allowing non-physicians to make medical decisions
- Rooted in the history of patient decision making
1891 Union Pacific Railway Company v Botsford

- Botsford sustained concussion on train
- Sued railroad
- Railroad wanted to SURGICALLY examine concussion
- Railroad request DENIED
Brief History Patient Decision Making

1914 Schloendorff v Society of New York Hospital
- a surgeon who performs an operation without patients consents commits an assault

1957 “Informed Consent” resulted from lawsuit by Martin Salgo
- Legs paralyzed by diagnostic procedure
- Was not informed of risks of procedure
Brief History Patient Decision Making

1960’s
1. Lawyers petitioned courts to order blood transfusions for Jehovah’s Witnesses
2. Medical malpractice cases became common

1970’s
Participatory Medicine movement began
- *Our Bodies, Our Selves* published
- Women began to demand explanations, control of birth process
Brief History Patient Decision Making

- 1972 Physicians required to specifically disclose risks in language patients could understand
- 1975 Karen Ann Quinlan, parents petitioned court to remove life-sustaining equipment
1980’s AIDS pandemic led to gay activists immersing themselves in details of clinical trials for new treatments

“PWA - Person with AIDS” replaced “AIDS victim”
1990 Cruzan v Director, MO Department of Health

- Right to consent has corollary: right to refuse treatment
- 1983 Nancy Cruzan found dead by side or road, vegetative state
- MO Gov John Ashcroft supported physicians in refusal to remove feeding tube
- 1990 Supreme Court allowed withdrawal of ANH
Brief History Patient Decision

The headstone for Nancy Cruzan. Photo courtesy of Chris Cruzan White.
1996 Wisconsin Supreme Court: physicians should make available all alternate, viable medical modes of treatment
Brief History Patient Decision

- 2003 “Terrie’s Law” passed in Florida
- 1990 Terri Schiavo sustained cardiac arrest after years of bulimia
- 1993 Malpractice claim against OBGyn resulted in $1 million settlement
Brief History Patient Decision

- 1998 Terri’s husband filed petition to allow removal of G tube
  - G-tube removed and inserted multiple times
- 2003 Governor Jeb Bush ordered that feeding tube be reinserted
- 2005 “Terri’s Law” overturned
- Terri Schiavo died after final removal of G-tube
Determining Capacity

**Informed consent** - requires that patient have the capacity to make the decision

Capacity comes into question in following:

- Depression, psychoses,
- Dementia
- Stroke
- Developmental delay, Intellectual Disability
- Impaired attentional capacity - ie severe pain, delirium
10 Myths about Capacity

- 1 Decision-making capacity = competency
- 2. AMA = lack of decision-making capacity
- 3. No need to assess decision making capacity unless patient goes AMA
- 4. Decision-making capacity is all or nothing
- 5. Cognitive impairment = no decision making capacity
10 Myths about Capacity

- 6. Lack of decision-making capacity is permanent
- 7. Patient who have not been given relevant information about their condition lack decision-making capacity
- 8. All patients with certain psychiatric disorders lack decision-making capacity
- 9. All institutionalized patients lack decision making capacity
- 10. Only psychiatrists and psychologists can assess decision making capacity
Determining Capacity

Requires four key components

- Communication
- Understanding
- Appreciation
- Rationalization or reasoning
Capacity: case example

19 yo female

History:
- intellectual disability
- bipolar mood disorder
- childhood sexual abuse
Capacity: case example

- 3rd inpatient psych admission in 3 months for suicidal gesture: ingesting batteries.
- triggered because boyfriend spent her disability check on methamphetamine.
- three months prior, newborn baby taken into state custody due to neglect
Capacity: Communication

- Patient: must express a treatment choice
- Physician: ask patient which TX choice they prefer
- Ex: Have you decided X or Y?
- Impaired in: psychiatric disorders, extreme indecision
- Patient asked if she preferred to wait for batteries to pass or get an EGD
Capacity: Understanding

- Patient: must recall information, link causal relationships, process general probabilities
- Physician: ask patient to paraphrase their view of the situation
- Ex: How likely do you think X will happen to you if you don’t get Y procedure?
- Impaired in: problems with memory, intelligence
- Patient: “I know if they get stuck, I could need surgery, but last time, they came out by themselves"
Capacity: Appreciation

- Patient: identify illness, treatment options, probable outcomes
- Physician: ask patient to describe disease, TX, outcomes,
- Ex: What do you think is wrong with your health? What treatments do you think would help? Alternatives?
- Impaired in: denial, delusional disorder
- Patient: "I know if they fall apart, they could burn a hole through my stomach."
Capacity: Rationalization

- **Patient:** weigh risks and benefits; consider patient goals
- **Physician:** ask patient to compare risks vs benefits of proposed TX and alternatives
  - Ex: What made you choose option X? What do you think will happen to you if you choose X instead of Y?
- **Impaired in:** psychotic thought disorder, phobias, delirium, dementia
- **Patient:** "I'd rather you cut me open, because sticking a tube in my throat reminds me of my abuse when I was a child."
Capacity Determination

Does patient have capacity?
Capacity Determination

- Yes!
- Able to express the two treatment choices
- She understands the batteries might not come out on their own
- She knows the chemicals in the batteries are corrosive
- She offers a legitimate reason for not wanting EGD
- In this case, physician decided to follow her progress with serial x-rays and patient passed batteries
Capacity Determination

- While being followed for passage of batteries, it is discovered she has an ectopic pregnancy
- Patient will require laparoscopic surgery
- PREDICTION: Will she have capacity to consent to treat the ectopic pregnancy?
Determination of capacity to treat ectopic pregnancy

- Communication: "That surgery sounds really dangerous."
- Understanding: patient thinks PROCEDURE will end her pregnancy
- Appreciation: "I want to just wait and let the baby pass on her own."
- Rationalization: "This pain and the fact I could die are because I let them take my first baby."
Capacity versus Competence

Patient does NOT have CAPACITY. Does she have COMPETENCE?

People who lack competence:

► Impaired or limited memory
► Inability to understand consequences of actions
► Inability to care for basic needs and keep themselves safe
Competency Determination

When is COMPETENCY evaluated?

- In cases of GUARDIANSHIP

- Clear and convincing evidence a person’s every day decision making ability is severely impaired and there is no alternative

- Unable to manage personal care, food, shelter, medical care, property, money, finances
Competency Determination

- In this case, patient has been hospitalized 3 times in 3 months
- Patient keeps giving her disability check away
- She is homeless despite being on disability
- Does not take her medications, causing decompensation with dangerous suicidal gestures
- Social worker petitions the state to place patient under guardianship
Competency Determination

- Physician determines **CAPACITY**, then fills out **INTERROGATORIES** that are presented in court.
- Interrogatories contain information about patient's ability to adhere to treatment, keep him or herself safe, meet basic needs.
- In this case, will include 3 battery ingestions, inability to understand need for ectopic pregnancy treatment.
- Interrogatories presented in court, and judge makes competency determination.
Competency Determination

In most cases, the interrogatories are sufficient to place patient under guardianship

When is a physician required to testify in competency hearing?

- When physician does not fill out interrogatories
- When physician omits important information
- When the patient's need for guardianship is questionable
- Patient "presents well" despite evidence of self-harm and neglect
Competency Determination

- Dementia is most common reason for competency determination
- Physician must evaluate decision making capacity before competency can be determined
  - Anticipate eventual loss of competence
  - At same time, allow patient to exercise decision-making capacity for as long as possible
Competency Determination

To make decisions, a person with dementia must demonstrate following:

- Appreciate she or he has a choice
- Understand prognosis, care, risks and benefits
- Maintain decision making capacity over time
A dementia diagnoses is not equal to lack of competence

People with mild or moderate dementia retain medical capacity

A person with dementia may lack capacity to drive or handle finances, but still retain medical capacity
As with all patients, the wishes of a person with dementia should be considered whenever possible, and until safety becomes an issue.
Contact me through my web site for more information or to book me for future speaking engagements

Special thanks to Sarah Raider-Wexler for modeling for case study slides

References on following slides
How Do I Determine if My Patient has Decision-Making Capacity?

http://www.the-hospitalist.org/article/how-do-i-determine-if-my-patient-has-decision-making-capacity/

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