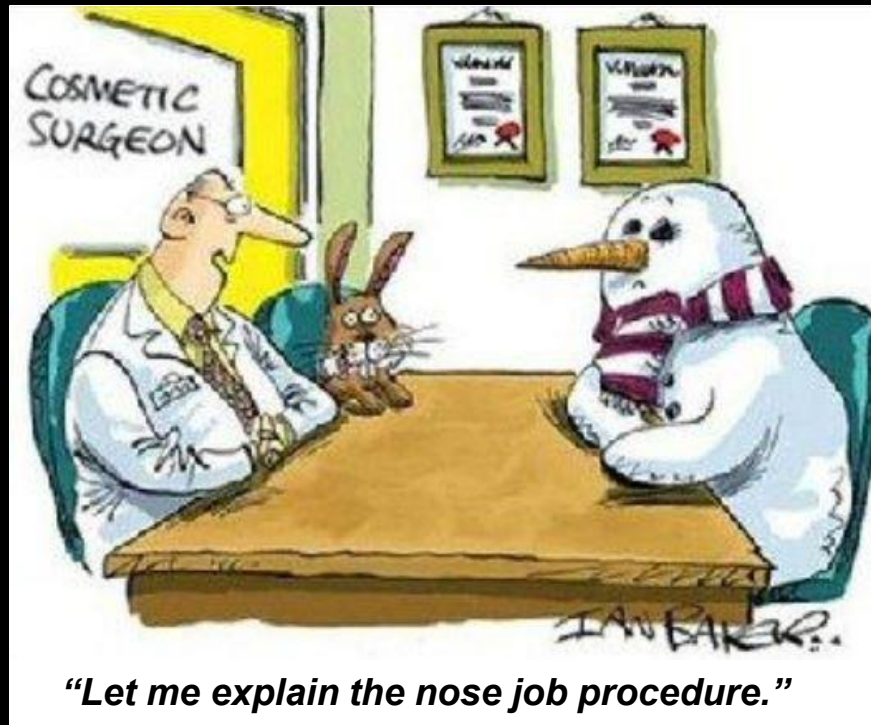

Consent & Capacity: An Overview



“Let me explain the nose job procedure.”

Troy Lehman

Oatley Vigmond

ONTARIO'S PERSONAL INJURY LAW FIRM

What is “Capacity”?

- Capacity relates to the mental capacity to make decisions
- Two parts to decision making:
 - (i) understanding the information relevant to making a decision; and
 - (ii) appreciating the consequences of a decision

What Kinds of Decisions are we Concerned With?

- Treatment
- Personal Care (other than treatment)
- Property

The Legislation

- *Health Care Consent Act*
- *Substitute Decisions Act*

Presumption of Capacity

- Everyone 16 and older is presumed to have capacity for treatment and personal care.
- Everyone 18 and older is presumed to have capacity to make decisions about property.

Health Care Consent Act

Consent

- No treatment without proper consent.
- Consent must come from capable person or Substitute Decision Maker.
- Consent must be informed.

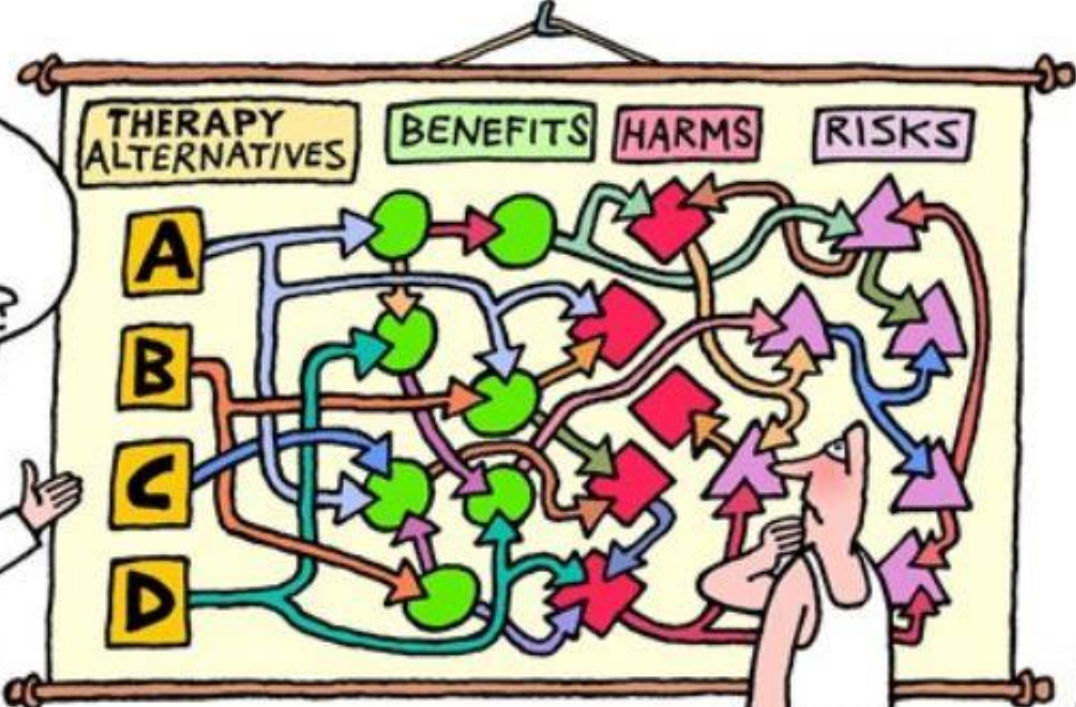
Informed Consent

- Informed means understanding:
 - Nature of tx.
 - Expected benefits.
 - Material risks and side effects.
 - Alternative courses of action.
 - Likely consequence of not having tx

Informed Consent

- Person may be incapable with respect to some treatments and capable with respect to others.

Which therapy would you prefer?



informed consent



"It's simple. My nurse blindfolds me, I spin around a few times, and then I try to reattach your tail."

Who Determines Capacity to Consent To Treatment?

- The health care practitioner providing the treatment makes determination.

How Is Capacity Determined?

- Must consider two part test:
 - Is patient able to understand the information that is relevant to making a decision about treatment?
 - Is patient able to appreciate the reasonably foreseeable consequences of a decision or lack of decision?

How Is Capacity Determined?

- Does the patient understand the condition for which tx is being proposed?
- Is the patient able to explain the nature of the treatment and understand relevant information?
- Is the patient aware of the possible outcomes of treatment, alternatives, lack of treatment?
- Are the patient's expectations realistic?
- Is the person able to make a decision and communicate a choice?
- Is the person able to manipulate the information rationally?

Documenting Finding

- Charting of finding of incapacity is essential, both to defend the decision and to evidence that finding was made.

What Happens If Patient Found To Be Incapable?

- Patient must be told about finding and need for SDM.
- Patient should be involved in discussions with SDM if possible.
- If patient objects must be advised of right to apply to Consent and Capacity Board.

Who Makes Decisions for Incapable Patients?

- The following is the hierarchy (must be 16 and capable themselves):
 - 1) Guardian of the person.
 - 2) Attorney for personal care.
 - 3) Spouse.
 - 4) Child/parent.
 - 5) Sibling.
 - 6) Any other blood relative.
 - 7) Public Guardian or Trustee.

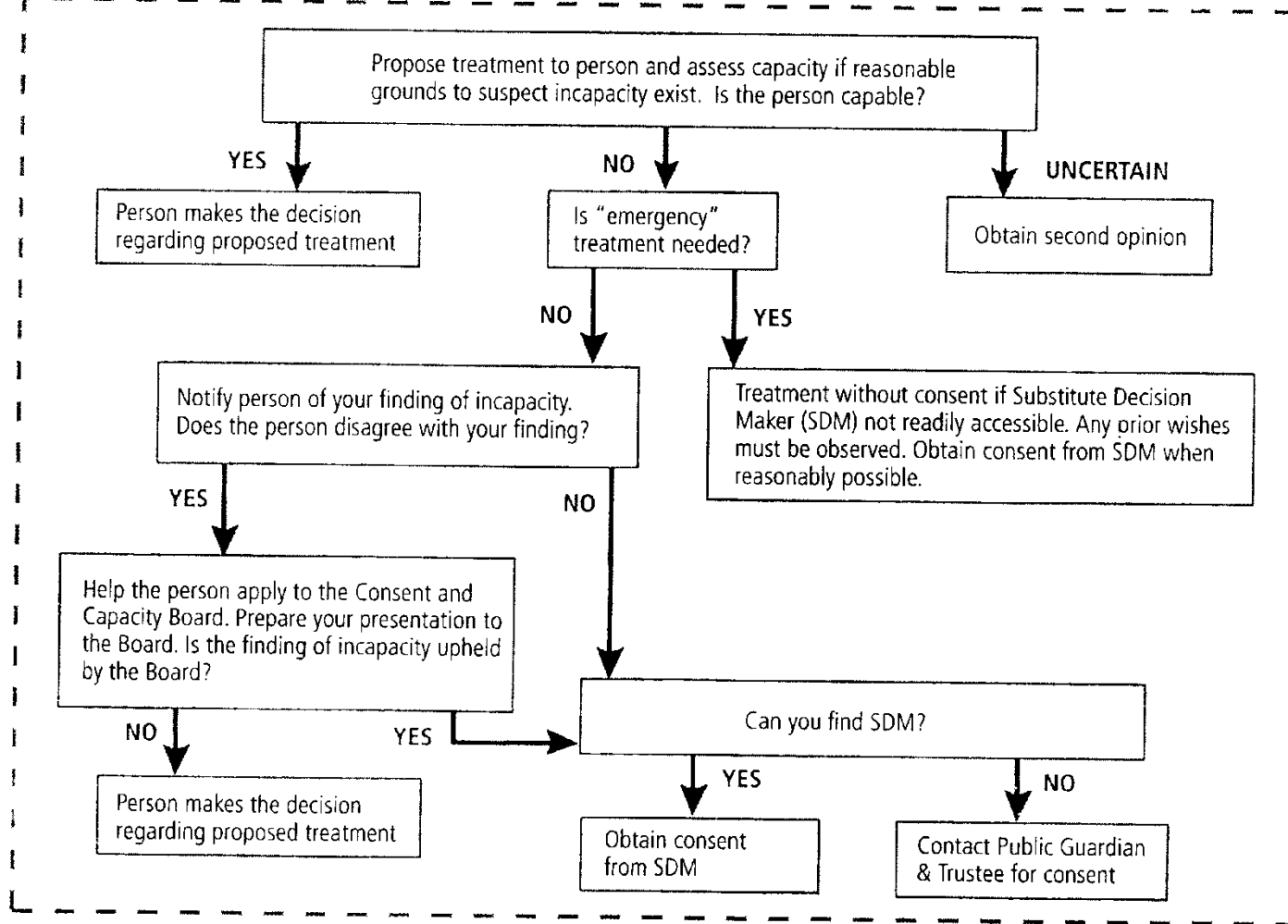
Who Makes Decisions for Incapable Patients?

- If person lower on list is present, they may give consent if they believe no other person higher on list would object.
- If two people tied on list cannot agree on consent the PGT will make the decision.

What Is Process if Patient Objects to Determination of Incapacity?

- Non-emergency tx must be held off until Board has made its decision or 48 hours have elapsed from incapable person being advised of rights and no application being made.
- Emergency = “there is an emergency if the person for whom treatment is proposed is apparently experiencing severe suffering or is at risk, if the treatment is not administered promptly, of sustaining serious bodily harm.”

Determining Capacity to Consent



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Substitute Decisions Act

Capacity to Manage Property

- Person who is 18 years old is presumed to have capacity to enter contracts.
- Fact that person is incapable may not be obvious to third parties.
- Without capacity determination, risk of injured person racking up debts and liabilities.

Why is Capacity to Make Property Decisions so Important?

- Risk that injured person will be taken advantage of.
- Lawsuits cannot be settled on behalf of incapable person without Court approval.
- Therefore, where there is a question or concern about capacity, it is important to get a capacity assessment done.

What is Capacity to Manage Property?

- Definition of capacity is in section 6 of the *Substitute Decisions Act*:
 6. *A person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.*

Case Study re Appreciating the Consequences of Decisions

- Ms. D is 22 year old nursing student
- Suffers acquired brain injury
- Significant problems with memory, information processing, neuro-cognitive fatigue and confabulation

Case Study re Appreciating the Consequences of Decisions

- Vocational/medical experts predict that she is unemployable
- Ms. D has an issue with insight. Able to understand the symptoms of an acquired brain injury but does not appreciate the extent that they apply to her. Convinced she will return to nursing

Case Study re Appreciating the Consequences of Decisions

- Issue in lawsuit about Ms. D's future earning capacity
- Ms. D is going to have a problem appreciating the consequences of a decision about that issue because of her problem with insight

Case Study re Appreciating the Consequences of Decisions

- Issue in lawsuit about Ms. D's future earning capacity
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When is a Capacity Assessment Required?

- Sometimes the issue is clear and no assessment is required.
- When there is a question or concern about whether person has capacity, prudent to obtain a capacity assessment

When is a Capacity Assessment Required?

- Prudent to obtain a capacity assessment at a relatively early stage to avoid risks of injured person making damaging decisions.

How is Capacity Assessment Funded?

- Funding through accident benefits in motor vehicle cases.
- Funding by law firm where there is a lawsuit.

What Happens After a Finding of Incapacity to Manage Property?

- SDM Required.
- Either Power of Attorney or Guardian of Property.
- Legal costs associated with this may be covered by insurance company in MVC claims.
- SDM has authority to make all decisions except will.

Capacity to Manage Personal Care

- Definition of capacity is in section 45 of the *Substitute Decisions Act*:

45. A person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

What is Capacity for Making Personal Care Decisions?

- Same test as for property decisions.
- May be capable in one area and incapable in another.

Why is Capacity for Personal Care Decisions so Important?

- Risk of injured person making decisions that are unsafe or harmful to his or her health
- Relating to health care, nutrition, shelter, clothing, hygiene or safety

What Happens When Person is Found Incapable of Personal Care?

- Need SDM for care.
- Guardian of Person or Power of Attorney for Personal Care.
- Power to make all personal care decisions in areas of incapacity.

Any Questions?
