

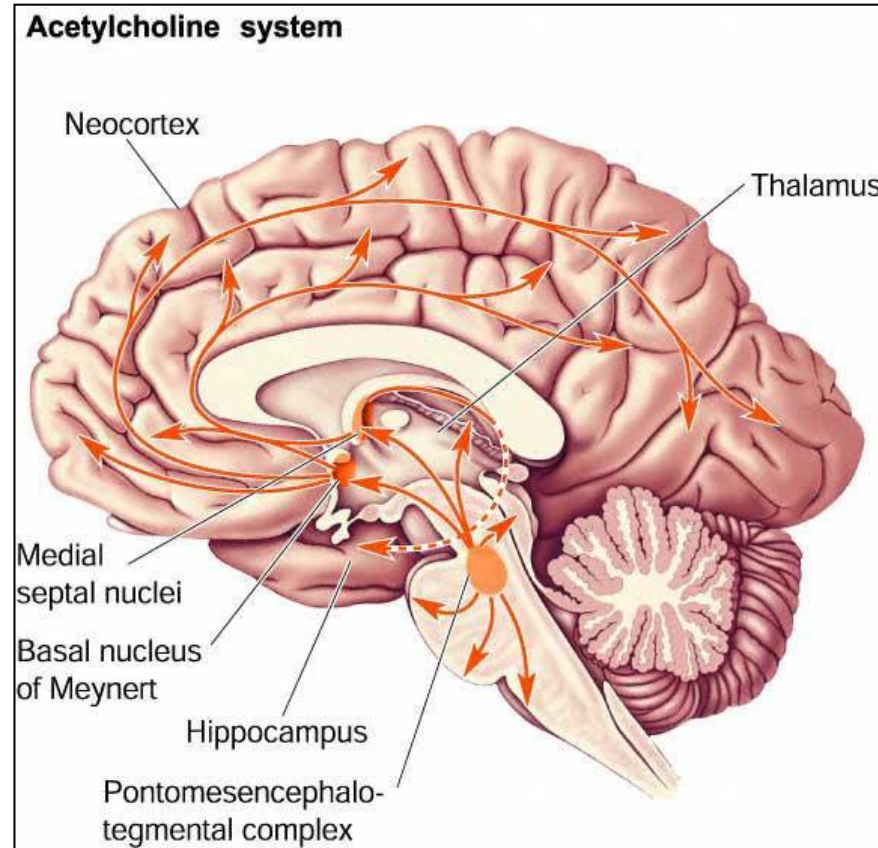
Consent and Capacity: Psychiatric Perspective

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Brain Changes



Brain Chemistry

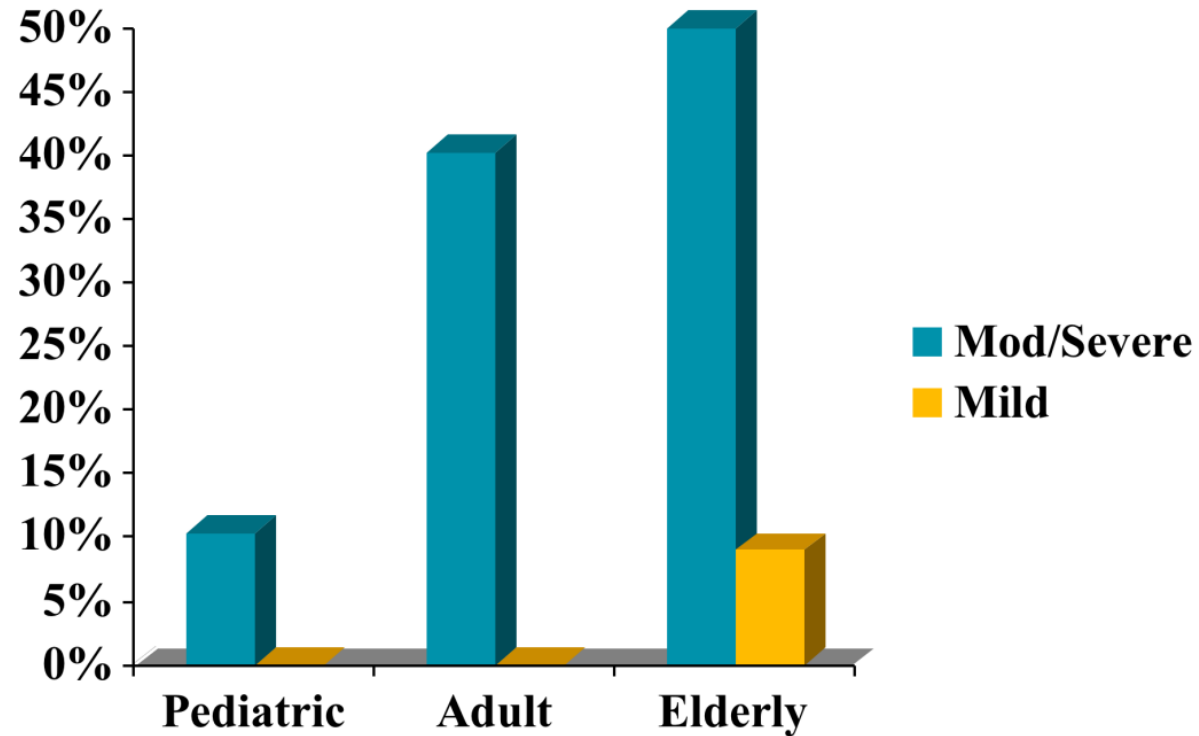


Traumatic Brain Injury

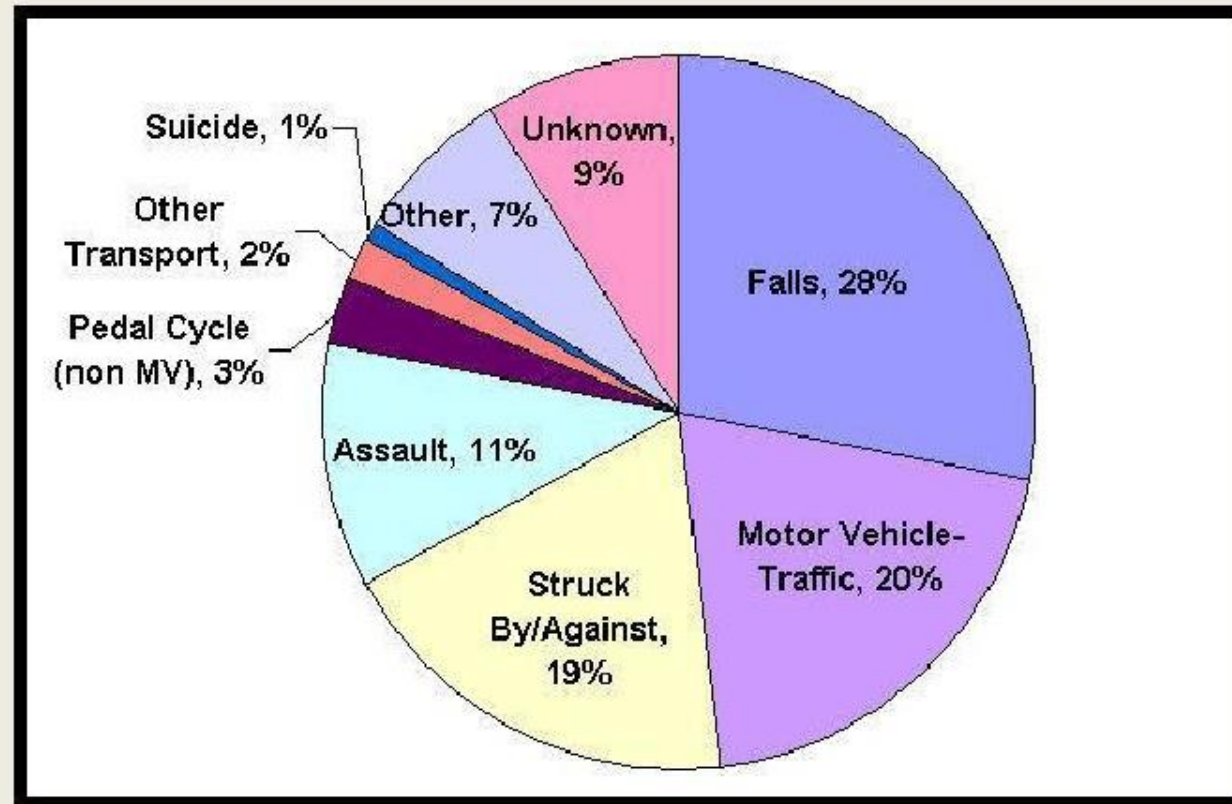


Guidelines for
**Mild Traumatic Brain Injury and
Persistent Symptoms**

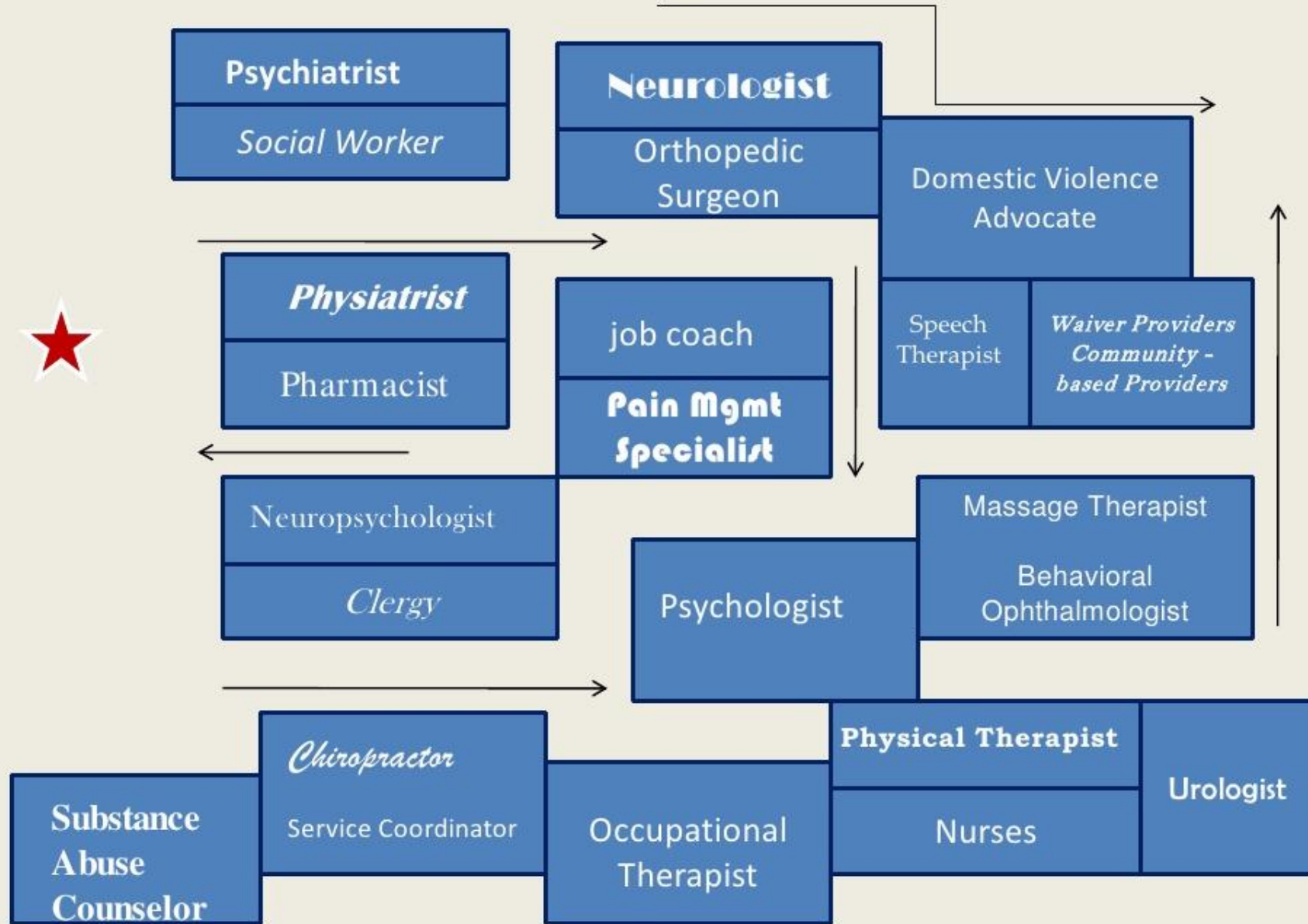
6 month Mortality Fladda et al (2007)



Leading Causes of Traumatic Brain Injury



A SAMPLING OF TREATMENT PROVIDERS



Executive Function

Executive function is the most important *cognitive* factor determining performance of social and instrumental activities.

- “Memory loss” is the most frequent presenting complaint – but usually not the biggest problem

This cuts across diagnoses: True for Alzheimer’s disease, non-Alzheimer dementia, traumatic brain injury, schizophrenia.

Patients with equal MMSE scores can show substantial differences in functional status.

- The MoCA, Clock Drawing Test and EXIT are more sensitive to declining executive function

Role of Executive Function

Executive impairment, measured quantitatively by instruments such as the EXIT or neuropsychological tests (verbal and figural fluency, trail-making B, clock drawing, etc.), explains much of the variance in multivariate models of instrumental function.

However, education and culture influence scores for particular functions such as driving or managing finances, and current circumstances influence the quality of decision making.

Formal Testing

- Neuropsychological testing including metacognitive measures.
- Formal: Memory tests that ask subjects how sure they are of their answer.
- Informal: Systematic observations and questions by the neuropsychologist

Occupational therapy assessment.

Comparison of self-rated, clinician-rated, and family-rated scales of cognition and everyday functioning.

Why assessors disagree about capacity

Different performance criteria or thresholds for determining competence or functional independence.

Differences in testing methods.

Context-dependency of performance, especially when executive function is impaired.

Fluctuations in performance, especially those related to medical illness or mood.

Capacity Concepts

Capacity is presumed

- Capacity is task specific
 - E.g. treatment, management of property
- Capacity is functional
 - Diagnosis does not indicate incapacity
- Capacity is a legal construct created by courts and legislatures
 - CCB is able only to hear appeals on specific issues
- Capacity confers the right to make decisions

Health Care Consent Act, 1996

HCCA defines "capacity" in Section 4:

Capacity - A person is capable with respect to a treatment, admission to a care facility or a personal assistance service if the person is able to understand the information that is relevant to making a decision about the treatment, admission or personal assistance service, as the case may be, and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

HCS

Presumption of capacity - A person is presumed to be capable with respect to treatment, admission to a care facility and personal assistance services.

Exception - A person is entitled to rely on the presumption of capacity with respect to another person unless he or she has reasonable grounds to believe that the other person is incapable with respect to the treatment, the admission or the personal assistance service, as the case may be.

Other Types of Capacity Assessments

In addition to treatment, in the civil context psychiatrists assess capacity to:

- Make decisions respecting disclosure of personal health information
- Manage one's property
- Write a will/power of attorney document
- Engage in sexual relations
- Instruct counsel

Financial Incapacity

Property and civil rights are provincial domain

- In Ontario, capacity to manage property must be assessed on admission to psychiatric facility unless there is a guardian of property or physician believes on reasonable grounds there is a continuing power of attorney for property in place
- Test for capacity to manage property set out in s. 6

Substitute Decisions Act, 1992

(Roy v. Fuerst)

Financial Incapacity

Disjunctive test: “incapacity” is defined

in s. 6 SDA

- Incapable if:
 - Not able to understand information relevant to making a decision “in the management of his or her property”; or
 - Not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision

Financial Incapacity

Capacity is presumed at law

- “right to be foolish” principle endorsed by Supreme Court in Starson, arises from financial capacity case and disabled woman’s purchase of allegedly too much jewellery from shopping channels (Re Koch)
- Analysis of how 2 alternative branches of test are understood is subject to Starson interpretation respecting concepts of ability to understand and appreciate
- MHA inpatients – notice of finding (F.33); right to apply to CCB

Community

In the community, or with hospitalized persons not under the MHA, the capacity assessment arises under SDA

- Under SDA, assessor (typically) required to advise person:
 - Purpose of assessment
 - Significance/effect of finding incapacity
 - Right to refuse to be assessed

SDA s. 78

(Daryherty v. Stall)

Capacity to Instruct Counsel

Ontario: Deemed capacity to retain and instruct counsel in CCB

proceedings where findings of incapacity made respecting:

- Treatment
- Managing property
- Admission to care facility
- Personal assistance services (HCCA, s. 81)

- Criminal Context: “limited cognitive ability” test; not necessary to be capable of making rational decisions to benefit self

(R. v. Taylor, 1992, OCA)

- ability to participate meaningfully in a trial subsumed in ability to communicate with counsel so that minimum standards of trial fairness met

(R. v. Morrissey, 2007, OCA)

Testamentary Capacity

The testator must have a “sound disposing mind” to write a valid will

- Solicitor's duty to enquire into client's testamentary capacity
- Caselaw addressing “sound disposing mind”, states testator

must understand:

- Nature/effect of will
- Nature/extent of property
- Extent of what being given under the will
- If relevant, understand claims that could be made by a

person being excluded

- Ability to communicate wishes not enough: need the “sound disposing mind” standard
- Mere ability to understand a question about ordinary/usual issues and give rational responses insufficient: look at nature of act to be done

Treatment Capacity

Health care is a provincial responsibility

- Interpretations of/procedures relating to findings of treatment capacity may vary from province to province
- Canadians have basic right to make decisions about health care
- Supreme Court (Starson) states: “the right to refuse unwanted medical treatment is fundamental to a person’s dignity and autonomy”. This is equally important when treating mental illness.
- Supreme Court endorses a competent patient’s absolute right to knowingly assume a risk others view as foolish
- In statutes and at common law, is presumption of capacity

Health Care Consent Act, 1996

s. 10(1) **No treatment without consent** - A health practitioner who proposes a treatment for a person shall not administer the treatment, and shall take reasonable steps to ensure that it is not administered, unless,

- (a) he or she is of the opinion that the person is capable with respect to the treatment, and the person has given consent; or
- (b) he or she is of the opinion that the person is incapable with respect to the treatment, and the person's substitute decision-maker has given consent on the person's behalf in accordance with this Act.

Health Care Consent Act, 1996

s. 15 (1) **Capacity depends on treatment** - A

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

(e.g. capacity respecting antibiotics versus antipsychotics at the same point in time)

s. 15(2) **Capacity depends on time** – A person may be incapable with respect to a treatment at one time and capable with respect to that treatment at another time (i.e. capacity can fluctuate)

Judicial Interpretation of Treatment Capacity

SCC decision - Fleming v Starson 2003 SCC 32

Starson is the highest authority in Ontario

Capacity is a two part, conjunctive test

Principles enunciated

1. Relevant information includes:

- nature/purpose of treatment proposed
- *condition diagnosed
- expected benefits
- material risks/side effects
- alternative courses of action
- likely consequence of no treatment
- opportunity to have questions answered

Judicial Interpretation of Treatment Capacity

Principles enunciated (cont'd)

2. First branch of the capacity test-able to understand-as

defined in Starson means:

- the cognitive ability to process, retain and understand the relevant information

Second branch of the capacity test-able to appreciate-as

defined in Starson means:

- able to apply the relevant information to one's own circumstances
- able to weigh the reasonably foreseeable risks and benefits of a decision

Judicial Interpretation of Treatment Capacity

to be able to apply relevant information to one's own circumstances does not require person to agree with the diagnosis or to describe his mental condition as an "illness" or in otherwise negative terms

BUT

- if it is demonstrated that person has a mental 'condition', the person must be able to recognize the possibility he is affected by the manifestations of that condition in order to be able to apply the relevant information to his own circumstances

Judicial Interpretation of Treatment Capacity

The focus of the test is on "ability" to understand/appreciate as opposed to "actual" understanding or appreciation, particularly given that actual understanding is impacted by quality and quantity of information provided by the health practitioner proposing treatment.

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- Capacity is a two part, conjunctive test. To be capable one must be able to BOTH understand the relevant information and appreciate the reasonably foreseeable consequences of a decision.

Elements of Consent

must relate to the treatment proposed

- must be informed
- must be voluntary
- must not be obtained through misrepresentation or fraud

(HCCA, 1996, s. 11(1))

- this essentially codifies the common law

Who Can be a Lawful Substitute Decision-Maker (“SDM”)

PART I - BASIC CRITERIA FOR ALL SDM

- SDM must be capable with respect to the treatment
- at least age 16 (unless SDM is parent of patient)
- available
- willing to assume the responsibility
- not prohibited by court order

(HCCA, 1996, s. 20(2))

Who Can be SDM?

PART II - THE LIST

☑ List appears in hierarchical order

☑ Public Guardian & Trustee (PGT) is SDM of last resort

and "tie-breaker"

List:

– guardian of the person (with requisite authority)

– attorney for person care (with requisite authority)

– Board appointed representative

– spouse or partner

– child or parent/C.A.S.

– parent with access rights only

– sibling

– any other relative (blood/marriage/adoption)

– PGT

