



Online Ethics Course

Topic 4: Mental health and questions around capacity





Intended learning outcomes

After completing the topic, learners should be able to:

- To explain the necessary conditions of capacity as applied to patients with mental health problems
- To understand the concept of legal capacity (e.g., as applied to consent)



Concept and context

In persons with mental health issues, assessment of capacity is important in a variety of contexts, such as taking a health decision, executing a will, standing trial or confessing to a crime



Mental capacity

- Mental capacity signifies the mental ability to understand the nature and effects of one's acts
- It refers to specific mental functions necessary for informed decision making
- Both cognitive abilities and emotional context must be included in any assessment of capacity



Models of mental capacity

Three common models of mental capacity exist, each with unique advantages and disadvantages:

- 1) Philosophical-legal model
- 2) Medical model
- 3) Functional mode



Philosophical-legal model

- Mental capacity results from being able to express desires, understand pertinent risks and benefits, appreciate the ramifications of a decision and think rationally



Medical Model

Medical symptoms are linked to incapacity (i.e., the extent to which individuals have neurological or psychiatric symptoms affecting the ability to perform cognitive tasks)

If certain conditions apply, a patient may be said to have impaired mental capacity



Functional model

- This model focuses on observable behavior; several mental abilities must be intact in order to be able to make an informed, reasoned and rational decision (e.g., memory, knowledge of pertinent parties and their responsibilities, considering likely consequences, planning and strategising, etc.)



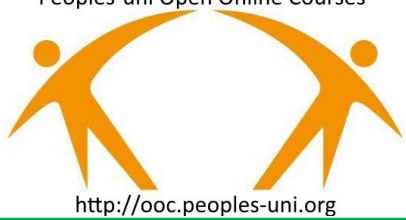
Legislative examples

- The next few slides provide examples from the UK and India showing primary legislation that covers both mental capacity and mental health issues



Mental Capacity Act, 2005

- An act of the Parliament, passed in the UK, applicable to England and Wales
- It provides a legal framework for acting and making decisions on behalf of adults who lack sufficient capacity to be able to make certain decisions for themselves <http://www.legislation.gov.uk/ukpga/2005/9/contents>



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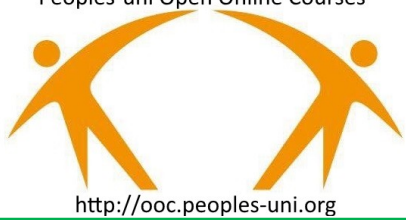
The five statutory principles are as follows:

- 1) A person must be assumed to have capacity unless it is established that he/she lacks capacity
- 2) A person is not to be treated as unable to make a decision unless all practicable steps to help him/her to do so have been taken without success
- 3) A person is not to be treated as unable to make a decision merely because he/she makes an unwise decision
- 4) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his/ her best interests
- 5) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action



Mental Health Act, UK (1983 & 2007)

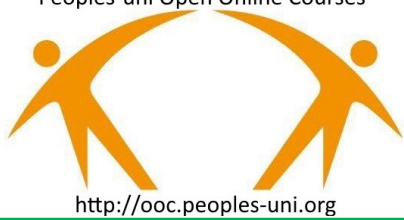
This Act provides the framework for treating, and if necessary, detaining patients with mental health problems, who could be a danger to themselves or to others <http://www.legislation.gov.uk/ukpga/2007/12/contents>



The Mental Health Act, 1987 (India)

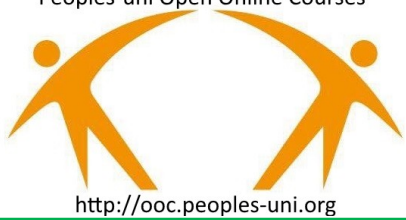
The following issues regarding capacity are covered in the act:

- **Section 23** mentions that an officer in charge of a police station, has the duty to protect any person found on the streets, who could be mentally ill; such a person is then, within 24 hours, produced before a magistrate, who assesses his/her capacity to understand, arranges a medical officer to assess his/her capacity and arranges further care
- **Section 50** concerns the judicial inquisition regarding an alleged mentally ill person possessing property, custody of his/her person and management of his/her property. In such a case, the court must hold that both, unsoundness of mind and incapacity to manage his/her affairs are present and that the latter is due to the former
- A new bill is pending to bring the law up-to-date



The Mental Healthcare Bill, 2013 (India)

- **Chapter III** concerns advance directives [see topic 6]
Every person, who is not a minor, shall have a right to make an advance directive in writing, specifying any or all of the following, namely
 - (a) the way the person wishes to be cared for and treated for a mental illness;
 - (b) the way the person wishes not to be cared for and treated for a mental illness;
 - (c) the individual or individuals, in order of precedence, he wants to appoint as his nominated representative
- **Chapter IV** concerns nominated representatives
- **Chapter V** concerns the rights of persons with mental illness
- <http://www.prsindia.org/administrator/uploads/general/1376983253~~mental%20health%20care%20bill%202013.pdf>



Incapacity v/s Incompetence

- Incapacity refers to functional inability, as determined by a clinician
- Incompetence is a legal term applied to individuals considered by law to be mentally incapable of performing a particular act or assuming a particular role
- Assessment is issue specific; details vary according to jurisdiction



Competency

- Competency refers to the minimum mental capacity required to perform a specific, legally recognized act or to assume a particular role, relating to a person's perception of reality and functional memory



Types of competence

- General competence implies that a person is functionally capable in all legally relevant domains
- Specific competence recognises that particular skills are needed for particular tasks, e.g., to drive a car, manage a business, get married etc.
- A person may be competent to do one thing but not another (e.g., to take care of oneself but not drive a car)



Questions around competency

- Questions around competency arise in important situations, such as when a person is

- a) a minor (<18 years of age)

Minors usually require the consent of a parent/designated guardian; minors may be sufficiently mature to consent to some things but not others; details depend on jurisdiction

- b) mentally disabled

Mental disability does not necessarily render a person incompetent in all areas of functioning; a mental health expert must determine if any specific functional incapacities exist that render a person unable to make a particular kind of decision or to perform a particular task



Healthcare decision-making

- Competency to consent and the right to refuse treatment go hand in hand [see topic 2]
- Forcing treatment against the wishes of a competent patient may result in a lawsuit for assault and battery, as well as malpractice

(Even if the doctor feels that the decision being taken is irrational, wrong or foolish, patient autonomy needs to be respected)



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Three essential elements of an informed consent:

- 1) Competency
- 2) Information
- 3) Voluntariness



Persuasion and Coercion

- *Persuasion*: To utilise the patient's reasoning ability to arrive at a desired result
- *Coercion*: To manipulate the patient by introducing extraneous elements which have the effect of undermining the patient's ability to reason



Exceptions to getting Informed consent

1) The emergency exception

When the patient is unable to give consent (e.g. unconscious) and is experiencing an acute, life-threatening crisis that requires immediate medical attention

2) Incompetency

A substitute decision-maker is necessary

3) Therapeutic privilege

Withholding full disclosure if informing would seriously worsen the patient's condition

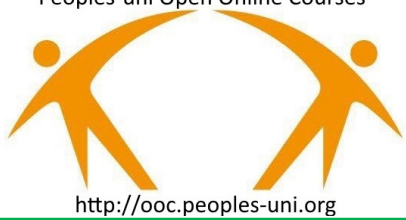
4) Waiver

The patient, competently, declines being informed



Levels of competency

- To determine a patient's competence, a minimal level of decision-making must exist such that the patient can at least:
 - 1) *Understand the particular treatment being offered*
 - 2) *Make a discernible decision regarding the treatment*
 - 3) *Communicate that decision verbally/non-verbally*
- NB: This minimal standard of decision-making capacity obtains only to simple consent; it is not 'informed consent' because risk-benefit analysis and alternative treatment choices are not provided



Standards of determining competency

- There are 4 standards of determining competency in decision-making, based on the mental capacity
 - 1) Communication of choice
 - 2) Understanding the information provided
 - 3) Appreciation of one's situation and the risks and benefits of the options available
 - 4) Rational decision-making

Most courts accept the first two standards, although the rational decision-making standard is usually preferred by psychiatrists



Consent options for non-competent patients

- Common consent options for patients lacking the mental capacity for healthcare decision making (depending on jurisdiction) are:
 - Proxy consent of next of kin
 - Spouse or court-appointed guardian, when the treatment wishes of the patient are unstated
 - Advance directives (living will, health care proxy, or durable power of attorney)
 - Adjudication of incompetence; appointment of guardian
 - Institutional administrators or committees/ Treatment review panels
 - Substituted consent of the court

Ref. Simon RI. *Clinical Psychiatry and the Law* (2ⁿ Ed). Washington, DC: American psychiatric Press, 1992^d



The doctrine of 'Parens Patriae'

- 'Parens patriae' – a Latin term meaning '*parent of his or her country*'
- This doctrine of has evolved in common law and is applied in situations where the State must make decisions in order to protect the interests of those persons who are unable to take care of themselves



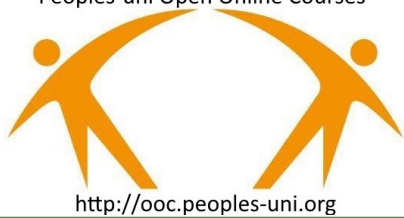
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- There are 2 tests in relation to the doctrine:
 - **‘Best Interests’ Test**, which requires the court to ascertain the course of action which would serve the best interests of the person in question (and not those of other stakeholders such as guardians or society in general)
 - **‘Substituted Judgment’ Test**, which requires the court to step into the shoes of a person who is considered to be mentally incapable and attempt to make the decision which the said person would have made, if he/she was competent to do so



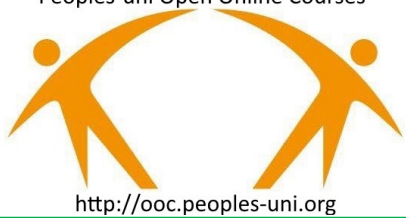
Criminal proceedings

- Basic elements relating to crime are:
 - 1) The mental state or level of intent to commit the act (*mens rea*)
 - 2) The act itself or conduct associated with committing the crime (*actus reus*)
 - 3) A concurrence in time between the guilt act and the guilty mental state



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- A person's mental status and reality testing can play a critical role in determining whether a defendant is
 - 1) Required to stand trial to face criminal charges
 - 2) Sentenced/acquitted of the alleged crime/ sent to prison/ hospitalised/executed in some extreme cases



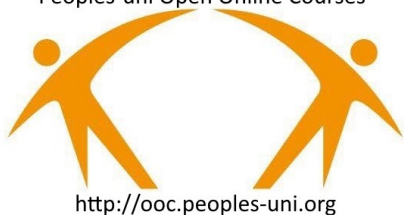
Competency to stand trial

- An impairment that puts into question a defendant's competency to stand trial is usually associated with a mental disorder/defect
- Check-lists and structured interviews (e.g. the interdisciplinary fitness Interview) are available that assess specific psychological factors applicable to competency standards



Insanity Defense

- The term ‘insanity’ is a legal construct, not a psychiatric diagnosis
- The 4 basic elements of the insanity defense are:
 - 1) Presence of a mental disorder
 - 2) Presence of a defect of reason
 - 3) A lack of knowledge of the nature or wrongfulness of the act
 - 4) An incapacity to refrain from the act



Diminished capacity

- Sometimes, mental impairment can affect the '*mens rea*' (criminal intent), but not to the extent of completely nullifying it.
- 'Diminished capacity' allows the defendant to introduce medical/psychological evidence that affects the '*mens rea*' for the crime charged



Indian Penal Code

- IPC sections pertaining to capacity in the context of criminal proceedings are as follows
- *Section 84*: Act of a person of unsound mind
- *Section 85*: Act of a person incapable of judgment by reason of intoxication caused against his will
- *Section 86*: Offence requiring a particular intent of knowledge committed by one who is intoxicated

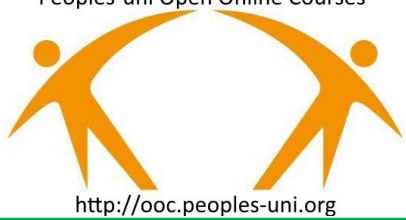
<http://indiankanoon.org/doc/1569253/>



Testamentary capacity

This phrase refers to the capacity to write a valid will

A will means a declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death



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- A will is declared invalid, if at the time of making the will, the testator was of unsound mind or did not have the mental capacity to understand the consequences of the act
- Testamentary capacity means that the person should have
 - An understanding of the nature of the will
 - The knowledge of the property to be disposed off
 - An ability to recognize those who may have justifiable claims on property



Assessing capacity

- In forensic settings, assessment of mental capacity combines functional, medical and philosophical-legal approaches [see earlier slides]
 - E.g., How does current behavior compare with past behavior; did the person understand the abstract concepts; are there concerns about memory; are/were alternatives known and considered; were the decisions free from delusions; what were the effects of co-existing illness, medications, toxic substances; did the person display strategic thinking and analysis; what were the relevant emotional factors affecting the decision, if any?

Ref: Blum B: *Mental capacity Inventory*, 1997; and Blum B: Undue influence in elder financial abuse



Reading suggestions

- <http://jeffreyjanofskymd.com/media/pdf/The-Hopkins-Competency-Assessment-Test.pdf>
- <http://www.omicsgroup.org/journals/evaluation-of-a-new-screening-tool-lucidity-in-mental-capacity-limcapassessment-tool-2167-7182-1000228.php?aid=58853>
- Simon RI. *Clinical-Legal Issues in Psychiatry*, and Blum B. *Forensic issues in Geriatric Psychiatry* In: Benjamin J. Sadock, Virginia A. Sadock. *Comprehensive Textbook Of Psychiatry*. New York: Lippincott Williams and Wilkins; 2009
- S Nambi. *Forensic Psychiatry (Psychiatry and Law) Indian Perspective*. New Delhi: Jaypee brothers medical publishers; 2014



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