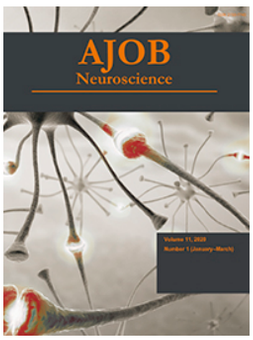

AJOB Neuroscience

ISSN: 2150-7740 (Print) 2150-7759 (Online) Journal homepage: https://www.tandfonline.com/loi/uabn20

Applying the Narrative Coherence Standard in Non-Medical Capacity Assessments

Tyler S. Gibb, Madison Irene Hybels & Khadijah Hussain

To cite this article: Tyler S. Gibb, Madison Irene Hybels & Khadijah Hussain (2020) Applying the Narrative Coherence Standard in Non-Medical Capacity Assessments, AJOB Neuroscience, 11:1, 31-33, DOI: 10.1080/21507740.2019.1704934

To link to this article: https://doi.org/10.1080/21507740.2019.1704934

Published online: 03 Feb 2020.

Roper, C. 2018. Capacity does not reside in me. *Critical perspectives on coercive interventions*. Abingdon: Routledge; 97–108.

Steinert, C., T. Steinert, E. Flammer, and S. Jaeger. 2016. Impact of the UN convention on the rights of persons with disabilities (UN-CRPD) on mental health care research-a systematic review. *BMC Psychiatry* 16(1): 166–180. doi: 10.1186/s12888-016-0862-1.

Szmukler, G. 2015. UN CRPD: Equal recognition before the law. *The Lancet Psychiatry* 2(11): e29. doi: 10.1016/S2215-0366(15)00369-7.

Szmukler, G. 2019. "Capacity", "best interests", "will and preferences" and the UN convention on the rights of persons with disabilities. *World Psychiatry* 18(1): 34–41. doi: 10.1002/wps.20584.

AJOB NEUROSCIENCE
2020, VOL. 11, NO. 1, 31–33
https://doi.org/10.1080/21507740.2019.1704934

Taylor & Francis
Taylor & Francis Group

OPEN PEER COMMENTARIES

Applying the Narrative Coherence Standard in Non-Medical Capacity Assessments

Tyler S. Gibb[a], Madison Irene Hybels[b], and Khadijah Hussain[a]

[a]Western Michigan University Homer Stryker M.D. School of Medicine; [b]Western Michigan University, Kalamazoo

We honor and protect a person's autonomy and the exercise of their legal rights by allowing them to direct their affairs, but, also, to bear the consequence of their capable choices. Similarly, prohibiting individuals from making monumental choices when they lack the necessary mental capacity also honors and protects their autonomy. Decision-making capacity is at the heart of high-quality medical care. Whether a patient possesses the necessary capacity to direct their treatment is also the threshold question in most clinical ethics consultations (Gibb and Redinger 2016).

Thus, ascertaining if and when someone possesses decision-making capacity is a serious inquiry. Often assessing decision-making capacity is seen as a medical inquiry. Still, there are a number of other professions that also routinely evaluate the decision-making capacity of individuals with whom they interact. Social workers assess the capacity of their clients. Bartenders assess capacity, or more accurately, the level of incapacity due to the intoxication of their patrons. Perhaps most similar to medical assessments, lawyers have the ethical and professional obligation to evaluate the capacity of their clients.

Assessment of decision-making capacity is challenging for a number of reasons (Ganzini et al. 2004). First, there is a consistent conflation of "capacity" and "competency." A thorough examination of these two related, but conceptually distinct concepts are beyond the scope of this article (Appelbaum and Grisso 1998). Second, decision-making capacity assessments are subjective, and at times idiosyncratic to the assessor. Third, capacity, properly understood, is intrinsically related to the decision at hand and the time at which the decision must be made. Consider the classic example of a patient with progressing dementia who is sufficiently capable of making routine, simple medical treatment decisions, such as accepting vaccinations, but gets lost in the details of complicated options, such as a radiation and chemotherapy treatment plan. The same patient may be able to make medical decisions early in the day, but experience sundowning in the late afternoon and evening, rendering them less capable of directing medical treatments. Further, capable individuals may change their minds about treatment plans, but also about their preferences and values that inform these decisions. Because of these challenges to capacity assessments, determining a patient's or client's decision-making ability is persistently difficult and garners on-going attention in the clinical setting and in the literature. The Narrative Coherence Standard, proffered by Goldberg, provides a potentially useful tool to overcome many of these challenges (Goldberg 2019).

In the medical environment, a variety of tests, criteria, and tools have been proposed to help clinicians

CONTACT Tyler S. Gibb tyler.gibb@med.wmich.edu Program in Medical Ethics, Humanities, and Law, Western Michigan University Homer Stryker M.D. School of Medicine, 1000 Oakland Drive, Kalamazoo, MI 49008, USA.

assess decision-making capacity, including the MacCAT-T, the MOCA, and the MMSE (Grisso et al. 2014). Applebaum's four criteria of capacity—understanding, appreciation, rationality, and the ability to communicate—is often referred to in clinical encounters and taught in medical education as the gold standard for capacity assessment (Appelbaum and Grisso 1988). However, fully validated objective tools or questionnaires do not yet exist, despite a consistent focus on the necessity for healthcare providers to assess capacity.

Healthcare providers are uniquely situated to thoroughly and competently assess capacity, but it is still an elusive and intimidating endeavor. Lawyers, who lack the clinical understanding and medical knowledge of healthcare providers, are in an even more difficult position to assess their client's capacity. Similar to the tools for medical professionals to determine capacity, the tools for non-medical professionals are varied, variable, and offer no clear standards. The American Bar Association published a small set of guidelines for determining the capacity of older adults with diminished capacity (Commission on Law and Aging 2018). In addition to this workbook for determining capacity, there are a handful of other tools provided by legal associations or trade publications (Repa 2016). Still, no gold standard nor clear training tools exist for lawyers. Unhelpfully, much of the legal literature refers to capacity as merely "being sound of mind," or, tautologically, by referencing Applebaum's four criteria, as Goldberg references (Akers 2010).

Conceptually, some distinction is drawn in some legal publications between three types of mental capacity necessary to exercise different legal powers (Meiklejohn 1989). Testamentary capacity is the ability to understand the process of posthumously bequeathing property or financial resources to another person through a valid will. Donative capacity is the ability to understand the value of what they have and the consequences of bestowing it upon someone else. Contractual capacity is the understanding of what is written in a document and how the terms of the contract impact the individual after its execution.

While these three standards can be helpful in differentiating types of capacity of a client, there is no standardization, and the relationship between these types of capacity remains unsettled. Lawyers are left to their own subjective, and often ill-informed, judgments regarding if and what capacity their client may possess. Because of this variability in determining capacity, the Narrative Coherence Standard may offer a worthwhile alternative framework to facilitate the non-medical professional's assessment of capacity.

Goldberg describes the Narrative Coherence Standard as being potentially useful in the medical context. We support that proposition as it offers a fresh approach to understanding capacity and incorporates some essential elements of narrative ethics into clinical practice. However, Goldberg doesn't fully explore the potential utility in non-medical settings, where the Narrative Coherence Standard maybe even more valuable. We argue that this standard may be particularly useful in the legal context. Exercising medical decision-making rights and legal rights are often similar and go hand in hand. For example, executing a will or establishing an estate plan is related to, and often includes, appointing a durable power of attorney for healthcare.

The Narrative Coherence Standard relies upon an understanding of the narrative arc of the patient or client's life. This presupposes a long-term relationship between the professional and the patient or client. While many physicians do not have the necessary long-term relationship with their patients to utilize the Narrative Coherence Standard, long-term relationships are more common between clients and lawyers, particularly Elder Law and Trusts & Estate lawyers. Lawyers who have known a client for many years will likely be able to ascertain when a decision late in life dramatically departs from the client's life-long narrative arc.

Using the Narrative Coherence Standard could work in many different ways within the legal world. It could include requiring the client to tell a quick life story before being able to sign or execute a document. The NCS could also include different aspects of a client's life, as told by family members or close friends. The Narrative Coherence standard would be beneficial to the legal sense because it would allow the working attorney to get a feel of how the client's decision fits in with the rest of their lifelong decision-making process. For example, when a client, who is a life-long liberal that actively opposes private gun ownership, suddenly requests that a long-established will be modified to donate substantial assets to the National Rifle Association may satisfy Applebaum's four criteria for capacity, but the Narrative Coherence Standard would give her lawyer pause, and an opportunity to delve deeper into the client's true capacity.

Conceptual ambiguity, definitional inconsistencies, subjectivity, and a lack of standardization will continue to vex the accurate, wholistic, nuanced

assessment of decision-making capacity. However, there is hope that as inter-professional collaboration and dialogue continue and expand, tools and standards from one field, such as the law, can help improve capacity assessment in other areas, such as medicine. The opposite is also true, and the Narrative Coherence Standards is an example of a model that may have some significant challenges for medical assessment but may be a useful tool for lawyers.

REFERENCES

Akers, G. 2010. Minding your business: Estate planning documents and the levels of capacity required for execution. *Estate Planning and Community Property Law Journal* 56 (3): 55–78.

Appelbaum, P. S., and T. Grisso. 1988. Assessing patients' capacities to consent to treatment. *New England Journal of Medicine* 319(25): 1635–8. doi: 10.1056/NEJM198812223192504.

Commission on Law and Aging. 2018. "Capacity Assessment." American Bar Association. 2018. Accessed November 14, 2019. https://www.americanbar.org/groups/law_aging/resources/capacity_assessment/.

Ganzini, L., L. Volicer, W. A. Nelson, E. Fox, and A. R. Derse. 2004. Ten myths about decision-making capacity. *Journal of the American Medical Directors Association* 5(4): 263–6. doi: 10.1016/S1525-8610(04)70134-6.

Gibb, T. S., and M. J. Redinger. 2016. Commentary: Clarifying medical decisionmaking – Who, How, and Why? *Cambridge Quarterly of Healthcare Ethics* 25(3): 556–60. doi: 10.1017/S0963180116000219.

Goldberg, A. L. 2020. How bioethics and case law diverge in assessments of mental capacity: An argument for a narrative coherence standard. *AJOB Neuroscience* 11(1): 7–17.

Thomas, G., P. S. Appelbaum. 1998. *Assessing competence to consent to treatment: A guide for physicians and other healthcare proessionals*. New York, NY: Oxford University Press.

Grisso, T., P. S. Appelbaum, and C. Hill-Fotouhi. 2014. The MacCAT-T: A clinical tool to assess patients' capacities to make treatment decisions. *Psychiatric Services* 48(11): 1415–9. doi: 10.1176/ps.48.11.1415.

Meiklejohn, A. 1989. Contractual and donative capacity. *Case Western Reserve Law Review* 39(2): 307.

Repa, B. K. 2016. "Can People With 'Diminished Capacity' Make Legal Documents?" Senior Care Advice. Available at: https://seniorcareadvice.com/can-people-with-diminished-capacity-make-legal-documents.htm

AJOB NEUROSCIENCE
2020, VOL. 11, NO. 1, 33–35
https://doi.org/10.1080/21507740.2019.1704927

OPEN PEER COMMENTARIES

With NCS, the Clinician May Get Stuck in the Past or Lost in the Present

Lisa E. Smilan[a] and David S. Conklin[a,b]

[a]Vanderbilt University Medical Center; [b]VA Tennessee Valley Healthcare System Nashville Campus

In his construction of the Narrative Coherence Standard (NCS), Dr. Goldberg (2020) strives to expand the standard of care for decisional capacity assessment beyond the legally derived MacArthur Criteria and to more broadly consider autonomy in the process of informed consent (autonomous consent). He accurately asserts that there is more to medical decision-making and informed consent than information sharing and the traditional MacArthur notion of capacity. Dr. Goldberg aptly uses two different cases to illustrate that even when patients demonstrate the cognitive ability to satisfy the MacArthur criteria, there may still be something amiss. Some may call this "clinical intuition" or "practical wisdom." In the case of Jim, the psychiatrists were able to recognize other illness-related impairments that affected autonomous consent, and ultimately reached a decision for treatment over objection. It is clear these impairments were not cognitive but related to the capacity for voluntarism (Roberts 2002), defined as "an individual's ability to act in accordance with one's authentic sense of what is good, right, and best in light of one's situation, values, and prior history" (707). Voluntarism is an under-recognized feature of autonomous consent and in many ways is derived from the patient's life narrative. The remainder of this

CONTACT Lisa E. Smilan lisa.e.smilan@vumc.org Center for Biomedical Ethics and Society, Vanderbilt University Medical Center, 2525 West End Avenue, Nashville, TN 37203, USA.