



8. Rules for determining legal capacity - IMA steering committee recommendations

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Background

On June 2, 2015, the IMA Ethics Board conducted a discussion on the provision of expert opinions for guardianship in the State of Israel. According to the data presented to the Ethics Board, tens of thousands of people in Israel have been deemed incompetent and deprived of the autonomy to make decisions concerning their body or possessions. This compares to a relatively small percentage of patients considered incompetent in European countries.

In the wake of the discussion, the members of the Ethics Board surmised that there might be excessive use of the power to determine that a person lacks competence to make decisions concerning his body. Therefore, the Ethics Board decided to form a professional committee that would issue precise recommendations on medical decisions indicating that a person is incompetent. The Ethics Board also decided to establish a training course to define appropriate criteria for rescinding a person's right to decide about his body and possessions, while respecting and appreciating the importance of this right to autonomy.

The committee deliberated from January through May of 2016 and agreed on the following:

- The basis for any medical treatment is the patient's informed consent. This is based on the rules of ethics and the Patients' Rights Law. Consequently, a physician is required to confirm that the patient is competent to give informed consent, and in the absence of competence to make decisions, an alternative agent must be found to act in the patient's place.
- The lack of competence to make decisions is a legal term, but in practice, the determination is **performed by physicians** who refer cases for further discussion in court.
- With the rapid aging of the population, the challenges related to legal capacity and guardianship are growing. These challenges include: an increasing percentage of people with dementia and emotional disorders (depression, anxiety), a decline in function and increase in the percentage of incapacitated people who depend on others, the exclusion of the elderly in society and a condescending attitude toward them, and a lack of sufficient mechanisms for protecting the incapacitated and safeguarding basic rights.
- The basic principles guiding the physician include safeguarding the patient's autonomy and right to determine his preferences, and the obligation to care for the



patient's health and wellbeing. These principles often clash and create an ethical dilemma.

- Society reserves a place of respect for an individual's autonomy, as anchored in the Basic Law: Human Dignity and Liberty.

The Legal Capacity and Guardianship Law states:

"Every person is eligible for rights and obligations from birth to death;

"Every person is competent for legal activity unless this competence has been removed or restricted by law or by a court ruling;

"A person who is unable to tend to his affairs due to mental illness or impairment may be declared by the court as incompetent."

There are specific tools for assessing decision-making competence, and these are different from the tools used to diagnose dementia, intellectual disability or mental illness. For example, the Aid To Capacity Evaluation (ACE) tool⁹⁵ is widely accepted in the world, but there are many other tools. Diagnostic tools suitable for assessing cognitive function are not necessarily suitable for assessing the capacity to make decisions.

Upon the appointment of a guardian for an adult, he ceases to be independent from a legal perspective and his affairs are managed by someone else. This entails a severe blow to his freedom and privacy.

Alternatives for safeguarding a person's autonomy, without the need for a hurtful process of guardianship, include various powers of attorney for medical treatment (for example, under the Patients' Rights Law and the Terminally Ill Patient Law).

Studies have shown that determinations made by a proxy under power of attorney are truer to a person's wishes than decisions made by his relatives. It seems that the people closest to us understand our wishes on medical issues in only 30% of the cases. Therefore, the committee encourages the public to appoint a proxy while the person is still competent.

Assessing competence

Assessing competence to make decisions includes:

Essential components:

1. **Understanding** - the ability to understand the information communicated (treatment, surgery, research, etc.), complications/risks and opportunities.
2. **Evaluation** - the ability to evaluate the relevance of the information communicated about the health of the patient himself.

95 <http://www.jcb.utoronto.ca/tools/documents/ace.pdf>



3. **Logic** - the ability to use information to conduct a logical process of decision-making.
4. **Expression** - the ability to express a decision.

In addition:

5. A diagnosis of intellectual disability, cognitive decline, dementia or mental illness does not in itself determine a person's incompetence to make decisions.
6. Competence to make decisions depends on the decision itself. Incompetence to make one particular decision does not imply incompetence for making other decisions. Therefore, competence must be examined for each decision separately.
7. Competence for decision-making is likely to change over time.

Physicians who assess competence

1. When suspicion arises that a patient is incompetent to make decisions, an expert's assessment is required – under the directives of the Ministry of Health and in accordance with the area of expertise and training. A mentally ill patient must be assessed by a psychiatrist.
2. When an expert determines that a patient is incompetent, a signed expert's certificate is required for submission to Family Court in order to issue a guardianship order.
3. The expert's certificate should include the components of assessing decision-making competence and an explanation of how the expert concluded that it is necessary to appoint a guardian.
4. During a period of hospitalization, the certificate should be limited to the period of hospitalization and absolutely no assessment should be made regarding possessions. This is because the situations relevant to the determination are likely to be limited to this period only.

Need for training

The Israeli Medical Association, led by the steering committee on incompetence, will establish a training course recommended for all medical personnel whose work relates to this subject. The course will train physicians from fields of expertise who are able and interested in serving in this role. In addition to reviewing the illnesses and professional directives for diagnosis and examination, the course will include content related to the patient's welfare and fidelity to the patient, with an emphasis on the relevant rules of medical ethics.



Professionals

The committee believes that only a medical expert should be authorized to **declare a person incompetent**.

Professionals who are not physicians can be involved in determining that a person is competent (a positive decision), as long as there is no other valid determination by a medical expert, and provided that the professionals have passed the training course. It should be emphasized that professionals who are not physicians **will be required** to pass the training course.

It should also be noted that social workers are involved in the legal proceedings, and thus the committee believes that the determination of competence should be left in the hands of psychologists (experts in the clinical or rehabilitation field) or registered nurses.

List of experts

The committee believes that the IMA should compile a list of experts who passed the training course.

Members of the committee: Dr. Tami Karni, Prof. Rael Strous, Dr. Simona Naor, Dr. Igor Barash, Prof. Tzvi Dwolatzky, Dr. Yoram Maaravi, Dr. Irena Sibin, Dr. Leah Aharoni, Dr. Vera Rosenfeld, Prof. Yehudit Aharon-Peretz.