

# Ethical and Legal Issues Regarding Consent in Research With Adult Stroke Patients

## *Case Study in the Ethics of Mental Health Research*

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**Abstract:** This case study describes research into interventions to enhance stroke patients' ability to communicate. Because patients' cognitive abilities are compromised, it is argued that they may lack the capacity to consent and that surrogate consent should be required. In South Africa, this would make conducting the research difficult because only court-appointed curators are "legally appropriate" substitutes for research enrolment. Here, the research ethics committee must balance legal requirements and ethical concerns. It must also balance protection and respect for autonomy, even for cognitively compromised participants. First, incapacity should not simply be assumed but should be individually assessed. However, stroke patients present a further complication for capacity assessment because they may retain the capacity to reason but have lost the ability to communicate effectively. Second, the research ethics committee must decide whether recruitment should be restricted or whether incapacitated participants may be enrolled. Given the low risk of harm, incapacitated persons could be enrolled by proxies.

**Key Words:** Capacity to consent, capacity assessment, balance between protection and respect for autonomy.

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### THE RESEARCH PROJECT

A proposal to conduct research with stroke victims is before the University of Cape Town's Faculty of Health Sciences Human Research Ethics Committee (HREC). The Principal Investigator (PI) plans qualitative research with adult stroke patients admitted to Groote Schuur Hospital, a busy tertiary level state-funded institution in Cape Town, South Africa. Most of these patients live in the Cape Town area, but some may come from rural areas further afield where the appropriate medical care is not locally available.

The PI is particularly interested in stroke patients' ability to communicate effectively. She has anecdotal evidence, based partly on her own observations, that many patients' ability to communicate with clinicians is compromised. Because of the injury to the brain that occurs with stroke, patients are often unable to understand language or are unable to convey their understanding. Some may also have attention, memory, and reasoning deficits. These communication difficulties hinder or even prevent the delivery of timely and effective treatment interventions for many patients. In turn, this leads to frustration for patients and healthcare professionals alike. Fur-

thermore, the PI has observed that, paradoxically, the standard exercises that were intended to assist understanding and thus improve communication actually seem to increase patients' confusion. In addition, the medical wards are noisy and very busy, which causes considerable background noise that seems to add to stroke patients' confusion. The PI believes that conducting the exercises to assist understanding in the busy noisy ward is counterproductive. She wishes to gather information about whether the standard exercises, as currently administered, improve or exacerbate communication with stroke patients. Secondly, she wants to explore the effect of background noise on the administering of the "helping" exercises.

The protocol proposes to recruit participants who can speak, albeit with difficulty, but whose cognitive abilities are compromised to some degree. The PI plans to request participation from the patients themselves, spending sufficient time with each patient to ensure that he or she understands what is being requested and can thus make a responsible choice about whether to participate. In other words, a careful process of informed consent is planned.

The methodology includes open-ended interviews with four groups of patients, consisting of men and women 18 years or older (the age of majority in South Africa). There will be two intervention and two control groups. Each group is planned to include five patients, and each group will be interviewed twice. Two groups will remain in the usual medical wards. One of these groups will receive the standard exercise intervention; the control group will not. The other two groups will be moved to quieter side wards where less activity takes place. One group will receive the standard exercise intervention, whereas the other will not.

Recruitment of research participants will depend on the admission of stroke patients to the medical wards. As each stroke patient is admitted, an attempt will be made to recruit him or her. Those who agree to participate will be assigned sequentially to either an intervention or a control group. The rate of recruitment will be dependent on the number of admissions in the study period. The PI, however, is confident that a sufficient number of participants can be recruited and that sequential randomization will ensure a fair representation in the groups of the general population that uses the hospital's facilities.

If the PI is correct that the environmental conditions (noise and busyness) negatively affect stroke patient treatment, then relatively simple logistical planning regarding where stroke patient beds are located could facilitate more effective treatment interventions. If it is the "helping" exercises themselves that add to patients' confusion, then an adjustment to the treatment protocol could be advocated. In turn, this would diminish the amount of frustration experienced, especially by the patients.

During discussion at the HREC meeting, one member of the committee argues that the proposal is unethical as it stands because stroke victims may not be able to give valid informed consent. The rationale for the research makes it plain that the participants' capacity to consent is likely to be impaired by their condition. He argues that necessarily proxy or surrogate consent by a "legally appropriate" substitute should be obtained, in accordance with ethics guidelines. The objection is not unreasonable because some victims of stroke may

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This case research is an amalgam of several research proposals that have come before the HREC.

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indeed be unable to give informed consent. However, to argue that, because a likelihood of impairment exists, necessarily proxy consent must be obtained raises two difficulties: one ethical and one legal (and also logistical).

The ethical difficulty is that the presence of incapacity is a question of fact, which means that incapacity must be demonstrated at the individual level and may not be assumed. The legal dilemma is that, according to current South African law, proxy decision making for adults is not permitted unless the proxy is a court-appointed curator. Therefore, the legal position would require the committee to stipulate that no incapacitated patients may participate unless they have court-appointed curators. This requirement would present a practical difficulty because court-appointed curators are rare, which means that the research probably cannot be done. How should the committee proceed?

### BACKGROUND: RESEARCH WITH THE COGNITIVELY IMPAIRED

Research with cognitively impaired participants is sometimes the only way to get the data needed to develop effective interventions for their conditions. However, it also gives rise to distinctive ethical issues (National Institutes of Health Office of Extramural Research, 2009). The central issues are whether cognitively impaired persons can give valid consent to participate in research and, if not, whether it is permissible to enroll them anyway (Lewis, 2002; Quinn, 1997; Tannsjö, 2004; Van Oosten, 2001). The first issue mainly requires a determination of fact, whereas the second is both an ethical and legal matter.

### The Capacity of Cognitively Impaired Individuals

Certain conditions predictably lead to cognitive impairment, including Alzheimer disease, psychiatric disorders like schizophrenia, and strokes. At a certain level of cognitive impairment, people may be unable to understand or to reason about the facts relevant to making a responsible decision about enrolment. They would lack the necessary capacity to give consent. However, some people may have diminished capacity but still be able to make decisions, perhaps with assistance (National Institutes of Health Office of Extramural Research, 2009). Others may retain the ability to make decisions about some aspects of their lives but lack the ability to decide about others. People in the early stages of dementia, for example, may still retain the capacity to manage their day-to-day lives.

When conducting research with people at risk of lacking consent capacity, it is important to strike a balance between protection and respect for autonomy. The objection by the HREC member is consequently not unreasonable. Some of the stroke victims may in fact lack capacity to give consent. This capacity requires the person to understand information provided by another, to use that information to come to an informed decision, and then to communicate that decision. However, to insist on a proxy for all participants without further justification might mean that persons who retain decision-making capacity could be denied the opportunity to decide for themselves. It could even result in a situation where persons are enrolled against their will because the proxy has decided. A better alternative, albeit more time-consuming, is to assess the capacity of each potential participant (National Institutes of Health Office of Extramural Research, 2009).

Whether research with incapacitated adults is justifiable depends on an assessment of the ethical and legal issues that surround enrolling individuals who lack capacity.

### Ethical Issues in Enrolling Individuals Who Lack Capacity

Preconditions of research with individuals who lack capacity are that the research must not be possible with capable persons and that it must have some direct relevance to the participants, even if

direct benefit to each individual is not possible. Because of the possibility of unfair exploitation, this requirement prevents unnecessary enrolment of incapacitated persons in research. Ensuring that, at least, the research involves some direct relevance to the class of participants actuates the principle of beneficence. However, even when the research is justifiable, risk of harm must be no more than minimal.

Surrogate decision makers may be used to give permission for the enrolment of participants. Generally speaking, surrogates are persons who are close to the incapacitated person or who have been appointed by a court or identified by statute.

### Legal Issues in Enrolling Individuals Who Lack Capacity

Research must comply with the law, as well as with ethical standards (Burt, 2003). This poses a particular challenge for researchers in South Africa regarding cognitively impaired adults and research participation. The legal position is that proxy consent for adults is not catered for unless the proxy is a court-appointed curator, which would involve a High Court application. This is an expensive procedure and is not accessible to most of the South African population. The best interest principle is not useful in this context because it is almost never possible to argue that enrolment in research is in a patient's best interest. In addition, South Africa does not recognize a Durable Power of Attorney, which means that even if the person has given written instructions as to who may make decisions on his or her behalf, healthcare professionals are not bound to act in accordance therewith (Buchanan and Brock, 1989; Kuhse, 2002). Therefore, in South Africa, only a court-appointed curator can make decisions for an incapacitated adult not otherwise authorized by statute.

Legislation, such as the National Health Act 61 of 2003 and the Mental Health Care Act 17 of 2002, creates exceptions for medical treatment. However, the law is silent on whether a proxy (other than a court-appointed curator) may consent on behalf of an adult research participant. The Constitution of the Republic of South Africa Act, 1996 s 12 (2) (c) explicitly protects the bodily and psychological integrity of individuals and requires that scientific and medical experiments be conducted on or with human participants only if those participants give informed consent.

Legal commentators currently lean toward regarding this constitutional requirement as indicating the need for personal consent (Van Wyk, 2001). This interpretation rules out the possibility of proxy consent for adult research participation. The principle of fair subject selection (based on the justice principle), however, militates against this interpretation. In other words, to prevent the unfair exclusion of particular groups of people from appropriate healthcare research, the interpretation that requires personal informed consent in all situations needs to be re-examined. Furthermore, support for a different interpretation is present in the ethics guidelines, both national and international, that make explicit provision for cognitively impaired adults to be research participants. For example, both the South African Department of Health and the South African Medical Research Council's research ethics guidelines foresee a legally authorized proxy for the consent process. The General Principles of the Medical Research Council (5.3.1) state

*"...Where a person, on account of age or physical or mental condition, is incapable of consenting to the proposed research procedure, proxy consent (consent by someone who is legally authorised to act on behalf of the incompetent person) must be procured..."*

The Department of Health's Ethics in Health Research (2.6) provides that "...If a participant lacks capacity to exercise an informed choice to participate, an appropriate person to make the

choice for them must be identified by the investigator.” Likewise, international guidelines such as the Declaration of Helsinki (World Medical Association, 2008) and the Council for International Organizations of Medical Sciences’ (2002) *International Ethical Guidelines for Biomedical Research Involving Human Subjects* require a legally appropriate proxy and additional protections.

In summary, the legal position in South Africa regarding proxy consent is not mirrored by the provisions in the ethics guidelines. The national legislation makes provision for proxy decision makers for treatment of incapacitated adults but not for enrolment in research. The ethics guidelines, on the other hand, create the impression that a proxy is easily appointable for research purposes. The Department of Health’s guidelines even indicate that the investigator can choose a proxy. This is definitely not in accordance with the legal position, which requires that a High Court judge decides whether a curator should be appointed. Such appointment signals a change in legal capacity for the adult concerned, even when full legal incompetence is not found to exist.

## ETHICAL ISSUES

### Legal versus Ethical Obligations

The particular issue raised by this case is peculiar to South Africa. However, the general question of how to balance legal requirements and ethical concerns may arise in any jurisdiction. Insofar as the law is clear, the committee should operate within its bounds. However, when the law is unclear, the committee and legal counsel should assess the potential liability for those concerned. Assuming that the risks of liability can be managed, they should then ascertain whether the ethical justification for the research is persuasive, even if its legal status remains uncertain. In other words, if there is no clear and feasible legal rule to follow, then the research should be justifiable on an ethical basis. In this study, it is not feasible or ethical to have curators appointed for incapacitated stroke patients just so that they might be considered for participation in the research.

In the South African context, the absence of clear law on the topic of proxy consent conflicts with the clear expectation in the ethics guidelines that proxy consent is possible. As was mentioned above, the Constitution prohibits participation in research without informed consent. No other South African legislation or any case law currently provides further guidance on the meaning and scope of the constitutional prohibition. Most, if not all, South African research ethics committees seem content to follow the ethics guidelines without paying attention to the Constitution. In other words, they will accept an indication by the researchers that a “suitable proxy” will give consent to the enrolment of the person. Whether this practice violates a legal obligation is not yet clear, no matter having been pronounced upon judicially yet. In South Africa, clarification on this matter could come only from the courts, particularly the Constitutional Court. To ensure clear informed thinking on the topic of incapacitated adults, research ethics committee membership should include one or more persons familiar with and experienced in working with cognitively impaired adults or ad hoc members could be co-opted for purposes of protocols like this one.

In the circumstances, in light of the objection, the HREC must decide whether recruitment must be restricted to only capacitated adults or whether incapacitated participants may also be recruited.

### Informed Consent: Capacity

Adults are presumed to have the capacity to consent unless there is clear factual evidence to the contrary. This means that although the objection raised at the HREC meeting is reasonable, it would be unreasonable to assume that incapacity exists because the persons have had a stroke. Where there is doubt about the capacity of individual members of the study population, individual capacity

assessment procedures should be carried out. In other words, incapacity should not be assumed but must be established as a matter of fact. Individual capacity assessment looks after the individual’s rights and welfare, whereas the assumption of incapacity is disrespectful and undermines his or her dignity.

Stroke patients present a further complication for capacity assessment because they may retain the capacity to reason about what they want to do (or have done to them) but may have lost (temporarily) the ability to communicate their decisions effectively. It is important that such difficulties of communication are not confused with difficulties arising from loss of capacity. This distinction suggests that a capacity assessment in the present case should have two parts. First, the extent of the potential participant’s ability to communicate and to understand should be assessed, including how best to convey information to him or her and how to interpret his or her responses. For example, if articulating words is difficult because of slurring, but evidence of the ability to understand what is being said to him or her exists, then it ought to be assumed that this person has a communication difficulty rather than a capacity deficit. The patient may be able to blink to signal agreement or to apply some pressure with his or her hand on the hand of another person. If he or she can do this, he or she clearly evidences the ability to understand and to communicate, albeit in an unconventional manner, which means that it cannot be assumed that he or she lacks the capacity to consent. Information about whether the person is hearing impaired should also be elicited; deafness may otherwise be mistaken for incapacity. On the other hand, if there are evident difficulties with understanding what is said to him or her, then it is possible that a capacity deficit is present. In this event, the choice is either to exclude the person as a potential participant or to use a proxy decision maker, drawn from the list in the National Health Act, as outlined above. It is not feasible or appropriate for a researcher to apply to the High Court for the appointment of a curator. First, the researcher’s legal interest in the patient is unlikely to persuade the High Court to appoint a curator; secondly, the researcher is unlikely to have sufficient funds to sustain such an application.

The second part involves the standard assessment of capacity, which should be conducted taking the previous assessment of the ability to communicate and to understand into account. This part of the assessment would establish, according to the current protocols for capacity assessment, the extent of capacity deficit and the likelihood of any benefit from the standard “helping exercises” that seek to enhance the capacity to understand and to communicate.

If the capacity assessment leads to the conclusion that the prospective participant is incapacitated, then it may be warranted and appropriate to permit proxy consent, with the assent or agreement of the participant being sought where possible (Shalowitz et al., 2006). Assent allows the incapacitated person to at least indicate a willingness to cooperate or not. If the incapacitated person dissents or shows unwillingness to cooperate, then this person should be excluded from the research, notwithstanding the proxy consent to participate. This approach demonstrates respect for the incapacitated person (Wong et al., 2005).

The proposed study involves two interviews per participant. It is reasonable, therefore, to check before the second interview whether the participant is still willing to continue. In other words, the consent process is ongoing, whose approach keeps the distinction between assessment of risk and respect for autonomy clearly in mind. In appropriate circumstances, repeat capacity assessment procedures may be administered where capacity to consent might fluctuate.

### Risks and Benefits

In general, the ethics guidelines stipulate that participants who lack the capacity to consent should be exposed to no more than

minimal risk of harm. For example, if a study were to involve blood draws to check the biokinetics of drugs administered during the experiment, these blood draws are unlikely to be assessed as posing more than minimal risk of harm. Similarly, the drugs are unlikely to pose more than a minimal risk of harm if they would have been administered as part of the regular treatment of stroke patients.

The idea behind keeping the risk of harm at no more than the minimum protects the incapacitated participant who cannot consent, especially where his or her wishes are unknown. In certain circumstances, where the risk of harm is on the borderline between minimal risk and some increase to minimal risk of harm, additional protections might be called for through, for example, more frequent monitoring of the participants and regular reports to the HREC. However, research ethics committees should guard against being overly protective of cognitively impaired adults by requiring unnecessarily stringent additional measures. Such overprotection is not only unnecessarily paternalistic and potentially undermining of autonomy but also risks making important research too expensive and time consuming to conduct.

In the study under consideration, the balance between risk of harm and likelihood of benefit indicates that no more than minimal risk of harm is likely as a result of participating in two interviews that are unlikely to be contrary to the medical interests of the participants (Lewis, 2002). The purpose of the research is to observe the effect of the intervention on the participants' ability to communicate. The proposed intervention for the "experimental" groups forms part of usual treatment. Changing the bed location of two groups of patients seems to be a neutral action. Any risk of harm flowing from changing the bed location is likely to be minimal. The participants may experience some emotional discomfort resulting from frustration or irritation during the interviews or the standard "helping" exercises.

Although the likelihood of individual benefit is small, an invitation to participate is unlikely to be seen as coercive. Although in some cases, there may be concerns about doctors coercing patients into study participation, there is no reason for concern with this study. First, the stakes for the PI are not high; for example, she has no prospect of financial gain from doing the study. Secondly, the patients are in a hospital with multiple caregivers who are independent of the study team.

Moreover, the benefit that may be gained from the study shows the possibility of simple but effective interventions that would lead to better treatment outcomes, which evidences the anticipated social value of the study.

## CONCLUSIONS

When the law is unclear, a research ethics committee and the institution's legal counsel should assess the potential legal liability should the research go ahead. This contribution does not advocate doing research that is clearly unlawful. This study proposes research with adult stroke patients who can speak, albeit with difficulty, and whose cognitive abilities are compromised to some degree. It offers the possibility of generalizable knowledge that may benefit future stroke patients' care. The risk of legal liability seems negligible, and there is only a very low risk of harm. If the HREC were to take a strict legalistic approach, it would conclude that only capacitated persons may be recruited unless they have a court-appointed curator. This legalistic approach would prevent the opportunity to include incapacitated persons in research that poses a negligible risk of harm. Proxies should be chosen from the list in the National Health Act or in the Mental Health Care Act. These persons are authorized to make treatment decisions where necessary.

It may be concluded, therefore, that the South African HREC would act reasonably to permit the recruitment of both capacitated and incapacitated participants, the latter with appropriate proxies. The need for proxy consent, raised at the HREC meeting, should be

dealt with on an individual basis. It should not be assumed that compromised cognitive abilities or communication difficulties imply incapacity, thus making proxy consent necessary.

The recruitment process should include a process to assess the capacity to understand and to decide for each of the potential participants to ensure that the PI does not overlook particular individuals who, at first glance, seem to be incapacitated but actually have a communication difficulty. The important distinction between an inability to communicate and incapacity must be maintained to avoid requiring a proxy for someone who retains the capacity to consent. Someone other than the researcher should do the capacity assessment to avoid any suggestion of bias.

For those persons who cannot give consent, proxy consent with assent seems reasonable in the context of this study. Arguments in favor of including both capacitated and incapacitated participants include that the information to be gained would be applicable to treatment of all stroke patients (both low- and high-functioning), and the risk of harm is very low. In addition, potential benefit could be seen more quickly because faster enrolment would be possible.

The main points of this contribution highlight some of the important aspects to consider when proposing research that may include incapacitated adults. These include that incapacity is a factual question to be determined by an individual assessment and that sometimes, being incapacitated ought not to prevent inclusion in low-risk research when the likelihood of benefit to the class of patients seems good. Further points include a discussion of how to balance legal and ethical requirements, especially when these do not mirror each other. An important aspect is that there should be a clear ethical justification for doing the research when the legal framework is unclear. This is different from advocating unlawful research.

## FURTHER READINGS

The topic under consideration in this case study is complex. In many instances, research ethics committees/institutional review boards tend to err on the side of extreme caution in light of the possibility of being sued for enrolling a person into a study without "proper informed consent." In other words, the focus is on whether liability is high rather than on whether the individual person's interests are able to be properly considered and whether socially valuable research with incapacitated persons can be done within the limits of the law and ethics guidelines.

The readings recommended may assist researchers and RECs/institutional review boards to pick their way through these difficult issues.

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### DISCLOSURE

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