

Drilling Deep into the - Assisted Decision-Making (Capacity) Act 2015

The functional assessment of capacity

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Overview

- Where are we coming from?
- Human Rights journey to functional capacity
- Terminology
- Assisted Decision-Making (Capacity) Act 2015
 - Capacity to be construed functionally
- AC Supreme Court decision delivered 17 October 2019

Where are we coming from?

- Lunacy Regulation (Ireland) Act 1871
 - ‘not the source of the wardship jurisdiction’ (AC – para 361)
- No statutory definition of capacity in 1871 Act or
 - *No definitive judicial definition of what “unsound mind” means*
 - *Lack of clarity in relation to the legal test in the 1871 Act and lack of clarity around the definition, on which wardship jurisdiction is founded, may also present a cause for concern given the scope of the jurisdiction* (AC – para 376)
- Conflation of capacity from a medical perspective and legal perspective
- Focus on Medical model where focus on impairment from a medical perspective
- Status approach – assessment based on disability
- All-or-nothing approach of wardship
 - *‘the assessment of capacity on an all-or-nothing basis **would not vindicate rights as far as possible**’* (MX v HSE [2012] IEHC)

Constitution of Ireland (1937)

Personal rights enshrined in the Constitution include:

- *All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity..... (Article 40.1)*
- *The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen (Article 40.3.1)*

Constitutional Right recognised

- **In re Ward of Court (No 2) [1996] 2IR**

*The loss by an individual of his or her mental capacity **does not result in any discrimination of his or her personal rights recognised by the Constitution, including the right to life, the right to bodily integrity, the right to privacy, including self-determination, and the right to refuse medical care and treatment. The ward is entitled to have all these rights respected, defended, vindicated and protected from unjust attack and they are in no way lessened or diminished by reason of her incapacity***

- **AC v HSE (Supreme Court 2019)**

People who lack decision-making capacity are protected by the same constitutional guarantees as any other person (Para 394)

UN Declaration of Human Rights (1948)

Article 1

- All human beings are born free and equal in dignity and rights

European Convention on Human Rights

Article 1

- The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in...this Convention
- European Courts of Human Rights established

European Convention on Human Rights Act 2003

- ECHR incorporated into Irish law
- Irish Courts must interpret Irish law in a way which gives effect to the State's obligations under the ECHR and this applies regardless of whether legislation pre or post 2003
- Every organ of the State must perform its functions in a manner **compatible with the State's obligations under the ECHR**
- Judicial Notice must be taken of:
 - Any declaration, **decision**, advisory opinion or **judgment of the European Court of Human Rights**
 - Any decision or opinion of the European Commission of Human Rights
 - Any decision of the Committee of Minister of the Council of Europe

Council of Europe Recommendation (99)4 of the Committee of Ministers to Member States on Principles Concerning the Legal Protection of Incapable Adults February 1999

- **Respect for Human and Legal Rights**

The fundamental principle underlying all the other principles, is **respect for the dignity of each person as a human being.**

The laws, procedures and practices relating to the protection of incapable adults shall be based on respect for their human rights and fundamental freedoms

- The range of measures of protection should include, in appropriate cases, those which do not restrict the **legal capacity** of the person concerned

UN Convention on the Rights of Persons with Disabilities **2006** (Signed by Ireland 2007, Ratified 2018)

- Article 1 **Purpose – is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity**
- Article 4 **General obligations**
- Article 5 Equality and non-discrimination – Entitled to equal protection and equal benefit of the law
- **Article 12 Equal recognition before the law**
- Article 13 Access to Justice – Effective access to justice. State Parties shall promote appropriate training for those working in the field of administration of justice
- **Article 16 Freedom from exploitation, violence and abuse**
- Article 17 Protecting the integrity of the person
- **Article 22 Respect for privacy**

UNCRPD Article 4 - General Obligations

4.1 State Parties undertake to ensure and promote **the full realisation of all human rights and fundamental freedoms** for all persons with disabilities **without discrimination of any kind...** To this end, State Parties undertake:

- (a) To adopt appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present Convention
- (b) To take appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination...
- (c) To take into account the protection and promotion of human rights... in all policies and programmes
- (d) To refrain from engaging in any act or practice that is inconsistent with the Convention....
- (e) To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organisation or private enterprise.....

UNCRPD Article 12 – Core provisions in relation to 2015 Act

- State Parties reaffirm that persons with disabilities have the right to recognition everywhere **as persons before the law** (Art 12.1)
- State Parties shall recognise that persons with disabilities **enjoy legal capacity on an equal basis with others in all aspects of life** (Art 12.2)
- State Parties shall take appropriate measures to provide access by persons with disabilities to the **support they may require in exercising their legal capacity** (Art 12.3)
- State Parties shall ensure that all measures that relate to the exercise of legal capacity **provide for appropriate and effective safeguards to prevent abuse** in accordance with international human rights law (Art 12.4)

Human Rights perspective to Capacity

- Medical model > Human Rights model
 - Move away from medical model of disability/impairment to a rights based approach under the social model that supports a person to maximise his or her ability (capacity) to make decisions
 - Emphasis on the fact that a person with a disability has '**legal capacity**' - rights equal to others,
 - Move from focus on protection for the vulnerable towards an emphasis on autonomy, capacity and empowerment

Terminology/Test

- Legal Capacity
 - *The decision to deprive a person of legal capacity cuts at the autonomy of the individual in a fundamental way...* (AC para 374)
- Mental Capacity
- Decision-Making Capacity
- Is it a Medical Test or Legal Test

UN Committee on the Rights of Person with Disabilities

General Comment No.1 (2014)

- **Equality before the law** is a basic general principle of human rights protection and is indispensable for the exercise of other human rights
- There has been a **general failure to understand the human rights-based model** of disability
- State Parties must holistically examine all areas of law to ensure **that the right of persons with disabilities to legal capacity is not restricted** on an unequal basis with others.
- Art 12 of the Convention affirms that **all persons with disabilities have full legal capacity**. Legal capacity has been prejudicially denied to many groups throughout history.
- The denial of legal capacity to persons with disabilities has, in many cases, led to their being deprived of many fundamental rights – **including the right to consent to medical treatment and the right to liberty**.

Distinction between legal capacity and mental capacity

- **Legal capacity and mental capacity are distinct concepts**
- **Legal capacity** is the ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency)
- Legal capacity is key to accessing meaningful participation in society.
- **Mental capacity** refers to the **decision-making skills** of the person, which vary from one person to another and may be different for a given person depending on many factors – environmental and social factors
- Under article 12 of the UNCRPD, perceived or actual deficits in decision-making capacity **must not be used** as justification for denying legal capacity.

Medical v Legal Test

Decision-making capacity = Legal test (Right to consent and refuse)

Medical assessment of functioning of mind/mental state = Medical test

- Not until Fitzpatrick v FK [2008] did we have a judicial pronouncement on the legal test for decision-making capacity
- Medical Council's Guide to Professional Conduct and Ethics (2009), now 2019
 - *You must make sure that patients have given their consent before you provide any medical investigation, examination or treatment. **Consent is required by law** and is an essential part of respect for patients' autonomy. Patients have the right to decide what happens to their own body. They also have a right to refuse medical treatment or withdraw consent*
- HSE Consent Policy (2013) being updated

Legislation

- Adults with Incapacity (Scotland) Act 2000
- Mental Capacity Act 2005
- Assisted Decision-Making (Capacity) Act 2015
 - No disability tag
 - No diagnostic test
 - No best interests
 - Emphasis on assisting and supporting a person to make decisions

ADMC Act - Assessment of Capacity

- Assisted Decision-Making (Capacity) Act 2015
 - ***A person's capacity to be construed functionally*** (issue specific and time specific)
 - *A person's capacity shall be assessed on the basis of his or her ability to understand, at the time a decision is to be made, the nature and consequence of the decision to be made by him or her in the context of the available choices at that time.*
 - *It shall be presumed that a relevant person ...has capacity in respect of the matter concerned unless the contrary is shown in accordance with the provisions of this Act*

ADMC Act -Lack of Capacity

- *A person lacks of capacity to make a decision if he or she is unable –*
 - *to understand the information relevant to the decision (what is the decision that has to be made)*
 - *to retain that information **long enough to make a voluntary choice***
 - *to use or weigh that information as part of the process of making the decision, or*
 - *to communicate his or her decision (whether by talking, writing, using sign language, assistive technology, or any other means) or, if the implementation of the decision requires the act of a third party, to communicate by any means with that third party*

Criteria to ensure functional assessment followed

- A person is not to be regarded as unable to understand the information relevant to a decision if he or she is able to understand an explanation of it given to him or her in a way that is appropriate to his or her circumstances (whether using clear language, visual aids or any other means)
- The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him or her from being regarded as having the capacity to make the decision
- The fact that a person lacks capacity in respect of a decision on a particular matter at a particular time does not prevent him or her from being regarded as having capacity to make decisions on the same matter at another time
- The fact that a person lacks capacity in respect of a decision on a particular matter does not prevent him or her from being regarded as having capacity to make decisions on other matters
- Information = consequences of available choices or failure to make the decision

Functional Assessment

- There is a **strong constitutional argument that assessment of capacity**...should focus on whether a ward has the capacity to make a particular decision, at a particular time, in a particular context (AC – para 375)
- Functional assessment of capacity enables individual rights to be respected
- Functional assessment enables the an ascertainment of the supports a person may need to enable the person to make the decision

Pending full commencement of ADMC Act 2015

- Decision-making capacity must be assessed on a functional basis
 - In the health context it is all about the right to consent to and the right to refuse specific treatment, care and place of care
- Principles set out in the 2015 Act are rights already established in national law – constitutional rights
- Constitutional Rights of a person who lacks decision-making capacity must be safeguarded and vindicated
- Right to autonomy – voice of person must be heard even if assistance is necessary to enable the person to be heard

Thank You

A decorative graphic at the bottom of the slide consists of a solid green horizontal bar. Below this bar, on the right side, there are several overlapping horizontal lines in shades of green and white, creating a layered, modern look.