CAPACITY & TREATMENT

University College Cork & MHLA Conference

25th April 2015

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OUTLINE

- Autonomy/Capacity – a core right: the need for sufficient procedural safeguards.
- Recent High Court capacity determinations.
  ECHR – recent Strasbourg jurisprudence.
- *MX v. H.S.E.* – rights under the Constitution/the Mental Health Act 2001.
- Convention on the Rights of Persons with Disabilities.
- Children and capacity
  - Self admission
  - Refusal to agree to medication
  - Privacy and disclosure of treatment issues

Re A Ward of Court (No.2) [1996] 2 I.R. 79, per Hamilton C.J. at 126

The loss by an individual of his or her mental capacity does not result in any diminution 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 or 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.

PRINCIPLES FOR DETERMINING CAPACITY TO CONSENT TO TREATMENT

- In *Fitzpatrick v. F.K.* [2009] 2 I.R. 7, the principles to be applied in determining whether a person lacks the capacity to consent to, or refuse, medical treatment, were set out.
- 6 principles:

Fitzpatrick v. F.K. [2009] 2 I.R. 7

(1) There is a presumption that an adult patient has the capacity, that is to say, the cognitive ability, to make a decision to refuse medical treatment, but that presumption can be rebutted ...

(2) In determining whether a patient is deprived of capacity to make a decision to refuse medical treatment whether -

- (a) by reason of permanent cognitive impairment, or
- (b) temporary factors, for example, factors of the type referred to by Lord Donaldson in *In re T (Adult: refusal of medical treatment)* [1993] Fam. 95,

the test is whether the patient's cognitive ability has been impaired to the extent that he or she does not sufficiently understand the nature, purpose and effect of the proffered treatment and the consequences of accepting or rejecting it in the context of the choices available (including any alternative treatment) at the time the decision is made.

Fitzpatrick v. F.K. [2009] 2 I.R. 7

(3) The three stage approach to the patient's decision making process adopted in *In re C. (Adult: refusal of medical treatment)* [1994] 1 W.L.R. 290 is a helpful tool in applying that test. The patient's cognitive ability will have been impaired to the extent that he or she is incapable of making the decision to refuse the proffered treatment if the patient-

(a) has not comprehended and retained the treatment information and, in particular, has not assimilated the information as to the consequences likely to ensue from not accepting the treatment,

(b) has not believed the treatment information and, in particular, if it is the case that not accepting the treatment is likely to result in the patient's death, has not believed that outcome is likely, and

(c) has not weighed the treatment information, in particular, the alternative choices and the likely outcomes, in the balance in arriving at the decision.

Fitzpatrick v. F.K. [2009] 2 I.R. 7

(4) The treatment information by reference to which the patient's capacity is to be assessed is the information which the clinician is under a duty to impart - information as to what is the appropriate treatment, that is to say, what treatment is medically indicated, at the time of the decision and the risks and consequences likely to flow from the choices available to the patient in making the decision.

(5) In assessing capacity it is necessary to distinguish between misunderstanding or misperception of the treatment information in the decision making process (which may sometimes be referred to colloquially as irrationality), on the one hand, and an irrational decision or a decision made for irrational reasons, on the other. The former may be evidence of lack of capacity. The latter is irrelevant to the assessment.

Fitzpatrick v. F.K. [2009] 2 I.R. 7

(6) In assessing capacity, whether at the bedside in a high dependency unit or in court, the assessment must have regard to the gravity of the decision, in terms of the consequences which are likely to ensue from the acceptance or rejection of the proffered treatment. In the private law context this means that, in applying the civil law standard of proof, the weight to be attached to the evidence should have regard to the gravity of the decision, whether that is characterised as the necessity for "clear and convincing proof" or an enjoinder that the court "should not draw its conclusions lightly".

RECENT HIGH COURT CASES

- *Governor of X Prison* , 31st March 2015, Baker J.
  - 6 principles
  - oral evidence
  - distinction between capacity to accept recommended treatment and capacity to refuse
  - "Vulnerable Adult" jurisdiction
  - Advance decision
- *H.S.E. v. K.W.*, 12th March 2015, O'Hanlon J.
- *H.S.E. v. J.B.*, 5th March 2015, O'Hanlon J.

MX v. H.S.E.

[2012] 3 I.R. 254; [2013] 1 I.L.R.M. 322

- *personal capacity rights*" under the Constitution comprise the Article 40.3 values of self-determination, bodily integrity, privacy, autonomy and dignity, all unenumerated, but identified in case-law, as well as the explicit right to equality before the law, as identified in, and qualified by, Article 40.1 of the Constitution, and are all capable of vindication in the courts (para. 52)
- the broader range of constitutional "*personal capacity rights*" now fall to be informed by the United Nations Convention on the Rights of Persons with Disabilities, as well as the principles enunciated in the judgments of the European Court of Human Rights. The vindication of these rights to a sufficiently high level is necessary ... "*heightened scrutiny*" (para. 72, see also paras. 61 to 64)

MX v. H.S.E.

[2012] 3 I.R. 254; [2013] 1 I.L.R.M. 322

- there is a constitutional duty to ensure that the patient's views are heard, if necessary, through a representative in the form of "assisted" decision-making (para. 73) – this could be achieved, for example, through the help of carers, social workers or, perhaps most appropriately, family members (para. 75)
- capacity should be assessed in a specific and tailored manner, i.e. in respect of particular types of decisions which fall to be made – an "across the board" assessment of a person's capacity does not vindicate rights as far as practicable. (paras. 77 to 79)

MX v. H.S.E.

[2012] 3 I.R. 254; [2013] 1 I.L.R.M. 322

- the "*best interest*" test may also involve assessment of the patient's wishes (para. 78)
- *"... the plaintiff is entitled to both an independent review and to an assisted decision-making process in vindication of her rights*." (para 81)

H.S.E. v. X.Y.

[2013] 1 I.R. 574; [2013] 1 I.L.R.M. 305 (*J.M. & R.P.*)

"24. In expressing the view that X.Y. lacks capacity to refuse to provide a blood sample which is required, I am conscious that capacity can fluctuate. I am not to be taken as being of the view that there are no decisions of a medical nature which X.Y. would not have the capacity to take. Neither, am I laying down any general principle that young people aged 15 going on 16 should always be regarded as lacking capacity. The views are specific to this fifteen year old's capacity to refuse to allow a blood sample to be taken."

H.S.E. v. X.Y.

[2013] 1 I.R. 574; [2013] 1 I.L.R.M. 305 (*J.M. & R.P.*)

- *"29. ... there is a distinction to be drawn between capacity to consent to medical treatment that is proposed and capacity to refuse medical treatment."*
  Re. R. (a minor) (Wardship; consent to treatment) [1991] 4 All E.R. 177.

  [See, also, *Re E. (a minor) (medical treatment)* [1992] 4 All E.R. 627; *Re S (a minor) (consent to medical treatment)* [1994] 2 F.L.R. 1065; *Re E (a minor) (wardship: medical treatment)* [1993] 1 F.L.R. 386; and *Re L (medical treatment: Gillick competency)* [1999] 2 F.C.R. 524.]

- For commentary, see *Children's Rights in Ireland*, Kilkelly, 2008, Tottel, pp. 432-448; *Children's Rights and the Developing Law*, Fortin, 2nd edition, 2003, LexisNexis UK, pp. 121-135.
  NB – *Glass v. United Kingdom*, App. No. 61827/00, 9th March, 2004.

- Also held that section 25 of the Mental Health Act 2001 authorises not only a minor's detention, but also treatment.

X.Y. v. H.S.E.
[2013] 1 I.R. 592

Challenge to section 25(6) of the Mental Health Act 2001.

(6) Where the court is satisfied having considered the report of the consultant psychiatrist referred to in subsection (1) or the report of the consultant psychiatrist referred to in subsection (5), as the case may be, and any other evidence that may be adduced before it that the child is suffering from a mental disorder, the court shall make an order that the child be admitted and detained for treatment in a specified approved centre for a period not exceeding 21 days.

X.Y. v. H.S.E.
[2013] 1 I.R. 592

Birmingham J. held that section 25 when read as a whole and, in particular, with the provisions of the Child Care Act 1991, "*provides significant safeguards*" (para. 15).

"*It is true that the Child Care Act, the provisions of which were incorporated in the Mental Health Act 2001, does not in terms mandate the joining of the minor as a party or the appointment of a* guardian ad litem*, but it must be recalled that the District Court is mandated and is required to regard the welfare of the child as the first and paramount consideration and is mandated in so far as practicable , to give due consideration, having regard to his or her age and understanding, to the wishes of the child*." (para. 19)

X.Y. v. H.S.E.
[2013] 1 I.R. 592

21. In my view, judges in the District Court to whom applications are made will be very aware of the importance attached both domestically and internationally to hearing the voice of the child. The European Convention on Human Rights Act 2003 requires that judicial notice be taken of decisions of the European Court of Human Rights. Accordingly, one can be confident that courts will have regard to and be influenced by ECtHR jurisprudence when considering matters such as whether to join the child as a party, whether to appoint a guardian ad litem *or whether to seek an independent report.*

X.Y. v. H.S.E.
[2013] 1 I.R. 592

"… the central role of parents when it comes to the taking of decisions in relation to their child and their central role in determining if it is in the best interests of a child. It will ordinarily be the case that decisions in relation to a child's medical treatment will be taken on behalf of a child by his or her parents. That is so whether the child has or has not mental health issues." (para. 23)

X.Y. v. H.S.E.

[2013] 1 I.R. 592

Re "*Gillick*" competence, "*context is all*".

"*It seems to me that the considerations that apply in deciding whether a sexually active teenager should be permitted to access contraception are of an altogether different order to those that apply in deciding whether a troubled teenager should be permitted to refuse medical treatment so as to advance a determination to commit suicide. A capacity or entitlement to refuse is not necessarily to be equated with a capacity or entitlement to consent to treatment.*" (para. 25)

X.Y. v. H.S.E.

[2013] 1 I.R. 592

- *36. … it is my view that the provisions of s. 25 of the Mental Health Act are capable of being implemented in a manner that is fully constitutional and Convention compliant. It is to be expected and assumed that the legislation will be operated in just that fashion …*
- *37. The view that I have reached is based on my expectation that the Act will be implemented in the way that I have indicated. Indeed, a failure to do so might well render orders made susceptible to challenge. The HSE, which initiates s. 25 applications, has a particular interest in ensuring that orders made are robust and not susceptible to challenge. For that reason it would seem desirable that the HSE would adopt a practice of drawing the attention of the Court and the parties to the provisions in relation to the appointment of a guardian* ad litem*, so that the desirability of adopting this approach in a particular case or perhaps adopting some suitable alternative, such as joining the child as a party, can be considered.*

Stanev v. Bulgaria, 17th January, 2012.

- legal capacity is "*directly decisive for the determination of 'civil rights and obligations' "* such that Article 6 is engaged (para. 233)

- "*the right to ask a court to review a declaration of incapacity is one of the most important rights for the person concerned since such a procedure, once initiated, will be decisive for the exercise of all rights and freedoms affected by the declaration of incapacity*" and that "*such persons should in principle enjoy direct access to the courts in this sphere*" (para. 241)

Stanev v. Bulgaria, 17th January, 2012.

- 18 out of 20 national legal systems analysed re direct access to the courts for partially incapacitated persons wishing to have their status reviewed
- in 17, such access was open even to those declared fully incapacitated - "[*t]his indicates that there is now a trend at European level towards granting legally incapacitated persons direct access to the courts to seek restoration of their capacity*" (paragraph 243);
- Ireland was one of the two of the 20 Council of Europe states analysed in which "*judicial proceedings for the discontinuation of an order depriving a person of legal capacity cannot be instituted directly by the person concerned*" (underlining added) (paragraphs 88 to 90);

Stanev v. Bulgaria, 17th January, 2012.

- the Court felt "*obliged to note the growing importance which international instruments for the protection of people with mental disorders are now attaching to granting them as much legal autonomy as possible*" with particular reference to Article 12 of the Convention on the Rights of Persons with Disabilities which requires adequate procedural safeguards including periodic reviews (at paragraph 244);

- the Court did not confine itself to ordering redress under Article 41 of the ECHR but also made findings under Article 46, thus giving its judgment the status of a 'pilot judgment' or 'quasi-pilot judgment'.

X v. Finland, 3rd July, 2012

220. The Court considers that forced administration of medication represents a serious interference with a person's physical integrity and must accordingly be based on a "law" that guarantees proper safeguards against arbitrariness. In the present case such safeguards were missing. The decision to confine the applicant to involuntary treatment included an automatic authorisation to proceed to forced administration of medication when the applicant refused the treatment. The decision-making was solely in the hands of the treating doctors who could take even quite radical measures regardless of the applicant's will. Moreover, their decision-making was free from any kind of immediate judicial scrutiny: the applicant did not have any remedy available whereby she could require a court to rule on the lawfulness, including proportionality, of the forced administration of medication and to have it discontinued.

X v. Finland, 3rd July, 2012

221. On these grounds the Court finds that the forced administration of medication in the present case was implemented without proper legal safeguards. The Court concludes that, even if there could be said to be a general legal basis for the measures provided for in Finnish law, the absence of sufficient safeguards against forced medication by the treating doctors deprived the applicant of the minimum degree of protection to which she was entitled under the rule of law in a democratic society.

D.D. v. Lithuania, 14th February, 2012

Article 6 requirements include:

the applicant's right to express their view and be heard in court

Sykora v. Czech Republic
22nd November, 2012

- whilst Article 8 of the Convention contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and effective (para. 102)
- any deprivation or limitation of legal capacity must be based on sufficiently reliable and conclusive evidence. An expert medical report should explain what kind of actions the applicant is unable to understand or control and what the consequences of his illness are for his social life, health, pecuniary interests, and so on. The degree of the applicant's incapacity should be addressed in sufficient detail (para. 103)

Sykora v. Czech Republic
22nd November, 2012

- proceedings should be conducted in a manner that ensures that they are "*really adversarial and the applicant's legitimate interests [are] protected*" (para. 108);
- a person is entitled to see the judgment which deprives them of legal capacity, unless there are particular circumstances justifying its non-disclosure: *"... being aware of a judgment depriving oneself of legal capacity is essential for effective access to remedies against such a serious interference with private life."* (para. 101).

Lashin v. Russia, 22nd January, 2013

- the Court should see and hear the applicant or, if an exception is to be made, examine the issue carefully (para. 82)
- an up-to-date expert report is required and must be independent – "...*where the opinion of an expert is likely to play a decisive role in the proceedings ... the expert's neutrality becomes an important requirement ... Lack of neutrality may result in a violation of the equality of arms guarantee under Article 6 of the Convention ... an expert's neutrality is equally important in the context of incapacitation proceedings, where the person's most basic rights under Article 8 are at stake*" (para. 87)

Lashin v. Russia, 22nd January, 2013

- capacity findings should be limited and specific, not blanket – *"... the domestic court in the present case, as in* Shtukaturov*, had no other choice than to apply and maintain full incapacity – the most stringent measure which meant total loss of autonomy in nearly all areas of life. That measure was, in the opinion of the Court and in the light of materials of the case, disproportionate to the legitimate aim pursued*" (para. 92)
- the person whose capacity has been denied must be able to access Court for regular review. The provision of a guardian is not of itself sufficient where the guardian opposes bringing a review (para. 97).

Lashin v. Russia, 22nd January, 2013

The Court went as far as criticising the medical evidence.

119. The Court reiterates that normally it would not review the opinion of a doctor whose impartiality and qualifications were not called into question and who had the benefit of direct contact with the patient. In the present case, however, the Court is prepared to take a critical view of the findings of the psychiatrists, mostly because (a) their conclusions were not submitted to judicial scrutiny at the domestic level, (b) their neutrality was open to doubt, and (c) their reports were not specific enough on points which are crucial for deciding whether compulsory hospitalisation was necessary.

Pleso v. Hungary, 2nd October, 2012

Proportionality

66. ... the Court stresses that involuntary hospitalisation may indeed be used only as a last resort for want of a less invasive alternative, and only if it carries true health benefits without imposing a disproportionate burden on the person concerned.

CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

- Adopted by UN on 13th December, 2006.
- Ireland has signed it but has not ratified it yet.
- The European Union has acceded to it: *Council Decision 2010/48/EC.*
- A 'paradigm shift': *M.X. v. H.S.E.*, para. 30.
- Guide to the Constitution.
- Relied on by ECtHR.

Article 12 CRPD
Equal Recognition before the Law

Requires:

- recognition of persons with disabilities as equal to others before the law;
- in particular, recognition that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life;
- appropriate supports in order to enable persons with disabilities to exercise their legal capacity;

Article 12 CRPD
Equal Recognition before the Law

- effective safeguards for the exercise of legal capacity to ensure that decisions are made free of conflicts of interest or undue pressure;
- proportionate and "tailored" decisions;
- that any restriction on the exercise of legal capacity be "for the shortest time possible";
- regular review by a competent, independent and impartial authority or judicial body of decisions impinging on the exercise of legal capacity.

CONVENTION ON THE RIGHTS OF THE CHILD

Commentary by the UN Committee on the Rights of the Child:

- States need to ensure that specific legal provisions set a minimum age for medical treatment without parental consent.
- The minimum age should not discriminate on the grounds of gender and it should be set at a point that is in line with the principles of evolving capacity (under Art. 5), the child's age and maturity (Art. 12) and with reference to the fact that children under 18 years of age are rights-holders.

Committee on the Rights of the Child, CRC/GC/2003(4), para. 9.

A NEW ERA?

"The right of persons with disabilities to make choices about their lives and enjoy legal capacity on an equal basis with others is one of the most significant human rights issues in Europe today. Being recognised as someone who can make decisions is instrumental in taking control over one's life and participating in society with others ...

"The bulk of European legal capacity systems are out-dated and in urgent need of law reform …

"legal capacity goes beyond decision-making; it is about what it means to be human. The life choices we make are part of who we are…

"The outcome approach is contradictory and does not afford persons with disabilities the dignity of making mistakes and taking risks like the rest of us."

Thomas Hammerberg, Council of Europe Commissioner for Human Rights: "*Who Gets to Decide? Right to legal capacity for persons with intellectual and psychosocial disabilities*", CommDH/Issue Paper 20th February, 2012.

A NEW ERA?

66. … The Court is of the view that where, as in this case, the issue is not whether there is an imminent danger to the person's health but rather whether medical treatment would improve his condition or the absence of such treatment would lead to a deterioration in that condition, it is incumbent on the authorities to strike a fair balance between the competing interests emanating, on the one hand, from society's responsibility to secure the best possible health care for those with diminished faculties (for example, because of lack of insight into their condition) and, on the other hand, from the individual's inalienable right to self-determination (including the right to refusal of hospitalisation or medical treatment, that is, his or her "right to be ill"). In other words, it is imperative to apply the principle of proportionality inherent in the structure of the provisions enshrining those Convention rights that are susceptible to restrictions.

Pleso v. Hungary, 2nd October, 2012, App. No. 41242/08 (UNDERLINING ADDED).