

Medical treatment of vulnerable adults



Aisling Gannon, Beauchamps Solicitors, looks at the proposals for a Mental Capacity Bill in Ireland and what this would mean in terms of healthcare delivery

A recent English case highlights the continued lack of clarity in the absence of legislation governing mental capacity to consent to medical treatment in Ireland. In this case, the 55-year-old defendant patient had “a significant impairment in intellectual functioning as a consequence of a learning disability” (DH NHS Foundation Trust v PS [2010] EWHC 1217).

Although she agreed to undergo surgery for a life-threatening cancerous tumour, she then failed to attend the hospital for treatment.

The NHS in the UK applied for declarations to permit special arrangements (including, if necessary, non-consensual sedation and the use of force to administer it) in order to ensure that she had the operation and stayed in hospital until she recovered.

The medical evidence concluded that the patient did not have capacity within the meaning of the English Mental



Ruling allowed NHS to treat cancer patient, despite individual's refusal

Capacity Act 2005 to make decisions concerning her future medical treatment. Accepting this evidence, the English High Court ruled that in the circumstances, it would be lawful to impose treatment on the cancer patient, despite her refusal to consent.

Irish position

Currently in Ireland, where a person is considered incapable of managing his/her own affairs, an application to court must be made to make that person a ward of court. In 2008, the Government approved proposals for a Mental Capacity Bill,

but it is yet to be introduced into the Dáil.

It would effectively replace the wards of court system (in so far as it applies to adults allegedly lacking capacity). It is intended to provide a modern framework governing decision-making on behalf of persons who lack capacity.

It would also give effect to the Hague Convention on the International Protection of Adults and UN Convention on the Rights of Persons with Disabilities. The legislation would presume that a person had capacity and the person would not be treated as unable to make a decision unless all practicable steps to help that person make a decision had been taken without success.

Current guidelines

Until the proposals for a Mental Capacity Bill are agreed and then enacted, if a similar situation arose in Ireland today, the courts would most likely follow the guiding principles in

Fitzpatrick & Anor v K & Anor, where the High Court ruled that the Coombe Women's Hospital acted lawfully in giving a blood transfusion to a woman, a Jehovah's witness, who refused the treatment after suffering a haemorrhage post birth ([2008] IEHC 104). The relevant principles applicable as set out by Ms Justice Laffoy are as follows:

1. An adult has the capacity to refuse treatment, but it is a rebuttable presumption;
2. The patient's cognitive ability must be so impaired that he does not sufficiently understand the nature, purpose and effect of the treatment and the consequences of accepting or rejecting it, in light of all the choices available;
3. The cognitive ability will have been impaired to the extent that he is incapable of making the decision to refuse by reason of the following factors:
 - The patient has not comprehended and retained the treatment information and the consequences likely to ensue from their refusal;
 - The patient has not believed the treatment information, in particular, that death may be the likely outcome;
 - The patient has not weighed the treatment information,

the alternative choices and the likely outcomes in the balance in arriving at the decision.

4. The clinician is under a duty to impart information as to the medically advised appropriate treatment and the risks and consequences and the choices available to the patient;
5. The clinician must recognise misunderstanding and misperception of the treatment information, which may be evidence of a lack of capacity. An irrational decision or a decision made for irrational reasons is irrelevant to the assessment;
6. Regard must also be had to the gravity of the decision and the consequences that are likely to ensue.

In conjunction with the above, the treating clinician must at all times act in the patient's best interests. The proposals for the Mental Capacity Bill outline the hierarchy of persons with whom the treating consultant can review matters in relation to a patient deemed to lack capacity. This will provide significant assistance to clinicians, if enacted.

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