**Title**

Mental Disorders and Decision-Making Capacity: What is the Role of Law?

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**Abstract**

When a patient appears to have a mental disorder, doubts may arise about his or her decision-making capacity. Health professionals must then assess the patient’s capacity in order to make sure of the validity of his or her consent or refusal. Incapacity has indeed legal consequences, as law provides for the appointment of a surrogate decision-maker in case of incapacity. With Belgian law as a point of departure, this contribution is aiming at identifying the role of law in capacity assessment itself, prior to the decision about (in)capacity.

In order to protect the patient’s rights and to support the task of those carrying out the assessment, law should provide for a global definition of decision-making capacity and for a frame-procedure guiding this assessment. In my opinion, it is possible for law to contribute to the complex task of capacity assessment without interfering embarrassingly with healthcare practice.

**Keywords**

Decision-making capacity, mental disorder, capacity assessment, law, healthcare, surrogate, consent.

**Text**

In daily healthcare practice, there are numerous occasions where a health professional wonders whether the patient facing him understands what he is being said or is able to balance the advantages and disadvantages of a decision, regarding his or her specific situation. If this is the result of misunderstanding of medical language or lack of knowledge about bodily functions, professionals can help patients to improve their understanding of their own medical situation.[[1]](#footnote-1)

If, despite repeated explanations and thorough efforts to make information accessible, a doubt nevertheless remains about the possibility for a patient to deal with the relevant information, then the question may arise whether this patient has *decision-making capacity*.

With Belgian law as a point of departure, the present contribution is aiming at analyzing the role of law in the assessment of decision-making capacity, particularly for patients with a mental disorder. The terms “mental disorder” are here used in a broad sense and cover mental illness as well as intellectual disability or dementia.

1. **Capacity is the (unclear) rule…**

According to a generally accepted principle, *capacity is the rule and incapacity is the exception*. It means that every adult is presumed to be endowed with capacity,[[2]](#footnote-2) whatever his or her medical situation. What matters is not a diagnosis but the ability of the patient to make and convey a decision about a certain matter at a certain moment. As a consequence, living with a mental disorder, like Alzheimer disease or a psychiatric illness, does not necessarily mean that the patient has lost decision-making capacity.[[3]](#footnote-3) Capacity depends on the patient’s real abilities at the moment a decision must be made.[[4]](#footnote-4)

The manifestation of a mental disorder can nevertheless infer doubts about capacity and make it necessary for the health professional to assess the patient’s capacity. The purpose of such an assessment is to determine whether the patient can make a decision for him- or herself or whether a surrogate decision-maker must be appointed. Investigating decision-making capacity of a patient is not a rare task in medical practice…But is it only a matter of clinical practice, or does law have a part to play here?

I think it does and that Belgian law unfortunately fails to take on this part satisfactorily.

The Belgian Patient’s Rights Act only deals with the consequences of incapacity: *if the patient is incapacitated*, the health professional must address a surrogate decision-maker.[[5]](#footnote-5) However, beside this consequence, at least three other questions arise: What is capacity? Who should assess capacity? How should capacity be assessed? Law could at least provide for a definition and a procedure, as recommended by the World Health Organization.[[6]](#footnote-6)

1. **What is capacity? Need for a definition**

By dealing with the consequences of incapacity, law implies that the patient’s capacity should be assessed. So, law should first provide for a definitionto clarify the criteria on which such an assessment should be based. Moreover, if patients cannot realize easily what they have been assessed on, the right to appeal remains very theoretical: to be able to challenge a decision about one’s capacity or incapacity, patients need to know what these concepts really encompass.

In this respect, the purpose of law is only to be consistent, not to try to describe in details a complex and changing reality, assuming that such a definition is possible. In order to help health professionals and patients to have an idea of the skills referred to by *capacity*, broad criteria defining this conceptcould be mentioned in a legal text. In Belgium, it could be the Patient’s Rights Act or a more general instrument dealing with incapacity and its consequences, such as the Code of Civil Law.

Concretely, decision-making capacity is the ability to

* understand the relevant information, which implies that the received information was conveyed in a clear and accessible language;
* assess one’s own situation and the reasonably foreseeable consequences, for oneself, of the decision;
* reason about treatment options, to weigh up different options; the *result* must not be reasonable but the *process* must be understandable, in accordance with one’s values;
* make one’s choice known.[[7]](#footnote-7)

1. **Who assesses capacity? Need for a procedure**

Concerning the professional assessing capacity, the Belgian Patient’s Rights Act provides that the “health professional” will address a surrogate decision-maker if the patient cannot exercise his or her rights by him- or herself. Consequently, any health professional is supposed to assess a patient’s capacity when a decision must be made within his or her field of competence.

Law should be more specific about who assesses the patient’s capacity,in order to underline the difference between *formal* and *informal* capacity assessment. In everyday practice health professionals perform assessments of their patients’ capacity all the time, but these are informal assessments: a mere maybe even unconscious observation that the presumption of capacity should not be questioned. Healthcare practice would be impossible if every single patient had to be submitted to a formal assessment, despite an apparent capacity. It is only when a health professional has a doubt about a patient’s capacity that a formal assessment should be carried out,[[8]](#footnote-8) following specific guidelines.

Any health professional can form a first opinion about a patient’s capacity, but the formal assessment needed in case of doubt should be performed by a duly trained physician. Whether this physician is a psychiatrist or another physician matters probably less than his or her specific training and experience regarding capacity assessment.[[9]](#footnote-9) According to a recent research conducted among members of the American Academy of Psychosomatic Medicine, even psychiatrists find capacity assessments challenging and feel under-trained to deal with that task.[[10]](#footnote-10)

So, in addition to criteria guiding capacity assessment, law could promote a specific training for the professionals who will be expected to carry out these assessments, by expressly declaring that only these trained professionals will perform formal assessments and by defining the minimum conditions of an appropriate training. This should at least be provided for certain categories of patients, whose capacity is particularly complex to assess, like people living with a mental disorder. In Belgian law, Royal Decrees[[11]](#footnote-11) could be issued, in conformity with the Patient’s Rights Act,[[12]](#footnote-12) to specify the training which should be attended by the professionals who are supposed to carry out these formal assessments of the capacity of patients with mental disorders.

1. **How should capacity be assessed? Still need for a procedure**

Finally**,** even if there is an implicit consensus to say that a health professional has to assess a patient’s capacity before trying to obtain his or her consent, the Belgian Patient’s Rights Act is mute on how such an assessment should be carried out.

Of course it is not the role of law to tell health professionals how to do their job but providing for a *frame-procedure* guiding capacity assessment would be an acknowledgment of the complexity of this process.

A minimal but legally sustained procedure could help to realize that a mere doubt about capacity is not a statement of incapacity and that it only calls for a more formal assessment, without prejudice to the conclusion of that assessment. A legal frame could also help the professionals in charge of assessment structuring their assessment or comfort them in the idea that a statement of capacity or incapacity is the result of a balance of probabilities[[13]](#footnote-13) and not the observation of a categorical and unchanging reality: as certitude is dangerous in that field, law could help to assume a certain level of uncertainty. Last but not least, the systematic use of a similar procedure could stimulate good practices’ exchanges and evidence-based research about the reliability of capacity assessment tests, in order to be more able to define in a next step what the best practices are.

In practice, numerous assessment tools exist, like the “Aid for Capacity Evaluation” of the University of Toronto[[14]](#footnote-14) or the “Mac Arthur Competence Assessment Tool-Treatment”,[[15]](#footnote-15) but there is no universal consensus and it is not the role of law to freeze practices by imposing a tool or another. Law could however provide at least for a procedure with minimum steps and principles to be respected: using a tool recognized as efficient by peers, carrying out an assessment which is specific to a decision, trying to identify causes of incapacity and to remedy them,[[16]](#footnote-16) describing the assessment process and observations in the patient’s record, performing regular re-assessments…

1. **Conclusions**

The consequences of a statement of incapacity are heavy, for the patients can be denied the possibility to exercise their rights – particularly the right to consent to or to refuse a treatment – by themselves. Therefore, law should not only pay attention to the *consequences* *of incapacity* but also to *capacity itself and the* *process* *guiding its assessment*. As our legal culture promotes patient’s autonomy, it is quite inconsistent not to deal with the elements that will lead a health professional to address a surrogate decision-maker beside (instead of?) the patients themselves.

Moreover, the need for capacity assessment will only grow in the future: on the one hand, the population is aging and will be likely to face capacity troubles caused by dementia;[[17]](#footnote-17) on the other hand, “all or nothing” solutions are not accepted anymore. Nowadays, consequences of incapacity must be tailored, adapted, to this incapacity, which makes precise assessments necessary.[[18]](#footnote-18)

For these reasons, law should deal, even minimally, with the process of capacity assessment.

Protecting the rights of vulnerable patients implies they could challenge a statement of incapacity, which is far easier if the assessment process is a bit formalized. A legal frame would also help to realize that any doubt about capacity is not a declaration of incapacity but calls for a more formal assessment: hasty declarations about capacity involve high risks of violating the patient’s rights, as the patients could be denied the right to decide by themselves even if they are able to, or, conversely, they could be deprived of the protection they should be granted.

From the health professionals’ point of view, law could provide a useful support to structure formal capacity assessment. By providing a framework for capacity assessment, law could also offer itself the opportunity to promote an appropriate training and to stimulate research concerning capacity assessment.

As a whole, ignoring capacity assessment has the perverse effect to suggest that it is an obvious matter: a patient is capacitated or not, and if not, a representative will make healthcare decisions on his behalf. It is maybe true when a patient is in a coma, but in the field of mental health, things are not that clear. Law therefore fails twice: first because it does not provide for guidelines, and second because this gap is misleading about the complexity of capacity assessment.

Law should then emphasize the importance of capacity assessment. Of course, law cannot encompass the whole complexity of such a process: a legal definition and a procedure will not solve every difficult issue of capacity assessment in practice, but this is no reason not to try to contribute by providing minimum guidelines, in order to acknowledge the complexity of the matter.

1. O.S. Surman, “Informed Consent: What the Patient Heard”, *Transplantation Proceedings* 45 (2013) 3155-3156; M.E. Falagas *et al.*, “Informed consent: how much and what do patients understand?”, *The American Journal of Surgery* 198(3) 2009 420-435; C.E. Wills and M. Holmes-Rovner, “Patient comprehension of information for shared treatment decision making: state of the art and future directions”, *Patient Education and Counseling* 50 (2003) 285–290.

   Improving patients’ understanding of information provided certainly requires high communication skills and the mere possibility, for any patient, to give an “informed consent” should be further investigated, but it is not the purpose of this contribution. [↑](#footnote-ref-1)
2. World Health Organisation. 2005. “Resource book on mental health, human rights and legislation”. Retrieved 23 April 2014, [www.who.int/mental\_health/policy/resource\_book\_MHLeg.pdf](http://www.who.int/mental_health/policy/resource_book_MHLeg.pdf), 40 [↑](#footnote-ref-2)
3. L.W. Roberts and A.R. Dyer, *Concise Guide to Ethics in Mental Health Care*, (Washington DC/ London: American Psychiatric Publishing Inc., 2004) 54; MacArthur Research Network on Mental Health and the Law. 2004. “The MacArthur Treatment Competence Study”. MacArthur Research Network on Mental Health and the Law. Retrieved 23 April 2014, [www.macarthur.virginia.edu/treatment.html](http://www.macarthur.virginia.edu/treatment.html) [↑](#footnote-ref-3)
4. In Belgian law precisely, even when a person has been made globally incompetent by effect of a judicial decision appointing a guardian, the patient must be “associated to the exercise of [his/her] rights as much as possible, given [his/her] ability to understand” (Patient’s Rights Act 2002. (c.4, s.13(2). Retrieved 23 April 2014, [www.ejustice.just.fgov.be/loi/loi.htm](http://www.ejustice.just.fgov.be/loi/loi.htm)). The new law about incapacity, due to come into force on the 1st of June 2014, emphasizes further the necessity to take into account the real capacity of the patient at the moment a decision must be made, regardless of a possible previous decision of incapacity in healthcare matters (Loi du 17 mars 2013 réformant les régimes d'incapacité et instaurant un nouveau statut de protection conforme à la dignité humaine, art. 215 – Act reforming incapacity regimes and introducing a new protection status in accordance with human dignity 2013. (c.18, s.215). Retrieved 23 April 2014, [www.ejustice.just.fgov.be/loi/loi.htm](http://www.ejustice.just.fgov.be/loi/loi.htm)). [↑](#footnote-ref-4)
5. Patient’s Rights Act 2002. (c.4, s.14). Retrieved 23 April 2014, [www.ejustice.just.fgov.be/loi/loi.htm](http://www.ejustice.just.fgov.be/loi/loi.htm) [↑](#footnote-ref-5)
6. World Health Organisation, *supra* note 2. [↑](#footnote-ref-6)
7. K. Rotthier, *Gedwongen opname van de geesteszieke*, (Bruges: Die Keure, 2012) 272; L.L. Sessums *et al.*, “Does this Patient Have Medical Decision-Making Capacity?”, *JAMA* 306(4) (2011) 421, quoting P.S. Appelbaum and T. Grisso, “Assessing patients’ capacities to consent to treatment”, *N Engl J Med*. 319(25) (1998) 1635-1638; P. S. Appelbaum, “Assessment of Patients’ Competence to Consent to Treatment”, *N Engl J Med*. 357(18) (2007) 1836; similar definitions in the England and Wales Mental Capacity Act 2005 (c.1, s.3: general definition of inability to make decisions. Retrieved 26 April 2014, [www.legislation.gov.uk/ukpga/2005/9/part/1](http://www.legislation.gov.uk/ukpga/2005/9/part/1)), in the Ontario Health Care Consent Act 1996 (c.1, s.4(1) : conditions of capacity with respect to a treatment, admission to care facility or a personal assistance service. Retrieved 26 April 2014, [www.e-laws.gov.on.ca/](http://www.e-laws.gov.on.ca/)) and decisions of the Ontario Consent and Capacity Board (e.g. CL (Re), 2013 CanLII 59146 (ON CCB). Retrieved 25 April 2014, [www.canlii.ca/t/g0kz7](http://www.canlii.ca/t/g0kz7)). [↑](#footnote-ref-7)
8. L.L. Sessums *et al.*, *supra* note 7, 421; S. Verma and M. Silberfeld, “Approaches to Capacity and Competency: The Canadian View”, *International Journal of Law and Psychiatry* 20(1) (1997) 41. [↑](#footnote-ref-8)
9. L.L. Sessums *et al.*, *supra* note 7, 421; L. Ganzini *et al.*, “Pitfalls in Assessment of Decision-Making Capacity”, *Psychosomatics* 44(3) (2003) 242. [↑](#footnote-ref-9)
10. L. Seyfried *et al.*, “Assessment of Decision-Making Capacity: Views and Experiences of Consultation Psychiatrists”, *Psychosomatics* 54(2) (2013) 115-123. [↑](#footnote-ref-10)
11. Belgian legal instruments issued by Government and providing for details about implementation of an Act. [↑](#footnote-ref-11)
12. Patient’s Rights Act 2002. (c.2, s.3(2)). Retrieved 23 April 2014, [www.ejustice.just.fgov.be/loi/loi.htm](http://www.ejustice.just.fgov.be/loi/loi.htm) [↑](#footnote-ref-12)
13. As explicitly said in the English and Welsh Mental Capacity Act 2005. (c.1, s.2(4)). Retrieved 26 April 2014, [www.legislation.gov.uk/ukpga/2005/9/part/1](http://www.legislation.gov.uk/ukpga/2005/9/part/1) [↑](#footnote-ref-13)
14. Joint Center for Bioethics of the University of Toronto. “Aid for Capacity Evaluation”. University of Toronto, Joint Center for Bioethics. Retrieved 26 April 2014, [www.jointcentreforbioethics.ca/tools/ace\_download.shtml](http://www.jointcentreforbioethics.ca/tools/ace_download.shtml) [↑](#footnote-ref-14)
15. Or MacCAT-T; *supra*, note 3. For a review of the available tools, see L.L. Sessums *et al.*, *supra* note 7. [↑](#footnote-ref-15)
16. L.L. Sessums *et al.*, *supra* note 7, 424; P. S. Appelbaum, *supra* note 7, 1838. As an example of the possibility and importance to try to improve decision-making capacity, a study showed the influence of severe depression on advance treatment directives and concluded that these patients should be encouraged to postpone such directives until they have received treatment for their depression (L. Ganzini *et al.*, “The effect of depression treatment on elderly patients' preferences for life-sustaining medical therapy”, *Am J Psychiatry* 151(11) (1994) 1631-1636. [↑](#footnote-ref-16)
17. World Health Organisation, *supra*, note 2, 2. [↑](#footnote-ref-17)
18. L. Seyfried *et al.*, *supra*, note 10; S. Verma and M. Silberfeld, *supra* note 8. The above quoted evolution of Belgian law (*supra* note 4) follows this line, in compliance with international recommendations (United Nations. 2006. *Convention on the Rights of Persons with Disabilities*. Retrieved 26 April 2014, [www.un.org/disabilities/convention/conventionfull.shtml](http://www.un.org/disabilities/convention/conventionfull.shtml), c.12.4; Council of Europe. 1999. *Recommendation n° R(99)4 of the Committee of Ministers to Member States on Principles Concerning the Legal Protection of Incapable Adults*. Retrieved 26 April 2014, [www.coe.int/t/dg3/healthbioethic/texts\_and\_documents/](http://www.coe.int/t/dg3/healthbioethic/texts_and_documents/), c.2,s. 2). [↑](#footnote-ref-18)