

Mental Capacity in Legislation and Practice: Implications for Professionalism, Ethics and Care

Brendan Kelly



**TRINITY
COLLEGE
DUBLIN**

Disclosure Statement / Declaration of Interest

No conflict of interest

Nominated by the College of Psychiatrists of Ireland to:

- **HSE National Implementation Group for the Assisted Decision-Making (Capacity) Act 2015**
- **Ministerial Group on Advance Healthcare Directives**

Mental Health in Ireland

*The Complete Guide for Patients,
Families, Health Care Professionals
and Everyone Who Wants To Be Well*

Brendan Kelly



theliffeypress.com

*...includes a
chapter on the
Assisted
Decision-Making
(Capacity) Act
2015*

- 1 Legislative background**
- 2 How common is mental incapacity in Ireland?**
- 3 Advance healthcare directives and suicide**
- 4 Deprivation of liberty**
- 5 Take home messages**

1 **Legislative background**

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Number 64 of 2015

Assisted Decision-Making (Capacity) Act 2015

How much decision-making authority is given away?

No Circuit Court

1. **Decision-making assistant**

0%

2. **Co-decision-maker**

? 50%

3. **Decision-making representative**

100%

Circuit Court

*Advance
healthcare
directives*

*Deprivation
of liberty?*



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Lack mental capacity

Internationally

Medical inpatients	34%
Psychiatry inpatients	45%

Ireland

Medical inpatients	28%	<i>Dr Ruth Murphy</i>
Psychiatry inpatients	?	<i>Dr Aoife Curley</i>
Nursing home patients	?	

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Codes of practice published for consultation

- **Draft Code of Practice for Health and Social Care Professionals on Advance Healthcare Directives**
- **Draft Code of Practice on How to Make an Advance Healthcare Directive**
- **Draft Code of Practice for Designated Healthcare Representatives**

HSE website

Closing date: 4 May 2018

Autonomy

Nonmaleficence

Beneficence

Justice

**Advance
healthcare
directives**

Criminal Law (Suicide) Act, 1993

A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for a term not exceeding 14 years

Mrs Young, an 89-year woman, made an Advance Healthcare Directive (AHD) refusing life sustaining treatment, including artificial hydration and nutrition, in circumstances including her current state of health

- **Increasingly immobile due to arthritis**
 - **Felt she could no longer live in her own home as result**
 - **Told those close to her that she prayed every day for death**
 - **Voluntarily stopped eating and drinking, reminding those close to her, who were upset by this, that she would be happy to die**
 - **After a week, Mrs Young slipped into a coma**
-
- **Her family called her doctor who found that she was severely dehydrated and would die without intravenous fluids**
 - **He was aware of AHD & her expressed statement that she prayed for death**
 - **He concluded that in giving effect to AHD, he would not be aiding or abetting in her suicide**
 - **Accordingly, he respected her will and preferences as expressed in AHD**

This vignette shows the kinds of difficult decisions which must be made around attempted suicide

Mrs Young's doctor concluded that while Mrs Young had said that she would be happy to die, her decision to stop eating did not constitute an attempt to die by suicide

On this basis, he concluded that complying with her valid and applicable AHD did not constitute aiding or abetting suicide

Accordingly, in light of her legally binding AHD, he did not attempt to administer intravenous fluids contrary to her expressed will and preference

Mr Ahmed, 72-year-old man, on dialysis several times a week for decades

- **Wife had died a few weeks earlier**
 - **Although his doctor didn't feel he was depressed, Mr Ahmed had been feeling very lonely**
 - **Told family & friends that he hoped that own death would occur soon**
 - **Decided not to continue dialysis**
 - **Called to dialysis unit to explain decision and say goodbye**
-
- **Made AHD refusing dialysis, stating it was to apply even if life was at risk**
 - **Discussed AHD with daughter (Designated Healthcare Representative)**
 - **Daughter contacted GP who makes a home visit to Mr Ahmed**
 - **Confirmed acute kidney failure which could only be treated with dialysis**
 - **Daughter confirmed that Mr Ahmed had been entirely clear in his wish to decline treatment in this specific circumstance and, in her view, this was a clear expression of his wishes regarding treatment**
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- **GP reviewed AHD and confirmed this was his expressed wish**
 - **GP arranged palliative care for Mr Ahmed in his own home**

The vignette reinforces the requirement that a valid and applicable AHD applies even if the effect is the death of the Directive-Maker (provided that the AHD states that it is to apply in these circumstances)

The fact that a person has expressed a wish to die does not mean that his or her refusal of treatment constitutes suicide

The GP took steps to confirm with Mr Ahmed's Designated Healthcare Representative that declining treatment was in accordance with his wishes

Having had this confirmed, he was legally required to comply with Mr Ahmed's refusal of treatment in his AHD

- **Mr Bell: 49-year old man, history of depression, two previous deliberate ODs, significant disability due to a stroke**
- **Brought to ED having been found unconscious at home**
- **Some months earlier he had made an AHD noting his poor quality of life stating he did not want to be investigated and treated if he were to become acutely ill for any reason, including cardiac, respiratory or neurological disease, even if that choice placed his life at risk**
 - **Mr Bell's consultant: aware of the AHD but uncertain why Mr Bell had become unexpectedly unwell**
 - **She noted that investigations to exclude OD are always performed in anyone presenting with unexplained reduction in consciousness**
 - **But it would take half an hour for the test result to return and Mr Bell's breathing was becoming shallow and his life at immediate risk**
 - **Decides to perform the blood test and ventilate Mr Bell for now**
 - **Plan to discontinue ventilation if the blood result did not confirm OD**
 - **Test results show no OD; ventilation discontinued**
 - **Mr Bell dies according to his will and preference as expressed in AHD**

This vignette indicates a real possibility that Mr Bell's acute life-threatening condition was due to attempted suicide

This gave rise to uncertainty as to whether Mr Bell's refusal of treatment could be observed or whether this would constitute aiding and abetting suicide

The decision to test for an overdose is reasonable given Dr Palmer's knowledge of Mr Bell's background

If there was no evidence of attempted suicide, Mr Bell's refusal of treatment in his AHD would be observed

If there was evidence of attempted suicide, Section 2 of the Criminal Law (Suicide) Act 1993 may apply

A Health and Social Care Professional who provides treatment to a person contrary to his or her valid and applicable AHD may be found to have committed an assault for which s/he may be made liable at:

- **civil law (i.e. through a legal action taken by the Directive-Maker or a person acting on behalf of the Directive-Maker) and/or**
- **criminal law (i.e. through a prosecution for assault/battery)**

However, Health and Social Care Professionals are not liable where s/he:

- **did not comply with a refusal of healthcare treatment provided that s/he had reasonable grounds to believe AHD was not valid or applicable**
- **complied with a refusal of healthcare treatment set out in AHD provided that s/he had reasonable grounds to believe AHD was valid and applicable**
- **had no grounds to believe AHD existed**
- **had grounds to believe AHD existed but had no immediate access to it and the medical condition was sufficiently urgent that s/he could not reasonably delay taking appropriate medical action until s/he had access to the AHD**

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A UK Supreme Court ruling in March 2014 (Cheshire West) made reference to the ‘acid test’ to see whether a person is being deprived of their liberty:

If a person (a) without capacity is (b) under continuous supervision and control and (c) is not free to leave...

...then this amounts to a deprivation of liberty within the meaning of Article 5 of the European Convention on Human Rights

Draft Heads of Bill published late 2017

Consultation ended March 2018

College submitted a response

May 2018

**“Mental Capacity and
Deprivation of Liberty in Ireland:
Where Next?”**



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Assisted Decision-Making (Capacity) Act 2015 is not yet commenced (*date mentioned: January 2019*)

- **Three levels of decision-making support**
- **Advance health-care directives**
- **Enduring power of attorney**

Deprivation of liberty measures are being developed as an add-on (*consultation ended: March 2018*)

Codes of practice on advance health care directives available for consultation on the HSE website (*consultation closing date: 4 May 2018*)

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