



Capacity assessments under the Mental Capacity Act 2005 post-neurointervention: the role and assessment of ‘authenticity’

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The assessment of capacity under the Mental Capacity Act 2005 (MCA)

- Section 2

- “a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain”

- Section 3

- “a person is unable to make a decision for himself if he is unable—
 - (a) to understand the information relevant to the decision,
 - (b) to retain that information,
 - (c) to use or weigh that information as part of the process of making the decision,
or
 - (d) to communicate his decision (whether by talking, using sign language or any other means)”

Concerns re capacity test

- Absence of authenticity considerations
 - Unable to capture situations when content of values, rather than the reasoning processes, has been affected by illness (Auckland)
 - Fails to take into account ways in which affective attitudes can impact upon decision-making capacity (Hope et al, Herring & Wall)
- Developments in neurotechnology (such as deep brain stimulation (DBS)) and evidence of changes in personality and identity after use of neurotechnology adds to concern
- Is current capacity assessment under the MCA insufficiently equipped to deal with authenticity-related challenges to capacity?

The concept of authenticity

- Being 'true' to oneself
- Necessary for autonomy on many philosophical accounts
- Is authentic self 'essentialist' or 'existentialist' in nature?
- Conceptions of authenticity
 - Jesper Ahlin's threefold categorization:
 - Sanctionist – e.g. Frankfurt, Dworkin
 - Originist – e.g. Tan et al, Elster
 - Coherentist – e.g. Ekstrom, Pugh

Fitting authenticity into the capacity assessment (or not?)

- Proposals to incorporate authenticity into current capacity assessment:
 - Auckland
 - Additional authenticity limb, assess authenticity using originist theory – are values attributable to mental disorder?
 - Easier to operationalize, but originist theories raise concerns at conceptual level – e.g. how to identify which values are attributable to mental disorder

- Proposals to incorporate authenticity into current capacity assessment:
 - Wall
 - Expand interpretation of ‘use or weigh’ criterion to cover assessment of ‘whether an advantage, disadvantage, or consideration associated with a decision has been given **sufficient or appropriate weight** by the decision-maker where the decision-maker has an ‘impairment’ that may undermine the decision-maker’s appreciative ability’
 - In context of depression, does individual demonstrate ‘minimal concern for themselves and their circumstances’?
 - But determination is substantive - requires drawing upon external, objective values and standards

- Proposals to incorporate authenticity into current capacity assessment:
 - Pugh
 - Supplement ‘use or weigh’ criterion with non-substantive conception of rationality
 - But requires autonomous decision-making be grounded in reflected emotional states
 - Law does not typically recognize actions motivated by **unreflective or irrational drives** as incapacitous → i.e. results in threshold for decision-making capacity being raised too high

My proposal - background

- Paul Skowron's 3 accounts of relationship between capacity and autonomy in English law
- 'Insufficiency' account: capacity is necessary but not sufficient – voluntariness / freedom from undue external influence is also required
- Similar to Beauchamp & Childress' account of autonomy:
 - (i) intention, (ii) understanding; (iii) absence of controlling influences (includes internal influences such as psychiatric disorders)
 - No explanatory account of what kinds of influences are 'controlling'?
 - Pugh: theory of authenticity and its role in autonomous agency may be able to better explain why these forms of internal influence undermine autonomy

- Key difference between insufficiency account and Beauchamp & Childress' account:
 - 'Controlling influences' in the law → generally forms of **external** influence
 - Skowron:
 - 'distinction between the internal and external limitations on autonomy'
 - 'The MCA requires an inability to decide because of an impairment, so it is largely restricted to the internal constraints on autonomy... In contrast, the insufficiency account, which says that autonomy requires both capacity and voluntariness, allows attention to the person's external circumstances'
 - 'The possible reasons that a person's autonomy can be 'compromised' are further specified as being 'under constraint', 'subject to coercion or undue influence', or 'for some other reason deprived of the capacity to make the relevant decision or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent'.'

My proposal

- Align legal position more closely to Beauchamp & Childress' account, with authenticity assessment to differentiate controlling influences
 - Current formulation already includes 'for some other reason... incapacitated or disabled from giving or expressing a real and genuine consent'
- Two steps: capacity and voluntariness

- Step 1: Capacity test under section 3 of MCA
 - (1) Does the psychiatric disorder or impairment affect the individual's decision-making capacity?
 - If yes, the individual would be deemed to lack capacity and best interests assessment could proceed. If no, proceed to Step 2 **only where authenticity concerns have been raised**
- Step 2: Voluntariness test
 - (2) Does the psychiatric disorder or impairment exert a controlling influence over the individual's decision-making process, so that it can properly be said that the decision is not of the individual's own volition?
- Threshold for authenticity?

Assessing authenticity

- ‘Radical interpretation’ approach (Banner & Szmukler, see also Pugh)
 - Broadly coherentist conception of authenticity
 - Permits radical changes in motivating desires, as long as changes are ‘intelligible’ to individual in light of system of values and commitments

References

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Thank you so much for your time!