

Adrian D Ward

towards fully inclusive laws and legal systems

**CONVERSATIONS ABOUT DEATH AND DYING**  
**5<sup>TH</sup> SEPTEMBER 2018**

**“CAPACITY LAW”**

by

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*“Our general principles do not rely on the concept of best interests of the incapable adult ... We consider that ‘best interests’ by itself is too vague and would require to be supplemented by further factors which have to be taken into account. We also consider that ‘best interests’ does not give due weight to the views of the adult, particularly to wishes and feelings which he or she had expressed while capable of doing so. ...”*

*“... The concept of best interests was developed in the context of child law where a child’s level of understanding may not be high and will usually have been lower in the past. Incapable adults such as those who are mentally ill, head-injured, or suffering from dementia at the time when a decision has to be made in connection with them, will have possessed full mental powers before their present incapacity. ...”*

*“... We think it is wrong to equate such adults with children, and for that reason would avoid extending child law concepts to them. Accordingly, the general principles we set out below are framed without express reference to best interests.”*

- (1) There must be benefit.*
- (2) Minimum necessary intervention in relation to the adult's freedom.*
- (3) Adult's present and past wishes and feelings.*
- (4) Views of others.*
- (5) Encourage exercise and development of skills.*

*The benefit principle “is indeed the core principle namely that it is the welfare of the adult and the benefit to the adult which is the overarching principle”.*

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- (2) Minimum necessary intervention in relation to the adult's freedom.*
- (3) Adult's present and past wishes and feelings.*
- (4) Views of others.*
- (5) Encourage exercise and development of skills.*

*1. – (6) For the purposes of this Act, and unless the context otherwise requires –*

*“adult” means a person who has attained the age of 16 years;*



*“incapable” means incapable of –*

*(a) acting; or*

*(b) making decisions; or*

*(c) communicating decisions; or*

*(d) understanding decisions; or*

*(e) retaining the memory of decisions,*

*as mentioned in any provision of this Act, by reason of mental disorder or of inability to communicate because of physical disability;*

*but a person shall not fall within this definition by reason only of a lack or deficiency in a faculty of communication if that lack or deficiency can be made good by human or mechanical aid (whether of an interpretative nature or otherwise); and*

*“incapacity” shall be construed accordingly.*

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*as mentioned in any provision of this Act, by reason of mental disorder or of inability to communicate because of physical disability;*

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*“incapacity” shall be construed accordingly.*

*“1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.”*

*“2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.”*

*“3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.”*

*“4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law.”*

...

*“States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards ... . Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, ... . The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.”*



*“Historically, persons with disabilities have been denied their right to legal capacity in many areas in a discriminatory manner under substitute decision-making regimes such as guardianship, conservatorship and mental health laws that permit forced treatment. These practices must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others.”*

*“Where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the ‘best interpretation of will and preferences’ must replace the ‘best interests’ determinations. This respects the rights, will and preferences of the individual, in accordance with article 12, paragraph 4. The ‘best interests’ principle is not a safeguard which complies with article 12 in relation to adults. The ‘will and preferences’ paradigm must replace the ‘best interests’ paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others.”*

*“Autonomy and self-determination.*

*CM/Rec(2009)11 on principles concerning powers of attorney and advance directives for incapacity.*

*Review of implementation available at:*

<https://www.coe.int/en/web/cdcj/activities/powers-attorney-advance-directives-incapacity>.”

*Capacity* \_\_\_\_\_ *Incapacity*

*Mind the gap!*

- *Doesn't accord with reality*
- *Fill it with*
  - *support*
  - *easy-read documents*
  - *co-decision making*
- *It produces in practice a presumption of incapacity*

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