

# Functional Test of Capacity & Part 5 Applications to the Circuit Court

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# Court Rules for Part 5 applications

A Capacity Application must be supported by a report from medical practitioner or healthcare professional, which must:

*(a) include details of the extent to which the person making the report has treated the relevant person and include details of any examination or assessment undertaken for the purposes of making the report, and;*

*(b) report on matters within the person's expertise which relate to the relevant person's capacity, considered in accordance with section 3 of the Act [functional test of capacity] to the extent relevant to the relief sought in the Capacity Application [i.e the specific decisions], including the likelihood of recovery of the relevant person's capacity.*

*A person's capacity shall be assessed on the basis of his or her ability to understand at the time that a decision is to be made, the nature and consequences of the decision in the context of available choices*

- Your starting presumption must be that the person has capacity to make a decision.
- A person must not be considered unable to make a decision unless all practicable steps have been taken to help him or her to do so.
- Making what others see as an unwise decision is not of itself evidence that the person lacks capacity to make that decision.
- Person-specific factors
  - Supports that may be needed
  - Beliefs and values
  - Importance of individual circumstances

# Lack of Decision-Making Capacity – unable to

- **Understand** information relevant to decision
  - Information about reasonably foreseeable consequences of each of the available choices or of not making the decision for the person
  - Keep it as simple as possible: no need for person to ‘be an expert’
- **Retain** that information long enough to make a voluntary choice
  - It’s not a memory test! It doesn’t matter if the person cannot recall choice later
- **Use or weigh** that information as part of the process of making the decision
  - People use or weigh information in accordance with their own beliefs and values, and different people may give different weight to different factors.
  - Eliciting values and beliefs important when assessing capacity
- **Communicate** by whatever means necessary

Capacity is decision-specific and time-specific

It is the process of decision-making that matters not the actual decision made

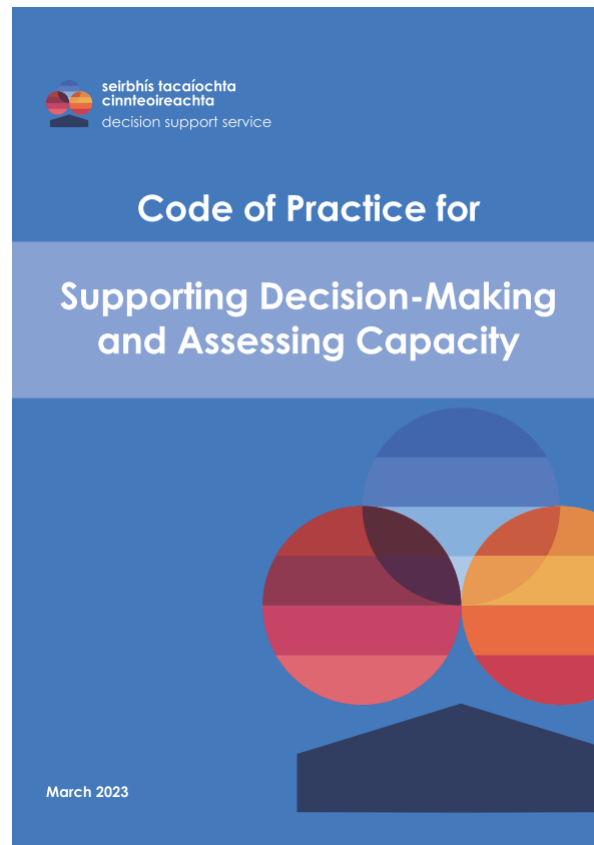
All four elements must be considered by an assessor and each documented.

This doesn’t mean a rigid, robotic structure to assessment: a conversation is needed.

# Assessors need to understand

- Responsibility in assessing capacity is to the Court and to the relevant person, not to the HSE/hospital/bed management.
- They may be required to explain, justify their report and conclusions
- It's not a technical exercise
  - It's a law
  - It's a human rights law & the stakes are high for the person.
- Doing a good assessment and report doesn't require a lot of knowledge but it does require diligence and the right attitude

# How should Assessors conduct the assessment?



# Preparation is essential

- The assessor must ...
  - Understand the context: the specific decision(s), the options and circumstances
  - Prepare questions and lines of enquiry
  - Understand any support needs of the person
  - Choose an appropriate time and place
  - Ensure the person is prepared for the capacity assessment;
- Sometimes the assessor already knows the person
  - May already understand the decision/ options and circumstances, support needs, how best to communicate and have a good rapport.
  - Assessment may be the culmination of a series of interactions between the assessor and the appointer
- If the assessor does not know the person, they will need to acquire a clear understanding of decision, pros and cons of options, circumstances of person to prepare lines of enquiry.

# Poor quality reports

- Sloppy, inadequate, cursory capacity reports suggest sloppy, inadequate, cursory assessments
  - Disrespectful to the court and will be rejected
  - Disrespectful to the person
- Not performing a functional assessment at all
  - Sweeping statements about capacity
  - MMSE's, MOCA's, diagnoses like dementia being seen as 'proof' of lack of capacity
- Reports of a 'functional assessment' without adequate "*details of any examination or assessment*" as the court requires.
- None of this acceptable



# How should Assessors record the Capacity Statement?

The report must satisfy a number of criteria under the court rules including the likelihood of recovery.

This is a HSE-developed template that ensures these criteria are addressed and it has been approved as acceptable by the Circuit Court.

*Use this template!* – *Used correctly it will guide assessors through what is needed and help prevent substandard reports*

Capacity Statement under Part 5 of the Assisted Decision-Making (Capacity) Act 2015

Please note this document is a guide to the functional assessment of capacity required for a Capacity Application under Part 5 of the Assisted Decision Making (Capacity) Act 2015.

This is not a legal document and has been developed for guidance purposes only.

Please note that the information in italics is for guidance purposes only.

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A. Details of the person

B. Details of the decision(s) - If more than one, each considered and recorded separately.

C. Details of the assessor – your role in care and treatment of the person and expertise in relation to assessment of capacity in this case

D. Details of the assessment

- Place, time, supports
- Each of the 4-stage test recorded for each decision – can the person understand, retain, use and weigh and communicate. (This doesn't require a rigid conversation)
- Record person's own words as much as possible

# Reporting the outcome of assessment

- The outcome of the assessment for each specific decision –
- If finding lacks capacity, report likelihood of recovery
- The court needs to be confident that the assessment was conducted with the necessary rigour.
- The court needs to understand your reasoning
  - Clarity
  - Appropriate level of detail
  - Honesty if uncertainty

Thank You