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## FROM LEGAL CAPACITY TO ACT TO DECISION MAKING CAPACITY IN LATVIAN PATIENTS' RIGHTS LAW

### PACIENTU TIESĪBAS LATVIJĀ – NO RĪCĪBSPĒJAS LĪDZ LEMTSPĒJAI

#### Kopsavilkums

Pacientu tiesības sniegt brīvu un informētu piekrišanu ārstniecībā ir vispāratzītas. Tās ir nostiprinātas normatīvajos aktos. Zināms, ka nozīmīga daļa pacientu, kuriem piemīt īslaicīgi vai ilgstoši garīga rakstura un fiziski traucējumi, ir ierobežoti savās spējās pieņemt lēmumus un tā īstenot informētas piekrišanas tiesības. Šī realitāte prasa vērtēt, vai rīcībspēja kā labi zināms civiltiesību institūts ir pietiekams un atbilstošs priekšnoteikums juridiski saistoša lēmuma pieņemšanai ārstniecībā, vai pastāv nepieciešamība Latvijas tiesību sistēmā ieviest jaunu, lemtspējas tiesību institūtu. Rakstā tiek raksturota Latvijas normatīvajos pastāvošais pacienta lēmumu pieņemšanas spējas regulējums un tiek parādīti tā trūkumi. Autoru secinājumi norāda, ka pacientu lemtspējas institūta ieviešana pilnveidotu pacientu tiesību aizsardzības sistēmu.

**Keywords:** patient, patients' rights, legal capacity, decision-making capacity, limited capacity

**Atslēgvārdi:** pacients, pacientu tiesības, rīcībspēja, lemtspēja, ierobežotas spējas

#### Introduction

The patient's right to give, refuse or withdraw free and informed consent for any health care intervention is well established in national<sup>1</sup> and international

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<sup>1</sup> Law on the Rights of Patients. Available: <https://likumi.lv/ta/en/en/id/203008-law-on-the-rights-of-patients> [viewed 01.11.2021.].

patients' rights law<sup>2</sup>. Consent is legally valid, if a patient has been properly informed, has the capacity to consent and is free from pressure. To exercise these rights, a patient should be able to understand, retain, analyse and communicate the information and his decision. However, many patients are limited in their ability to give informed consent due to short- or long-term mental and physical disabilities. The systematic review on the prevalence of lack of capacity in medical and psychiatric settings published by UK researchers suggest that for psychiatric settings, the weighted average proportion of patients with incapacity was 45%. For medical settings, the proportion of patients with incapacity was 34%.<sup>3</sup> The available data suggests that it is reasonable to believe that more than 8000 patients in Latvia yearly are admitted to mental health care institutions with varying degrees of limited capacity. There is no accurate data on the prevalence of such patients in Latvia. That reality requires clarifying whether legal capacity and capacity to act as well-known legal concepts are sufficient for decision making in health care or a new concept, namely, decision-making capacity should be introduced in Latvian law in general and patients' rights law in particular.

This article presents the institute of legal capacity to act in Latvian law generally and in patients' rights law particularly. It outlines procedural issues in the application of the capacity to act in exercising patients' rights. The article reveals the necessity to introduce the decision-making capacity in the Latvian patients' rights law.

## 1. Capacity to act in Latvian civil law: Overview

Every national legal system provides regulations concerning legal capacity in general and concerning natural and legal persons. Norms regulating legal capacity and capacity to act of a natural person in civil law matters are stated in the Latvian Civil Law, in the Art. 8, 357, 358, 358<sup>1</sup>, 364, 1405, 1408, 1409, as well as in norms of the Civil Procedure Law and other laws. In Latvian law, legal capacity and capacity to act is regulated as two separate legal issues. It is stated that any natural person has a legal capacity, which means that this person can be subject to civil rights. The capacity to act is understood as the ability to acquire rights and responsibilities. A prerequisite for capacity to act is the maturity of will, which is gained by reaching the age of 18 years.<sup>4</sup> It is presumed that an adult has

<sup>2</sup> For example, the Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine. Signed in Oviedo on 04.04.1997. [in the wording of 01.11.2021.].

<sup>3</sup> Lepping P, Stanly T, Turner J. Systematic review on the prevalence of lack of capacity in medical and psychiatric settings. Available: <https://pubmed.ncbi.nlm.nih.gov/26407382/> [viewed 28.10.2021.].

<sup>4</sup> Torgāns K. (sc. ed.). Latvijas Republikas Civillikuma komentāri: Ceturtā daļa. Saistību tiesības [Commentary to the Civil Law of Republic of Latvia: Part Four. The Law of Obligations]. Rīga: Mans Īpašums, 2000, p. 20.

the capacity to act by expressing his/her will and performing an action in all legal matters concerning him/herself.

In 2012–2013, a reform of the regulations concerning capacity to act was carried out in Latvia. It followed the judgment of the Constitutional Court of 27 December 2010 in case No. 2010-38-01.<sup>5</sup> The Constitutional Court declared that the Civil Law provisions in Art. 358 and 364 that permitted restrictions of one's capacity to act in full are unconstitutional and violate human rights of persons with disabilities. The court stated that the above-mentioned provisions of the Civil Law restricted personal rights to a greater extent than necessary and that the capacity of a person must be assessed in each case individually. The court acknowledged that Latvia must amend the legal framework, securing implementation of human rights of persons with disabilities, including the United Nations Convention on the Rights of Persons with Disabilities.<sup>6</sup>

Since 2013, the Art. 356.<sup>1</sup> states: "A person shall not be restricted in personal non-financial rights, as well as to defend his or her rights and lawful interests in institutions and court in relation to his or her restrictions for the capacity to act and freedom, disagreements, disputes with trustee and appointment and removal of the trustee."<sup>7</sup>

Material grounds for restriction of one's capacity to act are stated in Part One of the Civil Law. Firstly, Art. 357 states: "If a person has health disorders of mental nature or other, his or her capacity to act may be restricted, if it is necessary in the interests of such person and it is the only way how to protect them. In such case, trusteeship shall be established for such person." Secondly, the Art. 358<sup>1</sup> states that capacity to act may be restricted to such an extent in which he or she cannot understand the meaning of his or her activity or cannot control his or her activity. As we can see, for restriction of the capacity to act it is necessary to establish that a person cannot understand the meaning of his or her activity or cannot control it. The capacity to act can be restricted but only by a court. The court is supposed to assess to what extent the person is limited in his or her ability to understand and control listed activities. At the same time, the court is obliged to establish a trusteeship for such a person. A court, when assessing the abilities of a person, at first shall determine whether and to what extent a trustee with a person under trusteeship act together and only after that – whether and to what extent the trustee acts independently.<sup>8</sup>

With respect to the legal effect of the actions performed by a person who has health disorders of mental nature limiting his or her abilities to decide and

<sup>5</sup> Judgment of the Constitutional Court of the Republic of Latvia of 27 December 2010 in case No. 2010-38-01. Available in English: [https://www.satv.tiesa.gov.lv/wp-content/uploads/2010/04/2010-38-01\\_Spriedums\\_ENG.pdf](https://www.satv.tiesa.gov.lv/wp-content/uploads/2010/04/2010-38-01_Spriedums_ENG.pdf) [viewed 28.10.2021.].

<sup>6</sup> The United Nations Convention on the Rights of Persons with Disabilities. Signed in New York on 30.03.2007. [in the wording of 01.11.2021.].

<sup>7</sup> The Civil Law, Art. 356<sup>1</sup>. Available: <https://likumi.lv/ta/en/en/id/225418-the-civil-law> [viewed 20.10.2021.].

<sup>8</sup> The Civil Law, Art. 358<sup>1</sup>.

act, the Art. 362 provides that “An action that a person with health disorders of mental nature or other has committed prior to the establishment of a trusteeship has legal effect”. Meanwhile, the Art. 361 provides that the actions of a person under trusteeship shall be regarded as invalid if they are committed to the extent of the restriction of the capacity to act determined by the court. Thus, in cases when there is no restriction of the capacity to act stated by the court, the actions of a person are legally valid.

## **2. Capacity to act in Latvian obligation law**

In respect to the legal effect of civil legal transactions and delicts, the norms contained in Civil Law, Part Four “Obligations Law” provide a more detailed approach and state additional requirements in respect to capacity to act for legal transactions or delicts to be legally valid or void. Thus, Art. 1409 states: “Lawful transactions made by persons with the capacity to act while they are unconscious or being unable to understand the meaning of their action or being unable to control their action are void”. In respect to delicts, the Art. 1637 provides that, firstly, “persons with disorders of mental nature or other health disorders, who have not been able to understand the meaning of their action or have not been able to control their action, shall not be held liable for delicts [...]”. Secondly, “Persons with the capacity to act shall not be held liable for delicts if they committed the delict while unconscious or being unable to understand the meaning of their action or being unable to control their action”.

## **3. Capacity to act in Latvian patients’ rights law**

A patient is a special subject of patients’ rights law. The need for the protection of the patient as a separate right-holder is determined by the special needs and vulnerability of the person in health care. Patients’ rights to information, to give/refuse or withdraw consent, to private life in health care settings etc. are personal rights and exercise of these rights is regulated by the law “On the Rights of Patients” and the Convention on Human Rights and Biomedicine<sup>9</sup>. The law “On the Rights of Patients” does not regulate the issue of capacity to act but establishes the legal order in case a patient is unable to make a treatment decision or a decision in respect to participation in a clinical trial<sup>10</sup>.

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<sup>9</sup> The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine is ratified and since Latvia has a monist approach, this international treaty is incorporated into Latvian law.

<sup>10</sup> Law “On the Rights of Patients”, Art. 11 (2), (3). Available: <https://likumi.lv/ta/en/en/id/203008-law-on-the-rights-of-patients> [viewed 01.11.2021.].

Given that a person's ability to act in the field of his or her patient's rights is a personal right, the Civil Law Art. 356.<sup>1</sup> provides that the capacity to act in respect of health care issues shall not be limited. Every patient in his civil rights in health care *de iure* has the capacity to act by exercising his patients' rights and can be subject to obligations under the law.

The Convention on Human Rights and Biomedicine does not regulate the capacity to act in its substantive limb. The Art. 6 of the Convention states rules for the protection of persons who do not have a capacity to consent and are not able to consent. Part 3 of the Art. 6 states: "where, according to law, an adult does not have the capacity to consent to an intervention because of a mental disability, a disease or for similar reasons, the intervention may only be carried out with the authorization of his or her representative or an authority or a person or body provided for by law". As it is stated in the Explanatory Report of the Convention, it is for domestic law in each country to determine, in its own way, whether or not persons are capable of consenting to an intervention and taking account of the need to deprive persons of their capacity for autonomy only where it is necessary in their best interests.<sup>11</sup>

If a patient is unable to make a decision himself or herself regarding medical treatment due to his or her state of health or age, Art. 7 (1) of the law "On the Rights of Patients", gives the decision rights to the spouse or an adult relative,<sup>12</sup> as well as to a person authorised by the patient or the trustee.<sup>13</sup> In this case, one should establish whether a patient is able or unable to take medical treatment decisions.

Differently is regulated decision-taking for the involvement of a patient in clinical trials. The Art. 11 (2) the law "On the Rights of Patients" provides: "If a patient is unable to express his or her wishes, the spouse or the closest relative of the patient has the right to consent for his or her participation in a clinical trial". Here, a patient's ability to express his or her wishes should be established. However, Art. 11 (3) provides that, if a patient's capacity to act has been restricted by a court, then a patient's trustee has a right to decide to consent to participation in a clinical trial. Even though the Civil Law does not permit the restriction of capacity to act in respect to patients' rights, the law "On the Rights of Patients" provides permission of a trustee of a patient to consent to involvement in a clinical trial.

In case if a patient is concluding a contract or performing another legal transaction regulated by the Part Four of Civil Law concerning Obligation Law in health care being unconscious or being unable to understand the meaning of their action or being unable to control their action, such actions might be declared void. The same applies to delicts. In this case, one should establish that a patient is unconscious or unable to understand or control his or her actions. The Obligation Law provides

<sup>11</sup> Explanatory Report to the Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, para 42. Available: <https://rm.coe.int/16800ccde5> [viewed 01.11.2021.].

<sup>12</sup> Law "On the Rights of Patients", Art. 7 (1). Available: <https://likumi.lv/ta/en/en/id/203008-law-on-the-rights-of-patients> [viewed 01.11.2021.].

<sup>13</sup> Law "On the Rights of Patients", Art. 7 (2).

more clear criteria in respect to the inability of a person – inability to understand and to control one’s actions should be assessed and revealed in a particular case.

It can be concluded, first, – it is presumed that every adult has the capacity to act in respect to his or her health care matters. Latvian civil law does not permit the restriction of one’s capacity to act in respect to the exercise of patients’ rights by a court, namely, a patient *de iure* cannot be limited in capacity concerning his or her patient rights. Second, despite the general rule, the law “On the Rights of Patients” provides that in case a patient him/herself is unable to decide, the treatment decisions should be taken by listed third persons. The law does not state how that inability should be expressed, how and by whom it should be assessed, user stated, and documented. The law does not provide any safeguards in cases when someone is declared unable to exercise his/her rights by applying the Law on Rights of the Patient. Third, Latvian patients’ rights law does not regulate decision-making procedures in cases when a patient is partially or temporarily able or unable to decide. Fourth, in case of consenting to participate in clinical trials, the trustee has a right to consent. Finally, in case a patient is unconscious, unable to understand or control his actions, his or her legal transactions can be declared void and a patient shall not be liable for delicts in health care matters.

#### **4. The need to integrate decision-making capacity in Latvian patients’ rights law**

As mentioned in the introduction, the research data from the UK suggests that around 45% of patients in psychiatric institutions and 34% in somatic medical settings are lacking the decision-making capacity.<sup>14</sup> It can be estimated that the proportion of patients with varying degrees of limited capacity in Latvia could be similar. The human rights approach requires us to ensure that persons with disabilities can enjoy the rights to consenting to or rejecting medical interventions on an equal basis with others. No one should be automatically deprived of these rights because of an impairment or disability, or due to being subjected to guardianship.<sup>15</sup>

At present, in Latvian patients’ rights law, the “status approach” towards patients with incapacity is used. This approach equates certain impairments/disabilities with incapacity to make decisions in some or all areas of life. With this model, the very existence of a particular impairment is sufficient to strip the individual of legal capacity, regardless of the individual’s actual capacities.<sup>16</sup>

The way forward is to recognise, firstly, that there are numerous cases when a patient has full capacity to act legally, but *de facto* is limited to do so; secondly,

<sup>14</sup> Lepping P., Stanly T., Turner J. Systematic review on the prevalence of lack of capacity in medical and psychiatric settings. Available: <https://pubmed.ncbi.nlm.nih.gov/26407382/> [viewed 28.10.2021.].

<sup>15</sup> Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities, p. 7. Available: <https://rm.coe.int/16806da5c0> [viewed 05.11.2021.].

<sup>16</sup> Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities, p. 13.

that a person who *de facto* has limited abilities should not be considered a person unable to make decisions and therefore not given a chance to do so. All patients despite their limited ability to decide should be given a right to decisions in their health care matters as far and to the extent they can do it themselves or with the support of another person. Those with limited capacity should be supported in a manner appropriate to their abilities. Patients who are fully unable to make a decision, for example, being in a coma, should be distinguished from ones who are limited in their abilities. Therefore, an individualised and targeted approach to a patient's abilities and disabilities in a particular health care situation and the context of given intervention should be recognised, assessed and safeguarded.

An individualised approach to a patient's capacity to act and to be protected requires a new legal approach both in law and in practice. A person's capacity to act in health care *de facto* should be recognised and supported. Therefore, we have to introduce new legal regulations, namely, we should state that patients' decision-making capacity rather than the capacity to act is a prerequisite for decision making in health care.

Decision-making capacity is not a concept and term used in Latvian law. In other jurisdictions and legal doctrine, decision-making capacity is understood as the actual ability of a person to make an informed and reasonable decision in a given situation and to execute it. For example, in German law the legal capacity is defined as *Rechtsfähigkeit*, whereas the decision-making capacity – as *Entscheidungsfähigkeit*. Legal capacity and decision-making capacity are different notions in the UK.

Given that the decision-making capacity is related to the performance of a specific function, it would be wrong to consider that a person is *a priori* completely incapable of making all decisions. It is necessary to assess what functions the patient is able or, conversely, unable to perform. On the other hand, in circumstances, where the legal capacity of a patient is limited, without a prior assessment, the patient's decision-making capacity shall not be recognised as limited *a priori*. The actual capacity limitation is an essential condition in preventing the right to informed consent from being exercised independently and therefore requires the application of special solutions for protecting patients' rights.

Therefore, the determination and protection of a patient as a special right-holder must be considered more broadly than within the framework of the capacity to act regulated in Civil Law. It is necessary to cover not only the impact of unconsciousness and ability to understand or control actions – the patients' physical and mental health abilities, which are necessary for self-determination as a whole, must also be taken into account.

## Conclusions

1. The legal status of a patient as a special subject within the meaning of the law “On the Rights of Patients” must be considered more broadly than within

the framework of capacity to act established in the Civil Law, covering not only the effects of disturbance of consciousness and will on the patient's ability to understand and manage their actions.

2. Given that a person's ability to act in the field of his or her patient's rights is a personal right, since 2013 the Civil Law provides that the capacity to act in respect of health care issues shall not be limited. Every patient in his/her civil rights in health care *de iure* has the capacity to act by exercising his/her patients' rights and can be subject to obligations in accordance with the law.
3. Some patients are limited in their capacity to understand and act due to mental or physical health issues. Therefore, numerous patients in health care are *de iure* capable but *de facto* limited in their capacity to exercise their rights independently. To secure the exercise of a patient's *de facto* capacity in his/her healthcare process, the patients' actual decision-making capacity is important and shall be evaluated. Proper protection of such patients should be provided by law and in practice.
4. For the protection of rights of persons with limited capacity, a new legal framework should be introduced in Latvian patients' rights law stating the role of decision-making capacity, principles of assessment procedures and legal safeguards for patients who are limited in their capacity. The assessment of each patient requires special attention, given that the patient's mental health condition may change and certain disorders of consciousness or a will may affect a person's decision-making capacity both in the short and long term. Therefore, decision-making capacity must always be assessed in the context of a decision that is required in a particular situation.
5. To ensure the protection of a person, the assessment methodologies of decision-making capacity and expression of one's will require further research in both civil and health law.

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