ABSTRACT. An assessment of decision-making capacity is the accepted procedure for determining when a person is not competent. An inferential gap exists between the criteria for capacity specific abilities and the legal requirements to understand relevant information and appreciate the consequences of a decision. This gap extends to causal influences on a person’s capacity to decide. Using a published case of depression, we illustrate that assessors’ uses of diagnostic information is frequently not up to the task of bridging this inferential gap in a justifiable way. We then describe cases of faulty judgement which challenge the understanding of diagnostic causal influences. These cases help to clarify the nature of the expertise required for capacity assessments. In practice, the requirements of decision-making capacity are often abandoned to other considerations due to a lack of requisite expertise. The legal policy supporting decision-making capacity as a means to protective intervention is justified only if the requisite expertise is developed. We propose the requisite expertise to be developed in the long term as a distinct multidisciplinary endeavour.

KEY WORDS: mental capacity, incompetence, causal influences, understanding and appreciating, judgement, depression, decision-making

INTRODUCTION

Mill took the justification for certain forms of paternalism to be obvious, and exempted certain groups from the limitations to paternalism he was generally concerned to defend in On Liberty:

It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children … Those in a state to require being taken care of by others, must be protected from their own actions as well as against external injury.1

Any such attempt to retain a justified paternalism invites the question: How can we tell who is and who is not in such a state?

Decision-making capacity, “The capacity to make an acceptable choice with respect to a specific decision,”2 has evolved in the liberal democracies as the means for specifying who may require being taken care of by others. Persons who are competent to make decisions are free of paternalistic
intervention whereas those who lack this competence require benevolent supervision or appropriate direction.

A clinical judgement of decision-making incapacity (mental incompetence) was based, in the past, on the diagnosis of a mental disability/disorder that would explain the inability to perform.\textsuperscript{3} In recent years, legal definitions of mental capacity have moved from viewing mental capacity as a global, all embracing, condition to a more specific condition restricted to particular realms of decision making.\textsuperscript{4,5,6} The significance of underlying disability has thereby been rendered unclear, and the weight placed on disability has correspondingly diminished.\textsuperscript{7} Decision-making capacity is now generally defined in terms of functional abilities to understand information relevant to a decision, and to appreciate the consequences of the presenting options. Such abilities are logically independent of most diagnostic and descriptive categories: the detection of a disability can suggest a lack of capacity but there is no direct inference (except in cases that are unlikely to be disputed) from psychiatric disorder, intellectual disability, neurological deficit, etc. to a lack of capacity to make specific decisions.\textsuperscript{8} In what follows we will refer to the area of slack between these concepts as the \textit{inferential gap}.

We believe there is a need for a fuller discussion of the basis by which assessors of mental capacity justify their opinions. On what basis do they bridge the inferential gap in a given case? More clarity is required than presently exists about the logical and epistemological basis for such judgements.\textsuperscript{9} Partly as a result of this lack of clarity, it is a matter of contention just who should be performing mental capacity assessments. Statutes or the courts often take the judgement of an expert witness, without any wide agreement regarding who possesses the relevant expertise. Whether or not such arrangements work to the benefit of those they are meant to protect remains largely unexamined and unknown.\textsuperscript{10}

In this paper we do three things. First, we clarify the general relevance of diagnostic or causal judgements to a finding of decision-making capacity/incapacity. Expert knowledge does have a role to play though its relevance has frequently been mishandled. Second, we will describe a class of cases of faulty judgment where an assessor must evaluate decision-making capacity in the absence of such knowledge. Here there is a different sort of expertise and skill needed crucial to the justification of any finding of capacity/incapacity. Third, we will discuss the public policy implications of the first and second discussions, especially with regard to the role of expert knowledge in any defensible approach to capacity assessment.