

Getting to the core of the Act- Will and preference, support, unwise decisions, risk and liability- reflections on practice

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# A parody of capacity ....with elements of truth

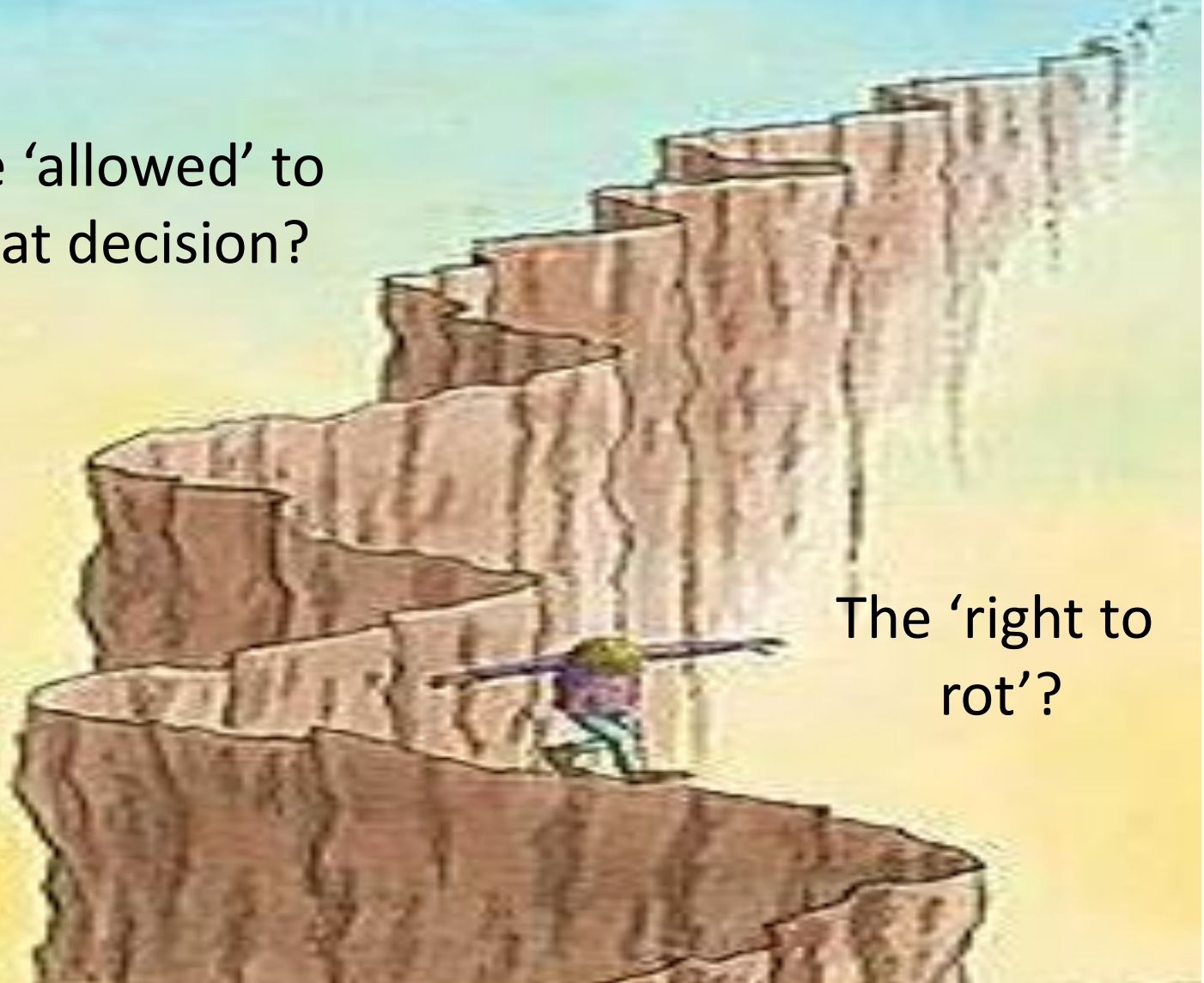
Maximise decision  
making capacity

Protect those  
lacking capacity  
from the  
consequences of  
their incapacity



Is he/she 'allowed' to  
make that decision?

The 'right to  
rot'?



# The ADM Act giveth...

- Assisted Decision-Making (Capacity) Act **not** Capacity (Assisted Decision-Making) Act
- It shall be **presumed** that a relevant person ... **has capacity**
- A relevant person ... shall not be considered as unable to make a decision ... **merely** by reason of making, having made, or being likely to make, an **unwise decision**.
- No diagnostic test – no provision that Act applies only if a diagnosis of, e.g., dementia
- No mention of ‘best interests’

# And it taketh away?

The intervener, in making an intervention in respect of a relevant person, shall.... permit, encourage and facilitate ... give effect, in so far as is practicable, to the past and present will and preferences of the relevant person.... **act at all times** in good faith and **for the benefit of** the relevant person

(19(5)) [A] co-decision-maker shall acquiesce with the wishes of the appointer in respect of the relevant decision ... unless it is **reasonably foreseeable** that ...[this] **will result in serious harm** to the appointer or to another person.

# No 'diagnostic test'?

- Functional incapacity decision by J Laffoy in Coombe Jehovah's Witness case didn't involve mental disorder
- ADM 2015 Act doesn't discriminate against those with mental disorder

## **But**

- Wider net for incapacity
- Won't eliminate appeal of having a 'narrative' or an explanation for those conducting assessments of capacity or for courts
- How else is it that a person's capacity *may shortly be in question?*

# No “best interests”?

- ‘Best interests’ as a shortcut to disregard people’s preferences regarding their own care or synonymous with ‘safety first’ or what is medically recommended.
- However, UK guidance clear that best interests to be considered holistically and consider P’s welfare in the widest sense and not just safety
- People, even if lacking capacity, are generally the best judges of what is in their interests.

# Will and preference rather than "best interests"?

- *give effect, in so far as is practicable, to the past and present will and preferences of the relevant person.... act at all times in good faith and for the benefit of the relevant person*
- **Good faith:** Sincere intention to be fair and honest, regardless of the outcome of the interaction. (Versus bad faith, duplicity, pretence).
- **Benefit:** a helpful or good effect, or something intended to help
- **For the benefit of:** in order to help or be useful to.



- *'...in so far as is practicable'* as an escape clause?
  - Distinguish between will and preferences that
    - Can't possibly be met
    - Can't reasonably be met
    - Should be met but can't because of deficits in services
- *'For the benefit of'* as a backdoor best interests or in opposition to will and preferences?
- Forthcoming proposals regarding Deprivation of Liberty will show how seriously DoJ takes their own legislation

# Unwise decisions

A relevant person ... shall not be considered as unable to make a decision ... **merely** by reason of making, having made, or being likely to make, an **unwise decision**.

- Unwise not incapacitous:
- *Merely*: Although the judgement that a decision is unwise is insufficient of itself to conclude that the person lacks capacity, it may still be a relevant consideration: e.g.
  - Repeated unwise decisions with significant risk of harm...
  - A particular unwise decision that is obviously irrational or out of character.
- Not the same as creating ‘a right to make unwise decisions’

# What is an unwise decision?

- Unwise: lacking wisdom or good sense, foolish, imprudent.
- A judgement by someone else that is different to the person's decision but based on the same evidence.
- Dimensions:
  - Seriousness of a poor outcome ('serious harm')
  - Likelihood of a poor outcome ('reasonably foreseeable' as a consequence of a decision)
  - Reasonableness
- Perils
  - Hindsight always 20/20
  - Presumption that, almost by definition, not taking advice of health & social care professionals is unwise
  - Reasonableness depends on P's perspective
  - Whose risk?

# 'Risk society' (Beck 1986)

- Risk now synonymous with harm and danger. There are hazards and potential threats everywhere. We are all vulnerable and we need to be ever vigilant
- In healthcare, uncertainty ('not known for sure what will happen' or 'can't predict safety') now equates to 'risk' (Parsloe 1999).
- Risk as harm means risk-taking can be perceived as outside the norm and concepts of risk are dominated by understanding patients as a danger to either themselves (or others).
- Professionals are 'responsible for identifying, quantifying and containing risk', gauging an 'acceptable level of risk' and making the 'right' decision (without benefit of hindsight)' (Felton 2017)

*'Someone who depicts the world as risk will ultimately become incapable of action'.*

**Table.** Risk that an individual will die in any one year<sup>30</sup>

<u>Term used</u>	<u>Quantitative Risk Range</u>	<u>Example</u>	<u>Measured Risk</u>
High	Greater than 1/100		
Moderate	1/100 to 1/1,000	Smoking 10 cigarettes per day	1/200
		All natural causes, age 40 years	1/850
Low	1/1,000 to 1/10,000	Influenza	1/5,000
		Road accident	1/8,000-1/16,000
Very low	1/10,000 to 1/100,000	Accident at home	1/26,000
		Homicide	1/100,000
Minimal	1/100,000 to 1/1,000,000	Drowning in bath tub	1/800,000
Negligible	Less than 1/1,000,000	Wasp or bee sting	1/5,000,000
		Hit by lightning	1/10,000,000

# Social workers took out court order to stop couple going on HOLIDAY because wife had dementia

By EMMA REYNOLDS

UPDATED: 17:39 GMT, 21 January 2012



 **119** View comments

An elderly couple were banned from going on holiday together after their local council said it was too risky.





# Elderly woman with dementia drowns in the Med after social workers fail to intervene

By [EMMA REYNOLDS](#)

UPDATED: 17:39 GMT, 21 January 2012



 **119** [View comments](#)

An elderly couple were banned from going on holiday together after their local council said it was too risky.



# A cross-sectional study of doctors', managers' and public representatives' views regarding acceptable level of risk in discharges from the emergency department

What risk of subsequent death is acceptable when deciding that someone attending the ED with - chest pain, sepsis, depression vignettes - doesn't need to be admitted?

	Average	No death acceptable
Physicians	1/1,000	8%
Dr managers	1/1,000	9%
Managers	1/5,000	15%
Politicians	1/10,000	25%



# Clarity / Certainty?

*‘Uncertainty creeps into medical practice through every pore. Whether a physician is defining a disease, making a diagnosis, assessing probabilities, assigning preferences, or putting it all together, he is walking on very slippery terrain.*

*It is difficult for non-physicians, and for many physicians, to appreciate how complex these tasks are, how poorly we understand them, and how easy it is for honest people to come to different conclusions’*

# Conclusions

- Some areas of ambiguity / uncertainty
- How well the ADM Act works to support decision making will depend on
  - Attitudes of health and social care professionals
  - Attitude of HSE when outcomes are bad
  - Codes of Practice
  - How Courts interpret the Act

# WBC v Z and others [2016] EWCOP

- Z was 20y, with Asperger's and an IQ of 70–75. The local authority was concerned she was engaging in risky behaviour
- Cobb J concluded that Z had capacity, contrary to the conclusion of the independent expert, noting *“some of Z's specific responses were included to illustrate the expert opinion that she lacked capacity, but on my reading of them could just as easily have shown merely naivety, immaturity, diffidence, or embarrassment....”*
- He cautioned against medical or care professions, or the Court itself, disapproving of unwise decisions and finding incapacity as a result: it was *‘unprincipled and wrong’* to take a *‘paternalistic, perhaps overly risk-averse’* approach.