

Capacity Impairments and Decision-Making Standards: Balancing Ideals and Imperfections

Mental Capacity Act: 10 Years On
Liverpool Maritime Museum 9-10 September

Mary Donnelly

CRPD: The Risks



The CRPD Ideal



Enables “persons to sculpt their own legal universe – a web of mutual rights and obligations voluntarily entered into with others.”

Quinn

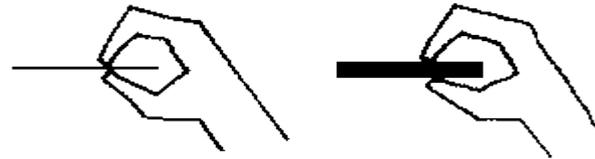
Will and Preferences in the CRPD



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. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, **will and preferences** of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

Philosophical Underpinnings

- *Autonomy?*

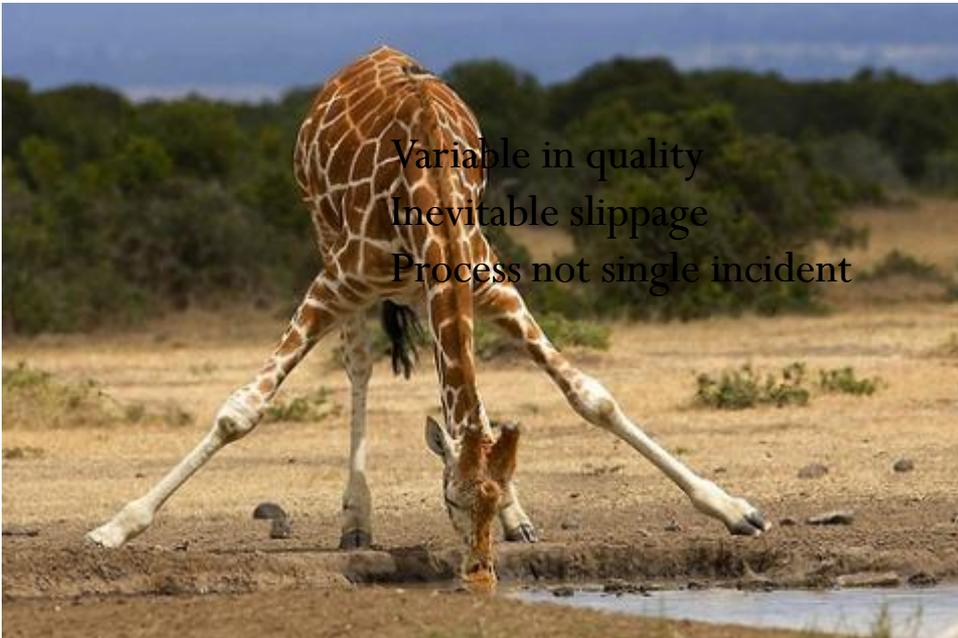


- *Freedom*



- *Freedom + Support = Autonomy?*

The Imperfections of Support



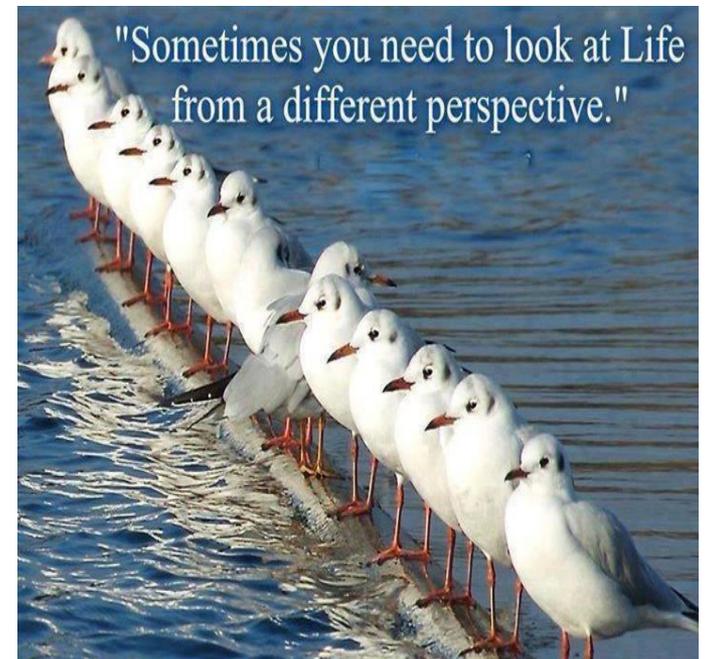
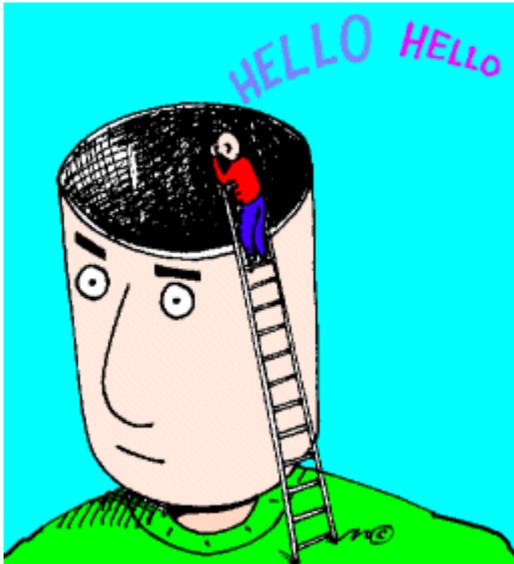
Variable in quality
Inevitable slippage
Process not single incident

Variable in quality

Inevitable slippage

Process not incident

Dignity



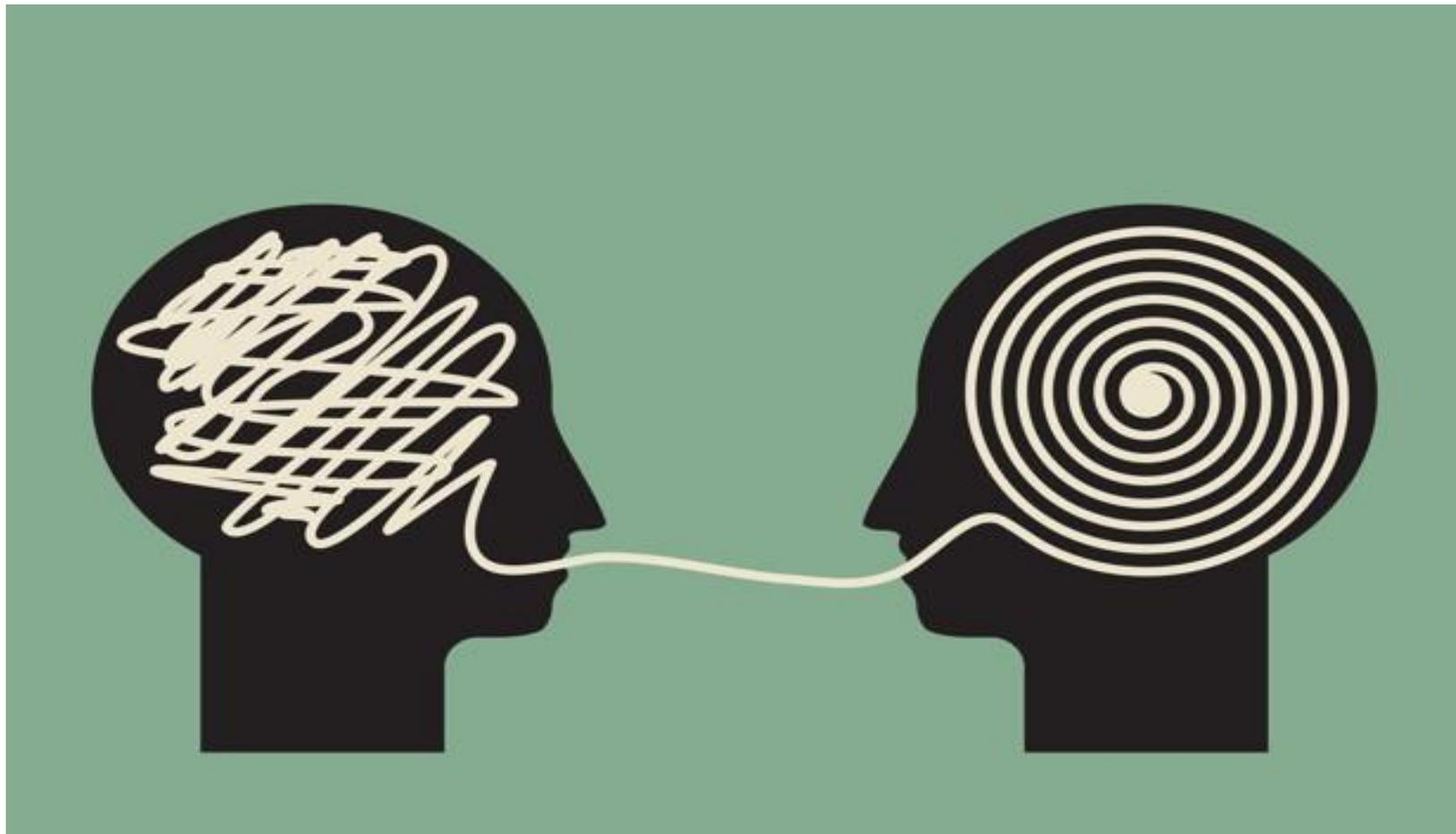
Perils of indifference



Indifference to will and preferences

Indifference to everything else

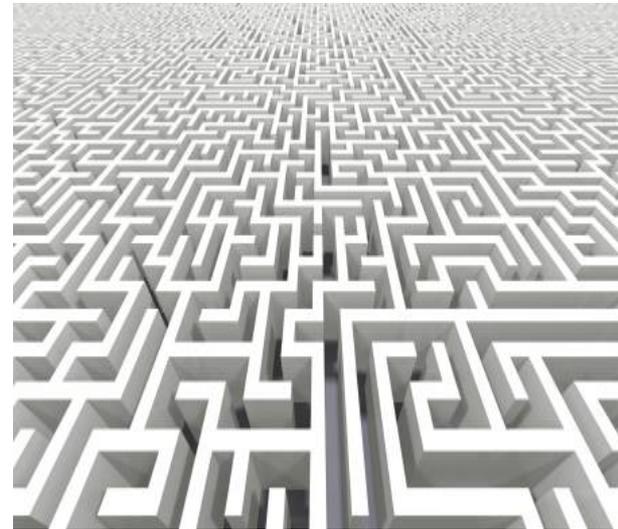
Best Interpretation



CRPD's Dual Role

- Political tool
- Basis for Decisions
- Educative, expressive, proactive

Manifesto
~~can~~ for
Change



Rhetorical Force

CLA **RITY**



Wishes and Feelings in the MCA

[S]o far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him: MCA s. 4(4)



[M]ust consider, so far as is reasonably ascertainable—

(a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),

(b) the beliefs and values that would be likely to influence his decision if he had capacity, and

(c) the other factors that he would be likely to consider if he were able to do so: MCA s. 4(6)

Best Interests



"Why do you always have to be so paternalistic?"

Name Change?



Dealing with uncertainty



- the degree of the person's incapacity
- the strength and consistency of the views being expressed
- the possible impact on the person of the knowledge that his or her views are not given effect
- crucially, the extent to which P's wishes and feelings, if given effect to, can properly be accommodated within the court's overall assessment of what is in her best interests

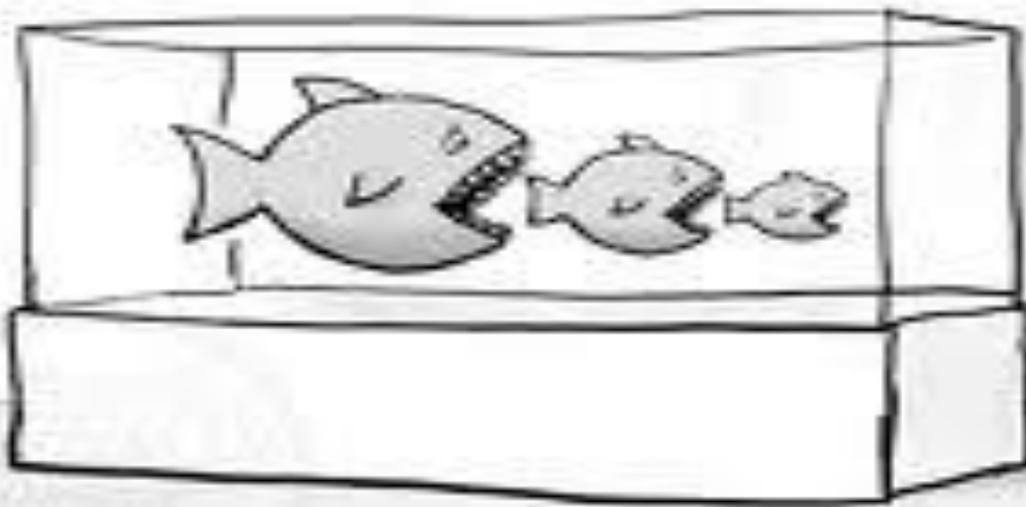
ITW v Z [2009] EWHC 2525 (Fam)

Taking on Risk



The fact that Ms S will experience some distress at home is an important concern, but again not determinative. Almost all progressive and ultimately fatal illnesses —dementia, some cancers, severe neurological conditions — involve distress for the sufferer and those close to them. . . . One wants to minimise the suffering, of course, but that goal has to be balanced against her desire in difficult circumstances to make the best of what time remains — to strive for as long as possible to achieve those ends which have given her life its value and which she still wishes to pursue, even if it means some distress and pain.

Reframing?



**"It's called 'Just Because it Looks Meaningful
Doesn't Mean That it is'."**

Ideals and Imperfections

