MENTAL HEALTH LAWYERS ASSOCIATION

THE "RIGHT" TO TAKE FOOLISH DECISIONS

1. One of the fascinations of human beings is that they are not exclusively rational. We have freedom to make choices for good or ill. We enjoy free will and we incur personal responsibility for those decisions. We have all made foolish decisions and we would no doubt have resented any interference by well-meaning people in those decisions. Those of us who have parented older children know these issues well. Why should this not apply as much to those who are vulnerable or for whom we feel a sense of responsibility? The desire to do good and to prevent harm is very strong.

2. For those of us involved in issues of mental health law these problems arise particularly in relation to the Mental Capacity Act 2005. There are two distinct issues: first, in relation to the assessment of capacity; and secondly, in relation to welfare provision for those found to lack capacity. Section 1(4) provides – "a person is not to be treated as unable to make a decision merely because he makes an unwise decision." In relation to the determination of welfare, I propose to focus on the provisions of Section 4 (6) which provides as follows – "he must 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

© the other factors he would be likely to consider if he were able to do so."

We need to consider each of these provisions in turn.

3. Perhaps I am naturally paternalistic, but I have found the application of section 1 (4) often very difficult. I remember a case in which I was rung up late on a Sunday night from a hospital where an elderly man had been admitted having failed in his attempt to commit suicide. He required a simple "washout" to remove the poison from his system failing which he would speedily die. He refused to allow anybody to treat him. The only issue was

whether or not he had capacity. All the medical staff and his family, who were present, opposed his decision. However, not only was there nothing to displace the presumption in favour of capacity, it was apparent from conversations with members of the family that he knew his own mind. Accordingly treatment had to be refused and he died that night. On another occasion, a woman wished to resume cohabitation with her husband who had completed a licence period having served 13 years in prison for the abuse of his previous wives. The Court of Appeal held that I was wrong in those circumstances to conclude that she lacked capacity on a proper application of this statutory provision. Again, I was involved in a case with a wealthy elderly man who, to the horror of his family, had formed an emotional attachment to and wished to marry his carer. Whatever the motives of any of the parties, it was clear that, although he lacked capacity in many areas, this was not one of them.

4. These cases raise very difficult issues for those of us who have been trained to a protective instinct. It is difficult for family lawyers to set aside those instincts and to allow people to do that which the court and others consider manifestly unwise. However, that is to avoid the first and most important question of all: who is responsible for the making of this decision? If it is the court, that is one thing but, if it is not, then the merits of the decision are simply no business of the court. I may feel that I have a responsibility by virtue of my position but in truth I have none unless a person lacks capacity.

5. The position in law is of course very different if a finding has been made that the person lacks capacity. The court's duty by virtue of section 1 (5) is that any decision made for or on behalf of a person who lacks capacity must be done or made in his best interests. At the end of the day, what is in someone's best interests is the responsibility of the decision maker, in my case the judge. However, in forming that view the court must have regard to all the provisions of the Act and in particular of section 4. In subsection 6 there is introduced a significant subjective element based on the views, wishes and beliefs of the person concerned. While such views do not bind a judge, they are clearly of considerable importance.

6. Earlier this year in a case concerning a possible abortion, I tried to make it clear that in my view it was not the intention of the Act to wrap the person concerned in cotton wool and protect them from all the vicissitudes of life. In my experience there are two distinctive types of case in which these issues can be of considerable importance. The first relates to those (usually elderly) who wish to return to their home or their family when it is the view of all professionals that they should be cared for in a residential setting. There are a number of reported cases on this subject in which the court has gone against the combined professional advice in the case because the view is taken that emotional needs matter as much, if not more, than physical care and safety. These can be very difficult judgments and one can well understand why professionals are particularly anxious to safeguard physical

welfare. But there is more to life than food, clothing, warmth and cleanliness. This is particularly so, in my opinion, where a person has a limited life expectancy.

7. The second general area relates to choice of relationships. Those whom others do not think to be good for us may nevertheless be very important. It may be that the overall balance of quality-of-life may involve a potentially risky relationship rather than its proscription. Two immediate examples spring to mind. The first relates to the woman who wished to resume a relationship with the man whom she had married notwithstanding his abuse of his previous wives. Having held that she lacked capacity, I nevertheless made provision for the resumption of that relationship not least because her own beliefs and values were such that she wanted to honour the marriage bond. Again one has allowed relationships with family members whose principal motive may be to undermine the main welfare plan but who will remain nevertheless very important to the person concerned. It is probably fair to say that all relationships involve risk to a greater or lesser extent, and it is difficult to see why those who lack capacity should be placed in so different a position to the rest of the population provided they are not at risk of significant abuse.

8. A more general example is to be found where people place themselves at risk of abuse but the level of protection required is such as to be simply oppressive. Thus where a woman lacked capacity to consent to sexual relations but was in fact unable really well to resist anything in trousers, a protective regime of round-the-clock 2 – 1 supervision was required. Whilst that may have been right in the short term and to allow her to acquire self-protection skills, it was clearly oppressive in the long-term and her interests required that risks should be taken. Obviously she was going to make foolish decisions but the only alternative was a form of indefinite civil imprisonment.

9. All these decisions were taken in the light of professional evidence as to risk and danger. In those circumstances it is readily understandable that the authorities themselves were not prepared to incur that risk. That is the proper function of the judge who, after all, enjoys a much greater degree of protection than does a doctor or a social worker. Not only are the media usually a little more restrained in their criticism but also judges are very difficult to get rid of – no High Court Judge has been dismissed (as far as I know) since 1689! I think we have to be sensitive to the pressures that operate on public bodies but at the same time be willing to assume responsibility for running risks where the general interests of the person concerned seem so to require.

10. There is clearly a fine line between compliance with section 1 (5) and the running of the sort of risks described above. Part of the solution may be found in section 1 (6) which encourages decisions that are “less restrictive of the person’s rights and freedom of action”. In contact cases in family law I have sometimes employed the approach of permitting contact where “it is not inconsistent with the welfare of the child”. I think a similar approach may be justified when dealing with persons who lack capacity when the choice is between greater or lesser restriction. The purpose of the jurisdiction is to enable those who lack

capacity to enjoy life to the fullness that is potentially available to them. To live life to the full is always to incur risks. That seems to me a proper approach in regard to those who lack capacity even though it is the judge rather than the person who is incurring and authorising the risk. I do not think we should be afraid of this for in my view it accords with any sensible philosophy of providing for the welfare of those who, through no fault of their own, are restricted in their ability to control their lives.