

Capacity to end one's own life?

Are we trying to stare directly into the sun?

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“You cannot stare straight into the face of the sun, or death”

François de La Rochefoucauld, Maxim 26 (1678)

Starting with my conclusions

1. A novel, anxious test (Munby).
2. But the right formulation of the decision for assisted dying/assisted suicide law and policy.
3. At the foothills of knowing how to validly conceptualise the test and assess it reliably.

Capacity for...

- A medical treatment?
- A matter related to assisted dying?
- General decision making?
- Ending one's own life?

How do international statutes fill in the ...?

With thanks to Maria Koniarz, medical law MA student, KCL

HEALTHCARE DECISION	A DECISION IN RELATION TO OR ABOUT ASSISTED DYING	GENERAL CAPACITY	DECISION TO END ONE'S OWN LIFE
<ul style="list-style-type: none"> - CANADIAN JURISDICTIONS - US JURISDICTIONS: <ul style="list-style-type: none"> - OREGON (US) - NEW JERSEY (US) - CALIFORNIA (US) - VERMONT (US) - WASHINGTON (US) - COLORADO (US) - DISTRICT OF COLUMBIA (US) - HAWAII (US) - MAINE (US) - NEW MEXICO (US) - SPAIN 	<ul style="list-style-type: none"> - AUSTRALIAN JURISDICTIONS <ul style="list-style-type: none"> - VICTORIA (AUS) - NEW SOUTH WALES (AUS) - QUEENSLAND (AUS) - TASMANIA (AUS) - SOUTH AUSTRALIA (AUS) - WESTERN AUSTRALIA (AUS) - NEW ZEALAND - SCOTLAND (BILL) - PORTUGAL - SWITZERLAND 	<ul style="list-style-type: none"> - LUXEMBOURG - BELGIUM - AUSTRIA 	<ul style="list-style-type: none"> - GERMANY - ENGLAND & WALES (BILL) - ISLE OF MAN (BILL)

Prototypes

Canada – a healthcare decision

Criminal Code, RSC 1985, c C-46, s 241.2

“capable of making decisions with respect to their health”

Australia - ? a circular decision

Victoria, Voluntary Assisted Dying Act 2017, S9

“the person must have decision-making capacity in relation to voluntary assisted dying”

Germany – a suicide decision

Judgment of the Federal Constitutional Court 2 BvR 2347/15, headnote 1b)

“The right to a self-determined death includes the freedom to take one’s own life. Where an individual decides to end their own life, having reached this decision based on how they personally define quality of life and a meaningful existence, their decision must, in principle, be respected by state and society as an act of personal autonomy and self-determination.” (headnote 1b)

“the formation of one’s free will requires that the decision-maker is aware of alternatives to suicide, assesses their respective consequences and makes their decision knowing all the relevant circumstances and options. (para 242)

England and Wales

- ‘Capacity to end their own life’

Terminally Ill Adults (End of Life) Bill [HC] 2024. S1(1)(a) – Kim Leadbeater’s Bill.

- Formulated this way in Westminster following Select Committee remarks on Lord Joffe’s Assisted Dying for the Terminally Ill Bill [HL] 2003.

“We have avoided, on the one hand, terms (such as "killing") which some find offensive and, on the other, phrases (such as "assisted dying") which others regard as either over-euphemistic or inaccurate (or both)”, para 18

What is the relevant information?

- In capacity assessments we *predefine* the relevant information as a set of options and we disclose that information as part of assessing understanding, retaining and using or weighing.
 - e.g. Treatment A vs. Treatment B; Residence X vs. Residence Y
- However, with the decision *ending one's own life* there is an anomaly with respect to relevant information.
 - The basic information disclosure is: Living vs. Not living
 - But 'Not living' is not experiential – it is not an event in life
- So, cognitively relevant information cannot be disclosed in the usual way \Rightarrow the abilities cannot be assessed in the usual way.

? Trying to stare directly into the sun



Possible *indirect* ways to assess the decision to end one's own life

- Continuous and settled preference.
- Consistency with prior beliefs/values.
- Recognised reasons.
- Relation to mood, self esteem, perfectionism, etc.

Are we ready to validity and reliably assess *capacity to end one's own life* in the NHS?

- Research base – quite close to nothing.
- 1 published court case (Re Z [2004] EWHC 2817 (Fam)) on capacity to elect to suicide in Switzerland.
- First jurisdiction in the world to introduce *capacity to end one's own life* as a statutory test.

Foreseeable consequences

- Weight will fall on Terminal illness/6 months prognosis.
- The structured capacity/consent requirements will:
 - Be light touch &/or avoided as there will be low confidence in them,
or
 - Require substantive High Court hearings

Thank you

<https://www.kcl.ac.uk/research/complex-life-and-death-decisions-group>

