

The HK legislative proposal for ADs – an English response

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English context

- Mental Capacity Act 2005:
 - Capacity
 - Best interests
 - Framework for decision-making – graduated informality overseen by Court of Protection

Advance care planning

- Where the person currently has capacity to make decisions/participate:
 - Advance decisions to refuse treatment
 - Advance statements
 - Appointment of attorney
- Where person currently lacks capacity to make decisions/participate
 - Identification of wishes, feelings, beliefs and values
- Critical point (forgotten in C-19): advance care planning is to be done **with** not **to** the person

Advance statements

- Care/treatment other than medical treatment
- Requests for specific treatment (but nb cannot demand particular treatment)
- The importance of the value/priorities statement
- No need to be written: video/audio

Advance decisions to refuse treatment (1)

- Building on common law, now placed on statutory footing in ss.24-26 MCA
- No standard form and no requirement to be in writing, but specific requirements re life-sustaining treatment
 - Written, signed, witnessed, and acknowledge that will apply to the treatment(s) even if life is at risk
- Template: mydecisions.org.uk
- Silent about basic care – probably cannot exclude

Advance decisions to refuse treatment (2)

- Not **valid** if (1) withdrawn with capacity (2) overtaken by power of attorney or (3) done anything else clearly inconsistent with remaining fixed decision
- Not **applicable** if (1) treatment is not the treatment specified in the advance decision; (2) any circumstances specified in the advance decision are absent, or (3) there are reasonable grounds for believing that circumstances exist which the person did not anticipate at the time of the advance decision and which would have affected his decision had he anticipated them.

Flashpoints in practice

- How does anyone know about them – and the perils of hearsay: *NHS Cumbria CCG v Rushton* [2018] EWCOP 41
- Keeping current vs time-limiting: *The X Primary Care Trust v XB & Anor* [2012] EWHC 1390 (Fam)
- Retrospective concerns about capacity: what place a presumption of capacity? *Re E (Medical treatment: Anorexia)* [2012] EWCOP 1639
- Should there be a ‘let out’ on the other side of capacity? *Re QQ* [2016] EWCOP 22

Some questions for you

- Do you want to record contemporaneous capacity – witnessing vs assessing?
- What do you want to happen if they ‘break’ ?
- Where do you want to house requests? (the language – advance directive vs advance decision)
- How great a let-out do you want on the other side of incapacity?
- And a plea not to get fixated on DNACPR (see the ReSPECT process: <https://www.resus.org.uk/respect>) – a nerdy point also about the model DNACPR form “*agreement has been reached that if this patient suffers from cardiopulmonary arrest, it would be in this patient’s best interests that neither artificial ventilation, external cardiac compression, nor defibrillation should be given*” – the other way around in the UK as regards thinking about Bt: *Aintree v James*

Some resources

- <http://www.39essex.com/resources-and-training/mental-capacity-law/>
- <http://www.mentalcapacitylawandpolicy.org.uk/>

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