

# Decision-Making Capacity, “wise decision” and Brain Injury

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**welcome**trust

# Daily Mail

**Star student, 23, wins \$1.5m after car crash  
brain trauma turned her into an impulsive  
sex-mad dominatrix**

**5 Feb., 2015**

# DMC and brain injury

- Masterman-Lister v Brutton & Co [2002]
- Expert witness:
  - “judges have stated that they should have been able to interview the “patient” and that this would have been of greater assistance to them than the medical or neuropsychological evidence before them”
  - “[the judges] need to recognise the limitation of face-to-face interactions as an assessment tool”

“A person is not to be treated as unable to make a decision merely because he makes an unwise decision”

S1(4) MCA

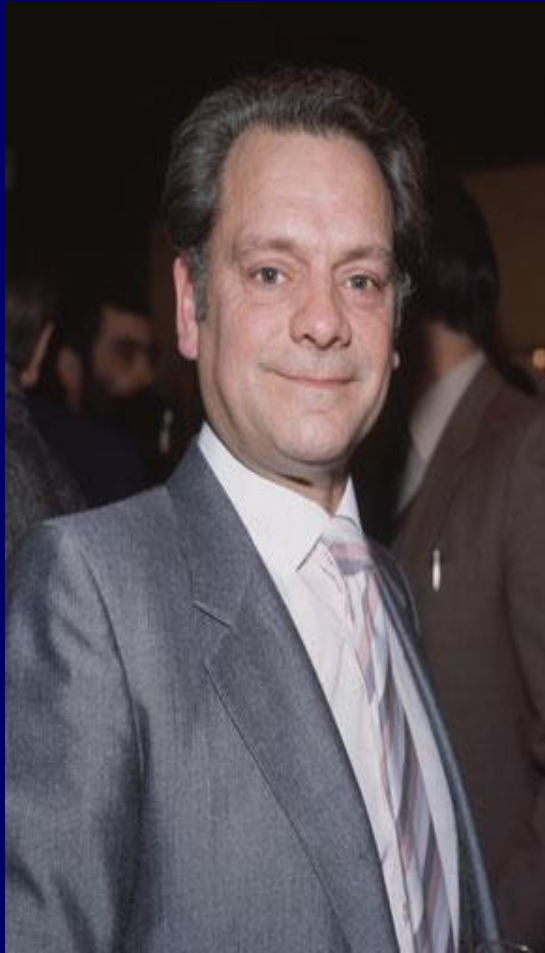
# The hard brain injury cases

ICD 10 F07.0 – Organic personality disorder

- Poor impulse control
- Defects in planning and anticipating the likely personal and social consequences of decisions.



# Unwise decisions



# Neuroscience

Functions patients with frontal brain injury lose:

- 1) awareness of deficit
- 2) metacognition – thinking about thinking
- 3) somatic markers – emotional bias in decision-making

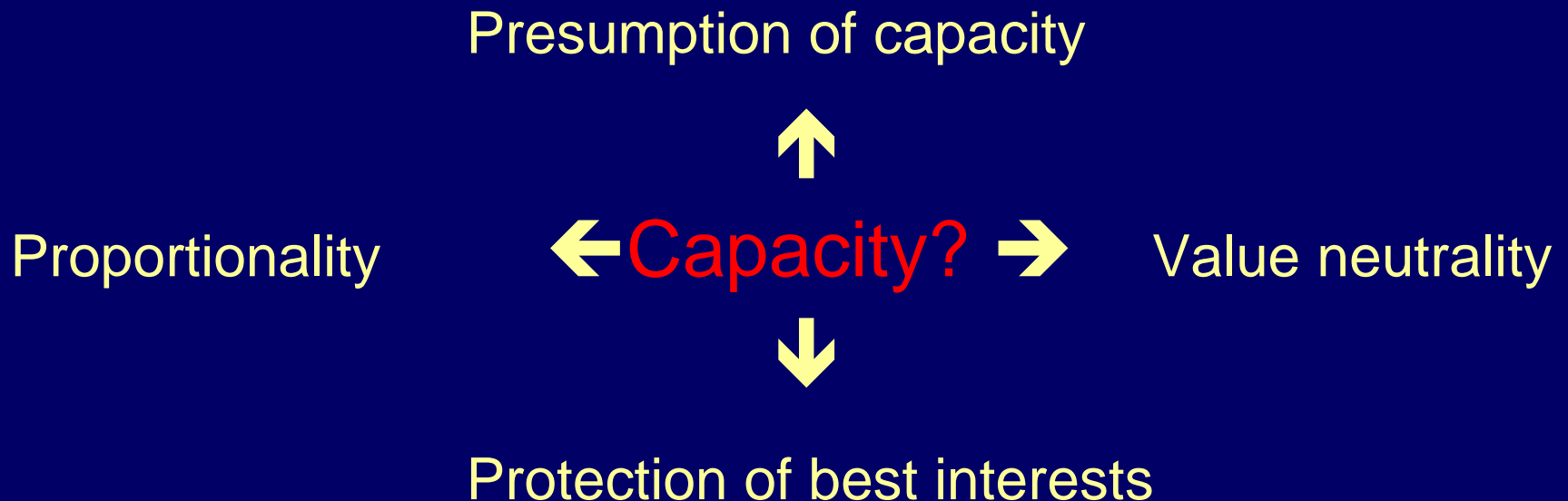


# Problems applying neuroscience to capacity assessment

- 1) The functional impairments relate to groups rather than individuals.
- 2) Relation of functional impairments to legal incapacities?

# Tailoring assessment of DMC for acquired brain injury

*Owen, Freyenhagen, Martin and David. Neuropsychological  
Rehabilitation (2015)*



# Before the interview

- What's the concern? Is it adequate to rebut the presumption of capacity?
  - Repeated “unwise” decisions or failure to learn from mistakes
  - Discrepancies between a patient's self-evaluation of ability and those of others
  - Collateral history of a “change in personality”
  - Marked executive impairment on psychological tests
- What is it that the person needs to decide about?
- Do I understand what needs deciding about well enough to communicate relevant information?
- Who/what supports the person make decisions?

# During the interview – probe the relevant abilities

## 1) Awareness of deficit

- Is the person aware of deficits relevant to the decision that needs to be made?
- Does retrospective or concurrent unawareness mean he or she is unable to *understand* or appreciate the relevant information?
- If the person does have awareness of relevant deficits, is the awareness engaged or disengaged from the deliberative process? Is it online awareness that the person is able to make *use* of in the context of deliberating?

## 2) Detachment and disengagement:

How does the person respond to their impulses in the context of decision-making and action?

- Does the person show an ability to “disengage” an impulse in order to consciously reflect?
- Does the person have the ability to resolve conflicting impulses that may arise in a decision situation?
- Is the person able to *use* a detached position in deliberation.

### 3) Emotion:

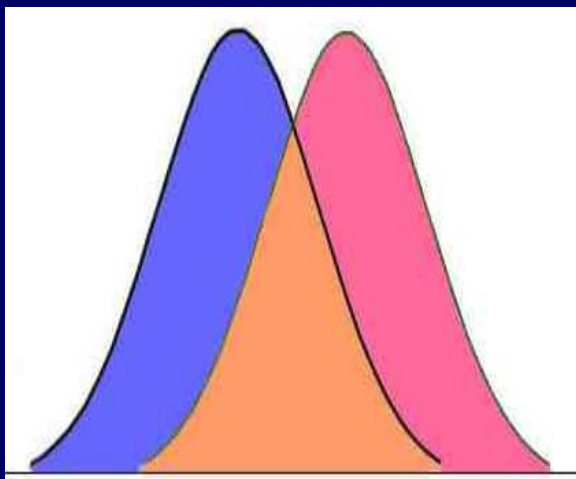
Requires nuance!

- To what extent are the person's emotional responses suited to the situation, given the moral values they espouse?
- To what extent is the person able to *use* their feelings to navigate the value–complexity of the decision they face?

# After the interview

- Consult others to support or refute the evidence obtained on the abilities during the interview or to highlight areas of uncertainty
- Be willing to have another go
- One stops assessment when there is enough evidence to form a judgement when a judgement needs to be made.
- Record short extracts of dialogue and “triangulate” with relevant evidence from collateral sources or from behaviour.

Look for differences of kind as well as differences in degree.



Distinguish:

P has the ability to use and weigh, but did not exercise it.

vs.

P lacks the ability to use and weigh, because P lacks the ability to disengage and reflect.





# Face-to-face DMC assessment helps the next step:

Capacity?

Yes → duties to inform, support but not coerce decisions (law of consent)

No → duties of surrogate/substituted decision making (law of best interests)

“ so 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” S4(4)