Mental Capacity Assessments and Best Interests Decision Making

Swindon Safeguarding Partnership

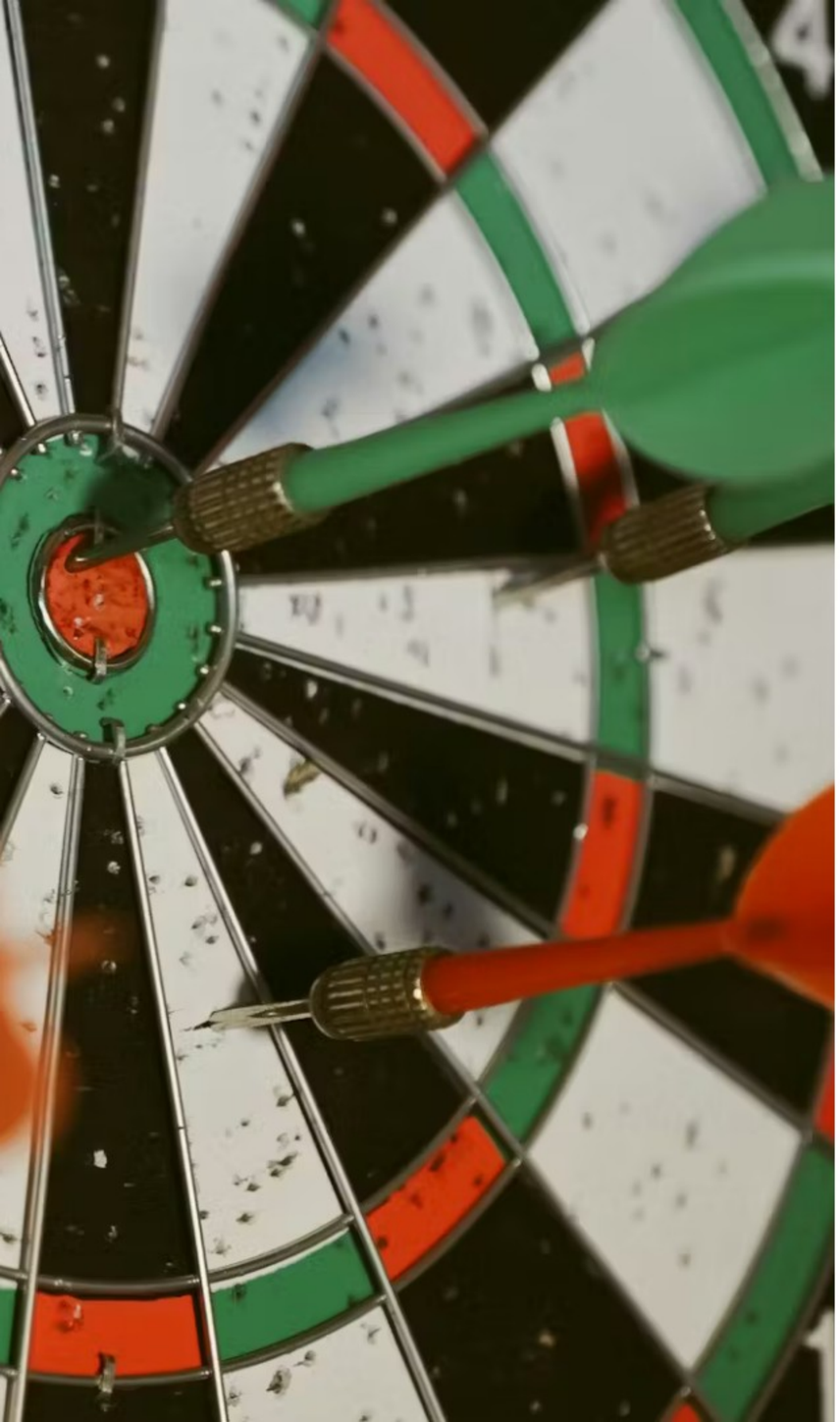
7th November 2024

Leona McCalla

Instructions

Housekeeping

- Please keep your camera off and mirophone muted.
- This webinar is being recorded and uploaded to your local partnership website as a learning resource
- If you can't see slides, or they freeze, try logging out then back in
- Please ask questions in the chat box or at the dedicated question space at the end
- Confidentiality
- Evaluation
- Please put your name, role and organisation in the chat



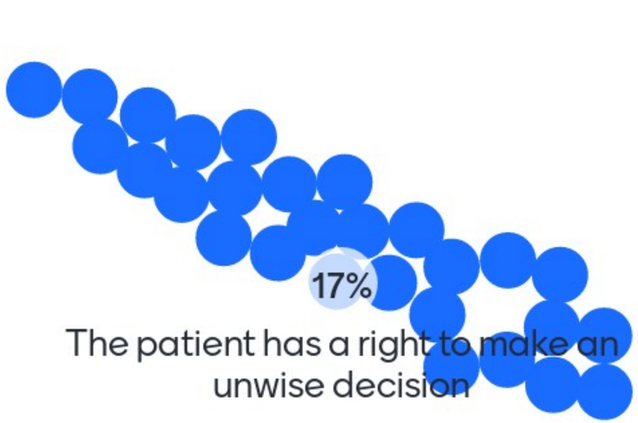
Mentimeter

Learning Objectives

- To develop understanding of the principles of the MCA
- To be able to identify salient factors relevant to the decision
- To be able to identify what to document to ensure that assessments are legally robust
- To understand how to complete a best interests decision and how to document this

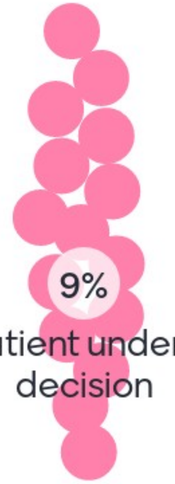
1

Which of the following are principles of the MCA?



17%

The patient has a right to make an unwise decision

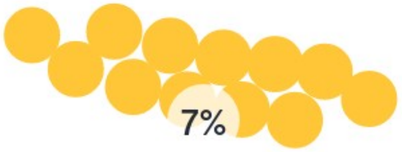


9%

That the patient understands the decision

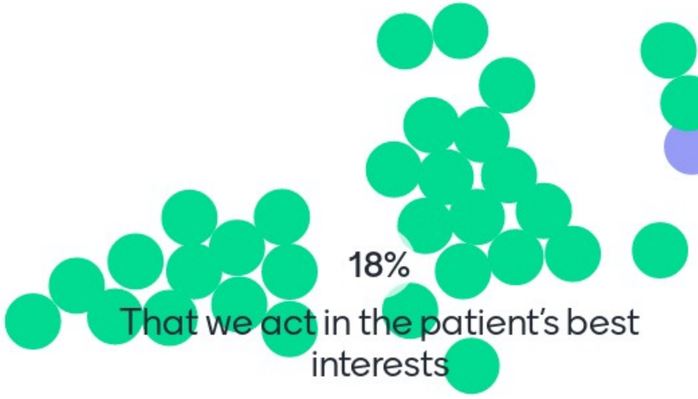
13%

That we assume the patient has capacity



7%

That the patient retains the information



18%

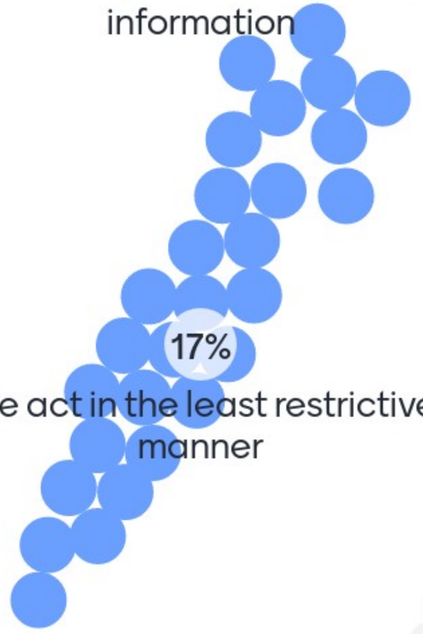
That we act in the patient's best interests

15%

That we support the patient to make the decision

5%

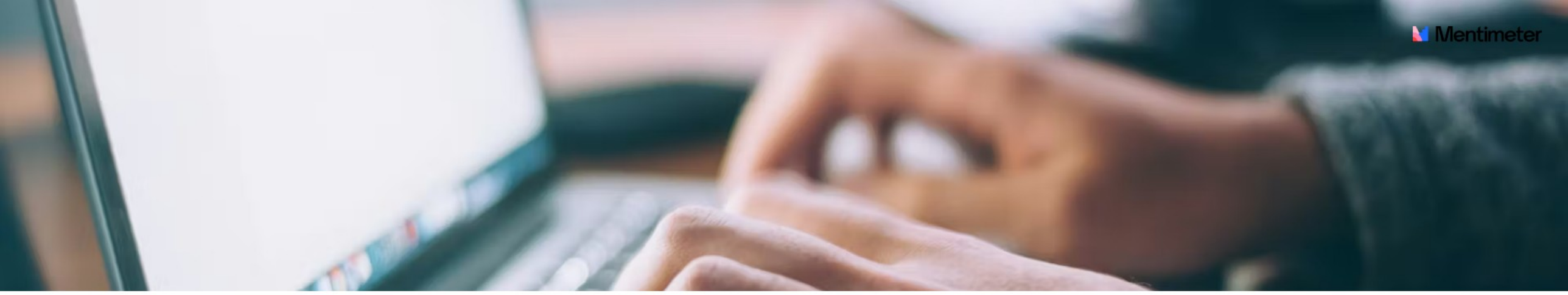
The patient must be over 18 years old



17%

We act in the least restrictive manner


Unwise decisions – just because I make an unwise decision, it doesn't mean I lack capacity
3
Take realistic steps to help me make a decision
2
MY best interests – Any decision made must be in my best interests
4
Is there a less restrictive option?
5
Presumption of capacity – Start by thinking I can make a decision
1



Principle 1 Assumption of capacity

The Mental Capacity Act 2005 requires agencies to assume a person has capacity unless it is established that they lack it.

However, misinterpretation of this principle in the cases covered by the SARs led to mental capacity assessments not being carried out.

Assessments were not completed even when professionals observed concerning events, such as service-users disengaging with service provision, making significant "unwise decisions", and/or having diagnoses which may have impacted upon their decision-making.

Principle 1 Assumption of capacity... *continued*

In the cases covered by SARs, professionals sometimes used capacity to justify not intervening in cases of probable self-neglect, therefore leaving people at considerable risk.

Social care practitioners with excessive workload pressures may be at risk of using capacity as a tool for 'disposing' of cases, whether consciously or unconsciously.

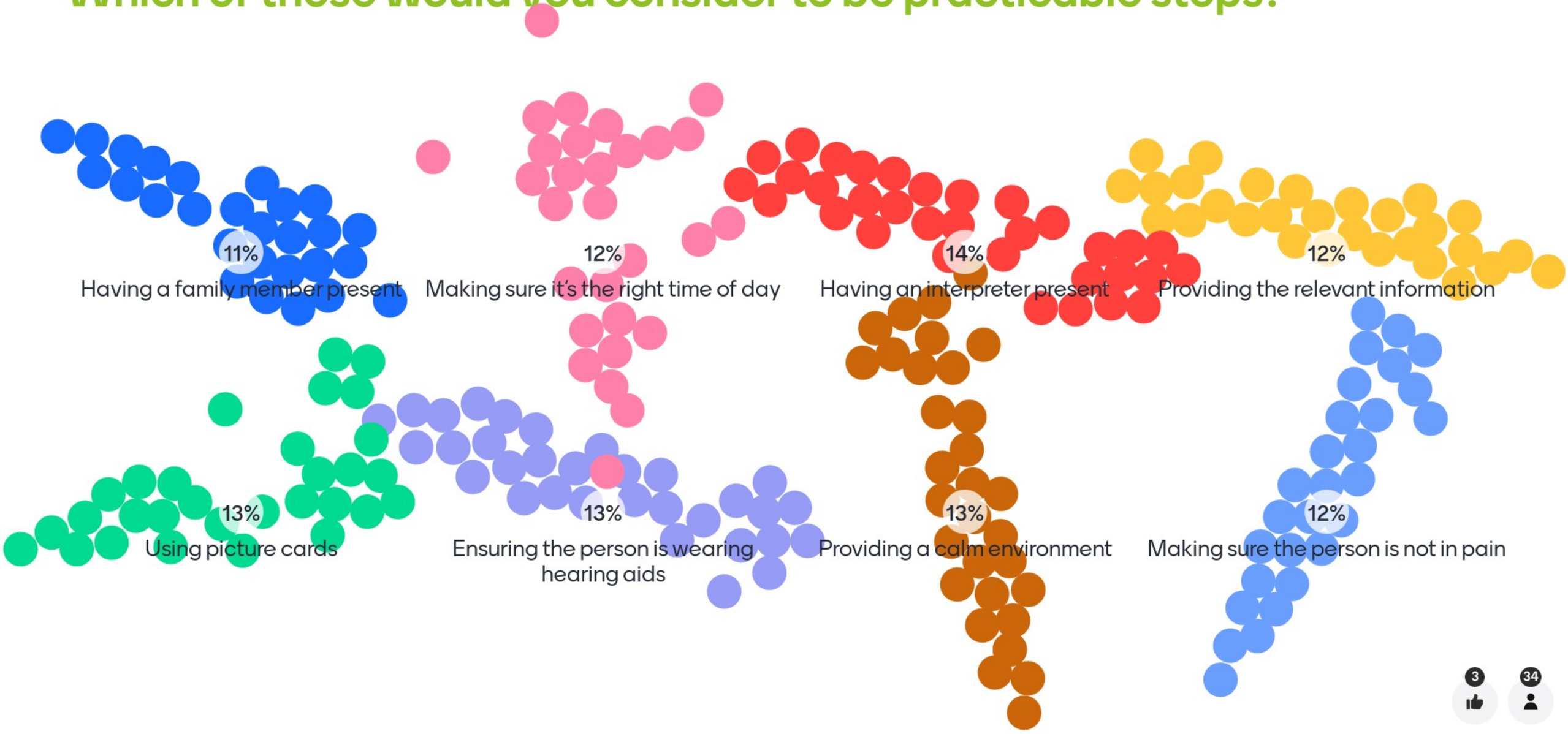
Policy Report 76: Oct 2022

Principle 2: Practicable Steps

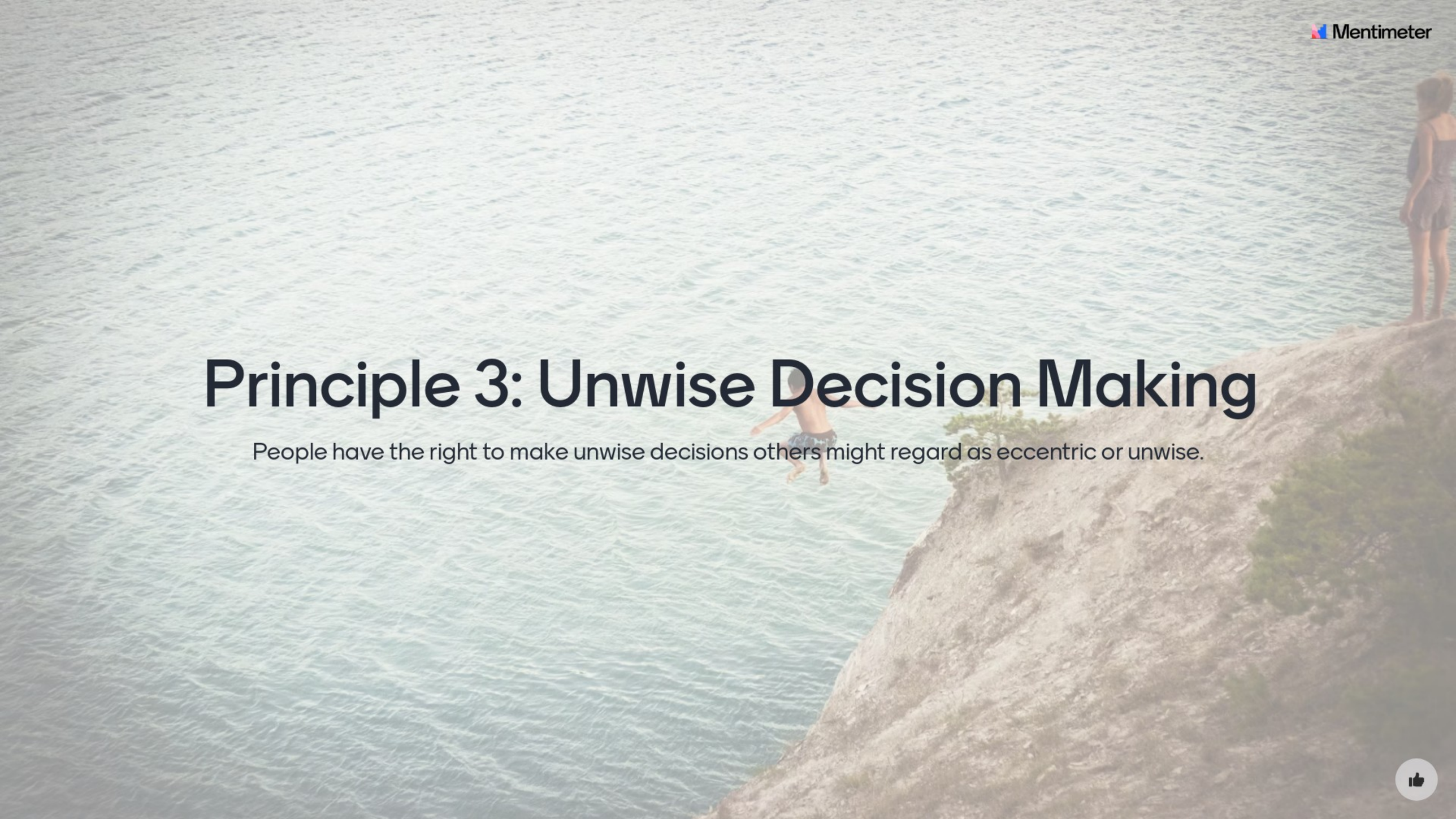
Support must be provided before we treat the person as being unable to make their own decision

Mentimeter

Which of these would you consider to be practicable steps?



3 34



Principle 3: Unwise Decision Making

People have the right to make unwise decisions others might regard as eccentric or unwise.

Principle 3: Unwise Decision Making

- Where there are clear indicators there are significant risk factors and there is an indication that there is an impairment of the mind or brain it is important to formally complete a mental capacity assessments.

- Unwise Decision: capacitated decision alone does not mean that the professional can cease engagement / close a case / walk away if the person still remains at significant risk of harm or is experiencing harm. The onus is on the professional to look for other ways to engage the individual, and consider alternative legal powers if necessary and proportionate.

Mental Incapacity Defined: Section 2 (the 'diagnostic test')

"A person lacks capacity in relation to a **matter** if at the **material time** he is unable to make a decision for himself in relation to the **matter** because of an impairment of, or a disturbance in the functioning of, the mind or brain"

What does this mean?

Assessing Capacity

- Incapacitated only in relation to a particular decision at a particular time
- It does not mean that a person lacks all capacity to make any decisions at all. A blanket approach
- Only the smallest area of decision making necessary should be identified
- Contrasts with approach that states that because a person has a particular medical condition, they lack general capacity

What are we assessing capacity for? This is always the starting point!!

- Does the person have the mental capacity to make a decision about receiving a package of care?
- Can the person decide regarding the provision of a hospital bed?
- Can the person decide about wound care/ pressure care?
- Does the person have the mental capacity to manage their diabetes?
- Can the person make the decision regarding hospital discharge?
- Can the person make a decision about taking prescribed medications?
- Does the person have the mental capacity to decide about accessing support with hoarding?
- Can the person make the decision regarding NG tube insertion?
- Does the person have the mental capacity to make a decision regarding continence care?

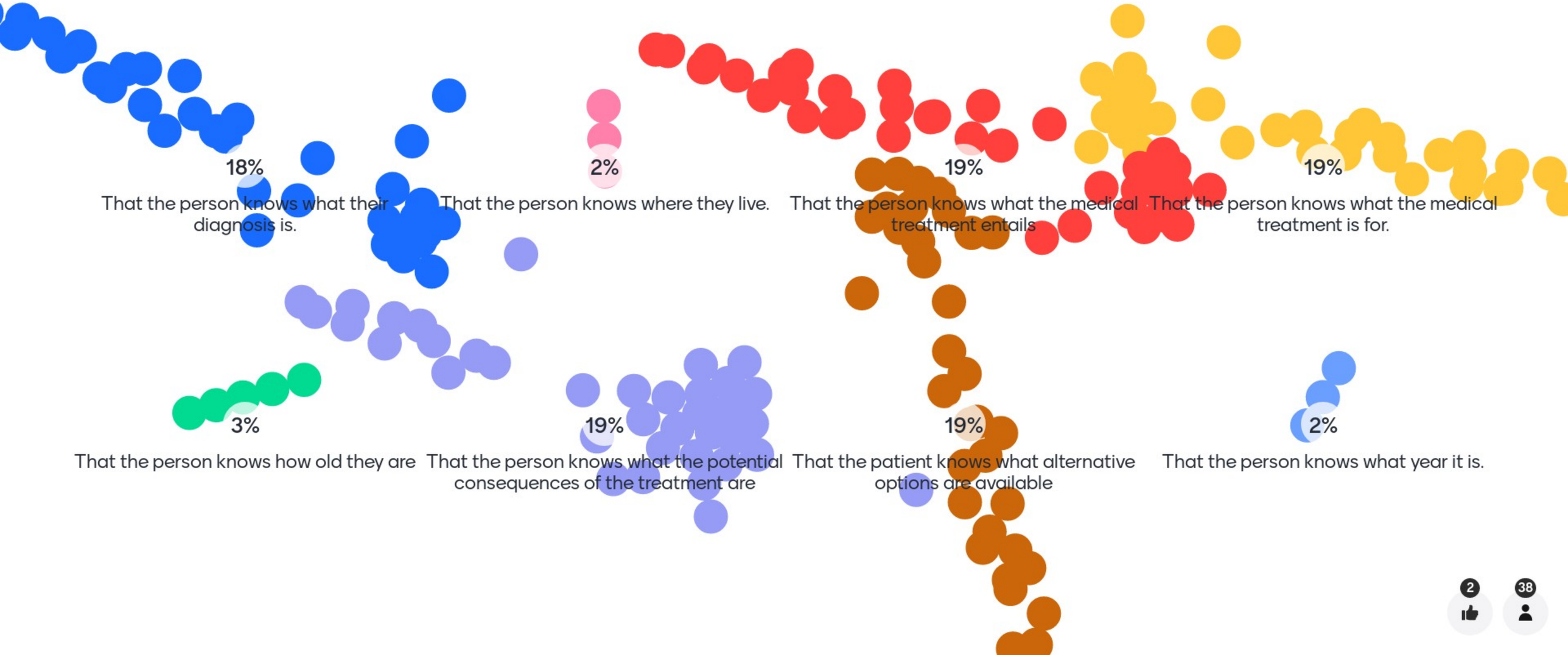
Mental Incapacity Defined: Section 3

- **Stage 1**: The functional test: **URWC**
- Can the person **understand** the relevant information?
- Can the person **retain** the relevant information?
- Can the person **use** or **weigh** the relevant information?
- Can the person **communicate** that decision?
-
- **Stage 2**: Does the person have an impairment or functioning of the mind or brain?
- **Stage 3**: Is it because of that impairment they cannot make decision? (Causative Nexus)

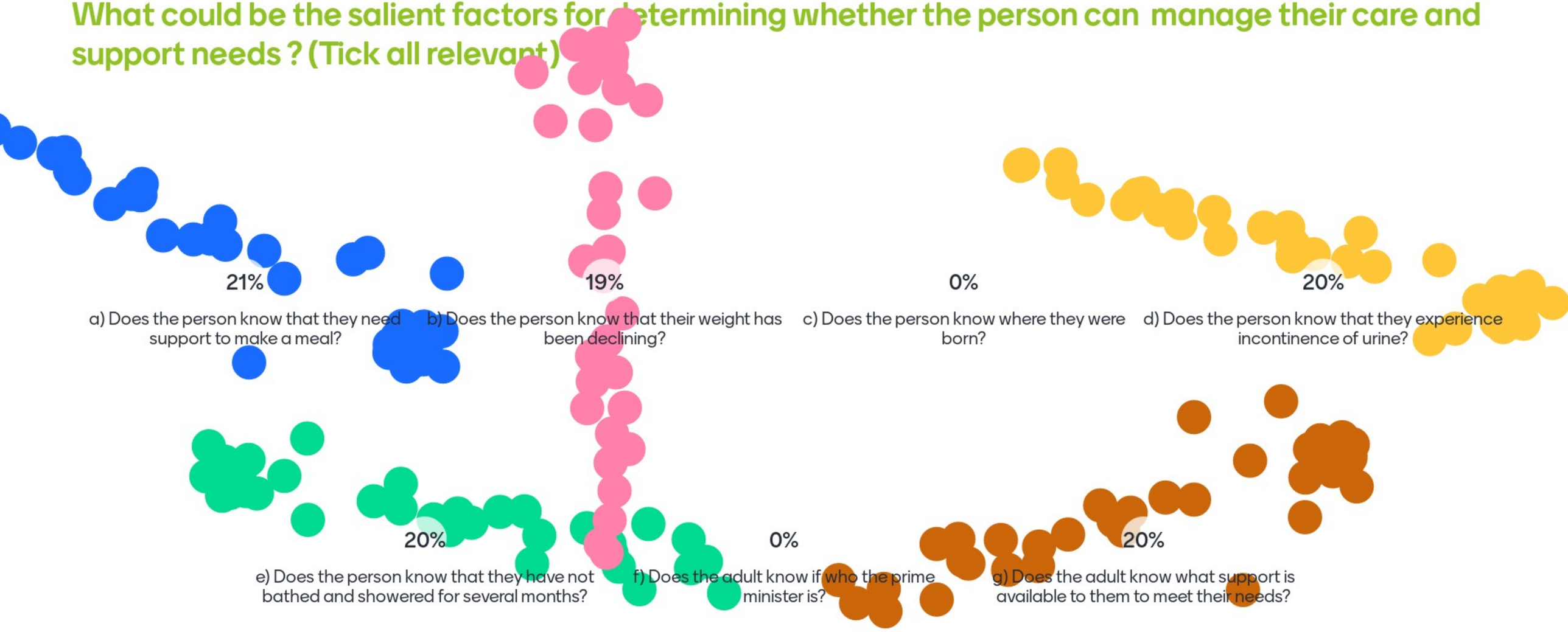
Stage 1

- Salient Factors: Asking the right questions for the decision to be made!!

What could be the salient factors for determining whether the person can consent to medical treatment ? (Tick all relevant)



What could be the salient factors for determining whether the person can manage their care and support needs ? (Tick all relevant)



Case Example: (CC v KK and STCC, 2012).

Salient factors: It is not necessary that P understands every element of what is being explained to him: This means that the onus is on you not just to identify the specific decision but also what the information is that is relevant to that decision, and what the options are that P is to chose between.

Options: The person under evaluation must be presented with detailed options so that their capacity to weigh up those options can be fairly assessed As the Code of Practice makes clear, each person whose capacity is under scrutiny must be given 'relevant information' including 'what the likely consequences of a decision would be (the possible effects of deciding one way or another)'.

Case Example: (CC v KK and STCC, 2012).... *continued*

Protection imperative: In relation to vulnerable adults and highlighted the importance of ensuring that the consideration of risk and the perceived need to protect does not unduly influence an assessment of capacity'.

"If I fall over and die on the floor, then I die on the floor".

Be in a position to explain to the court how questions have been put to P, where they have been put, and what efforts have been made to ensure that P understands the information before him or her.

Conducting Assessments:

- **Be transparent**- completing a capacity assessment/outcomes, ask the question you are trying to obtain consent for
- **Do your homework**- be clear what the salient info is that is relevant to the decision being made, including the '**reasonable foreseeable consequences**'.
- Salient info needs to delivered in a way that **"the man on the street can understand"**- Montgomery v Lanarkshire Health Board [2015] UKSC11
- Need to **not set 'the bar too high'** for understanding or be overly influenced by the 'protection imperative'- CC v KK & STCC [2012] EWCOP 2136

Conducting Complex Assessments

Repeat assessments: This might be required to ensure that professional curiosity and appropriate challenge is embedded within an assessment. It is important than when undertaking the assessment that the practitioner does not accept the first, and potentially superficial, response rather than exploring more deeply into how a person understands and can act on their situation.

Sharing information: It is important to collect and share information with a variety of sources, including other agencies, to complete a picture of the extent and impact of the self-neglect and to work together to support the individual and assist them in reducing the impact on their wellbeing and on others

MDT Discussion: Triangulating of information

"In proceeding under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities"

– MCA05 s.2 (4)

Documenting Stage 1

- Be in a position to explain to the court how questions have been put to P, where they have been put, and what efforts have been made to ensure that P understands the information before him or her:
- Example: Decision about being accommodated in hospital for care and treatment

Understanding:

I told Mr X that he is at GWH following a fall, I explained that he has had an operation following a hip fracture. I explained that he needs time to recover in hospital and that if he stays here, he will receive care and support to support recovery. Mr X was not able to understand any of the above information, he responded verbally but the content of his speech was muddled and confused. He was not able to understand where he is, why he is here and what treatment he is receiving.

Retaining:

I told Mr X that he is an inpatient at GWH, I told him that he is receiving treatment following a fall. I explained that he needs to stay on the ward for further medical observations and treatment. Mr X was not able to retain this information for long enough to make this decision. He asked on numerous occasion. Where am I? Why am I here?

Using and Weighing:

I explained the Mr X that at present he is not medically fit for discharge and that he needs to stay in hospital for further treatment to support his recovery. I told him that if he is discharged at present his health would rapidly decline. Mr X said "I don't need to be here, I'm not unwell". Mr X did not have any insight into the reasons why he is in hospital or the risks associated with not receiving treatment.

Communicating:

Mr X is able to verbally communicate

Diagnostic Test: Stage 2

What is the impairment of, or disturbance in the functioning of the mind or brain?

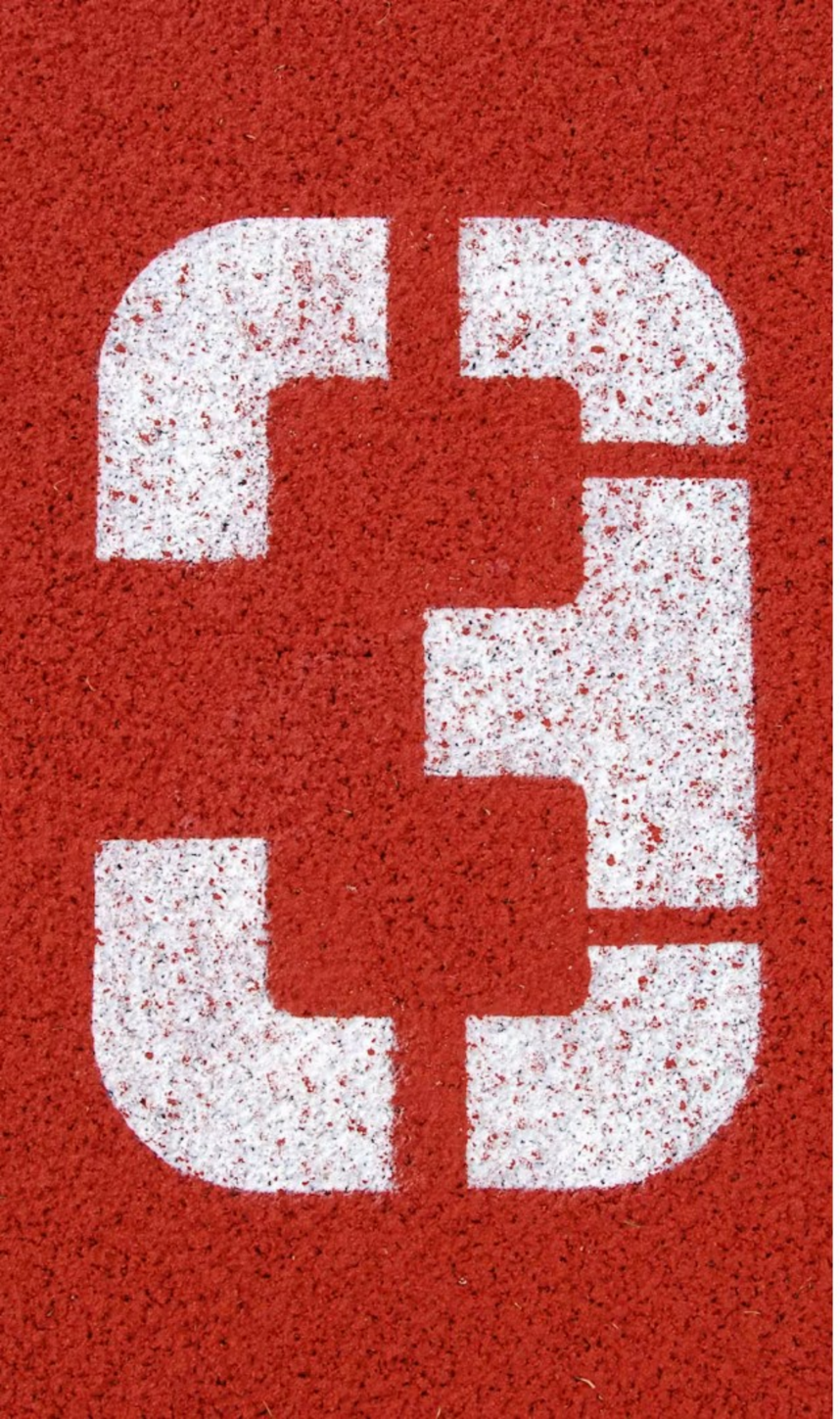
The impairment can be diagnosed formally by a clinician, but it doesn't have to be. It doesn't have to be as specific as a mental disorder diagnosis. It can be based on what you can see of or observe about the person. An impairment of the mind or brain doesn't have to be permanent to satisfy this aspect of the test- it can be temporary such as because of an acute infection or the effects of substances or alcohol for example

Documenting Stage 2

..... (the person) has a diagnosis of..... This is confirmed in medical paperwork

..... (the person) was diagnosed at the memory clinic with Alzheimer's disease in.....

There is no confirmed diagnosis of a mental impairment however there is evidence that they do have an impairment of the mind. For example, they have poor short term memory, are disorientated to time and place, fail to recognise key people in their life and have an inability to carry out activities of daily living



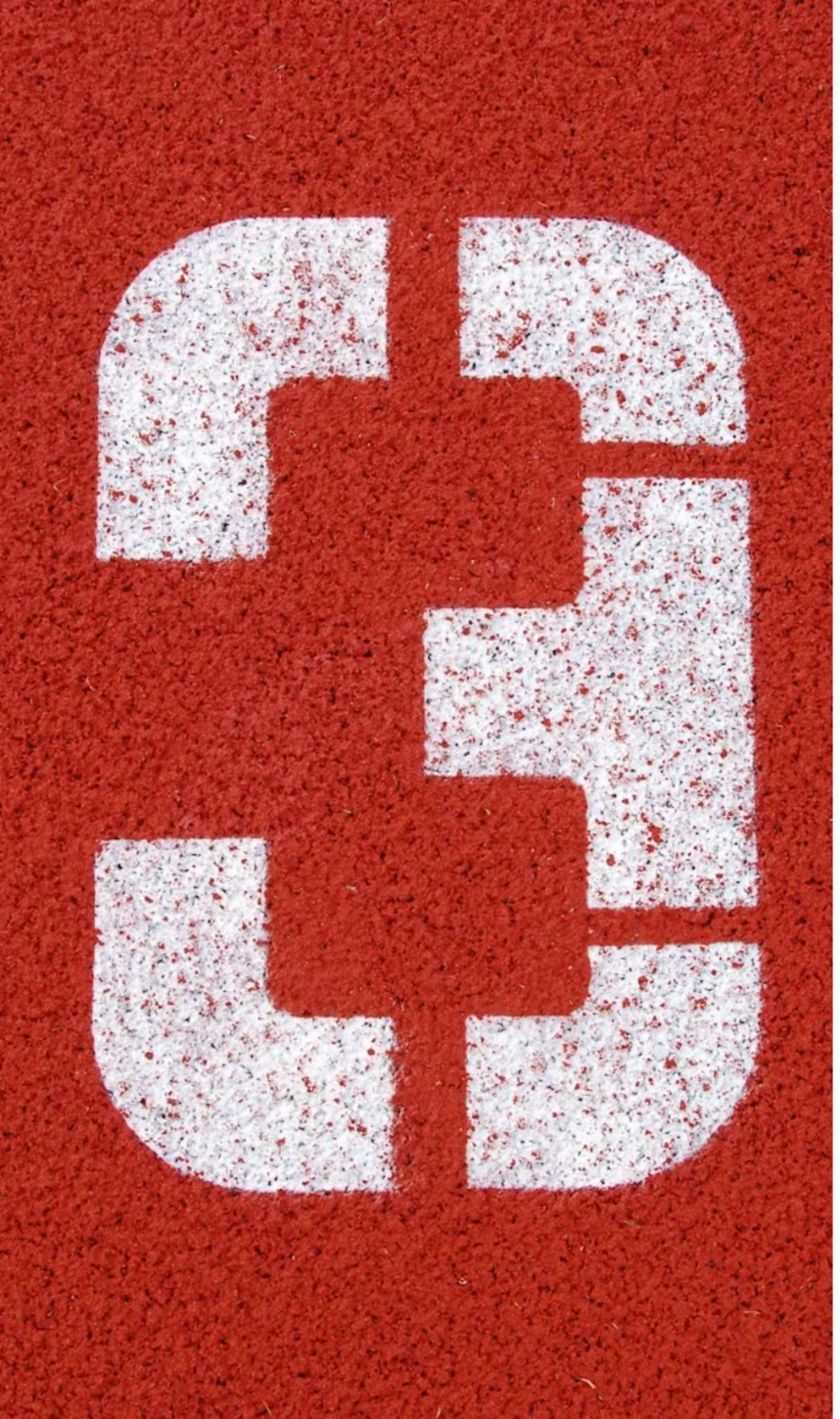
Causative Nexus: Stage 3

This is where you need to make a link between the person's inability to make the decision (Stage 1)

And the mental impairment (Stage 2)

The Court made clear in the PC v York case that the person must be unable to make the decision because of their mental impairment to be deemed as lacking capacity under the terms of the Mental Capacity Act 2005.

PC and NC v City of York Council [2013] EWCA Civ (para 54 of Judgment) (http://www.39essex.com/cop_cases/pc-and-nc-v-city-of-york-council/)



Documenting Stage 3

I assessed .....(the person) to lack capacity regarding the decision of .....at the time I saw them on the **balance of probabilities** because I was unable to find evidence that they could understand/ retain or use/weigh the information relevant to that decision and/or communication a decision to me.

I believe they could not make the decision **because the mental impairment** is affecting their ability to process the information properly and has affected their short term memory.

Best Interests Decision Making

"The Mental Capacity Act 2005 established a comprehensive scheme for decision making on behalf of people who are unable to make the decision for themselves. The decision maker.....stands in the shoes of the person who is unable to make the decision.....and makes the decision.....The decision needs to be that which is in the best interests"

Supreme Court Judgement, N v ACCG & Ors [2017] UKSC 22

Best Interests Decision Making

- **Principle 4**: Acts and decisions on behalf of the person lacking capacity must be in their best interests
- **Principle 5**: Acts and decisions must be the least restrictive

Who would you consult with when making a best interests decision?

Professionals

MDT colleagues

LPAs

Family members

Next of Kin

Family

Family

Dr, social worker, advocates, family, consultants

Who would you consult with when making a best interests decision?

Carers

LPA's

Friends

Family

Family members,

Individual with power of attorney

Family

Friends

Who would you consult with when making a best interests decision?

Other professionals

family membersprofessionals

Close familyProfessionals

Family

Doctors, family, friends, nurses, psychiatrists

Doctors

LPAs, Deputies, family, professionals, carers, IMCA

Advocate

Who would you consult with when making a best interests decision?

FamilyProfessionals

Professionals

The personFamilyFriendsCare providersGP

Carers

Documents stating past wishes etc

Social workers

Professionals, next of kin, social worker

Family, other involved professionals relevant to the decision being made - LPA would be the decision maker

Who would you consult with when making a best interests decision?

IMCA

IMCA

Professionals, Family,

Family, MDT colleagues, professionals, LPAs.,

Best Interests: Section 4 (a checklist)/ Chapter 5 Code of Practice

- The person making the decision will be known as the **'decision-maker'**
- Cannot make assumptions based on age, appearance, condition, behaviour
- Consider whether it is likely that the person will at some time have capacity in relation to the matter
- Permit & encourage the person to participate as fully as possible
- **Consider past & present wishes and feelings (particularly any written statement when they had capacity)**
- If decision concerns withdrawal of life-sustaining equipment, must not be motivated by a desire to bring about the person's death

Best Interests: Section 4 (a checklist)

- Consider the beliefs and values that would be likely to influence his decision if he had capacity
- Take into account the views of:
- Anyone named by the person as someone to be consulted
- Anyone engaged in their care or welfare
- Any donee of an LPA (discussed later)
- Any deputy appointed by the court (discussed later)

Autonomy vs Protection

The promotion of autonomy is central to social work practice:

- Some have argued that too much emphasis is placed on autonomy and there is insufficient focus on the individual's right to live in safety, free from harm and abuse.

- Braye et al (2015, 2016) completed systematic reviews of serious case reviews (now known as Safeguarding Adult Reviews), they identified that over 60 reviews featured self-neglect and of them over a third mentioned the complexity of balancing autonomy with protection.

- The research concluded that the promotion of autonomy is favoured by practitioners and that in some cases this was tantamount to abandonment, they suggest that the concept of autonomy and self-determination is often over simplified in social work practice

Re M EWHC 3456 (COP):

"physical health and safety can sometimes be bought at too high a price in happiness and emotional welfare. The emphasis must be on sensible risk appraisal, not striving to avoid all risk, whatever the price, but instead seeking a proper balance and being willing to tolerate manageable risk ..... What good is it making someone safer if it merely makes them miserable?"

Wye Valley NHS Trust v Mr B [2015] EWCOP 60:

The case concerned Mr B, a 73 year old with a long standing history of mental illness together with, in more recent years, poorly controlled Type II diabetes.. Mr B continued to resist medication for his diabetes and antibiotics for his foot, with the consequence that by the time his mental health had begun to recover in his physical health had markedly deteriorated.

The judge ruled **"capacity is not an off-switch"**

Documenting Decisions

- Explicitly state the + and - evidence
- A balance sheet

Benefits	Impact on wellbeing	Drawbacks

References

- CC v KK & STCC (http://www.39essex.com/cop_cases/cc-v-kk-and-stcc/)
- PC and NC v City of York Council [2013] EWCA Civ (para 54 of Judgment) (http://www.39essex.com/cop_cases/pc-and-nc-v-pc-and-nc-v-city-of-york-council/)
- Murrell & McCalla (2015) https://doi.org/10.1080/09503153.2015.1074667
- Braye, S., D. Orr, and M. Preston-Shoot. 2015. "Serious Case Review Findings on the Challenges of Self-Neglect: Indicators for Good Practice." The Journal of Adult Protection 17 (2): 75–8 https://doi.org/10.1108/JAP-05-2014-0015
- Re M EWHC 3456 (COP):39 Essex Chambers | Re M (Best Interests: Deprivation of Liberty) | 39 Essex Chambers | Barristers'Chambers
- Wye Valley NHS Trust v Mr B [2015] EWCOP 60 39 Essex Chambers | Wye Valley NHS Trust v Mr B | 39 Essex Chambers | Barristers' Chambers
- Mental Capacity, Self-Neglect, and Adult Safeguarding Practices: Evidence Synthesis and Agenda for Change | Policy Bristol | University of Bristol

Thank You!

Please complete a feedback form using the QR code or link in the chat. Once complete you will be able to download your certificate of attendance.