

# Best interests and the sanctity of life after *W v M*

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## ABSTRACT

The case of *W v M and Others*, in which the court rejected an application to withdraw artificial nutrition and hydration from a woman in a minimally conscious state, raises a number of profoundly important medico-legal issues. This article questions whether the requirement to respect the autonomy of incompetent patients, under the Mental Capacity Act 2005, is being unjustifiably disregarded in order to prioritise the sanctity of life. When patients have made informal statements of wishes and views, which clearly—if not precisely—apply to their present situation, judges should not feel free to usurp such expressions of autonomy unless there are compelling reasons for so doing.

## INTRODUCTION

The case of *W v M and others (Re M)*<sup>1</sup> demonstrates the terrible challenge of striking an appropriate balance between protecting life and according respect to the previously expressed autonomous wishes of the incompetent patient. When the sanctity of life conflicts with the legal requirement to consider the past ‘wishes and feelings, beliefs and values’ of the incompetent individual,<sup>2</sup> which factor should be given precedence? The ‘best interests’ balancing exercise will not provide a clear answer unless the patient’s clinical condition and quality of life are either demonstrably satisfactory or overwhelmingly burdensome. Thus, in a case where the quality of life is uncertain and open to interpretation, in the face of evidence that the person under scrutiny would not choose such a life, judges are essentially presented with a stark choice between autonomy and sanctity. This article develops Sheather’s observations over the conflict between the formerly competent person’s previously expressed wishes and the present (incompetent) person’s interests.<sup>3–4</sup> One of the central aims of the Mental Capacity Act 2005 was to afford greater respect to incompetent people; thus, it is argued that the judiciary should not feel at liberty to disregard important evidence concerning a patient’s past wishes unless there are compelling reasons for doing so. With reference to Dworkin’s argument that the competent persons should have sovereignty over their future incompetent self,<sup>5</sup> it is argued that while some incompetent patients might have sufficient contemporaneous interests in order to justify usurping their informally expressed autonomous wishes, this was not apparent in *Re M*.

## CONFLICTING INTERESTS

As Sheather has discussed, Dworkin’s argument that an individual’s critical interests, within which one’s autonomy is central, should take precedence over an individual’s day to day experiential

interests has a clear application in a case such as *Re M*. The crucial reason for rejecting the application to withdraw artificial nutrition and hydration (ANH) in *Re M* rested on the fact that a minimally conscious person has some capacity for experiential interests. M’s experiential interests consisted in being able to enjoy certain sensations, such as the sun on her skin or listening to music, and for the court this was sufficient to validate her continued treatment. With respect to M’s critical interests, her family provided clear evidence that M would not wish to have her life maintained in such circumstances. Unfortunately, M had not executed a legally binding advance refusal,<sup>6</sup> but she had expressed a view that she would rather not be kept alive in a similar scenario. While M’s previously expressed wishes related to a person in a vegetative state (VS), other comments relating to family members subjected to residential care clearly portrayed M as a person for whom a life of total dependency would be intolerable. We should, therefore, question whether the limited evidence that M derived some contentment from aspects of her life is sufficient justification for disregarding the evidence pertaining to M’s wishes. As Heywood has argued, this approach is ‘a rather narrow way of looking at best interests’.<sup>7</sup>

In *Re M*, the quality and scope of experiential interests were clearly open to question, but the very fact that some experience occurred was regarded as crucial. By contrast, a person in a VS has no capacity to experience anything and so we can speculate that if M’s original diagnosis of VS had proved accurate, authorisation to cease ANH would have been comparatively uncontentious.<sup>7</sup> As Baker J noted, ‘[I]n VS cases, the balance falls in one direction every time—in favour of withdrawal.’<sup>9</sup> But is ‘something’ necessarily better than ‘nothing’, or, should we question the assumption that being in VS is a worse fate than being in minimally conscious state (MCS)? For example, Ashwal and Cranford have argued that being in MCS is worse than being in VS because the persons can experience both pain and some awareness of their condition.<sup>10</sup> Although the evidence concerning M’s quality of life was inconclusive, being subject to some conflicting interpretation, even those opposed to withdrawing ANH could not deny that M’s life was afflicted with significant suffering. She endured severe spastic tetraparesis (which causes limb deformity), incontinence, discomfort associated with being fed artificially via a gastrostomy tube together with the constant threat of bed sores. Despite this, Baker J was not prepared to ‘accept that her experiences are wholly, or even on balance negative’, finding instead that M’s life was worth living in order to justify overriding her wishes. In such cases, when there is no clear evidence that the quality of life is

satisfactory, it is argued that the balancing exercise should focus upon what is best for each individual according to his or her preferences, personality and views. There can be little doubt over what M would have preferred had she retained the ability to communicate and although she is now silent on this question, M's past wishes should count for more in the determination of her future. The fact that the court found that M's life was of value to her in spite of the subjective evidence is even more disquieting if one considers Baker J's objective view of MCS. He described the condition as one which involves 'a quality of life that many would find impossible to accept were they able to consistently express themselves with full competence'.<sup>11</sup> Consequently, the justification for accepting this on M's behalf in order to safeguard the sanctity of life seems extremely dubious.

### STRIKING AN APPROPRIATE BALANCE

In analogous scenarios, such as when a person suffering from Alzheimer's has previously expressed a desire not to live in such a condition, persuasive arguments refuting Dworkin's position have been mounted. For if the incompetent person is enjoying life, with different but nevertheless clear experiential interests in the present, taking any steps to abbreviate such a life will clearly conflict with contemporaneous interests. Furthermore, as Dresser has argued, if the past competent person has little or no 'connectedness' to the new person, there may be limited justification for imposing the past person's view over the individual in the present.<sup>12</sup> There are, however, some important differences between people with Alzheimer's and those in MCS. If, like M, the new person appears to have very limited capacity for experiential interests, Dworkin's argument for respecting the competent person's jurisdiction over her future self seems stronger as there is less for the new person to lose. Similarly, the extent of the 'connectedness' between a person in MCS and their former self is unknown. Whereas a person with Alzheimer's will often seem to have forgotten many if not all former critical interests, we cannot be sure that the same is true of people in MCS. For example, the fact that M became upset over certain pieces of music, or following visits from her partner, might indicate that she retains some awareness of her former self and the tragedy of her predicament. As Ashwal and Cranford have argued, a person in MCS may experience distress as a consequence of being aware of their condition. Moreover, whereas a person with Alzheimer's might be observed to have acquired a new set of critical interests—having clear preferences and desires which can often be communicated—the same cannot generally be said of a person in MCS.

For these reasons, we should question the legal and ethical justification for rejecting M's critical interests by disregarding her previously expressed autonomous wishes in favour of prioritising the sanctity of life. There can be no justification for overriding the critical interests of such a patient unless the current experiential interests are significantly better than those

envisaged by the patient when she expressed her desire not to be maintained in a state of total dependency. The legal requirement to consider the past wishes and views of incompetent patients should not be seen as an opportunity for the judiciary to choose either autonomy or sanctity, but rather an obligation to respect autonomy.

### CONCLUSIONS

The judgement in *Re M* is incompatible with the legal requirement to respect the past wishes of incompetent people.<sup>13</sup> While the Code provides that this requirement should not necessarily be the deciding factor, we should question the basis upon which such evidence may be disregarded. In *Re M* it is evident that Baker J disregarded M's wishes, together with the wishes of her family, because he found the sanctity of life more worthy of protection than the concept of autonomy. While the continuance of life should, as Sheather comments, generally be regarded as a moral good, judges should not feel free to choose either autonomy or sanctity according to their preference. It is argued that disregarding autonomy in favour of preserving life can only be justified when there is clear evidence that the person is content in the present, with clear experiential interests which are worthy of protection. In cases where there is insufficient evidence that the person has a reasonable (or even tolerable) existence, there can be no justification for usurping autonomy in order to maintain a life that seems unbearable from a critical interests perspective and intolerable from an experiential perspective.

**Competing interests** None.

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