

## The words Clearly and Probably are different

This should be read as a follow-on-piece, to my previous PDF at

<https://www.dignityincare.org.uk/Discuss-and-debate/download/472/>

That PDF is a second version of something I had previously posted, with better proof-reading. However, I managed to mess-up one sentence which I had altered – and I'll 'correct' that here.

At the bottom of page 19, I wrote:

However, what I'm saying is that section 53 should have said:

53. The Trust asserts that the advance decision is not now valid because s.25(2)(c) is made out. I treat the burden of proof as being on the Trust which must establish that Mrs W has done something inconsistent with the advance decision clearly remaining her fixed decision.

I inadvertently put the 'clearly' in the wrong place – it should say:

However, what I'm saying is that section 53 should have said:

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Since I wrote the first PDF, I have been asking people if they think 'clearly' can be expressed as 'probably'. So far, the huge majority of people seem to be saying 'no – the words mean different things' – which is my own position.

I don't believe that a judge, such as Poole J, has the legal authority to alter a 'test of certainty' **which is stated within** a Statute – so I don't believe anyone, except Parliament, can alter the word 'clearly' in 25(2)(c) to the word 'probably'. Probably, means 51/49 – and whatever clearly means, be it 99/1, 95/5, 80/20 or whatever, it is a stronger test than 51/49.

This isn't a case of a Statute which says something must be decided, but without stating what degree of certainty is required – when judges can clarify the situation: **25(2)(c) says 'clearly'**.

I put a poll on Twitter.

Answers from all welcomed. Please retweet. Do the phrases 'clearly inconsistent with' and 'probably inconsistent with' mean the same thing, or different things?

The two answers people could vote for were:

They mean the same thing

They don't mean the same

There were 31 votes cast, and 592 'views' of the poll. All 31 votes cast (100%) were for 'They don't mean the same'.

I exchanged some Twitter direct messages with a doctor.

Me: Mr Justice Poole seems to think he can change 'clearly inconsistent with' in MCA 25(2)(c) to 'probably inconsistent with' – and I don't think he can do that. I think clearly must be a stronger test than probably.

The doctor: 100% agree. Clearly to my mind, anyway, means distinct and without doubt. Probably means that no one is certain. Clearly means Yes. Probably means neither yes or no.

I asked this on Twitter:

A question for Twitter (always risky!). Do people consider the words 'clearly' and 'probably' as carrying the same meaning – or do they mean two different things?

@MikeAlphaOne replied:

'Clearly' means there is substantial evidence to support it, 'probably' means there is very little evidence.

It seems to me, that almost everyone believes that 'clearly' indicates a greater-level-of-certainty than 'probably'. So, in my opinion, Poole J was in error when, in his ruling, he:

- 1) [it appears] Replaced the word 'clearly' in section 25(2)(c) with the word 'probably';

- 2) Applied section 25(2)(c) as if it is a best-interests determination, when in fact you need to identify which event made the ADRT invalid, and when the transition from validity to invalidity occurred;
- 3) Suggested that 25(2)(c) only applies after the patient has lost capacity.

As I have pointed out in my lengthy PDF at

<https://www.dignityincare.org.uk/Discuss-and-debate/download/472/>

and in the Dignity in Care thread at

<https://www.dignityincare.org.uk/Discuss-and-debate/Dignity-Champions-forum/I-think-Mr-Justice-Poole-must-be-wrong-in-his-interpretation-of-section-254c-of-the-Mental-Capacity-Act/1138/>

End-of-Life-at-Home is not similar to a court ruling being made by a judge: at home, we will either have genuine collaboration between family-carers, relatives, doctors, nurses and 999 paramedics, or else we will have a combination of chaos and conflict in many situations. And I don't want people who are dying, to be dying surrounded by conflict and chaos. We also don't want applications for court rulings to be routinely-made during EoL-at-Home, and 'planning ahead' which is encouraged by the NHS means that often section 25(2)(c) would be considered before the Advance Decision would be 'used'. If you believe that section 25(2)(c) is saying 'probably inconsistent with' instead of 'clearly inconsistent with', then it seems to me that there will be much more scope for disagreement, and therefore applications for court rulings. And, for cardiopulmonary resuscitation, the situation of '... well – it would be the clinicians who would apply/withhold the treatment and consider best interests if the Advance Decision was not valid' isn't true either.

If we think about 'Covid Jab Man' then he probably needs to include with his Advance Decision, a footnote to the effect that 'This ADRT is my decision **for after I have lost** mental capacity – whether or not I accept offered Covid vaccinations **before I lose** capacity, is an entirely different thing, **and does NOT** indicate 'retraction of' my ADRT'.

And, it is clearly unwise to 'simply create and then set-aside' an ADRT, as Mrs W seems to have done, because although legally that looks 'robust' (once created, the ADRT doesn't need to be resigned on 'review dates', etc, if you simply look at the law) in reality people such as Poole J and others can question the continuing validity of your ADRT. Even 'appoint a Welfare Attorney' doesn't work as well as it should: I'm considering writing a piece about 'thwarting the authority of Legal Proxies' because I'm thinking of this issue with Advance Decisions, section 25(2)(c) and Poole J's Mrs W ruling, in terms of 'Mrs W's authority as projected in her Advance Decision being thwarted'.

Written by Mike Stone

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Answers from all welcomed. Please retweet. Do the phrases 'clearly inconsistent with' and 'probably inconsistent with' mean the same thing, or different things?

They mean the same thing	0%
<b>They don't mean the same</b>	<b>100%</b>

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