

Kent Academic Repository

Full text document (pdf)

Citation for published version

Kong, Camillia (2014) Beyond the Balancing Scales: The Importance of Prejudice and Dialogue in A Local Authority v E and Others. *Child and Family Law Quarterly*, 26 (2). pp. 216-236. ISSN 1358-8184.

DOI

Link to record in KAR

<http://kar.kent.ac.uk/58515/>

Document Version

Author's Accepted Manuscript

Copyright & reuse

Content in the Kent Academic Repository is made available for research purposes. Unless otherwise stated all content is protected by copyright and in the absence of an open licence (eg Creative Commons), permissions for further reuse of content should be sought from the publisher, author or other copyright holder.

Versions of research

The version in the Kent Academic Repository may differ from the final published version.

Users are advised to check <http://kar.kent.ac.uk> for the status of the paper. **Users should always cite the published version of record.**

Enquiries

For any further enquiries regarding the licence status of this document, please contact:

researchsupport@kent.ac.uk

If you believe this document infringes copyright then please contact the KAR admin team with the take-down information provided at <http://kar.kent.ac.uk/contact.html>

Beyond the Balancing Scales: The Importance of Prejudice and Dialogue in A Local Authority v E and Others

Abstract:

In May 2012 a best interests ruling was made under the Mental Capacity Act 2005 to coercively treat a severely anorexic woman against her will. The best interests decision was purportedly reached through a process of judicial balancing; however, there is something deeply unsatisfactory about this account. The commentary delves beyond the expressed balancing method and applies the tools of philosophical hermeneutics to both understand and challenge the best interests ruling in *A Local Authority v E and Others*. First, the hermeneutic concept of ‘prejudice’ makes explicit the implicit judgements determining the best interests decision in this case. Second, the commentary challenges the best interests decision in two ways: (i) the hermeneutic emphasis on dialogical understanding provides grounds for questioning the judge’s failure to integrate the views of E and her wider decision community (including family and long-term clinicians); (ii) the ruling could be deemed invalid due to the implicit application of a status-based rather than statutory functional test to assess E’s current and retrospective capacity.

Keywords: adjudication, anorexia, best interests, hermeneutics, Mental Capacity Act 2005, *A Local Authority v E and Others*

In May 2012 a judge ruled that a severely anorexic woman, E, was to be coercively fed and treated against her wishes.¹ Numerous factors make this decision controversial. First, it directly opposed E's decision against treatment and desire to die with dignity. Two advance decisions were made against tube feeding and life support, yet both were overturned on the finding of retrospective incapacity. Second, treatment would involve extremely high risks, such as refeeding syndrome and E's susceptibility to physical trauma due to osteoporosis. Mechanical ventilation might be required to prevent her from dying during the course of treatment 'her chances of surviving or not surviving treatment [are] no more than equally balanced'.² Third, the invasiveness of forced feeding recreated the psychological trauma of the sexual abuse E suffered as a child. Fourth, the chances of a full recovery were small considering the complex triad of anorexia, borderline personality disorder and alcoholism, as well as her more recent addiction to prescribed opiates for pain relief. The restoration of a healthy Body Mass Index (BMI) would be merely a 'precondition for starting on fundamental psychological and physical therapies'.³ Finally, this ruling overturned not only E's wishes, but also the views of her family and the medical professionals treating her – all of who had come to a 'unanimous view that all treatment options have been exhausted' and that a palliative care route was appropriate.⁴

This commentary focuses on the deliberative procedure used to arrive at a various decisions in *A Local Authority v E and Others* (E and Others): the metaphor of the scales is applied to articulate the competing claims, and the process of 'weighing' or 'balancing' these claims is purported to both express and guide the judicial decision-making procedure. The following questions are asked in this commentary: what is the role of judicial balancing as a decision-making tool in E and Others? What other, implicit

¹ *A Local Authority v E and Others* [2012] EWHC 1639 (COP).

² *Ibid*, at para [72].

³ *Ibid*, at para [24].

⁴ *Ibid*, at para [21].

deliberative mechanisms can we uncover, and can these hidden resources provide improved critical tools to challenge the ruling?

Exploring the phenomenology of judicial deliberation in this case will help answer these questions and, in the process, two arguments which draw on the resources of philosophical hermeneutics will be forwarded: first, the view that balancing is the primary mechanism used to make the different decisions in this case will be questioned. Instead, the commentary suggests that the hermeneutic notion of ‘prejudice’ is crucial to understanding both the best interests ruling and capacity assessments. Second, the best interests ruling could be challenged on two fronts. Firstly, a more self-reflexive, dialogical mode of understanding as encouraged by hermeneutics would have incorporated the views E and of those closest to her in the best interests decision. Secondly, the best interests decision could be considered invalid due to the implicit status-based test used to assess E’s capacity, both at the material time and retrospectively.

The first half of the commentary focuses on the best interests ruling while the second half examines the capacity assessment in E and Others. Section I examines the importance and theoretical assumptions of the balancing procedure in Court of Protection rulings. Moreover, how it is purportedly used to make the best interests ruling in E and Others will be explored. Section II contests the moral suitability of the balancing procedure in this case. This section highlights the importance of ‘prejudice’ as well as argues that the hermeneutic distinction between moral and empathetic dialogue provides grounds for criticising the ruling in favour of life-preserving treatment. Section III continues this critical enquiry by examining how a status-based rather than functional test informs both current and retrospective capacity assessments, thus providing further legal grounds for challenging the best interests decision.

I.

The balancing model has become established as the authoritative deliberative tool in best interests adjudication under the Mental Capacity Act 2005 in England and Wales largely due to the important appellate ruling by Thorpe LJ in *Re A (Male Sterilisation)* [2000].⁵ Thorpe LJ identifies two steps in this deliberative procedure: using the analogy of a balance sheet, the judge should first list the benefits and dis-benefits. Next, the judge should input on each sheet the possible gains and losses as well as a calculated estimate of the probability of each. ‘At the end of that exercise the judge should be better placed to strike a balance between the sum of the certain and possible gains against the sum of the certain and possible losses’, states Thorpe LJ. ‘[O]nly if the account is in relatively significant credit will the judge conclude that the application is likely to advance the best interests of the claimant.’⁶ The decision to impose life-preserving treatment on E appears to be made using this balancing procedure: the benefits and dis-benefits of treatment are listed; the issue is boiled down to a conflict between one’s right to life and right of self-determination; these rights are then rendered commensurable accordingly so a clear cost-benefit analysis can be carried out. The exercise makes him conclude in favour of coercive treatment.

Deeper methodological reasons influence why one might endorse balancing as a decision-making procedure: first, the image of Justice as a set of balancing scales captures many ideals about the procedures and associated values of justice, such as the fairness, impartiality and the reasonable and transparent application of legal principles to particular claims. It is striking, for example, that Thorpe LJ deploys the language of financial

⁵ 1 FLR 549 [2000] 1 FCR 193. For example, Thorpe LJ is cited in *Local Authority X v MM & Anor* (No. 1) [2007] EWHC 2003 (Fam), *London Borough of Ealing v KS & Ors* [2008] EWHC 636 (Fam), *G v E & Ors* [2010] EWHC 621 (Fam), *Re SA* [2005] EWHC 2942 (Fam), *Re P* [2009] EWHC 163.

⁶ *Re A (Male Sterilisation)* [2000] 1 FLR 549 [2000] 1 FCR 193.

accountancy in his description of the balancing procedure. The purpose of a balance sheet is to reveal a company's assets and liabilities in accordance with general accountancy principles, and show evidence of true and fair income statements as a precaution against public, independent auditing. Second, judicial balancing is thought to promote particularism and flexibility in the sense that this mode of adjudication is sensitive to context-dependent factors.⁷ The balancing method thus appears beneficially consistent with the MCA requirements, which instruct 'the court to approach its task in a highly individualised way, focusing on the situation of the individual concerned and not on generalities'.⁸

Third, the balancing procedure helps make values commensurable and comparable.⁹ Commensurability means that items can be assigned a unit of value measured on a single, objective scale, which then facilitates the transitive comparison of preferences.¹⁰ For instance, in criticising Sumner J's previous judgement for focusing too heavily on hypothetical risks and probabilities, Thorpe LJ argues that '[a] risk is no more than a possibility of loss and should have no more emphasis in the exercise than the evaluation of the possibility of gain'. To over-emphasise a risk is to attach special weight to it, which thereby implies some form of qualitative judgement about that particular risk. This suggests that Sumner J's deliberation may have been flawed due to his failure to make the risks and benefits commensurable on a single scale. Applying the balancing

⁷ See FM Coffin, 'Judicial Balancing: The Protean Scales of Justice' (1988) 63 NYU L Rev 16, at p 24.

⁸ *A Local Authority v E and Others* [2012] EWHC 1639 (COP), at para [12].

⁹ On the flip side, incommensurability need not entail incomparability: see CR Sunstein, 'Incommensurability and Valuation in Law', (1994) 92 Mich L Rev 779, at pp 805-8. For the opposite view, see J Raz, *The Morality of Freedom* (Clarendon, 1988), at p 325; also J Griffin, 'Incommensurability: What's the Problem?' in R Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (Harvard University Press, 1997), at pp 35-36.

¹⁰ Balancing and its historical roots in legal pragmatism have been bound up with aspirations towards formulating an objective science of judicial decision-making. See RS Summers, 'Pragmatic Instrumentalism in Twentieth Century American Legal Thought – A Synthesis and Critique of our Dominant General Theory About Law and its Use', (1980-81) 66 Cornell L Rev 861. Also HLA Hart, 'American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream', (1977-1977) *Georgia Law Review* 969; TA Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 *Yale LJ* 943.

exercise correctly therefore involves quantifying and ranking the risks and benefits so that instances of ‘significant credit’ are discernible and will clearly indicate when one application should be favoured over another.

Finally, making values commensurable and comparable is thought to help promote deliberative objectivity, impartiality, and publicity as opposed to the subjective preferences of the judge.¹¹ The image of the scale illustrates these aspirations particularly well. Similar to the reasons why one calibrates a scale (to minimise potential inaccuracies so that its measurements are consistent over a wide variety of cases), judicial balancing implies that situating the values and interests at stake on a single metric in accordance with legal principles and rules can help minimise the influence of personal bias – and thereby make the decision-making process more objective. In sum, balancing is meant to be an impartial deliberative strategy which facilitates the judge to ‘compare the incomparable’ through a flexible yet objective methodology.

It would be unrealistic to suggest that all judges believe that balancing, particularly in difficult cases, is a wholly objective science or that decisions can be a matter of simply quantifying and calculating the values and interests at stake. This is not the claim of this commentary. Yet the above assumptions nonetheless form the normative backdrop behind the balancing procedure, especially once this method is made coextensive with the decision-making process itself. This is illustrated in the best interests ruling in *E and Others*: the scales articulate the interests and values at stake, where ‘[E’s] situation requires a balance to be struck between the weight objectively to be given to life on one hand and to personal independence on the other’.¹² In an evocative statement, Jackson J claims, ‘[t]he competing factors are, in my judgment, almost exactly in equilibrium, but having considered them as carefully as I am able, I find that the balance tips slowly but

¹¹ FM Coffin, ‘Judicial Balancing: The Protean Scales of Justice’ (1988) 63 NYU L Rev, at p 25.

¹² *A Local Authority v E and Others* [2012] EWHC 1639 (COP), at para [5], emphasis added.

unmistakably in the direction of life-preserving treatment. In the end, the presumption in favour of the preservation of life is not displaced'.¹³

We need to unpack this statement. Is balancing coextensive with the decision-making procedure? What implicit assumptions are embedded in this statement and are they appropriate to the dilemma at the heart of this case? We can understand this key phrase in three different ways:

(1) Balancing does reflect the decision-making process. The presumption in favour of life does not mean that balancing has not occurred – merely that the predetermined value of the right to life will be weightier when compared to other considerations prior to placing the two claims on the scale.

(2) Balancing does not reflect the decision-making process but conceals the premise doing most of the deliberative work: namely the presumption in favour of life.

(3) Balancing may or may not be used; what is clear is that it is not, nor should be, the sole mechanism of the decision-making process. Even if items are 'placed on a scale', prior qualitative judgements, such as the presumption in favour of life, intrude and influence the decision-making process and undermine the methodological assumptions of judicial balancing.

The claim in (2) might be too strong: one cannot establish for certain whether or not balancing reflects the deliberative process in the best interests decision. In theory, a pre-established quantity could be assigned to the presumption in favour of the preservation of

¹³ Ibid, at para [140], emphases added.

life. We could imagine that the judge has appointed the quantity of 100 units to the right to life prior to the balancing exercise; considerations in favour of the right of self-determination would thus need to be significant and numerous enough in order to displace the opposing weights.

However, we need to remain sceptical that actual quantitative weights can be attached to interests and values as significant as those in the case of E, or that any judge adjudicating difficult best interests cases would reduce the issues to a quantitative calculus. Jackson J himself acknowledges that ‘the balancing exercise is not mechanistic but intuitive’.¹⁴ Even if we assumed the decision-making procedure was more complex – where the values and weights of each side are determined intuitively rather than appointed specific quantities – position (1) would still need to explain the normative source and justification for the hierarchical ordering of particular values like the right to life. In other words, even if we were to ascertain that the balancing procedure is coextensive with the deliberation used to generate the best interests ruling, deeper moral judgements would be needed to justify both intuitive and quantitative forms of weighting or valuation, and it is precisely at this deeper level that the most crucial, morally significant deliberative work takes place (as we see in Section II). This is where position (3) is right: we need to move away from the scale metaphor to acquire a deeper understanding of the judicial deliberation in this case. Balancing may be a contributing deliberative tool but it is certainly not the sole or even primary device used to make and justify the best interests ruling. Examining the decision through the lens of hermeneutics will help expose some of the deeper substantive judgements determining the outcome and provide critical tools for examining both the best interests decision as well as the capacity assessments in this case.

¹⁴ Ibid, at para [129].

II.

The assumption that the balancing procedure can yield objective, impartial judgements is evident in the judge's use of the terms, 'unmistakable' and 'objective'. The image of the scale further reinforces certain utilitarian assumptions lurking behind the balancing procedure: conflicting values, interests, and traditions can be rendered commensurable – and thereby reconciled or adjudicated through a common measurement device. Balancing recognises that no interests or rights are absolute: like shifting market appraisals of goods, interests and rights will have relative worth and the law must be responsive and flexible to fluctuating valuations accordingly. This is why balancing seems appropriate for legal adjudications under the MCA: as Jackson J notes, the statute 'might have given absolute priority to the preservation of life, but it does not'.¹⁵

In practice, however, these assumptions of methodological objectivity, and commensurable and relative values are deeply contestable and unrealistic, which make it further unlikely that balancing can guarantee a fair outcome. To be clear, this commentary is not forwarding any metaethical arguments about the nature of values and moral reality. It is nonetheless worth noting that at a basic level the controversial nature of these assumptions should make us wary of its application to ethical dilemmas which cut as deeply as in *E and Others*. At stake in most mental capacity cases – and especially so in the adjudication of best interests – is some conception of the good. To objectively measure the right of self-determination with the right to life is impossible. The inherent difficulty in arbitrating between these two values through some kind of rational calculus indicates that the decision in *E and Others* is a morally significant one. Even if the judge

¹⁵ Ibid, at para [121].

could (and did) attach quantities to these substantial goods, it seems inappropriate and unresponsive to the moral dilemma at the heart of a case such as this; its resolution cannot be a simple matter of applying an objective calculus in order to determine the most suitable outcome.

To be clear, this commentary is not suggesting that balancing has no function in judicial deliberation: the balance sheet approach of Thorpe LJ can be endorsed for reasons of clarity and precision, and can be revelatory in its ability to pinpoint the core considerations at stake in a visually direct manner. We might better see which factors have magnetic importance. But again, this shows how balancing can be a component of deliberation but cannot by itself be the mechanism to decide the issues: the substantive reasons and valuations that determine which factors have magnetic importance are carrying the main deliberative burden. We need to distinguish between temporal priority and normative priority: if you subscribed to position (1), balancing may very well have temporal priority in the sense that it is the final step of the causal deliberative chain. But this does not mean it is the most important step. Nor can our decision-making tasks be reduced to it. For example, if we still wanted to criticise the ruling from the standpoint of position (1), we might say that the judge got his quantities wrong (i.e. ‘the sanctity of life is worth 70 rather than 100 weights’). But this carries us only so far. We will invariably need to start questioning why E’s life is worth 70 rather than 100 units and according to whose evaluation; yet again, we regress back to the qualitative judgements and why we defer to them. What is of particular interest is the deliberative work required to determine when and which values have magnetic importance: this is what is meant by normative priority.

When faced with values of equal moral significance there may be no rational way of deciding between them – of providing clear-cut reasons why one option is better than

the other – aside from the fact that it accords with our preunderstanding, or what Finnis calls our ‘pre-moral commensuration’. This refers to our ‘intuitive awareness of one’s own differentiated feelings towards’ and thoughts about ‘various goods and bads as concretely remembered, experienced or imagined.’¹⁶ Awareness of deep value conflict and indecision does not therefore mean goods have merely contingent and relative value. Appealing to ‘pre-moral commensuration’ will draw attention to the hierarchical and (perhaps) absolute valuing of certain goods. This is why position (3) is correct: reducing the normative dilemma to the scale metaphor is problematic for its oversimplified representation of the values at stake (as commensurable and quantifiable) and the (conscious or unconscious) concealment of the underlying ‘prejudgements’ which in actual fact help determine judicial decision-making. To understand what is going on in the best interests decision in E and Others, we need to render explicit the underlying prejudgements informing the judge’s ‘pre-moral commensuration’.

This is where the hermeneutic notion of prejudice can be quite helpful. ‘Prejudice’ or ‘prejudgement’ does not have the negative connotation of blind, unreflective or irrational opinions and biases; nor are they reducible to subjective preferences and interests. Prejudice has instead a ‘positive’, pre-Enlightenment meaning that captures one’s intersubjective and historical standpoint; they are the normative, linguistic, and historical traditions that mediate, orientate, and determine the present. Prejudices ‘constitute the initial directedness of our whole ability to experience [and] are biases of our openness to the world [...] whereby what we encounter says something to us’.¹⁷ To sever ourselves from these prejudgements is impossible since they constitute our

¹⁶ J Finnis, ‘Natural Law and Legal Reasoning’ (1990) 38 Clev St L Rev 1, at p 11. I would argue that Finnis’ definition can be expanded beyond the word, ‘feelings’ in the sense that such pre-moral commensuration need not rely on emotive instincts and impulses. I need not subscribe to Finnis’ natural law theory to find useful his definition of pre-moral commensuration.

¹⁷ H-G Gadamer, ‘The Universality of the Hermeneutical Problem’, in *Philosophical Hermeneutics*, DE Linge (trans. and ed.) (University of California, 1976), at p 9.

unavoidable standpoint – or horizon – by which the world is interpreted, understood, and known. The image of the horizon captures the openness or ‘infinite determinacy’¹⁸ of one’s field of vision, which changes with movement and has the potential to diminish or expand. Likewise, the constitutive prejudices of one’s horizon are constantly assessed, corrected, and changing.

With this in mind, we do not necessarily have to resolve the question of whether balancing is indeed coextensive with the decision-making in *E and Others*, though it is pretty clear it is not the sole deliberative mechanism. What is more important is how the law’s ‘strong presumption that all steps will be taken to preserve [life]’¹⁹ constitutes the prejudice that circumscribes the interpreted meaning and significance of the ethical dilemma; it helps determine the normative orientation of the judge’s standpoint. The sanctity of life is assumed prior to the balancing exercise and is assigned greater weight over other rights; the facts of the case need to disprove or displace this pre-existing principle. Describing the right to life, the judge states, ‘[a]ll human life is of value and our law contains the strong presumption that all steps will be taken to preserve it, unless the circumstances are exceptional’.²⁰ Reference to the right to life as the ‘most fundamental’ of the European Convention on Human Rights clearly suggests that it foregrounds and contextualises other rights; it implies that this principle’s intrinsic significance and value justifies its hierarchical place above other rights and interests. This suggests that Jackson J’s normative prejudice towards the sanctity of life is not simply a subjectively generated value that has been arbitrarily imposed in this case, but reflective of an intersubjectively affirmed prejudice commonly held in the law more generally.²¹ With this background

¹⁸ H-G Gadamer, *Truth and Method*, DG Marshall and J Weinsheimer (trans) (Continuum, 2004), at p 301.

¹⁹ *A Local Authority v E and Others* [2012] EWHC 1639 (COP), at para [119].

²⁰ *Ibid.*

²¹ The use of the term, ‘intersubjective’ is deliberate, as it suggests a prejudice that has widely held and discursively affirmed. To call it an ‘objective’ value would be too strong and unwittingly commit oneself to

presumption, it makes some sense as to why the balance would be seen to ‘unmistakably’ favour life-sustaining treatment.

The very existence of a widely affirmed prejudice in the law is not problematic in itself. However, one reason the balancing rhetoric feels unsatisfactory is how the method confers onto this prejudice the veneer of objectivity: one could have read the case notes and come to the exact opposite conclusion – that the scales tip towards a dignified death, relief from suffering, and the right of self-determination. For instance, such a conclusion was reached in a case of very similar circumstances, *Re L* [2012]²², only a few months after the *E* judgement. *Re L* also concerned the question of whether life-sustaining treatment through forcible refeeding would be in the best interests of a severely anorexic woman. The similarities between the two cases are striking: both expressed wishes against refeed and were found to lack capacity, both would suffer severe physical complications if treatment was administered and the prospects of recovery were low, both had supportive family and care professionals who were in favour of pursuing a palliative care route. Yet, in contrast to the *E* judgement, *L*’s considerable pain was taken into account in the best interests decision, where ‘all agree that this [was] wholly unacceptable’ and ‘[a]nything which [could] be done to make her comfortable and reduce her distress must be done.’²³ In making her declaration, King J similarly mentioned how the law contains a strong presumption that all steps will be taken to preserve life, though this is not absolute.²⁴ Minimising *L*’s suffering and distress, and maintaining her dignity at the end of her life, led to a decision against forcefeeding and the provision of palliative care.²⁵

In King J’s words,

a view of epistemic or moral truth which this commentary would be hesitant to endorse without further more argumentation.

²² EWHC 2741 (COP).

²³ *Ibid*, at para [51].

²⁴ *Ibid*, at para [66].

²⁵ *Ibid* [, at para 71.3(d)].

In assessing the proposed declarations I have to the forefront of my mind that Ms L finds the idea of force feeding extremely distressing. Taking into account the level of Ms L's distress and the evidence of Dr Danbury [an expert witness on behalf of the Official Solicitor] I instinctively pull back from the prospect of sanctioning any proposal which may mean that, what may be Ms L's last conscious moments, are filled with the fear of being forced to take in hated calories.²⁶

From the perspective of hermeneutics, comparing the divergent judgements in *Re L and E and Others* helps challenge the alleged objectivity of both the balancing method and the prejudice towards the sanctity of life. Crucially, King J's decision explicitly articulates orientating ethical prejudgements, such as relief from suffering and nonmaleficence, which displace the legal priority accorded to the sanctity of life. By contrast, Jackson J's appeal to the method of balancing obscures his orientating normative, prejudicial standpoint – yet the latter, not the former, is what makes his best interests decision transparent and explicable.

Even more interesting is how the best interests ruling can be challenged using other aspects of hermeneutical theory. Recognising the embedded and prejudicial nature of our moral standpoint is only one dimension of understanding; for a more complete, transformative interpretive stance our prejudices need to be tested through a process of dialogical engagement so that another's standpoint is respected as autonomous. When an alien standpoint is encountered, we either consciously or unconsciously reflect on our particular normative tradition, meaning that traditions are not by nature closed, isolated, and oppositional, or that they should be valued and preserved for its own sake.²⁷ Rather,

²⁶ *Ibid.*, at para [47].

²⁷ H-G Gadamer, *Truth and Method*, DG Marshall and J Weinsheimer (trans) (Continuum, 2004), at p 301.

tension between alien and familiar traditions heightens awareness of an ‘encounter’ between standpoints which results from one’s constantly shifting horizon; we recognise that our prejudgements ‘are constantly at stake’.²⁸ Critical reflection of our prejudgements will ideally involve the expansion rather than alienation of our standpoint, where a ‘superior breadth of vision’ is acquired and we ‘learn to look beyond what is close at hand – not in order to look away from it but to see it better within a larger whole and in truer proportion’.²⁹ This process of dialogical enrichment enables us to not only understand ourselves better, but come to understand and accord respect to the other’s standpoint.

It is debatable whether the best interests decision in *E and Others* reflects the recognition of an alternative moral tradition and its claims to independence and truth which would be characteristic of fully testing one’s prejudices in the hermeneutic sense. First, it is striking that the individuals who know *E* best were ‘in total agreement’³⁰ that a palliative care route was appropriate and argue in favour of *E*’s self-determination, whereas those in favour of life-preserving treatment had met *E* only once or not at all. Speaking on her behalf, *E*’s parents state,

We strongly feel that, five weeks into this pathway, this is an inhumane time to bring this into question, especially for a highly anxious woman. During the last five weeks we have watched our daughter preparing for her death in a very dignified and considered way, with a powerful sense of control over her situation. In this time, she has never faltered from her wish not to be re-fed.

²⁸ H-G Gadamer, ‘On the Scope and Function of Hermeneutical Reflection’, in *Philosophical Hermeneutics*, DE Linge (trans. and ed.) (University of California, 1976), at p 38.

²⁹ H-G Gadamer, *Truth and Method*, trans. Donald G. Marshall and Joel Weinsheimer (Continuum, 2004), at p 304.

³⁰ *A Local Authority v E and Others* [2012] EWHC 1639 (COP), at para [80].

We have always gone along with any treatment proposed by either the mental or physical health teams in the hope that she might show signs of “recovery” from her addictions. After 18 years, we have given up on that hope.³¹

E’s clinicians offer similar views. Dr. V, who treated E for over a year, ‘was of the opinion that E had made a competent decision to refuse treatment’, stating that ‘it does not feel appropriate to fight with [E] at this point; the fight itself (e.g. physically preventing access to the NG or PEG tube, vomiting, laxatives, trying to keep awake all the time) or the intervention (restraint, sedation) could hasten her death, as well as denying [her] the dignity that is so important’.³² Dr. D, another clinician who has known E well, describes her as ‘highly intelligent and articulate’ who can ‘clearly delineate between her disease and her sustained wishes to be offered dignity at the end of her life.’ Crucially, he mentions that ‘at no point has Dr. Glover [the expert witness on behalf of the Official Solicitor] had the opportunity to talk to E when she is well’.³³ He factors in the distress experienced by E caused by each failed treatment and questions, ‘how many times do I take E through the trauma and at what point should it be decided that refeeding is futile’.³⁴ Finally, E’s consultant psychiatrist over the last six years states, ‘She has come to the state where she is clearly telling us: - ‘Please leave me alone’ – a statement for which I think she has capacity’.³⁵

These close relationships seem to embody the hermeneutic ideal of moral dialogue which allows the other or ‘Thou’ to say something to us, particularly when our prejudices are tested. This dialogical stance involves a reflexive and open stance towards the truth claims and autonomy of the other. Importantly, the dialogical interplay is symmetrical in

³¹ Ibid.

³² Ibid, at para [86].

³³ Ibid, at para [101].

³⁴ Ibid, at para [107].

³⁵ Ibid, at para [109].

this moral relationship, which is ‘not to overlook his claim but to let him really say something to us’.³⁶ It is clear that among E’s clinicians this stance was not always adopted: treatment was imposed on E at various times and she was sectioned under the Mental Health Act on ten separate occasions, one period lasting for as long as four months. E’s parents themselves mention their agreement to these different interventions in the past. However, for both the clinicians and E’s parents their dialogical stance has had to shift in order to understand and recognise the autonomy of E’s standpoint.

By comparison, Dr. Glover had met E once. His ‘preliminary impression’ was that it was against her interests to undergo force-feeding, but upon examining her medical records, he advised in favour of force-feeding on grounds that intensive treatment had not yet been tried. Moreover, the judge has had no contact with E, but states, ‘E is a special person, whose life is of value. She does not see it that way now, but she may in future’.³⁷ These comments help illustrate Gadamer’s notion of empathetic dialogue which presumes that one can understand the deeper, original intentions of the ‘Thou’. This stance is problematic because not only does the interpreter assume she can become ‘unmoored’ from her prejudicial horizon, but is in a position to ‘speak’ on behalf of the other which can lead to an imposition of meaning and domination. Thus, the dialogical relation is asymmetrical in the sense that the empathiser claims to ‘understand the other better than the other understands himself. [...] [T]his means it is co-opted and pre-empted reflectively from the standpoint of the other person’.³⁸ It is telling that the judge resorts to the speculative language of ‘possibility’ rather than E’s own voice to defend life-preserving treatment – she ‘may’ value her life in future, ‘it is possible [...] that she could

³⁶ H-G Gadamer, *Truth and Method*, DG Marshall and J Weinsheimer (trans) (Continuum 2004), at pp 352, 355.

³⁷ *A Local Authority v E and Others* [2012] EWHC 1639 (COP) [137].

³⁸ H-G Gadamer, *Truth and Method*, DG Marshall and J Weinsheimer (trans) (Continuum 2004), at p 353. See also G Warnke, ‘Literature, Law, and Morality’, in B Krajewski (ed), *Gadamer’s Repercussions: Reconsidering Philosophical Hermeneutics* (University of California, 2004), at p 95.

achieve a state of being that would be acceptable to her’,³⁹ and that ‘although extremely burdensome to E, there is a possibility that [treatment] will succeed’.⁴⁰ Perhaps Jackson J defers to Dr. Glover’s evidence due to a preference towards independent experts rather than long-standing caretakers and clinicians on the presumption that the former is (theoretically) better positioned to be objective about the case.⁴¹ But from a hermeneutical perspective, the presumption that one can abandon background prejudices and become truly ‘objective’ is misleading. Consequently, E’s actual wishes, defended also by those who know her best, are effectively subsumed by the empathetic interpretation of her best interests by both the judge and Dr. Glover. The independence of her truth claims remains unrecognised.

This notion of empathetic dialogue raises further questions as to whose interest is being protected in the ruling. Jackson J admits that with treatment it is ‘*not probable* that [E] could achieve a state of being that would be acceptable to her.’ In fact, ‘[i]t is more likely that the underlying difficulties would remain and her life would continue at best to be a struggle’.⁴² But then why should the right to life have priority over that of self-determination? Carried too far, the presumption in favour of the preservation of life can lead to an untenable position referred to as vitalism – namely the view that ‘any life – irrespective of its quality and costs of treatment – is better than no life at all’.⁴³ Even a more moderate defence of the legal presumption towards the sanctity of life would

³⁹ *A Local Authority v E and Others* [2012] EWHC 1639 (COP) [123].

⁴⁰ *Ibid.*, at para [138].

⁴¹ This was also the case in *Re C (Adult: Refusal of Medical Treatment)* [1994] 1 WLR 290, 293 as well as *Re JT (Adult: Refusal of Medical Treatment)* [1998] 2 FCR 662, 664. See M Donnelly, *Healthcare Decision-Making and the Law: Autonomy, Capacity and the Limits of Liberalism* (Cambridge University Press, 2010), at p 153. Compare Jackson J’s approach to the one adopted by King J in *Re L*, whereby L’s family ‘left court knowing that their views and unmatched understanding of their daughter will be at the centre of decisions in relation to her treatment which will now focus on minimising Ms L’s distress and maintaining her dignity’ *Re L* [2012] EWHC 2741 (COP), at para [12].

⁴² *A Local Authority v E and Others* [2012] EWHC 1639 (COP), at para [123] emphases added.

⁴³ See the following commentaries by John Keown: ‘The Legal Revolution: From “Sanctity of Life” to “Quality of Life” and “Autonomy”’, (1997-1998) 14, *Contemporary Health Law and Policy* 253; ‘Restoring the Sanctity of Life and Replacing the Caricature: A Reply to David Price’ (2006) 26 *Legal Studies* 109; ‘To Treat or Not to Treat: Autonomy, Beneficence and the Sanctity of Life’, (1995) 16 *Sing L Rev* 360.

arguably lead to respecting E's refusal of treatment. For instance, John Keown makes a distinction between the 'worthwhileness of treatment' and the 'worthwhileness of the patient's life'⁴⁴, and argues that a patient's current and prospective condition prior to and post-treatment, as opposed to the value or worth of the patient's life, should be the basis on which to determine whether it is morally permissible to withhold life-preserving treatment.⁴⁵ According to this view, if the benefits of treatment fail to justify its costs or harms to a patient, treatment can be legitimately withdrawn or withheld. This stance might help avoid the problem of upholding the legal presumption irrespective of the patient's core interests. The law, however, has tended to conflate sanctity of life with vitalism.⁴⁶ Like King J in *Re L*, Jackson J's judgement acknowledges that the presumption in favour of life is not absolute, and thus at first glance appears consistent with a moderate defence of the sanctity of life. Yet an implicit adherence to an extreme vitalistic interpretation of the legal presumption is revealed in the decision to impose treatment despite Jackson J's recognition of the long-term difficulties, significant risks, and dubious benefit to E.

By contrast, the orientating framework shared by E's advocates could be interpreted in two different lights, depending on the perspective adopted. On one hand, their arguments against treatment might be understood as consistent with Keown's version of the sanctity of life doctrine: that the burdens of treatment clearly outweigh the benefits (if any) to E's interests and welfare, to the point that these burdens would be inflicting harm. On another hand the right of autonomy could be interpreted as a trump against the presumption in favour of life – a view which sanctity of life defenders such as Keown

⁴⁴ (1995) 16 *Sing L Rev*, at p 367.

⁴⁵ J Keown, 'The Legal Revolution: From "Sanctity of Life" to "Quality of Life" and "Autonomy"', (1997-1998) 14, *Contemporary Health Law and Policy*, at p 261. See J Finnis for a discussion of how the court's reliance on the acts and omissions distinction in the *Tony Bland* case has left the law 'misshapen': 'Bland: Crossing the Rubicon', (1993) 109 *Law Quarterly Review* 329, at p 333.

⁴⁶ See J Keown's discussion of this in the context of *Bland*: 'The Legal Revolution: From "Sanctity of Life" to "Quality of Life" and "Autonomy"', (1997-1998) 14, *Contemporary Health Law and Policy*, at p 277.

would clearly reject. Examining the sanctity of life debate in detail is beyond the scope of this commentary, yet it is important to understand why the prejudgement in favour of the right of autonomy has moral force in this case. For Keown, the significance of choice is reduced to the ability to make morally valuable choices in line with human flourishing.⁴⁷ He likens autonomy to a ‘pointer in a compass’ where the ‘pointer itself is of little value. [...] When the pointer indicates a morally valuable course and there may be a number of morally valuable courses – the choice merits respect. But when the choice is immoral, whether because it would harm another or oneself, or breach some other moral norm, what claim to moral respect can it have?’⁴⁸ In essence, ‘morally worthless choices [...] lack moral force’.⁴⁹ However, Keown’s dismissal of autonomy-based arguments justifying the right to refuse life-sustaining treatment is too hasty and presupposes a controversial framework of strong moral truth. We can accept that autonomy has value and meaning if it is situated within some kind of normative framework; we could also accept that choice in and of itself is not necessarily a standalone good. The reason why choice and autonomy is so highly prized amongst liberals is, not merely because it implies the freedom to make mundane choices such as which colour socks to wear or cereal to eat for breakfast, but because it means an individual can choose the substantive direction of their life, in accordance with a range of goods which have significance to one’s personal identity and relationships. Yet accepting these claims does not entail any commitment to strong moral truth, nor that choices that depart from ‘objective’ moral norms categorically lack merit and do not deserve respect. Numerous reasons justify why respect is granted towards an individual’s autonomous choices – including those we might think are not morally valuable ones. These reasons range from recognising how choice reflects an individual’s self-understanding and personal identity, to accepting the core reality of value

⁴⁷ Ibid, at p 263.

⁴⁸ Ibid.

⁴⁹ Ibid.

and religious plurality. Not only does Keown assume the uncontroversial objectivity of certain moral norms, he moreover fails to consider when moral choices and interests are fundamentally incommensurable. For example, the case of E reveals a number of deeply held morally valuable goods and prejudgements that are in conflict – between the sanctity of life and right of self-determination, between core medico-legal principles of nonmaleficence and beneficence.⁵⁰ In such instances of intractable conflict, respect for autonomy and decisional capacity becomes vitally important. Keown might claim that since E's autonomy is exercised towards an end or good which lacks moral value, her choice should not be respected. However, if morally worthy norms, ends or goods confer value onto choices (rather than vice versa), the question remains: what happens when an individual fails to endorse these norms, ends, or goods in the first place, or has a prevailing illness which fundamentally thwarts adherence to them? Reasons why E's right to autonomy has moral force is precisely because, as her advocates argue, the freedom to choose how one dies can itself be an important source of value and dignity. This is especially so in the context of severe anorexia, whereby the range of meaningful, morally worthwhile values and goods at one's disposal becomes acutely restricted. Consider E's description of her life as 'a pure torment' and 'pointless', where 'she has endured a lot of pain with very little benefit' and 'feels she is in a situation where she is able to give nothing to the world and the world is able to give nothing to her'.⁵¹ Adding to this, her family state movingly,

It upsets us greatly to advocate for our daughter's right to die. We love her dearly but feel that our role should now be to fight for her best interests, which, at this

⁵⁰ See TL Beauchamp, 'The "Four Principles" Approach to Health Care Local Authority v E and Others', in R Ashcroft et al, *Principles of Health Care Local Authority v E and Others* (Wiley, 2007), at pp 3-10.

⁵¹ *A Local Authority v E and Others* [2012] EWHC 1639 (COP), at para [76].

time, we strongly feel should be the right to choose her own pathway, free from restraint and fear of enforced re-feed. We feel that she has suffered enough. She stands no hope of achieving the things that she would value in her life and shows no signs of revising these aspirations. We would plead for E to have some control over what would be the last phase of her life, something she has been denied for many years. For us it is the quality of her life and not the quantity. We want her to be able to die with dignity in safe, warm surroundings with those that love her.⁵²

In sum, if the judge himself recognises that it is unlikely E will begin to value her life should she recover, whose welfare is promoted in the best interests ruling? If a broad social good or interest in the sanctity of life, perhaps a legal pragmatist perspective might uphold this as a legitimate aim that is consistent with certain utilitarian presumptions underlying the balancing methodology; yet its ethical implications are worrying. It might seem far-fetched that considerations about the social good would percolate into individual best interests cases, yet this would not be an isolated instance where public welfare trumps individual rights in legal practice.⁵³ Fenwick has shown, for example, how conflict between a child's right to privacy under Article 8 and rights of the media under Article 10 of the ECHR has exposed contradictory impulses in judicial deliberation: between a simultaneous understanding and resistance of individual rights as stipulated under the Convention, as well as a preference towards deeply rooted consequentialist thinking more consistent with common law.⁵⁴

Thus, the ambiguity surrounding whether the ruling in favour of coercive treatment does in fact protect E's interests illustrates the problems immanent to empathetic dialogue

⁵² Ibid, at para [80].

⁵³ See Fenwick, 'Judicial Reasoning in Clashing Rights Cases', in H Fenwick (ed) *Judicial Reasoning under the UK Human Rights Act* (Cambridge University Press 2007), at pp 255-307.

⁵⁴ Ibid, at pp 304-305.

– namely the subsumption of the Thou’s standpoint into one’s own normative horizon so that the autonomy of E’s claims as a separate ‘other’ remain unrecognised. Truly risking our prejudices involves being open to and acknowledging the independent truth of another’s normative horizon, a stance that is expressed perfectly by E’s parents: ‘[a]fter so many years of treatment E still finds it impossible to eat. This is her day-to-day reality. However distorted others might view it to be, it is still her reality’.⁵⁵ Ultimately, had the decision-making process been based on a moral rather than empathetic dialogical stance, this would have led the judge to conclude in favour of E’s right of self-determination rather than coercive treatment.

III.

Further grounds for contesting the best interests ruling emerge once we turn our attention to the judge’s deliberation surrounding E’s mental capacity. Here again the hermeneutical method is useful for illuminating the crucial prejudgements which determine the findings of both current and retrospective incapacity. In the case of the capacity assessments this section argues that Jackson J’s assessment is based on certain prejudices regarding the decision-making capacity of individuals diagnosed with anorexia nervosa. If a status-based rather than statutory functional capacity test has indeed been applied, this draws attention not only to reasons why the best interests decision may have been both unnecessary and legally invalid, but also possible conflicting notions of ‘capacity’ operating between the principles and judicial application of the MCA.

Under the MCA capacity is assessed through a functional test with the following criteria: the ability to (i) understand and (ii) retain the information relevant to the decision,

⁵⁵ *A Local Authority v E and Others* [2012] EWHC 1639 (COP), at para [80].

(iii) use and weigh such information in the deliberative process; and (iv) communicate a final decision. The statutory presumption is one of capacity unless proven otherwise on the balance of probabilities. The Act states in s.1(4), ‘A person is not to be treated as unable to make a decision merely because he makes an unwise decision’ and that ‘a lack of capacity cannot be established merely by reference to [...] a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity’.⁵⁶ The MCA Code of Practice makes clear, ‘it is important to assess people when they are in the best state to make the decision, if possible’.⁵⁷ It further reiterates that a status-based test cannot be used to determine capacity: ‘[a]nyone assessing someone’s capacity must not assume that a person lacks capacity simply because they have a particular diagnosis or condition.’⁵⁸ In ‘borderline cases or where there is doubt’ the burden of proof is on the assessor to show that the individual fails to fulfil one of the four functional criteria of capacity.⁵⁹ In sum, a functional, not status-based test of capacity must be used; a diagnosis of a particular kind cannot determine one’s incapacity, all practicable steps need to be made to facilitate an individual’s decision-making capacity, and the assessor is to presume capacity in the first instance. Best interests decision-making takes place only once incapacity has been established.

The combination of factors – that E demonstrated an ability to understand, retain and communicate information surrounding her illness, treatment options, and the consequences of her actions, combined with the statutory presumption of capacity and absence of contradicting medical advice – might suggest that E would be deemed competent to refuse treatment. The representative of the Official Solicitor reiterates this latter point, where ‘in the absence of contrary medical opinion he would have to take

⁵⁶ Mental Capacity Act 2005 s 2[3].

⁵⁷ Mental Capacity Act 2005 Code of Practice (2007), at para 4.46.

⁵⁸ *Ibid*, at para 4.48.

⁵⁹ Mental Capacity Act 2005 s1.

instructions from E, or in the opinions of Dr V and Dr D [both of whom had believed her mentally capable]’. Yet Jackson J states, ‘I am clear that E’s medical condition prevents this from being the ultimate conclusion’.⁶⁰ Though ‘she can understand and retain the information relevant to the treatment decision and can communicate her decision’ there is ‘no doubt’ that E’s mental functioning is disturbed by both her anorexia’.⁶¹ E’s incapacity is ultimately down to her failure to use and weigh information in a meaningful way due to the overpowering compulsion to not gain weight.

However, evidence to support this is extremely dubious: E’s incapacity is purportedly based on an instance where, despite smiling and laughing earlier in a conversation she began to cry when the question of weight gain was mentioned. This is bewildering reason for a finding of current incapacity. Surely the judge would have to recognise that the subject of weight and BMI would naturally be strong emotional triggers for E (particularly given her diagnosis of borderline personality disorder); the conversation, moreover, does not appear to have taken place within the context of a formal clinical capacity assessment. So why would this have any bearing on the legal adjudication of E’s capacity? The judge’s reasoning is incomprehensible on these facts alone.

We need to delve deeper to examine the prejudgement orientating the capacity assessment: the judge’s findings of both current and retrospective incapacity ultimately rest on a status-based rather than functional test. The assumption is that E’s anorexia fundamentally impairs her ability to make both contemporaneous and advance decisions – or more crudely stated: ‘anorexics lack capacity’.⁶² Though Jackson J admits that the anorexic patient is in a ‘Catch 22 situation regarding capacity: namely, that by deciding

⁶⁰ *A Local Authority v E and Others* [2012] EWHC 1639 (COP), at para [51].

⁶¹ *Ibid*, at para [48].

⁶² Allan Norman, ‘Corollaries of the Right to Life: A Duty to Live or a Right to Die?’ (The Small Places, 2 August 2012) <http://thesmallplaces.blogspot.co.uk/2012/08/allan-norman-corollaries-of-right-to.html> accessed 10 October 2012.

not to eat, she proves that she lacks capacity to decide at all'⁶³ he nonetheless agrees with Dr. Glover's view that 'anyone with severe anorexia would lack capacity to make such a decision'.⁶⁴ E's parents challenge precisely this premise:

It seems strange to us that the only people who don't seem to have the right to die when there is no further appropriate treatment available are those with an eating disorder. This is based on the assumption that they can never have capacity around any issues connected to food. There is a logic to this, but not from the perspective of the sufferer who is not extended the same rights as any other person.⁶⁵

Clearly E 'has core beliefs and it will be those beliefs that will determine if she wants to stay alive'.⁶⁶

But has the discussion thus far misconstrued the capacity adjudication? Perhaps the judge's statements above do not rest on a status-based test; rather, a *prima facie* case can be made that the finding of incapacity is due to a failure of executive function (EF) in E's decision-making ability which falls within the ambit of the functional criteria outlined in the MCA. This assumption may well be justified as it accords with the MCA's Code of Practice: there a person with anorexia nervosa is used as an example of impaired abilities to use and weigh information.⁶⁷ E's 'compulsion' and 'obsessive fear of weight gain'

⁶³ *A Local Authority v E and Others* [2012] EWHC 1639 (COP), at para [53].

⁶⁴ *Ibid*, at para [52].

⁶⁵ *Ibid*, emphasis added.

⁶⁶ *Ibid*, at para [76].

⁶⁷ *Mental Capacity Act 2005 Code of Practice* (2007), at paras 4.21-22. For a defence of the rational capacity of anorexics to refuse treatment, see H Draper, 'Anorexia Nervosa and Respecting a Refusal of Life-Prolonging Treatment: A Limited Justification', (2000) 14 *Bioethics* 120, at pp 120-133. The guide authored by the British Medical Association and the Law Society, *Assessment of Mental Capacity; A Practical Guide for Doctors and Lawyers*, (The Law Society, 3rd ed., 2010) also stipulates in their definition of use and weigh that '[a]n apparently irrational or unwise decision is not necessarily proof that an individual has failed to use or weigh relevant information, but it may trigger the need for a more detailed

which ‘overpowers all other thoughts’ means she lacks the executive functioning needed to use and weigh information ‘in a meaningful way’.⁶⁸

There are problems with this interpretation, however. To determine whether this objection has any force we need to have a clearer idea of what EF entails and whether it can be equated with the ability to use and weigh. But this is no easy task considering the degree of unclarity and disagreement surrounding the criteria of EF in neuropsychology. Salthouse states, ‘[t]he diversity of variables used to assess executive functioning suggests that there is not yet much agreement about the nature of this construct and even less about how it is to be assessed.’⁶⁹ Cognitive skills associated with EF have ranged from problem-solving and practical strategising, to the organisation and coordination of behaviour, to goal selection and planning, to both cognitive flexibility and abstraction, and finally, to successful ‘self-serving behaviour’.⁷⁰ Other definitions of EF emphasise its impact on ‘voluntariness’ or intentionality’:⁷¹ the means by which ‘the self exerts control over its environment (including the social environment of other people), makes decisions and choices, and also regulates itself’, where it is associated with impulse and emotional control,⁷² capacity for restraint, delayed gratification and transcendence of immediate and present considerations for future goals.⁷³ Examples of dysfunctional EF range from

assessment, *particularly if the decision is out of character*’. It has been noted how anorexia nervosa is frequently seen as a constitutive part of personal identity which would then suggest decisions against life-prolonging treatment may in fact be consistent with an individual’s character. See J Tan et al, ‘Anorexia nervosa and personal identity: The Accounts of Patients and their Parents’ (2003) 26 *International Journal of Law and Psychiatry* 533, at p539.

⁶⁸ *A Local Authority v E and Others* [2012] EWHC 1639 (COP), at para [49].

⁶⁹ TA Salthouse, ‘Relations Between Cognitive Abilities and Measures of Executive Functioning’ (2005) 19 *Neuropsychology* 532.

⁷⁰ *Ibid.*

⁷¹ RH Workman et al, ‘Clinical and Ethical Implications of Impaired Executive Control Functions for Patient Autonomy’ (200) 51 *Psychiatric Services* 359, at p 360.

⁷² V Anderson, ‘Executive Function in Children: Introduction’ (2002) 8 *Child Neuropsychology* 69, at p 70.

⁷³ R Baumeister et al, ‘Self-Regulation and the Executive Function’, in AW Kruglanski and ET Higgins (eds) *Social psychology: Handbook of basic principles*, 2nd ed. (New York, 2007), at pp 516-24.

money problems and procrastination, to drug and alcohol addiction and eating disorders, to anti-social behaviour, and criminality.⁷⁴

Given the wide spread of cognitive tasks associated with EF and disorders with its impairment it is difficult to determine decisively the way the concept would apply to E's case. But perhaps we can understand this concept in either a 'thin' and 'thick' sense: EF in the thin sense seems to be associated with procedural reasoning tasks (i.e. generating goals and planning means to an end, coordination of behaviour). In the thick sense, however, EF is associated with ideals of rational behaviour (i.e. self-regulation, non-pathological behaviour). This notion of EF is thick in the sense that traits such as 'self-serving behaviour', 'self-regulation', 'compulsion', and 'voluntariness' require further substantive content to flesh out their meaning and implicates background norms of proper intrapsychical ordering between irrational impulses and rational thinking (what it means to reason non-compulsively or autonomously). One strategy might draw upon EF in its thick meaning to explain the finding of E's incapacity at the material time: she fails to use and weigh in a 'meaningful way' because she fails to exhibit voluntary behaviour and is compelled by her 'obsessive fear of weight gain'. 'Compulsion' in this sense has been used in another influential pre-MCA court case concerning an anorexic individual: in *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)*⁷⁵ Lord Donaldson MR criticised Thorpe J's lack of consideration of how anorexia nervosa is an 'addictive illness' that 'creates a compulsion to refuse treatment or only to accept treatment which is likely to be ineffective', of which is 'part and parcel of the disease'.⁷⁶ Thus, legal precedent provides

⁷⁴ Ibid, at pp 516-7.

⁷⁵ [1992] 3 WLR 758.

⁷⁶ *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1992] 3 WLR 758. Also R Faden and T Beauchamp in *A History and Theory of Informed Consent* (New York, 1986), at p 268, define capacity as 'independence from control by neurotic compulsions, addictions, and related self-alienating psychiatric disorders'. Law Commission, Report on Mental Incapacity, Law Comm No 231 (HMSO,1995), at para 3.17, further recommended that 'a decision based on a compulsion [...] or any other inability to act on relevant information as a result of mental disability is not a decision made by a person with decision-making capacity'.

possible grounds for interpreting use and weigh in terms of a thick notion of EF and helps explain Jackson J's finding of incapacity.

However, this interpretation still fails to show how 'use and weigh' so defined does not collapse into a status-based test. If Jackson has Lord Donaldson in mind, the latter considers the overriding value of thinness or fear of weight gain is constitutive of the diagnostic criteria for anorexia nervosa; the anorexic individual would by default suffer from impaired EF in the thick – but not necessarily the thin – sense of the term.

Ultimately, the diagnostic criteria of anorexia nervosa and EF come apart only with a thin definition of the latter. But like Lord Donaldson, Jackson J's operating definition of 'use and weigh' appears to go beyond the procedural conditions typically upheld in thin definitions of EF, which include internally consistent reasons and values, understanding of potential risks, and efficient means-end reasoning.⁷⁷ Anorexic nervosa patients typically score high with such procedural reasoning tasks in clinical assessments.⁷⁸ E's consistent behaviour to refuse food and treatment is noted throughout the case notes; she clearly exhibits EF in the thin meaning of the term. If the judge is indeed assuming that E is incapable of using and weighing information meaningfully because she is controlled by her fear of weight gain, his assessment cannot help but be grounded on a status-based test, given the close enmeshment between the thick notions of EF (which stress non-compulsiveness, self-control and autonomy) and the diagnostic criteria of anorexia nervosa. In short, E would need to reason in a 'non-anorexic' manner to be deemed capacitous.

Even if we were to adopt the tack that the judge's assessment of E's capacity does in fact rest on functional criteria – fleshed out in terms of impaired EF in the thin sense –

⁷⁷ 'Use and weigh' is defined in basic terms as the processing of information (i.e. whether the risks involved are adequately weighed up): see British Medical Association and the Law Society, *Assessment of Mental Capacity; A Practical Guide for Doctors and Lawyers*, (The Law Society, 3rd ed., 2010), at p 29.

⁷⁸ J Tan et al, 'Competence to Refuse Treatment in Anorexia Nervosa', (2003) 26 *International Journal of Law and Psychiatry*, at pp 697-707.

this interpretation would still be unable to make sense of the invalidation of her advance decision through a finding of retrospective incapacity. This is one of the most puzzling aspects of the case and here there is strong evidence that a status-based test has indeed been applied in the capacity adjudication. E's concerted effort to raise her BMI to 15 in order to ensure her second advance decision would be legally recognised is used in two ways by the judge. On one hand, it proves E's incapacity during the time of her first advance decision which explains 'her subsequent attempt to put herself in a position to make an advance decision that would be accepted as valid'.⁷⁹ Yet even with her successfully reaching a BMI of 15 and confirmation of E's capacitous condition by her mother, solicitor, an independent mental health advocate, and her consultant psychiatrist over the past 6 years, her second advance decision is deemed invalid. The judge cites the following factors: 'E was either pulling out her PEG line or agreeing reluctantly to it remaining in, in the hope that she would achieve sufficient weight to be regarded as capable of making another advance decision'.⁸⁰ E moreover had been sectioned under the Mental Health Act the day following her advance decision. Crucially, the doctor, Professor L, did not carry out a capacity test at the time, though Jackson J claims, 'his general approach can be deduced from the fact that he recommended treatment, despite recording E's opposition very fully'.⁸¹ Jackson J seems to assume Professor L correctly concluded that E did lack capacity at the time, even if no formal test was carried out. And although Jackson J argues a full capacity assessment should have been undertaken 'against such an alarming background', this does not prevent him from discounting the contemporaneous views affirming E's mental competence through ex post facto

⁷⁹ *A Local Authority v E and Others* [2012] EWHC 1639 (COP), at para [59].

⁸⁰ *Ibid*, at para [60].

⁸¹ *Ibid*, at para [64].

speculation: ‘I think it is best doubtful that a thorough investigation at the time would have reached the conclusion that she had capacity’.⁸²

It is far from clear that E lacked capacity to make her second advance decision. The invalidation of E’s second advance decision is deeply troubling because, on one hand, Jackson J cites the absence of a full capacity assessment; yet, on the other, this does not prevent a finding of retrospective incapacity based on his own speculation. Certainly those who knew her best were of the belief she was mentally competent. The fact that E was sectioned the next day does not necessarily prove her incapacity, particularly as Professor L’s report ‘[d]id not deal with the question of capacity’.⁸³ Moreover, if the judge’s background notion of use and weigh draws upon one or even both thin and thick accounts of EF, the events leading up to E’s second advance decision would show plain evidence of E’s capacity: she clearly planned ahead, she was able to delay short-term gratification for a long-term goal, she overcame the ‘compulsion’ of her illness to achieve a greater good in accordance with her longstanding values. Indeed, Jackson J discounts the most obvious examples of where E might have displayed dysfunctional EF, such as her expressing views contradictory to her advance decision and refusal of treatment. Such inconsistency of preferences would suggest a failure of EF in the thin sense. On that basis the judge’s finding of retrospective incapacity would also have firmer legal ground insofar as the statutory requirements stipulate that the unchanging, consistent expression of wishes is necessary for the recognition of valid advance decision, and thus appears consistent with the functional emphasis of the capacity test.⁸⁴ But crucially, this is not the evidence Jackson J cites to overturn E’s advanced decision. In fact, ‘E’s actual behaviour in refusing food has been entirely consistent with her decision and I would have been reluctant to conclude that her decision was undermined by trusting statements about what

⁸² Ibid, at para [65], emphasis added.

⁸³ Ibid, at para [64].

⁸⁴ Mental Capacity Act 2005, s 25(2).

are bound to be deeply mixed feelings'.⁸⁵ Her mixed feelings are not thought to be evidence that she changed her mind about her advanced decision. This seems to support the views of Dr. C, one of E's long-term clinicians, who points out that 'E's wishes for palliation have been consistent' to the point that '[s]he had even been willing to raise her BMI in order to make an advance decision'.⁸⁶ Thus, it seems unlikely that the judge's operative notion of capacity in the retrospective assessment hinges on a thin notion of EF. A functional test moreover could not prove her retrospective incapacity to make the second advance decision. But where there is doubt the statutory presumption of capacity and deferral to contemporaneous expert assessments are meant to be decisive. It seems to me that the judge must rely on a status-based test if he is to, not only oppose the confirmed judgements of those around E at that time, but also override the presumption of capacity.

We still need to make sense of this puzzle: Jackson J admits that E's consistent refusal of food is 'entirely consistent with her decision', yet she is deemed to have lacked capacity at the time of making her advance decision. Another strategy we might deploy is to say that the judge's finding is based on distinguishing between pathological and 'authentic' sources of value. Pathological values could be understood as 'inauthentic' and thereby overruled, but values from an 'authentic' source ought to be recognised since 'the concept of authenticity is core to the liberal account of capacity'.⁸⁷ These arguments frequently stem from understandable worries surrounding false positives of decision-

⁸⁵ *A Local Authority v E and Others* [2012] EWHC 1639 (COP), at para [79] emphasis added.

⁸⁶ *Ibid.*, at para [104].

⁸⁷ See especially Tony Hope et al., 'Anorexia Nervosa and the Language of Authenticity', (2003) 41 *The Hastings Center Report* 19, J Tan et al., 'Competence to Refuse Treatment in Anorexia Nervosa', (2003) 26 *International Journal of Law and Psychiatry* 697., M Donnelly, *Healthcare Decision-Making and the Law: Autonomy, Capacity and the Limits of Liberalism* (Cambridge University Press, 2010), at p 123. Also see *The Law Commission Mentally Incapacitated Adults and Decision-Making: Medical Treatment and Research* (Law Comm CO 129, 1993), at para 2.20(3) which recommended that 'a mentally disordered person should be considered unable to take the medical treatment decision in question if he or she [...] is unable because of mental disorder to make a true choice in relation to [the decision]'. The word 'true' was dropped in the MCA, though Donnelly argues that it is implied in the statute.

making capacity amongst anorexics. As mentioned above, anorexic nervosa patients like E often pass with flying colours standardised tests of mental competence that are based on cognitive, procedural reasoning (thin EF) tasks and ‘logical consistency in rational argumentation’.⁸⁸ If this is indeed the way to interpret the judge’s invalidation of E’s advance decisions, it accords with recent research arguing that assessors must examine the underlying source of values to determine mental capacity since standard clinical competency tests fail to track core issues constitutive of the eating disorder.⁸⁹ Thus, it is ‘doubtful’ that E would be deemed capacitous at the time of making her advance decision because her underlying values likely stemmed from a pathological and thereby inauthentic source.

Such an interpretive strategy nonetheless faces a number of pitfalls. The normative backdrop of this view assumes that authenticity – like the thick sense of EF – involves the rational control of pathological elements. Yet should authenticity be so closely associated with rational control, particularly given the important decisional tools provided by non-rational components, such as emotion?⁹⁰ There is the further epistemic question of how the judge could determine what values originate from the authentic self, particularly given the egosyntonic nature of anorexia, whereby the pathological disorder is frequently seen as a constitutive part of personal identity.⁹¹ If this is the case, in what sense is the pathological disorder ‘inauthentic’? If the distinction between ‘authentic’ and

⁸⁸ Such as the MacArthur –Competency Assessment Tool -Treatment. See TM Breden and J Vollmann, ‘The cognitive based approach of capacity assessment in psychiatry: A philosophical critique of the MacCAT-T’, (2004) 12 *Health Care Analysis* 276.

⁸⁹ Tony Hope et al, ‘Anorexia Nervosa and the Language of Authenticity’, (2003) 41 *The Hastings Center Report* 19; J Tan et al, ‘Competence to Refuse Treatment in Anorexia Nervosa’, (2003) 26 *International Journal of Law and Psychiatry* 697; J Tan et al, ‘Anorexia nervosa and personal identity: The Accounts of Patients and their Parents’ (2003) 26 *International Journal of Law and Psychiatry*, at p 545.

⁹⁰ LC Charland, ‘Appreciation and Emotion: Theoretical Reflections on the MacArthur Treatment Competence Study’ (1998) 8 *Kennedy Institute of Ethics Journal* 359. There may be numerous arguments for associating authenticity with rational and pathological control; see D Shapiro, *Autonomy and Rigid Character* (Basic Books, 1984) but more recently the cognitivist and rationalist inflection to its underlying theory of autonomy has been questioned.

⁹¹ J Tan et al, ‘Anorexia nervosa and personal identity: The Accounts of Patients and their Parents’ (2003) 26 *International Journal of Law and Psychiatry*, at p 545.

‘inauthentic’ sources of values was indeed the judge’s reasoning behind the finding of retrospective incapacity, the ruling must ultimately rest on her diagnostic condition since the behaviours expressive of pathological, supposedly ‘inauthentic’ elements – such as a refusal to eat or undergo treatment due to fear of weight gain – are constitutive of the disorder. Thus, we revert back to a status-based test even on this attempt to render coherent the judge’s assessment of E’s retrospective capacity to make her advance decisions.

This raises worrying implications: first, the move to best interests decision-making might have been unjustified in the first instance: if both findings of current and retrospective incapacity are questionable from a statutory point of view, the best interests ruling in favour of coercive treatment would be invalid. But there are broader repercussions. If the diagnosis of a disorder hinges on a particular pathology – as is the case of anorexia nervosa – and the functional criteria of capacity is interpreted as automatically precluding these pathological influences, a tension emerges between judicial application and the normative intent of recent mental health legislation such as the MCA – namely to prevent discrimination and paternalistic intervention based on a person’s status.⁹² It is striking that similar cases where incapacity has been found amongst individuals suffering from anorexia, firstly, cite how such a finding might be a derivative of the diagnosis, and secondly, pre-date the MCA’s revisionary emphasis on a functional, decision-specific conception of capacity. To clarify, the claim is not that the judge is wrong to depend on precedent or that the prejudices and normative standpoint of the judge are illegitimate in either the best interests ruling or capacity adjudications. One might argue that for precisely the reasons mentioned above – the close enmeshment between underlying values and the structure of reasoning in certain mental disorders – a purely

⁹² Law Commission, Report on Mental Incapacity, Law Comm No 231 (HMSO, 1995) at para 3.3, states that a status-based approach was ‘quite out of tune with the policy aim of enabling and encouraging people to take for themselves any decision which they have the capacity to take.’

functional test might be, not only impossible but inappropriate, particularly in certain life-or-death scenarios. At root this case reveals conflicting impulses between the principles behind the MCA and the ethical values or prejudgements informing its practical application. However, proper debate about these issues can take place only once the normative standpoint and prejudgements orientating judicial deliberation are made explicit.

IV.

The issues discussed in this commentary illustrate the acute importance of delving beyond the expressed deliberative procedure in a case so as to avoid diverting our analytical and critical attention away from the locus of deliberative action and where normative problems subsequently emerge. By contrast, a hermeneutical analysis helps draw explicit attention to the prejudgements impacting on the judicial decisions in *E and Others*: we have seen how the presumption in favour of the sanctity of life helps determine the best interests ruling, as well as how a status-based test bleeds into the different capacity assessments. It has given us reason to challenge the ruling in favour of coercive life-preserving treatment. The interpretive skills of hermeneutics have also been helpful in pinpointing possible tensions between the principles and ideals of the MCA on one hand, and its application and practice on the other, especially surrounding the ethical and practical issues emerging from the statute's normative focus on autonomy, functional capacity, and its particularistic and contingent approach to life-preserving treatment.

Ultimately, a more explicit articulation of deep-seated intuitions guiding legal practice is needed to challenge and enrich the deliberative tools of those making crucial decisions in the Court of Protection. In other legal spheres characterised by conflicting

rights claims judicial reasoning frequently prioritises ‘form over substance’, where ‘the judiciary tends to be more comfortable with a fairly mechanistic approach to reasoning as opposed to [a] more value-laden type of reasoning’.⁹³ The rhetorical language of scales and balancing throughout *E and Others* falls within this mould. However, both best interests decision-making and capacity adjudication are unavoidably value-laden, making it even more important that the deliberative procedure renders explicit the texture of those reasons and moral intuitions capturing the judicial imagination. For instance, the deliberation in *E and Others* reveals how prejudgements orientated towards the sanctity of life and other welfarist considerations are perhaps more deeply entrenched than the right of self-determination in legal practice, despite current legislative trends moving towards the ideals of patient consent and autonomy.⁹⁴ The latter trend has also proved to be a strong tradition in its own right within medico-legal and philosophical thinking.

Revealing the presence of these conflicting prejudices helps us better understand how divergent ethical conclusions can be reached on strikingly similar cases, such as *E and Others* and *Re L*, and even more importantly, illuminates the ‘tectonic movement’ between sometimes incommensurable ethical traditions within the law. Hermeneutics is therefore useful for, not just its articulatory cogency, but expanding the scope for critical, reflexive debate about the core ethical issues at stake. In accepting the impossibility of a neutral, prejudice-free standpoint we need not assume that the judiciary is captive to arbitrary subjective interests or whims. The emergence of transformative, dialogical encounters that are capable of respecting the independent and autonomous claims of another is contingent on the self-reflexive understanding of one’s own intersubjectively-constituted standpoint. We may or may not agree with Jackson J’s ruling in *E and Others*,

⁹³ Fenwick, ‘Judicial Reasoning in Clashing Rights Cases’, in H Fenwick (ed) *Judicial Reasoning under the UK Human Rights Act* (Cambridge University Press, 2007), at p. 306.

⁹⁴ Cf. M Bratton, ‘Anorexia, Welfare, and the Varieties of Autonomy: Judicial Rhetoric and the Law in Practice’ (2010) 17, *Philosophy, Psychiatry, and Psychology* 159, at p 160.

but such a debate is contingent upon making the deliberative process more self-conscious and open. For this we need to look beyond the metaphor of the scales.⁹⁵

⁹⁵ This commentary was written with the generous funding provided by the British Academy under their Postdoctoral Fellowship Scheme, of which I am most grateful. My thanks to two anonymous reviewers, Tom O'Shea, Jill Craigie, Charles Foster, Wayne Martin, and Fabian Freyenhagen for their constructive comments on earlier drafts of this commentary.