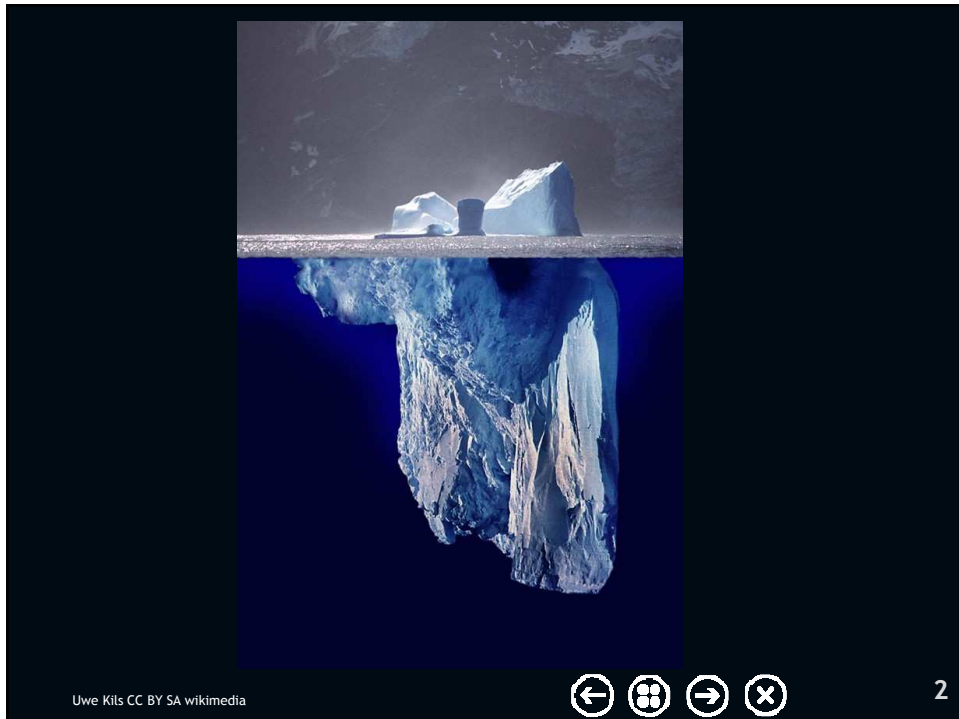


Involuntary, Intermediate and Voluntary Categories: the Changing Landscape

Darius Whelan, School of Law
CCJHR and IMHLA Mental Health Law
Conference, April 2015

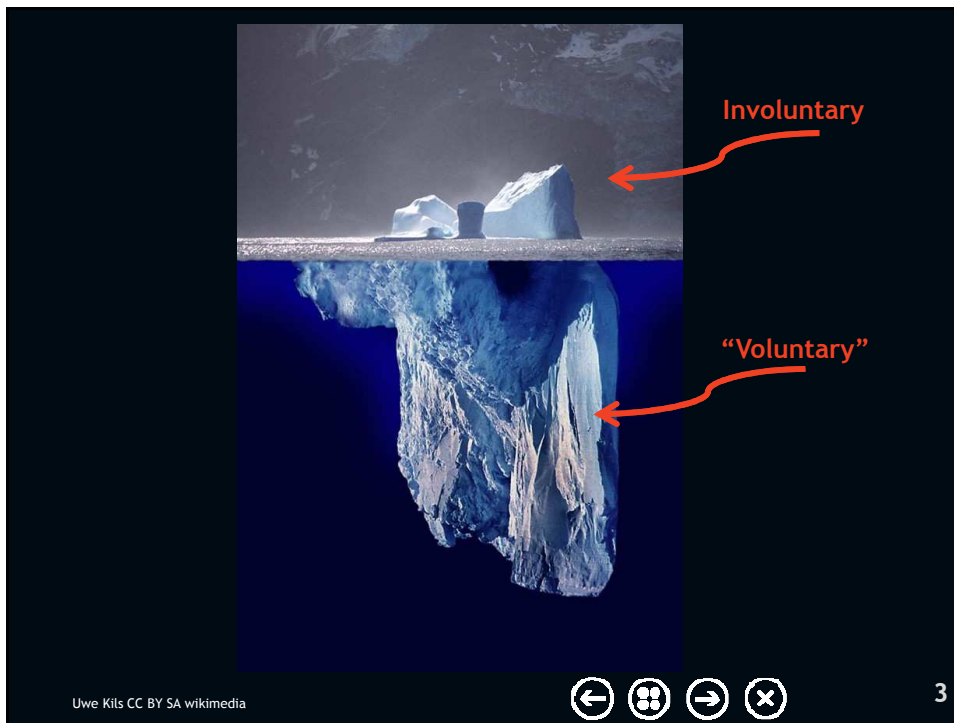
A TRADITION OF
INDEPENDENT
THINKING



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De Facto Detention

- Voluntary Service User (Patient) who
 - does not have capacity to consent to admission, and/or
 - wishes to leave centre but fears re-grading as involuntary patient



"Bournemouth Gap"

- *R v Community and Mental Health NHS Trust, ex parte L. (1998)*
 - House of Lords: De Facto Detention justified by common law doctrine of necessity
- *H.L. v United Kingdom (2004)*
 - European Court of HR: Detention of this kind breaches Article 5
- Led to Deprivation of Liberty Safeguards (DoLS) in UK
- *Cheshire West* case (2014) – lower threshold for deprivation of liberty



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E.H. v St. Vincent's (2009)

- Service user (patient) initially admitted on involuntary basis, then remained in centre after involuntary detention ended
- 12 days of detention in issue (Dec. 10-22)
- Supreme Court – Person was “voluntary” within meaning of s.2 of 2001 Act during that period
- Act merely requires that person be receiving care and treatment in the approved centre
- Kearns J.: *H.L. v UK* not relevant as in that case the patient was voluntary at the outset

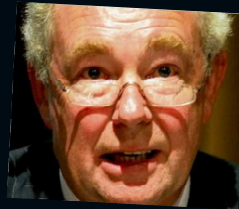


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Legal challenges only to be made if in patient's best interests?

The fact that s.17 of the 2001 Act provides for the assignment ...of a legal representative for a patient ...should not give rise to an assumption that a legal challenge to that patient's detention is warranted unless the best interests of the patient so demand

– Kearns J.



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"Voluntary" or not?

P.L. v Clinical Director of St Patrick's University Hospital – 2 judgments in 2012

- Mr. L. was involuntary, then voluntary
- Special Care Unit – locked ward
- Expressed a desire to leave on a number of occasions,
- Tried to jump over garden wall on three occasions.
- Forcibly restrained 30 times.



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- First judgment :
 - Peart J. - “Voluntary” service user (patient) need not have consented to their admission.
 - Even if service user indicates wish to leave, that doesn’t mean that they must be re-graded under ss.23/24.
 - Consultant or other staff can talk to service user; reassure them; encourage them to stay
 - Clinicians must be permitted a wide margin of appreciation in how they might consider best interests of service user served
 - Very deferential to medical opinion



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- Second judgment:
 - Mr L. sought to raise issues under European Convention on Human Rights (ECHR)
 - Peart J. – Mr L. had capacity to consent, and did consent, to his voluntary status in the hospital
 - Therefore he did not have standing to challenge Act on basis of how it might apply to other persons who did not have capacity
 - This case was different from *H.L. v UK* and *M. v Ukraine*



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Use of s.9 - no indication of wish to leave

K.C. v Clinical Director of St Loman's (2013)

- Ms. C. was voluntarily in hospital; but refusing treatment
- Hospital wished to organise involuntary admission
- She had not indicated wish to leave so ss.23/24 could not be used
- Instead, authorised officer made application under s.9 and GP visited hospital to make recommendation
- Detention held to be lawful



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UN Convention on Rights of Persons with Disabilities (2006) - **CRPD**

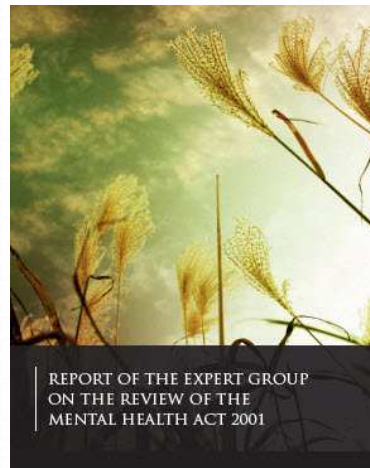
- Paradigm shift: away from medical model to social model
- Emphasis on will and preferences of person and assisted decision-making
- Equality for people with disabilities
- No deprivation of liberty based on disability



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Report of the Expert Group on the Review of the Mental Health Act 2001 (2015)



SAMPLE RECOMMENDATIONS



- o Rights based approach should be adopted in new legislation
- o Best interests to be replaced by Guiding Principles:
 - o Enjoyment of highest attainable standard of mental health
 - o Person's own understanding of his/her mental health to be given due respect
 - o Autonomy and self determination
 - o Dignity
 - o Bodily integrity
 - o Least restrictive care

- o New criteria for detention –
 - o Suffering from mental illness which makes it necessary to receive treatment in an approved centre and
 - o It is immediately necessary for protection of person's life, for protection from serious + imminent threat to person's health or for protection of other persons and
 - o Reception, detention and treatment likely to materially benefit the person's condition
- o [Note reciprocity principle – person can only be deprived of liberty if treatment would benefit them]

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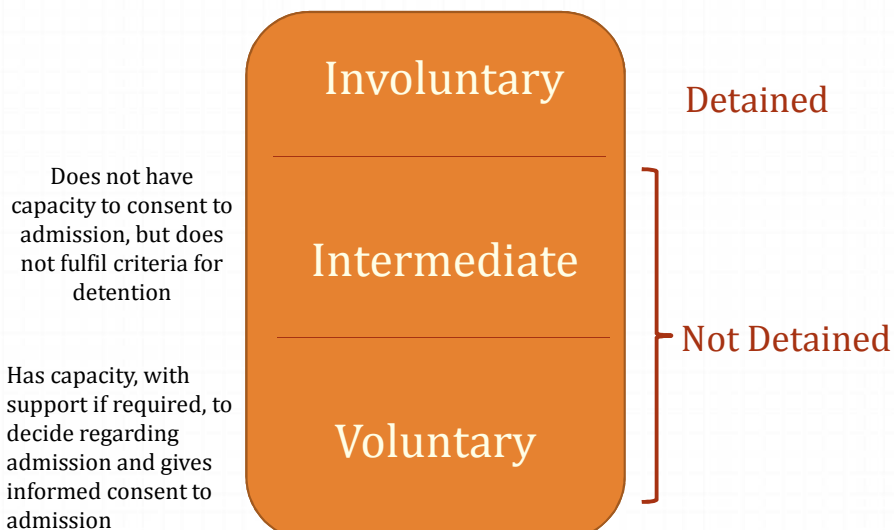
o Admission

- o Authorised Officer (AO) will make all applications
 - o Family/carer may request second AO
- o Admission must be certified by Consultant Psychiatrist after examination of the patient and following consultation with at least one other Mental Health Professional (MHP) of a different discipline that is and/or will be involved in the treatment of the person in the approved centre.
- o If person may lack capacity, there must be a formal capacity assessment within 24 hours
 - o MH Commission to publish guidelines on capacity assessment

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- o If person requires support to make the decision re voluntary admission, that support must be provided
- o If person does not have capacity, may be admitted involuntarily (provided satisfy criteria)
- o “Voluntary” service user (patient) is person who has capacity, with support if required, to decide regarding admission and gives informed consent to admission
- o Intermediate service user (patient) – does not have capacity to consent to admission but does not fulfil criteria for detention – is not detained but will have reviews by Review Board *[new title for tribunal]*

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- o Intermediate service user (patient) - Role of Review Board will focus on capacity
- o In emergency, Consultant Psychiatrist can override refusal of treatment by decision-making representative (DMR) *[where person's actual behaviour is injurious to self or others]*
 - o Subject to review by Review Board within 3 days
- o Re-grading from voluntary to involuntary
 - o No need for person to indicate wish to leave
 - o Authorised Officer will attend approved centre

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