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Reasonableness in Capacity Law

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It is not uncommon for people to hold bizarre views. Sometimes, these views appear before the courts in mental capacity cases. Judges must then decide if the views are so bizarre that they constitute evidence of incapacity or, instead, if those views are the everyday sort that do not constitute such evidence. The idea behind the distinction is that the everyday sort can be false but, in some important sense, not *that* unreasonable. But what should tip the balance of reasons for a view to count as severely unreasonable rather than merely so? It turns out that capacity law is unable to provide a principled answer to this question because it lacks a standard to parse beliefs. This paper offers such a standard, focussing on the ability to reason, or the 'use and weigh' criterion, which features in most capacity statutes. The standard takes the form of a threshold with four necessary conditions. The main idea is that when a person's belief satisfies those conditions, it counts as evidence of an inability to reason. The standard's objective is to displace the various unarticulated conceptions of reasonableness which judges are currently compelled to use to determine questions of reasoning ability.

INTRODUCTION

A patient, Ms T, with borderline personality disorder refused a blood transfusion because she believed her blood was evil.[1] She worried that adding more blood to her body would increase the volume of evil blood in her and make it more likely that she would do evil things. The court in this case held that the patient's worry was based on a 'misconception of reality' so unreasonable that it was to be treated as evidence of a 'disorder of the mind'.[2] That evidence eventually contributed to a finding of incapacity in respect of refusing treatment.

A man, Mr S, with schizoaffective disorder wished to donate a tenth of his inheritance every year to a church.[3] If he carried out his plan, he would run out of money in a few years and become dependent on social assistance. He was motivated by the view that God would 'reward him very richly' for his donations, which would in time enable him to become, as he put it, 'a tax-paying member of society, a wonderful investment, so to speak, for the taxpayer.'[4] In

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1 *NHS Trust* v *Ms T* [2004] EWHC 1279 (Fam) (*Ms T*).
2 *ibid* at [61].
3 *Re P (capacity to tithe inheritance)* [2014] EWCOP B14 (*Re P*).
4 *ibid* at [80].

this case, the court also found that there was a disorder of the mind but that it was not severe enough to tip the balance into a finding of incapacity.

Ms T and Mr S held false views about themselves and their circumstances. But what was on the scales for Ms T that resulted in a finding of incapacity that was missing in the case of Mr S? In these and other cases, or so I will argue, capacity courts have been relying on varying and unarticulated conceptions of reasonableness which have been doing much of the background work in determining whether an individual has the ability to reason. That ability is a statutory condition of decision-making throughout the common law. It turns out, however, that an adequate conception of reasonableness, perhaps by dint of being unarticulated, is absent in capacity law. This is unlikely to come as a surprise to anyone familiar with the work on reasonableness elsewhere in the law, where it is frequently described as vague, obscure, and uninformative.[5] Notwithstanding these warnings from the literature, capacity law remains in need of a sufficiently articulated and practicable standard which can demarcate the limits of what counts as reasoning. This paper develops such a standard by drawing on the norms of rationality and the epistemology of beliefs. But before we get there, I will need to convince you that we are in need of such a standard. I do this in the second section of the paper, where I review some of the case law which exhibits the problems that come of proceeding as though one has a standard when, in fact, one doesn't. The pretence of a standard, however, has its uses. It suggests that the courts are of the view that a standard is necessary. And *when* there is talk of a standard, it also reveals clues for *where* it would be useful to have one and what work the courts wish it could do. That discussion comes in the third section. Finally, the fourth section presents the standard and also provides a set of test cases for it. Those are the three main sections of this paper and they can, for the most part, be read independently.

Throughout what follows, I will mostly focus on the case law of the Court of Protection in England and Wales, and one case from the Supreme Court of Canada. Whenever these or other courts need to determine a question of decision-making capacity, I will refer to them as 'capacity courts'.

GROUNDWORK

The four abilities model

Focussing on reasonableness might appear puzzling in the context of capacity law. Capacity courts, after all, are interested in cognitive impairment and talk of reasonableness in judicial capacity determinations is uncommon.[6] Why, then,

5 See, for example, Adam Perry, 'Plainly Wrong' (2023) 86 MLR 122; Hasan Dindjer, 'What Makes an Administrative Decision Unreasonable?' (2021) 84 MLR 265; Alyse Bertenthal, 'Administrative Reasonableness: An Empirical Analysis' (2020) *Wisconsin Law Review* 85; and Jeffrey Jowell and Anthony Lester, 'Beyond Wednesbury: Substantive Principles of Administrative Law' [1987] *Public Law* 368.

6 Indeed, judges frequently speak against probing reasonableness in capacity contexts. I take up this point in the third section below ('Thresholds').

should we be worrying about reasonableness? The answer requires that we look under the hood of how the courts conceptualise capacity.

Capacity assessments throughout the common law are typically structured by what is sometimes called the 'four abilities model'.[7] According to this model, a person is presumed to have capacity unless they are unable to: (a) *understand* the set of facts relevant to their circumstances; (b) *appreciate* that those facts are, indeed, relevant to their circumstances (and retain those facts across time);[8] (c) *reason* with those facts, that is, to use and weigh them in the right way;[9] and (d) *communicate* their decisions.[10] If a person lacks any of these four abilities on account of an impairment or disturbance of the mind, that is sufficient for a finding of incapacity. But distinguishing these ability categories in this way is likely to strike some readers as perplexing. For understanding of anything involves working with reasons that explain the world around us, and if we are to work with such reasons we must, unsurprisingly, be able to reason – that is, to weigh and use the considerations that count in favour of the beliefs that constitute our understanding.[11] The same goes, *a fortiori*, for appreciation, since it is a specialised subset of understanding; that is to say, it is the understanding of the relevance of certain facts to oneself. The mental activity of specifying 'relevance' requires that you discount certain considerations and emphasise others – and, try as you might, you can't do any of that without the reasons that help you discriminate between facts. On the other hand, you won't be able to get any kind of reasoning off the ground without a foundational appreciation of the relevance of some facts and the irrelevance of others, for how else could you know what, as the courts like to say, to 'weigh or use'?

It is hard to know what to make of the four abilities model. As you can see, putting it to work is a conceptually messy business and so it is perhaps no surprise that capacity courts are relying on other background frameworks to

7 To take a small but representative sample, versions of the model feature in: the Mental Capacity Act 2005 (MCA 2005), s 3, of England and Wales; in Canada through Ontario's Health Care Consent Act 1996 (HCCA 1996), ch 2, sched A, s 21(2) and the Substitute Decisions Act 1992 (SDA 1992), ch 30, s 45; in Australia through Victoria's Mental Health Act 2014, pt 5, s 68; and in Ireland's Assisted Decision Making Capacity Act 2015, pt 1, s (3)(2).

8 The MCA 2005 swaps the 'ability to appreciate' the relevance of certain facts to oneself with the 'ability to retain' information across time. The courts, however, have continued to rely on the ability to appreciate as an essential component of capacity determinations; see, for example, *PH* v *A Local Authority and Others* [2011] EWHC 1704 (Fam). Notably in the UK context, Northern Ireland's Mental Capacity Act 2016 carves out a separate provision for the ability to appreciate in addition to the abilities to retain and weigh and use information (s 4(1)).

9 The MCA 2005 uses the phrase 'unable to … use or weigh', with the disjunctive 'or' following the negative 'unable to', meaning, in the view of the courts, that proof of inability must encompass both using and weighing the relevant information adequately. On this question of interpretation, see *Kings College Hospital NHS Foundation Trust* v *C & V* [2015] EWCOP 80 (*C & V*) at [35].

10 In clinical settings, capacity is often tested through the 'MacArthur Competence Assessment Tool – Treatment', which likewise tracks the four abilities model. See Thomas Grisso and Paul S. Applebaum, *MacArthur Competence Assessment Tool for Treatment* (Sarasota, FL: Professional Resource Press 1998) (*MacCAT-T*).

11 What's a reason? The most influential answer in circulation today is that it is a fact that counts in favour of something, such as an act or belief. See, for example, Thomas M. Scanlon, *What We Owe to Each Other* (Cambridge, MA: Harvard University Press, 1998) 17 and Derek Parfit, *On What Matters* vol 1 (Oxford: OUP, 2011) 31, but see also Roger Crisp, *Reasons and the Good* (Oxford: OUP, 2006) 43 (reasons as properties of actions that count in favour of their performance).

discharge their duties. Ostensibly, the model is supposed to facilitate a functional (sometimes called 'procedural') approach to capacity that is concerned exclusively with the ability to make decisions rather than, say, with the values reflected in the content of those decisions.[12] That contrast is the standard foil for the model,[13] and its target is the outcome (or 'substantive') approach of the past that, incidentally, relied on the courts being willing to grapple with the reasonableness of people's decisions.[14] Elsewhere, I have argued that the functional-outcome distinction is unsustainable and judgments of value in capacity assessments are rationally inescapable.[15] If you are persuaded by that argument, functional models of capacity and their value-neutrality ambitions are non-starters.[16] Here, however, my objective is to explain the ongoing but unacknowledged reliance of capacity courts on reasonableness, which I argue is doing much of the work in determining whether an individual has the ability to reason. To do that, I will need to turn to the case law.

Case law: reasonableness and reasoning

Capacity courts do not have a test for reasonableness in determining the status of a person's ability to reason. What they do instead is partly rely on clinical assessments by psychiatrists and others.[17] These assessments are then subject to judicial scrutiny on the basis of 'all the relevant evidence',[18] and it is not uncommon for judges to subsequently disagree with even 'very experienced' clinicians.[19] And since the clinical assessments of capacity are not necessarily

12 A point to note here, and which will be emphasised in the third section below, is that the law distinguishes between (a) the possession of an ability and (b) the utilisation of that ability. Sometimes, as I will argue, the former will depend on the latter.

13 Camillia Kong and others, 'Judging Values and Participation in Mental Capacity Law' (2019) 8 *Laws* 3.

14 Barton W. Palmer and Alexandrea L. Harmell, 'Assessment of Healthcare Decision-making Capacity' (2016) 31 *Archives of Clinical Neuropsychology* 530, 532.

15 Binesh Hass, 'The values and rules of capacity assessments' (2022) 48 *Journal of Medical Ethics* 816 and Binesh Hass, 'Reasoning and reversibility in capacity law' (2022) *Journal of Medical Ethics* (pre-print).

16 For a complementary line of argument, see Natalie F. Banner, 'Unreasonable reasons: normative judgments in the assessment of clinical capacity' (2012) 18 *Journal of Evaluation in Clinical Practice* 1038.

17 For example, *MacCAT-T* n 10 above; the Capacity Assessment Tool (CAT) (Maria T. Carney and others, 'The development and piloting of a capacity assessment tool' (2001) 12 *Journal of Clinical Ethics* 17); the Assessment of Capacity for Everyday Decisions (ACED) (James M. Lai and others, 'Everyday decision-making ability in older persons with cognitive impairment' (2008) 16 *American Journal of Geriatric Psychiatry* 693); the Aid to Capacity Evaluation (ACE) (Edward E. Etchells and others, 'Bioethics for clinicians: Capacity' (1996) 155 *Canadian Medical Association Journal* 657); and the Hopkins Competency Assessment Test (HCAT) (Jeffrey S. Janofsky and others, 'The Hopkins Competency Assessment Test: a brief method for evaluating patients' capacity to give informed consent' (1992) 43 *Hospital and Community Psychiatry* 132).

18 *PH* v *A Local Authority* [2011] EWHC 1704 (COP) at [16][xiii] per Baker J.

19 UK: *C & V* n 9 above at [90]; Canada: *Law Society of New Brunswick* v *Ryan* [2003] SCC 20 at [49]. For discussion in the English law context, see Cressida Auckland, 'The cusp of capacity: empowering and protecting people in decisions about treatment and care' (University of Oxford, DPhil thesis, 2019) 83.

determinative for judicial assessments of capacity,[20] the courts are compelled to draw upon additional conceptual resources. What are these resources?

In *NHS Trust* v *Ms T*, the idea of *irrationality* played a key role. A decision is irrational if it is:

> so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.[21]

Some readers will be quick to recognise that this is how the courts like to talk, word for word, about the kind of unreasonableness that was long ago made famous by *Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation*[22] (*Wednesbury*). But *Wednesbury* unreasonableness is notoriously amorphous and has resisted, as Adam Perry recently observed, more than 70 years of scholarly efforts to elucidate its structure.[23] What's more, whatever one might think of the prospects of salvaging *Wednesbury* unreasonableness for use on its home turf of administrative law, it is not going to be practicable in capacity law. Why might this be?

Recall that, in administrative law, reasonableness is inextricable from a whole host of concepts that have no place in the context of determining whether a patient has capacity. Take, for instance, the notion of *deference*,[24] which is a matter of extending due regard – or giving 'weight' – to the judgments of another relevant entity.[25] An administrative decision can be unreasonable for insufficiently weighting the judgments of such an entity. No such parallel exists in a capacity court, where the reasoning under scrutiny is a private individual's. A private individual has no duties of deference.[26] And so, too, with some of the

20 Even assessment tools, such as the MacCAT-T, typically state that they do 'not provide scores that translate directly into determinations of legal competence or incompetence'; *MacCAT-T* n 10 above, 23.

21 *Ms T* n 1 above at [53] citing, as guidance, *Re MB (Medical Treatment)* [1997] 2 FLR 426 (*Re MB*) at [436G]-[437H]. The same excerpt on unreasonableness-as-irrationality arises in *Guys and St Thomas NHS Foundation Trust & Anor* v *R* [2020] EWCOP 4 at [52]. See also *Council of Civil Service Unions* v *Minister for The Civil Service* [1985] AC 374 (*GCHQ*) at [410G], Lord Diplock arguing that '"irrationality" … can by now be succinctly referred to as "*Wednesbury* unreasonableness"'. For a discussion of how reasonableness and rationality can come apart, see Timothy Endicott, *Administrative Law* (Oxford: OUP, 5th ed, 2022) 244 ff. For a health care rationing case that inverts the connection, that is, irrationality-as-unreasonableness, see *Thanet Clinical Commissioning Groups, ex parte Elizabeth Rose* [2014] EWHC 1182 at [95].

22 *GCHQ ibid* at [410G], referring to '*Wednesbury* unreasonableness', *Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation* [1948] 1 KB 223.

23 Perry, n 5 above.

24 *ibid*.

25 Aileen Kavanagh, 'Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication' in Grant Huscroft (ed), *Expounding the Constitution* (Cambridge: CUP, 2008).

26 However, as Cressida Auckland has pointed out to me, capacity courts sometimes take a deferential approach in certain capacity-related matters, such as best interest questions and the wishes and feelings of individuals in addressing those questions. See however *Re P* [2009] EWHC 163 (Ch) at [41], questioning the weight to be according to an individual's wishes and feelings, and *Re M* [2009] EWHC 2525 (Fam) at [35] on factors for a court to consider in weighting wishes and feelings. For extensive discussion on weighting wishes, especially in the light of ECHR,

other widely recognised indicia of *Wednesbury* unreasonableness.[27] A person who appears before a capacity court, for example, has no duty to ensure that their reasoning is not *inconsistent with statute*. They also needn't worry about *disproportionality* between their means and ends. Indeed, these are not the kinds of unreasonableness that could be of use in judicial determinations of capacity. But then what kinds of unreasonableness *did* the court have in mind in *Ms T* when it invoked the famous mantra of *Wednesbury* to describe what it perceived to be irrational? You would not be able to tell by looking at the case. That is a problem, for it results in a mystery for ascertaining how the court arrived at the determination that Ms T lacked capacity. That mystery is not solved by an *ex post* admission that their determination was the right one. Courts have duties of fairness to demonstrate how they arrive at their conclusions by giving reasons,[28] and it will not do to hide hunches, prejudices, or even good common sense 'beneath *Wednesbury*'s ample cloak'.[29]

You might think that *Ms T*, decided a year before the Mental Capacity Act 2005 (MCA) was brought into play, was symptomatic of the imprecision and reliance on nebulous concepts which the Act was designed to remedy. The MCA, after all, is explicit from the outset about the conditions that a person must satisfy in order to have decision-making capacity in the eyes of the court. Section 3(1)(c) is clear that, to have capacity, a person must be able to use and weigh the information that is relevant to their decision-making on a given issue. This is just another way to talk about the familiar notion of the ability to reason, but neither the MCA nor its Code of Practice says anything about how to determine whether a person has it. The subsequent case law which has grown up around the Act has likewise fallen short of adequately providing such guidance. This far from minor predicament has not gone unnoticed. In *Kings College Hospital NHS Foundation Trust* v *C & V* (*C & V*),[30] the court complained of the excessive subjectivity involved in making sense of the Act's use and weigh criterion. In that case, the presiding medical authorities had accepted that C was able to understand and retain the information relevant to her decision to refuse treatment (as well as the ability to communicate that decision), but argued that she was unable to use and weigh that information adequately. C therefore lacked capacity on their view. The court disagreed. The medical authorities failed to

Art 8, see Emily Jackson, 'From "Doctor Knows Best" to Dignity: Placing Adults Who Lack Capacity at the Centre of Decisions About Their Medical Treatment' (2018) 81 MLR 247, 262.

27 Paul Daly, '*Wednesbury*'s Reason and Structure' [2011] *Public Law* 238.

28 Though there is no general duty at common law to provide reasons, see *Dover District Council* v *CPRE Kent* [2017] UKSC 79 at [54] per Lord Carnwath, following *R* v *Home Secretary, ex parte Doody* [1994] 1 AC 531, on 'the common law principle of "fairness" in a statutory context, in which the giving of reasons was seen as essential to allow effective supervision by the courts.' See also Sedley J in *R* v *Higher Education Funding Council, ex parte Institute of Dental Surgery* [1994] 1 WLR 242, noting that a failure to give reasons can render a decision unlawful.

29 Jowell and Lester, n 5 above, 372. Worries about the obfuscatory function of 'reasonableness' are notably trans-Atlantic. Alyse Bertenthal, for instance, writes of the 'lack of definitional clarity' as constituting, amongst other things, 'a problem for courts, which are increasingly labouring under the perception that judges will do whatever they want to do and cloak their decisions under some vague, easily manipulated legal standard (like reasonableness)', Bertenthal, n 5 above, 87.

30 *C & V* n 9 above.

prove – 'to the requisite standard' – that C's weighing and using of the relevant information was inadequate.[31] So, now the key question: what was the 'requisite standard'?

As with the pre-MCA case of *Ms T*, you would not be able to tell by looking at the case. The court in *C & V* reviewed a number of occasions on which, in its view, C demonstrated that she could weigh and use the facts of her case adequately. For instance, the court observed that, on one occasion, C recognised that, if she stopped dialysis, she would die and that this would be unpleasant.[32] On other occasions, the court would say, C was clear that she knew that she *could* recover from her condition but that she nevertheless wanted no such future.[33] These and other instances recorded in C's medical records and recounted by the court in its decision together outweighed the instances relied upon by the various medical and academic experts who had concluded that C lacked the ability to reason adequately. There is regrettably not much analysis attached to the court's recollection of these ability-related occasions. Indeed, the occasions on which C was adjudged by the court to have had that ability are presented as though they are self-evident. But they aren't, and, looking at the case, the mystery remains in respect of how the court ended up at the view that the presiding medical authorities had failed to prove 'to the requisite standard' that C lacked capacity. What the court *did* do, however, was tacitly rely on some view of what the reasonable person *would* do if they were in C's shoes. Perhaps the most telling instance in this regard was the court's reliance on an occasion where C initially refused but, following a discussion with others, subsequently consented to an aspect of the treatment her doctors were advising.[34] The fact that C changed her mind following the discussion was taken by the court, on a balance of probabilities,[35] as indicative of the ability to weigh and use the considerations that counted for and against treatment. Yet regarding that fact as being indicative of that ability is a significant leap in reasoning that conceptually requires relying, in part, on: (i) an idea about how responding appropriately to countervailing reasons is at least partly constitutive of the ability to reason; (ii) a conception of what it is to respond appropriately to countervailing reasons, that is, to be a reasonable person; and (iii) an empirical view of C living up to that conception.[36] But what is that conception such that C could live up to it? What is it, in other words, to be a reasonable person in the eyes of a capacity court?

This question more or less explicitly arises when courts are required to consider whether a person whose capacity is in question is able to appreciate the reasonably foreseeable consequences of their decisions. But why more or less? In part, because the question is only revealed by recognising that

31 *ibid* at [71].
32 *ibid* at [77].
33 *ibid* at [79].
34 *C & V* n 9 above at [74].
35 MCA 2005, s 2(4).
36 Supposing that (iii) is warranted on account of the common statutory requirement (for example, as in MCA 2005, s 1(2)) to assume that everyone has capacity unless otherwise established does not settle the conceptually prior question of specifying what it is that C is assumed to be. One cannot know or assume that an A is a B without knowing what is a B.

what is reasonably foreseeable is that which is foreseeable from the point of view of a reasonable person. So, one will need a theory of reasonableness in order to grapple, for instance, with section 3(4) of the MCA. This subsection says that the information that is relevant to a person's decision, and which is being subjected to judicial scrutiny, 'includes information about the reasonably foreseeable consequences of (a) deciding one way or another or (b) failing to make the decision.'[37] But we now know that a theory of reasonableness in capacity law has yet to make an appearance in the courts. This holds even when apex courts function as capacity courts. Take the Supreme Court of Canada case of *Starson* v *Swayze*[38] (*Starson*). This case centred on a physicist, Professor Starson, who refused medical treatment for what his psychiatrist diagnosed as bipolar disorder. The relevant legal body, the Ontario Consent and Capacity Board, had held that he lacked the capacity to refuse treatment. The Board's decision was subsequently overturned upon judicial review, which was then eventually subject to an appeal at the Supreme Court. In taking the case, the court faced two main issues: whether the initial judicial review applied the correct standard of review to the Board's decision; and whether the judicial review correctly interpreted the relevant statutory test for capacity.[39] This second question turned, for the most part, on whether Starson lacked capacity because he was unable to appreciate the reasonably foreseeable consequences of his decision to refuse treatment. Let me focus on this second question, as it takes us to heart of how reasonableness does its work in capacity cases.

There are, the court would say, 'three "common clinical indicators" of a person's ability to appreciate the [reasonably foreseeable] consequences of accepting or declining treatment'.[40] These indicators turn out to be three related abilities that the person in question must have, namely: to understand that the condition which is the target of a proposed treatment may affect them; to assess how the proposed treatment and its alternatives may affect them; and to make a choice that is not significantly formed as a result of a delusional belief.[41] Together, the court remarked, 'these indicators provide a useful framework for identifying what [the] "ability to appreciate" [reasonably foreseeable consequences] means in concrete terms.' Concreteness, of course, would be welcome and the court, to its credit, was at pains to apply the indicators to the facts of the case. How did they do this in respect of, say, Starson's ability to assess how the proposed treatment might affect him? As in *C & V*, the strategy of the court in *Starson* tracked common sense: to look at the medical evidence and decide whether it counted in favour of, or against, the ability to assess, in this case, how the proposed treatment would go. You might think that that is a fine way to proceed except that, without the stabilising benefit of an explicit and practicable standard, the medical facts were treated by the writers of both

37 Roughly the same wording appears in the Ontario Health Care Consent Act 1996, c 2, sched A, s 4(1): 'the reasonably foreseeable consequences of a decision or lack of a decision'.

38 [2003] SCC 32.

39 *ibid* at [62]. The court was clear that what was not at issue were disagreements (a) between the patient and his doctors (*ibid* at [56]) or (b) about treatment options (*ibid* at [36]).

40 *ibid* at [18].

41 *ibid*, the court citing Brian F. Hoffman, *The Law of Consent to Treatment in Ontario* (Toronto: Butterworths, 2nd ed, 1997) 18.

the majority and minority opinions as self-evidently counting in favour of completely opposing views. For example, writing the dissent, McLachlin CJ sought to survey the 'ample evidence' in support of the conclusion that Starson was unable to 'appreciate the reasonably foreseeable consequences of accepting or refusing treatment'.[42] The 'ample evidence' McLachlin CJ had in mind was a series of statements by Starson's doctors, including some of the following:

> [Starson] does not understand the ramifications on himself, does not appreciate that there are treatment options which are legitimate, nor does he appreciate the risks of rejecting those.[43]

> I don't believe that [Starson] has any appreciation whatsoever of what those side effects could mean in terms of him. And I don't think he has the ability to engage in a discussion of any sort that would allow him to become more knowledgeable in that area. I mean, at least argue on a rational basis. No, I don't think he could do that.[44]

These statements are mirrored in different ways in the other records examined by McLachlin CJ.[45] But what none of the statements actually amount to is evidence of much else except that the doctors who issued them took the view that Starson was unable to appreciate the reasonably foreseeable consequences of his decisions. That is distinct, however, from constituting evidence of Starson's inability in that regard per se. The closest we get to that kind of evidence is Starson's denial that he had a mental disorder, which was regarded by the court as demonstrating his inability to appreciate the facts of – and, by extension, the implications of his decisions in respect of – his condition.[46] That may or may not be the right view, but that is not the point. The point is that the resulting view was not grounded in a discernible and explicit standard against which it, along with countervailing views, could be judged.

This ungrounded approach, as I say, is liable to produce situations in which the same facts are regarded by different judges as self-evidently pointing in opposite directions. And, indeed, that is what happened in *Starson*. Writing for the majority, Major J remarked that 'the evidence amply supports' the view contradicted by what McLachlin CJ had earlier said was 'ample evidence' that Starson lacked capacity.[47] Major J would go on to argue that the determination of incapacity supported by the Board and subsequently endorsed by McLachlin CJ was based on 'two findings', namely:

> that the patient was in 'almost total' denial of a mental disorder, and that he failed to appreciate the consequences of his decision. Putting aside, for the moment, the issue of whether the Board properly applied the capacity test, a careful *review of the evidence* demonstrates that there is *no basis* for either of the above findings.[48]

42 *ibid* at [37].
43 *ibid*.
44 *ibid*.
45 *ibid* at [39], [43] and [46].
46 *ibid* at [39] and [45].
47 *ibid* at [90].
48 *ibid*, emphases added.

Major J then proceeds to examine the same medical facts reflected in the physician statements which featured in McLachlin CJ's opinion, and concludes that those statements 'are not supported by any basis in the record'.[49] There was 'no evidence',[50] 'scant evidentiary basis',[51] or 'no basis',[52] Major J would say, for the view favoured by McLachlin CJ, namely, that Starson was unable to appreciate the reasonably foreseeable consequences of refusing treatment.

As the preceding observations suggest, the members of the court were at loggerheads not as regards questions of law but rather as regards questions of fact. And then you might wonder that if that was indeed the case, then a complaint such as mine about loose and inoperable standards of law misses the gist of the court's disagreements by dint of those disagreements pertaining to facts, not law. Versions of this objection sometimes arise for those who think that reasonableness resists generalisability in principle precisely because it is so fact-specific.[53] You may have surmised that I am not of this view, for standards do much of the work in determining which facts are ultimately decisive. And, in this sense, the moral of the story in *Starson* was much the same as it was in *C & V*. Despite the courts' frequent talk of 'concrete terms' and 'requisite standards', neither case lived up to such notions, and the result was that the judges were left with extreme latitude in treating the facts according to their own unarticulated conceptions of reasonableness. Some, as in *C & V*, saw sufficient evidence of incapacity where, it turned out, there was little; and others, as in *Starson*, relying upon separate such conceptions arrived at views that were diametrically opposed to those of their peers despite having considered the same facts. It seems, then, as Alex Ruck Keene once put it, that 'mental capacity is in the eye of the beholder', meaning that 'we need to look less at the person being assessed, and more at the person doing the assessing.'[54] These observations might leave you feeling less than sanguine. But if there is a silver lining to the story I have told so far, it will be that the judges in these cases were at least *talking* as though they were relying on a standard of reasonableness, suggesting, then, that they perhaps thought that they *ought* to be doing so.

THRESHOLDS

Wednesbury indicia

Talk of reasonableness in capacity courts, when there is such talk, typically mimics the reasonableness talk that one finds in other areas of law. We saw a particularly illustrative example of this in *Ms T*, where the court invoked

49 *ibid* at [97].
50 *ibid* at [100], and, referring to the treatment prognosis favoured by the Board and McLachlin CJ, but flatly rejected by Major J at [102]: '[t]he evidence, in fact, suggests just the opposite.'
51 *ibid* at [105].
52 *ibid* at [106].
53 Consider, for example, the remarks on reasonableness in *Hull City Council* v *KF* [2022] EWCOP 33. For discussion, see Timothy Endicott, 'Questions of Law' (1998) 114 LQR 292.
54 Alex Ruck Keene, 'Is mental capacity in the eye of the beholder?' (2017) 11 *Advances in Mental Health and Intellectual Disabilities* 30, 30, arguing that this reality is 'inescapable … and will remain so even if we seek to recast our legislative provisions.'

Wednesbury unreasonableness in all but name not to review the decisions of a public-facing entity but, somewhat strangely, to assess the reasoning of a single patient.[55] As we have seen, the talk is loose and capacity courts have yet to evolve their views of reasonableness beyond 'know-it-when-they-see-it'.[56] Despite this looseness, you might think that the court in *Ms T* was on to something when it recited the *Wednesbury* line about the fictional decision which is 'outrageous in its defiance of logic or of accepted moral standards'. For even if the court did not explain itself, we can extrapolate. Take a common and fairly uncontroversial indicium of *Wednesbury* unreasonableness,[57] such as illogicality. A decision is 'illogical', as Paul Daly explains, 'where the means chosen … to achieve a particular aim are not apt to achieve the aim, [and so] the inaptness points towards the decision being unreasonable'.[58] The case Daly cites as an example involves a licensing body imposing a condition on an applicant which was virtually impossible to satisfy.[59] By dint of requiring the impossible, the licensing body's decision was unreasonable in that regard. As Daly's example suggests, illogicality, in the sense relevant to the aptness of means to ends, encompasses the classical logic notions of both validity (where one's conclusion follows from one's premises) and, vitally, soundness (where one's conclusion follows from one's premises *and* one's premises are, in fact, true). Logicality is commonly mistaken as being limited just to validity (or consistency), misleading some to think that, for instance, in the case of Ms T, there was nothing logically objectionable in her belief that receiving the blood transfusion would increase the volume of evil in her. Yet even if the reasoning behind that belief were expressed in a way that could satisfy validity, it could never approach soundness (since blood, I will assume, cannot be evil) and, so, could never be 'logical'. So far so good. But how would 'illogicality' play out in a capacity court? Suppose that you appeared before such a court, and one of the arguments presented in favour of a determination of incapacity was that the means you chose to achieve your ends were obviously inapt. What then?

Well, not much. As one judge put it, '[t]he right knowingly to be foolish is not unimportant … [t]he dignity of the individual is at stake.'[60] Indeed, one of capacity law's founding principles is that people are presumed to have capacity and are thereby entitled to help themselves to vast servings of imprudence,[61]

55 *Ms T* n 1 above at [53], citing, as guidance, *Re MB* n 21 above at [436G].
56 Bertenthal, n 29 above, 87, describing reasonableness review in the US.
57 This is not the only way to analyse unreasonableness. Dindjer, n 5 above, 2, for instance, takes the view that thinking about unreasonableness through indicia will not tell us much about its essence.
58 Daly, n 27 above, 242. Daly has in mind what philosophers usually refer to as 'instrumental rationality' rather than 'illogicality', the latter typically being used to label breaches in the rules of classical logic, such as non-contradiction. To keep the language in the legal literature consistent, I will proceed with Daly's usage.
59 *Zenner* v *Prince Edward Island College of Optometrists* [2005] 3 SCR 645, 661.
60 *Koch (Re)* 1997 CanLII 12138 (*Koch*), 521 per Quinn J.
61 On first-person limitations to imprudence, see Jonathan Herring, 'Losing It? Losing What? The Law and Dementia' (2009) 21 *Child and Family Law Quarterly* 3, discussing the weight that should be accorded to those wishes of an individual which would result in serious harm to them.

including imprudence in the aptness of means to ends.[62] It is not the business of the law to get people to live wisely,[63] or even to live at all – '[a] mentally competent patient has an absolute right to refuse to consent to medical treatment for any reason, rational or irrational, or for no reason at all, even where that decision may lead to his or her own death'.[64] What's more, the courts sometimes like to say that '[t]he temptation to base a judgement of a person's capacity upon whether they seem to have made a good or bad decision, and in particular upon whether they have accepted or rejected medical advice, is *absolutely to be avoided*.'[65]

And yet, despite the emphatic language, there is more to the story than such statements would have you believe. As I have argued elsewhere,[66] a court *cannot* rationally avoid concerning itself with the quality of your reasoning – even in your *ex ante* state of presumed capacity – when it is trying to determine if it should make decisions for you. How else could a court assess whether you have the ability to weigh and use the facts that bear upon your case but by looking at what you believe?[67] For remember how one ends up in a capacity court: it is not because of a mental disorder simpliciter. That would be unlawful,[68] and, just as vitally, having a mental disorder does not automatically entail that one does not have the capacity to make a specific decision.[69] Remember that in the vast majority of cases one ends up in a capacity court because of a mental disorder *in conjunction with* the prima facie imprudence of a specific decision one is trying to make, such as refusing life-saving treatment.[70] It is that conjunction, in most cases, which prompts healthcare providers to perform a capacity assessment and which then ends up before a court. And once a court gets into the details of assessing the reasoning behind your decision, it will need to do so with reference,

62 MCA 2005, s 1(2): 'A person must be assumed to have capacity unless it is established that he lacks capacity.' HCCA 1996, ch 2, sched A, s 4(2): 'A person is presumed to be capable with respect to treatment, admission to a care facility and personal assistance services.'

63 MCA 2005, s 1(4): 'A person is not to be treated as unable to make a decision merely because he makes an unwise decision.'

64 *Re MB* n 21 above at [17]. See also *Sidaway* v *Board of Governors of the Bethlem Royal Hospital* [1985] UKHL 1, 28 and *T, Re* [1992] EWCA Civ 18 at [3].

65 *Heart of England NHS Foundation Trust* v *JB* [2014] EWCOP 342 at [7] (emphasis added).

66 Hass, 'Reasoning and reversibility' n 15 above.

67 You might think that the question in capacity assessment contexts is whether one *can* believe that something relevant to one's decision is a fact rather than whether one actually believes that it is so. I take up this point in my discussion of the functional model of rational belief-formation in the fourth section of this paper ('Severity'). The courts, for their part, are sometimes clear that the ability to understand a particular fact, and the ability to reason with it, requires that one *actually* believe that that fact is a fact. This foregrounds the content of one's beliefs in judicial determinations of capacity. See, for example, *Local Authority X* v *MM & Anor* (no 1) [2007] EWHC 2003 (Fam) at [81]: 'If one does not "believe" a particular piece of information then one does not, in truth, "comprehend" or "understand" it, nor can it be said that one is able to "use" or "weigh" it.' See also *PCT* v *P, AH & the Local Authority* [2009] COPLR Con Vol 956 at [35].

68 MCA 2005, s 2(3)(b): 'A lack of capacity cannot be established merely by reference to a condition of [a person]'.

69 *C (Capacity to Access the Internet and Social Media)* [2020] EWCOP 73 at [32] '[r]etention of information is a fact specific and usually relatively easy to determine criterion'; *Re A (A Child)* 2016 EWCA 759 at [33]: '[c]ases are all fact specific'.

70 *Re P* n 3 above at [60], on 'unwise or irrational' decisions triggering capacity assessments.

explicit or not, to some standard of reasoning which it values enough to believe that you must live up to it if you are to count as having the capacity to make the decision in question. That is a value-laden (or, if you prefer, an evaluative) commitment.[71] That commitment also happens to be rationally unavoidable not just in judicial assessments of the bits of reasoning which appear before the courts but also in the assessment of all reasoning by anyone full stop. How so? For the reason that it is part of the logic of selecting between alternative standards against which reasoning is to be assessed that one must value the standard one ultimately chooses as being superior in some sense, however trivially, to extant alternatives.[72] Otherwise, the choice is beyond reason: one had no reason to choose *that* standard. And needless to say, the absence of conscious choice does nothing to diminish this point, as all that would reveal is ignorance of the value-laden ends to which one's actions are directed. In the context of a capacity court, the evaluative nature of the capacity determination – concerned as it must be with determining whether your reasoning is *good enough* to count as reasoning – is also a clue that, in respect of illogicality as an indicium of unreasonableness, it is not the inaptness of your means per se that is relevant but rather the *severity* of the inaptness. The statutory presumption of capacity is not rebutted, in other words, by mere illogicality. There is a threshold of severity that must be breached.

These observations about the relevance of a severity threshold for illogicality might make you wonder about whether something similar would hold for other indicia of unreasonableness. Take disproportionality. Roughly translated into the language of capacity law, disproportionality refers to decisions whose benefits are 'outweighed' by the harms they entail for certain special interests of persons,[73] such as the prolongation of life,[74] or respect for one's wishes and feelings,[75] interests which are effectively treated as 'qualified legal rights'.[76] But disproportionality, like illogicality, is subject to 'the right knowingly to be foolish' and one is generally free to bring about outcomes that do more harm than good to oneself.[77] That is, however, up until that 'right' breaches a severity threshold. And, indeed, this was part of the deliberations in *Ms T*, which

71 On the political implications of these evaluative commitments, see Jules Holroyd, 'Clarifying Capacity: Value and Reasons' in Lubomira Radoilska (ed), *Autonomy and Mental Disorder* (Oxford: OUP, 2012).

72 These are claims I defended at length in Binesh Hass, 'The Opaqueness of Rules' (2021) 41 OJLS 407 but, as I noted in that paper, they are old insights: see, for example, Socrates' denial of akrasia in *Protagoras* (358c–d), and David Hume, *An Enquiry Concerning Human Understanding* (Oxford: OUP, 2005) s 5.

73 The language of reasons being 'outweighed' is common but metaphorical. For a non-metaphorical explanation of what it is for a reason to be defeated (and, so, outweighed), see Joseph Raz, *From Normativity to Responsibility* (Oxford: OUP, 2011) ch 2 s 4.

74 *Aintree* v *James* [2013] UKSC 6 (*Aintree*) at [35]: 'There is considerable weight or a strong presumption for the prolongation of life but it is not absolute.' See also, for example, the MCA Code of Practice [5.31] and, on the court weighing the sanctity of life, *Airedale NHS Trust* v *Bland* [1993] AC 789.

75 *Newcastle upon Tyne Hospitals Foundation Trust* v *LM* [2014] EWHC 454 at [23]: '[the patient's] wishes and feelings and her long-standing beliefs and values carried determinative weight.' For a discussion of the evolution of the court's views on the importance of a person's wishes and feelings, see Auckland, n 19 above, 120.

76 Timothy Endicott, 'Why Proportionality is Not a General Ground of Judicial Review' (2020) 1 *Keele Law Review* 1, 2.

77 Jackson, n 26 above, 267.

featured as one of this paper's opening vignettes,[78] where respect for Ms T's wishes (refusing a blood transfusion due to her belief that her blood was evil) was held in balance against other of her important interests (the preservation of her life). The prevailing view in that case was that giving effect to her wishes would have entailed a disproportionate harm which was sufficiently severe in its expected consequences as to count as evidence against Ms T's ability to weigh the expected consequences of carrying out her wishes.[79] In the case of Mr S in *Re P*, on the other hand, the expected harm (the risk of financial ruin), though disproportionate (in the light of the available alternatives), was not sufficiently severe to outweigh respect for his wishes.[80] The point, however, is the same between the two cases, which is that it was not disproportionality per se, but rather its severity, which was relevant to the court's deliberations.[81]

Locating unreasonableness

The foregoing considerations in respect of illogicality and disproportionality as indicia of unreasonableness may confirm what you already suspected, which is that reasonableness is a matter of degree.[82] And, accordingly, mere falsehood is not sufficient to establish that the unreasonableness on display is so severe as to count as evidence of incapacity.[83] Yet if that is indeed what you suspected, then in a certain sense it puts you and me both at odds with some very influential accounts of reasonableness, such as the one favoured by John Gardner. But why just in a certain sense? For Gardner, to be reasonable is no more and no less than to be justified,[84] which is to have resolved your beliefs and/or actions, depending on what is being judged, on the side of the relevant undefeated reasons.[85] On Gardner's view, it isn't possible to make a reasonable decision on

78 *Ms T* n 1 above.

79 To count against Ms T's capacity, of course, is not to determine the question of her capacity *tout court*; see *C & V* n 9 above at [30]: 'the fact that a decision not to have life saving medical treatment may be considered an unwise decision and may have a fatal outcome is not of itself evidence of a lack of capacity to take that decision'.

80 *Re P* n 3 above.

81 A further dimension that distinguished the cases of Ms T and Mr S, but which I have not examined, was gender, and some might think that that played a role in the decisions. For related reading, see Anna Arstein-Kerslake, *Legal Capacity & Gender: Realising the Human Right to Legal Personhood and Agency of Women, Disabled Women, and Gender Minorities* (Cham: Springer, 2021).

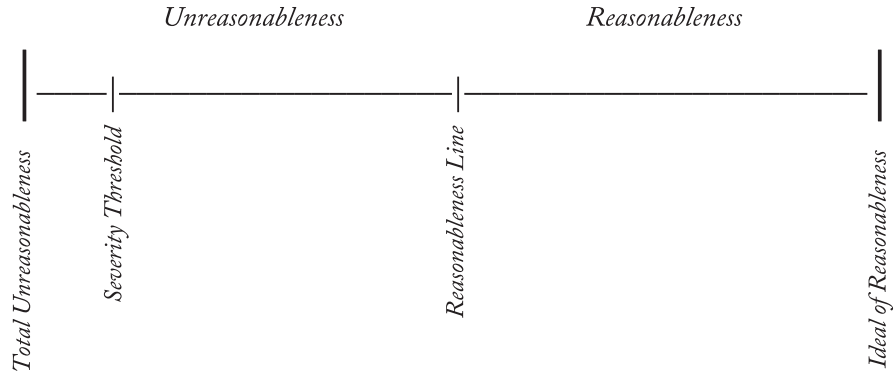
82 On degrees of capacity-related abilities, see also Peter Bartlett, 'Re-thinking the Mental Capacity Act 2005: Towards the Next Generation of Law' (2023) 86 MLR 659, 685.

83 This point also comes up in the context of false beliefs and disability, *ibid*, 687.

84 John Gardner, 'The Many Faces of the Reasonable Person' in *Torts and Other Wrongs* (Oxford: OUP, 2019) esp 273-278; John Gardner, 'Fifteen Themes from *Law as a Leap of Faith*' (2015) 6 *Jurisprudence* 601, 608 on justified false belief and excuses. See also John Gardner and Timothy Macklem, 'Reasons' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and the Philosophy of Law* (New York, NY: OUP, 2004) 474. For a recent critique of the reasonableness-as-justification view, see Dindjer, n 5 above, 10-15.

85 Joseph Raz, *Practical Reason and Norms* (Oxford: OUP, 2002) 39. Using Raz's influential terminology, an undefeated reason is a reason that is neither outweighed nor excluded by other reasons. A reason can be defeated by other first-order reasons by weight (that is to say, a reason can be 'weightier' if certain things count in its favour) and excluded by second-order reasons

the basis of a falsehood,[86] as that would suggest that one can be justified in acting on the basis of a defeated reason – but that is just irrationality, which admits of excuse but not justification.[87] However, there are good pragmatic reasons not to go down the road in which reasonableness collapses into justification.[88] Pragmatically, we should want to preserve conceptual space for the possibility that, in a capacity court, a person's point of view can be unreasonable and false but not so severe in its unreasonableness as to count as evidence of an inability to reason. Let me illustrate the place of this desideratum with a diagram:



The space to the right of the *Severity Threshold* and left of the *Reasonableness Line* is populated by unreasonable beliefs which are false.[89] Think of Mr S's views about tithing and divine favour from *Re P*: the relatively everyday sort of views that are bizarre but common and which are not so severe as to count as evidence of incapacity.[90] Then we have beliefs which sit to the left of the *Threshold*: the space where one's views, if one intends to act upon them, will count as evidence of incapacity. These will include Ms T's view that she ought to have refused a blood transfusion because her blood was evil.[91] Now, whether

(for example, a duty is a reason not to act upon otherwise possibly weightier first-order reasons that conflict with one's duty – that makes the duty a second-order reason).

86 Joseph Raz, *Engaging Reasons* (Oxford: OUP, 1999) 54 f; see also Bernard Williams, 'Deciding to Believe' in *Problems of the Self* (Cambridge: CUP, 1973) 148 and G.E.M. Anscombe, *Intention* (Oxford: Blackwell, 1963) 56-60.

87 Gardner, 'Fifteen Themes' n 84 above, 608. On Gardner's distinction between excuses and justifications, see his *Offences and Defences* (Oxford: OUP, 2007) chs 5 and 6. If you agree with Gardner, the limit of justification in the case of a person wrongfully acting for a defeated reason is their beliefs: though they may (or may not) have been justified in believing that they ought to act as they did, the most that they could hope for as regards their wrongful action is excuse, not justification.

88 On potentially justified dogmatism, see Neil Levy, *Bad Beliefs* (New York, NY: OUP, 2022) 92-95 and Saul A. Kripke, *Philosophical Troubles: Collected Papers* (New York, NY: OUP, 2011) 49.

89 Are all unreasonable views false? Not necessarily. Some philosophers working in epistemology today, notably Levy, *ibid*, x-xi, take the view that any belief that is unsupported by the evidence available to oneself *or* the totality of evidence is unjustified. This is a 'bad belief', on Levy's view, and is presumably unreasonable. But it may also be true – it just happens to be unsupported by evidence (think of the detective who correctly identifies the wrongdoer not on the basis of evidence but through a superstitious hunch or tarot reading).

90 *Re P* n 3 above.

91 *Ms T* n 1 above.

they recognise it or not, capacity courts are in the business of specifying where the *Threshold* will lie. As I say, however, a theory of reasonableness – or, more aptly, a theory of severe unreasonableness – that could inform this judicial work has yet to make an appearance in capacity law. The absence of such a theory has not meant that conceptions of unreasonableness are not in play. They very much are. It just so happens that they are unarticulated and, as a result, varying folk common-sense conceptions of unreasonableness have seen different judges place the *Threshold* in different places. How do judges determine whether a person is able to use and weigh the facts of their case to the 'requisite standard' when no such standard exists?[92] How do we know whether someone is able to appreciate the reasonably foreseeable consequences of their intended decision when what is reasonably foreseeable depends on what is foreseeable from the point-of-view of the reasonable person, but for whom we lack a theory?[93] We can begin to answer these and other questions once we have an answer to a question which I hope to have shown conceptually precedes them, that is: where should we put the *Severity Threshold*?

SEVERITY

Severe unreasonableness

A theory of severe unreasonableness will need to be extremely limited in its reach, for otherwise it risks wrongly enveloping beliefs that are protected by the dignitarian 'right knowingly to be foolish'.[94] Where should we place the *Severity Threshold* so as to leave in peace people who are living up to that right? Here is one model for the ability to reason criterion:

> *Severity Threshold*
>
> Necessarily, a person 'P' is unable to weigh and use a fact '*f*' that is material to their case if P has a belief that '*b*', in respect of *f*, that is—
>
> (1) not supported by *ex ante* evidence available to P;
> (2) not affected by *ex post* countervailing evidence presented to P;
> (3) not possibly shared by P's community of peers; and
> (4) not empirically possible.

While some of this will look familiar,[95] much of it will need unpacking in a way that enables us to exclude everyday forms of bad thinking. We will also need to test the model with a few hard cases in order to illustrate its potential utility in a capacity court.

92 MCA 2005, s 3(1)(c).
93 UK: MCA 2005, s 3(4); Canada: HCCA 1996, ch 2, sched A, s 4(1); SDA 1992, ch 30, s 45.
94 *Koch* n 60 above, 521; see also Jackson, n 26 above, 262.
95 Karl Jasper, *General Psychopathology* (Chicago, IL: University of Chicago Press, 1963) 93 ff; James Gilleen and Anthony S. David, 'The cognitive psychiatry of delusions: from psychopathology to neuropsychology and back again' (2005) 35 *Psychological Medicine* 5, 6.

In respect of the model's terms, let me begin with the orthodox philosophical view of what it is for something to be a fact. A fact is the thing, or things, in virtue of which a statement about that thing, or those things, is true.[96] The ability to 'weigh and use' facts is the cognitive ability to respond to facts. This puts us in the company of mice, which use their brains to respond to the facts of this world, but not plants, which respond to, but do not cognitively interact with, such facts. A fact is 'material' to P's case if it can alter the outcome in a way that is relevant to the determination of P's capacity before a court. Some of P's beliefs, no matter how fantastical, will therefore not count as evidence of P's inability to reason if those beliefs pertain to immaterial facts that do not feature in P's reasoning in respect of, say, the treatment decision they intend to make.

Those are the basic terms of the model. Now for a review of its conditions: (1) refers to the evidence, the set of material facts, to which P has ready and independent access, whereas (2) refers to evidence that is presented to P by others, including friends, experts, and judges. These conditions are important since they allow for the assessment of the reasons P has, by dint of (1), or may have, by dint of (2), for *b*. But why are reasons important in this model? For one thing, P having *b* necessarily depends on P having reasons for having *b*.[97] Any assessment of P's ability to reason is an assessment that takes P to be someone whose belief-formation is rational, which is another way of suggesting that P's belief that *b* is *for* reasons. The reasons may be false and easily defeated, or even the wrong kind of reasons, but, without reasons, P having *b* is rationally impossible.[98] The flip side of this analysis is that if we do not think that P's belief that *b* is for reasons, what grounds could we have for assessing P's ability to believe that *b* for reasons? The correct answer is 'no grounds at all'. That is why any model of capacity assessment which incorporates the ability to reason as a criterion must recognise that we cannot assess P's ability to reason in respect of *b* without assessing P's reasons for *b*. Luckily, this happens to be both a logical requirement and a legal one, for remember that the 'in respect of' in that last sentence is vital: capacity both in statute and at common law is decision-specific, not general, and the decision-specificity is always going to be about P's reasons for *b*; that is, *for* refusing treatment, *for* tithing their inheritance, etc, and *not* about P's beliefs generally.

The foregoing explanation tells us why an assessment of the ability to reason must turn on an assessment of P's reasons for their belief that *b*. It leaves open the question of what it is for P's reasons for *b* to be *supported* by evidence, however. Leaving the question open is deliberate, for it strikes at issues which are foundational in the theory of reasons about the weights and kinds of conflicting reasons, but this paper is obviously not the place to sort through them.[99] At the

96 This is the truth-making or correspondence theory of facts; see Bertrand Russell, 'The Philosophy of Logical Atomism' in his *Logic and Knowledge: Essays 1901-1950* Robert C. Marsh (ed) (London: George Allen and Unwin, 1956).

97 Hass, n 72 above, 411.

98 Pamela Hieronymi, 'Believing at Will' (2009) 35 *Canadian Journal of Philosophy* 149.

99 For empirical studies of responsiveness to reasons, see Jonathan Baron, *Thinking and Deciding* (Cambridge: CUP, 4th ed, 2008) and Gordon Pennycook and others, 'On the belief that beliefs should change according to evidence: Implications for conspiratorial, moral, paranormal, political, religious, and science beliefs' (2020) 4 *Judgment and Decision Making* 476.

minimum, a reason can fail to lend support to, or constitute evidence for, a belief on this model if it contains a logical or empirical impossibility. The latter is captured by Condition (4), of which more below, though it might be helpful to briefly give an example of what the former would look like in a capacity context. If P knows that it is true that they have a schizoaffective disorder but also believes that it is unknown that they have such a disorder, and that is why they are refusing treatment, what we have is a logical impossibility. It is logically impossible to know that something is true but unknown. That result would count in favour of P's belief that *b* breaching the *Severity Threshold*.

There is also an important point to make as regards what it means, under Condition (2), for *b* not to be *affected* by countervailing evidence. One way, but certainly not the only way, to think of this question would be as an aspect of how we ought to rationally form beliefs. If you take a functional point of view,[100] you might say that, just as our visual system ought to function in a certain way thanks to the rigours of natural selection (to distinguish shapes and colours, for instance), so, too, should our rational belief-formation system: when it works as it should, it compels us to believe that, say, in the light of certain facts, we have two rather than three hands,[101] two legs, not three, etc.[102] On this functional account, severe unreasonableness in rational belief-formation is, in part, a kind of system dysfunction.[103] Part of what makes this view attractive is that it is sensitive to the impairment-centric focus of capacity law. Putting it to work, the functional model of rational belief-formation gives us something like the following explanation: for P's belief that *b* to be unsupported by evidence under (1) and unaffected by evidence under (2) is for P's rational belief-formation system not to be revising *b* according to what that system has evolved to do,[104] which is to respond to supporting and countervailing reasons according to the norms of rationality.[105]

100 Timothy Bayne, 'Delusion and the Norms of Rationality' in Tzu-Wei Hung and Timothy J. Lane (eds), *Rationality: Constraints and Contexts* (London: Elsevier, 2017).

101 Edoardo Bisiach, 'Language without Thought' in Lawrence Weiskrantz (ed), *Thought without Language* (Oxford: OUP, 1988) 469.

102 For a more specific analogue, consider Capgras delusion, a delusional misidentification syndrome where one has the false belief that identical duplicates (imposters) have replaced the significant people in one's life. Current neurophysiological models, which are used as the basis for treatment, hold that there are two neural processes that regulate face recognition: affective and semantic processing. Capgras delusion is thought to involve damage to the former but not the latter, which explains why someone who suffers from it is able to recognise faces (semantic processing) but is unable to experience familiarity (affective processing). For discussion, see Bayne, n 100 above, 82.

103 The other parts being the three other conditions of the *Threshold* model. Since the model has four necessary conditions, an unwise or mistaken belief that falls afoul of Conditions (1) or (2) will not constitute evidence of incapacity without also falling afoul of the others.

104 A seemingly similar but different version of this view will be found in Tim Bayne's important work on delusions and the norms of rationality. For Bayne, however, the belief-formation system, from the point of view of natural selection, is designed not to be rational but rather conducive to our survival. See Bayne, n 100 above, 87-90.

105 Despite my phrasing, the idea in this sentence need not be tied to evolution. See, for example, Michael A. Smith, *Ethics and the A Priori* (Cambridge: CUP, 2004) 36: 'the psychological states of rational deliberators and thinkers connect with each other in just the way that they rationally should.' But see also Peter Danielson, 'Rationality and Evolution' in Alfred R. Mele

What exactly, you might ask, are these norms? The short answer is that the norms of rationality are the norms that specify what it is to respond correctly to reasons.[106] These norms can be expressed in the form of necessary conditions, and the least controversial of them include the following—

Necessarily, if P is epistemically rational:
(a) P does not believe *b* and not-*b* at the same time.
(b) P does not believe (i) *b* and (ii) if *b* then *c*, but (iii) not-*c* at the same time.

Necessarily, if P is instrumentally rational, and *x* is an act:
(c) P does not intend to *x* and not-*x* at the same time.
(d) P does not intend to not-*x* at the time at which they intend to attain some end *e*, and *x* is the means to attain *e*.

No doubt there are clever counterexamples for each of these conditions.[107] But, for the most part, no set of norms of rationality applicable to most of what we do when we take ourselves to be reasoning could hope to exclude them (or similar variations),[108] and they are likely to apply to almost every situation relevant to the courts. I should say, however, that what the norms of rationality are is actually less vital than recognising that, without *some* norms, assessing someone's ability to reason is straightforwardly incoherent. Without norms, there can be no assessment of anything. Better, then, for capacity courts to start the difficult business of explicitly referring to, and refining, these norms.

Now let me consider the relevance of P's community of peers in respect of *b*, which is captured by Condition (3) of the *Threshold* model. Whereas (1) and (2) were conditions of practical reason, (3) is an epistemic condition which refers to the fact that, if a sufficiently sizeable number of relevant non-pathological individuals whom P trusts, or ought to trust, report that *b* is justifiable, then P has at least one good reason to retain *b* as their belief.[109] Think of your beliefs about some sufficiently technical and complex topic, such as gravity. Chances are, unless you are the right kind of physicist, you are unlikely to be in a position to dispute the general theory of relativity which explains gravitational forces. At the minimum, that fact gives you one good reason not to dispute that theory. So, if P's treatment refusal depends on *b* and *b* is widely shared by P's community, that is *one* good reason, though perhaps not an *all things considered*, or undefeated, reason for P not to dispute *b*. It is not, moreover, uncommon to see the courts applying some version of (3) in cases that involve deeply held religious beliefs

and Piers Rawling (eds), *The Oxford Handbook of Rationality* (Oxford: OUP, 2009) 418 ff on the 'the fruitfulness of the theories that unify evolution and rationality'. On my view, rational belief-formation is the formation of beliefs in accordance with the principles of rationality; thus, arbitrarily forming a belief (for instance, by tossing a coin) that happens to be rationally required will not count as rational belief-formation.

106 This is what John Broome calls *equivalence*, and which he goes on to reject in chs 5 and 6 of his *Rationality Through Reasoning* (Oxford: Wiley-Blackwell, 2013).

107 See, for example, Larry Temkin, *Rethinking the Good: Moral Ideals and the Nature of Practical Reasoning* (New York: OUP, 2012) or Elia Zardini, 'Naive *Modus Ponens*' (2013) 42 *Journal of Philosophical Logic* 575.

108 An old but frequently challenged insight recently defended afresh in Owen Griffiths and A. C. Paseau, *One True Logic* (Oxford: OUP, 2022).

109 For discussion, see Levy, n 88 above, 76.

which are shared by a wider epistemic community.[110] You could even say that part of the purpose of (3) is to enable a path through which such religious views can pass freely. I will explain in the next section why this is something we should want on human rights grounds. But you might wonder about other beliefs or belief systems that enjoy wide appeal. Take the 19th century case of 'zetetic astronomy', which rejected the 'rotundity of the earth' in favour of the view that it was a plane. At its peak, its enthusiasts numbered in the thousands and were organised under a variety of flat-earth societies on both sides of the Atlantic. It might seem that (3) would provide safe passage to such views, in contrast to a suitably hard-nosed and no-nonsense judge who wouldn't. Yet such a judge is irreplaceable. Courts will need to determine when a group of people is to count as a relevant epistemic community. This determination will vary across time. In our day, an adherent of zetetic astronomy is unlikely to benefit from (3), whereas an anti-vaxxer might. This is doubtless a vulnerability of the model but, as we shall see in the next section, it has payoffs.

The final condition, (4), sets the extraordinarily high modal standard of empirical impossibility which the contents of *b* need to satisfy in order for P's having *b* to count as evidence of P's inability to reason. If P believes they swallowed a car and medical treatment would cause unwanted combustions, that is a belief whose contents are empirically impossible rather than merely false. That result also counts in favour of P's belief that *b* breaching the *Severity Threshold*. To be clear, mere breach is not sufficient for the determination that P lacks capacity. Mere breach is sufficient just for a determination that P's belief that *b* is evidence of incapacity in respect of a specific decision, which relies on *b*, that P is trying to make.

Applications of the *Threshold* model

The first test of the model is that it needs to be totally inapplicable to cases beyond those which would be of relevance to a capacity court. The model does not explicitly mention capacity – and nor should it, for that would be question-begging – and yet it needs to exclude cases in which capacity is not a question. Does it do this?

Suppose that two politicians, A and B, are having a heated debate about some economic policy.[111] A and B share an objective. Both want to avoid a recession. But A thinks that B's views on recession avoidance are unsupported

110 For a recent case, see *London Borough of X* v *MR & Ors* (Rev1) [2022] EWCOP 1. Though the court's respect for religious views has not, in the past, been necessarily tied to those views being shared, as we saw in *Wye Valley NHS Trust* v *B (Rev 1)* [2015] EWCOP 60 (*Wye Valley*) at [40] and [43]. Yet nor is the fact that a devoutly held belief is shared by a religious community sufficient for it to persuade the court to decide a question in favour of that belief, as we saw in the relatively recent cases of *KM, Re* [2021] EWCOP 42 and *IH (Observance of Muslim Practice)* [2017] EWCOP 9. In clinical settings, the DSM-V also carves out an exception in its entry on delusions for religious beliefs that are not 'elevated'; on this, see *Sherwood Forest Hospitals NHS Foundation Trust* v *C* [2020] EWCOP 10 at [18] and [19].

111 A version of this example occurs in Chris Walker, 'Delusion: what did Jaspers really say?' (1991) 159 *British Journal of Psychiatry* 94.

by the evidence available to even B (Condition (1) of the *Threshold* model). B's views also seem to A to be unaffected by the evidence, provided by A, which suggests that B's ideas would actually guarantee a recession (Condition (2)). A even thinks that B is so outrageously mistaken that B's views cannot possibly be shared by even B's own constituents (Condition (3)). A admits that even if B's views are not logically impossible, they rely on empirically impossible economic ideas (Condition (4)). 'Pure fantasy', says A when asked about B's various notions. Unfortunately for A, and I guess everyone else, too, B thinks exactly the same things about A. Where do we go from here?

Other things being equal, the result we should want is that neither A nor B is found to lack capacity on the *Threshold* model even if both are badly wrong in their views. The path to that result begins by recalling that the model consists of four non-ordinal and necessary conditions. Furthermore, from the point of view of the entity tasked with applying the model, for any of the model's four conditions, the only possible value is 'true', 'false', or 'indeterminate'. This makes the model's logic *trivalent* from the assessing entity's point of view (though not necessarily trivalent otherwise).[112] For the sake of argument, suppose that some fictional court were tasked with determining if B's views on how to avoid a recession (B's belief that *b*) should count as evidence of incapacity. The court's deliberations would take something like the following form: per Condition (1), is B's belief that *b* not supported by the *ex ante* evidence available to B? If the court, relying on the usual way it deals with questions of evidence, decides that it is false that B's belief is not so supported, it becomes subsequently impossible to arrive at a determination of incapacity. If the court thinks that the evidence is too unclear, or too finely balanced to resolve one way or the other, and thus decides that it is indeterminate that B's belief is not so supported, then in that case, too, it becomes impossible to arrive at a determination of incapacity through *b*. The same process will ensue for the other conditions, in whatever order they are taken, and, together, they present so high a bar that it is virtually inconceivable that either A or B could be found to lack capacity. Why might that be? Because, for the most part, the model's four necessary conditions turn on empirical questions, the answer to at least one of which is almost always going to be at least 'maybe'. Is there, on balance, enough evidence to support A or B's bizarre economic beliefs? Suppose you took a hard-line view and said that there is no such evidence and, further, that neither A nor B's beliefs seemed to be affected by the countervailing evidence put to them, thus satisfying Conditions (1) and (2). But are those views, for which you see no evidence, possibly shared by a sizeable number of non-pathological individuals in A or B's community, per Condition (3)? If they are or might be, that would block a result that could count towards a finding of incapacity through *b*. And so, too, with Condition (4): if it is or might be true that A or B's economic notions are empirically possible, that would also block the same result. As you can see by running through the model, what emerges is a mixed bag that comfortably places even A and B on the capacitous side of the *Threshold*, for even a single 'indeterminate' re-

112 See *Aintree* n 74 above at [24].

sult arising from engaging its conditions would block a finding of incapacity through *b*.

Perhaps, however, you think that the model is too forgiving. You might wonder what view would *not* on fall the capacitous side of the *Threshold*. Consider once more the cases of Ms T and Mr S.[113] Ms T refused treatment for a blood transfusion on the basis of the belief that her blood was evil and, if the doctors gave her more blood (through a transfusion), it would increase the total volume of evil blood in her body and make it more likely that she would do evil things (let me again refer to all of that as '*b*'). The court in that case had no trouble flagging Ms T's 'misconception of reality' as evidence of an inability to weigh and use the facts of her case. We are likely all on the same page that this was the right result. But, as I say, it is not the result but the reasons for the result that should fix our attention. Part of the argument in this paper has been that the court's reasoning was unprincipled because virtually nothing was offered to explain how the court (i) arrived at the view that Ms T's belief constituted a misconception of reality, (ii) distinguished a belief that was such a misconception from one that was not, and (iii) understood what it is to ably weigh and use facts. I claim that the *Threshold* model, like the court, arrives at the right conclusion about Ms T's belief but with the additional benefit of being able to answer our questions about *how* it got there. Was *b* not supported by the *ex ante* evidence available to her? It was not, for Ms T offered no such evidence, thus satisfying Condition (1) – and, what's more, nothing could show that Ms T's blood was evil, thus satisfying Condition (4). Was *b* not affected by *ex post* countervailing evidence? Evidently, it was not, for it persisted in Ms T's mind without accounting for the reasons against *b*, thus satisfying Condition (2). Was *b* shared by Ms T's wider community of peers? As far as we know, it was not, for there was no talk of such a community, thus enabling Condition (3) to be satisfied. But you might worry that this is cutting it too close and we should want the *Threshold* model to offer a principled way to safeguard the beliefs of individuals who, for instance, have highly idiosyncratic religious views which are not shared by others. I will turn to this point shortly. For now let me just say that if *b* were shared by a wider community, it would not follow that other of Ms T's beliefs in respect of treatment refusal could not feature as alternatives to a finding of incapacity. Yet if *b* were shared by such a community, it is vital to note that there would be no chance of *b* counting as evidence of an inability to weigh and use the relevant facts. And that is just as we should want it, for otherwise the model would be at risk of encouraging breaches of a slew of fundamental rights, such as Article 9 rights to the freedom of religion under the European Convention of Human Rights.

This might make you think that the relevance of such rights should put the wisdom of including a condition that rests so heavily on the possibility of others sharing one's views into doubt. For in addition to the right to the freedom of religion, there is also the right to the freedom of conscience, which does not depend on commonality.[114] In the case of *Ms T*, there was no reference to a

113 *Ms T* n 1 above and *Re P* n 3 above, respectively.

114 ECHR, Art 9 specifically safeguards the freedom of conscience, thought, and religion 'either *alone* or in community with others' (emphasis added).

wider community (and this, incidentally, made it easy to satisfy Condition (3) of the *Threshold* model). But what stopped the court from making reference to the right to freedom of conscience or religion anyway? The court took the initiative in this regard in *Wye Valley*[115] and, even more explicitly, in *Re P*, where, in relation to Mr S's beliefs on tithing, it held that the 'fact that relatively few people now tithe [was] neither here nor there', for it did *not* matter whether Mr S's beliefs reflected 'a core belief required of members of a particular religion or a deviation and a matter of individual conscience.'[116] The straightforward reply to this challenge is to note that the *Threshold* model is not structured with the express aim of preserving rights, religious or otherwise. That is work for other instruments. The model's aim instead is to provide a principled, discretion-limiting framework that enables courts to determine when a relevant belief of a person is so severely unreasonable as to count as evidence of an inability to reason.[117] Obviously, that is going to come into tension with people's freedom of conscience. All of mental capacity law is abrasive to such a freedom.[118] The business of capacity law is exactly the business of specifying when it is justifiable to intrude upon people's freedom to think and do as they like for themselves.[119] We should not be in any doubt about that nor attempt to dress up capacity law in a way that obfuscates its essentially intrusive function. Be that as it may, it turns out that Mr S's views on tithing actually do finely on the *Threshold* model. This is so principally because they are protected by Condition (3), since it is perfectly possible, indeed, likely, that Mr S's views on tithing were shared by his co-religionists. It is also worth noting that, as regards Condition (1), Mr S's views were supported by the *ex ante* evidence available to him, namely, the scripture and principles of his faith, to which he made frequent and specific reference.[120]

Now you might be of the view that, as with Ms T, who could not produce evidence that her blood was evil because no such evidence could exist (or so I have assumed), a similar line of thought ought to bear upon Mr S's religious beliefs – for religious evidence, you might say, is no evidence at all. This move would risk casting Condition (1) as an objectivist or all-things-considered approach to what could constitute eligible evidence. As philosophically tempting as that route may seem, it would be a mistake. Capacity law, first of all, is not the place to settle questions about the normative status of religious testimony.[121] And second, we will not want to exclude religion in this way from eligible grounds of evidence, for that would produce significant Article 9 difficulties for capacity courts, where religious justifications feature so frequently in people's

115 *Wye Valley* n 110 above at [14].
116 *Re P* n 3 above at [111].
117 As emphasised throughout, however, for a particular belief *b* to count as evidence of incapacity is not to establish incapacity all things considered; see *C & V* n 9 above at [30].
118 On calibrating the degree of that abrasiveness, see *MM & Anor*, n 67 above, at [120].
119 Hass, 'Reasoning and reversibility' n 15 above.
120 For example, *Re P* n 3 above at [39], [46], [47], [50], [80] and [98].
121 For discussion, see Shimon Waldfogel and Stacey Meadows, 'Religious issues in the capacity evaluation' (1996) 18 *General Hospital Psychiatry* 173 on distinguishing between religious and delusional beliefs and Natalie F. Banner, 'Can procedural and substantive elements of decision-making be reconciled in assessments of mental capacity?' (2013) 9 *International Journal of Law in Context* 71 on content-based approaches to such distinctions.

decision-making.[122] The upside of a model that is able to accommodate such justifications is that it is practicable. The downside, as ever, is that the pragmatism comes at the potential cost of not having a model that is completely satisfactory from a philosophical point of view. On balance, these considerations weigh in favour of the position that Condition (1) ought to be interpreted as encompassing, subject to the norms of rationality, all evidence, including religious evidence, that is available to a person and which counts in favour of the belief under question. That has the effect of placing Mr S exactly where he should be placed, which is on the capacitous side of the *Threshold*.

CONCLUSION

Throughout this paper, I have tried to convince you that capacity law lacks, but sorely needs, an articulated standard of reasonableness. It needs such a standard because the current state of affairs, in which judges are relying on unarticulated and presumably folk conceptions of reasonableness, has given the courts too wide a scope for discretion.

People are starting to notice. In a recent lecture, John Coggon wondered whether mental capacity law is even law given the vast and seemingly unfettered discretion judges have at their disposal,[123] and which, for lack of guidance, they are compelled to use in order to make sense of the cases that appear before them. That is a bad look for capacity law.[124] There is no doubt lots of talk in the law reports of a 'requisite standard' for determining when, say, someone has the ability to reason, to weigh and use the facts of their case – and yet, when you look, you will not find it. What you *will* find are more like job descriptions for such a standard, setting out the work judges are presumably hoping it *would* do.[125] But even mere talk of a standard, even a non-existent standard, is both telling and useful. It is telling because it suggests that courts think that such a standard is necessary. And it is useful because, when that talk does occur, it reveals clues for where the standard can be inserted once one has been developed. This paper has focused on one such location, namely, the point at which courts are required to engage the ability to reason criterion which features in virtually every capacity statute. My central claim has been that the *Threshold* model of reasonableness provides a principled framework for

122 Notwithstanding Art 9 ECHR protections of freedom of conscience, non-religiously motivated beliefs such as Ms T's have historically been at a disadvantage in the courts when compared to those of, for example, Mr S, which are so motivated. This is a well-studied and arguably regrettable reality, analysis of which sits beyond the scope of this paper. For an illustration of the exceptionally high bar a 'philosophical belief' must meet in order to be protected by courts, see *Grainger Plc & Ors* v *Nicholson* [2010] ICR 360 at [24]. For discussion, see Frank Cranmer, 'The Right to Freedom of Thought in the United Kingdom' (2021) 8 *European Journal of Comparative Law and Governance* 146, 155 ff and Jackson, n 26 above.

123 John Coggon, 'Is mental capacity law law?' (23 November 2022, Faculty of Law, University of Oxford).

124 It is a bad look elsewhere, too; see for example Mark Hedley, *The Modern Judge: Power, Responsibility and Society's Expectations* (Bristol: LexisNexis, 2016) 47.

125 *A Mental Health Trust* v *ER & Anor* [2021] EWCOP 32 at [27], citing as guidance *PCT* v *P, AH, and The Local Authority* [2009] EW Misc 10 (EWCOP) at [35].

determining when a person's beliefs are sufficiently unreasonable as to count as evidence of an inability to reason. I have no doubt that there are cases where the model may struggle to yield the right answer.[126] But, at the minimum, it is a discrete standard with identifiable necessary conditions – and that, in my view, is itself a small step in the right direction.

126 For example, in anorexia cases. These cases are perplexing precisely because individuals with anorexia often deliberate rationally in complex ways when they refuse treatment. Yet when determinations of incapacity are made in such cases, they are often made on the basis of the view that complex rationalisation in respect of food intake is a symptom of the condition which evidences one's inability to reason about such choices. It has not escaped the attention of the courts that this approach has the appearance of a Catch-22; for in deciding not to eat (and giving reasons not to eat), a person with anorexia 'proves', as one judge put it, that they are unable to decide not to eat (and unable to give reasons not to eat). Whether this framing is correct is a matter for another time. See *Re E (Medical treatment: Anorexia) (Rev 1)* [2012] EWCOP 1639 at [50]-[53]. For recent cases, see *RD (anorexia: compulsory treatment)* [2021] EWCOP 35 at [11] and *A Mental Health Trust* v *ER & Anor* [2021] EWCOP 32 at [34].