



KINGS  
CHAMBERS

# Emotional dysregulation and the use of anticipatory declarations in the Court of Protection

Sam Karim QC

Aisling Campbell

Dr Nicholas Todd (Consultant Clinical Psychologist)

[kingschambers.com](https://www.kingschambers.com)  [@kings\\_chambers](https://twitter.com/kings_chambers)  [@kings-chambers](https://www.linkedin.com/company/kings-chambers)



# Agenda

- **Dr Todd**

- Emotional dysregulation
- Fluctuating capacity
- Section 2 of the MCA 2005 and the causal nexus

- **Sam Karim QC and Aisling Campbell**

- Case study:
  - Legal framework
  - Practice and procedure

# Emotional Dysregulation & Fluctuating Mental Capacity



KINGS  
CHAMBERS

Dr Nicholas Todd  
Consultant Clinical Psychologist

[kingschambers.com](https://www.kingschambers.com)  [@kings\\_chambers](https://twitter.com/kings_chambers)  [@kings-chambers](https://www.linkedin.com/company/kings-chambers)



# Emotional Regulation

*The ability to attend to and understand emotions*

*The propensity to respond to emotions in a helpful way*

*The ability to maintain cognitive and behavioural control whilst experiencing an emotional state*

*The perceived and actual ability to control ones emotional experience*

Gill et al (2021)



# Emotional Dysregulation

*Detrimental attitude  
towards emotions /  
Non-acceptance of  
emotional responses*

*Low emotional  
atunement /  
Emotional clarity /  
Emotional  
awareness*

*Low emotional  
control / Impulse  
control difficulties*

*Reduced attentional  
capacity*

*Reduced behavioural  
control*

*Limited access to  
emotional  
regulation  
strategies /  
Avoidant,  
externalising and  
internalising  
emotional  
response styles*

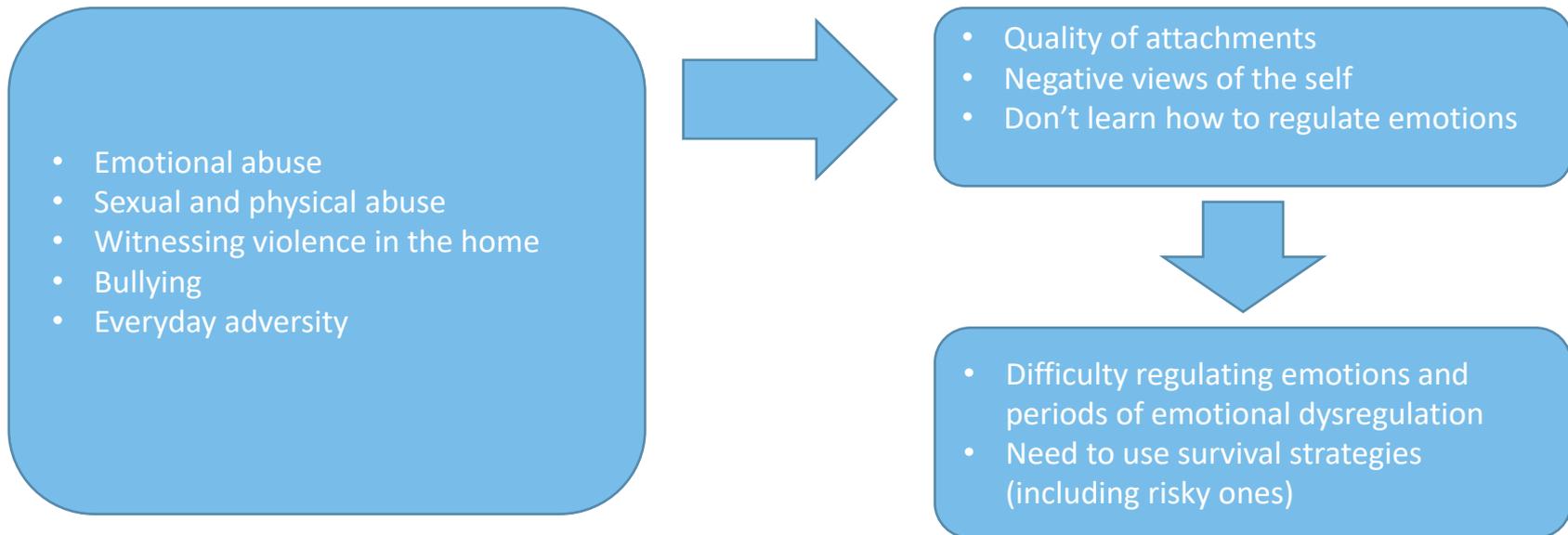
*Difficulties engaging  
in goal directed  
behaviour*

Void et al (2004) & Gill et al (2021)

# A core transdiagnostic symptom in a range of psychiatric disorders

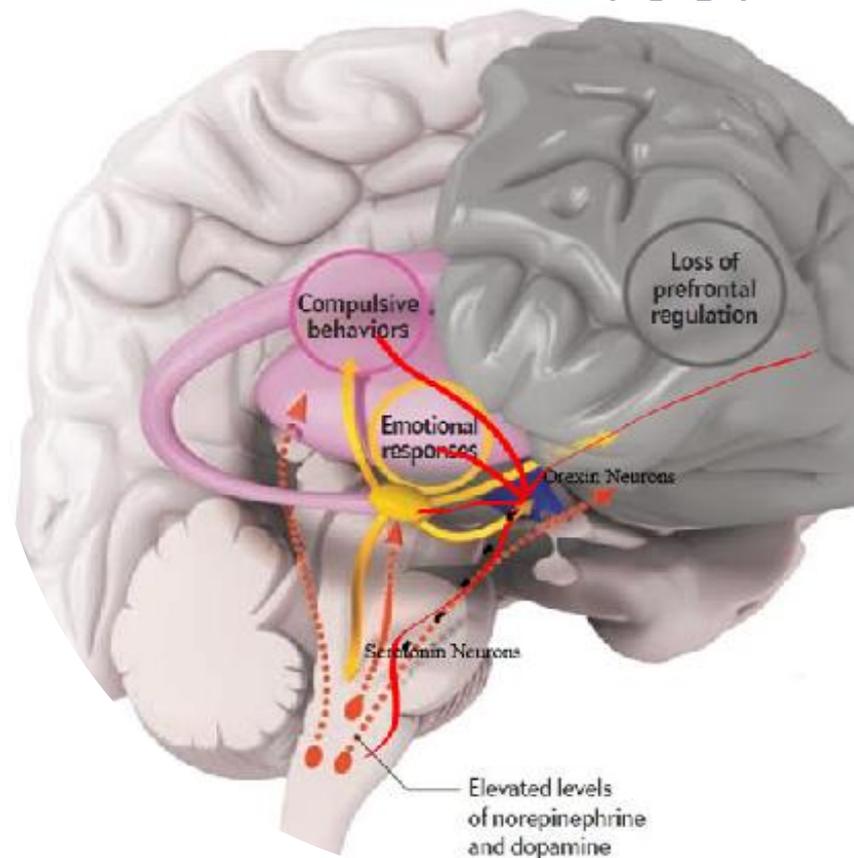
- *Learning Disabilities*
- *Autism*
- *Personality Disorder*
- *Post Traumatic Stress Disorder*
- *Attention Deficit Hyperactivity Disorder*
- *Bipolar Disorder*
- *Substance Misuse Disorders*

# People with complex emotional needs: Relationship with childhood trauma



## An impairment of, or disturbance, in the functioning of the mind or brain?

- Emotional dysregulation whether associated with a psychiatric disorder or standing on its own as a response to childhood trauma presents with cognitive, emotional, behavioural and physiological symptoms
- These symptoms can be considered an impairment or disturbance if they significantly impair a persons ability to function in the key domains of their life
- However, the determination of the presence of emotional dysregulation and the level of impairment it causes requires a skilled mental health practitioner to assess thoroughly



# Examining the 'causative nexus'

Examining whether the impairments caused by emotional dysregulation cause someone to lack mental capacity requires the assessor to first formulate the factors underlying the emotional dysregulation

Without a formulation of the factors underlying the emotional dysregulation it is not possible to determine whether: a) support can be offered to reduce the emotional dysregulation, and; b) the decision is an unwise rather than an incapacitous decision

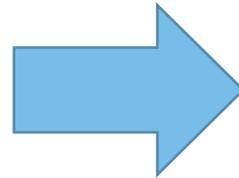
# Someone with complex emotional needs: Example formulation



# Fluctuating mental capacity in emotional dysregulation

## Emotional Dysregulation:

- Emotional dysregulation by its very nature fluctuates
- Some people experience periods of emotional dysregulation followed by periods of emotional regulation
- Other people experience different levels of intensity of emotional dysregulation most of the time



## Fluctuating Mental Capacity:

- The person cannot use and weigh the relevant information when emotionally dysregulated. However, when emotionally regulated can use and weigh the relevant information
- The person is able understand that when they become emotionally dysregulated that they are unable to make the decisions they would ordinarily make when emotionally regulated
- The person is able to use and weigh the consequences of continuing to make decisions during periods of emotional dysregulation without support with the benefit of support to manage decision making during these periods

# Types of fluctuating mental capacity in emotional dysregulation

## Fluctuates temporarily

e.g.

*Emotional dysregulation after a major life event but after it has been processed the persons emotional state returns to baseline*

## Fluctuates on a predictable basis

e.g.

*Emotional dysregulation following specific triggers which are easily identifiable in the persons formulation*

## Fluctuates unpredictability

e.g.

*Emotional dysregulation occurring frequent at random without any warning*

# Case study

- Alex – age 20
- Supported living placement with 24 hour care
- Diagnoses of emotional dysregulation and autism
- Medical evidence – Alex has capacity to make decisions about his residence and care when he is being supported
- When Alex becomes emotionally dysregulated, he loses capacity

# The legal framework – fluctuating capacity

- MCA 2005
  - Section 1 principles
  - Section 2 people who lack capacity
    - (1) - a person lacks capacity in relation to a matter **if at the material time** he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.
    - (2) – does not matter whether the impairment or disturbance is **permanent or temporary**
  - Section 3 inability to make decisions

- Mental Capacity Act Code of Practice

- 4.4 – an assessment of a person’s capacity must be based on their ability to make a **specific decision at the time it needs to be made**, and not their ability to make decisions in general
- 4.26 – fluctuating capacity means having a problem or condition that **gets worse occasionally** and affects their ability to make decisions
- 4.27 – an assessment must only examine a person’s capacity to make a particular decision **when it needs to be made**. It may be possible to put off the decision until the person has the capacity to make it.



- DOLS Code of Practice

- 8.22 - **balance needs to be struck** between the need to review and terminate an authorisation if a person regains capacity, and spending time and resources constantly reviewing, terminating and then seeking fresh deprivation of liberty authorisations as the relevant person's capacity changes.
- 8.23 – **each case must be treated on its merits** – managing authorities should keep all cases under review: where a person subject to an authorisation is deemed to have regained the capacity to decide about the arrangements made for their care and treatment, **the managing authority must assess whether there is consistent evidence of the regaining of capacity on a longer-term basis.** This is a clinical judgement that will need to be made by a suitably qualified person.
- 8.24 – where there is consistent evidence of regaining capacity on this longer term basis, **deprivation of liberty should be lifted immediately, and a formal review and termination of the authorisation sought.** However, it should be borne in mind that a deprivation of liberty authorisation carries with it certain safeguards that the relevant person will lose if the authorisation is terminated. **Where the regaining of capacity is likely to be temporary, and the authorisation will be required again within a short period of time, the authorisation should be left in place, but with the situation kept under ongoing review.**

# The legal framework – anticipatory declarations

- MCA 2005

- Section 15 → **whether** the person has or lacks capacity to make a decision specific in the declaration + the Court may make declarations as to the lawfulness or otherwise of any act done, **or yet to be done**, in relation to that person
- Not curtailed by “**if at the material time**” wording of Section 2 that is imported into Section 16



# The legal framework – case law

- Evolution starting with *Re D (Unborn Child)* [2009] EWCA 446
- *A, B, C v (1) X (2) Z* [2012] EWHC 2400 – Mr Justice Hedley’s “longitudinal view”
- *Royal Borough of Greenwich v CDM* [2018] EWCOP 15 – Mr Justice Cohen made declaration of fluctuating capacity...
- ...Approach rejected by Mr Justice Hedley in *Cheshire West & Chester Council v PWK* [2019] EWCOP 57 – reaffirming longitudinal view to avoid difficulties of declarations of fluctuating capacity

# The legal framework – case law

- *United Lincolnshire Hospitals NHS Trust v CD* [2019] EWCOP 24, Mr Justice Francis – Section 15(1)(c) gives Court the power to make an anticipatory declaration of lawfulness, contingent on P losing capacity, in exceptional circumstances
- *Wakefield v (1) DN (2) MN* [2019] EWHC 2306, Mr Justice Cobb – anticipatory declarations in the event of ‘meltdowns’ – authorised a detailed care plan
- Mr Justice MacDonald refused to make an anticipatory or contingent DOL order in *Hertfordshire County Council v (1) NK (2) AK* [2020] EWHC 139 – not appropriate where care plan *may* constitute a deprivation of liberty *if* at some unspecified point P’s behaviour deteriorated

# The legal framework – case law

- Mr Justice Hayden in (1) *GSTT* (2) *SLAM v R* [2020] EWCOP 4 – declaration that if P lost capacity, it was lawful for the Trust to deliver obstetric care, even if it did not accord with her clearly stated, capacitous wishes:

[35] “...inevitably, this Court will find itself involved in situations in which an individual may have capacity to take decisions on some issues but not on others and facing circumstances where P may be able to take decisions on one day that he is unable to on another. Manifestly, **it is neither practical nor desirable for the Court to resolve questions of fluctuating capacity on a day to day basis.** It may, depending on the individual facts, have to make orders which **anticipate a likely loss of capacity if it is going to be able to protect P efficiently**”.

# The legal framework – case law

- *A Healthcare & B NHS Trust v CC* [2020] EWHC 574 – Mrs Justice Lieven found that, when P refuses dialysis, he lacks capacity
- *A County Council v (1) KK (2) SK (3) JK (4) A Clinical Commissioning Group* [2020] EWCOP 68 – Mrs Justice Lieven accepted medical evidence that there are times when P may prospectively lose capacity (but did not make anticipatory declarations for reasons specific to that case)

# Longitudinal view

- The courts have recognised that some decisions are self-contained transactions which can be taken at a particular point in time, but others are a *series of linked* decisions taken over a period of time, such as in the conduct of litigation
- *Dunhill v Burgin* [2012] EWCA Civ 397 at §25
  - *The proceedings themselves may take many twists and turns, they may develop and change as the evidence is gathered and the arguments refined. There are, of course, litigants whose capacity fluctuates over time, so that there may be times in any proceedings where they need a litigation friend and other times when they do not*

# Longitudinal view

- Taking a *longitudinal view* – see *Cheshire West v PWK* [2019] EWCOP 57, where Hedley J found that PWK lacked capacity in all areas including residence and care and said the following
  - *The management of affairs relates to a continuous state of affairs whose demands may be unpredictable and may occasionally be urgent. In the context of the evidence that I have, I am not satisfied that he has capacity to manage his affairs*

# P&P

- Questions to the expert about nature and frequency of incapacity
- What are the triggers
- How are they recognised
- How can they be minimised
- If care/support is central, then can they be treated as self contained silos, *Re B*
- Reassessment
- Order that provides to take a place of safety and/or DoL