

MENTAL CAPACITY ACT 2005

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Persons Who Lack Capacity

Advance decisions to refuse treatment

Section 26: Effect of advance decisions

91. This deals with the legal effect of a qualifying advance decision. If it is both valid and applicable it has the same effect as a contemporaneous refusal of treatment by a person with capacity. That is, the treatment cannot lawfully be given. If given, the person refusing would be able to claim damages for the tort of battery and the treatment-provider might face criminal liability for assault. *Subsections (2) and (3)* clarify the rules about liability. A treatment-provider may safely treat unless satisfied that there is a valid and applicable qualifying advance refusal; and a treatment-provider may safely withhold or withdraw treatment as long as he has reasonable grounds for believing that there is a valid and applicable qualifying advance decision.
92. If there is doubt or a dispute about the existence, validity or applicability of an advance decision then the Court of Protection can determine the issue. There is an important proviso to the general rule that an advance refusal is legally effective. There may be a doubt or dispute about whether a particular refusal is in fact one which meets all the tests (existence, validity and applicability). As with decisions by donees or deputies in *section 6(7)*, action may be taken to prevent the death of the person concerned, or a serious deterioration in his condition, whilst any such doubt or dispute is referred to the court.