a presentation by

HILL DICKINSON

Consent and Refusal of Treatment/Mental Capacity Act and DOLs

What does it mean for Transition Services?

Sharon Thomas
Partner
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Transition of care

- Transition is important to ensure that services are appropriate for the patient's age and needs
- Some patients with more complex needs also have support from social care and special education. Services should work together to co-ordinate transition.
- The same principles apply to transition planning in respect of consent and assessment of capacity/competence as they do to treatment
- Ten Key steps to transition

What is Consent and why is it needed?

- Before giving treatment to a patient the clinician needs to obtain valid consent.

Montgomery v Lanarkshire Health Board [2015] UKSC 11

- To be valid there has to be three key elements to the consenting process:
  - **Voluntary**
  - **Informed**
  - **Capacity**

Shift Towards Greater Patient Autonomy

Bolam:

- “Doctor knows best” attitude – medically trained professionals were considered gatekeepers of knowledge, who could provide the information that they only considered necessary to the patient.

Montgomery:

- Patients now widely regarded as persons holding rights, rather than as passive recipients of care from the medical profession.

Important points to remember

- By definition, a person who lacks capacity to consent does not consent to treatment, even if they co-operate with the treatment or actively seek it.
- Consent is either given or refused
- Clinicians need to establish whether the patient has the capacity or competence to give or refuse consent to a particular treatment/intervention/investigation before proceeding
- Process cannot be reduced to a tick box exercise or merely obtaining a signature on a form

Points to remember

- Clinicians will have to explain not only their preferred course of action, but also the alternatives and the risks of all options which any reasonable patient would want to know about,

- Information must be given in a language and over time which enables the patient to make an informed choice.

- The assessment of whether a risk is “material” cannot be reduced to percentages. The assessment is fact sensitive and specific to the characteristics of the patient.

- There is a therapeutic exception, where disclosure of a particular matter would be detrimental to the health of a patient, but this is a very limited exception – *need to document reasons if rely on this*.

How does this apply to Children and Young People?

- When proposing any form of medical treatment or intervention it is a natural part of the process to discuss any proposals for treatment with the patient, providing all necessary information regarding the benefits, the risks and any alternatives

- Such discussions form part of the consent process (remember to clearly record these!)

- Consent should be sought in the same way from children and young people and/or a person with parental responsibility, depending upon the circumstances

- Those discussions also provide the basis for you to assess capacity/competence of the patient to consent

Patient Attends for initial assessment. Identified that further treatment, intervention and/or investigations required

Identify the specific treatment, intervention and/or investigation proposed

Explain why this is required

Identify any alternatives, where available

Explain the benefits and the risks of all options available – remember must be personal
(Material risks = risks which "the particular patient would be likely to attach significance to")

Ensure that information is provided in a language and/or format which the patient can understand

If more than one option available explain the rationale for the preferred course of action

Ensure a reasonable amount of time is afforded to enable the patient to make an informed choice

Consent, Capacity and Gillick Competence

- Aged 16 or over – Capacity MCA 2005
- Under 16 – “Gillick competence”
- In practice is there any difference in how you assess capacity and how you assess competence?

Assessing capacity

- MCA 2005 – "*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 Stage test

Assessing capacity

Does the person have an impairment or disturbance in the functioning of their mind or brain? (Stage 1)

If yes, can they do all of the following (Stage 2):-

- Understand information relevant to the decision (principal benefits and risks of the proposed treatment, and any alternatives)
- Retain that information
- Use and weigh that information as part of the process of making the decision
- Communicate their decision?

Assessing competence

Gillick v West Norfolk, 1985

Lord Scarman's comments in his judgment in this case are often referred to as the test of "Gillick competency":

*"the parental right to determine whether or not their minor child below the age of 16 will have medical treatment terminates if and when the child achieves a **sufficient understanding and intelligence** to enable him or her to **understand fully** what is proposed. It will be a question of fact whether a child seeking advice has sufficient understanding of what is involved to give a consent valid in law."*

He went on to state:

*"...it is not enough that she should understand the nature of the advice which is being given: she must also have a sufficient maturity to **understand what is involved**."*

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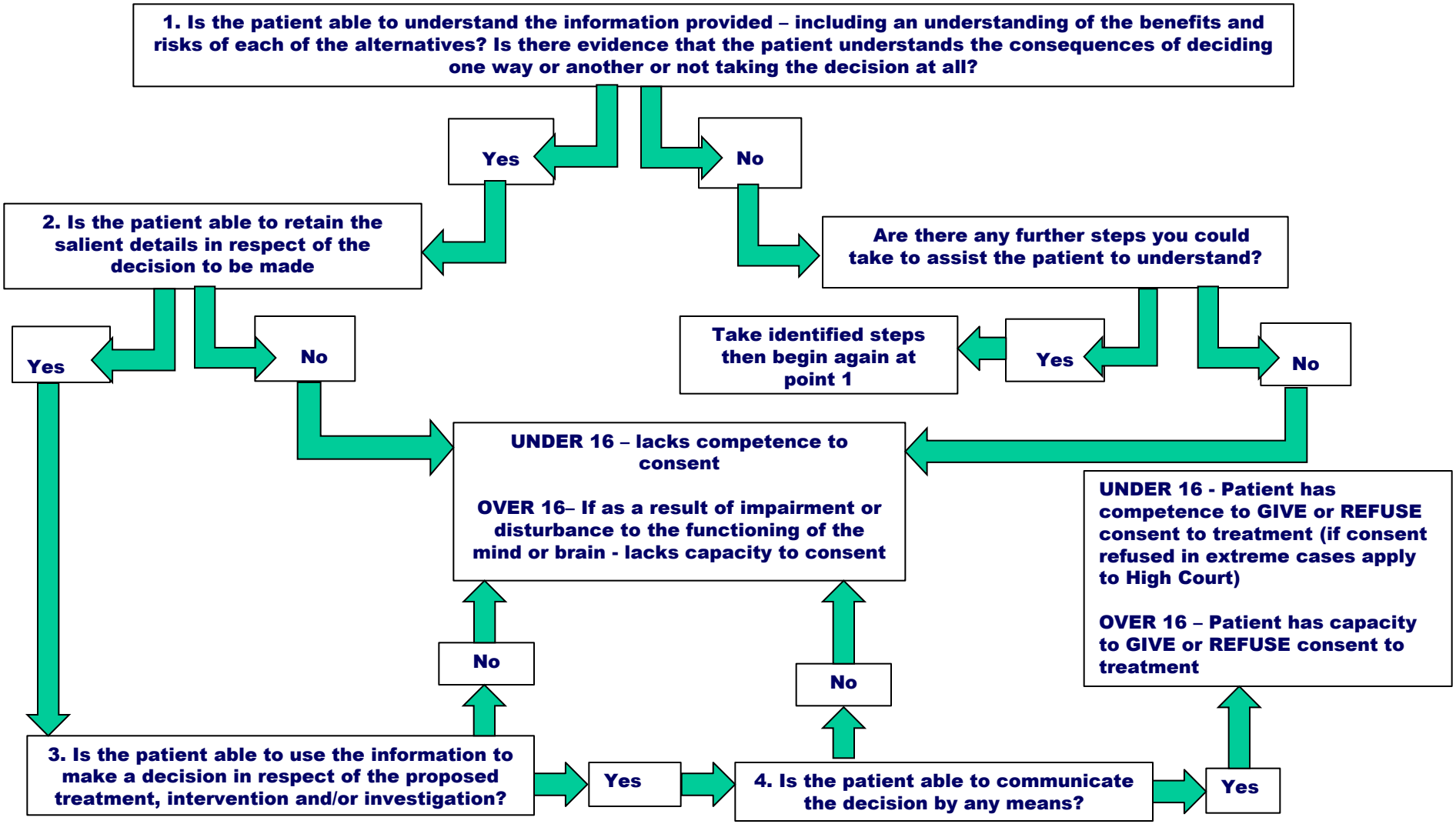
Assessing Capacity



The limits of Competence and the Power of the Court to override decisions of Young Persons and Parents

- Re W (A Minor) (Medical Treatment: Court's Jurisdiction) [1993] Fam 64, [1992] 4 All ER 627 CA

- Re E (A Minor)(Wardship: Medical Treatment) [1993] 1 FLR 386, Re: E (A Minor)

Case Law Update – Deprivation of Liberty and the zone of parental authority

- ***A Local Authority v D and others*** **[2015] EWHC 3125**
- ***Trust A v X and A Local Authority*** **[2015] EWHC 922 (Fam)**
- ***Birmingham City Council v D*** **(2016) EWCOP 8, (2016) MHLO 5**

A Local Authority v D and others [2015] EWHC 3125

FACTS:

- AB was 14 years old. He had a moderate Learning disability and ADHD.
- AB was residing in a children's home under an interim care order, he attended a special school, and was under the care of CAMHS. He was happy, settled, and wished to remain in the children's home but lacked capacity to make the decision.
- It was not disputed that the arrangements in place amounted to a deprivation of liberty

A Local Authority v D and others [2015] EWHC 3125

- The question the Court was asked to determine was:

"Where a child is in the care of a local authority and subject to an interim care, or a care, order, may the local authority in the exercise of its statutory parental responsibility consent to what would otherwise amount to a deprivation of liberty?"

- The answer given by Mr Justice Keehan was *"an emphatic "no"*

A Local Authority v D and others [2015] EWHC 3125

- In taking a child into care and instituting care proceedings, the local authority is acting as an "organ of the state"*.*

- To allow a local authority to consent to the deprivation of liberty of a child would:

(1) breach Article 5 of the Convention which provides "no one should be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law",

(2) would not afford the "proper safeguards which will secure the legal justifications for the constraints under which they are made out", and

(3) would not meet the need for a periodic independent check on whether the arrangements made for them are in their best interests

A Local Authority v D and others [2015] EWHC 3125

The Judge made some general observations :

(1)The Cheshire West criteria must be rigorously applied to the individual circumstances of each case.

(2) A deprivation of liberty will be lawful if warranted under statute – e.g. s.25 of the Children Act 1989 or the Mental Health Act 1983

(3) Where a child is not looked after, then there may not in fact be a deprivation at all if it falls within the zone of parental responsibility exercised by his parents - in those circumstances, the court will not need to make any declaration as to the lawfulness of the child's deprivation of liberty.

A Local Authority v D and others [2015] EWHC 3125

(4) Where a child is a looked-after child, different considerations may apply, regardless of whether the parents consent to the deprivation of liberty.

(5) Where a child is the subject of an interim care order or a care order, it is extremely unlikely that a parent could consent to what would otherwise amount to a deprivation of liberty. In those circumstances, a local authority cannot consent to a deprivation of liberty.

Trust A v X and A Local Authority [2015] EWHC 922 (Fam)

FACTS:

- D was15 years of age. He had a diagnosis of Attention Deficit Hyperactivity Disorder, Asperser's Syndrome and Tourette's.
- On 15 October 2013 he was informally admitted for a multidisciplinary assessment and treatment. D remained at Hospital B at the time of the application.
- In light of the decision of the Supreme Court in 'Cheshire West', the hospital Trust issued an application under the inherent jurisdiction of the High Court seeking a declaration that the deprivation of D's liberty by the Trust was lawful and in his best interests.

Trust A v X and A Local Authority [2015] EWHC 922 (Fam)

The Court was asked to determine the following principal issues:

a) does the placement of D at Hospital B satisfy the first limb of the test propounded by Baroness Hale in Cheshire West;

b) if so, does the parents' consent to his placement come within the exercise of parental responsibility in respect of a 15 year old young person. In other words are the parents able to consent to what would otherwise amount to a deprivation of liberty; and

c) if not, should the court exercise its powers under the inherent jurisdiction to consider declaring that the deprivation of liberty of D at Hospital B is lawful and in his best interests.

Trust A v X and A Local Authority [2015] EWHC 922 (Fam)

- The Judge concluded that the arrangements made for D amounted to a deprivation of D's Liberty:

- The Judge concluded that in this particular case consent fell within the 'zone of parental responsibility:

(i) Decisions that come within the zone of parental responsibility for a 15 year old who does not suffer from any disability or disorder will be wholly different from those decisions which have to be taken by parents whose 15 year old does suffer with such disabilities.

(ii) A decision to keep a 15 year old under constant supervision and control, where there is no disability or disorder would undoubtedly be considered an inappropriate exercise of parental responsibility and would probably amount to ill treatment.

(iii) The decision to keep an autistic 15 year old who has erratic, challenging and potentially harmful behaviours under constant supervision and control is a quite different matter; to do otherwise would be neglectful.

Trust A v X and A Local Authority [2015] EWHC 922 (Fam)

Mr Justice Keehan considered the following factors to have been important when reaching his decision:

1. The arrangements were made on the advice of treating clinicians;

2. All professionals involved where in agreement that the arrangements were in D's best interests;

3. The parents were acting in accordance with medical advice; and

4. having consented to his placement at Hospital B, the parents continued to take an active interest and involvement in his care and treatment and overall welfare

Trust A v X and A Local Authority [2015] EWHC 922 (Fam)

The Judge asked himself:

> *why on public policy or human rights grounds should these parents be denied the ability to secure the best medical treatment and care for their son? Why should the state interfere in these parents' role to make informed decisions about their son's care and living arrangements?*

The Judge found:

> *no reasons or justifications for denying the parents that role or permitting the state to interfere in D's life or that of his family.*

Trust A v X and A Local Authority [2015] EWHC 922 (Fam)

Conclusions:

- D would have been deprived of his liberty but for his parent's consent to his placement;

- On the particular facts of this case, the consent of D's parents to his placement at Hospital B, falls within the 'zone of parental responsibility';

- In the case of a young person under the age of 16, the court may, in the exercise of the inherent jurisdiction, authorise a deprivation of liberty;

Trust A v X and A Local Authority [2015] EWHC 922 (Fam)

- Declined to give wider guidance in respect of the approach taken by hospital trusts or local authorities in the cases of young people under the age of 16 who are or may be subject to a deprivation of liberty:

  "*These cases are invariably fact specific and require a close examination of the 'concrete' situation on the ground.*"

- Clear that for those aged 16 or over any deprivation of liberty will need to be authorised by the Court of Protection.

Birmingham City Council v D (2016) EWCOP 8, (2016) MHLO 5

- On turning 16 D's case was again considered by Mr Justice Keehan this time in the Court of Protection. At this time D was in a residential placement.

- The Application was this time made by the Local Authority who had made the necessary arrangements and provided funding for his residential placement

- The Local Authority argued that "3 limbs" of the test of whether a person is deprived of their liberty as set out in *Storck v Germany [2006] 43 EHRR 6* were not met:

Limb 1: Objective element = Confinement to a certain limited place for a not negligible length of time; **and**

Limb 2: Subjective element = Absence of valid consent to the confinement; **and**

Limb 3: Imputable to the State

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Birmingham City Council v D (2016) EWCOP 8, (2016) MHLO 5

Local Authority

- Limb 1 satisfied
- Limbs 2 and 3 not satisfied and accordingly D is not deprived of his liberty because:

a) D's parents may consent to his confinement as they retain parental responsibility; and

b) D resides at his residential unit under s20 Children Act 1989 accommodation to which his parents agreed. Therefore his placement and confinement both at the residential unit and his school are not imputable to the state but rather are at the request of, and with the consent of, his parents.

Official Solicitor

- Limb 1 satisfied
- Limbs 2 and 3 also satisfied and accordingly D is deprived of his liberty because:

a) D's parents cannot consent to his confinement as he has attained the age of 16 years; and

b) the circumstances of D's confinement are plainly and clearly imputable to the state via the acts of the local authority. The residential unit and the school D attends are paid for by the authority. Moreover, the local authority took the lead in identifying this establishment and devised and/or approved the regime by which D is cared for in the residential unit and in school.

Birmingham City Council v D (2016) EWCOP 8, (2016) MHLO 5

- The Official Solicitor further argued that:

  a) no parent in any circumstances may consent to the confinement of their child, whatever their age, in circumstances which absent a valid consent would amount to a deprivation of liberty; and

  b) on that basis the decision in Trust A v X was wrong insofar as it was held that D's parents could consent to his confinement in Hospital B when he was under 16 years of age

Birmingham City Council v D (2016) EWCOP 8, (2016) MHLO 5

- The Judge again considered the issue of whether D was deprived of his liberty. He confirmed that the comments of Baroness Hale in Cheshire West applied and quoted from para. 54 of the Judgment:

> *"If the acid test is whether a person is under the complete supervision and control of those caring for her and is not free to leave the place where she lives, then the truth is that both MIG and MEG are being deprived of their liberty. Furthermore, that deprivation is the responsibility of the state.* ***Similar constraints would not necessarily amount to a deprivation of liberty for the purpose of article 5 if imposed by parents in the exercise of their ordinary parental responsibilities and outside the legal framework governing state intervention in the lives of children or people who lack the capacity to make their own decisions."***

Birmingham City Council v D (2016) EWCOP 8, (2016) MHLO 5

- The Judge made the following comments in respect of his earlier Judgment and "the zone of parental responsibility":

1. 'the zone of parental authority' in situations such as this was not open-ended and relative to the presenting situation. The Judge found that what is proportionate for a 5 year old is likely to be disproportionate for a 15 year old. The same is said by the Judge to apply to children affected by differing degrees of illness, in that the decision to consent to a child's admission into medical care will be dependent upon and proportionate to their healthcare need.

3. In *Trust A v X* when considering whether the First Limb of *Storck* was satisfied, the Judge applied a completely objective test in which D's disabilities were of no consideration at all.

4. When considering the Second Limb of Storck and the zone and scope of parental responsibility there were a wide number of factors to be considered. The age and maturity of a child or young person are very important factors when considering the extent of parental responsibility A further important factor is the extent to which, if at all, a child or young person has the ability and capacity to make decisions for themselves

Birmingham City Council v D (2016) EWCOP 8, (2016) MHLO 5

5. The Judge made clear that the facts are extremely important. On the facts of Trust A v X , especially the loving and caring relationships that his parents had with him and the close working relationship they enjoyed with D's medical and other professions, the Judge considered their decision to consent to D's confinement in Hospital to be a proper exercise of parental responsibility.

6. The position in *Trust A v X* is to be contrasted with the factual matrix in *A Local Authority v D* and others where the Judge came, on the facts of that case, to a contrary conclusion.

7. The Judge emphasised that the position is quite different once a young person attains the age of 16. Parliament has drawn a distinction between these young people and those children who are under the age of 16.

8. A distinction was drawn between the approach to the issue in this case and the approach in *Trust A v X*. One concerning the scope or zone of the exercise of parental responsibility and the second recognising the special status accorded by Parliament to 16 and 17 year old people in D's case.

Birmingham City Council v D (2016) EWCOP 8, (2016) MHLO 5

Conclusions:

1. A parent **cannot** consent to the confinement of a child who has attained the age of 16. Such a consent falls outside the zone or scope of parental responsibility.
2. A public body, as an organ of the state, is under a positive obligation to protect the rights accorded by Article 5(1). Therefore this local authority was and is obliged to protect D's Article 5(1) rights. This obligation requires the local authority to apply to the court to (i) determine whether D is deprived of his liberty and (ii) so, to seek authorisation for its continuance.
3. The protection of D's Article 5(1) rights must not and cannot be overridden by consideration of the resource implications for state bodies including this local authority.
4. Declined to give any general guidance on the issue of the deprivation of liberty of young people as the fact that cases of confinement and/or deprivation of liberty are highly fact specific.

When can treatment be provided?

CIRCUMSTANCE	PARENTAL CONSENT REQUIRED	TREATMENT CAN BE GIVEN	TREATMENT CANNOT BE GIVEN	COURT APPLICATION REQUIRED
Patient under 16 – Competent and Consents	✗	✓	✗	✗
Patient under 16 – Competent and refuses consent	✗	✗	✓	✓ Court Authorisation would be required before providing treatment – Court would only usually intervene in respect of serious/life threatening cases
Patient under 16 – Not competent but compliant	✓ Case Law indicates that medical treatment falls within the 'zone of parental control' but be careful – the older the child the less clear this is	✓ If it is considered to be in the patient's best interests to receive the treatment and there is no dispute	✗	✗
Patient under 16 – Not competent and non-compliant	? Case Law indicates that medical treatment falls within the 'zone of parental control' but be careful – the older the child the less clear this is	? If it is considered to be in the patient's best interests to receive the treatment and there is no dispute	✗	? Although case law indicates that medical treatment falls within the 'zone of parental control' given the lack of clarity in this area where the patient is non-compliant and may require restraint it is sensible to seek authority from the Court. Depends on age of the child and the nature of the treatment – seek advice
Patient 16/17 – Capacitous and Consents	✗	✓	✗	✗
Patient 16/17 – Capacitous and refuses consent	✗	✗	✓	✓ Court authorisation would be needed before treatment could be given. Very unlikely to authorise treatment where patient has capacity
Patient 16/17– Lacks Capacity but compliant	? If there is no Mental Disorder and the patient is assessed as lacking competence as a result of immaturity then may be able to rely on parental consent. If the patient lacks capacity best practice would be to provide treatment in patient's best interests (s.4 MCA)	✓ Treatment can be provided under s.5 and s.6 MCA in the patient's best interests (s.4 MCA) if there is no dispute	✗	✓ If providing treatment would involve DoL and under 18 ? If there is a dispute as to patient's best interests and/or considered to be serious medical treatment must refer to the Court
Patient 16/17 – Lacks Capacity and non-compliant	✗	✓ Treatment can be provided under s.5 and s.6 MCA in the patient's best interests (s.4 MCA) if there is no dispute	✗	? If patient aged under 18 Court authorisation required if provision of treatment would deprive patient of their liberty If there is a dispute as to patient's best interests and/or considered to be serious medical treatment must refer to the Court

Any questions?

QUICK REMINDER…

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