

# Capacity – getting it right

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# The MCA: Principles (1)

- **Principle 1:** A person must be assumed to have capacity unless it is established that he lacks capacity.
- Never for person to prove their own capacity
- But the capacity conundrum:

*The presumption of capacity is important; it ensures proper respect for personal autonomy by requiring any decision as to a lack of capacity to be based on evidence. Yet the section 1(2) presumption like any other, has logical limits. When there is good reason for cause for concern, where there is legitimate doubt as to capacity [to make the relevant decision], the presumption cannot be used to avoid taking responsibility for assessing and determining capacity. To do that would be to fail to respect personal autonomy in a different way.*

*Royal Bank of Scotland Plc v AB [2020] UKEAT 0266\_18\_2702*

- The key: a presumption does not mean a licence not to investigate

## The MCA: Principles (2)

Principle 3: A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

- A 'right' to make unwise decisions?
- Guarding against the 'protection imperative'

## The MCA: Principles (3)

**Principle 2:** A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success

- The most important principle in the Act?
- *CH v A Metropolitan Council* [2017] EWCOP 12
  - Failure to implement programme of sex education identified as necessary to enable to married man with learning disability to gain capacity to consent to sexual relations
  - Agreed damages of £10,000 (at low end according to judge) together with costs
  - Compensation also for wife for breach of art.8 ECHR
- Key word is **practicable** – see, by contrast, *NHS Foundation Trust v AB* [2019] EWCOP 45 (contraception)

# Capacity: what does the Act actually say?

## Section 2: People who lack capacity

- (1) For the purposes of this Act, 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.

[...]

## Section 3: Inability to make decisions

- (1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable

- (a) to understand the information relevant to the decision,
- (b) to retain that information,
- (c) to use or weigh that information as part of the process of making the decision, or
- (d) to communicate his decision (whether by talking, using sign language or any other means).

# Capacity: the three questions

- (1) Is the person unable to make a decision? If so:
- (2) Is there an impairment or disturbance in the functioning of the person's mind or brain? If so:
- (3) Is the person's inability to make the decision because of the identified impairment or disturbance?

NB: Code of Practice as it stands is wrong: *A Local Authority v JB* [2021] UKSC 52

## Reducing complexity

- Wellcome project: [www.mhj.org.uk](http://www.mhj.org.uk)
- The **context** – why has the capacity question arisen?
- The **question** – what exactly is the question being asked?
- The **test** – when is it governed by case-law?
- The **information** – what is the relevant information? *A Local Authority v JB* [2021] UKSC 52

## How to balance the principles

“The fundamental principles of self-determination, freedom from non-consensual medical treatment and personal inviolability, and the equally fundamental principles behind the right to health, are most respected by capacity assessments that are criteria-focussed, evidence-based, person-centred and non-judgmental. Such assessments engage with the demand (or plea) of the person to be understood for who they are, free of pre-judgment and stereotype, in the context of a decision about their own body and private life.”

*PBU & NJE v Mental Health Tribunal* [2018] VSC 564



# Capacity – further help

And the capacity assessment guide:

<https://www.39essex.com/mental-capacity-guidance-note-assessment/>

# More resources

- [39 Essex Chambers | Mental Capacity Law | 39 Essex Chambers | Barristers' Chambers](#)
- [Mental Health & Justice | \(mhj.org.uk\)](#)
- [Mental Capacity Law and Policy](#)
- [MCA Directory | SCIE](#)
- [Mental Health Law Online](#)
- [Open Justice Court of Protection](#)

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