

# Elephant traps and worked examples: the Mental Capacity Act 2005 and the Assisted Decision-Making (Capacity) Act 2015

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## **Alex Ruck Keene KC (Hon)**

Barrister, 39 Essex Chambers

Visiting Professor King's College London

Visiting Senior Lecturer, Institute of Psychiatry, Psychology and Neuroscience, King's College London

Research Affiliate, Essex Autonomy Project, University of Essex

[alex.ruckkeene@39essex.com](mailto:alex.ruckkeene@39essex.com)

@capacitylaw

# Locating in time and space: the Mental Capacity Act 2005

- Key concepts:
  - Statutory principles
  - Mental capacity: a functional test, with a ‘causative nexus’ required between disturbance or impairment in the functioning of the mind of brain and the inability to make the decision
  - Best interests: a statutory test based on ‘checklist’ – shorthand now is “put yourself in the shoes of the person”
- Guided informality: “Section 5 of the 2005 Act gives a *general authority*, to act in relation to the care or treatment of P, to those caring for him *who reasonably believe both that P lacks capacity in relation to the matter and that it will be in P’s best interests for the act to be done*. This will usually suffice, unless the decision is so serious that the court itself has said it must be taken to court.”

## Mental Capacity Act 2005 (2)

- ‘Deprivation of Liberty Safeguards’: administrative framework for deprivation of liberty in care homes / hospitals for care and treatment not falling within scope of Mental Health Act 1983
- Lasting Powers of Attorney (H&W and P&A)
- Advance Decisions to Refuse Treatment
- Oversight by Court of Protection, specialist superior court of record
- Margins of the MCA are contested:
  - Common law tests for eg testamentary capacity
  - The scope of the inherent jurisdiction for those who **have** capacity but are vulnerable

## Some English cautionary tales

- **Principle 1:** A person must be assumed to have capacity unless it is established that he lacks capacity. [cf s.8(2)]
- 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] UKCAT 0266\_18\_2702

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## The Principles (2)

**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 [cf s.8(3)]

- What does practicable mean?
- [CH v A Metropolitan Council](#) [2017] EWCOP 12
  - Failure to implement programme of sex education identified as necessary to enable to married man with intellectual disability to gain capacity to consent to sexual relations => damages for breaches of rights under Articles 8 ECHR

## The Principles (3)

- But nb, the limits of support: [C \(Capacity to Access the Internet and Social Media\)](#) [2020] EWCOP 73

*[...] whilst the local authority welcomes and encourages practical strategies to assist C and recognises the benefit of support in the area of technology and its use, Mr Johnson's realistic submission was that there comes a point where support and encouragement becomes so integral to the decision making process that, in reality, the individual concerned is little more than an automaton who is simply carrying out the instruction of others rather than responding to prompts and making capacitous personal decisions. His submission was that for C, at this point in her personal development, that would be the reality as there would have to be continuous one to one supervision and support of her use of technology.*

*[...] if the process could only really occur with the degree of supervision and prompting suggested then that would, in truth, be a fiction rather than a genuine exercise in autonomy. It would probably also be impractical in the care setting.*

## The Principles (3)

Principle 3: A person is not to be treated as unable to make a decision merely because he makes an unwise decision [cf s.8(4)]

- A 'right' to make unwise decisions?
- Balancing the 'protection imperative' against abdication of responsibility

*If P has capacity to make a decision then he or she has the right to make an unwise decision and to suffer the consequences if and when things go wrong. In this way P can learn from mistakes and thus attain a greater degree of independence.*

[A Local Authority v JB](#) [2021] UKSC 52

# Functional thoughts

## Section 3 ADMCA

(2) A person lacks the capacity to make a decision if he or she is unable—

- (a) to understand the information relevant to the decision,
- (b) to retain that information long enough to make a voluntary choice,
- (c) to use or weigh that information as part of the process of making the decision, or
- (d) to communicate his or her decision (whether by talking, writing, using sign language, assistive technology, or any other means) or, if the implementation of the decision requires the act of a third party, to communicate by any means with that third party.

## Section 3 MCA:

(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)

All hyperlinks are to relevant pages of the [Capacity Guide](#)



## Worked examples of determining capacity

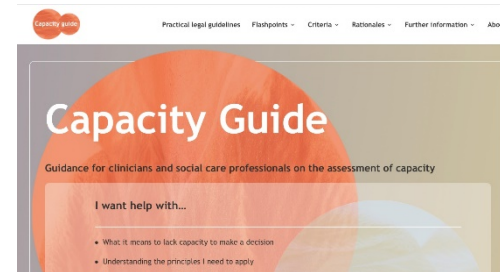
- [\*Kings College Hospital NHS Foundation Trust v C & Anor\*](#) [2015] EWCOP 80
  - Focusing in on ‘using and weighing’ (the most difficult area) and requirement to place the decision in the context of the person’s own values
- [\*Liverpool City Council v CMW\*](#) [2021] EWCOP 50
  - Decision-specificity of capacity, but not falling into the trap of silos
- [\*A Local Authority v PG & Ors\*](#) [2023] EWCOP 9
  - The time-specificity of capacity where capacity fluctuates

## Reducing complexity

- 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? [and remember this includes foreseeable consequences – s.3(7): including of harm to others? *Re JB*]
- The **translation gap** – what is the problem and how does it link to the law?:  
[Shedinar – in conversation with Dr Nuala Kane: capacity rationales, accountability and support – Mental Capacity Law and Policy](#)

## Three resources which may be of assistance

- Wellcome-funded work on contested capacity assessment:  
<https://capacityguide.org.uk/>
- 39 Essex Chambers guidance note on [carrying out and recording capacity assessments](#)
- 39 Essex Chambers guidance note on [relevant information for different categories of decision](#)



CARRYING OUT AND RECORDING  
CAPACITY ASSESSMENTS  
March 2023



GUIDANCE NOTE: RELEVANT INFORMATION FOR  
DIFFERENT CATEGORIES OF DECISIONS  
September 2022



# Capacity in context

- [\*A Local Authority v JB\*](#) [2021] UKSC 52: capacity to engage in sexual relations
  - The social construction element of capacity – what information do we expect **everyone** to be able to understand, retain etc?
  - The scales falling from our eyes as to how far the statutory focus on the person can go to the exclusion of others

## Two diagnostic questions

- The MCA requires a ‘causal nexus’ between an impairment or disturbance in the functioning of the person’s mind or brain and their functional inability to make the decision
- The ADMCA does not
- Two questions:
  - Will the courts be satisfied with an explanation **that** a person lacks capacity to make a decision for ADMCA purposes with no explanation of **why** they cannot understand/retain/use/weigh the relevant information?
  - How wide might the net of incapacity be cast?

## On the other side of incapacity

- ADMCA approach: will and preferences (and benefit): see s.8
- But can overdo the difference between ADMCA and MCA approach: “The purpose of the best interests test is to **consider matters from the patient’s point of view**” [Aintree v James](#) [2014] 1 AC 591
- Not a ‘what P would have done test,’ but if it is clear what P would have done will carry (at a minimum) very great weight absent compelling reasons to contrary, especially in medical context:
  - [Briggs v Briggs](#) [2016] EWCOP 53
  - Contrast [Wye Valley NHS Trust v B](#) [2015] EWCOP 60 and [East Lancashire NHS Trust v PW](#) [2019] EWCOP 10

## Standing in the shoes of the person – the implications

- The line between clinical appropriateness and best interests / will and preferences-based decision-making: [University Hospitals Birmingham NHS Foundation Trust v HB \[2018\] EWCOP 39](#): “it is plain that administering CPR in the event of a further collapse and giving her, albeit a very, very small chance of life, is what she would wish”
- The consistently idiosyncratic (*Wye Valley*) and the pre- and post- incapacity (*Briggs*)
- Where wishes and feelings are not reliably identifiable: [Abertawe Bro Morgannwg University Local Health Board v RY & Anor \[2017\] EWCOP 2](#)
- Circumstances under which wishes expressed: [ADS v DSM \[2017\] EWCOP 8](#) and [Barnsley Hospital NHS Foundation Trust v MSP \[2020\] EWCOP 26](#)
- The potential for the clash between past and present wishes: [“When past and present wishes collide: the theory, the practice and the future”](#) Eld. L.J. 2016, 7(2) 132-140

## The wider context

- It's not just about the ADMCA
- By analogy: best interests decision-making under the MCA is a choice between available options: [N v ACCG](#) [2017] UKSC 22
- What is an available option will often be function of decision-making by statutory bodies applying other statutes
- Or family members making their own decisions



# Two resources and an article which may help

- 39 Essex Chambers guidance note on [determining and recording best interests](#)
- Judging Values Project
  - [Communication and Participation in the Court of Protection](#)
  - [Making Values Matter in the Court of Protection](#)
- Alex Ruck Keene and Michal Friedman, [Best interests, wishes and feelings and the Court of Protection 2015-2020](#), Northern Ireland Journal of Elder Law and Capacity



## Best interests, wishes and feelings and the Court of Protection 2015-2020

By Alex Ruck Keene, Barrister;  
Wellcome Research Fellow and Visiting Lecturer at the Dickson Poon School of Law, King's College London; Visiting Senior Lecturer, Institute of Psychiatry, Psychology & Neuroscience, King's College London;  
Research Affiliate, Essex Autonomy Project, University of Essex  
and Michal Friedman MSc

In this article the authors analyse caselaw during the last five years on whether the trend is continuing that the Court is presuming in favour of following the identified wishes and feelings of the person.

### Introduction

In order to make a best interests decision, judges of the Court of Protection in England & Wales now regularly talk of standing in the shoes of the individual whose case is before them. At one level, this simply reflects the structure of the Mental Capacity Act 2005 (MCA 2005): the legal fiction is that a judicial decision under s.16(2)(a) MCA 2005 is the decision of the person themselves. In and of itself, this does not suggest anything in terms of the **outcome** of the process of considering best interests: it would be quite possible to stand in the shoes of the person and to walk in the opposite direction to that which they would have gone. But, perhaps influenced by the UN Convention on the Rights of Persons with Disabilities (UNCRPD), or perhaps seeking to reflect the injunction of Lady Hale in *Aintree v James* that the purpose of the best interests test is to consider matters from the person's point of view, it seems that judges are indeed seeking to walk further in P's shoes. In an article published in 2015, one of the authors of this article, Alex Ruck Keene, reviewed with Cressida Auckland both the history of the statutory best interests test in s.4 MCA 2005 and the caselaw to that point.<sup>1</sup> That article suggested that, in practice, it was possible to discern the emergence of a presumption in favour of following the identified wishes and feelings of the person.

## One point to watch – AHDs and the change of mind

- MCA 2005 – ADRT not valid if the donor “has done anything else clearly inconsistent with the advance decision remaining his fixed decision”: see *Re PW (Jehovah's Witness: Validity of Advance Decision)* [2021] EWCOP 52
- Ireland does not have this loophole: s.85(3) ADMCA “whilst he or she had capacity to do so, has done anything else...”

# More resources

- [39 Essex Chambers | Mental Capacity Law | 39 Essex Chambers | Barristers' Chambers](#)
- [Mental Health & Justice | \(mhj.org.uk\)](#)
- [Mental Capacity Law and Policy](#)

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