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.

> *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

- Questioning our presumptions about the presumption of capacity

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

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

The MCA: Principles (4)

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?
- Key word is practicable: see e.g. *LBX v K* [2013] EWHC 3230 (Fam) - creativity as the key
- But be clear where you're crossing the line from support into (well-meaning) best interests decision-making: *Calderdale Metropolitan Borough Council v LS & Anor* [2025] EWCOP 10 (T3)

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 able to make a decision? If not:

(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?

(I.e. please don't keep following what the Code says: it is **WRONG**: *A Local Authority v JB* [2021] UKSC 52)

Capacity – getting it right

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 and NJE v Mental Health Tribunal [2018] VSC 564

Capacity assessment and conversation analysis – in discussion with Jess Foulkes, Suzanne Beeke and Anna Volkmer – Mental Capacity Law and Policy

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 writing it up

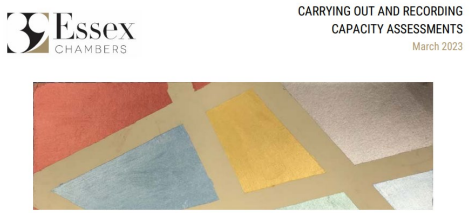
Given the number of capacity assessments that are required to be carried out on a daily basis in multiple arenas, it would obviously be too onerous to require a highly detailed analysis in the document in which the capacity decision is recorded. However, a careful and succinct account of the formulation of the matter to be decided and the formulation of the relevant information in respect of that matter, together with a careful and concise account of how the relevant information was conveyed and with what result, would seem to me to be the minimum that is required.

North Bristol NHS Trust v R [2023] EWCOP 5

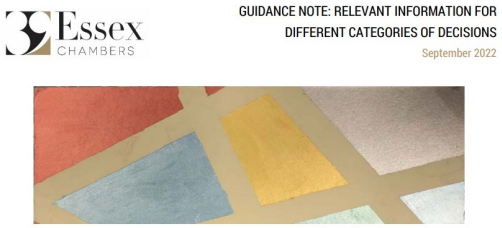
Three resources which may be of assistance

- Wellcome-funded work on contested capacity assessment: https://capacityguide.org.uk/

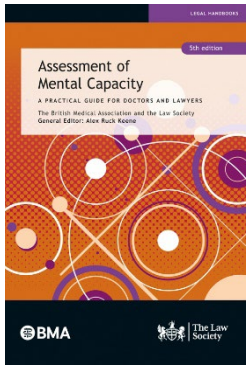
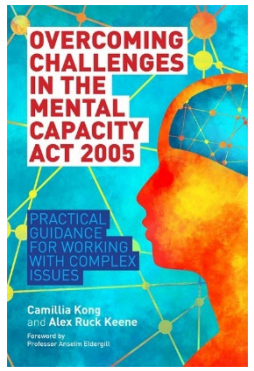
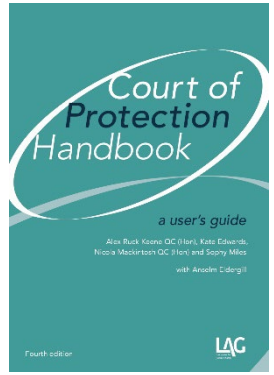
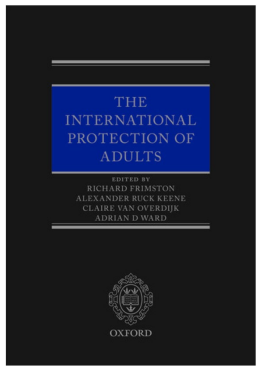
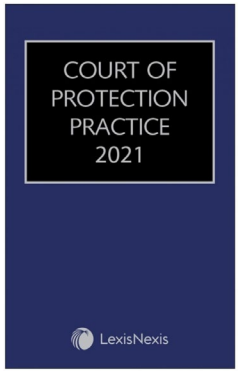
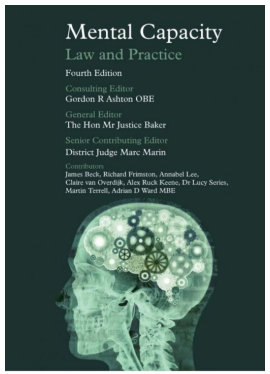
- 39 Essex Chambers guidance note on carrying out and recording capacity assessments



- 39 Essex Chambers guidance note on relevant information for different categories of decision



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]

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