

# Person-specific determinations

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## Alex Ruck Keene KC (Hon)

Barrister, 39 Essex Chambers

Visiting Professor King's College London

Visiting Professor, Geller Institute of Ageing and Memory, University of West 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

## Starting in the right place

- The Mental Capacity Act 2005 gives no power to act, and imposes no duty to act (s.5 as a workaround, not a power in the care and treatment context)
- So always stop and think
  - Why are you doing what you are doing?
  - What power do you have to act?
  - How is the person's capacity relevant to what you are doing?
- Is there another legal framework which is relevant? [Suicide and the \(mis\)use of capacity – in conversation with Dr Chloe Beale – 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?

## 39 Essex Chambers guidance note on [relevant information for different categories of decision](#)

### Using this guidance note

4. There are three key points that need to be emphasised here:
  - a. Starting with the information set out here means that is not necessary to reinvent the wheel each time they come to consider whether a person can make one of the types of decision covered. If professionals start with the information as potentially relevant (or irrelevant) they will be doing so on the basis that they will be following a path adopted as appropriate by the courts;
  - b. However, because each situation is specific, the information set out must always be tailored to the person's actual situation;<sup>2</sup>
  - c. As emphasised in the [guidance note](#) on carrying out and recording capacity assessments, it is crucial to be clear before starting the process of considering the person's capacity that all those who might be involved in the assessment process agree on what the information is that the person needs to be able to understand, retain, use and weigh. Not being clear about this is one of the single greatest causes of unnecessary complexity, difficulty and challenge.

### Categories of decision

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# An example: care

## Care

5. Questions of care are often considered at the same time as questions of residence (addressed below). They need to be considered separately, but not at the expense of artificially assigning them to pigeonholes if the nature of the person's needs mean that the questions are on the facts of their case interrelated.<sup>3</sup>
6. In the context of decisions relating to care, each decision will be specific instead of general, and will have to be revisited should circumstances or the question posed to the person under assessment change. The following constitute relevant information to an assessment of whether a person has capacity to decide their own care:<sup>4</sup>
  - (a) **With what areas the person under assessment has been assessed as needing support;**
  - (b) **What sort of support they need, how often, for how long and in what form;**
  - (c) **Who will provide such support;**
  - (d) **What would happen without that support, or if the support was refused.**
  - (e) **The possible risk of accepting support from carers, including that carers may not always treat the person being cared for properly**
  - (f) **That if the person has a concern about the care they are being given, the steps they could take to alert people.**
7. The following factors have been found not to be relevant to an assessment of capacity as to care:<sup>5</sup>
  - (a) **Administrative matters such as how care is to be funded or managed, and how staff will be appointed;**

## Best interests

- Being clear about the available options
- Being careful about ‘balance sheets’
- Remember that key to the decision is the person’s wishes, feelings, beliefs and values – all of which are relevant
- Being willing to revisit
- And do not get hung up on having meetings...

# 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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alex.ruckkeene@39essex.com

