

# Capacity – some English thoughts

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## Alex Ruck Keene

Barrister, 39 Essex Chambers, London

Wellcome Research Fellow and Visiting Lecturer 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)

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## 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, in particular, is widely misunderstood by those involved in care. It is sometimes used to support non-intervention or poor care, leaving vulnerable adults exposed to risk of harm. In some cases this is because professionals struggle to understand how to apply the principle in practice. In other cases, the evidence suggests the principle has been deliberately misappropriated to avoid taking responsibility for a vulnerable adult.*

(House of Lord Select Committee post-legislative scrutiny of MCA 2005, para 105)

- Reliance upon the presumption is **inadequate** where there are reasonable grounds to consider that person may not have capacity to make the decision, especially where consequences are serious

## 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 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
- See, by contrast, *NHS Foundation Trust v AB* [2019] EWCOP 45 (contraception)

## 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

# Functional thoughts

## 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)

## 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.

# Digging deeper into the functional test

- Wellcome-funded work on contested capacity assessment: <https://mhj.org.uk/>
- The translation gap



# Want to read more?

<http://www.39essex.com/resources-and-training/mental-capacity-law/>

[www.mhj.org.uk](http://www.mhj.org.uk)

[www.mclap.org.uk](http://www.mclap.org.uk)

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