

## ARBD – is the law any good?

October 2023

### 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@3essex.com  
@capacitylaw

3essex.com

BARRISTERS · ARBITRATORS · MEDIATORS

LONDON · MANCHESTER · SINGAPORE · KUALA LUMPUR



1

### The issue

- An increasing body of evidence that misunderstanding / misapplication of the law stands in the way of effectively addressing the problems caused by ABRD
- Can't hope in this presentation to cover everything so want to focus upon the Mental Capacity Act 2005 – 4 'unnecessary' problems and 2 'necessary' problems
- (Much) more in Preston-Shoot and Ward (2021) [How to use legal powers to safeguard highly vulnerable dependent drinkers in England and Wales](#)

3essex.com

BARRISTERS · ARBITRATORS · MEDIATORS

LONDON · MANCHESTER · SINGAPORE · KUALA LUMPUR



2

### Always remember the context

- The MCA never explains **why** you are doing what you are doing, it explains **how** you can do what you need to do
- Why you need to act (or not act) always has another basis – from legal perspective, most often the Human Rights Act 1998: Human rights as a balancing exercise – positive duties vs negative obligations
- So:
  - Stop and think – why are actions being taken?
  - How is the person's capacity relevant to what is being done?
  - 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](#)
- And in most cases you will be operating in conditions of uncertainty: the critical question is how to use that uncertainty justly (and what systems can do to support that): see this [briefing](#)

3essex.com

BARRISTERS · ARBITRATORS · MEDIATORS

LONDON · MANCHESTER · SINGAPORE · KUALA LUMPUR



3

### Unnecessary problem (1): misunderstanding the presumption of capacity

- **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

3essex.com

BARRISTERS · ARBITRATORS · MEDIATORS

LONDON · MANCHESTER · SINGAPORE · KUALA LUMPUR



4

### Unnecessary problem (2): relying upon a 'right' to make unwise decisions

**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*

3essex.com

BARRISTERS · ARBITRATORS · MEDIATORS

LONDON · MANCHESTER · SINGAPORE · KUALA LUMPUR



5

### Unnecessary problem (3): not asking the right question

- Asking about capacity to make decisions around drinking in isolation is not a helpful question

*Ms Catherine Rowlands submits that the approach of the Official Solicitor is misconceived. She contends that Ms Morris, by concentrating on PB's understanding of his dependency on alcohol, has conflated the issues and has, accordingly, blurred the questions that require to be considered. I think Ms Rowlands is correct to refocus on the central issue in question i.e. whether PB has the capacity to take decisions concerning his residence and care, recognising that PB's drinking is a relevant factor.*

*London Borough of Tower Hamlets v PB [2020] EWCOP 34*

- Asking the right question means you can then focus on what the relevant information is

3essex.com

BARRISTERS · ARBITRATORS · MEDIATORS

LONDON · MANCHESTER · SINGAPORE · KUALA LUMPUR



6

#### Unnecessary problem (4): 'lifestyle choice'

Is your use of the term 'lifestyle choice' implicitly washing your hands of the situation out of frustration / dislike / bias?

39essex.com

BARRISTERS · ARBITRATORS · MEDIATORS

LONDON · MANCHESTER · SINGAPORE · KUALA LUMPUR



7

#### Necessary problem (4): fluctuating capacity

- The key: taking a sensible approach to 'the decision':
  - *RB of Greenwich v CDM* [2019] EWCOP 32
  - *CD v London Borough of Croydon* [2019] EWHC 2943 (Fam)
  - *A Local Authority v PG & Ors* [2023] EWCOP 9
- [Fluctuating capacity in context](#): remember the wider obligations in play

39essex.com

BARRISTERS · ARBITRATORS · MEDIATORS

LONDON · MANCHESTER · SINGAPORE · KUALA LUMPUR



8

#### Necessary problem (5): impaired executive capacity

- The key: triangulating what the person says against what they do
- The question: does the person understand / can they use and weigh the impact of their own deficits?
- See for more [The person seems to say one thing and to do another - Capacity guide](#)

39essex.com

BARRISTERS · ARBITRATORS · MEDIATORS

LONDON · MANCHESTER · SINGAPORE · KUALA LUMPUR



9

#### More resources

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

@capacitylaw  
alex.ruckkeene@39essex.com

39essex.com

BARRISTERS · ARBITRATORS · MEDIATORS

LONDON · MANCHESTER · SINGAPORE · KUALA LUMPUR



10