



Welcome to the October 2023 Mental Capacity Report, which is much shorter than last month's blockbuster (to everyone's relief). Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Report: Brain stem death before the courts and conveyancing;
- (2) In the Property and Affairs Report: the Powers of Attorney Act 2023 gets Royal Assent, and how it will change the Mental Capacity Act 2005;
- (3) In the Practice and Procedure Report: revised guidance for Accredited Legal Representatives and anonymisation of clinicians in cases involving the MCA 2005;
- (4) In the Wider Context Report: a revised online ADRT service and a revised clinical guide for staff working with autistic people and those with a learning disability, and our Irish correspondents highlight two specific aspects of the Assisted Decision-Making (Capacity) Act 2015;
- (5) In the Scotland Report: attorneys as executors.

You can find our past issues, our case summaries, and more on our dedicated sub-site [here](#), where you can also sign up to the Mental Capacity Report.

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The picture at the top, "Colourful," is by Geoffrey Files, a young autistic man. We are very grateful to him and his family for permission to use his artwork.

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### Short note: brain stem death, an explainer of the law in England & Wales, and a question of consent

The case of Andy Casey sheds light again on the difficult question of diagnosing death by neurological criteria ('DNC'), and the wider question of what, in fact, it means to be dead. The first instance decision by Macdonald J can be found [here](#), and the decision of the Court of Appeal refusing permission to appeal [here](#). At the time of writing, it is not clear whether or not Mr Casey's family sought to take the case to Strasbourg, as they indicated they wished to do before the Court of Appeal, nor (if they did) what the Strasbourg court did in response.

For those who want to know more about it, this [explainer](#) by Tor and Ben Tankel is helpful; Alex's [review](#) of the recent book on the medico-legal development of neurological death in the UK by Dr Kartina Choong may also be helpful. And some may want to see the 2008 [Code of Practice](#) for the Diagnosis and Confirmation of Death by the Academy of Medical Royal Colleges, as well as the [2015 RCPCH Code](#) relating to those under 2 months old (both currently under review).

One point to note is that it appears before the High Court and the Court of Appeal that there was an assumption that DNC testing requires the consent of a person with parental responsibility (if the individual is a child), or recourse to the Mental Capacity Act 2005 as a work-around for

the inability of an adult suspected of being brain stem dead to give the necessary consent: see paragraph 31 of the first instance decision and paragraph 8 of the Court of Appeal decision. In this regard, it is perhaps of note that this is an assumption which was not necessarily shared by the Court of Appeal in the only previous case to reach it relating to DNC testing (the *Battersbee* case concerned the situation where it was not possible to carry out DNC testing). In *Manchester University NHS Foundation Trust v Namiq & Anor* [2020] EWHC 180 (Fam) (concerning a very young child, and hence in circumstances where both the 2008 Code and the 2015 Code were relevant), Lieven J was faced with the argument that:

*[t]he DNC tests could only be carried out if the parents had given fully informed consent. He relies on Glass v UK to argue that the tests would be invalid without such consent. In my view this argument is wrong for a number of reasons. Firstly, the parents were aware that the tests were going to be carried out probably that day, as is shown by the transcript of the conversation with Dr E, and the Father did ultimately accept this. The transcript does not suggest that the Father or Mother said the tests should not go ahead. Further, the parents were fully informed as to the purpose of the tests, so in my view the issue about "informed" consent goes nowhere on the facts of the case. Secondly, I do not think there is any requirement for written consent from the parents, or for the*

*information to be written down. There is no such requirement in the Code. Glass is dealing with a very different situation, where the issue was the withdrawal of certain treatment. It is not clear to me that consent would necessarily have to be given for a test at all. But, I do not have to decide that issue because the parents undoubtedly knew that the test was to be carried out, and knew what the test was about. Therefore they were given the appropriate information, and on the facts of the case their consent can be inferred from their conduct. Thirdly, and in any event, even if the tests should not have taken place because of lack of consent that does not mean that the outputs of the test would not be admissible before me. I am being asked to decide a factual question as to whether Midrar is dead, and lack of consent would not vitiate the evidence that goes to that issue (emphasis added)*

Lieven's decision was challenged on this ground before the Court of Appeal, but the Court of Appeal held that "for reasons given by Lieven J, there is no merit in this point" (paragraph 68). And it is of note that the Canadian position in guidance published in May 2023 is that "consent for DNC testing should neither be required nor requested" – further explanation as to why this may be being given here (and note neither the 2008 nor the 2015 Codes mention the word 'consent,' with the words 'best interests' in the 2008 Code reserved for decisions about treatment of the patient, and not appearing in the 2015 Code at all). Put shortly, the argument that consent / a workaround for consent is not needed is that doctors should not be seeking to undertake DNC testing unless they properly consider that the person is brain stem dead. And if a person is, indeed, brain stem dead, seeking consent by proxy (for a child) or thinking about

their best interests for MCA purposes to testing is legally meaningless.

There is no doubt that involving those close to the person is hugely important, but we suggest that it is extremely important to know the basis upon which such involvement is taking place: seeking consent (in relation to a child), consulting or informing?

### How we get there: conveyance plans in the Court of Protection

For those who have not already seen it, we strongly recommend reading Ian Brownhill's blog on 'conveyancing planning' before the Court of Protection on the Open Justice Court of Protection website. As Ian notes: "[a] 'conveyance plan' is, in the simplest sense, a plan which provides how a person will get from one place to another. However, conveyance is often one of the most complex areas legally and logistically in a case."

### Multiple exclusion homelessness and mental capacity

Some may be interested to know of the launch of an NIHR-funded project (involving Alex) focusing on the assessment of the mental capacity of people who are experiencing multiple exclusion homelessness, a term used to capture the overlapping of a range of experiences associated with profound social exclusion, including not just homelessness but also institutional care, substance misuse, and 'street culture' activities. Factors such as poor mental health, addiction, and the effects of adverse childhood experiences in this population mean that capacity assessments under the Mental Capacity Act 2005 (MCA) can be particularly challenging. The research will explore and analyse health and social care practitioner approaches to mental capacity assessments with people experiencing multiple exclusion homelessness in England.

Findings from mixed-methods research will inform the co-production of a revised and tested specialist assessment tool for this population. For more details, see [here](#).

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Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes. To view full CV click [here](#).



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Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click [here](#).



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Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; honorary membership of the Law Society of Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

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## Conferences

Members of the Court of Protection team regularly present at seminars and webinars arranged both by Chambers and by others.

Alex is leading a masterclass on approaching complex capacity assessment with Dr Gareth Owen in London on 1 November 2023 as part of the Maudsley Learning programme of events. For more details, and to book see [here](#).

Alex is also doing a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his [website](#).

### **Advertising conferences and training events**

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity [My Life Films](#) in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

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Our next edition will be out in November. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: [marketing@39essex.com](mailto:marketing@39essex.com).

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