MENTAL CAPACITY REPORT: THE WIDER CONTEXT

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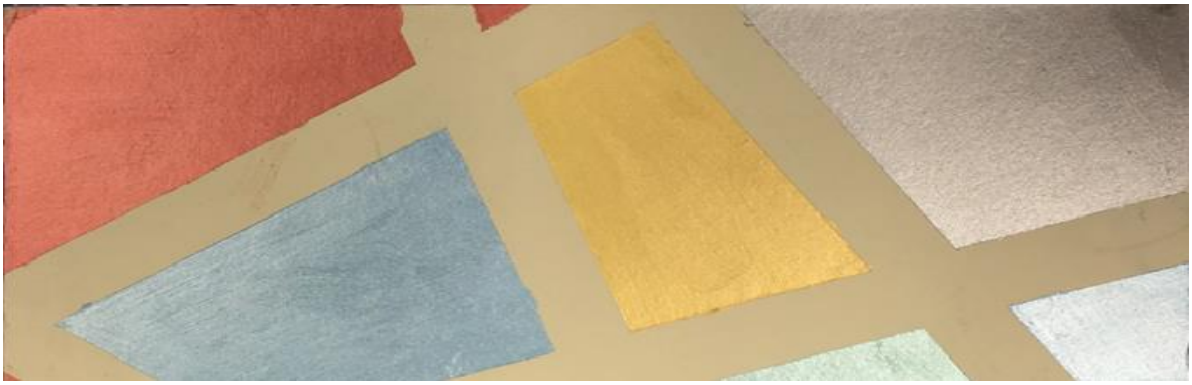

Welcome to the April 2022 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: Draft MCA and LPS Code published; capacity to terminate a pregnancy; the (limited) role of the Inherent Jurisdiction; and is an application needed in all vaccine disputes?

(2) In the Property and Affairs Report: the Court of Appeal weighs in on testamentary capacity, and the evidence used to prove it; and an invitation to the pilot for digital submission of property and affairs cases

(3) In the Practice and Procedure Report: reporting restrictions; the role of COP in MHA discharge planning; costs; and notable conferences on capacity;

(4) In the Wider Context Report: the impact of s.49 reports on mental health professionals; Article 2 and 3 damages claim; the *M'Naghten* test considered; and is having a deputy an Article 14 'status'?

(5) In the Scotland Report: Guardians' remuneration; open justice or anonymisation; and still time to contribute to the Scott Review or sign up to the World Congress on Adult Capacity in Edinburgh;

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also find updated versions of both our capacity and best interests guides.

Editors
Victoria Butler-Cole QC
Neil Allen
Nicola Kohn
Katie Scott
Arianna Kelly
Rachel Sullivan
Stephanie David
Nyasha Weinberg
Simon Edwards (P&A)

Scottish Contributors
Adrian Ward
Jill Stavert

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

Contents

Acquired brain injury call for evidence

DHSC has opened a call for evidence to help develop the government's acquired brain injury strategy. The consultation is specifically seeking *'the views of people living with acquired brain injury or other neurological conditions and their families, as well as professionals working in this space.'* The exercise is structured as a call for evidence rather than a formal consultation on specific proposals, and is *'a request for ideas on which [the government] can build.'*

The call for evidence is open until 6 June 2022, and an easy read version of the call for evidence is available.

Call for Carers

Neil and fellow researchers at the University of Manchester are seeking to understand the experiences of people supporting a family member to live at home with dementia during the pandemic. The study is taking place across the UK, and you do not have to live with the family member to complete the survey. If you are in this position, they would love to hear from you, or if you are in a position to help to find respondents, that would be enormously helpful.

The survey is available online or in paper format – the online link is here: https://www.qualtrics.manchester.ac.uk/jfe/form/SV_3Rcu3T71wOz05eu , and they would be very grateful if you could circulate to relevant individuals and networks or post to your social media. If you have a group where paper copies would be better, please contact Jayne Astbury on jayne.astbury@manchester.ac.uk or telephone 07385 463 137 for delivery of a stack of surveys.

The survey is expected to take about 30-45 minutes to complete and will remain open until 30 June 2022.

New chair of the National Mental Capacity Forum announced

Dr Margaret Flynn has been appointed as the new chair of the Mental Capacity Forum, for a term of three years. *'Since 2019, Dr Flynn has*

been a Trustee of Anheddau Cyf, a not-for-profit charity supporting adults with learning disabilities, autism and mental health challenges across North Wales. Dr Flynn was also appointed as a Director of All Wales People First in 2018. She has been a Director of Flynn and Eley Associates Ltd since 2009 and has held various editorial roles for the Journal of Adult Protection since 1999.'

Inequitable access to transplants

In a slightly odd coincidence of timing, given the recent decision in the case of William Verden, an article that Alex has co-written about adults with impaired decision-making capacity and inequitable access to transplants has just appeared in Transplant International. It is open access (i.e. free) and we hope that the article will prompt debate about strategies for non-discrimination, the developments of policies, as well as further research in this area.

Impact on psychiatrists in intellectual disability of Court of Protection orders for section 49 (Mental Capacity Act) reports

A recent article has set out the results of an online survey of 104 learning disability psychiatrists, of whom approximately 2/3 of whom had been asked to complete s.49 MCA reports in Court of Protection proceedings. It sets out a number of concerning findings and suggests further consideration is required of the use of such orders.

The study's findings include (in relation to those asked to prepare a s.49 report):

- Approximately half were asked to provide an opinion outside their subjective expertise;
- 61.8% were asked to prepare a report for an individual not on their case-load;
- 30.8% of the reports were estimated to take 10-20 hours to complete, and 21.8% required more than 20 hours to complete. Only 15% took less than 5 hours to complete;
- Extensions were requested in 78.2% of the reports described;
- Only 25% of the respondents were somewhat or fully confident in writing reports, and 69.1% stated that they had 'no support' in preparing the report;
- 85% experienced stress as a result of being asked to prepare a report, with some experiencing stress of such a degree that they took sick leave;

The article also found that there were impacts on other patients, and the psychiatrists were not allocated sufficient time in their working day to complete the reports:

> *Over three-quarters of those who had been ordered to produce a section 49 report said there had been an impact on their work with patients, including cancellation of clinics, home visits and attendance at clinical meetings. Other essential activities also had to be postponed, such as preparation for appraisal. Many noted that they had to work on the report in their own time.*

While the study considered psychiatrists working in intellectual disability, the authors considered it was likely that older adult psychiatrists would be experiencing more significant impacts.

Article 2 and 3 damages claims: who can bring the claim on behalf of the person?

Milner v Barchester Healthcare Homes Ltd [2022] EWHC 593 (QB) (22 March 2022) (Master Davison)

Article 2 – Article 3 – damages claims

Ms Milner was a close friend of Elsie Casey, who died aged 94 in a care home where she was subject to a standard authorisation. Ms Milner had issued a claim for damages for breaches of Mrs Casey's Article 2 and Article 8 rights prior to

her death, alleging serious neglect at the care home.

The Defendant care home company sought to strike out her claim. The court held that the claim based on Article 2 should not proceed as there was no real prospect of the Claimant showing that there had been a real and immediate risk to Mrs Casey's life. She had been assessed as being at risk from choking, but that was a relatively benign, chronic issue, as for many elderly people. There was no evidence that aspiration pneumonia had caused her death.

The claim under Article 3 was allowed to proceed. The court noted that the allegations in respect of Article 3 included that Mrs Casey was ill-treated for 4.5 years, including being unwashed and left in soiled clothing and bedding, becoming dehydrated, falling, and being subject to inappropriate restraint. The care home in question had been subject to criticism at the time by outside agencies. It was possible that the complaints made would be found to violate Article 3.

Although there was not a close link between conduct complained of and Mrs Casey's death, Ms Milner might be able to establish that she had a strong moral interest or other compelling interest in bringing the claim, give the obvious public interest in ensuring that care homes refrain from breaches of human rights, and that any breaches should be properly investigated.

'Monitoring the Mental Health Act'

The CQC report 'Monitoring the Mental Health Act 2020/2021' has been published and can be found here.

The CQC has a duty under the MHA to monitor how services exercise their powers and discharge their duties when patients are detained in hospital or are subject to community treatment orders or guardianship. The report makes depressing reading, the key messages being that:

(i) the workforce is under extreme pressure – the pandemic having placed additional stresses on staff. The report states that *'staff are now exhausted, with high levels of anxiety, stress and burnout, and the workforce is experiencing high levels of vacancies. The negative impact of working under this sustained pressure poses a challenge to the safe, effective and caring management of inpatient services and to the delivery of care in a way that maintains people's human rights.'*

(ii) During the pandemic there has been an increase in children and young people being cared for in inappropriate settings while they wait for a bed, as well as people being admitted to hospital for prolonged periods and

(iii) urgent action is required to address longstanding inequalities in mental health care, and in particular the CQC remains concerned that Black or Black British people are more likely to be detained under the MHA, spend longer in hospital and have more subsequent readmissions than White people.

Of particular significance to mental capacity practitioners are the following:

- That there remains confusion, even in mental health settings, about people's legal rights under the MHA, Mental Capacity Act (MCA) and Deprivation of Liberty Safeguards (DoLS). The CQC would welcome clearer guidance about which legislation to use with the introduction of the Liberty Protection Safeguards.
- The fall out from the Supreme Court (SC) decision of *SSJ v MM* [2018] UKSC 60 in

2018, in which the Supreme Court held that restricted patients cannot, under the MHA, be conditionally discharged from hospital to continued deprivation of liberty (for example in a residential social care placement. This has led to

(i) a practice of recalling such patients (albeit not actually requiring their physical return to hospital) whilst granting them extended leave of absence from hospital; and

(ii) in the case of *Cumbria, Northumberland, Tyne and Wear NHS Foundation Trust & Anor v EG* [2021] EWHC 2990 (Fam), to the High Court invoking section 3 of the Human Rights Act to declare that where it is necessary to do so in order to avoid a breach of a patient's Convention rights, s.72 of the MHA can be construed so as not to require discharge from detention even where the link to the hospital is tenuous. Accordingly, the CQC calls for the proposals to create an explicit 'supervised discharge' power to be implemented, to apply to people who would not be able to leave hospital without such a measure being in place.

Compulsion is no defence: the limits of an insanity plea

R v Keal [2022] EWCA Crim 341 (18 March 2022) (Burnett LJ, Thirlwall LJ, Morris J)

Other proceedings – criminal

On the very edges of capacity law, in R v Keal [2022] EWCA Crim 341, the Court of Appeal refused to expand the *M'Naghten* rules to include those circumstances in which defendants are aware that what they are doing is wrong but have no power no resist the compulsion under which they are acting.

R v Keal concerned the attempted murder by the Appellant of his mother, father and grandmother in 2018. At the time the Appellant, aged 33, was suffering from significant mental ill health: he had attempted suicide the previous day and had been battling mental health problems and drug addiction for a number of years.

The evidence at his trial, and on which he was convicted of three counts of attempted murder, was that the Appellant had carried out violent, sustained attacks against his family members but that, in the course of the attack on his father he had said *"I'm sorry I don't want to, I'm sorry I'm sorry dad" and to his mother, "I'm sorry, this isn't me it's the devil"* [3-4].

The judge at the original criminal trial had directed the jury on the so-called *M'Naghten* Questions and had directed them [21] that

> *8. The defendant has raised the defence of insanity; insanity being a legal term used to describe the effect of a medical condition on the functioning of the mind. Insanity does not have to be permanent or incurable: it may be temporary and curable.*
>
> *9. In law, a person is presumed to be sane and reasonable enough to be responsible for their actions. But if a person proves that it is more likely than not that, when they did a particular act, because they were suffering from a disease of the mind either they did not know what they were doing or they did not know that what they were doing was wrong, by the standards of reasonable ordinary people, the defendant*

> *is to be found "not guilty by reason of insanity". "Wrong" in this context means wrong in law i.e. against the law.*
>
> *10. There are two elements to the defence of insanity. First, the defence must establish, on the balance of probabilities, that Mr Keal was suffering from a disease of the mind that led to a defect of reasoning. Second, they must show either that he did not know the nature and quality of his actions or that he did not know that what he was doing was wrong.*

While all four expert psychiatrists who had examined Mr Keal agreed he was suffering from a disease of the mind that led to a defect of reasoning, they all also agreed that he knew the nature and quality of his actions: the question for the jury was therefore whether he *"knew what he was doing was wrong"* [11], specifically whether he knew that *"it was against the law"* [12].

The Appellant appealed to quash his conviction and have his guilty verdicts replaced by not guilty by reason of insanity on the basis that the jury had been misdirected; that *"where a defendant's delusion operates so as to deny him agency, his culpability is the same, whether or not he is conscious that his act is wrong"*. [26] The Appellant submitted that the insanity defence should extend to those who are aware that what they are doing is wrong, but feel compelled by their delusion to do it anyway.

The relevant elements of the M'Naghten Rules were identified by the Court at [11] as Rules 2, 3 and 4, namely:

> *2nd. What are the proper questions to be submitted to the jury, when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?*
>
> *3rd. In what terms ought the question to be left to the jury, as to the prisoner's state of mind at the time when the act was committed?*
>
> *4th. If a person under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused?*

The conclusions reached by Tindal LCJ in *M'Naghten,* as set out in *Keal* at [12], are, broadly, that jurors should be told:

> *[t]hat every man is to be presumed sane and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction;…*
>
> *[t]o establish a defence on the ground of insanity it must be clearly proved that at the time of committing the act, the accused had to be labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong…*
>
> *the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it…*
>
> *If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course therefore has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong.*

Tindal LCJ, in answer to the fourth *M'Naghten* question *(*if a person under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused) held:

> [12] … *the answer must of course depend on the nature of the delusion: but, making the same assumption as we did before, namely that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment." (emphasis added)*

Dismissing the appeal in *Keal*, Lord Burnett who delivered the sole judgment of the Court of Appeal first set out the meaning of "wrong".

> *37. The meaning of "wrong", and the leading cases on that question, Windle and Johnson were relied upon by the trial judge and have featured in the arguments before us.*
>
> *38. In Windle the appellant killed his wife. There was evidence that he was suffering from a defect of reason from a disease of the mind. The medical evidence was that he knew that he was doing an act which the law forbade, but it was possible that when he did so he believed that he was putting her "out of her sufferings". It was argued that the word "wrong" meant "morally wrong". The defence could be established where the defendant thought he was doing a beneficial act, even though he knew it was wrong in law. Lord Goddard LCJ rejected that argument: he held that the word "wrong" in the M'Naghten Rules means "contrary to law".*
>
> *39. In Johnson, the Court of Appeal revisited the position where the defendant knows that what he did was wrong as a matter of law but did not consider that what he had done was wrong in the moral sense. As in Windle, it was common ground that the appellant knew what he was doing was against the law, but one of the doctors took the view that the appellant did not consider that what he had done was wrong in the moral sense. At §§17 to 20 Latham LJ cited the views expressed in the then current editions of Archbold, Blackstone's Criminal Practice and in Smith and Hogan on Criminal Law. He concluded, at §23, that the strict position remained as stated in Windle and in the passages of those three textbooks to which they had referred. Finally, at §24, Latham LJ observed that there is room for reconsideration of rules which have their genesis in the middle years of the 19th century but "it does not seem to us that that debate is a debate which can properly take place before us at this level in this case". The Court of Appeal certified a question of public importance for consideration by the House of Lords. The House of Lords refused to grant leave to appeal.*
>
> *40. The passage in Blackstone's Criminal Practice expressly approved by Latham LJ is now found (in substantially the same terms) in the 2022 edition at paragraph A3.33. Addressing the issue of not knowing that the act was "wrong", the authors state:*

*"This is an alternative to not knowing the nature and quality of the act and is the only sense in which an insane person is given a defence when none would be available to the sane (knowledge of moral or legal wrongness as opposed to knowledge of the facts which render it wrong, being generally irrelevant to criminal responsibility). The major question debated here is whether 'wrong' means legally wrong or morally wrong. It is suggested that the key to a proper understanding of this question is to recognise that the question is a negative one. If D **does** know **either** that his act is **morally** wrong (according to the ordinary standard adopted by reasonable men, per Lord Reading in Codere (1916) 12 Cr App R 21) **or** that it is **legally** wrong then it cannot be said that 'he does **not** know he was doing what was wrong'. In two leading decisions on the matter (Codere and Windle [1952] 2QB 826), it was only necessary to hold that it was correct to tell the jury that D could not rely on the defence if D knew that his act was legally wrong. Both were murder cases and it was not seriously suggested in either that D did not know his act was legally wrong and yet knew that it was morally wrong. (On the contrary, Windle thought he was morally right to kill his suicidal wife and yet knew it was legally wrong since he said, 'I suppose they will hang me for this'.) The ruling in Windle that '"wrong' means contrary to law' has now also been applied in Johnson… to a case where there was some evidence that D did not know that his act was morally wrong; it was held that this could not avail him as it was agreed that he knew that it was legally wrong. A converse case would be that of a D who does not appreciate that his act is legally wrong but who does realise that it is morally wrong, where arguably the defence would again not be made out." (original emphasis)*

41. We endorse this analysis of the authorities. In order to establish the defence of insanity within the M'Naghten Rules on the ground of not knowing the act was "wrong", the defendant must establish both that (a) he did not know that his act was unlawful (i.e. contrary to law) and (b) he did not know that his act was "morally" wrong (also expressed as wrong "by the standards of ordinary people"). In our judgment, "wrong" means both against the law and wrong by the standards of ordinary reasonable people. Strictly a jury must be satisfied that the defendant did not know that what he was doing was against the law nor wrong by the standards of reasonable ordinary people. In practice how the jury is directed on this issue will depend on the facts and issues in the particular case.

42. The focus in Windle (and Johnson) on "wrong" meaning "contrary to law" flowed from the nature of each case. On the facts of both, each defendant knew what he was doing was "contrary to law", but there was evidence that he did not consider that the act was "morally wrong". The defence failed because the defendant could not establish (a) above. Equally, in the reverse, and likely rare, case, where the defendant did not know what he was doing was

> *"contrary to law", but did know it was "morally wrong", the defence is not available; and indeed that is situation which Tindal LCJ had in mind when distinguishing between "knowledge of the law of the land" and knowing what "he ought not to do" in his answer to the second and third questions (set out in paragraph 12 above).*

As to whether the M'Naghten Rules include an element of "lack of choice", ie extend to include those circumstances where an accused is aware that something is "wrong" but feels compelled to do it anyway, the Court of Appeal held that they did not. Further, it pointed it out that it was bound by Court of Appeal authority in the form of *R v Kopsch* (1927) 19 Cr App Rep 50 which dismissed what Lord Hewart described as the *"fantastic theory of uncontrollable impulse"*. [45] It further noted that the Law Commission had specifically recognised that the law as it stands does not include an element reflecting lack of capacity to control one's actions – ie a defence of irresistible impulse.

The *Keal* judgment is very clear that *"the defence of insanity is not available to a defendant who, although he knew what he was doing was wrong, he believed that he had no choice but to commit the act in question"* [48]. Furthermore, it notes that, having considered the matter at some length previously, any extension of the law of insanity is matter that should properly be left to Parliament.

Having a deputy and Article 14 ECHR 'status'

MOC v Secretary of State for Work and Pensions [2022] EWCA Civ 1 (11 January 2022) (Peter Jackson, LJ, Singh LJ, Andrews LJ)

Other proceedings – Administrative

In *MOC v SSWP* [2022] EWCA Civ 1, the Court of Appeal considered whether having a property and affairs deputy was a protected 'status' for the purposes of Article 14 ECHR. The case related to the Disability Living Allowance (DLA) 'Hospitalisation Rule', which operates to suspend the payment of DLA where a person has been in hospital after 28 days. MOC argued that this policy unlawfully discriminated against him.

There is a difference in the application of Hospitalisation Rule for children and adults following a successful challenge to the rule in respect of children in *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47. Since 2016, the regulations allow anyone under the age of 18 to continue to receive DLA or PIP while in hospital; however, adults do not continue to receive DLA after 28 days in hospital. Adults living in residential care settings are also barred from receiving the care component.

MOC was 60 years old and had complex medical conditions and disabilities. He had qualified for the highest rates of both the mobility and care component DLA since 1993 (and has presumably since been migrated to the Personal Independence Payment). MOC's sister, MG, had been appointed his property and affairs deputy by the Court of Protection.

In June 2016, MOC was admitted to an acute hospital and re-admitted in July 2016. He remained there until September 2016, at which time he was admitted to a specialist neurorehabilitation unit. In July 2017, he was admitted to a nursing home within a local hospital, and he has not been able to return to living in the community.

MOC's DLA was fully suspended from August 2016 (28 days after his July 2016 admission) due to the effect of the Hospitalisation Rule. His DLA mobility component was restored on his transfer to the nursing home in August 2017. His care component was not payable under the relevant regulations while he was in nursing care.

Through MG, MOC argued (first to the First-Tier Tribunal (FTT) and then to the Upper Tribunal (UT)) that the 'Hospitalisation Rule' unlawfully discriminated against him under Article 14 read together with Article 1 Protocol 1 ECHR ('A1P1'). At the FTT, MG argued on behalf of MOC that MOC had been discriminated against *'on the grounds of age and status as an "uncapacitous [sic] person in hospital."'* [27] The FTT declined to read *Mathieson* across to find that the Hospitalisation Rule was unlawful in respect of adults.

In the UT, the parties were agreed that MOC was *'a severely disabled adult in need of lengthy in-patient hospital treatment.'* [32] The court did not agree that MOC had a relevant 'status' for the purposes of Article 14 as being either an:

> *(1) "incapacitous severely disabled adult in need of lengthy in-patient hospital treatment", or*
>
> *(2) "a severely disabled adult who lacks capacity to make decisions about care and medical treatment in need of lengthy in-patient treatment".*
>
> *The principal reason for rejecting this submission was that capacity was unsuitable as a key element in identifying a "status" for Article 14 and too "potentially evanescent" (para. 10). The Judge also observed that, if lack of capacity was a trigger for a finding that there had been a breach of a claimant's human rights, there was a risk of people moving in and out of being the subject of a breach on a "virtually daily basis" (para. 7).* [32]

The UT considered that in any event, any difference in treatment was justified. While it may be relevant for the purposes of the Regulations whether the person required an informal carer, the evidence in the case did not support a conclusion that the deputy had a *'hands-on caring role.'* [34]

The Court of Appeal agreed with the UT that the proposed status (argued before it as *'that of "a severely disabled adult who lacks capacity to make decisions about care and medical treatment in need of lengthy in-patient hospital treatment"'*) was not one on which an Article 14 discrimination claim could be properly founded in this case. The Court of Appeal found that the UT:

> *65...was right to observe that the question of capacity as such is not a status. First, the scheme of the 2005 Act was designed to move away from a status-based approach to a functional approach, in other words to focus on particular decisions at a particular time. Secondly, there needs to be reasonable certainty: a person's capacity may change from time to time and may do so quickly. That is not a sound foundation for the "status" required by Article 14.*
>
> *66. I should also observe that I can see no logical connection between the purpose of DLA and the role of a deputy appointed under the 2005 Act. There were times at the hearing when it appeared to be suggested that what this case is really about is whether a deputy is entitled to claim expenses for performing her tasks as a deputy. Whether or not that would be a good idea as a matter of social and economic policy, in my view it has nothing to do with whether the rule under challenge is discriminatory.*

Book Review: The Spaces of Mental Capacity Law: Moving Beyond Binaries (Beverley Clough)

The Spaces of Mental Capacity Law Moving Beyond Binaries (Beverley Clough, Routledge, 2021, Hardback £120/ebook £33.29)

[*A version of this book review will be forthcoming in due course in the International Journal of Mental Health and Capacity Law, so this serves as a sneak preview – the most recent issue of the journal can be found here*]

Dr Beverley Clough, Associate Professor in Law and Social Justice at the University of Leeds, has established herself in a relatively short space of time as one of those whose works go straight onto the reading list for students (in all senses) of matters capacity related. Her latest work, the fruits of a ISRF Early Career Fellowship, is "The Spaces of Mental Capacity Law: Moving Beyond Binaries," and should equally find its way onto the reading list. It is a stimulating, and very challenging, exploration of both the conceptual spaces and the contexts which mental capacity laws exist, focusing primarily upon England & Wales.

After two largely conceptual chapters, drawing out, in particular, a model with which to interrogate the space occupied by the Mental Capacity Act 2005, the central spine of the book is a dissection of five 'binaries' that Clough identifies as pervading mental capacity laws in jurisdiction such as England & Wales: (1) capacity/incapacity; (2) care/disability; (3) state/individual; (4) freedom/deprivation of liberty; and (5) the distinction between public law and private law. In each of the chapters, Clough identifies ways in which the binary in question is perhaps not as fixed as is assumed, either by current law, or by those who apply it. She is particularly interested in, and critical of, the ways in those binaries are embedded in the broader logics of liberalism, and one of the signal services of the book is to bring those links into the light.

Refreshingly, at least to this reader, whilst Clough is clear that her goal is to open up new ways of thinking about mental capacity law, the book adopts a subtle and nuanced approach to some of the ways in which current legal frameworks relating to capacity have been challenged by those dissatisfied with the ways in which they serve (or do not serve) those with impairments of different kinds. She has, for instance, some acute, and interestingly sceptical observations about the debates relating to relational autonomy and vulnerability. She also asks some particularly pertinent questions about the potential for the UN Convention on the Rights of Persons with Disabilities to allow an escape from the binaries that she identifies, noting the extent to which (perhaps ironically) that the "residue of liberal legal ideals is present across the Articles of the Convention in terms of the language used and a focus on autonomy" (page 191).

I noted at the outset that the book is challenging, a word that I chose carefully for its multiple meanings. The more conceptual chapters, in particular, are definitely not an easy read, and those new to the field might find themselves at times having to wrap the wet towel around their heads whilst they trace the development of the arguments through. The wet towel would be well-used, though, because the chapters which follow amply bring the theoretical into close and detailed contact with 'real life.' As both an academic and a practitioner before the Court of Protection, I must also confess to giving the odd hollow laugh at the sustained analysis of judgments[1] which I am well aware reflect as much the vagaries and contingencies of fate than they do of the workings out of any very considered philosophy. That having been said, of course: (a) the judgments reflect the written record, and are therefore fair game for dissection; and (b) Clough's analysis of what is not said, or what is assumed, in those judgments is always stimulating.

The major reason for saying that I find the book challenging in what could be taken as a negative fashion is perhaps a little unfair, but it is only a function of it being so stimulating in what it covers. What the book left me wanting was a second volume in which Clough grapples with the ways in which the binaries that she so interestingly challenges play out in two key areas.

The first is where questions of disability are simply not in play (or not in play in the same way) in relation to capacity than in the ways she carefully analyses in chapter 3. For instance, what is a doctor to do in relation to a patient who is unable to consent to a life-saving procedure not because of any underlying cognitive challenges, but because they are unconscious having been brought in after a car-crash? It would certainly be possible to find other ways of directing and/or limiting the doctor's approach[2] but it does seem very difficult not to find a route which does not, at some level, engage questions of capacity.

The second is where there is no direct state involvement. Each of the binaries that she describes arises in situations where the state is in some way involved in the life of the individual(s) concerned, and Clough makes a powerful case for revisiting the very foundations of that involvement. It is, however, not so obvious that the state is intervening in a situation where someone seeks to enter into a contract, to make a gift, or to make arrangements to dispose of their property after death. All of those are situations where the capacity/incapacity binary arises (although largely unmediated by the Mental Capacity Act 2005[3]). I hope that Clough can be persuaded to offer some thoughts in her future work as to whether (and if so) how the binary needs to be revisited in such contexts. For my part, and accepting that I may be incapable of escaping the coils of liberal legal ideals, I might still require some persuasion that – for all its flaws – there is any other model that commands greater legitimacy for all the purposes for which it is which it is required than that of mental capacity.

I reiterate, though: that I make these observations is primarily a function of how stimulating the work itself is, and I recommend it highly to all those interested in thinking more broadly about mental capacity law than is sometimes possible in the thickets of the MCA 2005 itself.

[Full disclosure, I was provided with an inspection copy of this book by the publishers. I am always happy to review books in the field of mental capacity and mental health law (broadly defined).]

[1] Some of which relate to cases I have been in.
[2] There are some civil law jurisdictions, for instance, there is general health legislation providing for treatment to be provided in an emergency absent consent.

[3] The test for capacity to contract, to make a gift, and to make a will are all governed by the common law, save that the Mental Capacity Act 2005 governs the situation if the Court of Protection is being asked to act on behalf of the person.

Alex Ruck Keene

Shedinar: Deprivation of Liberty in the Shadows of the Institution (Dr Lucy Series)

Deprivation of Liberty in the Shadows of the Institution (Dr Lucy Series, Bristol University Press, 2022, Hardback £24.99/ebook free)

In this conversation, Alex asks Dr Lucy Series about her book Deprivation of Liberty in the Shadows of the Institution (available here, for free, thanks to the Wellcome Trust) looking at the tangled history of deprivation of liberty, social care detention, *Cheshire West* and its legacies, and the concept of the empowerment entrepreneur.

Editors and contributors

Victoria Butler-Cole QC: vb@39essex.com

Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributor to 'Assessment of Mental Capacity' (Law Society/BMA), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click here.

Neil Allen: neil.allen@39essex.com

Neil has particular interests in ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. When time permits, Neil publishes in academic books and journals and created the website www.lpslaw.co.uk. To view full CV click here.

Nicola Kohn: nicola.kohn@39essex.com

Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 5th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2019). To view full CV click here.

Katie Scott: katie.scott@39essex.com

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.

Rachel Sullivan: rachel.sullivan@39essex.com

Rachel has a broad public law and Court of Protection practice, with a particular interest in the fields of health and human rights law. She appears regularly in the Court of Protection and is instructed by the Official Solicitor, NHS bodies, local authorities and families. To view full CV click here.

Stephanie David: stephanie.david@39essex.com

Steph regularly appears in the Court of Protection in health and welfare matters. She has acted for individual family members, the Official Solicitor, Clinical Commissioning Groups and local authorities. She has a broad practice in public and private law, with a particular interest in health and human rights issues. She appeared in the Supreme Court in *PJ v Welsh Ministers* [2019] 2 WLR 82 as to whether the power to impose conditions on a CTO can include a deprivation of liberty. To view full CV click here.

Arianna Kelly: arianna.kelly@39essex.com

Arianna has a specialist practice in mental capacity, community care, mental health law and inquests. Arianna acts in a range of Court of Protection matters including welfare, property and affairs, serious medical treatment and in matters relating to the inherent jurisdiction of the High Court. Arianna works extensively in the field of community care. To view a full CV, click here.

Nyasha Weinberg: Nyasha.Weinberg@39essex.com

Nyasha has a practice across public and private law, has appeared in the Court of Protection and has a particular interest in health and human rights issues. To view a full CV, click here.

Simon Edwards: simon.edwards@39essex.com

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.

Scotland editors

Adrian Ward: adw@tcyoung.co.uk

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.

Jill Stavert: j.stavert@napier.ac.uk

Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click here.

Conferences

7th World Congress on Adult Capacity, Edinburgh International Conference Centre [EICC], 7-9 June 2022 The world is coming to Edinburgh – for this live, in-person, event. A must for everyone throughout the British Isles with an interest in mental capacity/incapacity and related topics, from a wide range of angles; with live contributions from leading experts from 29 countries across five continents, including many UK leaders in the field. For details as they develop, go to www.wcac2022.org. Of particular interest is likely to be the section on "Programme": including scrolling down from "Programme" to click on "Plenary Sessions" to see all of those who so far have committed to speak at those sessions. To avoid disappointment, register now at "Registration". An early bird price is available until 11th April 2022.

The Judging Values and Participation in Mental Capacity Law Conference

The *Judging Values in Participation and Mental Capacity Law* Project conference will be held at the British Academy (10-11 Carlton House Terrace, London SW1Y 5AH), on **Monday 20th June 2022 between 9.00am-5.30pm**. It will feature panel speakers including Former President of the Supreme Court Baroness Brenda Hale of Richmond, Former High Court Judge Sir Mark Hedley, Former Senior Judge of the Court of Protection Denzil Lush, Former District Judge of the Court of Protection Margaret Glentworth, Victoria Butler-Cole QC (39 Essex Chambers), and Alex Ruck Keene (39 Essex Chambers, King's College London). The conference fee is £25 (including lunch and a reception). If you would like to attend please register on our events page here by 1 June 2022. If you have any queries please contact the Project Lead, Dr Camillia Kong.

Forthcoming Training Courses

Neil Allen will be running the following series of training courses:

22 April 2022	DoLS refresher for mental health assessors (half-day)
28 April 2022	The Mental Health and Capacity Act Interface (full-day)
6 May 2022	Necessity and Proportionality training (half-day)
13 May 2022	BIA/DoLS legal update (full-day)
16 May 2022	AMHP legal update (full-day)
17 June 2022	DoLS refresher for mental health assessors (half-day)
14 July 2022	BIA/DoLS legal update (full-day)
16 September 2022	BIA/DoLS legal update (full-day)

To book for an organisation or individual, further details are available here or you can email Neil.

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.

Conferences (continued)

Pregnancy, Childbirth and the Mental Capacity Act: 4 May 2022

Ian Brownhill will be offering a course through Edge Training to assist delegates to navigate the challenging landscape of mental capacity law in the field of obstetrics. Delegates will cover the basics of the Mental Capacity Act and how the law should be applied in relation to specific decisions such as caesarean sections and birth plans. Related areas will also be covered such as contraception and termination of pregnancies. There will be particular consideration of those detained under the Mental Health Act and guidance on when to apply to the Court of Protection. To register, click here.

Essex Autonomy Project Summer School 2022

Early Registration for the 2022 Autonomy Summer School (*Social Care and Human Rights*), to be held between 27 and 29 July 2022, closes on 20 April. To register, visit the Summer School page on the Autonomy Project website and follow the registration link.

Programme Update:

The programme for the Summer School is now beginning to come together. As well as three distinguished keynote speakers (Michael BACH, Peter BERESFORD and Victoria JOFFE), Wayne Martin and his team will be be joined by a number of friends of the Autonomy Project who are directly involved in developing and delivering policy to advance human rights in care settings. These include (affiliations for identification purposes only):

> Arun CHOPRA, Medical Director, Mental Welfare Commission for Scotland

> Karen CHUMBLEY, Clinical Lead for End-of-Life Care, Suffolk and North-East Essex NHS Integrated Care System

> Caoimhe GLEESON, Programme Manager, National Office for Human Rights and Equality Policy, Health Service Executive, Republic of Ireland

> Patricia RICKARD-CLARKE, Chair of Safeguarding Ireland, Deputy Chair of Sage Advocacy

Planned Summer School Sessions Include:

> Speech and Language Therapy as a Human Rights Mechanism

> Complex Communication: Barriers, Facilitators and Ethical Considerations in Autism, Stroke and TBI

> Respect for Human Rights in End-of-Life Care Planning

> Enabling the Dignity of Risk in Everyday Practice

> Care, Consent and the Limits of Co-Production in Involuntary Settings

The 2022 Summer School will be held once again in person only, on the grounds of the Wivenhoe House Hotel and Conference Centre. The programme is designed to allow ample time for discussion and debate, and for the kind of interdisciplinary collaboration that has been the hallmark of past Autonomy Summer Schools. Questions should be addressed to: autonomy@essex.ac.uk.

Our next edition will be out in May. 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.

Sheraton Doyle
Senior Practice Manager
sheraton.doyle@39essex.com

Peter Campbell
Senior Practice Manager
peter.campbell@39essex.com

Chambers UK Bar
Court of Protection:
Health & Welfare
Leading Set

The Legal 500 UK
Court of Protection and
Community Care
Top Tier Set