



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

- (1) In the Health, Welfare and Deprivation of Liberty Report: Vaccine judgments; deprivation of liberty of 16- and 17-year-olds; and brain stem death.
- (2) In the Property and Affairs Report: Capacity to make an LPA; and remuneration for non-professional deputies.
- (3) In the Practice and Procedure Report: A dispatch from the World Congress on Capacity; and updates on the National Deprivation of Liberty Court for children.
- (4) In the Wider Context Report: Draft Mental Health Act Bill is published; Mental capacity and PI awards; values in the Court of Protection; and helpful and interesting videos.
- (5) In the Scotland Report: Dispatches from the World Congress.

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

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.

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.

Contents

HEALTH, WELFARE AND DEPRIVATION OF LIBERTY	2
Consultation on the LPS and new MCA Code of Practice closes on 14 July 2022.....	2
Deprivations of Liberty of 16 and 17-year-olds, and the applicability of the streamlined procedure.....	3
Consideration of further evidence in an appeal of a vaccine judgment	8
Vaccination plans and best interests	9
Brain stem death	11
PROPERTY AND AFFAIRS	13
Capacity to make an LPA	13
Remuneration for non-professional deputies	18
PRACTICE AND PROCEDURE	19
The World Congress on Adult Capacity: a dispatch	19
National Deprivation of Liberty Court	20
THE WIDER CONTEXT	22
Draft Mental Health Act Bill published	22
The 'human element' in the social space of the courtroom: framing and shaping the deliberative process in mental capacity law	25
Making Values Matter in the Court of Protection – new film	26
Call for Carers	27
Mental capacity and personal injury awards	27
A “just” approach to uncertainty in mental health and capacity practice and policy	28
Deprivation of Liberty in the Shadows of the Institution: The movie.....	29
Lady Hale on MCA/MHA fusion and children in mental health detention	29
Book Review: Supporting Legal Capacity in Socio-Legal Context	30
SCOTLAND	34
General	34
The World Congress on Adult Capacity: a dispatch	34

HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

Consultation on the LPS and new MCA Code of Practice closes on 14 July 2022

A reminder that the consultation on the LPS and new MCA Code Practice has been extended and now closes on 14 July 2022; all consultation documents can be found [here](#) (which includes drafts as

updated from original publication). The LPS team at DHSC recently sent an update, which is available in full [here](#). We would note:

Draft templates covering the LPS process

We are planning to publish a draft set of template forms for operational use before the end of the consultation. The templates are to be used at key points in the LPS process when information needs to be transferred from one party to another. The templates will also enable the recording of the LPS assessment information which will be required operationally for authorisation. It is important to distinguish these template forms from the data that Responsible Bodies will be required to report at a national level. The national reporting requirements are set out in the national minimum data set which is available in draft here alongside the consultation documents. Some items in the national minimum data set will not be covered in these templates and will be collected separately. It should be noted that these templates will not be mandatory but may be of use in ensuring that there is a consistency in information collected by Responsible Bodies.

LPS Steering Group meeting minutes

The minutes from the most recent LPS Steering Group meeting that took place on Monday 9th May have been published today and are available online [here](#).

Deprivations of Liberty of 16- and 17-year-olds, and the applicability of the streamlined procedure

Bolton Council v KL [2022] EWCOP 24 (21 June 2022) (HHJ Hilder)

Article 5 ECHR – “Deprivation of Liberty”

Summary¹

How should the Court of Protection approach applications to authorise the deprivation of liberty of a 16 or 17 year old? And when is the streamlined procedure appropriate? These questions were not – in reality – on the radar of those considering deprivation of liberty in the community setting in the aftermath of the *Cheshire West* decision. However, in light of the *Re D* decision, they are now very firmly on the radar – and will remain so for the foreseeable future as we have no current indication as to when the LPS will come into force.

In *Bolton Council v KL*, SJ Hilder set down, in a helpfully full and detailed judgment, the substantive law relating to deprivation of liberty of 16/17 year olds, the procedural issues (including the complex interaction with procedures available in respect of children simply on the basis of age) and when cases are likely to be suitable for the streamlined procedure – i.e. when they are likely to be suitable to be considered by the courts solely on the papers.

¹ Arianna having been involved in this case, she has not contributed to this note.

The facts of the case are not directly relevant to the wider framing of the judgment, save and to the extent that they related to a young person who was the subject of a care order, had no family contact and would be transitioning to adult services within 12 months. Each of these were considered by her as 'markers' for suitability/unsuitability for the streamlined procedure.

As SJ Hilder noted:

56. The streamlined application was devised to meet the minimum requirements for compliance with Convention and domestic law, by abbreviating the procedural requirements of the standard COP1 application process. The difference between the standard and the streamlined court procedures is the intensity of scrutiny. The COPDOL11 process is very definitely not a 'rubber-stamping' procedure but it relies on judicial antennae alone to identify from paperwork if/where further enquiry is required.

57. The application in relation to KL could have been made on form COP1 to the Manchester hub court. The availability of the streamlined application does not make it inappropriate to start proceedings seeking authorisation of deprivation of liberty by the standard COP1 procedures, even where there is no apparent dispute. Just as judicial antennae may pick up matters which require deeper consideration such that the application is taken out of the streamlined procedure, applicants themselves may form the view that, even without active opposition, arrangements need to be probed more actively than the paperwork procedure envisages. I would be slow to criticise an applicant for making the application by COP1 rather than under the streamlined procedure. In my judgment there is little danger that the workload of the Court will be significantly increased by this approach because the 'streamlined' nature of the COPDOL11 procedure, with the prospect of quicker conclusion and lower costs, will be attractive to over-stretched applicants wherever possible.

58. Conversely, where an application has been made by COPDOL11 but the judge considers that the streamlined procedure is not appropriate, unless there was an obvious disregard for the intentions of the streamlined procedure (for example, a clear dispute, or a failure to undertake the consultations required to identify whether or not there is dispute), I would be slow to criticise an applicant for having used it. The fact that a judge has identified concerns attests to the robustness of the procedure; it does not necessarily mean that the application was wrongly made.

The real question, therefore, is less about whether the COP1 or COPDOL11 form was used, and more about whether the case is suitable then to be run through to its conclusion on the papers. As to this, Senior Judge Hilder noted that the streamlined procedure was not designed with 16/17 year olds in mind, and that such applications are:

60. [...] factually distinguishable from the other cases which pass through the streamlined procedure. The 16 and 17 year olds are at a critical stage of their development and at the unavoidable cusp of transition from children's services to adults' services. That transition is known to be difficult, too often poorly implemented, for young people who lack capacity to make relevant decisions for themselves even when there is no issue of deprivation of their liberty. Where the issue does arise, it is much more common than for other age groups that 'best interest' arrangements are said to require the use of restraint and/or sedation. Not all but many of the 16 and 17 year olds already have a lengthy history of family breakdown, challenging needs and broken placements.

61. The 16/17 year old cohort is also distinguishable from the other cases which pass through the streamlined procedure for the very reason of there being alternative provision for that age group

elsewhere. Outside the Court of Protection, if a 16 or 17 year old is to be lawfully deprived of their liberty, authorisation from a judge of High Court level is required. (In practice, the heavy workload of such cases is usually dealt with by s9 nominated judges.) This would be Tier 3 in the Court of Protection. The obiter comments of the Court of Appeal in *Re X* and more recently the requirements for procedural safeguards set out by the Supreme Court in *Re T* confirm my concern that adopting a paper-based approach for 16/17 year olds in the Court of Protection would be a disparity of approach very difficult to justify.

SJ Hilder then went through a series of factors as indicators of (un)suitability for the streamlined procedure. Starting with care orders, she noted that an extant care order is a marker of unsuitability. Conversely, however, an absence of a care order is not a marker of suitability:

65. A care order is not the only indicator of difficulties to date and legislative overlap. The Court is receiving streamlined applications in respect of 16/17 year olds who are 'looked after children' pursuant to section s20 of the Children Act 1989. The factual background in such applications is often very similar to those in which a care order has actually been made, and the legislative overlap is as complicated.

66. The Court is also receiving streamlined applications in respect of 16/17 year olds who continue to live with their families. The nature of the challenges which lead to care arrangements amounting to deprivation of liberty may be different but the state is still involved in the arrangements. Absence of exercise of formal powers does not eliminate the complex statutory overlap. Often in such cases there is an additional layer of complexity in that care arrangements post-18 will be funded by health bodies instead of or jointly with the Local Authority.

Turning to absence of contact with family members, SJ Hilder noted that:

*68. Involvement of family members may be considered, as it was by Charles J in *Re NRA*, as a source of advocacy for P. Even in circumstances where family members are no longer primary carers of young people, continued contact provides an opportunity for hearing a different view, and its absence indicates total dependence on arrangements made by public bodies. Foster care is a form of local authority provision. An independent advocate would be an outside voice but different in kind to that which family members may raise. In my judgment, when an application concerns a minor, absence of contact with family members is an indication of circumstances which require careful scrutiny and accordingly a marker of unsuitability for the streamlined procedure.*

As regards the imminence of transition:

69. As already noted, transition from children's to adult's services is an unavoidable feature of age. It is often a confusing process with too little 'joined up' working and the risk of decision-making falling between the cracks. Often the process of identifying a post-18 placement is difficult and protracted. It would be unhelpful, ineffective and unnecessarily expensive in time and fees for the Court to authorise arrangements made by one service which do not have the commitment of the other, or to authorise such arrangements only for a very short period in the knowledge that another application will be required very quickly afterwards. In my judgment, the imminence of transition between services responsible for care arrangements is a marker of unsuitability for the streamlined service.

SJ Hilder found that there were particular difficulties in adopting to 16-17 year olds any of the approaches that have been adopted in relation to independent representation of adults the subject of streamlined applications:

*71. The closest family members for a 16/17 year old are likely to be a parent or someone who has exercised a quasi-parental role. It is now clear from *Re D* that a parent cannot consent to*

deprivation of liberty as an exercise of parental responsibility. Where a young person is still living in the family home, parents are likely to be involved in the implementation of the measures which amount to deprivation of the young person's liberty. Where the young person is living elsewhere, it is likely (without necessarily implying any criticism of the parents) that care arrangements at the family home became unsustainable. Either way, it is difficult to see that the parent, however devoted, is sufficiently independent and free of other interests to be able to represent the young person in the proceedings, or that a parent should gain by representative means what they lack in the scope of parental responsibility. Rather, they should have the opportunity of being a party in their own right, or participating in proceedings less formally by permission to attend and be part of discussions, so that they can present their own views.

72. Foster parents, even long-term ones, are not in my view analogous to the "devoted family members" on which Charles J was willing to rely. From the nature of their involvement in a young person's life, and without criticism being implied, they have their own interests in arrangements. They should certainly be consulted but they cannot be considered wholly independent of the public body applicant in a case concerning deprivation of liberty of a young person for whom they care. They are unlikely to be able to address the wider welfare issues, such as transition arrangements.

73. Similarly, an advocate has an important role in articulating a young person's wishes and feelings but is not in a position to bring to bear any scrutiny of the arrangements beyond that which he sees (which may not be very far where, like KL, the person for whom he advocates does not wish to engage.)

74. The resources available for s49 reports are limited, and as a result there is presently a long delay before a streamlined application requiring a s49 report reaches a point where that report can even be commissioned. Delay is particularly inimical where the subject of an application is at a critical stage of their development and at a point of transition between public services.

75. Accredited Legal Representatives are now an available resource, and much valued by the Court. The Law Society Practice Note at paragraph 7 explicitly adopts Charles J's positive view of ALR appointment in streamlined proceedings but at paragraph 10.1 it explicitly cautions against appointment in proceedings "when P is between the ages of 16-18." The reason given for this is "the complexity of the overlapping legislation". The eligibility criteria for accreditation understandably focus on experience of the Mental Capacity Act 2005, with no requirement for any expertise or familiarity with wider issues in respect of minors.

76. The appointment of an ALR is made by the Court from a database according to a 'turntaking' principle which aims to ensure that all ALRs are given an equal share of appointment opportunities. At the moment there is no way of knowing if the ALR at the top of the list for next invitation is "sufficiently experienced in all the relevant frameworks". It would delay matters and be administratively burdensome to request this information and, if necessary, repeat the invitation process with the next in line.

77. Experience since December 2019 has shown that, with the benefit of robust scrutiny by fully informed representatives of P, some of the applications relating to deprivation of liberty of 16/17 year olds throw up very worrying issues in transitional arrangements and in respect of restraint; but others can be finalised by consent quickly. The difficulty is in knowing on first consideration of the COPDOL11 application which route a particular case is likely to follow. (Perhaps most worrying is the fact that the applicant has not identified when making the application issues which subsequently concern the Court.)

78. Those applications which are finalised quickly usually relate to care arrangements which can, and are expected to, continue unchanged beyond the age of 18; and include a clear explanation of / timeline for arrangements for transition to adult services. If both of these aspects are clearly set out in the application papers (bearing in mind the applicant's duty of full and frank disclosure), then I would agree with the Official Solicitor that difficulties with overlapping legislation are unlikely to arise; and with Charles J that an ALR could easily do what solicitors appointed by the OS may do.

79. In the absence of such confirmed information in the application papers, the Law Society's Practice Note is, in my judgment, correct: it will generally be unlikely for the court to appoint an ALR in cases concerning 16/17 year olds. (emphasis added)

SJ Hilder set out a helpful overview of how the court has been – administratively – handling applications to date, and how it will do so going forward, together with an indication of the provisions likely to appear both in an order taking the application out of the streamlined procedure, and the scope of matters to be addressed in further directions once P's representation is secured. She also noted that:

85. When the position is reached that the Court is willing to grant an authorisation and conclude proceedings, the format of order should follow closely the terms of a Re X final order. In particular, the Court will be unlikely to discharge P as a party or the appointment of the Litigation Friend unless there is an agreed person willing and suitable to be appointed as Rule 1.2 representative for P during the review period, to monitor the implementation of the authorised care arrangements, to make an earlier application if it is considered that the authorised care arrangements no longer meet the needs of P, and to provide information for the review.

SJ Hilder concluded by noting that

87. Whilst I am cautious of statements of 'general guidance', each 'best interests' determination falling to be considered on its own merits, I have endeavoured to explain how the Court is approaching a new stream of cases, with the hope of assisting all participants in proceedings before the Court. In short:

- a. the Court is unlikely to consider that the streamlined procedure is appropriate for authorisation of deprivation of liberty in the living arrangements of 16/17 year olds;*
- b. the Court is unlikely to be critical of an applicant for bringing an application for authorisation of deprivation of liberty in the living arrangements of a 16/17 year old either by COP1 application to the appropriate hub court, or by streamlined application to the central registry at First Avenue House. It follows from (a) that the procedure adopted post-issue is likely to be substantially the same. If/when an in-person attended hearing is required, consideration will be given to transfer to a local hearing centre.*

88. I am conscious of the complexities of overlapping jurisdictions and emphasise that nothing in this judgment is intended to interfere with procedures adopted outside the Court of Protection. I am aware that the Family Justice Observatory is considering deprivation of liberty of minors. An opportunity for Court of Protection engagement in that process has been arranged, with the goal of ensuring that overlapping jurisdictions interact in the best possible way for the young people they both seek to protect.

Comment

The Court of Protection – and those having recourse to it to discharge their obligations towards 16/17-year-olds – are going to be stuck with the compromise of the streamlined procedure for quite some time, as was made clear in this exchange between the Chair of the Joint Committee on Human Rights and Michelle Dyson, Director-General for Adult Social Care, Department of Health and Social Care, at [the evidence session](#) for its inquiry into human rights in care settings on 18 May 2022:

Chair: Envisaging when the new system starts and the current system ends, are we talking about months or years? What sort of timeframe is it?

Michelle Dyson: We will announce that. We have this very big consultation running at the moment.

Chair: Sure, but I mean roughly.

Michelle Dyson: I cannot commit. We have to absorb the results of that consultation. It is hundreds of pages.

It is clear from this judgment that SJ Hilder has been distinctly troubled by some of the applications that she has seen (although not, it should be emphasised, this one). In particular, she has been concerned about applications advanced on the basis that there is, in effect, ‘nothing to see here’ – which may, in turn, shed a light on what’s considered to be normal practice. This, in turn, perhaps gives us an indication of the scale of the task that awaits as we move towards LPS implementation. In this regard, watch this space both for an updated version of our guide to judicial deprivation of liberty, and also a guide we are working up on 16/17 year olds and mental capacity (and, in the interim, a [short video](#) by Alex).

Consideration of further evidence in an appeal of a vaccine judgment

MC and AC v A CCG and DC [\[2022\] EWCOP 20](#) (20 May 2022) (Hayden J)

Best interests – Medical Treatment

An appeal of a [vaccination judgment](#) ([\[2022\] EWCOP 2](#)) has resulted in the Court adopting the unusual approach of ordering further evidence before determining the appeal.

In *MC v A CCG* [\[2022\] EWCOP 20](#), there was a dispute between the CCG and DC’s parents as to whether it was in DC’s best interests to be vaccinated against Covid-19. The matter took a significant period of time to come before the court; Mr Justice Hayden was critical of this delay:

9. *No sensible or coherent explanation has been offered, either to me or to Judge Burrows, to explain the extraordinary delay in bringing the matter to Court. The Judge made the following pertinent observations:*

"[5] One issue that I must address before moving on to the substance of this case is delay. There has been a very substantial lapse in time since DC's need for the vaccine was first identified by the CCG and this matter reaching court. Having briefly considered some of the other recent cases concerning the COVID-19 vaccine, this seems to be a common theme. I appreciate there has been an attempt by the CCG and DC's parents to discuss and consult over the vaccine. However, as long ago as February 2021 it was clear that there was a

dispute over this issue. There was then a delay until July 2021 for a review of DC's unvaccinated status. It was not until September 2021 that a best interests meeting was convened. Then there was a further delay until December 2021 until these proceedings were issued.

[6] It seems to me this is unacceptable. If, as the CCG contends, DC is a highly vulnerable person for whom infection with COVID-19 could be extremely serious, then they have a duty to act speedily to protect him. Once it becomes clear there is a dispute between clinicians and the family on an urgent matter over important treatment of a mentally incapacitous adult, an application to the Court of Protection should be brought- and determined- with urgency."

10. As I have stated, it is beyond any contrary coherent argument that DC is within the category of those vulnerable to Covid infection. He was amongst the first cohort to be approached for vaccination. The lengthy and avoidable delay exposed him to risk of harm, including death. It was the responsibility of the CCG to bring the dispute before the Court as a matter of urgency. The delay here was egregious and requires to be identified as such. Whilst there may have been attempts to negotiate with the parents, Judge Burrows was entirely correct to identify a clear dispute by February 2021.

11. At the time of this appeal, i.e., 14 months later, DC has still not been vaccinated. DC has, as I have set out, a profound learning disability. This signals that his rights have properly to be scrutinised and meticulously protected. His condition does not occlude his rights as an autonomous adult. In the negotiations between the doctors and the parents, DC's voice was effectively silenced. In the court process, that is restored through the appointment of the Official Solicitor on his behalf.

Between judgment being handed down by HHJ Burrows and the appeal being heard, DC contracted Covid-19 (although this had not been communicated to the other parties until shortly before the appeal). Hayden J was therefore faced with an appeal where circumstances had changed significantly from the date of the first judgment.

Hayden J held that the appropriate course in these circumstances was to permit DC's parents to obtain fresh evidence. This was in part to address the question of whether vaccination would continue to be of benefit in boosting immunity despite DC's infection.

The criteria in *Ladd v Marshall* for the admission of new evidence were therefore made out. This was notwithstanding the fact that the case for vaccination prior to DC's infection was 'compelling', and that (per Hayden J's earlier judgment in *SD v Royal Borough of Kensington and Chelsea* [2021] EWCOP 14) 'it is not the function of the Court of Protection to arbitrate medical controversy or to provide a forum for ventilating speculative theories'. The unusual approach adopted here is a reflection of the highly unusual circumstances before the court given DC's supervening infection, and is perhaps best seen as confined to the facts of the case.

Vaccination plans and best interests

A Clinical Commissioning Group v FZ and TZ [2022] EWCOP 21 (30 May 2022) (HHJ Burrows

Best Interests - Medical Treatment

Summary

This case concerns FZ, a woman in her 40s of British Muslim and South Asian heritage with learning disability and Down's syndrome. She was cared for by her family who did not consider COVID-19 vaccinations to be in her best interests. With no dispute about her inability to decide the matter herself, the judgment focuses upon whether the vaccinations would be in her best interests.

The judgment contains a helpful summary of the vaccination case law, including *E (Vaccine) v Hammersmith and Fulham LBC* [2021] EWCOP7, *SD v Royal Borough of Kensington & Chelsea* [2021] EWCOP 14, *Re H (a child) (Parental Responsibility: Vaccination)* [2020] EWCA Civ 664, *M v H*, and *P & T* [2020] EWFC 93, and *SS v Richmond upon Thames* [2021] EWCOP 31.

FZ was "extremely clinically vulnerable" and, due to her previous history of refusing vaccines and her hostility and fear of the act of vaccination by injection, a special support plan had been prepared by the CCG. A personal assistant would be commissioned who would befriend FZ over a number of visits prior to the vaccination. Then, on the day, partly through distraction and partly by support, the "vaccinator" would attend and inject her swiftly, essentially before she was able to understand what was happening. No use of physical interventions and restraint was contemplated, beyond the entirely usual holding of the target arm to ensure a safe injection.

On behalf of the family, her sister-in-law put forward a number of objections, the most persuasive of which was that FZ was extremely suspicious of strangers. She did not like doctors or clinicians treating her, and needles. The vaccinations would cause her trauma that would, in the long term, damage trust. In recent years, FZ had been resistant to ear de-waxing, would not tolerate abdominal ultrasound or pressure checks, removed attached equipment placed on her by an anaesthetist who was trying to monitor her chest, and refused to have a vaccination even though it was essential for her to observe Hajj. Days before the hearing she was agitated and responded aggressively when her legal representative visited and was later heard to raise her voice to TZ and say "No" to the proposed conversation with the representative.

The benefits of the vaccine were plain but the difficulty in administering it in a way that is likely to work was immense, and the damage a failed attempt could cause to the relationships within the family was hard to assess. On balance, the court decided that it was not in her best interests to have the vaccination.

Comment

This thoughtful judgment helpfully summarises the case law and current state of the pandemic, with 18.7 million cases in England alone, and 154,000 people having died. It emphasises the lethality of the virus to the unvaccinated and the present reduction in social distancing measures. The facts perhaps illustrate the role of necessity and proportionality when a proposed intervention is against a person's will. Necessity focuses very much on the balance of risk between intervening (in this case by vaccination) and not intervening. Whereas proportionality looks at the way in which a necessary intervention might be undertaken; do the ends justify the means? The person's wishes and feelings play a key role when considering proportionality and sometimes, like here, those wishes and feelings (whether expressed verbally or through behaviour) can ultimately at least water down if not trump the necessity to intervene.

Brain stem death

Barts Health NHS Trust v Hollie Dance, Paul Battersbee and Archie Battersbee [2022] EWHC 1435 (Fam) (13 June 2022) (Arbuthnot J)

Serious Medical Treatment

Summary

This case concerns Archie Battersbee, a 12 year old boy, born on 10th March 2010. The case concerns two applications by Barts Health NHS Trust: the first was for the Court to make a declaration that Archie is brain stem dead and that he was dead on a particular date; the second sought a declaration that it was not in Archie's to continue to receive mechanical ventilation. Both applications were opposed by Archie's parents.

Archie's family has been granted permission to appeal the first instance judgment.

On 26th April 2022, the Trust had made an application to facilitate Archie's undergoing brain stem testing in accordance with the Academy of Medical Royal Colleges' 2008 Code of Practice for the Diagnosis and Confirmation of Death ("the Code of Practice"). His parents had refused to give their consent to the test. Arbuthnot J granted the Trust's application on 13 May 2022.

On 16 May 2022, two independent attempts were made but the Code of Practice test could not be administered. This presented an difficulty in the court's final consideration, as the Code of Practice test is the approved way to show death by neurological criteria ("DNC") and the witnesses called said they had never had to consider whether a patient was dead without reliance on the test. Further MRIs were ordered on the 27th May and performed in light of the inability to carry out the brain stem test.

During the final hearing, Archie's parents raised preliminary issues that the scans of Archie's brain and spine produced by independent specialist interventionist were not images of Archie but of someone else, and that the hospital was purposefully starving Archie. Both issues were resolved in favour of the Trust with Mrs Justice Arbuthnot stating at [47-48]: "*The two issues raised show clearly the lack of trust the family has in the very experienced clinicians caring for Archie. [...] We can all understand on a human level the mother's desperation, but I did not accept that these experienced doctors were not worthy of her trust.*"

In considering the substantive application, the court established the test of whether Archie can be considered 'brain dead'. Arbuthnot J accepts that the test for death is settled per *Re M (Declaration of Death of Child)* [2020] EWCA Civ 164 and *Airedale NHS v Bland* [1993] AC 789. The court also considered that it should approach the question of whether the criteria were met with 'anxious scrutiny,' but the relevant standard was one on the balance of probabilities, and no best interests analysis is appropriate. The court considered that 'anxious scrutiny' is particularly apposite where the brain stem test could not be used to determine death. (para 159)

Arbuthnot J ruled that Archie died at noon on 31 May 2022:

179. *It is clear from the anxious and careful scrutiny of all the evidence including from clinicians with different specialisms from five separate hospitals that tragically on the balance of probabilities, Archie is dead..*

180. *I find that Archie died at noon on 31st May 2022, which was shortly after the MRI scans taken that day. I find that irreversible cessation of brain stem function has been conclusively established.*

Mrs Justice Arbuthnot consequently gave permission to cease mechanical ventilation:

181. *I give permission to the medical professionals at the Royal London Hospital (1) to cease to ventilate mechanically Archie Battersbee; (2) to extubate Archie Battersbee; (3) to cease the administration of medication to Archie Battersbee and (4) not to attempt any cardio or pulmonary resuscitation on Archie Battersbee when cardiac output ceases or respiratory effort ceases."*

Mrs Justice Arbuthnot chose to also make a ruling on his best interests that that the burdens of his treatment outweigh the benefits:

195. *In all the circumstances, on balance, I find that the burdens of the treatment and his condition along with the total lack of a prospect of recovery outweigh Archie's Christian beliefs and the benefits to him of a continuing life on mechanical ventilation for a few more weeks or months with all the other procedures that that entails.*

196. *On balance, had I not made the declaration set out at paragraphs 180 to 182 above I would have found that it was not in Archie's best interests for him to continue medical treatment in the form of mechanical ventilation and the ancillary care which accompanies the ventilation.*

PROPERTY AND AFFAIRS

Capacity to make an LPA

The Public Guardian v RI and others [2022] EWCOP 22 (7 June 22) (Poole J)

Lasting Powers of Attorney - Capacity

Summary

In *The Public Guardian v RI & Ors* [2022] EWCOP 22, Poole J had to decide whether the donor of an LPA executed in 2009 had had capacity to execute it. As he noted, whilst it is not uncommon for courts to determine this question, there is a dearth of reported judgments, with the exception of the extract of a judgment of former Senior Judge Lush in *Re Collis*.

The application was brought by the Public Guardian, who appeared by Counsel, and with the respondents (the three attorneys and the wife of one of them) being unrepresented. The donor himself was neither a party nor represented.

At paragraph 16, Poole J directed himself that the relevant information in relation to the execution of an LPA is:

- a. The effect of the LPA.
- b. Who the attorneys are.
- c. The scope of the attorneys' powers and that the MCA 2005 restricts the exercise of their powers.
- d. When the attorneys can exercise those powers, including the need for the LPA to be executed before it is effective.
- e. The scope of the assets the attorneys can deal with under the LPA.
- f. The power of the donor to revoke the LPA when he has capacity to do so.
- g. The pros and cons of executing the particular LPA and of not doing so.

On the facts of the case, Poole J found that the donor had not had capacity to execute the LPA in 2009, as required by s.9(2)(c) MCA 2005, such that, applying s.22(2)(a) MCA 2005, one of the requirements for the creation of an LPA had not been met. He therefore directed the Public Guardian to cancel the registration of the LPA. However, as there was no suggestion that any of the attorneys knew that the donor had lacked capacity, or otherwise acted improperly, Poole J was clear that the protection under s.14 MCA 2005 applied to them.

Poole J also identified at paragraph 27 that:

Ideally, where there is a dispute about past capacity which the court is required to determine, it would be helpful to have evidence as to,

a. *The certificate provider's experience - in particular in making a sufficient assessment of the capacity of a prospective donor who is known to have a learning disability or other impairment which might affect their capacity to execute an LPA – their usual practice or their specific recollections of the making of the LPA;*

b. *Evidence from carers and family members relevant to P's capacity to execute an LPA at the relevant time and to any changes in P's condition, relevant to capacity, over time.*

c. *Medical evidence, capacity assessments, assessments for benefits, records from carers or activity centres, or other professional evidence roughly contemporaneous with the relevant date when the LPA was executed.*

d. *An assessment by a suitably qualified and experienced person of P's current capacity and reasoned opinion as to their capacity to execute the LPA at the relevant time, such opinion being informed by review of relevant medical records, contemporaneous assessments, and the evidence from carers and family members.*

Comment

On the face of it, this is a useful confirmation of the component parts of capacity to execute an LPA, as well as the evidence required in the event that the court is to be asked to determine whether the donor had the capacity at the material time. It does not resolve the question of whether it is possible to have capacity to execute an LPA even without having capacity to make all the decisions that might be encompassed within the scope of the power granted by the attorney, but it is entirely consistent with such an approach.

It is not entirely clear from the judgment quite how forceful the respondents actually were in seeking to uphold the validity of the power or whether (as is, in reality, more often their concern) they were seeking to make clear that they had done nothing wrong. In any event, they are not recorded as having advanced any legal arguments, and it would appear that Poole J largely took his lead from the submissions of Counsel for the Public Guardian (see paragraph 16).

In the circumstances, therefore, it is perhaps important to note three assumptions in the judgment of Poole J which require unpacking – not least because most or all of them we anticipate are so deep-rooted as never to be subject of question.

The first is the assumption that the MCA principles applied in retrospect: see paragraph 12, where Poole J recorded this, although he noted (at paragraph 12) that the court would “*have regard to all the evidence relevant to capacity at the material time, including evidence of matters that have come to light subsequent to the making of the decision in question.*”

The second, linked, is the assumption that the burden of proof lay on the Public Guardian, “*who allege[d] that RD did not have capacity to execute the LPA in 2009*” (paragraph 27), although, in deciding whether or not to seek more evidence as to the donor’s capacity in 2009, Poole J also noted that the approach of the Court of Protection was “*more inquisitorial [...] than adversarial*” (paragraph 18).

The third was that the certifier (in the instant case, a legal executive) had assessed and considered the donor's capacity at the point of certification.

As to the first of the assumptions, this is in line with the decision of then Senior Judge in *Re Collis*, although it is not clear whether Senior Judge Lush had received any submissions upon the application of the principles contained in s.1 MCA 2005.² However, the assumption does not sit easily with the plain language of the Act itself. Section 1(2) is framed in the present tense: "[a] person must be assumed to have capacity unless it is established that he **lacks** capacity" (emphasis added). Similarly, the "support principle" in s.1(3) is framed in the present tense: "[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." Given the framing of these principles – both using the present tense – they must either both apply in retrospect or only to a current assessment of capacity. In this regard, it is therefore relevant to observe that applying the support principle in retrospect seems to be an impossible task. The time for giving such support must logically have passed, as the person has made the 'decision' in question; the real issue is whether, in fact, the person had capacity to make the decision at the time.

As to the second of these assumptions (as to the burden of proof), there are four points to note:

- a. Insofar as a statutory burden of proof can be identified, it can only flow from the wording of s.1(2). However, as noted above, this is framed in the present tense. The statutory burden undoubtedly applies when the court is making a declaration of capacity for purposes of s.15(1)(a) MCA 2005, this is also a provision framed in the present tense, i.e. whether a person "has or lacks" capacity to make the decision specified in the declaration;
- b. By contrast, a court making a determination under s.22(1)(a) MCA 2005 is undertaking a different task.³ Section 22(1)(a) contains no statutory burden, but simply empowers the court to determine "any question relating to [...] whether one or more of the requirements for the creation of a lasting power of attorney have been met." Then-Senior Judge Lush in *Re Collis* proceeded on the basis that the burden that remained on the person asserting incapacity, citing the pre-MCA case of *Re W (Enduring Power of Attorney)* [2001] 1 FLR 832. However, on a proper analysis, that earlier decision turned on the statutory wording of the Enduring Powers of Attorney Act 1985. The 1985 Act did contain a statutory (legal) burden, in the context of a

² Interestingly, in his 2003 [memorandum of evidence](#) to the Joint Committee on the Draft Mental Incapacity Bill, then Master Lush seemed to take the view that the principles operated in retrospect, and that this could cause problems.

9. Similarly, clause 3 restates the common-law principle that "a person must be assumed to have capacity unless it is established that he lacks capacity," but it over-simplifies the matter, and potentially favours abusers by not allowing the burden of proof to shift in appropriate cases.

10. For example, if an 85 year old woman with vascular dementia gives a door-to-door salesman, whom she has never met before, a cheque for £5,000, the onus should shift to him to prove that she had the capacity to understand the nature and effect of her actions when making a gift of that size, rather than there be an automatic presumption that she was capable of making the gift.

³ A point identified of his own motion, it appears, by Poole J in *RI*: see para. 11 "[u]pon any finding that RD lacked capacity to execute the LPA the court should record its determination and must then direct the Public Guardian to cancel the registration of the LPA. I am not persuaded that a declaration as to capacity under s.15 of the MCA 2005 is also required – what is required is a determination of past capacity to execute the LPA."

situation where the power to register powers of attorney was vested in the (old) Court of Protection. The situation is now different, not least because registration now lies with the Public Guardian. When an application has been registered the plain language of s.22(2)(a) empowers the court to determine any question relating to whether one or more requirements for the creation of an LPA have been met. There is no reference in s.22(2)(a) (as there was in relation to the EPA provisions considered in *Re W*, or in relation to the registration requirements in Sch.1 to the MCA 2005) to any person or body being satisfied of any matter;

- c. If that is the case, therefore, and the MCA in fact lays down no statutory or evidentiary burden in relation to the past capacity to execute an LPA, what approach should be adopted? This is not a question which appears to have been addressed in any of the material relating to the pre-history of the MCA 2005, nor in any reported case determined under the MCA 2005. Should the situation be seen as being akin to contract, where the burden is conventionally understood to lie on the person asserting (and hence relying upon) incapacity? Or is it akin to wills, lifetime gifts and (as Alex has suggested [here](#)), advance decisions to refuse treatment? In relation to these situations, the starting point is that the person is to be presumed to have had capacity. However, if proper doubts have been raised that the person lacked the relevant capacity, then the evidential burden shifts to those person(s) seeking to establish that the relevant capacity was present. Although there is case-law suggesting that the contractual approach to incapacity applies to agency arrangements, there is no definitive case on the question, and the (limited) case-law that there is does not point in all one direction.⁴ Further, just as the approach to capacity set down under the MCA 2005 only applies for purposes of the Act (see s.2(1) MCA 2005), it is equally the case that common law approaches do not automatically govern the approach of the Court of Protection, a creature of statute;
- d. Whilst in very many cases, the court is likely to be much more concerned with the current conduct of the attorney(s) than with whether the donor had capacity to execute the power, it may be that there will be a case in future in which the assumption made by Poole J will be tested.

The last assumption made by Poole J relates to the task of the certificate provider: the judgment gives the impression that he understood that the provider's task is to assess and certify the donor's capacity: see e.g. paras 27 and 32. The assumption is widespread, but the Ministry of Justice has recently made clear that this is both wrong, and something that they do not intend to change. In its [response](#) to the 2021 [consultation](#) on modernising LPAs, the Ministry of Justice noted as follows:

77. Turning back to the responses that said that the role of the certificate provider is to assess the donor's mental capacity; this is incorrect as mental capacity should be assumed under the MCA unless there is evidence to indicate otherwise.

78. A number of responses made reference to this with the response from the Law Society, in particular, stating this position "is wrong and should be corrected". Their view was that the role of the certificate provider should be clarified to say that it is an assessment of capacity, with a requirement for the certificate provider to declare that they understand their role and that they may be called before the Court of Protection.

79. The role of the certificate provider under the MCA is to confirm three things at the time of execution that mean the LPA can be created: 1. That the donor understands the LPA 2. That there

⁴ For a discussion, see Eliza Varney, 'Agency contracts and the scope of the incapacity defence in English contract law: a topic too hot to handle?' 2020 Journal of Business Law 5, pp. 382-402.

is no fraud or undue pressure on them to make the LPA 3. That there is no other reason the LPA cannot be executed

80. Importantly, the first requirement is not that the donor has mental capacity to execute the LPA but that the donor understands the LPA. It is correct that a donor cannot execute an LPA if they do not have mental capacity. It is also the case that mental capacity should be assumed without evidence to the contrary and that the ability to understand information forms part of the capacity assessment.

81. This means the certificate provider should have a conversation with the donor about their LPA to determine the donor's understanding of the document they are creating at, or as close to, the time of execution as possible. If the certificate provider believes the donor does not understand the document, they should not sign the certificate. While a lack of understanding could indicate a lack of mental capacity, the belief that the donor does not understand the document is enough on its own that the certificate provider should not sign the certificate to confirm the LPA can proceed. A capacity assessment is not needed for a certificate provider to refuse to sign the LPA.

82. In their response, the Law Society suggested determining a position on the donor's understanding "requires some positive step to be taken, such as asking relevant questions. It is not possible to comply with this requirement by simply relying on the presumption of mental capacity, without asking questions which might rebut that presumption". The government agrees with this. It is for this reason we are considering the use of example or set questions for the certificate provider, as well as the ability for the certificate provider to record and provide their assessment to OPG, particularly where they have concerns. This idea has featured in both our ongoing workshops with our stakeholder working group and the workshops that accompanied the consultation.

83. Providing additional support and guidance to certificate providers on their role to both protect the donor and facilitate their rights is an important part of the reforms we want to take forward. However, it does not require changes to legislation to make this happen and so was not featured heavily in the consultation.

The government will provide greater clarity around the role of the certificate provider in assessing the donor's understanding of the LPA and protecting against fraud, abuse and undue pressure. It intends to do this by giving additional guidance and support to those carrying out this role and providing a way to raise concerns directly with OPG.

It may be that the Government, by seeking to maintain the current position of certification of understanding only is trying to maintain a very low 'capacity' threshold for the formal requirements of execution of an LPA. That is undoubtedly a laudable goal. However, if there is, in fact, no contemporaneous **evidence** of the person's capacity to execute it, it might be thought that it is simply continuing to store up trouble of the kind that arose in the case before Poole J. It would also mean that the Public Guardian continues to be required to 'gate-keep' as regards registration – which requires that, substantively, that the donor has the capacity to execute the power – on the basis of a certificate which does not actually address this question in terms. Indeed, a certificate provider could (for instance) properly assert that the donor had capacity to understand the LPA, in circumstances where donor could not use and weigh the consequences of making one, and therefore did not, in fact, have capacity to execute it.

As discussed here, a [Private Members Bill](#) on LPAs is to be introduced by Stuart Metcalfe MP. It is unclear at the time of writing whether this Bill may, in fact, be a vehicle supported by the Government,

by which some or all of the proposals advanced by the Ministry of Justice are to be taken forward. In any event, it might be thought that the Bill could provide an opportunity for the question of what, precisely, the certifier should be doing to be revisited.

Remuneration for non-professional deputies

Riddle v Parker Rhodes Hickmott Solicitors [2022] EWCOP 18 (3 May 2022)(Hayden J)

Deputies – Financial and property and affairs

Summary

In *Riddle v Parker Rhodes Hickmott Solicitors* 2022 [EWCOP] 18, Hayden J refused permission to appeal an order refusing to reconsider an order appointing a deputy in so far as it related to his remuneration.

The original order had provided for remuneration by way of fixed costs, namely those set out in PD19B at the lower local authority rates. The deputy contended he should have his costs assessed alleging that the estate was complex to administer.

The judgment helpfully sets out the statutory and case law framework both for remuneration and reconsideration of orders. Hayden J considered that when reconsidering the order, HHJ Hilder had fully taken into account the deputy's arguments as to complexity and saw no reason to give permission to appeal.

Comment

This case sets no precedent but is useful not only for its reminder of the relevant law and procedure but of the necessity of deputies wanting higher rates to secure them on appointment and, perhaps also, the reluctance of the courts to allow non-professional deputies more than local authority rates.

PRACTICE AND PROCEDURE

The World Congress on Adult Capacity: a dispatch

For the first time since the before-times, I found myself in mid-June 2022 heading on a train to an actual conference, with real people. Three days later, I returned from the 7th World Congress on Adult Capacity mentally over-stimulated and physically exhausted, having been entirely immersed in capacity related matters of every hue. The bald numbers from the Congress would be impressive under any circumstances, but even more so in the present state of the world: 274 participants from 30 countries, participating in 28 sessions. Some of those sessions were plenary, including an uncompromising⁵ plenary presentation by the Vice-Chair of the UN Committee on the Rights of Persons with Disabilities, Professor Jonas Ruškus, and a tour de force application of the Kuhnian model of scientific progress to the world of capacity by Professor Wayne Martin – the text of which is available [here](#). The opening speech by the indefatigable President of the organising committee (and mainstay of our Scotland Report), Adrian Ward, can be found [here](#); and his closing remarks [here](#), generously – and rightly – thanking the other members of the organising committee and supporting cast (including the other mainstay of our Scotland Report, Jill Stavert, who led on the academic programme). The majority of the sessions took place in parallel and, even more acutely than usual, I suffered conference cloning regret syndrome. Even though the conference organisers took full advantage of technology to enable distribution of materials, there is no substitute to hearing the presentation live, or to participating in discussion in the immediate aftermath.

We hope to bring you more coverage of the Congress next month, but for now, four personal observations must suffice.

First: perhaps because of the mind-set of those attending, perhaps because of the particular journey that I took through the different sessions, or perhaps because of the stage of the journey that we are now at, it was striking how, whilst the CRPD permeated all aspects of the conference, the permeation was one focused on practical, rather than theoretical matters. Debates about the validity or otherwise of the concept of mental capacity, for instance, placed squarely on the table by Professor Ruškus, did not feature in the remainder of the conference sessions that I attended, whilst detailed and gritty discussions about how best to support decision-making abilities, and to reach the ‘right’ decision for the person otherwise, did. To single out as an example, perhaps invidiously, I would note [I-Decide](#) project run by Support Girona, who have set up a fascinating model for supported decision-making agreements including not just the person and their supporter, but also a facilitator. This is not merely a theoretical model, but one developed within the framework of existing law.

Second: I was reminded, again, how legal capacity has a very different place within civil law jurisdictions to that which it has in common law jurisdictions. In (very) crude terms, it seems to me that whereas

⁵ But on one view slightly surprising, in that he singled out Ireland (alongside Peru, Colombia and Costa Rica) as an example of a jurisdiction closer to compliance with Article 12 CRPD. Whilst the new Assisted Decision-Making (Capacity) Act 2015, yet to come into force, undoubtedly tracks much closer to compliance with the letter of Article 12(4), it is still founded upon a functional model of mental capacity.

legal capacity is a clearly, and expressly, identified concept within the grounding codes of civil law jurisdictions, identifying the place of legal capacity is a much more piecemeal affair within common law jurisdictions.⁶ Hence (and in equally crude terms) it seems to me the importance placed by activists upon reforms in civil law jurisdictions which lead to amendments in the relevant code as to the meaning of legal capacity (and when a person can be ‘incapacitated’), and the scepticism of common lawyers that those amendments give the full picture of what happens in situations where a person is temporarily or permanently cognitively impaired to the point that they cannot make (or communicate) a decision.

Third: there was, for me, a running theme implicit in many of the discussions and presentations of the impossibility of legislating for the qualities that are required for the delivery of support, through whatever legal mechanism is put in place. Whilst I was unable to attend the session at which he spoke, Graham Morgan, a member of the Executive of the Scottish Mental Health Law Review⁷ has previously put it very vividly – how can you legislate for love? And if you cannot legislate for such qualities, is time and effort better spent on supporting the development of those qualities amongst those providing support, or on changing the wording of the law?

Fourth: the organisers are to be heartily congratulated on having pulled off against overwhelming odds a superb Congress, and for both laying down a real gauntlet to their successors in Argentina and the tools to support them to take up that challenge.

Alex Ruck Keene

National Deprivation of Liberty Court

More details have been released on the new National Deprivation of Liberty Court at the Royal Courts of Justice, which will deal only with applications for deprivations of liberty in relation to children:

The President of the Family Division today announces the launch of a National DoLs (Deprivation of Liberty) court on 4 July 2022. The court will deal with applications seeking authorisation to deprive children of their liberty and will be based at the Royal Courts of Justice under the leadership of Mr Justice Moor.

From 4 July 2022, all new applications seeking these orders will be issued in the Royal Courts of Justice (RCJ).

The new court will be supported by two Family High Court/deputy high court judges each week and a dedicated administrative team based in the RCJ. Cases will either be retained for hearing within the National DoLs Court or will be returned to circuit, based on agreed criteria.

It is anticipated that, subject to judicial direction, cases will be heard remotely.

⁶ An example of this, indirectly, can be found in the fascinating table produced by Rosie Harding in her chapter in her new co-edited volume, “Supporting Legal Capacity in Socio-Legal Context (Hart, 2022), where she identifies 16 different supported and substituted decision-making frameworks in English capacity law. And that list only addresses statutory frameworks, to which it would be necessary to add all the different ways in which the common law addresses the consequences of cognitive impairments.

⁷ A project which loomed large in the work of the Congress, not least through the visible and highly engaged presence of its chair John, now Lord, Scott QC.

Sir Andrew McFarlane, President of the Family Division said:

'This is important, sensitive work and the continued growth in the number of these applications to the family courts requires the creation of a dedicated listing protocol. The national DoLs court will provide the necessary expertise in dealing with these matters. I am grateful to Lisa Harker and the Nuffield Family Justice Observatory who have kindly agreed to conduct research which will enhance our understanding of the nature of this work.'

THE WIDER CONTEXT

Draft Mental Health Act Bill published

Following a commitment given in the Queen's Speech in May 2022, a draft [Mental Health Bill](#) has been brought forward today (27 June 2022). It contains 49 clauses and 3 schedules, accompanied by [explanatory notes](#) and an [Impact Assessment](#).

Its main elements are:

- Amending the definition of mental disorder (for civil detentions only) so that people can no longer be detained solely because they have a learning disability or because they are autistic. The draft Bill also includes the proposal to require integrated care boards in England to establish a (consent-based) register of autistic people and those with learning disability who have 'risk factors' for detention under the civil parts of the Mental Health Act 1983 ('MHA 1983'), and for this register to be taken into account in commissioning and market function decisions;
- Changing and tightening the criteria needed to detain people under the civil sections of the MHA 1983 (and to place patients on CTOs), as well as tightening the definition of 'appropriate medical treatment' to seek to reinforce the requirement that such treatment has a reasonable prospect of alleviating or preventing the worsening of the disorder or manifestation of the disorder – i.e. (implicitly) addressing the concept of therapeutic benefit;
- Shortening s.3 to 3 (from the current 6) months at the first instance, then 6 months, then 1 year at a time (and making equivalent changes to the position in relation to guardianship);
- Introducing a statutory care and treatment plan for all patients in detention (other than on very short term emergency provisions) as well as subject to guardianship, to be produced – where possible – with the patient. This brings England into line with Wales; the operation of such plans are to be monitored by the hospital managers;
- Changing the approach to treatment under Part 4, by creating an approach that functionally mirrors the approach to decision-making under the MCA 2005, including provision for consideration of advance decisions to refuse treatment. The approach mirrors, but does not entirely replicate, the MCA approach, as there are still 'let outs' for treatment against a person's will, framed by reference to the nudge theory of making it more burdensome for a clinician to do so. There is no statutory provision for advance choice documents, but their principles are incorporated into the provisions of new clauses 56A and 57A. The period during which it is possible to treat on the basis of one clinical opinion alone is also being reduced from 3 months to 2. It will also no longer be possible to administer treatment under the 'urgent' provisions of s.62 to a patient who is capaciously/competently refusing it. The explanatory notes contain a helpful table of the implications of the change.
- Giving patients better support, including offering informal patients the option of an independent mental health advocate (already the position in Wales); and allowing patients to choose their own 'nominated person', rather than have a 'nearest relative' assigned for them. Where no nominated person has been appointed, and the patient currently lacks capacity (or for a child, competence), there are provisions to enable the AMHP to appoint one;
- Tightening the rules around CTOs, including the requirement for the appointment of a community clinician and liaison between the community and the responsible clinician, and

enabling the Tribunal to make recommendations that the responsible clinician reconsiders conditions;

- Introducing a 28-day time-limit for transfers from prison to hospital for acutely ill prisoners (subject to an ‘exceptional circumstances’ let-out) and ending the temporary use of prison for those awaiting assessment or treatment.
- Introducing a new form of supervised community discharge. This will allow the discharge of restricted patients into the community, with the necessary care and supervision to adequately and appropriately manage their risk.
- Increasing the frequency with which patients can make appeals to Tribunals on their detention and provide Tribunals with a power to recommend that aftercare services are put in place;
- Tidying up the perennial problems in relation to determination of ordinary residence for purposes of s.117 MHA aftercare.

More will be forthcoming here as I have the chance to dig further into its detail, but a number of key points merit immediate emphasis.

First, this is draft legislation which amends the MHA 1983. This is in line with the approach of the [independent Review](#) chaired by Sir Simon Wessely, which deliberately took an approach of modernising the MHA 1983, rather than attempting to start again from a blank sheet of paper as has happened (for instance) in Northern Ireland in the form of the Mental Capacity Act (Northern Ireland) 2016. Some might say that the amending approach is underwhelming; others might say that it represents realism. As the former legal adviser to the Review, I need:

- to declare an interest;
- to say that it seems to me that there some frequently underestimated merits to proceeding with due caution in respect of legislative reform in this area;⁸ and
- to express regret that the Northern Ireland legislation (‘fusing’ mental health and mental capacity legislation) is moving sufficiently slowly towards implementation that, contrary to the hopes of many, it has not been possible to learn lessons from it within this reform cycle.

Second, and crucially, the draft legislation is going to be subject to pre-legislative scrutiny by a joint Parliamentary committee, anticipated to review the Bill and report in late autumn. The Government intends then to make such amendments as are required to respond to the recommendations of the committee with a view to introducing the Bill in 2023. The timeframe thereafter starts to sound long, with full implementation to be achieved by 2030-2031. We might anticipate that the pre-legislative scrutiny committee will want to examine the timeframe for implementation carefully, to see whether it is striking the right balance between ensuring implementation is effective and allowing too much more water to go under what is roundly recognised to be a bridge in need of some considerable upgrading.

Third, the draft legislation adopts many, but not all, of the recommendations of the independent Review. Even where it does not adopt those recommendations expressly (as with the recommendation to place principles on the face of the Act), it can be seen in many cases to have ‘internalised’ those recommendations through the measures that it introduces to push practice towards greater respect for the rights, will and preferences⁹ of those subject to the Act. Nonetheless, we might

⁸ See also in this regard the Review’s approach to the question of whether non-consensual treatment or admission is ever compliant with international human rights norms at Appendix B of its report, an approach I would say remains valid despite the passage of nearly three further years since the report was published.

⁹ A term that I am deliberately drawing from Article 12 (4) of the Convention on the Rights of Persons with Disabilities, given the direct implications of the MHA 1983 for the legal capacity (i.e. the extent to which their decisions are viewed as determinative) of those falling within its scope.

anticipate that the starting point for the pre-legislative scrutiny committee will be to examine why measures recommended by the Review have not found their way into the draft Bill, and to stress-test the reasoning for this. In this regard, and again declaring an interest from my role on the Review, I am bound to say that I hope that particular attention is paid to the position in relation to the role of the Tribunal in relation to treatment challenges, as this is notably absent from the draft Bill, but featured significantly in the Review's thinking as a safeguard which, by its very existence, would help guide clinicians to proceeding in line with their patient's will and preferences.¹⁰

Fourth, in one crucial respect, the draft Bill introduces a measure that was specifically **not** recommended by the Review, namely the removal of those with learning disability and autism from the scope of detention under s.3 MHA 1983. Whilst coming from an entirely legitimate and understandable desire to try to stop the inappropriate detention of people with these conditions, for my part I have grave doubts that, in isolation, this change would achieve this as opposed to leading to the use of an alternative framework (the Mental Capacity Act) to authorise detention of those in crisis. The Bill includes some measures which might potentially alleviate this in the form of a 'register' for those autistic people or people with learning disability at risk of civil detention.¹¹ However, a serious discussion is needed, and I would hope can take place during pre-legislative scrutiny, as to whether such would actually achieve the goal being sought – and what further measures (for instance amendments to the MCA 2005) might be required to stop Rumsfeld-ian known unknowns from coming to pass.

Fifth, it is impossible to escape the irony of this draft Bill being published within a week of the Bill of Rights Bill, reflecting as it does a serious policy commitment towards greater promotion of the human rights of those within its scope. It might be said that the Bill is doing 'the right thing' in terms of making the promotion of those rights a matter for Parliament, but in many ways, this Bill is enabling Parliament to play 'catch-up' to understandings of rights in this area developed, in significant part, by the courts.¹² It may also be appropriate here to set out again how the [Review](#) identified how human rights operate in this area:

Knowing an individual's rights in specific circumstances should be straightforward. The difficulty comes when there is more than one right involved (e.g. the right to liberty versus the right to life) or when rights of others may conflict with the rights of the patient. Here we are required to strike fair balances, using the recognised concept of proportionality. Any government, or other body, must respect the rights of those in whose lives it sanctions intervention. At the same time, it may have other duties. It may be required to protect the lives of those contemplating serious self-harm or suicide. It must have regard to the safety of any others where there is a reasonably probable consequence of what a patient might do. These sorts of issues are the justification for the compulsive powers the state authorises and uses in this field. Our position is those interventions must be the least invasive or restrictive required to enable the state to fulfil its duties. An approach which focuses solely on the rights of one specific group can never be sufficient for a state concerned for the rights and safety of all.¹³

¹⁰ Slightly curiously, the Impact Assessment notes (at para 81) that "[t]he Government proposes to allow the MHT to review the patient's CTP where concerns have been expressed."

¹¹ Although, being consent based, it is not immediately obvious how this would benefit those whose conditions have a profound impact upon their decision-making abilities.

¹² Amongst other examples are the decisions in *X v Finland*, making the clear the importance of procedural safeguards in relation to involuntary treatment and *Rooman v Belgium*, emphasising the requirement of the link between detention and the availability of treatment with a therapeutic benefit.

¹³ See also the section in the Review report on "How we are meeting our human rights obligations"

Put another way, it might be said that human rights arguments assist everyone – including clinicians – to navigate the ethical dilemmas that are involved in respecting rights, will and preferences in the presence of mental disorder.¹⁴

Sixth, the changes proposed in the draft Bill, for instance in relation to the detention criteria, as well as learning disability and autism, will increasingly cement a distinction between ‘civil’ and ‘forensic’ patients. It might be thought that this is a reflection of the different purposes that the MHA 1983 is playing in these two contexts, but this is likely (and rightly) to be something that is a focus of scrutiny at the pre-legislative stage.

Seventh and finally, all the law reform in the world can only go so far towards securing actual respect for rights, will and preferences – it is, ultimately, impossible to legislate for actual respect, which reflects the qualities of those charged with discharging duties and power under the Act. And without commitments to change, including financial commitments, legislative change will fall upon very stony ground. This was a central theme of the Review, and it is incumbent upon all those concerned with securing meaningful change in this area to keep banging this drum.

The ‘human element’ in the social space of the courtroom: framing and shaping the deliberative process in mental capacity law

The recent article of Dr Camilia Kong, Rebecca Stickler and colleagues ‘[The ‘human element’ in the social space of the courtroom: framing and shaping the deliberative process in mental capacity law](#)’ raises a number of interesting and thought-provoking questions about how decisions are made in the Court of Protection. The paper’s abstract summarises its goals:

The context- and person-specific nature of the Mental Capacity Act 2005 (MCA) in England and Wales means inherent indeterminacy characterises decision-making in the Court of Protection (CoP), not least regarding conflicting values and the weight that should be accorded to competing factors. This paper explores how legal professionals frame and influence the MCA’s deliberative and adjudicative processes in the social space of the courtroom through a thematic analysis of semi-structured interviews with legal practitioners specialising in mental capacity law and retired judges from the CoP and the Courts of Appeal with specific experience of adjudicating mental capacity disputes. The concept of the ‘human element’ offers important new insight into how legal professionals perform their roles and justify their activities in the conduct of legal proceedings. The ‘human element’ takes effect in two ways: first, it operates as an overarching normative prism that accounts for what good practice demands of legal professionals in mental capacity law; secondly, it explains how these professionals orientate these norms in the day-to-day conduct of their work. The ‘human element’ further presents challenges that demand practical negotiation in relation to countervailing normative commitments to objectivity and socio-institutional expectations around professional hierarchies, expertise, and evidential thresholds.

There was consensus among participants as to what the ‘ideal’ was for professionals working in the Court of Protection:

Most participants identified that integral to the effective performance of their professional roles is meaningful communication with all parties and the adoption of a collaborative, as opposed to

¹⁴ For very practical examples of this, see the work of the British Institute of Human Rights, in particular their toolkit for embedding human rights in Mental Health Services

adversarial or aggressive, approach to professional practice. This requirement was linked to a commonly articulated account of CoP cases as

'... not about anyone winning or losing' (LP40), but 'looking forward, and looking for solutions' (LP27), and asking 'what's your destination? And then let's signpost the right route together' (LP13).

The necessity of this approach was connected to the messiness of, and difficulties within, personal and professional relationships seen as intrinsic to mental capacity law cases. This, coupled with the discretionary exercise demanded by the MCA, risks 'battlelines' being drawn with each party fiercely defending what they strongly consider to be P's best interests and rejecting, doubting or minimising any contrary positions.

A number of professionals identified that, through dialogue and collaboration, battlelines can be eroded, re-positioned or relaxed, and people can ideally be brought together with a shared objective of finding the right outcome for P. This could make the CoP better able to obtain a comprehensive, truer understanding of P's values with all different 'voices' being heard. Participants also highlighted the skills and character traits of empathy, trust, honesty, sensitivity, and rapport building as being crucial to fostering an inclusive, conciliatory and collaborative approach.

Participants also noted:

- The lack of training for those interacting directly with people lacking capacity, and for speaking to them about sensitive issues;
- The importance of empathy and emotional intelligence, particularly in considering the situation from the perspective of P;
- The common view that 'foregrounding' P (understanding and acting in line with P's wishes as much as possible) was extremely important in both health and welfare and property and affairs; however, it often proved difficult in practice to articulate P's values in the same way as their wishes and lawyers representing a litigation friend may force those acting for P to express views directly contrary to P's in court, which can be an 'uncomfortable' or 'intrusive' experience;
- *'The idea that mental capacity law attracted people with the same values emerged repeatedly in participants' account of their work, operating, as one barrister described it, as 'a small club of practitioners and judges' (LP35) in which someone who did not hold similar core values was going to be quickly identified, exposed, and treated differently. This latter point captures interesting ways in which self-defining and reflexive accounts of participants rested on 'ingroup membership', distinguishing those drawn to this area of law for the putatively 'right' (or more altruistic) as opposed to 'wrong' (or self-regarding) reasons and values.'*
- *Participants described ambivalence regarding the professional hierarchies that are internally and externally deferred to, affirmed, and sustained in their practice. The tendency to defer to certain professional voices – particularly in the medical field – was described as an invidious aspect of CoP work. One participant spoke of the 'medical mafia' and how 'the ranks sometimes close'*
- *... professionals recognised a tension between a commitment to personal values and motivations underpinning their account of good practice in mental capacity law and the legal requirement placed upon them to undertake a detached and objective assessment of reasons in context.*

Making Values Matter in the Court of Protection – new film

Following a previous training film about [communication and participation](#) for Court of Protection lawyers, a project team including researchers based at the Institute for [Crime and Justice Policy Research](#) (ICPR), at Birkbeck's School of Law, have developed a second training film for specialist lawyers as part of the [Judging Values and Participation in Mental Capacity Law](#) project, which is funded by the Arts and Humanities Research Council.

The second training film, 'Making Values Matter in the Court of Protection' is [now available to watch on YouTube](#), and aims to improve Court of Protection practitioners of the meaning and role of values in decision making. The film also aims to increase lawyers' knowledge about how to identify values and incorporate them into decision making; and demonstrate examples of good practice when lawyers communicate with a person and their family to explore and discuss their values.

The creation of this resource was enabled through a Research England Policy Support Fund grant at the University of Bristol, and co-produced with the charity, [VoiceAbility](#), which provides advocacy for people with a learning disability and/or autism.

The film features an interview with a person with learning disability, about their values and a follow-up discussion with that person's relative. A VoiceAbility leader and her father were central to the filmed demonstration, which also includes commentary, discussion and reflections on the law and practice from Senior Research Fellow, Dr Camillia Kong, and three specialist Court of Protection lawyers (one from law firm Irwin Mitchell and two from 39 Essex Chambers). Designed to be watched from start to finish, the video can also be used as an interactive professional development resource to promote discussion and reflection amongst groups of practitioners as part of their professional development.

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](#), 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.

Mental capacity and personal injury awards

Martin v Salford Royal NHS Foundation Trust [2022] EWHC 532 (QB) (11 March 2022)(HHJ Bird sitting as a DHCJ)

Other proceedings - Personal Injury

Summary

This is the latest judgment in this long running piece of personal injury litigation. The liability judgment of Andrews J (as she then was) is reported at [2018] EWHC 1824 (QB) and the quantum judgment of HHJ Bird is reported at [2021] EWHC 3058 (QB).

This judgment was to determine **how** the damages were to be paid: either (i) by a lump sum order or (ii) by a periodical payments order and if periodical payments are appropriate whether that order should be variable. There was agreement that there should be an order for periodical payments, and so unsurprisingly this was what was ordered by the Court. The Court also concluded that the order should be variable.

Our interest in this case however arises from the determination of the issue as to whether the claimant (whom was found to have capacity) should receive damages to reflect the set up and running costs of a personal injury trust.

The Claimant had an emotionally unstable personality disorder (EUPD) and a diagnosis of schizophrenia. The Judge found that while the Claimant had capacity to make decisions about her property and affairs, she was vulnerable to suggestion and at risk of being influenced to spend her money in inappropriate ways as a result of her EUPD. Accordingly, the claimant argued that the Court had a positive duty to protect her as a vulnerable person, and this required it to award the claimant the costs of setting up a personal injury trust, despite the fact that she had capacity to manage her own money.

The Court held that save where children and protected parties or protected beneficiaries are involved, the Court does not generally adopt a protective role and declined to do so on this occasion.

Comment

The most significant discussion in the judgment on the issue of whether or not the Court has a protective function in respect of a capacitous but vulnerable person was in response to an argument that the operational duty pursuant to article 2 was engaged (the Claimant had expressed suicidal ideation in the past). The Court concluded that it was not. What is not clear is the extent to which the parties and the Court explored whether the Claimant could be said to be someone whose capacity was at times vitiated by her vulnerability (and in particular the undue influence of others) such that it may have been appropriate for the Court to exercise its inherent jurisdiction adopting the principles set out in Munby J's (as he then was) judgment *Re SA* [2005] EWHC 2942 (Fam). In such circumstances, the existence of a personal injury trust may well provide the opportunity for assessment of the Claimant's capacity (by the trustee) so as to ensure that any decision made by the Claimant in the future is a capacitous one.

A “just” approach to uncertainty in mental health and capacity practice and policy

As part of the Wellcome-funded Mental Health and Justice Project, the King's Policy Institute held a Policy Lab in November 2021 to address the following question:

Where there is significant uncertainty affecting a decision in the mental health and capacity context, what would we aspire to as a “just” approach and how could different mechanisms support this?

There are many dimensions of uncertainty, and decisions taking place under uncertainty may have different levels of risk. In the Policy Lab we focused on decisions where there is high uncertainty but not high immediate risk, as this space provides the most scope to invest time and effort in ensuring a “just” approach to decision making. Work on the Lab was led by Alex, alongside Alex Pollitt of the Policy Lab, and facilitator Ross Pow of Power of Numbers. A briefing report from the Lab, [published](#) in June 2022, summarises the key ideas produced, while accompanying appendices include a more detailed record of the day’s discussion and the briefing pack circulated to participants in advance.

Deprivation of Liberty in the Shadows of the Institution: The movie

The recent book by Dr Lucy Series, *Deprivation of Liberty in the Shadows of the Institution*, was noted in our May 2022 edition, and is available as a free e-book [here](#). It is now joined by a film produced in collaboration between Dr Series, the artist [Grace Currie](#), and the film production company [Helter Skelter](#). Dr Series describes this film in her own post [here](#), and notes that ‘[t]he film is funded from my Wellcome fellowship grant, and so can be distributed under a creative commons license ([CC BY-NC-ND 4.0](#)), which means that you can take this film and use it (so long as you don’t modify it), for example in training, in workshops or events where you are discussing deprivation of liberty topics. Or just watch it and share it with people who might find it interesting.’ You can watch the video on Grace Currie’s webpage [here](#).

Lady Hale on MCA/MHA fusion and children in mental health detention

There is a [brief and interesting interview with Lady Hale](#) in the 27 May 2022 British Journal of Psychiatry Bulletin. We would note Lady Hale’s comments on some topical issues, including the MCA/MHA interface and children in mental health detention (focusing particularly on Northern Ireland):

Hale acknowledges, however, that we may now be in a situation which is confusing for practitioners, particularly in the interface between the Mental Health and Mental Capacity Acts.

‘It does inevitably mean that there are procedures which it might be easier to do without. I agree that there have to be safeguards in both types of situation. But whether they have to be as complicated as they are, whether one could unite the Mental Health Act and the Mental Capacity Act

into a single system that operated in all kinds of eventualities that might arise for people with all kinds of diagnoses ... I think that would be the right thing. We’d be back to the Mental Health Act of 1959, of course, which was trying to do the same.’..

Northern Ireland’s very recent introduction of ‘fusion legislation’ is something Hale watches with keen interest and is ‘hoping it works out well’. The MCA (NI) 2016 is the first legislation of its kind, aiming to provide a framework for the care and treatment of people who lack capacity to consent, across all areas of health and social care. Hale sees it as a potential way to resolve some of the confusion and complications of the English system.

‘I think in principle the justification for doing things to and with people who lack the capacity or who don’t consent to it, is that they lack the capacity to consent to it. That’s the best philosophical justification for interfering with their autonomy in that way. Of course, it does depend on what you mean by lack of capacity. But I think that it’s possible to devise a definition of lack of capacity which would cater for the major mental illnesses as well,

because of the way in which they interfere with the mental decision-making process. And so my own view is that's the right way to go.

'I've got some of the way towards persuading the Mental Health Act review here that that might in the long run be the right way to go. But I think they're waiting to see how things work out in Northern Ireland before they adopt something like that.'

The discussion on whether to remove learning disability and autism from the Mental Health Act is a particularly fraught one, but Hale suggests that we may be asking the wrong question. An approach based on a test of capacity would make the condition for detention – whether mental illness or mental disability – secondary, she says. 'They ought all to be in a single, simple, coherent system. But that's the lawyer in me, you see, that likes it to be principled and to get away from the notion that this is a stigmatizing thing, as opposed to a necessary safeguard for people who, in their own best interests, have to have their liberty curtailed.'...

How, for example, should Northern Ireland's new mental capacity legislation deal with the under-16 s?

'I think the under-16 s are a problem everywhere. We've had quite a lot of litigation here, but not only for under-16 s, 16 and 17 year olds as well [a reference to the 2019 Re: D case,³ where she delivered the main judgment, finding that parents could not consent to deprive a 16 or 17 year old of their liberty]. There are really tricky questions about whether you have a separate regime for them and what the regime should be and to what extent should it recognise children's autonomy. And I don't have any simple answers to that at all.'

...What about the use of mental health legislation more generally for under-16 s. Does she support my use of detention for young in-patients subject to an extremely restrictive programme of care to which they cannot consent?

'For a long, long time I've been worried that the anxiety to spare any patient, but particularly a child patient, what is seen as the stigma of having been the subject to formal processes actually, of course, deprives those people of the protection which the formal processes are designed to give them. And if we think that anybody deserves protection against what I am sure is well-meaning but misguided attempts to help them or secure them, the need for protection is just as great with young people as it is with older people. So I think I've always thought that was the right position in principle. But of course, in practice, you want your safeguards to be not too bureaucratic and more readily operable and not too time-consuming, as long as there are some safeguards.'

Book Review: Supporting Legal Capacity in Socio-Legal Context

[Supporting Legal Capacity in Socio-Legal Context](#) (Mary Donnelly, Rosie Harding and Ezgi Taşcıoğlu, eds., Hart, 2022, hardback/eBook, c.£76/61)

The second wave of scholarship about the UN Convention in the Rights of Persons with Disabilities is now firmly with us. Following hard on the heels of a volume edited by Michael Ashley Stein and others

on the CRPD in the mental health context¹⁵ comes another edited volume of equally high quality and (almost) equal jurisdictional reach, thinking about legal capacity more broadly. *Supporting Legal Capacity in Socio-Legal Context*, edited by Mary Donnelly, Rosie Harding and Ezgi Taşcıoğlu,¹⁶ is an edited collection stimulated by a workshop convened by the Oñati Institute in July 2019. As the editors acknowledge, the pandemic (touched upon, albeit only relatively briefly, in some of the chapters) substantially delayed progress towards publication. In the circumstances, indeed, the editors and contributors are to be congratulated for having persevered against the odds to bring so substantive a work to completion.

The book contains 16 chapters, written by contributors from the UK (importantly, including England & Wales and Scotland – two of the three distinct jurisdictions within one island; Northern Ireland, sadly,¹⁷ does not feature), Canada, Finland, India, Ireland, Spain, Sweden and Turkey. The contributors (and indeed) editors are, in many ways, a ‘who’s who’ of capacity law scholarship – even if, as the editors rightly acknowledge, there is no explicitly disabled voice amongst the authors.¹⁸ Crucially, it is a volume which does not seek to impose a homogeneity of stance towards the CRPD upon its contributors, but at the same time (including in the editors’ opening chapter) steering away from the polarising tone of some of the debates which on occasion has characterised the first wave of CRPD scholarship, generating much heat but frequently a frustrating lack of illumination as to what operationalising the right to legal capacity really means. The volume also fulfils in spades the editors’ hope that it “showcase[s] the contribution of socio-legal methodologies in developing an evidence-base for the enhanced right to legal capacity.”¹⁹

It is divided into three broad sections: (1) charting the conceptual contours of capacity law; (2) reforming capacity law: making, shaping and interpreting legal frameworks; and (3) supporting legal capacity in everyday life: balancing empowerment and safeguards. This means that it has something for (almost) everyone, whether you be student, researcher, activist, law-maker, clinician, social worker, philosopher or lawyer, and whether you be a newcomer to these debates or steeped in the arcana of “100% supported decision-making.”

Of particular interest, at least to me, are those chapters which shed light on areas which are insufficiently understood within the Anglosphere. These include the chapters by Patricia Cuenca Gómez on the reforms to Spanish civil legislation on legal capacity on persons with disabilities and Ezgi Taşcıoğlu on Turkey’s state reporting to the Committee on Persons with Disabilities, both of which (in different ways) illuminate how legal capacity has a very different place within civil law jurisdictions to

¹⁵ Stein, M. A., Mahomed, F., Patel, V., & Sunkel, C. (Eds.). (2021). *Mental health, legal capacity, and human rights*. Cambridge University Press, reviewed here.

¹⁶ In line with the approach taken in the volume, I do not use their titles here, or those of the contributors. No disrespect is intended thereby.

¹⁷ “Sadly,” because of the experiment that Northern Ireland is embarking upon with the enactment – but not yet full implementation of the Mental Capacity Act (Northern Ireland) 2016, fusing mental capacity and mental health legislation.

¹⁸ The volume edited by Stein et al does feature “service user” perspectives (to use the term adopted by the editors of that volume). Without wanting to make too much of this, reflecting as it does, no doubt, different editorial strategies, priorities and challenges, it is nonetheless a noteworthy difference when the two volumes are placed side by side. For those wanting (in effect) to hear the voices of those whose legal capacity who may be in issue outside the ‘conventional’ mental health field, I could not do better than recommend the work of Eilíonóir Flynn, one of the contributors to this volume, in particular the Voices Project, and the edited volume to which it gave rise: Flynn, E., Arstein-Kerslake, A., De Bhailís, C., & Serra, M. L. (Eds.). (2018). *Global perspectives on legal capacity reform: Our voices, our stories*. Routledge.

¹⁹ Page 3.

that which it has in common law jurisdictions. In (very) crude terms, it seems to me that whereas legal capacity is a clearly, and expressly, identified concept within the grounding codes of civil law jurisdictions, identifying the place of legal capacity is a much more piecemeal affair within common law jurisdictions.²⁰ Hence (and in equally crude terms) the importance placed by activists upon reforms in civil law jurisdictions which lead to amendments in the relevant code as to the meaning of legal capacity (and when a person can be ‘incapacitated’), and the scepticism of common lawyers that those amendments give the full picture of what happens in situations where a person is temporarily or permanently cognitively impaired to the point that they cannot make (or communicate) a decision. Equally interesting, for a different reason, is the chapter by Titti Mattson on decision-making in relation to social services for persons with dementia in Sweden, which explores some of the complexities of a system placing a high premium on supporting individuals to remain at home and upon interventions (at least in social services) being based solely upon consent – both ‘big ticket’ items from a CRPD perspective. The chapter by Soumitra Pathare and Arjun Kapoor also provides an important (and in this volume²¹ isolated) example of attempts to bring about CRPD compliance within a low-resource country setting: in this case, India, through the prism of the Mental Healthcare Act 2017.

It would also be wrong to leave this review without highlighting the chapter by Eilionóir Flynn, ‘*The (Contested) Role of the Academy in Activist Movements for Legal Capacity Reform: A Personal Reflection.*’ In some ways an unusual piece within an academic collection, given its very personal tone, it makes for particularly interesting reading. The former Chair of the Committee on the Rights of Persons with Disabilities, Theresa Degener, has described the Committee as having been “perhaps naïve” to devote its first General Comment – and hence, by implication, a very substantial amount of its small ‘p’ political capital – to the issue of legal capacity.²² That naivete might also be seen in the way in which General Comment 1 proceeded on the basis that it was setting out an approach to legal capacity which simply spoke for itself, akin to a prophecy²³ revealing self-evident truths. In some ways, Flynn’s chapter – dealing with the process of the passage of the Assisted Decision-Making (Capacity) Act 2015 in Ireland – can be seen as a report of the point at which the prophetic approach contained in General Comment 1 had to be tested by law-makers seeking to reduce the high level principles of the CRPD to domestic legal provisions. Flynn does not hide her disappointment at the end result in Ireland, but the chapter – and the book as a whole – represents necessary reading for those taking stock of the

²⁰ An example of this, indirectly, can be found in the fascinating table produced by Rosie Harding in her chapter on Supporting Legal Capacity of what she has identified as 16 different supported and substituted decision-making frameworks in English capacity law. And that list only addresses statutory frameworks, to which it would be necessary to add all the different ways in which the common law addresses the consequences of cognitive impairments.

²¹ The Stein et al work achieves a greater – if still not universal – jurisdictional spread.

²² Degener T. Editor’s foreword. *International Journal of Law in Context*. 2017 Mar;13(1):1-5, an observation also noted by Mary Donnelly in this work (page 20).

²³ A word I use advisedly, drawing upon the work of James Gustafson, to which my attention was drawn by Scott Kim, a collaborator of mine over many years, including on the Mental Health & Justice project. Whilst Gustafson’s work has nothing directly to do with the CRPD, his analysis of different types of moral discourse is extraordinarily helpful for those seeking to understand why the discussions between the proponents of the ‘hard-line’ or ‘radical’ interpretation of legal capacity within the CRPD and those operating within legal, clinical and policy frameworks as they stand so often appear to be ones where those involved are talking different languages: they are. See, in particular, Gustafson, J. M. (1988). *Varieties of moral discourse: prophetic, narrative, ethical, and policy. The Stob Lectures*. Interestingly, Flynn uses the religious language of conversion in her chapter, noting that she was “[i]nitially highly sceptical about whether such a ‘radical’ notion [as that contained in Article 12 CRPD] was possible to achieve. However, my conversion, since it occurred, has been complete, proving that there really is no zealot like a convert when it comes to Article 12” (page 133).

first wave of scholarship and activism, and working how best to move forward to enhancing the right to the enjoyment of legal capacity on an equal basis.

[Full disclosure, I provided comments on a draft of the chapter by Camillia Kong on the significance of strong evaluation and narrativity in supporting capacity. I was also 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).]

Alex Ruck Keene

SCOTLAND

General

Alex emerged from his sabbatical to attend the 7th World Congress on Adult Capacity in Edinburgh, so before he disappeared from view again we prevailed upon him to write the piece below. As Alex indicates, Jill and I were both heavily involved in the Congress. The success that Alex described was absolutely a tremendously sustained team effort, but all of the others who worked so hard are unlikely to object that – particularly here in the Report – I should single out the central importance of Jill’s role leading on all aspects of the academic programme, from recruiting for the academic programme committee and for other functions, and leading on preparation of the invitation to submit abstracts, right through to making the adjustments necessary to retain the coherence and balance of the programme that she had so carefully structured during some inevitable last-minute changes in availabilities. Also, both Jill and I were probably too conflicted to attempt the overview and assessment provided by Alex, and also (at least speaking for myself) too exhausted!

Jill also has a central and parallel role as a member of the Executive Team of the Scottish Mental Health Law Review, whose “Additional proposals” consultation opened on 3rd June 2022 and closes on 22nd July 2022, thus following hot upon the heels of the more general consultation which ran until 27th May 2022. The latest consultation at [Scottish Mental Health Law Review - Additional Proposals - Scottish Government - Citizen Space \(consult.gov.scot\)](https://consult.gov.scot/scottish-mental-health-law-review-additional-proposals) targets three topics: independent advocacy, advance statements and forensic proposals. Although the consultation questions appear unnumbered when first stated, it is helpful that they are gathered with numbering at the end of each section. This is not the time or place to comment in any detail on the document: our purpose is to draw attention to the fact that it has been issued, and to the deadline.

The response of the Law Society of Scotland is now available, linked to the Society’s news release which can be accessed [here](#).

In recent issues we have endeavoured to track the progress of the “PKM litigation” and undertook to continue to do so. We are not aware of any significant developments to be reported at this stage.

Adrian D Ward

The World Congress on Adult Capacity: a dispatch

For the first time since the before-times, I found myself in mid-June 2022 heading on a train to an actual conference, with real people. Three days later, I returned from the 7th World Congress on Adult Capacity mentally over-stimulated and physically exhausted, having been entirely immersed in capacity related matters of every hue. The bald numbers from the Congress would be impressive under any circumstances, but even more so in the present state of the world: 274 participants from 30 countries, participating in 28 sessions. Some of those sessions were plenary, including an uncompromising²⁴ plenary presentation by the Vice-Chair of the UN Committee on the Rights of Persons with Disabilities, Professor Jonas Ruškus, and a tour de force application of the Kuhnian model of scientific progress to

²⁴ But on one view slightly surprising, in that he singled out Ireland (alongside Peru, Colombia and Costa Rica) as an example of a jurisdiction closer to compliance with Article 12 CRPD. Whilst the new Assisted Decision-Making (Capacity) Act 2015, yet to come into force, undoubtedly tracks much closer to compliance with the letter of Article 12(4), it is still founded upon a functional model of mental capacity.

the world of capacity by Professor Wayne Martin – the text of which is available [here](#). The opening speech by the indefatigable President of the organising committee (and mainstay of our Scotland Report), Adrian Ward, can be found [here](#); and his closing remarks [here](#), generously – and rightly – thanking the other members of the organising committee and supporting cast (including the other mainstay of our Scotland Report, Jill Stavert, who led on the academic programme). The majority of the sessions took place in parallel and, even more acutely than usual, I suffered conference cloning regret syndrome. Even though the conference organisers took full advantage of technology to enable distribution of materials, there is no substitute to hearing the presentation live, or to participating in discussion in the immediate aftermath.

We hope to bring you more coverage of the Congress next month, but for now, four personal observations must suffice.

First: perhaps because of the mind-set of those attending, perhaps because of the particular journey that I took through the different sessions, or perhaps because of the stage of the journey that we are now at, it was striking how, whilst the CRPD permeated all aspects of the conference, the permeation was one focused on practical, rather than theoretical matters. Debates about the validity or otherwise of the concept of mental capacity, for instance, placed squarely on the table by Professor Ruškus, did not feature in the remainder of the conference sessions that I attended, whilst detailed and gritty discussions about how best to support decision-making abilities, and to reach the ‘right’ decision for the person otherwise, did. To single out as an example, perhaps invidiously, I would note [I-Decide](#) project run by Support Girona, who have set up a fascinating model for supported decision-making agreements including not just the person and their supporter, but also a facilitator. This is not merely a theoretical model, but one developed within the framework of existing law.

Second: I was reminded, again, how legal capacity has a very different place within civil law jurisdictions to that which it has in common law jurisdictions. In (very) crude terms, it seems to me that whereas legal capacity is a clearly, and expressly, identified concept within the grounding codes of civil law jurisdictions, identifying the place of legal capacity is a much more piecemeal affair within common law jurisdictions.²⁵ Hence (and in equally crude terms) it seems to me the importance placed by activists upon reforms in civil law jurisdictions which lead to amendments in the relevant code as to the meaning of legal capacity (and when a person can be ‘incapacitated’), and the scepticism of common lawyers that those amendments give the full picture of what happens in situations where a person is temporarily or permanently cognitively impaired to the point that they cannot make (or communicate) a decision.

Third: there was, for me, a running theme implicit in many of the discussions and presentations of the impossibility of legislating for the qualities that are required for the delivery of support, through whatever legal mechanism is put in place. Whilst I was unable to attend the session at which he spoke, Graham Morgan, a member of the Executive of the Scottish Mental Health Law Review²⁶ has previously put it very vividly – how can you legislate for love? And if you cannot legislate for such qualities, is

²⁵ An example of this, indirectly, can be found in the fascinating table produced by Rosie Harding in her chapter in her new co-edited volume, “Supporting Legal Capacity in Socio-Legal Context (Hart, 2022), where she identifies 16 different supported and substituted decision-making frameworks in English capacity law. And that list only addresses statutory frameworks, to which it would be necessary to add all the different ways in which the common law addresses the consequences of cognitive impairments.

²⁶ A project which loomed large in the work of the Congress, not least through the visible and highly engaged presence of its chair John, now Lord, Scott QC.

time and effort better spent on supporting the development of those qualities amongst those providing support, or on changing the wording of the law?

Fourth: the organisers are to be heartily congratulated on having pulled off against overwhelming odds a superb Congress, and for both laying down a real gauntlet to their successors in Argentina and the tools to support them to take up that challenge.

Alex Ruck Keene

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 and Seminars

Forthcoming Training Courses

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

14 July 2022	BIA/DoLS legal update (full-day)
15 July 2022	Necessity and Proportionality Training (9:30-12:30)
15 July 2022	Necessity and Proportionality Training (13:30-16:30)
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](#).

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 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.

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.

Our next edition will be out in July. 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

clerks@39essex.com • DX: London/Chancery Lane 298 • 39essex.com

LONDON

81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
39 Essex Chambers is an equal opportunities employer.
Fax: +44 (0)20 7353 3978
39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number 0C360005) with its registered office at 81 Chancery Lane, London WC2A 1DD.

MANCHESTER

82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE

Maxwell Chambers,
#02-16 32, Maxwell Road
Singapore 069115
Tel: +(65) 6634 1336

KUALA LUMPUR

#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur,
Malaysia: +(60)32 271 1085

39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services.

39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.