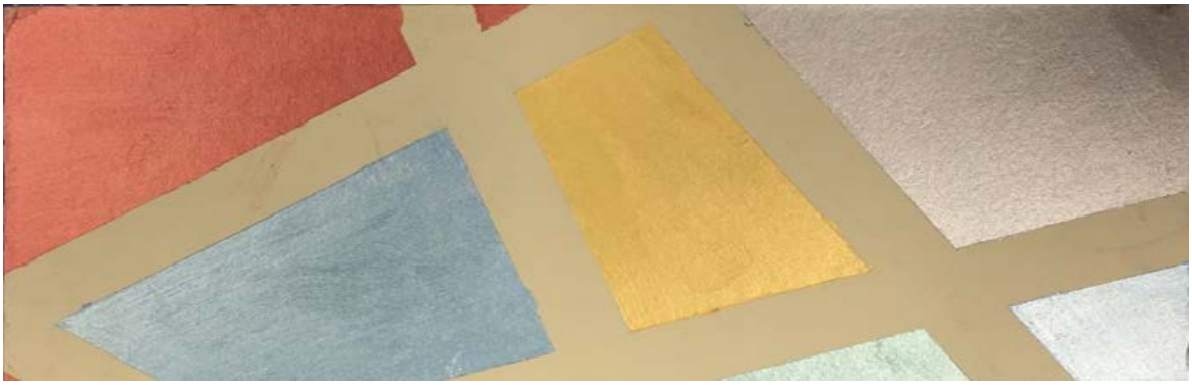
MENTAL CAPACITY REPORT: THE WIDER CONTEXT

May 2023 | Issue 131



Welcome to the May 2023 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: LPS on the shelf; fluctuating capacity and the interface under the judicial spotlight;

(2) In the Property and Affairs Report: the new surety bonds structure and an update on the Powers of Attorney Bill;

(3) In the Practice and Procedure Report: reporting restrictions and the Court of Appeal, and costs in serious medical treatment cases;

(4) In the Wider Context Report: DNACPR notices and disability, litigation capacity, the new SCIE MCA database, and Ireland commences the 2015 Act;

(5) In the Scotland Report: problems of powers of attorney in different settings and a very difficult Article 5 choice.

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

Editors
Alex Ruck Keene KC (Hon)
Victoria Butler-Cole KC
Neil Allen
Nicola Kohn
Katie Scott
Arianna Kelly
Stephanie David
Nyasha Weinberg
Simon Edwards (P&A)

Scottish Contributors
Adrian Ward
Jill Stavert

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

Contents

Do not attempt cardiopulmonary resuscitation (DNACPR) and people with a learning disability and or autism

Depressingly, it has been necessary for the powers that be NHS England to write, again, to write to all medical practitioners to

> *We are writing to you to remind you and your systems of the importance of implementing the Universal principles for advanced care planning and ensuring that DNACPR decisions for people with a learning disability and autistic people are appropriate, are made on an individual basis and that conversations are reasonably adjusted.*
>
> *The NHS is clear that it is unacceptable that people have a DNACPR decision on their record simply because they have a learning disability, autism or both.*
>
> *The terms 'learning disability' and 'Down's syndrome' should never be a reason for DNACPR decision making, nor used to describe the underlying, or only, cause of death. Learning disability itself is not a fatal condition: death may occur as a consequence of co-occurring physical disorders and serious health events.*

In short, care planning must be done with, not to, people. If you need help implementing this principle, this video may be of assistance.

New SCIE MCA directory

The SCIE MCA directory has now been revamped and expanded, running to some 386 resources at

the time of writing.

Litigation capacity before the courts

There have been two notable recent cases on capacity to conduct proceedings.

In *Cannon v Bar Standards Board* [2023] EWCA Civ 278 the Court of Appeal considered the law on capacity to conduct proceedings in an appeal brought by a disbarred barrister who argued that she had lacked capacity to participate in the hearing before the BSB which had resulted in her disbarment. In its review of the law, it expressly noted the Supreme Court decision in *JB*, discussed in the next article.

Dismissing the appeal the Court of Appeal noted, firstly, that the evidence on which the appellant sought to rely was not contemporaneous and was therefore insufficient to rebut the presumption of capacity. The Court of Appeal noted further, that the appellant's own solicitors did not raise the issue of mental capacity at the material time.

The court emphasised the difference between mental capacity and the fairness of proceedings involving a vulnerable individual. At paragraph 34 held that:

> *A person may well have vulnerabilities arising from underlying mental health conditions. Those may require adjustments to ensure that proceedings are fair. Special measures may need to be taken to accommodate a witness with vulnerabilities or who has a fear of being present at a hearing with a particular person. There may need to be an adjournment because of physical or mental conditions. In the present case, the difficulties that have been identified in relation to the appellant are ones that were relevant to the way in which the disciplinary process might need to be conducted to ensure fairness (as Dr Isaacs pointed out in his assessment of September 2019). They do not provide a sufficient basis on which to conclude that the presumption of capacity has been rebutted…..*

In *R (Philip Percival v Police and Crime Commissioner for Notts & Ors* [2022] EWHC 3544 (Admin), HHJ Richard Williams sitting as a High Court Judge considered the mental capacity of the claimant to bring judicial review proceedings against the respective Police and Crime Commissioners for Nottinghamshire and Derbyshire in 2021 and 2022.

Professor Percival had brought damages claims arising out of two incident in 2011 when he had been (a) on the first occasion, detained by officers under s.136 Mental Health Act 1983, (b) on a second occasion, been visited by a police officer and issued with a harassment warning in relation to his conduct with a former partner.

The claims were listed for trial in December 2021, but two weeks prior to the hearing, HHJ Gosnell felt himself bound to vacate the trial due to an application brought by Professor Percival himself in which he maintained that he lacked litigation capacity (paragraphs 6-7).

While these claims were stayed, and absent the appointment of any litigation friend or the provision of any further capacity evidence, Professor Percival brought two further claims for judicial review arising out of the handling of the complaints he had made about the alleged misconduct. He justified this action, advising that he "*finds the judicial review proceedings therapeutic and less daunting [than the personal injury litigation], since they are essentially a paper-based exercise and do not involve him having to relive the events in 2011, which he still finds difficult to deal with*" (paragraph 16).

Noting the perturbation of the defendants that the claimant might argue – as he did – that he

lacked capacity to conduct proceedings in one set of litigation while retaining capacity in another, HHJ Richard Williams held at paragraph 18 that:

> *determining capacity is ultimately a functional test focusing on the ability of a person to make a particular decision. I note that some of the medical evidence, at least before HHJ Gosnell, did suggest that the lack of capacity in that case may have arisen as a result of Professor Percival being faced with the potential of being cross-examined about the events in 2011. In any event, I am not making any decision about Professor Percival's current capacity to litigate those proceedings, only his capacity in relation to conducting these judicial review proceedings.*

This judgment provides a helpful and accurate reminder of the specificity of the test for capacity in any domain. The fact that an individual might lack capacity to conduct one set of proceedings at one particular time should not, of course, be determinative of whether he might lack capacity to conduct proceedings of another form at a later date.

On the facts of the case, though, it is perhaps difficult to avoid the impression that HHJ Richard Williams was keen to find that Professor Percival had capacity to conduct the proceedings for what might be thought to be an extraneous reason – namely that the previous proceedings had been stalled (it appears) by difficulties in appointing the Official Solicitor as litigation friend. Had he concluded that Professor Percival lacked capacity to conduct the judicial review proceedings, these, too, would have joined the queue.

CPR Part 21: all (apparent) change, and an update to the White Book

With effect from 6 April 2023, there has been a change in how the civil courts approach questions relating to the participation of children and protected parties in proceedings (nb, this change does not relate to the Court of Protection, nor to the family courts/Family Division of the High Court, which have their own set of Rules and Practice Directions).

CPR Practice Direction 21 has been withdrawn, and CPR Part 21 has been amended to include most, but not all, of the provisions contained in the Practice Direction, as well as a number of relatively minor changes to the rules themselves. This forms part of the rolling process being undertaken by the Civil Procedure Rules Committee ('CPRC') to comply with its statutory duty under s.2(7) Civil Procedure Act 1997 to simplify the Rules.

The explanation for the removal of PD21 can be found in the minutes of the October 2022 CRPC meeting, namely that it was considered to be "*a mix of (i) repetition, (ii) outmoded or otherwise inappropriate content and (iii) provisions that should be in the rule*[s]." This means, in turn, that Part 21 now includes elements which had previously been found in the Practice Direction and is – therefore – longer, although more succinctly expressed.

The CPRC had consulted upon its proposals in the late autumn of 2022. Only one change attracted substantive comment: one respondent raising a concern that the increase to £100,000 in the revised version of CPR r.21.11(9)(a) (control of money recovered for the benefit of a protected beneficiary) would mean that fewer claimants can apply to the Court of Protection for appointment of a Deputy. The minutes of the CPRC meeting of 2 December 2022 contains the explanation from Master Cook of the practical rationale which satisfied the CPRC that the concern was misplaced, thus:

> [t]*he purpose of this provision was to*

> *enable the court to avoid the expense of appointing a Deputy or applying to the Court of Protection where the damages awarded were modest. This sum has been fixed at £50,000 for a considerable period of time. Management by the court (Court Funds Office) is a light touch inexpensive alternative to the Court of Protection route. The increase to £100,000 gives more scope to reduce costs for protected beneficiaries and was seen as leading to fewer applications to the Court of Protection, not more.*

We would note that clearing PD21 out of the way is likely to be helpful for an entirely different reason to that which motivated the CRPC. The Civil Justice Council has convened a Working Group (on which I sit) is looking at practice and procedure around determining mental capacity in civil proceedings. Whilst work is still ongoing, one possible outcome is a recommendation will be made as to the need for a Practice Direction to amplify the provisions of Part 21 in such a way as to add value, rather than duplicate.

Linked to this, it is unfortunate that the 2023 edition of the White Book does not quite get it right in relation to litigation capacity (separately, there is a much bigger issue, for which the White Book editors can bear no responsibility, as to whether Part 21 gets it right at all in terms of the approach to take to litigation capacity).

In particular, the following paragraph (2.1.03) of the White Book contains an error we hope can be corrected in future editions:

> *In legal proceedings the burden of proof is on the person who asserts that capacity is lacking. If there is any doubt as to whether a person lacks capacity, this is to be decided on the balance of probabilities; see s.2(4) of the 2005 Act. The presumption of capacity will only be displaced on the basis of proper evidence. **That evidence must be current and must deal first with the "diagnostic test" of impairment or disturbance of the functioning of the mind or brain, then secondly the "functional test" of whether the impairment renders the person unable to make the relevant decisions in litigation**. It must deal with all the factors in s.3 of the Mental Capacity Act including whether there are any practical steps which could be taken to assist the claimant in making decisions in relation to the litigation. See Fox v Wiggins [2019] EWHC 2713 (QB) and King v Wright Roofing Co Ltd [2020] EWHC 2129 (QB).*

The error, in the sentence in bold, is to follow the 'old' ordering as set out in the Mental Capacity Act Code of Practice. However, in A Local Authority v JB [2021] UKSC 52, the Supreme Court made clear that the test need to be applied in the reverse order. Following the Court of Appeal in York City Council v C [2013] EWCA Civ 478 (sometimes also called PC v NC), Lord Stephens identified that section 2(1) – the core determinative provision – requires the court (and hence anyone else, outside court) to address two questions. First, is the person unable to make the decision for themselves? As Lord Stephens noted:

> *67.* […] *The focus is on the capacity to make a specific decision so that the determination of capacity under Part 1 of the MCA 2005 is decision-specific as the Court of Appeal stated in this case at para 91. The only statutory test is in relation to the ability to decide. In the context of sexual relations, the other vocabulary that has developed around the MCA, of "person-specific", "act-specific", "situation-specific" and "issue-specific", should not be permitted to detract from that statutory test, though it may helpfully be used to identify a*

> *particular feature of the matter in respect of which a decision is to be made in an individual case.*
>
> *68. As the assessment of capacity is decision-specific, the court is required to identify the correct formulation of "the matter" in respect of which it must evaluate whether P is unable to make a decision for himself: see York City Council v C at paras 19, 35 and 40.*
>
> *69. The correct formulation of "the matter" then leads to a requirement to identify "the information relevant to the decision" under section 3(1)(a) which includes information about the reasonably foreseeable consequences of deciding one way or another or of failing to make the decision: see section 3(4).*

If the court concludes that P cannot make the decision, then the second question is whether there is a "*clear causative nexus between P's inability to make a decision for himself in relation to the matter and an impairment of, or a disturbance in the functioning of, P's mind or brain*." Lord Stephens was clear (at paragraph 78) that the two questions in s.2(1) were to be approached in the sequence set out above, i.e. starting with the functional aspect. Whilst the Supreme Court was considering the MCA in the context of its application by the Court of Protection, Lord Stephens' observations apply with equal force to its application by the civil courts, because CPR r.21.1(2)(c) expressly provides that references to a person lacking capacity are references to a person lacking capacity for those purposes applying the MCA 2005 (see also *Saulle v Nouvet* [2007] EWHC 2902 (QB).) The Court of Appeal in *Cannon v Bar Standards Board* [2023] EWCA Civ 278 (discussed above) expressly noted the observations in *JB* as to the ordering of the test at paragraph 22).

Helpfully, the recently revised certificate as to capacity to conduct proceedings has the test the right way around.

Separately, it is unfortunate that in the same highlighted sentence, the White Book uses the term 'diagnostic' element. Although in common currency, it is misleading. As we put it in our guidance note on capacity:

> *As a judge has put it, a formal diagnosis "may constitute powerful evidence informing the answer to the second cardinal element of the single test of capacity, namely whether any inability of [P] to make a decision in relation to the matter in issue is because of an impairment of, or a disturbance, in the functioning of the mind or brain"* [see *North Bristol NHS Trust v R* [2023] EWCOP 5 at paragraph 48]. *However, it is entirely legitimate to reach such a conclusion in the absence either of a formal diagnosis or without being able to formulate precisely the underlying condition or conditions. To this extent, therefore, the term "diagnostic" test which is often used here is misleading.*

Using the term 'diagnostic element' also suggests that medical evidence is required, but this is incorrect. The White Book (in the same paragraph, 21.0.3) notes *Hinduja v Hinduja* [2020] EWHC 1533 (Ch) as an example of a case where medical evidence is not necessary, this is perhaps rather to understate the position. Falk J (as she then was) undertook a first principles analysis of the position, identifying that medical evidence is simply not required by the Rules.

> *37. There is no requirement in the [Civil Procedure Rules] to provide medical evidence. The absence of any such requirement was commented on by Chadwick LJ in Masterman-Lister at [66]. There is no reference to medical evidence in CPR 21.6. The only reference to medical evidence is in paragraph 2.2 of PD 21, which applies where CPR*

> *21.5(3) is being relied on. That requires the grounds of belief of lack of capacity to be stated and, "if" that belief is based on medical opinion, for "any relevant document" to be attached. So the Practice Direction provides that medical evidence of lack of capacity must be attached only if (a) it is the basis of the belief, and (b) exists in documentary form. It does not require a document to be created for the purpose.*
>
> […]
>
> *50. In summary, medical evidence is not required under the rules* […]

Whilst, as set out above, Practice Direction 21 has now been removed, the reference to medical opinion (or, now, 'expert opinion') is to be found in CPR r.21.6, and is on the same basis. There may well be situations in which the court will consider that it cannot make a determination that the party lacks capacity to conduct the proceedings absent medical evidence. However, we would suggest that it is important that representatives and judges approach matters from the correct starting position (not least because it also opens the door to taking the same approach as is now taken in the Court of Protection, namely that where expertise is, in fact, required, that expertise can be obtained from an appropriately qualified professional such as a social worker who is able to speak to the individual's capacity.

Short note: cognitive impairment, parenting and care proceedings - the irrelevance of blame.

In *West Sussex County Council v K* [2022] EWFC 170, HHJ Thorp (sitting as a s.9 High Court Judge) was considering whether the threshold was crossed to justify the making of a care order. The father had died when the child was 2; the mother had suffered a sudden and catastrophic brain haemorrhage in November 2021. She had been left with minimal abilities; she required 24/7 care; she had very limited cognition and understanding; and lacked capacity to litigate or make any decisions about her own welfare. It was agreed that was not able to make any decisions about her child's welfare, and could exercise any parental responsibility for her on a practical basis. In those circumstances, all decision-making was made by others and she has no input into it. Further, it was agreed that she does not have capacity to provide agreement under s.20 Children Act 1989 for K to stay in Local Authority accommodation.

A submission was made on behalf of the local authority that "[t]he mother is a protected party and is incapable of any conscious thought.that could result in her being blamed for placing K at risk of future harm." The submission was repeated by all of the other parties, who were, as HHJ Thorp identified "quite rightly, and understandably, very concerned that some sort of blame might be attributed to the mother in this case, or that the difficulties in her care may be placed at her door. As I have indicated earlier, the Official Solicitor is particularly concerned that there should not be state intervention just because a person has a disability, and that they should not be deprived of their Article 8 rights."

However, HHJ Thorp made clear that it was not necessary or appropriate to deal with the case with any reference to blame. He emphasised that, as the Supreme Court had made clear, such a finding was not necessary for purposes of s.31 Children Act 1989 and that

> *In my judgment, "blame" is not required. Family practitioners are well used to the fact that in the family courts, we often see parents who are not blameworthy. The fact that they are not able to provide safe and adequate care may be for a variety of reasons but should not of itself reflect blame on their part. Rather, s31*

recognises that in some cases where the children's needs are not going to be met by a parent, then the state may need to intervene to ensure that those needs are met.

The future of ageing: ethical considerations for research and innovation – Nuffield Council on Bioethics Report

In a veritable doorstop of a report published on 25 April 2023, the Nuffield Council on Bioethics sets out its findings from a two-year in-depth inquiry by an interdisciplinary working group, who benefitted from the evidence and experience shared by many contributors from across the UK and beyond. The report, T*he future of ageing: ethical considerations for research and innovation.* looks at the role that biomedical research and technological innovation has to play in responding to the needs of an ageing population. It focuses on three broad areas of research and innovation:

- Research into biological ageing
- Assistive, monitoring, and communications technologies such as health apps and smart home technologies
- Data-driven detection and diagnosis of age-related conditions.

Developments in these areas offer possible benefits in terms of supporting people to flourish in older age, but they can also raise significant ethical questions about how ageing is perceived, and how older adults are valued in our society. The report sets out to identify the values, principles and factors that are most at stake in the context of research that seeks to influence our experience of ageing, and proposes an ethical framework and toolkit to help everyone involved in conducting research relating to ageing to think through the ethical implications of their work.

The report is dedicated to Baroness Sally Greengross. As the chair of the working group, Bella Starling, notes in her introduction, "*Sally was a member of the working group and an unerring advocate for the rights of older people, who sadly passed away in June 2022. We hope that this report bears testament to her passion and influence. It was an honour to work with her.*"

The report culminates by setting out 15 recommendations to policymakers, research funders, researchers, regulators and professional bodies, health care professionals and others involved in shaping research, as follows:

> ***All research stakeholders*** *are encouraged to use the ethical framework and toolkit to guide their thinking and their processes – particularly when scrutinising funding applications and making decisions about the translation of research into An interactive tool on our website provides further prompts and support for those directly involved in research and implementation.*
>
> ***The Government*** *is urged to establish a cross-governmental strategy to support the aims of achieving five extra healthy years for all and narrowing the inequitable gap in healthy life expectancy, and to support this strategy with an intergenerational public advisory It should also ensure that any new screening or testing programmes for age-related diseases must be accompanied by properly funded services and support for those diagnosed.*
>
> ***Research funders*** *are encouraged routinely to expect meaningful collaboration between researchers and older adults in any research they fund*

concerned with ageing; to fund the necessary engagement infrastructure and expertise; to establish minimum demographic datasets to ensure that diversity of inclusion in studies is measured; and to take active steps to encourage partnership working between researchers and We further recommend that funders explicitly take a public health, life-course approach to research funding, recognising the importance of preventative approaches, and prioritising the needs of those who are currently most disadvantaged.

All the UK Research and Innovation (UKRI) funding councils *are encouraged to support interdisciplinary ageing research through the new Ageing Networks.*

The Health Research Authority (HRA) *is encouraged to work with the* National Institute for Health and Care Research (NIHR) *and other partners to identify good practice in involving older adults with impaired mental capacity in research, and to support ethics committees to feel confident in reviewing such research*[1]

The Medicines and Healthcare products Regulatory Agency (MHRA) *is urged to continue working with funders and others to address the challenges that may hinder older adults with multiple long-term conditions being included in research relevant to them, and if necessary to consider mandating such inclusion.*
The British Standards Institution (BSI) *is encouraged to work with the* MHRA, Innovate UK, *and other stakeholders to develop accredited standards that promote ethical and inclusive research practices with respect to technologies designed to support people to live well in older age.*

***Providers of undergraduate education for health professionals and biomedical scientists** are urged to ensure that their students gain a rounded, interdisciplinary understanding of ageing, including the ethical considerations set out in our ethical framework and toolkit.*

It was particularly interesting reading the report, and, especially, Chapter 2 on attitudes to ageing, in light of the recent (thirteenth) session of the UN Open-Ended Working Group on Ageing for the purpose of strengthening the protection of the human rights of older persons, held between 3 and 6 April 2023 in New York. The working group is considering the existing international framework of the human rights of older persons and identifying possible gaps and how best to address them, including by considering, as appropriate, the feasibility of further instruments and measures, with a report due with its recommendations by the time of the fourteenth session. Any discussion of what is or is not (and what should be) in any such instruments or measures would be equally informed by this Report as we hope will be biomedical researchers and those commissioning and funding such research.

FCA Consumer Duty: Looking out for vulnerable customers

On 27 July 2022, the Financial Conduct Authority ("FCA") set out its final rules and guidance for a new Consumer Duty that sets higher and clearer standards of consumer protection across financial services. The new duty will need to be

[1]This is, perhaps unsurprisingly, a recommendation that were are particularly interested in; it is very helpful that the Report also specifically singles out the NIHR INCLUDE Impaired Capacity to Consent Framework as a practical tool.

applied by firms to new and existing products and services open to sale (or for renewal) from 31 July 2023. For closed books, firms have until 31 July 2023 to apply the duty.

The new duty will be set out in Principle 12; and will state as follows: "A firm must act to deliver good outcomes for retail customers." Where a "retail customer" is defined as an individual who is acting for purposes which are outside their trade, business or profession.

The purpose, as set out in the proposed amendments to the FCA Handbook, is to ensure that retail customers receive a high level of protection, given: (i) they typically face a weak bargaining position in their relationships with firms; (ii) they are susceptible to cognitive and behavioural biases; (iii) they may lack experience or expertise in relation to products offered through retail market business; and (iv) there are frequently information asymmetries involved in retail market business.

Given the duty, there are a number of related obligations, including:

a. A firm must act in good faith towards retail customers;
b. A firm must avoid causing foreseeable harm to retail customers;
c. A firm must enable and support retail customers in pursuing their financial objectives.

In the guidance on those obligations, there are multiple references to retail customers with "characteristics of vulnerability".

The FCA defines "vulnerability" as "customers who, due to their personal circumstances, are especially susceptible to harm, particularly when a firm is not acting with appropriate levels of care".2 It goes on to advise firms to think about vulnerability as a "spectrum of risk", noting that all customers are at risk of becoming vulnerable and the risk is increased by "characteristics of vulnerability related to 4 key drivers":

- Health – health conditions or illnesses that affect ability to carry out day-to-day tasks.
- Life events – life events such as bereavement, job loss or relationship breakdown.
- Resilience – low ability to withstand financial or emotional shocks.
- Capability – low knowledge of financial matters or low confidence in managing money (financial capability). Low capability in other relevant areas such as literacy, or digital skills.

The "characteristics" associated with these drivers include "mental health condition or disability", "low mental capacity or cognitive disability" and "learning difficulties".3 The guidance specifically flags the need for firms to consider how they can empower consumers to manage their finances or protect them from scams, particularly when someone may lack capacity or have impaired decision-making. It notes that some vulnerable consumers may need additional support in making decisions or rely on others to make decisions on their behalf.

Firms are advised to have a pre-emptive and flexible processes in place (i) to adapt to the needs of vulnerable customers (ii) for dealing with temporary vulnerability (including through third party representation). A firm should take reasonable steps to assist customers in making capacitous decisions. Firms should also build in extra time and flexibility to ensure the needs of vulnerable customers are met (as well as

[2] FG21/1 "Guidance for firms on the fair treatment of vulnerable customers" February 2021, para 2.5

[3] *Ibid,* Table 1

ensuring that they discharge their obligations in the Equality Act 2010. Firms are also advised to ensure they have adequate systems in place so that a customer's vulnerability and any third party representation can be recorded, as well as ensuring their communications are clear and provided to vulnerable customers in way they can understand (to include marketing, point of sale, post-contractual information, information about changes to the product or service, and complaints processes).

"How I should be cared for in a mental health hospital."

In 2022, NHS England commissioned the Restraint Reduction Network to create the new 'How I should be cared for in a mental health hospital' toolkit, which tells people about the different kinds of restrictive practices they might be subject to, the law, their rights, and how they should expect to be cared for while in hospital. The toolkit is now available here.

The resources are compliant with Seni's Law (2018) and were written, edited and designed by people who have been in hospital themselves and understand what it might be like.

The resources include information for people and family members on the person's rights and what to expect when they are in hospital, along with an evaluation tool to help people check if they are getting good care and if restrictive practices are being used correctly.

Children's Commissioner for England report: Children's Mental Health Services 2021-2022

A new report from the Children's Commissioner's office outlines key findings in understanding children's access to mental health services in England in financial year 2021-22, as follows:

- *Of the 1.4 million children estimated to have a mental health disorder, less than half (48%) received at least 1 contact with CYPMHS and 34% received at least 2 contacts with CYPMHS.*
- *The percentage of children who had their referrals closed before treatment has increased for the first time in years. In 2021-22, 32% of children who were referred did not receive treatment compared to lower numbers in 2020-21 (24%), 2019-20 (27%) and 2018-19 (36%). There remains wide variation across the country in how many children's referrals were closed without treatment, from as low as 5% of referrals in NHS East Sussex to 50% in NHS North Cumbria.*
- *The average waiting time between a child being referred to CYPMHS and starting treatment increased from 32 days in 2020-21 to 40 days in 2021-22. The average waiting time for children to enter treatment (defined as having two contacts with CYPMHS) varies widely by CCG from as quick as 13 days in NHS Leicester City to as long as 80 days in NHS Sunderland.*
- *Spending on children's mental health services has increased every year, after adjusting for inflation, since 2017-18. CCGs spent £927 million on CYPMHS in 2021-22, equal to 1% of the total budget allocated to them. This compares to £869 million in 2020-21 – an increase of 7% in real terms. The share of CCGs spending over 1% of their total budget increased from 30% in 2020- 21 to 45% in 2021-22.*
- *The number of children admitted to inpatient mental health wards continues to fall, as does the number of detentions of children under the Mental Health Act each year. Of the 869 detentions of children under the Mental Health Act in 2021-22, 71% were of girls.*

- *An increasing number of children, many of whom have mental health difficulties but are not admitted to hospital, are being deprived of their liberty in other settings. These children are hidden from view as they do not appear in any official statistics, **but research suggests that over ten times as many children are being deprived of liberty in this way in 2023 as in 2017-18.*** (emphasis added)

- *Children in inpatient mental health settings who we spoke to wanted more, earlier intervention to prevent crisis admissions – sometimes children are presenting multiple times at A&E before an inpatient admission is considered.*

- *Much more can be done to make inpatient mental health wards feel safe and familial. Children reported a huge variation in the quality of relationships they had with staff. For example, while some children felt they knew staff genuinely cared about them, one child described how staff would only refer to children by their initials, rather than their name. There appears to be a particularly acute issue with the quality of night staff.*

- *Education was viewed very positively by most of the children spoken to for this report, and highlights the importance of high-quality education in these settings for children's recovery as well as their learning.*

- *The data collected on children in inpatient settings, including demographic information and information about key safeguards for children, is patchy and makes it harder to improve quality.*

"Notices to quit" – their impact

A new report from researchers at King's College London[4] has highlighted the impact that "notices to quit" care homes can have.

The study's findings highlight:

- that 'notices to quit' may follow strained relationships between care homes and residents' families following relatives' complaints or concerns over quality of care. Notices to quit were almost always one piece of 'traumatic journeys' within a particular care home experienced by the families interviewed for this report, who felt that constructive, empathetic and person-centred communication was lacking.

- Some care home managers and LGO reports mentioned stress and pressures on staff related to high levels of contact and/or complaints and/or abusive behaviour by relatives and/or high or complex levels of care as a primary factor for serving notice. Indeed, the most common reason for care homes serving notice – according to Care Quality Commission (CQC) (the regulator) data - is the inability to cater for a resident's needs. But, various LGO reports have concluded that the circumstances under which such notices were served are not always in the best interest of a resident, the option of last resort or not in line with necessary procedures, which it viewed as often amounting to an 'injustice' towards the resident and/or the relative.

- The negative emotional impact of the circumstances before, during and after receiving or learning of (in the case of funded individuals where the notice was handed to the commissioning local authorities) such a

[4] Dr Caroline Emmer De Albuquerque Green and Professor Jill Manthorpe: 'Angry, relieved, forever traumatised': A report into the experiences of families of care home residents who were served a 'notice to quit'(March 2023).

notice on families can be immense, with some relatives reporting posttraumatic stress disorder or long-term anxiety as a result. This seemed especially the case if the care home had not followed necessary procedures and policies leading up to the notice or once notice had been served. But some of the data, particularly the LGO reports, suggest that the negative emotional impact may also affect some individuals even when procedures and policies are followed.

- Many of the study's participants felt emotionally and practically overwhelmed, especially during the window between having been served notice and having to leave the care home, struggling to secure alternative accommodation for their family members. Interview participants reported the positive effect of support, including peer (other relatives') support and legal advice, on their ability to cope with the situation. However, local authority social workers (if they were in touch with such services) were often not perceived as helpful at any stage of the notice journey, with some exceptions who said that social workers had supported them to find new placements. Exploring a legal route to challenging the notice was not an option for many relatives because of the time, stress and financial burden associated with civil proceedings.

- The majority of people interviewed, whose relative in a care home survived the notice period and moved to another care setting, perceived an improvement in their life, around quality of care and wellbeing of their relative in the new care home or other care setting (We acknowledge of course that this study is limited by not hearing from residents who were the subject of notices to leave to get their accounts). This suggests that a change in care setting may indeed be a positive solution for a care home resident and/or their families. This is perhaps unsurprising considering the conflicted relationships, which often became worse after raising concerns, between families and notice serving care homes that the participants in this study described. In cases where notice was served because care needs could no longer be safely catered for, the move may also indeed be necessary and in the resident's best interest. However, some of the LGO reports concluded that, at times, families ended up in situations in which they had to take their relatives with care needs into their own homes without having the right environment and support to do so, which resulted in stress and anxiety for families and unsafe conditions for the people they cared for.

The report sets out a series of recommendations to address the issues set out above.

Controlling or Coercive Behaviour Statutory Guidance

The statutory guidance issued under section 77 of the Serious Crime Act 2015 (the 2015 Act) has been updated. It is entitled 'Controlling or Coercive Behaviour Statutory Guidance Framework 5 April 2023' and can be found here.

The guidance was updated following the coming into force of section 68 of the Domestic Abuse Act 2021 (the 2021 Act) which amended the definition of "personally connected" in section 76 of the 2015 Act. This removed the "living together" requirement, which means that from 5 April 2023, the offence of controlling or coercive behaviour now applies to partners, ex-partners or family members, regardless of whether the victim and perpetrator live together.

The guidance is primarily aimed at police and

criminal justice agencies in England and Wales involved in the investigation of criminal behaviour. Indeed any persons or agency investigating offences in relation to controlling or coercive behaviour under section 76 of the 2015 Act must have regard to this Guidance. However, the information contained in this guidance is also important to organisations and agencies in England and Wales working with victims (including children) or perpetrators of domestic abuse, this of course includes children and adult social care providers and ICBs.

The Guidance contains detail on what constitutes controlling or coercive behaviour and guidance on identifying and evidencing the offence. This is particularly useful for agencies concerned with obtaining civil injunctions in COP and inherent jurisdiction proceedings, where coercive or controlling behaviour is in issue.

The Care Act appeals process

Summary

The Claimant in *HL v SSHC* [2023] EWHC 866 (Admin) sought to judicially review the Secretary of State for Health and Social Care's decision "*not to make regulations pursuant to s 72 of the Care Act 2014 (**the CA 2014**) to make provision for appeals against decisions taken by a local authority in the exercise of its functions under Part 1 of the CA 2014*".

Part 1 of the CA 2014 places local authorities ('LAs') under a duty to meet the care needs of eligible individuals in their area who require support. This is to promote individual's well-being: s.1(1) defined as including dignity and control over day-to-day life s.1(2). LAs are required to have regard to the importance of beginning with the assumption that the individual is best placed to judge their own wellbeing: s.1(3). The LA's duty to carry out a needs assessment is set out at s.9. Where an adult has needs, the LA must determine whether these meet the specific eligibility criteria, and if so, the LA must, pursuant to s.18 "*meet [an] adult's needs for care and support which meet the eligibility criteria where they are ordinarily resident*". S.19 empowers LAs to meet identified needs which they are not required to meet under s.18.

S.72 of the CA 2014 confers a power on the SSHC to make regulations governing appeals. No such regulations have been made, nor has s.72 been brought into force following s.127. Whether this is unlawful is the central issue in this case. Relevant context to s.72 is set out by Julian Knowles J at paragraphs 8-13 of the judgment, in particular the fact that individual care recipient may disagree about the level of care and support that is necessary. That individual can complain to the LA via its internal complaint procedure, to the Local and Social Care Ombudsman ('LGSCO') (on limited grounds), seek judicial review of the LA's decision, or bring a claim under the Human Rights Act 1998 ('HRA 1998'). The Claimant contended that there were not effective dispute resolution mechanisms as none wereare capable of reaching a decision on the merits of any dispute with the LA, the "*nub of the Claimant's complaint is that the Defendant decided in 2016 to implement an appeals system under s 72, but then on 1 December 2021 in a White Paper performed what she regards as a volte-face and decided not to implement the appeals system*" (paragraph 13).

Three main grounds of challenge were advanced on behalf of the Claimant were as follows:

- Ground 1: the Defendant breached his common law duty to consult prior to making his decision in December 2021 to 'shelve' the implementation of an independent appeals system.
- Ground 2: the failure to implement an

appeals system poses a real risk of individuals being unable to have effective access to a legal remedy.

- Ground 3: the failure also amounts to an interference with the procedural guarantees to an effective remedy to which the Claimant is entitled under Article 8 of the European Convention on Human Rights ('ECHR').

Julian Knowles J reviewed relevant policy and legal context, noting the requirement on local authorities to keep care and support plans under general review annually pursuant to s.27(1) Care Act and *Care and Support Statutory Guidance (*updated 2 September 2022), and the existing routes for challenging adult social care decisions, identifying that the LGSCO is expressly precluded from questioning a decision on its merits.

A history of s. 72 of the CA 2014, set out in the judgment, covers that it was introduced following public consultation and following express recommendation of the Law Commission and a Joint Committee of Parliament. A decision was taken to implement an appeals system following a 2015 consultation. The Consultation Paper contained proposals for a three-stage appeals system. In 2016 the SSHC announced the decision to introduce the proposed system as recorded in the *Care Act Factsheet 13: Appeals Policy Proposal*. Developments from 2016 onwards culminated in the White Paper in December 2021 which concluded that an appeals system would be "*introduced immediately*." It is that decision which was the focus of this case.

The SSHC relied on the evidence of the Director of Adult Social Care Policy who noted in his witness statement at cited at paragraph 84 of the judgment that the "*Secretary of State had to make policy decisions about which areas to prioritise early spending on*". The SSHC made the decision that other areas were to be prioritized and the appeals system was not a reform priority. The White Paper concluded:

> *The Care Act 2014 includes a provision to introduce a new system to allow the public to appeal certain social care decisions made by local authorities. While we do not intend to introduce such a system immediately, we are keeping it under ongoing review as the new reforms are implemented and will continue to gather evidence to inform future thinking.*

The court's findings on the three grounds:

The Court's findings on the three Grounds advanced were as follows.

Ground 1: That the ground of challenge concerning the duty to consult must fail (paragraph 106) This is on the basis that there was no statutory duty to consult in 2021 in this case. Julian Knowles J applied *R (Better Streets for Kensington and Chelsea) v The Royal Borough of Kensington and Chelsea* [2023] EWHC 536 (Admin), [36]-[47] and *R (Plantagenet Alliance Ltd) v The Secretary of State for Justice and others* [2014] EWHC 1662 Admin, and made the findings that:

- There could be no suggestion that the Defendant made an *unequivocal* promise to consult in relation to an appeals system under s. 72 (paragraph 116);
- That there had previously been consultations, but that these could not have given rise to an expectation of a subsequent consultation (paragraph 117).
- That the White Paper Consultation of 2021 was of a broad type - it covered some 233 organisations. The court consequently took the view that the consultation conducted met the purposes required – namely that the

(a) decision-maker receives all relevant information and that it is properly tested; (b) it avoided the sense of injustice which the person who is the subject of the decision will otherwise feel; and (c) the broad and inclusive nature of the consultation was reflective of the democratic principle (paragraph 121);

- That the fact that there was a fundamental change in circumstances marked by the white paper did not require the type of consultation that the Claimant's contends for – where a change in government policy follows a full consultation, this does not require the consultation process to be repeated (paragraph 124).

Julian Knowles J concluded at paragraph 130 that the combination of the Law Commission's work and ongoing consideration, taken together, mean there had been no unfairness, let alone that of the necessary cogency that could warrant an intervention.

Ground 2: Julian Knowles J rejected the Ground 2 advanced by the Claimant, the 'access to justice' argument, his conclusion being found at paragraph 152.

His analysis began with considering one of the first cases under the access to justice head: *R v Lord Chancellor ex parte Witham* [1998] QB 575, which had identified that "*access to courts was a constitutional right at common law which could be abrogated only be a specific statutory provision in primary legislation*." He then considered *R (UNISON) v Lord Chancellor* [2017] 3 WLR 409, a a 'fees case' which was concerned with the lawfulness or policy or delegated legislation which creates an unreasonably or unacceptable impediment to effective access to justice. Julian Knowles J noted that the policies considered in *Unison, Witham* and *R (BF (Eritrea)) v SSHD* [2021] 1 WLR 3967 prevented *any* access at all to a court or tribunal.

Measured against that yardstick, Julian Knowles J found that the Claimant had failed to fulfill the requirement per *R (A) v Secretary of State for the Home Department* [2021] 1 WLR 3931 at [80] to show that there is 'unacceptable risk' this is because:

- Parliament, by leaving it to the SSHD to bring into force and then implement an appeals system, did not consider the problem so pressing as to require the Secretary of State to implement such a system (paragraph 144);

- The Claimant was not left without remedies – including JR and HRA 1998 claims which confer broad and flexible powers on the court and the LGSCO (paragraph 145);

- That work completed by the Department "*has not uncovered that much concern about the lack of a merits appeal system"* (paragraph 146).

Thus, while Julian Knowles J accepted the general point that the Defendant acknowledged a possible need for change regarding appeals, that this fell short of showing "*there is currently a risk of an unconstitutional and unlawful denial of access to justice"*. Accordingly Ground 2 was rejected (paragraphs 150-151).

Ground 3: The Court rejected Ground 3 "*for essentially the same reasons"* at paragraph 152. Mr Justice Knowles accepted that Article 8 carries procedural weight. However, he found that there was nothing in *Kiarie v Secretary of State for the Home Department (R (Byndloss) v Secretary of State for the Home Department)* [2017] 1 WLR 2380 that assisted the Claimant's case; rather, it pointed to to states' margin of appreciation in determining how those procedural rights are to be vindicated. Finally, he concluded that service users like the Claimant can access the courts and the LGSCO, and that

that legal aid is available (see paragraph 155).

For the reasons set out in relation to each ground above, the claim was dismissed.

Comment

We set out the reasoning of this judgment in some detail, both because of its importance in itself (unless people have an effective ability to challenge care decisions, then their options available to them in the name of their best interests are radically limited), but also because of the coincidence of its timing with the decision to delay LPS. It would be interesting to speculate how a judicial review to challenge the SSHC's failure to implement LPS might be run. By contrast to the Care Act, the Mental Capacity (Amendment) Act 2019 did not empower the SSHC to bring into force the new framework; rather, it simply provided for the new framework. Parliament therefore undoubtedly might be considered to have considered the problem to be "pressing," a word that the Government itself used in responding to the Law Commission's recommendations, noting that "[w]e agree in principle that the current DoLS system should be replaced as a matter of pressing urgency."[5] Given the limited scope of non-means-tested legal aid, how effective is the ability of those deprived of their liberty to access justice where either (a) they are stuck in the queue waiting for a DoLs authorisation; or (b) in the community if they are (crudely) required in many cases to pay for the privilege of being deprived of their liberty. And in relation to the equivalent of Ground 3, the LPS engages not 'merely' Article 8, but also Article 5 procedural rights.

Assisted Decision-Making (Capacity) Act 2015 commenced

After a very protracted journey, including amendments introduced even before it had been implemented, Ireland's Assisted Decision-Making (Capacity) Act 2015 was commenced on 26 April 2023. An extremely helpful informal consolidated version of the Act, including subsequent amendments and clarifying the rather impenetrable commencement orders, has been prepared by David Leahy SC and can be found via here.

Alex has recorded a video including elephant traps and worked examples from England & Wales which may be of some assistance to those working with the 2015 Act.

[5] 180314 Response to Law Commission on DoLS - final.pdf, at paragraph 13.

Editors and Contributors

Alex Ruck Keene KC (Hon): alex.ruckkeene@39essex.com
Alex has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, including as Visiting Professor at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

Victoria Butler-Cole KC: 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. She is Vice-Chair of the Court of Protection Bar Association and a member of the Nuffield Council on Bioethics. 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.

Arianna Kelly: Arianna.kelly@39essex.com
Arianna practices 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 inherent jurisdiction matters. Arianna works extensively in the field of community care. She is a contributor to Court of Protection Practice (LexisNexis). To view a 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 2022). 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.

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, ICBs 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.

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.

Adrian Ward: adrian@adward.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

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

Parishil Patel KC is speaking on Safeguarding Protected Parties from financial and relationship abuse at Irwin Mitchell's national Court of Protection conference on 29 June 2023 in Birmingham. For more details, and to book your free ticket, see here.

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

Advertising conferences and training events

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

Our next edition will be out in June. 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
Fax: +44 (0)20 7353 3978

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