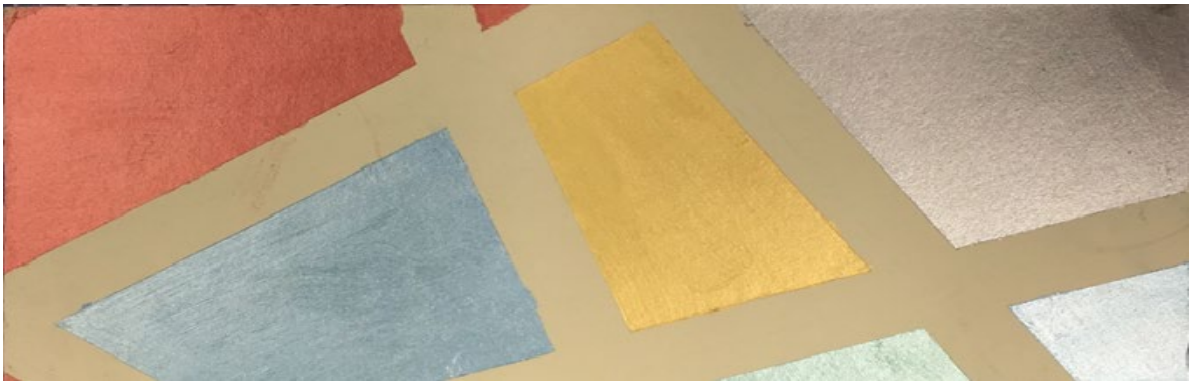
MENTAL HEALTH MATTERS
May 2025 | Issue 150



Welcome to the May 2025 Mental Capacity Report. It is our 150th issue, and, to mark this, Tor and Alex have recorded a discussion reflecting on how the report (then the newsletter) came to be back in 2010, and on how the law and practice have evolved since then. The first issue of the newsletter they discuss can be found here.

Highlights:

(1) In the Health, Welfare and Deprivation of Liberty Report: new and updated guidance notes;

(2) In the Practice and Procedure Report: naming clinicians (and other professionals), and cross-border deprivation of liberty;

(3) Section 63 MHA 1983 and diabetes, and the Mental Health Bill progresses to the Commons;

(4) In the Children's Capacity Report: the Court of Appeal explains why local authorities cannot consent to the confinement of children in their care;

(5) In the Wider Context Report: the other party's interest in litigation capacity, how far landlords are supposed to go in hoarding cases, and a new Convention on the rights of older adults on the cards?

(6) In the Scotland Report: AWI reform update and cross-border deprivation of liberty – Scottish reflections what is appealable in the AWI context.

As there were no developments meriting specific reporting in the property and affairs field this month, we do not have a Property and Affairs report.

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.

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

Diabetes and section 63 MHA 1983

Nottinghamshire Healthcare NHS Foundation Trust v MC [2025] EWHC 920 (Fam) (High Court) (Family Division) (Morgan J)

Other proceedings – family

Summary[1]

For many years a detained patient, MC, had type 1 (insulin dependent) diabetes which he had deliberately mismanaged which led to severe hypertension and peripheral vascular disease. He was non-compliant with blood tests to monitor blood glucose levels and refused most of his daily insulin, but often took it in the evening. In January 2024 he required a below-the-knee amputation secondary to gangrene and sepsis because of poor compliance with diabetes treatment, and now had end stage complications resulting in damage to the back of the eye, nerve damage and chronic loss of kidney function.

MC, who had capacity to make decisions about that treatment, usually refused most of the treatment. Without consistent and comprehensive treatment, he would inevitably die.

MC's treating trust NHS Trust applied for an order under the inherent jurisdiction of the High Court that a decision not to impose treatment under s.63 MHA 1983 was lawful. The treatment in issue was treatment for type 1 diabetes and its complications.

The Trust argued the proposed treatment was for mental disorder because his refusal was a manifestation of severe personality disorder but the restraint required would lead to adverse outcomes so should not be used, despite the risk of MC's early death. MC had capacity to make the decisions and conduct the proceedings. MC argued that the treatment fell outside s.63 MHA 1983 and that it was not in his interests for treatment of his physical conditions to be forced upon him. He also disputed the diagnosis of personality disorder, did not want to die and, in an emergency, would want treatment to save his life.

Morgan J held that the relevant treatment fell within s.63 MHA 1983. Although type 1 diabetes might often be diagnosed in childhood and was not in and of itself a manifestation of mental disorder, the progression of the symptoms and currently serious diabetic complications were such a manifestation. As she put it at paragraph 46:

I agree that it may be, that MC's approach to health care includes elements of a strong wish to control in an environment where the opportunity to exert control is markedly diminished (inevitably so, the

[1] Note, Arianna having been involved in the case, she has not contributed to this summary.

environment being a ward in a high secure institution populated by those with severe personality disorders). I accept nevertheless Dr B's evidence that the strong wish to control has its roots in his severe personality disorder. The severe personality disorder, as Dr B's evidence so helpfully explained, is in effect shorthand, which gathers into it the features making up the condition of for example his paranoia, distrust and confrontational functioning. This manifests itself in an approach to health care which is not intentional self-harm but prioritises in decision making those features in which feed into his overwhelming desire to have and exert control eclipsing those which would lead to him having better physical health.

Morgan J also held that MC had capacity to make relevant medical treatment decisions, and that it was lawful for treatment not to be imposed on him pursuant to the s.63 powers of his responsible clinician.

Comment

Readers may be puzzled as to what the purpose of the Trust's application was. There was no doctor proposing to provide treatment to MC against his wishes. MC was in agreement with that approach. The Trust had sought a second opinion which supported their plan. There is no appellate authority setting out a legal obligation to seek an order from the High Court approving a decision not to exercise powers of compulsory treatment under s.63 MHA 1983 (although Mostyn J had expressed the view in *Nottinghamshire Healthcare NHS Trust v RC* [2014] EWCOP 1317 – prior to the Supreme Court decision in *Re Y* – that a decision not to provide life-saving treatment under s.63 likely engaged Article 2 and Trusts would be *'well-advised'* to bring an application for declaratory relief). MC's arguments about whether or not the treatment was treatment was mental disorder were not determinative, as whether or not s.63 was engaged, there was no plan to administer the treatment to MC against his wishes. There was even agreement that in an emergency, MC would be given urgent treatment as would any other patient. The judgment includes the evidence of one of the Trust's witnesses, Dr A, who said that "*"I worry about a situation where a nurse gives him insulin in the evening in those circumstances and he is hypoglycaemic overnight and dies. The coroner will ask the nurse if they gave him insulin and then will ask did you check his blood sugar level before you gave it"*. As the judge noted, this comment goes "*some way in explaining how, in circumstances where a capacitous individual does not wish to have treatment imposed against their will, and a Trust does not wish to impose such treatment against their will, that seemingly uncontentious state of affairs has nonetheless required a contested application before this court."*

More broadly:

1. MC's capacity to make the decisions brings into sharp focus the physical/mental treatment divide, by which he could refuse the former but not the latter if clinically indicated, which in this case it was not.

2. The decision reflects the traditionally broad interpretation given to 'treatment for mental disorder'. Whilst the attempt to persuade Morgan J that this interpretation is one that requires revisiting in light of the evolving Strasbourg case-law did not tempt her into the new landscape, it is an area which is going to be under the spotlight as the Mental Health Bill progresses.

Mental Health Bill progress

The Mental Health Bill has now left the House of Lords and will come before the House of

Commons. Progress can be tracked here, where you can also find a helpful "Keeling Schedule" version prepared by the DHSC of the Mental Health Act 1983 as amended by the Bill (Alex can breathe a sigh of relief, because it means reliance does not need to be placed any more on his unofficial version). As noted by Tim Spencer-Lane in his helpful article, key amendments made by the Lords in face of Government opposition (which are likely to be reversed) are (1) expanding those who can carry out functions under ss.135/136; (2) placing a 12 month limit on CTOs unless substantial procedural hurdles were overcome; and (3) imposing a duty to debrief patients.

Calocane inquiry chair named

The retired judge HH Deborah Taylor has been appointed to chair the public inquiry into the events that led to the killings by Valdo Calocane in Nottingham in June 2023.

The statutory inquiry will have the power to examine all the agencies involved, including the Nottinghamshire Police and the Crown Prosecution Service; compel witnesses, and establish the facts. The Prime Minister has committed that the inquiry should report within two years.

Parliamentary Office of Science and Technology notes

The Parliamentary Office of Science and Technology has published two recent POSTnotes on AI and Mental Healthcare – Opportunities and Delivery Considerations - oppo, and AI and Mental Healthcare – Ethical and Regulatory Considerations. As with all POSTnotes (there are also others, for instance, about mental health reform) these two provide an accessible and up-to-date survey of the relevant issues.

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.

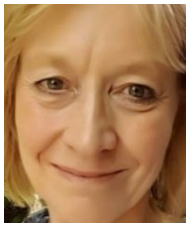
Katie Scott: katie.scott@39essex.com
Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular 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.

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

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.

Alex also does 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