



Welcome to the June 2025 Mental Capacity Report. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Report: the court is not a rubber stamp for clinicians and what does it mean to represent P's interests;
- (2) In the Property and Affairs Report: Professional Deputy Costs, and paying drug debts for P;
- (3) In the Practice and Procedure Report: capacity to conduct proceedings and the costs of inadequate disclosure;
- (4) In the Mental Health Matters Report: capacity to conduct Tribunal proceeding, and the independent investigation into the care and treatment of Valdo Calocane;
- (5) In the Children's Capacity Report: looking at other options before using the inherent jurisdiction to authorize a deprivation of liberty;
- (6) In the Wider Context Report: what happens if you never had litigation capacity and new books;.
- (7) In the Scotland Report: AWI reform and the UK Protocol on Judicial Cooperation.

The progress of the Terminally Ill Adults (End of Life) Bill can be followed on Alex's resources page [here](#).

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

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

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Litigation capacity – and what happens if you never had it?

Johnston v Financial Ombudsman Service [2025] EWCA Civ 551 (Asplin LJ, Coulson LJ, Baker LJ)

Johnston v Financial Ombudsman Service [2025] EWCA Civ 551 is a case with a particularly complicated procedural history, but for present purposes the critical questions for the Court of Appeal were: (1) whether Mr Johnston lacked litigation capacity at the material times; and (2) whether, if he did lack that capacity, he could have brought proceedings against the Financial Ombudsman Service at all.

In relation to the first question, Baker LJ gave a very helpful recap of the law relating to litigation capacity / capacity to conduct proceedings as it stands in light of the decision of the Supreme Court in *A Local Authority v JB* [2021] UKSC 52, [2022] AC 1322, with its focus on (1) starting with identifying the decision, and the relevant information; and (2) only if the person is unable to understand / retain / use and weigh the relevant information or communicate their decision, moving on to ask why. He continued:

39. There are three further relevant general principles, identified in my judgment in *A Local Authority v P* [2018] EWCOP 10at

paragraph 15, cited by Lewis LJ in his judgment in *Cannon v Bar Standards Board* [2023] EWCA Civ 278 (considered below).

First:

“Capacity is both issue-specific and time-specific. A person may have capacity in respect of certain matters but not in relation to other matters. Equally, a person may have capacity at one time and not at another. The question is whether at the date on which the court is considering the question the person lacks capacity in question.”

Secondly,

*“In assessing the question of capacity, the court must consider all the relevant evidence. Clearly, the opinion of an independently instructed expert will be likely to be of very considerable importance, but as Charles J observed in *A County Council v KD and L* [2005] EWHC 144 (Fam) [2005] 1 FLR 851 at paras 39 and 44, “it is important to remember (i) that the roles of the court and the*

expert are distinct and (ii) it is the court that is in the position to weigh the expert evidence against its findings on the other evidence... the judge must always remember that he or she is the person who makes the final decision."

Thirdly,

"The court must avoid the "protection imperative" – the danger that the court, that all professionals involved with treating and helping P, may feel drawn towards an outcome that is more protective of her and fail to carry out an assessment of capacity that is detached and objective: *CC v KK* [2012] EWHC 2136 (COP)."

40. Prior to the implementation of the MCA 2005, the leading common law authority on capacity to conduct proceedings was *Masterman-Lister v Brutton and Co* and another [2002] EWCA Civ 1889 in which Chadwick LJ said, at paragraph 75:

"For the purposes of ... CPR 21 – the test to be applied, as it seems to me, is whether the party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisers and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings. If he has capacity to understand that which he needs to understand in order to pursue or defend a claim, I can see no reason why the law – whether substantive or procedural – should require the interposition of a next friend or guardian ad litem (or, as such a person is now described in the Civil Procedure Rules, a litigation friend)."

41. An example of the application of the MCA 2005 principles to a decision whether a person lacks capacity to conduct litigation is the judgment of Burnett J (as he then was) in *V v R* [2011] EWHC 822 (QB). Having set out the statutory provisions, the judge said (at paragraph 10):

"It is common ground in these proceedings that the claimant suffers from an impairment or disturbance in the functioning of the mind or brain. The question is whether she is unable to make decisions for herself in connection with the litigation. In considering that broad question, the statutory scheme requires the presumption of capacity to be displaced on the balance of probabilities. The principles in section 1 distinguish capacity to make a decision from the wisdom of a decision made. The principles also require that all practicable steps are taken to help the person concerned make the relevant decision. The underlying policy of the Act is to avoid concluding that incapacity is established unless, after careful enquiry, it is necessary to do so. That is underpinned by the various cautions found in the Act relating to age, appearance and behaviour, by the requirement to convey information in a way appropriate to the individual's circumstances, and by the recognition that retention of information for but a short period may be sufficient for the purposes of establishing capacity. The underlying policy of the Act is unsurprising and reflects the earlier common law approach very substantially, given that the finding of incapacity in any environment substantially curtails the individual's right of action. In the context of litigation, a finding of incapacity curtails the right of unimpeded access to the law."

42. In that case, having carefully considered the medical and other evidence, Burnett J concluded (paragraph 34) that the claimant had “difficulties rather than a straightforward inability to weigh the evidence and make relevant decisions”. He concluded that those difficulties were “capable of being ameliorated, if not entirely overcome, by the careful and structured support that the statute contemplates”. In those circumstances, he was not satisfied on the balance of probabilities, that the claimant was unable to use and weigh information as part of the process of making litigation decisions. He therefore refused the application for a declaration that she lacked capacity to conduct the litigation.

43. In this case, the Court is considering Mr Johnston’s capacity over a number of years. In *Public Guardian v RI and Others* [2022] EWCOP 22, a case concerning a donor’s capacity to execute a lasting power of attorney, Poole J observed (at paragraph 27): “... 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,

1. The certificate provider’s experience ...
2. Evidence from carers and family members ...
3. Medical evidence, capacity assessments, assessments for benefits, records from carers or activity centres, or other professional evidence roughly contemporaneous with the relevant date ...
4. An assessment by a suitably qualified and experienced person of P’s current capacity and reasoned opinion as to their capacity ... at the relevant time, such opinion being informed by review of relevant medical records, contemporaneous assessments, and the evidence from carers and family members.”
- 5.

44. In *Cannon v Bar Standards Board* [2023] EWCA Civ 278, the appellant sought to

appeal against findings of a professional disciplinary tribunal, contending amongst other grounds that she lacked capacity to conduct litigation at the time of the tribunal proceedings. Lewis LJ, in a judgment with which the rest of the Court agreed, noted (at paragraph 25) that the psychiatric reports on which the appellant relied did not address the test, or all the relevant factors, for assessing capacity, that the psychiatrist had access to some but not all of the appellant’s medical records, and had not addressed the various actions the appellant had undertaken in relation to the disciplinary proceedings in order to consider whether she was able to understand, retain use, or weigh the relevant information. The psychiatrist’s opinion amounted simply to an assertion that because the appellant had post-traumatic stress disorder, she lacked capacity. Lewis LJ concluded (paragraph 27) that the medical evidence did “not itself provide a proper evidential basis for rebutting the presumption that the appellant had capacity to take the decisions necessary to enable her to participate” in the proceedings. He added, at paragraph 34, that there was a difference between questions of capacity and the fairness of proceedings and that a party may have vulnerabilities arising from underlying mental health conditions which required adjustments to ensure that proceedings are fair. In that case, however, there had been no challenge to the fairness of the proceedings before the tribunal.

Baker LJ was not impressed with the evidence put before the Court of Appeal concerning Mr Johnston’s litigation capacity. The evidence was put forward by a consultant psychiatrist, Dr Attavar, who also signed a certificate that he had lacked capacity to conduct proceedings since 2010. Baker LJ was “wholly unpersuaded” (paragraph 58) that this was the case.

59. There are a number of deficiencies and difficulties in the evidence about capacity presented to this Court. A preliminary point is that none of the reports complies fully with the requirements for expert evidence in CPR

rule 35.10 and Practice Direction 35. In addition, and more importantly, there are deficiencies in the evidence of Dr Attavar on which Mr Johnston relies to rebut the presumption of capacity. As Ms Morris KC pointed out on behalf of the FOS, these deficiencies are similar to those identified in *Cannon v Bar Standards Board*. In some respects, they are even more substantial.

60. First, there are deficiencies in the manner in which Dr Attavar was instructed to conduct the assessment. As Ms Morris pointed out, there is no letter of instruction either for the report produced in July 2023 or for the certificate signed in September 2023. Furthermore, it seems from the July report that Dr Attavar only had access to some of the relevant medical records. There is nothing in the September certificate to suggest that, before signing the certificate, he had an opportunity for a comprehensive review of the records recommended by *Poole J in Public Guardian v RI and Others*.

61. Secondly, the certificate signed by Dr Attavar failed to identify at all the proceedings in respect of which he was certifying that Mr Johnston lacked capacity. Mr Johnston has engaged in a number of proceedings – according to Dr Rao's September report, he spoke of being involved in sixteen court cases. The question of capacity to conduct proceedings depends in part on the proceedings involved. Whether or not a litigant is able to understand, retain, and use or weigh the information relevant to the decision may vary depending on the decision and the information involved. Dr Attavar's certificate does not identify which of the various cases in which Mr Johnston was apparently involved is covered by the certificate.

62. Thirdly, the certificate does not explain how Mr Johnston's mental disorders affected his capacity to understand, retain, and use or weigh the information so as to leave him unable to make decisions and conduct the proceedings. Some of the

comments in the certificate amount to no more than a repetition of the diagnosis with no or no sufficient explanation of how the disorders affect his abilities. Indeed, it is unclear from the certificate whether Dr Attavar was in fact saying that Mr Johnston was unable to understand, retain, and use or weigh the information. In some respects, the text inserted in the boxes in Part 2 suggested that his abilities depended on whether he was supported and provided with reasonable adjustments.

63. Fourthly, the certificate referred to the earlier report prepared a few weeks prior to the certificate in July 2023. The conclusion in that report, however, was that, whilst Mr Johnston did not have capacity to conduct legal proceedings by himself without a legal representative, he did have the capacity to instruct a lawyer to act for him in his legal affairs.

64. Fifthly, the bald assertion in the certificate that Mr Johnston has been unable to conduct litigation since 2010 was unsupported by any analysis or explanation. An assertion that he had lacked capacity for thirteen years required some explanation, by reference to the evidence considered by Dr Attavar who had not met Mr Johnston before July 2023. The certificate contained no such explanation, and the July letter to which it referred contained only a brief summary of extracts from the medical records which had been supplied by Mr Johnston himself. There was, for example, no reference to anything between 2010 and 2016. In those circumstances, it is difficult to understand how Dr Attavar was able to say that Mr Johnston had lacked capacity since 2010.

Dr Attavar's opinion was also not supported by the subsequent opinion of another consultant psychiatrist, a Dr Rao:

65. [...] Less than three weeks after Dr Attavar saw Mr Johnston and signed a certificate that he lacked capacity to conduct unspecified proceedings and had done so since 2010, Dr Rao assessed him and

concluded that he needed “reasonable adjustments ... in the form of clear verbal communication and allowing him sufficient time to understand while sending written material.” It is true that Dr Rao was not at that stage asked to assess his capacity, but there is nothing in his report to support Dr Attavar’s conclusion. In March 2024, Dr Rao conducted a capacity assessment and reached the clear conclusion that Mr Johnston did not lack capacity to conduct any of the various proceedings in which he was engaged. It was Dr Rao’s view that Mr Johnston needed a range of reasonable adjustments which he spelt out in his report, but not that he lacked capacity. In my view, Dr Rao’s clear and well-presented opinion is to be preferred to the opinion expressed by Dr Attavar.

As Baker LJ reminded himself:

66. The presumption of capacity is a fundamental principle in our law. As Burnett J observed in *V v R*, “the underlying policy of the Act is to avoid concluding that incapacity is established unless, after careful enquiry, it is necessary to do so”. Furthermore, “in the context of litigation, a finding of incapacity curtails the right of unimpeded access to the law” – a further fundamental principle. The evidence adduced on this appeal comes nowhere near rebutting the presumption.

67. Accordingly, I conclude that Mr Johnston has failed to prove that he lacked capacity at any stage in these proceedings. He was therefore not a “protected party” under CPR rule 21.1. I would therefore dismiss the appeal on the ground for which permission has been granted.

As to the second question, Baker LJ noted that, had Mr Johnston made out his case that he lacked capacity to conduct proceedings since 2010:

57. [...] the effect would in fact be more far reaching than contended for by Mr Matovu. For under CPR rule 21.3(4), “any step taken before a... protected party has a litigation

friend has no effect unless the court orders otherwise”. If Mr Johnston lacked capacity for the period of 13 years asserted by Dr Attavar, he had no capacity to start the proceedings against the FOS when he filed the claim in December 2020, with the result that every step in the proceedings from the filing of the claim onwards would have no effect unless the court ordered otherwise. No application has been made for the court to make such an order.

Coulson LJ gave a short concurring judgment:

79. One of the oddities of this case is that, unlike all the authorities to which we were referred, this was a situation where a claimant – not a defendant – sought to argue that he did not have capacity during the relevant period. Since, on his case, that period extended back to 2010, the effect of his argument appeared to be that not only the intervening court orders, but the entire proceedings (which he started), were a nullity. Mr Matovu appeared to accept that point during the course of argument.

80. Entirely properly, Ms Morris KC, on behalf of the respondent, drew our attention to CPR 21.3. That provides:

“21.3.

(1) This rule does not apply where the court has made an order under rule 21.2(3).

(2) A person may not, without the court’s permission –

(a) make an application against a child or protected party before proceedings have started; or

(b) take any step in proceedings except –

(i) issuing and serving a claim form; or

(ii) applying for the appointment of a litigation friend under rule 21.6, until the child or protected

party has a litigation friend.”

81. Ms Morris said that, on one reading of r.21.3(2)(b)(i), a person who did not have capacity could commence proceedings by issuing a claim form, even if the lack of capacity invalidated all the subsequent court orders.

82. I do not agree with that interpretation of the rule. In my judgment, r.21.3(2) is concerned with the position where a child or protected party is a defendant. It is designed to give the child or protected party proper protection once they have been served with a claim form. The first two sub-rules of r.21.3 are not concerned with the position where a party without capacity wishes to bring a claim in their own name. I note that, at paragraph 21.3.1, the learned editors of this part of the White Book take the same view as to the scope of the rule.

83. That must also be right as a matter of common sense. A child of 8 does not have capacity, so could not validly commence proceedings on his or her own. Furthermore, if a lack of capacity invalidates orders made by a court at a time when it was not appreciated that the party in question did not have capacity, then it would be absurd if the same rule did not apply to the commencement of the proceedings themselves, if those proceedings had been commenced by somebody who lacked capacity.

In her two sentence concurring judgment, Asplin LJ expressly identified her agreement with Coulson LJ's interpretation of CPR Part 21.

Comment

The review of the law relating to capacity to conduct proceedings (or litigation capacity as it is often called) by Baker LJ is extremely useful as a stock take. The – detailed – dissection of the failings of the evidence put forward to support Mr Johnston's incapacity is also very helpful as a case-study in what not to do, both in terms of the process of assessment, and in terms of writing it

up (in which regard, more broadly, it may be useful to see our [updated guidance note](#)).

In terms of the construction of CPR r.21.3, Coulson LJ's construction must be correct, but it does reinforce what very practical problems can stand in the way of a person with impaired decision-making capacity seeking to bring proceedings. There is clearly a balance to be struck, but Strasbourg has recently [reinforced](#) how vital it is to make sure that the impairment of decision-making capacity should not stand as an improper bar to access to justice. If and when further steps are taken (as I hope that they will) to respond to the report of the Civil Justice Council on [The Procedure for Determining Mental Capacity in Civil Proceedings](#), I would very much hope that thought can be given about whether CPR r.21.3 strikes the right balance.

Get Me to Hospital

SCIE has published [Get me to hospital: When and how to use the Mental Capacity Act to convey a person to hospital for physical health treatment](#), a very helpful toolkit (with the help of Tor, Nicola and Alex) of resources 'for individuals with a cognitive impairment and that may draw on care and support, their families and health and social care practitioners. It may be used to forward plan and help in situations when an individual may need conveyance to hospital.' The summary states:

This guide originated from evidence which demonstrates that practitioners struggle to make these decisions and focuses on issues of supporting people under the Mental Capacity Act (MCA), not the Mental Health Act – who are assessed as unable to make their own decision to be conveyed to hospital for physical treatment, and require a decision to be made, in their best interests.

The focus of this guide is to support both the individual when they are at the centre of decisions relating to conveyance to hospital, and the practitioner responsible for arranging, or undertaking, conveyance of the individual. It also looks to address potential health inequalities where individuals have been known to die from preventable

conditions because professionals have not used the MCA, correctly.

Palliative Care Commission

The Palliative Care Commission has been established to consider a range of issues:

The Commission's work aims to produce recommendations for solutions to the current difficulties and gaps in access to high-quality palliative care that can meet the extensive range of needs of our diverse population in all areas of the UK. The evidence we receive will be carefully read and analysed, as will evidence heard from witnesses and roundtable meetings. Commissioners are not there to represent their own organisation, but to take a broad overview to find ways forward that can feed into the ten-year plan.

Following the analysis of research and evidence gathered by the Commission, a report will be written to present to the Secretary of State for Health and Social Care, Members of the Houses of Commons and Lords, and service commissioners, and will be available for providers, clinicians and the public.

Guidance to support implementation of the Mental Capacity Act in acute trusts for adults with a learning disability

In what may be one of its last such documents, NHS England has published Guidance to support implementation of the Mental Capacity Act in acute trusts for adults with a learning disability. The Guidance states:

This guidance support trusts and community providers to enable front line staff to fulfil their legal requirements around the Mental Capacity Act (MCA) 2005; specifically when supporting people with a learning disability.

A Health Services Safety Investigations Body report in 2023 on the care of acute hospital inpatients with a learning disability in

England, found variation in staff understanding and application of the MCA in the care of people with a learning disability.

Trusts leadership are asked to ensure they understand the guidance, take the actions indicated and make these resources available to all frontline staff.

To make this guidance as useful as possible for trusts and clinicians, we provide practical tools and resources that can be downloaded:

- *a flowchart to help you decide how to assess capacity*
- *a checklist for preparing to assess the mental capacity of someone with a learning disability*
- *advice on how to undertake the 2-stage test for mental capacity*
- *reasonable adjustments that can support assessment of capacity of people with a learning disability*
- *template forms for recording mental capacity assessment and best interests decision including balance tables*
- *a poster about Mental Capacity Act assessments*

This guidance supports and complements NICE guidance on decision-making and capacity assessment.

An International Comparison of Psychiatric Advance Directive Policy: Across eleven jurisdictions and alongside advance directive policy

In the context of the start of the Public Bill Committee stage of the Mental Health Bill in the Westminster Parliament, some may be interested to see this article which has just appeared and to which Alex contributed: An International Comparison of Psychiatric Advance Directive

Policy: Across eleven jurisdictions and alongside advance directive policy. As the abstract puts it:

The present work provides a comparative policy review of psychiatric advance directives, considering 1) variation across eleven international jurisdictions and 2) differentiation from other advance directive policy. The aim is to support well-founded legal and clinical practice when it comes to psychiatric advance directives by 1) clarifying the range of present approaches and 2) highlighting differential treatment of those with mental health conditions. Applicable statutes in England and Wales; Germany; India; the Netherlands; New South Wales (Australia), Northern Ireland, Virginia (USA); Washington (USA); Switzerland; Scotland; and Victoria (Australia) were reviewed by a team with expertise in law, clinical practice, and ethics. Policy variations were identified related to requirements for validity, activation, amendment, revocation, and override of preferences expressed. Psychiatric advance directives tend to be more strictly regulated and have less legal force than medical advance directives, with more restrictive guidelines and more conditions allowing advance preferences to be overridden. Psychiatric advance directives also tend to be less uniform across jurisdictions, sometimes reflecting varied functions of the directive and sometimes suggesting varied framing of the appropriateness of coercion in psychiatric care. More work is needed to evaluate the validity of distinct psychiatric advance directive policy. Stricter regulation and weaker legal force can serve as barriers to use, and coercion carries associated harms; psychiatric advance directive policy, especially choices that differ from other advance directive policy, should be well-justified.

Dr Margaret Flynn reappointed as chair of the National Mental Capacity Forum

Our warm congratulations to Dr Margaret Flynn reappointment for a further three-year term as the chair of the National Mental Capacity Forum.

Book review

An Introduction to Health and Welfare Disputes involving High Net Worth Individuals, Ian

Brownhill (Law Brief Publishing, 2025, 80 pp, paperback, £49.99)

“All happy families are alike; each unhappy family is unhappy in its own way” (Leo Tolstoy, Anna Karenina).

Some of the most difficult and intractable cases I am involved in as a practising barrister are those engaging welfare issues relating to high net worth individuals. All too often such cases involve families (and ‘significant others’) who feel that, because they are not beholden to either the NHS or local authorities to provide care and treatment for P, they can opt-out of the Mental Capacity Act 2005 as well. They can also all too often involve the working out of complex and messy family dynamics through the prism of P – with, often, lurking in the background views about P’s assets.

My Chambers colleague, Ian Brownhill, has done more than his fair share of such cases, and his new book is a very practical and grounded reminder that the Mental Capacity Act 2005 applies equally to all (even if, frequently, the options that may exist for those with more resources are greater). In ten crisp chapters, he addresses such thorny issues as the (very limited) scope of property and affairs deputies to make welfare decisions, the approach to privately funded medical treatment (including cosmetic procedures), deprivation of liberty (often an issue overlooked when the cage is particularly glittering), predatory marriages, and the breakdown of relationships. In brief, but very wise compass, he provides a powerful tool for ensuring that the particular unhappinesses which can be found in the families of high net worth individuals are resolved in ways which do not lose sight of the interests of P.

Alex Ruck Keene



Book review

Wards of Court and the Inherent Jurisdiction Rob George (*Hart, 2024, 293 pp, hardback, £90, ebook free*)

I have spent quite a bit of time with the wet towel around my head recently working out precisely how the recent Supreme Court decision in *Abbasi & Haastrup* translates across to the Court of Protection (for some thoughts with Hannah Taylor of Bevan Brittan, see [here](#)). Part of our discussions revolved around whether the reliance placed by the Supreme Court upon the *parens patriae* jurisdiction to justify the orders made providing for anonymity of clinicians in serious medical treatment cases translated across to the situation where the Court of Protection is considered such cases involving adults with impaired decision-making capacity. In this context, I reminded myself that I had yet to review the book published by Professor Rob George (now KC) last year on the strange history of the inherent jurisdiction in relation to children and adults. So, with apologies that it is slightly overdue, here it is.

The first thing to note about the book is that it is available for free in electronic form [here](#), which is hugely to the credit of all those involved, because it is a book which deserves to be read very widely.

The second thing to note is that it comes with a foreword from Baroness Hale which strongly endorses the central – and very challenging – message of the book, namely that the High Court’s inherent jurisdiction is being used improperly. Both George and Baroness Hale reserve some of their strongest criticisms for the use of the inherent jurisdiction in two particularly controversial areas:

- In relation to the deprivation of liberty of children, Baroness Hale noting her view that: “[t]his flies in the face of the statutory scheme [set out in s.25 Children Act 1989] and may well violate article 5 of the European Convention on

Human Rights because the power to do this is not sufficiently precise to be ‘in accordance with the law’. Perhaps worse, it lets the government off the hook for their failure to provide adequate placements for some very troubled children.”^[1]

- In relation to the adults who have capacity but are in some way vulnerable. Baroness Hale describes this as the “bare-faced invention of a jurisdiction which does not exist,” and goes on to note her view that “Parliament deliberately decided not to enact a limited protective scheme, preserving the autonomy of the person concerned, which the Law Commission had proposed in 1995.”

Taking these together, she goes on to wonder whether she:

had wasted most of my time at the Law Commission – helping to devise carefully thought-out schemes for the care and upbringing of children and for decision-making on behalf of adults unable to make decisions for themselves. I well remember how controversial our recommendations for strictly limited emergency protection for adults who did not lack capacity were within the Commission. Of course, the great majority of cases are dealt with under those statutory schemes, which were certainly necessary. But what is the point of devising principles, criteria and limits if the High Court can simply ignore them? Is the undoubted wisdom and goodwill of the High Court Judges a good enough excuse.

There is a huge amount packed into the nearly 300 pages of the book, which benefits hugely from the author’s portfolio career as both a practising barrister and a Professor of Law and Policy at University College London.

Right from the outset, it is notable for the clarity both of thought and of exposition – the discussion of what, exactly, the concept of the court’s inherent jurisdiction means in the introductory chapter is a model of lucidity. It then gives a fascinating history of how the courts have shaped the “great safety net” of the inherent jurisdiction over time in relation, before turning to set out the principles, the procedure (in children’s cases – as he notes later in the book, the

procedure in relation to adults is still remarkably murky), and examine how some other common law jurisdictions have used it (spoiler alert – very sparingly).

Having laid the groundwork, it is in Part II that George really starts to move onto the offensive, challenging not just how it is used, but in some cases whether it is even legitimate to use it, in relation to a range of specific areas.

Each of these chapters merits careful reading by those who are asked both to argue and to determine cases falling within their scope, but for present purposes I want to focus on Chapter 14, “Vulnerable Adults with Mental Capacity.” Of particular assistance here is the way in which George places matters in a historical perspective (relying in significant part upon, but at a number of points critiquing, Sir James Munby). I anticipate that many who have got this far in the review might have been scratching their heads as to what Baroness Hale was talking about by reference to the Law Commission’s work in the 1990s, and what that could have to do with this issue, as most people now only remember it for leading to the MCA 2005 – i.e. a jurisdiction over those **lacking** material decision-making capacity. What George reminds is that there was a whole part of its Mental Incapacity report which was specifically addressed to public law protections of “vulnerable adults.” Those recommendations were not enacted. George, along with Baroness Hale, takes the view that this represented a “clear policy decision not to legislate in relation to vulnerable, capacitous adults – as David Lock puts it, it was ‘deliberately left out’ of the Mental Capacity Act 2005 (‘MCA 2005’) scheme” (page 201).^[2] Further, as George suggests “[i]t has no historical basis – as recently as 2003, the authorities were categorically against there being such a jurisdiction. As Hewson noted, ‘[a] perceived need for a remedy does not thereby endow judges with power, however worthy their motives’, and some of the authorities deployed in support are used in a positively misleading way, cited to support points in direct opposition to their ratio” (page 223). His conclusion is damning:

The jurisdiction in relation to vulnerable adults is the archetypal example of the protective

imperative in action – and of the dangers of this ‘intuitively appealing’ approach. The subjects of the applications are invariably in sympathetic situations, where human instinct is to want to help – but from this desire to protect, the court has created an entire jurisdiction with no clear definition as to who may be subject to it, no established principles, no predictability of application, and no safeguards. While potentially well-meaning, it is dangerous and constitutionally inappropriate: it should be ‘no function of the courts to legislate in a new field’ in this way. If there is to be such a jurisdiction, it should come from Parliament. There should be a clear structure; those who fall within its scope should be known and predictable; coherent principles must exist addressing how the powers can be exercised; and limitations on the court’s powers should be expressly stated (including P’s right of veto). These requirements are ill-suited to development by the judiciary from scratch, as the existing state of the law demonstrates.

Some of the most difficult questions I get asked wearing my hat as a practising barrister are as to whether and when the inherent jurisdiction can be used in relation to an adult understood to have capacity but to be vulnerable (my attempt along with others in my Chambers to give some guidance can be found [here](#)). But Baroness Hale’s ringing endorsement of George’s detailed critique might be thought to raise real questions about whether the exercise is even a legitimate one at all.

That is not to say that those judges who have taken the view that capacity is necessary but insufficient for the exercise of true autonomy (which lies at the heart of the invention of the jurisdiction) are wrong. We only need to see the debates about the Terminally Ill Adults (End of Life) Bill to recognise the truth of this (and the work of [Kevin Ariyo](#) has also really helped expand our understanding of interpersonal influence in the legal context). But this book might be thought to make more urgent the question of whether this is not a matter which not just *could* be thought about by Parliament, but *must* be thought about by Parliament.

I have focused on this part of the book because it is an area that I have found troubling for many years; others will no doubt focus in other parts

and will either have their concerns reinforced or start spluttering that George must be wrong (and, in the process, will be helpfully forced to think precisely why that must be the case). Overall, therefore, this is indeed, as Baroness Hale says in her introduction, a “remarkable book.”

[1] The book, current to June 2024, pre-dates the introduction of the Children’s Wellbeing and Schools Bill, which may (through [clause 11](#), expanding s.25 Children Act 1989), address Baroness Hale’s concerns as to the procedural aspects, if not her concerns about the adequacy of provision.

[2] I have some considerable sympathy with this view, but the historical record is remarkably sparse for something quite so (relatively) recent – as George notes (at page 201), the “1997 consultation Green Paper stated that the government was ‘not convinced that there is a pressing need for reform’. By the time of the White Paper, all mention of this part of the Commission’s report had disappeared.” It feels like quite a bit might lie between those two sentences.

Alex Ruck Keene

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](#).

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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](#).



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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](#)



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



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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.

Neil is running the following courses, with tickets available [here](#):

- BIA/DoLS refresher training: 26 June 2025, 16 July 2025.
- DoLS Authoriser Training: 4 July 2025
- AMHP/MHA 1983 Legal Update: 10 July 2025

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 May. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: marketing@39essex.com.

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