



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

- (1) In the Health, Welfare and Deprivation of Liberty Report: time-specificity of capacity (again), a Welsh primer on key caselaw and urban myths around s.4B MCA 2005;
- (2) In the Property and Affairs Report: two guest articles from new members of the Court of Protection on attorney elephant traps;
- (3) In the Practice and Procedure Report: the purpose of transparency and the length of restrictions, and the contempt consequences of being found to have capacity;
- (4) In the Mental Health Matters Report: progress of the Mental Health Bill and the CRPD and the United Kingdom in a stand-off;
- (5) In the Children's Capacity Report: the Law Commission's Disabled Children's Social Care report and improving the outcomes of children in complex situations.
- (6) In the Scotland Report: an update on AWI reform.

We do not have a Wider Context Report this month, but 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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Anticipating the reasonableness of responses – time-specific capacity in action

Darlington Borough Council v AW & Ors [2025] EWCOP 33 (T3) (Henke J)

Mental capacity – assessing capacity

Summary

This case decided in August 2025, but only published more recently, is another in a now near-continuous stream of cases grappling with complexities of applying the time-specific MCA 2005 in real life.

The facts of the case are disturbing, both in the depths of the despair that they illuminated on the part of the young person involved, and also for the fact that they are by no means uncommon. They also, to the extent relevant, reinforce the propositions set out in the Law Commission’s Disabled Children’s Social Care report that something is clearly not working as regards those moving towards adulthood and whose needs straddle the social and health care divide.

The young person in question, AW, having been the subject of inherent jurisdiction proceedings during her late adolescence, had now turned 18. At that point, her capacity to make relevant decisions assumed a new importance. The independent expert, Dr Ince, opined as follows at paragraph 34:

- a. *AW has capacity to conduct the proceedings. Dr Ince applies the presumption of capacity and notes that on the three occasions he assessed AW she was able to understand, retain and use and weigh the relevant information.*
- b. *AW has capacity to make decisions on her residence. The presumption of capacity is not rebutted.*
- c. *In relation to care, AW is able to understand and retain the relevant information. However, in response to specific triggers, AW was unable effectively to use and weigh the relevant information. However, those periods, if she is supported, should be broadly avoidable or if they do occur, will be short lived. This is not a pass on a fluctuating capacity. However, Dr Ince asserted that there is on an "interim basis" sufficient evidence to rebut the presumption of capacity as a consequence of contextually predictable episodes in which AW displays executive function secondary to her trauma and neurodevelopment disorders.*
- d. *In relation to contact as a global and general decision, AW's capacity is not absent. However in*

moments of emotional arousal, mistrust or relational stress her ability to appraise information is impaired and episodically disrupted. On this decision, AW's presentation is consistent with trauma related executive disfunction and the known difficulties that autistic individuals may experience when navigating relational ambiguity, safeguarding intervention and emotionally nuanced social context. "It would be a categorical error to interpret her minimisation or brief responses as a lack of capacity per say; rather, these must be seen as context and communication patterns that require sensitive interpretation."

- e. In relation to contact with SP and NY, Dr Ince concluded that AW lacks capacity to make the decision on contact with both.
- f. AW has capacity to engage in sexual relations.

35. Dr Ince concluded that AW has a confirmed diagnosis of ASD. In relation to this diagnosis AW's presentation is characterised by sensory sensitivity, cognitive rigidity, marked difficulties with transitions and relational boundaries and atypical executive function. There is evidence of difficulties with interoceptive awareness, a concrete thinking style and emotional processing deficits all consistent with the autistic profile. AW also meets the criteria for Complex Post Traumatic Stress Disorder. The experiences which have led to this traumatic stress disorder results in an affective instability, a negative self-concept, relational hypervigilance and a pattern of maladaptive coping strategies to include self-injury, disordered eating and social

withdrawal. AW also presents with disordered eating behaviours, most closely aligned with Atypical Anorexia Nervosa.

36. Dr Ince concluded that overall, AW presents with a constellation of interacting difficulties, to include Autism, developmental trauma, effective instability and relational risks. The conditions do not exist in isolation and her presentation is not adequately captured by one diagnostic label. AW's functional profile varies significantly depending on emotional state, environmental stability, relational safety and perceived autonomy. These factors form the causative nexus between the diagnostic and the functional test.

37 Dr Ince provided a further report on the 6 May 2025 responding to a significant number of questions of clarification which had been raised. In summary:

- a. Dr Ince repeated his findings that AW lacked [note, this must be a typo for 'did not lack'] capacity to conduct the proceedings but if subject matter capacity is compromised (such as on care) then AW may not have capacity and this would be caused by episodes of dysregulation.
- b. AW's starvation has significant impact on cognitive functioning and emotional regulation. The cumulative effect of proposed nutritional deprivation likely impaired her ability to use and weigh relevant information effectively during periods of acute malnutrition. However, AW's decision not to eat or take nutrition were rooted in authentic, consensually rational decision making informed by lived experience. The evidence

suggests that this decision reflects a capacity as to decision making.

- c. *There are periods when AW has capacity to make decisions on care and support and contact and periods when she does not. These periods are not random but contextually predictable arising in specific identifiable circumstances such as relational rupture and perceived threats to her autonomy.*

Importantly, Dr Ince considered that:

Anticipatory declarations could be operationalised effectively for AW provided that the care team is furnished with a clear, objective criteria and is supported by ongoing training to maintain vigilance and procedural accuracy.

The reference to “anticipatory declarations” was a reference to the body of case law (summarised helpfully by Henke J) in which the Court of Protection has concluded that it has jurisdiction to make declarations about the lawfulness of actions to be carried out when a currently capacitous person ceases to have that capacity.¹

However, ultimately, the parties before Henke J – and the judge herself – considered that this was not a case in which such declarations could be made. Whilst she accepted that had the jurisdiction to do so, she declined to do so:

57. In this case I have jurisdiction to make anticipatory declarations, but I decline to do so. Sections 5 and 6 MCA can be used to manage the circumstances of this case and any

future crisis that AW may suffer. Whilst AW has put herself at risk in the past, I have reminded myself that I must guard against any suggestion that unwise decision-making is analogous to decision-making without capacity. Capacitous adults may make wise or unwise decisions. The point is that they have the capacity to choose and make informed decisions however unwise. I have reminded myself that I must guard against the protection imperative and paternalistic decision-making. I must respect AW's autonomy. I have carefully considered whether the evidence establishes with sufficient clarity the circumstances in which AW may lack capacity and in the event that AW does, the circumstances in which contingent best interest decisions would need to be made. I have concluded based on the evidence as a whole, of which Dr Ince's evidence is a significant part, that the evidence in this case does not provide that sufficient clarity. Accordingly, I decline to make anticipatory declarations which, on the evidence, would not be practical to implement.

The application for anticipatory declarations was therefore dismissed.

Henke J observed of AW that:

59. She is an intelligent young person who was delighted to have her capacity and thus her autonomy recognised. She remained willing to accept the support offered to her by the statutory agencies and those statutory agencies remained committed to her. AW's parents were in agreement with my decision-making.

60. I have written this judgment to enable AW to have a brief record of court proceedings which were before the

¹ Although, as per Hayden J in GSTT & SLAM v R [2020] EWCOP 4, any declarations as to the lawfulness of deprivation of liberty arising in such periods have to be

made by the High Court exercising its inherent jurisdiction.

court for a year. During that time AW was deprived of her liberty first under the Inherent Jurisdiction relating to children (s.100 Children Act 1989) and later in the Court of Protection wherein it was declared in the interim that she lacked capacity in the relevant domains. However, once the expert evidence had been finalised and tested before the court, it became apparent that in her case the evidence did not support the presumption of capacity being displaced. AW is an adult now with capacity, able to make good and bad choices about her own future. I wished her well on 22 May 2025 and I do so again as I end this judgment.

Comment

This case, as with *Leicestershire CC v P and Another* (*Capacity: Anticipatory Declaration*) [2024] EWCOP 53, is a very helpful reminder that ss.5 and 6 MCA 2005 are the 'first line' tools established by Parliament to grapple with the care and treatment of those with impaired decision-making capacity. And, within this, it is important to recall that they provide protection from liability (and hence, in effect, a power to act) where the actor 'reasonably believes' that the person lacks the relevant capacity, and that their actions are in the person's best interests. As the Court of Appeal observed in *Commissioner of Police for the Metropolis v ZH* [2013] EWCA Civ 69:

40. A striking feature of the statutory defence is the extent to which it is pervaded by the concepts of reasonableness, practicability and appropriateness. Strict liability has no place here. Of particular relevance to the present case is the fact that D is under no liability to P in tort for an act done in connection with the care or treatment of P, if he reasonably believes that it will be in P's best interests for the act to be done; and (in the case of restraint) if

he reasonably believes that it is necessary to do the act in order to prevent harm to P; and he is obliged to take into account the views of, amongst others, anyone caring for P, but only if it is practicable and appropriate to consult the carer.

When the law says 'reasonable belief,' it is the law's code for 'we do not expect perfection, but a coherent explanation.' In the context of a situation such that of AW, where it appears on the basis of the evidence set out in the judgment that crises leading to impaired decision-making capacity could be unpredictable, it might be thought that this provides exactly the framework required to manage the situation. In AW's case, as in the *Leicestershire* case, it might also be hoped that those working with AW are able to work with her to set out anticipatory care plans to make clear her wishes in the event that she does experience another crisis, as such then make it even clearer what the 'right' course of action would be at such point.

Entirely separately, the case contains an important reminder that if an expert is not likely to be able to report within the relevant timeframe, it is vital that they let the parties and the court know "so that it may take proactive steps, including instructing an alternative expert" (paragraph 32).

Short note: a Welsh primer in key caselaw

TIRE v Carmarthenshire County Council [2024] EWCOP 81 (T2) is, as far as we know (but we would welcome correction) the first published judgment from the Court of Protection in Welsh (although many will have been delivered orally). As this Practice Direction makes clear, Court of Protection proceedings in or having a connection with Wales must be conducted on the basis that the Welsh and English languages are treated on the basis of equality.

The case itself was a relatively 'routine' s.21A application, although characterised by a very clear desire on the part of HHJ Edwards to understand the perspective of P, and to recognise the impact upon her of the decision that she should remain in a care home². Of particular – wider – assistance is the appendix to the judgment in which the judge set out an agreed translation by the bilingual Counsel involved (Nia Gowman and Lewis Harrison) of the legal framework and key cases concerning best interests.

Short note: sex, capacity and confusion

Re W (Capacity to Engage in Sexual Relations & Marry) [2025] EWCOP 32 (T2) concerned a 32-year-old woman with learning disability in supported accommodation, receiving a total of 21 hours of support per week. She worked two days a week at McDonalds and spent time with friends and family with whom she went on holidays. The issue was whether she had capacity to engage in sexual relations and to enter into a marriage or civil partnership in circumstances where she lacked capacity to make decisions 'about contact with others'.

In a previous judgment in September 2016 the court had concluded that W had been the subject of a forced marriage, which was annulled, and had been the victim of abuse including rape. At that she lacked capacity to engage in sexual relations and to marry. From June 2021, a learning disability nurse had provided sex education, but there had been a number of concerning incidents. The most recent expert evidence was that "Were she to be in a mutually respectful, safe relationship, it is my opinion that she would have capacity to make decisions about engaging in sexual relationships. However, if there is even minor perceived coercion, W is

likely to acquiesce with what the other person wishes to happen." The focus of the case was on W's ability to "use" relevant information in circumstances where she was vulnerable to coercion.

In essence, the court decided the best interests decisions as to contact, and taking all practicable steps, would enable W to have capacity to decide on sexual relations and marriage. HHJ Farquhar held that:

On the basis of the full cooperation and disclosure that W has exercised to date I am satisfied that the Local Authority would have the ability to play a full role in such decisions in the vast majority of incidents in which W makes contact with an individual. It is likely, in the vast majority of instances that the individuals with whom W would wish to engage in sexual relations would be those with whom she has already had contact. That is a group of individuals over which the Local Authority will have some control bearing in mind the protections in place and the agreed position that W lacks capacity in regard to with whom she has contact.

Accordingly, W was declared to have capacity but was a vulnerable individual who would need support at appropriate times to be able to effectively exercise that capacity, for which the local authority was to prepare a care and support plan to set out such support.

Comment

This case is interesting in three respects. First, it illustrates the use of TZ style support plans which, put bluntly, enable a best interests decision to be made about who P has contact with which provides a 'safe' relationship in which

² We do not, unfortunately, profess Welsh language abilities – the website used to allow us to navigate

through did, perhaps rather tellingly, translate the "Court of Protection" as "the custody court."

P can make capacitous decisions regarding sex. Second, it adopts the same approach with regards to marriage, despite the person lacking capacity as to the person with whom they would enter the marriage contract. And, third, the evidence hinged upon whether W was unable to use relevant information because her “the eagerness to please is part of who W is and her learning disability means that she finds it more difficult not to act upon it.” But with the ‘safeguards’ of best interests decisions in respect of those with whom she had contact, this would reduce the risk of sexual abuse.

Many people – we suspect potentially including the judge – might consider that the conclusions reached shows that the law in this area requires a wholesale (statutory) reconsideration. For those wanting to think more about these areas, we recommend this [book](#).

Wishing won’t make it so – urban myths around s.4B MCA 2005

Alex was contacted, again, by a health care professional who had been told with complete confidence that the new version of s.4B MCA 2005 included in the Mental Capacity (Amendment) Act 2019 was in force. This, in turn, meant that they had been told with complete confidence that it was possible to deprive someone of their liberty in an emergency where they lacked capacity to consent to the steps required to provide them with life-sustaining treatment, or to prevent a serious deterioration in their confidence, and to rely in so doing on the protections contained in s.4B.

If only that was the case. When Alex was at the Law Commission working on the [Mental Capacity and Deprivation of Liberty project](#), the Commission recognised that there was a real gap in the law which led to professionals ‘freezing,’ and – in extremis – to people dying. Section 4B as it stands only kicks in to

provide protection “while a decision as respects any relevant issue is sought from the court” (and other conditions are met). In other words, as was put in *Cardiff and Vale UHB v NN* [2024] EWCOP 61 (T3), it “expressly authorises the deprivation of a person's liberty for the purpose of giving a patient life-sustaining treatment or preventing a serious deterioration in their condition while court authorisation for the same is sought” (paragraph 20). Section 6 MCA 2005 provides protection in relation to restraint, but only where the steps taken do not cross the line to deprivation of liberty (a line which can be problematically difficult to identify, especially in high octane situations).

The Law Commission therefore proposed that s.4B be amended to provide a ‘standalone’ provision relating to emergency deprivation of liberty. A somewhat different form of that proposal appears in s.2 of the Mental Capacity (Amendment) Act 2019. However, that section is not in force (nor is any of the rest of the Act, which is primarily the vehicle for implementing the Liberty Protection Safeguards).

We can therefore be unusually categorical:

You **cannot** rely upon s.4B to deprive someone of their liberty if you are not making an application to the Court of Protection.

If you would like to be able to do so, you need to persuade the Government to bring the 2019 Act into force but that is not a matter for us as mere lawyers.

Section 44 MCA 2005 convictions

Edge Training have very helpfully [published](#) the results of an FOI request they have made to seek to establish the number of prosecution and convictions under s.44 MCA 2005 (the offence of

ill treating or neglect of a person lacking capacity). They show a consistent downward trend (with one blip) since 2017, and a consistently very low conviction rate. What would be very interesting would be to do the equivalent FOI request in relation to the offences created by s.20-21 of the Criminal Justice and Courts Act 2015 which apply to care workers / care providers which are not capacity specific. If there is a trend of prosecutions under these offences which is upwards, it might mean there is a choice to use a different route; if there is not, there would appear to be a considerable problem.

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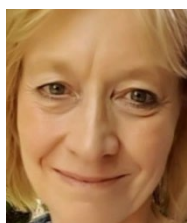
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Conferences

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 November 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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