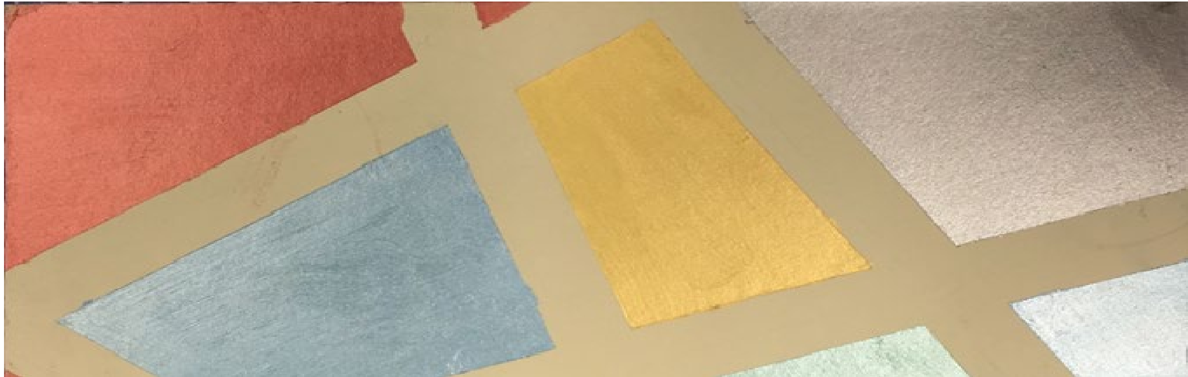
39 Essex CHAMBERS



Welcome to the May 2026 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: *Townsend* updated, sex before the Court of Protection again, and a profoundly disturbing report on dementia in acute hospitals;

(2) In the Property and Affairs Report: new OPG investigation requirements and the consequences thereof;

(3) In the Practice and Procedure Report: importance guidance on instructing experts, when habitual residence can be revisited, and a very useful new book on coercive control;

(4) In the Mental Health Matters Report: the legal gaps for those in mental health crisis in ED and misunderstandings of the MCA in the mental health context;

(5) In the Children's Capacity Report: deprivation of liberty of children in statute and in unregulated placements and what procedural fairness (does) not require in assessment;

(6) In the Wider Context Report: the MCA and suicide, and new guidance on consenting to clinical trials.

(7) In the Scotland Report: an update on the new AWI accreditation programme being run by the Law Society of Scotland.

We offer our hearty congratulations to Sir Stephen Cobb on his appointment as President of the Family Division and of the Court of Protection. For anyone who wants reassurance that the new President truly 'gets' the Mental Capacity Act, we suggest reading his judgment in the case of 'Stitch,' his last decision as a Tier 3 judge of the Court of Protection.

A reminder that that whilst Chambers have launched a new and zippy version of our website which may look unfamiliar, all the content that you might need – our Reports, our case-law summaries, and our guidance notes – can still be found via here.

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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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Amendments to the MHA 1983

On 6 April 2026, two further amendments to the MHA 1983 were commenced. Section 51 of the Mental Health Act 2025 inserts a new s.142C into the 1983 Act and extends to England and Wales, Scotland and Northern Ireland. For context, *YL v Birmingham CC* [2007] UKHL 27 ruled that an independent care home providing local authority-arranged accommodation was not a "public authority" under s.6(3)(b) HRA 1998. Parliament patched the gap for care homes (Health and Social Care Act 2008, s.145; later Care Act 2014, s.73) and for some directly-arranged NHS services. However, this did not cover those in care homes with s.117 MHA 1983 after-care (*Sammut v Next Steps Mental Healthcare Ltd* [2024] EWHC 2265 (KB)) or informal patients in private mental health services.

This amendment extends the remit of the Human Rights Act 1998 to private care providers, requiring them to act compatibly with the Convention rights set out in the Human Rights Act 1998, when providing services as set out in section 142C(2) of the 1983 Act. The geographical extension to Scotland and Northern Ireland is unusual for a 1983 Act amendment and reflects the cross-border reach of independent mental health provision.

The second is section 52 of the 2025 Act (England only) which imposes a duty on the Secretary of State to review regulation 18 of the Care Quality Commission (Registration) Regulations 2009 to consider the circumstances in which the CQC ought to be notified where a person under 18 is an inpatient in a hospital or registered establishment and is being treated for, or being assessed in relation to, mental disorder. A report setting out the conclusions of the review must be laid and published by the Secretary of State within 2 years of 18 December 2025.

HSSIB concerns about the care of people in emergency departments in mental health crisis

The Health Services Safety Investigation Body ('HSSIB') have been sufficiently concerned in the course of the investigation into this issue that they have published an interim report.[1] In headline terms, the investigation has found that:

[1] Alex acted as a legal subject matter adviser.

- There is an absence of clear legal powers to lawfully prevent vulnerable individuals from leaving the ED while awaiting assessment or admission.
- This legal ambiguity exposes patients to increased risk of harm and/or being unlawfully deprived of their liberty, and places staff in a position of uncertainty when attempting to manage safety.
- For those requiring formal admission to a mental health hospital, an application under the Mental Health Act 1983 cannot be completed until a bed has been identified, which can take days.
- Staff and organisations reported they are often faced with choosing "the least harmful way to break the law" in order to try and keep patients safe.
- EDs are not designed to provide therapeutic mental health care and prolonged stays may worsen patients' conditions and create challenges in maintaining a safe environment for everyone.

The HSSIB has made two safety recommendations:

> *HSSIB recommends that the Department of Health and Social Care urgently reviews the current legal framework and addresses the current legislative gaps in emergency care for people in mental health crisis and clarify the extension of legal powers for health professionals to hold someone in the emergency department. This will safeguard people who are currently arriving at the emergency department in a mental health crisis and the staff who care for them to support safe, consistent and legally compliant care.*

> *HSSIB recommends that the Care Quality Commission works with stakeholders to produce a position statement on existing legal powers, and the expectations for support for staff, for the care of people experiencing a mental health crisis in emergency departments (including mental health emergency departments and mental health crisis assessment services), who are not detained under a formal legal framework. This should include a review of current guidance and existing powers to help support safe, consistent, and legally compliant care in the absence of comprehensive legislation, while minimising harm and addressing the unique challenges of prolonged stays in the emergency department.*

The MHA, the MCA, misunderstandings and misapplications

Alex was asked to provide (and to speak to) an expert report on the MHA 1983 and the MCA 2005 for purposes of the Nottingham Inquiry. The report covered a significant amount of ground seeking to set out common misunderstandings and misapplications of the MHA 1983 and the MCA 2005, as well as the complexities that arise where the law is out of step with Codes of Practice. The report can be found here, a transcript of Alex's evidence here, and a recording of his evidence here. A particular issue that he highlighted in the oral evidence session was around the category error of talking of 'capacity to commit a crime': for more on why this is legally nonsensical, we recommend watching the webinar held in 2023 Chambers on When P is an Offender.

Mental healthcare aspirations in Wales

The Welsh Government published in March 2026 two quality statements (the Mental Health Quality Statement and Self-harm Quality Statement, defining the outcomes and standards

which services must deliver, with a view to helping Wales to be the first nation in the United Kingdom to deliver same-day, open access mental health care.

Article 3 in the County Court

Ali v Northamptonshire Healthcare NHS Trust [2026] EWCC 13 (County Court (Mr Recorder Adrian Jack))

Other proceedings – civil

Summary

In a rarely reported case from the county court, Mr Recorder Adrian Jack considered a damages claim under the Human Rights Act 1998 for breaches of Articles 3 and 8 ECHR. The claimant prisoner, Mr Ali, sought damages limited to £5,000 for not receiving the mental health treatment he required in order to have a reasonable prospect of release from custody.

Mr Ali was sentenced for rape to indefinite detention for public protection. During his time in prison, there were repeated incidents of a sexual and violent nature. He attempted suicide twice. He was diagnosed with several personality disorders and moved to Rampton Psychiatric Hospital. Following a deterioration in Mr Ali's behaviour, when he caused extensive damage to two rooms at Rampton, the hospital determined that it could no longer provide care for him. Mr Ali was moved back to prison.

Whilst back in prison, Mr Ali said that he would like to return to Rampton, but was told he needed to follow the pathway therapy route before he could self-refer. He raised a formal complaint about not being referred back to Rampton. His claim for damages stemmed from the alleged failure of the defendant NHS Trust to provide the requisite mental health treatment, the pathway therapy, so he had no realistic prospect of being referred back to Rampton, and therefore no realistic prospect of receiving the treatment which would reduce the risk of his reoffending if he were released.

The Trust accepted that it was responsible for the medical care of the claimant for some, but not all, of the time that the claimant was in prison. There was however some confusion during the trial when the Trust sought to argue that the recommendation regarding a referral to Rampton Hospital sat with a private contractor, Practice Plus Group ("PPG"), and not with the Trust. The judge disallowed this new evidence to be adduced and held that the Trust was bound by its concession in its witness statement that the Trust was responsible for healthcare provided to Mr Ali at the material times.

In assessing Mr Ali's claim, the judge considered extensively the case law of the European Court of Human Rights on Article 3. In fact, the judge readily admitted that he *"set out somewhat more than would be normal due to Mr Ali's potential difficulties accessing the relevant case law himself"*. Of particular relevance was the case of *Murray v The Netherlands* [2016] ECHR 408, where the Grand Chamber identified at 108(d) that:

> *Where the assessment leads to the conclusion that a particular treatment or therapy may indeed help the life prisoner to rehabilitate himself or herself, he or she is to be enabled to receive that treatment to the extent possible within the constraints of the prison context… This is of particular importance where treatment in effect constitutes a precondition for the life prisoner's possible, future eligibility for release and is thus a crucial aspect of de factor reducibility of the life sentence."*

The Grand Chamber concluded at para 112:

> *In conclusion, life prisoners should thus be detained under such conditions, and be provided with such treatment, that they are given a realistic opportunity to rehabilitate themselves in order to have a hope of release. A failure to provide a life prisoner with such opportunity may accordingly render the life sentence de facto irreducible.*

The judge made relevant findings of fact, including that Mr Ali needed to undergo the pathway therapy to be considered for transfer to Rampton, and that he had not been offered the chance to participate in that therapy. However, Mr Ali had adduced no expert evidence as to the likelihood of his mental state improving or that completing the therapy on its own would be sufficient to ensure a transfer. Nevertheless, the judge accepted that it was possible that Mr Ali's mental state could improve when undergoing pathway therapy.

Ultimately, the judge concluded that the Trust owed a duty to give Mr Ali access to the pathway therapy, even if the therapy would not have succeeded in bringing about a situation where he was eventually released. What mattered is that he should have that chance, *and "the failure to give him that chance in my judgment is a breach of his Article 3 rights."* It was not strictly necessary for the judge to consider Mr Ali's Article 8 claim but he would have decided it in Mr Ali's favour for much the same reasons.

In assessing the level of damages to be awarded, the judge held that *"a modest award of damages"* was necessary to afford just satisfaction to Mr Ali in the amount of £2,000.

Comment

In a world where county court judgments are rarely reported or made publicly available, this is an extremely welcome and valuable insight into the workings of the civil justice system, particularly where issues of mental health and human rights are considered. Although initially allocated to the small claims track (presumably because of the limited monetary value of the claim), it was then transferred to the multi-track. This perhaps speaks to the significance of the claim, not in terms of monetary value, but in relation to claimant's mental health, and the missed opportunities for his rehabilitation. Furthermore, the case required extensive consideration of the case law of the European Court of Human Rights, adding extra layers of legal complexity which, understandably, might pose difficulties for a litigant in person such as Mr Ali.

Although not setting any formal precedent as a decision of the county court, the approach taken by the judge could potentially have wide reaching ramifications for mental health trusts. Article 3 ECHR claims, for prohibition against torture, inhuman or degrading treatment, have historically been understood to present a high threshold to overcome in order to succeed. However, in interpreting the ECtHR case law on Article 3 in a mental health and prison context, the judge rejected the argument that the threshold was as high as the defendant NHS Trust put it. He made an unequivocal finding that the Trust owed a duty to the claimant prisoner to provide the therapy required for his potential rehabilitation. Furthermore, the judge made clear that, even if the Article 3 claim had not succeeded, he would have found that the Trust's failure to provide treatment breached Article 8.

We understand that the Trust attempted to appeal the decision in *Ali v Northamptonshire Healthcare NHS Trust (No. 2)* [2026] EWCC 21. In relation to the various grounds advanced, the judge had no difficulty dismissing those grounds based on alleged errors of fact. However, but for the fact that the application for permission to appeal was out of time, the judge would have

granted permission to appeal in relation to the legal issue, namely:

> *a novel and important question that has not previously been the subject of considered appellate authority: what is the scope and content of the Article 3 duty – as articulated by the Court of Appeal in ASY v Home Office [2024] EWCA Civ 373; [2025] KB 87 – when applied to an NHS Trust acting as a mental health care provider within a multi-agency prison healthcare system? That question has potential implications for a significant number of NHS Trusts operating in custodial settings and is a sufficiently compelling reason for permission to appeal to be granted.*

The judge noted that a renewed application to the High Court for permission to appeal was also out of time, although it was still open to the defendant to apply. Given that the judge indicated that he would have granted permission to appeal, it would be interesting to know if the defendant NHS Trust made a renewed application to the High Court for permission to appeal. If not, we will have to await a future (reported) case in which the issue might arise. Watch this space…

Independent review into mental health conditions, ADHD and autism: interim report

The interim report of the independent review into mental health conditions, ADHD and autism was published on 31 March 2026. The review states that it was commissioned:

> *in response to mounting pressure across multiple parts of the current system, and to the growing difficulty many people face in obtaining timely, appropriate and proportionate support. Referrals for mental health and neurodevelopmental conditions particularly ADHD and autism have risen substantially. Waiting times for assessment and treatment have increased. Schools, universities, employers, general practice, other public services and specialist services all report sustained pressure. At the same time, public discussion of mental health conditions, ADHD and autism has become more prominent, more urgent and, at times, increasingly polarised around questions of available support, the role of diagnosis and different interpretations of rising demand.*

The interim report is clear that it does not offer conclusions or recommendations, which will be made in the final report, and instead focuses on understanding "*why many people who are autistic, have ADHD and/or experience mental health conditions are not getting the support they need as quickly or as early as they need it; and what needs to change to address this.*" It observes that demand has increased, and notes that the review seeks to understand "*how changes in population prevalence, psychological distress, administrative diagnosis, self-identification, service demand and underlying need relate to one another, and what that implies for policy and service design that will improve lives.*" The report indicates how neurodevelopmental conditions are associated with "*mental health difficulties, neurodevelopmental conditions and not being in education, employment or training – particularly for young people. The Review intends to do further work in this area so that its recommendations can inform the Rt Hon Alan Milburn's review on Young People and Work and wider work on reforming the SEND (Special Educational Needs and Disabilities) system.*" The interim report highlights the need to resolve gaps in data as the work goes forward.

The report sets out some preliminary findings on trends in mental health and neurodevelopmental disorders:

- Common mental health conditions (anxiety and depression) and psychological distress have increased over the past two decades, particularly among young people.
- Recent evidence suggests a shift in historical trends, whereby young people are experiencing more psychological distress than older groups. "*The nature of distress is also changing. The largest increases among young people are seen in emotional symptoms, loneliness, sleep problems, loss of confidence and difficulty concentrating, rather than across all domains of mental health equally. Evidence suggests that, among those reporting high levels of distress, functional impairment has also increased over time, indicating that these difficulties are not only more frequently reported but may also be more disruptive to day-to-day life… Rising distress among young people is linked to educational disruption, school absence, disengagement from work and training, and high rates of young people not in education, employment or training (NEET). This highlights the importance of understanding mental health trends not only in relation to services, but also in relation to participation and life chances.*"
- While it appears that population prevalence of ADHD has been stable, "[r]*eferrals, waiting lists for assessment and recorded diagnoses for ADHD have increased substantially, particularly among adolescent and young adult females. NHS England monitoring data show that the number of children and young people waiting for an ADHD assessment rose from around 21,000 in April 2019 to around 270,000 by December 2025* […] *This does not imply that one set of trends is "real" and the other is not. The evidence points to a more complex picture in which relatively stable underlying prevalence can coexist with rapidly rising diagnosis, referral and service demand.* […] *There is substantial pressure on services providing ADHD assessment. The next phase of the Review will examine more closely the quality and consistency of assessments, variation in diagnostic practice, and the extent to which diagnosis is followed by evidence-based treatment. Among children and young people, the proportion of diagnoses followed by medication prescribing has roughly halved in the post-pandemic period, suggesting a shift in case mix or wider contextual changes that require further investigation.*"
- The trends for autism are similar to those for ADHD, with relatively stable prevalence, but "[s]*elf-identification and diagnoses within health and education systems have increased substantially.* […] *That increase has been particularly marked in the education system. By 2025, autism-related identified need accounted for around 3.1% of school-age children within the SEND system and growth has been especially rapid among girls and pupils without learning disability, indicating changing patterns of recognition.*"

Short Note: falling between the disposal cracks

Summary

The case of *R v Wood* [2026] EWCA Crim 480 is an interesting appeal involving the MHA 1983, the MCA 2005 and the criminal law. On 3 April 2018 firefighters found David Wood unconscious in his Sheffield Council bungalow after passers-by spotted smoke. Expert evidence showed the fire had been started deliberately by igniting a curtain draped over the sofa. He had dyspraxia, was alcohol dependent, and had significant cognitive impairment from a 2015 fall causing a basal skull fracture and frontal brain haemorrhages, leaving him with dysexecutive syndrome. At the trial, no intermediary was provided, the court psychiatrist had not seen the

medical records regarding his brain injury, and a concerned jury member passed the following note to the judge:

> *Sir, I hope you do not find this premature or critical, but I have immediate concerns over the mental capacity of the defendant based on his appearance, manner, behaviour in the dock. Is the legal system or the mental health system more appropriate? Perhaps this will be addressed. Sorry if this offends but it is an honest reflection.*

The trial continued and he was convicted of arson being reckless as to whether life was endangered, and sentenced to an extended sentence of 9 years, consecutive to 11 months activated from a suspended sentence imposed the previous year for an earlier attempted arson. On appeal, fresh psychiatric and neuropsychological evidence unanimously concluded he had been unfit to stand trial, but that his condition was not treatable, so a hospital order was not sought.

A Care Act assessment concluded he had eligible needs for a supported living placement, but a supervision order was unavailable because neither the local authority nor the Probation Service would act as supervising officer. Moreover, he was found to have capacity to make decisions as to residence and care so there would be no means of enforcing any requirements imposed by a supervision order, particularly to prevent him accessing alcohol.

Accordingly, in the absence of a hospital or supervision order disposal, the Court allowed the appeal, quashed the conviction, substituted findings of disability and that he did the act, and made an order for absolute discharge. The local authority was to arrange supported living accommodation to which Mr Wood consented to avoid street homelessness, and Probation would trigger MAPPA arrangements to manage the risks.

Comment

Aside from the impressive intervention of the juror regarding Wood's fitness to stand trial, this case illustrates the difficulties navigating the hospital order/supervision order/absolute discharge options of the criminal courts for those found unfit. In relation to his capacity, given the repeated fire-setting incidents, it would have been interesting to test the evidence as to whether his mental impairment was causing him to be unable to 'use' the information relevant to residence and care. The case certainly illustrates the importance of multi-agency co-operation when someone has a brain injury, alcohol dependency and an offending history when the person cannot be detained in prison, hospital or in social care.

Given that "*Dependence on alcohol or drugs is not considered to be a disorder or disability of the mind*" (MHA s1(3)), the following paragraph of the judgment raised an eyebrow:

> *"48. A hospital order is not an option in the present case, because the medical professionals do not support it. Whilst alcohol dependency is a recognised mental disorder within the meaning of the Mental Health Act 1983, and qualifies as a mental health condition for the purposes of treatment, it does not qualify as a basis for detention in hospital.*

Whilst alcohol dependency is excluded from the 'mental disorder' definition, there can of course be mental disorders associated with it. Moreover, a brain injury resulting in personality and behavioural changes can also amount to a 'mental disorder', which is the cornerstone of any form of health or social care 'unsound mind' detention for Article 5(1)(e) purposes.

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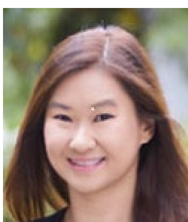

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Conferences

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 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.

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