



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

(1) In the Health, Welfare and Deprivation of Liberty Report: a masterclass in determining a particularly complex set of capacity questions;

(2) In the Property and Affairs Report: statutory will applications and publicity; OPG guidance on family care payments, and the bond provider saga continues;

(3) In the Practice and Procedure Report: a helpful reminder of elephant traps for the unwary as regards when time runs for purposes of appealing decisions;

(4) In the Mental Health Matters Report: the Mental Health Bill progresses, and the CQC reports on the MHA 1983 in 2023-24;

(5) In the Children's Capacity Report: a new BMA toolkit to help with capacity and other issues in relation to those aged 16 and 17, and back to the vexed question of parental consent to confinement;

(6) In the Wider Context Report: the inherent jurisdiction rebuffed in a personal injury case, recent research of relevance, and strong views from the CRPD Committee on medical assistance in dying and the 2000 Hague Convention.

(7) In the Scotland Report: what is appealable in the AWI context, and the complexities of the position of those aged 16 and 17 in Scotland.

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.

Contents

Short note: the inherent jurisdiction rebuffed 2

Short note: same-sex care and disability..... 3

Research corner 3

2000 Hague Convention on the International Protection of Adults: Practical Handbook..... 4

CRPD Committee concluding observations 4

Book review 5

Short note: the inherent jurisdiction rebuffed

In the personal injury case of *Forsyth v Howson & Anor* [2025] EWHC 653 (KB), the defendant sought approval of a settlement agreement pursuant to the court's inherent jurisdiction but against the wishes of the Claimant. The claimant had been assessed as having capacity to conduct the litigation and had decided to accept a Part 36 settlement offer even though the advice of his lawyers was that it was too low. The defendant was worried that if the claimant was subsequently found to lack capacity to manage his property and affairs, which was a real possibility, then his capacity to accept the Part 36 offer might be questioned, and the acceptance unravelled.

There have been a number of previous cases, cited in the judgment, where the inherent jurisdiction has been used to give court approval of a settlement even though the claimant had capacity to conduct the litigation, where there were doubts or concerns about that capacity, or the claimant's capacity to manage their finances. In this case however, the court refused to accede to the defendant's application because:

1. There was only a small risk that the claimant would later be judged to lack capacity to conduct proceedings and therefore to

accept the Part 36 offer, as all the experts who had assessed him had found he had litigation capacity.

2. The claimant did not want the court to exercise its inherent jurisdiction to protect the settlement agreement.
3. Given the claimant's objection, it was difficult to see how privilege could be waived so that the court could consider all the relevant material that would ordinarily be reviewed when approving a settlement for a protected party.
4. The actual offer was lower than the claimant's legal advisors had advised was appropriate, so it was unlikely the court would approve it in any event.

The use of the inherent jurisdiction to avoid determining disputed or complex issues of capacity in personal injury litigation appears relatively common, noting the cases cited in this judgment. This case is an example of the obvious limits of that approach, but yet again shows how much the binary distinction of the world of adults into those having capacity and those lacking capacity to make relevant decisions does not always sit easily with reality.

Short note: same-sex care and disability

The main issue in *R (VRP) v The Royal Borough of Kingston Upon Thames* [2025] EWHC 504 (Admin) was whether the local authority had a duty to provide same-sex carers for the personal and intimate care of a 19-year-old woman described as having severe physical, learning and Autistic disabilities. Her parents through direct payments commissioned her full-time one-to-one support with female carers. They were concerned there would be a time when they were no longer able to do so and were worried that local authority commissioned services would not ensure the same-sex personal and intimate care for their daughter. They also argued that local authorities should record the sex (as well as the gender) of service users when carrying out functions under the Care Act 2014. The local authority’s position was that there was no such duty and the arrangements it had in place for the discharge of its existing duties meant that in practice such care would always be provided by female carers.

Heather Williams J, applying the Care Act 2014, Human Rights Act 1998, and Equality Act 2010, ultimately rejected the argument for the “novel duty” being imposed:

161. I have fully taken into account the no doubt deeply held concerns of the Claimant’s parents, but in the circumstances no legal basis has been shown for the Court to recognise the alleged Combined Duty - namely a novel duty for which there is no supporting authority, to operate a system that ensures or which has the objective of ensuring, the provision of same-sex personal and intimate care for female service users (save where there is a preference or it is assessed to be in the service user’s best interests to have care delivered on some other basis) – in

addition to the Defendant’s existing legal responsibilities.”

162. Whilst written practice guidance in this area (which the Defendant is in the process of compiling) is in no doubt desirable, that is a long way from the Court finding that the current absence of written guidance reflecting the alleged Combined Duty, is unlawful.

Research corner

Capacity assessment and conversation analysis

In a recent ‘in conversation with,’ Alex spoke to [Jess Foulkes](#), [Dr Suzanne Beeke](#) and [Dr Anna Volkmer](#) about their paper in the International Journal of Language & Communication Disorders, *Using Conversation Analysis to explore assessments of decision-making capacity in a hospital setting*. They explore what ‘conversation analysis,’ means, and how it helps shed light on the process of capacity assessment. They also considered about the implications for training and further research. (Note, there is a good cat intervention – hurrah – and an annoying ring tone – sorry – in this episode).

The MCA and Multiple Exclusion Homelessness – a scoping paper walkthrough

Alex has done a walkthrough of *Approaches to the mental capacity assessment of people experiencing multiple exclusion homelessness in England: A scoping paper* by Stephen Martineau, a research fellow at King’s College London. The paper forms part of the preparatory work for the larger-scale research study funded by NIHR Health and Social Care Delivery Research which is currently underway (running until 2026) (with which Alex is

involved). Stephen welcomes comments on the paper, at stephen.martineau@kcl.ac.uk.

DNACPR and resuscitation policies

If you want to look at something Alex was not involved in, a very helpful – and challenging – review has recently been published By Emily Fitton and others in BMJ Supportive & Palliative Care. Called *Divergence in DNACPR and resuscitation policies: institutional survey in England*, it analyses the policies of hospitals and care homes in England as regards the use of do not attempt cardiopulmonary resuscitation (DNACPR) recommendations. They found that “many of the policies we surveyed diverge significantly from national guidance. Some require that CPR be administered in all cases where no DNACPR recommendation has been made. Others fail to specify that CPR may be appropriate even in the presence of a DNACPR recommendation.” They therefore conclude that “[l]ocal DNACPR policies currently place both patients and healthcare professionals at significant risk.”

2000 Hague Convention on the International Protection of Adults: Practical Handbook

The Hague Conference has recently published a Practical Handbook to accompany the 2000 Hague Convention on the International Protection of Adults. The Handbook reflects the practical experiences of those using the Convention since it came into force,¹ and contains case examples and practical guidance on resolving some of the dilemmas that arise. It has already had its first outing before the English

¹ Including from England & Wales. Although the UK has still (embarrassingly) only ratified the Convention in respect of Scotland, Schedule 3 to the MCA 2005 reflects the obligations of the Convention. Alex formed part of the UK delegation on the Hague Conference

courts, in the context of a further go-round in relation to the question of whether and under what circumstances Scottish guardianship orders providing for deprivation of liberty can be recognised and enforced in England (the decision of Theis J is likely to be published in short order).

The British Medical Association has published a toolkit on treating 16 and 17-year-olds in England, Wales, and Northern Ireland.²

This toolkit sets out the legal and ethical factors doctors need to consider when providing care and treatment for young people aged 16 and 17 years old in England, Wales, and Northern Ireland, such as consent, refusal of treatment, and confidentiality.

CRPD Committee concluding observations

The CRPD Committee – the expert body overseeing the UN Convention on the Rights of Persons with Disabilities – has recently published a further round of concluding observations. Of particular interest are

- (1) those in relation to Canada, in which they note in relation to the provision of Medical Assistance in Dying (at paragraph 19(b)) that:

The concept of ‘choice’ creates a false dichotomy by setting up the premise that if persons with disabilities are suffering, it is valid for the State Party to enable their death, with safeguards not guaranteeing the provision of support, and ableist assumptions deemphasising the myriad of support options for persons with

working group, and was therefore able to feed in the practical experiences of working with Schedule 3 cases.
² Full disclosure, Alex has had input into the England Wales sections.

disabilities to live dignified lives, and the systemic failures of the State Party to address the social determinants of health and well-being, such as poverty alleviation, access to healthcare, accessible housing, prevention of homelessness, prevention of gender-based violence, the provision of community-based mental health supports and employment supports.

- (2) Those in relation to the European Union, which recommends that it:

Halt efforts to authorize EU Member States to join or remain parties to the Hague Convention of 13 January 2000 on the International Protection of Adults; do not proceed with the proposed Regulation COM/2023/280 final, and do not proceed with the proposed Council Decision COM(2023) 281 final/2;³

And expresses “concern about the reluctance of the European Union to advise Member States to not proceed with the Draft Additional Protocol to the Oviedo Convention.” It notes that “[t]he Committee reiterates that the draft additional protocol would legitimize involuntary placement and treatment of persons with disabilities, and that it would contribute to the fragmentation of international law, creating deep contradictions between the Convention and the law of the Council of Europe.”

Another way of putting that last point is that the EU, at present, appears to be minded to follow the approach of the European Court of Human Rights, which accepts the validity of the

concepts of mental capacity and mental disorder, and the validity (as a last resort) of compulsory confinement and treatment. We suggest that it would be surprising, and indeed deeply problematic, were it to take any other course.

Book review

The Later Years: The Simple Guide to Organising the Rest of your Life by Peter Thornton (Bedford Square. 2025, 337pp, paperback, £10.99)

The only flaw with this book is its title, as it suggests that it is only relevant for those who identify themselves as being in their later years (or for those close to such people). It is, in fact, a book that anyone of any age should read to prepare for life’s inevitable unknowns. Written by Sir Peter Thornton KC, the first Chief Coroner of England & Wales, the book sets out to provide practical guidance for a whole host of things that are all too often put off for a rainy day. In straightforward and clear terms, the book covers such issues as: making a lasting power of attorney and a will, setting out your wishes regarding medical treatment and wider care concerns, planning financially (including covering care costs), avoiding scams, and the rights of older persons. It also provides a necessary route through what to do after death for those who are left behind (I would also in this regard recommend Ciarad Lloyd’s *You Are Not Alone* to help with the emotional load that death brings). It is a book that I wish that I had had a time when I needed to deal with the administrative after-effects of sudden death, and know that I should be implementing to make sure that I have my

³ The Regulation and Decision would effectively transpose the 2000 Hague Convention into EU law.

death file suitably arranged for when the time comes.

Full disclosure: I am very grateful to the publishers for providing me with a copy; I also gave some assistance in relation to the sections relating to advance decisions to refuse treatment / DNACPR and mental capacity matters.

Alex Ruck Keene

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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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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 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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