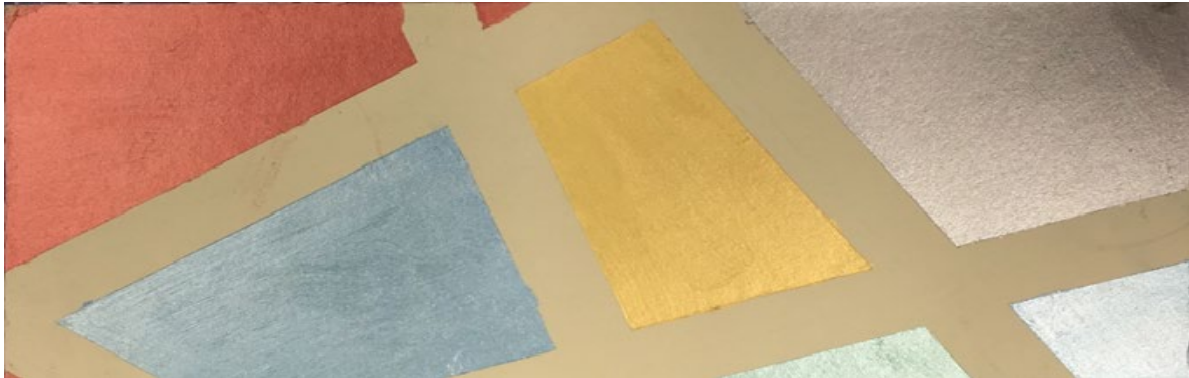




Welcome to the November 2025 Mental Capacity Report. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Report: *Cheshire West 2*, the return of LPS and where the buck stops with termination;
- (2) In the Property and Affairs Report: accessing Child Trust Funds and LPA fee increase;
- (3) In the Practice and Procedure Report: where (not if) brain stem death testing should take place;
- (4) In the Mental Health Matters Report: progress of the Mental Health Bill and the duties owed by AMHPs;
- (5) In the Children's Capacity Report: resources for children transitioning to adult in the palliative context.
- (6) The Wider Context: the Terminally Ill Adults (End of Life) Bill before the House of Lords, and CQC despairs at the state of care.
- (7) In the Scotland Report: an update on AWI reform.

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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Mental Health Bill – the end game

The Mental Health Bill is now very firmly in its last stages, having cleared the Commons and heading towards likely ‘ping-pong’ with the Lords. At Third Reading, Stephen Kinnock, the Minister for Care, whilst not giving away a great deal of detail as regards the timeframe for implementation, made clear that:

The first priority once the Bill gets Royal Assent will be to draft and consult on the code of practice. We will engage closely with people with lived experience and their families and carers and with commissioners, providers, clinicians and others to do that.

The Big Mental Health Report 2025

Mind’s second annual Big Mental Health Report (2025), produced with the Centre for Mental Health, provides the clearest picture yet of mental health across England and Wales. Drawing on surveys of over 18,000 people, it highlights persistent inequalities, worsening outcomes for young people, and growing pressures on services. The survey revealed that, in the last 12 months:

- 82% said their mental health has negatively impacted their employment
- 40% reported difficulties building relationships at work due to their mental health

- 57% said their mental health has negatively impacted their finances
- 74% reported increased feelings of isolation due to their mental health

Current State of Mental Health

- 1 in 5 adults in England lives with a common mental health problem (e.g., anxiety or depression).
- Rates are higher in deprived areas (26%) and among women (24%).
- Young people’s mental health is worsening, with 1 in 5 aged 8-25 with a probable mental health disorder.
- Suicide remains high (7055 deaths in 2023); self-harm among 10–24-year-old girls is three times higher than adult women.
- Mental and physical health are intertwined: one-third of people with physical health condition also have a common mental health problem.
- The economic and social costs of mental ill-health in England is around £300 billion per year.

Drivers of Poor Mental Health

- Poverty, poor quality housing, debt and insecure work remain major contributors.
- Public-service cuts since 2010, especially

youth services (-70%) and local-authority budgets (-18%), have weakened community support.

- Child poverty in the UK has reached 4.5 million and is projected to rise further.
- The Covid-19 pandemic left a legacy of anxiety, loneliness and economic insecurity.
- Young people face new pressures from social media, sleep loss, and academic stress.

Experiences of Support

- Waiting lists continue to grow; many report deterioration while waiting for help.
- A third of adults say GP or third-sector support did not meet their needs.
- Access to ADHD and autism assessment is uneven, with some waiting for up to 10 years.
- Despite the government's manifesto, the share of NHS funding for mental health fell to 8.78 % in 2024-25 and is projected to fall to 8.71% this year.

Stigma and Discrimination

- Public understanding of mental health has regressed to pre-2009 levels.
- Stereotypes about conditions such as schizophrenia are increasing.
- Only 1 in 5 people with ADHD has told their employer, with stigma and fear of discrimination persisting.

Key Recommendations

1. Ensure timely access to quality mental-health care through sustained investment and reform.

2. Prioritise young people, expanding early-help hubs and school-based support.
3. Tackle stigma and discrimination via national education campaigns and better data.
4. Address social determinants - poverty, housing, employment - through cross-government action.

‘Investigating Deaths under the Mental Health Act: The Need for Independence and Parity’

The Independent Advisory Panel on Deaths in Custody (IAPDC) has issued a report, ‘Investigating deaths under the Mental Health Act: The need for independence and parity.’ The report considers the role of investigations (as distinct from inquests) which consider these deaths, noting that inquests may take months or years to include. The investigations also assist in providing information for inquests and provide an independent source of information.

Core Finding

The report found that deaths of patients detained under the Mental Health Act 1983 are not independently investigated, unlike deaths in prisons, police custody, or immigration detention. This lack of independent scrutiny creates an inequality between detention settings and undermines Article 2 ECHR (right to life) obligations. The report calls for a new independent investigative mechanism to review all deaths in MHA detention - both ‘natural’ and ‘unnatural’ - to ensure accountability, transparency, and learning.

Scale of the Issue

- Deaths in MHA detention occur at three times the rate of those in prisons.
- Between 2023–24, there were 225 deaths in MHA detention (162 natural, 71 unnatural).

- Yet only prison and police deaths receive automatic, independent investigation.

Key Problems Identified

- Investigations currently rely on ad hoc internal NHS reviews, often of variable quality and lacking independence.
- Families report exclusion and mistrust, describing current processes as 'hospitals marking their own homework'.
- Coroners have repeatedly raised concern that poor internal investigations impede effective inquests and risk future deaths.
- Data quality is inconsistent - hundreds of deaths may have gone unreported to coroners between 2011–14.
- The current Patient Safety Incident Response Framework (PSIRF) is useful for learning but not equivalent to an Article 2-compliant investigation.

Legal and Human Rights Context

- Article 2 ECHR requires deaths in state detention to be independently and effectively investigated.
- The Wessely (2018) MHA Review urged Government to revisit independent investigations within five years if no progress was made.
- Seven years on, the IAPDC concludes that progress has been insufficient and reform is now essential.
- Deaths under the Mental Capacity Act 2005 are not automatically treated as state detention; however, the IAPDC notes that parity arguments may extend to such cases in future.

Recommendations

1. Create an independent mechanism (within or across existing bodies) to investigate all deaths under MHA detention.
2. Include both natural and unnatural deaths to avoid missing systemic failings.
3. Embed clinical leadership in the new investigative body.
4. Work collaboratively with the Parliamentary & Health Service Ombudsman (PHSO), Care Quality Commission (CQC), and the Health Services Safety Investigations Body (HSSIB).
5. Publish comparable data and thematic learning to improve prevention and transparency.

AMHPs and duties of care

Khamba v Harrow London Borough Council and others [2025] EWHC 2803 (KB) (High Court (King's Bench Division) (Foster J)

Other proceedings – civil

Summary

This was a local authority's application to strike out a negligence and HRA claim against an AMHP for whom it was responsible, following a violent attack by a son on his mother causing her catastrophic injuries, and the psychiatric injury of his sister who discovered the aftermath. The son was later found not guilty by reason of insanity and detained under a hospital order (ss. 37/41 MHA 1983) with a diagnosis of paranoid schizophrenia.

Following his mental health deteriorating, a private psychiatrist considered the son was detainable and made an urgent referral for a MHA assessment due to the high risk to family members. After the son was initially arrested, a MHA assessment took place on 14 August 2018. The outcome was that he did not meet the

criteria for s.2 and the AMHP advised his mother that any further threatening behaviour should be dealt with through the criminal justice system and that no follow-up was needed. On 23 December 2018, he violently attacked the family members.

The various claims were struck out or dismissed for the following reasons:

- Section 139(2) MHA 1983 rendered the proceedings a nullity because the claimants had not obtained the required leave of the High Court. The claimant's argument that this case concerned an 'omission' rather than an 'act' was rejected: the legal protection was substantive, not procedural. The court also refused to read down s.139 under the HRA. The AMHP was doing "any act purporting to be done in pursuance of" the MHA" and so permission to bring the claim was required for which either bad faith or without reasonable care must be proven.
- Even if permission had been granted, no common law duty of care arose on the facts, applying the cases of *Poole BC v GN* (2019), *HXA v Surrey CC*; *YXA v Wolverhampton CC* (2023), and *Tindall v Chief Constable of Thames Valley Police* (2024). In particular, Foster J held that the AMHP did not assume responsibility for the patient's safety, nor exercise a sufficient degree of control to become liable for injury caused. Accordingly, she held there could be no liability for a failure to prevent harm to a third party.
- The human rights claims (Articles 2, 3 and 8 ECHR) would also have failed. Applying *Osman v UK* and *Rabone v Pennine Care NHS Trust*, the local authority did not know, nor ought to have known, of a real and immediate risk to life. The son was not detained or under the State's control and so the Article 2 operational duty did not arise.

The alleged ill-treatment did not meet the Article 3 threshold, and Article 8 added no broader protection to Article 3.

Accordingly, Foster J held that:

1. Section 139(2) operated to render the proceedings brought by the claimants a nullity.
2. In any event no common law duty of care arose as argued by the Claimants.
3. The claims in respect of rights arising under the HRA would likewise have failed.

Comment

This is a significant case, particularly in relation to the decision regarding omissions. Whether the protection of s.139 MHA applied to omissions, such as a failure to detain a person, was previously undecided. Foster J held that:

85. Consideration of the meaning and scope of section 139 has recognised it is unusual for a failure in a procedural requirement to invalidate a substantive claim, but has nonetheless analysed the statutory intention of this section as being to provide substantial protection for the putative defendant, and not a mere procedural hurdle. As Lord Bingham said in Seal at para 20, the section was designed to protect "those responsible for the care of mental patients from being harassed by litigation..."

The decision demonstrates that the purpose of s.139 "reflects a strong policy of protection of those responsible for the care of mental patients" (para 90).

Given that the terrain of duties of care owed by the AMHP in the discharge of their functions was also new, it would not be surprising at all if the case went to the Court of Appeal (assuming that

the procedural bar of s.139(2) could either be remedied or circumvented).

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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 December. 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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