Autonomy and the Lawyer's Role: Enabling Choice or Exercising Control? Insights from Adult Social Care Practice

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Abstract

This note examines the tension between autonomy and protection in adult social care law and practice. Drawing on the authors' experiences and the legal frameworks governing care, support and mental capacity, it explores how efforts to promote welfare and manage risk may restrict autonomy and liberty. Particular attention is given to the role of local government lawyers in advising social work professionals on the legality, necessity and proportionality of interventions, and in shaping applications before the Court of Protection and under the High Court's inherent jurisdiction. It argues that meaningful person-centred practice requires critical reflection of the exercise of power when balancing risk, protection and individual choice.

Keywords: adult social care; Mental Capacity Act 2005; Care Act 2014; Court of Protection; inherent jurisdiction; safeguarding; autonomy; deprivation of liberty; fluctuating capacity; local authority lawyers.

[A] INTRODUCTION

The Mental Capacity Act (MCA) 2005 and the Care Act (CA) 2014 provide the principal frameworks through which autonomy and protection are balanced in adult social care. Both statutes seek to promote individual choice whilst ensuring that adults who are vulnerable to abuse, neglect or exploitation receive appropriate support and protection from harm. In practice, however, the distinction between enabling autonomy and exercising control is rarely straightforward. Lawyers advising local authorities are frequently required to navigate situations involving

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fluctuating capacity, coercive relationships, safeguarding concerns and significant risks to welfare – often all at once. The legal principles may be well established, but their application requires difficult judgements about when intervention is justified and when a person's wishes should prevail despite obvious concern.

Rather than presenting autonomy and control as opposing concepts, this discussion focuses on the often fine and fact-sensitive boundary between enabling choice, responding to risk, and addressing potential coercion. It examines how that boundary is navigated in practice and how it shapes the day-to-day lives of those subject to adult social care interventions. Autonomy is not exercised in isolation, but within relationships of care, dependency, influence and professional authority, which legal intervention may support, constrain or reconfigure.

This discussion begins by examining the statutory frameworks governing autonomy and protection, and the ways in which fluctuating capacity, executive dysfunction, and coercive conduct complicate their application. It then considers the Court of Protection (CoP) and the inherent jurisdiction as mechanisms through which protective intervention is scrutinized and, where appropriate, authorized. Building on this, it explores the role of the local authority lawyer as facilitator, gatekeeper, and regulator, before examining safeguarding and deprivation of liberty as practical examples of circumstances in which measures intended to protect vulnerable adults may risk becoming forms of control. Throughout, the note argues that the lawyer's role extends beyond determining what the law permits to critically evaluating whether intervention is supported by the evidence, responsive to the individual's circumstances, and justified as a necessary and proportionate response.

For ease of reference, the terms "lawyer" and "practitioner" are used interchangeably throughout this note, unless the context indicates otherwise. References to a "professional" are used as a collective term for adult social care professionals, including social workers and other practitioners involved in assessment, care planning and safeguarding. Similarly, references to a "person" or "individual" are used as neutral descriptors and may refer to adults with capacity, adults lacking capacity, or adults whose capacity is disputed, as dictated by the context under discussion.

[B] A FRAGILE BALANCE?

Section 1 of the MCA 2005[1] sets out the core statutory principles, including the presumption of capacity (section 1(2)), the right to make unwise decisions (section 1(4)), and the concept of least restrictive practice (section 1(6)). Capacity is determined by the two-stage test in sections 2 and 3 MCA 2005. As confirmed by the Supreme Court in *A Local Authority v JB* (2021), an inability to make a decision must be *causally connected* to an impairment of, or disturbance in the functioning of, the mind or brain. This provides an important safeguard against professional concern being readily translated into findings of incapacity.

Separately, the CA 2014 places clear duties on local authorities to promote wellbeing, prevent abuse and intervene where necessary.[2] This, together with the MCA 2005, aims to support individual adult choice while recognizing that protection may sometimes require intervention.[3]

The challenge lies in determining how the legal frameworks should be applied to the realities of people's lives. Decision-making is often shaped by a combination of internal and external factors. Practitioners must remain alert to the impact of fluctuating capacity and executive dysfunction, as well as undue influence, coercive control, dependency and self-neglect. The difficulty is often not whether a decision has been expressed, but whether it represents a genuinely autonomous choice. This was recognized by the Court of Appeal in *DL v A Local Authority* (2012), where the court held that even adults who possess mental capacity may nonetheless be prevented from making genuinely free decisions as a result of coercion, undue influence, or constraint exercised by others. The case concerned elderly parents whose decision-making was alleged to have been overborne by their son's controlling behaviour. In confirming that the High Court's inherent jurisdiction extends to such circumstances,[4] the Court of Appeal acknowledged that vulnerability may arise not only from a lack of capacity, but also from external pressures which constrain a person's ability to make decisions freely.

Further, section 2(1) MCA 2005 is clear that capacity is time and decision specific. Application of the MCA 2005 is therefore also challenging

1 Accompanied by the MCA 2005 Code of Practice.

2 Accompanied by the Care and Support Statutory Guidance.

3 Albeit most provisions of the MCA 2005 apply to persons aged 16 and over, the CA 2014 generally applies to adults aged 18 and over. However, local authorities also have duties to undertake transition assessments for children, and carers of children, where the child is likely to have needs for care and support after turning 18 (see, for example, section 58 CA 2014).

4 See more on the application of the inherent jurisdiction at section [C] below.

where an individual's decision-making ability fluctuates over time. This is particularly common in cases involving mental illness, acquired brain injury, dementia and certain neurological conditions. The statutory framework encourages professionals to maximize an individual's participation in decision-making wherever possible, recognizing that temporary incapacity should not automatically result in substitute decision-making, even where those decisions are made in their best interests pursuant to section 1(5) of the MCA 2005. For lawyers, fluctuating capacity raises practical questions not only about the assessment of capacity itself, but also about the appropriate legal framework. Practitioners must consider whether fluctuations can be accommodated through ordinary decision-making processes, whether a decision can reasonably be delayed until the individual is able to participate, or whether court proceedings are required, including whether an interim direction and/or order should be sought under section 48 MCA 2005 to deal with the situation in question.

Application of these principles was considered in *A Local Authority v PG & Ors* (2023), where the court rejected an anticipatory approach that would have required professionals to determine, in real time, whether P's capacity had increased or diminished on a particular day. Instead, the court adopted a longitudinal assessment of capacity, recognizing that P's decision-making fluctuated frequently and unpredictably and that requiring practitioners to wait for periods of apparent capacitous decision-making would be unworkable in practice. Therefore, the question is often not simply whether capacity fluctuates, but whether the pattern, frequency and predictability of those fluctuations create a practical need for judicial intervention. In a case in which one of us was instructed, despite clear evidence of fluctuating capacity, it was concluded that measures under section 48 MCA 2005 were neither necessary nor proportionate because the identified risks could and should be managed through existing care-planning and decision-making processes pending further assessment. The critical issue was not the existence of fluctuation itself, but whether it rendered the ordinary statutory framework insufficient to manage the risks presented.

Complicating matters further is the concept of executive dysfunction. Yana Suchy (2009) describes executive functioning as the collection of higher-order cognitive processes involved in planning, initiating, organizing, monitoring and regulating goal-directed behaviour. In other words, executive function enables an individual to plan and carry out decisions. An individual who is experiencing executive dysfunction may demonstrate an understanding of the relevant information and may be able to articulate a decision when asked. However, they might struggle

to translate the decision into action or to consistently implement choices in practice. For practitioners, this poses a difficult question about the distinction between a person's ability to make a decision, and their ability to execute it in practice, and consequently whether legal intervention is required.

The practical relevance of executive dysfunction was highlighted in *Warrington Borough Council v Y & Ors* (2023), where the CoP considered evidence that an individual who appeared capable during assessment nevertheless experienced significant real-world difficulties arising from "Dysexecutive Syndrome" and "the frontal lobe paradox". This case demonstrates the need for practitioners to consider not only whether a person can understand and articulate a decision, but also whether impairments affect their ability to implement that decision in their daily life. In these contexts, and in our experience, autonomy and protection do not sit as clear alternatives; they overlap, interact, and at times pull in different directions.

Generally, the operation of the MCA 2005 and the CA 2014 reaches into the minutiae of individuals' lives. Care planning and safeguarding processes often involve decisions about contact, residence, and support. These decisions can reshape relationships and the fundamental structure of people's lives, particularly where concerns about risk or coercion arise. The focus is therefore not only on whether a person can decide, but on the *conditions* in which those decisions are made. In many cases, the state acquires significant influence over matters that most adults would regard as deeply private. Pause and consider: how would you feel if others had the authority to decide how you live your life? Whom you see and speak to? Where you live? How your money is managed?

It is precisely because these interventions can reach so deeply into a person's private life that the lawyer's role should extend beyond scrutinizing whether the proposed intervention is legally permissible. The lawyer should also interrogate the way in which the problem itself has been framed: what is being characterized as a risk, by whom, and on the basis of whose account? Particular care is required to ensure that professional or institutional understandings of risk do not come to dominate simply because they are expressed in the language of safeguarding or protection. Equally important is whether sufficient weight has been given to the individual's own account of their circumstances, relationships, wishes and understanding of the risks they may choose to live with. Legal scrutiny in this context is therefore not simply concerned with the boundaries

of lawful state intervention, but with the assumptions and narratives through which the case for intervention has been constructed.

Based on our experience, the boundary between autonomy and control is neither fixed nor binary. Efforts to support autonomy may involve elements of control; just as protective interventions may limit aspects of individual choice. In practice, this does not create a clear divide, but a shifting, context-dependent balance. Professionals may need to consider whether practical support, prompting, monitoring or other proportionate safeguards can enable the person to exercise greater autonomy without unnecessarily displacing their choices. Conversely, an intervention intended to protect the individual may become overly restrictive if it does not respond to changes in their abilities, circumstances or wishes.

The result is an iterative process, requiring professionals to continually consider whether the support or restrictions in place remain necessary and proportionate, and whether a less restrictive approach could achieve the same protective purpose. For lawyers, the significance lies in recognizing that the existence of a legal power does not determine whether it should be exercised. Rather, legal advice requires continuing scrutiny of the evidence, the individual's circumstances, and whether intervention remains justified as those circumstances evolve.

[C] THE COURT OF PROTECTION AND THE INHERENT JURISDICTION

The CoP, established under Part 2 of the MCA 2005, possesses a wide jurisdiction to declare whether a person has or lacks capacity (section 15) and make decisions about a person's welfare, property, or affairs, including through the appointment of a deputy (section 16). For local authority lawyers, CoP proceedings may become necessary where disagreements about capacity, best interests, risk or restrictive interventions cannot be resolved through ordinary social care processes. The CoP, therefore, provides a judicial forum for determining some of the most difficult and ethically complex questions encountered in adult social care, including disputes about residence, care arrangements, contact, medical treatment and deprivation of liberty.

At the same time, the CoP performs a broader constitutional function. While it safeguards the rights of individuals who lack capacity, it also scrutinizes and, where lawful and necessary, authorizes the exercise of state power over profoundly personal aspects of a person's life. In this sense, the CoP is both a protector of individual rights and the institution

through which restrictions on autonomy may be legitimized. In reaching its decisions, the CoP must consider evidence relating to capacity, the statutory best interests framework, and, critically, the person's own wishes, feelings, beliefs and values pursuant to section 4(6) MCA 2005. The CoP's role is therefore not simply to determine what is safest, but to balance autonomy, dignity, welfare and protection within the limits imposed by law. As Lady Hale observed in *Aintree University Hospitals NHS Foundation Trust v James* (2013: paragraph 45), "[t]he purpose of the best interests test is to consider matters from the patient's point of view". The CoP provides independent scrutiny of proposed interventions and determines whether the exercise of power over a person who lacks capacity is lawful, necessary and proportionate.

Still, the balancing act between power and autonomy is not confined solely to individuals who lack capacity. The courts have increasingly recognized that adults with capacity may nevertheless be vulnerable to coercion, undue influence or other forms of constraint. As the CoP's jurisdiction is generally predicated upon an individual lacking capacity in relation to the relevant matter, the inherent jurisdiction of the High Court can operate as what Lord Donaldson MR famously described as the "great safety net" of the common law. This expression derives from *F v West Berkshire HA* (also known as *In re F (Mental Patient: Sterilisation)* (1990: page 13), a case concerning the proposed sterilization of an adult woman who lacked capacity to consent to the procedure. Although this case pre-dated the MCA 2005, its wider significance lies in the court's recognition of the inherent jurisdiction as a means of responding to circumstances in which protection was necessary, but no specific statutory jurisdiction provided the answer. In the modern context, that protective function remains relevant to vulnerable adults who retain capacity but whose ability to make genuinely autonomous decisions may be compromised by coercion, undue influence or the conduct of others. The inherent jurisdiction therefore occupies a difficult space between autonomy and protection: it provides a mechanism for judicial intervention where vulnerability cannot adequately be addressed through the MCA 2005 framework, while simultaneously raising the question of when protection itself becomes a form of control.

That tension also places particular responsibility on the lawyer who translates safeguarding concerns into the language of judicial intervention. The application presented to the court is not a neutral reproduction of the underlying circumstances: decisions about which facts to emphasize, how risks are characterized, and what alternatives to litigation are identified can materially shape the apparent necessity and

proportionality of intervention. A situation framed primarily in terms of danger, coercion and vulnerability may make protective orders appear inevitable, whereas closer attention to the adult's expressed wishes, the practical support available to facilitate autonomous decision-making, and less restrictive safeguarding measures may reveal a wider range of possible responses. The lawyer's task is therefore not simply to establish whether the inherent jurisdiction *can* be invoked, but critically to examine whether judicial control *should* be sought and, if so, in *what form*. This requires safeguarding concerns to be tested against the available evidence, the adult's autonomy and the feasibility of less restrictive alternatives. In this sense, the boundary between protection and control is shaped not only when the judge determines the application, but when the case for intervention is formulated and presented by the lawyer to the court. The lawyer's responsibility is therefore not exhausted by identifying a jurisdictional basis for intervention; it also requires critical evaluation of whether the evidence justifies invoking the court's powers at all, and whether the proposed response represents the least restrictive means of addressing the identified concern.

[D] THE LAWYER'S ROLE: FACILITATOR, GATEKEEPER, OR REGULATOR?

In our experience advising as local authority lawyers, the adult social care lawyer's role cannot be characterized as either neutral or purely facilitative. Legal advisers do more than interpret legislation; they influence how statutory powers are exercised, how risks are understood and, ultimately, advise whether intervention should be pursued. The task of the lawyer shifts between facilitating individual autonomy, acting as a gatekeeper to state intervention, and, at times, contributing to the structure of outcomes in a way that carries elements of regulation or control.

These different functions become clearer when the legal principles are translated into legal advice. Acting as a facilitator of autonomy requires more than simply identifying that an adult has expressed a particular wish. It involves ensuring that the individual's wishes, feelings, values and preferences are accurately identified and placed at the centre of the decision-making process; testing whether apparent concerns about the wisdom of a person's choices are being conflated with doubts about capacity; and asking what practicable support could enable the person to make, communicate or implement their own decision. In this sense, the lawyer can perform an important corrective function where professional

anxiety about risk might otherwise displace the statutory commitment to autonomy.

The lawyer's role as gatekeeper to state intervention is correspondingly exacting. Where intervention is proposed on the basis of incapacity, coercion, undue influence or vulnerability, the lawyer must scrutinize the evidential basis upon which those concepts are invoked. This may require testing the evidence of incapacity or coercion, identifying gaps or inconsistencies in professional assessments, asking whether less restrictive measures have genuinely been explored and examining whether the proposed application is necessary and proportionate to the risk identified. The question is therefore not simply whether a legal route to intervention is available, but whether recourse to that route can be justified in the circumstances of the individual case.

At the same time, legal advice is capable of doing more than constraining intervention. Once a lawyer advises on the form an application should take, the evidence required to support it, the orders that should be sought or the safeguards that might render a proposed course legally defensible without the need for judicial oversight, the lawyer begins to participate in shaping the intervention itself. The distinction between facilitating, gatekeeping and regulating is therefore not always clear-cut. The same lawyer may advise against intervention where an individual's autonomy can be appropriately supported, conclude at a later stage that the evidential threshold for intervention remains unmet, and subsequently assist in designing a lawful and proportionate response once intervention is justified.

This exposes a significant feature of adult social care legal practice. Principles such as autonomy, necessity, proportionality and least restriction do not operate only as abstract limits imposed by courts after an application has been made. They are mediated much earlier through legal advice. The lawyer's questions about capacity, evidence, alternatives, wishes and proportionality can affect whether a matter reaches court at all and, if it does, the form in which it reaches the court. Legal advice consequently occupies an important position between the exercise of professional judgement and the exercise of state power. The adult social care lawyer is neither simply an advocate for intervention nor a detached observer of it, but one of the actors through whom the boundary between legitimate protection and unjustified interference is negotiated in practice.

By way of practical example (as discussed in section [B] above), cases involving fluctuating capacity raise particular difficulties for practitioners. *A Local Authority v PG & Ors* (2023) illustrates the point. For lawyers,

identifying, and advising on, fluctuating capacity requires more than an understanding of the legal test. It requires scrutiny of whether assessments adequately capture the individual's presentation over time, whether professionals can realistically identify changes in capacity as they occur, and whether the relevant decision can safely be deferred. Those considerations may affect whether reliance on sections 5 and 6 of the MCA 2005 (see further analysis of these sections below) is sufficient, whether anticipatory declarations or other judicial intervention should be sought, or whether more restrictive measures, including deprivation of liberty authorizations, can be justified. This practical example reinforces the point made above that the lawyer acts simultaneously as facilitator, gatekeeper and regulator, mediating the boundary between individual choice and protective intervention.

Central to the practitioner's function is ensuring that the individual's voice is heard. Advocacy and representation play a critical role within both safeguarding and the CoP. Individuals who are subject to deprivation of liberty authorizations are entitled to a representative pursuant to Schedule A1 to the MCA 2005, which requires the appointment of a Relevant Person's Representative to support and represent the person subject to the authorization.[5] As Lady Hale emphasized in *P v Cheshire West and Chester Council* (*Cheshire West*) (2014: paragraph 1), "human rights are for everyone, including the most disabled members of our community, and … those rights include the same right to liberty as has everyone else". Representation therefore serves not merely as a procedural formality, but as an important safeguard against protective interventions becoming unjustified exercises of control.

Independent advocates, litigation friends and accredited legal representatives frequently provide the primary means through which the individual's perspective is communicated to decision makers. For local government lawyers, these views are not simply procedural requirements to be recorded and filed away; instead, they form an essential evidence base against which proposed interventions must be assessed. In this respect, lawyers are not merely advising on what the law permits; they are required to engage with what the individual wants and whether the state's proposed response is truly justified.

The statutory scheme recognizes that promoting welfare may sometimes require the exercise of control. Sections 5 and 6 MCA 2005 provide legal protection for those who carry out acts in connection with

[5] Specifically, Mental Capacity Act 2005, Schedule A1, Part 10 (appointment and functions of the Relevant Person's Representative).

the care or treatment of an individual who lacks capacity, including, in limited circumstances, the use of restraint where it is "necessary" and "proportionate" to prevent harm. This highlights the responsibility on lawyers to ensure that an individual's wishes and feelings are not submerged beneath assessments of risk and best interests, and brings into sharper focus the point at which protective intervention may itself become a form of control.

[E] WHEN PROTECTION BECOMES CONTROL

The courts have consistently emphasized that practitioners must not let concerns about a person's welfare override a proper assessment of their mental capacity—often expressed as not allowing "the tail of welfare to wag the dog of capacity" (*Heart of England NHS Foundation Trust v JB* (2014: paragraph 7). This reflects the fundamental principle that individuals have the right to make decisions that others may regard as unwise. Under the MCA 2005, practitioners are legally required to begin with the presumption that a person has capacity and to respect their right to make unwise decisions, even where those decisions may expose them to significant risk of harm as enshrined by sections 1(2) and (4).

Safeguarding intervention is often prompted by circumstances that would cause concern to professionals. However, the existence of risk, vulnerability or professional concern does not, without more, justify intervention that overrides an individual's wishes. The MCA 2005 deliberately prioritizes decision-making rights even where the outcome appears objectively poor, provided the individual possesses the relevant capacity. The challenge for practitioners is therefore not simply identifying risk, but distinguishing between situations that require protective intervention and those in which respect for autonomy demands acceptance of a decision with which they fundamentally disagree.

For example, an adult may repeatedly express a wish to remain in a relationship or living arrangement that professionals regard as harmful. The lawyer's task is not simply to accept or reject allegations of coercive control, but to scrutinize the evidential basis for them. As illustrated by *DL v A Local Authority* (2012) (see section [B] above), the central question is whether the individual's apparent decision reflects a genuinely autonomous choice or one that has been undermined by external pressure. In *DL*, the parents were capable of expressing decisions and, on the assumed facts, satisfied the MCA 2005 capacity test. The concern was whether those decisions were truly their own, or whether they had been shaped by their son's controlling behaviour. This requires careful

analysis of the person's wishes and feelings, the consistency of their decision-making, and the evidence said to demonstrate coercion, rather than an assumption that an unwise or risky decision is necessarily a constrained one. In a case in which one of us was instructed, an adult repeatedly reported to professionals that she was at risk from her husband but refused to leave the relationship. Legal advice focused initially on creating a safe opportunity for her to engage with professionals away from his influence. Only then could a properly informed decision be made as to whether she wished to accept support and whether any application under the inherent jurisdiction was necessary or justified.

Section 42 of the CA 2014 places a duty on local authorities to "make (or cause to be made) whatever enquiries it thinks necessary to enable it to decide whether any action should be taken in the adult's case … and, if so, what and by whom". This applies where a local authority has:

> reasonable cause to suspect that an adult in its area … has needs for care and support, … is experiencing, or is at risk of, abuse or neglect [whether by a third party or self-neglect], and as a result of those needs is unable to protect himself or herself against the abuse or neglect or the risk of it.

Section 42 therefore reflects the state's responsibility to identify and respond to safeguarding concerns. Whilst local authorities are required to make enquiries where statutory criteria are met, safeguarding is not intended to operate as a vehicle for paternalistic intervention. The principles underpinning "Making Safeguarding Personal"[6] emphasize that safeguarding should be undertaken *with*, rather than *to*, the individual concerned. In doing so, the initiative challenges professionals to move beyond a purely risk-focused approach and to engage meaningfully with the person's own understanding of risk, safety and wellbeing. This can be difficult where an individual's expressed wishes conflict with professional assessments of what is safe or desirable, but it reflects the broader principle that protection should not automatically displace autonomy.

For the lawyer advising in this context, the key task is therefore to distinguish between a safeguarding concern that properly calls for protective intervention, and professional anxiety about a person's choices or exposure to risk. Before supporting intervention, the lawyer should test whether there is evidence that the person is unable to make the relevant decision, or that their choices are affected by coercion, undue

[6] "Making Safeguarding Personal" is an approach to adult safeguarding developed by the Local Government Association and the Association of Directors of Adult Social Services which promotes person-centred, outcomes-focused safeguarding practice and emphasizes the participation of adults in decisions affecting them.

influence or some other constraint on their ability to act freely, rather than assuming that an unwise or risky decision itself justifies intervention. The person's own wishes, values and desired outcomes must be properly identified and taken seriously, including what they themselves regard as an acceptable level of risk. The lawyer should also ask whether practical or less restrictive measures could address the safeguarding concern while preserving the person's autonomy. Ultimately, any proposed intervention should have a clear legal basis, pursue an identified safeguarding purpose and be necessary and proportionate to the risk identified. In this way, the lawyer's role is not simply to facilitate action in response to risk, but to ensure that safeguarding remains genuinely protective without becoming unnecessarily paternalistic.

[F] THE UK SUPREME COURT AND DEPRIVATION OF LIBERTY

Few areas demonstrate the tension between autonomy and protection more sharply than deprivation of liberty. The legal concept derives from Article 5 of the European Convention on Human Rights (ECHR), which guarantees everyone the qualified "right to liberty and security … in accordance with a procedure prescribed by law". At its core, deprivation of liberty concerns a person being confined to a particular place and unable to freely leave it. The European Court of Human Rights outlines three elements for deprivation of liberty: objective confinement in a particular restricted place for a material period of time, an absence of valid consent to that confinement, and attribution of responsibility to the state (*Storck v Germany* 2005: paragraphs 74, 89; Series 2020: 196). In the context of adult social care, this concerns individuals whose daily life is controlled to such a degree as to require authorization and oversight.

Section 64(5) MCA 2005 expressly links the concept of deprivation of liberty to Article 5, providing that references to a deprivation of liberty within the MCA 2005 have the same meaning as under the ECHR. The consequence is that, where care arrangements amount to a deprivation of liberty within the meaning of the law, it is ultimately a question of human rights, informed by domestic and Strasbourg jurisprudence.

For over a decade, the legal landscape in England and Wales was dominated by the Supreme Court's decision in *Cheshire West* (2014), with Lady Hale's now famous proposition that "a gilded cage is still a cage" (paragraph 46). This phrase captured a fundamental principle: the quality, purpose or benevolence does not determine whether a person's liberty has been restricted. A placement may be safe, comfortable and

unquestionably motivated by concern for an individual's welfare yet still constitute a deprivation of their liberty if they are subject to continuous supervision and control, and not free to leave—the so-called "acid test". In many respects, the judgment crystallized the central tension in adult social care law: the fact that protection and control are not opposing concepts, but often two sides of the same intervention. The challenge for practitioners is to recognize when measures intended to safeguard an individual cross the line from enabling autonomy to restricting it.

The judgment reinforced the principle that people who lack capacity are entitled to the same rights and procedural safeguards as those who do not. As set out in section [D] above, Lady Hale opened *Cheshire West* (2014) by stating that "human rights are for everyone". Nevertheless, critics questioned whether the acid test's focus on objective restrictions, rather than the individual's subjective experience, risked characterizing supportive care arrangements as forms of detention. Rosie Harding (2021), for example, notes the concern that the breadth of the test substantially expanded the reach of deprivation of liberty safeguards and brought many ordinary care arrangements within the scope of Article 5 scrutiny. The debate generated by *Cheshire West* (2014) therefore extended beyond the technical definition of deprivation of liberty and raised broader questions about dignity, autonomy and the extent to which the state should scrutinize arrangements made for those who lack capacity.

In June 2026, the Supreme Court fundamentally altered the legal landscape once more by handing down a complete reversal of the position via its judgment in the case of *A Reference by the Attorney General for Northern Ireland of a Devolution Issue under Paragraph 34 of Schedule 10 to the Northern Ireland Act 1998* (*AGNI*) (2026). Overruling *Cheshire West* (2014), the court rejected the notion that deprivation of liberty can be identified through a single universal test and instead focused on a multifactorial approach which looks at the individual's "concrete situation". Particular significance is to be attached to the individual's wishes and feelings, with the court recognizing that a person who lacks capacity to make decisions about their care arrangements may nevertheless be capable of expressing valid consent, for the purposes of Article 5 ECHR, to the circumstances in which they live. The judgment therefore reframes the relationship between protection and autonomy. Rather than assuming that extensive procedural safeguards are always required where restrictive arrangements exist, the court emphasized the importance of understanding how those arrangements are actually *experienced* by the individual concerned. For lawyers advising local authorities and appearing before the CoP, the challenge is no longer simply

to identify restrictions, but to assess whether intervention designed to protect vulnerable adults risks imposing a degree of state oversight that the individual themselves neither seeks nor experiences as a deprivation of liberty.

AGNI (2026) provides greater clarity regarding the role of consent and subjective experience in the deprivation of liberty analysis, but it leaves many difficult questions unanswered. How much understanding is enough? When does acceptance become consent? What happens when capacity fluctuates? Where executive dysfunction is a relevant consideration, what if a person verbally expresses their consent, but their behaviour says otherwise? The decision overturns reliance on the concrete thresholds set out by the acid test, but in doing so places even greater emphasis on the importance of professional judgement. For local authority lawyers, that shift is potentially both autonomy-enhancing and problematic. On one view, it requires a more genuinely person-centred analysis. The question is not simply whether particular features of an arrangement can objectively be identified, but what those arrangements mean for this particular person, including how they understand, experience and express their wishes about them. Lawyers advising local authorities will therefore need to interrogate the evidence behind an assessment rather than simply testing the facts against a familiar legal formula. That means examining not only what the person says, but the context in which it is said, the consistency of their wishes over time, any relevant difficulties with executive functioning or communication, and the extent to which apparent agreement reflects a meaningful exercise of autonomy.

Yet, the same shift creates a corresponding risk. The greater the emphasis placed upon an evaluative assessment of the person's concrete situation, the greater the scope for differences in professional judgement. There is a danger that ostensibly person-centred reasoning may become paternalistic reasoning by another name, particularly where professionals conclude that the person's conduct should be afforded greater weight than their expressed wishes. The practical challenge for local authorities is therefore not simply to exercise judgement, but to make that judgement transparent and capable of scrutiny.

In short, the acid test may be a thing of the past, but the plight of the adult social care lawyer, and professionals tasked with assessing the situation on the ground, remains.

[G] CONCLUSION

The central challenge of adult social care law is not choosing between autonomy and protection, but determining how both can be respected simultaneously. In practice, that task frequently falls to lawyers advising local authorities, social workers, and the courts. The lawyer enables choice where the legal framework is used to give proper effect to the adult's wishes, feelings and values, and where intervention does not extend beyond what the evidence justifies. Conversely, the lawyer risks exercising or facilitating control where concerns about vulnerability, risk or welfare are allowed to displace the individual's voice, where assumptions are substituted for evidence, or where restrictive intervention becomes the default rather than a properly justified response. The discussion in this note demonstrates that the lawyer may occupy both roles: facilitator of autonomy and participant in the exercise of power. The distinction depends not on the legal framework itself, but on how it is applied.

Responsible legal practice requires more than identifying a lawful route to intervention. It requires rigorous scrutiny of the evidence, meaningful engagement with the individual's wishes, values and relational circumstances, careful consideration of less restrictive alternatives, and continuing attention to necessity and proportionality. These principles should operate not merely as standards applied by the court following an application, but as disciplines shaping legal advice from the outset. The lawyer's role is therefore not simply to determine how proposed intervention can be lawfully achieved, but to question whether it should occur at all. It is through that discipline of scrutiny and justification that lawyers can help ensure that legal protection remains a safeguard against harm, rather than a mechanism through which protection unnecessarily becomes control.

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Care and Support Statutory Guidance

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Mental Capacity Act 2005

Mental Capacity Act 2005 Code of Practice

Cases

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