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***Capacity in Legal Proceedings:
Autonomy, Participation and Protection***

It is a pleasure to be with you today at Hazlewood Castle. Looking around this remarkable building, I am conscious of the many lives that have passed through it over the centuries. From medieval landowners and travellers seeking refuge, to religious communities and the thousands of children born here during its years as a maternity hospital, the Castle has served many different purposes. Yet throughout those changing roles there is a common theme: people have come here seeking safety, support and protection.

The pursuit of protection is, of course, one of the law's oldest functions. The difficulty, both historically and today, lies in determining where protection ends and interference begins. That question is particularly acute in the field of mental capacity law.

Here, courts and professionals are frequently required to balance two fundamental values: respect for personal autonomy on the one hand and the need to protect vulnerable individuals on the other.

It is that balance, and the continuing evolution of the law's response to it, which I wish to explore today.

In doing so, I will consider the evolution of capacity as a legal concept, the distinctive framework that has emerged in Northern Ireland, and the manner

in which courts have sought to balance autonomy and protection across a range of legal contexts. Along the way, I will explore recent developments in deprivation of liberty, the participation of children and young people in decision-making, litigation capacity and access to justice, and the challenges presented by capacity within criminal proceedings.

Capacity often appears deceptively straightforward as a legal concept. We speak of people either possessing capacity or lacking it. Yet the reality is considerably more nuanced. Capacity is rarely an abstract or universal question. Rather, it is context-specific, decision-specific and frequently dependent upon a careful assessment of the individual's ability to understand, participate and exercise choice in relation to a particular matter.

Modern capacity law has therefore moved beyond simplistic notions of competence and incapacity. Increasingly, the focus has become one of participation: identifying the support necessary to enable individuals to make decisions for themselves wherever possible and ensuring that, where intervention is required, it remains both necessary and proportionate.

To understand how we arrived at that position, it is useful to begin with the historical development of capacity as a legal concept.

Issues of capacity can be traced back to the 19th-century case of *Banks v Goodfellow*¹ which explored testamentary capacity. Although decided in a very different era, the case remains significant because it reflected a developing recognition that personal autonomy and decision-making ability occupy a central place within the law. The tensions it exposed remain familiar today, requiring the law to determine when individual choice should prevail

¹ [1870] LR 5 QB 549

and when intervention is necessary to protect those who may be unable to make decisions for themselves.

Notwithstanding the emphasis placed on the preservation autonomy in the early case law, the law on capacity with respect to medical care and treatment has historically been piecemeal and characterised by a paternalism which, while well-intentioned and in the spirit of protection, sought to dismiss respect for individual autonomy. Indeed, the absence of mental capacity legislation in Northern Ireland has meant that the courts have traditionally sought to rely upon their inherent *parens patriae* jurisdiction to intervene in the lives of those considered unable to make decisions for themselves.

Reform to mental health and capacity law has long been on the agenda across many jurisdictions, primarily as an attempt to better recognise the value to be afforded to patient autonomy. Indeed, the difficulties associated with the absence of mental capacity legislation in Northern Ireland were exposed by the Bamford Review of Mental Health and Learning Disability in 2007² which underlined the need to further develop the law in this area and reform the pre-existing Mental Health (Northern Ireland) Order 1986 (“MHO”). The Bamford review advocated for a single comprehensive legislative framework for the reform of mental health law through the introduction of non-discriminatory capacity legislation in Northern Ireland. This drive for reform is aptly emphasised in the Explanatory and Financial Memorandum to the Mental Capacity Bill which stated that, “while the Mental Health Order has worked well, it is out of sync with the growing recognition of the right to personal autonomy”³.

² [Bamford Review - A comprehensive legislative framework - August 2007](#)

³ [Mental-Capacity-Bill-efm-as-introduced.pdf](#), paragraph 5

The introduction of the Mental Capacity Act (NI) 2016 (“MCA(NI)”) therefore represents a ground-breaking piece of legislation that seeks to harmonise the law on mental health and capacity for those over sixteen and amend and eventually repeal the MHO. Its significance lies in the fact that it represents the first of its kind to “fuse” mental health and mental capacity law into a single Act which bases compulsory interventions on a lack of mental capacity as opposed to the presence of mental disorder. In doing so, the Act has made NI the first jurisdiction to adopt a single legislative framework in relation to decision-making for involuntary treatment with 15 parts and 308 sections, and 11 Schedules. Ultimately, it represents a conceptual shift in how capacity is to be understood in the NI legal system, adopting a functional, decision-specific model of capacity that embraces principles that place autonomy, decision-making ability and tailored support at the centre of legal assessment.

Recent Supreme Court authority has further emphasised the importance of wishes and feelings in the assessment of liberty and participation, reinforcing many of the autonomy-based principles underpinning the Act.

Notwithstanding the positive developments achieved by the introduction of the MCA(NI), the successive collapses of NI power-sharing institutions have meant that its implementation remains uneven as this legislation has only partially been enacted from December 2019 in relation to deprivation of liberty. Indeed, the failure to repeal the MHO has meant that the promises of the MCA(NI) have unfortunately not been entirely realised, leaving an incomplete picture as to the landscape of capacity law in NI. NI’s political and constitutional dynamics ultimately serve to contextualise the fragmented and uneven development of the mental health and capacity legal framework in NI.

Moreover, during the development of the Act, considerable thought was given to how it might include all people equally within its provisions, but this was not ultimately achieved. Children under sixteen were not included in the fusion of mental health and mental capacity law, leaving residual, potential discrimination as a result of an incomplete law reform process. The complexity of the current legal framework for those aged under 16 presents ongoing challenges for all involved⁴. The system in Northern Ireland is therefore somewhat different from that in England and Wales.

Vulnerable individuals may face different types of deprivation of liberty including detention by police, imprisonment, involuntary confinement in hospitals, psychiatric institutions, and care homes. The MCA(NI) therefore treats detention amounting to deprivation of liberty (DoL) as one of the most serious interventions against a person who lacks capacity, speaking to the very essence of the fundamental right to liberty and security enshrined in Article 5 ECHR⁵ which provides that:

“Everyone has the right to liberty and security of person. No one shall be deprived of his liberty [unless he or she is of an unsound mind] and in accordance with a procedure prescribed by law”.

Although the MCA(NI) has not been fully commenced, the provisions authorising deprivation of liberty for those lacking the mental capacity to consent to arrangements for their care or treatment, have been in force since December 2019. These safeguards provide the statutory framework through

⁴ Anne-Maree Farrell, Elizabeth Agnew and Patrick Hann, ‘*Mental health and capacity laws in Northern Ireland: examining the position of children and young people*’ (2025) *Med Law Rev* 33 (1).

⁵ DoLS Code of Practice (Nov 2019)

which restrictions upon the liberty of those lacking capacity may be assessed, authorised and reviewed.

The MCA(NI) adopts a decision-specific approach to capacity. Sections 3 and 4 require an assessment of whether a person is able to understand, retain, appreciate, use and weigh information relevant to the particular decision and communicate that decision, and, if not, whether the inability arises because of an impairment or disturbance in the functioning of the mind or brain. While materially similar to the approach contained within the Mental Capacity Act 2005 in England and Wales, the Northern Ireland framework possesses several distinctive features. In particular, the MCA(NI) is accompanied by statutory Codes of Practice issued by the Department of Health. Professionals exercising functions under the Act must have regard to those Codes, and any failure to do so is a matter which may be taken into account by a court or tribunal in subsequent proceedings.

For more than a decade, the law concerning deprivation of liberty across the United Kingdom was dominated by the decision of the Supreme Court in *P v Cheshire West and Chester Council*.⁶ That case arose from the circumstances of three highly vulnerable individuals who lacked capacity to determine their own living arrangements and who were receiving care in placements designed to promote their welfare and safety. The issue before the court was whether such arrangements amounted to a deprivation of liberty notwithstanding their protective and benevolent nature.

Delivering the leading judgment, Lady Hale emphasised that the concept of liberty protected by article 5 ECHR applies equally to all persons, irrespective of disability. The court rejected the notion that restrictions could cease to

⁶ [2014] UKSC 19

constitute a deprivation of liberty merely because they were imposed in a person's best interests or because they were motivated by care rather than punishment.

As Lady Hale so eloquently observed, "A gilded cage is still a cage." The court held that the focus should be placed upon the objective reality of the person's situation rather than upon the benevolence of those caring for them. In doing so, it articulated what became known as the "acid test" for identifying a deprivation of liberty.

The relevant questions became whether the person was subject to continuous supervision and control and whether they were free to leave. If both conditions were satisfied, a deprivation of liberty would ordinarily be established.

Critically, factors such as the person's compliance with the arrangements, the relative normality of the placement, the purpose of the restrictions, or the fact that the arrangements were considered beneficial, were regarded as irrelevant to that determination.

The significance of *Cheshire West* extended far beyond the circumstances of the individuals involved. The decision established a broad and rights-focused understanding of deprivation of liberty, ensuring that some of society's most vulnerable individuals would benefit from the procedural safeguards guaranteed by article 5 ECHR.

In practical terms, however, it also dramatically expanded the number of situations capable of amounting to a deprivation of liberty, bringing within the scope of article 5 many care arrangements in hospitals, residential settings

and private homes that had previously been regarded as ordinary welfare measures.

Section 306(1) of the MCA(NI) defines deprivation of liberty by direct reference to article 5 ECHR. Consequently, the principles established in *Cheshire West* became central to the operation of the Northern Ireland deprivation of liberty safeguards and shaped both professional practice and judicial decision-making for many years.

That position, however, has now changed in a profound and arguably seismic way.

The operation of the deprivation of liberty framework under the MCA(NI) has already received consideration at appellate level within Northern Ireland. In *Northern Health and Social Care Trust v Review Tribunal*,⁷ the Court of Appeal considered the Review Tribunal's decision to revoke a deprivation of liberty authorisation concerning a patient residing within a residential care setting. The Trust challenged that decision, maintaining that the patient should remain subject to the deprivation of liberty safeguards and contending that the tribunal was not entitled to consider future arrangements for the patient's care. Dismissing the appeal, the court confirmed that decisions concerning deprivation of liberty require a dynamic and evaluative assessment. The inquiry is not confined to a snapshot in time. Rather, it requires a forward-looking evaluation of necessity, proportionality and the least restrictive option available in the circumstances.

However, the most significant development in this field has undoubtedly arisen from the Supreme Court's decision in *A Reference by the Attorney General*

⁷ [2024] NICA 44

*for Northern Ireland of a devolution issue under paragraph 34 of Schedule 10 to the Northern Ireland Act 1998*⁸.

The origins of this case lay in Northern Ireland's distinctive statutory framework and, in particular, a proposal by the Minister of Health to revise the Deprivation of Liberty Safeguards Code of Practice issued under the MCA(NI). The proposed revision sought to recognise that an individual who lacks legal capacity to decide upon their residence and care arrangements may nevertheless be capable of expressing wishes and feelings that amount to a valid consent to those arrangements for the purposes of article 5 ECHR.

The difficulty, however, was twofold. First, the proposed revision appeared fundamentally inconsistent with the prevailing understanding of *Cheshire West*. As conventionally understood, *Cheshire West* proceeded upon the basis that a person lacking mental capacity to decide upon their living arrangements was incapable of providing a valid consent to their confinement. Consequently, where the "acid test", set out in *Cheshire West*, was satisfied, the individual was regarded as deprived of liberty and the procedural safeguards of article 5 were engaged. Secondly, and of particular constitutional significance, the Minister could only lawfully revise the Code if such a revision was compatible with article 5 ECHR. By virtue of section 24 of the Northern Ireland Act 1998, a Northern Ireland Minister possesses no power to act incompatibly with Convention rights. The question was therefore not merely whether *Cheshire West* was correct, but whether the proposed revision to the Northern Ireland deprivation of liberty framework could lawfully be introduced at all.

⁸ [2026] UKSC 16

The Attorney General's reference therefore presented a question of considerable constitutional and practical significance. It required the Supreme Court to determine whether article 5 ECHR truly required such an expansive conception of deprivation of liberty and, in particular, whether the concepts of capacity and consent had become improperly conflated. At its heart was the deceptively simple but profound question of whether a person can lack legal capacity to decide where they live, yet still possess sufficient understanding of their circumstances to express meaningful consent to those arrangements through their wishes and feelings?

In a unanimous judgment delivered by Lord Sales and Lady Simler, the Supreme Court answered that question in the affirmative. Concluding that *Cheshire West* had taken a wrong turn in its interpretation of article 5 and Strasbourg jurisprudence, the court invoked the 1966 Practice Statement, the exceptional procedure permitting departure from previous Supreme Court authority and expressly overruled the decision.

The court held that the determination of whether a person is deprived of liberty under article 5 requires a multifactorial assessment focused upon the individual's particular circumstances. Rejecting the notion that deprivation of liberty could be reduced to a single universal formula, the court emphasised that the starting point must always be the individual's "concrete situation", with account taken of a range of factors including the type, duration, effects and manner of implementation of the relevant restrictions. No single consideration is determinative. Rather, the inquiry requires a careful evaluative assessment of all the circumstances of the case.

In doing so, the Supreme Court returned to the Strasbourg jurisprudence which recognises that a deprivation of liberty contains both an objective and a

subjective component. The objective element concerns whether the individual is confined within a restricted setting for a material period of time. The subjective element concerns whether there exists a valid consent to that confinement.

The court considered that *Cheshire West* had placed disproportionate weight upon the objective element, effectively marginalising the distinct role of consent within the article 5 analysis.

The court therefore concluded that factors previously regarded as irrelevant under *Cheshire West* may, depending upon the circumstances, form part of the assessment. Compliance, the absence of objection, the relative normality of the placement, and the purpose of the arrangements are no longer excluded from consideration. While none is decisive in itself, each may assist the court in determining whether the individual's circumstances amount in reality to a deprivation of liberty within the meaning of article 5.

The court drew a distinction between legal capacity under domestic legislation and consent for the purposes of article 5. It held that "valid consent" constitutes an autonomous Convention concept. Accordingly, a person may lack legal capacity to decide where they live or what care arrangements they receive, yet nonetheless possess sufficient awareness of their circumstances to express wishes and feelings amounting to a valid consent to those arrangements.

In such circumstances, the subjective element necessary to establish a deprivation of liberty may not be present, notwithstanding the absence of decision-making capacity under domestic law.

The judgment represents a substantial reorientation of the law. For more than a decade, deprivation of liberty jurisprudence had been shaped by the premise that a lack of capacity effectively precluded consent.

The Supreme Court has now drawn a distinction between those concepts and has restored greater prominence to the individual's own wishes, feelings and lived experience. In doing so, it has emphasised that article 5 is not solely concerned with protection from unlawful confinement but must also be interpreted consistently with broader principles of dignity, autonomy and respect for individual choice.

This outcome presents both intellectual and practical challenges. It remains to be seen whether further refinement will be required. However, there can be little doubt that the *NI Attorney General's Reference* has transformed the legal landscape in which deprivation of liberty is to be understood. As a result, Northern Ireland once again finds itself at the forefront of capacity law developments within the United Kingdom.

In the context of children and young people, questions of capacity engage issues far beyond competency and consent. They raise important questions concerning children's status as autonomous rights-holders, the scope of parental responsibility, and the extent to which children should participate in decisions affecting their lives. At its core, this area of law requires a balance to be struck between protection and participation, between welfare and autonomy, and between parental responsibility and the voice of the child.

At the domestic level, the principal framework is provided by the Children (Northern Ireland) Order 1995. The Order seeks to balance respect for children's wishes and feelings with the responsibilities of parents and the

court. Central to that framework is the paramountcy principle, requiring the child's welfare to be the court's paramount consideration. In determining welfare, the court must take account of a range of factors, including the child's wishes and feelings, considered in light of their age and understanding.

The primary responsibility for the upbringing of children rests with those exercising parental responsibility. The law therefore attempts to reconcile two potentially competing objectives: respect for the child's emerging autonomy and the responsibility of parents and the state to protect the child's welfare. Although the Children Order provides an important rights-based foundation, it does not directly address issues such as involuntary treatment or deprivation of liberty. For those aged sixteen and above, such matters fall within the MCA(NI), whereas for younger children the legal framework remains a combination of common law and statute.

Those principles are reinforced by more recent legislative developments. The Children's Services Co-operation Act (Northern Ireland) 2015 introduced a statutory duty requiring public authorities to work together to improve outcomes for children and young people, including in relation to mental health and well-being. The current Children and Young People's Strategy reflects many of the principles contained within the United Nations Convention on the Rights of the Child ("UNCRC").

At the international level, article 12 UNCRC is of particular significance although it is not incorporated in domestic law. It recognises the right of children capable of forming their own views to express those views freely in all matters affecting them, with those views being given due weight according to age and maturity. Article 12 has become one of the most influential provisions in contemporary discussions concerning children's participation,

autonomy and decision-making. The Convention on the Rights of Persons with Disabilities has further reinforced these themes through its emphasis on legal capacity, supported decision-making and respect for individual preferences.

In any event, on the domestic plane, the importance of meaningful participation has been developed significantly illustrated by Professor Laura Lundy's well-known model of child participation.⁹ Lundy identifies four interconnected elements necessary for effective participation: space, voice, audience and influence. The model emphasises that participation requires more than merely hearing a child's views. Children must be given opportunities to express those views, those views must be listened to, and they must be capable of influencing the decision-making process where appropriate.

Viewed through this lens, the central question is not simply whether children are consulted, but whether they are genuinely involved in decisions affecting their lives. That question remains particularly important in the context of mental health and capacity law. Indeed, one of the defining features of the Bamford Review was its emphasis upon a human rights-based approach which sought to place dignity, autonomy and participation at the centre of legal decision-making. The challenge for Northern Ireland's current framework is therefore whether it succeeds in translating those principles into meaningful participation for children and young people in practice.

Notwithstanding its attempt to harmonise mental health and capacity law in Northern Ireland, children under sixteen were excluded from the fusion

⁹ Laura Lundy. "A lexicon for research on international children's rights in troubled times." (2019) *The International Journal of Children's Rights* 27(4) 595

model adopted by the MCA(NI). The result is an important age-based distinction within the current legal framework.

Those principles must, however, be understood against the distinctive legal framework governing children under sixteen in Northern Ireland which are governed through a combination of common law and statute, including the Mental Health (Northern Ireland) Order 1986, the Children (Northern Ireland) Order 1995, the Criminal Justice Act (Northern Ireland) 1966 and the Age of Majority Act (Northern Ireland) 1969. Consequently, children under sixteen remain outside the statutory safeguards provided by the MCA(NI).

The starting point for determining whether a child under sixteen may validly consent to medical treatment is the seminal decision of the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority*.¹⁰ *Gillick* was concerned whether a doctor could lawfully provide contraceptive advice and treatment to a child under sixteen without parental consent. The decision established that parental authority diminishes as a child acquires sufficient maturity and understanding to make decisions independently.

Capacity was therefore linked not merely to age but to the individual child's ability to understand the nature and consequences of the decision in question. In doing so, the House of Lords recognised that childhood development is a gradual process rather than one marked by rigid legal boundaries.

It is now well established that a child under sixteen may consent to medical treatment where *Gillick* competence is demonstrated.

¹⁰ [1986] AC 112

More recently, the Court of Appeal of England and Wales in *Bell v Tavistock and Portman NHS Foundation Trust*¹¹ confirmed that the assessment of *Gillick* competence remains a matter for clinicians rather than the courts. The decision emphasised that competence depends upon both the nature of the decision being made and the individual child's ability to understand and weigh the relevant information. Assessments must therefore be individualised, the consequences of the proposed treatment carefully considered, and children supported to achieve competence wherever possible. In this way, *Bell* reaffirmed the central principle of *Gillick* that maturity, rather than age alone, determines autonomy.

This approach reflects a broader rights-based understanding of childhood which recognises the evolving capacities of children and their increasing entitlement to participate in decisions affecting their lives. It also represents a marked departure from the more paternalistic traditions that historically characterised the law's approach to capacity.

Indeed, research consistently demonstrates that children reach maturity and decision-making capacity at different stages, with cognitive development continuing throughout adolescence and into early adulthood. As children mature, increasing weight should therefore be afforded to their views and preferences, reflecting an appropriate balance between welfare, protection and autonomy. This principle is expressly recognised by article 5 of the UNCRC, which requires domestic laws to be developed in a manner consistent with the evolving capacities of the child.

¹¹ [2021] EWCA Civ 1363

Similar themes emerge in the decision of the Northern Ireland Court of Appeal in *Mr IJ v Ms GH*,¹² where the court emphasised that competence cannot be determined by age alone and may evolve as a child matures. The case arose in the context of whether a child could instruct separate legal representation and reflects the increasingly prominent role afforded to children's participation within legal proceedings. The court acknowledged that, particularly in relation to older children, separate representation may be appropriate where the circumstances of the case and the child's level of competence justify such an approach. Importantly, it also recognised the continuing need to ensure that the voice of the child is heard within family proceedings.

While *Gillick* competence applies across a wide range of medical decisions, it remains highly context-specific and depends upon the particular decision under consideration. Difficulties arise most acutely in cases involving the refusal of life-saving treatment, where the courts have traditionally adopted a more interventionist approach in order to safeguard the child's welfare and best interests.

*Re W (A Minor) (Medical Treatment: Court's Jurisdiction)*¹³ remains one of the leading authorities in this area. The Court of Appeal confirmed that even where a child is sufficiently mature to express views about treatment, the court retains an overriding responsibility to protect welfare. Accordingly, where a refusal of treatment creates a serious risk of grave harm, the court may intervene notwithstanding the wishes of the child.

¹² [2022] NICA 7

¹³ 1993] Fam 64

The same approach can be seen in *Re E and F (Minors: Blood Transfusion)*¹⁴ which confirmed that even a competent minor cannot necessarily refuse life-saving treatment, and in *Re J (Blood Transfusion)*,¹⁵ where the court emphasised the need to balance age, maturity, beliefs and risk within a best-interests framework. Here we see the continuing interplay between autonomy and welfare in the context of children's decision-making.

The jurisprudential position therefore remains that children under sixteen will not ordinarily be permitted to refuse treatment which the court considers necessary to protect their welfare. It is for this reason that the courts have consistently maintained jurisdiction to override the decisions of even *Gillick*-competent children where exceptional circumstances require intervention. As Lord Donaldson observed in *Re R (A Minor) (Wardship: Consent to Treatment)*,¹⁶ the court's protective jurisdiction may in appropriate circumstances supersede the child's own decision.

While scholars such as Cave have suggested that the *Gillick* test has "shown signs of strain",¹⁷ cases such as *Bell* demonstrate that its enduring strength lies in its flexibility. The assessment of competence is inherently context-specific and depends upon both the maturity of the individual child and the nature of the decision under consideration. As the potential consequences of a decision become more serious and far-reaching, so too does the level of understanding required to demonstrate competence.

The relationship between *Gillick* and the court's *parens patriae* jurisdiction therefore reflects the dual objectives of the common law, with both the

¹⁴ [2021] EWCA Civ 1888

¹⁵ [2024] EWHC 1034 (Fam)

¹⁶ [1992] Fam 11

¹⁷ E Cave, 'Goodbye Gillick? Identifying and Resolving Problems with the Concept of Child Competence' (2013) 34(1) *Legal Studies* 103

protection and empowerment of children. Competence undoubtedly facilitates participation, but it does not displace the court's responsibility to safeguard welfare and best interests. While these objectives may occasionally appear to pull in different directions, they are ultimately complementary. Together they reflect the law's continuing attempt to strike an appropriate balance between autonomy and protection in relation to children's decision-making.

Let me pivot at this point to employment law as our courts have had to consider capacity issues in this arena recently. Following the seminal Northern Ireland Court of Appeal decision in *Galo v Bombardier Aerospace UK*¹⁸, the importance of judicial determination of capacity during proceedings was firmly established. Crucially, *Galo* inextricably links the issue of capacity to fundamental constitutional rights, particularly the right to a fair hearing. Ultimately, *Galo* clarifies litigation capacity is more than a medical or evidential question; it engages legal adjudication rooted in the principles of access to justice and fairness.

The significance of *Galo* lies not only in the principles established by the Court of Appeal but also in the unusual procedural history of the litigation itself. The case made its way to the Court of Appeal on two separate occasions, each highlighting a different aspect of the challenge presented by vulnerable litigants participating in legal proceedings.

The first appeal, decided in 2016,¹⁹ arose from concerns regarding procedural fairness and the adequacy of the adjustments made by the tribunal to accommodate Mr Galo's disability. Following the Court of Appeal's intervention, the matter was remitted for a fresh hearing. However, in the

¹⁸ [2023] NICA 50

¹⁹ *Galo v Bombardier Aerospace UK* [2016] NICA 25

course of those subsequent proceedings a more fundamental issue emerged. The evidence suggested that the difficulties experienced by Mr Galo extended beyond vulnerability and procedural accommodation and gave rise to a question as to whether he possessed the capacity to conduct litigation at all. It was that issue which ultimately returned the case to the Court of Appeal in 2023.

The protracted procedural history of *Galo* reflects that evolution, moving from questions of procedural fairness and reasonable adjustment in the 2016 proceedings to the more fundamental issue of litigation capacity in the 2023 appeal.

The 2016 *Galo* judgment concentrated on the appellant's vulnerability and procedural fairness. *Galo* has since become a touchstone for discussions in relation to vulnerable litigants.

Mr Galo, an appellant with Asperger's Syndrome, argued he was not afforded a fair hearing by the tribunal. Galo averred the tribunal acted unlawfully with respect to its failure to make reasonable adjustments for his disability; unreasonably failing to adjourn the case on several occasions; and proceeding to hear his unfair dismissal claim in his absence and in the face of medical evidence supportive of an adjournment, among other things.

After consideration, the Court of Appeal concluded that the tribunal had failed to meet the requirements of procedural fairness and called for a significant shift in approach towards vulnerable litigants. In doing so, it emphasised the importance of meaningful participation throughout proceedings, recognising participation as a core component of both procedural and substantive justice and as an important value underpinning the administration of law.

The court emphasised that tribunals must actively facilitate effective participation by vulnerable litigants. This includes making reasonable adjustments where necessary, carefully considering medical evidence, adapting questioning and procedure, and recognising that fairness may require a departure from ordinary processes. More broadly, the decision highlighted the need for greater tolerance of people who communicate in atypical ways.

When the case returned to the tribunal for a fresh hearing, it became clear there was a further, more fundamental issue not addressed in the 2016 ruling. Evidential considerations suggested significant limitations in Mr Galo's ability to understand proceedings, make decisions, and instruct representatives, raising the possibility that he could not meaningfully engage in litigation, even with appropriate adjustments. In 2023, therefore, the court faced the more rudimentary question of whether Mr Galo had the mental capacity to litigate at all?

In assessing capacity, the Court confirmed the appropriate test, set out in *Masterman-Lister v Brutton & Co*²⁰, namely, "whether the appellant was capable of understanding, with the assistance of such proper explanation ... the issues upon which his consent or decision was likely to be necessary".

Indeed, the Court further underscored that the determination of capacity "is not something to be determined in the abstract. The focus must be on the particular piece of litigation" as per *Stott v Leotec Limited*²¹ thus highlighting its inherently contextual nature. This premise was further encapsulated by the

²⁰ [2002] EWCA Civ 1889

²¹ [UK EAT/0263/19/LA]

Court where it indicated, “a person’s capacity to litigate is an intrinsically fact sensitive and contextual issue”.

Ultimately, the court was unequivocal in its answer, reflecting that capacity goes to the heart of the constitutional right of access to justice, thereby echoing *Witham v Lord Chancellor*,²² wherein the court explicitly stated, “in every case where a real issue arises about a party’s capacity to litigate the court or tribunal concerned must make an appropriate determination”, emphasising the positive duty to determine capacity.

Crucially, the court rejected any suggestion that capacity determinations are contingent upon the production of further psychiatric or psychological evidence. While recognising that expert evidence will often play an important role in practice, the court emphasised that the responsibility for determining capacity remains an inalienable judicial function. This was identified as the central error in the tribunal’s approach. Rather than engaging with the extensive evidential material already available, the tribunal had effectively placed the issue into abeyance pending the production of a further psychiatric report. The court considered this approach to be fundamentally flawed. It observed that the tribunal already possessed a substantial body of evidence bearing directly upon the question of capacity and concluded that it had failed to make the evaluative assessment required of it. The judgment therefore makes clear that evidential deficiencies, whether real or perceived, cannot relieve a court or tribunal of its obligation to address capacity once the issue has properly arisen.

In sum, the court formulated its “golden rule”:

²² [1998] QB 575

“[I]n every case in which any issue pertaining to litigation capacity arises, the court or tribunal concerned must be proactive in fulfilment of its overarching duties to vouchsafe the litigant’s constitutional right of access to a court, to conduct and determine the proceedings fairly and even-handedly, to ensure that the interests of certain litigants in particular are adequately safeguard and to protect against any misuse of its process. ..”²³

Clearly, capacity issues are not an immediate barrier to hearing claims but instead must be addressed in a way that enables participation, safeguards fairness, and upholds the constitutional right of access to justice.

Undoubtedly, *Galo* turned the dial on fairness for vulnerable litigants; capacity is no longer treated as an isolated or peripheral issue. Judges must adapt procedure, lawyers must raise capacity concerns early, and experts must frame their evidence in a way that assists courts in navigating uncertainty rather than avoiding it. The court made it unmistakably clear that tribunals should investigate capacity issues whenever they arise, make determinations even in the absence of perfect medical evidence, and consider protective measures such as the appointment of a litigation friend to safeguard litigants’ constitutional right of access to a court and a fair hearing. There is no doubt, *Galo* sets a high standard for protecting vulnerable litigants, but without procedural reform and resources, tribunals may struggle to implement it effectively.

The structural limitations that make implementation difficult demand consideration, as the court itself indicated and it remains to be seen whether

²³ Ibid.

the *Galo* requirements may be refined to take into account realities on the ground. For instance, the Official Solicitor does not act in tribunals and litigants themselves may make choices as to how they want to participate, perhaps on paper if other options run out.

The approach adopted in *Galo* is consistent with the guidance contained within the Equal Treatment Bench Book which provides practical guidance to courts and tribunals on accommodating disabled litigants and supporting effective participation within legal proceedings. The principle, that fairness in adjudication is paramount, is pronounced throughout.

Attention should be paid to Chapter Five of the Equal Treatment Bench Book, articulated clearly in *Galo* (2023). Chapter Five provides a practical account of mental capacity with respect to participation in legal proceedings. The framework begins with a strong presumption that adults have capacity; a presumption which reflects the legal system's commitment to individual autonomy.

The legal standard for determining capacity is derived from the Mental Capacity Act 2005. While the Mental Capacity Act 2005 does not apply in Northern Ireland, the principles discussed in the Equal Treatment Bench Book remain influential in shaping judicial approaches to litigation capacity and participation.

Chapter 5 proceeds from a strong presumption of capacity and emphasises that capacity must be assessed by reference to the particular decision in issue. The guidance reflects the familiar principles of the Mental Capacity Act 2005, including support for decision-making wherever possible and the requirement to avoid unnecessary restrictions upon individual autonomy.

The Mental Capacity Act further provides a set of guiding principles that shape judicial reasoning in this area. These include the obligation to take all practicable steps to support individuals in making decisions, the recognition that an unsound decision does not in itself demonstrate incapacity, and the requirement that any intervention be the least restrictive of the person's rights and freedoms. Where a person is found to lack capacity, any decisions taken on their behalf must be made in their "best interests".

The identification of incapacity has significant consequences for the conduct of proceedings. A person who lacks capacity to litigate is designated as a "protected party", and the court cannot properly proceed unless appropriate representation is in place. The procedural rules in civil and family jurisdictions mandate the appointment of a litigation friend, and any steps taken without such protection may be invalid.

The litigation friend occupies a central role in safeguarding the rights of those who lack capacity. Acting as a procedural representative, the litigation friend is responsible for conducting the proceedings, making decisions in the protected party's best interests, and facilitating communication with the court. Although the framework for litigation friends is most fully developed in civil and family procedure rules, the Equal Treatment Bench Book notes tribunals possess analogous powers to appoint such representatives as part of their case-management jurisdiction. Indeed, *Jhuti v Royal Mail*,²⁴ confirmed in *Galo* as persuasive, affirmed employment tribunals are expected to be proactive where a party's capacity is in doubt.

Ultimately, Chapter 5 underscores the active responsibility of judges to ensure that issues of capacity are identified early and managed effectively.

²⁴ [UKEAT 0061/17/RN] at para 51

The increasing use of artificial intelligence presents an additional challenge for the future development of capacity law. Technological tools now have the potential to assist professionals in identifying patterns of communication difficulty, cognitive impairment and vulnerability. In some contexts, they may prove valuable in helping clinicians, lawyers and courts organise large volumes of information, identify relevant issues and support decision-making processes.

However, the issue of capacity is ultimately concerned with the rights, autonomy and dignity of the individual. The determination of capacity remains a legal and human judgment requiring careful consideration of the person's circumstances, wishes, understanding and ability to participate in decision-making. Capacity is not simply a clinical diagnosis or data set capable of being processed through an algorithm. Another angle is that AI may actually mask the incapacity of some. These are further questions for another day.

Indeed, many of the themes discussed throughout this lecture highlight why caution is required. The law has increasingly moved towards recognising the importance of participation, supported decision-making and the individual's own wishes and feelings. These are matters which depend upon context, communication and human interaction. While artificial intelligence may assist decision-makers, it cannot replace the responsibility of judges, lawyers, clinicians and experts to engage directly with the individual whose rights are at stake.

The challenge for the future will therefore be to ensure that advances in technology are harnessed in a manner that enhances participation and access to justice rather than diminishes them. As with capacity law itself, the

question is not merely what technology can do, but how it can be used in a way that respects autonomy while providing appropriate protection for vulnerable individuals.

Let me turn to criminal law at this point. Although the MCA(NI) does not govern the law relating to fitness to plead, it nevertheless forms part of the broader legal landscape within which questions of capacity and participation are now understood. Fitness to plead remains rooted in the common law and the statutory framework provided by the Mental Health (Northern Ireland) Order 1986. However, the MCA(NI)'s emphasis upon autonomy, supported decision-making and tailored intervention reflects wider developments which have influenced contemporary thinking about vulnerable defendants and effective participation within criminal proceedings.

The modern approach is therefore increasingly concerned not merely with identifying those who are incapable of participating in the trial process, but with considering what supports, adjustments and safeguards may enable participation to occur. In that way, contemporary criminal justice seeks, wherever possible, to keep defendants within the ordinary trial process whilst preserving the fairness and integrity of proceedings.

Approaches to fitness to plead differ across various court levels. In the Crown Court, Article 49 of the MHO provides a structured framework. By contrast, the magistrates' courts adopt a more flexible, case-by-case approach in the absence of a formal statutory test. District Judges consider psychiatric and psychological evidence as part of the broader evidential picture, determining whether participation can be supported through adjustments, intermediaries, or modified procedures, or whether a protective fact-finding process is

required. Influenced by authorities such as *R (P) v Barking Youth Court*²⁵ and *Singh v Stratford Magistrates' Court*²⁶, this model focuses on participation as opposed to strict procedural thresholds.

This pragmatic approach aligns with the principles of the UN Convention on the Rights of Persons with Disabilities, particularly the emphasis on supported decision-making. By integrating expert evidence and prioritising participation wherever possible, magistrates' courts reflect an evolving commitment to inclusion. At the same time, they preserve the essential safeguard that, in exceptional cases where participation cannot be facilitated, a finding of unfitness remains necessary to uphold fairness and the integrity of proceedings.

Advances in clinical expertise and procedural safeguards have transformed how courts interpret and apply the fitness to plead test. Psychiatric and psychological evidence now provides deeper insight into communication difficulties, developmental disorders, and fluctuating capacity, supported by improved judicial training. Many defendants who might have been deemed unfit are now able to participate effectively with appropriate support. Measures such as registered intermediaries, specialist guidance like the Advocate's Gateway, and tailored questioning techniques help courts assess a defendant's true abilities rather than being limited by communication barriers.

Increasingly, therefore, the question is not simply whether a defendant can participate. The more relevant inquiry is what measures may be necessary to facilitate meaningful participation. In many cases, the availability of appropriate support enables defendants who might once have been regarded

²⁵ *R (P) v Barking Youth Court* [2002] 2 Cr App R 19

²⁶ *Singh v Stratford Magistrates' Court* [2007] EWHC 1582 (Admin)

as incapable of standing trial to participate effectively in proceedings whilst maintaining the requirements of fairness.

The recent case of *R v Rodgers*²⁷ further illustrates the increasing judicial focus upon effective participation in criminal proceedings. The appellant had been assessed as fit to stand trial and was facing a murder charge arising from a lengthy and complex jury trial. Following the close of the prosecution case, however, a breakdown occurred between the appellant and his legal representatives. The trial subsequently proceeded with the appellant acting in person. This occurred notwithstanding the fact that he was recognised as a vulnerable defendant with significant cognitive and communication difficulties and had previously been assessed as requiring the assistance of a registered intermediary.

The practical consequences of that situation became increasingly apparent as the trial progressed. The appellant was required to make critical forensic decisions without legal advice, to conduct his own cross-examination of witnesses and ultimately to address the jury in a murder trial. His evidence-in-chief was conducted by the trial judge, who subsequently acknowledged to the jury that she had deliberately limited the extent of her intervention because judicial assistance could not properly extend into the realm of advocacy. The Court of Appeal later observed that neither judicial assistance nor intermediary support could replicate the protection afforded by independent legal representation.

The disparity in representation was particularly striking. The appellant's cross-examination of a key co-accused witness lasted only a matter of about eight minutes, whereas counsel representing that co-accused was able to

²⁷ [2026] NICA 20

cross-examine extensively and later deliver a closing address lasting approximately one and a half days. The appellant's own closing speech, by contrast, lasted only a matter of minutes. These factors formed part of the court's broader concern that the appellant, despite technically being fit to stand trial, was unable to participate on an equal footing in proceedings of exceptional seriousness and complexity.

Significantly, the court emphasised that fitness to stand trial and effective participation are not synonymous concepts. A defendant may satisfy the legal threshold for fitness yet still require substantial procedural safeguards in order to participate fairly and effectively in proceedings. The court's analysis placed considerable emphasis upon the practical operation of those safeguards, including the use of registered intermediaries, ground rules hearings and adapted procedures. In doing so, it reinforced the principle that courts must look beyond formal findings of fitness and remain alert to the realities of participation throughout the trial process. In that respect, the judgment illustrates the increasing judicial recognition that participation exists on a spectrum and that procedural fairness requires courts to remain attentive to varying levels of vulnerability throughout proceedings.

More broadly, *Rodgers* underlines the extent to which contemporary criminal justice has moved towards a participation-based model of fairness. The judgment emphasised that vulnerability cannot be reduced to a binary distinction between those who are fit and those who are unfit to stand trial. Rather, courts must consider whether a defendant can engage effectively with proceedings as they unfold and whether appropriate supports remain available throughout the trial process. Questions relating to communication, understanding, legal representation and procedural accommodation may therefore assume particular importance. In that respect, *Rodgers* demonstrates

that fairness is not secured by a single determination made at the commencement of proceedings but requires continuing judicial vigilance throughout the life of a case.

The issues highlighted in *Rodgers* may be seen as forming part of the wider matrix of discussions concerning the operation of the law relating to unfitness to plead and trials of the facts. It is noteworthy that the Department of Justice and the Department of Health are presently reviewing this area of law. The development of the legislative framework is a matter for government and the NI Assembly. The function of the courts is different. It is our role, as judges, to interpret and apply the law in force at any given time whilst ensuring fairness to all participants in the justice system. In light of ongoing developments, I do not propose to comment further upon that review.

The Law Commission of England and Wales has recognised that the traditional *Pritchard* test may no longer fully reflect modern clinical understanding. Its review highlighted concerns about clarity and consistency, recommending a statutory reformulation centred on decision-making capacity and effective participation, along with improved procedures for early identification and support. Although implementation has been slow, the courts themselves have continued to evolve, often leading practical developments ahead of legislative reform. In addition, I mention briefly that in Northern Ireland there is currently a review into a trial of the facts when someone is deemed incapable.

The importance of expert evidence is illustrated in *The King v Gallagher*²⁸ which revisited a decades-old conviction involving a vulnerable young woman with significant intellectual impairment. Analysis of the original

²⁸ *The King v Gallagher* [2024] NICA 63

expert reports revealed profound concerns about suggestibility and the reliability of her confessions, particularly given coercive interview techniques and the absence of safeguards such as legal advice or an appropriate adult. The case underscores how failures to properly interpret or apply clinical evidence can undermine fairness, and how modern standards would likely have prompted a fitness inquiry.

While *Gallagher* was not formally concerned with fitness to plead, the facts inevitably invite reflection on questions of participation. The appellant's profound intellectual limitations, extremely low cognitive functioning and marked suggestibility raise the issue of whether she was ever capable of engaging meaningfully with the criminal process. Viewed through a contemporary lens, the case demonstrates how concerns regarding communication, understanding and decision-making capacity may arise long before the question of fitness to plead itself is reached. In many respects, the case illustrates why modern criminal justice increasingly focuses upon participation as a continuum rather than as a binary distinction between fitness and unfitness.

Ultimately, the developments in both domestic and international law point toward a more capacity-focused and participation-oriented framework. Proposals for reform, including separate tests for participation and the ability to plead guilty, reflect a growing emphasis on autonomy and supported decision-making.

The journey of capacity law, from *Banks v Goodfellow* through to the Mental Capacity Act (Northern Ireland), *Galo*, and the modern jurisprudence on children's participation and deprivation of liberty, demonstrates that capacity is not a fixed attribute that a person either possesses or lacks. Rather, it is a

nuanced, contextual and deeply human concept that lies at the intersection of autonomy, dignity, protection and justice.

What emerges from the cases and legislation considered today is a common thread: the law is increasingly concerned not merely with identifying those who lack capacity, but with recognising and supporting the decision-making abilities that individuals possess. Whether we are considering an older person in residential care, a child seeking to participate in decisions affecting their life, a vulnerable litigant attempting to access justice, or a defendant facing criminal proceedings, the central question is no longer simply whether capacity is absent. The more challenging question is how the legal system can maximise participation while maintaining appropriate safeguards.

Recent developments in the law of deprivation of liberty illustrate this particularly clearly. The Supreme Court has reaffirmed that legal analysis cannot focus exclusively upon deficits in decision-making capacity. The individual's own wishes, feelings and lived experience remain of central importance when determining the boundary between protective intervention and deprivation of liberty.

Northern Ireland occupies a distinctive place in this discussion. The Mental Capacity Act (Northern Ireland) represents an ambitious and innovative attempt to place autonomy at the centre of the legal framework. Yet the continued partial implementation of that legislation, together with the exclusion of children under sixteen from its scope, reminds us that the project of reform remains incomplete.

For judges, lawyers, clinicians and experts alike, this presents both an opportunity and a responsibility. Capacity assessments cannot be approached

as a purely medical exercise. Nor are they solely legal determinations. They require careful interdisciplinary engagement, informed by evidence, attentive to individual circumstances, and grounded in respect for the person whose rights and interests are at stake. Experts, in particular, play a vital role in assisting courts to understand not only impairments and diagnoses, but also the practical implications for understanding, communication and participation.

Ultimately, the measure of any capacity framework is not how effectively it excludes people from decision-making, but how effectively it enables them to take part in decisions affecting their own lives. The continuing evolution of the law in this area reflects a growing recognition that vulnerability and autonomy are not opposing concepts. Recent developments in the law of deprivation of liberty demonstrate that the challenge is no longer simply to identify the existence of restrictions, but to understand how those restrictions are experienced by the individual concerned.

If, as Lady Hale observed, a gilded cage is still a cage, the law is now required to look more closely at the person within it. Questions of wishes, feelings, participation and consent have assumed a renewed importance. The modern inquiry is therefore not confined to whether protective arrangements exist, but extends to whether those arrangements are experienced as confinement or accepted as a means of support, care and security.

Capacity law will undoubtedly continue to evolve. New clinical insights, changing societal expectations and developing human rights standards will continue to challenge established assumptions. As that evolution continues, it is essential that the law remains faithful to a simple but fundamental principle: every person is entitled to be treated as a participant in decisions

affecting them for as long, and to the greatest extent, that their circumstances permit. It is also key that we have dedicated experts working in this field to assist judges in making decisions which I have found to be the most difficult of decisions affecting people's lives.

Thank you.