# Mental Capacity and Traumatic Brain Injury

## England's Legislative Responses

***Andy Mantell , Lucy Underdown and Jane Bennett***

2016

London South Bank University | School of Health and Social Care

INSWABI

biswg
connecting brain injury professionals

# The purpose of this research

**Research question**

- Does English legislation on mental capacity meet the needs of people with Traumatic Brain Injury (TBI)?

**Aims**

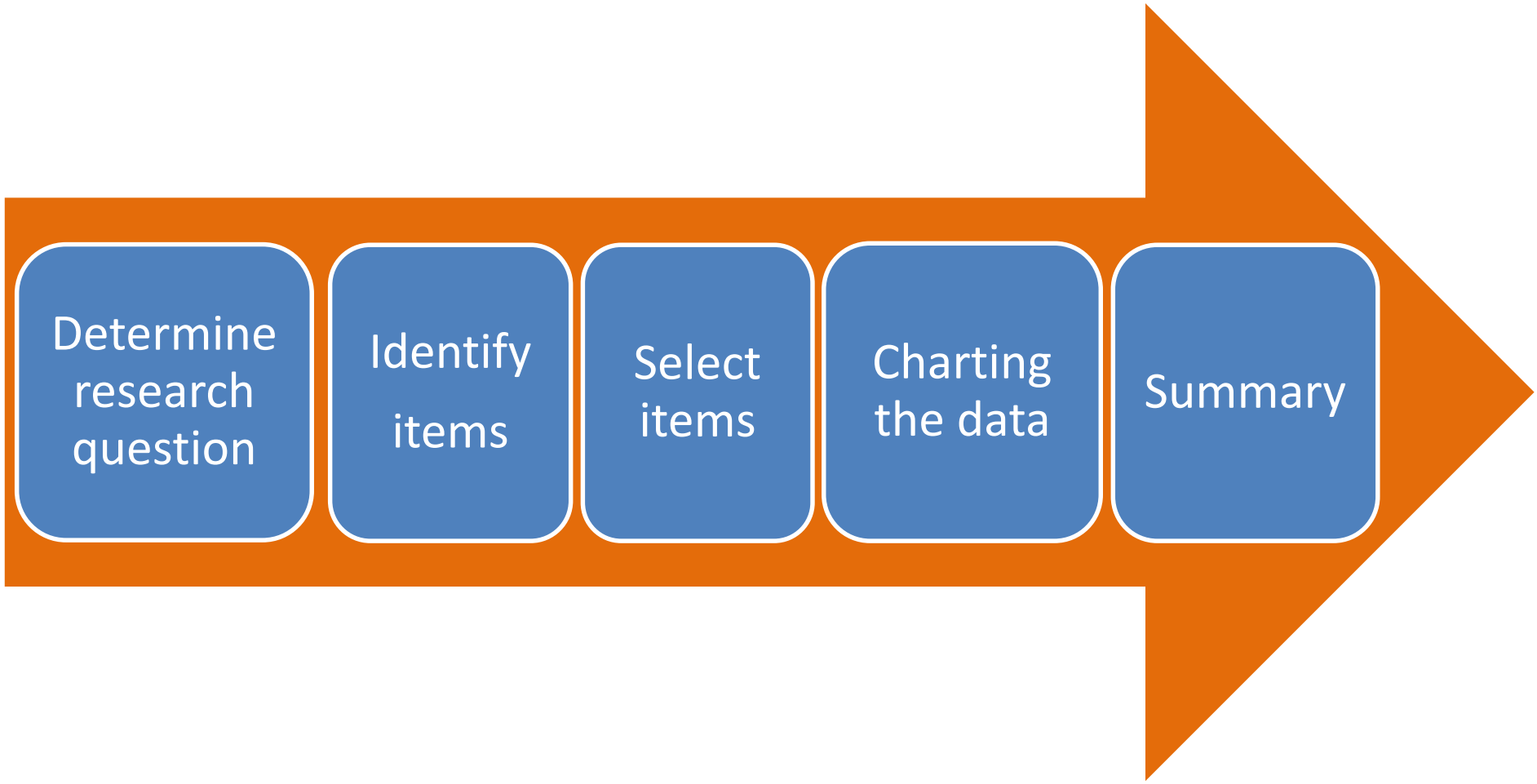
- Identify how the legislation and supporting policy was intended to identified if a person with TBI had capacity in relation to a matter.
- Identify how the legislation and policy intended to empower, but also protect those with TBI.
- Indentify how case law on mental capacity effected people with TBI.
- Identify issues for social work practice which have arise from the legislation.
- Identify the implications for people with TBI of the House of Lords Review of the legislation and the Law Commission Consultation on reforming the legislation.

**Objective**

- To highlight the strengths and pitfalls of the legislation for those working with TBI, to enable social workers to be better equipped to effectively support them.

# Methodology: Scoping Study

(Arkesy and O'Malley 2005)



# Identifying and selecting items

- The study looked at government policy documents, legislation and guidance from the 2005 to 2015.
- Case law was explored from 2007 -2015.
- To identify current social work practice issues, social work journals were searched using ASUS and SCOPUS, from 2006 to 2015.
- The search term used were ‘TBI and capacity’, ‘ABI and capacity’, ‘Brain* and capacity’ and simply ‘capacity’.

# Charting the data – legal framework

**Legislation**

- The Sexual Offences Act 2003
- The **Mental Capacity Act 2005**, as amended by The Mental Health Act 2007
- The Health and Social Care Act 2008
- The Care Act 2014
- Secondary legislation (codes of practice)

**The Courts' interpretations**

- Case/common law:
  - Litigate
  - Make wills
  - Consent to sex
- Court of Protection
  - Situational incapacity
  - Deprivation of liberty in the persons home

# The Mental Capacity Act 2005

**Aims of the Act**

1. Support decision making capacity (DMC) through assessment of their capacity to make decisions
2. Act in the best interest of individuals who lack capacity
3. Support people to plan for their future.

**Guiding principles**

**When assessing a person's DMC**

(i) Assumption of capacity unless established otherwise.

(ii) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.

(iii) Capacity is not necessarily wisdom.

**If a person lacks capacity**

(iv) Act in their best interest

(v) Least restrictive option.

# Two stage test of incapacity

**Diagnostic test**

- Does the person have an impairment of the mind or brain, or is there some other sort of disturbance affecting the way their mind works?

**and**

**Functional test**

- If so, does that impairment or disturbance mean that the person is unable to make decision in question at the time it needs to be made?

# The functional test (four stages)

i. Does the person have a general understanding of what decision they need to make and why they need to make it?

ii. Does the person have a general understanding of the likely consequences of making or not making the decision?

iii. Is the person able to understand, retain, use and weigh up the information relevant to this decision?

iv. Can the person communicate their decision?

Summarised as the **URWC** (Understand, Retain, Weigh-up and Communicate) test.

# Authority of act when a person lacks capacity

**Measures a person can take in advance of mental incapacity**

1. Advanced decisions to refuse treatment.
2. Lasting Powers of Attorney:
    a. Property and Financial LPA
    b. Health and Welfare LPA

**Measures when a person has lost capacity**

1. Appointeeship
2. Acts in connection with care or treatment
3. Deputy – similar to LPA, but court appointed and role set by court.
4. Directions from the Court of Protection.
5. Deprivation of Liberty Safeguards

# What safeguards exist?

1. Office of the Public Guardian oversees LPA's and Deputies.
2. Independent Mental Capacity Advocates.
3. An offence to mistreat someone who lacks capacity
4. Appoint official solicitor.
5. Guidance on involvement in research.
6. 'Inherent jurisdiction' of the court where situational incapacity (influence of others).

# Key themes from primary case law relevant to MCA and TBI

| Theme | No of cases (18 total) |
|---|---|
| Best interests | 6 |
| Capacity (litigation or testimony) | 2 |
| Deprivation of liberty | 2 |
| Deputies | 2 |
| Inherent jurisdiction of the court | 2 |
| Withdrawal of nutrition or life sustaining treatment | 2 |
| Advance directives | 1 |
| Habitual residence | 1 |
| Gratuitous care allowance | 1 |
| Management of property and affairs | 1 |
| Power of attorney | 1 |

# Examples of key cases

| Case | Year | Issue | Implications for TBI |
|---|---|---|---|
| Dunhill (by her litigation friend) v Burgin | 2012 | Capacity to litigate | Confirmed Masterman-Lister (2002) ruling and that capacity for decisions arising within the proceedings should also be considered. |
| Re Walker (Deceased); Walker & Another v Badmin | 2014 | Testimony capacity | Confirmed validity of common law test from Banks v Goodfellow (1870) |
| Cheshire West & Cheshire Council v P & M | 2011 | Depriving of liberty | Established the 'acid test' for depriving someone of their liberty |
| Re C | 2010 | Test for withdrawing life sustaining treatment in PVS. Jurisdiction of the Court | Court has jurisdiction. Confirmed test from Airedale NHS Trust V Bland (1993). Confirmed withdrawal of nutrition and hydration not a breach of human rights. |

# Key points from House of Lords Review

## Key Findings

- Overall – 'visionary piece of legislation', but Deprivation of Liberty Safeguards (DoLS) 'not fit for purpose'.

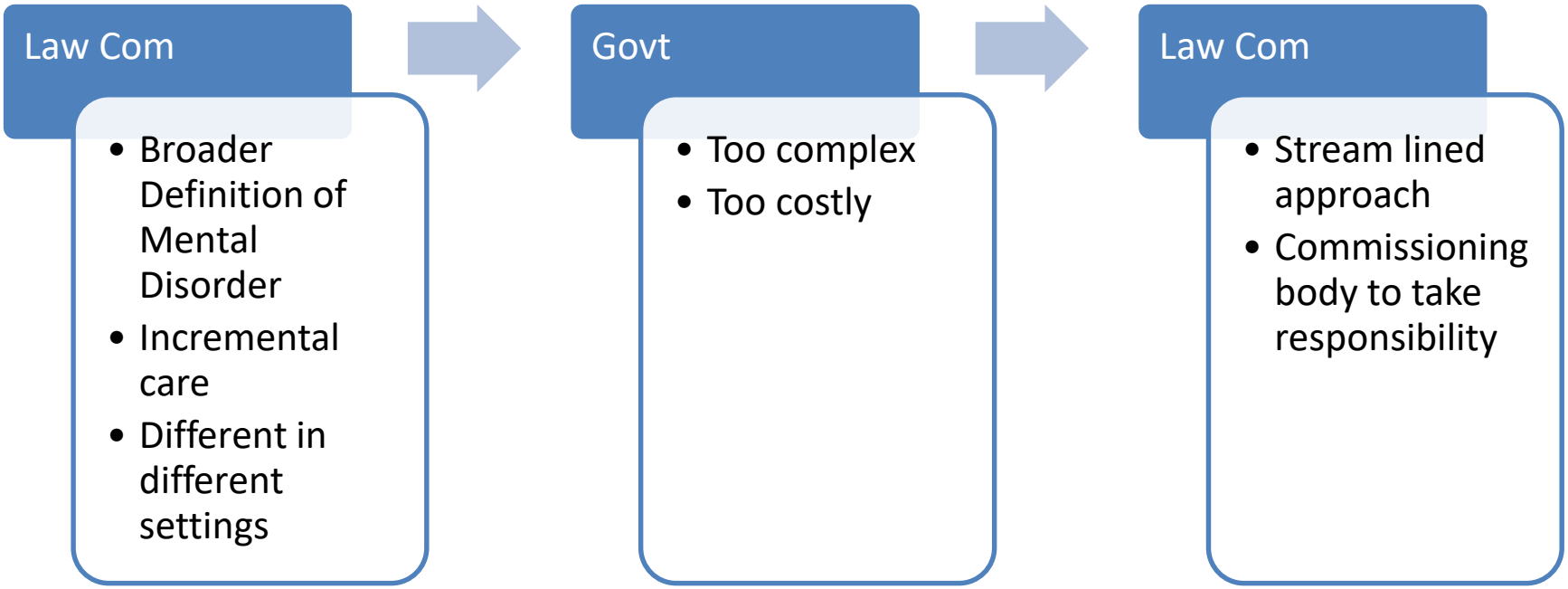
- The principles – 'perversely applied':
  - presumption of capacity used to avoid assessing capacity
  - unwise decisions- misinterpretation of the sequalae of TBI
  - best interest confused with clinical decision

## Key Recommendations

- Assessment – Non specialist undertaking structured interview.

- Advocacy – IMCA's need specialist knowledge of TBI to be able to advocate effectively.

# Revising Deprivation of liberty Safeguards



# MCA and Literature

| Name | Tarek, A. Gaber, K | Herbert, C | Herbert, C | Herbert, C |
|---|---|---|---|---|
| Year | 2006 | 2010 | 2010 | 2010 |
| Source | Disability and Rehabilitation | The Cambridge handbook of forensic psychology | Clinical neuropsychology: | The Cambridge handbook of forensic psychology. |
| Title | Medico-legal and ethical aspects in the management of wandering patients following brain injury | Vulnerable adults' capacity | Mental capacity | Consent and capacity in civil cases |
| Themes | Wandering and agitation common following TBI. Need structured environment | Lack of capacity doesn't mean you are vulnerable and vice versa | DOLS<br>Best interest | Diagnostic and functional approach |
| Knowledge | Empirical | Expert | Expert | Expert |
| Relevance | Very relevant | Relevant | Relevant | Relevant |

# MCA and TBI Literature

| Name | Newby, H and Morgan R | Sangars, D.; Taylor, M.; Sangars, B. | Manthorpe, J and Samsi | Owen, G, Freyenhagen, F, Martin, W and David, A |
|---|---|---|---|---|
| Year | 2013 | 2014 | 2015 | 2015 |
| Source | Practical neuropsyc. Rehab. in ABI | Neuropsychological Rehabilitation | Journal of Social Care and Nuero-disability | Age & Ageing |
| Title | Assessment of mental capacity (Chapter) | Inside The DOLS House | Changing practice: adapting to the Mental Capacity Act 2005 | Clinical assessment of decision-making capacity |
| Themes | Recommends Berry and Toss (2011) assessment framework | 1."Refusing Care and Treatment" "2. Attempting to Leave Ward" | Best interest Future planning Legal literacy of SW | Assessment 'Online' awareness of deficits |
| Knowledge | Expert | Empirical | Empirical | Empirical |

# Key themes

- Assessment:
  - SW identifying when an assessment should be conducted.
  - SW having sufficient knowledge and skills of TBI to undertake the assessment.
  - SW having sufficient knowledge of TBI to be able to correctly understand the pTBI's responses.

# Key themes – the difficulty of assessing

- ‘Weigh up’, an aspect of the functional test requires the pTBI to have awareness of how the TBI has effected them.

- Owen et al (2015) found that awareness can be:
  - ✓ Retrospective – Doesn’t contribute to decision making capacity (DMC)
  - ✓ Concurrent – Necessary but not sufficient to contribute to DMC
  - ✓ Online – Where they can actively use their awareness in their weighing up process.

# Key themes

- Best interest:
  - Confused with clinical judgement
  - Where pTBI is dependent on someone
  - Significance of past wishes to proxy decision makers

- IMCA similarly appropriate skills and knowledge of TBI, if to be effective advocates.

- DoLS not fit for purpose and does not cover pure brain injury

# Discussion

- The five guiding principles encompassed **aspirations** that have **not been achieved** in practice.
- The legal framework is **not nuanced to real world subtleties** such as the influences of others.
- The *diagnostic test* is **at odds** with the UN charter on the rights of people with Disability.
- Clinical assessment of cognition does not accurately correlate to the *functional test*, which in turn may be a **poor predictor of real life decision making capacity.**
- Owen et al (2015) argued that unwise decisions (principle 3) should trigger an assessment.
- However, should we go further - including best interest (principle 4) in the assessment, so that outcomes are considered in the round rather than isolation?

# Discussion

- Structured assessment is essential to enabling a person to make decisions (principle 2) (Owen et al  2015).

- However, a compensatory strategy provides ‘scaffolding’, which may provide a false impression of their DMC in the real world, where that scaffolding is not present.

- As Owen noted DMC ‘… involves navigating a decision situation populated with options, opportunities, dangers, temptations and other people’ (p9).

# Discussion - Aims

- Identify how the legislation and supporting policy was intended to identified if a person with TBI had capacity in relation to a matter.
- In practice it has had unintended negative consequences for pTBI
- Identify how the legislation and policy intended to empower, but also protect those with TBI.
- Frame work is insufficiently sensitive to the real life experiences of pTBI
- Identify how case law on mental capacity effected people with TBI.
- The case law has helped to protect the right of pTBI

# Discussion - Aims

- Identify issues for social work practice which have arise from the legislation.
- A lack of knowledge of TBI combined with a lack of knowledge of the mental capacity legislation leaves pTBI vulnerable
- Identify the implications for people with TBI of the House of Lords Review of the legislation and the Law Commission Consultation on reforming the legislation.
- Awaiting final outcome of consultation.

# Discussion

**Limitations:**

i. Hearing social workers' voices on practice.

ii. Lack of social work literature on this area.

iii. Focusing on other professionals could have produced more results.

# Conclusion

***Research question:***

*Does English legislation on mental capacity meet the needs of people with Traumatic Brain Injury (TBI)?*

- The Act can empower people with TBI.
- Those whose decision making is influenced by others are not sufficiently protected by the legislation.
- Principles 1-4 have had unfortunate consequences in practice.
- This can leave pTBI with a incorrect assessment of capacity, insufficient support and vulnerable to abuse.

# Conclusion cont.

***Objective***

*To highlight the strengths and pitfalls of the legislation for those working with TBI, to enable social workers to be better equipped to effectively support them.*

- UK legislation focuses on individual decisions in isolation, neglecting the influence of other environmental factors on individual's real world decisions.
- A central difficulty for social workers is how to utilise structured assessments to apply abstract criteria to determine real world decision making.
- Social workers need to develop knowledge of the legislation and TBI to ensure that pTBI are not left vulnerable.

# Thank you for listening

**Any questions?**

Contact Andy Mantell at:
mantella@lsbu.ac.uk

BISWG Website :
http://www.biswg.co.uk

INSWABI website:
http://www.biswg.co.uk/html/inswabi.html

# References


- Arksey,H & O'Malley L (2005): Scoping studies: towards a methodological framework, International Journal of Social Research Methodology, 8:1, 19-32
- AVS (by his litigation friend, CS) v NHS Foundation Trust & B PCT [2011] EWCA CIV No. 7
- EG v RS, JS & BEN PCT [2010] EWHC 30073 (COP)
- Broach, S, Clements, L and Read J (2015) *Disabled Children: A Legal Handbook (2nd Edn).* London: Legal Action Group.
- Re C (withdrawal of treatment: vegetative state) [2010] EWHC 3448 (COP)
- Cheshire West & Cheshire Council v P & M [2011] EWHC 1330 (FAM) *
- Department of Constitutional Affairs (2007). The Mental Capacity Act 2005 Code of Practice. London: TSO.
- Re DT; Public Guardian v IT & Others [2015] EWCOP 10
- Dunhill (by her litigation friend) v Burgin [2012] EWCA CIV 397
- An English Local Authority v SW & Others [2014] EWCOP 43

# References


- Re H (a minor and incapacitated person); Baker v H & the Official Solicitor [2009] COPLR CON VOL606
- Re HNL; ATL & The Public Guardian [2015] EWCOP 77
- Ex Primary Care Trust v XB [2012] EWHC 1390 (FAM)
- Health and Disability Commissioner. (1997). Advance Directives, Living Wills and Questions of Competence. Retrieved from http://www.hdc.org.nz/education/presentations/advance-directives,-living-wills-and-questions-of-competence
- Health and Disability Commissioner. (2009). The HDC Code of Health and Disability Services Consumers' Rights Regulation 1996. Retrieved from http://www.hdc.org.nz/the-act--code/the-code-of-rights/the-code-%28full%29
- Re JDS; KGS v JDS [2012] EWHC 302 (COP)
- Herbert, C (2010) Consent and capacity in civil cases. In Brown, J (Ed); Campbell, E (Ed)The Cambridge handbook of forensic psychology. Cambridge: Cambridge University Press
- Herbert, C (2010) Vulnerable adults' capacity. In Brown, J (Ed); Campbell, E (Ed)The Cambridge handbook of forensic psychology. Cambridge: Cambridge University Press

# References


- Herbert, C (2013) Mental capacity. Goldstein, L. (Ed); McNeil, J. (Ed); Clinical neuropsychology: A practical guide to assessment and management for clinicians . Chichester: Wiley-Blackwell
- LBL v RYJ & BJ [2010] EWHC 2665 (COP)
- Lush, D. (2012). *Mental Capacity Update*. University of Essex, 19/9/12.
- Manthorpe, J and Samsi, K Changing practice: adapting to the Mental Capacity Act 2005 *Social Care and Neuro-disability* VOL. 4 NO. 3/4 2013, pp. 124-133,
- Masterman-Lister v Brutton & Co, Jewell & Home Counties Dairies (1); CA19 DEC 2002
- (1) An NHS Trust (2) B PCT v D U (by his litigation friend, the Official Solicitor) & Others [2009] EWHC 3504 (FAM)
- Newby, H Ryan-Morgan, T (2013) Assessment of Mental Capacity. In Newby, G (Ed); Coetzer, R (Ed); Daisley, A (Ed); Weatherhead, S (Ed); Practical neuropsychological rehabilitation in acquired brain injury: A guide for working clinicians. London: Karnac
- Re PV; Newcastle City Council v PV (by his litigation friend, the Official Solicitor) & Criminal Injuries Compensation Authority [2015] EWCOP 22

# References


- Sangars, D.; Taylor, M.; Sangars, B (2014) Inside The Dols House, A Freedom Of Information Act Survey Of Variations In The Use Of Deprivation Of Liberty Safegauards (Dols) In England
- SN v HM (by the Official solicitors as her litigation friend) [2011] EWHC B30 (COP)
- Tarek A. Gaber, K (2006) Medico-legal and ethical aspects in the management of wandering patients following brain injury: Questionnaire survey. *Disability and Rehabilitation*, 28(22): 1413–1416
- W (by her litigation friend B) v (1) M (by her litigation friend the Official Solicitor) (2) S and (3) a NHS Primary Care Trust [2011] EWHC 2443 (FAM)
- W Primary Care Trust v TB [2009] EWHC 1737 (FAM)
- Re Walker (Deceased); Walker & Another v Badmin & Others [2014] EWHC 72 (CH)