

RESEARCH ARTICLE

# The ‘human element’ in the social space of the courtroom: framing and shaping the deliberative process in mental capacity law<sup>†‡</sup>

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## Abstract

The context- and person-specific nature of the Mental Capacity Act 2005 (MCA) in England and Wales means inherent indeterminacy characterises decision-making in the Court of Protection (CoP), not least regarding conflicting values and the weight that should be accorded to competing factors. This paper explores how legal professionals frame and influence the MCA’s deliberative and adjudicative processes in the social space of the courtroom through a thematic analysis of semi-structured interviews with legal practitioners specialising in mental capacity law and retired judges from the CoP and the Courts of Appeal with specific experience of adjudicating mental capacity disputes. The concept of the ‘human element’ offers important new insight into how legal professionals perform their roles and justify their activities in the conduct of legal proceedings. The ‘human element’ takes effect in two ways: first, it operates as an overarching normative prism that accounts for what good practice demands of legal professionals in mental capacity law; secondly, it explains how these professionals orientate these norms in the day-to-day conduct of their work. The ‘human element’ further presents challenges that demand practical negotiation in relation to countervailing normative commitments to objectivity and socio-institutional expectations around professional hierarchies, expertise, and evidential thresholds.

**Keywords:** mental capacity law; practice; profession; ethics; Mental Capacity Act 2005

One of the obvious truths is that the justice system is a human system, and the human beings who are playing the major part are all different. They all have different positions, they all have different beliefs, and they all have different life experience. They all have different faiths, so you bring to your work whatever you are. (R)9

## Introduction

The Mental Capacity Act 2005 (MCA) in England and Wales is explicit in prescribing a values-based legal framework, centred round the ideas of ‘mental capacity’ and ‘best interests’.<sup>1</sup> In legal proceedings,

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<sup>1</sup>The values-based framework could be understood through strict or flexible interpretations. For discussion see C Kong et al ‘Judging values and participation in mental capacity law’ (2019) 8 *Laws* 3.

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the specialist Court of Protection (CoP), established by the MCA, must grapple with fundamental questions relating to the interpretation and application of the law's principled requirements, with each case having its own distinctive factual matrix and a unique person at the heart of the whole process. Decision-making in the CoP revolves around questions concerning the person's health and welfare, or their property and affairs, that are characterised by inherent uncertainty and complexity. This includes questions regarding the form of, and weight to be given to, conflicting values, such as the requirement to protect the person lacking capacity (P) and to attend to their subjective wishes in a substitute decision-making process. The MCA itself provides little guidance or clarity about how these complex questions should be navigated, with judges in the CoP required to conduct an evaluative, discretionary exercise which ultimately results in a value judgement, framed in response to the evidence and arguments gathered and presented by legal practitioners.<sup>2</sup>

The case law emerging from the CoP reveals how exercising these value judgements can result in divergent decisions, ranging from questions about P's capacity – whether an individual has decision-making capacity according to the functional test that is set out in the MCA, s 2 and s 3<sup>3</sup> – to decisions regarding P's participation within legal proceedings. The most contentious domain of decision-making resides in applications of the best interests standard – which, most notably in s 4(6), requires the best interests decision-maker to consider 'so far as is reasonably ascertainable'

- (a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),
- (b) the beliefs and values that would be likely to influence his decision if he had capacity, and
- (c) the other factors that he would be likely to consider if he were able to do so.

Yet how this best interests test should be interpreted and applied, particularly in relation to the ascription of weight to P's wishes and feelings, beliefs and values, is subject to interpretation.<sup>4</sup> Given the principles-based framework of the MCA, the fact-specificity of each case, and the discretionary nature of decision-making, divergent approaches may be unavoidable, but are ripe for detailed and critical academic scrutiny.

Thus far, academic scholarship on the MCA and its jurisprudence has, by and large, focused its critical reflections on the judgments published for specific mental capacity law cases through doctrinal analysis of major judgments,<sup>5</sup> philosophical dissections of the arguments developed by judges in the rationales they provide for specific decisions,<sup>6</sup> as well as overarching theoretical analyses that seek to reveal the problematic nature, and potential future directions, of the law in the area.<sup>7</sup>

<sup>2</sup>Sir M Hedley *The Modern Judge: Power, Responsibility, and Society's Expectations* (Bristol: LexisNexis, 2016).

<sup>3</sup>Premised on the ability to (a) understand, (b) retain, (c) use and weigh information in the process of making a decision, and (d) communicate a decision.

<sup>4</sup>Examples regarding the participation of P, see *YLA v PM & MZ* [2013] EWHC 3622 (Fam); *KK v STCC* [2012] EWHC 2136 (COP); *In re X (Court of Protection Practice)* [2015] EWCA Civ 599. Judicial interpretations of unwise decisions in the context of best interests decision-making illustrate a further domain of varying value judgements: J Coggon and C Kong 'From best interests to better interests? Values, unwisdom and objectivity in mental capacity law' (2021) 80 Cambridge LJ 2453.

<sup>5</sup>Eg L Series 'The place of wishes and feelings in best interests decisions: *Wye Valley NHS Trust v Mr B*' (2016) 79 Mod L Rev 1101; J Stavert 'Deprivation of liberty and persons with incapacity: the Cheshire West ruling' (2015) 19 Edin L Rev 129; V Sachdeva et al 'The MCA in the Supreme Court – reflections on *Aintree v James*' (2014) Elder LJ 54.

<sup>6</sup>P Skowron 'The relationship between autonomy and adult mental capacity in the law of England and Wales' (2019) 27 Med L Rev 32; C Kong 'Constructing female sexual and reproductive agency in mental capacity law' (2019) 66 Int J Law and Psychiatry 101488; M Dunn and C Foster 'Autonomy and welfare as amici curiae' (2010) 18 Med Law Rev 68; J Coggon 'Anorexia nervosa, best interests, and the patient's human right to a "wholesale overwhelming of her autonomy": *A Local Authority v E* [2012] EWHC 1639 (COP) [2012] HRL 29' (2014) 22 Med L Rev 119; J Coggon 'Alcohol dependence and anorexia nervosa: individual autonomy and the jurisdiction of the Court of Protection: An NHS Foundation Trust v Ms X' [2014] EWCOP 35; (2014) 140 BMLR 41' (2015) 23 Med L Rev 659; C Kong et al 'An aide memoir for a balancing act? Critiquing the "balance sheet" approach to best interests decision-making' (2020) 28 Med L Rev 753.

<sup>7</sup>C Kong *Mental Capacity in Relationship: Decision-making, Dialogue, and Autonomy* (Cambridge: Cambridge University Press, 2017); J Coggon 'Mental capacity law, autonomy, and best interests: an argument for conceptual and practical clarity in

Whilst contributing extensively to our understanding of the complex and contrasting evaluative stances taken to govern and regulate the lives of people lacking mental capacity, these studies are limited in their reliance on the post-hoc legal rationalisation of judicial decisions articulated in a published judgment. Such sources prevent scholars from attending to the ways in which the practice of mental capacity law takes shape in the courtroom context. The ‘back-stage’ value orientations of judges and legal professionals, as well as the encounters and interactions that shape the production of this final account of the decision, remain elusive. Thus, we currently know very little about how arguments, and the legal and ethical values that underpin them, are framed, presented and digested; how the various actors and stakeholders feature in the deliberative legal process; and how evidence is assimilated and judged to be relevant.

This lack of knowledge has stimulated a recent socio-legal turn through empirical studies<sup>8</sup> and related public engagement projects that are motivated by a perceived need to increase transparency in the CoP process through public scrutiny of the CoP’s work as it takes shape within legal proceedings.<sup>9</sup> The academic value of this new body of scholarship lies in the ways in which its scrutiny of mental capacity law in practice has functioned to open the doors of the courtroom through research activities, thus enabling more extensive critical analysis of the courtroom process and supplementing the reliance on published judgments as the sole source for analytic study.

As part of a wider programme of research<sup>10</sup> examining the negotiation of ‘legal’ and ‘extra-legal’ values<sup>11</sup> within the deliberative and adjudicative processes of mental capacity law, this paper reports on novel empirical work undertaken which helps shed further light on how legal professionals themselves understand how values should feature in these proceedings. This includes what values mean; from where they are sourced; how they are brought to the table; how they are operationalised to shape legal arguments; and how they are accommodated in legal decision-making. Our study is focused accordingly on the reflections of people responsible for making decisions and setting up a case in the CoP – specifically, how legal practitioners and retired judges (collectively referred to herein as ‘legal professionals’) interpret the interplay between different values in their functional legal roles and in shaping their orientation to CoP processes. As we reveal, an important feature for legal professionals is the nuanced negotiation of conflicting values at multiple levels: between individuals and professionals; between their expectations and personal motivation; between legal and extra-legal considerations and sources. To be clear, our study is not one where these reflections are treated as objectively valid representations of real-life practice – substantiating legal professionals’ self-reflections would require a different set of questions and methodology than the one presented here.<sup>12</sup> Rather, we show what legal professionals themselves envisage as normative and aspirational in their work, and the manner in which a distinctive professional identity is generated through this evaluative prism.

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the Court of Protection’ (2016) 24 Med L Rev 396; Coggon and Kong, above n 4; B Clough *The Spaces of Mental Capacity Law: Moving beyond Binaries* (London: Routledge, 2021).

<sup>8</sup>J Lindsey and R Harding ‘Capabilities, capacity, and consent: sexual intimacy in the Court of Protection’ (2021) 48 J Law Soc 60; J Lindsey ‘Competing professional knowledge claims about mental capacity in the Court of Protection’ (2020) 28 Med L Rev 1; J Lindsey ‘Testimonial injustice and vulnerability: a qualitative analysis of participation in the Court of Protection’ (2019) 28 Soc Leg Stud 450. Empirical work has also been carried out to examine the participation of lay users in criminal and family courts, and employment, immigration, and asylum tribunals: J Jacobson and P Cooper (eds) *Participation in Courts and Tribunals: Concepts, Realities and Aspirations* (Bristol: Bristol University Press, 2020).

<sup>9</sup>See the *Court of Protection Open Justice* project: <https://openjusticecourtofprotection.org> (accessed 1 April 2022).

<sup>10</sup>The *Judging Values and Participation in Mental Capacity Law* Project: <http://www.icpr.org.uk/theme/courts-court-users-and-sentencing/judging-values-and-participation-mental-capacity-law>.

<sup>11</sup>Values are what we understand to be normative commitments and standards which matter or are significant to individuals/groups of individuals. We invoke the distinction between ‘legal’ and ‘extra-legal’ to highlight the interplay between values that may be seen to be traditionally associated with a conception of the law (ie impartiality, due process, rule of law, precedent, etc) and those that are thought to be outside the law (ie morality, political ideas, religious commitment, socio-cultural influences). As seen in this paper, the legal/extra-legal distinction is particularly fluid in the understanding of CoP professionals.

<sup>12</sup>Not least careful examination of the conditions of putatively objective socio-legal phenomena.

Following our discussion of the study methodology in Section 1, we present our empirical findings, revealing how legal professionals operationalise an inchoate notion of the ‘human element’ as a means of both providing normative shape to, and then in seeking to enact, mental capacity law in practice. This ‘human element’ has two distinctive dimensions. In Section 2, we describe its *normative dimension*, in which legal professionals articulate a normative account of what they believe good practice demands in mental capacity law, capturing interpersonal norms for professional practice, and detailing the personal and motivational backdrop to such commitments. In Section 3, we describe its dimension of *practical enactment*, in which legal professionals putatively attune and orientate these norms in distinctive, P-centric ways in the day-to-day conduct of their work, as they prepare materials for consideration in the courtroom, present arguments, and adjudicate decisions. In Section 4, we reveal how legal professionals seek to manage practical challenges through the normative prism of the human element, such as those associated with socio-institutional expectations around professional hierarchies and countervailing normative commitments to objectivity in the legal process. Section 5 reflects on the theoretical and legal implications of our study, and outlines areas for future research.

## 1. Methodology

Our empirical study involved three methodological components. First, following research ethics approval,<sup>13</sup> we adopted a purposive sampling strategy to recruit participants identified as being able to best inform the research questions, constrained by considerations of representativeness described below. Secondly, we undertook semi-structured, in-depth, qualitative interviews to enable focused but conversational discussion. Thirdly, we applied thematic analysis,<sup>14</sup> aided by the CAQDAS programme ATLAS.ti, to identify key themes emerging in the data, using a range of coding strategies. In order to develop our thematic understanding, we undertook these three stages iteratively, enabling refinements to be made to our recruitment strategy and the interview topic guide in light of emerging analytic insights from previous phases. At the conclusion of the third stage of analysis, the considered judgement of the research team was that data saturation had been reached.

### (a) Participants and interviews

Semi-structured qualitative interviews were conducted with 56 legal professionals across England and Wales.<sup>15</sup> 44 participants were barristers, solicitors or other relevant legal practitioners. We sampled purposively in order to ensure that the practitioners selected for interview possessed a recognised specialism, or had significant experience, in mental capacity law. This involved, first, compiling an initial informal list of the barristers and solicitors across major chambers and firms whose listings included their specialising in this area of law. Second, given that CoP practice is made up of a relatively small number of practitioners who are well-known to each other, we shared this list with two barristers working alongside the research team to ascertain whether there were any recognisable errors or omissions. Further, to ensure a representative sample, participants were chosen to ensure extensive geographical reach (throughout England and Wales), representation of specialisation (ie health and welfare and/or medical treatment and/or property and affairs), as well as representation of different parties in a CoP case (ie P, family members, public and commissioning bodies).

Another 12 participants were retired judges who also had extensive experience of adjudicating mental capacity disputes, either through their role as judges in the CoP, or as judges who had overseen

<sup>13</sup>Ethics approval was granted through the School of Law Research Ethics Committee of Birkbeck College, University of London.

<sup>14</sup>V Braun and V Clarke ‘Using thematic analysis in psychology’ (2006) 3 *Qual Res Psychol* 77; V Braun and V Clarke *Thematic Analysis: A Practical Guide* (London: Sage, 2021).

<sup>15</sup>The collective term ‘legal professionals’ or ‘professionals’ is used to denote a group of participants which includes both legal practitioners and retired judges. The abbreviation ‘LP’ denotes legal practitioner and ‘RJ’ indicates retired judges when attributing quotations.

mental capacity cases in the High Court, or the higher courts, and we continued to recruit further participants across both groups until data saturation was reached.<sup>16</sup> At all stages of data collection, we sought to ensure that the sample was broadly representative of age, experience, gender, ethnicity, and court setting. The topic guide for practitioner interviews was finalised after an initial piloting phase with two practitioners and each data collection phase resulted in subsequent refinements to the interview topic guide. A similar but separate interview topic guide was prepared for retired judges on the basis of the uniqueness of their role of deciding mental capacity cases. Within our final analysis, practitioner and judicial groups have been treated as two components of a comprehensive data set, as our iterative analysis did not reveal notable thematic differences in their respective accounts, despite adjustments to the interview schedule to accommodate their divergent legal functions. Key themes were shared between the two groups, which allowed for collective insight.

### *(b) Data analysis*

Data analysis took an inductive approach to thematic analysis, deploying three distinctive but progressive phases, modifying slightly the step-wise approach that has been documented for this analytic approach.<sup>17</sup> (i) Inductive, line-by-line coding of transcripts generated initial codes. The data corpus for each phase of interviews was coded in its entirety rather than on a selective basis; no limits were set in relation to the number of initial codes, and care was taken to ensure that codes were active, concise, and context-relevant. (ii) Multidisciplinary analysis of initial codes searched for emerging themes through methods of memo-writing, constant comparative analysis, and the production of graphical representations of a thematic map. (iii) Themes were reviewed, defined, and named through a comparative analysis of relevant codes under each theme; themes and sub-themes were re-sorted, and further memos were prepared to provide a coherent summary of how coded data within each theme and sub-theme provided unique analytic insight.

The central theme that emerged was the view that ‘the human element’<sup>18</sup> constituted a core, distinctive feature of mental capacity law and its practice for legal professionals, and was connected to a number of sub-themes further described below. This central theme captures, we argue, the main empirical insights from across the entire group of participants, incorporating the perspectives of both legal practitioners who specialise in health and welfare or property and affairs, and retired judges, though the form of the explanations and accounts given varied in light of their distinctive professional roles in legal proceedings. We turn now to the first component of legal professionals’ accounts of the ‘human element’ of mental capacity law practice: the overarching set of normative commitments that they draw on to define good practice in ‘human’ terms.

## **2. The human element as an overarching normative prism for good practice**

Participants observed how their involvement in mental capacity law cases demands an approach premised on a set of normative commitments focused on collaborative, participatory, and open-ended ways of working in the courtroom, which, on their own account, may be different to those adopted in other areas of litigation. In their view, distinctive personal skills and character traits are critical to undergird and foster this normative account of good practice in mental capacity law, even as it was noted that the practical reality could fall short.

<sup>16</sup>B Saunders et al ‘Saturation in qualitative research: exploring its conceptualization and operationalization’ (2018) 52 *Qual Quant* 1893. We were unable to recruit sitting judges for reasons beyond our control, as Section 5 explains. For non-CoP retired judges, we interpreted sufficient experience of mental capacity law cases to include those retired judges who had heard at least three published cases in this area of law.

<sup>17</sup>Braun and Clarke (2006), above n 14; ME Kiger and L Varpio ‘Thematic analysis of qualitative data: AMEE Guide No 131’ (2020) 42 *Med Teach* 846.

<sup>18</sup>A term originally used by one interviewee.

Most participants identified that integral to the effective performance of their professional roles is meaningful communication with all parties and the adoption of a collaborative, as opposed to adversarial or aggressive, approach to professional practice. This requirement was linked to a commonly articulated account of CoP cases as

‘... not about anyone winning or losing’ (LP40), but  
 ‘looking forward, and looking for solutions’ (LP27), and asking  
 ‘what’s your destination? And then let’s signpost the right route together’ (LP13).

The necessity of this approach was connected to the messiness of, and difficulties within, personal and professional relationships seen as intrinsic to mental capacity law cases. This, coupled with the discretionary exercise demanded by the MCA, risks ‘battlelines’ being drawn with each party fiercely defending what they strongly consider to be P’s best interests and rejecting, doubting or minimising any contrary positions.

A number of professionals identified that, through dialogue and collaboration, battlelines can be eroded, re-positioned or relaxed, and people can ideally be brought together with a shared objective of finding the right outcome for P. This could make the CoP better able to obtain a comprehensive, truer understanding of P’s values with all different ‘voices’ being heard. Participants also highlighted the skills and character traits of empathy, trust, honesty, sensitivity, and rapport building as being crucial to fostering an inclusive, conciliatory and collaborative approach.

Professionals nonetheless noted departures from this collaborative ideal in practice, often citing their own inexperience, specific legal specialisations, or the absence of necessary traits (eg empathy) which could undermine a collaborative approach. As opposed to family or public law practitioners, one legal practitioner thought those from a Chancery background tended to treat health and welfare applications ‘as black and white’ which, ‘when... faced with that kind of attitude, it becomes far more adversarial ... and litigious’ (LP38). Another recalled their own personal inexperience that led them to ‘being much more animated than I should’ve been on a number of occasions’ when younger, citing how inexperience could make it all ‘about winning ... and ... being the hottest thing in court’ (LP10). Despite themselves subscribing to the ideal of collaboration, one professional was sceptical of its existence in practice:

If you were going to take it from a purely legalistic point of view, P is the problem that has to be solved. I like to always say the Court of Protection should have been called the Court of Facilitated Decision making. In truth, it is protective, it is about protecting P. A collaborative perspective doesn’t really exist (LP31).

Several respondents also identified that judges played a particularly important and distinctive role in fostering or negating a successful collaborative approach. One retired judge summarised,

There is a point in the conduct of almost all litigation when a win-win resolution is possible; of course, by the time it reaches me in court it is frequently too late; but it has been an important value to me to help parties strive for a mutually satisfactory outcome. (RJ10)

In contrast, however, the judicial role as ultimate decision-maker could also be seen to undermine collaboration:

You could have a case where all the orders have been agreed and they’ve gone in and the judge has approved them. Then you go in for a hearing and the judge goes, ‘I’m absolutely not going to agree a final order on this case. What on earth are you on about?’ Everybody is looking at each other going, ‘What?’ Or, you know, you can have a case where a judge is going, ‘Yes, absolutely. I think you guys have all worked really hard together, and I appreciate you vacating hearings and not taking up court time and working together.’ (LP8)

Nonetheless, participants thought that competent dialogue between legal, social care and health other professionals, family members and other persons was an important mechanism to navigate uncertainty and unease about what decision should be made for P, as well as to counteract the tensions and communication breakdowns that are frequently present in family or care contexts within which the dispute has arisen. Participants also identified the need for practitioners and judges to be able to communicate well and engage directly with P, to 'be able to have a difficult conversation with someone about a difficult topic or subject matter and ... support them to be able to feel in a place that they can communicate their views to you' (LP39). Participants acknowledged that they often lacked the necessary skills to approach P with the requisite sensitivity and training, where one admitted that '[w]e all just kind of make it up as we go along' (LP17). Another described similar concerns, exacerbated by the intrusiveness of CoP work, stating:

I just worry about whether we're ever damaging people by sending people who are not trained to talk about these issues, out to talk about it, and especially in cases where they're really upsetting issues: cases where they're talking about assaults, or things that family have done to them or haven't done to them. I wouldn't expect to sit down with somebody with capacity and ask them about the most traumatic, deepest, personal things in their life, and take a note of it and then tell people about it. Yet somehow we do with people where that communication is even more difficult and needs to be done even more sensitively. Somehow it's like we ... mentally do some gymnastics to get to a point where that's more okay rather than less okay. (LP15)

Despite the commonly noted absence of training and some scepticism that ideals of good communication were enacted in practice, aspirational skills of emotional sensitivity, compassion, and empathy were commonly advanced in accounts of good practice. Fundamentally, this meant the ability of legal professionals to place themselves in the shoes of P, and other parties in the case, to try and see the world from a completely different set of normative commitments or ways of living. Both judge and practitioner felt these skills were critical to the exercise of their functional legal roles. Two retired judges observed:

I think a judge who lacks compassion is deeply flawed ... The least that the litigant can expect is that the judgement ... [and] the judge should be empathetic. (RJ9)

[W]hat we need is empathy in bucket loads and we need imagination. Imagining, trying to find what it's like to be somebody with that particular problem. And I mean, some people have that or some people think they've got that to a greater extent, than other people. (RJ3)

The value of emotional intelligence as opposed to intellectual prowess was stressed repeatedly. Given that raw emotion frequently characterised the conflicts that require resolution in court, understanding the intricacies of the law was not paramount. Instead, recognising the psychological complexities of human nature, and the need to immerse oneself in an emotional response to a case, were approaches that were commonly endorsed. These rightly, legal professionals thought, came at the expense of a more technical or intellectual approach to making progress, which typically was seen as being accorded inappropriate status in the justice system:

[M]aybe, in our justice system the emotional dimension is underestimated, and the importance of the intellect overestimated ... I mean, if you [want to] understand a rooted antipathy to a particular medical treatment, maybe you have to understand the individual a bit. (RJ9)

One practitioner did, however, question whether emotional responses were similarly required in property and affairs case, noting that, for solicitors functioning as financial deputies:

[I]t is a little bit more better that we are able to separate ourselves and have that distance. Because whilst they need that emotional [empathy], they get that from family and from their support workers, from their case managers, the people who see them every day. I think if someone's in charge of your finances, in a way, it helps that they're able to detach themselves a little bit. Otherwise, if someone's having to sell a property, you might go into and just think, 'They just don't want to move. I just can't force this on them.' I think it's good to be able to detach yourself and be a bit like, 'I can force this on them. It's not nice, but I can see the bigger picture beyond just how it's going to make them feel in the short term.' (LP32).

However, whether from a health and welfare or property and affairs perspective, participants repeatedly identified the benefits to employing emotional intelligence and endeavouring to understand the emotional dimension of a case, which rendered the judge and practitioner to feel better able to recognise the impact their practice may have on someone's life, to identify what really mattered, and to find a workable solution moving forwards.

*(a) The personal and motivational backdrop to the 'human element'*

This normative account of good practice, and the skills and character traits identified as being key to its enactment in practice, were not solely developed through accounts of the fundamental nature of the work in this area of law. Instead, there was a strong reflexive quality to the human element of good practice, where it was seen to be grounded predominantly in relation to the personal values and motivations of those deciding to specialise in mental capacity law. One practitioner explained,

I think I very much wanted to be involved in this because of the human element and the impact, that you could play your role in making a better outcome. That definitely influenced the field of law that I went into. I think that I have always been somebody who has had a very strong sense of right and wrong and fairness, of it being fair. I think that is a characteristic that I have had since childhood, so it probably influenced me. That probably influenced me into being a lawyer per se and then having the human aspect of it, that pushed me in the direction of this work. (LP39)

Legal professionals suggested that the values-based motivational grounding to specialise in mental capacity law rendered distinctive the kind of practitioner or judge attracted to this area. An emphasis on other-regarding values formed a common motivational theme amongst responses, such as the desire to help people, make a difference, represent individuals who lacked societal power or with potential vulnerabilities. One respondent stated:

I think anybody that I have ever come across that does this sort of work, I feel like we are all a common breed, really, and that you can always see that people genuinely are interested in actually helping people and using the law for good. I mean I don't know that many corporate lawyers to be honest, but I don't know they would necessarily have that same motivation as what I think CoP lawyers do. (LP37)

The idea that mental capacity law attracted people with the same values emerged repeatedly in participants' account of their work, operating, as one barrister described it, as 'a small club of practitioners and judges' (LP35) in which someone who did not hold similar core values was going to be quickly identified, exposed, and treated differently. This latter point captures interesting ways in which self-defining and reflexive accounts of participants rested on 'ingroup membership', distinguishing those drawn to this area of law for the putatively 'right' (or more altruistic) as opposed to 'wrong' (or self-regarding) reasons and values. For example, one practitioner noted that the increasing appeal of CoP for financial considerations runs contrary to what they envisaged was the overarching purpose (and appropriate procedures) of CoP work:

But I think we've seen a lot of firms coming up to do this work now, because it's non-means tested legal aid ... But, you have practitioners that come in, don't understand the process, just about get the right forms in, but the information that they provide is really poor. The way in which they contact parties isn't great. As I said at the very beginning, it is a collaborative process, and yes, whilst we all have to protect our party's interests, generally, if the parties are working together, you are always going to reduce costs. That's always my way of trying to work the cases. But you have advocates that are coming in and firms that are coming in that don't understand the Court of Protection at all. You have to teach them, or tell them, 'Well actually no, this is how we do it.' (LP8)

In summary, the 'human element' of mental capacity law practice takes initial shape through a set of normative commitments expressed by legal professionals that also denote their distinctive professional identity and group membership: these commitments are both a response to the complexities presented by 'hard cases' as well as an articulation of the character skills and traits that participants view as essential to a good mental capacity law practitioner or judge. This raises interesting points about how the ideal of the 'human element' is intimately connected to the self-understanding and reflexivity of participants, particularly how subscription to the ideal co-exists alongside scepticism about its practical enactment. In the next section, we turn to consider specifically how this normative prism was thought relevant to practice.

### 3. Enacting the human element in courtroom practice

Legal professionals outlined how they aspired to practically enact the human element in their orientation towards courtroom work. Configuring this approach to their work meant cultivating an approach to practice that enabled them to navigate the distinctive human dimensions of the complex cases to be adjudicated. This included grappling with the dynamics of representing and advocating for persons who often lack societal power and legal agency, leading to a practical focus on the unique subjectivity of the person at the heart of the case, and the need to manage different forms of conflict that inevitably took shape in the social space of the courtroom. These two orientations in their legal practice are outlined in turn.

#### *(a) Foregrounding the human person at the centre of the case*

Participants spoke of the subjective impact of encountering the non-ideal reality of the MCA – notably the possible disempowerment of individuals from exercising their own decision-making agency and the conflict between the formal procedures of the CoP with the purported legislative imperatives to keep the person at the centre of legal proceedings. Legal professionals described the statutory framework as 'regimented' (LP12) or 'straightjacket[ed] in some ways' (LP13), and were generally ambivalent about whether legal proceedings can work with or against the person – empowering individuals at times, whilst exacerbating powerlessness at others.

In particular, the legal imperative to make decisions on behalf of others could be conflated with pre-existing societal stigma and discrimination. One practitioner noted,

[T]he minute that you're labelled with a disability and a possible incapacity, every single thing that you do is analysed and judged. (LP30)

Acknowledgement that the CoP and the legislation itself could worsen powerlessness, stigma, and discrimination experienced by persons with disabilities, led professionals (regardless of specialisation in health and welfare or property and affairs) to describe a practical orientation that would ideally put the individual at the centre of CoP proceedings. One financial deputy stated,

[Y]ou've got to look at it from a human perspective and think, 'What is the point in managing somebody's finances if there's not a person at the centre of it?' It's not just a pot of money or a

trust fund that exists somewhere. It's there to benefit this person. If they're [not] there and able to tell you how they want to spend it, or how they want it spent, or what's important to them to tailor around that, then there would be absolutely no point, really. (LP32)

This 'human perspective' was thought to involve recognising the individual as a *subject* as opposed to an *object*: as a person with prospective wishes, feelings, and values as opposed to a diagnosis. One participant described it as 'inverting the telescope or the triangle', such that, '[r]ather than everything being done to them, everything should come from them' (LP30), regardless of how profound their impairment might be. Professionals thought this orientation prioritised substantive (as opposed to superficial) engagement with the person herself.

Though many subscribed to this aspirational orientation of focusing on P's subjectivity, its departure in real-life enactment was also frequently noted, with some recounting tendencies to 'pigeonhol[e] people' (LP34) based on their diagnosis:

I think people can sometimes be too reliant and dependent on what their diagnosis is, and then assume that 'We're never going to find out what they are,' or, 'They're never going to be very much.' I'm not saying it's as brutal as that, but it can be very nuanced that pushes them into thinking, 'Less weight,' because what are we to do? I hope I don't do that. I think there are some which is inevitable, like severe learning disabilities from birth would make it harder for me to recognise instantly what the values were. But it doesn't mean that one shouldn't go through the exercise of trying to establish whether there were any ascertainable values, beliefs, wishes and feelings. (LP34)

Several professionals spoke of their own cynicism and propensity to oversimplify and generalise cases – 'identify[ing] with some people more easily than others' (LP2). Even as they articulated their own conviction that it was vital the individual wasn't lost, one participant admitted that generalisations were hard to dislodge in the context of specific illnesses:

When you're doing Court of Protection cases a lot, I think that you can become, or some people can become, quite jaded. If you've got lots of cases on the go at the same time, and you just pick up the papers, and you're looking for – you can often think, 'Same old, same old,' and, you know, looking for new points ... You see the age of the person, because you see 1930-something, or sometimes 1920, and you're, like, 'Oh ...' I've seen people look at papers and say, '1920, 1930. Dementia. Well, they're not going anywhere. It's clearly a care home case for life. This is going to be an open and shut case. Why do we have to have any exploration about what this person is saying?', notwithstanding that this person is headbutting a wall, wanting to leave, packing their bags, crying, saying, 'Please, somebody, listen to me.' (LP12)

Another professional observed how the prevailing tendency to focus on P's wishes and feelings in CoP work, to the exclusion of P's values, could result in the 'dehumanisation' of the individual:

I am being really honest here, I can't remember the last time I wrote down what were P's values. I think we so focus on wishes and feelings we forget about the values bit sometimes. You know, and sometimes there is a risk that when you are kind of following this analysis of the best interest checklist, there is potential to kind of dehumanise the person a little bit, in terms of these are all the factors that you've got to gather, and I think there is a risk of forgetting, you know, about the kind of core unwritten things about somebody that values are. (LP17)

Interestingly, confusion about the role and meaning of values on the ground was thought by one practitioner to impede the process of investigating P's values to ensure they were properly foregrounded in CoP proceedings:

I can't immediately think of a single case, actually, in the last 13, 14 years, where someone has clearly set out a person's values and beliefs. I don't think we really – and by 'we' I'm mainly referring to, like, the assessors and so on, but perhaps lawyers as well – I don't think we really know the difference between values and beliefs. I would guess practitioners – health and social care practitioners – find it very difficult to document what the person's values and beliefs are, in the same way as I struggle when you ask me what my values are. It's like, 'Oh, God.' (LP35)

Despite these candid admissions, professionals retained a clear aspirational account of good practice, speaking of how direct engagement with the person concerned has a reciprocal impact, insofar as it was thought to remind practitioners and judges of the basic fact and gravity of making a decision on behalf of another human being. The physical encounter with the individual was therefore thought to add phenomenological weight to the process of acknowledging P's subjectivity, where face-to-face meetings between P and the judge were perceived to reinforce the subjective impact of that decision and CoP proceedings. As one practitioner expressed:

[I]f the best interest decision is swaying against their wishes and feelings, then it makes it a much harder decision when you're confronted with the person on whose behalf the decision is being taken. ... [I]t's much easier to disrespect someone on paper than in person. (LP35)

For most – but not all – participants, physical meetings with P were an important way of enacting an empathetic approach to practice, describing what they saw as a time-consuming but necessary process of actively trying to position themselves in such way as to relate to and understand P's situation and fears, to get to know the real 'P'. In one case, a practitioner,

... spent a day with [P] ... just talking and getting to know her, but for her to get to know us, because the other, kind of, aspect of this is that if we represent P, P has to be confident enough to open up to us, and that will take some time... [W]hat P says at the first interview or first meeting or first discussion may be representative of P's values, wishes and feelings, etc, but there may be far more which only comes out if P's got confidence in the people that represent him or her. ...[T]here is a concern of making sure that you don't rush the process or make assumptions because they very often will not open up easily. (LP36)

Even with the deployment of these practical strategies, professionals did reflect on limitations, difficulties, and uncertainty that they got things right:

Maybe because of limitations of reports or the number of times P has been visited, or just even the difficulties in enabling P to express whatever they can about a particular issue, it's always going to be imperfect... [I]t's those that you think, 'Well I don't know if we've really got a sense of who P is here but, based on other factors, we can still conclude the case or resolve that issue.' It's not something that haunts me with every case, but there are certain cases you think, 'I don't know if we really got to the bottom of what was going on there.' (LP14)

Another practitioner spoke bluntly about the intrusive and uncomfortable reality of representing views contrary to the individual with borderline or fluctuating capacity, where the notion of foregrounding the subjectivity of P in proceedings amounts to a 'fabrication':

[I]t's a very difficult situation to be, when you think, 'Well, at this moment in time, this person may well have the capacity to say what they're saying.' Here I am sitting next to them, speaking on their behalf through a different hat, maybe, so to speak, litigation friend, and it's very surreal. I almost feel embarrassed to be doing it on their behalf, when they're clearly set against what I'm saying. It's like, who am I to sit there and speak for them when they feel they can speak for

themselves. That's when you see the reality of what you're doing is actually quite... It almost feels like a fabrication, a show, or a theatre, or something like that. Something that's just not quite right. It just feels a bit strange. It feels intrusive, actually, that's what it feels like. (LP10)

In sum, professionals' accounts of foregrounding P point to interesting ways in which they negotiate P's subjectivity through CoP proceedings. The phenomenology of meeting – either face-to-face or remotely – may function as a practical strategy for professionals to counteract and cope with their own unease with some of the inherent contradictions and dehumanising propensities embedded within a legislative framework that can objectify individuals, particularly through its use of the diagnostic threshold as partially indicative of when capacity might warrant further investigation.

### **(b) Managing human conflict**

For practitioners and retired judges, part of the aspiration of recognising P's humanity also involved striving to attune themselves to the person's connectedness to others, and the need to address challenges intrinsic to their relational lives. Participants understood P as situated within their relationships in nuanced ways – sometimes subjecting relationships to critical scrutiny; other times acknowledging the constitutive nature of those relationships to the individual's values. Participants described the necessity of working dialectically between subjective and relational perspectives, in order to generate a more holistic picture of P's relationship context. One participant illustrated this clearly through a case where P, who was raised in a very religious family, decided they no longer wished to follow their religion in their new placement:

[P's] view was that [they were] going to be far happier without all of that and so even though [they were] expressing that that's what was going to make [them] happy, we felt very strongly that we needed to explore it further...to understand...whether there were any other factors that were influencing on that decision. So, I suppose it's looking at the broader picture of why 'P' is coming to a decision. That's why it needs proper scrutiny, because in that case we were concerned that the reason why [they were] wanting to shun [their] religion is because [they] associated it with [their] family... [W]e needed to understand the family dynamics. If that was why [they were] shunning it, we needed to understand how [they were] feeling about that from the perspective of contact, moving forward, whether it was just a complete, yes, shunning. The family, of course, on the flipside, were very concerned to ensure that [their] religious beliefs and the way that [they'd] been brought up was maintained in any placement...I think any sort of decision-making, really, could potentially involve broader elements that would need looking at. (LP24)

At times, participants also spoke less of an objective assessment and more of an intuitive 'feel' for relationships and their benefit to P. Speaking about property and affairs cases, one practitioner noted:

I find that you learn with experience and age... not to be too negative at the outset towards family members when you see a situation that, on paper, looks really awful. For example children of parents who lack capacity being deputies and feathering their own nests, and all of this. Ultimately, although on black and white paper form in terms of what the MCA says, it looks as if they're doing something untoward, but actually, it's not that straightforward. You really need to understand the family dynamic behind it. (LP10)

Interestingly, this was for the purpose of doing what was best for, not just P, but also their significant relationships – with participants often suggesting this more holistic focus can be instrumentally valuable towards achieving an outcome that would optimally benefit P.

Whilst the presence of human conflict is not unique to mental capacity law, participants nonetheless thought the *pragmatics of generating a P-centric outcome* captured a distinctive orientation in CoP work which sought to focus on P in non-ideal relational circumstances. As one judge described:

The job of the judge in circumstances [where people are not co-operating] is to try and see how those parties can be brought together, the family, the carers and everybody else, to work for the benefit of P. I often assess and listen to these cases and I've thought, 'Actually, has anybody really realised what the importance of this case is? That's all about P and P's best interests.' The whole thing becomes an argument between parties about who said what, when and the history. Really that is irrelevant. (RJ11)

According to professionals, these pragmatics involve strategies to collaborate and listen to different parties, mediate and repair relationships, de-escalate conflict, distil the core issues, and bring different people on board with the ultimate decision, even if these attempts were unsuccessful. One concrete example of how these pragmatics might shape one's orientation was in difficult cases revolving around P's contact with P's family members who may have been unable to cope with caring for, or even neglected or abused, P:

[I]n pretty [much] every single case that I have dealt with, P has wanted contact but not to be abused and not to be neglected. If P is able to express that... then what you do is you take that risk out of the contact and you make contact the best possible quality contact it can be... You don't punish the parents for what, from an objective point of view, is bad behaviour and abusive behaviour, if P wants that contact. You make it safe. (LP30)

Beyond this, participants spoke of additional reasons as to why conflict management is intrinsic to CoP work: the very nature of the cases entails a deep emotional investment of those around P and the professionals and retired judges we interviewed perceived it to be their role to attend to or alleviate these emotional ruptures. One retired judge described his approach of listening to parties and family members caught up in litigation as a 'matter of common humanity' (RJ11), whilst a practitioner stated:

[The] Court of Protection is very different from the other cases I do ... They are really usually, obviously as sad a situation as there is in order for it to be a Court of Protection, you are just trying to do your best for P primarily, but also for everyone else. To the extent that there are conflicts, there are always conflicts in the family, you are trying to minimise those. It is actually quite a complicated endeavour that you are trying to heal really ... [Particularly in end-of-life cases] [t]he emotions are so very raw and powerful, and the situation is usually terrible whatever anyone does anyway. I try and do my absolute best to certainly not exacerbate anything, to the extent you can avoid it, but try and bring everyone together. I know that doesn't sound very legal to me, but I don't think they are very legal in general. I think they are about a lot more things than that. (LP40)

Though many responses expressed a focus on P, the implicit sense of duty to others beyond P suggests interesting ways in which professionals may have some tacit awareness of how CoP decisions can substantively impact the community around the person, generating a sense of extra-legal obligations. The ambiguous legal/extra-legal status of these more relational considerations also provokes questions regarding the extent to which conflict management for reasons beyond the pragmatics of P-centricity might indicate a broader interpretation of what CoP work is meant to achieve amongst some participants – specifically, the extent to which collaboration and consensus may become an *end in itself*, such that it could potentially eclipse a focus on P in the decision itself. One participant stated,

What I beat myself up more about is not getting everyone to agree. I don't care what the argument is but, if I get to the point where they're still disagreeing, I think, Bloody hell, what else could I have done? Should I have done this? Should I have done that differently? (LP16)

Legal professionals therefore noted that attuning themselves to the relational conditions around the individual could either enhance or obstruct the practical focus on the person; they also had the potential to divert priorities in decision-making. As such, the emphasis on managing human conflict with an aim towards repairing relationships and fostering collaboration may be in tension with a more forensic, critical approach towards relationships around P, identified as important to achieve a P-centric outcome. Contradicting idealistic normative accounts of P-centricity, one practitioner noted the limited resources on the ground and stated bluntly,

I love the idea of values being a fundamental part of decision-making, and they absolutely should be. I'm not disputing that in any way, shape or form. But, as somebody who has now been doing this for quite a while, and I'm getting more and more cynical about it every, you know, year, so much of the decision-making really comes down to possibly not best interest but best option. (LP4)

#### 4. Managing socio-institutional expectations

Professionals claimed their approach to courtroom practice involved negotiating the aforementioned tension between legal/extra-legal considerations. They described how they sought to negotiate professional expectations associated with operating in a context which defines clear institutional expectations and formal requirements around the application of the rule of law. Two particular aspects of difficulty that participants sought to manage concerned how they dealt with entrenched professional hierarchies as well as legal expectations around the value of objectivity in preparing, presenting, and adjudicating between arguments.

##### *(a) The navigation of entrenched professional hierarchies*

Participants described ambivalence regarding the professional hierarchies that are internally and externally deferred to, affirmed, and sustained in their practice. The tendency to defer to certain professional voices – particularly in the medical field – was described as an invidious aspect of CoP work. One participant spoke of the 'medical mafia' and how 'the ranks sometimes close' (LP27). Responses also reflected on how the hierarchical and status-driven nature of the legal profession itself provides external affirmation of pre-existing professional hierarchies, particularly in the tendency to prioritise certain professional perspectives over others:

[I]t's a part of our legal hierarchy that people are often valued by how much they earn, and I think weirdly that tips into social work and probably in terms of into medical things... it is status which equivocates to how your salary is, rather than, 'What's this person's actual experience that they can bring to the table?' (LP11)

The same participant noted that professional hierarchies could give rise to tensions concerning purported expertise and the status of good evidence in the courtroom:

[A] lot of the time the better evidence is from the nurse or the social worker than it is from the psychiatrist or the clinical psychologist or the neuropsychiatrist who've met them once, or even worse they've never met them. They've just read the records. So I think there's a great problem in a lot of the time we're looking at people we believe are experts because they've got lots of qualifications, but really what is better for P is someone who knows them well who's able to take an independent and impartial view. (LP11)

Due to these tensions, some professionals described how they sought to adopt practical strategies that *heighten proximity to P* to circumvent what were often perceived to be invidious hierarchal norms. Many stressed the importance of eliciting evidence from more junior staff so as to include those with regular contact with P, noting also how the legal professional hierarchy might be operationalised to draw attention back to P. For example, one participant expressed the view that reinforcing the hierarchical status of the judicial role could simultaneously challenge experts outside the legal profession:

If there is a dispute on capacity and there is a borderline dispute, it's really important for the judge to meet P because simple reliance on expert evidence isn't enough, I think. ... [J]ust because independent experts and experts say that someone lacks capacity or has capacity isn't the end point. You know, the final arbiter is the judge. (LP38)

These observations indicate ways in which the role of status in the legal profession and perceived evidentiary thresholds in CoP proceedings may consolidate rather than challenge professional hierarchies. Participants reflected a general sense that the internal and external legitimisation of professional hierarchies can be sometimes inconsistent with the normative imperative to recognise P's subjectivity, and to pursue a P-centric outcome.

#### **(b) Negotiating a commitment to objectivity**

Descriptions of detached expectations around professional conduct sat ambiguously with the internalised ethical values that practitioners identified as constitutive of good practice, requiring careful management. First, the reflexive accounts that professionals gave of themselves highlighted the importance and motivational power of their own ethical values: such values were seen as inevitable, sometimes productive, sources for working through the complexities of cases. A practitioner and retired judge stated respectively:

I think on the whole, if we didn't have those values and we weren't drawing on our own life experience, then I think we'd just be very robotic in the way that we made all of our decisions. And we wouldn't be looking at our clients as individuals, really, or thinking about what they really needed, or what their values are. If we're going to really assess what their values are, we need to have our own as well, even if they're not the same. (LP32)

I don't think we can divorce our own personal experience from the way that we do anything, whether it be a very technical area of law, or whether it be this much more social area of law. I think the best we can do is to tell people why we've done something. If you can tell people why you've done it, you are, in that way you and others are able to analyse whether your own values and life experiences have been factors, or whether you have exercised your discretion in a more principled way with as little unconscious, or conscious bias in it as is possible... (RJ2)

However, there was some uncertainty as to the extent to which a legal professional's own value sources ought to impact on arguing, deliberating, and adjudicating in the courtroom. Whilst their own accounts of internalised altruistic motives and values denoted group membership to putatively 'true' CoP specialists, this perspective also led to complex relationships with strongly held values associated with legal professional practice, ie impartiality, objectivity, open-mindedness, fairness etc. For example:

[T]he reason that I got into this work was because I did work experience when I was [young involving people with mental impairments] and thought, 'These people have absolutely nothing.' And that's continued, really. That continues to drive me. That's what motivates me, gets me up in the morning, makes me angry, determined, passionate. ... But also the client group presents with significant additional challenges, which you need exceptional skills to be able to manage. And

you need to have that separation between what you're doing for the client and what motivates you personally. Even though the motivation is intermingled. (LP30)

The recognised legal imperative to provide representation for P regardless of disagreements with P's substantive commitments was another clear example of this tension. For instance, a few participants described an uneasy dynamic between the other-regarding motivation to help P with an overarching commitment to equal representation for all, where the former were compartmentalised in order to advance the at times offensive beliefs of P, such as those relating to racism, relevant to assessing best interests.

More generally, a wide spectrum of views were expressed regarding the putative objectivity of decisions made in mental capacity law, highlighting for some the inherent arbitrariness of this standard, and for others its presumptive necessity. Representing the latter view, one participant cautioned against the implicit overdetermination of certain sociocultural values, such as when '... middle-class values about middle-class people and the way that lovely middle-class people with lovely middle-class lives judge cases involving people who don't come from the same background' (LP17). One response located this overdetermination of values within lawyers themselves:

I think that we kid ourselves if we think that we are simply undertaking some kind of – I don't know – scientific, objective, cold-hearted analysis. I think values are enormously influential in the way these things are determined. I mean, I quite like lawyers, generally, but I think that, as well, we have probably too influential a role in setting the journey for the individual. (LP25)

Another legal professional expressed concerns about unpredictability,

... different judges bring very different values of their own to proceedings ... some of them are more objective, and some of them are certainly less objective and I think that's not ideal, because it means it's quite hard to know what's going to happen. (LP11)

On the other side of the spectrum, scepticism about objectivity as an appropriate standard in mental capacity law may be linked to the extent to which legal professionals viewed and assessed their own values as inevitable, productive sources informing their practice. One participant stated:

I think [values are] incredibly important and the court inevitably applies its own values when reaching decisions in contested cases; I don't think we're ever going to be able to strip that. There is never going to be a completely objective way of reaching decisions about people's lives. It needs a human element and all of us bring a human element when we are dealing with these cases. I think our values can be very different ... but I think you constantly have to check yourself, that you're not imposing your own values or the way that you'd want to live your own life on those that you're representing actually. (LP21)

Retired judges also stressed their value-situatedness as both definitive and potentially constructive in the process of deliberation, even if only to heighten awareness of their own standpoint in the decision-making process,

Nobody is objective ... I think the best that you can say is that you try to be aware of your own prejudices and try not to let those suddenly become as if that's a given. If somebody says they're completely objective, I think they're fooling themselves. (RJ4)

I do think that the key is know ... thyself so that, if you have a prejudice or an inclination, you must be aware of it. You must recognise it, and you must be on guard to, as it were, moderate its influence on your assessment. I think it's okay. We all have prejudices. All human beings are

prejudiced creatures ... The vital safeguard is to know your prejudices and be on guard. That's all you can do. You can't eliminate them. (RJ9)

In summary, professionals recognised a tension between a commitment to personal values and motivations underpinning their account of good practice in mental capacity law and the legal requirement placed upon them to undertake a detached and objective assessment of reasons in context.

## 5. Discussion

The human element, which we claim best captures how practitioners and retired judges think mental capacity law should be interpreted and operationalised in the courtroom, gestures towards a distinctive, if inchoate, normative vision for good legal practice. This normative vision incorporates a number of required professional competencies for mental capacity jurisprudence that are founded upon personal motivational commitments. The constituents of the human element are, moreover, pursued in practice in ways that foreground specific requirements in professional work which need to be continually negotiated and managed.

Notably, this multi-layered concept of the human element has numerous functions for legal professionals. In one sense it is a self-ascribing, identity-constituting account, insofar as it captures the CoP specialist's account of their own distinctive identity. The normativity of the human element in such accounts helps informally denote those who are members of this 'club': perceptions of their identity not only separate those with the putatively 'right' or 'wrong' motivation for specialising in this area of law, but also frame their positionality in relation to other professionals (social workers, other legal practitioners, judges), to P, P's family members, and, indeed, to themselves. This phenomenon has two interesting layers: first, through the lens of theories of social group formation, we can see how the identity-constituting nature of 'the human element' works to delineate 'ingroup' membership as 'genuine' CoP legal professionals. As Brewer writes, ingroup membership involves a form of 'contingent altruism' where there are 'expectations of cooperation and security [which] promote positive attraction toward other ingroup members and motivate adherence to ingroup norms of appearance and behavior that assure that one will be recognized as a good or legitimate ingroup member'.<sup>19</sup> Our analysis gestures towards a similar process of ingroup membership formation of CoP professional identity, premised on the cyclical reinforcement between the normativity, subjective endorsement, and descriptions of practical enactment, of the human element.

But beyond this prism of ingroup membership formation, the normativity of the human element within professionals' identity can be seen to have a second, broader philosophical significance in terms of how it lays bare *the grounding of professional identity in value*: namely the identity-constituting significance of self-expressions of what matters.<sup>20</sup> This is particularly evident in the manner in which the human element functions to articulate an overarching commitment for professionals, to help evaluate, and give shape and meaning to their work in non-ideal circumstances. Interestingly, the skills and values that emanate from this normative commitment are those that are typically considered external to the law. Given how legal professionals seem to express their subjective and collective identity *qua* professionals within this area of law, it is perhaps unsurprising that they also articulate the importance of emotional engagement, collaborative ways of working, and a reflexive approach to their practice, at the expense of anchoring themselves in legal sources deployed through a formal, procedural model of constrained legal reasoning. Moreover, by their own account, this aspirational vision is highly demanding in its normative commitments, reinforced not least by the absence of training or guidance

<sup>19</sup>M Brewer 'The psychology of prejudice: Ingroup love or outgroup hate?' (1999) 55 J Soc Issues 433; JC Turner 'Social categorization and the self-concept: a social cognitive theory of group behavior' in T Postmes and NR Branscombe (eds) *Rediscovering Social Identity* (New York: Psychology Press, 2010).

<sup>20</sup>C Taylor 'Self-interpreting animals' in *Human Agency and Language* (Cambridge: Cambridge University Press, 1985); C Taylor 'Interpretation and the sciences of man' in *Philosophy and the Human Sciences* (Cambridge: Cambridge University Press, 1985).

in the apparently crucial interpersonal skills and communication competencies that professionals envisage as constitutive of practising well in this area of law at all levels.<sup>21</sup>

Beyond its normative function for practitioners and retired judges, the human element also gestures towards two important insights about how courtroom practices diverge from the legal framing of the MCA. The first insight concerns the putative aspiration towards liberal value-neutrality in mental capacity law, where the principles and procedural focus of the functional test are (in theory) designed to (i) recognise the plurality and subjectivity of values, as well as (ii) remain agnostic towards the substantive content of a person's values and how they may manifest in decisions.<sup>22</sup> The breadth of values that are constitutive of the human element challenges the tendency to either deny the presence and influence of extra-legal values (as they appear to be an inevitable grounding for practice) or uphold an ideal of impartiality and disengagement from values (such that what CoP legal professionals themselves observe to be distinctive about this area of law would be rendered obsolete).<sup>23</sup> Our data reiterates the observation that the main challenge within the CoP is not about what the law states or how it should be interpreted, nor even often between competing accounts of the facts, but rather about how values are indeterminately weighted and the substantive justification for these ascriptions of weight.<sup>24</sup> The study also provides clear evidence of a far more complex values landscape beyond common appeals to the reductive autonomy-paternalism binary in mental capacity law. The necessity of negotiating this terrain of complex values appears to be a critical feature of the indeterminate framing of the MCA, even as it remains a separate question for investigation as to how these values might be negotiated in a skilful manner.

The second insight concerns the way in which the relational orientation embedded in the human element contrasts with the atomistic presuppositions codified within the MCA and its principles. Contrary to the idealised notion of individual autonomy and decision-making that foregrounds the legislation,<sup>25</sup> the accounts of legal professionals indicate how relationality infuses both the pragmatics of their work and their own interpretation of what it means to practise and judge *well*. Not only is P considered in relationship, but these professionals view themselves as relationally situated, making the ability to understand complex relationships, negotiate human conflict and hierarchies, and work collaboratively with others, core features of what they perceive to be mental capacity law practice.

There are two main limitations of our study. First, the optimism intrinsic to professionals' account of practice is notable, given its disconnect from the vigorous critiques of the MCA and CoP practice from multiple angles, ranging from the prism of the UN Convention on the Rights of Persons with Disabilities to post-hoc reflection that has heretofore dominated academic investigation into the

<sup>21</sup>Participants repeatedly highlighted the absence of training and steep learning curve in this area of law, expressing that the critical need was some training around communication skills with P, in order to help enhance P's participation in proceedings. As a result, the *Judging Values* project, in collaboration with VoiceAbility and involving persons with lived experience, developed a training video for CoP practitioners on effective participation and communication: see <https://www.youtube.com/watch?v=WuEtw2rnqBw> (accessed 1 April 2022). Recent joint initiatives by the professional regulatory bodies for barristers, solicitors and legal executives specify required competencies for lawyers in the Coroners' Court. These new competencies are accompanied by training resources that aim to help practitioners develop certain extra-legal skills and eschew the adversarial approach taken by some practitioners in inquests. 'Empathy' was included as a desirable quality in the training resource: see Solicitor's Regulation Authority 'Competences for lawyers practising in inquests in the Coroners' Courts': <https://www.sra.org.uk/solicitors/resources/practising-coroners-court/competences-lawyers-practising-inquests-coroners-courts/> (accessed 1 April 2022).

<sup>22</sup>This intent is also evident in the principle that an unwise decision may not be indicative of a lack of capacity, in order to permit idiosyncratic values and decisions. As Coggon and Kong, above n 4, show, legislative debates sought to incorporate this agnostic, impartial stance that is characteristic of liberal neutrality.

<sup>23</sup>The quintessential philosophical articulations of (i) would be the value pluralism of JS Mill *On Liberty* (Cambridge: Cambridge University Press, 2011) and I Berlin *Two Concepts of Liberty* (Oxford: Clarendon, 1966); of (ii) John Rawls' notion of the 'veil of ignorance' in *A Theory of Justice* (Cambridge, MA: Harvard, 1971) describes the disengaged stance to strip individuals of their substantive commitments as conducive to generating a principles grounded in justice as fairness.

<sup>24</sup>Kong *et al.*, above n 5.

<sup>25</sup>This has been explored in Kong, above n 5.

MCA.<sup>26</sup> For example, the accounts in our study reveal an implicit culture within the CoP formed around substantive values that normatively guide the treatment of P, which clearly departs from other, more observational-oriented studies, such as by Lindsey, that depict as endemic to the CoP a professional culture of exclusion and testimonial injustice against P.<sup>27</sup> The potential divergence between the normative accounts of our participants and the observational analyses in other academic work therefore raises an interesting worry around a prospective social desirability bias of the accounts given by professionals. It might be thought that responses reflect the (un)conscious management of one's image to adhere to what is perceived to be the socially desirable motivation, espousing the values of 'good' practitioner or judge just because of their desire to minimise limitations of the CoP or failings in their own professional lives, and thereby skewing the data.<sup>28</sup> Concerns of social desirability bias may then raise a secondary question about the methodological decision to focus on qualitative interviews rather than triangulating professionals' accounts with observational data of real-world practice and interviews with Ps.

Whilst recognising the potential limitations of our study, we clarified at the outset our aim to glean detailed understanding of the interpretive accounts of legal professionals whose work informs CoP practice directly rather than seeking to provide a putatively objective picture of the CoP, and our methodological design was fashioned accordingly.<sup>29</sup> We also maintain that the nuance and heterogeneity of the data that we have presented – where examples of observed poor practice, admissions of personal limitations, cynicism, uncertainty and failures of the MCA and court process – is evidence of candour and suggests that concerns about social desirability bias may be overinflated.<sup>30</sup> Even if one remains convinced that the accounts of participants potentially veered towards the overoptimistic and aspirational, the explicit articulation of the normative framing of this area of law by its legal practitioners and judges itself remains a noteworthy empirical contribution offering a valid representation of what *they themselves* envisage to be valuable and distinctive about their work in mental capacity law. Undertaking future empirical research probing the experience of P will nonetheless be vital to address a crucial void of socio-legal research exploring the CoP thus far, though the ethical and methodological challenges are significant. Further empirical study incorporating observations of practice would also help advance questions regarding the real-world instantiation of the human element as normative framework, but we would caution against the theoretical overdetermination of such observations.<sup>31</sup>

<sup>26</sup>See M Donnelly 'Best interests in the Mental Capacity Act: time to say goodbye?' (2016) 24 Med L Rev 318 for a nuanced example of bringing the CRPD and MCA into dialogue.

<sup>27</sup>Lindsey 'Testimonial injustice and vulnerability', above n 8.

<sup>28</sup>N Bergen and R Labonté "'Everything is perfect, and we have no problems": detecting and limiting social desirability bias in qualitative research' (2020) 30 Qual Health Res 783.

<sup>29</sup>We also remain critical of contentious methodological assumptions which cast sceptical doubts on the 'truth' or 'objectivity' of interpretive accounts that articulate subjective or intersubjective meaning. However, the force of our analysis and conclusions do not hinge on resolving this core issue.

<sup>30</sup>Bergen and Labonté, above n 28, identify these indicators of social desirability in in-depth interviews: 'denial of (already known) problems, challenges, or shortcomings; providing only partial or vague answers (paltering); excessive and repeated praise for government initiatives; nervous facial expression and other body language cues; and inconsistent use of advanced vocabulary related to the study topic'. These indicators did not characterise our data; our interview design was also such that we sought to elicit examples and personal experience of poor practice, using follow-up questions for clear case illustrations to expound on various points. The internal consistency of each interview provides additional reassurance, though we are alive to the manner in which self-presentation will be an issue in qualitative interviews of this nature, regardless of study subject.

<sup>31</sup>For example, Lindsey's study (above n 8) is heavily grounded in Fricker's account of epistemic injustice and conceptualisations of vulnerability. Another limitation of Lindsey's study is that sample cases were limited to capacity to consent to marry, have sex, and contact with others. Whilst our data confirms Lindsey's point regarding the contested evidential basis of P's testimony in meetings with judges, it does not lead us to draw the same conclusion. It is, however, important to clarify the formal evidential status of P's testimony in judicial meetings as well as the legal, and indeed ethical, basis for such meetings. We expound on this point in C Kong et al 'Justifying and practising effective participation in the Court of Protection: an empirical study' (manuscript in submission).

The second limitation concerns the absence of sitting judges as participants. Whilst the project submitted a proposal looking at values to the Judicial Office, we were advised that this would not be approved. Subsequent submission of a proposal with a more confined focus on participation as opposed to values was also turned down due to concerns that the more narrowed scope would nonetheless be situated within a broader study about values. Future empirical work will obviously need to seek to capture the perspectives of sitting CoP judges, though there are significant practical governance constraints in pursuing this line of inquiry.

## Conclusion

In this paper we have presented empirical data where, according to the interpretive account of legal practitioners and retired judges, ‘the human element’ is a core, distinctive feature of mental capacity law and its practice. This concept of the human element embodies both the normative prism through which certain values and commitments are seen to be constitutive of good practice, as well as a practical dimension that putatively guides their negotiation of the complex relational and values terrain within this area of law. The import of these findings is in providing the first empirical account of how diverse legal professionals dealing with mental capacity law cases understand, interpret, and situate their practice through the prism of values: it shows normatively-laden self-ascriptions that indicate an aspirational dimension to how the distinctive features of this area of law and their professional identities within it are to be understood. But the implications, as we have shown above, have broader reach, providing substantive evidence on the import and grounding function of a wide range of values for what practitioners and retired judges envisage is vital for practising and judging well in this area of law. Our findings also highlight how legal professionals utilise values constitutive of the human element to address the normative and practical vacuum left by the MCA’s formal principles, which demand constant contextualisation and specificity in problematic real-world cases.

Important questions also remain. Can such a rich normative account of what good mental capacity law practice in the courtroom requires be robustly defended? Are these insights distinctive or unique to this area of law, or might they also resonate with other specialist areas of law, such as family law, where values also lie front and centre in the deliberative and adjudicative process? Do these insights, and the very idea of the ‘human element’ of mental capacity law practice idealise an account of professional identity and work that is of uncertain real-world validity? Finally, to what extent does the account of professional practice and identity in mental capacity law even qualify as ‘law’ as we know it, in so far as negotiation (of relationships, of values, etc) appears to be far more central and indeed, necessary, given the indeterminate framing of the MCA which renders the narrow application of legal reasoning and principles unfeasible? Future theoretical and empirical work will be vital to help address these issues.