Mental Capacity Law Newsletter July 2014: Issue 48

Court of Protection: Health, Welfare and Deprivation of Liberty

Introduction

Welcome to the July issue of the Mental Capacity Law Newsletter family. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: a difficult case on the line between the MHA/the MCA, safeguarding gone wrong, and updates on post-*Cheshire West* developments;

(2) In the Property and Affairs Newsletter: cases on deputies, undue influence and the COP and the duty of attorneys in continuing healthcare disputes;

(3) In the Practice and Procedure Newsletter: a focus on different aspects of access by the media to the court;

(4) In the Capacity outside the COP newsletter: an update on DNACPR notices, a case on charging in relation to monies managed by a Deputy, and updates on the Government's response to the House of Lords Select Committee's post-legislative scrutiny of the MCA 2005;

(5) In the Scotland Newsletter: an update on the legal consequences of delaying reporting by MHOs in welfare guardianship applications, a case on the proper duration of guardianship and an update on the Mental Health Bill.

In this issue, we also introduce two changes. The first is that we are delighted to introduce Simon Edwards as our Property and Affairs editor. The second is that, to reflect that many more decisions are now being reported pursuant to the President's Transparency Practice Guidance, we are introducing 'Short Notes' on cases which do not merit reporting in full here but where one or more short points of wider interest appear. As ever, we welcome feedback to the editors.

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Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Anna Bicarregui
Simon Edwards (P&A)

Scottish contributors
Adrian Ward
Jill Stavert

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Hyperlinks are included to judgments; if inactive, the judgment is likely to appear soon at www.mentalhealthlaw.co.uk.

The difficult line – the MCA and the MHA

Northamptonshire Healthcare NHS Foundation Trust and others v ML and others [2014] EWCOP 2 (Hayden J)

Article 5 ECHR – DOLS ineligibility

Summary

ML was 25 years of age with severe learning disability, developmental disorder, autism, epilepsy and diabetes. Save for one hospital admission, he had lived and been cared for in the family home for all of his life. He attended the National Autistic Society Day Centre. The Applicants sought declarations that it was in his best interests to reside and undergo treatment at Bestwood Hospital until he could be discharged to a suitable assisted living package in the community. The Official Solicitor supported the declarations; his parents opposed.

Mr Justice Hayden ultimately concluded that it was in ML's best interests to move to the independent hospital. However, there was an eligibility issue. All accepted that autism amounted to a mental disorder within the meaning of the MHA. And all accepted that ML would be deprived of liberty. Three options were therefore identified:

1. Firstly, to conclude that ML was ineligible to be deprived of his liberty under the Mental Capacity Act 2005, but nonetheless to declare that it was lawful and in his best interest to reside at Bestwood Hospital and to receive treatment there (without authorising the deprivation of liberty) and to leave the question of authorisation of deprivation of liberty to sections 2 and 3 of the Mental Health Act 1983;

2. Secondly, to make orders and declarations under the MCA, to declare that it was in ML's best interest to reside at and receive care from Bestwood Hospital, to authorise the deprivation of his liberty and any further treatment, seclusion and restraint under the aegis of that Act;

3. Thirdly, to invoke the inherent jurisdiction of the High Court to authorise the deprivation of ML's liberty pursuant to the Court's conclusion that he should reside and receive care at Bestwood Hospital.

The Court agreed with the Official Solicitor that the MHA was the only framework in which ML could properly be detained in the hospital as he was ineligible for a Court of Protection order under MCA s.16A. However, this left a number of uncertainties. The necessary treatment was envisaged to last between 18 and 24 months, making an application under MHA s.3 both apposite and honest. As ML's nearest relative his mother, who was resistant to what was proposed, could object to the s.3 admission and could apply to discharge him from detention which, the Court believed, would have catastrophic consequences for his welfare. His Lordship noted:

> "*75. In my judgment, it can make no difference at all to ML whether his detention is authorised under the MCA, the MHA or the inherent jurisdiction, each contain rigorous safeguards to review his detention or in the case of the inherent jurisdiction can easily be adapted to do so.*
>
> *76. Having considered the case law and the statutory provision it is clear that the magnetic north when contemplating the deprivation of liberty of those who fall within Case E is and is likely to remain the Mental Health Act.*"

After referring to the decisions in *J v The Foundation Trust* [2010] Fam 70, *DN v Northumberland and Wear NHS Foundation Trust* [2011] UKUT 327, and *AM v South London and Maudsley NHS Trust* [2013] UKUT 365 (AAC), his Lordship observed:

> "*79. I am not persuaded by the suggestion, implicit in the DOH letter, that detention under M.C.A for the incapacitous is in someway discriminatory (if in equivalent circumstances the capacitous would be detained under the M.H.A) given that both regimes afford equally rigorous structures and either one might potentially be suitable on the facts. Nor can I easily contemplate the factual situation that would likely test the hypothesis.*
>
> *80. I am however quite sure that there is a pressing need for clarity and predictability at the interface of these two complex regimes, Charles J's interpretation assists in that. Most importantly however he makes the point that the rationale of the legislation drives one to the M.H.A where the M.H.A 1983 is being considered by those who could make an application, predicated on the relevant recommendations under S2 or S3. They like the decision maker under the M.C.A should assume that the treatment referred to in S3 (2) cannot be provided under the M.C.A.*"

Given that the MHA was the proper vehicle, his Lordship took an unusual course. Any application to displace the nearest relative would be reserved to him and the judgment was to be released to the President of the First Tier Tribunal with an invitation to him to allocate a judge of the First Tier to hear any applications to ensure judicial continuity.

Comment

These proceedings illustrate that the MHA has primacy when it applies. Thus, when a person could be detained under the MHA and is an objecting mental health patient, the MHA is the applicable regime. Having heard evidence and the submissions in detail, the Court was clearly concerned about the key decisions being taken by others under the MHA. Registered medical practitioners would need to determine whether the criteria for detention under s.3 MHA were in fact met. An approved mental health professional would have to consider whether such an application ought to be made. The nearest relative would be able to object or apply to discharge, subject to displacement proceedings. And clearly reserving the matter to his Lordship signals the likely futility of exercising such an objection or right to discharge.

It is suggested, however, that recognising the applicability of the MHA was the right decision in this case. The Court of Protection is limited to doing for the patient what he could do for himself if of full capacity, and can go no further. And the powers and safeguards of the MHA have been carefully calibrated, based on over two hundred years of statutory experience, which must not be subverted save by the will of Parliament.

Finally, at the end of the judgment, his Lordship noted by way of a plea: "*Those who practice within the Court of Protection must understand that it is part of the responsibility of the lawyers to ensure that there are realistic time estimates given to the court. The instinct to underestimate the timescale of a case in order that it might be heard more expeditiously is misconceived as this case certainly has proved.*"

Safeguarding and the CoP – a difficult mix

Milton Keynes Council v RR & Ors [2014] EWCOP B19 (District Judge Mort)[1]

Article 5 ECHR – DOLS authorisations

Summary

This case concerned an elderly lady with dementia who had been removed from her home by Milton Keynes Council in October 2012 following safeguarding concerns about her welfare, which included bruising to her face, over the previous few months. RR was taken from her home, which she was said to have left 'willingly' and placed in a care home. Her son, SS, was not present at home at the time and was not told for another 19 days where his mother was. There had been no safeguarding investigation into the concerns that had been raised. The Council did not seek the court's authorisation for the removal and placement in the care home. A standard authorisation was sought but not put in place for two weeks after removal. The Council applied to the Court of Protection 15 days after RR was removed from her home, and interim declarations were subsequently made in respect of RR's continued residence at the care home. During the court proceedings, many allegations were made against SS, who denied them. The Council subsequently decided not to pursue the allegations. By this stage, it was some 16 months after RR had been removed from her home. The Council then determined that it would not fund a package of care at home for RR, and that it would not provide direct payments to RR via SS. The proceedings were resolved by consent, with final declarations that RR lacked capacity to litigate, to decide where to live, and to make decisions about care and contact with others, and that it was in her best interests to reside at the care home and to have contact with SS, substantially in accordance with the general rules on visiting that the care home operated for all families.

District Judge Mort held that:

> *"23. The initial failure of MKC to investigate the safeguarding concerns was deplorable as was their failure to apply to the Court of Protection for authority to remove RR from her home. The 19 day delay in applying to the court compounds their failure as does their failure to advise SS of his mother's whereabouts for the same period. Furthermore the safeguarding investigation was not completed until 12/9/13 with the result that contact between RR and her son was subject to restrictions for longer than was necessary. There can be no excuse for MKC's initial failure to investigate the safeguarding alerts. The way they have dealt with this case has been woefully inadequate from the start. It has resulted in avoidable and unlawful interference in respect of RR's Art. 5 right to liberty and security of person and her Art. 8 right to respect for her private and family life and her home. Those rights are not invalidated, nor are the unlawful interferences with those rights rendered any less serious by virtue of RR's incapacity."*

Thus, a declaration was granted that RR was unlawfully deprived of her liberty when she was removed from her home, and until the standard authorisation was granted. There was also a breach of RR's Article 8 rights consequent upon her removal from her home. The Council was to send written apologies to RR and SS.

[1] Note: Alex did not contribute to this case comment, having had involvement with this case at one stage.

Comment

This case is another illustration of the failure to have embedded the MCA and the Deprivation of Liberty safeguards into everyday practice that was identified by the House of Lords Select Committee. It is surprising that in late 2012, a local authority was not aware of the need to obtain advance authorisation for the removal of an incapacitated adult from their home, and alarming that safeguarding incidents were not investigated swiftly (or at all) despite RR's obvious vulnerability to harm. The declarations and apology do not appear likely to have much meaning to RR, given her advanced cognitive impairment, but the Court's decision on costs (yet to be handed down) and the naming of the Council in this judgment may assist in reinforcing the need to pay attention to the requirements of the MCA.

Deprivations of Liberty post-*Cheshire West*: A Thank You and Emerging Findings

To assist the President in streamlining the process for court applications to deprive liberty (judgment has yet to be handed down), ADASS undertook a survey of local authorities in England and we issued a newsletter plea for relevant data. The response for both was overwhelming and we would particularly like to thank the large number of people and organisations that contacted us. Here we will outline the headlines, with kind permission from ADASS.

ADASS emerging findings

Projected number of referrals/requests

Table 1: Actual and projected referrals for assessments under DoLS (MCA Schedule A1)

	Responding authorities Total number	Grossed estimate for 152 authorities[2] Total number	
2013/14	10,151	13,719	
2014/15	94,561	138,165	
2015/16		108,830	175,916

Base (all respondents): 108 in 2013/14, 103 in 2014/15, 93 in 2015/16

[2] Grossed figure calculated by taking the mean figure for each type of responding authority and applying it to non-responding authorities of the same type.

Table 2: Actual and projected requests for non-MCA Schedule A1 settings (eg supported living, shared lives, education settings)		
	Responding authorities Total number	Grossed estimate for 152 authorities[3] Total number
2013/14	134	212
2014/15	18,267	28,605
2015/16	18,035	31,470

Base (all respondents): 91 in 2013/14, 96 in 2014/15, 86 in 2015/16

Funding shortfall

Estimated shortfall between the DoLS activity 2014-5 and the Department of Health DoLS grant allocation for the 82 local authorities that responded was £43.97 million. If this is representative of those that were not able to respond, the estimated grossed total would be £87.63 million.

Newsletter readers' concerns

- Shortfall in the number of trained best interests assessors; takes time to train more.
- Shortfall in the need for additional mental health assessors.
- Pressing need to increase the statutory deadline for urgent authorisations from 7 days to 21 days.
- DoLS not designed for short-term detention; allow an urgent authorisation without a standard authorisation.
- Urgent applications to the Court need to be quicker and less resource intensive, whilst avoiding a tick box exercise.
- Further clarity required as to what amounts to continuous supervision and control.
- Increased workload and financial implications for supervisory bodies.
- Impact on case managing, ability to effectively review authorisations.
- Significant disparity between cost of a DoLS authorisation and a court authorisation.
- Likely increase in section 117 funding for satisfying the acid test in psychiatric wards (particularly dementia and learning disability).
- Guidance required relating to 16-19 year olds, particularly in residential schools.
- Repetitive form filling.

Deprivations of Liberty – statutory reform?

In the Government's response to the Select Committee's post-legislative scrutiny report, available here, a significant element related to the provisions of Schedule A1, which were heavily criticised in that report. The following are our

[3] Grossed figure calculated by taking the mean figure for each type of responding authority and applying it to non-responding authorities of the same type.

understanding from the Government's response of the concrete steps that will be taken:

Short to medium term

- ADASS (the Association of Directors of Adult Social Services) will lead a time-limited task group to assist local authorities and work through the implications of the Supreme Court judgment. The task group will contain key partners (including CQC, NHS England, DH, and representation from local authority solicitors) and will aim to publish an initial read-out of its findings by the end of August 2014. Its work will be informed by input from the care provider sector. To this end, the Care Provider Alliance has agreed to lead an event where care providers can put forward and discuss their concerns following on from the Supreme Court judgment;

- The Government will commission a project to consider the value of each of the DOLS forms and to redraft them (or redesign from scratch) with a view to creating a new set that better balances the need to robustly protect and enhance an individual's rights with the need for a more streamlined and less burdensome system. The project will complete by the end of November 2014;

- The Government will commission up to-date guidance on deprivation of liberty case law – to be published by the end of 2014;

- The revised Code of Practice to the MHA 1983 will include a specific chapter on the interface between deprivation of liberty under the MCA (including DoLS) and the Mental Health Act 1983 and the determination of which regime should be used in particular circumstances. The draft revised Code of Practice will go out to public consultation this summer;

Long term

- The Government has asked the Law Commission to undertake a review as part of the Commission's forthcoming work programme (to be agreed shortly with the Lord Chancellor) that will consult on and then potentially draft a new legal framework to allow for the authorisation of a best interests deprivation of liberty in supported living arrangements. We shall agree precise terms of reference with the Law Commission in due course but the new system shall be rooted firmly in the MCA. We are clear that this work must include wide stakeholder consultation and careful consideration of the many issues at play. "This work will not complete for a few years."

- As part of this work, the Government will ask the Law Commission, to consider "the learning points" that can be applied to DoLS and any improvements that can be made in light of its work (and indeed any changes that will need to be made to DoLS to take account of the new supported living provisions). "Any changes to DoLS would seek to address those recommendations made by the House of Lords: namely to ensure the provisions are in keeping with the ethos of the Mental Capacity Act (any improved DoLS would continue to be part of the MCA), that they are clearly drafted and easily understood, that consideration is taken as to how to strengthen the role of the Relevant

Person's Representative and that the effective oversight of the supervisory body be ensured."

Not on the agenda

The Government has made it clear that it does not propose to take forward:

- Any legislative proposal to close the new Bournewood Gap identified by the House of Lords following on the decision in *Dr A*. The Government does not consider that there is a new Gap. "*If necessary, the inherent jurisdiction of the High Court could provide any further authorisation that may be required to deprive a patient detained under the Mental Health Act 1983 of their liberty for medical treatment unrelated to the patient's mental disorder. Given the small number of cases in which this will arise, we do not propose to introduce legislative amendments.*

- Any major work in relation to the DoLS Code of Practice until the Law Commission has reported its finding. However, if "*following the work of the ADASS-led task group, minor amendments to the Code would seem valuable, the Government will consult and take a decision on this through the DH-led MCA Steering Group.*"

Deprivations of Liberty – resources

By way of brief reminder, Alex has continued to maintain his resources page on his website dedicated to post-*Cheshire West* guidance; the most recent addition is an excellent paper written from a psychiatric perspective by Julie Chalmers, Specialist Advisor in Mental Health Law to the Royal College of Psychiatrists. He is still very much in receive mode for further useful guidance!

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Conferences at which editors/contributors are speaking

The duty of patient involvement in DNACPR decisions

Tor is speaking at a seminar at 39 Essex Street at the Hall in Gray's Inn at 6pm on 3 July on the implications of the decision in *Tracey*. The seminar is chaired by Fenella Morris QC, and the other speakers are Vikram Sachdeva Professor Penney Lewis of King's College London, and Dr Jerry Nolan, Royal United Hospital, Bath. For more details and to reserve a place, please email beth.williams@39essex.com.

'Taking Stock'

Neil is speaking at the annual 'Taking Stock' Conference on 17 October, jointly promoted by the Approved Mental Health Professionals Association (North West and North Wales) and Cardiff Law School with sponsorship from Irwin Mitchell Solicitors and Thirty Nine Essex Street Barristers Chambers – and with support from Manchester University. Full details are available here.

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Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to Mind in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Chambers Details

Our next Newsletter will be out in early August. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Newsletter in the future please contact marketing@39essex.com.

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THE QUEEN'S AWARDS FOR ENTERPRISE INTERNATIONAL TRADE 2013

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Alex been recommended as a leading expert in the field of mental capacity law for several years, appearing in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively about mental capacity law and policy, works to which he has contributed including 'The Court of Protection Handbook' (forthcoming, 2014, LAG); 'The International Protection of Adults' (forthcoming, 2014, Oxford University Press), Jordan's 'Court of Protection Practice' and the third edition of 'Assessment of Mental Capacity' (Law Society/BMA 2009). He is an Honorary Research Lecturer at the University of Manchester, and the creator of the website www.mentalcapacitylawandpolicylaw.org.uk. To view full CV click here.

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Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. She previously lectured in Medical Ethics at King's College London and was Assistant Director of the Nuffield Council on Bioethics. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA 2009), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click here.

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Neil has particular interests in human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Neil is the Deputy Director of the University's Legal Advice Centre and a Trustee for a mental health charity. To view full CV click here.

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Anna regularly appears in the Court of Protection in cases concerning welfare issues and property and financial affairs. She acts on behalf of local authorities, family members and the Official Solicitor. Anna also provides training in COP related matters. Anna also practices in the fields of education and employment where she has particular expertise in discrimination/human rights issues. To view full CV click here.

Simon Edwards
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Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click here.

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Adrian is a practising Scottish solicitor, a partner of T C Young LLP, who has specialised in and developed adult incapacity law in Scotland over more than three decades. Described in a court judgment as: "*the acknowledged master of this subject, and the person who has done more than any other practitioner in Scotland to advance this area of law*," he is author of *Adult Incapacity*, *Adults with Incapacity Legislation* and several other books on the subject. To view full CV click here.

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