Mental Capacity Law Newsletter August 2016: Issue 68

Essex CHAMBERS

Capacity outside the Court of Protection

Welcome to the August 2016 Newsletters. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: covert medication and deprivation and further findings in relation to state imputability;

(2) In the Property and Affairs Newsletter: statutory wills and charitable giving and OPG guidance on professional deputy costs;

(3) In the Practice and Procedure Newsletter: an update on Case Management, s.49 and Transparency pilots and habitual residence strikes again;

(4) In the Capacity outside the COP Newsletter: assistance wanted with questionnaires on powers of attorneys/advance decisions and mediation and relevant law reform developments around the world;

(5) In the Scotland Newsletter: the first AWI appeal determined by the Sheriff Appeal Court and Scottish observations on habitual vs ordinary residence.

With this Newsletter, we also roll out the next iteration of our capacity assessment guide, including a re-ordering of the stages of the test and summaries of (ir)relevant information for the most important decisions. You can find it on our dedicated sub-site here, along with all our past issues, our case summaries, and much more. And you can find 'one-pagers' of the key cases on the SCIE website.

We are now taking our usual summer break, but will return in early October with all the mental capacity news that is fit to print.

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

Guest contributor
Beverley Taylor

Scottish contributors
Adrian Ward
Jill Stavert

Table of Contents

For all our mental capacity resources, click here.

Review of Recommendation CM/Rec(2009)11 – help wanted

Joan Goulbourn at the Ministry of Justice has enlisted our help in ensuring that as complete a set of answers as possible can be given to the review of Recommendation 2009(11) of the Committee of Ministers to member states on principles concerning continuing powers of attorney and advance directives for incapacity. A detailed questionnaire (prepared by our very own Adrian Ward, who is charged with conducting the review) can be found here, together with explanatory notes here. Please can questionnaires, complete either in whole or in part, be returned to Joan (Joan.Goulbourn@justice.gsi.gov.uk) by 9 September.

Mediation in the Court of Protection: consultation

Charlotte May, a specialist mediator and adult social care solicitor is conducting research in to mediation in the Court of Protection, and is after participants willing to complete a survey as to mediations which have (and have not) worked in the Court of Protection. Details of the research can be found here (note that questionnaires will now be sent out in September 2016). There is at present, a real dearth of hard evidence as to the ways in which mediation can work in the court, and we would urge anyone with experience to engage in this consultation to help develop a body of such material.

Weighing balance sheets in the scales

Re A (A Child) [2016] EWCA Civ 759 (Court of Appeal (McFarlane and King LJJ)

Best interests – medical treatment

Summary

This appeal arose following an application made by an NHS Trust to withdraw life-sustaining treatment, in particular, to remove respiratory support by a ventilator from a patient with the inevitable consequence that the patient would quickly die thereafter.

The case concerned a little boy (A), aged 2 years 8 months, who suffered a road traffic accident. A suffered grave injuries including a spinal cord injury and hypoxic brain injury. He was tetraplegic and could not feel anything below the neck. He could not see and, whilst the circuit of his hearing was intact, he was unable to process this into functional hearing. He did not respond to any command, noise or sight. He had no spontaneous respiratory effort, no limb movement, no response to painful stimuli, no cough reflex and weak gag responses.

A's mother could not accept the medical evidence as to A's current level of responsiveness. She believed that he responded to music, that when he curled his hands it was a sign of pleasure rather than a reflex movement and that there might be some functional vision. She believed A responded to her voice. All the doctors said that the mother was mistaken in her belief.

A remained in pediatric intensive care since the day of his accident and received 24 hour one to one nursing care. His life expectancy was uncertain by limited. A had suffered three episodes of ventilator associated pneumonia and

multiple urinary tract infections. It was common ground that A would have repeated episodes of pneumonia and, at some stage, his pneumonia would be so severe that he would not be able to be ventilated and will die.

Given the extent of A's injuries and his poor prognosis, his treating clinicians had discussed with A's family the possibility of the withdrawal of life sustaining treatment. A's father agreed to the withdrawal of life support because he felt that A was suffering from intensive care intervention. A's mother did not agree to the proposed course of action and wished the continuation of full intensive care. It was against this backdrop that the NHS Trust made an application to court for a declaration that it would be lawful and in A's best interests to remove his respiratory support.

When the matter came to trial, the three doctors who were called to give evidence, and the children's guardian, were each of the view that A's best interests could only be served by discontinuing life sustaining treatment. If the declarations were not made, it would be desirable to move A to a neurorehabilitation unit for long-term care. This in itself would require surgery to allow A to be ventilated through a tracheostomy tube as his current form of ventilation through a mechanical ventilator could not be used outside an intensive care unit. In addition, a gastrostomy PEG would have to be inserted to allow A to be fed directly into his stomach. The medical team considered that such invastive procedures to be wholly contrary to A's best interests and, in the event, given A's clinical presentation in the last few weeks, it would seem that any attempt to transfer A to a rehabilitation unit was out of the question.

The judge at first instance, Parker J, granted the declarations sought by the NHS Trust and declared that it was lawful and in A's best interests to remove his respiratory support by extubating him and, if he becomes unstable, not to reintroduce his respiratory support again but instead generally to furnish pain relief or sedation and nursing to ensure that A suffers the least distress and pain in the manner of his dying. The mother appealed to the Court of Appeal on three grounds:

1. The judge was wrong to make a finding that A was in pain and/or misunderstood the evidence in respect of pain;

2. The judge failed to carry out a proper, detailed and careful balancing exercise in respect of whether continued treatment was in A's best interests;

3. The judge failed to have regard to the obligation to protect life.

The Court of Appeal dismissed the mother's appeal on all three grounds.

In relation to the judge's findings on pain, the Court of Appeal recognised that this was an area of medical disagreement. Two of the doctors believed that A's physical manifestations observed by the treatment were clinical responses to pain or discomfort. One of the doctors considered that those parts of A's brain that process pain were demonstrably injured on the MRI scan, and not working on an EEG, which led the doctor to believe that A did not feel pain and was not in distress. The judge, having seen and heard all the evidence, had to choose between what was undoubtedly a "reasonable range of professional opinion." It could not be said that the judge was plainly wrong in

preferring the interpretation of the two doctors who had observed commonplace signs associated with pain and discomfort.

In any event, the Court of Appeal found that even if the judge had been wrong about A's ability to feel pain and discomfort, the judge had correctly directed herself as to the law and weighed up with care all the relevant factors to inform A's best interests in the widest sense. It could not be said that the judge had been wrong in agreeing with all of the experts and A's children's guardian that it the time had come to withdraw A's life-sustaining treatment.

Comment

This is a very unusual appeal in that it directly challenged the findings of a trial judge as to the specific condition of and sensations experienced by the subject of a medical treatment application. We report it because, notwithstanding that it related to a child, A, the Court of Appeal drew heavily from the case law established under the Mental Capacity Act 2005 when considering and assessing A's best interests. In particular, central to the Court of Appeal's approach was the Supreme Court decision in *Aintree Hospital NHS Foundation Trust v James* [2013] UKSC 67. The Court formulated the test to be applied as *"what is in the best interests of the child at the particular time in question, having regard to his welfare in the widest sense, not just medical, but social and psychological?"* The Court of Appeal highlighted a real danger of failing to stand back and consider A's welfare in its widest sense. In this particular case, almost all of the evidence related to the issue of "pain" and disproportionate emphasis had been placed on this one item which, although relevant, did not go to the heart of the decision.

Importantly for practitioners, the Court of Appeal cautioned against applying a too rigid and mechanistic approach when using a balance sheet. King LJ was "*well aware of their value*." However, endorsing concerns expressed by McFarlane LJ in *Re F (A Child) (International Relocation Cases)* [2015] EWCA Civ 882, she noted that:

> *The courts have long recognised that in disputes in respect of serious medical treatment the matter should be brought before the court. See for example NHS Trust v SR Radiology and Chemotherapy [2013] 1 FLR 1297. At the end of the day, as was emphasised by Baroness Hale in the Aintree case, the test to be applied by the courts in such cases is simply this: what is in the best interests of the child at the particular time in question, having regard to his welfare in the widest sense, not just medical, but social and psychological? Too heavy a focus on a balance sheet may, as was recognised by McFarlane LJ, lead to a loss of attribution of weight.*

That message applies more widely to best interests' decision-making generally, not just in highly sensitive medical treatment cases. As McFarlane LJ emphasised in *Re F* (and Hayden J has made clear is also the case under the MCA), "[i]*f a balance sheet is used it should be a route to judgment and not a substitution for the judgment itself*."

Short note: s.117 and deputies

In the course of a judgment [2016] EWHC 1954 (Ch) refusing a strike out application in respect of a restitutionary claim (a judgment which says a number of interesting things about whether such claims can be brought in the context of s.117 MHA 1983 where the claim is not for repayment

of monies charged but where it is said that an aftercare plan should have been in place so that monies would never have been paid by the claimant), Newey J reminded us, in passing, of the need for deputies to be careful to ensure that they make requests for aftercare under s.117 wherever such can (and should) be made. The claimant's deputy in the instant case had paid well over £500,000 on his behalf in care home fees and then upon carers in circumstances where the claimant is now contending that such sums should always have been paid by the relevant local authority and NHS CCG. Newey J indicated that he considered that the claimant would have an uphill struggle with his restitutionary claim, such that the consequences of what was contended (by the claimant) to be his deputy's "mistake of law" may not easily be untangled.

Money and mental health: consultation

The new Money and Mental Health Policy Institute upon which we reported in April 2016 has now published a major consultation entitled *In Control – a consultation on* regulating *spending in periods of poor mental health*. The report examines some of the psychological drivers of increased spending and explore a range of possible solutions, along with a series of questions to which the institute invites those with expertise in financial services, retail and mental health to respond. The deadline for responding is 10 October.

Inside the Ethics Committee

For those of you who missed it, the editors other than Tor strongly recommend that you listen to the edition of *Inside the Ethics Committee* on withdrawal of CANH which was broadcast on 4 August, on which Tor featured, and which featured a powerful (and challenging) discussion of the role of the Court of Protection in such cases. It can be found here.

Mental capacity law reform in New Zealand

Both readers from New Zealand and readers from England and Wales would be well advised to read the report recently published by Alison Douglass for the New Zealand Law Foundation. The report, available here, entitled *Mental Capacity: Updating New Zealand's Law and Practice*, is an admirably comprehensive and detailed review both of the current law in New Zealand and – by comparison – that in England and Wales – and a detailed set of proposals for reform.

Separately, a mental capacity toolkit has been published to assist doctors and other healthcare professionals in assessing capacity, which includes an extremely useful checklist. Whilst it is New Zealand-specific as regards the legal framework, the outline is equally applicable by way of good practice to capacity assessments being carried out in England and Wales. A particularly interesting aspect is the emphasis upon the cultural component, which takes a specific form in New Zealand but – in principle – is equally relevant to assessments carried out in other jurisdictions.

Vulnerable adult law reform in Singapore

Once again proving that Singapore is a useful comparative resource for those in England and Wales willing/able to look further afield, we note (with thanks to Terence Seah of Virtus Law for

bringing it to our attention) that the Singaporean government is consulting upon a draft Vulnerable Adults Bill. The consultation documents can be found here, and the deadline for response is 23 August. The Bill has certain features similar to those in the Scottish Adult Support and Protection Act 2007. If translated into the English context, it would represent – at least in part – a codification of the High Court's inherent jurisdiction, something which Alex, at least, would wish the Law Commission to consider as part of its 13th programme of law reform on which it is consulting at present.

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Conferences at which editors/contributors are speaking

4th World Congress on Adult Guardianship

Adrian will be giving a keynote speech at this conference in Erkner, Germany, from 14 to 17 September. For more details, see here.

Autism-Europe International Conference

Alex will be taking part in a panel discussion on deprivation of liberty at Autism-Europe's 11th international congress in Edinburgh on 16-18 September. For more details, see here.

ESCRC seminar series on safeguarding

Alex is a member of the core research team for an-ESRC funded seminar series entitled 'Safeguarding Adults and Legal Literacy,' investigating the impact of the Care Act. The third (free) seminar in the series will be on 'Safeguarding and devolution – UK perspectives' (22 September). For more details, see here.

Deprivation of Liberty in the Community

Alex will be doing a day-long seminar on deprivation of liberty in the community in central London for Edge Training on 7 October. For more details, and to book, see here.

Switalskis' Annual Review of the Mental Capacity Act

Neil and Annabel will be speaking at the Annual Review of the Mental Capacity Act in York on 13 October 2016. For more details, and to book, see here.

Taking Stock

Both Neil and Alex will be speaking at the 2016 Annual 'Taking Stock' Conference on 21 October in Manchester, which this year has the theme 'The five guiding principles of the Mental Health Act.' For more details, and to book, see here.

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.

Alzheimer Europe Conference

Adrian will be speaking at the 26th Annual Conference of Alzheimer Europe which takes place in Copenhagen, Denmark from 31 October–2 November 2016, which has the theme Excellence in dementia research and care. For more details, see here.

Jordans Court of Protection Conference

Simon will be speaking on the law and practice relating to property and affairs deputies at the Jordans annual COP Practice and Procedure conference on 3 November. For more details and to book see here.

Other conferences of interest

Financially Safe and Secure?

Action on Elder Abuse (AEA) Northern Ireland is delivering its first national conference on 30 September, supported by the Commissioner for Older People for Northern Ireland (COPNI) and sponsored by Ulster Bank, to explore the nature and extent of financial abuse of older people and focus on working collaboratively to address what has been described as the 'crime of the 21st Century'. For full details and to book see here.

Chambers Details

Our next Newsletter will be out in early October. 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.

David Barnes
Chief Executive and Director of Clerking
david.barnes@39essex.com

Alastair Davidson
Senior Clerk
alastair.davidson@39essex.com

Sheraton Doyle
Practice Manager
sheraton.doyle@39essex.com

Peter Campbell
Practice Manager
peter.campbell@39essex.com

London 81 Chancery Lane, London, WC1A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

Manchester 82 King Street, Manchester M2 4WQ
Tel: +44 (0)161 870 0333
Fax: +44 (0)20 7353 3978

Singapore Maxwell Chambers, 32 Maxwell Road, #02-16,
Singapore 069115
Tel: +(65) 6634 1336

For all our services: visit www.39essex.com

Editors

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

Scottish contributors

Adrian Ward
Jill Stavert

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THE QUEEN'S AWARDS FOR ENTERPRISE INTERNATIONAL TRADE 2013

Editors and Contributors

Alex Ruck Keene: alex.ruckkeene@39essex.com

Alex is recommended as a 'star junior' in Chambers & Partners 2016 for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations and is the creator of the website www.mentalcapacitylawandpolicy.org.uk. He is on secondment for 2016 to the Law Commission working on the replacement for DOLS. To view full CV click here.

Victoria Butler-Cole: vb@39essex.com

Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. 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.

Neil Allen: neil.allen@39essex.com

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.

Annabel Lee: annabel.lee@39essex.com

Annabel appears frequently in the Court of Protection. Recently, she appeared in a High Court medical treatment case representing the family of a young man in a coma with a rare brain condition. She has also been instructed by local authorities, care homes and individuals in COP proceedings concerning a range of personal welfare and financial matters. Annabel also practices in the related field of human rights. To view full CV click here.

Anna Bicarregui: anna.bicarregui@39essex.com

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: simon.edwards@39essex.com

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.

Adrian Ward adw@tcyoung.co.uk

Adrian is a practising Scottish solicitor, a consultant at 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.

Jill Stavert: J.Stavert@napier.ac.uk

Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Incapacity Law, Rights and Policy and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee, Alzheimer Scotland's Human Rights and Public Policy Committee, the South East Scotland Research Ethics Committee 1, and the Scottish Human Rights Commission Research Advisory Group. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click here.