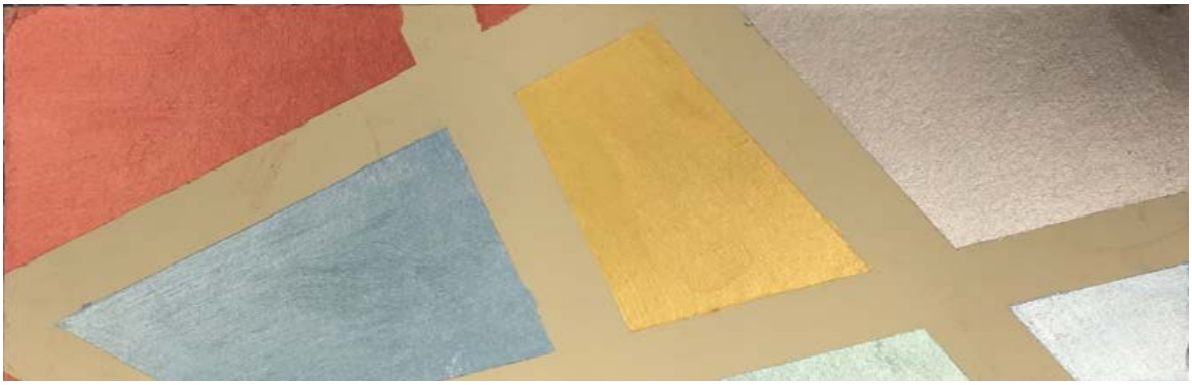
Essex CHAMBERS

MENTAL CAPACITY REPORT: THE WIDER CONTEXT

April 2017 | Issue 75



Welcome to the April 2017 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the Court of Appeal overturns the conventional understanding of deprivation of liberty under the MHA; children, consent and deprivation of liberty, changes to inquest requirements in relation to DoLS/*Re X* orders;

(2) In the Property and Affairs Report: new guidance on access to and disclosure of the wills of those lacking capacity, the OPG's good practice guide for professional attorneys and new fixed fees for deputies;

(3) In the Practice and Procedure Report: the Supreme Court pronounces on best interests, available options and case management, a new Senior Judge for the Court of Protection, and updates on case-law relating to funding and HRA damages;

(4) In the Wider Context Report: a new approach to advance care planning and the European Court of Human Rights grapples with Article 12 CRPD;

(5) In the Scotland Report: Scottish powers and English banks, the Scottish OPG cracks down and a review of the second edition of a leading textbook.

We have also published a special report upon the Law Commission's Mental Capacity and Deprivation of Liberty project, with a detailed summary and responses from a range of perspectives. And remember, you can find all our past issues, our case summaries, and more on our dedicated sub-site here, and our one-pagers of key cases on the SCIE website.

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The picture at the top, "*Colourful*," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

Contents

ENGLAND AND WALES

ReSPECT – a new approach to advance care planning

It is a truth (almost) universally acknowledged that DNACPR/DNR notices are not working.[1] Cases such as *Tracey* and *Winspear* show that the conversations that need to take place before decisions are taken to place such notices in medical records are not happening. Cases such as that of Andrew Waters show that determinations as to when CPR may be appropriate are – at least in some cases – made on the basis of unjustified assumptions as to disability.

In our view just as important – if not more importantly – questions as to when CPR should be attempted have assumed a prominence which arguably detracts from the bigger picture. A fixation on one specific intervention (which may, in many cases, not work) has led to a loss of focus upon the wider issue of the overall priorities for the individual patient in circumstances where they may not be able to give specific consent. Importantly, those priorities are just about what sort of care the patient may want as well as specific interventions they may not want. Identifying these priorities are just as important for patients who lack the capacity to participate in such discussions as they are for those with it.

It is for this reason that the ReSPECT process that has recently been unveiled for use by clinical bodies is so welcome. Short for "Recommended Summary Plan for Emergency Care and Treatment," the process is designed to lead to the completion of a form setting out recommendations for clinical care in emergency situations where obtaining the necessary consent will not be possible. Importantly, the process, and the form, starts not from the identification of specific interventions, but rather the personal preferences of the individual, to outline whether their priority is to sustain life or prioritise comfort. Against that spectrum, it is possible then to develop the requisite

[1] Note, Alex was involved in providing informal legal input to the ReSPECT working party. A longer version of this article, together with observations on how it sits within the framework of the MCA 2005, can be found here.

recommendations for care and treatment and (where necessary) outline specific interventions that may or may not be wanted or be clinically appropriate.

A full explanation of the process can be found at http://respectprocess.org.uk/, and articles about it in the BMJ here and here.

The process, and the form, is the subject of ongoing research as it is implemented in different localities across the United Kingdom, but for our part it is a vital first step in enabling a culture change to ensure that emergency care and treatment is properly personalised.

FURTHER AFIELD

A clash of rights (models)?

AM-V v Finland [2017] ECHR 273 European Court of Human Rights (First Section)

Article 8 ECHR – residence – CRPD

In *A-MV v Finland*, (Application no. 53251/13, decision of 23 March 2017), the European Court of Human Rights considered carefully but rejected a central tenet of the interpretation of Article 12 of the Convention of the Rights of Persons with Disabilities advanced by the Committee on that Convention, namely that the will and preferences of an individual should always be determinative of any decision taken in their name.

A-MV was a man with intellectual disabilities, who had been taken into public care when he was 11 and placed with a foster family. When turned 18, a mentor was appointed for AM-V; A-MV had not complained about this appointment, he also accepted, in principle, that he needed the assistance of one. In February 2011, however, the mentor took a decision concerning A-MV's place of residence which, according to him, was against his own will, preventing him from moving from his home town in the south of Finland to live in a remote town in the north of the country with his former foster parents. He brought proceedings asking to replace the mentor by another person insofar as matters concerning the choice of his place of residence and education were concerned. This request was ultimately refused in 2013 by the domestic courts. Having considered evidence include expert testimony from a psychologist and from A-MV in person, the Finnish courts took the view that he was unable to understand the significance of the planned move to a remote part of the country. It took into account, in particular, the level of his intellectual disability (it being said he functioned at the level of a six to nine year old child) and the fact that he had no particular complaints about his current situation in his home town where he lived in a special unit for intellectually disabled adults, went to work, had hobbies and a support network of relatives, friends and staff from the social welfare authorities. The Finnish court lastly expressed doubts as to whether his opinion was genuinely his own or his foster parents. The Finnish courts therefore refused to replace the mentor.

A-MV applied to the Strasbourg court, and was supported in his application by the Mental Disability Advocacy Centre, which placed particular emphasis upon Article 12 CRPD. MDAC, which has played a pivotal role in cases involving Eastern European guardianship systems (for instance the case brought by the late Rusi Stanev against Bulgaria), argued that:

> *66.* […] *states were required to ensure that the will and preferences of persons with disabilities were respected at all times and could not be overridden or ignored by paternalistic "best interests" decision-making. The will and preferences expressed by persons with disabilities in respect of their family relationships and their right to choose their place of residence had to be respected and protected as these issues were an inherent part of a person's autonomy, independence, dignity and self-development and central to a person's independent living in a wider community. In order to ensure that persons with disabilities were both protected from violations and that they had the ability to obtain effective remedies when violations occurred, States had a positive obligation to apply stringent and effective safeguards in order to ensure that their rights to exercise legal capacity were "practical and effective" rather than "theoretical and illusory".*
>
> *67. The starting point, based on the current international standards, was that the will and preferences of a person with disabilities should take precedence over other considerations when it came to decisions affecting that person. This was clear from the text of the United Nations Convention on the Rights of Persons with Disabilities. Even in jurisdictions with a former reliance on the "best interests" approach, there was an emerging trend towards placing more emphasis on the will and preferences of the person. There was a clear move from a "best-interests" model to a "supported decision-making" approach." (emphasis added)*

The court accepted – contrary to the arguments advanced by the Finnish Government – that AM-V's right to private life under Article 8 was interfered with by the fact that the domestic courts had refused to change his mentor.

The question, therefore, was whether the interference was justified. The court identified that critical legal contention advanced by the applicant was that "*there was a measure in place under which the mentor was required not to abide by the applicant's wishes and instead to give precedence to his best interests, if and where the applicant was deemed unable to understand the significance of a specific matter*." The court reminded itself that, in order to determine the proportionality of a general measure, it had primarily to assess the legislative choices underlying it, and further reminded itself of the (variable) margin of appreciation left to national authorities. It noted (at para 84) that "[t]h*e procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. In particular, the Court must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8*."

The court then turned to the case before it, starting by noting that under Finnish law, the appointment of a mentor does not entail a deprivation or restriction of the legal capacity of the person for whom the mentor is designated:

> *The powers of the mentor to represent the ward cover the latter's property and financial affairs to the extent set out in the appointing court's order, but these powers do not exclude the ward's capacity to act for him- or herself. If, like*

> *in the present case, the court has specifically ordered that the mentor's function shall also cover matters pertaining to the ward's person, the mentor is competent to represent the ward in such a matter only where the latter is unable to understand its significance* […]. *In a context such as the present one, the interference with the applicant's freedom to choose where and with whom to live that resulted from the appointment and retention of a mentor for him was therefore solely contingent on the determination that the applicant was unable to understand the significance of that particular issue. This determination in turn depended on the assessment of the applicant's intellectual capacity in conjunction with and in relation to all the aspects of that specific issue. The Court also notes that Finland, having recently ratified the UNCRPD, has done so while expressly considering that there was no need or cause to amend the current legislation in these respects (see Government Bill HE 284/2014 vp., p. 45).*

The ECtHR then analysed the quality of the domestic process leading to the conclusion both that the applicant was unable to understand the significance of the underlying issue, and also the doubts expressed to whether the wishes he were expressing were his own will. Reminding itself of the review nature of its jurisdiction, the Strasbourg court saw no reason to call into question the factual findings of the domestic courts. Its conclusions were therefore – perhaps – not surprising, but fly sufficiently in face of the arguments advanced reliant upon Article 12 CRPD as to merit setting out in full:

> *89. In the light of the above mentioned findings, the Court is satisfied that the impugned decision was taken in the context of a mentor arrangement that had been based on, and tailored to, the specific individual circumstances of the applicant, and that the impugned decision was reached on the basis of a concrete and careful consideration of all the relevant aspects of the particular situation. In essence, the decision was not based on a qualification of the applicant as a person with a disability. Instead, the decision was based on the finding that, in this particular case, the disability was of a kind that, in terms of its effects on the applicant's cognitive skills, rendered the applicant unable to adequately understand the significance and the implications of the specific decision he wished to take, and that therefore, the applicant's well-being and interests required that the mentor arrangement be maintained.*
>
> *90. The Court is mindful of the need for the domestic authorities to reach, in each particular case, a balance between the respect for the dignity and self-determination of the individual and the need to protect the individual and safeguard his or her interests, especially under circumstances where his or her individual qualities or situation place the person in a particularly vulnerable position. The Court considers that a proper balance was struck in the present case: there were effective safeguards in the domestic proceedings to prevent abuse, as required by the standards of international human rights law, ensuring that the applicant's rights, will and preferences were taken into account. The applicant was involved at all stages of the proceedings: he was heard in person and he could put forward his wishes. The interference was proportional and tailored to the applicant's circumstances, and was subject to review by competent,*

> *independent and impartial domestic courts. The measure taken was also consonant with the legitimate aim of protecting the applicant's health, in a broader sense of his well-being.*
>
> *91. For the above mentioned reasons, the Court considers that, in the light of the findings of the domestic courts in this particular case, the impugned decision was based on relevant and sufficient reasons and that the refusal to make changes in the mentor arrangements concerning the applicant was not disproportionate to the legitimate aim pursued.*

The court therefore found that there had been no violation of Article 8 ECHR. It also found that there was no violation of AM-V's right to freedom of movement under Article 2 of Protocol 4 to the Convention.

Comment

It is certainly possible to highlight the facts that (1) A-MV had agreed initially to the appointment of his mentor, and continued to acknowledge the need for his support; and (2) his stated wishes and feelings appeared on one view to be the potential fruit of (improper?) influence from his former foster parents. Both of these could be seen as in some way indicating that this was not a situation where there was a clash between A-MV's "actual" or "authentic" will and preferences and the decision that was made for him by his mentor and upheld by the ECtHR.

In reality, however, it is difficult to see this decision as anything other than a rebuttal of the position advanced by the MDAC, based squarely on that of the Committee on the Rights of Persons with Disabilities, as to the import of Article 12 CRPD. The approach of the Strasbourg court is in conflict with that of the Committee in two ways.

The first is that the court proceeded quite explicitly on the basis that it was acceptable for steps to be taken on the basis of impaired mental capacity. This did not, the court considered, lead to a removal of AM-V's legal capacity but rather responded to AM-V's cognitive impairment. Although paying lip-service to the fact that AM-V's legal capacity was unchallenged, this is a very different approach to that set out in paragraph 15 of the General Comment on Article 12, in which the Committee challenged the "conflation" of mental and legal capacity and the denial of legal capacity to make a particular decision on the basis of a cognitive or psychosocial disability.

The second is that the effect of the Strasbourg court's decision is that, for so long as it is considered that AM-V does not have the mental capacity to understand the significance of a move he has expressed a desire to make, his ability to do so will effectively be blocked by the mentor appointed to act for him, and the mentor will be supported in this by the courts. It difficult to see the approach taken by the court as anything other than the exercise of the model of "substitute decision-making" defined by the Committee in paragraph 27 of the General Comment as being incompatible with the CRPD, because the court's approach was expressly predicated on an consideration of what was believed to be in the objective (best) interests of AM-V, as opposed to being based on AM-V's will and preferences.

As noted at the outset, that is difficult not to see this decision as a direct rebuff by the longest

established regional human rights court to the approach urged by the Committee. In this, it seems to us particularly telling that the ECtHR in paragraph 90 analysed the measures taken by the Finnish court through the language of Article 12 CRPD, including, in particular, emphasis on A-MV's rights, will and preferences. It is extremely difficult – if not impossible – to imagine that the Committee looking at A-MV's situation would have reached the same conclusion.

When combined with the detailed analysis of the requirements of Article 12 (juxtaposed with those outlined in the General Comment) by the German Federal Constitutional Court in the decision reported in our November 2016 newsletter, some concrete answers are starting to emerge to the previously academic questions posed as to the direction of travel to be taken in this field. They may be country-, or region-specific, and there is no doubt they reflect the views of those operating within human rights mechanisms drawn up many years ago.

Some may, further, dismiss them as answers given by legal dinosaurs blindly wedded to an old paradigm.

For our part, however, we would suggest that this shows that, at the level of rhetoric and argument, the view propounded by the Committee is one that has to find traction amongst experienced judges attuned to human rights issues – or, put another way, they consider more convincing reasons are required to take the leap of faith demanded by the Committee. Alternatively, and more optimistically, one can see from the fact that the ECtHR in this decision rigorously sought to apply Article 12 CRPD in its determination of whether the interference with Article 8 ECHR was proportionate that the Convention, and the Committee, have already succeeded in reframing the debate at the highest regional level of human rights protection within Europe.

As a coda, and at the risk of self-aggrandisement, Alex would note that the approach of the ECtHR here is almost exactly that advocated for in the Essex Autonomy Project Three Jurisdiction Report which he co-authored, and which has, to his mind, produced much fruitful room for dialogue and discussion as regards making real the concept of support for the exercise of legal capacity.

United Nations High Commissioner for Human Rights report on Mental Health and Human Rights

The High Commissioner published a detailed report on 31 January 2017 on Mental Health and Human Rights, adopted at the 34th session of the Human Rights Council on 27 Feb-4 March 2017. It is uncompromisingly rigorous in its explanation of the demands of a human rights approach to mental health (as amplified by the CRPD). It also includes a set of recommendations for implementing the changes needed to bring about a human rights approach to mental health. We will leave readers to judge the extent (and the likelihood in the current climate) of the changes required (in all countries) to achieve the recommendation set out at paragraph 42:

> *42. Regarding mental health and disability specifically, mental health laws, where they exist, should avoid the separate regulation of legal capacity, the right to liberty and security, or other aspects of the law which are amenable to*

> *being mainstreamed into general legislation. In all cases, laws and regulations should be compliant with articles 5, 12, 13, 14, 15, 16, 17 and 25 of the Convention on the Rights of Persons with Disabilities, among other provisions, and should: (a) prohibit the arbitrary deprivation of liberty on the basis of impairment, irrespective of any purported justification based on the need to provide "care" or on account of "posing a danger to him or herself or to others"; (b) ensure the individual's right to free and informed consent in all cases for all treatment and decisions related to health care, including the availability and accessibility of diverse modes and means of communication, information and support to exercise this right; and (c) in accordance with the standards of the Convention, develop, adopt and integrate into the legal framework the practice of supported decision-making, advance directives and the principle of "the best interpretation of the will and preferences" of the person concerned as a last resort.*

Law Commission of Ontario Final Report on Legal Capacity, Supported Decision-Making and Guardianship

Demonstrating both the extent to which the area of legal capacity remains a field of concentrated study in the law reform arena (and the extent to which it is operating on different tracks depending upon the environment), the Law Commission of Ontario has just published a detailed report on legal capacity, supported decision-making capacity and guardianship. Much of the detailed report is specific to the particular (and in many ways very innovative) legal mechanisms already in place in Ontario to support the exercise of legal capacity. Of broader interest, however, is Chapter IV, in which the Commission notes early on (with masterly understatement) that:

> *Issues related to concepts of legal capacity and supported decision-making are among the most controversial in this area of the law, as well as the most difficult. They raise profound conceptual and ethical questions, as well as considerable practical challenges.*

The Commission further notes that the UN Committee's

> *General Comment* [which it later specifically notes is 'non-binding'] *sets out a program of immediate and profound law reform, with enormous personal, social and legal ramifications not only for individuals themselves, but also for governments, family members and third parties. The Comment raises a host of practical questions and implementation issues, for which States Parties are expected to develop solutions.*

The Commission drily notes that this view of Article 12 appears to be "*radically different*" to that of Canada (which entered a specific reservation and declaration to the effect that Article 12 permits substitute decision-making arrangements as well as those based on the provision of supports "in appropriate circumstances and in accordance with the law", and reserved the right for Canada "to continue their use in appropriate circumstances and subject to appropriate and effective safeguards").

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Conferences

Conferences at which editors/contributors are speaking

Scottish Paralegal Association Conference

Adrian will be speaking on adults with incapacity at this conference in Glasgow on 20 April 2017. For more details, and to book, see here.

Deprivation of liberty: what does the future hold?

Alex will be speaking at this event on 5 May in Consett, County Durham on 5 May. 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.

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

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