MENTAL CAPACITY REPORT:
HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

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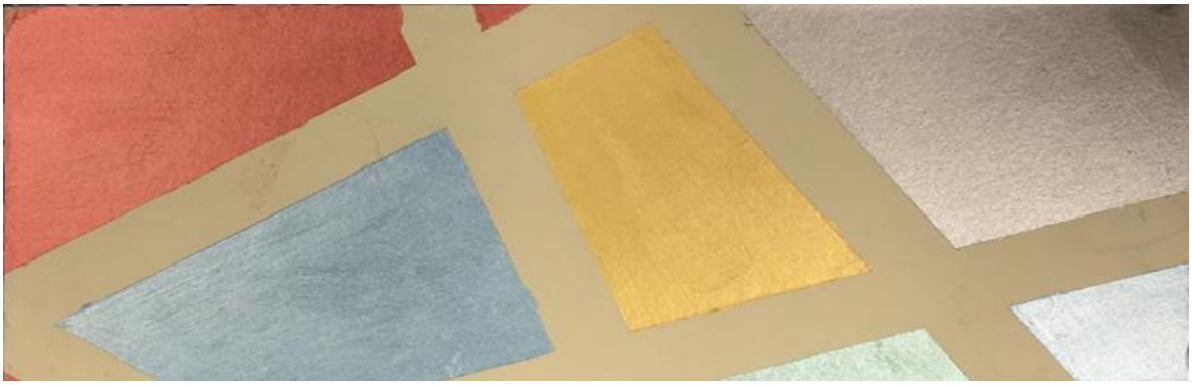

Welcome to the April 2018 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the Government responds to the Law Commission's *Mental Capacity and Deprivation of Liberty* report, the Joint Committee on Human Rights rolls up its sleeves, and exploring the outer limits of best interests;

(2) In the Property and Affairs Report: a guest article by Denzil Lush on statutory wills and substituted judgment and the *Dunhill v Burgin* saga concludes;

(2) In the Practice and Procedure Report: an unfortunate judicial wrong turn on 'foreign' powers of attorney, the new Equal Treatment Bench book, and robust case management gone too far;

(3) In the Wider Context Report: appointeeship under the spotlight again, a CRPD update and the Indian Supreme Court considers life-sustaining treatment;

(4) In the Scotland Report: the Mental Welfare Commission examines advocacy, a new Practice Note from the Edinburgh Sheriff Court and a Scottish perspective on the judicial wrong turn on 'foreign' powers;

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.

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The Law Commission Mental Capacity and Deprivation of Liberty Report: the Government responds

The Government published on 14 March its response to the Law Commission's Mental Capacity and Deprivation of Liberty report. The headline is that the Government "*agree*[s] *in principle that the current DoLS system should be replaced as a matter of pressing urgency*," and that it will legislate in due course. Before the introduction of any new system, the Government has said that it will "*need to consider carefully the detail of these proposals carefully and ensure that the design of the new system fits with the conditions of the sector, taking into account the future direction of health and social care*."

In its detailed response, the Government has accepted, or accepted in principle, all of the recommendations except (1) the recommendation relating to a statutory codification of capacity law in relation to children; and (2) four areas which it has left for the independent Mental Health Act review to consider.

Joint Committee on Human Rights inquiry into DOLS reform

Following its open call for evidence in its inquiry: The Right to Freedom and Safety: Reform of the Deprivation of Liberty Safeguards, the Committee has published over 100 submissions (with more to come) written by interested parties and has heard oral evidence on the following issues:

- Whether the Law Commission's proposals for Liberty Protection Safeguards ('LPS') strike the correct balance between adequate protection for human rights with the need for a scheme which is less bureaucratic and onerous than the Deprivation of Liberty Safeguards.
- Whether the Government should proceed to implement the proposals for Liberty Protection Safeguards as a matter of urgency.
- Whether a definition of deprivation of liberty

for care and treatment should be debated by Parliament and set out in statute.

In summarising the written submissions published so far, we cannot hope to do justice to their quality. If you have time to only read one, we suggest that of Caroline Docking whose daughter, Eleanor, was deprived of oxygen during birth.

The oral evidence has been fascinating to listen to, for which transcripts are available. For example, here is the link to the evidence given by Graham Enderby, Mark Neary, Dr Lucy Series and Alex. Much of the written views make unsurprisingly depressing reading and illustrate the challenges faced by individuals and organisations struggling to cope with the demand for Article 5 safeguards following *Cheshire West*. Here are some broad themes arising:

- The majority of people believed the proposals did strike the correct balance and should be implemented as a matter of urgency, although many thought it should not be rushed through (as DoLS originally was) and some considered reform should be timed with the MHA review. There was a lack of consensus as to whether Parliament should define a deprivation of liberty.
- The adoption of safeguards for 16- and 17-year olds was welcomed. Few, if any, people suggested a role for parental consent which is interesting in light of *Re D (A Child)* [2017] EWCA Civ 1695 which allows for such a role.
- All were keen to have safeguards *before* the deprivation of liberty begins, analogous to the timing of safeguards for children coming in to local authority care.
- There was a lot of concern expressed in relation to the role of the "independent" reviewer, with rubber-stamping worries.
- Limiting access to the skills and knowledge of a professional assessor (the AMCP) to only those who object or pose a risk to others ran the risk of removing the universality of access to human rights. And it was suggested that for many people, the involvement of an independent professional with the power to achieve a speedy resolution would be more valuable than a largely theoretical right of appeal to a court.
- More detail was required in relation to how self-funders would be adequately protected in 24-hour care, and how would access to the home be secured for assessment.
- Who would authorise the deprivation of liberty for those in receipt of after-care services under s.117 of the MHA 1983 whereby there is a joint statutory duty on health and social services?

Defining a deprivation of liberty

Mostyn J tackled what he described as the elephant in the room, namely whether Cheshire West was correctly decided, stating: "*I am convinced that the decision is legally wrong and socially disastrous. It pits the state against families and costs hard-pressed public authorities vast sums, which ought to be spent on the front line*." Drawing upon *Ferreira* at [98]-[99] – which emphasised that the lack of freedom to leave must be because of the supervision and control – his Lordship contends that Parliament should put beyond doubt that an incapacitated adult will only be deprived of liberty if:

a) she is prevented from removing herself permanently in order to live where and with whom she chooses; and

b) the dominant reason is the continuous supervision and control to which she is subjected, and not her underlying condition.

Professor Richard Jones proposed a simpler definition which would exclude those content with their living arrangements: "*a deprivation of liberty exists where a person is residing in a place where he is not free to leave and where he is consistently indicating either through words or behaviour a desire to leave*." He also proposed the replacement of DoLS with amendments to guardianship, whose advantages would include:

- The elimination of MCA/MHA interface issues.
- Locally based tribunals with non-means tested legal aid available.
- Article 5(4) compliance, noting that the functions of the "responsible body" and the "independent reviewer" under the LPS do not do so.
- Resultant savings from dismantling DoLS which could be used to expand service delivery.
- Greater protective powers for the nearest relative.

Sir William Charles observed that the case law is in a mess which causes significant difficulties on the ground and an uncertain platform for the replacement of the DOLS. He observed that a statutory definition would be pointless because if the Supreme Court does not revisit *Cheshire West* and the Human Rights Act still applies, any legislation would have to be construed by the courts so as to comply with Article 5. Rather than using deprivation of liberty as the trigger for safeguards, "*substantive and procedural safeguards should be based on the question: Is the relevant person being provided with the least restrictive practically available option to best promote their welfare*?" Such a test would be easy to understand and apply, providing the necessary safeguards against arbitrary detention. Such an approach echoes that advanced by Dr Lucy Series who comments, "*All that is required of a statute is that it sets out where the safeguards may apply (and where they may not), what should trigger an application and what criteria must be met for an authorisation*".

In relation to the proposed amendments to the core of the MCA, Sir William stressed the importance of not overlooking the impact on the property and affairs jurisdiction: "*… the proposal to amend s. 4 of the Mental Capacity Act should not be adopted because of its lack of clarity and its potential for having a very damaging impact on the making of uncontested decisions relating to a patient's property and affairs.*" The proposal "*could well lead to unnecessary cost for thousands of patients in the ascertainment of their views on issues relating to their property and affairs*".

Age UK observed that the DoLS are most often used to protect older people and unless the current social care funding crisis is addressed, the new LPS scheme will be little more than a bureaucratic exercise. It noted a risk that this scheme could create anxiety for some older people, who may feel it allows them to be 'prisoners in their own homes'. Their families may also feel that they will be seen as the

'enforcers' of a deprivation of liberty. The CQC also has concerns about expanding the scheme to cover domestic settings "*where the proposed reform does not set out clearly an oversight mechanism*". ADASS and the LGA also noted that when examined operationally, the LPS have the potential to be as bureaucratic and onerous as the existing scheme.

Some people had concerns regarding the invention of advance consent to deprivation of liberty, it being seen as a mechanism for avoiding the administrative burdens associated with Article 5 safeguards. Others were open to the idea but, because of the seriousness of the decision, felt it should be afforded the same level of recording as an advance decision to refuse life-sustaining treatment. It was also noted that there is no consideration of the means of ensuring that any arrangements that were agreed to in advance were in accordance with the less restrictive option principle.

Unsound mind

Most people who commented on the issue were against what was seen as the stigmatising 'unsound mind' terminology, with its nineteenth century tone. Lancashire County Council said that many GPs are already refusing to use the 'outdated' term for COPDOL applications. The Royal College of Psychiatrists recommended its replacement with "any disorder or disability of mind". It noted that it is difficult to understand how those unconscious due to intoxication, with "locked-in" syndrome, or in a persistent vegetative or minimally conscious state, could be encompassed by the "unsound mind" concept but not by the "any disorder or disability of mind" concept. In any event, the College states, no-one with these conditions are deprived of liberty by the State; they are deprived by their condition and would be permitted to leave the moment they were physically able to do so. On a practical note, the College also referred to the current significant shortage of psychiatrists which "*is unlikely to change for many years, even if recruitment to the specialty markedly improves, because of the lengthy training period.*"

Advocacy and challenging detention

The growing demand for statutory advocacy was acknowledged, and how important it would be going forward for this to be adequately funded by central, rather than local, government. Many who responded to the Committee called for a detailed impact assessment to be undertaken before any legislative changes were made.

Dr Series estimates that the rate of appeal to the Court of Protection is fewer than 1% of people subject to a DoLS authorisation during 2017, and under 0.5% of DoLS applications overall. This compares with around 47% of MHA detentions being challenged in the tribunal. Professor Phil Fennell and some organisations, such as the Mental Health Tribunal Members Association and the Royal College of Psychiatrists, called for a tribunal system instead of the Court of Protection, with a role in scrutinising care and treatment planning. Dr Series suggests that a better, albeit still imperfect, alternative to what the LPS provide "*would be for the 'responsible body' to be under a clear duty to refer cases for review when either P or P's family object, or when care and treatment restrictions are particularly intrusive or invasive*", with P's relatives and advocates retaining a right to apply for a review as a fallback safeguard. Nottinghamshire County Council said it was vital that the nature

of an objection is fully described in legislation, possibly through the use of 'threshold' descriptors.

Finally, Baroness Finlay observed how shocking it is to hear the low percentage of benefit from DoLS: "*A medication or an operation that had a 10% or less improvement rate would not be continued long term without extensive review to select out those who are likely to benefit, yet the DoLS process has been applied wholesale*."

The dog that didn't bark

NHS Dorset CCG v LB and SHC [2018] EWCOP 7 (Baker J)[1]

Article 5 – deprivation of liberty – costs

Summary

This judgment, which primarily concerns an application for costs, is yet further fallout from *Cheshire West*. The CCG sought to bring a number of test cases before the court, aiming to carve out further exceptions from Cheshire West. The questions posed by the CCG for determination as a preliminary issue were:

i) Whether, for the purposes of Article 5 of ECHR and s64(5) of the MCA, P is deprived of his/her liberty if s/he is not free to leave and is subject to continuous supervision and control but:

   a. the restrictions to which he/she is subject are imposed in his/her own home (whether by family members or by paid carers) and;

   b. the restrictions are necessary and proportionate for the purpose of providing P with care;

ii) in any event, whether responsibility for any deprivation of liberty in P's own home is to be imputed to the applicant solely by virtue of the fact that it provides NHS continuing care funding for P's care.

The Official Solicitor was invited to act as litigation friend for the four Ps, but refused the invitation in two cases where legal aid was not available, on the basis that it was not appropriate to use P's own funds to argue a test case. After receiving the Official Solicitor's submissions on the deprivation of liberty arguments, the CCG sought permission to withdraw its request for a preliminary hearing for three reasons:

(1) the CCG had reconsidered its position in the light of the Official Solicitor's analysis;

(2) only one of the original four test cases was now able to proceed to a hearing on the preliminary issues, due to difficulties and delays, and as a result the practical application of any decision to future cases might be very limited in scope; and

(3) the recent publication by the Law Commission of its report on Mental Capacity and Deprivation of Liberty (Law Comm 372), which included recommendations for reforms designed to obviate the need for an application to the Court of Protection in the vast majority of cases of alleged deprivation of liberty,

[1] Alex having been instructed in these cases by the Official Solicitor on behalf of the Ps, he has not contributed to this note.

whilst not removing entirely the need for the Court to consider the issue raised in the test cases, reduced the justification for those cases and also, it was conceded, reduced the strength of the applicant's argument that the circumstances of the four individuals did not amount to a deprivation of liberty.

The Official Solicitor sought an order that the CCG should pay all his costs in one of the proposed test cases, and half his costs in the other, essentially on the basis that the Official Solicitor had succeeded in his case, which was not in reality a welfare matter but more akin to a civil claim. Further, argued the Official Solicitor, the CCG should have realised at the outset that some of the cases were not suitable test cases, and should have conceded the preliminary issue more quickly after the Law Commission report was published.

Baker J declined to depart from the general rule in welfare cases, noting that the law remained in a state of uncertainty following *Cheshire West* and that it was unsurprising that the CCG had wanted further guidance from the court.

Comment

It is not surprising that statutory bodies are still seeking creative ways to avoid the effects of *Cheshire West*, and perhaps equally unsurprising that (with the exception of the hospital setting) such attempts have not led anywhere. In light of the Law Commission's proposals and the government's indication that they are, in the main, accepted, this may be the last attempt to restrict *Cheshire West* pending legislative change. On the other hand, if the JHCR comes to an entirely different conclusion about the Law Commission's proposals or the timetable for implementation stretches off into the distance once the MHA Review concludes, the courts may once again be asked to consider the issue afresh.

A complex and very personal cocktail of capacity and vulnerability

AB v HT & Ors [2018] EWCOP 2 (Baker J)

Capacity – best interests – marriage – contact

Summary

This case concerned the capacity and best interests of a 37 year old woman, M, who had suffered a difficult childhood and first marriage, and was at the time of the hearing being treated in a psychiatric hospital for a psychotic illness. She also had an acquired brain injury which affected her cognitive functioning. M had previously lived with her father, and had taken part in an Islamic marriage ceremony in 2013. Her father and partner were parties to the proceedings, as was her aunt, who had taken M away from them and cared for her for a period of time before M's admission to hospital. Unfortunately for M, her family members were all in conflict with one another, and the court had to deal with over 100 pages of fact-finding allegations from all sides, extending to both welfare and financial matters.

The hearing that gave rise to this judgment took place some 2½ years after proceedings were issued by M's father. At the time of the hearing, it was anticipated that M would remain in hospital receiving treatment for her mental disorder for at least another year if not longer. Baker J had to determine issues of capacity and

best interests, as well as the status of the Islamic marriage ceremony.

Baker J concluded that there was insufficient evidence on which to conclude that M had lacked capacity to participate in the marriage ceremony, but that she presently lacked capacity to make relevant decisions, and that while it was possible she might regain capacity in future if her psychiatric treatment was successful, that was no reason not to make declarations of incapacity, in circumstances where the likelihood of an improvement in her condition and the timescales involved were uncertain.

On the factual allegations, Baker J concluded that M's father and partner had acted contrary to her best interests, misusing her money, failing to look after her properly, and arranging the marriage ceremony for the benefit of her partner's immigration status. The court did not find, however, that there had been a forced marriage.

The court made orders confirming M's incapacity in relevant areas, and a declaration that the marriage ceremony did not confirm with the requirements of the Marriage Acts, such that M and her partner were not married under English law.

There was then a dispute about whether the proceedings should continue. The Official Solicitor and local authority sought to bring them to an end, but Baker J concluded that they should continue, for three reasons: (i) it was possible that the picture as to M's capacity would be clearer within a year; (ii) there were continuing disputes about M's long-term residence and contact with her family which would need to be resolved, most probably by the court, and (iii) despite the criticism of M's father and partner, they remained people interested in her welfare whose views should be considered pursuant to s.4 MCA. On the latter point, Baker J said:

> [The partner] *MS is not married to M as a matter of English law but is married to her according to Islamic law. It would normally be appropriate to consult the spouse or partner of the adult concerned, although not necessarily where the spouse or partner is estranged or has been abusive towards adult. In my judgment, the question whether to seek the views of MS when making future best interests decisions concerning M and, if he is consulted, the weight to be attached to his (and [the father's]) views are sensitive and difficult issues and, furthermore are issues about which the parties will almost inevitably disagree, leading to further proceedings before this court.*

Comment

Although not determining any points of principle, this judgment is of interest for its summary of the approach to evidence in fact-finding hearings, its discussion of Islamic law in relation to marriage, and in the judge's refusal to accept that despite having made serious findings against M's father and partner, it did not follow as a matter of course that they should not continue to be consulted in relation to best interests decisions about her future welfare. On the latter point, it will be interesting to see whether any subsequent judgments emerge in the proceedings analysing this difficult and contentious question of which there has, to date, been little judicial consideration.

Constructing the 'responsible citizen'

SSHD v Sergei Skripal; SSHD v Yulia Skripal [2018] EWCOP 6 (Williams J)

Best interests – P's wishes

Summary

The Court of Protection was thrust into the centre of a major international incident in these two linked cases, concerning Sergei Skripa and his daughter Yulia and, specifically, whether it was in their best interests for the Organisation for the Prohibition of Chemical Weapons to:

(1) Collect fresh blood samples from Mr and Ms Skripal to

   a. Undertake their own analysis in relation to evidence of nerve agents,

   b. conduct DNA analysis to confirm the samples originally tested by Porton Down are from Mr and Ms Skripal,

(2) Analyse the medical records of Mr and Ms Skripal setting out their treatment since 4 March 2018,

(3) Re-test the samples already analysed by Porton Down.

As both Mr Skripal and Ms Skripal were unconscious, under heavy sedation, and neither were in a position to consent to the taking of further blood samples for these purposes or to the disclosure of their medical records Salisbury NHS Foundation Trust confirmed to the UK Government that a court order would be required to authorise (a) and (b) above. The SSHD therefore applied on an urgent basis to the Court of Protection for personal welfare orders. In his judgment, Williams J had to consider a number of discrete matters.

Public or private hearing?

Williams J gave a brief overview of Part 4 COPR and PD4C, concerning transparency. He noted that there was an apparent tension between the 'General Rule' in COPR 4.1 that proceedings will be heard in private and the effect of PD4C2.1 to the effect that the court will ordinarily make an order for the hearing to be in public unless it appears to the court there is a good reason for not making the order. However, he did not seek to resolve that apparent tension on the basis that the "unique and exceptional circumstances" of the application made it clear that the 'General Rule' should apply, noting a series of factors, in particular the sensitivity of the evidence and the matters before him. He therefore held that the urgent hearing should take place in private but his judgment would be published in accordance with COPR 4.2(2)(b).

Permission, participation and consular notification

Williams J had no hesitation in holding that permission should be granted in each case, both to be listed together, and that Mr and Ms Skripal should be joined with the Official Solicitor appointed to act as litigation friend for each of them. Perhaps betraying his background as a family practitioner with extensive experience of cross-border cases, he raised of his own motion the question of whether this rise to any notification obligation pursuant to Articles 36 and 37 of the Vienna Convention on Consular Relations of 24 April 1963 as Ms Skripal is a Russian national although Mr Skripal became a British national. The President had previously given guidance on this issue in the context of

care cases in the Family Court in *Re E (A Child)* [2014] EWHC 6 (Fam). He noted that:

> *Mr Thomas QC* [for the SSHD] *submitted that as there is no domestic implementation of Art 37 no obligation arises. He also questioned whether the court could be a competent authority. He noted that the Convention is implemented by section 1 and Schedule 1 of the Consular Relations Act 1968 and that this does not include Article 37. I note that at paragraphs 41 and 44 in Re E (above) the President noted the issue in relation to the effect of Article 37 in public international and English domestic law. Mr Sachdeva QC* [for the Skripals] *drew my attention to the context in which the President offered the guidance and that it was guidance only for the purposes of care cases in the family court. Both Mr Thomas QC and Mr Sachdeva QC also submitted that even if (and it is a very big if) that guidance could be transposed into the Court of Protection there was good reason for not imposing a notification obligation still less the other obligations the President identified in paragraph 47 of Re E. I am satisfied for the reasons set out above that there is no notification obligation in law on this court. The nature and extent of any good practice which might be followed in Court of Protection cases where a foreign national is the subject of an application may require consideration in another case. In practice, the Russian consular authorities will be made aware of these proceedings because this judgment will be published. I do not consider it necessary to list the issue for the sort of further extensive argument that would be necessary to enable the court to determine if any good practice guidance should be given.*

Habitual residence

As Williams J noted, the MCA 2005 deals with the jurisdiction of the court by implementing into domestic law the jurisdictional provisions contained in the 2000 Convention on the International Protection of Adults; s.63 MCA 2005 and Sch 3. Part 2 and in particular paragraphs 7(1)(a), (c) and (d). Thus the courts of England and Wales would have jurisdiction over a person habitually resident in England and Wales or a person present in England and Wales if the measure is urgent. Where the court is unable to ascertain habitual residence the court is to treat the person as habitually resident in England and Wales.

At paragraph 20, he noted that "[t]*he evidence before me does not enable me to ascertain the habitual residence of either Mr Skripal or Ms Skripal. I am therefore to treat them as habitually resident in England and Wales and thus jurisdiction arises under Schedule 3 paragraph 7(1)(a). In any event I am satisfied that in respect of both Mr and Ms Skripal I have jurisdiction pursuant [to] Schedule 3, paragraph 7(1)(c) to make the orders sought on the basis that whatever other jurisdiction may exist they are present and the measures are urgent*."

Best interests

The unique circumstances of the case required Williams J to examine how broadly the concept of 'best interests' could stretch in circumstances where there was no evidence as to either Mr Skripal's or Ms Skripal's past or present wishes and feelings in relation to the issues at hand. As well as the 'usual suspects' in terms of case-law, Williams J also noted the statutory Code of Practice identifies at para 5.47-8 the possibility that other factors that the person lacking

capacity might consider if they were able to could "*include the effect of the decision on other people….. the duties of a responsible citizen.*"

His careful analysis of how best interests was to play out on the facts of this unusual case merits reproduction in full:

> *30. There is little or no evidence to assist me in identifying any particular beliefs or values which either Mr Skripal or Ms Skripal held for the purposes of applying s.4(6)(b). The case is put both by the Secretary of State and the Official Solicitor on the basis of how the beliefs and values of the reasonable adult subjected to an attack of any sort, but particularly of this sort, might influence their decision. Although it would be impossible for me to be unaware of what is in the public domain about Mr Skripal and Ms Skripal that is not evidenced before me and so I am constrained to approach this decision at this moment in time on the basis of assumptions as to how a reasonable citizen would approach matters. In the absence of any evidence to show that either Mr Skripal or Ms Skripal was not a reasonable citizen that is how I will approach it. The evidence establishes that the OPCW is an independent organisation with the support of 192 nation States and one of whose primary tasks is providing technical assistance in relation to chemical weapons issues. Their procedures appear to be rigorous and robust – as would be expected given the subject matter of their work. Their enquiry can be expected to be entirely objective and independent. The results of their enquiry will likely hold very considerable weight in any forum. Their enquiry is therefore likely to produce the most robust, objective, independent and reliable material which will inform any determination of what happened to Mr Skripal and Ms Skripal. That might simply confirm the current conclusions, it might elaborate or clarify them, it might reach a different conclusion. Although the Secretary of State does not believe the latter prospect to be likely given her confidence in Porton Down's findings I do not think the possibility can be ignored – and in particular I do not think an individual faced with supporting or not supporting such an inquiry would ignore that possibility at this stage.*
>
> *31. Most reasonable citizens in my experience have a quite acute sense of justice and injustice. Most want to secure the best information about what has happened when a serious crime is alleged to have been committed. I accept that such a person would believe in the rule of law; that justice requires that crime or serious allegations of crime are thoroughly investigated; that where possible answers are found as to who, how and why a crime was perpetrated, that where possible truth is spoken to power; that no-one whether an individual or a State is above or beyond the reach of the law and that in these turbulent times what can be done to support the effective operation of international conventions is done. Whilst I don't assume that the reasonable citizen would necessarily have asked himself or herself those sorts of questions in quite such detail I do believe that if those issues were put to them they would adopt them and they would influence their decision. In any event all go to the general point that the reasonable citizen, including Mr Skripal and Ms Skripal believe that justice should be done. The conduct of the investigations proposed by the OPCW will*

further the general aim of justice being done as well as perhaps the more precisely identified goals which Mr Eadie QC identified in the course of argument. I accept that Mr Skripal and Ms Skripal's decision would be influenced by these values and beliefs and that the influence would be in favour of consenting to the taking and testing of samples and disclosure of notes. I am satisfied that an inquiry such as the OPCW will conduct which might verify Porton Down's conclusion, might elaborate or clarify them or might reach a different conclusion is something they would wish be conducted and they would want to assist in that by providing samples.

32. Even if I am wrong on these assumptions as to their beliefs or views I am satisfied it is in the broad parameters of their best interests for it to be known as far as may be possible what occurred to them and the OPCW enquiry will promote that aspect of their best interests.

33. Quite separately I accept that there may be some potential medical benefit in the tests being conducted by the OPCW in that they may identify some matter which sheds further light on the nature of the agent involved and thus the treatment that might be administered. I understand that the Secretary of State reposes complete confidence in the results of the tests carried out by Porton Down but I believe both that Mr Skripal and Ms Skripal would wish for the further analysis (and so s.4(6)(c) would be engaged) but that also objectively there is benefit in the expertise of the OPCW also being brought to bear even if the possibility of them uncovering something useful from a medical perspective may be slight.

34. Those matters therefore support the conclusion that it is in the best interests of Mr Skripal and Ms Skripal to have further blood samples taken and for their medical records to be disclosed.

35. On the other side of the equation what points to such steps not being in their best interests or being harmful? The taking of the modest blood samples proposed through the cannula already in situ will have very little impact. ZZ [their treating consultant] is of the opinion that it will be unlikely to adversely effect their clinical condition. The involvement of the OPCW and the use to which the results may be put in support of the pursuit of 'justice' will no doubt lead to further publicity but it seems to me to be unlikely to lead to any further intrusion than is currently the case and assuming that Mr Skripal and Ms Skripal regain consciousness so as to be aware of it. Does the authorisation of further testing create any further risk to the physical safety of Mr Skripal or Ms Skripal? I have not been addressed on this issue – theoretically I suppose it might if it were thought the death of Mr Skripal and Ms Skripal prior to the taking of samples might undermine the efficacy of the evidence gathering exercise (as opined by DD [a Porton Down Scientific Adviser]). The Secretary of State has confirmed that measures are already in place to ensure their physical safety. Does the disclosure of medical notes to the OPCW amount to an intrusion into their privacy which is not in their best interests? I accept ZZ's point that disclosure of medical records should only go so far as is necessary and this will cover disclosure from the period 4 March 2018 and for the specific information that the OPCW has sought. If it is sought I

consider that it is in their best interests that OPCW is provided with copies of the relevant records not merely having sight of them. The processes which are in place for maintaining the confidentiality of such records (along with the integrity of the samples) which are evidenced satisfy me that copies could be provided subject to their destruction or return at the conclusion of the enquiry.

36. The overall balance in the evaluation of the best interests of Mr Skripal and Ms Skripal assessed on a broad spectrum and taking account of the pros and cons of taking and testing the samples and disclosing the notes in my judgment falls very clearly in favour of the taking of the samples, their submission for analysis by OPCW and the disclosure of the medical notes to aid that process. In so far as it is necessary it is also lawful and in their best interests that the existing samples are provided to OPCW for further testing.

Williams J made orders accordingly.

Comment

It is interesting that Williams J chose to go down the 'responsible citizen' route as the primary route to reach the (obviously correct) conclusion that it was in the Skripals' best interests for the relevant steps to be taken. Other judges might have placed more emphasis upon his alternative route, namely that it was equally, if not, possibly even more likely that the Skripals would have wanted to take any opportunity to explore a course of action which might give rise to even a small possibility of medical benefit to them. There is undoubtedly a place for altruism or being seen to 'do the right thing' in the conception of best interests (see, in addition to the *TJ* case cited, *Re Peter Jones* and the pre-MCA case of *Re Y (Mental Incapacity: Bone marrow transplant)* [1996] 2 FLR 787). There is, equally, clear authority for the proposition that the Court of Protection can, in some cases, be entitled to take steps in the name of a person's best interests to seek to secure even the slightest chance of a medical improvement: see, e.g. *B v D* [2017] EWCOP 15. Which route one chooses to reach the outcome in this case depends, one suspects, on one's view of human nature.

Very much as a side-note, we note that the apparent tension that Williams J notes in relation to the 'General Rule' and the Transparency Practice Direction is a side-effect of the fact that they represent the clunky but necessary work around for the fact that the MCA 2005 does not contain the automatic restrictions on the publication of specific types of information about the subject of proceedings that applies in relation to children. This means that it is necessary for an order to be made in each case to enable the proceedings to take place in public (which is intended to the default following the completion of the Transparency Pilot) but with suitable protections relating to the identities of the parties and private and sensitive information that is regularly put before it). It is very much to be hoped that when the MCA is amended in due course to implement the Law Commission's Mental Capacity (Amendment) Bill, the opportunity will be taken to introduce into primary legislation a provision which will enable this process to be streamlined.

Deception in the name of best interests

Re AB [2016] EWCOP 66 (Mostyn J)

Best interests – medical treatment – P's wishes

In this case, which was decided in December 2016, but which only appeared on Bailii in March 2018 (for reasons which will perhaps be self-evident) Mostyn J was asked to approve a treatment regime for a woman with HIV which involved the administration of medication to her on the basis of active deception.

The woman, AB, contracted HIV in 2000. At that point, her capacity to make decisions regarding medical treatment was unimpaired, and she voluntarily sought treatment and engaged fully and consensually and willingly with such treatment until 2008. In 2008, there was a major deterioration in her mental condition, and after that her engagement with HIV treatment was interrupted. Her medical condition worsened, AB suffering from a serious psycho-affective disorder. The evidence before the court was that, although people with this disorder do, from time to time, recover, the extent of relapses in AB's case, and their scale, made it unlikely the foreseeable future she would recover from her psychiatric condition. The position agreed before the court – including by the Official Solicitor on AB's behalf [2] – was that she undoubtedly lacked capacity to decide whether to engage in anti-retroviral treatment.

Critically, AB was at the time of the judgment was, in the words of the judge:

> *16.* […] *in the grips of very powerful delusions, which prevent her from addressing many aspects of normal life rationally. For example, she does not believe that, now, she is HIV positive. She believes that she is a participant in a film about HIV, in which she will be participating with her husband. She does not, in fact, have a husband, but she believes that she is married to a celebrity sportsman. She believes that the person who is her husband will come back for her and take her away to live in connubial bliss. She believes that when blood samples are taken from her by the hospital staff it is done by them for the purposes of drinking her blood. Above all, she is positive that she is not HIV infected, and were she to learn that she was being secretly and clandestinely administered with anti-retroviral treatment the evidence is that she would be exceedingly aggrieved.*
>
> *17. If the choice were hers, and hers alone, she would not take the anti-retroviral treatment and, on the evidence, it is clear that, were that course to be followed, having regard to previous monitoring when there have been interruptions, it is foreseeable that within a relatively short period of time her immune system would be seriously compromised and she would be exposed to the risk of death.*

[2] As a footnote, it would have been fascinating to understand the basis upon which the conversation between the Official Solicitor's staff member and AB took place – the "eloquent" attendance note clearly made an impression upon Mostyn J: "[I]*f anyone has any doubts as to the scale of the mental challenges faced by AB they only need to read that note, which I am not going to read into this judgment*."

Mostyn J therefore had to make the decision on AB's behalf as to what was in her best interests, and embarked for this purpose upon a consideration of her past and present wishes and feelings, as well as the beliefs and values that would be likely to have influenced her decision had she had capacity:

> *19. As far as her past feelings are concerned, up to 2008, which is when we know that she did have capacity, her conduct in that period demonstrates that her wishes were to receive HIV treatment.*
>
> *20. As far as her present wishes are concerned, there is no dispute: they are very strongly opposed to HIV treatment.*
>
> *21. Parliament has decreed that I must go on to consider not only actual wishes and feelings but hypothetical wishes and feelings, because by virtue of Section 4(6)(b) I have to consider the beliefs and values that would be likely to influence her decision if she had capacity and I am also required by virtue of paragraph (c) to consider the other factors that she would be likely to consider if she were able to do so.*
>
> *22. I am perfectly satisfied, having regard to her willing and consensual participation in treatment up to 2008, that if she had capacity (and I would interpolate parenthetically that of course if she had capacity we would not be having this case), she would unquestionably enthusiastically embrace anti-retroviral treatment, which I do not shrink from describing as a miracle treatment.*

In the circumstances, Mostyn J had:

> *25.* […] *no hesitation in concluding that virtually no weight should be given to AB's present wishes and feelings. Instead, I should place considerable weight on her past wishes, as demonstrated by the evidence, and on her hypothetical wishes, which I have no doubt would be in favour of the treatment.*
>
> *26. It is, it might seem, a strong step for the Court to take: to authorise a course of medication that involves deception, and I hesitate from saying that perhaps it is not so surprising in this post-truth world in which we now seem to live, but that would be perhaps a cynical aside. However, on the facts of this case, there can be no doubt that there has to be authorised a course of action that ensures that AB, in her best interests, receives the treatment that will likely save her. It is for this reason that I am happy to approve the order that has been put before me.*
>
> *27. The order will provide, however, that if the truth emerges to AB and she moves to a position of active resistance then the matter will have to be reviewed, and the Court will have to consider, in that situation, whether to move to forced administration of these drugs, which would be a very difficult decision to make, because it would not be a one-off administration of treatment, but would be a quotidian administration of treatment, which is a very different state of affairs to that which is normally encountered in this Court.*

Comment

Even more than in most cases before the Court of Protection, one is left wanting to know what

happened next for AB. Moreover, and almost more than in any other case decided to date, it also brings home the potential within the MCA for stark clashes between past and present wishes and feelings.

It could also – we suggest – be used as a case-study for testing thinking about the CRPD. Is this, for instance, a case where it would be legitimate to say that AB's 'will' can be taken from her actions before the period of mental ill-health, and can legitimately be said to be different to – and of a higher order than the 'preferences' being expressed now? Is it, therefore, an exemplar of the model suggested by George Szmukler[3]? And where does the requirement under Article 25(d) that healthcare be provided on the basis of "free and informed consent" (and/or the right under Article 17 to equal respect for physical and mental integrity) come in? It is all too easy by searching for absolutist principles here to reach a point which would seem entirely wrong – including, above all (I would very venture to suggest) to AB herself if and when her mental state recovered.

Short note: continuing healthcare and responsibility for community deprivation of liberty authorisations

The new framework for continuing healthcare ("CHC") and NHS-funded Nursing Care ("FNC") has been published, to come into force in October 2018. We highlight it because it includes a section at paragraphs 320-322 which specifically considers DOLS and clarifies the responsibilities of CCGs in authorising deprivations of liberty.

It provides at paragraph 322 that, where an individual who lacks capacity lives in their own home rather than in hospital or in a residential care home – ie a *Re X* style scenario – and is in receipt of CHC, as the primary funding authority, it is the duty of the CCG to apply to the Court of Protection to seek authorisation of the relevant deprivation of liberty.

Outside of a *Re X* scenario, however, the Framework confirms that responsibility for seeking a standard or urgent authorisation (or court authorisation) for any deprivation of liberty remains with the managing authority: the care home or hospital in which P is placed. It also reiterates that any request for authorisation should be made *before* the placement takes effect.

Short note: fluctuating capacity – a further chapter

Re MB [2017] EWCOP B27 (HHJ Parry)

Mental capacity – residence

Re MB is a case that was decided as far back as August 2017, but only recently appeared on Bailii. It is the penultimate judgment in the long running saga of MB, first heard by Mr Justice Charles as long ago as 2007; the final chapter can be found here.

The case came before the Court as a challenge to MB's standard authorisation, pursuant to

[3] See e.g. Szmukler G. The UN Convention on the Rights of Persons with Disabilities: "rights, will and preferences" in relation to mental health disabilities. Int J Law and Psychiatry 2017. https://doi.org/10.1016/j.ijlp.2017.06.003 and his book *Men in White Coats: Treatment Under Coercion* (OUP, 2018.

section 21A of the MCA. MB has a moderate learning disability, an autism spectrum disorder and complex epilepsy. He has lived at the care home under orders of the court since 14th July 2008 following litigation in which Mr Justice Charles had concluded that he lacked capacity to make decisions about his residence and care.

The hearing before HHJ Parry was listed as a result of the parties having received an expert report on MB's capacity from the independently instructed psychiatrist, Dr Layton. Dr Layton had concluded that while MB lacked the capacity to conduct the litigation, he had capacity to make decisions about his residence and care. This was the first clinician to have come to this view since the case had been before the COP.

The local authority sought permission to instruct a further expert to report on capacity as a result of the 'huge risk' to MB if he were able to choose where he could live (he had wanted for the past 10 years to move from his care home into the community). They argued that this further instruction was appropriate given the weight of clinical opinion which had always concluded that MB lacked the relevant capacity and the fact that Dr Layton could not provide an answer to why MB now had capacity "*because there is no evidence of any specific event or change in his regime to which it could be attributed*."

HHJ Parry reflected on how Dr Layton had carried out the assessment, paying particular attention to the practical steps that had to be taken to help MB to achieve capacity. As such is a useful example of a case in which s.1(3) of the MCA is applied. HHJ Parry summarised Dr Layton's views on this issue as follows:

> *One of MB's difficulties is that he cannot generalise from the past to a new situation and an overload of information can lead to him losing capacity. Therefore, he needs substantial support to deal with new situations. Dr Layton concluded that with support he would have capacity to make decisions about his residence because this is a decision made over a longer period of time and did not require the capacity to cope with a lot of information over a short period. It would also be a decision in relation to a realistic option on offer and it could be done over several weeks to several months.*

This case is of particular interest because it is one of the few cases in which fluctuating capacity is considered. The Judge summarised Dr Layton's conclusions on this as follows:

> *However, his autism predisposes him to high levels of anxiety which impairs his cognitive performance and therefore, his capacity. When he is affected by anxiety it can take between minutes and days to bring him down during which period he would lack capacity. He may not have capacity for short term decisions during the day. He could also lose capacity on any day when he would not be able to weigh matters and he is affected by unpredictable events such as interactions with others. Dr Layton accepted that it was very difficult to be sure whether MB has flashes of capacity or flashes of losing capacity. He described MB's capacity as delicate and fragile*

Dr Layton had considered that a standard authorisation should be in place for these short periods of incapacity. The Judge and the parties

agreed that "*this is an impossibility legally or as part of anticipatory care planning to manage periods of apparent incapacity because MB cannot consent to it.*"

HHJ Parry ultimately granted the local authority's request for the instruction of a further expert on the basis that further expert evidence was 'reasonably required'. It seems therefore that this was not a case to which the case management pilot applied (the test for expert evidence under the pilot was of course the higher "necessity" test, the test now being applied across the board in COPR 15.3).

Comment

The question of the Court's jurisdiction in cases of fluctuating capacity is a tricky one and is considered in our report of the last judgment here.

The lack of any detailed consideration of the jurisdictional challenges from the High Court in such cases makes it difficult for practitioners to know how best to deal with what is a relatively common scenario. We know of at least one case which has just been transferred up to the High Court for hearing in June on this issue.

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Conferences

Conferences at which editors/contributors are speaking

Law Society of Scotland: Guardianship, intervention and voluntary measures conference

Adrian and Alex are both speaking at this conference in Edinburgh on 26 April. For details, and to book, see here.

Medical treatment and the Courts

Tor is speaking, with Vikram Sachdeva QC and Sir William Charles, at two conferences organised by Browne Jacobson in London on 9 May and Manchester on 24 May.

Other conferences of interest

Towards Liberty Protection Safeguards: Implications of the 2017 Law Commission Report

This conference being held on 20 April in London will look at where the law is and where it might go in relation to deprivation of liberty. For more details, and book, see here, quoting HCUK250dols for a discounted rate.

UK Mental Disability Law Conference

The Second UK Mental Disability Law Conference takes place on 26 and 27 June 2018, hosted jointly by the School of Law at the University of Nottingham and the Institute of Mental Health, with the endorsement of the Human Rights Law Centre at the University of Nottingham. For more details and to submit papers 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 the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next report 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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