Essex CHAMBERS

MENTAL CAPACITY REPORT: THE WIDER CONTEXT

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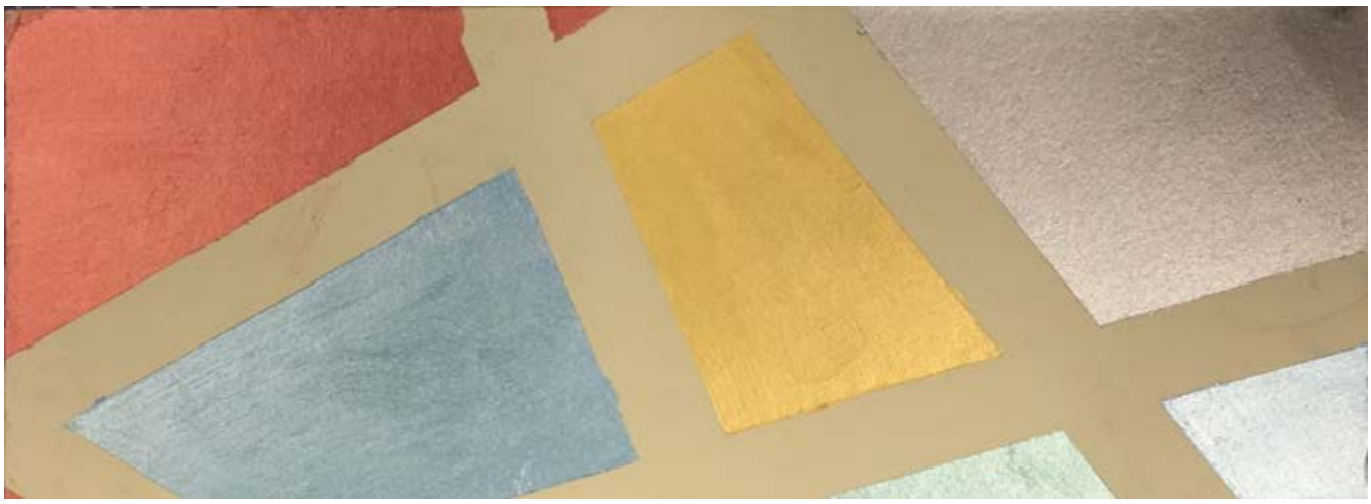

Welcome to the February 2017 Mental Capacity Report. You will note a new look, and also a new title, which reflects the fact that over the years we have evolved to carry material that goes considerably wider and deeper than in a conventional Newsletter. We have also retitled the individual sections of the Report (which you can continue to get in compendium and screen-friendly forms).

Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: positive obligations under Article 5, deprivation of liberty in the intensive care setting, and best interests in the context of childbirth and anorexia;

(2) In the Property and Affairs Report: common mistakes in making LPAs;

(3) In the Practice and Procedure Report: costs in medical treatment; an important case on time-limits in HRA cases, frustrating the Court of Protection and the end of era marked for the Court of Protection Practice;

(4) In the Wider Context Report: a new MCA/DOLS resource, capacity and the MHT, restraint in the mental health setting, mental health patients in general hospitals and truth and lying in dementia;

(5) In the Scotland Report: solicitors claiming an interest and the *nobile officium* comes to the rescue.

Editors
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You can find all our past issues, our case summaries, and much more on our dedicated sub-site here. 'One-pagers' of cases of most relevance to social work professionals will also appear on the SCIE website.

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

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New MCA/DOLS online resource

The Medical Protection Society in partnership with Cambridgeshire County Council and NHS England has just launched a new Mental Capacity Act and Deprivation of Liberty online learning tool specifically for health professionals across England and Wales. This online resource, to which Alex has contributed, and which draws also upon the 39 Essex Chambers guides, is completely free and will help healthcare professionals understand:

- What the MCA is
- What they need to know
- How it affects them
- How it affects their patients
- How to apply this to their practice.

The modules are designed to support and update your knowledge whenever you need it and are supported with relevant case studies and films from experts in this field. The modules are also supported by a knowledge check which is also certificated

To access the new modules click here (registration is required, but the modules are free).

Capacity and the MHT

R(OK) v FTT and Cambian Fairview [2017] UKUT 22 (AAC) (Upper Tribunal (AAC) (Upper Tribunal Judge Jacobs))

Other proceedings – judicial review

Summary

The Upper Tribunal has held with impeccable (some might say remorseless) logic that the principles set down by Lady Hale in *R (H) v*

Secretary of State for Health [2006] 1 AC 441 apply equally to patients detained under s.3 MHA 1983 as they do to patients detained s.2 MHA 1983. OK lacked capacity to apply to the FTT to challenge her detention. Her solicitor sought to do so on her behalf, but the proceedings were curtailed when it emerged that she had lacked the relevant capacity. She then applied to the Upper Tribunal (AAC) to judicially review the decision of the FTT, and argued that:

> *… that there is a gap in the legislation that fails to provide for patients who lack the capacity to decide to apply to the First-tier Tribunal. In order to overcome that deficiency, section 66 of the Mental Health Act 1983 should be interpreted, pursuant to section 3 of the Human Rights Act 1998, in a way that is compatible with the patient's Convention rights. The Convention rights engaged are Article 5, 6 and 14. The proposed interpretation that protects those rights is to read section 66(1)(i) as applying to a 'patient (with the assistance of a litigation friend if needed)'. In R (H) v Secretary of State for Health [2006] 1 AC 441, the House of Lords decided that the overall scheme of the Mental Health Act 1983 was compatible with the Convention rights of a patient detained under section 2 for assessment. That case is said to be distinguishable, because the patient here is detained under section 3, where different time scales apply.*

Upper Tribunal Judge Jacobs held that there was no basis upon which to distinguish *H*, noting that:

> *… the time periods differ according to the basis on which the patient is within the Act. The patient's solicitor is right that the House of Lords was concerned with a patient detained under section 2, for which the time limit was 28 days. But I cannot find anything in the speech of Lady Hale, with whom all the others agreed, to suggest that the period of time was significant, still less decisive. More important in her reasoning was the proper use of the Secretary of State's power to refer a case to the tribunal:*
>
> > *27. Even if the patient's nearest relative has no independent right of application, there is much that she, or other concerned members of the family, friends or professionals, can do to help put the patient's case before a judicial authority. The history of this case is a good illustration. The patient's mother was able to challenge every important decision affecting her daughter. Most helpfully, she stimulated the Secretary of State's reference to the tribunal very quickly after it became clear that her daughter was to be kept in hospital longer than 28 days. Had MH been discharged once the 28 days were up there would, in my view, have been no violation of her rights under article 5(4). It follows that section 2 of the Act is not incompatible with article 5(4). Section 29(4), however, is another matter.*
>
> *That reasoning is equally applicable to a patient detained under section 3 rather than section 2.*

Upper Tribunal Judge Jacobs therefore held that:

> *21. I accept that there appears to be a gap in the protection of a patient's right to bring their case before the First-tier Tribunal, but that is apparent only when the tribunal's rules of procedure are considered in isolation. It disappears when the various duties and powers under those rules, the Mental Health Act 1983 and the Mental Capacity Act 2005 are considered as a package. This case is governed by the reasoning in R (H). There is no violation of the patient's Convention rights. An application for the Secretary of State to refer his case could have been made under section 67 and, if that was refused, the patient could have had recourse to judicial review.*

Comment

It is more than a little concerning that Upper Tribunal Judge Jacobs reached his decision without any reference to the decision of the ECtHR in the Strasbourg case that followed *H*. In that case, the ECtHR held that the system, as a whole, including the duty upon the SoS to refer upon application, complied with Article 5(4), but it was a very close-run thing:

> *95. The question might be asked whether such a hearing could have taken place had the applicant not had a relative willing and able, through solicitors, to bring her situation to the attention of the Secretary of State. However, the Court may only consider the case before it, and the facts of the present case clearly illustrate that in circumstances such as the applicant's, where the incompetent patient is "befriended", the means do exist for operating section 29(4) of the 1983 Act compatibly with the requirements of Article 5 § 4 of the Convention. For that reason, no failure to comply with those requirements can be found in the applicant's case as regards the period of her detention in issue under the present head.*

OK was, in this case, able to benefit from the assistance of a solicitor (even if they should have brought the case to the attention of the Secretary of the State, rather than the Tribunal) but is troubling that the implications of the Strasbourg judgment were not considered by the judge (or apparently brought to his attention).

Use of restraint in mental health settings

A new memorandum of understanding has been published by the College of Policing on the use of restraint in mental health settings. It has been endorsed by the National Police Chiefs' Council, Mind, the Royal College of Psychiatrists, the Royal College of Nursing and the Faculty of Forensic and Legal Medicine with a view to other organisations providing their formal support in due course.

The MoU descends to very considerable – and helpful – detail as to expectations as between police and healthcare providers, as well as useful examples of good practice. It also contains a helpful summary of the relevant legal provisions (albeit one which repeats the canard that reliance can be placed upon s.4B MCA 2005 to deprive a person of their liberty to enable a life-sustaining intervention or to prevent a serious deterioration in their condition without making clear that this can only be relied upon at the same time as an application is being made to the Court of Protection).

Mental health patients and care in general hospitals

The National Confidential Enquiry into Patient Outcome and Death has just published a report – "Mental Health in General Hospitals: Treat as One" – highlighting the poor quality of mental health and physical health care for patients aged 18 years or older with a significant mental disorder who are admitted to a general hospital. The report takes a critical look at areas where the care of patients might have been improved. The report also areas for improvement in the clinical and the organisational care of these patients.

New GMC guidance on confidentiality

The GMC has published new guidance on confidentiality, to come into force on 25 April 2017, including detailed guidance on addressing these questions in the context of those lacking the material decision-making capacity.

Seeing through the fog: Money and Mental Health Policy Institute

In a new report, "Seeing through the fog," the admirable MMHPI looks at the range of ways in which mental health problems can make it harder for people to manage their money, making important financial tasks like comparing different products and paying the bills on time much more difficult. For instance, the report found that people with PTSD often have memory problems, which can make remembering PINs and online banking details impossible, and that conditions such as ADHD and depression are associated with reduced attention span, which can make it harder to engage with complex financial tasks like budgeting.

Importantly, the report does not just stop there, but sets out a range of adjustments that could be offered by financial services providers, and others, to help people with mental health problems to overcome the extra challenges with money management that they often face.

Government's response to the Five Year Forward View for Mental Health

The Government has published its response to the Five Year Forward View for Mental Health. The response follows the recommendations made by the Mental Health Taskforce in its February 2016 report The Five Forward View for Mental Health: a report from the independent Mental Health Taskforce to the NHS in England (reported in our March 2016 newsletter). We are pleased to see that the Government has accepted all of the Taskforce's recommendations which are aimed at improving mental health services including expanding provision, more thorough monitoring and regulation, and the appointment of 'Mental Health Champions' in each community. Perhaps most relevant to mental capacity practitioner is the Taskforce's Recommendation No. 51:

> *The Department of Health should work with a wide range of stakeholders to review whether the Mental Health Act (and relevant Code of Practice) in its current form should be revised in parts, to ensure stronger protection of people's autonomy, and greater scrutiny and protection where the views of individuals with mental capacity to make healthcare decisions may be overridden to enforce treatment against their will.*

The Government has accepted this recommendation and added that:

> *Officials are currently exploring if any legal changes may be required to allow a person to be treated in the community for a mental health problem that would otherwise require a compulsory stay in hospital, through conditions placed in a Community Treatment Order.*

Contracting out protections

The Local Government Ombudsman has sharply criticised Wokingham Borough Council and urged it to pay £4,000 after a vulnerable dementia patient lost a third of her body weight while living in the care home it contracted to look after her. The LGO was critical of the lack of activities organized at the home, the care provided for the woman who left the home malnourished, and the lack of action taken to address her weight loss. The LGO also criticized the care home's record keeping, and that staff did not seek specialist support for her low weight.

There is an important wider lesson to be heeded by all local authorities which was summed up by Dr Jane Martin, Local Government Ombudsman: *"This case highlights the need to remind councils that when contracting out services to third parties, they cannot contract out the accountability for those services.*

The news was reported on the Local Government Lawyer website here, and the LGO's full report is available here.

What is Truth? An Inquiry about Truth and Lying in Dementia Care

This interesting report published by the Mental Health Foundation, and based on work by an expert panel, explores the difficult issues relating to people with dementia experiencing a different reality or set of beliefs. People with dementia commonly experience different realities and beliefs from those around them. The experience of perceiving different realities usually becomes more frequent and persistent as the condition progresses. Practitioners and cares are often desperate for advice and guidance as to how best to respond in these situations. One of the most common questions is whether 'non-truth' telling can be justified in order to support the wellbeing of the person with dementia.

In summary, the panel felt that one should always start from a point as close to the whole-truth-telling as possible but, if this is causing unnecessary distress, move onto a response that might include an untruth. There is always a balancing act between wanting to stay as close to whole-truth-telling as possible and ensuring one is not causing distress. After considering all of the evidence the panel found six underlying principles of all responses and interventions that are critical in supporting the person living with dementia to have wellbeing:

1. Experiences of different realities and beliefs are meaningful to a person living with dementia. A key role of any carer or practitioner is to find out what this meaning is. This is a fundamental aspect of good quality care, and should not be considered a luxury agenda item, "*if there is time*."

2. Finding out what experiences of different realities and beliefs mean must be done with an open mind; a flexible, tailored approach;

and with kindness. The more a carer or practitioner knows about the life story, personality and values of the person with dementia, the more likely they will be able to understand the meaning behind these experiences.

3. Responses and interventions should start as close to whole-truth-telling as possible. In other words, there may be situations where it is known from the start that whole-truth-telling will not be possible. But moves away from whole-truth-telling should only occur if it would cause unnecessary distress. 'Lies' (as in blatant untruths initiated by a carer or practitioner – as opposed to meeting a person with dementia in their reality) may only be used in extreme circumstances to avoid physical or psychological harm.

4. 'Environmental lies' should be avoided. These are artificial spaces designed to deceive, such as a painted shop front (as opposed to a real small shop within a care setting).

5. Responses and interventions should be kept consistent across family carers or staff teams.

6. What does and does not work should be documented and shared.

The full report can be accessed here, and the source document containing a review of the evidence is available here.

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Alex is recommended as a 'star junior' in Chambers & Partners 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, including as Wellcome Trust Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. He is on secondment 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.

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

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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.

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

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

Adrian Ward: adw@tcyoung.co.uk

Adrian is a 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.

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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.

Conferences

Conferences at which editors/contributors are speaking

Royal Faculty of Procurators in Glasgow

Adrian will be speaking on adults with incapacity at the RFPG Spring Private Law Conference on 1 March 2017. For more details, and to book, see here.

Seminar on Childbirth and the Court of Protection

39 Essex Chambers is hosting a seminar in conjunction with the charity Birthrights about caesarean-section cases in the Court of Protection. The seminar aims to take a critical look at these cases, with a distinguished multi-disciplinary panel. The seminar is at 5pm-7pm on 8 March 2017, and places can be reserved by emailing beth.williams@39essex.com.

Hugh James Brain Injury conference

Alex will be speaking at this conference aimed at healthcare professionals working with individuals with brain injuries and their families on 14 March. For more details, and to book, see here.

Scottish Paralegal Association Conference

Adrian will be speaking on adults with incapacity this conference in Glasgow on 20 April 2017. 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 March. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Newsletter in the future please contact: marketing@39essex.com

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