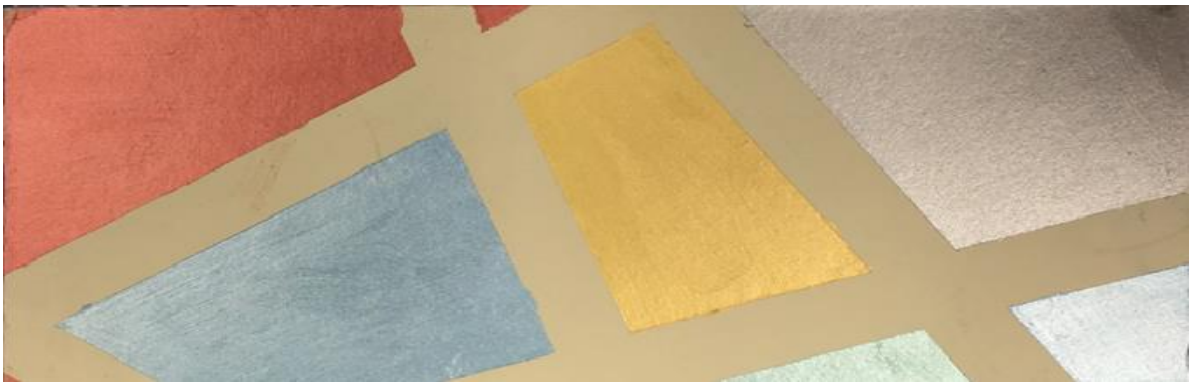

Welcome to the June 2018 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: a rare appellate level decision considering best interests (and confirming that they should be rare);

(2) In the Property and Affairs Report: (partially) endorsing an attorney's actions after the event;

(3) In the Practice and Procedure Report: choosing litigation friends;

(4) In the Wider Context Report: the National Mental Capacity Forum reports, and an important Strasbourg re-cap of the principles applying to capacity;

(5) In the Scotland Report: a new Public Guardian and the MWC is cautious about attorneys consenting to restrictions on liberty;

You can find all our past issues, our case summaries, and more on our dedicated sub-site here.

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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

HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

Appeals, best interests, dementia and CANH

Re RW [2018] EWCA Civ 1067 (Court of Appeal (Arden, Sharp and Peter Jackson LJJ))

Best interests – Medical treatment – Practice and Procedure – Transparency – Appeals

Summary[1]

The small body of appellate level jurisdiction on the MCA has been added to in this case, concerning the continued provision of clinically assisted nutrition and hydration (CANH) via a nasogastric (NG) tube to an elderly man with end stage dementia. The question that had been before Parker J had been whether, if and when he was discharged home from hospital, it would be in his best interests for him to be discharged with an NG tube in place (as his family contended), or whether the NG tube should no longer be maintained upon discharge (the position of the Trust and the Official Solicitor on his behalf). Parker J endorsed the position of the Trust/Official Solicitor; the man's family sought permission to appeal.

Refusing permission to appeal, the Court of Appeal emphasised the high hurdle for challenging a decision made at first instance as to best interests, especially where the judge has directed themselves correctly as to the law. Both Sharp and Peter Jackson LJJ (the latter delivering his first Court of Appeal judgment in this area) also made interesting observations about the place of wishes and feelings in best interests decision-making especially where – as here – there was no reliable evidence as to what the individual in question might have done. Peter Jackson LJ noted that:

> [t]*he Law Commission's recent review of the law relating to Mental Capacity and Deprivation of Liberty Safeguards recommends a legislative addition to s.4(6), so that decision-makers should 'give particular weight to any wishes or feelings ascertained'. In its response on 14 March 2018, the Government accepted this recommendation, noting that the principle of taking account of an individual's wishes and feelings is very important and already represents good practice.*

Peter Jackson LJ made two important – wider – observations about best interests in the context of serious medical treatment observations. The first was to record that Counsel for the appellant had been "wise" to abandon a contention that "*above a 'minimally conscious state' the sanctity of life should absolutely prevail regardless of other balance sheet considerations, unless there is very clear and cogent evidence that P himself would have wished to have CANH withdrawn…*" Rather, Peter Jackson LJ noted at para 96:

[1] Katie being involved in the case, she did not contribute to this note.

> *The framework for the assessment of best interests is a universal framework, regardless of diagnosis, and attempts to load the scales in this manner should be firmly resisted.*

Further, Peter Jackson LJ emphasised that in considering serious medical treatment decisions, the Court of Protection:

> *must have the realistic treatment options clearly in mind. There is no purpose in deciding whether a particular option is in the best interests of the patient if it is not in fact known to be available. In RW's case, there is considerable uncertainty as to whether any hospital would re-intubate him after discharge from hospital, and that to my mind was a matter that the judge would have needed to further investigate if she had been minded to conclude that the NG tube should be maintained."*

Finally, the court also had cause to consider the question of transparency. Although the Trust had at one stage been anonymised, agreement had then been reached that it could be named; the contentious issue before Parker J had been whether the family, RW and the clinicians should be named. The family sought to contend that RW was in a similar position to Manuela Sykes, as a campaigner who would have wanted his name to be made public. Parker J held that none of these individuals should be named. Before the Court of Appeal, the outstanding challenge was to her decision as regards RW.

Rejecting the challenge, Sharp LJ made clear that the threshold for interfering in the judge's decision was a high one: "*i.e., where a first instance judge had "erred in principle or reached a conclusion which was plainly wrong, that is, one outside the ambit of conclusions which a judge could reasonably reach: see Browne v Associated Newspapers Ltd [2007] 3 WLR 289 at paragraph 45 and JIH v New Group Newspapers Ltd at para 26*" (para 74). She further made clear that she agreed with Peter Jackson LJ's observations (at paras 98-99) that:

> *98.* […] *In cases of this nature, the balance between Arts. 8 and 10 will normally be found to tip in favour of protecting the identity of the individual concerned. Individuals and families coming before the Court of Protection in often extreme circumstances should not have the further worry that they are likely to be identified to the public at large.*
>
> *99. There will be occasional cases (Derek Paravicini, Steven Neary, Manuela Sykes) where individuals are named. Of these, the last is most directly relevant to the situation of RW. Ms Sykes was a campaigner who, before losing capacity, had placed much information about herself and her dementia in the public domain. It is said by RW's sons that he would want the same, largely so that alleged shortcomings in his treatment at various hospitals could be publicised to the greatest effect. It is said that information about RW could be selected for publication, so as not to expose the indignity of his current condition. I do not find these arguments persuasive. There is no dependable evidence that RW would want his most private information to be identified to the world at large, and any grievances expressed by his sons (which find no support in the judge's judgment) are theirs, not his. The proposal that there should be a partial embargo, for example on photographs that we have seen of RW in his current condition, risks misinforming, rather than informing the public. I therefore agree with Sharp LJ's conclusion and her reasons, more fully expressed, as to the continued anonymisation of RW and his family members, and as to the duration of the order.*

In addition to the points of law recorded above, Sharp LJ's judgment contained a useful discussion (at paras 23-31, by reference, in particular, to the evidence of the independent expert geriatrician) of good medical practice in the context of end stage dementia.

Comment

It is rare for a challenge to be brought to a first instance judgment on best interests on the basis that the judge was simply wrong. This judgment – as with *Aintree* – makes clear why: the appellate courts are extremely reluctant to interfere in the evaluative process undertaken by first instance judges. Indeed, this judgment is unusual because it is so detailed in its explanation as to why permission was being refused; the Court of Appeal was, in reality, using the opportunity to emphasise the general points addressed above, hence why they gave permission (at para 82) for it to be cited in future cases.

PROPERTY AND AFFAIRS

Endorsing after the event

TH v JH & Ors [2018] EWCOP 13 (HHJ Vincent)

Best interests – property and affairs – CoP jurisdiction – costs – interface with civil proceedings

Summary

This was an application by the holder of an EPA for retrospective approval of gifts and payments for voluntary care. P at the time of the application was 95 and suffering from advanced dementia and living in a residential home. He was a widower and his assets consisted of his interest in his former home and a reasonable income.

The applicant was one of his sons and the application was opposed by the other son. There was a good deal of enmity involved between the two.

The payments in question had taken place over a number of years during which time for a substantial period the applicant was his father's full time carer. Unfortunately, he had kept no proper records of his dealings with his father's money nor accounts of why he was "paying" himself or his family what he did. He agreed that he should be replaced by a panel deputy.

In the result, the court gave retrospective approval for a substantial part of the payments whether as gifts or proper payment for voluntary care.

As regards the non-approved sums, the court stated that the Court of Protection has no jurisdiction to make an order for repayment (see paragraph 112). The court held that it would not be in P's best interests to order the to be appointed deputy to set about recovery proceedings (113) and directed instead that the outstanding debt be taken from the applicant's putative share of P's residuary estate and if insufficient as a debt owed to that estate.

As regards costs, despite criticisms of the applicant's defaults, there was no finding of bad faith and the resulting sum approved was much nearer the applicant's contentions than those of his brother. Thus, the court refused to depart from the usual rule that the parties' costs be paid from P's estate.

Comment

This case illustrates the problems that ensue when an attorney does not keep proper records and document decisions to make gratuitous care payments etc. As regards the jurisdiction to make an order for repayment, it is right that there is no express power and this is a deficiency that could be remedied. In *Re PP* [2017] EWCOP 29 (January and March 2018 Reports) however, the court, in effect, made retrospective approval conditional on repayment and bringing into hotchpot and that could, if appropriate, have been a practice followed here.

PRACTICE AND PROCEDURE

Choosing a litigation friend

Flora Keays by her litigation friend Sara Keays v The executors of the estate of the late Right Honourable Cecil, Baron Parkinson [2018] EWHC 1006 (Ch) (Court of Appeal (Arden, Sharp and Peter Jackson LJJ))

Other proceedings – Chancery

Summary

Flora Keays is the adult child of the late Cecil Parkinson and Sara is her mother. Whilst a child, Sara obtained a maintenance order against Cecil Parkinson in the sum of £20,000 per annum for Flora. Cecil Parkinson continued that payment after Flora's majority because Flora suffers from serious physical and mental disability.

Cecil Parkinson died on 22 January 2016 and his will made no provision for Flora (or Sara). He referred to a life insurance policy of which Flora was said to be the sole beneficiary.

The £20,000 per annum payments stopped and Flora brought Inheritance Act proceedings seeking financial provision from Cecil Parkinson's estate. The executors alleged inability on the part of Sara to conduct the litigation on Flora's behalf and a conflict of interest and brought an application for her removal as litigation friend. CPR21.7 gives the court power to terminate a litigation friend's appointment and appoint another but does not give any guidance as to how that discretion should be exercised.

So far as authority is concerned, Master Clark relied on, in respect of adverse interest, a passage from *Davilla v Davilla* [2016] B14 (Ch) (a judgment of Laurence Rabinowitz sitting as a deputy High Court Judge) at paragraph 137 as follows:

> *(1). As noted above, CPR 21.4(3)(b) stipulates that in order for a person to act as a litigation friend that person must have "no interest adverse to that of the …protected party". The relevant inquiry here is directed towards the conduct and outcome of the litigation for which the individual is to be appointed as litigation friend, and it will in most cases not be relevant to search, outside the bounds of the particular litigation, for some factor that might suggest some potential conflict between the interests of the party and the interests of the litigation friend unless it can reasonably be said that this potential conflict may also affect the manner in which the litigation friend is likely to approach the conduct of the litigation itself.*
>
> *(2). Moreover, what this prohibition is directed towards is an interest that is "adverse" to that of the protected party. It follows that the fact that the person appointed as litigation friend has his own independent interest or reasons for wishing the litigation to be pursued ought not, in general, to be a sufficient reason for impeaching that appointment. Such an interest would, at least in general, run in the same direction as the protected party rather than being adverse to the protected party's interests.*

> *(3). However, it is necessary in this context to have regard to the decision of the Court of Appeal in Nottingham CC v Bottomley and another [2010] EWCA Civ 756, the only authority on this issue to which I was referred. In dealing with the position of a litigation friend, Stanley Burnton LJ (with whom Rix and Maurice Kay LLJ agreed) emphasised the need for the litigation friend to "seek the best outcome" for the protected party and for a litigation friend to "be able to exercise some independent judgment on the advice she receives from those acting for a claimant, and …be expected to accept all the advice she is given", something that might be difficult where, as in that case, the litigation friend worked for an organisation that would benefit from a settlement in a form that might not necessarily be to the benefit of the protected party itself.*
>
> *(4). This highlights the fact that, even where the interests of the protected party and litigation friend generally run in parallel or coincide, this does not of itself preclude the possibility that, in some contexts, those interests might diverge and become adverse. Whether or not that is so will, of course, always depend upon the facts of the particular case.*

Master Clark rejected the executors' allegations against Sara Keays of conflict of interest and lack of ability to conduct the litigation. Sara Keays had, however, agreed to the appointment of an independent solicitor as Flora's litigation friend but the executors would not agree to her choice, hence the need for the hearing.

As Master Clark noted at para 47:

> *The application notice seeks the appointment of a solicitor proposed by the executors as being an appropriate litigation friend. That is an unusual application. The practical reality is that the litigation friend will have extensive dealings with the parent or person responsible for the child or protected party. The court should therefore in my judgment be reluctant to impose a litigation friend on the parent or responsible person; and should only do so if there is no other viable candidate.*

Master Clark, further, noted that the executees could not veto a solicitor chosen by Sara: provided that the solicitor was otherwise a suitable appointee, she should be entitled to choose the solicitor that she preferred.

The executors gave a number of bases for objecting to the solicitor chosen by Sara, but ultimately accepted that she could fairly and competently conduct the proceedings on the claimant's behalf. However, they nonetheless submitted that it would not further the overriding objective for her to be appointed, when personal difficulties had arisen between her and the partner acting for the executors. However, Master Clark noted that "*the suggestion that the overriding objective requires harmonious personal interactions between solicitors acting for opposing parties seems to me to be unrealistic*" and that, in any event, it would be possible to circumvent any such personal difficulties. In the result, therefore, Master Clark appointed the solicitor of Sara's choice.

At the end of her judgment, Master Clark remarked upon the fact that the executors were not taking a neutral stance as regards the claim or the application. She stated that that was not desirable as costs

attributable to the role of an executor as such in a claim such as this ought to be clearly distinguishable from those incurred in defending the claim, see CPR PD 46, para 1.

Comment

The circumstances of this case are somewhat unusual, but they provide a useful reminder of the meaning of "adverse interest" for purposes of identifying whether a person is a suitable litigation friend. The observation that the court should be reluctant to impose a litigation friend over the choice of that of a parent or responsible person in civil proceedings sits at interesting odds with the position in relation to the appointment of litigation friends before the Court of Protection, where (perhaps as a function of the inquisitorial nature of the proceedings) the views of others as to who might constitute a suitable litigation friend play much less of a role.

Finally, in the context of litigation capacity more generally, the facts of this case arguably pale into comparison to the fascinating case of *Wembley v Wooten* [2018] FamCA 334, determined recently in Australia, where in the context of determining that a man did, in fact, have capacity to conduct parenting and property proceedings, the court had to consider whether the man's ability to give instructions was affected by, inter alia, alcohol consumption, his heavy chain smoking, and his focus on proving that he was right and his legal representatives were wrong. As Macmillan J noted: "[t*]he husband in this case is not the first nor will he be the last litigant who thinks he is smarter than those advising him. Nor will the husband be the first or last litigant to make foolish decisions. That in my view does not make him a person with a disability*."

Court of Protection online

As part of the HCMTS reform programme, work will start in Spring 2019 to enable people using the Court of Protection to initiate and manage their cases online. We will watch this development with care – not least to with an eye to whether, to serve the needs of some, the result is that the court is moved yet further out of the reach of those Ps/their families who are unable to make use of these online facilities.

Lady Hale on openness and privacy in proceedings

Those concerned with transparency issues in the Court of Protection may find it useful to read and reflect upon how many of the observations made by Lady Hale in her Sir Nicholas Wall Memorial Lecture 2018 relating to openness and privacy in family proceedings either could or should apply in proceedings before the Court of Protection.

THE WIDER CONTEXT

ENGLAND AND WALES

National Mental Capacity Forum Report

The report of Baroness Finlay, Chair of the NMCF, for 2017 has now been published. Aside from giving mentions in dispatches for our guides, the report outlines the work done by the Forum against the four priorities set by the Chair:

- Hearing the voice of the person
- Improving understanding
- Supporting carers
- Reducing/preventing exploitation

The report does not just address work done by the Forum, but also contains very useful examples of good practice from across a wide range of sectors and geographical areas. It concludes with identifying the following priorities for the next year's work:

1. The Deprivation of Liberty Safeguards proposed by the Law Commission, the Joint Committee on Human Rights inquiry and the Government's responses, as well as the next steps over implementation of improved regulations.
2. The current Mental Capacity Act Code of Practice is a strong candidate for interim revision, as some parts are now out of date; this is particularly true of the DoLS additional code.
3. The difficulties around transition from children to adult services as a person reaches 18 may need clear guidance to create a more seamless transition to independence and greater protection of those who will probably never reach independence.
4. The cessation of life sustaining nutrition and hydration must be monitored to ensure appropriate protection of the patient, to audit the 'best interests' decision-making processes, and examine the long-term outcomes of such processes. This requires the establishment of a confidential register of such deaths.
5. Those who provide advocacy services of any type hold an enormous amount of responsibility for the safeguarding and wellbeing of vulnerable people. It is important that those providing advocacy services are nationally registered and regulated. There is a need for an independent uniform complaints and disciplinary procedure in the event of concerns being raised.
6. For decision-making support to be effective, those providing support must listen attentively and non-judgementally to the person with impaired capacity, and identify ways to maximise the

person's decisions making ability. This requires people across all walks of life to recognise their responsibility to others they encounter in any sector.

Ordinary residence disputes in relation to those with impaired capacity

The Department of Health and Social Care has published the latest round of anonymised determinations of ordinary residence disputes from 2017. These disputes quite commonly involve people who lack capacity to make their own decisions about their residence and care. Insofar as they relate to such issues, the latest determinations are summarised below:

- OR11 – P had a moderate learning disability and autism. From 1998, P lived in Council A, first at home with his mother and then from 2004 in a care home. On 10 December 2012, the Court of Protection decided that it was in P's best interests to reside in independent supported living accommodation. On 17 January 2013, P moved to supported living accommodation in Council B. His accommodation was paid for by way of housing benefit. The Secretary of State concluded that P had been ordinary resident in the area of Council B since 17 January 2013.

- OR 12 – P had a diagnosis of Down's Syndrome and learning disability. Prior to March 2015, P lived in supported housing in Council A. P's needs changed and she was assessed as needing a supported living placement. Capacity assessments in February and March 2015 concluded that P had capacity to decide where to live and to sign a tenancy agreement. P was offered a choice of two placements and chose a supported living placement in the area of Council B. Council B disputed that P had capacity to move to the supported living placement in the area of Council B. That conclusion was inconsistent with other assessments undertaken by an independent psychiatrist on 26 June 2012 and 24 September 2016, and a different social worker on 22 August 2013. The Secretary of State noted that capacity was time and issue specific and concluded that, on the balance of probabilities, P did have capacity to decide to move voluntarily in March 2015 and became ordinary resident in Council B when she moved.

- OR13 – P resided in Council B until June 1992 when she suffered an acquired brain injury after being assaulted. She was treated in hospital in the area of Council A between 1992 and 1997. It was agreed that she lacked capacity to make decisions about her residence and care. In 1997, P was discharged to accommodation in the area of Council B. Council A argued that the accommodation was hospital accommodation and that P was ordinarily resident in Council B by virtue of the deeming provision. Council B argued that the accommodation was non-hospital accommodation, that the deeming provision did not apply, and that P was therefore ordinarily resident in Council A. The Secretary of State had no hesitation in finding that the accommodation fell within the definition of a "hospital" as the evidence showed that P was admitted for treatment for her acquired brain injury for both convalescence and/or medical rehabilitation. P was therefore ordinarily resident in Council B from 1997.

- OR14 – P lived in her own tenancy in the area of Council B for approximately 50 years. In June 2015, P's GP reported that P was "*moderately demented*" and recommended a move to 24 hour residential care. Council B assessed P in July 2015 and concluded that she did not meet the eligibility criteria for residential care. P's daughter challenged this conclusion. Another assessment by Council B in September 2015 concluded that P had capacity and did not require additional services as P was due to move in with her daughter. On 22 September 2015, P moved to live with her daughter in the area of Council A. In December 2015 P was admitted to hospital in the area of Council A. Council A undertook an assessment of P's needs and concluded that she required residential care to meet her needs. In January 2016, Council A assessed P as lacking capacity to make decisions about her care and residence. P was then discharged to a residential care home in the area of Council A which was funded by Council A. Council A contended that Council B had failed in their duty to meet P's needs and that her move to Council A was not for voluntary or settled purposes. The Secretary of State rejected this argument and proceeded on the basis that P had capacity to make her own decisions as to accommodation and care. The evidence indicated that P wished to move to the area of Council A to live with or nearer her daughter. She was therefore ordinarily resident in the area of Council A.

- OR15 – P attended a residential special school in the area of Council B from 2000. In 2009, she was subsequently placed in the area of Council A and the placement involved accommodation funded by the NHS. There was a starting but rebuttable presumption that a person would not acquire an ordinary residence while in NHS funded accommodation but that had to be considered in light of all of the relevant facts. In this regard, there was a dispute as to P's capacity to make decisions about her residence and care at that time. Although there was no assessment of P's capacity, there was evidence available as to P's cognitive abilities in 2008. The Secretary of State determined that it was more likely than not that P did not have capacity to decide where to live. There was no indication that P's placement in Council A was intended to be temporary or that the area of Council B would remain the focus of her life and activities following her move. The Secretary of State determined that P was ordinarily resident in the area of Council A.

- OR16 – P had been diagnosed with a learning disability, schizophrenia and epilepsy along with a number of physical health needs. She had been admitted to various institutions including hospitals from 1964 to 2004 and a care home from 2004 in the area of Council B. There was no dispute that P lacked capacity to decide where to live. It appeared that Council A granted a standard authorisation depriving P of her liberty in the care home. In 2014, Council B was informed that P no longer qualified for "mental health funding" and that responsibility for P's care passed to Council B's social services authority. Council B disputed the decision that P was no longer entitled to health services. The Secretary of State determined that P was ordinarily resident in the area of Council B placing weight on (amongst other factors) the fact that P indicated a wish to remain in Council B, that she had lived in Council B since 1971, and that in all the circumstances it would be contrary to common sense to suggest that B was ordinarily resident in Council A.

Comment

The ordinary residence test must always be applied to the facts following the approach of *R (Cornwall Council) v Secretary of State for Health* [2015] UKSC 46 (see also our guidance here). These recently published determinations do not set out any new legal principles. However, they do provide useful examples of how the test is applied in practice across a variety of factual circumstances, and the transparency shown in public decision making by the publication of these determinations is very welcome.

New advance care planning assistance

Compassion in Dying having published a new booklet: '*Planning Ahead: My treatment and care*.' It is a practical guide designed to assist both professionals who want to promote Advance Care Planning in their care setting, as well as individuals who want to make plans for their future treatment in line with their beliefs, values and wishes. The booklet can be ordered free of charge here.

Getting things changed

A report has been published into research led by Bristol University conducted in the light of the implementation of the Equality Act 2010 to better understand the gap between policy and practice, and to see how changes can be made to practices on the terms of disabled people themselves. The objectives of the project were to:

1. identify the barriers facing disabled people in the UK, and understand better how social practices get 'stuck';
2. discuss and connect micro and macro theories of social practice, by applying them within the field of disability;
3. explore disabled people's own solutions, and understand better the conditions under which 'coproduction' can have an effect on practice;
4. develop detailed understanding of how organisations and practices can be shifted, on the terms of disabled people themselves;
5. recommend what can be done by disabled people, practitioners and policy makers to tackle the injustices experienced by disabled people.

203 practitioners and 245 disabled people (with impairments ranging from physical, sensory, mental health issues, autism, learning disabilities and dementia, and many multiple or complex impairments) took part in the research over a 3 year period.

The key recommendations for policy makers and practitioners include:

- All public institutions must have systems in place, preferably led by disabled people, to monitor and report on how they're adhering to the Equality Act 2010.
- Disability needs to be valued as part of increasing diversity within organisations, and to be seen as a way of promoting better ways of doing things.
- Informal, more relaxed settings are often the key to better practices, for instance in personal support but also at universities, within hospital waiting rooms, or in dementia groups.

HUMAN RIGHTS DEVELOPMENTS

Capacity, consent and Strasbourg

Shakulina & Ors v Russia [2018] ECHR 464 (European Court of Human Rights (Third Section))

Article 5 – deprivation of liberty – mental capacity -assessing capacity

Summary

This case concerned six Russians who had been deprived of their capacity; four complained of serious irregularities in the court proceedings whereby they had been deprived of their legal capacity. One applicant also complained of her involuntary confinement in a psychiatric facility.

Articles 6 and 8 ECHR

The Strasbourg court took the opportunity to undertake a useful recap of the provisions of Articles 8 ECHR in the context of deprivation of legal capacity, emphasising that such constitutes a serious interference with a person's private life, leading (in the applicants' case) to the loss of their "*autonomy in almost all spheres of their life for an indefinite period of time*."

Whilst the ECtHR emphasised that "*in such a complex matter as determining someone's mental capacity, the national authorities should have a wide margin of appreciation because they have the benefit of direct contact with the persons concerned and are therefore particularly well placed to determine such issues*," the court reminded us that the extent of the State's margin of appreciation depends on two major factors:

1. the nature of the issues and the importance of the interests at stake. Thus, very serious limitations in the sphere of private life or restrictions on the fundamental rights of a particularly vulnerable social group may warrant stricter scrutiny.
2. the quality of the domestic procedure which resulted in the interference. Although Article 8 of the Convention contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to ensure due respect for the interests safeguarded by Article 8.

Key aspects of the judicial decision-making process determining a person's legal capacity include:

1. whether or not the person concerned had had a possibility to participate personally and/or had had some form of representation in the incapacitation proceedings;

2. whether the person concerned had been able to appeal against the incapacitation decision;

3. whether, after the lapse of a certain period of time, an automatic review of the legal status or direct access to the court had been available to incapacitated people; and

4. whether the experts assessing the state of health of the incapacitated people had been neutral.

The court noted that it had previously examined whether:

1. the national courts had relied on an up-to-date medical expert report;

2. whether the medical experts and subsequently the national courts had not only found the existence of a mental disorder, but had also assessed the nature or degree of the disorder as warranting legal incapacitation; and

3. whether the national courts had examined evidence other than the medical expert report and analysed other factors in their determination of a person's legal capacity.

The court noted that it had previously found violations of Article 8 of the Convention in situations where the national courts, by virtue of the domestic law, had been unable to provide a tailor-made response to a person's particular circumstances and had had the choice only between full capacity or total incapacitation of the person concerned.

Applying those principles to the cases before it, and on facts that are not directly relevant for our purposes, the court had little hesitation in finding that the Article 8 rights of the individuals concerned had been breached. The court further noted that noted that the different nature of the interests protected by Articles 6 and 8 of the Convention may require separate examination of the claims lodged under these provisions, but that in the present cases having regard to the findings under Article about procedural defects in the incapacitation proceedings it was not necessary to consider Article 6 separately.

Article 5

Ms Shakulina also complained of her involuntary psychiatric confinement. An emergency doctor had ordered the her urgent hospitalisation on account of her deteriorating state of health. In particular, she had been living in insanitary conditions, had not been paying utility charges, had been using an open fire, had been cooking on a radiator, and had delusional ideas about her neighbours. Her brother, who was her legal guardian at the time, consented to her hospitalisation. The psychiatric hospital then became her guardian, and consented to the hospitalisation. She was then subsequently detained on the basis of an order of the District Court, acting on expert opinion to the effect that she had schizophrenia.

In a further addition to the small but important body on the nature of consent to confinement (analysed in Alex's paper here), the court noted that it appeared that the government was claiming the applicant's treatment in the psychiatric hospital had been voluntary because her guardians had consented to it and that, thus, the applicant was not deprived of her liberty within the meaning of Article 5(1) of the Convention. Relying on its analysis in the earlier Shtukaturov case, the court found that: "*even though the applicant was legally incapacitated, it did not preclude her from understanding her situation and expressing her opinion on the matter* [and that] *she was able to understand her situation and did not agree to her psychiatric confinement. Therefore, she was deprived of her liberty for the purposes of Article 5 § 1 of the Convention*."

Whilst the court found that Ms Shakulina was undeniably suffering from a mental disorder and thus could be considered "a person of unsound mind," there had not been any proper analysis of the kind or degree of the applicant's mental disorder and a number of serious procedural defects in the judicial authorisation of her continued involuntary psychiatric confinement. Her deprivation of liberty was therefore unlawful.

Comment

On one view, the observations of the court in relation to incapacitation relate to a far-off legal procedure of which we know little. However, the reality is that appointment of a deputy under the MCA or a guardian under the Adults with Incapacity Act may [2] have the effect of amounting to legal incapacitation of the individual in question, at least in respect of all decisions within the scope of the deputy/guardian's authority.

This judgment should again make us ask whether the changes in the Court of Protection Rules in (now) rule 1, introducing the menu of options for P's participation – which were introduced in large part in response to the earlier case-law of the court – go far enough? And what of the position in Scotland in relation to guardianship applications?

This judgment is also of interest for the fact that no reference is made to the CRPD, despite the fact that the case was brought by the admirable MDAC (now Validity), who have been assiduous in other cases in highlighting its provisions. In any event, however, the judgment does not suggest that the Strasbourg court considers that measures to remove or limit legal capacity on the basis of (in CRPD terms) psychosocial disability are per se unlawful. Rather, the court proceeds on the basis that they constitute a serious interference with the rights of the individual, must proceed on the basis of proper

[2] We say "may" because we note that Strasbourg appeared to consider that that the Finnish system, which allows for a "*mentor*" to represent a "*ward*" in relation to matters pertaining to their person only where the latter is "*unable to understand its significance*" did not amount to a deprivation of restriction of legal capacity, because "*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*." (*AM-V v Finland* [2017] ECHR 273).

evidence and suitable procedural protections, and, crucially, represent a tailor-made solution to the circumstances of the individual. It would be interesting to see how the Strasbourg court reacted to the provisions of s.5 MCA 2005 which, as they stand, represents both a much less draconian – and more tailor-made – way of responding to temporary or permanent impairment of capacity, but, conversely, a measure which is surrounded with very few procedural safeguards.

Finally, it is difficult when reading the discussion of whether Ms Shakulina was consenting to her confinement not to have in mind the recent blog by Mark Neary about the capacity assessment being undertaken for his son for purposes of the 'community DOLS' application being prepared by Hillingdon. If the 'test' that was being set was whether was able to express a view on the matter, one might think that he both could and does – and that, on this test, he should not be considered to be deprived of his liberty.

Involuntary detention – a further go-round in Geneva?

For those who have been following the split in Geneva between the UN bodies as to whether involuntary detention and/or treatment is ever permitted (as to which, see further here), the most recent opinion of the Human Rights Council Working Group on Arbitrary Detention ('WGAD') makes fascinating reading.[3]

The WGAD was considering a complaint relating to Japan regarding the detention, on (broadly) psychiatric grounds of a Mr N. The WGAD, noted that:

> *35. The Working Group notes that article 9 of the Covenant* [i.e. the International Covenant on Civil and Political Rights] *requires that no one shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by national law. In the present case, the Working Group observes that article 29 of the Act on Mental Health and Welfare for the Mentally Disabled (Act No. 123 of 1950) permits hospitalization only when two or more designated mental health doctors have made the same judgment that the person in question has a psychiatric disorder and that he or she could harm himself or herself or others due to his or her psychiatric disorder unless he or she is hospitalized for medical care and protection. In such a case, the Governor of the Prefecture shall inform the person in question, in writing, of the fact that he or she is to be involuntarily admitted.*
>
> *36. Without making any assessment of the compatibility of the above-mentioned provisions of the Act on Mental Health and Welfare for the Mentally Disabled with the international human rights obligations of Japan, it appears obvious to the Working Group that those provisions were not followed during the involuntary hospitalization of Mr. N.*
>
> […]
>
> *38. The Working Group wishes to underline that any instance of deprivation of liberty, including internment in psychiatric hospitals, must meet the standards set out in article 9 of the Covenant. The Working Group, in the*

[3] It is available here http://www.ohchr.org/Documents/Issues/Detention/Opinions/Session81/A_HRC_WGAD_2018_8.pdf, in advanced unedited form.

> *United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings before a Court, states that, where a person with a disability is deprived of his or her liberty through any process, that person is, on an equal basis with others, entitled to guarantees in accordance with international human rights law, necessarily including the right to liberty and security of person, reasonable accommodation and humane treatment in accordance with the objectives and principles of the highest standards of international law pertaining to the rights of persons with disabilities. A mechanism complete with due process of law guarantees shall be established to review cases of placement in any situation of deprivation of liberty without specific, free and informed consent. Such reviews are to include the possibility of appeal.*
>
> […]
>
> *45. The Working Group also notes that Japan has been a party to the Convention on the Rights of Persons with Disabilities since 20 January 2014. The Working Group reiterates that it is contrary to the provisions of article 14 of the Convention to deprive a person of his or her liberty on the basis of disability. Moreover, as stated in the Basic Principles and Guidelines, the involuntary committal or internment of persons on the grounds of the existence of an impairment or perceived impairment is prohibited.*
>
> *46. The Working Group once again wishes to emphasize that Mr. N was initially detained for the minor offence of attempted theft of a can of carbonated drink. Neither at the time of his detention nor prior to that there is any evidence of Mr. N being violent or otherwise presenting a danger to himself and/or to others. His subsequent transfer to Tokyo Metropolitan Matsuzawa Hospital had no connection to the initial incident of attempted theft. It is therefore clear to the Working Group that the deprivation of liberty of Mr. N was carried out purely on the basis of his psychiatric disorder, and was thus discriminatory* (emphasis added).

From paragraph 46, it would appear, therefore, that the WGAD takes the view (as does, inter alia, the UN Human Rights Committee) that it is lawful to deprive a person of their liberty where they both have a psychiatric disorder and either pose a risk to themselves or others. Paragraph 45 suggests that the WGAD consider that they are, in so doing, applying Article 14 CRPD. The CRPD Committee by contrast takes the view (in its Guidelines on Article 14) that "*the involuntary detention of persons with disabilities based on risk or dangerousness, alleged need of care or treatment or other reasons tied to impairment or health diagnosis is contrary to the right to liberty, and amounts to arbitrary deprivation of liberty*."

We also note in this context the admissibility decision (in November 2017, but which has only just come to our attention) of the Strasbourg court in *N v Romania*. In its – now usual – review of relevant international instruments, the court took specific note both of Article 14 CRPD and of the Committee's guidelines on the Article (see both paras 102-3 and 147). However, these did not lead the court to conclude that deprivation of the liberty on the basis of unsoundness of mind was, per se, unlawful, as the Committee contends (see the review of general principles at paras 141-142). Rather, and in similar vein to the WGAD, the court proceeded on the basis that Article 14(1)(b) CRPD was aimed at stopping situations where the sole reason for detention was the individual's disability: see paragraph 159 and the discussion in the preceding paragraphs about the absent of evidence that Mr N posed any danger to society.

World Health Organisation report on institutional care in Europe

A report published in June by a WHO project on adults with psychosocial and intellectual disabilities living in institutions in the WHO European Region examined a total of 75 institutions across 24 countries in the Region and Kosovo using the WHO QualityRights Toolkit. Out of all the quality ratings made, only 25% showed compliance with international standards, meaning that long-term institutional care in the Region has significant room for improvement. As the report identifies:

> *long-term institutional care for people with psychosocial and intellectual disabilities in many European countries is far below the standard. A significant proportion of the assessed institutions were violating the fundamental rights of people with psychosocial and intellectual disabilities, including their legal capacity, autonomy, dignity, liberty and security of person, physical and mental integrity and freedom from torture and ill treatment and from exploitation, violence and abuse. Some of the most egregious violations reported were: use of mechanical and pharmacological restraints to manage difficult behaviour, a culture of impunity with regard to reported cases of sexual abuse, numerous irregularities concerning informed consent, discrimination and barriers to access to high-quality care for general and reproductive health, lack of alternative or complementary mental health treatment options and a general lack of opportunities for meaningful daily activities within or outside the institutions.*

SEND assistance from abroad

For those seeking to make arguments based upon the CRPD before the SEND Tribunal, in particular for measures to be taken to ensure provision of education on an inclusive basis, we would suggest that reference might usefully be made to the detailed report just issued (so far in advanced unedited form) by the CRPD Committee in response to a complaint against Spain in relation to its provision of special educational needs.

OTHER INTERNATIONAL DEVELOPMENTS OF RELEVANCE

Vulnerable Adults – a Singaporean solution?

On 18 May 2018, the Government of Singapore passed the Vulnerable Adults Act (a link to the Bill is here, which we understand was passed without amendment). The passing of the Act follows extensive consultations and engagements with the public and stakeholders with strong support for the Bill, with many acknowledging the problems associated with Singapore's rapidly ageing population. The Act is intended to provide greater protections for vulnerable adults. Section 4(1) sets out the key principles:

> *(1) In performing any duty or exercising any power under this Act in relation to a vulnerable adult, the Director and every protector, approved welfare officer and enforcement officer must have regard to the following principles:*
>
> *(a) the duty is being performed or the power is being exercised for the purpose of protecting the vulnerable adult from abuse, neglect and self-neglect;*

(b) a vulnerable adult, where not lacking mental capacity, is generally best placed to decide how he or she wishes to live and whether or not to accept any assistance;

(c) if a vulnerable adult lacks mental capacity, the vulnerable adult's views (whether past or present), wishes, feelings, values and beliefs, where reasonably ascertainable, must be considered;

(d) regard must be had to whether the purpose for which the duty is being performed or the power is being exercised can be achieved in a way that is less restrictive of the vulnerable adult's rights and freedom of action;

(e) in all matters relating to the administration or application of this Act, the welfare and best interests of the vulnerable adult must be the first and paramount consideration.

The Vulnerable Adults Act is intended to complement existing laws that protect vulnerable individuals such as the Women's Charter and Mental Capacity Act (the latter modelled very closely upon the English MCA 2005). The powers conferred in the Act enable the State to intervene by way of, for example, entering a vulnerable adult's premises (section 8), assessing his or her condition (section 6), and relocating that individual to a place of safety (section 11) if he or she is at risk. The threshold for exercising these powers is a high one – either the individual must be a "vulnerable adult" (defined as an individual over the age of 18 and is, by reason of mental or physical infirmity, disability or incapacity, incapable of protecting himself or herself from abuse, neglect or self-neglect) and who is experiencing or at risk of abuse, neglect or self-neglect (section 5). According to the Ministry of Social and Family Development ("MSF"), the Act is designed to be used as a matter of last resort where family and community interventions have been exhausted or are ineffective. The Minister for Social and Family Development made a public plea for the community to step forward and break the silence by reporting any suspected cases of abuse, neglect or self-neglect. The Act protects whistleblowers from civil and criminal liability as long as they act with reasonable care and in good faith. The MSF intends to bring the law into force before the end of the year.

It is instructive to consider from our perspective what we might learn from overseas jurisdictions dealing with similar problems and concerns. In our domestic legal system, the regime of last resort which is deployed to protect vulnerable adults is the inherent jurisdiction of the High Court – a device which was called "the great safety net" by Lord Donaldson MR in *Re F* [1990] 2 AC 1 cited with approval by the (soon to be) President of the Court of Protection, Lord Justice McFarlane, in *A Local Authority v DL* [2012] EWCA Civ 253. That "the great safety net" of the inherent jurisdiction has survived the passing of the Mental Capacity Act 2005 in England and Wales is not now in doubt. However, what is far from clear is the precise remit of the inherent jurisdiction and the circumstances in which it can – and should – be exercised. This is often left to be tested on a case by case basis. There is an argument that a codified statutory framework, along the lines of the Singapore Vulnerable Adults Act, setting out the principles, powers and circumstances in which those powers can be exercised, might provide greater certainty and confidence to act (or refrain from acting) in what are very often extremely difficult,

sensitive and delicate circumstances. Scotland already has a statutory framework for the protection of adults at risk of harm in the Adult Support and Protection (Scotland) Act 2007.

The express protection for whistleblowers might also engender a culture of more openness which is particularly critical where acts of abuse take place behind closed doors. It will be interesting to see how the Singapore Vulnerable Adults Act is interpreted and utilised in practice in future years.

Gibraltar Lasting Powers of Attorney and Capacity Act 2018

This new law came into effect in April 2018, including provisions (modelled on the MCA) relating to lasting powers of attorney and advance decisions, and a scheme (modelled on that in the Jersey Capacity and Self-Determination Law 2016) for authorising 'significant restrictions upon liberty.' It will be interesting seeing how these statutory definitions fare before the courts, hooked as they are very much on redefining the objective 'acid test' in ways that, on their face, may appear to water down the universality of the meaning of the right to liberty so strongly emphasised by Lady Hale in *Cheshire West*.

SCOTLAND

Public Guardian appointed

Fiona Brown, currently Deputy Public Guardian and Deputy Accountant of Court, will become Scotland's third Public Guardian with effect from 1st August 2018. She will also take over the linked role of Accountant of Court, an office that has existed since 1889. She will take over both roles from Sandra McDonald, whose forthcoming retirement was reported in the May 2018 report.

Fiona Brown has worked for what is now Scottish Courts & Tribunals Service ever since she became an Administrative Assistant at Airdrie Sheriff Court when she left school in 1993. Successive promotions have taken her to various locations since then. Her last appointment before she joined the Offices of the Public Guardian and Accountant of Court was as Fines Enforcement Manager for the Sheriffdom of South Strathclyde, Dumfries & Galloway. That appointment coincided with the introduction of the then new fines enforcement regime, ahead of unification with District and JP courts. She created the Fines Enforcement Team for her sheriffdom and was fully involved in implementation of the National Fines Enforcement Scheme.

In December 2014 she joined the Office of the Public Guardian, taking up post as Deputy Public Guardian and Deputy Accountant of Court, initially on a temporary basis, her appointment being substantive from June 2015. Since then she has been the operational lead for the OPG Guardianship Team, and the Accountant of Court Team. She has led on a variety of projects including implementation of the Professional Guardians Scheme, a significant internal restructuring, and the re-engineering of supervisory processes in order to achieve compliance with the UN Convention on the Rights of Persons with Disabilities.

She says that she is "*absolutely delighted*" at the appointment: "*I am excited by the challenge and am really looking forward to leading the Office of the Public Guardian and of the Accountant of Court through this next phase, a period which will bring significant changes. I am quite sure, with the support of the team, we will deliver effective and positive results*."

Paying tribute to her predecessor, she added: "*It is a fantastic opportunity, but I have big boots to fill; I wish Sandra McDonald well in her new venture as an independent advisor and trainer in the mental capacity field, and am pleased that we don't lose her entirely!*"

Adrian D Ward

Mental Welfare Commission for Scotland Advice Note on Powers of Attorney authorising significant restrictions of liberty

In March the Mental Welfare Commission published its advice on whether a person holding a Power of Attorney can authorise a significant restriction of liberty of an individual with incapacity. In the absence of reform, the Adults with Incapacity (Scotland) Act 2000 is currently silent on this issue.

This is very pertinent to compliance with Article 5 ECHR (the right to liberty), requiring as it does both legal authorisation for a non-consensual deprivation of liberty and a real and effective ability to challenge the legality of such deprivation of this liberty. However, the ability of welfare attorneys, or similar arrangements, to consent to deprivations of liberty has been, and remains, a rather grey area in European Court of Human Rights jurisprudence. Its ruling in *Stanev* hinted that such an arrangement might be permissible and Article 5 compatible but no further guidance was provided and its *Stankov* ruling, in fact, implied that extreme caution should be adopted here.

There is, of course, the argument that if an adult has granted an attorney the power to consent to care arrangements, including arrangements amounting to a deprivation of liberty, then this should be respected. This is recognised by the Commission – and it encourages people granting powers of attorney to be as specific as possible in the powers granted – but the Commission does not consider that a power of attorney can be safely relied on to authorise coercive measures which amount to a deprivation of liberty.

Noting the Article 5 ECHR requirement for legal authorisation for a non-consensual deprivation of liberty and the requirement of Article 12 of the Convention on the Rights of Persons with Disabilities that measures affecting a person's legal capacity must respect their rights, will and preferences, the Commission adopts a cautious approach. It recommends that where there is persistent verbal, or non-verbal, resistance from an adult with incapacity to a significant restriction of liberty (e.g. relating to remaining in a care setting) then it is better to seek court authorisation for such deprivation of liberty (even where a power of attorney contains a relevant provision).

At the same time, the Commission acknowledges that some resistance may be very temporary, but easily overcome with persuasion or direction, provided this respects the adult's rights. Moreover, some resistance may be for interventions not considered to be a significant restriction of liberty (e.g. to ensure personal hygiene or nutrition). In this particular connection, the Commission considers that such resistance may need to be overcome for the immediate safety of the adult or other people and that a legal process is not required if the attorney is acting within the apparent scope of their powers. However, where doubt exists as to the scope of such powers then the Commission advises that an application is made to the sheriff court under Section 3(3) of the Adults with Incapacity (Scotland) Act 2000 for directions.

Jill Stavert

Mental Welfare Commission for Scotland report on people with dementia in community hospitals

The Mental Welfare Commission has recently published a report of its visits to 78 wards in 56 of the 89 community hospitals in Scotland (between June and September 2017). Every patient with dementia who was able and willing to talk was met. The Commission also spoke to staff and family carers, and reviewed case files and drug prescription sheets.

A reading of the full report is recommended but, in essence, its key findings were that whilst there was provision for the physical health needs of patients with dementia there tended to be a lack of care planning for care and support focusing on the patient's dementia both in terms of the environment in hospital and arrangements at home. A need for targeting training amongst staff was identified. Moreover, when rights-based issues were discussed with staff the Commission often felt such staff were not familiar with incapacity and mental health legislation. Apparently, relatively few mentioned how a patient was to be supported with personal care and would be encouraged to maintain their skills and independence. 12 recommendations were made.

Existing principles that underpin both the Adults with Incapacity (Scotland) Act 2000 and Mental Health (Care and Treatment) (Scotland) Act 2003[4] specifically reinforce the need to maintain the autonomy and exercise of legal capacity of individuals with mental disorder, including dementia. ECHR jurisprudence is increasingly reinforcing this and, of course, Article 12 of the UN Convention on the Rights of Persons with Disabilities takes this much further, something that the Scottish Government has noted in its recent consultation on proposals for reform of the Adults with Incapacity (Scotland) Act 2000.[5] For this reason health boards and staff in community hospitals must take serious heed of the Commission's report and its recommendations. *Jill Stavert*

Lawscot Wellbeing

"Lawscot Wellbeing" was launched by the Law Society of Scotland at a well-attended event hosted by Burness Paull in Edinburgh on 14th May 2018. It is an online resource providing help and guidance for members of the Law Society of Scotland and employers. It works in collaboration with others in the public and voluntary sector, including NHS Scotland, LawCare, SeeMe, Scottish Association for Mental Health, and others. Its functions include providing information and signposting to members of the Law Society, to assist in managing emotional wellbeing; supporting them and others employed in the Scottish legal sector who may experience difficulties in accessing support services and advice; providing support to colleagues and managers assisting people in difficulty or crisis; providing guidance to members of the Society who have concerns about the emotional wellbeing of clients; challenging the stigma that can surround issues of emotional wellbeing; and championing best

[4] See sections 1 of both the Adults with Incapacity (Scotland) Act 2000 and Mental Health (Care and Treatment) (Scotland) Act 2003.
[5] The Scottish Government will be releasing information on responses to the consultation shortly, although several organisations have already published their responses online.

practice. The service has confidential helplines. It provides in addition support to members of the Society returning to the profession after maternity or paternity leave, and those facing redundancy. Perhaps the most telling comment at the launch event was that someone is "no less of a lawyer" because they encounter and seek to address emotional wellbeing issues. Striking advocacy of the potential impact of such issues, and the importance of access to help and support in dealing with them, was provided by Eilidh Wiseman, a Past President of the Law Society.

Adrian D Ward

Review of adults with incapacity legislation

In our last Report we included links to available responses to the Scottish Government Consultation on Reform of Adults with Incapacity Legislation. Mhairi Maguire has now provided the following link to the response by Enable Scotland, here.

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Adrian is a recognised national and international expert in adult incapacity law. While still practising he acted in or instructed many leading cases in the field. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

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Conferences

Conferences at which editors/contributors are speaking

Court of Protection seminar: The capacity to marry and divorce, and damages in the Court of Protection

Tor is speaking, with Fenella Morris QC, at a seminar organised by Irwin Mitchell on 21 June in London. For more details, and to book, please use this email address.

Other conferences of interest

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, see here.

Towards Liberty Protection Safeguards

This conference being held on 24 September 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.

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 July. 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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