



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

- (1) In the Health, Welfare and Deprivation of Liberty Report: the limits of wishes and feelings and a different take on Article 5;
- (2) In the Property and Affairs Report: changes to EPA/LPA registration fees;
- (3) In the Practice and Procedure Report: a further amendment to the CoP Rules, a major on the participation of P, a guest article on ground rules in cross-examination and HRA damages, costs and the LAA;
- (4) In the Wider Context Report: tools to address coercive control, the MCA and immigration detention, and the second issue of the International Journal of Mental Health and Capacity Law;
- (5) In the Scotland Newsletter: an important Sheriff Appeal Court decision about care charges and the divestment of assets

And remember, you can find all our past issues, our case summaries, and much more on our dedicated sub-site [here](#). 'One-pagers' of the cases in these Newsletters of most relevance to social work professionals will also shortly appear on the SCIE website.

### Editors

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

### Scottish Contributors

Adrian Ward  
Jill Stavert

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

The limits of wishes and feelings ..... 2

Short note: a different take on Article 5 ..... 4

### The limits of wishes and feelings

*Abertawe Bro Morgannwg University LHB v RY and CP [2017] EWCOP 2* (Hayden J)

*Best interests – medical treatment – treatment withdrawal*

#### Summary

The central issue in this case was whether it remained in the best interests of a 81-year-old man, RY, to receive deep suctioning via a tracheostomy which the court had previously consented to on his behalf in an *extempore* judgment ([2016] EWHC 3256). His life expectancy was predicted to be around 6 months from the hearing. His level of awareness was on an ‘upward trajectory’, from him being in a coma to a vegetative state and now in a minimally conscious state. But his general physical condition was deteriorating and would so continue. Crucially, perhaps, he had the capacity for pain and, it must be assumed, the capacity for pleasure.

The man’s daughter, CP, believed her father ‘would want everything done’ to preserve his life and he would have viewed that ‘any life is better than no life’. However, her account of his wishes were unreliable. His ‘voice’ remained resistantly silent:

*40... It is therefore particularly sad that, despite the efforts made, it has not been possible to identify RY’s own wishes. I have arrived at the general conclusion that RY was a private, decent man who was not given to discussing his emotions and beliefs and had never allowed himself to contemplate, or at least discuss with others, the parlous situation in which he now finds himself. Perhaps this is no more (or less) than the ‘sang froid’ of an older generation.*

*41. Thus I am in the position here of evaluating RY’s best interests with no evidence of sufficient quality to indicate to me what his wishes would be, were he to be in a position to communicate them. It would be both wrong to speculate, and in my view judgement, flawed to assume that in the absence of clear and reliable evidence as to RY’s views, the emphasis on the ‘sanctity of life’ becomes in some way greater. This powerful and important consideration will always weigh heavily in the balance but it must not be allowed to quash all other considerations. Those whose voices do not carry through to the courtroom are just as entitled to protection as those individuals in the cases I have referred to above.*

The true question was whether the tracheostomy was “overly burdensome.” That is to say, “whether it can be rationalised as a proportionate intervention in the context of RY’s

medical welfare, having regard to his overall clinical situation." His Lordship found:

*53. I have come to the clear conclusion that deep suctioning via RY's tracheostomy causes him pain, which may at times be considerable and at others less so. The tracheostomy serves its immediate function in the sense that it can, when required, substitute for RY's compromised cough reflex and clear secretions. In this sense the tracheostomy cannot be described as futile. The real question is whether, in the context of RY's poor prognosis and declining physiological circumstances, the deep suctioning can be said to contribute either to the quality or expectation of his life. Were it to do so it might justify the pain undoubtedly involved. I am satisfied on the evidence that it does not. Society cannot ask those in the medical profession to cause harm without purpose. To do so compromises both their integrity and, inevitably, the dignity of their patient.*

On balance, however, the court decided not at this stage to grant the application to withdraw the relevant treatment. This was because (1) the realisation that deep suctioning causes pain came late in the day and those involved needed time to reflect on that finding; and (2) no deep suctioning had been required over the previous 4 days and so had become "delicately poised between what can properly be described as 'burdensome' and that which is 'overly burdensome'. In the absence of understanding RY's own views I believe the balance tips, for now, in favour of supporting life." If the suctioning became necessary as a regular and daily part of his life, Hayden J held that it would not be in RY's

best interests and, in the absence of consensus, the Health Board would need to return to court.

Shortly after the judgment was delivered to the parties, RY died peacefully in hospital.

### Comment

This judgment stands as an interesting counterpart to that in *Briggs v Briggs (2)* [2016] EWCOP 53. In that former case, it was possible to identify with a sufficient degree of certainty what P would have done; in this case, and despite very considerable efforts, Hayden J could not be satisfied that he had any equivalent basis to guide him in his determination of the decision that was right for RY. The case therefore stands as an important reminder that there may be circumstances where the starting point in determining what decision is right for the person cannot be their wishes, feelings, and alternatives must be sought. It also stands as a reminder, however, of the importance of that the duty to seek to identify those wishes and feelings.

On an entirely different note, Hayden J also made a number of observations as to the filming of patients in prolonged disorders of consciousness as part of an assessment of their awareness:

*52. I also feel bound to record some unease with these video recordings more generally. It is axiomatic that they are highly invasive of RY's privacy and that he has no capacity to consent to them. They have been viewed by a variety of professionals. Though Mr Badwan has found them useful here, I do not consider that video recordings should ever be regarded as a routine investigative tool. Both the videoing and their distribution*

*will require strong and well-reasoned justification.*

*requirements are not contradictory but complementary [...]*

### Short note: a different take on Article 5

On 15 February 2017, the Supreme Court handed down judgment on in the matter of *R (on the application of Hicks and others) v Commissioner of Police for the Metropolis* [2017] UKSC 9. The decision arose in an entirely different context to the health and social care context, but is of no little interest as a different take upon Article 5 ECHR. The appellants had been detained for various periods on the wedding day of the Duke and Duchess of Cambridge. Each had been separately detained on the basis that the police had good grounds to believe their arrest and detention was necessary to prevent an imminent breach of the peace. They had all been released once the wedding – and the risk of a breach of the peace – was over. The central issue was whether an arrest for breach of the peace complied with the requirements of Article 5(1)(c).

Lord Toulson, giving the sole judgment of the Supreme Court and holding that the arrests had been lawful, made a number of observations about Article 5 ECHR which have a very different flavor to those made in *Cheshire West*:

*29. The fundamental principle underlying article 5 is the need to protect the individual from arbitrary detention, and an essential part of that protection is timely judicial control, but at the same time article 5 must not be interpreted in such a way as would make it impracticable for the police to perform their duty to maintain public order and protect the lives and property of others. These twin*

*30. In balancing these twin considerations it is necessary to keep a grasp of reality and the practical implications. Indeed, this is central to the principle of proportionality, which is not only embedded in article 5 but is part of the common law relating to arrest for breach of the peace."*

It will be interesting to see what, if any, use is made of these observations in the event the Supreme Court grant permission to appeal in the *Ferreira* decision, and takes stock of the "practical implications" of the decision in *Cheshire West* three years after it was handed down.

---

## Editors and Contributors



**Alex Ruck Keene:** [alex.ruckkeene@39essex.com](mailto:alex.ruckkeene@39essex.com)

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](http://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](mailto:vb@39essex.com)

Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA 2009), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click [here](#).



**Neil Allen:** [neil.allen@39essex.com](mailto:neil.allen@39essex.com)

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



**Annabel Lee:** [annabel.lee@39essex.com](mailto:annabel.lee@39essex.com)

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



**Anna Bicarregui:** [anna.bicarregui@39essex.com](mailto:anna.bicarregui@39essex.com)

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

---

## Editors and Contributors



**Simon Edwards:** [simon.edwards@39essex.com](mailto:simon.edwards@39essex.com)

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



**Nicola Kohn:** [nicola.kohn@39essex.com](mailto:nicola.kohn@39essex.com)

Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 4<sup>th</sup> edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2015). To view full CV click [here](#).



**Adrian Ward:** [adw@tcyoung.co.uk](mailto: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](#).



**Jill Stavert:** [j.stavert@napier.ac.uk](mailto:j.stavert@napier.ac.uk)

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

## Conferences

### Conferences at which editors/contributors are speaking

#### 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](mailto: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 2017. 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 April. 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](mailto:marketing@39essex.com).

**David Barnes**

Chief Executive and Director of Clerking  
[david.barnes@39essex.com](mailto:david.barnes@39essex.com)

**Michael Kaplan**

Senior Clerk  
[michael.kaplan@39essex.com](mailto:michael.kaplan@39essex.com)

**Sheraton Doyle**

Senior Practice Manager  
[sheraton.doyle@39essex.com](mailto:sheraton.doyle@39essex.com)

**Peter Campbell**

Senior Practice Manager  
[peter.campbell@39essex.com](mailto:peter.campbell@39essex.com)



International  
 Arbitration Chambers  
 of the Year 2014  
 Legal 500

Environment &  
 Planning  
 Chambers  
 of the Year 2015

[clerks@39essex.com](mailto:clerks@39essex.com) • **DX: London/Chancery Lane 298** • [39essex.com](http://39essex.com)

**LONDON**

81 Chancery Lane,  
 London WC2A 1DD  
 Tel: +44 (0)20 7832 1111  
 Fax: +44 (0)20 7353 3978

**MANCHESTER**

82 King Street,  
 Manchester M2 4WQ  
 Tel: +44 (0)16 1870 0333  
 Fax: +44 (0)20 7353 3978

**SINGAPORE**

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

**KUALA LUMPUR**

#02-9, Bangunan Sulaiman,  
 Jalan Sultan Hishamuddin  
 50000 Kuala Lumpur,  
 Malaysia: +(60)32 271 1085

39 Essex Chambers is an equal opportunities employer.

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number 0C360005) with its registered office at 81 Chancery Lane, London WC2A 1DD.

39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services.

39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.