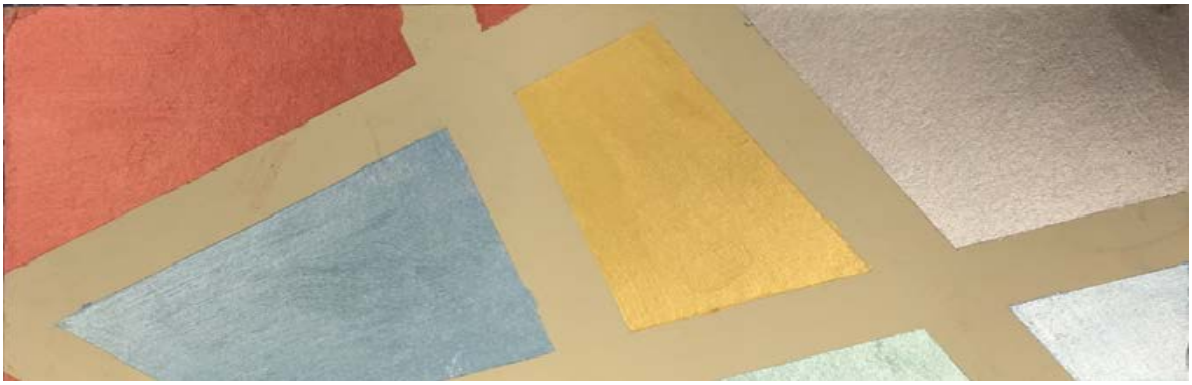
Essex CHAMBERS

MENTAL CAPACITY REPORT: PRACTICE AND PROCEDURE

March 2017 | Issue 74



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.

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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

The Court of Protection (Amendment) Rules 2017

The next tranche of amendments to the Court of Protection Rules have now been laid before Parliament. These amendments, which will take effect on 6 April (and do not form part of a Pilot), make provision for civil restraint orders, thereby making express powers of the court which had previously been implicit only. They also, for the first time, set out (in a new Part 24) procedural rules for the making of applications relating to Schedule 3 to the MCA 2005, i.e. the international jurisdiction of the CoP. The new Part 24 provides for three separate types of application: (1) an application for recognition and enforcement of a foreign protective measure; (2) an application to disapply or modify a foreign lasting power of attorney (including in this, importantly, a Scottish power) and (3) an application for a declaration as to the authority of a donee of a foreign power. The last of these is designed to address a problem that occurs with frustrating frequency, namely a failure by a public authority or – most often – a financial institution to accept a foreign power of attorney that is valid according to its governing law (see further in this regard Alex's overview article, and also *The International Protection of Adults* (OUP, 2015)).

Part 24 is accompanied by a new Practice Direction, available here. You will also find here a PD (PD23C) to accompany the new provisions relating to civil restraint orders, an updated PD10AA to give new contact details, and amendments to the transparency pilot PD, PD9E and PD13A to enable the merging in due course of the approaches to allowing public access to court in serious medical treatment and transparency pilot cases

The Participation of P in Welfare Cases in the Court of Protection

A huge – and hugely impressive – report on the participation of P has been published by Cardiff University's team (Lucy Series, Phil Fennell and Julie Doughty) looking into welfare cases at the Court of Protection. The report, available here, makes uncomfortable reading as regards the approach of a system which has as its focus an individual said to be of impaired capacity, but which is, in essence, designed around the needs of the professionals. It does, however, provide a

detailed evidence base and concrete proposals for reform so as to meet a 'human rights model of participation.' We would very strongly recommend that anyone concerned with the work, and the future, of the Court of Protection take the time to read, at a minimum, the summary and the recommendations at the outset.

Re Martins anonymity lifted

Mr Martins now having died, the anonymisation order in place has been lifted, and the underlying best interests decision of Baker J giving rise to the contempt proceedings relating to Mrs Kirk and the frustrated appellate decision of Munby LJ has been now been reported.

Moving the Bar: Is cross-examination any good?

[*Editorial Note: we are very pleased to be able to publish this guest comment by Penny Cooper, Professor of law, Co-founder and Chair of The Advocate's Gateway, Barrister and Academic Associate 39 Essex Chambers.*]

Lord Thomas and the judgment in Rashid [2017]

The recruitment process for the next Lord Chief Justice has begun. The headlines have been about the new age restriction and who this rules out of the running, but my thoughts have been turning to the current Lord Chief Justice's judgments. For me, his most significant judgment to date is *Rashid* [2017] EWCA Crim 2. It is a must-read for advocates, including those who work in the Court of Protection.

This is the essential paragraph:

> [Professional] *competence includes the ability to ask questions without using tag questions, by using short and simple sentences, by using easy to understand language, by ensuring that questions and sentences were grammatically simple, by using open ended prompts to elicit further information and by avoiding the use of tone of voice to imply an answer. These are all essential requirements for advocacy whether in examining or cross-examining witnesses or in taking instructions. An advocate would in this court's view be in serious dereliction of duty to the court, quite apart from a breach of professional duty, to continue with any case if the advocate could not properly carry out these basic tasks. (para 80)*

Rashid should make every advocate stop and re-consider the proper approach to questioning witnesses and clients, particularly when it comes to cross-examination.

Communicating with vulnerable people in court

In November 2016 Mr Justice Charles issued guidance on facilitating participation of 'P' and vulnerable persons in Court of Protection proceedings. The potential for cross-examination to do more harm than good is never more apparent than when a witness is vulnerable due to age or incapacity. The criminal courts brought in a range of special measures, including the communication facilitators, known as witness intermediaries (see section 29, Youth Justice and Criminal Evidence Act 1999), to help vulnerable witnesses give evidence. In one recent Crown Court case, an intermediary helped an adult witness at a remote location give evidence using an eye tracker device. Intermediaries have also assisted children as

young as three to give evidence in England and are now used in Ireland, Northern Ireland and New South Wales, Australia. The Court of Protection's new guidance includes advice on the use of intermediaries.

Communicatively competent advocates

In *Rashid*, the adult defendant was vulnerable on account of his intellectual functioning. It was argued that he should have had an intermediary not only when he gave evidence, but also for the whole of the trial. The Court of Appeal disagreed; intermediaries are a scarce resource and advocates must be communicatively competent. Intermediaries should not be used to compensate for poor advocacy skills. There was no suggestion whatsoever in *Rashid* that the advocates lacked such competence – "*indeed they self-evidently displayed such competence*" (para 81).

Advocates must adjust their pace, tone, vocabulary and grammar so that a witness understands the questions. "*Advocates must adapt to the witness, not the other way round.*" (*Lubemba* [2014] EWCA Crim 2064, para 45).

Rashid is not only relevant to advocacy with vulnerable clients; the lessons go further than that. *Rashid* reminds us that advocates are always duty bound to be communicatively competent when questioning witnesses (or clients).

How can we tell if cross-examination is any good?

The short answer, scientifically speaking, is that we can't. But cross-examination is better if advocates 'ask' rather than 'tell' witnesses. There is no scientific basis to support the notion that the modern habit of asserting things to witnesses (telling rather than asking) is an effective way to elicit the truth. In fact, a wealth of research by psychologists tells us that witnesses may be compliant or in other ways unable to deal with the confrontational nature of such questions.

In 2013 the former Lord Chief Justice, in his last judgment before retiring (*Farooqi & Ors* [2013] EWCA Crim 1649), sent out this message about cross-examination:

> *Assuming that there is material to justify the allegation, "Were you driving at 120 mph?" is more effective than, "I put it you, that you were driving at 120 mph?" What ought to be avoided is the increasing modern habit of assertion, (often in tendentious terms or incorporating comment), which is not true cross-examination. This is unfair to the witness and blurs the line from a jury's perspective between evidence from the witness and inadmissible comment from the advocate. (para 113)*

Lord Neuberger's healthy scepticism about the value of oral testimony

Lord Neuberger said recently in an extra-judicial speech:

> *I am very sceptical about judges relying on their impression of a witness, or even on how the witness deals with questions. Honest people, especially in the unfamiliar and artificial setting of a trial, will often be uncomfortable, evasive, inaccurate, combative, or, maybe even worse, compliant. (para 10)*

Most witnesses are unfamiliar with courts and almost all are unfamiliar with the actual witness box/ chair from which they will be giving

evidence. How many lawyers ensure their witnesses are familiar with the venue before they give evidence? How many explain the purpose of cross-examination and ensure that witnesses understand it is not a conversation?

Properly directed questions

It is not only about-to-retire judges who express views about cross-examination. Mrs Justice Parker said in *Re PB* [2014] EWCOP 14:

> *Advocates need to be able to control the witness by the form and structure of their questions and not permit discursive replies or to allow the witness to ramble (particularly if the witness has the tendency to be prolix). There is no necessity for a long introduction: apart from anything else it may distract and confuse the witness and the judge.*
>
> *Examination must not proceed by way of "exploration" of the evidence: i.e. a debate, or by putting theory or speculation, rather than by properly directed questions which require an answer. (paras 142 – 143)*

Universal ground rules for cross-examination?

What do these judgments and Lord Neuberger's views tell us about cross-examination? I think they give us the makings of some universal ground rules.

1. Lawyers should familiarise their witnesses with the trial setting before they give evidence (this of course must not include a dress-rehearsal of their evidence - see *Momodou* [2005] EWCA Crim 177).

Cross-examination questions should:

2. Be short and focus on one point.
3. Use simple vocabulary.
4. Use simple sentences. (Not 'tag' questions, that is statements with a generic question tacked onto the end. Avoid for example: "You would agree wouldn't you, [statement]?" or "[Statement], that's right isn't it?")
5. Properly direct the witness to the matter which requires their answer; a question should not invite the witness to speculate or debate.
6. Not contain preamble. (For example, a preamble "In light of your previous answers, let me ask you about this, if I may…" should be dispensed with altogether.)
7. Not contain comment on the evidence. (If it is a good comment, save it for the speech.)
8. Not use intonation to imply a question. For example, do not say: "You were unhappy about that?" Instead ask, "Did that make you unhappy?" or "Were you unhappy?"

Advocacy tutors will say that cross-examination questions must be 'leading' so that the advocate 'controls the witness'. Definitions of leading questions vary but it is not true to say that questions starting with who, what, why, where, when or how are not capable of being leading. "Were you unhappy?" is a leading question if it suggests something to the witness that they have not already said in evidence. "Were you unhappy?", is more effective and fairer than a comment with a tag on the end such as, "You were unhappy, weren't you?"

The bottom line about cross-examination

Lord Neuberger is right:

> *"[T]here is an argument for saying that, at least in some cases, it is safer to assess the evidence without the complicating factor of oral testimony."*

For those who do question witnesses, the message from the Court of Appeal is clear: It is not acceptable for the advocate's poor questioning to create or add to a witness's communication difficulty.

Penny Cooper

Short Note: Prisons and Courts Bill

Although not directly applicable in the Court of Protection, readers may care to keep an eye on the progress of the provisions of the Prisons and Courts Bill regarding cross-examination of witnesses in family proceedings as a bellwether for approaches that may in due course be adopted in the CoP. These are addressed, and critiqued, in a useful article by Simon Burrows in Family Law here.

Capacity, representation and the MHT

PI v West London Mental Health NHS Trust [2017] UKUT 66 (AAC) (Upper Tribunal (AAC) (Upper Tribunal Judge Knowles QC))

Mental capacity – litigation

Summary

How should the First-tier Tribunal (Mental Health) react when, during the course of a tribunal hearing, it appears that the patient no longer has capacity to appoint or instruct his solicitor? The patient, detained under MHA s.3 with schizophrenia, had become more unsettled two weeks before the hearing but had the capacity to instruct. However, the day before, the responsible clinician told his legal representative that the patient lacked capacity to instruct a legal representative. The medical member of the panel was similarly concerned when conducting the pre-hearing examination when the patient told him that he had not made an application for discharge and did not want to attend the hearing.

On the morning of the hearing, the tribunal was informed that the patient was now considered to have capacity and the evidence was heard. However, during the course of the responsible clinician's evidence, the patient appeared to be responding to auditory stimuli unheard by others and was distressed. So his evidence was interposed, after which he left the hearing. As a result of his evidence, his legal representative asked the tribunal to review the capacity issue. For if he lacked capacity to instruct, the tribunal could appoint his representative who could then act in his best interests which might have led to an application to withdraw the challenge. The tribunal considered it unnecessary to do so.

Following *YA v Central and North West London NHS Trust and others* [2015] UKUT 0037 (AAC), the Upper Tribunal agreed that "*the issue of a patient's capacity to appoint a representative, to give instructions and to participate in proceedings before the tribunal should be kept under review by all those involved, not least the tribunal itself*." This may be thought to give effect not just to the patient's best interests but also to the procedural safeguards required by Article 5 ECHR (para 34).

The need for such ongoing review did not sit easily with rule 11(7)(b) of the Tribunal Procedure (First-tier) (Health, Education and

Social Care Chamber) Rules 2008. But a broader reading was required. On the facts, the tribunal should have had a short pause in the proceedings to:

(a) Establish whether the patient lacked capacity which may have meant him being seen on the ward;

(b) Ascertain the patient's wishes about the continuation of the hearing; and

(c) Ascertain whether the patient's legal representative remained instructed.

However, the error of law did not affect the outcome. The legal representative was content to act for the patient on the basis of earlier instructions and was content to proceed in his absence. All the relevant submissions were made and it was difficult to see how the patient's participation in the proceedings was significantly compromised. Moreover, there was no unfairness.

As to best interests and applying to withdraw the challenge, Judge Knowles QC repeated the guidance given in *YA* as to how legal representatives ought to proceed where their patient lacks the relevant capacity. Such guidance provided a process of engagement with the tribunal. Applying to withdraw the application may allow the patient another challenge in the nearer future but would also deprive them of the opportunity to test the basis for detention at that point in time: "*In my view it is particularly important that the detention of a person who lacks capacity to instruct in relation to the proceedings is challenged without delay*" (para 50).

So, in conclusion, the tribunal erred in law by failing to give adequate reasons for its decision not to review the patient's capacity to give instructions to his legal representative during the hearing. However, that decision was not aside because the patient was neither disadvantaged by either the representation he then received nor by the process the tribunal followed having refused to review his capacity.

Comment

This decision develops the reasoning of *YA* and tackles the issue of incapacity arising during the course of a hearing. The substantive guidance as to the salient details of the decision to appoint a representative (which includes the capacity to conduct proceedings) was given in *YA*. It is not commonplace for Ps in the Court of Protection to have litigation capacity, bearing in mind mere 'reason to believe' incapacity is required for the interim powers under in s.48 MCA 2005. And it is interesting to note that this lower evidential threshold for incapacity is not applicable to First-tier tribunal proceedings. But if P was thought to have litigation capacity and such capacity deteriorated during the course of a hearing, the essence of this decision would be applicable by analogy. The decision also serves to provide useful guidance for those appearing in and on tribunals.

HRA damages, costs and the LAA

Three recent decisions have focused on the interaction between the statutory charge and human rights damages. In *GD and BD (children by their children's guardian), MD and FD v Wakefield Metropolitan District Council and West Yorkshire Police* [2016] EWHC 3312 (Fam), Cobb J explored (at paras 132-42) the impact of the statutory charge on a damages award under the HRA 1998. Although he did not give a conclusive view

on the issue, he suggested that, unless the local authority and police, agreed to pay the costs of the proceedings which gave rise to the human rights case, the award of damages would be extinguished by the statutory charge.

In *Re CZ (Human Rights Act Claim: Costs*) [2017] EWFC 11, the same judge confirmed that, where a public funded certificate is granted to a party to pursue a claim under the HRA 1998 for declaration and damages arising within care proceedings, the statutory charge will apply (i.e. the damages will represent and the Legal Aid Agency has the ability to recoup its costs (or a proportion of them) from any damages award. Rejecting a submission that Article 13 ECHR (the right to an effective remedy) mandated the award of a sum sufficient to enable a claimant in such a case to recover their costs, Cobb J expressed himself (at para 71):

> *wholly satisfied that the Claimants have been able to access a court effectively, and have a remedy in the form of a declaration and an award of damages. The fact that the damages award is vulnerable to recoupment by operation of a statutory charge for costs arises because Parliament, in devising a scheme for assisting litigants to bring legal claims, has also devised a method of recoupment; the significant benefits of public funding to enable litigants to prosecute legitimate claims do not come without some trade-off. It seems to me that I should not interpret the provisions of the HRA 1998 (particularly by reference to a Convention right which has not found its way into English law), in such a way as to create what would swiftly become a dual-carriageway by-pass around the provisions of LASPO 2012.*

Separately, in *CZ,* Cobb J further confirmed that: (1) the costs relating to the care proceedings are to be considered within the framework of the FPR 2010; whereas (2) the costs of a declaration and/or damages claim under the HRA 1998 are awarded under the CPR 1998, on the conventional 'loser pays' basis, but subject to the important provisos as to the conduct of the litigation by both parties. We suggest that exactly the same approach should hold in the context of applications for declarations/damages under the HRA 1998 brought in the context of CoP proceedings. In *CZ*, the claimants, whilst successful in obtaining declarations and damages to reflect (conceded) breaches of the ECHR by the local authority in question, had the costs awards referable to their HRA 1998 claim reduced to reflect the judge's conclusion that, at some stages, their conduct of the litigation was such that they had forfeited their entitlement.

In *H (A Minor) v Northamptonshire CC* [2017] EWHC 282 (Fam), Keehan J, having taken the unusual step of ordering the Lord Chancellor to pay additional costs incurred by the local authority as a result of the LAA's failure timeously to make a decision as to whether or not the statutory charge would apply to HRA damages sought arising out of care proceedings, gave guidance as to how such claims should be run. They are of sufficient importance by analogy to CoP cases to merit reproduction in full:

> *117 Where damages are sought in just satisfaction of a HRA claim during the currency of public law proceedings, I provide the following guidance:*

(a) *alleged breaches of Convention rights by a local authority must be set out with particularity in a letter before action as soon as ever possible;*

(b) *every effort should be made by the claimant and the local authority to settle the issues of liability and the quantum of damages before and without the need to issue proceedings;*

(c) *where liability and quantum are agreed prior to the issue of proceedings, it will invariably be in the interests of the child to issue a Part 8 claim to secure the court's approval of the proposed settlement pursuant to CPR r 21.10;*

(d) *the local authority should, save in exceptional circumstances, pay the reasonable costs of the claimant's HRA claim/proceedings;*

(e) *where is it necessary for a party to issue a formal HRA claim, proceedings should be issued separately from the care proceedings and a separate public funding certificate should be sought from the LAA in respect of the same;*

(f) *well in advance of the final hearing of the HRA claim the LAA should be invited to make a decision on whether it asserts that the statutory charge will be applicable to any award of HRA damages. Where*

(i) *the basis of threshold and the material facts of the case are agreed or the court has made findings of fact and given a judgment establishing the factual matrix of the public law proceedings; and*

(ii) *liability is agreed and the material facts relied upon to establish the breach or breaches of the claimant's Convention rights are agreed or have been determined by the court,*

I see no reason in law or on public policy grounds or in practical terms why the LAA could not and should not notify the court and the parties of its decision on the applicability of the statutory charge prior to the final hearing and well in advance of the submission of the claimant's solicitor's final bill(s); and

(g) *with the benefit of the LAA's decision, the court should have all the necessary information to assess the quantum of damages or, as the case may be, to approve the settlement, and to consider what are the appropriate orders for costs.*

Keehan J also added a postscript relating to the fact that HRA damages against the state for breaches of Convention right by the State are not currently 'ring fenced' from the applicability of the statutory charge.

120. The issue I raise, in the context of HRA claims brought by children, and by parents, during the currency of pending care proceedings, is whether it is just, equitable or reasonable that damages awarded to a child, or to a parent, as a result of breaches of his/her Convention Rights by one organ of the State should be recouped by another organ of the State in respect of public law proceedings which would otherwise not

be recoverable. Public funding in such cases is non means tested and non merits based. Furthermore, save in exceptional circumstances, the local authority issuing the care proceedings is not liable to pay the costs of any other party: Re T [2012] UKSC 36.

121. I very much doubt that such a recoupment is just, equitable or reasonable. In the vast majority of cases the effect of the recoupment of the child's or parent's costs of the care proceedings will be to wipe out the entirety of the HRA damages awarded. In this event, the child or the parent will not receive a penny.

123. In making these observations, I have well in mind that:

a. it is a founding principle of the introduction and provision of State funding to ensure that a legally aided party is in no better and in no worse a position than a privately paying party to litigation; and

b. a solicitor representing a privately paying client has a lien over any damages recovered by his/her client in respect of the solicitor's fees.

124. Nevertheless, I question whether the time has come to exclude a child's and/or parents HRA claim damages from the application of the statutory charge in relation to costs incurred in 'connected' public law proceedings within the meaning of s.25 LASPO. This is, of course, solely a matter for the Lord Chancellor.

Finally in this round-up we note the useful schedule of cases of damages awards in HRA claims involving children in care proceedings prepared by the Association of Lawyers for Children, to which reference was made by Cobb J in *CZ*. They may well be useful by analogy in CoP cases where the allegation is that the actions of a public body unlawfully interfered with the Article 8 ECHR right to family life enjoyed by children and their parents.

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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.

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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.

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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.

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.

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