MENTAL CAPACITY REPORT:
HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

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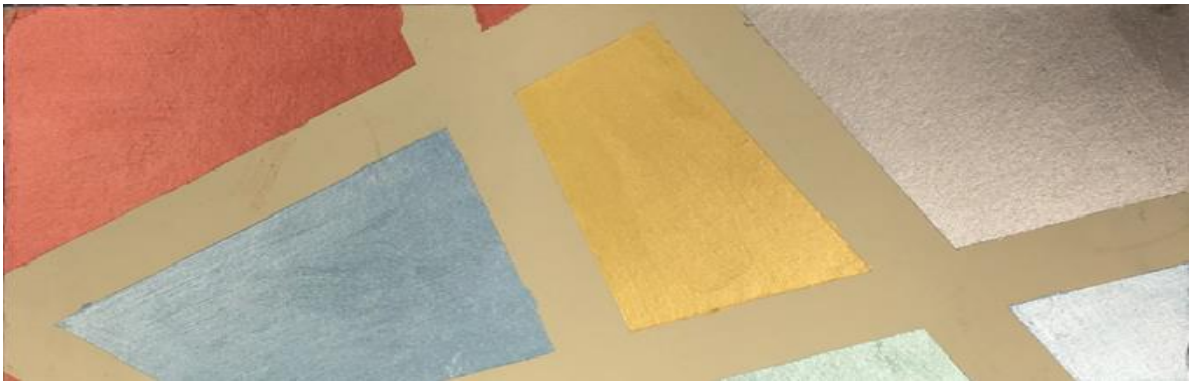

Welcome to the October 2017 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: serious medical treatment cases and the involvement of the CoP, family members and Rule 3A and DoLS before the European Court of Human Rights;

(2) In the Property and Affairs Report: financial abuse at home and tools to combat financial scamming;

(2) In the Practice and Procedure Report: a transparency update, a guest article on welfare cases in practice before the CoP and a problematic case on capacity thresholds and the inherent jurisdiction;

(3) In the Wider Context Report: the LGO and the MCA 2005, an update on the assisted dying challenge, the Mental Health Act review and guidance for enabling serious ill people to travel;

(4) In the Scotland Report: the Scottish Public Guardian on powers of attorney problems and a sideways judicial look at the meaning of support.

You can find all our past issues, our case summaries, and more on our dedicated sub-site here, and our one-pagers of key cases on the SCIE website.

We also take this opportunity to welcome Katie Scott to the editorial team!

Editors
Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Annabel Lee
Nicola Kohn
Katie Scott
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.

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A dramatic shift? Treatment withdrawal and the role of the Court of Protection

M v A Hospital [2017] EWCOP 19 (Peter Jackson J)

Medical treatment – treatment withdrawal

Summary[1]

In *M v A Hospital* Peter Jackson J (giving one of his last judgments before his elevation to the Court of Appeal) has made clear his view that there is no legal obligation upon medical practitioners to seek the sanction of the court before withdrawing clinically assisted nutrition and hydration ('CANH') from patients in a permanently vegetative state ('PVS') or minimally conscious state ('MCS'), where all concerned are in agreement that to provide such treatment is no longer in the person's best interests.

Peter Jackson J's judgment has been widely misreported as relating to a right to die – it is no such thing; rather, it relates to the right not to be subject to treatment to which a person cannot consent and which is not in their best interests. It has also been misreported as relating to the withdrawal of care – again, this is wrong, as palliative care would always be provided to the individual concerned even after CANH has been withdrawn. Finally, it has also been reported as determining conclusively, subject to any potential appeal by the Official Solicitor, the question of whether or not a legal obligation exists. This is a more nuanced question, to which we return below after putting this decision in its context.

Background

M was in what was described by Peter Jackson J as an MCS as the result of Huntingdon's Disease. Her family, in complete agreement with the treating team at the Trust responsible for her care, believed that it was not in her best interests to continue to receive CANH. However, and as Peter Jackson J found was entirely understandably to have been the case, all those concerned felt that "*an external decision*" was required before CANH could be stopped. The matter was formally brought to the court by M's mother as a challenge to a deprivation of liberty authorisation in place for M at the hospital where she was being cared for. In reality, this was a mechanism in order to ensure that non-means

[1] Note, Tor having been involved in the case, this note is prepared without her input.

tested legal aid was available (a mechanism which has now been ruled out by the Court of Appeal in Briggs). As Peter Jackson J identified, the real application was for a determination "*if required*" that it was in M's best interests not to continue with CANH. Unusually, but not unprecedentedly, M was not represented by the Official Solicitor as her litigation friend, but rather by her mother, and, whilst we do not address this further here, Peter Jackson J's judgment contains some important observations as to when it is appropriate for a family member to act as P's litigation friend in a serious medical treatment case. As will be set out further below, however, the Official Solicitor was to have a further – important – involvement in the proceedings.

The decision

On the substantive question before the court, Peter Jackson J had little difficulty in determining that it was not in M's best interests for CANH to be continued, and indeed found that the evidence had shown that it had not been beneficial for the previous year.

Had the judgment stopped there, it is likely that it would not have aroused the widespread interest that it has – although we would like to think that his observations about the interaction between family members and medical professionals would have been picked up as a welcome corrective to the narrative portrayed in many reported cases. At paragraph 27, Peter Jackson J noted:

> *that the medical opinion on M's overall best interests was to some degree influenced by (and might, in the end, be said to have been tipped by) the views of her family. There is nothing wrong with that. For obvious reasons, it is not found in many of the reported cases, which often portray doctors and families in opposite camps, but those cases are surely unrepresentative of the much greater number where a common position is reached through people listening to each other. Just as family members will naturally pay regard to the views of carers and doctors, particularly on the medical aspects of the situation, so doctors will naturally listen to the views of the family about their relative's wider best interests. What is important is that those called upon to express a view should do so conscientiously, drawing upon their personal and professional knowledge of the individual concerned."*

Future applications?

Why the judgment has aroused much wider interest is as a result of what Peter Jackson J then went on to do. Until very recently, the conventional wisdom has been that an application to court is required in any case where it is proposed to withdraw CANH from a person in a PVS or MCS. As Peter Jackson J noted (at paragraph 28), this "*reflected the dicta of the House of Lords in the 1993 case of Tony Bland that, until such time as a body of experience and practice was built up, good practice required a court application before withdrawal of CANH in cases of PVS*." This conventional wisdom was reflected in Practice Direction 9E to the Court of Protection Rules.

Recently, however, questions have been asked as to whether (a) the requirement to bring such cases to court is a legal requirement (as opposed to a requirement of good practice) or (b) if it is a legal requirement, it should remain so.

Earlier this year, King LJ, speaking for the Court of Appeal in *Director of Legal Aid Casework & Ors v Briggs* [2017] EWCA Civ 1169, offered some (apparently unprompted) obiter observations to the effect that "*if the medical treatment proposed is not in dispute, then, regardless of whether it involves the withdrawal of treatment from a person who is minimally conscious or in a persistent vegetative state, it is a decision as to what treatment is in P's best interests and can be taken by the treating doctors who then have immunity pursuant to section 5 MCA*." King LJ reached her conclusions in this regard on the basis of a detailed analysis of the MCA 2005, its accompanying regulations, Code of Practice and PD9E, but without argument or reference to her of the jurisprudence in the area.

Peter Jackson J, however, did have the benefit of detailed argument (albeit of a specific nature, as discussed further below), and reached the conclusion consistent with the obiter observations of the Court of Appeal that it was not a legal requirement on the facts of M's case for the decision to withdraw CANH to have been taken by the court. He did so for a number of reasons. In particular, he concluded that there was no statutory obligation to bring the case to court, that the cases and materials brought to his attention did not support the proposition that a court decision was necessary as a matter of law (as opposed to a matter of practice), and, crucially, that the State's obligation under Article 2 ECHR did not mandate court oversight as a matter of law. Importantly, he noted the anomalous position that, save for the class of PVS and MCS patients under consideration, "*overwhelmingly*" treatment decisions up to and including the withholding and withdrawal of life-support are taken by clinicians and families working together in accordance with recognised good practice, and that there was no suggestion that such should all be the subject of external supervision. In the circumstances, therefore, he held that:

> *a decision to withdraw CANH, taken in accordance with the prevailing professional guidance – currently the GMC's Good Medical Practice guidance, the BMA guidance 'Withholding and Withdrawing Life-prolonging Medical Treatment' and 'End of Life Care' and the Royal College of Physicians' Guidance on Prolonged Disorders of Consciousness – will be lawful and the clinicians will benefit from the protection of s.5. The court is always available where there is disagreement, or where it is felt for some other reason that an application should be made, but this will only arise in rare cases, such as Aintree.*

Importantly, Peter Jackson J noted both that recognised medical standards will "*doubtless evolve*" (and highlighted current work in this regard) and also that every case is intensely fact specific, such that "*those considering withdrawal of CANH should not hesitate to approach the Court of Protection in any case in which it seems to them to be right to do so*."

Comment

The conclusions set out above regarding the need for the involvement of the court were reached in specific context, which it would be wrong to gloss over. They were reached after consideration of written arguments alone and in circumstances where, as Peter Jackson J was also careful to note (at paragraph 36) that the Official Solicitor had not been formally involved. It is important to note, however, that he

had specifically invited the Official Solicitor ("*given his general interest in the issue and his passing involvement in the pre-proceedings stages*") to provide him with observations. The Official Solicitor responded to that invitation and provided him with a "substantial" skeleton argument, which, amongst other things "*trenchantly assert*[ed] *that an application to court should be made in every case of proposed withdrawal of CANH, unless there is a valid advance directive*" (paragraph 30).

In the circumstances, and not least given the very robust stance taken by the Official Solicitor, it seems to us clear that it is now beyond sensible argument that, where a valid advance decision to refuse treatment has been made which applies to CANH, there can be no need to apply to court. Put another way, had there been any argument to suggest that an application was required, then it is proper to presume that the Official Solicitor would have put it.

At the time of writing, however, the status of the remainder of Peter Jackson J's conclusions is perhaps more debatable. In particular, it is unclear whether:

1. the Official Solicitor will seek to appeal the decision (that he was not, himself, a party, to proceedings would not seem to us to be a bar, he obviously having sufficient interest – as the Official Solicitor – in the case: see, for example, *MA Holdings Ltd v (1) George Wimpey UK Ltd (2) Tewkesbury BC* [2008] EWCA Civ 12); or

2. whether (as foreshadowed in his written submissions) he will contend in any future case that the observations are obiter because the application in M's case had in fact been made and determined.

If the former course of action is taken, we will have to wait to see what the appellate court/courts do. If the Official Solicitor (or indeed, anyone else) adopts the latter path, it seems to us that, with respect, this is too simplistic. The question of whether an application for a determination of M's best interests needed to be made had been put in issue by M's mother at the very outset of the proceedings. Peter Jackson J's judgment noted in its opening paragraph that the real application was for a request "*if required*" for a best interests determination (see also paragraph 30). The priority, at that stage, was to decide the question of M's treatment; the "*prior*" question of the need for the proceedings then being addressed subsequently in the fashion set out above. As Peter Jackson J then went on to note at paragraph 36, "[i]*t is not good enough for the court to say that, because proceedings have in fact been issued and determined, the question of whether they were necessary in the first place has thereby become moot*." Peter Jackson J, in other words, does not appear to have taken the view that he was merely expressing "*gratuitous comment*" (paragraph 36), but rather to be giving a judicial determination of a question put to him. In the circumstances, and whilst acknowledging that the position is more nuanced than might at first appear from some of the reporting, it seems to us that it is difficult to cast these observations as 'mere' obiter and – by inference – easily put to one side. Even if, strictly, the observations do not constitute part of the ratio of the case, there are obiter and there are obiter: see Megarry J in *Brunner v Greenslade* [1971] Ch 993 at 1002: "*A mere passing remark, or a statement or assumption*

on some matter that has not been argued, is one thing; a considered judgment on a point fully argued is another, especially where, had the facts been otherwise, it would have formed part of the ratio. Such judicial dicta, standing in authority somewhere between a ratio decidendi and an obiter dictum, seem to me to have a weight nearer to the former than the latter."

In the circumstances, and putting aside for one moment the fact that (as the Official Solicitor himself acknowledged in his written submissions) it is difficult to see how a 'live' case could ever arise on this issue, we would respectfully suggest that these observations represent the most detailed judicial attempt so far to grapple with this question, and that (if no appeal is brought) it is unlikely that another court would depart from the conclusions reached by Peter Jackson J on the basis of their forensic status alone.

The way forward

We note that at the time of writing there have been reports that the President may seek to issue "guidance" (the precise nature and status of which is as yet unclear) to clarify when cases should come to court. We should note in this context that there is no obvious route within the MCA 2005 or the Court of Protection Rules by which the President can issue guidance as to when cases should come to court, as opposed to how such cases should be addressed when they do come to court.[2] To the extent that the guidance represents the President's view of the relevant legal obligations, interesting questions will arise as to the status of that view vis-à-vis the conclusions of Peter Jackson J, and also as to how that view could be challenged in court if and to the extent that anyone should disagree with it.

Pending the issuing of any such guidance, and notwithstanding the view of the authors that Peter Jackson J gave the correct answer to the question asked of him, it is important to note that we deliberately emphasised the word "judicial" the concluding paragraph of the sub-section above because we should put down a marker that it seems to us that it is arguably a question that engages more than merely issues of narrow legal responsibility, and hence a question that does not fall to be answered solely by the judiciary.

Put another way, it is entirely open to us to consider that society has an interest in deciding: (1) whether we are content to leave decision-making in this regard to the collaborative non-court-based process set down by the framework of the MCA 2005; and (2) if so, whether we think that the safeguards set down in the Act as it stands are sufficient to protect all the relevant interests, above all the interests of P.

Our view is that the most important consideration is that there should be a robust framework for decision-making, whether that framework be administered outside or by the Court of Protection. Declaring an interest (on Alex's part), this only makes more important that Parliament is given the opportunity to debate the draft Mental Capacity (Amendment) Bill proposed by the Law Commission which includes the proposals to limit the scope of the

[2] The problematic status of PD9E in this regard being discussed by Alex in 2016 in the Journal of Medical Ethics.

s.5 MCA 2005 defence so as to enshrine more robust safeguards in law. In the interim, the onus is on the relevant regulatory and representative bodies to ensure that (at a minimum) equivalent safeguards are implemented as a matter of practice, and we would hope that this can be achieved sooner rather than later.

Families, confinement and Rule 3A Representatives

SCC v MSA & Ors [2017] EWCOP 18 (DJ Bellamy)

Article 5 ECHR – deprivation of liberty

Summary[3]

District Judge Bellamy has added to the small but important body of case-law concerning Rule 3A in the context of so-called *Re X* applications for judicial authorisation of deprivation of liberty. He has given guidance as to whether it is ever appropriate for a family member (or other person) responsible for implementing restrictive care arrangements that constitute a deprivation of liberty also to be appointed and to act as P's Rule 3A representative.

MSA was a young man whose care at his family home was delivered in accordance with a package of care commissioned by SCCG. MSA was recorded as being "*unable to communicate or mobilise independently, is frequently strapped into his wheelchair, is kept for some of the time in a padded room at his home with a closed door that he cannot open, is highly resistive to personal care interventions so that physical restraint is required, and does not have external carers in the home*." His mother was one of the key people assisting SCCG in the implementation of the care package resulting in P's deprivation of liberty. SCCG made an application for judicial authorisation of P's deprivation of liberty, with his mother identified as being a suitable candidate to be his rule 3A representative.

It is not immediately obvious from the judgment how the Official Solicitor became involved in the proceedings, although it was clear that MSA's mother, JA, indicated at some stage that she did not wish to act as Rule 3A representative (or as litigation friend). The Official Solicitor expressed concern that SCCG did not accept that it would be "*manifestly inappropriate for MSA's representative in these proceedings and future review hearings to be the very person responsible for implementing restrictive care arrangements that constitute a deprivation of liberty, in circumstances where those arrangements go well beyond mere 24 hour supervision*." SCCG took the position that JA could undertake the role of Rule 3A representative as it had been outlined by Charles J in *Re VE* as "*she is fully engaged with statutory services and care providers and has a history of advocating on MSA's behalf. There is nothing in her conduct to date by which JA has demonstrated she would be unsuitable if willing to so act*."

Both parties filed written submissions and, at the request of the Official Solicitor, the court agreed to consider the appropriateness of JA acting as MSA's Rule 3A representative, irrespective of the question of her willingness or otherwise to act in this capacity. As District Judge Bellamy noted,

[3] Note, Tor having been involved in the case, this note is prepared without her input.

because JA did not want to be so appointed, "*the question posed by the Official Solicitor could be said to be academic*," nonetheless acceded to the request to give some guidance on this issue, as follows:

> *25. I have considered the submissions from both parties carefully and have also had an opportunity not only of reviewing the statutory framework but also considering the judgments of Charles J in NRA and VE. I would not wish to depart in any way from the guidance he gives to representatives or the conclusions he reaches as to the suitability of appointment of representative or litigation friend of family members.*
>
> *26. As Charles J indicated in NRA (paragraph 163) the interest of devoted family members or friends does not give rise to an adverse interest to P and so to a conflict of interest, or otherwise mean that they cannot properly and effectively promote P's best interests. Indeed, in performing their supporting and caring role over the years many such family and friends will have been doing just that by, for example, investigating, negotiating, obtaining and reviewing care and support from public authorities to promote P's best interests at home and in the community. The performance of that role will often mean that they have fought P's corner over a long time to promote his or her best interests and that they are, and will be the best or an appropriate litigation friend because they know P best and will be best placed to ensure the promotion of P's best interests ...*
>
> *27. However, whilst I accept that each case is fact-specific to which the general principles set out in NRA and Re VE should be applied, it must be right that where there is any possibility (even if it is perceived rather than actual) that a conflict of interest will arise, the appointment of a representative or litigation friend must be closely scrutinised by the court. Whilst I would not go so far as to say even in this particular case it was "manifestly inappropriate" for JA to act as P's representative, the circumstances of P's deprivation and the existence of an implementation of a care plan which significantly restricts P's liberty by way of restraint, require the court to give close scrutiny as to whether or not, if she is willing, JA would be an appropriate representative or litigation friend or whether such role should be undertaken by an independent person such as the official solicitor.*
>
> *28. It would be inappropriate for this judgment to go beyond the facts and circumstances of this case. There are in my judgment sufficient guidelines both in the statutory framework and the decisions of Charles J in VE and NRA for the following issues to be recorded:-*
>
> > *(a) Whether or not a family member or friend who is responsible in part for implementing restrictive care arrangements is appropriate to be representative or litigation friend is fact and case specific.*
> > *(b) The court will have close regard to the relationship between the family member and P,and*
> >
> > *(c) The conduct, if any, of the family member and any available evidence that he or she has acted otherwise than in accordance with Rule 140(1) or Rule 147.*

(d) That the court must consider the nature of the restrictive care package and the role that the family member would play in such regime.

29. I entirely agree with the submission of the Official Solicitor that where, a family member is responsible for providing care that includes significant restrictive physical interventions, the court should take great care in exercising its discretion as regards P's representation in proceedings pursuant to Rule 3A. However, I would go no further than that. If it be the case that a family member or friend who is so involved puts themselves forward to act as representative or litigation friend, subject to that scrutiny being carried out there can be no blanket objection, in principle, to their ability to undertake the role.

30. Provided the court is satisfied that such representative can:-

(i) elicit P's wishes and feelings and making them and the matters mentioned in Section 4(6) of the MCA known to the court without causing P any or any unnecessary distress;

(ii) critically examine from the perspective of P's best interests and with a detailed knowledge of P the pros and cons of a care package, and whether it is the least restrictive available option; and

(iii) keep the implementation of the care package under review and raising points relating to it and changes in P's behaviour or health then such appointment can be made.

All of these factors go to the essence of P's Article 5 rights and provided the court is satisfied they can and are being adequately protected such role can be undertaken by the friend or family member.

Comment

There are three comments to make about this judgment. The first concerns the substance of the guidance given by District Judge Bellamy. The judgment faithfully follows the approach adopted by Charles J (and also, in an entirely different context, that of Peter Jackson J in *M v A Hospital*, covered elsewhere in this Report, in which he held that there is no reason in principle why a family member cannot act as litigation friend in an application for withdrawal of clinically assisted nutrition and hydration, even if they support the application). It shows how far the pendulum has swung from an essentially instinctive suspicion of the ability of those with a personal connection to P to act as their litigation friend in CoP proceedings towards a view that they may, in fact, be exactly the right person to act because of that personal connection. There is a great deal to be said for this, although the more the pendulum does swing, the more that we may legitimately start to ask whether we may need, at least in certain classes of case, both a litigation friend (to advocate for P) and an amicus or other person to assist in the inquisitorial stress-testing of the arguments advanced by the parties. For more on this, see both the article Alex and Neil co-wrote with Peter Bartlett.

The second comment is of the 'dog that did not bark in the night' nature. There appears to have been no dispute that MSA was deprived of his liberty for purposes of Article 5(1) ECHR, notwithstanding the fact that (1) he was in his own home; (2) his mother was either his primary

carer; and (3) on the face of the judgment, there were no external carers (i.e., it would appear, no carers employed directly by SCCG). We had thought that this scenario might be tested before the courts in test cases to be heard before Baker J in early September, but such was not to be, and this case serves as another reminder of the tentacles of Article 5 ECHR.

The third comment concerns the status and nature of the guidance given, which gives rise to two further points:

a. It seems now as a matter of routine accepted that it is entirely possible for District Judges sitting in the Court of Protection to address and give guidance upon 'systemic' matters (for another recent example, see The Public Guardian's Severance Applications). Many of their judgments on individual cases have also had very considerable impact in shaping approaches more widely (think, for instance, of the judgment in Manuela Sykes' case). This could be said to reflect a rather cavalier departure in the CoP from the approach that applies in the civil courts to the status of District Judges. Alternatively, it could be said to represent a realistic recognition that: (1) we are all still finding our way; (2) that the District Judges are entrusted to determine the vast bulk of the issues that come before the courts; and (3) that, in consequence, we can, and should, have regard to reasoned judgments reflecting their practical expertise in applying the MCA and the Court of Protection Rules.

b. For reasons discussed in relation to the comment on *M v A Hospital*, it suggested that the guidance given by DJ Bellamy, whilst strictly academic, stands on the spectrum between pure obiter (i.e. comment) and ratio decidendi (i.e. the basis of the decision) significantly closer to the latter.

DOLS before the European Court of Human Rights

RB v United Kingdom Application no. 6406/15, decision of 12 September 2017 (European Court of Human Rights (First Section))

Article 5 ECHR – DOLS authorisations

Summary[4]

When he was 31, RB experienced a significant head injury, including frontal lobe damage, which resulted in an organic personality change and physical disabilities. He was discharged from hospital in 2008 to a neuro-rehabilitation facility. Frustrated with his lack of rehabilitative progress towards independent living, he stopped co-operating with the programme, escaped the care home on a number of occasions and abused alcohol. Now 41, he challenged the standard authorisation and this reference to the European Court of Human Rights followed his unsuccessful appeal in the domestic courts.

RB contended that his rights had been violated. In relation to Article 5(1)(e) he argued that his detention was unnecessary as the restrictions imposed were excessive and alternative

[4] Note, Alex and Nicola were both instructed on RB's behalf before the ECtHR; while Neil led on the writing of this note, as the case is now concluded Alex has not felt constrained from involvement in drafting by our usual editorial rules about involvement in notes on our own cases.

arrangements could be found; his best interests had not been taken into account; and the detention was based on his alcoholism. Under Article 8 he argued that his detention interfered with his rights and it was disproportionate to ignore his wishes and feelings. In short, he argued that he would be condemned to a lifetime of detention in the care home because he did not want to comply with rehabilitation.

Being the first time it had passed comment on DoLS, the ECtHR held (in considering the admissibility of the application):

> *31… there is nothing in the facts of this case which would indicate that the necessary guarantees are missing… Accordingly, the Court concludes that in the circumstances of the case, fair and proper procedures to protect against the potential arbitrariness of the applicant's detention were in place.It found that the alternatives to detention had been properly considered by the domestic courts and his arguments to the contrary were not borne out.*

Article 5 ECHR permits the detention of alcoholics but RB argued that domestic law did not and that he was being detained as an alcoholic. Again this was rejected by the court:

> *37… The Court therefore concludes that the applicant was detained in accordance with the domestic law due to his lack of capacity (not as an "alcoholic"), or in Convention terms as a person of "unsound mind".*
> *38. As the applicant is detained as a person of "unsound mind", the three minimum conditions of Winterwerp must be fulfilled (see paragraph 24 above) and it appears that they were in this case. First, the applicant was reliably shown to be of unsound mind, as a true mental disorder was established before the domestic courts on the basis of objective medical expertise (see paragraph 8 above). Second, the domestic courts concluded that the disorder was of a kind or degree warranting compulsory confinement (see paragraphs 8, 9 and 11). Third, the validity of the continued confinement depends upon the persistence of such a disorder.*

Having rejected his Article 5 arguments, the court held that no separate issues arose under Article 8, and declared the application inadmissible.

Comment

Albeit only on an admissibility decision, the European Court of Human Rights appears to have given DoLS a clean bill of health, this being the first time it has considered the state of English law since *HL v United Kingdom*. In particular, it seems that the Court was satisfied that DoLS addresses the criticisms made in *HL*. There are three noteworthy points about the judgment.

The first relates to the grounds for RB's detention. The Convention refers to "unsound mind". DoLS requires both mental incapacity (under MCA ss2-3) and mental disorder (under MHA s.1). In this case, RB's personality change caused by his acquired brain injury would amount to a mental disorder (as per para 38) but it is interesting that the court equated his "lack of *capacity*" with "unsound mind" (in para 37).

Do paras 37-38 conflict with each other? Or does mental incapacity provide sufficient grounds for detention under Article 5(1)(e)? The point is quite significant. If mental incapacity alone suffices,

there is no need for the DoLS mental health assessment (although objective medical expertise would still be required, presumably in relation to mental incapacity). It would also expand the remit of Article 5(1)(e) ECHR to potentially cover all those who lack mental capacity, and would also, ironically, cut against the trend of the courts trying to 'de-medicalise' capacity and recognise it as a socio-legal construct. Whilst the Northern Ireland Mental Capacity Act 2016 (bravely) dispensed with a separate mental health requirement, the Law Commission was arguably well-advised to retain the mental health requirement for the Liberty Protection Safeguards, at least for now.

The second point to note is the court's clear endorsement of *Winterwerp* in this context. It demonstrates that the Court of Appeal erred in *G v E and others* [2010] EWCA Civ 822 in deciding that *Winterwerp* was not applicable to detention under the MCA 2005.

The third point is that the Court appeared to be entirely unfazed by the current debate as to whether deprivation of liberty on the basis of unsoundness of mind is illegitimate having regard to Article 14 CRPD. As the first time in which the Court had to have regard to the elaborate administrative mechanism created by DoLS, taking Article 5(1)(e) far outside the context of psychiatric hospitals in which it was created, it might have been thought that this was the opportunity for the court to baulk at its very existence in light of Article 14 CRPD. To the contrary – as noted above, it gave DoLS a clean bill of health.

10 years of the Mental Capacity Act

As many readers will be aware, the MCA came fully into force on 1 October 2017. The Principal Social Workers' Network led a day of action on 27 September. Twitterati can search #MCA10 for highlights of the day, including guest posts from both Neil and Mark Neary.

Editors and Contributors

Alex Ruck Keene: 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 Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

Victoria Butler-Cole: vb@39essex.com

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

Neil Allen: 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

Annabel has experience in a wide range of issues before the Court of Protection, including medical treatment, deprivation of liberty, residence, care contact, welfare, property and financial affairs, and has particular expertise in complex cross-border jurisdiction matters. She is a contributing editor to 'Court of Protection Practice' and an editor of the Court of Protection Law Reports. She sits on the London Committee of the Court of Protection Practitioners Association. To view full CV click here.

Nicola Kohn: 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 4th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2015). To view full CV click here.

Editors and Contributors

Katie Scott: katie.scott@39essex.com

Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes, and is chair of the London Group of the Court of Protection Practitioners Association. To view full CV click here.

Simon Edwards: 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.

Adrian Ward: adw@tcyoung.co.uk

Adrian is a Scottish solicitor and 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

Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law 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

Adults with Incapacity: the Future is Now

Adrian is speaking at this half-day LSA conference on 18 October in Glasgow. For more details, and to book, see here.

'Taking Stock'

Neil is chairing and speaking at the 2017 Annual 'Taking Stock' Conference in Manchester on 19 October. For more details, and to book, see here.

International Congress on Vulnerabilities, Law and Rights

Adrian is speaking on 7 November 2017 at the International Congress on Vulnerabilities, Law and Rights, in Coimbra, Portugal, organised by Coimbra University. For more details, see here.

Deprivation of Liberty in the Community

Alex is delivering a day's training in London on 1 December for Edge Training on judicial authorisation of deprivation of liberty. For more details, and to book see here.

Deprivation of Liberty Safeguards: The Implications of the 2017 Law Commission Report

Alex is chairing and speaking at this conference in London on 8 December which looks both at the present and potential future state of the law in this area. For more details, 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 November. 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.

Michael Kaplan
Senior Clerk
michael.kaplan@39essex.com

Sheraton Doyle
Senior Practice Manager
sheraton.doyle@39essex.com

Peter Campbell
Senior Practice Manager
peter.campbell@39essex.com

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clerks@39essex.com • DX: London/Chancery Lane 298 • 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