MENTAL CAPACITY REPORT: PRACTICE AND PROCEDURE

September 2017 | Issue 79

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

(1) In the Health, Welfare and Deprivation of Liberty Report: alcohol and best interests, the price for failing to support, patient choice from the other side of capacity, and Bournewood brought to life;

(2) In the Property and Affairs Report: Denzil Lush and LPAs, the Law Commission consultation on wills, professional deputies run amok and OPG updates;

(2) In the Practice and Procedure Report: s.21A, medical treatment and the role of the courts, the extension of the pilots, and guidance on CoP visitors;

(3) In the Wider Context Report: mental capacity in (in)action in SARs, litigation friends in tribunals, legal services and vulnerability, and the Committee on the Rights of Persons scrutinises the UK;

(4) In the Scotland Report: a Scottish perspective on powers of attorney problems and attorney registration updates.

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 say goodbye to our fellow editor Anna Bicarregui and thank for all her dedication in producing contributions against the odds – we will miss you.

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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

Congratulations 2
Legal aid, medical treatment and the role of the courts 2
Extension of pilots 6
The Court of Protection gets electronic seals 6
Court of Protection visitors and the release of their reports 6
Anonymisation of judgments 7

Congratulations

We congratulate Peter Jackson J on his appointment to the Court of Appeal – even as we will miss his presence in the Court of Protection (and his soundbites of such utility for training purposes). We also congratulate Gwynneth Knowles QC and Jonathan Cohen QC on their appointment to the High Court Bench (Family Division) and – we presume – also to take up roles as nominated judges of the Court of Protection.

Legal aid, medical treatment and the role of the courts

Director of Legal Aid Casework et al v Briggs [2017] EWCA Civ 1169 (Sir Brian Leveson, King and Burnett LJJ)

Article 5 ECHR – deprivation of liberty – DOLS authorisations – best interests – medical treatment – treatment withdrawal

Summary

The Court of Appeal has overturned the decision of Charles J that he could, within the scope of MCA s.21A proceedings (and hence non-means-tested legal aid), consider whether life-sustaining treatment should be continued to be provided to a man in a minimally conscious state subject to a standard DoLS authorisation. The court was intensely alive to the consequences of their decision as regards legal aid (see paras 10 and 113-14) but reached their conclusion on the basis of a strict construction of the statute.

Giving the leading judgment, King LJ held that challenging detention under MCA s.21A "*relates to decisions about the deprivation of liberty and not, as suggested by the judge, to the circumstances which lead up to the deprivation of liberty*" (para 89). Best interests, like capacity, is decision-specific and the particular decision is whether it is necessary, proportionate and in the best interests of P to be a detained resident (paras 89-90). Moreover:

> *92. In my judgment, a question in relation to serious medical treatment is not fundamentally a question in relation to deprivation of liberty. The issue before the court, as was accepted by the judge, was whether P should or should not be given certain medical treatment. It may be that following the making of such a decision there will be implications in relation to P's liberty as was recognised by the judge. For example: there may*

> *have to be a deprivation of liberty to prevent a woman from leaving the labour ward in circumstances where she lacks capacity and refuses a caesarean section which is clinically indicated and in her best interests. In my view, in such circumstances, the deprivation of liberty is secondary. The real question is whether it is in her best interests to have the surgery, whether or not it is in her best interests to be deprived of her liberty is then determined against the backdrop of the decision in relation to the proposed serious medical treatment. In my judgment that makes the appropriate application an application made under s.15 – s.17 MCA and not an application under s21A.*

The Court of Appeal did not narrow the scope of MCA s.21A – and by extension, DoLS – as much as had been sought by the Legal Aid Agency, which argued that "*under Schedule A1, all that is required within the best interests assessment is for the assessors to satisfy themselves that there is in fact a care plan and a needs assessment in place. No further detailed examination or consideration of the contents is* […] *either required or appropriate*." However, King LJ recognised that:

> *93. Having said that, in my judgment, [the Legal Aid Agency] has sought to place too narrow a scope on Sch. A1. There are many issues which relate to a deprivation of liberty which need appropriately to be considered by the assessor and which may be reflected in recommendations for conditions in the assessor's report and which may even be determinative of whether a standard authorisation is made.*
>
> *94. Where a dispute is referred to the court under s.21A, the issue is often in relation to P and the family's wish for P to go home, set against the assessor's view that it is in P's best interests to be placed in a care home and consequently deprived of his or her liberty. Miss Richards has helpfully provided the court with a table of cases where applications have appropriately been made under s.21A; on closer examination, each of them has involved a dispute as to whether P should reside in some form of care home or return to either his home or to live with a family member in the community. Such cases are focused specifically on the issue as to whether P should be detained and are properly brought under s21A. Proper consideration of those cases by the assessor in compliance with the guidance in the DOLS Code, requires far more of an extensive consideration of the relevant circumstances than that which is suggested by Mr Nicholls, namely simply ensuring a care plan and needs assessment is in place without further consideration as to the content.*
>
> *95. Contact, for example, is an issue capable of going to the heart of whether being detained is in a person's best interests; it may be that in an ideal world P's best interests would be served by a deprivation of liberty in the form of her living in a care home properly looked after, where the appropriate medication regime will be adhered to and P will have a proper balanced diet. Desirable as that may be, and such a regime may well provide the optimum care outcome for P, but it may also be the case that unless, regular contact can be facilitated to a particular family member, the distress and confusion caused to P would be such that it would be no longer in her best interests to be detained, and that what might amount to sub optimum physical*

care would ultimately be preferable to no, or insufficient contact. The weighing up of such options are part of the best interests assessment process in relation to which the professionals who are eligible to be assessors are peculiarly qualified to conduct."

Medical treatment issues, King LJ noted, were a separate matter, about which best interests assessors have neither the expertise nor the facilities to intensely scrutinise; nor is such a decision necessary for them to decide whether the deprivation of liberty of itself was required. If there was an outstanding treatment issue, she held, P can be protected by limiting the duration of the standard authorisation (para 97).

The Court of Appeal set out a number of observations in relation to medical treatment, both as to the application of the concept of deprivation of liberty and also as to the potential need for the involvement of the court. King LJ noted that:

> *105 … For my part, I find it hard to see how an argument could now be framed to the effect that Mr Briggs was being deprived of his liberty during the months he was in hospital and being cared for in a minimally conscious state. That being so, no standard authorisation was necessary and, as a consequence, the only available application open to the respondent in relation to the withdrawal of CANH should have been through the conventional s.16 route.*
>
> *106. In my view, Ferreira confirms what I myself would regard as an obvious point, namely that the question of deprivation of liberty does not arise where a person who lacks capacity is so unwell that they are at risk of dying if they were anywhere other than in hospital and therefore, by virtue of their physical condition, they are unable to leave the hospital. It may be the case however that as the treatment progresses and P's physical condition improves, his or her ongoing care becomes a deprivation of liberty and, at that stage, a standard authorisation or court order will be required if the continued retention of P on the ward is not to become unlawful.*
>
> *107. All parties agree that circumstances will continue to arise where a person requiring treatment will meet Lady Hale's 'acid test'. For that reason the court decided to hear the case, notwithstanding that this case itself is now academic, not only because Mr Briggs has now died, but also because in this court's view no standard authorisation was necessary, and his case was therefore outside the scope of s.21A in any event.*
>
> *108. The proper approach to a case where the central issue is medical treatment (serious or otherwise) following Ferreira is therefore as follows:*
>
> *i) 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.*
>
> *ii) If there is a dispute in relation to medical treatment of an*

incapacitated person, and, specifically, where there is a doubt as to whether CANH should be withdrawn, then the matter should be referred to the court for a personal welfare determination under sections 15-17 MCA.

iii) *Where, as a consequence of receiving life saving treatment, P is unable to leave hospital, that is not a deprivation of liberty which falls foul of Article 5(1). A standard authorisation is not therefore required and any application in relation to treatment will properly be made under s.16 MCA.*

iv) *If, as a consequence of ensuring that P receives the treatment that is in his or her best interests, P will become subjected to a deprivation of liberty of a type that falls within Article 5(1), then there must be authorisation for that deprivation of liberty:*

a) *If already in hospital or in care under Schedule A1 (or S4A(5)): or*
b) *Pursuant to a court order under section 4A(3) MCA.*

v) *The Sch. A1 decision will be made pursuant to para. 16 on the basis that the proposed deprivation of liberty is in P's best interests, necessary and proportionate; conditions of the type envisaged by the DOLS Code of Practice can be recommended if necessary.*

vi) *If there is a disagreement as to whether there should be a standard authorisation, or in relation to the conditions attached to such an authorisation, then the matter can be brought to by way of an application under s.21A to determine any question relating to the authorisation and to make any appropriate order varying or terminating the authorisation. Clinical issues in relation to treatment will remain in the hands of the treating physicians.* (emphasis added)

Comment

This is a significant decision in a number of respects. Reinforcing *Ferreira*, it narrows the scope of Article 5 ECHR where P is "*so unwell that they are at risk of dying if they were anywhere other than in hospital and therefore, by virtue of their physical condition, they are unable to leave the hospital*." Indeed, the court considered that Mr Briggs was not deprived of his liberty. It also strives to draw a distinction between "the deprivation of liberty" and "the circumstances which lead up to the deprivation of liberty". Following *Cheshire West*, it has become increasingly difficult to distinguish between these two. Indeed, the Law Commission's proposal for reform is very much founded upon an approach that is contrary to that expected in the present case:

> *1.29. A DoLS authorisation simply authorises "deprivation of liberty". By contrast, an authorisation under the Liberty Protection Safeguards would authorise particular arrangements for a person's care or treatment insofar as the arrangements give rise to a deprivation of liberty. This is an important difference. It focuses attention at the authorisation stage not simply on the binary question of whether a person should be deprived of their liberty or not, but on the question of the ways in which a person may*

justifiably be deprived of liberty… (emphasis added)

The Court of Appeal also noted at para 56 that "The statutory DOLS code therefore says in terms that the assessor is to make conditions in relation only to the deprivation of liberty itself." But, again, given how low the threshold is for deprivation of liberty, it is difficult to distinguish the deprivation from the care. Note also how issues of contact clearly fall within the best interests assessor's remit.

Separately, the observations at para 108(i), whilst strictly obiter, are of considerable importance in light of the current debates as to whether, and how, Practice Direction 9E to the Court of Protection Rules should be amended – and whether, and, if so, on what basis, medical treatment decisions need to come to court. This – strong – Court of Appeal (including both the President of the Queen's Bench Division and the new Lord Chief Justice) has clearly taken the view that it is only in the case of dispute that a medical treatment decision ever needs to come to court, (see further in this regard, inter alia, Alex's article on s.5 and the articles in the July 2017 issue of the Journal of Medical Ethics).

Extension of pilots

The Court of Protection pilot schemes on Transparency, Case Management, and Section 49 Reports have all been extended until 30 November 2017. The intention is that a full revised and consolidated package of the Court of Protection Rules and their supporting Practice Directions, providing for the piloted procedures to become part of normal court procedure, will be laid before the end of the year and therefore the pilots have been extended until the date when the consolidated Rules will come into force to avoid a gap.

The Court of Protection gets electronic seals

In a step which will gladden the heart of all those who have had to include "This order takes effect notwithstanding the fact that it is not yet sealed" in their orders from the Court of Protection, the Court of Protection from 21 July, has been endorsing all non-financial orders with an electronic seal. For more details, see the letter from HMCTS here.

Court of Protection visitors and the release of their reports

Summary

The OPG has published guidance on when Court of Protection visitors' reports can be released and who they can be released to. There are four main circumstances:

- *Regulations allow the Public Guardian to release a copy of a visitor's report to people the visitor has interviewed while preparing the report;*
- *A visit report may be released to people or organisations included in a Public Guardian application to the Court of Protection or supplied to the police or a local authority in an investigation;*
- *Personal information in a visit report may be released following a Data Protection Act subject access request; and*
- *The Court of Protection can order reports by a visitor to help with its decision-making. Reports produced for*

the court can only be released with the court's permission.

Anonymisation of judgments

The Transparency Project has published a guidance note for families and professionals in relation to the publication of family court judgments. The unofficial but detailed guide is designed to assist those involved in family court cases to think through issues around publication of judgments in those cases. The same approach is likely to be helpful by analogy to the publication of Court of Protection judgments. The guidance is divided into two parts: (1) should the judgment be published? and (2) if so, the anonymisation checklist. There is useful consideration of the pros and cons of publishing a court judgment and a detailed checklist which provides a helpful practical tool for anonymisation.

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

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

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

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

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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

The Legal Profession: Back to Basics

Adrian is speaking at the Annual Conference of the Law Society of Scotland in Edinburgh on 19 September 2017.

JUSTICE Human Rights Law Conference

Tor is speaking at JUSTICE's Annual Human Rights Law Conference in London on 13 October.

Mediation Awareness Week

Tor is taking part in a panel on 16 October on "Mediating Medical cases after Charlie Gard" as part of Mediation Awareness week.

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.

National Advocacy Conference

Alex is speaking at the National Advocacy Conference in Birmingham on 19 October. For more details, and to book tickets see here.

National IMCA Conferences

Alex is speaking at the two Irwin Mitchell/Empowerment Matters National IMCA Conferences in Sheffield on 20 October and London on 10 November.

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

Alex is chairing this conference in London on 8 December.

Taking Stock

Neil is speaking at the annual AMHPA conference in Manchester on 19 October.

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 October. 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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