Mental Capacity Law Newsletter April 2015: Issue 55

Court of Protection: Health, Welfare and Deprivation of Liberty

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Introduction

Welcome to the April 2015 Newsletters. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: 'baby Bournewood?', an update on the long-awaited Guidance on Deprivation of Liberty, deprivation of liberty at home, the 7th IMCA report and an important ECtHR ruling on the acid test;

(2) In the Property and Affairs Newsletter: an important decision on the interaction between the CICA and the COP, anonymisation of judgments and changes to LPA forms;

(3) In the Practice and Procedure Newsletter: details of the first stage of reform of the COP rules, the new Practice Direction on contempt of court, vulnerable witnesses, and funding questions;

(4) In the Capacity outside the COP Newsletter: an editorial comment on the Care Act and capacity, the House of Lords debates the Select Committee report, recruitment for the chair of the National Mental Capacity Forum, an extremely important decision of the Supreme Court on informed consent, and the publication of the first work on the international protection of adults edited (inter alia) by Alex and Adrian;

(5) In the Scotland Newsletter: a bumper selection of important material, including news of a new project to consider compatibility of both Scots and NI legislation with the CRPD, the potential for the introduction of designated specialist sheriffs for adult incapacity work, and commentary on recent case-law of relevance to practitioners in the area.

We are also delighted to announce that, as of this month, Beverley Taylor, until recently the Deputy Official Solicitor, will be providing regular guest contributions.

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Deprivation of liberty at home

W City Council v Mrs L [2015] EWCOP 20 (Bodey J)

Article 5 ECHR – Deprivation of Liberty

Summary

The central issue was whether Mrs L, a 93-year old lady with Alzheimer's dementia, was "deprived" of her liberty in her home, where care and safety arrangements had been set up for her between her adult daughters and the Local Authority. The Local Authority contended that she was; her daughter, acting as litigation friend, L contended that she was not.

Mrs L had been living in the upper floor flat of a 2-storey building for around 39 years. Owing to the risks, her family arranged for a fence and two gates to be erected, enclosing the garden. The front door to her flat which led into the garden was locked with a Yale lock, which Mrs L could operate so she could access the garden when she wished. At night, door sensors switched themselves on in the evening and off in the morning and would be activated if Mrs L were to leave the property at night. An alarm call would be automatically be made to one of her daughters nearby and, if not available, would re-route to the emergency services. This would enable Mrs L to be guided safely back home and had not been triggered since they were installed. The Local Authority provided a care package consisting of three visits a day by specialist dementia carers.

Bodey J summarised the law, noting that "[t]*he fact that Cheshire West was heard by 7 Supreme Court Justices and that the decision was by a majority of 4 to 3 demonstrates the difficulty of the topic*." After outlining the respective positions of the parties, his Lordship held that the circumstances did not constitute a deprivation of liberty or, if they did, it was not imputable to the State. In light of the importance of the issue, we set out the court's reasoning in full:

> *"22. It is clear from Cheshire West that there may be situations where a person is not free to leave a place, but is not under such continuous supervision and control as to mean that the arrangements put in place constitute a deprivation of liberty (per Lady Hale, cited at paragraph 11 above). It is well established that the difference between a deprivation of liberty and a restriction of liberty is one of degree or intensity, not one of nature or substance. The bulk of the jurisprudence can be seen to concern individuals in State-run social care institutions or hospitals, and not individuals in their own homes. This per se cannot of course be decisive in a given case for saying that a deprivation of liberty does not exist (for it is easy to envisage arrangements in a person's own home which would constitute just such a deprivation of liberty); but, in my judgment, the 'own home' consideration must be a relevant factor in the mix.*
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> *23. There are also references in the authorities suggesting that it has been relevant that the individual concerned, or someone acting on his behalf, was the complainant; in other words, was oppositional concerning the arrangements. For example at paragraph 71 of Cheshire West Lord Neuberger said:*
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> > *'… It is a fair point that the Strasbourg court has never had to consider a case where a person was confined to what may be described as an ordinary home. However, I cannot see any good reason why the fact that a person is confined to a domestic home, as opposed to a hospital or other institution, should*

> *prevent her from contending that she has been deprived of her liberty." [Emphasis added]*

Again, in paragraph 41 of Cheshire West, Lady Hale spoke about the complainant being under the complete supervision and control of the staff and not free to leave [emphasis added]. Such considerations do not apply here, although they are clearly not pre-requisite to a deprivation of liberty: see paragraph 12(a) above. But it is overwhelmingly clear that Mrs L is where she always wanted to be when she was capacitous: and where not only has she not shown or expressed any dissatisfaction with the arrangements, but has demonstrated positively a continuing satisfaction with being in her own home. Further, her home is clearly not a 'placement' in the sense of a person being taken or taking herself to some institution or hospital.

24. The fact of Mrs L referring to, and demonstrating by her demeanour, this continuing contentment in her home is not in issue. It is right that she is of course not capacitated. Otherwise, this case would not be happening. But I do find that she is capable of expressing her wishes and feelings, as is referred to in the documents and shown in such things as for example her choice of clothes, the choice of what she does around the property, and in her going in and out of the garden at will. Although I accept the general need for the caution which Miss Hirst urges me to exercise, this consideration must be relevant in the evaluation of whether Mrs L is being 'deprived' of her 'liberty' within Article 5.

25. This case is thus different from one involving institutional accommodation with arrangements designed to confine the person for his or her safety, and where that person, or someone on his or her behalf, is challenging the need for such confinement. At paragraph 38 of Cheshire West Lady Hale spoke about 'the presence or absence of coercion' being a relevant consideration. As I have said, the range of criteria to be taken into account includes the type, duration, effects and manner of implementation of the arrangements put in place. The fact that those criteria are prefaced by the words 'such as' demonstrates that they are not intended to be exhaustive. It is a question of an overall review of all the particular circumstances of the case.

26. I observe too that Article 5 refers to everyone having a right to 'liberty and security of person' [emphasis added]. Mrs L's 'security' is being achieved by the arrangements put into place as being in her best interests, even though involving restrictions. Such restrictions are not continuous or complete. Mrs L has ample time to spend as she wishes, and the carer's visits are the minimum necessary for her safety and wellbeing, being largely concerned to ensure that she is eating, taking liquids and coping generally in other respects.

27. This is a finely balanced case; but on the totality of everything that I have read in the files, I have come to the conclusion and find that whilst the arrangements (clearly) constitute restrictions on Mrs L's liberty, they do not quite cross the line to being a deprivation of it. If I were wrong about that, and if there is a deprivation of Mrs L's liberty, is it to be imputed to the State? On the facts, I find not. This is a shared arrangement set up by agreement with a caring and pro-active family: and the responsibility of the State is, it seems to me, diluted by the strong role which the family has played and continues to play. I do not consider in such circumstances that the mischief of State interference at which Article 5 was and is directed, sufficiently exists.

> *28. In these circumstances, my decision is simply that there is no deprivation of Mrs L's liberty. This is not per se because Mrs L is in her own home; nor because she wishes to be there. Those features alone would not necessarily stop particular arrangements amounting to a deprivation of liberty. Rather it is a finely balanced decision taken on all the facts of the particular case…"* (emphasis added)

Comment

Alongside *Rochdale MBC v KW* (a further iteration of which is discussed below), this is the second reported case that has sought to distance its factual circumstances from *Cheshire West*. The court's reluctance to place significant weight on the "own home" feature is understandable, given that some might contend that P and MIG were living at "home", albeit not their "own". Similarly, KW lived in her "home" but this was not her "own" because it was a rented property. Were a person's accommodation status to be relevant to the triggering of Article 5 would mean that we would run the risk of very fine distinctions being drawn in determining what constitutes a "home". Indeed, in *R (G) v Nottinghamshire Healthcare NHS Trust and others* [2009] EWCA Civ 795, the Trust suggested that Rampton high security hospital was the detained patient's "home".

What we might be witnessing is the emerging relevance of Article 8 in the triggering of Article 5: an argument put to, but not referred to by, the Supreme Court. "Home", in Article 8 terms, is *"the place … where private and family life develops*": *Gomez v Spain* (2005) 41 EHRR 40 at para 53. And clearly, the lower the threshold for "deprivation of liberty," the greater the intrusion on people's Article 8 rights. The following passage from the Court of Appeal's judgment in the *Rampton* smoking ban case might become increasingly relevant:

> *"42. Article 8 seeks to prevent intrusion by the state into the physical and private space which the concept of home represents. For example, what one eats or drinks may not be important, but that the state should dictate what a person eats or drinks in the privacy of a person's own home would be regarded as deeply intrusive. As Isaiah Berlin put it:*
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> > *'The desire not to be impinged upon, to be left to oneself, has been a mark of high civilization both on the part of individuals and communities. The sense of privacy itself, of the area of personal relationships as something sacred in its own right, derives from a conception of freedom which for all its religious roots, is scarcely older, in its developed state, than the Renaissance or Reformation. Yet its decline would mark the death of a civilization, of an entire moral outlook.' (Inaugural Lecture, Oxford 1958)"*

As Mostyn J did *Rochdale*, Bodey J cites the reference in Article 5 to "liberty *and security*" of person. Whether the appellate courts begin to shift their focus in this way will be interesting given the ECtHR's stance to date, which is that "security of person" does not provide any separate interpretation from the right to liberty, its inclusion serving to emphasise that detention must not be arbitrary: see, e.g., *Altun v Turkey* [2004] ECHR 237 at para 57. This can be contrasted with the interpretation afforded to analogous provisions in the Universal Declaration of Human Rights (article 3), the International Covenant on Civil and Political Rights (article 9), and the American Declaration on the Rights and Duties of Man (article 1).

It is a matter of some considerable regret that the Local Authority only introduced very late in the day questions relating to the circumstances in which the State might be responsible for violating its positive obligations under Article 5 ECHR to protect people from arbitrary interferences by private persons. So this aspect of the case was not considered in any depth by Bodey J. However, it is analysed in the Law Society guidance discussed below (guidance drafted before the transcript of Bodey J's judgment had been published but with limited information as to his conclusions).

It is not known whether this decision is to be appealed. As matters stand, it seems that *W City Council* provides a rare example of when someone is not free to leave but is not under continuous or complete supervision and control.

'Baby Bournewood?'

D (A Child) (Deprivation of Liberty) [2015] EWHC 922 (Fam) (Family Division (Keehan J))

Article 5 ECHR – Deprivation of liberty – Children and young persons – Interface with inherent jurisdiction

Summary

This case concerns the question of the application of the 'acid test' to those under 16. D, the child at the centre of the proceedings, was 15, with a number of difficulties including ADHD, Asperger's and Tourette's. He was informally admitted to hospital ('hospital B') in 2013 for a multi-disciplinary assessment and treatment. The psychiatric unit had six beds, with a school room attached to the building. It was locked; he could not leave with staff or family member; he was under 30-minute observation but sought out more regular contact with staff. He left the unit daily, accompanied by staff, going off site for activities including in the community on a one-to-one basis.

D was assessed as not being *Gillick* competent to consent to his residence and care arrangements. In light of the decision in *Cheshire West*, the hospital Trust issued an application in December 2014 under the inherent jurisdiction of the High Court seeking a declaration that the deprivation of D's liberty by the Trust was lawful and in his best interests.

The matter came on for final determination before Keehan J on 9 and 10 March 2015. His Lordship was asked to determine the following principal issues:

1. Did the placement of D at Hospital B satisfy the first limb of the test propounded by Baroness Hale in *Cheshire West*?

2. If so, did the parents' consent to his placement come within the exercise of parental responsibility in respect of a 15 year old young person? In other words, were the parents able to consent to what would otherwise amount to a deprivation of liberty?; and

3. If not, should the court exercise its powers under the inherent jurisdiction to consider declaring that the deprivation of liberty of D at Hospital B was lawful and in his best interests?

The applicant hospital Trust submitted that D was objectively confined, and that his parents could not consent to this placement because consenting to what would otherwise be a deprivation of liberty fell outside the zone of parental responsibility. The local authority

submitted that D was not deprived of his liberty, both (initially) because his circumstances did not amount to a deprivation of his liberty and because the decision of D's parents to consent to his placement at Hospital B fell within the proper exercise of parental responsibility. None of the other parties (or the children's guardian) advanced substantive arguments on this issue.

Keehan J held the following:

1. The observations of Thorpe LJ in *RK v BCC and othrs* [2011] EWCA Civ 1305 to the effect that a parent may not lawfully detain or authorise the deprivation of liberty of a child (a) were obiter; (b) did not correctly state the legal position; (c) were arguably inconsistent with the views of Lords Neuberger and Kerr in *Cheshire West*; and (d) were not binding upon him;

2. The essential ratio of *Cheshire West* did not apply to the circumstances of D's case. However:

> *"42. The protection of Article 5 of the Convention and the fundamental right to liberty applies to the whole of the human race; young or old and to those with disabilities just as much to those without. It may be those rights have sometimes to be limited or restricted because of the young age or disabilities of the individual but 'the starting point should be the same as that for everyone else', per Baroness Hale: Cheshire West at paragraph 45.*
>
> *43. The majority in Cheshire West decided that what it means to be deprived of liberty is the same for everyone, whether or not they have a physical or mental disability: per Baroness Hale in Cheshire West at paragraph 46."*

Therefore, the acid test definitions of a deprivation of liberty applied as much to D as they did to the subjects of the appeals in *Cheshire West.* In reaching this conclusion, Keehan J expressly rejected the submission that he could and should adopt the 'relative normality' approach adopted by the Court of Appeal in *P and Q*;

3. The essential issue in this case was whether D's parents could, in the proper exercise of parental responsibility, consent to his accommodation in Hospital B and thus render what would otherwise be a deprivation of liberty not a deprivation of liberty (i.e. mean that the second in *Cheshire West* is not satisfied);

4. He was 'wholly satisfied' that D lived in conditions which amounted to a deprivation of his liberty:

> *"He is under constant supervision and control. The fact that D enjoys residing in the unit in Hospital B, that he is comfortable there and readily seeks out and engages with members of staff are irrelevant factors when considering whether there is a deprivation of liberty. So too are the facts that the arrangements have been made in his welfare best interests and have been, and are, to his benefit. A gilded cage is still a cage." (paragraph 52)*

5. When considering the exercise of parental responsibility in this case and whether a decision falls within the zone of parental responsibility, it was:

> *"55.* […] *inevitable and necessary that I take into account D's autism and his other diagnosed conditions. I do so because they are important and fundamental factors to take into account when considering his maturity and his ability to make decisions about his day to day life.*
>
> *56. An appropriate exercise of parental responsibility in respect of a 5 year old child will differ very considerably from what is or is not an appropriate exercise of parental responsibility in respect of a 15 year old young person.*
>
> *57. The decisions which might be said to come within the zone of parental responsibility for a 15 year old who did not suffer from the conditions with which D has been diagnosed will be of a wholly different order from those decisions which have to be taken by parents whose 15 year old son suffers with D's disabilities. Thus a decision to keep such a 15 year old boy under constant supervision and control would undoubtedly be considered an inappropriate exercise of parental responsibility and would probably amount to ill treatment. The decision to keep an autistic 15 year old boy who has erratic, challenging and potentially harmful behaviours under constant supervision and control is a quite different matter; to do otherwise would be neglectful. In such a case I consider the decision to keep this young person under constant supervision and control is the proper exercise of parental responsibility."*

6. Given that it was incontrovertible that D's parents were acting on medical advice and were making decisions of which he was incapable, in his welfare best interests, to protect him and provide him with the help and support he needed, it would be "*wholly disproportionate, and fly in the face of common sense, to rule that the decision of the parents to place D at Hospital B was not well within the zone of parental responsibility*."

7. In the exercise of their parental responsibility for D, D's parents had and were able to consent to his placement, thereby meaning his placement did not amount to a deprivation of liberty.

Keehan J expressly declined to give wider guidance either as to the approach to be taken by hospital trusts or local authorities in the cases of young people under the age of 16 who are or may be subject to a deprivation of liberty. "*These cases are invariably fact specific and require a close examination of the 'concrete' situation on the ground*" (paragraph 68); further, he declined to comment upon the approach to be taken by the local authority "still less the Court of Protection" once D had attained the age of 16.

Comment

Whilst some may well welcome this decision as a sensible curtailment of the scope of the acid test, we must register a significant note of disquiet at the approach taken.

Keehan J – rightly – emphasised the importance of the universality of Article 5 and the right to liberty, regardless of disability, and rejected the invitation of the local authority to apply the 'relative normality' test propounded by the Court

of Appeal in *P and Q*. However, he then reached his conclusion on the basis of an approach that compared D's situation not with that of an 'ordinary' child of 15, but with that of a child of 15 with significant disabilities.

This approach appears to contradict the comparator for those under 18 that was identified by Lord Kerr in the Supreme Court at paragraphs 77 to 79, namely *"children of their own age and relative maturity who are free from disability*" (paragraph 79).

It is arguably predicated on an approach that ends up denying the recognition of D's right to liberty (albeit by a different route) in precisely the same ways that the Courts of Appeal had done in the cases of MIG, MEG and P. In concrete terms, it resulted in a disabled 15 year old being confined in a psychiatric hospital for fifteen months without any formalised admission procedures indicating who could propose admission, for what reasons, and on the basis of what kind of medical and other assessments and conclusions. There was no requirement to fix the exact purpose of the admission; no limits in terms of time, treatment or care attached to the admission; no independent scrutiny; and D was afforded independent representation to challenge the circumstances. This was justified, in essence, on the basis of the bona fides of his parents and the treating doctors. Readers would be forgiven for wondering whether this does not chime significantly with HL's circumstances.

Given that Keehan J was absolutely clear that D's situation amounted – objectively – to confinement and that this confinement was, in part, for purposes of assessment and treatment of his mental disorder, we suggest that this decision is likely to be viewed in due course as being just as – if not more – controversial than the decision in *Nielsen.* There, a 12 year old boy was hospitalised for five and a half months, at his mother's request, for therapeutic purposes where the assistance rendered by the authorities was only of a limited and subsidiary nature, in contrast to the present case.

This case also illustrates the potential relevance of Article 8 to the interpretation of Article 5: that is, the lower the threshold for "deprivation of liberty", the more the State is required to interfere with people's right to respect for private life, family life and their home, in particular, in order to protect their right to liberty.

Short note: *Rochdale* rumbles on

In the latest twist in the *Rochdale* saga, Mostyn J has, in essence, held ([2015] EWCOP 13) that the Court of Appeal did not have the power to allow the appeal against his original decision as it had purported to do by way of endorsing (without a hearing) a consent order. Given that things continue to move apace in relation to this case (the latest development being that KW is seeking permission to appeal Mostyn J's most recent decision to the Court of Appeal[1]), we do not propose to cover matters further at this stage. We would, though, note that we continue to recommend that pending any further developments before the Court of Appeal, very considerable caution is given to the conclusions reached by Mostyn J as to KW's circumstances in his earlier decision for the reasons we gave in our comment thereupon.

Deprivation of Liberty Guidance

The Law Society Guidance that Alex and Neil have been working on for several months, along with

[1] With thanks to Jola Edwards of Peter Edwards Law, the solicitor instructed on behalf of KW, for confirming this.

Sophy Miles, Beverley Taylor and Paula Scully, was due out on 1 April. A major fire in the area stymied the Law Society from being able to make the final arrangements to host it, but it should be available early in the week commencing 6 April on the Society's website, along with a podcast in which Alex discusses the key points.

In the interim, and give the flavour of the Guidance, we reproduce here the Executive Summary:

> "*There are many people in different settings who are deprived of their liberty by virtue of the type of care or treatment that they are receiving, or the level of restrictive practices that they are subject to, but they cannot consent to it because they lack the mental capacity to do so. In March 2014, the Supreme Court handed down judgment in two cases: P v Cheshire West and Chester Council and P & Q v Surrey County Council [2014] UKSC 19. That judgment, commonly known as Cheshire West, has led to a considerable increase in the numbers of people in England and Wales who are considered to be "deprived" of their liberty for the purposes of receiving care and treatment. The judgment also emphasised the importance of identifying those who are deprived of their liberty so that their circumstances can be the subject of regular independent checks to ensure that decisions being made about them are actually being made in their best interests.*
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> *The Department of Health commissioned guidance to assist those professionals most directly concerned with commissioning, implementation and oversight of arrangements for the care and treatment of individuals who may lack the capacity to consent to such arrangements. Its purpose is to provide practical assistance in identifying whether they are deprived of their liberty, and hence to ensure that appropriate steps can be taken to secure their rights under Article 5 of the European Convention on Human Rights ('ECHR'). It serves – in some ways – as an informal update to Chapter 2 of the DOLS Code of Practice, although it does not have the same statutory status, and the views expressed in it are those of the authors rather than representing Department of Health policy. It does not constitute formal legal advice, which should always be sought where necessary on the facts of difficult cases.*
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> *This guidance is not a panacea for Article 5 ECHR: there are a number of important limitations. First, it relates only to those who lack the mental capacity to consent to their residential and care arrangements: it does not cover situations where those with capacity are objecting to the same. Second, those of any age could potentially be deprived of their liberty; however, this guidance focuses solely on those aged 16 and over because that is the minimum age at which the Court of Protection can authorise a deprivation of liberty. Third, its principal aim is to assist in identifying a deprivation: it does not address in detail how that deprivation ought to be authorised. Nor does the guidance consider the law regarding the challenging of a deprivation of liberty under Article 5(4) ECHR; resources addressing that question can be found in Chapter 11.*
>
> *The guidance starts in Part I with an overview of the legal framework and of the key legal questions that must now be asked following the decision of the Supreme Court. Part II is the heart of the guidance, applying the legal principles across the following settings: the hospital setting, the psychiatric setting, the care home setting, supported living/shared lives/extra care, at home, and in relation to those aged 16 and 17. Where relevant, the guidance identifies particular sub-divisions within the care setting covered in the chapter (for instance, Accident and Emergency*

departments and Intensive Care Units within the hospital setting).

For each setting or sub-category, a list of potentially 'liberty-restricting' factors are given that may indicate that a deprivation of liberty is occurring; three scenarios are also given, one illustrating a deprivation of liberty, one a potential deprivation of liberty depending on the circumstances, and one a situation unlikely to amount to a deprivation of liberty. Each chapter then concludes with a list of questions that professionals may want to ask themselves whenever they are confronted with a situation which may amount to a deprivation of liberty. Each chapter can be downloaded separately, as can the list of questions for that chapter, so professionals need only have with them those parts of the guidance that are most relevant to the circumstances they are likely to encounter.

In Part III is to be found summaries of key cases (including those which must in light of Cheshire West be read with a health warning) and further information and resources for those needing to keep themselves abreast of developments. The law is stated as at the end of February 2015.

Given that there remain a significant number of areas in which the law has yet to be clarified by the courts, this guidance serves as much to provoke professionals to seek further specific advice in difficult cases as it does to give answers. It will, inevitably, be superseded in due course by further judgments of the court but will at least provide a starting point to assist professionals to ask the right questions.

ADASS forms and guidance

The ADASS DOLS forms have been slightly revised to take account of the judgment in *AJ*. Guidance to accompany the forms has also now been produced. Both should be available shortly here; in the interim, and with thanks to Lorraine Currie, the guidance is available here.

Joint Guidance on Deprivation of Liberty in Children's Homes withdrawn

With thanks to James Batey of HMCTS for bringing this to our attention, we understand that the Guidance "*Deprivation of liberty - guidance for providers of children's homes and residential special schools - agreed by the President of the Court of Protection and Ofsted and dated the 12 February 2014*" has been withdrawn with immediate effect. We are informed that "[t]*his has been agreed by the President of the Court of Protection and Ofsted in light of developing case law.*"

DOLS debate in the House of Lords

The week after the debate on the post-legislative scrutiny report of the House of Lords Select Committee (discussed in the Capacity outside the Court of Protection Newsletter), a short debate on DOLS debate took place on 16 March at the instigation of Baroness Finlay. The Hansard report is available here, but in summary form, Baroness Finlay was concerned to obtain assistance from the Government as to the scope of the implications of the Cheshire West judgment and say whether it is seen to be appropriate to interpret the implications so widely. She, and other peers, identified the substantial burdens imposed upon local authorities in consequence of the judgment, and also flagged up other questions that have been exercising others since the decision was handed down. Particular interesting was the intervention of Lord Hope, the former deputy

President of the Supreme Court, and his observations upon the judgment (and his agreement with Lord Brown, another former Law Lord) that the cases of P, MIG and MEG represent the extreme limits of what English courts would conclude involves a deprivation of liberty.

In his response on behalf of the Government, Earl Howe made clear that:

> *"the Supreme Court judgment has challenged us to think about how we regard the most vulnerable members of society. The ultimate test is for those of us fortunate to have full capacity to put ourselves in the place of those who do not. If we were prevented from leaving a hospital ward—if we could exercise no choice over our day-to-day activities, over whom we met and when we met them—I wonder how we would feel. I suspect that we would expect at the very least to have a legal route of redress. Those who lack capacity deserve and are entitled to exactly the same. The challenge now is to deliver these rights in a busy and pressurised health and care system upon which demand continues to rise."*

Whilst he noted steps such as the reduction in the number of forms required for DOLS as a result of the work of the ADASS task force, Earl Howe made clear that there will be no immediate legislative "quick fix":

> *"The noble and learned Lord, Lord Hope, and my noble friend Lord Howard questioned whether there might be changes to the law that we could make more quickly to help alleviate the pressure on the system pending the Law Commission report. I know that some partners have called for rapid legal changes. One example is increasing the time for which hospitals can authorise a deprivation of liberty—that is, instead of the current seven days, perhaps 14 or 21 days. Another suggestion that I have heard is to change the requirement for local authorities to process applications within 21 days by extending that period. Although I sympathise with local authorities and hospitals because of the pressures they are under, the counterargument that I know many others make is that, with something as important as fundamental human rights, government should not weaken the safeguards. My own belief is that the changes proposed should be considered in the round with the wider changes that the Law Commission is currently considering so that we do not inadvertently cause negative or unhelpful side-effects."*

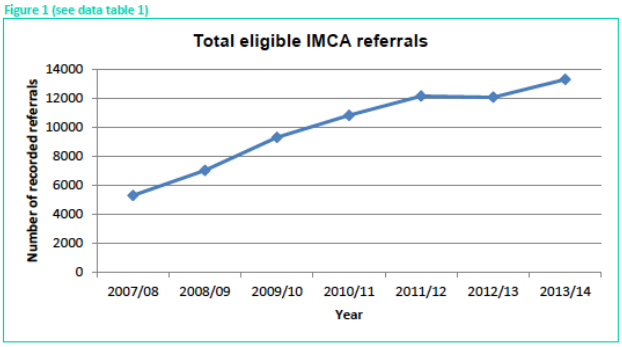
Further:

> *"The noble Baroness, Lady Finlay, questioned whether there should be a test case—and, if so, who should do it and where the funding should come from. In terms of a test case to take to the Supreme Court, the Government are not yet minded to force this issue."*

The Seventh Year of the Independent Mental Capacity Advocacy (IMCA) Service

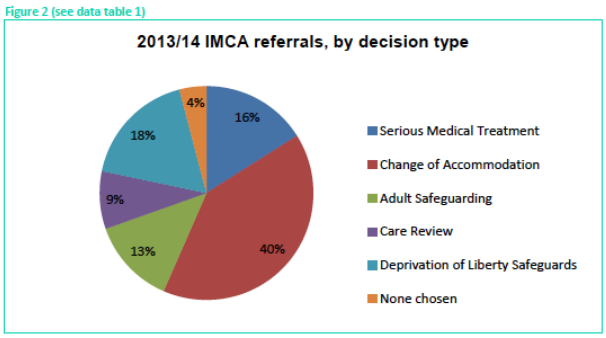
This report (covering England only), which came out on 26 March, is well worth a read. It covers the reporting period of 1 April 2013 to 31 March 2014 and provides a useful insight into the IMCA service prior to the impact of the *Cheshire West* decision. There are also a number of case studies to assist practitioners. Overall, the data shows a trend in the number of referrals:

Figure 1 (see data table 1)



The two most common conditions, in respect of which a referral was made, were dementia (42%) and learning disability (20%). The proportion of referrals for each type of decision were:

Figure 2 (see data table 1)



The report contains a number of key messages:

- Capacity: It is important that a person's capacity to make decisions about their treatment is considered and an IMCA appointed if appropriate;

- Care plans: If a person lacks capacity their lack of objection to existing arrangements should not mean that care plans are not scrutinised. An IMCA should be appointed if appropriate;

- Discharge planning: It is import that accommodation decisions are considered early in hospital stays to avoid delays at discharge;

- Right to appeal: If a person who lacks capacity wishes to appeal against a DoLS authorisation then they should be supported to do so even if the Relevant Person's Representative feels the DoLS is in their best interests [note, this report does not cover the decision in *AJ*, which makes this point even more strongly];

- Safeguarding: Half of the people who lacked capacity did not have any support from an advocate, family member or friend during the safeguarding referral.

The report makes four recommendations:

- That IMCAs and MCA leads in hospitals work to build links and improve awareness of the MCA and the IMCA service among clinicians;

- Responsible bodies should ensure that they have a documented policy on when safeguarding cases should be referred to an IMCA. They should revisit the criteria within the policy to ensure that those who would benefit from an advocate have the opportunity to do so. In particular, consideration should be given to cases where there is no appropriate family member or friend to support a person who lacks capacity;

- All local authorities should review their processes and procedures for providing IMCA support to unpaid Relevant Person's Representatives to ensure that the right people are given access to this valuable service;

- All IMCA providers should review the draft guidance on training and development,

provided with this report and consider how it could be implemented in their organisation. Commissioners should also consider training standards when reviewing contracts.

Deprivation of liberty – the ECtHR pronounces again

In *Stankov v Bulgaria* (Application No. 25820/07, decision of 17 March 2015), the European Court of Human Rights has given a further important judgment in relation to Bulgarian care homes (thanks, in significant part, to the excellent work of the Mental Disability Advocacy Centre). Jill Stavert covers the decision – currently available only in French – and its implications in the Scotland section of this Newsletter, but we would emphasise two points of particular importance to those concerned with deprivation of liberty in England and Wales:

1. The court held (at paragraph 87) that Mr Stankov was "*sous un contrôle constant et n'était pas libre de quitter le foyer sans autorisation à tout moment lorsqu'il le souhaitait*" (i.e., in our unofficial translation "*under constant control and was not free to leave the care home without permission at any point that he wished*." In so holding, the court was less concerned with examining the circumstances within the care home than it was with the circumscription of Mr Stankov's ability to come and go from the care home without permission (and the fact that the police would potentially be called if he did so). This undoubtedly suggests – at least in the context of social care placements – an approach that is not concerned with micro-analysis of the regime in the placement but takes a broader-brush (dare one say common sense?) approach to the question of deprivation of liberty;

2. The court also confirmed that in asking whether a person has the capacity to consent (and has properly consented) to their confinement for social care purposes, the same approach is to be taken as in relation to placement for psychiatric treatment purposes: see paragraph 90. In other words, the consent of a person can only be considered valid if (in our unofficial translation) there is "*sufficient and credible proof to suggest that the person's capacity to consent and to understand the consequences of their consent was established during the course of a fair and appropriate procedure, and that all necessary information concerning the placement and the proposed treatment was provided to the person concerned in an adequate fashion*."

Whilst this case came too late to be considered in the Law Society guidance, the approach suggested in the guidance in relation to both of these points is consistent with that taken in *Stankov*. We would note, in particular, that the approach taken in relation to capacity to consent is – as is suggested in the guidance – in essence consistent with that suggested by Baker J in *A PCT v LDV* [2013] EWHC 272 (Fam), and that this approach should apply to consideration of whether the capacity requirement under paragraph 14 of Schedule A1 is met, whether in hospital or a care home. This is, we suggest, a more stringent test than may sometimes have been appreciated, and requires, in particular, the communication of and the functional ability to process the core elements of the confinement that will result from admission. Put another way – and very bluntly – a person cannot be said to have consented to their confinement if they have

not been told of and do not understand the core features of that confinement.

The (not so?) great confinement

For those of you who want to take a step back and ask whether we are on the right track as regards deprivation of liberty, we would strongly recommend (sparing Neil's blushes) the article Neil has written in the most recent issue of the Elder Law Journal on *Cheshire West* and its impact. A sneak preview is to be found here.

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Conferences at which editors/contributors are speaking

Socio-Legal Studies Association

Alex is presenting a paper on "(Re)presenting P before the Court of Protection" and Jill a paper on "Addressing the *Bournewood* gap in Scotland" at the SLSA 2015 Annual Conference at the University of Warwick 1-2 April.

Commonwealth Legal Education Association

Jill will be presenting (with Rebecca McGregor) a paper on "Access to equal recognition before the law for persons with mental disabilities through supported decision making in Scotland" at the Commonwealth Legal Education Association 2015 conference in Glasgow 9-10 April.

Elderly Care Conference 2015

Alex will be speaking at Browne Jacobson's Annual Elderly Care Conference in Manchester on 20 April. For full details, see here.

Medical Issues and the Mental Capacity Act 2005

Tor will be speaking at a conference arranged by Clarke Willmott on 24 April, her topic being "The Court of Protection and medical treatment disputes: avoiding court and what happens if you can't." Full details of the conference are available here.

'In Whose Best Interests?' Determining best interests in health and social care

Alex will be giving the keynote speech at this inaugural conference on 2 July, arranged by the University of Worcester in association with the Worcester Medico-Legal Society. For full details, including as to how to submit papers, 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.

Chambers Details

Our next Newsletter will be out in early May. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Newsletter in the future please contact marketing@39essex.com.

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THE QUEEN'S AWARDS FOR ENTERPRISE INTERNATIONAL TRADE 2013

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Alex been recommended as a leading expert in the field of mental capacity law for several years, appearing in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively about mental capacity law and policy, works to which he has contributed including 'The Court of Protection Handbook' (2014, LAG); 'The International Protection of Adults' (2015, Oxford University Press), Jordan's 'Court of Protection Practice' and the third edition of 'Assessment of Mental Capacity' (Law Society/BMA 2009). He is an Honorary Research Lecturer at the University of Manchester, and the creator of 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. She previously lectured in Medical Ethics at King's College London and was Assistant Director of the Nuffield Council on Bioethics. 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.

Simon Edwards
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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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Adrian is a practising Scottish solicitor, a partner of 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.

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