Scotland

Introduction

Welcome to the July 2015 Newsletters: Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: an article from Tim Spencer-Lane of the Law Commission outlining its vitally important consultation on deprivation of liberty, Re X, duck-spotting with Mostyn J and a significant case on medical treatment;

(2) In the Property and Affairs Newsletter: an important review of the law of ‘doing the right thing’ in statutory will cases, SJ Lush on wishes and feelings, and a reminder of the new LPA forms;

(3) In the Practice and Procedure Newsletter: an update on the significant changes to the Court of Protection Rules taking effect from 1 July, a useful case on the inherent jurisdiction and procedural points of analogy from cases involving children;

(4) In the Capacity outside the COP Newsletter: a stop press on ordinary residence following the Supreme Court’s decision in the Cornwall case, the Law Society’s Practice Note on meeting the needs of vulnerable clients, capacity to withdraw consent an update on the Northern Ireland Mental Capacity Bill, and the European Court of Human Rights considers life-sustaining treatment;

(5) In the Scotland Newsletter: the new Scottish Government guidance on ordinary residence and an update on the Mental Health Bill.

And remember, you can now find all our past issues, our case summaries, and much more on our dedicated sub-site here.

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For all our mental capacity resources, click here. Transcripts not available at time of writing are likely to be soon at www.mentalhealthlaw.co.uk.
New guidance – old flaw?


Apart from the concerns identified below, the guidance brings helpful clarity to situations where people in need of provision of accommodation and/or services under the Social Work (Scotland) Act 1968 cross borders between local authorities. As “Case Study 3” in the guidance shows, complexities can be situations where a person in area A has an accident resulting in permanently impaired mobility in area B and is placed in residential care in area C. The answer in that case is that local authority C charges the cost to local authority B, because local authority B arranged the placement, and then local authority B charges to local authority A because the lady’s ordinary residence remains in area A. There is perhaps some concern that this assumes full and prompt co-operation among the three local authorities. Those of us in practice are aware that this does not always happen. That accordingly leaves open the question as to whether, if local authority B discharged their duty to meet needs arising in their area regardless of the person’s ordinary residence, and in consequence arranged the placement in area C, in advance of any engagement by area A, then does responsibility rest with local authority B as the placing authority, or local authority A as the authority of ordinary residence? The guidance could be interpreted as suggesting either.

A greater concern is the suggested timescale for dispute resolution, and the lack of access to that process for people actually affected by such delay. The guidance suggests (paragraph 47) that: “Where a local authority corresponds with another authority, a timescale of one month is the suggested period within which the latter should issue a response”. It then suggests (paragraph 48) that: “Where agreement cannot be reached within 4 months of the dispute commencing the authorities may wish to consider requesting a determination of ordinary residence [by Scottish Ministers] under section 86(2)”. No information is given as to the period within which Scottish Ministers would resolve the dispute. Practitioners who have been involved in cross-border dispute situations between local authorities, or simply where local authorities have failed to respond, are aware of circumstances where real disadvantage and detriment can be caused to vulnerable people, and serious anxiety to their families, by prolonged failure to resolve. It is disappointing that they would still require to seek remedies outside the dispute resolution process outlined in the new guidance.

The most surprising aspect of the new guidance is that it still follows the previous guidance in offering a unique interpretation of relevant English case authority on the question of when ordinary residence moves when a person lacking sufficient capacity to decide the matter herself or himself in fact moves from one local authority area to another. As with the old guidance, the new guidance acknowledges (paragraph 16) that: “There is no statutory definition of the term ‘ordinarily resident’ in the 1968 Act, nor have the Scottish courts been asked, as at the date of this Circular taking effect [1st June 2015], to interpret its meaning”. It then proceeds in paragraphs 17 and 18 to refer to English authorities, including the dictum of Lord Scarman in Shah v London
Borough of Barnet [1983] 1 All E.R. 226: “unless ... it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning I unhesitatingly subscribe to the view that ‘ordinarily resident’ refers to a man’s abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration” (emphasis in guidance).

In a case on habitual residence of a child, the Supreme Court observed in Re LC (Children) [2014] UKSC 1 (Supreme Court) that where Lord Scarman had observed in the Shah case that proof of ordinary (or, the Supreme Court said, habitual) residence was “ultimately a question of fact, depending more upon the evidence of matters susceptible of objective proof than upon evidence as to state of mind”, the Supreme Court was of the opinion that: “insofar as Lord Scarman’s observation [in Shah] might be taken to exclude the relevance of a person’s state of mind to her habitual residence, I suggest that this court should consign it to legal history, along with the test which he propounded”.

Then last year in “the Cornwall case” - R (Cornwall Council) v SoS for Health & Ors [2014] EWCA Civ 12 – the Court of Appeal in England, dealing with a dispute about in which Council area an adult was ordinarily resident, confirmed that: “Shah should be abandoned as the appropriate test to apply when considering the ordinary residence of young children, because they cannot sensibly be said voluntarily to choose where they live nor to have a subjective settled purpose with respect to it. Precisely the same difficulties arise with respect to those who are severely mentally disabled as Vale itself recognised. Shah provides no real assistance in those cases either.” (Lord Justice Elias, para 74).

Even more peculiarly, the new guidance quotes in Annex A what are known as the two “Vale tests” for determining the ordinary residence of individuals who lack capacity. Vale test 1 is in the following terms: “Where a person was so mentally handicapped that she was totally dependent on a parent or guardian, her ordinary residence was that of the parent or guardian: Mr Justice Taylor proceeds to expand on this to state that it was clear from Lord Scarman’s speech in Shah that the mind of the claimant was important in two respects in determining ordinary residence: the residence must be voluntarily adopted and there must be a degree of settled purpose. In this case however, the applicant was not capable of deciding where to live and it is unreal to speak of settled purpose: the decision as to where she should live was at all times her parents’ decision”. Vale test 2 is: “The Alternative Approach involves considering a person’s ordinary residence as if they had capacity. All the facts of the person’s case should be considered including physical presence in a particular place and the nature and purpose of that presence as outlined in Shah without requiring the person themselves to have adopted the residence voluntarily”.

Startlingly, having quoted this authority and having acknowledged that in the absence of any Scottish authority it is necessary to look to English authority, the Scottish guidance persists in following Vale test 1 and disregarding Vale test 2, notwithstanding that equivalent English guidance, which is Department of Health: “Ordinary Residence: Guidance on the Identification of the Ordinary Residence of People in need of Community Care Services, England” (October 2013 – being an update of earlier guidance), refers to both tests as alternatives. The new Scottish guidance, like its predecessor, offers no basis or authority in law for this different “interpretation”. It merely states that “the approach in England differs in that it encourages
a broader view than that in Scotland”. One fears that Scottish Ministers continue to face the potential alternatives of judicial review for failing to follow their own guidance, or judicial review for failing to apply the law upon which their guidance is stated to be based; and people affected will still be caught in that situation, including in cross-border situations where, under the Care Act 2014, the “responsible person” (in the case of Scotland, the Scottish Ministers) for the country in which the claiming authority is based determines the matter. We are still at risk of situations where a person who has moved from England to Scotland is deemed in accordance with English guidance to no longer have ordinary residence in an English local authority area, and under Scottish guidance not to have acquired ordinary residence in a Scottish local authority area.

The difficulties are compounded in that the view with which Scottish Ministers persist will clearly result in differences between ordinary residence, on the one hand, and habitual residence both under the Adults with Incapacity (Scotland) Act 2000 and under the Hague Convention on International Protection of Adults (Hague Convention 35, of 13th January 2000) in the case of persons with impairments of relevant capacity. That will increase unnecessarily the number of cases where the deemed local authority of ordinary residence will be in a different area from the court having jurisdiction on grounds of habitual residence.

A further potential complication is that under the Carers Bill at present before the Scottish Parliament, it is proposed that assessments of carers’ needs should be carried out by the local authority of the carers’ ordinary residence, even where that is different from the ordinary residence of the person cared for (presumably, in the meantime, meaning ordinary residence as asserted – without authority – by Scottish Ministers).

The Cornwall case was appealed to the Supreme Court. Annex A concludes with a note that the guidance will be reviewed and, if necessary, amended following that decision. As noted in the Stop Press in the Capacity outside the Court of Protection Guidance, the decision of the Supreme Court was handed down just as this Newsletter went to press. We will be returning to this subject in the next Newsletter.

Adrian D Ward

Mental Health (Scotland) Bill

Introduction

Further to the February 2015 update on this Bill, Stage 3 the legislative process took place on 24th June 2015. The following is therefore a brief summary of the most notable of its finalised provisions.

As mentioned before, the Bill amends the Mental Health (Care and Treatment)(Scotland) Act 2003 (2003 Act) and the Criminal Procedure (Scotland) Act 1995. It also introduces a victim notification scheme in relation to mentally disordered offenders extending the existing victim notification scheme under the Criminal Justice (Scotland) Act 2003.

Certain original provisions are now missing, and these are, in the view of the author, to be welcomed. The proposal to extend the existing automatic 5 working day extension between the

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1 The Bill as passed contains several ‘tidying up’ provisions which will not be mentioned here.
2 Subject, of course, to any potential challenge to legislative competence (ss 33 and 35 Scotland Act 1998) and Royal Assent.
end of a short term detention certificate and the Mental Health Tribunal hearing to 10 working days was removed. Additionally, the reduction of the period within which an appeal can be made against a decision to transfer to hospital (state or otherwise) from 12 weeks to 28 days was also removed.

However, mental health officers (MHOs) will still have increased duties, as previously indicated. In its End of Stage 1 Report, the Health and Sport Committee, as lead committee, sought further assurances from the Scottish Government regarding resourcing and a strategic review of MHO provision to improve the recruitment, training and retention\(^3\). The Scottish Government responded by saying that in its assessment the proposed legislative changes will have a limited impact on MHOs. However, noting concerns regarding the capacity of the MHOs workforce generally it is exploring this with key stakeholders, including local authorities and mental health officers, to see how it can be addressed\(^4\).

Orders regarding level of security (ss 9D-11A, Bill as passed)

The right for patients to be able to challenge their conditions of detention on grounds of excessive security will be extended to medium secure units only. As mentioned earlier, there could conceivably be occasions where an individual in a low secure setting may be subject to inappropriately relative high levels of security although the necessity for their detention remains. This has important Article 8 (right to private and family life) ECHR (and corresponding Articles 17 and 23 CRPD) implications. However, the Scottish Government was not prepared to concede this.

The awaited regulations to accompany the provisions in s 268 and make the right to appeal against detention in conditions of excessive security in non-state hospitals real have also now been drafted and it is intended that these will come into force after the summer recess\(^5\).

There are, however, certain obstacles to a patient’s ability to make the challenge. The Bill amends the 2003 Act to require that before such a challenge, from both the State Hospital and non-state hospitals\(^6\), a medical practitioner must report (with reasons) that in their opinion the patient does not require to be detained under such a level of security\(^7\). This may help to reduce unmeritorious challenges but it nevertheless is an impediment to a patient’s ability to obtain a fair hearing and fully exercise their right with potential ECHR, and CRPD, implications\(^8\). Another impediment of a similar nature appears in the draft regulations relating to medium secure settings. These provide\(^9\) that a patient’s detention will be at a level of security that is excessive when the security at the hospital is greater than is necessary to safely manage (a) the risk that the patient may pose to (i) the patient’s own safety; and (ii) the safety of any other person; and (b) any risk to the patient’s safety that other persons may pose. This last criterion


\(^5\) See also A Ward, *LS v Scottish Ministers (Judicial Review)*, in the June 2015 newsletter on this issue.

\(^6\) ss 264 and 268, 2003 Act respectively.

\(^7\) ss 9D(2) and (3) Bill as passed.

\(^8\) Articles 6, 8 and 14 ECHR. See also Articles 5, 12, 13 and 17 CRPD.

\(^9\) Reg. 5, draft Mental Health (Detention in Conditions of Excessive Security) (Scotland) Regulations 2015.
could therefore be arguably used to justify retention of the patient at a higher level of security than is required even though it is beyond that patient’s control and not therapeutically appropriate with Articles 3, 8 and 14 ECHR, and also Article 5 ECHR\(^{10}\), consequences.

**Nurses’ holding power (s 14, Bill as passed)**

Nurses will be able to detain patients pending medical examination for a period not exceeding three hours. Currently, they can detain a patient for up to two hours but this can be extended by up to an hour to allow the medical examination to take place\(^{11}\).

**Absconding patients from other jurisdictions (s 25, Bill as passed)**

There were concerns that the amendments might potentially permit treatment that the absconding patient would not have been subjected to in the jurisdiction from where they came. This has now been ameliorated to some extent by the fact that the final Bill specifically provides that neurosurgery and ECT will not be authorised.

**Deaths of psychiatric patients (s 27B Bill as passed)**

It is debatable whether the current arrangements for investigation into the deaths of psychiatric patients, which currently do not command mandatory investigations under legislation, is compatible with the operational duty imposed on states by Article 2 ECHR\(^{12}\). Unfortunately, this does not appear to have been satisfactorily addressed in the Inquiries into Deaths (Scotland) Bill currently before the Scottish Parliament.

The Mental Health Bill as passed admittedly now contains a provision requiring the Scottish Government to carry out a review of existing arrangements for investigating deaths of compulsory and voluntary psychiatric patients within 3 years of the material section coming into force. It must then report its findings to the Scottish Parliament. This is a step in the right direction but a painfully slow process.

**Extension of assessment order period (s 29, Bill as passed)**

A court will be able to extend an assessment order for 14 days (it is currently 7 days). As previously mentioned\(^{13}\), this has implications in terms of timeous determination of a patient’s case under Articles 5 and 6 ECHR.

**Patient/service user support**

**a) Named persons (ss18A-20A Bill as passed)**

The 2003 Act will be amended so that no named person will be appointed for anyone aged 16 years and over unless they specifically appoint such a named person in a written and witnessed statement. Similarly, a named person must specifically consent to act in a written and witnessed statement. What now needs to be worked on is clarifying and raising awareness as to the role of named persons as this has been

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\(^{10}\) Aerts v Belgium (25357/94) (1998) ECHR 64; Hadzic and Suljic v Bosnia Herzegovina (39446/06)(2011)ECHR 911.

\(^{11}\) s 299, 2003 Act.

found to be lacking in many cases\textsuperscript{14}. The Mental Welfare Commission has already recommended that the Scottish Government revises the 2003 Act Code of Practice and its guidance for named to this end\textsuperscript{15}.

\textbf{b) Advance statements (s 21 Bill as passed)}

The End of Stage 1 Report had recommended that in addition to the central register of advance statements to be held by the Mental Welfare Commission the Scottish Government consider placing a statutory duty on health boards and local authorities to promote them\textsuperscript{16}. This is important in terms of recognition of the need to reinforce the requirement for patient participation under the 2003 Act, under Article 8 ECHR and in terms of moving towards the April 2014 UN Committee on the Rights of Persons with Disabilities \textit{General Comment on Article 12 CRPD: the right to equal recognition before the law}.

The Bill as passed includes a provision requiring health board to publicise any support it offers for making or withdrawing an advance statement and sending a copy of such advance statement or withdrawal to a health board. Moreover, the Mental Welfare Commission may require the health board to provide information on its compliance with such duty. Whilst this falls short of a duty to actually promote advance statements it is nevertheless a positive step forward.

\textbf{c) Independent advocacy (s 21A Bill as passed)}

As stated in the February 2015 issue, the provision of independent advocacy, despite the statutory obligation on health boards and local authorities across to secure its availability\textsuperscript{17}, is inadequate. Moreover, research indicates that at any one time in Scotland around 1.2 million people (representing 21\% of the population) have a right to independent advocacy\textsuperscript{18}.

Reinforcement of this provision would thus maintain and enhance the person- and rights-centred spirit of the Act in terms of promoting autonomy and equal partnership in shared decision-making. It would also to some extent address the requirements of the UN Committee on the Rights of Persons with Disabilities \textit{General Comment on Article 12 CRPD}.

The Bill as passed provides that the Mental Welfare Commission can request information on local authority and health board actual and intended compliance of this duty from local authorities and health boards\textsuperscript{19}.

\textit{Victim Notification Scheme (ss 43-45, Bill as passed)}

Section 16 of the Criminal Justice Act provides that victims can receive information regarding, for example, the first time the prisoner is entitled to be considered for temporary release, escapes, is transferred to a prison outside Scotland, releases on licence/parole, dies or when the custodial sentences ends. The EU Directive 2012/29/EU contains a right for victims to receive information (Article 6) and makes no distinction

\begin{itemize}
  \item \textsuperscript{14} See, for example, the McManus Review, p14 and Mental Welfare Commission for Scotland, Experience of Named Persons, 2014, pp 4-5 and 21.
  \item \textsuperscript{15} \textit{Ibid}, pp 4-5.
  \item \textsuperscript{16} Paras 157-158, Report.
  \item \textsuperscript{17} S 259 2003 Act.
  \item \textsuperscript{18} See Scottish Independent Advocacy Alliance, \textit{Mental Health (Scotland) Bill: SIAA Briefing for the Health and Sport Committee}, November 2014, p2.
  \item \textsuperscript{19} Actual evidence of compliance can be requested for a period of at least 2 years specified by the Commission and information on intended compliance can be requested for a period of at least 2 years.
\end{itemize}
between offenders and mentally disordered offenders.

The Bill as passed permits victims to receive certain information about a mentally disordered offender who is in hospital receiving treatment for mental disorder under a hospital direction or transfer for treatment direction (s 43 Bill as passed). It also permits victims (and their next of kin) have the right to receive certain information about a mentally disordered offender (aged 16 years and over) on a compulsion order and restriction order (s 44 Bill as passed). Victims also have the right to make representations in certain circumstances when disposals or measures are being considered regarding a mentally disordered offender (s 45 Bill as passed).

There has been concern, reflected in the End of Stage 1 Report, about the ministerial power in s 48 to amend the provision, under delegated legislation, and that this might subsequently be used to extend the provisions to persons subject to compulsion orders. This would therefore potentially apply to persons who have only committed a minor offences and it is questionable whether this would be a reasonable and proportionate measure in terms of Articles 8 and 14 ECHR.

In its response the Scottish Government stated that if the scheme is extended beyond those on a Restriction Order it would be done in such a way that will not put mentally disordered offenders in a disadvantaged position relative to other offenders. It also stated that a Short Life Working Group was currently considering how to implement these provisions in the Bill.

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20 Para 194.
21 Scottish Government response to End of Stage 1 report, pp 11-12.

Conclusion

The Bill was not intended by the Scottish Government to represent a ‘root and branch’ review of the 2003 Act. This was disappointing to those who would have liked to have used this opportunity to undertake a wider review and amendment of the legislation. However, as indicated above, whilst certain concerns remain about some of the amendments several of those that were challenged have been removed. Time will no doubt tell the extent to which the amendments will operate in practice.

Jill Stavert
Conferences

Conferences at which editors/contributors are speaking

International Academy of Law and Mental Health Congress

Jill is presenting a paper at this conference on 12-17 July in Vienna, entitled 'Meeting the Challenges of the General Comment on Article 12 CRPD: Scottish Incapacity and Mental Health Legislation.'

Deprivation of Liberty Safeguards

Tor will speaking at POhWER’s conference on 17 July in Central London on DOLS, including discussion of the Law Commission’s Consultation Paper. For further details, and to book, see here.

The Law Society of Scotland Update Conference on Mental Health and Incapacity

Jill is speaking on deprivation of liberty at this conference in Glasgow on 4 September. For further details, and to book, see here.

The Mental Capacity Act 2005 – Ten Years On

Alex will be speaking on ‘(Re)presenting P’ at this major conference hosted by the University of Liverpool on 9 and 10 September. For further details and to book, see here.

Jordan’s Court of Protection Conference

Alex will be speaking at Jordan’s Annual Court of Protection Conference on 13 October 2015. For further details, and to book, see here.

Court of Protection Practitioners’ Association National Conference

Alex will be speaking at COPPA’s national conference on 24 September 2015. For further details, and to book, see here.

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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.
Conferences

**Seventh Annual Review of the Mental Capacity Act 2005**

Neil and Alex will both be speaking (along with Fenella Morris QC) at this annual fixture in York on 15 October, now under the auspices of Switalskis solicitors. For further details, and to book, see [here](#).

**Taking Stock**

Neil will be speaking on 16 October at this (further) annual fixture, arranged by Cardiff Law School, at the Royal Northern College of Music. For further details, and to book, see [here](#).

**Other conferences of interest**

Our friends Empowerment Matters are hosting an IMCA conference on 12 November at the Smart Aston Court Hotel in Derby, entitled ‘Interesting Times – developments for IMCAs in practice and law.’ For more details and to book, see [here](#).
Chambers Details

Our next Newsletter will be out in early August. 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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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, 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. 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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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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Anna regularly appears in the Court of Protection in cases concerning welfare issues and property and financial affairs. She acts on behalf of local authorities, family members and the Official Solicitor. Anna also provides training in COP related matters. Anna also practices in the fields of education and employment where she has particular expertise in discrimination/human rights issues. To view full CV click here.
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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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Dr Jill Stavert is Reader in Law within the School of Accounting, Financial Services and Law at Edinburgh Napier University and Director of its Centre for Mental Health and Incapacity Law Rights and Policy. 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 2013 updated guidance on Deprivation of Liberty) and is a voluntary legal officer for the Scottish Association for Mental Health. To view full CV click here.