

Capacity outside the Court of Protection

Introduction

Welcome to the June issue of the Mental Capacity Law Newsletter family. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Newsletter: the Court of Appeal revisits capacity (and the role of precedent); prohibiting contact; advance decisions to refuse treatment; and treatment options in an MCS;
- (2) In the Property and Affairs Newsletter, the sequel to the infamous *Rolex* case;
- (3) In the Practice and Procedure Newsletter: a rare award of costs in welfare proceedings; the proper place of the press in CoP proceedings; revisiting decisions on appeal; judicial contact with the subject of proceedings; joint instruction of experts in publicly funded cases, and a plea for assistance with streamlining directions hearings;
- (4) In the Capacity outside the COP newsletter: two important cases involving capacity and children and two book reviews;
- (5) In the Scotland Newsletter, a vitally important decision of Sheriff John Baird which casts significant doubt upon the validity of very many powers of attorney entered into in Scotland and upon the standard template available on the Scots OPG website.

We are also delighted to include with this newsletter a discussion paper on the Convention on Persons with Disabilities and an analysis of both the MCA 2005 and the AWIA 2000 by reference to its requirements. This discussion paper, written by Lucy Series, Anna Arstein-Kerslake, Piers Gooding and Eilionóir Flynn, is vital reading for all practitioners (of whatever hue) seeking to understand the implications of this Convention for domestic law and practice in both England and Scotland.

Editors

Alex Ruck Keene
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Hyperlinks are included to judgments; if inactive, the judgment is likely to appear soon at www.mentalhealthlaw.co.uk.

Capacity in relation to children: self-harm

An NHS Foundation Hospital v P [2014] EWHC 1650 (Fam) (Baker J)

Summary

This was an out of hours urgent application under the inherent jurisdiction by a Trust for a declaration that it was lawful for its doctors to treat a 17 year old girl (P) following a drug overdose, notwithstanding her refusal to consent to the treatment.

P had a history of self-harming and had been known to the Child and Adolescent Mental Health Service for some time. The week before the hearing she had been discharged from detention under section 2 of the Mental Health Act 1983.

P had taken an overdose of paracetamol and was admitted to hospital shortly afterwards. For several hours she resisted all treatment to counter the effects of the paracetamol. Her mother consented to the treatment on P's behalf, but the Trust was reluctant to administer treatment without a court order.

The Trust sought the opinion of a child and adolescent psychiatrist who considered that P had a personality disorder but did not lack capacity to make decisions about her medical treatment.

By late evening the situation was critical because unless a paracetamol overdose is treated within approximately 8 hours, there may be serious liver damage which may lead to the patient dying. That point had been reached at 10pm. At 11pm a solicitor acting for the Trust contacted the out of hours' duty officer who telephoned the judge. When the judge spoke to the solicitor he was

informed that P had agreed to take the first dose of medication but the treating clinicians were concerned that she might refuse to continue the treatment which needed to be administered over a continuous period of about 21 hours. A duty solicitor employed by CAFCASS Legal agreed to assist the judge as an advocate to the court.

The Trust solicitor asked for an order including a declaration that it was lawful and in P's best interests for the medical practitioners having responsibility for her care and treatment to treat her for the overdose, and to carry out such sedation or restraint as might be required, even if they would amount to a deprivation of liberty.

As P was over 16, the judge applied the provisions of the MCA 2005 to the question of whether she had capacity. The judge noted that the information available to the court was limited but given the opinion of the psychiatrist, would grant a declaration that *'on the basis of the information available at present, I am not satisfied that she lacks capacity to make decisions concerning her medical treatment.'*

The judge reiterated the legal position. All medical treatment requires consent. Treatment administered to a competent adult without consent will amount to a tortious act and may render the medical practitioner liable to criminal proceedings. A person with capacity of 18 or over may refuse treatment even if that decision is unwise (and may lead to death).

However, in respect of a child with capacity who is under 18, the court may exercise its inherent jurisdiction to override the child's wishes in her best interests and give its consent to her treatment. The child's welfare is the court's paramount consideration. Whilst the wishes and feelings of a 17 year old is an important component of the analysis of welfare, they are not

decisive. The court must also consider other factors and in particular any harm the child has suffered or is at risk of suffering.

The judge held that the balance came down firmly in favour of overriding P's wishes. Her Article 8 rights were outweighed by her rights under Article 2. The judge therefore made the declarations sought by the Trust.

Having made those declarations, the judge again emphasised that he had taken account of P's wishes and feelings. He referred to the fact that due to the urgency of the situation he had made the order without speaking directly to P. He noted that it was possible that P might wish to apply to the court to vary or discharge the order later in the morning. He made directions to facilitate a hearing before the applications judge in the event that P did wish to make such an application. If P did not make an application then the treatment should continue for the 21 hours. Both parties could then apply to vary or discharge the order. The order should not remain in force long term and the judge ordered that it would expire within 28 days unless an application was made to extend it before that date.

Comment

The unusual wording of the declaration of incapacity in this case appears to be a function of the urgency of the case which caused difficulties in obtaining detailed evidence – as Peter Jackson J pointed out recently in [Re JB](#), language such as 'not being satisfied that P has capacity' sits uneasily with the presumption of capacity and the burden of proof under the MCA 2005. Given the urgency of the situation and the seriousness of the risks to P however, it is easy to see why the court took the approach it did, and attempted to put in place measures for P to challenge the declarations swiftly – although one wonders how likely it is in

reality that a 17 year old receiving treatment in hospital, whose mother and doctors supported that treatment, would have been able to get before the applications judge the next day.

P was on the cusp of being an adult and acquiring the ability to take unwise decisions if she had capacity. In such cases (as the judge acknowledged) her wishes and feelings should be given significant weight. The seriousness of the potential harm in this case (possible death) outweighed her strongly voiced wishes (although we note that she had in fact agreed to the first dose of the antidote). Given the factual matrix in this case, the evidence of a mental disorder and the fact that she had recently been discharged from section 2, the interesting question arises whether P's Article 2 rights might have led the judge to the same conclusion even if she had turned 18 and the case had been heard under the MCA 2005 (*Rabone v Pennine Care NHS Foundation Trust* [\[2012\] UKSC 2](#)).

Capacity in relation to children: termination of pregnancy

An NHS Trust v A, B, C and a Local Authority [\[2014\] EWHC 1445 \(Fam\)](#) (Mostyn J)

Summary

This case in the Family Division concerned a 13 year old girl (A) who was assessed to be over 21 weeks pregnant. The NHS Trust concerned sought urgent declaratory relief that if A lacked capacity to consent to the continuation or termination of the pregnancy then it would be in her best interests to terminate the pregnancy; and that if A had capacity then the court should make a declaration to that effect so that the position was "put beyond doubt and that any later criticisms of the Trust, in taking the steps that they did, [could] be deflected".

Initial meetings between the specialists and A had revealed her to be uncommunicative and a doubt was raised about her capacity to decide to continue with or to terminate the pregnancy.

The test for capacity in a child under 16 was set out in *Gillick v West Norfolk and Wisbech Area Health Authority & Anr* [1986] 1 FLR 224: “[...] *there is no statutory provision which compels me to hold that a girl under the age of 16 lacks the legal capacity to consent to contraceptive advice, examination and treatment provided that she has sufficient understanding and intelligence to know what they involve*”.

The judge relied on the evidence of a consultant psychiatrist, Dr Ganguly (whose oral evidence he ordered to be annexed to the judgment) in concluding that A did have “*sufficient understanding and intelligence*” (capacity) to decide that she wanted a termination and that her decision was not the product of influence by adults in her family. As Dr Ganguly put it, “*she understood the gist of [what was involved in a termination] to the extent that it would be necessary for her to reach a decision.*”

Comment

Mr Justice Mostyn expressly stated that he was giving judgment in open court “*so that anyone who later reads the transcript of this judgment understands that proceedings of this nature are not done in secret by some mysterious court determined to prevent the public from knowing what is being done in its name*”. He emphasised the need for transparency in such cases whilst making clear that a reporting restrictions order was appropriate.

¹ Although for a characteristically thoughtful argument as to why it should, see the article by McFarlane J (as he then

Whilst the MCA 2005 does not apply to children aged 16 and under,¹ the evidence of the consultant psychiatrist made clear that there was overlap between the *Gillick* test and with the functional test in the MCA 2005.

Article 8 and inadequate care packages

McDonald v UK ([Application no. 4241/12](#), 20 May 2014) (European Court of Human Rights)

A brief mention of the decision by the ECtHR to dismiss the appeal by Ms McDonald arising from her failed attempts to persuade the domestic courts that making her wear incontinence pads at night when she was not incontinent but required assistance to access the toilet was a violation of her rights under Article 8 ECHR. Sadly for Ms McDonald, although the ECtHR found that the decision by the local authority to reduce her care package and remove the provision of a night-waking carer did engage Article 8(1), it was justified as proportionate under Article 8(2) having regard to the scarcity of resources. This decision hammers home the comments made by Mrs Justice Eleanor King in [ACCG & Anor v MN & Ors](#) [2013] EWHC 3859 (COP) that arguable Article 8 claims within CoP proceedings are likely to be extremely rare.

was): *Mental Capacity: One Standard for all Ages* [2011] Fam Law 479.

Book review: Cretney and Lush on Lasting and Enduring Powers of Attorney

Book review: [Cretney and Lush on Lasting and Enduring Powers of Attorney \(7th Edition\)](#): Senior Judge Denzil Lush (Jordans, 2014, £67.50)

This work is now in its seventh edition. It is rightly regarded as the bible in this area, so this review therefore will be relatively short. Suffice it to say that, written by Senior Judge Denzil Lush, it comes with the stamp of authority of a judge who knows more about LPAs and EPAs than any other judge sitting today. The book is also particularly useful because SJ Lush has a very strong sense of the history underlying the current regime. Notwithstanding the fact that the Court of Appeal has recently (in a slightly different context) sought to emphasise again that the starting point in relation in mental capacity issues is the plain text of the Act itself, a sense of the history underpinning some of the provisions in the Act and Rules is necessary in order to understand how powers of attorney are supposed to work. Therefore, whilst some might say that the sections of the work dealing with the past should themselves be consigned to history, I would urge them to be retained.

A very useful addition to this edition is an analysis and discussion of the position in relation to private international law questions. The exact status of foreign powers of attorney under the law of England and Wales (set out in Schedule 3 to the MCA 2005) is a matter of no little complexity. In his chapter on this, SJ Lush details the precise position as clearly as it can be. In particular, he makes the important point that the foreign power of attorney is not a measure of protection (to use the language of Schedule 3, reflecting in turn that of the 2000 Hague Convention on the

International Protection of Adults). This means that the attorney cannot, for instance, invoke the summary procedure provided for in respect of such measures of protection to obtain recognition and enforcement of the power. The chapter stands as a powerful reminder of why the United Kingdom should ratify the 2000 Convention in respect of England and Wales (in addition to Scotland, already a 'Convention country') so that use can be made of the procedure envisaged under Article 38 of the Convention (and paragraph 30 of Schedule 3, not yet in force) for certificates to be issued confirming the powers under which an attorney acts.

Many of those reading this review will already have this edition parked neatly on their bookshelves; I would recommend that those who do not and who practice or advise in this area remedy that situation forthwith.

Alex Ruck Keene

Book review: Dementia and the Law

Book review: [Dementia and the Law](#): Tony Harrop-Griffiths, Jonathan Cowen, Christine Cooper, Rhys Hadden, Angela Hodes, Victoria Flowers, Steven Fuller (Jordans, 2014, £55)

This new work deals with many of the very specific problems faced by those caring for, treating, or seeking to advise and assist those with dementia. In some ways, it is quite a similar book in its approach to that reviewed last month, the second edition of *Elderly People and the Law*. Both books seek to set out a tour d'horizon of the various legal issues that arise in relation to a particular category or class of person. In this case, it is those with dementia.

There are many advantages to this sort of approach. For a start, it reflects reality. After all, a lawyer asked to give advice in relation to a person with dementia will need to have at least a broad overview of the main issues that are likely to arise. For instance, they will need to know something, at least, about the sort of assessments that the individual clients might have to undergo for the purposes of receiving social care. They will also they will also need to know at least the outlines of how it is that the Mental Capacity Act 2005 will be of relevance both before and after the point at which the client loses capacity to take their own decisions in relation to their property and affairs and in relation to their health and welfare.

This book seeks to provide such a guide. Its chapters cover a broad range of topics, for instance the right to assessments; NHS care and treatment; local authority care; funding care services; challenging decisions and making complaints; as well as a particularly helpful set of chapters on the Administrative Court and the Court of Protection.

Although for the most part this is an excellent book, judiciously balancing the need for width of coverage with adequate detail to highlight specific points, there are a few oddities that I must point out.

In particular, starting to work with a chapter on accessing rights of personal information (whilst a decision explained in the preface) is perhaps not the most obvious jumping-off point. Further, and whilst I accept that I may have at the moment become slightly obsessed by the Convention on the Rights of Persons with Disabilities, I was perhaps a little surprised I could not find a mention of the Convention in the work. It poses dramatic challenges to the way in which we approach those with dementia. Whilst it is not yet implemented in domestic legislation, it has been used by both by

our courts and by Strasbourg as an aid to construction. It is also clear that there are very real issues as regards the compatibility of the MCA 2005 and the CRPD. I hope that in the second edition of this book it would be possible to include discussion of this important Convention.

A second edition of this book well, I hope, be forthcoming in relatively short order. This is because much of the law relating to social care in England (and indeed in Wales) is shortly to undergo radical changes. In England, we have just seen Royal Assent given to the Care Act 2014. As its provisions come into force, the landscape will look very different. The authors have done a heroic job of trying to anticipate some of these changes by reference to the Care Bill as it stood at the point when the text was being prepared. But they were, inevitably, unable to include coverage of the full detail of what became of the Act.

In the next edition of the book, I also hope that it may prove possible to include a chapter from a psychiatrist to give a clinical perspective on the issues posed by dementia. This would be the icing on the cake, because the book does not purport to be a clinical textbook, but rather a legal guide. But 'dementia' is a short-hand, and lawyers in my experience could often usefully do with having some of its nuances teased out from a clinical perspective.

Overall, however, and despite these minor quibbles, this book is immensely helpful. The authors, all practicing barristers, are to be congratulated on pulling together so much useful information in so clear an overview of these critical areas of the law through the prism of the needs of so vulnerable a group of individuals.

Alex Ruck Keene

Conferences at which editors/contributors are speaking

The Deprivation of Liberty Procedures: Safeguards for Whom?

Neil is speaking at the day-long conference arranged on 13 June by Cardiff University Centre for Health and Social Care Law and the Law Society's Mental Health and Disability Committee, to discuss the extent to which the DOL procedures comply with international human rights standards, and whether they offer adequate protection for the rights of service users and their carers. The Conference will focus on the implications of the ruling of the Supreme Court *Cheshire West* as well as the likely impact of the Report of the House of Lords Committee on the Mental Capacity Act. Other speakers include Richard Jones, Phil Fennell, Lucy Series, Professor Peter Bartlett, Sophy Miles and Mark Neary. Full details are available [here](#).

End of Life Care and the Law – Wirral Hospice St John's and Hill Dickinson
Tor and Parishil are speaking at this conference in the North West on 25 June 2014 which covers end of life issues including DNACPR notices, advance decisions to refuse treatment, and the MCA and CoP. Full details are available [here](#).

Other conferences of interest

Mental Health Lawyers Association COP Conference

The MHLA is holding its first COP conference on 6 June in London. The key-note speaker is Mr Justice Charles, Vice-President of the Court of Protection, and other speakers include representatives from the LAA and the Official Solicitor's office. Full details are available [here](#).

BABICM Summer Conference

The British Association of Brain Injury Care Managers is holding its summer conference on 25 and 26 June 2014 at the Hilton Birmingham Metropole. Entitled "Nobody Does It Better! Current Practical Issues in Brain Injury," the conference will examine issues facing brain injury case managers: (1) sex, capacity and the law; (2) what constitutes privileged documentation;

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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

and (3) the implications of the judgment in *Loughlin v Singh*. For more details and to register, please click [here](#).

Our next Newsletter will be out in early July. 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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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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