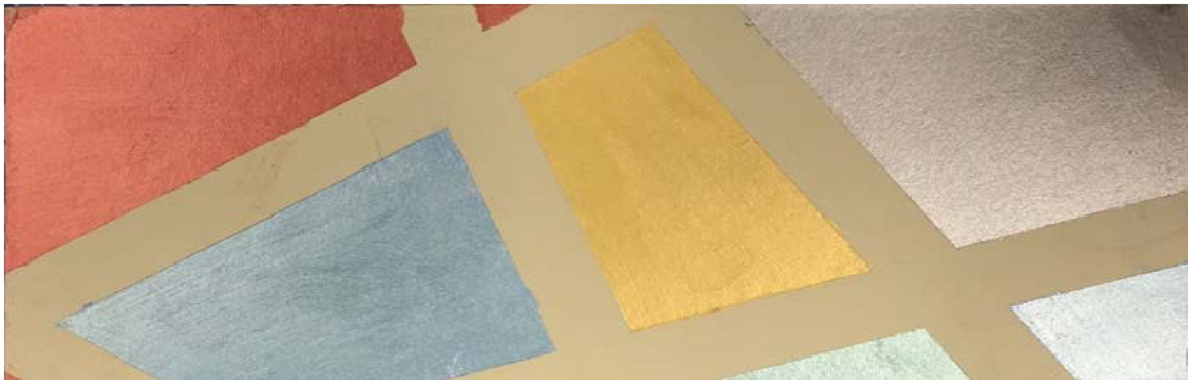


Welcome to the February 2024 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: medical treatment dilemmas of different hues, how risky can the court be, and capacity in context;

(2) In the Property and Affairs Report: useful guides for those creating LPAs and an Australian take on balancing risk and (false) hope in the context of scamming;

(3) In the Practice and Procedure Report: medical evidence, mental disorder and deprivation of liberty, and the approach to propensity evidence;

(4) In the Wider Context Report: the new framework for care home visiting in England, an important consultation on capacity in civil litigation, new core ethics guidance from the BMA, and the Circuit Court rolls up its sleeves in Ireland;

(5) In the Scotland Report: discrimination narrowly avoided, and a case posing questions about compensation for unlawful detention.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also sign up to the Mental Capacity Report.

The sharp-eyed amongst you will have noticed that there was no third edition of the informal Court of Protection Law Reports series at the start of this year: this is because there will shortly be announced exciting news about their future – watch this space.

Editors
Alex Ruck Keene KC (Hon)
Victoria Butler-Cole KC
Neil Allen
Nicola Kohn
Katie Scott
Arianna Kelly
Nyasha Weinberg
Simon Edwards (P&A)

Scottish Contributors
Adrian Ward
Jill Stavert

The picture at the top, "*Colourful*," is by Geoffrey Files, a young autistic man. We are very grateful to him and his family for permission to use his artwork.

Contents

HEALTH, WELFARE AND DEPRIVATION OF LIBERTY 2
The MCA and human rights – a refresher.......... 2
Medical treatment and the clarity of options..... 4
An interface overcome – physical treatment for a detained patient........ 5
Short note: licensed lying?........ 7
Capacity in context 7
Capacity and decision-specificity........ 10
How risky can the court be?........ 14
Best interests and anorexia........ 16
PROPERTY AND AFFAIRS........ 21
Mencap Trust Company guides to LPAs.......... 21
Short note: an Australian approach to managing the risk from scammers 21
PRACTICE AND PROCEDURE........ 23
Brian Farmer 23
Mental disorder, medical evidence and deprivation of liberty........ 23
Short note: the approach to propensity evidence 25
Court of Protection statistics........ 26
THE WIDER CONTEXT 28
Updated guidance note on deprivation of liberty and those under 18........ 28
Care home and hospital visiting in England: the new framework from 6 April 2024........ 28
Capacity in civil proceedings consultation – help wanted........ 31
The Care Act, charging and capacity........ 32
BMA Core Ethics Guidance 32
Remote assessments and MHA renewals – the High Court rules them out 32
NHS England guidance on meeting the needs of autistic adults in mental health services 33
Short note: the European Court of Human Rights: mental health detention and Articles 3 and 5 ECHR 34
Short Note: the EU and the CRPD 36
IRELAND........ 37
In the Matter of Joan Doe [2023] IECC 10 37
SCOTLAND 41
Manifestation of endemic disability discrimination rejected........ 41
O' boats an' men........ 45
Streamlined Legal Aid applications for some Part 6 orders........ 49

HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

The MCA and human rights – a refresher

Re BNK (Dental Treatment) [2023] EWCOP 56 (Paul Bowen KC, sitting as a Tier 3 Judge)

Best interests – medical treatment

Summary

Paul Bowen KC, sitting as a Tier 3 Judge, has helpfully restated the interaction between the MCA and the ECHR in the medical treatment context. The case concerned dental treatment in relation to a 36 year old man with profound cognitive impairments. There were three options before the court, summarised at paragraph 3 thus:

> *3.1. Option one: Do nothing. This is likely to be BNK's preferred option and is the least restrictive option which avoids the disadvantages associated with Options*

2 and 3. However, this option does not address BNK's current and future pain and the risk of serious infection, including sepsis which is a life-threatening condition.

3.2. Option two: General anaesthetic to allow full examination, radiographs, extraction of roots of upper front teeth and any other necessary treatment including fillings, extractions and/or extraction of all remaining teeth if they are not functional or unrestorable. This would address BNK's pain and infection and would make eating and drinking more comfortable once the initial pain and swelling have receded. Other baseline medical examinations could also be carried out while BNK is anaesthetised namely blood tests; an ultrasound scan of his abdomen to investigate his abdominal pain; rectal examination; and an ear examination. However, this is a more restrictive option, is likely to cause BNK distress and require physical or chemical restraint during conveyance and admission. After awaking from the anaesthetic there would be post-operative pain and a risk of post-operative complications, but these should be manageable with a specific aftercare plan. There may also be psychological distress and BNK may be more resistant to treatment in future.

3.3. Option three: General anaesthetic for planned extraction of all remaining teeth ('full dental clearance'). The advantages and disadvantages are as for Option 2, except a major additional disadvantage is BNK would have no teeth which would severely hamper his ability to eat and drink, which would be a significant loss. BNK's father considers this would cause him significant distress as eating snacks is the 'single activity that lights up his day'. This would be mitigated in future if BNK once his gums have hardened and/ or he is fitted for dentures, but this could only happen once the gums have healed. The major advantage of this option over Option 2 is that BNK would require no interventions in future which would spare him significant distress.

On the evidence before him, Paul Bowen KC found that option 2 was to be preferred, although he accepted that option 3 would be in BNK's best interests if "*upon examination, it transpires that he has insufficient manageable or functional teeth worth preserving; or if the process of conveyance and admission should prove so traumatic for BNK that it should be avoided in future at all costs. As I have already observed, the evidence is that BNK will still be able to eat many of the snacks he enjoys even after full dental clearance once the immediate sensitivity has gone*" (paragraph 29).

Paul Bowen KC also noted at paragraph 30 that:

> *The parties made no submissions to me in relation to the human rights implications of the proposed treatment but I am satisfied that both Options 2 and 3 are compatible with BNK's human rights and therefore lawful under s 6 HRA. Even if it might be said that the imposition of restraint and the administration of treatment against BNK's wishes reached the threshold of 'inhuman and degrading' treatment for the purposes of Article 3, a medical intervention which is a therapeutic necessity from the point of view of established principles of medicine cannot in principle be regarded as inhuman and degrading and is therefore not a violation: NHS Trust v X, [109]. Furthermore, while such treatment is also a prima facie interference with the right to bodily integrity protected by Article 8(1), such treatment may be justified under Article 8(2) as a necessary and proportionate means of achieving the legitimate end of preserving life and protecting BNK from*

> *harm. The state may be under a positive duty to protect an incapacitated adult such as BNK from serious pain and illness and from any real and immediate risks to life of which it is aware under Articles 2 and 3: see R. (Maguire) v HM Senior Coroner for Blackpool and Fylde [2023] UKSC 20. Such a duty will outweigh any countervailing duty to respect BNK's right to bodily integrity under Article 8. I do not need to decide whether such a duty is in fact owed in these circumstances, as the state has a wide margin of appreciation when balancing its competing duties and 'is entitled to have regard to the preservation of life as a factor that can permissibly be taken into account in appropriate circumstances in evaluating, for example, whether there has been a breach of article 3 or whether the qualifications to articles 8 and 9 come into play': NHS Trust v X, [108]. I am satisfied that there is medical necessity for BNK to receive the proposed treatment in Options 2 and 3 and that if, on examination, Option 3 is preferred that will be for reasons of medical necessity. There will be no breach of BNK's human rights in those circumstances*.

It is also of note, finally, that BNK was identified as being a Jehovah's Witness, but no relief ended up being sought because the risk of blood products being required as a result of the dental work was so low and any emergency would arise slowly and there were non-blood products which could be used.

Comment

There was, strictly, no need for Paul Bowen to have discussed the human rights position in his judgment, but it is a helpful reminder that the Court of Protection – just as much as NHS Trusts, local authorities or ICBs – is bound to act compatibly with the ECHR. His observations are in line with the consistent position of the European Court of Human Rights; they would not pass muster with the 'abolitionist' approach associated with the Committee on the Rights of Persons with Disabilities, but, in turn, we might question how those advocating for such an approach would respond to BNK's situation: would they say that 'do nothing' would be the appropriate response as it appeared most clearly to track his will and preferences? Or would it be necessary to distinguish between his 'will' and his 'preferences,' and – if so, how would such an exercise differ, in truth, from the sort of careful analysis undertaken by the Court of Protection here in the name of BNK's best interests.

Medical treatment and the clarity of options

The NHS Foundation Trust v K [2023] EWCOP 57 (Judd J)

Best interests – medical treatment

Summary[1]

In this case Judd J had to consider an application for declarations with respect for K, a young person who was currently an inpatient in intensive care, with a progressive condition and whose treating doctors considered to be reaching the end of her life. The application was brought because it had proven very difficult to engage her family in discussions about end of life care.

As Judd J identified, there were only three options: (1) to continued to treat her in ICU, intubated so as to allow her to receive continuous breathing support; (2) to extubate her, and to stop any further attempts to re-intubate in the event of respiratory difficulties;

[1] Tor having been in the case, she has not contributed to the summary.

and (3) to have a tracheostomy to manage her breathing support. Options 2 and 3 would give a prognosis of weeks or months; option (2) unlikely to be more than days. The Trust was not prepared to offer option 1 (nor did any of the experts instructed to report to the court consider it to be appropriate); it submitted that option 2 was in K's best interests, but was prepared to offer option 3 if the court disagreed with option 2.

On the facts of the case, Judd J found that option 3 was not in J's best interests, because thew prospects of K being able to obtain any benefit from a longer life and/or interaction with her family following a tracheostomy were too poor to outweigh the significant burdens that this would entail. Whilst she was clear that option 2 (palliative care and extubation) would also carry with it the potential for distress and discomfort to K with symptoms that will require careful management. It would mean that the time with her family would be very short and realistically it seemed there is no alternative to remaining in the ICU. As she noted at paragraph 45, "[u]*ltimately, however, it is my clear view, having read the care plan provided, that it is this pathway which is in her best interests, not a tracheostomy. I will therefore make the declaration sought by the Applicant Trust.*"

Comment

Whilst this case is – sadly – not unusual as regards the clinical dilemmas involved, it was perhaps unusual in the clarity with which the Trust set forward what options were and were not on the table, so that there was not the (troubling) confusion which can otherwise reign as to the dividing line between the clinicians offering their clinical expertise as to the appropriateness (or otherwise) of the possible options, and the court deciding on behalf of the person as to which option to accept.

As a further example of a judge approaching matters self-directing themselves as to clarity, we note also *University Hospitals Southampton NHS Foundation Trust v Miss T & Ors* [2023] EWCOP 54, concerning both the options for, and the best interests of the patient with learning disability in choosing between, treatment for cervical cancer in circumstances requiring, as he noted, the patient to be rendered unconscious for three days, potentially giving rise to PTSD.

An interface overcome – physical treatment for a detained patient

The NHS Foundation Trust v KL [2023] EWCOP 59 (John McKendrick KC, sitting as Tier 3 Judge)

Best interests – medical treatment – Mental Health Act 1983 – interface with MCA

Summary[2]

This case concerned the treatment for leukaemia of a patient detained under the Mental Health Act 1983.

Procedurally, there was a delay in bringing proceedings as a result of a dispute between the Trust responsible for the hospital where K was to receive the treatment, and the private provider responsible for the hospital where she was detained under the MHA 1983. John McKendrick KC (sitting as Tier 3 Judge) did not "*propose to comment on the dispute between the applicant and the X group, other than to observe that no public body or private institution tasked with caring for vulnerable people should compromise their charges' welfare through a lack of cooperation*" (paragraph 17). There were also multiple other deficiencies in the applicant's case

[2] Nicola having been in the case, she has not contributed to the summary.

which made it impossible for the court to give an extempore judgment.

In the reserved judgment, John McKendrick KC was satisfied that K lacked capacity to make the material decisions. As regards her best interests, he was clear that:

> *63. Ms KL wishes to live. She wishes to get better. She enjoys her family. She values her autonomy. Her wishes and feelings are clear and she has been able to communicate them to her treating haematology team: she wants to get better and she does not want to die. I place significant weight on her ascertainable and clear wishes.*

The treatment, however, would not be risk-free, carrying with it a 5% risk of death from infection. John McKendrick KC also had:

> *66.* […] *very much in mind the arduous nature of the treatment; the prolonged period of inpatient admission; the necessity for X Group staff to be on the ward with a ratio of 4:1 staff and the need for restraint both for mental health reasons and to deliver the intravenous chemotherapy. These are very significant interferences in Ms KL's rights. They are however, entirely necessary and proportionate because without this background to the treatment, she could not be safely provided with the intravenous chemotherapy. She manifestly needs it. The haematology evidence is that her prognosis with the treatment is good. I am concerned the risk of infection is very high because of the ancillary damage done to cells because of the toxic nature of the chemotherapy and I am in full agreement with the clinicians that inpatient admission until March is necessary and very much in Ms KL's best interests to keep her safe from infection when she is weakened by the intravenous chemotherapy.*

He found, therefore, that three further cycles of intravenous chemotherapy were in her best interests, together with a portacath.

As regards deprivation of liberty, John McKendrick KC had to navigate a complexity caused by the interaction between the MHA 1938 and the DoLS regime, accepting ("under very limited time" (paragraph 71) the agreed submissions that "*Ms KL is not ineligible to be deprived of her liberty as a patient in hospital for medical treatment albeit she is on section 17 MHA leave*." He further agreed with the analysis of the Official Solicitor that any restraint provided outside the circumstances under the chemotherapy terms remained treatment required to keep her safe and well in hospital for purposes of receiving such treatment (i.e. that it did not give rise to 'medical treatment for mental disorder') such that it could be authorised under the MCA 2005. John McKendrick KC made clear that:

> *74. Restraint must be carried out in accordance with terms of section 6 of the 2005 Act and consistently with paragraphs 6.40 to 6.48 of the 2005 Act Code of Practice. The applicant must agree a care plan with the Official Solicitor in respect of restraint. It will be subject to the court's anxious scrutiny at the next hearing (see below).*

Going forward, John McKendrick KC noted that:

> *76. Given the multiple breaches of court orders I am concerned for Ms KL's welfare. The disregard for the orders and directions made by Theis J and the piecemeal nature of how the evidence has been given to Ms KL's litigation friend and family is not simply a procedural hiccup. It has obscured the court's focus on the welfare and safety of Ms KL. Therefore, it is necessary to list this matter for a review hearing in the first week of February, with a time*

> *estimate of half a day, to consider the deployment of restraint, and to ensure Ms KL's best interests in respect of cycles 3 and 4 are being properly managed. The parties will agree directions for this. If all matters are agreed then an agreed order can be placed before the court and the hearing vacated. It is necessary to emphasise the importance of the applicant complying with those directions.*
>
> *77. Should there be ancillary applications to name the applicant and/or X Group and or seek costs or for any other reason I will make directions to consider such applications.*

He also expressly identified his gratitude "*to the Official Solicitor, her team and her counsel who have had to grapple with the consequences of the breach of directions by working long hours beyond the reasonable working day*" (paragraph 78).

Comment

Given the procedural problems faced by the court, it is perhaps unsurprising that it gave relatively short shrift to the deprivation of liberty issue, but one question that it could have asked here was as to whether any authority to deprive KL of her liberty at the acute trust was in fact required at all, or whether placing her under custody of the managers of that hospital under s.17(3) MHA 1983 would have given sufficient authority for the purpose.

Short note: licensed lying?

King's College Hospital NHS Foundation Trust & Anor v TTN (Medical Treatment: Retinal Detachment) [2024] EWCOP 1[3] concerned the question of whether it was in the best interests of a detained patient to undergo treatment to address retinal detachment. It ore strong resemblances to *Re KL* – above – including the same approach (at paragraph 43) to the interaction between the MHA and the MCA when it came to deprivation of liberty for purposes of receiving treatment for physical disorder in a different hospital. At the conclusion of his judgment, Cobb J noted that:

> *There is a marginal dispute about what TTN should be told and when. There is some concern on the part of the Applicants that TTN should not be told until after the procedure about the outcome of this hearing. The Official Solicitor is concerned about this and feels that TTN should (if he asks) be told the truth. The Official Solicitor is somewhat less concerned that TTN is to be misled about the administration of sedation medication given that with sedation he is less likely to need restraint and this becomes therefore the least restrictive option. I am of the view that the Applicants should avoid as far as possible actively misleading TTN, but where it is necessary to do so in order to achieve this outcome in the least restrictive way, then this in my judgment can be permitted. For the avoidance of doubt, I am of the view that TTN should be told after the event (at the latest) that the procedure has been authorised by the court.*

Capacity in context

A Local Authority v KP [2023] EHWC 3210 (Fam) (Family Division / Court of Protection (David Lock KC, sitting as a Deputy High Court Judge)

Mental capacity – assessing capacity

Summary

This is a case not easily reducible to a short

[3] Katie having been involved in the case, she has not contributed to this note.

summary. In very broad outline, however, it concerned a significant dilemma as to the steps to be taken to safeguard the interests of an 18 year old woman with cognitive impairments who did not – or could not – understand the risks to which she was at from her mother's partner. The dilemma was accentuated by the fact that previous steps taken by the local authority to remove the woman from her mother's house had not only not worked, but they had also had a serious impact on the young woman's mental health.

In a detailed and careful judgment, David Lock KC (sitting as a Deputy High Court Judge) made a number of observations about capacity in particular which are of wider application. As he identified, the two key areas of decision-making for KP were capacity to decide whether to live in a property with her mother's partner, D, and the ability to make the decision whether to have contact with him. The expert evidence before him, which he accepted, told David Lock KC two things:

> *69. First,the precise extent to which KP has a lack of capacity remains unclear and that further tests need to be undertaken to test the extent to which KP has capacity to understand how others are functioning and thus make her own decisions. Secondly, that KP may well have fluctuating capacity depending on the extent of her dysregulation. On a good day she may well be able to understand enough to make decisions for herself but may not be able to do so when her mind is dysregulated. However, Dr Kliman does not suggest that KP ever has capacity in respect of making decisions about contact with D because her mindset is so affected by his influence and by her mother's staunch refusal to accept that D presents any risk to KP at all.*
>
> […]
>
> *71. The City of York case [PC & Anor v City of York Council [2013] EWCA Civ 478] confirms that, in order for KP to have capacity to decide whether she should share accommodation with D or have any contact with him, she needs to have some degree of understanding that D's previous convictions and his character presents some risk to her and, she must, to some extent understand that spending time with him gives rise to such a risk. If she is able to understand that information, she next needs to be able to use and weigh that information about risk in making the decision whether she should share accommodation with D or have any contact with him.*
>
> *72. In my judgment, the evidence is clear that KP has no real degree of understanding that D's previous convictions and his character presents any degree of risk to her. She, like her mother, refuses to accept that D presents any risk to her. She not only refuses to accept that D presents a risk but, in my judgment, she is unable to do so because she does not have the ability to engage with the idea that D and her mother may not be right about this issue. I accept the evidence from Dr Kliman that KP has relied on and accepted the assurances given by her mother over and above any concerns raised by her social workers or support workers and so refuses to accept that D presents any risk whatsoever. In my judgment, the evidence shows that D is by far the dominant figure in this household and, due to the poor cognitive functioning of both KP and J, D has a considerable ability to mould and shape how both KP and her mother see the world. They are clearly acting under his influence and it is an influence that he is keen to maintain, as the social workers saw in September 2023 when he rather*

> *than J accompanied KP to a meeting with the social workers.*
>
> *75. I consider that there is a real possibility that D is seeking to exert influence over KP because he wishes to keep her living with him and J for his own purposes. At this stage, it is not clear what those purposes are but there is a relatively high risk that whatever he has in mind for KP, that will not be objectively judged to be in her best interests*
>
> *.*
> *76. KP will only lack capacity to make her own decisions about sharing accommodation with D and having contact with him if she is unable to understand the risks to her from doing so because of her impairment of the mind or brain. I am satisfied, based on the evidence of Dr Kliman, that her inability to understand the risks that D presents are substantially caused by her inability to envisage circumstances being different to how she sees them at the moment. That inability to see and assess the risks of a counterfactual situation appears to me to arise directly from a combination of her autism and her learning difficulties.*

David Lock KC, however, was very clear that KP's situation was one directly covered by s.1(3) MCA 2005, because the evidence before him was that it was possible that, with some targeted and focused psychological support over a period of weeks or even months, KP might gain an understanding about D's risks and thus might reach the position where she was able to understand the risks that D presented. He therefore felt unable to make a final determination (as opposed to an interim one under s.48) that KP lacked capacity in the material domains until all reasonable steps had been taken to undertake the relevant work. He also noted that, at that point, "serious issues" (paragraph 80) would arise as to whether she was nonetheless sufficiently vulnerable that the inherent jurisdiction should be invoked.

The Court of Protection's best interests jurisdiction therefore being in play, David Lock KC identified that there were:

> *89.* [...]*, at present, no "good options" here. Allowing KP to continue to live with a registered sex offender cannot be considered to be a good option, particularly where he may have assaulted her in the past (although that is unclear) and is on bail under suspicion of having committed further offences. Nonetheless, at this stage, it is the only option available to me. I therefore invite the Local Authority to prepare a plan setting out how they propose to support KP and keep KP as safe as is reasonably practicable (and allowing her to keep her job) on the assumption she continues to live at J's house. That plan should set out any injunctive relief that the Local Authority invites the court to provide in order to ensure that KP remains safe.*

In the meantime, pending the preparation of that plan, David Lock KC set out a number of orders he was prepared to make to protect KP, primarily directed to enabling the local authority to work with KP in the absence of J and D.

Significantly, the judgment contains the following postscript:

> *94. This hearing took place on 22 and 23 November 2023 and KP was present at the hearing with her solicitor throughout the hearing. Since circulating this judgment in draft, I have been told that, on 25 November following the hearing, KP made her own decision to leave J's house and temporarily moved in with her boyfriend at his parent's house. She said she has blocked D and says is not going to talk to him again. She has also made a series of disclosures which*

> *suggest that D may be grooming her towards a sexual relationship with him or someone else.*
>
> *95. The Local Authority have seen KP on multiple occasions since the hearing and KP has been shown supported accommodation in another area which she likes. The Local Authority are also making efforts to seek to get her employment transferred to a hotel which is local to her new place of residence. Her email to the social worker said "I'm going to start getting my life together and thank you G for opening my eyes wish I could hug you". Whilst I am conscious that KP's learning difficulties and ASD mean that her views could change again, I welcome this development. The overall evidence* [suggests that] *the careful and sensitive way in which this case was conducted in front of KP has played a significant part in her change of mind. I wish her well for the future.*

As noted above, the observations about capacity, and in particular how to approach questions of capacity under constraint, are of broader application. They reflect the approach adopted in Singapore under the equivalent (identical) legislation in *Re BKR*, in which the Singaporean Court of Appeal made clear that it is legitimate to take account of the person's actual circumstances when determining their current ability to make decisions about those circumstances. Importantly, as the judgment in the instant case emphasises, however, what might be said to be a broad approach to decision-making capacity carries with it the corollary of an acute focus on s.1(3) MCA 2005 and the steps that can be taken to support the person to recognise the impact of their circumstances upon them.

Those wanting to think further about these issues may also find of interest this shedinar discussion with Dr Kevin Ariyo about the research work of the Mental Health and Justice Project about interpersonal influence, and this book on relational autonomy in practice.

Capacity and decision-specificity

Local Authority A v ZZ [2023] EWCOP 61 (HHJ Burrows)

Mental capacity – assessing capacity

Summary

This matter[4] related to a man HHJ Burrows named 'Peter', who was 19 years old at the time of the judgment. Peter had had what is described as a "*troubled and abused life and he presents as a significant risk to children and vulnerable adults as a result of his history of sexual offending*" (paragraph 1).

Peter had been convicted of committing a serious sexual offence against a young child when he was a teenager. He was made the subject of a Sexual Harm Prevention Order which forbade him from being in the same premises as a child without supervision. He was made a looked-after child under s.20 Children Act, and placed in a residential educational placement. He later moved to a Supported Living Accommodation. He had pending criminal charges at the time of the hearing.

Peter was in a relationship with 'Jenny,' whom he met at college and is described as a 'vulnerable person.' They were never left on their own, despite their wishing to have a sexual relationship with each other.

[4] Decided in August 2023, but only published in January 2024.

A number of capacity assessments were undertaken in relation to Peter's capacity, including reports from a clinical neuropsychiatrist, a forensic psychologist, and Dr Lisa Rippon, a developmental psychiatrist. Peter was diagnosed with ADHD, executive functioning difficulties and a learning disability, though did not meet the criteria for autism. He was engaged with care planning, therapeutic work and education, but was considered to need long periods of time to learn new skills.

The instant judgment was solely in relation to his capacity to make certain decisions.

The parties agreed that Peter lacked capacity to conduct proceedings, to make decisions as to his care, contact with people other than Jenny and his mother, and to use the internet and social media; capacity to marry also appears to be agreed once the court determined whether Peter had sexual capacity. The judgment does not address these domains in detail. Judge Burrows considered Peter's capacity in a range of domains, where the parties were not agreed.

Residence: Looking to the list of relevant information in *LBX v K* [2013] EWHC 3230 (COP) as a starting point, Judge Burrows considered it clear "*that Peter is able to understand the first seven: which are about the type of property, the difference between visiting and living in a place, the area in which it is,* nearness *to family friends, activities available, whether he would have to pay for the place himself. Dr Rippon accepts Peter can understand all those. The contentious issue concerns care. Does Peter understand that care is an important aspect of the place he would have to live in? Or, put another way, that Peter knows he has to reside in a place where care is available, and that would rule out places where that care was not available, whether because of unsuitability or because no commissioned service would be available there*" (paragraph 35). Peter would ideally have liked to live with Jenny and her mother, but it appears to be agreed that this is not a viable option. The Official Solicitor argued that Peter had "*capacity to make a decision about residence where care is not an issue, because the only option is a placement with care provided*" (paragraph 36). HHJ Burrows observed:

> *37. This is a difficult and common point. I have concluded that Peter has the capacity to make the decision he has to make over residence, and that is because he does not actually have a decision to make over whether he lives in a care setting. That being said, if in the near future Peter were to want to move to a place without an adequate level of care, support and supervision, the matter would have to be revisited. If the option was between Placement Q (similar to Placement 1) and Placement R (just an ordinary flat with Jenny, but without any adequate supervision) the issues of residence and care would be closely related and the Court may well conclude that he lacks the capacity to make that decision.*

Property and Affairs: Peter was able to manage his limited income and expenditure, and had an appointee who dealt with his benefits. "*His usual spending decisions are not regularly overridden*" (paragraph 39). HHJ Burrows found that the presumption of capacity was not displaced in relation to his "*relatively straightforward financial affairs*" (paragraph 39). The local authority argued that it would be incoherent to determine that he was able to manage his property and affairs not managed by his deputy. HHJ Burrows did not agree: "[i]f *Peter did not have an appointee, his property and affairs decision making* would *become more complex for him. I doubt he would then have capacity to deal with the more complex part of his property and affairs. He would then need a deputy or, as it happens, an appointee to enable him to have capacity of the parts of his financial affairs he can manage*" (paragraph 39).

Contact with Jenny and Peter's mother: The Official Solicitor invited the court to determine that Peter had capacity to make decisions about contact these two individuals (though he was agreed to lack capacity to interact with the world at large), adopting a 'person-specific' approach. Dr Rippon considered that Peter had capacity to make decisions about contact with these people. However, HHJ Burrows rejected this evidence:

> *43. Dr Rippon did consider that Peter was able to make decisions about contact with Jenny because he knows her so well and has a strong emotional attachment to her. Her concerns about Jenny were about Peter's sexual impulsivity and what she considered to be his lack of insight into that aspect of his thinking. That impulsivity equally applies to strangers as it does to Jenny, it seems to me. That is because Peter, whilst recognising that he is liable to be sexually disinhibited, is unable to do anything about it. That is the essence of the risk that makes him lack capacity when deciding whether to have contact with the world in general. I am unable to see how that situation is any different when it comes to contact with Jenny. Since Peter lacks capacity to make decisions about his contact with people in general because of his inability to understand the risks he poses to others, and his inability, therefore, to mitigate those risks, I am persuaded that he lacks the capacity to make decisions about contact with his mother and Jenny.*

Sex and contraception: In discussions with Dr Rippon, Peter was clear in his understanding that it was Jenny's decision whether or not she wished to have sex with him, and that it would be wrong to have sex with an unconscious person because they could not consent. These questions were considered in the specific context of Peter's relationship with Jenny. HHJ Burrows found that "[Peter] *understands what the physical act of sexual relations consists in. He understands that where there is sexual intercourse between a man and a woman there is a risk that the woman could become pregnant without adequate protection. He also understands that sexually transmitted diseases exist and can be spread from the infected partner to the other. This too can be ameliorated by the use of condoms. Peter also understands that consent is necessary on both sides. He need not have sex if he does not wish to. Equally, neither should his partner*."

However, Dr Rippon's written and oral evidence raised concerns about Peter's "*lack of what she calls 'insight into his ability to control his behaviour and stop himself from engaging in behaviour he knows is wrong.' In her oral evidence on questioning from Mr Lewis and me, Dr Rippon focused on situations Peter may find himself in where he may find it difficult to stop himself because of his sexual urges. This has caused some difficulty for the court. Clearly, urges are, by their very nature, difficult to control, and it would be setting the bar too high if capacity to consent to sexual relations were to be ruled out because a person was unable to control an urge (for instance) to carry on with the sexual act. Having said that, Peter is a sexual offender who is unable to control his urges to engage in very harmful and criminal sexual behaviour, as I have already found"* (paragraph 46).

HHJ Burrows ultimately rejected the suggestion that a "*sixth* factor…*ought to be introduced into the* <u>JB</u> *test, namely, to have insight into and the ability to control one's urges*" (paragraph 47). He concluded that Peter had capacity, on the basis that "*ordinary risk taking, which may be unwise does not render the decision incapacitous. I would go further. A person can have the capacity to engage in sexual relations, understanding that his partner may withdraw her consent at any moment, and that with that he must stop the sexual act. If, however, when that withdrawal of consent happens the person is unable to overcome his*

urges, that is nothing to do with capacity to consent to sexual relations" (paragraph 47). Whilst HHJ Burrows noted Jenny's vulnerability, it also found that "[a]*lthough the protection of the public is a relevant consideration in MCA and Court of Protection cases, it is not the primary purpose of this jurisdiction. Peter is subject to a criminal* order *designed to protect vulnerable would-be victims. The fundamental principle of the MCA is to enable people whose decision-making abilities are restricted by their mental health difficulties to enjoy autonomy and to make decisions, even where those decisions are unwise and wrong*" (paragraph 49).

HHJ Burrows similarly found that Peter's experiencing urges or making impulsive decisions did not prevent him from having capacity in relation to using contraception. "*Dr Rippon appeared in her oral evidence to agree that the impediment to a decision here would be the overwhelming feelings of sexual desire rather than the product of a malfunctioning mind or brain. That would be enough to rule out a finding of incapacity under the MCA. However, there is no reason why, with planning, proper contraception cannot be put in place for Peter's partner, be that Jenny or anyone else. There is no reason to believe Peter cannot do this, even if he requires support with the planning and execution of the plan*" (paragraph 51).

Analysis

The case is reminiscent of the recent decision of Poole J *Re PN (Capacity: Sexual Relations and Disclosure)* [2023] EWCOP 44 (featured in our November 2023 Mental Capacity Report). Both cases considered young men with histories of sexual offending, and looked at the question of whether impulsivity and sexual urges that may be difficult to control could cause a person to lack capacity. Both decisions found that the young men had capacity, and were cautious not to set the bar too high, even though it was possible the protected people may resume sexual offending.

The case is also notable for its treatment of residence capacity. However, with respect, we propose that an alternative solution might have avoided what otherwise becomes extremely complicated. If there is only one realistic option for the person's residence, and the person is not suggesting absenting themselves from there, we might suggest that the correct approach is not to conclude that they have capacity to make that decision, but rather that it is simply not a question which falls to be decided at this point. See, by analogy, the approach taken by MacDonald J in *GK & Anor v EE & Anor* [2023] EWCOP 49. Had the question been whether Peter satisfied the (curious) capacity requirement for purposes of DoLS, the court would have been forced to reach a conclusion: at that point, we note that, in *London Borough of Tower Hamlets v A & Anor* [2020] EWCOP 21, Senior Judge Hilder found that a person who had capacity to choose between two settings in which her care needs would be met, but lacked capacity to make decisions in relation to her care needs, lacked capacity "in relation to the question whether or not he should be accommodated in the relevant hospital or care home for the purpose of being given the relevant care or treatment" for the purposes of the capacity requirement in DoLS.[5]

HHJ Burrows' conclusions about Peter's ability to manage his property and affairs also, again with respect, did cause us to raise our eyebrows, insofar as they appear to suggest that the role of

[5] Although we are duty bound to note that we do conceptually find it very difficult to think of situations where a person unable to process their care needs can truly make decisions about residence where their residence is being provided to meet those needs: a point made by Sir Mark Hedley in *Re CMW* [2021] EWCOP 50.

an appointee is to support a person to make decisions about this issue. We would undoubtedly like this to be the case, but we suggest that this rather a rosy interpretation. It is far from clear what statutory duties are actually imposed upon appointees to comply with the MCA 2005, and it is also far from clear that appointees do in fact act in such a supportive fashion.

How risky can the court be?

J v Luton Borough Council and Others [2024] EWCA Civ 3 (Court of Appeal (Peter Jackson, Dingemans and Lewis LJJ)

Best interests – travel

Summary

This matter related to an appeal from orders made by Roberts J in July 2023, in which she was considering parallel proceedings in the Court of Protection and Family Division. The Court of Protection application related to J, described as being in his early 20s and having severe learning disabilities. J and his family had moved from Afghanistan to the UK as refugees, and J was the eldest of seven siblings. He lived with his parents and attended college, and had been naturalised as a British citizen. His family wished for him to travel to Afghanistan with them for a holiday; this followed the family stating to the local authority in 2022 that there were plans to take J to Afghanistan to visit family members, enter into an arranged marriage and bring his wife back to the UK. Mental capacity assessments were undertaken and J was assessed as lacking capacity to marry and to engage in sexual relations. The local authority obtained a Forced Marriage Protection Order (FMPO) in 2022. The family accepted the capacity assessment, and it is understood that there were not further plans for him to marry.

On 14 July 2023, the family made an oral application for an order that J should be allowed to travel with the family to Afghanistan on 31 July 2023 for approximately five weeks. Considering this application on 26 July 2023, Roberts J made an order that it was not in his best interests to make this trip, and reinforced that decision by continuing an order made by the Family Division that prevented J's family from removing him from England and Wales. Giving an ex tempore judgment, the judge held that she was satisfied that J lacked capacity to decide whether to undertake the trip. Roberts J had then refused the family's application for the following main reasons:

1. The Foreign Commonwealth and Development Office gives extremely clear advice that there are significant risks to British nationals travelling to Afghanistan. This included a heightened risk of detention for British nationals. There is no access to consular support to assist if the family were to encounter difficulties, and no realistic way of mitigating these difficulties.

2. If J were to become stranded in Afghanistan, due to his significant needs for care and support, he would be at particular risk.

3. While the court recognised that there were benefits of traveling with family and revisiting the country where J had previously lived, these did not outweigh the risks discussed by the FCO.

Roberts J noted that her decision was one specific to the time at which it was taken, and if the risks were to change, she would not rule out a future trip to Afghanistan.

The Official Solicitor sought permission to appeal on the following grounds:

> *1. The court failed to properly conduct a best interests analysis as required by s.4 of the Mental Capacity Act 2005.*

> *Specifically:*
>
> > *(a) The court placed undue weight on the Foreign, Commonwealth and Development Office ("FCDO") guidance that British citizens should not travel to Afghanistan to the exclusion of other factors in s.4 of the MCA.*
> > *(b) The court failed to give any weight to J's wishes and feelings, as they were not mentioned at all during judgment;*
> > *(c) The judge failed to give any or any sufficient weight to the specific mitigation that the family described in order to protect J;*
> > *(d) The court failed to give sufficient weight to J's values and beliefs, and the views of his family;*
> > *(e) The court failed to give sufficient weight to the risk of harm to J in not travelling with his family.*
> > *(f) A proper assessment of the above factors would have resulted in the granting of the application that it was in J's best interests to travel to Afghanistan as planned.*
>
> *2. The decision amounts to a breach of J's Article 14 rights against discrimination in securing his Convention rights, namely Art 8, on the basis of 'other status', namely his disabilities.*

Permission to appeal was granted on both grounds, with the court considering that an appeal would not be academic because the issue was likely to arise again for this family. However, at the hearing, the Official Solicitor accepted that Ground 2 did not add anything to Ground 1.

The Official Solicitor argued that Roberts J had given insufficient weight to J's wishes and feelings, which were that he strongly wished to go on the trips and was excited about it, and had treated the FCDO advice as decisive. The Official Solicitor argued that the court had not sufficiently considered this question from J's perspective, and that J would have had decided to go (as had the rest of his family, save for his father) if he had capacity. The Official Solicitor further argued that the FCDO advice was 'generic' and that the family "*may have their own means of assessing risk*" (paragraph 18). J's family noted that people from the UK were now regularly traveling to the Afghanistan.

The local authority argued that Roberts J had been alive to the relevant factors and was entitled to reach the conclusion that she did. The local authority took the position that a determination of best interests would depend strongly on the particular circumstances of the case.

The Court of Appeal dismissed the appeal. Giving the sole reasoned judgment, Peter Jackson LJ noted that "*assessing risk in cases of this nature it is important that the fullest consideration is given to the importance of a person's heritage and family relationships, with an awareness that an unduly risk-averse approach can itself cause harm or welfare disadvantage*" (paragraph 27). However, he reached the very clear conclusion that Roberts J had done so. Peter Jackson LJ on to note that there likely ought to have been further scrutiny of the risk where "*the court had no information about why asylum had been granted to this family, and …J would have had to travel on his British passport as his Afghan passport had expired. Each of these issues was potentially relevant to an assessment of the risks that J might face in Afghanistan*" (paragraph 28). Peter Jackson LJ considered that Roberts J had "*looked in the matter very fully' and 'the judge was fully aware of J's perspective and the importance of the trip to him, and also of the family's perspective… the fact that she did not mention them individually in giving judgment did not advance the appeal*" (paragraph 29). He found that the Roberts J had not treated the

FCDO guidance as doctrine, but had used it to bring to "*the court's consideration a series of facts that were not in reality in dispute. The judge's assessment that those facts gave rise to risks that tipped the best interests balance was no more than a conventional judicial exercise, taking account of the nature, likelihood and consequences of the feared harm. Her decision, clearly reached with regret, was soundly based and amply reasoned*" (paragraph 30).

Comment

The case reiterates the wide breadth given to first-instance judges in making decisions on best interests, and the difficulty of bringing an appeal on such a judgment. Indeed, we are aware of only one judgment where the Court of Appeal has reached a conclusion that a first instance judge was flatly wrong in their conclusions as to where P's best interests lay. While the Official Solicitor looked to *Aintree* in this matter for support of her contention that greater weight should be given to J's wishes, we would also note Lady Hale's discussion in *Aintree* on the role of appellate courts in reviewing finely-balanced issues of best interests at [42]:

> *That is not to say that I would have reached the same conclusion as the judge in relation to each of these treatments […] The treatments in question were all highly invasive. […] Cardiopulmonary resuscitation, on the other hand, although it had been used successfully in the past, is designed to restart a heart which has stopped beating or lungs which have stopped breathing, in effect to bring the patient back to life. I can understand why the judge thought it premature to say that it should not be attempted. But given the particular nature of this treatment, given its prospects of success, and particularly given the risk that, if revived, the patient would be even more seriously disabled than before, I would probably have declared that it would not be in the patient's best interests to attempt it. But if the judge has correctly directed himself as to the law, as in my view this judge did, an appellate court can only interfere with his decision if satisfied that it was wrong: Re B (A Child) (Care Proceedings: Appeal)* [2013] UKSC 33, [2013] 1 WLR 1911. *In a case as sensitive and difficult as this, whichever way the judge's decision goes, an appellate court should be very slow to conclude that he was wrong.*

While the Court of Appeal did not appear to take the view that the Lord Justices would have found differently at first instance (and might have found even greater levels of risk than did Roberts J), it is clear that its findings were in line with the sentiments expressed by Lady Hale above.

Best interests and anorexia

Re Beatrice (No 2) [2023] EWCOP 60 (Mostyn J)

Best interests – medical treatment

Summary

Although not his final judgment, a delay in getting the case to Bailli means that the final published judgment of Mostyn J[6] is the conclusion to the story of Beatrice, the story of a 50-year-old woman with profound and enduring thirty year long history of anorexia set out in his earlier judgment [2023] EWCOP 17.

In that judgment, Mostyn J addressed anorexia in terms of terrorism and insurgency; he likened the diet favoured by some sufferers with the

[6] Who goes from strength to strength after his much regretted early retirement: see here for his new podcast series Law and Disorder.

regime imposed by the Nazis in concentration camps. Despite her assertion that she believed she "might" retain the requisite capacity to make the necessary decisions to manage her care, Mostyn J made orders that Beatrice lacked capacity to make decisions about the treatment of her anorexia and to decide on care and treatment options in respect of her nutrition and hydration – i.e. her anorexia. Unusually for a Court of Protection decision, Mostyn J agreed to make free-standing capacity declarations, while adjourning the decisions on best interests for a later (albeit imminent) date.

Beatrice No.2 sets out the analysis of what was in Beatrice's best interests: essentially, whether she should be compelled to take on nutrition and, accordingly, have a chance of living; or that she should not be so compelled, and thus, in all likelihood, die.

Mostyn J's judgment follows, appropriately, the s.4 statutory test about which he observes:

> *10. When weighing these factors, the exercise is quintessentially an evaluation rather than an exercise of discretion. The case law clearly establishes a number of simple propositions which guide the evaluative judgment which I must make as to Beatrice's best interests. The propositions are these.*
>
> a. *When assessing best interests the exercise is first and foremost to consider matters from the point of view of Beatrice: Aintree University Hospitals NHS Foundation Trust v James [2013] UKSC 67 at paragraph 45.*
>
> b. *Welfare must be assessed in the wider sense, not merely medical but social and psychological also (ibid at paragraph 39).*
>
> c. *While there is a strong presumption in favour of the preservation of life this may, in an appropriate case, yield to the need to respect personal autonomy and dignity of the protected person and her right to self determination (ibid at paragraph 35).*

Mostyn J accepted the submission on behalf of the Official Solicitor to the effect that:

> *further treatment to achieve weight gain would be futile, overly burdensome to Beatrice and in circumstances where there is no prospect of any real recovery from her eating disorder. Treatment within a SEDU (including forcible feeding) would be an assault upon Beatrice and a violation of her rights under article 3, which prohibits inhuman or degrading treatment unless it is shown to be in her best interests on the basis of therapeutic necessity that has been convincingly shown to exist. There is no such evidence in this case and instead further inpatient admission would do more harm than good.*

In terms of wishes and feelings, Mostyn J found that Beatrice did not wish to die, but not wish her suffering to continue. He considered that she found forced feed "abhorrent" and not to be contemplated (paragraph 16), and that was Beatrice was a Christian and "would subscribe to the Christian tenet that self-destruction is sinful" – albeit that Mostyn J dismissed the relevance of this on the basis that he did not think Beatrice's conduct to be voluntarily self-destructive (paragraphs 17-8).

In terms of the views of others, he noted that both Beatrice's father and her brothers wished her to have whatever treatment was necessary, including compulsory treatment against her will, to preserve her life. However, he considered that

past experience demonstrated the futility of many treatments tried; any future treatment was likely to be "equivalently futile" (paragraph 20). Further, he identified that both Beatrice's treating clinicians, and the independent expert, Ty Glover, considered further active treatment against her would not to be in her best interests; her treating clinicians were not prepared to administer it in any event.[7]

In light of this analysis, Mostyn J concluded that "it is in Beatrice's best interests only to have *treatment which involves such feeding and/or weight restoration that her treating clinicians consider clinically indicated and which she expressly accepts or requests*" (paragraph 24).

On reaching this conclusion, Mostyn J returned to the observations in his earlier judgment, where he likened Beatrice's anorexia to a malign invasion of the mind; a struggle against invading forces.

> *27. Surely, it might be said, given there is no question of Beatrice being complicit in this struggle, the Court should authorise whatever measures are necessary to defeat that invader. But that approach would be to misunderstand the function of the Court when it makes a best interest decision on behalf of an incapacitated person such as Beatrice.*
>
> *28. When making that highly nuanced individual evaluation I am obliged to afford appropriate weight to the decision that Beatrice has made not only to discontinue the struggle against this invader of her mind but more specifically emphatically to reject the idea of being forcibly fed.*
>
> *29. I agree with Ms Sutton KC that the protection given to an individual's autonomy granted by article 8, building on the common law, applies to the incapacitated just as much as it applies to capacitous members of society provided that the decision in question is not antisocial, unlawful or obviously irrational. As I have said, on the facts of this case, this factor is the one with the magnetic influence in my decision making.*
>
> *30. The decision that I make has nothing to do with the right to die or with the Court authorising somebody's death. It is simply a decision that respects Beatrice's own very strong opposition to, and abhorrence of, forced feeding.*
>
> *31. It is a decision that not only respects the opposition of Beatrice in principle but it is also a decision which is realistic in that an order which required force feeding would likely be frustrated by Beatrice in short order by self-vomiting and where there is no evidence, as I have said, of a clinician who would be prepared to do it.*

Having made this decision, Mostyn J then set out the consequential declarations he considered should be made as a result:

1. Firstly, a declaration under the Inherent Jurisdiction of the High Court that "it is lawful for Beatrice's treating clinicians not to take steps to provide Beatrice with nutrition and hydration by force under the Mental Health Act 1983 against her wishes, even if in the opinion of her treating clinicians it would be immediately necessary to administer such nutrition and hydration to preserve her life." (for the provenance of such a declaration, readers are directed to his earlier judgment, Nottinghamshire Healthcare NHS Trust v RC [2014] EWCOP

[7] Which, parenthetically, we note does raise the question of why this was being framed as a best interests question at all, given that a court cannot order a doctor to provide treatment.

1317.

2. In the event Beatrice were expressly to accept or request an escalation of treatment to provide nutrition and hydration, even with restraint, this would be lawful if in accordance with her express wishes;
3. A s.15 declaration that referral for end of life care would be lawful saving that Beatrice would not be moved to a hospice against her wishes.

In acknowledging the undoubted disappointment the judgment would likely cause Beatrice's family, Mostyn J observed (at paragraph 37) that:

> *I hope they will understand that I am a mere servant of the law and that I have to administer it as it has been passed by Parliament. That law requires me to weigh certain factors. I have concluded that a correct weighing exercise requires me to give predominant and conclusive weight to Beatrice's strongly expressed wish not to be forcibly fed.*

Notably, at the end of the judgment, Mostyn J breaks the proverbial fourth wall to comment on commentary criticising his references to the Nazis (not, we should perhaps make clear, commentary by any of the editorial team here). Mostyn J observed, firstly, that he simply did not accept that his analogy suggested any complicity on behalf of Beatrice in her predicament. Secondly, that he rejected the criticism of the analogy he had lit upon per se.

> *42. In order to make my judgments understandable to the reasonable person it is my practice to use analogy and metaphor in order to make them readable and, dare I say it, interesting. To say that somebody's daily calorific intake is 260 is just an abstract number.*
>
> *43. It does not begin to acquire any kind of real life significance until it is put in context by analogy and in my opinion the analogy of the amounts of bodily fuel allowed in the 1944 Minnesota Starvation Experiment and by the bestial Nazi regime to its victims at the same time shines a very strong light on the suffering that this malign invader of Beatrice's mind is inflicting on her.*
>
> *44. The analogy is probably not necessary for those of extremely high intelligence but, in my opinion, it is apt in order to explain my decision to the reasonable person. Finally, I would point out that my first judgment was seen in draft by both leading counsel before it was published and neither raised any suggestion that the analogy was inappropriate.*

Comment

This is a very interesting judgment to revisit in the context of a discussion held on anorexia in chambers just last week (https://www.39essex.com/events/anorexia-and-court-protection) at which anorexia advocates and carers for anorexia sufferers argued vociferously that (a) by definition, those suffering with anorexia could not have capacity to make decisions about their nutrition and hydration (b) their wishes and feelings in that context should be overridden unless and until their weight had reached a "normal" level (c) all steps should be taken to preserve their lives, including feeding against their will and under restraint.

The "experts by experience" who spoke at the conference also suggested that the Court of Protection would make declarations and orders leading to withdrawal of treatment against P's wishes thus condemning P to death in spite of an enduring wish to live. We hope that this judgment provides some reassurance that the Court of

Protection remains committed to the preservation of P's autonomy, that P's wishes and feelings remain an integral element of the best interests evaluation and that, as here, orders made will frequently reflect the possibility that P may change their mind regarding treatment.

We have resisted the urge to comment on Mostyn's observations in response to previous commentary upon his judgment.

PROPERTY AND AFFAIRS

Mencap Trust Company guides to LPAs

The Mencap Trust Company has published a suite of guides to various aspects of the making and operation of LPAs. Some cover ground which is contained in OPG guidance but in respect of others (such as guidance to certificate providers) no OPG guidance is available.

This makes the suite especially useful as it provides a one stop (free) shop aimed at lay users (but useful for professionals as aides memoire too). It is also very helpful for those wanting to support those who might be on the cusp of having capacity to make an LPA.

The topics covered are:

- Easy Read Guide and Record to health & welfare LPA
- Easy Read Guide to SECTIONS 8 and 9 of health and welfare LPA
- Certificate provider's guidance for health and welfare LPA
- Guidance for a health and welfare attorney
- Supporters Guide on property and financial affairs LPA
- Easy Read Guide and Record on property and financial affairs LPA
- Easy Read Guide to SECTION 8 of property and financial affairs LPA
- Certificate provider's guidance for property and financial affairs LPA
- Guidance for a property and financial affairs attorney

Short note: an Australian approach to managing the risk from scammers

With thanks to Piers Gooding for flagging this, we note the very interesting decision of the Victorian Civil and Administrative Tribunal in *Re EAD (Guardianship)* [2023] VCAT 1129. The case concerned a woman who (in English terms) lacked capacity to make decisions about her property and affairs. She spent all her (minimal) allowance "*on persons who are deceiving her into believing that there are intense personal relationships or friendships to be established or maintained by the regular provision of funds to them*" (paragraph 23), and continued to do so despite sustained efforts to explain, distract or rehabilitate her to other activities. However, as the Tribunal noted (at paragraph 26).

> *EAD appears to derive some actual joy and feelings of validation from her interactions with scammers. The evidence is that she would experience emotional pain if restricted from social interaction with them. I am aware that her disability means that she does not perceive and understand the deception and makes herself vulnerable to the silver-tongued techniques of grifters. On the other hand, her contact with these persons injects a level of (false, but possibly pleasurable) excitement or romance in her life.*

Under the relevant law in Victoria,[8] the Tribunal had to apply the principle that:

> *e) the represented person's will and preferences should only be overridden if it is necessary to do so to prevent serious harm to the represented person. ...*

In EAD's case, the Tribunal found that:

> *26.* […] *Her incapacity to weigh this up does not affect my responsibility to take into account her will and preferences, nor an administrator's responsibility to act in accordance with her will and preferences, except where there is serious harm. I find that EAD's will and preference is to continue to participate in discussions with these scammers - even after she has been informed that they are deceiving her and having been offered alternative forms of social contact.*

The Tribunal noted:

> *28. In these circumstances, I was impressed that the administrator has taken time to observe and consider EAD's will and preferences. The administrator has also considered what the impact of acting contrary to her will and preferences would be. I accept their evidence in the absence of any direct evidence from her. Certainly, there is no evidence that she has ever expressed a wish to be rid of the scammers from her life. After observing her will and preferences, the administrator has adopted a practice – over the life of the administration orders – of maintaining an allowance of $150* [roughly £80] *per fortnight that she may spend how she wishes, even if that means it is deposited to the benefit of scammers. The balance of her income is expended on her needs and the development of healthy savings. Requests that EAD might make for larger expenses are scrutinised by the administrator as to whether they are genuine expenses or likely to also be diverted to nefarious persons. Unless satisfied that it is a genuine expense for EAD's benefit, the administrator refuses the expense.*
>
> *29. I find that in adopting these practices, the administrator is giving all practicable and appropriate effect to her will and preferences, avoiding serious financial harm and acting in such a way as to protect from abuse and exploitation by avoiding more serious financial losses.*

Comment

The Victorian law in question is undoubtedly much closer to the CRPD than is the MCA in terms both of its requirement to consider 'will and preferences,' and its steer that they should (nb, not 'can') only be overridden where necessary to do so to prevent serious harm. There is, of course, no reason why deputies in England & Wales cannot adopt a similar approach to best interests, and this case provides a useful worked example of balancing (even if – to others – false) joy against (to others, obviously real) risk of harm.

[8] The Guardianship and Administration Act 2019.

PRACTICE AND PROCEDURE

Brian Farmer

Anyone who cares about the Court of Protection will – or should be – sad that Brian Farmer has retired as the (very) long-standing Press Association correspondent regularly to be seen lurking with a characteristic gleam in his eye around the Royal Courts of Justice. He brought to his reporting on the Court of Protection a real determination to convey matters accurately, and a willingness to go the extra mile to understand the context. He will be greatly missed.

Mental disorder, medical evidence and deprivation of liberty

Stockport MBC v KB [2023] EWCOP 58 (HHJ Burrows)

Article 5 – Practice and Procedure

Summary

In this case, HHJ Burrows addressed two questions in relating to 'community DoL' applications that have bubbled away for some time. As he noted at paragraph 2:

> *The first is whether, in order to satisfy the requirement under Article 5§1(e), namely that P suffers from "unsoundness of mind", the evidence upon which that conclusion is based has to say so in those terms? Secondly, whether the Court, either in its guise as a judge considering a COPDOL11 application on the papers, or via an application under the COP1 procedure, has to be in possession of evidence from a medical doctor?*

As set out by HHJ Burrows, the decision came against a backdrop of considerable difficulty on the part of the applicant local authority obtaining the requisite evidence from GPs. Some of their concerns related to the use of the term 'unsound mind.' Some of them were also concerned about their unwillingness to carry out an assessment they did not feel qualified to carry out. As HHJ Burrows noted at paragraph 15:

> *If the letter in response was going to be used in any way as a mental health assessment it was thought they would need to have been section 12 approved doctors under the MHA'83. In fact, s.12 MHA approval is relevant only to the process of authorising detention within that Act, often referred to as "sectioning". As the COPDOL11 form makes clear, s. 12 approval is not required for an assessment to be made in this process. Notwithstanding that, however, any clinician who does not consider themselves able to certify that a patient has a mental disorder or is "of unsound mind", must not do so.*

Further GP concerns were about the 'medico-legal' implications of putting their names to confirmations that a person is of unsound mind (HHJ Burrows, unfortunately, did not comment upon the validity or otherwise of this concern), and, finally, that none of the three forms of standard contracts under which GPs operate oblige them to provide medical evidence to public bodies for Court of Protection applications (he could also have added that GPs fall outside the scope of those to whom s.49 applications can be directed).

HHJ Burrows summarised his conclusions at paragraph 2 thus:

> *(1) In the context of applications to authorise a package of care, which inevitably results in P being deprived of his or her liberty, the Court must be satisfied that P suffers from unsoundness of mind. However, these words have no mystical powers; they are not an "open sesame" giving access to the Article 5 cave. They refer to a mental disorder. It is for the court to be satisfied that P is of unsound mind on the basis of the evidence before it. Provided that evidence satisfies the Court that P has a mental disorder, and subject of course to the other essential requirements also being satisfied, the Court may authorise detention.*
>
> *(2) The European Court of Human Rights (ECtHR) jurisprudence is clear that "unsoundness of mind" has to be proved by those seeking to assert it on sound medical evidence. Usually that evidence will come from a medical doctor, generally a psychiatrist or General Practitioner. Whether, in appropriate circumstances that evidence could come from a psychologist, mental health nurse, or other similar specialist clinical expert may be a moot point. It is one I do not have to decide in this case. I simply direct that the Applicant needs to commission and instruct a registered medical doctor, either a psychiatrist or a GP, to review KB's case and provide a report dealing with her diagnosis as well as whether that condition causes her to lack capacity to make relevant decisions, as well as the likely duration of that condition.*

HHJ Burrows gave chapter and verse as to the reasoning underpinning his conclusions by reference to Strasbourg case-law, up to and including the Grand Chamber 'restatement' of the position in *Rooman v Belgium* [2019] ECHR 109, making clear that the key consideration was as to whether there was reliable evidence of mental disorder, rather than (for instance) the use by any clinician of the precise term 'unsound mind.' Further, as he put it at paragraph 31:

> *The word "medical" connotes that the evidence is of and pertaining to the science of medicine. It is clear to me that means a registered medical practitioner. There is no need to elaborate on that in this case. Here it means either a psychiatrist or a GP. Whether a wider net can be cast for other clinicians, such as clinical psychologists, learning disability nurses, or occupational therapists, may be a moot point. However, in this case the evidence needed is from a medical doctor.*

One observation that might give readers pause is HHJ Burrows's statement at paragraph 28 that "[o]*f course it is important to be clear… that the Court remembers that the mental disorder must be the cause of the mental incapacity*," as it could be read as suggesting that it is necessary for the capacity assessment to be carried out by a clinician. This is undoubtedly not the case, because it is entirely possible for assessment of whether the person has capacity to consent to the arrangements giving rise to their confinement to be carried out (for instance) by a social worker; so long, in such a case, as there is medical evidence that the person does, indeed, have a mental disorder.

Further, although it is entirely understandable that HHJ Burrows did not wish to wade into the debate about how wide a definition can be given to the word 'medical,' it is perhaps to be regretted that he did not, as it was an issue causing considerable discussion in the context of the (now aborted) moves towards implementation of the Liberty Protection Safeguards. We would have been interested in his take (even obiter) on in a later paragraph – 130 – in *Ilnseher v Germany* to that cited in his judgment, where the European Court of Human Rights said:

> *As for the requirements to be met by an "objective medical expertise", the Court considers in general that the national authorities are better placed than itself to evaluate the qualifications of the medical expert in question* [,,,] *However, in certain specific cases, it has considered it necessary for the medical experts in question to have a specific qualification,* ***and has in particular required the assessment to be carried out by a psychiatric expert where the person confined as being "of unsound mind" had no history of mental disorders*** [...] *as well as, sometimes, the assessment to be made by an external expert* [...] (case citations omitted, emphasis added*).*

Short note: the approach to propensity evidence

Lancashire County Council v M & Ors [2023] EWHC 3097 (Fam) was decided in the Family Division, but the principles set out therein and below are equally applicable in the Court of Protection. In it, Hayden J Hayden considered an application in relation to two children, A and J, who were respectively aged 5 and 3. Care proceedings had commenced in 2019 due to A's exposure to domestic violence, and it was accepted that A's father (F) "*has consistently behaved in a violent and controlling manner towards the mother (M). He admits that when intoxicated by alcohol, he behaves violently and aggressively. His verbal abuse of M is particularly vituperative, calculated to belittle and demean her. F was convicted of an offence of battery of M in May 2021. This involved an incident of strangulation; it was met by a custodial sentence, which was suspended. Only a few months later, July 2021, there were further serious incidents between the couple. At the conclusion of the care proceedings, a Supervision Order was made, predicated on the assumption that the parents had separated. They had not*" (paragraph 1). M repeatedly reassured professionals that she and F were no longer living together, but F was living in the house throughout the relevant period. M and F had a third child, R, who died in 2021 due to apparent neglect while M and F were highly intoxicated. However, on post-mortem examination, R was found to have had a rib fracture which was consistent with non-accidental injury and likely required significant force consistent with squeezing or gripping the baby forcefully. The local authority applied for a care order in respect of A and J in 2022, and the hearing was to determine the issue of who had caused the injury. Neither parent suggested that the other had caused the injury, or accepted that they had caused the injury.

One of the issues the court considered was F's propensity towards violence. Hayden J noted that "[w]*hilst propensity for abusive behaviour, whether identified in psychological assessment, or predicated on previous behaviour, does not permit, without more, a conclusion that F was most likely to have inflicted the injury… What requires to be confronted is whether or to what extent, F's violent behaviour is incorporated into the broader evidential canvas which requires to be considered when identifying a likely perpetrator*" (paragraph 35).

After reviewing relevant criminal authorities, on propensity evidence, Hayden J noted that he referred to them "*not to suggest that the approach set out in the criminal jurisdiction is to be imported, in an identical manner, into the fact-finding process in family proceedings in precisely the same way (plainly, they cannot be), but merely to demonstrate that which I consider to be an essentially self-obvious proposition i.e., that if propensity evidence is potentially admissible in criminal law proceedings, it would be entirely illogical to exclude it from consideration in investigative proceedings in the family court. Moreover, and with the greatest diffidence and respect for Wall J* [*in CB and JB (Care Proceedings: Guidelines)* 1998] EWHC Fam 2000: [1999] 1 WLR 238]*, the starting point for consideration of the relevance of such evidence should not be hampered or distorted by a presumption that such evidence is "unlikely" to be of assistance. It will depend on the facts of the individual case*" (paragraph 42).

Hayden J considered that when applying propensity evidence in a Family rather than criminal court, "*the Judge will, invariably, be scrutinising a broad evidential landscape. Where the lodestar for the Court's approach is the paramountcy of the child's welfare, a very wide category of evidence will fall for consideration. This will include hearsay evidence, be it first or second hand, in documentary format or in oral evidence. It will also include expert opinion evidence. The standard of proof is, of course, the civil standard, requiring facts to be proved on the balance of probabilities*" (paragraph 43). [He concluded at paragraph 44: "[t]*he investigative process must track down ascertainable facts from the broadest canvas available and, where possible, draw such inferences as those facts will support. It is frequently a difficult task, but it is not one that can be shirked. The danger in failing to confront it is that an innocent individual may be tainted by a finding that has a direct impact, both on her and on the child. A finding which leaves a parent in a pool of potential perpetrators is likely to adversely influence the nature and extent of the contact arrangements or indeed, on where and with whom the child will live in the future. Of course, the imperative of child protection must not generate a reason to burden unsatisfactory evidence with a greater weight than it can legitimately support*."

Hayden J cautioned against overreliance on psychological assessment in propensity evidence:

> *The danger inherent in such evidence is now entirely recognised. As Wall J made clear, this opinion evidence, might easily be both prejudicial and wrong. Moreover, it trespasses on the function of the Judge in the assessment of adult credibility as to the responsibility for a child's injuries. This is, of course, entirely different from evaluating propensity generated by evidence of established behaviour.*

In the instant case, Hayden J found that the propensity evidence supported a finding that F had been the perpetrator. He also expressly read into the judgment the provisions of s.70 Domestic Abuse Act 2021 – introducing the offences on non-fatal strangulation and non-fatal suffocation – and the considerations that apply on sentencing, on the basis he considered (at paragraph 30): that "*they require to be far more widely known and understood by family law practitioners*" (and, we would add, those appearing before the Court of Protection).

Court of Protection statistics

The Court of Protection statistics between July and September 2023 have been published (part of the 'Family Court Statistics Quarterly: July to September 2023 ' . They can be found here, and show

- There were 1,655 applications relating to deprivation of liberty under the Mental Capacity Act 2005 made, which is an increase of less than 1% on the number made in the same quarter in 2022
- In July to September 2023, there were 9,956 applications made under the Mental Capacity Act 2005 (MCA), up by 10% on the equivalent quarter in 2022 (9,045 applications). Of those, 35% related to applications for appointment of a property and affairs deputy (Table 20). The report concludes that the reason for this increase is '*due to an aging population and an increase in the number of Lasting Power of Attorneys being made*.'

- In July to September 2023, there were 302,277 LPAs registered, the highest in its series and up 51% compared to the equivalent quarter in 2022.

For the first time, the report included the number of applications made to the High Court to deprive children of their liberty pursuant to the Court's Inherent Jurisdiction. The report notes that 388 such applications were made during the quarter. Most of these children were teenagers with 48% of them being between 13 and 15 years old and 27% being between 16 and 18 years old. The Nuffield Family Justice Observatory reports that this compares to 358 applications (incl. 5 repeats) over the same period last year.

THE WIDER CONTEXT

Updated guidance note on deprivation of liberty and those under 18

We have updated our guidance note on this (remarkably thorny) topic, to be found here.

Care home and hospital visiting in England: the new framework from 6 April 2024

Following on from its consultation on visiting in care homes and hospitals in England, the DHSC has (1) published its response; and (2) laid before Parliament the relevant regulations to embed that response.

In material part, the summary of the response provided as follows:

> *The majority of responses supported the government's proposal to introduce a fundamental standard on visiting.*
>
> *The government will now work with CQC to develop and introduce a new fundamental standard. This will focus on visiting, against which CQC will assess certain registered settings as part of its existing inspection framework. We intend to lay the necessary regulations in Parliament to introduce this additional standard as soon as possible. We will also work with CQC to publish the necessary guidance to the health and social care sector to ensure this new standard is clear and upheld.*
>
> *Through this new standard, CQC will be able to specifically include visiting considerations as part of its wider regulatory assessment of providers. This could include using civil enforcement powers in line with its published enforcement policy when it is necessary and proportionate to do so.*
> *Of the themes we observed within our consultation, respondents cited that they found government guidance unclear, and that strict visiting times and complicated complaints processes were some of the barriers to visiting in health and care settings. Legislation will therefore help to create a consistent understanding of what is acceptable across all relevant providers. We will also seek to make guidance on the complaints process clearer for when issues do arise.*
>
> *Some respondents expressed concern that through the provision of a standard and accompanying guidance, 'exceptional circumstances' or 'reasonable explanations' (where a provider may restrict visiting) may actually provide the conditions for more restrictive practices, which is contrary to our intention. We recognise that there will always be some, very limited, circumstances in which visiting cannot be facilitated by the provider to maintain the safety and wellbeing of service users and staff. However, we do not plan to include a list of these circumstances in the statutory instrument itself. We are clear that visiting is critical to the health and wellbeing of everyone.*
>
> *While the majority expressed clear support for a consistent approach across CQC-registered settings, we recognise concerns raised by sector representatives about the requirements for some health and care settings potentially putting individuals at increased risk. For this reason, we intend to exclude services for substance misuse and inpatient detoxification or rehabilitation services from the requirement. This reflects the complex circumstances and risk of relapse for a vulnerable person, and visiting is already carefully considered within care plans in these settings. Supported living settings and 'extra care' housing schemes will also not be in scope of the regulation. These settings generally exercise 'exclusive possession', in which the individual has a tenancy agreement and they can decide who visits. All guidance will clearly set out the scope of this new regulation.*

> *We intend to address concerns about residents of care homes being discouraged to take visits out of the home by overly burdensome restrictions upon their return. A care home is a person's home, and we will be including a provision in regulations that residents should be encouraged to take visits out of the care home to support their wellbeing.*
>
> *We have received clear support and heard the positive impact that this policy would have, particularly for service users and their loved ones, with powerful personal testimony. The range of support provided by many visitors, which often extends beyond companionship to a 'care supporter' role and advocate, is fundamental.*
>
> *Some have called for this right to be protected within new, primary legislation. Given the overwhelming support in this consultation, and the role of CQC as the regulator in England, the government believes the most proportionate and appropriate way in which to protect and enable visiting is to now move to introduce a new CQC fundamental standard on visiting. This puts visiting on the same level as other fundamental standards, such as that which requires providers to meet the nutritional and hydration needs of service users.*
>
> *A new fundamental standard on visiting provides a standard to be enforced by CQC as part of its existing civil enforcement powers. This will highlight the importance of visiting to providers and all stakeholders, and ensure that providers account for the vital role that visiting plays.*

One part of the response did rather leap out at us – the assertion that those in supported living settings and extra care housing schemes generally exercise 'exclusive possession,' and in which the individual has a tenancy agreement and they can decide who visits. As a bald proposition this is distinctly questionable, and we might suggest not obviously a very sound foundation upon which to exclude those in such placements from the regulation – many of whom may very well be in places which could well change (in effect) overnight from a care home to a supported living placement without any actual change for the individuals concerned.

The regulations (The Health and Social Care Act 2008 (Regulated Activities) (Amendment) Regulations 2023) track through the commitments in the consultation response. This instrument inserts a new fundamental standard, namely new regulation 9A (visiting and accompanying in care homes, hospitals and hospices), into the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014. This fundamental standard requires that service users (defined in regulation 2 of the 2014 Regulations as "a person who receives services provided in the carrying on of a regulated activity") are, unless there are exceptional circumstances, facilitated to receive visits to care homes, hospitals and hospices and, in relation to service users who are provided with accommodation in a care home, are not discouraged from taking visits out of the care home. It also requires service users to be enabled to be accompanied at a hospital or hospice when attending as an outpatient.

As the Explanatory Memorandum notes (at paragraph 6.5):

> *"Exceptional circumstances" will be assessed on the circumstances of each case and will carry its ordinary, restricted meaning as interpreted by cases such as R v Kelly [2000] 1 QB 198 "We must construe exceptional circumstances as an ordinary, familiar adjective and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional, a circumstance need not be*

> *unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely or normally encountered." The Department considers that an example of an exceptional circumstance might be where a visit would pose a significant risk to the health, safety or wellbeing of a service user or an employee of the provider.*

New regulation 9A(2) also sets out a requirement that the taking of 'visits out' out of a care home must not be discouraged (unless there are exceptional circumstances). The Explanatory Memorandum notes at paragraph 7.7 that:

> *Though residents cannot legally be prevented from leaving care homes (except in certain cases such as where the person lacks the relevant capacity and is subject to the Deprivation of Liberty Safeguards), we understand that during the pandemic a range of restrictions were placed on residents wishing to leave the care home, particularly upon their return, and that these discouraged service users from taking visits out. The intention is that service users must not be discouraged from leaving the care home premises to support their wellbeing and participation in their community. In practice, this will mean, for example, that providers should not impose unreasonable rules on returning after a visit out that would discourage service users from taking a visit out and effectively act as a restriction.*

Importantly, new regulation 9A(4) makes it clear that a service user is not required to receive any visit, take a visit out of a care home, or be accompanied, if they do not wish to be. If a service user does not have capacity to consent, they are not required to receive a visit, or be accompanied, if it would not be in their best interests to do so.

Regulation 9A applies to mental health hospitals. However, Regulation 9A(4) will not require or enable a registered person to do anything that is not in accordance with any court or tribunal order or with any provision in, or made under, the Mental Health Act 1983, the Mental Capacity Act 2005 and so far as relating to high security psychiatric services, the National Health Service Act 2006. The Explanatory Memorandum explains that "[t]*he purpose of this is to ensure that the requirements in this instrument do not conflict with provisions made in or under the legislation listed and to avoid any unintended consequences*." Specifically in relation to mental health hospitals, however, it is perhaps worth noting that there is no provision of the MHA 1983 which directly relates to the control of visiting other than those providing for visits in private by, for instance, Second Opinion Appointed Doctors (a point slightly glossed over in Chapter 11 of the Code of Practice to the MHA 1983). It is therefore perhaps not entirely obvious what provisions of the MHA 1983 are going to be in play here.

New regulation 9A will not apply to a registered person in respect of the regulated activity of 'accommodation for persons who require treatment for substance misuse' or in respect of any detoxification services for substance misuse (which may take place in a hospital setting). This is achieved by excluding these services from the definition of 'relevant regulated activity' in new regulation 9A(6). As the Explanatory Memorandum makes clear:

> *These services are excluded because it is common for an individual in a substance misuse residential rehabilitation or inpatient detoxification service to go without visitors for a period while undergoing treatment or rehabilitation, to support their treatment. Limiting visits according to risk and being able to maintain a safe drug and alcohol free environment is fundamental to their operation. Other activities which the CQC regulates, such as personal care; management of blood*

> *and blood derived products and transport services; and triage and medical advice provided remotely, are also excluded from the definition of 'relevant regulated activity' as visiting and accompanying are not relevant in respect of these activities.*

It is perhaps striking that the Government has not prepared a full impact assessment, on the basis that it considers that there is no significant, impact on business, charities or voluntary bodies. The Explanatory Memorandum notes at paragraph 12.2 that:

> *Costs have been estimated for care home settings where the central estimate of the quantified cost to business is £526,000 in year 1 of the appraisal period. This figure is an estimate of the staff administration and familiarisation costs of facilitating visitors for the care home settings that are not currently accommodating visits in any circumstances. This annual figure is expected to decrease over time, as the number of care homes reporting not allowing visiting has been broadly decreasing.*

The CQC are now consulting on the guidance on visiting with a closing date of 20 February 2024.

Capacity in civil proceedings consultation – help wanted

The Civil Justice Council has published a consultation on Procedure for Determining Mental Capacity in Civil Proceedings which will run for 3 months until 17 March 2024 at 23:59. The consultation paper can be found online here.

As the Working Group on the project, including Alex, has identified, the problem is that:

> *The CPR makes no provision for cases in which a party's capacity is in doubt: how the issue is to be identified, investigated or resolved. The provisions regarding the appointment of a litigation friend also assume that there is a person suitable, able and willing to undertake the role.*
>
> *The issue was identified more than 20 years ago in Masterman-Lister v Brutton ("Masterman-Lister") when Kennedy LJ observed that neither CPR 21 (nor the preceding provision, RSC Order 80) made any provision for "a judicial determination of the question whether or not capacity exists". Kennedy LJ recommended that the Rules Committee consider the issue, but held that meanwhile: "courts should always, as a matter of practice, at the first convenient opportunity, investigate the question of capacity whenever there is any reason to suspect that it may be absent …"*

The Consultation Paper briefly summarises the discussions of the working group, the main issues identified and some provisional proposals for change. Not all of the proposals were agreed by the whole working group and all will be revisited in light of the consultation responses.

The CJC wishes to hear from a wide range of consultees, not only from people with significant experience of issues of mental incapacity and/or the civil justice system but also from those with more limited experience of specific issues or procedures.

Responses should be submitted by PDF or word document here. Please use the cover sheet available here.

As part of the consultation process, there will be a seminar on 1 March 2024: to register, please see here.

The Care Act, charging and capacity

In this 'in conversation with,' Alex is joined in his shed by Arianna to talk about her new book, Social Care Charging, and then to look at the issues which arise where decisions about charging and care planning are taking place in relation to those with impaired decision-making capacity.

BMA Core Ethics Guidance

The BMA has replaced its textbook, *Medical Ethics Today* (3rd edition published in 2012), with a new online resource bringing together its core ethics toolkits in a single, easy to search and navigate resource (with an easy to remember URL – www.bma.org.uk/core-ethics). This makes its guidance much more accessible to members – at any time of the day or night – and makes it much easier to update, as individual 'chapters' (toolkits) can be updated as and when the need arises. (The individual toolkits are also still available on the website as stand-alone documents.) The Mental Capacity Act toolkit (covering England and Wales) has been updated and new toolkits have been produced on mental capacity in Scotland and Northern Ireland.

Remote assessments and MHA renewals – the High Court rules them out

In *Devon Partnership NHS Trust v SSHC* [2021] EWHC 101 (Admin), handed down on 22 January 2021, the Divisional Court held that "the phrases "personally seen" in s. 11(5) MHA 1983 and "personally examined" in s. 12(1) require the physical attendance of the person in question (i.e. the doctors and the Approved Mental Health Professional) on the patient.

In *Derbyshire Health Care NHS Trust v SSHC & Others* [2023] EWHC 3182 (Admin), Lane J has held that, despite somewhat different language being used, the same approach applies to renewing detention, CTOs and guardianship.

The Trust sought declarations that:

1. *The responsible clinician is not required to undertake a face-to-face examination of the patient before making a community treatment order ("CTO") under section 17A(1);*
2. *The word "examine" in section 20A(4) should not be interpreted as meaning a face-to-face examination, so that a remote examination of the community patient by the responsible clinician before the latter extends the CTO may be sufficient; and/or*
3. *The word "examine" in section 20(3) and (6) should not be interpreted as meaning a face-to-face examination, so that a remote examination of the patient by the responsible clinician before the latter renews the authority for detention for hospital treatment of a patient under section 3 or guardianship in the community under section 7, may be sufficient.*

Lane J declined to make the first declaration sought because it had not arisen on the facts of the actual case before him, which (in a slightly complicated fashion) involved an interested party who had been

placed on a CTO following personal examination, and then remotely renewed during COVID. Lane J observed that he "*should not be taken as in any way questioning the fact that, in the light of Devon, there is uncertainty in respect of section 17A. This Court must, however, resist the temptation to venture outside the limits of its ability to give sound and effective declaratory relief*" (paragraph 82).

In relation to the second and third declarations, Lane J effectively transposed the reasoning from *Devon* to the renewal situation. In response to a submission that the word "examine" could be subject to an updating construction, he identified at paragraph 112:

> *on the state of the evidence, the claimant cannot show that there is the necessary societal consensus that an examination conducted by telephone or video conferencing will always be of the same high quality as one involving the physical co-location of clinician and patient. As I have sought to explain, Parliament's intention was to demand, as a general matter, an examination of such quality. Accordingly, the claimant cannot rely upon the "updating" or "always speaking" principle of statutory construction as a reason for this court to grant the remaining two declarations.*

NHS England guidance on meeting the needs of autistic adults in mental health services

In December 2023, NHS England published guidance on meeting the needs of autistic adults in mental health services.

The Guidance appears to have been prompted by the realisation that not only are the number of adults diagnosed as autistic in England rising rapidly, but also that they have a higher prevalence of mental ill health compared to the general population. The aim of the guidance is "*to help drive our collective efforts to bring about improvements in the provision of mental health care for autistic adults in all mental health services. It will support staff working in mental health to better understand and feel confident about meeting the needs of autistic people who access their services.*" One of the key aims of the guidance is to provide earlier, well-targeted community support, in order to avoid admissions and long stays in mental health inpatient units.

The guidance uses four levels of stepped mental health care that can be provided for autistic adults - demarcated by the acuteness and type of mental health need they are designed to treat and support. The four levels are: Level 1: Staying well in the community; Level 2: Planned mental health care; Level 3: Crisis care; and Level 4: Inpatient care.

The guidance provides that mental health services should:

1. ensure services are accessible and acceptable to autistic adults
2. support access to meaningful activity
3. facilitate timely access to autism assessment, when clinically indicated
4. use evidence to guide intervention choice
5. assess and proportionately manage risk

6. monitor and minimise the use of restrictive practices
7. support cohesive transitions
8. consider the physical health needs of people accessing mental health services

To achieve this, all ICBs should:

- develop a local commissioning strategy to ensure appropriately adjusted and tailored mental health provision is available for autistic adults, informed by local and national statistical data
- develop and maintain a well-trained workforce

A detailed examination of the guidance is beyond the scope of this report, but it is useful to look at two aspects of the guidance. First – the requirement to make services accessible and acceptable to those with autism. This part of the guidance is detailed. It requires ICBs to make reasonable adjustments both at a service level (so for example considering the lighting in a service, or ensuring that the written information is accessible to someone with autism, or that booking appointments can be made without the need to make phone calls), as well as on an individual basis.

The guidance on item 6, monitoring and minimising the use of restrictive practices however, is less detailed. It grapples with the systemic issues, for example, it requires ICBs to look at the community systems available for autistic adults (together with the local authority and third sector partners) that can "*foster positive emotional wellbeing and reduce the need for higher level services for escalating mental health needs*." However there is little guidance on how to reduce the use of these practices on an individual basis. Such measures could include, perhaps, the wider use of positive behaviour support plans, ensuring that the person's sensory needs are being met in their environment, and where appropriate protecting their legal rights by making applications to the Court of Protection to ensure that the restrictive measures are lawful.

Short note: the European Court of Human Rights: mental health detention and Articles 3 and 5 ECHR

Strasbourg means what it says in relation to the tightening of the criteria for admission and detention in the context of mental disorder that has been a feature of its case-law since *Rooman v Belgium* [2019] ECHR 105.[9] This has bene made very clear in its first judgment of 2024, *Miranda Magro v Portugal* [2024] ECHR 1. The case concerned a Portuguese man who had bene convicted on charges of criminal damage, making threats and sexual harassment he was sentenced to a "preventive detention measure" on the basis of a serious mental illness and held in a prison hospital. The applicant did not dispute that he had a serious mental health condition at the time, but complained of the conditions of his detention, and submitted that he should have been held in a psychiatric facility in order to have access to the requisite medical care. He complained under both Articles 3 and 5 ECHR.

[9] See also for another sign of the changing context, the resolution on mental health adopted by the European Parliament (i.e. the EU representative assembly) of 12 December 2023, and the detailed calls therein for steps to reduce coercion in mental healthcare, although without going so far as to call for the abolition of compulsory admission and / or treatment.

In relation to his claim under Article 3, the ECtHR noted that:

> *80. In this connection, the Court observes that the Government in the present case did not provide any evidence, such as medical reports or a copy of the applicant's individual therapeutic plan, attesting that he had received individualised, continuous and specialised care and follow-up treatment, and that appropriate therapy and medication had been prescribed and provided to him (compare Strazimiri v. Albania, no. 34602/16, § 108, 21 January 2020). For instance, no information has been provided to indicate that he had regular and continued psychiatric follow-up aimed at adequately treating his illness, preventing its worsening, or carrying out preparatory work towards the applicant's release and reintegration into the community. **The Court notes, therefore, that the Government have failed to demonstrate that the applicant received the therapeutic treatment required by his condition** (see Murray v. the Netherlands [GC], no. 10511/10, § 106, 26 April 2016; Rooman, cited above, §§ 146-47; and Strazimiri, cited above, §§ 108-12; and contrast Moxamed Ismaaciil and Abdirahman Warsame v. Malta, nos. 52160/13 and 52165/13, § 95, 12 January 2016), as it has not been shown that the administration of drugs with long-lasting effects was complemented by the implementation of a comprehensive treatment strategy. In circumstances such as these, where the Government have failed to refute the applicant's consistent allegations with convincing evidence, the Court is prepared to accept the applicant's account of the conditions of his detention in the psychiatric unit of the Caxias Prison Hospital (see the case-law quoted in paragraph 74 above).*
>
> *81. The Court accepts that the very nature of the applicant's psychological condition rendered him more vulnerable than the average detainee and that his detention in the conditions described above may have exacerbated to a certain extent his feelings of distress, anguish and fear. In this connection, the Court considers that the failure of the authorities to provide the applicant with appropriate assistance and care has unnecessarily exposed him to a risk to his health and must have resulted in stress and anxiety (see, mutatis mutandis, Sławomir Musiał v. Poland, no. 28300/06, § 96, 20 January 2009)* (emphasis added)

The court therefore found a violation of Article 3 ECHR.

Turning to Article 5 ECHR, the court found that, at first sight, the detention met the three minimum criteria under Article 5(1)(e) were met, as the applicant had been diagnosed with a mental disorder warranting detention, and detained pursuant to a procedure prescribed by the law (paragraph 91). However, that was not the end of the story:

> *92. […] the Court notes that the conditions in which a person suffering from a mental health disorder receives treatment are also relevant in assessing the lawfulness of his or her detention within the meaning of Article 5 of the Convention (see Rooman, cited above, §§ 194 and 208). In order to determine whether the detention of the applicant as a "person of unsound mind" has been "lawful" in the present case, the Court, taking into account its findings under Article 3, will assess the appropriateness of the institution in which he was detained, including whether an individualised treatment plan was put in place. Such a plan should have taken account of the specific needs of his mental health and have been aimed specifically, in so far as possible, at curing or alleviating his condition, including, where appropriate, bringing about a reduction in or control over the level of danger posed, with a view to preparing him for possible future reintegration into society (ibid., § 208).*
>
> *93. The Court notes that between 14 April and 18 October 2021, the applicant, who was found to*

be not criminally responsible, was detained in the psychiatric unit of the Caxias Prison Hospital (see paragraph 14-15 above); the prison hospital is primarily aimed at serving the ordinary prison community suffering from mental illness and is not part of the health system (see paragraphs 39 and 47 above). The Court accepts that the mere fact that the applicant was not placed in an appropriate facility does not, per se, render his detention unlawful (see Rooman, cited above, § 210). However, the Court reiterates that keeping detainees with mental illnesses in the psychiatric ward of ordinary prisons pending their placement in a proper mental health establishment, without the provision of sufficient and appropriate care, as appears to have been the case with the applicant, is not compatible with the protection ensured by the Convention for such individuals.

94. Having considered the submissions of both parties and in view of its findings in paragraphs 77-82 above, the Court is not convinced that the applicant was offered appropriate treatment or that the therapeutic environment he was placed in was suitable for his condition. In this connection, the Court reiterates that the level of care provided must go beyond basic care. ***Mere access to health professionals, consultations and the provision of medication cannot suffice for treatment to be considered appropriate and thus satisfactory under Article 5 of the Convention*** *(see Rooman, cited above, § 209). Also, as already found in paragraph 80, the Government did not present the therapeutic plan for the applicant or other documents in this respect. Furthermore, having regard to the applicant's state of health and special vulnerability, the Court also takes note of the impact his detention had on him, namely in aggravating his state of confusion and fear owing to the restrictive and anti-therapeutic environment that detention in a prison facility entailed.* (emphasis added)

The court therefore found there was a violation, also, of Article 5 ECHR.

Rooman has been domesticated in England & Wales (surprisingly) recently in *SF v Avon and Wiltshire Mental Health Partnership* [2023] UKUT 205 (AAC). There are also interesting moves afoot in Wales to seek to draw a more direct statutory link between detention and treatment, and we anticipate that this case may well be referred in that context.

It is perhaps, though, important to emphasise that it would be very unlikely that the Strasbourg court would be sympathetic to anyone seeking to rely upon this (important) tightening of the criteria to deny care to a person seeking it.

Short Note: the EU and the CRPD

The Second Chamber of the Court of Justice of the European Communities considered aspects of the UN CRPD in the context of employment age discrimination. A 28-year-old student with disabilities was being assisted to recruit a personal assistant who should be 'preferably between 18 and 30 years old' as the assistant would need to ensure that her highly personal needs in relation to her social life as a university student were met. The issue was whether this was discriminatory on age grounds.

In *AP Assistenzprofis* [2023] EUECJ C-518/22, the court took into account Article 19 CRPD (the right to independent living) which contained "*specific requirements to enable persons with disabilities to live with the same autonomy as others and with choices equal to others*." The court held that this must be interpreted as not precluding an age requirement for personal assistants which took account of the wishes of the person with disability, provided such a measure was necessary for the protection of the rights and freedoms of others.

The decision perhaps illustrates the growing traction of the CRPD when interpreting domestic and European law.

IRELAND

In the Matter of Joan Doe [2023] IECC 10

Prior to the end of 2023 the Circuit Court in Dublin delivered its first written judgment under the Assisted Decision-Making (Capacity) Act 2015. This may have been surprising to some because, historically, it was most unusual for the Circuit Court to deliver written judgments. Between 2016 and 2022 there were a total of 20 written judgments of the Circuit Court over the seven-year period. Although there were nine in 2023, perhaps indicating a change in the usual practice.[10]

This written judgment in question, *In the Matter of Joan Doe* [2023] IECC 10, concerned a dispute between Joan Doe's siblings and the Health Service Executive ('the HSE') as to whether the siblings were suitable to act as Decision-Making Representatives ('DMR') for Joan Doe. The HSE contended that the siblings were unsuitable and an independent panel DMR ought to be appointed.

By way of background, Joan Doe is a widow, without children, in her late sixties. Her assets consist of a primary residence, an apartment, some savings and an income from three pensions. She has a diagnoses of frontotemporal dementia and a history of mental illness with significant episodes of suicidal ideation. Ms. Doe's brother, John Doe, gave evidence that "*the Relevant Person suffered from OCD for many years. However, in 2011 something went wrong. He said at that time she had a series of admissions to a Mental Health Service and "she has never been well in the same sense since 2011*". John Doe looked after Ms. Doe's property and finances for her since 2014/2015, and has lived in her home rent free since 2021, as Ms. Doe came home from her assisted living accommodation each weekend, and someone had to be there.

A suitable person

One of the most interesting features of the judgment, in my view, is that the court opted not to rely on the relatively straightforward suitability criterion. Section 38(2) of the ADMCA provides that the court may make an order appointing a 'suitable person' to act as DMR, suggesting that the court, having heard evidence in a case, could make findings based on the evidence that the proposed DMR is simply unsuitable. Instead, the court in this case opted to make findings pursuant to 38(5) that there were conflicts of interest and pursuant to 38(6) that certain members of the family did not have the requisite financial acumen to take on the role.

It is striking that the court opted to do this as opposed to making a finding, for example, that none of the siblings were suitable people because they had engaged in acts such as calling the treating psychiatrist a "bitch", intimidating the treating psychiatrist, failing to provide financial details to the social worker, or accepting ongoing cash payments from the Relevant Person. Given the extent of responsibility afforded to DMRs, their fiduciary duty, their obligation to comply with the Code of Practice

[10] See: https://www.courts.ie/search/judgments/%22%20type%3AJudgment%22%20AND%20%22filter%3Aalfresco_radio.title%22%20AND%20%22filter%3Aalfresco_Court.Circuit%20Court%22.

for DMRs, and in the present case, liaise with the treating medical team with whom there had been a fundamental breakdown in the relationship, in all of the circumstances one might conclude that the siblings were simply unsuitable.

Will and Preferences

In considering making any intervention under the Act, which includes appointing a DMR, the court must not only take account of, but also give effect to, in so far as it is practicable to do so, the past and present will and preferences of the relevant person. In considering this issue and balancing any expression of will and preference against the person's incapacity, the court held, at par. 6.10, that it "*must be mindful of the fact that a person not having the ability to make a decision on a particular matter, does not mean that their wishes are to be totally disregarded*."

The court goes on to hold, at par 6.11, that "*while the court is mindful of the fact that the right to have a voice heard and respect the will and preference of the Relevant Person, it is not the only consideration. The court must also consider the issues of vulnerability and how that can be best dealt with*". The ADMCA sets out what the Circuit Court is obliged to consider when determining an application pursuant to section 38 to appoint a DMR. In addition to the guiding principles the court is obliged to consider the factors set out in s 38(5) of the Act, which include the person's will and preferences, preservation of family relationships, the existing relationship with the proposed representative, their compatibility, the representative's capability, and assessment of potential conflicts of interest. Further, s 38(6)(a)–(d) provides that when considering the appointment of a decision-making representative for a relevant person's property and affairs, the court must consider the complexity of the individual's financial affairs, the expertise needed to manage them, the capability of the proposed representative, and the financial support available to them.

In addition to considering "issues of vulnerability" the court found, at par. 6.13, that "*while the court has to be very respectful of respecting the past will and preferences of persons who lack capacity, it has to also be conscious of the need for effective safeguards to prevent abuse*". The legislative framework is drafted with the clear aim of preventing abuse by those who perform the role of DMR. DMRs are accountable to the Director of the Decision Support Service and ultimately the Court. It may be the case that the court may find that a proposed DMR has a conflict of interest which results in a finding that they are unsuitable pursuant to section 38(5)(f), however the imposition on the court to impose 'effective safeguards to prevent abuse' in appointing a DMR is an interpretation of the ADMCA arising from this case.

While it is evident from the summary of the independent solicitor for the Relevant Person that the Relevant Person's *present* will and preferences were unascertainable, it is interesting that the court did not make any findings as to the Relevant Person's *past* will and preferences. It is not known whether there was any indication from the decisions previously made by the Relevant Person that she would want any of her siblings to be appointed as her DMR, or what weight the court placed on Ms. Doe allowing her brother to take care of her property and finances for the previous eight or nine years. While it may remain the case, having determined that the Relevant Person's past will and preference would

indicate that any one of the siblings would be preferred by the Relevant Person, that the court could conclude that such sibling(s) are unsuitable.

Objectivity

In refusing to appoint the siblings as DMRs, the court, at par. 9.2, held that the Relevant Person's siblings "*cannot objectively deal with financial, medical and care decisions on behalf of their sister*". The requirement for a DMR to objectively deal with relevant decisions does not appear in the ADMCA or the Code of Practice for DMRs. Section 3.6 of the Code of Practice sets out how a DMR ought to consider options. The standard set out in the Code is, in my view, subjective in that the responsibility to make decisions, either independently or jointly with the relevant person (ss 3.6.4 and 3.6.5) necessitates a subjective interpretation and application of the individual's preferences to specific, often varied, circumstances.

The determinative factors

In reaching the decision that none of the four siblings of Joan Doe were suitable as DMRs under the ADMCA, the court considered several factors. Regarding John Doe, the treating psychiatrist reported a confusion in his understanding of the roles of advocate and decision-maker. Further, Mr. John Doe's residence in the Relevant Person's property and the expected inheritance from her estate raised concerns. There were serious issues around his handling of the Relevant Person's medication, including an instance of withholding medication and resistance to sharing financial information necessary for the Fair Deal Scheme.

James Doe's financial dependence on the Relevant Person, evident from a regular standing order of €25 per week and contributions to the cost of a holiday on which the Relevant Person went, was also problematic. June Doe's suitability was questioned due to an alleged assault on a nurse manager and her admission of using derogatory language. Joy Doe was considered to lack the necessary skills to act as a financial DMR.

Finally, the family, as a whole, was viewed critically. The court referred to the evidence of the treating psychiatrist regarding the family's inability to care for the Relevant Person at home, and the psychiatrist's experiences of threatening and intimidating behaviour from the family, particularly from Mr. John Doe. Concerns about the administration of medication by the family were also raised by Dr. AB.

Conclusion

It remains to be seen whether the courts here will develop any case law around the weight to be attached to a Relevant Person's will and preferences, the priority or weight to be attached to each of the guiding principles and whether there ought to be any order of preference in the appointment of DMRs. For practitioners, this case provides some helpful guidelines as to the type of issues that will influence a court in refusing to appoint family members as DMRs. Though, no doubt, there is much more to come.

Emma Slattery BL

Comment

From a (very interested) external perspective, one of the striking features of the judgment was its deliberate emphasis upon the fact that will and preferences are not the sole determinant of decision-making under the 2015 Act. This is self-evidently correct from the terms of the legislation itself, which – contrary to some of the 'messaging' around it – is not solely about will and preferences, rather, and tracking Article 12 CRPD, it is about respect for will and preferences, but also the other rights in play, including the right to be safeguarded against exploitation, violence and abuse.

Alex Ruck Keene

SCOTLAND

Manifestation of endemic disability discrimination rejected

Rarely can so much of significance be concealed by a decision requiring only "technical" interpretation of a rule of court, as in *S v M* [2024] SAC (Civ) 1, a decision of the Sheriff Appeal Court by Sheriff Principal Catherine Dowdalls KC, sitting alone. Even the basic facts are startling. According to an undisputed psychiatric assessment before the court, *S*, the defender in the proceedings, has a mild learning disability, but was able to exercise her right to instruct a solicitor to act for her in the case, and had competently done so, that being the position at all relevant times, and continuing to be so. The pursuer nevertheless sought to deprive her of that right, and thus delay further his own protracted case, by having a curator ad litem appointed.

The pursuer founded on his interpretation of rule 33.16 of the Ordinary Cause Rules 1993, a rule last reviewed and re-framed in 2017. In the words of the courts at both first instance and on appeal, the outcome of the pursuer's interpretation would have been "absurd". There were generalised references in the decisions, at both first instance and on appeal, to the European Convention on Human Rights: no more than that, as all concerned seem to have considered it unnecessary to "go there". But any commentary must "go there". People in Scotland with mental and intellectual disabilities live in an environment awash with platitudes and good intentions, but in reality face endemic discrimination, including institutional discrimination still lurking in places in our laws and procedures. The essence of the pursuer's case was that the label of "mental disorder", when attached to the defender, incapacitated her from the benefit of fundamental rights, even though the label was irrelevant to her ability to exercise those rights. It seems unarguable that this would have violated her rights under Articles 6 and 8, and in association with them Article 14, of the European Convention. That interpretation would need no external reinforcement, but is in fact indisputably reinforced by the UN Convention on the Rights of Persons with Disabilities, not part of Scots law but ratified in full by the United Kingdom, and thus a significant aid to interpretation where necessary.

The interpretation urged by the pursuer would not only have been "absurd", and have violated the defender's fundamental rights; it would also inevitably have meant that rule 33.16 was *ultra vires* of the Parliament – both in relation to the European Convention and as a devolution issue – and thus a nullity.

The possible nature of the pursuer's motive in instructing his solicitor to proceed as was done must at least be considered by a commentator. That will conclude this item. Suffice to say here that the legality of a party's motive was a significance in the other Scottish case considered below in this issue of the Report.

The case to which the application for appointment of a curator ad litem related was brought under section 11 of the Children (Scotland) Act 1995. The pursuer sought orders for declarator that he is the father of a three year-old child of the defender, orders for parental rights and responsibilities in relation to the child, and contact with the child. The defender opposes the making of any such orders in favour of the pursuer. Apart from noting the broader context of the litigation, rights and obligations of and in relation to the child are absent from the proceedings referred to in this Report. In particular, there is no reference to the requirement in section 11(7) of the 1995 Act that the court "*shall regard the welfare of*

the child concerned as its paramount consideration" and should "*not make any such order unless it considers that it would be better for the child that the order be made than that none should be made at all*".

Sheriff Principal Dowdalls quotes all relevant provisions of rule 33.16. Taken in isolation, subsections (1) and (2) appear to make mandatory the outcome urged by the pursuer. The rule "*applies to a family action where it appears to the court that the defender has a mental disorder*" (33.16(1)). A psychiatric opinion to that effect was before the court. In an action to which the rule applies, and therefore in this action, "*the sheriff shall, after the expiry of the period for lodging a notice of intention to defend – (a) appoint a curator ad litem to the defender*". Reading no further, that would have been the beginning and end of the matter, had the rule been within the competence of the Parliament. That was the position urged by the pursuer, and upon a reading of the rule up to that point accepted as clearcut by the courts both at first instance and on appeal.

The picture changes completely if, as the courts did, one reads beyond rule 33.16(2)(a). Upon appointing the curator ad litem under (a), the court must make an order under (b) to lodge in process a report, based on medical evidence, stating whether or not, in the opinion of a suitably qualified medical practitioner, the defender is incapable of instructing a solicitor to represent the defender's interests. Right away, the requirement shifts from existence of a mental disorder to consideration of the relevant capability or incapability of the defender. That is where the focus stays for the remainder of rule 33.16. If the appointment of curator ad litem were to get beyond that first hurdle, the curator ad litem must, having regard to the nature of the defender's mental disorder, "*review whether there appears to have been any change in the defender's capacity to instruct a solicitor, in order to ascertain whether it is appropriate for the appointment to continue*". If it appears to the curator ad litem that the defender may no longer be so incapable, the curator ad litem must seek the sheriff's permission to obtain a medical opinion on the matter, the curator ad litem must lodge a copy of that opinion in process, and where the opinion concludes that the defender is not incapable of instructing a solicitor, the curator ad litem must seek discharge from appointment by Minute (33.16(8), (8A), (8B) and (8C)). In the present case, the practical effect of that, given the acceptance of all concerned of the medical assessment already before the court, is that any curator ad litem actually appointed would rapidly reach the point of being disqualified from acting, would be discharged, and the defender's right to instruct the representation of her choice would be reinstated. That is the "absurd" outcome referred to by both courts, an outcome with the consequences already described above. Sheriff Principal Dowdalls summarised the position in paragraph [20] of her opinion as follows:

> *"It is apparent from the above that the purpose of rule 33.16 is not to require that, in every case where the defender suffers from a mental disorder, the case is conducted on the defender's behalf by a curator ad litem. The purpose of the rule is to identify, through the appointment of a curator ad litem who will obtain a medical report, whether the defender is capable of instructing a solicitor. The rule requires that the defender's capacity to instruct a solicitor is kept under review by the curator ad litem and that, in the event that the defender is not incapable of instructing a solicitor, to seek discharge of the appointment."*

In paragraph [22] the Sheriff Principal stated that:

> *"… The purpose of the rule is twofold: firstly, …, it is to protect the interests of the defender; secondly it is to ensure that a defender who is not incapable of instructing a solicitor is permitted to do so and to conduct the litigation without the appointment of a curator ad litem …"*

The foregoing was sufficient to enable the Sheriff Principal to refuse the appeal. Sheriff Derek Livingston, at first instance, made the additional point that in rule 33.1(2) the definition of "mental disorder" was qualified by the words "*In this chapter unless the context otherwise requires*". Rule 33.1(2) in effect adopts a definition of "incapable" in the same terms as section 1(6) of the Adults with Incapacity (Scotland) Act 2000, including that the incapability be "by reason of mental disorder" as defined in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003. The relevant provisions of rule 33.1(2) and section 328 of the 2003 Act are quoted in the Appeal Court's decision. Though not commented upon in either decision, section 328 provides that "*'mental disorder' means any – (a) mental illness; (b) personality disorder; or (c) learning disability*". On the basis of currently quoted statistics, that very wide definition accordingly applies at any one point in time to a significant percentage of the population, inevitably including current litigants who, like *S*, are quite capable of instructing their own representation and are doing so, and quite possibly some of those so instructed.

Sheriff Livingston had granted leave to appeal *ex proprio motu*, on the basis that he considered that "*the matter might be worthy of further consideration by your Lordships and Ladyships*", so that the outcome is now clarification of the law on this point binding on sheriffs at first instance throughout Scotland.

The defender had also made an issue of the delay of more than three years from expiry of the period of notice following upon commencement of the action, that rule 33.16 related to something which should have been done at a much earlier point in time, that a proof fixed for 21st November 2023 was put in jeopardy by the pursuer's appeal, and that "*the ship has well and truly sailed on any such procedural irregularity*" (referring to the delay). The Sheriff Principal at [21] noted that paragraphs (2) and (3) of rule 33.16 "*appear to anticipate the appointment being made at a relatively early stage and certainly prior to a diet of proof*", but that the "*language of rule 33.16 does not set a time limit for the appointment of a curator ad litem*", therefore the Sheriff Principal did not agree with the defender's submission that "*the ship has well and truly sailed*".

The following four observations are not reflected in the decisions at first instance or upon appeal.

The first is that there was no consideration of my view, expressed soon after the passage of the 2000 Act in paragraph 10-43 of "*Adult Incapacity*" (W Green, 2003), pointing out that curators ad litem were not abolished by the Act, nor mentioned in it, but that following passage of the 2000 Act the options were appointment of a guardian with relevant powers, the granting of an intervention order authorising an appointee to pursue or defend an action, or appointment of a curator ad litem; and that those first two options "*should normally be preferred over appointment of a curator ad litem*", because "*Having regard to ECHR Article 6 and the second general principle under the Incapacity Act, it would appear that the risks of contravention of the adult's rights and the restriction of the adult's freedom are likely to be less if the requirements of intervention order procedure are followed*".

Secondly, this case has arisen as Scottish Government are already pressing forward with consideration of the definition and application of the term "mental disorder" in legislation, in furtherance of the Programme of Work described in the December 2023 Report. This case highlights the inexcusably

careless drafting of rule 33.16 in its use of "mental disorder", reinforcing misunderstandings arising from the way that the term is used in different contexts as the gateway to very different outcomes: in the 2003 Act, as the gateway to compulsion; in the 2000 Act, simply as a prerequisite for a finding of incapacity, which in turn has multiple applications; and so forth. One still encounters, with depressing frequency, the assumption by those who should know better that the existence of a mental disorder equates to incapacity. This can arise in many guises, including, for example, the need for the Lord Justice Clerk to clarify this point, in the decision of the Inner House issued on 14th March 2023 in an appeal by *Dr Mina Mohiul Maqsud Chowdhury v General Medical Council* in relation to fitness to practice proceedings. The case was described in the May 2023 Report and includes in full the relevant quotation from the Lord Justice Clerk. There are also concerns that reliance of the term "mental disorder" in some settings appears to be contrary to the UN Disability Convention. It may be that the term has outlived its usefulness, should be abolished, and should be replaced with definitions more clearly linked to the various purposes for which they are used.

Thirdly, while it was convenient in *S v M* that a psychiatric assessment of the defender's capability to instruct a solicitor was helpful, that is not essential and in a sense irrelevant, because (put shortly) having regard to relevant provisions of the code of conduct for solicitors, and the general human rights environment, success of the pursuer's application would have forced the defender's solicitor into breach of fundamental professional obligations. Having evidently engaged with the defender, and before accepting instructions, the defender's solicitor was obliged to provide all reasonable support to enable the defender to exercise her legal capacity in the matter of the proceedings brought against her (and indeed ensuring provision of such support is an obligation undertaken by the state in its ratification of the UN Disability Convention, under Article 12.3). The way in which the pursuer's solicitor discharged that obligation and, having ensured the provision of any necessary support, concluded that it was appropriate for her to accept instructions and to act, is a privileged matter between the solicitor and her client, and the conclusion of a solicitor that the solicitor is competently instructed is not a matter for enquiry by any other party, or indeed by the court, perhaps with the exception of some situation where a court might be aware of, or have drawn to its attention, real cause for concern about the performance by the solicitor of the solicitor's professional obligations. Otherwise, in all jurisdictions and for all purposes a court and other parties must accept as true, and beyond enquiry, the statement by a solicitor when that solicitor rises in court and announces that they are acting for X in the matter before the court. Except perhaps for some very good reason, it would be entirely inappropriate for the court, whether or not on the prompting of another party, to ask "Do you really?". That leads to the final point below.

Fourthly, by the same token, one has to accept that in *S v M* the pursuer's solicitor was acting upon the full instructions of the pursuer. Given the practical consequences of making the application and in instructing the appeal, it is difficult to see what legitimate motive the pursuer may have had. As explained above, if a curator ad litem had been appointed, the prescribed procedure would inevitably have resulted, probably quite quickly, in the curator ad litem stepping aside and the defender re-acquiring her right to instruct representation of her choice. Significant amounts of time would be lost in a case already three years in court. Expense, either to individuals or to the public purse, would have been incurred. Litigation is usually stressful, and often distressing, for participants, no more so than for a litigant with a mild learning disability facing opposed assertions of paternity and rights for contact

with her three year-old child. If, for one reason or another, the pursuer's application or appeal were to mean that the defender had to start again from square one with other representation, that would clearly be further detrimental on all the grounds of delay, expense, and distress to the defender: on delay, see the sheriff's comments in *Scottish Borders Council v AB*, [2019] SC JED 85, 2020 SLT (Sh Ct) 41, which we described in the December 2019 report, commending the assistance provided to the court by the solicitor for a learning disabled party by having spent time with her client frequently over several months to reach the point where she could represent her client as she did. One would reasonably have thought that a person claiming paternity and anxious to have contact with his child would have sought to have his application determined without avoidable delay, one way or the other, so that either contact would commence, or he would know (albeit sadly, no doubt) that it was not going to happen. There is a dearth of authority in Scotland on what does and does not amount to an abuse of process, but while acknowledging that there might be some perfectly good and legitimate reason for the pursuer proceeding as he did, it is difficult to envisage what that might be, and to be reminded of the dictum of Goldberg J in the Australian case of *White Industries Pty Ltd v Flower & Hart* 213 (1998) 156 ALR 169 at 252 "*… It is not proper, in my view to adopt a positive or assertive obstructionist or delaying strategy which is not in the interests of justice and inhibits the court from achieving an expeditious and timely resolution of a dispute*".

Adrian D Ward

O' boats an' men

(Attribution obvious in this first Report after 25th January; with apologies accordingly)

The case of *Galbraith Trawlers Limited v The Advocate General for Scotland (as representing the HOME OFFICE)* [2024] CSIH 1, 2024 SLT 43, concerned the amount of damages to be paid by the Home Office, as defender and appellant in an appeal to the Inner House, to Galbraith Trawlers Limited, pursuers and respondents, for the admittedly unlawful detention of three fishing vessels. Though concerned with unlawful detention of boats, its potential relevance to unlawful deprivation of liberty of both men and, of course, women, is nevertheless of significance to adult incapacity practitioners. There are various references to cases of unlawful detention of a mentally disordered patient and other unlawful detentions and arrests, without explicit reference to Article 5 of the European Convention; a specific focus on the lawfulness of the motives for exercise of powers, whether the manner of exercise was lawful or unlawful; and some concluding comments on what, nowadays, should be awarded even as "nominal damages" where only nominal damages are held to be appropriate. The potentially relevant context for adult incapacity practitioners includes the prolonged failure of the Scottish Parliament to comply with Article 5 by legislating for a method to authorise deprivations of liberty of adults unable to consent to arrangements in a manner compliant with Article 5; the prevalence in particular of unlawful discharges of adults from hospitals to care homes before, during and after the pandemic, and the emerging practice of unlawfully retaining them in hospitals when that is no longer medically justified; and issues about the lawfulness of the motives for such discharges.

In *Galbraith*, the Home Office appealed against an award by the sheriff at Campbeltown of damages of £284,227 plus interest for losses arising from the detention of the fishing vessels, the appeal having been referred to the Inner House by the Sheriff Appeal Court. The opinion of the Inner House was

delivered by Lord Carloway, the Lord President, the other members of the court being Lords Malcolm and Pentland.

All three fishing vessels were detained under provisions of the Immigration Act 1971, section 25 of which provides that where a person is convicted on indictment of facilitating a breach of immigration law by an individual who is not a UK national, the court may order forfeit of a vessel which has been used in connection with the offence. Prior to forfeiture, under section 25D of that Act (as applied to Scotland), if a person has been arrested for an offence under section 25, such a vessel may be detained by a "senior officer" *inter alia* until a decision is taken as to whether or not to institute criminal procedures against the arrested person for the section 25 offence. A "senior officer" is an immigration officer not below the rank of Chief Immigration Officer. The Home Office conceded that the immigration officer was below that rank, but argued that this was a procedural error but for which the vessels would have been lawfully detained anyway, therefore damages should be limited to nominal damages.

The Lord President summarised the task before the court as follows:

> *"The Advocate General contends that, owing to the particular circumstances of the case, the sheriff ought to have restricted his award to a nominal amount. That contention flowed, in essence, from the reasoning in Parker v Chief Constable of Essex Police [2019] 1 WLR 2238 (Sir Brian Leveson at para 104) that the test, when assessing damages in a wrongful detention case, is not to compare the claimant's position with what would have happened, but for that detention, but with what would have happened if the relevant authority had appreciated what they ought to have done to effect a lawful detention. This test, which was said to be the product of R (Lumba) v Home Secretary [2012] 1 AC 245, has been criticised both by the High Court of Australia (Lewis v Australian Capital Territory [2020] 271 CLR 192) and the Supreme Court of Ireland (GE v Commissioner of the Garda Síochána [2022] IESC 51). In order to determine the appeal, the court must decide whether Parker is in line with Scots law or whether it should follow the Australian and Irish jurisprudence."* [From para [1] of his opinion]

He amplified that as follows:

> *"The Advocate General does not challenge the sheriff's finding that the vessels were detained unlawfully. He confines his appeal to a contention that only nominal damages ought to have been awarded. This is on the basis that the mistakes, which were made by the Home Office in detaining the vessels, were procedural or technical errors. Had the Home Office been aware of the correct method of detention, they could and would have lawfully detained the vessels. Therefore, the Advocate General argues, the unlawfulness of the detention did not cause the loss. The detentions could have been executed lawfully, and the same loss would have occurred if they had been."*

For the authorities relied upon and referred to by the Advocate General, and those by the pursuers and by the court, see the judgment. As narrated by the Lord President, the pursuer's case can be summarised as follows:

> *"The pursuers did not argue, nor did they lead evidence, that a senior officer or a constable could not have lawfully detained the vessels. Rather, they said that the power under section 25D had been exercised by someone who was not a senior officer or constable. The court had to consider what would have happened if the delict had not been committed. There was no point of principle*

which required damages to be approached differently from that of the detention of a person. Liberty of a person had generally been afforded greater protection by the law than property rights. If unlawfully detained persons were only entitled to an award of nominal damages, the same considerations should apply to property owners."

The defenders contended that the authorities relied upon by the Advocate General were neither binding nor germane to, and were distinguishable from, the present case. The legislation was different. It mattered not that the deprivation could have been achieved lawfully. It was not. The sheriff had found that the pursuers had sustained a real loss. The Advocate General's argument was that even if the Home Office had laboured under a complete misapprehension as to the law, and followed that, causation was to be approached as though there had been proper compliance. The pursuers pointed out that there was no common approach in cases of delict. It varied according to the basis and purpose of the liability. For the steps in the pursuers' argument, and authorities, again see the Lord President's opinion.

The court's decision commenced with the basic proposition:

"When a wrong has been committed, the court will order the wrongdoer to compensate the person affected by assessing what, in monetary terms, will put that person back into the same position as he would have been in had the wrong not occurred." [32]

After surveying the relevant authorities and drawing the principles from them, the Lord President said:

"Applying these straightforward principles, the question here is what, in fact, would have happened if the vessels had not been wrongfully detained. The sheriff was not prepared to find in fact that they would have been detained lawfully. On the contrary, he considered that the Home Office had a flawed understanding of what was required in order to detain a vessel. He was unable to accept that, had the Home Office properly understood what was required, they could and would have lawfully detained the vessels. The sheriff was well entitled to reach this view and to find in fact, as he did (ff 25), that the wrongful detention had had a 'severely detrimental effect on the [pursuers'] financial situation'. [33]

"It appears from the evidence of Inspector Lindsay that the decisions to detain were tactical ones which were designed to 'drive compliance'. That is not a lawful ground for detention. Section 25D makes it clear that the only purpose of detention is to enable the court to make a forfeiture order. Such an order is a financial punishment. For there to be reasonable grounds for believing that it is in prospect, the person detaining the vessel must have in mind: the nature of the crime, notably its seriousness; the likely penalty in financial terms; and the value of the vessels and any other assets owned by the potential accused. There was no evidence that any form of analysis of these issues or balancing exercise was carried out by the Home Office in order to determine whether detention was required so that forfeiture could follow. The conclusion must be, as a matter of fact, that, had Inspector Lindsay signed and served the letters herself (see infra), a detention may have followed, but it too would have been unlawful." [34]

The Inner House proceeded through several decisions to pick out contrasting strands. Was the test what would in fact have happened if the unlawful arrest or detention had not taken place; but what would have happened on the supposition that it had been appreciated what the law required and that had been followed, the latter being open to the criticism that to assume lawfulness was to assume

what was sought to be proved. The Inner House arrived at the contrast between the view taken in England & Wales, and the view taken in the High Court of Australia and the Supreme Court of Ireland, referred to above, but this time addressing the decision of the UK Supreme Court in *R (Hemmati) v Home Secretary* [2021] AC 143, in which Lord Kitchin stated (at para 112) that only nominal damages would flow if it were established that the wrongfully detained person *could* have been lawfully detained. Following the Australian case *Lewis v Australian Capital Territory* [2020] 271 CLR 192, and the Irish case *GE v Commissioner of An Garda Síochána* [2022] IESC 51, the Inner House opted for the Australian and Irish view, and concluded that:

> *"Although the present case is resolved on the basis that it has not been found in fact that, had the Home Office appreciated the tests for lawful detention, a lawful detention would have followed, the court disagrees with the reasoning in Parker in favour of that in Australia and Ireland. The correct counterfactual is simply what would, on the balance of probabilities, have happened; not what might or could have happened."* [42]

The appeal was refused. The Lord President concluded by examining what "nominal damages" actually means. He reviewed various cases from the 19th century and one in 1933, quoting the sums awarded and their equivalent values now, and he quoted the comment of the Lord Chancellor in *The Mediana* [1900] AC 113, Halsbury LC at 117 [46], that nominal damages for the infringement of a right did not mean small damages. With reference to the present case, he concluded that:

> *"Had the court awarded only nominal damages it would have measured those in thousands of pounds and not in the shape of a £1.00 coin. The resultant figure ought to serve as a modest deterrent of unlawful detentions."* [46]

I simply pose the questions to be derived from this for practitioners in Scotland considering cases of apparent unlawful discharges from hospital, or failures to discharge, whether from a starting-point of delict or a starting-point of adult incapacity rights. Which of the factors considered in *Galbraith* are relevant to the variety of factual situations that have occurred? If it could be proved that the driver for discharges was an unlawful one, mainly to reduce so-called bed-blocking, did that equate to the unlawfulness of the purpose of the detention of the vessels to "drive compliance" [34], which was not a lawful ground for detention and therefore any "remedial" steps taken would not have rendered the detention lawful? Its purpose was unlawful, therefore it was unlawful. Would the absence of such unlawful motive alter the outcome? While there may have been convergence between the laws of England & Wales and of Scotland in matters of tort/delict, would the Supreme Court – if such a case were taken that far – acknowledge and follow the fundamental differences between the two systems in matters of adult incapacity, and apply the preferred view of the (exclusively) Scottish courts? There could be different answers for different cases.

In the case of unlawfulness during the pandemic or earlier, practitioners would require to consider the various possible applicable rules of prescription and limitation under the Prescription and Limitation (Scotland) Act 1973 as amended, including whether the victim had since died, whether and to what extent the harm sustained was a "personal injury" (as defined in the 1973 Act to include a disease), whether the wrong was the deprivation of liberty itself without the personal injury element, the effect of impairment of the capabilities of the victim, and so on.

What victims of unlawful deprivation of liberty in terms of Article 5 are assured of is the right to compensation in Article 5.5. The question is: how much? Have potential claims in Scotland been deterred because of the view in England & Wales that only nominal compensation, and levels there awarded as such, would be payable anyway, so a claim was not worth the effort. Has the decision in *Galbraith* fundamentally altered such a judgement, with the prospect of even nominal monetary compensation being reflected "in thousands of pounds"?

Adrian D Ward

Streamlined Legal Aid applications for some Part 6 orders

The Scots Law Times of 26th January 2024 contained intimation of a new streamlined procedure for unopposed applications for Part 6 orders. The relevant Scottish Legal Aid Board web page is here. At first sight, it bears to relate only to guardianship applications, but in fact the new procedure relates to any "unopposed" applications where welfare powers are included (whether or not along with financial powers) for grant of intervention or guardianship orders, renewal of guardianship, and applications for appointment of joint or substitute guardians, whether or not under a guardianship order previously granted. The provisions of the 2000 Act quoted are sections 53(1), 57(1), 60(1), 62(1) and 63(1). It is helpful that SLAB have streamlined the process in this way, thus removing previous unnecessary difficulties to address the needs of adults to whom the 2000 Act applies, but there are some unfortunate infelicities at the link and in the form for streamlined applications at a further link. To mention two of them here, there is lack of clarity about the term "unopposed applications" because one could say that no applications are opposed at time of obtaining Legal Aid and prior to lodging in court (with the rare possible exception of applications for Legal Aid made only after the AWI application has been commenced and opposed). The better interpretation, it seems, is that this is intended to link back to the explanation in the fourth paragraph of the procedure when Legal Aid is sought to oppose an existing application and raise a counter-application. It would seem that the streamlined procedure is to be disapplied on the presumption that in these circumstances the counter-application will be opposed (though of course that is not a certainty).

Secondly, the information sought in the form is said to be the information needed to process the application, but seeking the "Applicant's relationship to adult" seems to be perhaps interesting but irrelevant (and in any event lacks the qualification "if any"), and the same would appear to apply to the question "Please explain the Applicant's involvement in the adult's everyday life".

It will be interesting to see whether the web link and form are improved, better further to remove avoidable difficulties.

Adrian D Ward

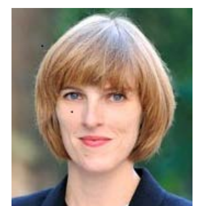
Editors and contributors

Alex Ruck Keene KC (Hon): alex.ruckkeene@39essex.com
Alex has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court and the European Court of Human Rights. He also writes extensively, has numerous academic affiliations, including as Visiting Professor at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

Victoria Butler-Cole KC: vb@39essex.com
Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. She is Vice-Chair of the Court of Protection Bar Association and a member of the Nuffield Council on Bioethics. To view full CV click here.

Neil Allen: neil.allen@39essex.com
Neil has particular interests in ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. When time permits, Neil publishes in academic books and journals and created the website www.lpslaw.co.uk. To view full CV click here.

Arianna Kelly: Arianna.kelly@39essex.com
Arianna practices in mental capacity, community care, mental health law and inquests. Arianna acts in a range of Court of Protection matters including welfare, property and affairs, serious medical treatment and in inherent jurisdiction matters. Arianna works extensively in the field of community care. She is a contributor to Court of Protection Practice (LexisNexis). To view a full CV, click here.



Nicola Kohn: nicola.kohn@39essex.com

Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 5th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2019). To view full CV click here.

Katie Scott: katie.scott@39essex.com

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

Nyasha Weinberg: Nyasha.Weinberg@39essex.com

Nyasha has a practice across public and private law, has appeared in the Court of Protection and has a particular interest in health and human rights issues. To view a full CV, click here

Simon Edwards: simon.edwards@39essex.com

Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click here.

Scotland editors

Adrian Ward: adrian@adward.co.uk

Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; honorary membership of the Law Society of Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

Jill Stavert: j.stavert@napier.ac.uk

Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click here.

Conferences

Members of the Court of Protection team regularly present at seminars and webinars arranged both by Chambers and by others.

Alex is also doing a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

Peter Edwards Law has announced its spring training schedule, here, including an introduction – MCA and Deprivation of Liberty, and introduction to using Court of Protection including s. 21A Appeals, and a Court of Protection / MCA Masterclass - Legal Update.

Adrian will be speaking at the World Congress of Adult Support and Care. This event will be held at the Faculty of Law of the University of Buenos Aires from August 27-30, 2024. For more details, see here.

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

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

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

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

Chambers UK Bar
Court of Protection:
Health & Welfare
Leading Set

The Legal 500 UK
Court of Protection
and Community Care
Top Tier Set

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

LONDON
81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER
82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE
Maxwell Chambers,
#02-16 32, Maxwell Road
Singapore 069115
Tel: +(65) 6634 1336

KUALA LUMPUR
#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur,
Malaysia: +(60)32 271 1085

39 Essex Chambers is an equal opportunities employer.

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number 0C360005) with its registered office at 81 Chancery Lane, London WC2A 1DD.

39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services.

39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.