MENTAL CAPACITY REPORT: HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

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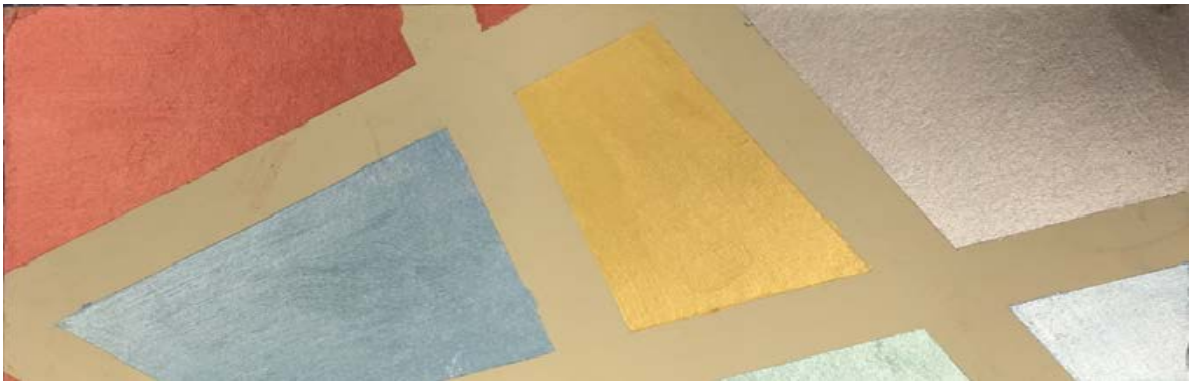

Welcome to the February 2024 Mental Capacity Report. Highlights this month include:

(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.

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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.

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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; 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

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

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 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*

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

> *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 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*

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

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

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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.

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*

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

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 JB 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 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

[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.

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 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.*

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

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*

[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.

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 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

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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.

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.

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