



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

- (1) In the Health, Welfare and Deprivation of Liberty Report: sexual and contraceptive complexities and an important light shed on DoLS from Northern Ireland;
- (2) In the Property and Affairs Report: the obligations on the LPA certificate provider, telling P their damages award, and dispensing with notification in statutory will cases;
- (3) In the Practice and Procedure Report: when it is necessary to go to court in serious medical treatment cases, and a Scottish cross-border problem;
- (4) In the (new) Mental Health Matters Report: medical evidence, mental disorder and deprivation of liberty, and the approach to propensity evidence;
- (5) In the Wider Context Report: when not to try CPR, developments in the context of assisted dying / assisted suicide and with Martha's Rule, and news from Ireland;
- (6) In the Scotland Report: a Scottish take on the *Cheshire West* anniversary and a tribute to Karen Kirk.

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.

Finally, we should note March 2024 contains three ten year anniversaries. One is national – indeed international – significance: the decision in *Cheshire West*; one is of national significance: the House of Lords Select Committee [post-legislative scrutiny report](#) on the MCA 2005; and the third is of personal significance to Alex: the launch of his [website](#).

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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.

## Contents

Scotland ten years post-Cheshire West: the advantages and disadvantages of not legislating!..... 2  
 Karen Kirk, Solicitor Advocate..... 5

### Scotland ten years post-Cheshire West: the advantages and disadvantages of not legislating!

#### Introduction

It’s been ten years since the UK Supreme Court *Cheshire West*<sup>1</sup> ruling, so where are we in Scotland in terms of responding to this?

Well, one could argue that at least we haven’t tied ourselves in the Deprivation of Liberty Safeguards and halted Liberty Protection Safeguards knots that our cousins South of the Border seem to have. However, in fairness to such cousins, that is probably because whilst we have *considered* how to address the issues the judgment raised we haven’t actually *done* anything concrete yet! That being said, the Scottish Government’s current programme of reform for mental health and capacity law will result in steps to address the issues, and the importance of doing this swiftly was recently brought into even sharper relief by, somewhat ironically, the English and Welsh Court of Protection *Aberdeenshire Council v SF*<sup>2</sup> ruling (see also the Practice and Procedure section of this Report).

#### ECHR issues

In a nutshell, Article 5(1)(e) ECHR allows the

deprivation of liberty of ‘persons of unsound mind’. This is, of course, subject to safeguards, such as the ability to challenge the lawfulness of this through a court or tribunal and to be discharged as soon as the reason for detaining the person has ceased and/or it is not lawful (Article 5(4) ECHR). The 2004 European Court of Human Rights *Bournemouth*<sup>3</sup> ruling made it clear that Article 5 is engaged where a person lacks capacity to consent to a deprivation of their liberty and they are therefore entitled to Article 5 protections.

The Court stated that a deprivation of liberty engaging Article 5 is where a person is under continuous supervision and control and is not free to leave<sup>4</sup>. This was confirmed by the UK Supreme Court in *Cheshire West*<sup>5</sup> – its ‘acid test’ for a deprivation of liberty – which also made it clear that the Article 5 reach extends to all health and social care situations. We also know that simply dealing with the issue about how a deprivation of liberty can be authorised is insufficient. Article 5(4) challenge safeguards must be practical and effective for persons with mental disabilities<sup>6</sup>. Whilst this might not dictate that automatic judicial review occurs it certainly means that the ability to challenge the lawfulness of a deprivation of liberty must be within the realistic grasp of the person subjected to it.

<sup>1</sup> *P (by his litigation friend the Official Solicitor) (Appellant) v Cheshire West and Chester Council and another (Respondents); P and Q (by their litigation friend, the Official Solicitor)(Appellants) v Surrey County Council (Respondent)* [2014] UKSC 1 (*Cheshire West*) .

<sup>2</sup> *Aberdeenshire Council v SF* [2024] EWCOP 10.

<sup>3</sup> *HL v UK* (2005) 40 EHRR 32.

<sup>4</sup> *Ibid*, para 91.

<sup>5</sup> *Cheshire West* at 49, per Lady Hale.

<sup>6</sup> *MH v UK* (2013) ECHR 1008.

## What this means for Scotland

*Bournewood* and *Cheshire West* led to a questioning of the Article 5 ECHR compatibility of Adults with Incapacity (Scotland) Act 2000 (AWIA) measures where adults who lack capacity are deprived of their liberty, and also those under section 13ZA of the Social Work (Scotland) Act 1968 (SWSA) (allowing local authorities to move adults who lack capacity to residential care). Detention under the Mental Health (Care and Treatment) (Scotland) Act 2003 is, however, largely Article 5 compliant although questions arise about Articles 5 and 8 ECHR compatibility and non-consensual treatment whilst on Short Term Detention Orders<sup>7</sup>, and levels of restriction whilst in low secure facilities, as well as the reminder that the lawfulness of detention on the basis of mental disorder depends on the availability of suitable care and treatment<sup>8</sup>.

The Scottish Courts appear to have accepted that Article 5 ECHR compatibility can be achieved through appropriate guardianship powers<sup>9</sup>. However, this has seemingly glossed over the fact that there is an absence of accompanying Article 5(4) safeguards. In 2024, the Court of Protection *Aberdeenshire Council v SF* ruling helpfully pointed this out! Nor would the argument that guardians are effectively the person giving consent to the deprivation of liberty hold given the lack of Strasbourg endorsement here.

In response to *Cheshire West*, the Mental Welfare

Commission for Scotland also issued guidance in 2014 warning against the use of Section 13ZA SWSA where the person is being moved to a care setting where they will be, or are likely to be, deprived of their liberty<sup>10</sup>.

## Post-*Bournewood* and *Cheshire West* actions in Scotland

Prior to the Scottish Mental Health Law Review (2019-2022) the Scottish Law Commission and Scottish Government both considered and consulted on the issues raised by *Bournewood* and *Cheshire West*. The recommendations made, and draft Bill provided, by the Scottish Law Commission<sup>11</sup> were ultimately not taken forward. Although there have been several 'near misses' in terms of *Bournewood/Cheshire West* situations reaching court hearings none, rather surprisingly given the time lapse, have been judicially considered in Scotland with *Aberdeenshire Council v SF*, in England in 2024, being the first.

The need to address the *Bournewood* and *Cheshire West* 'gaps' therefore fell to the Scottish Mental Health Law Review. By this stage, frustration was mounting over the lack of action to address these particular human rights concerns<sup>12</sup>, although they are admittedly complex which involve a need to both achieve ECHR compatibility whilst not creating unnecessary levels of bureaucracy. Moreover, so far we have been of course only considered ECHR requirements here. CRPD challenges to the denial of the exercise of legal capacity and

<sup>7</sup> *X v Finland* (2012) ECHR 1371.

<sup>8</sup> *Rooman v Belgium* (2019) ECHR 105.

<sup>9</sup> *K v Argyll and Bute Council* (2021) SAC (Civ) 21.

<sup>10</sup> This 2014 guidance is also reflected in the Commission's *Deprivation of Liberty: Advice Notes*, updated March 2021, <https://www.mwscot.org.uk/good-practice/guidance-advice>

<sup>11</sup> Scottish Law Commission (2014), *Report on Adults with Incapacity*, (Scot Law Com No 240),

<https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/completed-projects/adults-with-incapacity/>

<sup>12</sup> See, for example, Law Society for Scotland (2021), *Our 2021 priorities: Incapacity, mental health and adult care and protection*, <https://www.lawscot.org.uk/news-and-events/blogs-opinions/our-2021-priorities-incapacity-mental-health-and-adult-care-and-protection/>

deprivation of liberty on the basis of a diagnosis of mental disability and related impairment (based on mental capacity assessments) is something else that requires consideration given that the UK is a CRPD state party and because the Scottish Government intends that CRPD rights, along with those in other international human rights treaties, will, to some extent at least, become legally enforceable in Scotland. This was a fundamental issue that was considered by Scottish Mental Health Law Review and reflected in its recommendations<sup>13</sup>.

Its reasoning and recommendations on deprivation of liberty can be found in Section 3 of Chapter 8 of its Final Report. Whilst a full reading of this section of the report is strongly advised, it in essence recommended that in the short term the Scottish Government should establish a legislative framework for situations where a person may be deprived of their liberty that:

- Respects the wishes of a person who cannot make an autonomous decision but can, with support, express a will and preference to remain in their current living arrangements (even where these arrangements would otherwise constitute a deprivation of liberty).
- A practical and effective standalone right of review available to the adult deprived of their liberty, or a person acting on their behalf (where the adult is not subject to any order) and the ability of the Mental Welfare Commission to intervene where it has concerns.
- Powers of Attorney may grant advance consent to deprive the granter of their liberty, subject to safeguards. Although the Review recognised the lack of direction from the

European Court of Human Rights on the Article 5 compatibility of this, it decided that provided that rights protecting measures were in place, this represents the will of the granter.

- A court or tribunal may authorise a Decision Making Representative, or an intervention order, to deprive the person of their liberty.
- Where a person cannot consent to their care arrangements, even with support, and is being deprived of their liberty but does not have a welfare attorney or a Decision Making Representative, a court/tribunal may grant a Standard or, to preserve life or health, an Urgent Order for Deprivation of Liberty, either lasting for only as long as needed to achieve the protection required, with regular review dates and a right of appeal at the time of granting.
- Before proceeding to apply for a Standard Order for deprivation of liberty, an evaluation of the human rights implications must be completed.

The Review also stated that in the longer term this framework should be revised as its Human Rights Enablement, Supported Decision Making, and Autonomous Decision Making recommendations are developed.

In its high level 2023<sup>14</sup> response to the Review's recommendations the Scottish Government accepted such recommendations in broad terms. It announced a 10-year programme of reform of mental health and capacity law specifying various priorities throughout this period, one of the first being adults with incapacity law reform, including the deprivation

<sup>13</sup> Scottish Mental Health Law Review (2022), *Final Report*, Chapter 8, section 3.

<sup>14</sup> Scottish Government (2023), *Scottish Mental Health Law Review: Our Response*,

<https://www.gov.scot/publications/scottish-mental-health-law-review-response/>

of liberty challenges. We understand that the Scottish Government will shortly consult on proposed changes to the law here and that these will include enhancing AWIA guardianship provisions to ensure greater respect for a person's autonomy but also to specifically recognise that guardians may be empowered to authorise deprivations of liberty with accompanying Article 5(4) safeguards. The outcome and resultant legislation are therefore awaited.

*Jill Stavert*

Karen Kirk, Solicitor Advocate

12<sup>th</sup> April 1979 – 15<sup>th</sup> February 2024

A sense of shared loss and grief has spread through the Scottish legal profession upon the death of Karen Kirk, at the tragically young age of 44, survived by her husband and her two young children. There is also palpable shock, particularly among all those who dealt with her in her many roles unaware of the underlying illness which she herself never seemed to allow to define her, or to intrude upon her enthusiasm for the work that she did, or her life.

"Formidable" is not a word readily associated with her warm and friendly personality. It is a word that nevertheless defines all that she achieved in her profession and more widely, and her overriding motivation to making available, and delivering, justice for people most in need of it, people who, in our topsy-turvy world, face marginalisation and discrimination in a legal environment that by its own fundamental principles ought to place them at its centre.

Karen specialised in litigation, and in disability, incapacity and mental health law, from her graduation in 2002 from Strathclyde University, spending 16 years with Legal Services Agency in roles all the way from trainee to partner. As well as her specialist practice as a solicitor, she was

regularly appointed as safeguarder under the Adults with Incapacity (Scotland) Act 2000 and as curator ad litem under the Mental Health (Care and Treatment) (Scotland) Act 2003. She became a solicitor advocate in 2009. From 2014 she held the two key Law Society of Scotland recognised specialisms of mental health law and incapacity and disability law. She became a legal member of the Housing and Property Tribunal in 2017, of the Mental Health Tribunal in 2018, and of the Social Security Tribunal in 2022. Also in 2022, she became a part-time summary sheriff. She and Deirdre Hanlon were long-serving colleagues, and friends, at Legal Services Agency, before forming their own firm of Kirk Hanlon, Solicitors, in March 2020, established to provide a specialist legal service for clients in the area of incapacity and disability law in Scotland. Their firm always achieved to a high standard their core values of providing quality, specialist services with integrity, and with a flexibility that placed the needs and circumstances of each client at its centre. It speaks for itself that throughout the long history of the Law Society of Scotland's Mental Health and Disability Committee, Karen and Deirdre were the only two partners of the same firm both to serve simultaneously as members of that committee. Both gave generously of their time and abilities to make major contributions to the work of the committee, in Karen's case from June 2017 until her death. Deirdre continues to do so. Respect for both developed into friendships within the committee, from those now endeavouring to provide support to Deirdre in both her personal loss and the demands upon her as now sole partner.

It was typical of Karen that she gained widespread respect for her ability, tenacity and professionalism, as well as for her humanity, as much from her opponents as from her colleagues. That was my experience. She challenged as an unlawful deprivation of liberty

the placement of her client in a nursing home by a relative who was her client's attorney. She demonstrated all of those qualities by pleading that a power of attorney could never lawfully authorise a deprivation of liberty, and that in any event the attorney in that case was not empowered to do so. Those are questions still not answered in Scots law. I was consulted and instructed by the attorney. I first met Karen when she came to my office to discuss the case. I was impressed by the clarity with which we were able to map out the key issues in ways in which the questions which the court would have to answer were defined. But we were both equally troubled that we represented factions of a family which was tearing itself apart over this issue. It would undoubtedly have been to the great advantage of the development of the law for the issues that we identified to be judicially determined, but it was difficult to see how the process of determining them would be of long-term benefit to her client and his entire surrounding family across both factions. We took the further step of identifying a compromise solution that we were both able properly to recommend to our respective clients: and the matter was resolved that way. That initial experience remained with me as validating all that I subsequently learned and experienced of Karen as a huge contributor to the work and standing of our profession in all the ways in which she became involved, as well as being a person whom it was a privilege to know. Her loss will be very much felt in so many ways and by so many people – including me.

*Adrian D Ward*

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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](http://www.lpslaw.co.uk). To view full CV click [here](#).



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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](#).



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



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Adrian is a 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.

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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](#).

Adrian will be speaking at the following open events: the Royal Faculty of Procurators of Glasgow Private Client Conference (14 March, details [here](#)), the World Congress on Adult Support and Care in Buenos Aires (August 27-30, 2024, details [here](#)) and the European Law Institute Annual Conference in Dublin (10 October, details [here](#)).

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.

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Our next edition will be out in April. 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](mailto:marketing@39essex.com).

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