Mental Capacity Law Newsletter July 2016: Issue 67

Compendium

Welcome to the July 2016 Newsletters. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: some light shed on undoing advance decisions to refuse medical treatment;

(2) In the Property and Affairs Newsletter: Senior Judge's last judgment (on dispensing with service) and the latest LPA/deputy statistics;

(3) In the Practice and Procedure Newsletter: different aspects of (and consequences of) reporting restrictions;

(4) In the Capacity outside the COP Newsletter: guidance on s.20 Children Act 1989 'consents' and capacity, powers of attorney and managing telephone subscriber accounts;

(5) In the Scotland Newsletter: an update on practice before the Glasgow Sheriff court, a round-up of relevant case-law, and the review of the Council of Europe's Recommendation CM/Rec(2009)11 *on principles concerning continuing powers of attorney and advance directives for incapacity*.

And remember, you can now find all our past issues, our case summaries, and much more on our dedicated sub-site here. 'One-pagers' of the cases in these Newsletters of most relevance to social work professionals will also shortly appear on the SCIE website.

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For all our mental capacity resources, click here.

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When is an advance decision not binding?

Re QQ [2016] EWCOP 22 (Keehan J)

Medical treatment – advance decisions

Summary and comment

In this case, Keehan J was concerned with the question of whether it was in the best interests of QQ, a young woman with a diagnosis of an emotionally unstable personality disorder and schizophrenia, to receive anti-coagulation medication on a prophylactic (i.e. anticipatory) basis so as to prevent episodes of deep vein thrombosis. The actual decision (that she lacked the relevant decision-making capacity and that the treatment was in her best interests) was very shortly reasoned, and we would not report it but for the obiter observations of the judge about the construction of s.25(2)(c) MCA 2005.

Section 25(2)(c) MCA 2005 is ambiguous. It provides that an advance decision is not valid if P "*has done anything else* [i.e. other than withdrawing it at the time they had capacity or granted an LPA subsequently which contains 'overriding' powers'] *clearly inconsistent with the advance decision remaining his fixed decision*."
The wording of s.25(2)(c) raises two real questions:

1. Does it only cover actions carried out prior to the onset of incapacity, or can it also cover the position where a person no longer has capacity to alter or withdraw their advance decision (and as a corollary whether to accept or refuse medical treatment)? In other words, is it apt to cover the situation envisaged by Munby J in *HE v A Hospitals NHS Trust* [2003] 2 FLR 408 where a person still has the ability (to a greater or lesser extent) to express his wishes and feelings whilst not retaining the capacity to alter or revoke his advance decision?; and

2. What exactly does 'do' mean for purposes of s.25(2)(c)? Does it require that a person has taken a positive action (such as, in *HE*'s case, convert to Islam and thereby abandon the central tenet of the value structure upon which the decision was based, or, perhaps more commonly, accepting treatment offered by a medical professional), or can it extend to words (instance demanding or indicating that they would accept treatment)?

Alex discussed some of the issues involved here in an article written several years ago, noting that there had yet to be specific judicial consideration of the meaning of s.25(2)(c).

In *Re QQ* Keehan J gave some passing (obiter) consideration to the meaning of the provision. It was obiter because he accepted that QQ had at all material times lacked the capacity to make decisions in relation to the medication.

> It follows [he held] that I do not accept that when QQ made an advance decision in August 2015 in relation to her treatment that she was capacitous and therefore that it is a valid or lawful advance decision. If I were to be wrong on that issue, I accept Mr Wenban-Smith's submission that the contrary views that QQ has recently and fleetingly expressed from time to time, namely that she would accept treatment, would not of themselves invalidate, pursuant to s 25 (2) (c) of the Mental Capacity Act 2005, what would otherwise have been a valid advance decision.

Keehan J's judgment is – for these purposes – frustratingly brief. However, he undoubtedly left open the possibility that a person can render invalid an advance decision that they have made to refuse treatment after the point that they have lost capacity both to withdraw it and to make decisions as to medical treatment (and hence it is prima facie applicable), for instance by making sustained (incapacitous) indications that they either wished or would accept medication that they had previously sought to refuse in their advance decision.

On one view, this must be right, and indeed, as noted in the article, it seems to us that in reality it is all but inconceivable that both clinicians and the courts would stand by and decline to treat a patient who (albeit from the other side of capacity) was seeking to undo an ADRT that they had previously made. It also acknowledges the reality that (in most cases) it is not actually possible to anticipate precisely how you might feel at the point when you are deemed to lack capacity to make decisions as to your own medical treatment, and what at that point you might or might not want.

On another view, both as a matter of strict construction of the Act and from a purely philosophical perspective, we might question whether this is correct. The very point of an advance decision to refuse treatment is that you are seeking – in advance of incapacity – to lay down your refusal to consent to that treatment, which you intend to be binding as if you were capacitously refusing at the point it is being offered it. It is, viewed from this perspective, a remarkably stark example of the 'self-binding' or Ulysses directive, and you should (arguably) be held to the consequences of your decision even at the point when, by definition, you are not in a position to make it.

In due course, it may well be that there will need to be a decision (or possibly statutory reform) which will assist us calibrate ADRTs in such a way as to ensure that they serve as a tool to exercise legal capacity without (inadvertently) binding those who make them into irreversible and (properly) unconscionable situations. The recent Essex Autonomy Project Three Jurisdictions Project report touched upon this dilemma by reference to Article 12 CPRD (see pp.33) , and it is one that will only become more prevalent as – is to be hoped – the use of ADRTs become more widespread.

Short note: delay in determining CANH withdrawal applications

In *Cumbria NHS CCG v Miss S & Ors* [2016] EWCOP 32, Hayden J was confronted with a dismally familiar situation, namely that disputes as the precise state of consciousness of 'P' gave rise to a delay in the determination of an application for withdrawal of clinically assisted nutrition and hydration ('CANH'). Hayden J reiterated that:

> *the avoidance of delay in medical treatment cases is an important imperative, as I have now said in a number of judgments. This is not to say that assessments ought to be rushed or that delays may not sometimes be clinically purposive, but respect for a patient's autonomy, dignity and integrity requires all involved in these difficult cases to keep in focus that these important rights are compromised in consequence of avoidable delay. Those who are beyond pain, understanding or without any true consciousness require vigilant protection of their rights and interests, all the more so because of their unique level of vulnerability. Equally I cannot over-emphasise the importance of listening to the family who ultimately know the patient's personality best. That is not to say that their wishes and views should be determinative, but it is extremely important that they are heard and their observations given appropriate weight.*

Separately, Hayden J reiterated his observations from the case of Mrs N that consciousness can be a somewhat elusive concept and that awareness "*is not reducible to a test or clinical sign and will frequently contain what may be a significantly subjective element*," the assessment tools have an inevitably subjective complexion to them as well, and that professional enthusiasm and determination are admirable qualities, "*but it is important to guard against overly optimistic assessment driven by a vocational desire to make a difference*."

We are hopeful that steps in train at present will go some considerable way to reducing the delays (rightly) identified by Hayden J as causing real distress in these applications, by ensuring that the proper evidence (including, where the necessary element of independent scrutiny) is prepared before the application is brought, rather than being identified as necessary only part-way through. We will report upon these developments as soon as we are able.

Dispensing with service

I v D (by his litigation friend the Official Solicitor) [2016] EWCOP 35 (Senior Judge Lush)

Practice and procedure – other

Summary

In this case, his last reported decision, Senior Judge Lush was dealing with an application to dispense with service of an application to make a statutory will on a person who was entitled to a half share in P's estate and would be disinherited by the proposed statutory will.

The matter came before the Senior Judge by way of an appeal but the procedural history is not relevant for the purposes of the decision. So far as the facts and the result are concerned they, too, are not of general interest.

P had received a substantial personal injury award and his mother had been appointed receiver (in the days before professional deputies) and was subsequently appointed deputy. P's mother applied for a statutory will. She also applied for service on P's father to be dispensed with on the ground that P's father had had no contact with him and his whereabouts were unknown. The Senior Judge refused the application to dispense with service as there was no urgency, P's father had the right to be heard and he was not impressed with the efforts made thus far to locate him.

Of general interest, the Official Solicitor asked the Senior Judge to give guidance on the principles to be applied when the court to dispense with the service required by paragraph 9 of PD9F.

The latter provides:

> *The applicant must name as a respondent:*
>
> *(a) any beneficiary under an existing will or codicil who is likely to be materially or adversely affected by the application;*
>
> *(b) any beneficiary under a proposed will or codicil who is likely to be materially or adversely affected by the application; and*
>
> *(c) any prospective beneficiary under P's intestacy where P has no existing will.*

The guidance suggested is at paragraph 40 of the judgment and the Senior Judge approved it at paragraph 44. It is as follows.

> *The Official Solicitor submits that, where the court is faced with an application to dispense with service on a materially affected party the following matters should be considered by the court:*

(1) A decision by the court to dispense with the service of an application on a person who would otherwise be entitled to it is not "an act done, or decision made, under [the Mental Capacity Act 2005] for or on behalf of P" within the meaning of section 1(5). It is therefore not a decision which is to be determined only by reference to an assessment of P's best interests.

(2) The court's decisions on procedural matters should be considered with regard to the obligation to give effect to the overriding objective set out at rule 3 of the Court of Protection Rules 2007. This makes clear that dealing with a case justly includes:

- *(a) ensuring that it is dealt with expeditiously and fairly*
- *(b) ensuring that P's interests and position are properly considered. Although P's best interest may be relevant to the court's decision to dispense with service, unlike a decision which is being taken for or on behalf of P, they are not determinative;*
- *(c) dealing with the case in ways that are proportionate to the nature, importance and complexity of the issues;*
- *(d) ensuring that the parties are on an equal footing;*
- *(e) saving expense; and*
- *(f) allotting it an appropriate share of the court's resources, while taking account of the need to allot resources to other cases.*

(3) The court should recognise that a decision to dispense with service on an individual otherwise entitled to it may engage that individual's rights under the European Convention on Human Rights, especially articles 6 and 8. In any event, P's own Convention rights are certainly engaged. More broadly, even if Convention rights are not engaged, issues of procedural fairness arise.

(4) A decision to dispense with service on an affected party will mean that the court may have to decide the substantive application without all the relevant material before it.

(5) Any decision to dispense with service on an individual will be taken by the court on the basis of untested evidence. The apparent merits of the substantive application should not be used to justify dispensing with service.

(6) Fears about the consequences to P or the applicant of service on the individual in question can in many ways be ameliorated by the use of the court's powers under rule 19 to redact relevant details, such as addresses.

(7) The consequences of the application succeeding to the individual who is not to be served should also be considered.

(8) Before a decision is taken to dispense with service because of practical difficulties, consideration should be given to the possibility of effecting service by means of an alternative route under rule 34.

(9) Matters of procedural fairness should be given a high regard, and it is submitted that cases where it is appropriate to dispense with service on an individual who is directly and adversely affected by an application are likely to be exceptional.

(10) Different factors may apply in cases where the application is to dispense with service on P or where there is genuine urgency and there is a need to balance the prejudice of proceeding in the absence of an affected party against the prejudice to P or another party of not proceeding at all.

Comment

It is quite clear from the decision in this case, the guidance set out above and previous authority, that service in accordance with paragraph 9 PD9F will rarely be dispensed with outside cases of genuine urgency. The decision also, separately, marks the end of an era with the retirement of Senior Judge Lush, who was the subject of an appreciation by Penny Letts in our last issue, and whom we wish very well in his well-earned retirement. The Court of Protection will be much the poorer for the loss of his knowledge, experience and wisdom.

Lasting Powers of Attorney/ deputyship statistics

The Court of Protection/OPG statistics for January to March 2016 are now out. They show that there were 141,667 Lasting Powers of Attorney (LPAs) received in January to March 2016, the highest quarterly figure so far and up 18% on the same quarter for 2015. The MOJ (plausibly) puts the recent increases down largely to increased publicity and new online forms which have been introduced to make it simpler and faster to apply for LPAs. There were 3,511 EPAs registered in January to March 2016, down 14% on January to March 2015. There were 3,127 Deputyships appointed in January to March 2016, a decrease of 21% on the equivalent quarter in 2015.

To anonymise or not (1)

University College London Hospitals NHS Foundation Trust v Miss G [2016] EWCOP 28 (Peter Jackson J)

Media – court reporting

Summary

Miss G was in a permanently vegetative state as a result of a heart attack that caused irreversible hypoxic brain injury. She was being kept alive by means of clinically assisted nutrition and hydration (CANH). The parties agreed that it was not in Miss G's best interests for CANH to be continued and the court made declarations accordingly.

A reporting restrictions order (RRO) had been made which applied for one month after Miss G's death. The Trust, supported by Miss G's family, applied for the reporting restrictions order to be extended indefinitely. The Trust argued that there was no public interest in Miss G or her family being named at any stage. Miss G's family members were private people who were unhappy at the thought of any publicity, particularly at such a difficult time. The Official Solicitor (on behalf of Miss G) and the Press Association opposed the application.

The court concluded that the existing RRO would not be varied and would cease one month after Miss G's death and would not be varied. The court's reasons were summed up as follows:

> *The names of those who are born and those who die are rightly a matter of public record. The fact that someone has died is always a matter of proper public interest and the ability to record it is a normal incident or society. It is probable that in this case and others like it there will be a coroner's inquest, held in public. These features will normally be present in cases involving the withdrawal of treatment and in such cases those seeking report restrictions, particularly open-ended ones, will in practice have to show that privacy considerations outweigh them. I cannot therefore agree with the Trust's submission that there is no legitimate public interest in Miss G's identity being known.*

Further, the court distinguished the earlier case of *Re V* [2016] EWCOP 20 (reported in our May 2016 newsletter), in which the RRO was extended indefinitely, by emphasizing the fact-specific nature of the analysis. Where an RRO is made in a case where death is foreseeable, the court should consider whether the appropriate duration is to be until death, until a fixed date after death or until further order.

Comment

It is unclear quite where the balance is to be struck between the public interest of identifying the individual and protecting the private interests of the individual's family. The court accepted that the circumstances were undoubtedly *"distressing"* to family members but there was *"no evidence that the identification of Miss G would harm family members or be a significant infringement of their privacy"*. One of the factors which militated against extending the RRO, in contrast to the case of *Re V*, was that there was unlikely to be

any significant reporting of the personal details of this case, still less intrusive reporting. The lifting of the RRO therefore depended, in large part, on the understanding that media reporting would be sensitive and responsible as opposed to the reporting of *Re V* which was described as *"prurient rather than in the public interest"*.

To anonymise or not (2)

M v Press Association [2016] EWCOP 34 (Hayden J)

Media – court reporting

Summary

This decision of Hayden J follows his judgment in *M v Mrs N* [2015] EWCOP 76. To recap, Mrs N was profoundly impaired both physically and cognitively in consequence of the progressive degenerative impact of Multiple Sclerosis. Her treatment was being provided through a percutaneous endoscopic gastrostomy (PEG) tube. The court made a declaration that it was in Mrs N's best interests to withdraw clinically assisted nutrition and hydration.

The court also made a reporting restrictions order (RRO) prohibiting the identification of M and Mrs N in any press report during Mrs N's lifetime and for seven days after death. The RRO was extended until 14 days after the final judgment in *Re V* [2016] EWCOP 21 which was handed down on 4 May 2015 (and reported in our May 2016 newsletter).

In reliance on *Re V*, M subsequently made an application to extend the RRO in this case *"until further order of the court"*. In support of the application, M argued that there would be significant interference with the family's Article 8 rights if the court permitted Mrs N to be named. This was a private Jewish family, well-known in the wider community. The family had been distressed by their involvement in the COP proceedings and by the press interest.

In balancing in the competing interests, including M's deep seated wish to preserve her mother's anonymity, the court came to *"the firm conclusion that the balance here weighs more heavily in favour of freedom of expression."* Hayden J reasoned at paragraph 30:

> *Judges of this Court are not inured to the day to day realities in these cases. I have no doubt that those closest to M and her family, those who matter to the family the most, will have identified Mrs N from the facts of the case. For those beyond that circle, the name of the individual serves only to make her story more real and the issues it raises more acute. Therein lies the public interest. By contrast the introduction of both Mrs N's and M's name into the public domain has relatively limited impact on M's privacy or Article 8 rights more generally. Certainly there is no real evidence to that effect.*

Hayden J further commented at paragraphs 33 and 34:

> *Of course, as has now been analysed in a number of cases in the Court of Protection, evaluating P's best interests will invariably involve the Judge considering the wider canvas of P's life, often via the conduit of evidence from family members. Inevitably, that involves an inquiry into the private sphere which will usually engage facets of the rights protected by Article 8. It is unlikely, in my view, that many cases will be confined solely to assessing the advantages or disadvantages of a particular course of treatment without considering some of the circumstances of the individual patient. In this case whilst I have undoubtedly considered features of Mrs N's life, character and personality, the issue of withdrawal of hydration and nutrition from a patient in MCS is plainly the predominant one. Indeed, I think it can properly be characterized as one of the major issues in contemporary life.*
>
> *The challenge, in the parallel analysis of the competing rights and interests in play, is that the rights in contemplation are of wholly different complexion. The exercise involves the juxtaposition of the intensely personal (grief, loss, privacy) alongside the conceptual (the public interest, the freedom of the press, the effective dissemination of information, the administration of justice). In a jurisdiction where there is a human, and inevitable pull to the protection of the vulnerable, (this is after all the Court of Protection), it is easy to overlook how some of the wider, abstract concepts also protect society more generally and in doing so embrace the vulnerable.*

Comment

Like case of *G* [2016] EWCOP 28, noted above, this case demonstrates the intensely fact-specific analysis required when considering the appropriate duration of a RRO. In particular, the court seized upon one feature of this case which had particular resonance. That was that Mrs N had been involved in litigation over 40 years ago concerning her son's paternity at time when public attitudes were far less liberal and people perhaps quicker to condemn the private lives of others. Those proceedings were heard in open court, to which the press would have full access, and involved discussing the most personal aspects of her private life. These events were seen as defining Mrs N's *"indomitable spirit"*.

Whilst Charles J in *Re V* gave extensive general guidance as to the correct approach to be applied these cases, the application of that guidance to specific facts remains challenging. In contrast to the earlier case of *Re* V, the court noted that the reporting of this case had almost entirely been confined to the legal and medical issues as this case represented an evolution in the existing case law extending declaratory relief for the first time to those in a minimally conscious state. There had been no evidence of press intrusion having occurred in the last few months. Whilst the body of case law on this important issue continues to gather momentum, it is clear that the principle of open and transparent justice can only be sustained by sensitive and responsible reporting.

Short Note: costs and the media

Charles J has recently handed down his judgments upon the costs consequences of the decision in *Re V* [2016] EWCOP 20. In *Re V* [2016] EWCOP 29, he refused the applicant's application for part of her costs to be paid by the media respondents on the indemnity basis. The application was brought in part on the basis

of the conduct of the relevant media bodies. Following the approach taken by the President in *Re G* [2014] EWCOP 5, Charles J considered (at paragraph 20)

> *that basing a costs order against the Respondents on their conduct and reporting that I criticised would be a back door, an unprincipled and an arbitrary approach to expressing disapproval of, or punishing, that conduct because it would be based on the point that they participated and argued against the application whilst others, whose conduct was also criticised, did not. However, I leave open whether in other circumstances equivalent conduct could properly be taken into account to found either an order for costs or the basis of their assessment.*

Court of Protection statistics

The statistics for January to March 2016 are now out.

In January to March 2016, there were 7,225 applications made under the MCA 2005, up 9% on the equivalent quarter in 2015. The majority of these (54%) related to applications for appointment of a property and affairs deputy. Following the introduction of new forms in July 2015, applicants must make separate applications for 'property and affairs' and 'personal welfare'. This is why there were fewer 'hybrid deputy' applications compared to previous years.

There were 6,554 orders made, similar to the same quarter in 2015. Most (52%) of the orders related to the appointment of a deputy for property and affairs. The trend in orders made mirrors that of applications and has been steadily increasing since 2010 albeit at a faster rate.

Applications relating to deprivation of liberty increased from 109 in 2013 to 525 in 2014 to 1,497 in 2015. There were 678 applications made in the most recent quarter, triple the number made in January to March 2015. The overall increase follows the decision in *Cheshire* West. Of the 678 applications made in January to March 2016, 459 (68%) came from a Local Authority, 185 (27%) from solicitors and 34 (5%) from others including clinical commission groups, other professionals or applicants in person. Over half (52%) of the applications were made under the streamlined process set out in *Re X and others* [2014] EWCOP 25.

New CPR Guidance published

The British Medical Association (BMA), the Resuscitation Council (UK), and the Royal College of Nursing (RCN) have very recently (30 June) issued updated guidance regarding anticipatory decisions about whether or not to attempt resuscitation in a person when their heart stops or they stop breathing.

This update to the 3rd edition takes into account, in particular, the decision in the *Winspear* case, concerning the requirement to consult family members (or others properly concerned in the person's welfare) where they do not have capacity to participate in the process leading to decisions made about CPR.

We reproduce below the main messages from the guidance, although cannot emphasise enough that they are not intended to be a substitute for reading the whole document and having regard to the clear and helpful flow-charts to assist decision-making.

1. *Considering explicitly, and whenever possible making specific anticipatory decisions about, whether or not to attempt CPR is an important part of good-quality care for any person who is approaching the end of life and/or is at risk of cardiorespiratory arrest.*

2. *If cardiorespiratory arrest is not predicted or reasonably foreseeable in the current circumstances or treatment episode, it is not necessary to initiate discussion about CPR with patients.*

3. *For many people, anticipatory decisions about CPR are best made in the wider context of advance care planning, before a crisis necessitates a hurried decision in an emergency setting.*
4. *Every decision about CPR must be made on the basis of a careful assessment of each individual's situation. These decisions should never be dictated by 'blanket' policies.*

5. *Each decision about CPR should be subject to review based on the person's individual circumstances.*

6. *In the setting of an acute illness, review should be sufficiently frequent to allow a change of decision (in either direction) in response to the person's clinical progress or lack thereof. In the setting of end-of-life care for a progressive, irreversible condition there may be little or no need for review of the decision.*

7. *Triggers for review should include any request from the patient or those close to them, any substantial change in the patient's clinical condition or prognosis and transfer of the patient to a different location (including transfer within a healthcare establishment).*

8. *For a person in whom CPR may be successful, when a decision about future CPR is being considered there must be a presumption in favour of involvement of the person in the decision-making process. If she or he lacks capacity those close to them must be involved in discussions to explore the person's wishes, feelings, beliefs and values in order to reach a 'best interests' decision. It is important to ensure that they understand that (in the absence of an applicable power of attorney or court-appointed deputy or guardian) they are not the final decision-makers, but they have an important role in helping the healthcare team to make a decision that is in the patient's best interests.*

9. *If a patient with capacity refuses CPR, or a patient lacking capacity has a valid and applicable advance decision to refuse treatment (ADRT), specifically refusing CPR, this must be respected.*

10. *If the healthcare team is as certain as it can be that a person is dying as an inevitable result of underlying disease or a catastrophic health event, and CPR would not re-start the heart and breathing for a sustained period, CPR should not be attempted.*

11. *Even when CPR has no realistic prospect of success, there must be a presumption in favour of explaining the need and basis for a DNACPR decision to a patient, or to those close to a patient who lacks capacity. It is not necessary to obtain the consent of a patient or of those close to a patient to a decision not to attempt CPR that has no realistic prospect of success. The patient and those close to the patient do not have a right to demand treatment that is clinically inappropriate and healthcare professionals have no obligation to offer or deliver such treatment.*

12. *Where there is a clear clinical need for a DNACPR decision in a dying patient for whom CPR offers no realistic prospect of success, that decision should be made and explained to the patient and those close to the patient at the earliest practicable and appropriate opportunity.*

13. *Where a patient or those close to a patient disagree with a DNACPR decision a second opinion should be offered. Endorsement of a DNACPR decision by all members of a multidisciplinary team may avoid the need to offer a further opinion.*

14. *Effective communication is essential to ensure that decisions about CPR are made well and understood clearly by all those involved. There should be clear, accurate, honest and timely communication with the patient and (unless the patient has requested confidentiality) those close to the patient, including provision of information and checking their understanding of what has been explained to them. Agreeing broader goals of care with patients and those close to patients is an essential prerequisite to enabling each of them to understand decisions about CPR in context.*

We hope that this – very important – document is the last iteration of its kind before we can move beyond the fixation with DNACPR decisions into a broader approach to advance care planning: see in this regard the ReSPECT (Recommended Summary Plan for Emergency Care and Treatment) project currently being undertaken by the Resuscitation Council (UK).

Call for evidence - are the current legal frameworks available to support informal patients in A&E sufficient?

Current work coordinated by the National Collaborating Centre for Mental Health (NCCMH) to improve access to urgent and emergency mental health care has led to debates about the sufficiency of legal frameworks available to protect people who present at A&E informally, but later either actively want to leave or need to be passively prevented from doing so by placing them with security guards/other staff. The use of the MCA 2005 has been advocated by some as an appropriate way of preventing a mentally disturbed person from leaving, and keeping them in A&E until a Mental Health Act assessment can occur. In order to explore this area further, a call for evidence has been put out by Claire Barcham, asking people to send information on cases where people had left A&E, and sadly came to harm. The purpose is to consider

which legal frameworks could have been used, whether further training and development is needed to ensure people could use the current frameworks appropriately, or whether a change in the law is needed.

More details, and the call for evidence itself, can be found in Claire's blog on Daisy Bogg's website here.

Guest Note: Learning Disability England

[*Editorial note: we are delighted to be able to publish this piece by Gary Bourlet & Alicia Wood, Co-founders, Learning Disability England*]

Learning Disability England launched in the House of Lords on the 14th June 2016. It has brought together the Housing & Support Alliance which was mainly made up of provider and commissioner members, with People First England, a project to get the voice of people with learning disabilities into the media and politics. We were inspired by Every Australian Counts, a campaign that brought together disabled people, families and professionals to campaign for better social care funding. What captured our interest was the fact that the campaign was led by disabled people and families and supported by organisations and professionals in an attempt to shift perceptions of disabled people in Australian society. That's what we are attempting to do at Learning Disability England.

We think that a big reason why people with learning disabilities and their families get such a bad deal in the UK is because they are still seen as second class citizens, not quite human. We have an abundance of charities out there trying to change attitudes and make life better for people with learning disabilities and their families but we think that part of the problem is when people with learning disabilities are portrayed as helpless victims, voiceless and in need of charity and others to speak for them, that this promotes the belief that people with learning disabilities are somehow different to the rest of us. This has to change and we will do this by making sure that people with learning disabilities are the main spokespeople in the media and at the political table.

Learning Disability England will always look at issues from a human rights and equality perspective and we want to challenge attitudes in a way that stops being with learning disabilities being seen as 'the other' and instead seen as 'one of us'. We will campaign for equality and people's rights but we will continue to be practical and offer solutions. We will also continue to hold expertise in mental capacity, deprivation of liberty and housing and social care law that relates to people with learning disabilities. One of our areas of work will be to establish a 'Fighting Fund' so that we can help people and families make legal challenges and change things for others.

Our constitution is the first (we believe) that gives real power to the charity members that would traditionally be 'beneficiaries', disabled people and families. Every member will get a vote and a say in what our priorities are and how we are run.

We think that if we want to really change things, that we need to work together and have support staff, managers, social workers, academics, commissioners, health professionals on board as members. We

particularly want legal professionals to support Learning Disability England, those that have long been supportive of people with learning disabilities being treated lawfully and equally. We also want those who have never worked with people with learning disabilities and want to help one of the few remaining groups of people in British society that are regularly discriminated against, institutionalised and marginalised, to rise up and challenge all that is wrong. We are Stronger, Louder, Together. Join us: www.learningdisabilityengland.org.uk

Short note: capacity and s.20 Children Act 'agreements'

In *re X, Y & Z, Re (Damages: Inordinate Delay in Issuing Proceedings)* [2016] EWFC B44, Human Rights Act damages claims were brought by two children (X and Y) and their mother (Z) following on from family court proceedings. The local authority had accommodated the children using section 20 of the Children Act 1989 but had then failed to take any care proceedings for some two years. The effect of this was that the children had no representative and were in an uncertain situation. The local authority took decisions about the children as if it had parental responsibility during that time (it did not have PR and knew it did not have PR) and failed to consult with their mother who did have parental responsibility. The local authority also restricted contact with the mother without any proper legal basis. Damages of £20,000 were awarded to each child and £5,000 to their mother for breaches of their Article 6 and Article 8 rights.

Of interest for those concerned with mental capacity matters were the dicta of HHJ Farquahar (not relevant on the facts of this case) about capacity in relation to s.20 Children Act 1989. We have on previous occasions referred to and highlighted the guidance given in Coventry CC v C [2012] EWHC 2190 as to the steps that social workers must take where a parent may lack capacity to give the 'consent' that is conventionally sought under s.20 Children Act 1989 from those with parental responsibility where arrangements are being made for accommodation under s.20 of the Act. HHJ Farquahar reiterated that guidance, but emphasised that there must be a specific matter which gives rise to a concern that the person lacks capacity, and also that the mere presence of mental health issues would not, itself, suffice to hold that an agreement is not valid.

Short note: litigation capacity under the microscope

In *Davila v Davila* [2016] EWHC B14 (Ch) Laurence Rabinowitz QC, in the course of a very long judgment concerning numerous (for these purposes) irrelevant issues, had cause to examine CPR Part 21 in some detail. The case was an application to set aside default judgment for a large sum of money (over £4 million at the time judgment was entered) in a claim where a mother (Marina) had sued her son (Alvaro) with another son (Ricardo) acting as her litigation friend.

Alvaro sought to have the litigation friend certificate signed by his brother discharged, set aside or terminated. Alvaro considered that Ricardo had no authority to issue proceedings on behalf of Marina. If he was right then the proceedings as a whole would be a nullity so that the default judgment obtained against him would fall away and he wouldn't have to pay over £4 million (guaranteed to focus the mind in the way that litigation friend issues in the COP rarely do).

It was common ground that Marina was a 'protected party' for the purposes of CPR Part 21, defined by CPR 21.1(2) to mean "a party, or an intended party, who lacks capacity to conduct the proceedings". CPR 21.2(1) provides that a protected party must have a litigation friend to conduct proceedings on his or her behalf.

CPR 21.4(3), dealing with who may be a litigation friend without a court order, provides that a person may act as a litigation friend if he "*(a) can fairly and competently conduct proceedings on behalf of the …protected party; (b) has no interest adverse to that of the … protected party; and (c) where the … protected party is a claimant, undertakes to pay any costs which the…protected party may be ordered to pay in relation to the proceedings, subject to any right he may have to be repaid from the assets of the … protected party*." CPR 21.5 sets out the procedure to be followed to become a litigation friend without a court order, including the need to file a certificate of suitability stating that he satisfies the conditions specified in CPR 21.4(3).

Ricardo had set out that he considered that he was suitable as a litigation friend and also set out details of his mother's mental health problems including dementia.

Alvaro made a series of allegations about his brother's unsuitability to act as a litigation friend, including that he had exerted undue influence over his mother and abused his powers under a Power of Attorney for his own gain.

The judge made the following holdings of relevance.

CPR 21.7(1) provided that the court may (a) direct that a person may not act as a litigation friend; (b) terminate a litigation friend's appointment; or (c) appoint a new litigation friend in substitution for an existing one. The powers were forward looking: none appeared to envisage or extend so far as to permit the court to revoke an appointment as litigation friend retrospectively *ab initio*.

On the facts of this case, there was little point in considering whether Ricardo should continue to be litigation friend (he had been substituted as a claimant sometime previously on his mother's death) and therefore CPR 21.7(1) did not assist Alvaro.

Alvaro had also applied to set aside the appointment of Ricardo as litigation friend retrospectively under CPR 11(6). The judge held on the facts of the case that CPR 11 (issues with the court's jurisdiction) did not assist Alvaro and even if there had been reason to dispute the court's jurisdiction, such a challenge would have needed to have been made within 14 days of serving the acknowledgment of service.

Alvaro also relied upon the inherent jurisdiction of the court for the purpose of seeking retrospectively to set aside Ricardo's appointment as litigation friend. The judge considered that, whether or not expressly set out in a rule, the court did have power to address serious transgressions affecting proceedings before it and that this was likely to include dealing with the consequences of a wrongful appointment of a litigation friend.

Whilst it was open to the court at any stage of the proceedings to be able to address the on-going ability of a particular individual to continue to act as litigation friend, it was important, given the serious consequences of it being successful, that any application for relief of that type, once the conditions for it arose, should be pursued without delay.

Alvaro had not acted promptly in this case. The application was made some two and a half years after Ricardo had been appointed litigation friend and some three months after he had ceased to be his mother's litigation friend and had been substituted as the claimant.

Following the guidance given by the Court of Appeal in *Mitchell* [2014] 1 WLR 794 and *Denton* [2014] 1 WLR 3926 the judge held that unless Alvaro was able to explain and justify the delay, his application should be dismissed on the basis that it was materially out of time.

Alvaro had known that his brother was acting as litigation friend for his mother more than one year before he made the application. The judge held that he was an intelligent man, familiar with litigation and with ready access to legal advice and that there was no justification for the delay.

The judge rejected Alvaro's application that Ricardo's appointment as litigation friend to Marina be retrospectively revoked. Alvaro's contention that the litigation was at all times unauthorised was therefore not accepted.

At paragraph 137, the judge also made a series of useful observations on the appointment of litigation friends which are potentially of broader relevance outside the context of civil proceedings:

(i) *CPR 21.4(3)(b) stipulated that in order for a person to act as a litigation friend that person must have "no interest adverse to that of the …protected party". The relevant inquiry was directed towards the conduct and outcome of the litigation for which the individual is to be appointed as litigation friend, and it was in most cases not relevant to search, outside the bounds of the particular litigation, for some factor that might suggest some potential conflict between the interests of the party and the interests of the litigation friend unless it could reasonably be said that this potential conflict may also affect the manner in which the litigation friend was likely to approach the conduct of the litigation itself.*

(ii) *Moreover, what this prohibition is directed towards is an interest that is "adverse" to that of the protected party. It followed that the fact that the person appointed as litigation friend has his own independent interest or reasons for wishing the litigation to be pursued ought not, in general, to be a sufficient reason for impeaching that appointment. Such an interest would, at least in general, run in the same direction as the protected party rather than being adverse to the protected party's interests.*

(iii) *However, it was necessary in this context to have regard to the decision of the Court of Appeal in Nottingham CC v Bottomley and another [2010] EWCA Civ 756, where Stanley Burnton LJ emphasised the need for the litigation friend to "seek the best outcome" for the protected party and for a litigation friend to "be able to exercise some independent judgment on the advice she receives from those acting for a claimant, and …be expected to accept all the advice she is given", something that might be difficult*

where, as in that case, the litigation friend worked for an organisation that would benefit from a settlement in a form that might not necessarily be to the benefit of the protected party itself.

(iv) *This highlights the fact that, even where the interests of the protected party and litigation friend generally run in parallel or coincide, this does not of itself preclude the possibility that, in some contexts, those interests might diverge and become adverse. Whether or not that is so will, of course, always depend upon the facts of the particular case.*

(v) *The purpose of the requirement that the litigation friend be able "fairly and competently" to conduct proceedings on behalf of the protected party was likely to be to ensure that the litigation friend has the skill, ability and experience to be able properly to conduct litigation of the sort in question. At the same time, what the requirement was unlikely to have envisaged, at least in general and save perhaps in exceptional cases, was that the court should be required to conduct a general inquiry extending far beyond issues of skill, ability and experience, and instead venturing into a consideration of unproven allegations of a series of potential transgressions said to have been committed over a period of years by the litigation friend in transactions not directly related to the matters giving rise to the litigation itself.*

(vi) *This was not intended to suggest that a court would not willingly consider in this context a finding or determination by a court or tribunal, domestic or foreign, to the effect that the litigation friend has been guilty, for example, of dishonesty, a crime, or conduct incompatible with the role of litigation friend. In contrast, what was unlikely in general to assist the court in a case such as the present, were simply allegations, contested on all sides, about matters arising in the context of other transactions, which are said to establish unsuitability.*

Falling down on safeguarding: Ombudsman complaint concerning Oxfordshire County Council

The Local Government Ombudsman has criticised Oxfordshire County Council for its inadequate response to a safeguarding referral. The case concerned the care provided to a woman with dementia who spent a week at Huntercombe Hall care home, where she became dehydrated and had to be admitted to hospital. The Council's safeguarding investigation concluded that there had been 'partial neglect', but there was a failure to consider properly the evidence received from the care home, or to act on it. The CQC was not notified, and the Ombudsman found that the Council's failings may have put other residents at risk. The Council was required to pay the woman's husband £750 and the care home was told that it should waive the fee charged for the stay.

Updated guidance on Lasting Powers of Attorney

The Law Society has published an updated Practice Note for solicitors on Lasting Powers of Attorney.

Ofcom guidance on managing telephone subscriber account on behalf of someone else

Ofcom has issued guidance as to managing a telephone subscriber account on behalf of someone who needs help with their affairs. It focuses on the difference between using the 'third party bill management' service that telecoms companies are obliged to offer, and the use of powers of attorney in England & Wales. As noted in the Scotland Newsletter, this guidance (as with so much else that supposedly covers all three UK jurisdictions) comes with a serious health warning that it is only, in reality, addressed to the position in England and Wales.

It's not just us: UN observations on mental health services in the UK

The United Nations Committee on Economic, Social and Cultural Rights has published a country report on the United Kingdom's compliance with the International Covenant on Economic, Social and Cultural Rights. The Committee is critical of the inadequate provision of mental health services in the UK, noting that:

> *Despite the legal duty introduced by the Health and Social Care Act of 2012 to deliver "parity of esteem" between mental and physical health, the Committee is concerned about the lack of adequate resources provided to mental health services. The Committee notes with concern the information on shortcomings in the implementation of the mental health legislation and the lack of adequate mental health care provided to persons in detention.*

The Committee also flags concern about the care of people with dementia, saying that it "urges the State party to take all necessary measures to ensure adequate pension benefits, care and treatment of older people, including by carrying out training programmes for doctors and health care professionals about the rights of older persons and the treatment of dementia and Alzheimer's diseases."

For more on this, see the story in the admirable Community Care.

Independence, authorisation and deprivation of liberty[1]

IN v Ukraine (Application no. 28472/08) (European Court of Human Rights)

Article 5 ECHR – deprivation of liberty - damages

Summary

Mr IN brought criminal proceedings for libel after his employment record noted that he had been dismissed for theft. Following his numerous complaints to the town prosecutor's office for failing to investigate his case, the prosecutor requested his placement in a psychiatric facility. Two psychiatrists studied Mr IN's complaint letters which contained evidence of a "high probability of socially dangerous behaviour". Paramedics, a psychiatrist, and police officers visited his home and he was taken to hospital in an

[1] Note, in light of the commentary upon the Law Commission's Mental Capacity Deprivation of Project, to which Alex is a consultant, this note was drafted by Neil Allen.

ambulance. There was conflicting evidence as to the extent to which he allowed them into his home and whether he went with them voluntarily.

The following day he was examined by a panel of four doctors, including the two psychiatrists that were initially involved, and was involuntarily detained. He alleged that (i) his psychiatric confinement from March to December 2000 had breached Article 5(1), (ii) he had had no enforceable right to compensation under Article 5(5), and (iii) the civil proceedings for redress had been unreasonably long contrary to Article 6(1). The court upheld his complaints and he was awarded EUR 15,000. It found that there were no fair and proper procedure for his deprivation of liberty and stated:

> *81 …* [T]*he vulnerability of persons with alleged mental disorders and the fact that they are under the control of the psychiatric facility personnel, requires clear effective guarantees against arbitrary involuntarily hospitalisation (see, mutatis mutandis, M.S. v. Croatia (no. 2), no. 75450/12, 19 February 2015), especially when, as in the present case, the confinement was initiated by a prosecutor exclusively on the basis of the applicant's letters to State bodies in the absence of any known complaints about the applicant's behaviour from other persons. Moreover, in the present case the panel of psychiatrists was composed of four doctors, two of whom were the same doctors who had initially decided to admit the applicant to hospital (see paragraph 13 above). This undermined the guarantees of independence of the health-care professionals, whose decision was the only basis for the applicant's deprivation of liberty. With all respect to their professional expertise, the broad powers vested in health-care professionals are to be counterbalanced by procedures aimed at preventing indiscriminate involuntary hospitalisation (see H.L. v. the United Kingdom, § 121, and L.M. v. Latvia, § 51, both cited above).* (emphasis added)

Comment

We mention this decision because of the potential implications it has for the Law Commission's forthcoming Draft Bill to amend the Mental Capacity Act 2005 and replace the deprivation of liberty safeguards. Under DoLS, in hospitals and care homes the urgent authorisation lacks such independence but is time-limited to 7 days' detention, extending to 14 days in total if there are exceptional reasons. But within that timeframe, an independent assessor must determine best interests. This "*should be seen as a cornerstone of the protection that the DOL safeguards offer to people facing deprivation of liberty if they are to be effective as safeguards at all*": *LB of Hillingdon v Neary* [2011] EWCOP 1377, at [174]. In terms of the present authorisation process, it will be recalled that in *Neary* Peter Jackson J held:

> *The responsibilities of a supervisory body, correctly understood, require it to scrutinise the assessment it receives with independence and a degree of care that is appropriate to the seriousness of the decision and to the circumstances of the individual case that are or should be known to it.* (emphasis added)

The Court of Protection similarly provides an independent judgment for deprivations of liberty occurring elsewhere. Similarly, under the Mental Health Act 1983 an approved mental health professional exercises their own independent judgment as to whether a person ought to be detained in hospital. According to the Commission's revised approach, it appears that commissioning bodies would authorise themselves to

detain which, depending on the authorisation arrangements, raises potential risks of arbitrariness. Its interim position states:

> *1.42 … we are considering whether a defined group of people should receive additional independent oversight of the deprivation of their liberty, which would be undertaken by an Approved Mental Capacity Professional. Owing to the vast number of people now considered to be deprived of their liberty following Cheshire West, it would not be proportionate or* ***affordable*** *to provide such oversight to all those caught by article 5 of the ECHR. Whilst we are still working to develop the precise criteria that would operate to identify this group, we envisage that this group would consist of those who are subject to greater infringement of their rights, including, in particular, their rights to private and family life under article 8 of the ECHR.* (emphasis added)

There is a real risk that the significantly larger proportion of the population that are seen as deprived of their liberty will result, for economic reasons, in a drastic watering down of the current Article 5 safeguards. Ironically, it seems that the bar is so low, and the number of people deprived of liberty is so high, that providing that independent check may now be unaffordable. In *Cheshire West* Lady Hale referred to the need for a "*periodic independent check on whether the arrangements made for them are in their best interests*", although the court may have had Article 5(4) more in mind. But in *H.L. v. the United Kingdom*, the ECtHR held:

> *121. The Court observes that, as a result of the lack of procedural regulation and limits, the hospital's health care professionals assumed full control of the liberty and treatment of a vulnerable incapacitated individual solely on the basis of their own clinical assessments completed as and when they considered fit: as Lord Steyn remarked, this left "effective and unqualified control" in their hands. While the Court does not question the good faith of those professionals or that they acted in what they considered to be the applicant's best interests, the very purpose of procedural safeguards is to protect individuals against any "misjudgments and professional lapses" (Lord Steyn, paragraph 49 above).* (emphasis added)

Whilst in *L.M. v. Latvia* the ECtHR held:

> *51. In the present case, having had regard to th*e conclusion of the panel of psychi*atrists …, it is evident that in actual fact the experts diagnosed the applicant's condition and automatically prescribed further hospitalisation. With all respect to their professional expertise, the broad powers vested in health-care professionals are to be counterbalanced by procedures aimed at preventing indiscriminate involuntary hospitalisation (see H.L., § 121, cited above).*

The ECtHR's reference in *IN v Ukraine* to "*the guarantees of independence*" is therefore potentially significant for future reform as it could suggest that a fair and proper detention procedure requires some degree of independent scrutiny in the administrative decision-making process that leads to the person being detained. Under the relevant Ukrainian domestic law, the initial decision to involuntarily admit a patient to hospital could only be taken by a psychiatrist. The necessity of detention had to then be confirmed by a panel of three doctors and the patient had the right to challenge that decision in court.

Frustratingly, the judgment does not expressly refer to whether the initial psychiatrist could sit on the panel or whether all members of the panel had to be independent of the initial decision. But the point is an

important one. If the ECtHR is suggesting that Article 5(1) requires some guarantee of independence (as we have currently), this may pose challenges to a scheme which empowers commissioners of detention to authorise such detention. This point of legal principle is certainly something to bear in mind when we see the draft Bill at the end of this year.

Consultation on Scottish Law Commission report: update

The Scottish Government has published a summary of responses to the consultation on the Scottish Law Commission Report on Adults with Incapacity. The responses that gave permission for publication are now available on the Scottish Government website. We will have full coverage of this in the next issue.

Glasgow Sheriff Court – Practice Update

We previously reported on the introduction of the current Glasgow Sheriff Court Practice Rules for applications under the Adults with Incapacity (Scotland) Act 2000 here. Glasgow Sheriff Court have now issued "Practice Update #1 – June 2016". This includes specific requirements, which seem helpful and uncontroversial, about ensuring that the adult's name, address and date of birth is accurately and consistently stated in the application and supporting reports, and that an extract birth certificate should be lodged "in cases of confusion or uncertainty". It seems to have been necessary to remind agents to submit an accurate schedule for intimation. Agents are requested to email it to the AWI Clerk. The designation of any proposed substitute guardian should be included in the schedule for intimation. There are instructions to be followed when re-submitting applications which have been returned for correction. Changes made should be highlighted, and it should be confirmed that they are the only changes. If a renewal application has been returned for correction, the original lodging date will be retained provided that the corrected application is re-submitted within 14 days. That will be particularly helpful in cases where the renewal application is submitted close to expiry of the existing order.

It appears that the court has found it necessary to request that consideration should be given "to whether less extensive financial powers would amount to the least restrictive option" (in terms of section 1(3) of the 2000 Act) where the principal reason for the application is to seek financial powers. One has to deduce that a pattern has emerged of excessive and unnecessary powers being sought in such cases, though it could reasonably be asserted that section 1(3) only excludes the granting of powers either in respect of matters of which an adult is in fact capable, or in respect of matters where some other measure would be less restrictive. One would question whether a power to do something which might never arise, but in respect of which the adult would be incapable if it did arise, would contravene section 1(3): indeed, agents could be criticised for omitting to seek powers which could be required if that then results in an otherwise avoidable application for variation. Moreover, it is not entirely clear what is the court's attitude in relation to applications for plenary powers (in financial matters) in terms of section 64(1)(b) of the 2000 Act.

The Practice Update addresses the thorny question of averments commencing: "The applicant tells me …". These will be rejected by the court. In the particular circumstances of the jurisdiction under the 2000 Act, however, careful and responsible agents will sometimes find it necessary to depart from unqualified averments of fact. In a case where an adult's need for protection under the Act clearly needs to be brought to the court, and it is appropriate for an agent to proceed with such application, the agent may not be in a position to take responsibility for the accuracy of everything that the agent has been told by the applicant, and in what is essentially an inquisitorial jurisdiction it may be appropriate for the agent to put the court on notice that some matters may require further investigation, particularly where these relate to the suitability of a particular candidate for appointment, or other matters peripheral to the basic point that the

adult requires protection. Rather puzzling is the requirement that applications for the appointment of joint guardians should "make it clear whether or not the applicants seek appointment jointly and severally". It does not appear that the court has power to vary the provisions of section 62(6) and (7) regarding joint guardians, which make it clear that joint guardians may exercise their functions individually, but must consult the other joint guardians unless consultation would be impracticable or the joint guardians agree that consultation is not necessary. The provision regarding liability of joint guardians is governed in those same subsections. The requirement of the latest Practice Update in that regard sits oddly with the statutory position.

The Newsletter has received reports of Glasgow Sheriff Court requiring powers sought where an appointment of a substitute guardian is sought to be repeated in relation to the substitute guardian. That is difficult to understand, and appears to fail to take account of the distinction between a guardianship and a guardian. Where a substitution is triggered, the substitute guardian takes over the guardianship as it stands. This does not in fact appear to be a requirement of the Practice Update.

Adrian D Ward

Mental Welfare Commission for Scotland report on emergency mental health detention

In June 2016, the Mental Welfare Commission published a report *Emergency detention certificates without mental health officer consent.* The report is in response to the request of the Scottish Government that the Commission further investigate after its 2014/15 monitoring report indicated a wide range of levels of mental health officer consent for emergency mental health detentions across Scotland.

In the June 2016 report the Commission looks at all emergency detention certificates issued between 1 July 2015 and 31 December 2015. It again found large discrepancies in mental health officer consents for emergency mental health detentions across Scotland with Greater Glasgow and Clyde accounting for some 50% of all certificates issued without such consent.

Part 5 of the Mental Health (Care and Treatment)(Scotland) Act 2003[2] (the 2003 Act) authorises a fully registered medical practitioner to grant a certificate allowing the managers of a hospital to detain someone for up to 72 hours. The medical practitioner must, amongst other things, obtain the consent of a mental health officer wherever practicable.[3]

In terms of Article 5 ECHR (the right to liberty) the European Court of Human Rights Court has held that emergency detention authorised by an administrative authority is compatible with Article 5(4) "provided that it is of short duration and the individual is able to bring judicial proceedings "speedily" to challenge the lawfulness of any such detention including, where appropriate, its lawful justification as an emergency

[2] s36.
[3] Mental Health (Care and Treatment)(Scotland) Act 2003, ss 36(3((d) and 36(6).

measure"[4]. The ability to bring such proceedings is not, however, available for a person subject to an emergency detention order under the 2003 Act. For this reason, it is imperative that emergency detention certificates are used sparingly – as the Mental Welfare Commission has itself advised[5]- as is the need to ensure that the protective statutory procedures, such as make strenuous efforts to obtain the consent of mental health officers when it is deemed necessary.

Clearly, one of the issues here is the declining numbers of mental health officers across Scotland at the same time as their responsibilities are increasing. This has been mentioned in previous issues of this newsletter (see most recently the March 2016 edition). It should therefore be noted that the Scottish Government chief social worker was also asked to investigate the issue of the shortfall of mental health officers across Scottish local authorities. It should also be noted that the Mental Welfare Commission discussed its findings concerning Greater Glasgow and Clyde Health Board and an improvement plan is attached to the Commission's report.

Jill Stavert

Electronic communications – further possibilities

Sandra McDonald, Public Guardian, has been proactive in modernising communications methods in matters within her responsibilities. Some sheriff courts have also been helpful so far as discretion available under the Summary Applications Etc. Rules permits.

The Public Guardian introduced electronic registration of powers of attorney some time ago. Amendment to the Adults with Incapacity (Scotland) Act 2000 was necessary to achieve this, but that was done by an order under the Electronic Communications Act 2000, rather than primary legislation. Section 19A of the 2000 Act, permitting electronic submission of applications to register continuing and welfare powers of attorney, was inserted by the Adults with Incapacity (Electronic Communications) (Scotland) Order 2008/380. The Public Guardian has confirmed to the Newsletter that her office are working on arrangements to make further use of electronic communication. Where registration of powers of attorney is applied for electronically, the sender (most often a solicitor) has always been able to access a copy of the registered power of attorney electronically, upon receipt of an email from the Office of the Public Guardian confirming registration. However, copies sent in accordance with section 19(5) of the 2000 Act are sent by hard copy. These include the requirement to send a copy to the granter and copies to up to two specified persons. The Public Guardian's proposal will include changes to the electronic system to require provision of email addresses so that copies may be sent electronically.

There is of course great potential for efficiency by use of electronic communications for other purposes

[4] *Winterwerp v the Netherlands* (1979) 2 EHRR 387, paras 57–61; *X v. the United Kingdom* (1981) ECHR 6, para 58 and *MH v UK* (2013) ECHR 1008, para 77.
[5] Mental Welfare Commission for Scotland website: *Emergency Detention*. See also Mental Welfare Commission for Scotland *Deprivation of Liberty (update 2015)*.

under the 2000 Act. That potential extends, for example, to intimations to the Office of the Public Guardian, the Mental Welfare Commission and relevant local authorities. The Newsletter is aware of at least one instance in which a sheriff court helpfully permitted intimation to an individual who was overseas electronically, and confirmation by that individual of receipt of intimation by email, as sufficient intimation. It would however be helpful for such arrangements to be regularised. We shall keep readers advised of developments as they come to our notice. As ever, in this and all other matters, we are grateful to readers who send information to us.

Adrian D Ward

Misleading information from Ofcom

As noted in the Capacity outside the Court of Protection Newsletter, Ofcom has published guidance on managing a telephone subscriber account on behalf of someone who needs help with their affairs.

However, the guidance is misleading in a number of respects. First of all, it proclaims that it was "prepared … with assistance from the Office of the Public Guardian." Enquiry has established that only the Public Guardian for England & Wales was consulted. It is of course unhelpful that when the Mental Capacity Act 2005 of England & Wales established a Public Guardian for England & Wales, five years after the Adults with Incapacity (Scotland) Act 2000 had established Scotland's Public Guardian, England & Wales omitted to follow the usual convention of using a differentiated title to avoid confusion. That risk could have been avoided by informal differentiation. Scotland's Public Guardian, though as holder of the senior of the two appointments she does not strictly need to, does normally identify herself as "Public Guardian (Scotland)". It is obviously necessary that the "other" Public Guardian should similarly adopt the designation "Public Guardian (England & Wales)". The failure of that Public Guardian to do so can only be seen as unhelpful, and remarkably blinkered.

The publication from Ofcom itself has a heading "England & Wales" which gives significant information about powers of attorney and other measures, such as deputies, older forms of powers of attorney and benefits appointees. It also, importantly, gives information about third party bill management, information on how an (English & Welsh) lasting power of attorney differs from third party bill management, the evidence required about powers of attorney, and some examples. The brief section on Scotland and Northern Ireland contains none of these features. The implication, accordingly, is that no relevant measures other than continuing or welfare powers of attorney are available in Scotland. There is no mention of all of the other potentially relevant measures under the 2000 Act: guardianship and intervention orders, access to funds and management of residents' finances. There is no mention of availability of third party bill management in the section on Scotland and Northern Ireland, notwithstanding that Ofcom itself requires telecoms providers throughout the UK to offer third party bill management. It refers to "general or ordinary powers of attorney" only to the extent of asserting that they cease to have legal authority if the granter loses mental capacity. Setting aside the inaccurate reference in the Scottish context to "mental capacity", this is plainly wrong. Most general or ordinary powers of attorney by individuals containing powers that would permit management of a telephone subscriber account, and still in force, were granted in the period from 1st January 1991 until Part 2 of the 2000 Act came into force on

2nd April 2001, when such "general or ordinary powers of attorney" automatically continued in force following loss of capacity by virtue of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 section 71.

One can only assume that Ofcom prepared and issued this guidance with only customers in England & Wales in mind, and without troubling to check the accuracy even of the extremely limited information provided regarding Scotland. One suspects that the even more brief reference to Northern Ireland is open to similar criticisms.

This is but the most recent example of guidance produced (in different spheres) that fails to take into account the different legal frameworks that apply across the three jurisdictions of the United (?) Kingdom.

Adrian D Ward

Risks to home visiting employees in wintry conditions

We reported in the April 2016 Practice and Procedure Newsletter on the case of *Kennedy v Cordia (Services) LLP* [2016] UKSC 6. The case has also been reported at 2016 S.L.T. 209. Our previous report addressed the aspects of this decision of the Supreme Court relevant to the admissibility of expert evidence in civil cases. The case is also relevant to the obligations of employers of employees making home visits as part of their work. Cordia (Services) LLP are a provider of home care services on behalf of Glasgow City Council, and are wholly owned by the council. Cordia were aware of the risk of home carers slipping and falling on snow and ice when travelling to and from clients' houses in winter. There had on average been four such accidents reported to Cordia or to the Council during each year since 2005, and 16 such accidents in the harsh winter of 2010. The Council had carried out risk assessments in 2005 and again in July 2010. The assessment concluded that the risk had been reduced to the lowest level that was reasonably practicable by provision of a hazard awareness booklet and instruction on appropriate footwear; and that no additional controls were required.

The pursuer, Miss Kennedy, was employed by Cordia as a home carer. At about 8.00 p.m. on 18th December 2010 she was required to visit a Mrs Craig, who was elderly, terminally ill and incontinent, at her home, in order to provide her with palliative and personal care. The visit was one of a series carried out by Miss Kennedy during her shift. After a visit to another client, she was driven to Mrs Craig's home by a colleague. There had been snow and ice on the ground for some time. The colleague parked her car close to a sloping public footpath leading to Mrs Craig's house. It was covered in fresh snow overlying ice, and had not been gritted or salted. Miss Kennedy was wearing flat boots with ridged soles. After only a few steps along the footpath she slipped and fell, injuring her wrist. She claimed damages. She was successful at first instance before Lord McEwan on the grounds that her employers were in breach of the Personal Protective Equipment at Work Regulations 1992 (SI 1992/2966) and the Management of Health and Safety at Work Regulations 1999 (SI 1999/3242) in that her employers ought to have provided her with anti-slip attachments to her footwear. Evidence at first instance included an American study which showed a reduction in falls of 90% among elderly people who wore Yaktrax attachments, which provide increased traction in icy conditions. The defenders appealed successfully to an Extra Division of the Inner House. The pursuer then appealed successfully to the Supreme Court, whose decision has been reported as above.

Apart from issues of admissibility of expert evidence (addressed in the April 2016 Newsletter item above), the clear conclusion to be drawn from this decision is that employers have a duty to provide employees with non-slip attachments to their footwear where employees are required to make home visits (or perhaps other visits) in wintry conditions where there could be a risk of slipping on snow or ice. This could apply to employees such as the pursuer providing care services, but also employees visiting for professional or other reasons. Such employees could include employees of legal firms.

Adrian D Ward

J, Applicant: Application by J, Solicitor, in respect of the adult F

We commented briefly on this case in the April Newsletter. It has now been reported at 2016 S.L.T. (Sh Ct) 119. We shall continue to follow any developments in relation to the issue raised in that case. We would welcome any information as to further cases, which may be unreported, in which the meaning of "claiming an interest" in the Adults with Incapacity (Scotland) Act 2000 has been considered.

Adrian D Ward

M v Fife Council [2016] CSIH 17; 2016 S.L.T. 489

This case was a successful appeal heard by an Extra Division of the Inner House against a decision of Sheriff J H Williamson awarding damages of £45,910 against Fife Council, being fees incurred for a year's education at Butterstone (an independent special educational needs school), after *M* had failed to transition from the school to a mainstream college course after the end of his final academic year. The failure to transition was due to the effects of an autistic spectrum disorder and dyspraxia, in consequence of which (it was accepted) *M* was disabled within the meaning of section 6 of the Equality Act 2010. Because of the failure to transition, Fife Council as education authority was requested to fund his further year's schooling. They refused. *M* averred that this refusal constituted unlawful discrimination against him on the basis of age and disability, contrary to the Equality Act 2010. The costs of the further year's education had been funded by a loan from *M*'s grandfather. The Court of Session held that the defenders had unlawfully discriminated against the pursuer, but substituted an award of £2,500 for the discrimination on the basis that it was not open to the sheriff to award the cost of the school fees incurred. The substituted award was in respect of injured feelings.

Adrian D Ward

Smart's Guardian v Fife Council [2015] CSOH 183; 2016 S.L.T. 384

This case was a petition for judicial review brought by a guardian appointed under the Adults with Incapacity (Scotland) Act 2000 holding powers in relation to the property and financial affairs of an adult who had been awarded £5.1 million damages against the driver of a motor vehicle which had struck him. The petition was brought against the responsible local authority. It was alleged that the local authority had failed to carry out their statutory duty under section 12A of the Social Work (Scotland) Act 1968 in respect

of the adult's care in the community. It was held that the petition was not incompetent on the basis that the petitioner had an effective alternative remedy in the form of the respondents' complaints procedure, but the petition failed because the respondents had assessed the needs of the adult on two separate occasions. They had assessed that her needs called for the provision of services in terms of section 12A which were adequately met by her care plan. The respondents had had regard to section 12B of the 1968 Act and had determined that it was not appropriate to make payment in respect of the provision of the service. Section 12B required the respondents, where the person was assessed as able to pay in full, to pay only "such amount" as they determined to be appropriate.

Adrian D Ward

C v Gordonstoun Schools Ltd [2016] CSIH 32; 2016 S.L.T. 587

This case was an unsuccessful appeal heard by an Extra Division of the Inner House of the Court of Session against a decision of the Additional Support Needs Tribunal for Scotland. M was one of two students found having sexual intercourse on a teacher's desk at Gordonstoun School one evening. Both were expelled. M's mother, *C*, claimed that the school had discriminated against M on grounds of her disability. M had attention deficit hyperactivity disorder ("ADHD"). It was held that the Tribunal had correctly proceeded on the basis that they required to consider the position in respect of M without taking into account the effect of any medication. They were correct to conclude that: "Having considered all of the evidence, it is our view that M cannot be said to have an impairment which substantially and adversely affects her ability to carry out normal day-to-day activities". The Tribunal had concluded that M went about her normal day-to-day activities in an entirely normal fashion. She was able to go on outings without any special considerations, to live in a boarding school setting without any special considerations, and to go on an ocean voyage and apparently do everything required of her on it. The ADHD had affected M's social skills, but the Tribunal was not satisfied that such effects were substantial. Likewise, on causation, the Tribunal had concluded that they were not satisfied that M's actions arose in consequence of her ADHD. The encounter had been planned in advance. She had had positive relationships with suitable boys. M's mother was aware that M had previously had sex with a boy during study leave, and had not suggested that this was in any way attributable to M's ADHD.

Adrian D Ward

Council of Europe seeks views and information on powers of attorney and advance directives

The recent Essex Autonomy Project report *Towards Compliance with CRPD Art.12 in Capacity/Incapacity Legislation across the UK*[6] reinforces the potential of powers of attorney and advance directives to act as instruments of support for the exercise of legal agency in circumstances where decision-specific decision-making capacity is impaired, intermittent or absent. Indeed, this is included as one of the report's

[6] Alex Ruck Keene, Adrian Ward and Jill Stavert of this newsletter were all members of the project's core research team.

recommendations.[7] Moreover, the European Court of Human Rights has also emphasized the importance of respect for legal capacity and seriousness of its denial or limitation in rulings concerning Article 8 ECHR (the right to respect for private and family life).[8]

In October 2015, the European Committee on Legal Co-operation (at the Council of Europe) agreed to conduct a follow-up by member states to Recommendation CM/Rec(2009)11 *on principles concerning continuing powers of attorney and advance directives for incapacity*.

The Council of Europe is reviewing the implementation of the recommendation, and for these purposes is looking to member states to complete a questionnaire (in 'full' or 'short' form) identifying information as to how they have implemented the recommendation is now available. This should include information on the experience of professional advisers who assist individuals, the relevant service providers in personal welfare and health matters, financial institutions etc. (in relation to property and financial matters); other actors (NGOs, universities, etc.). In completing the questionnaire, Member States are encouraged to consult and delegate as they consider appropriate, so that any readers motivated to assist should contact their own Ministry of Justice (or equivalent)

The questionnaire was drafted by our own Adrian Ward who will also be collating the responses. Responses are required no later than 30 September 2016.

A report of the findings, including recommendations for follow-up action, will be presented to the European Committee on Legal Co-operation CDCJ in 2017.

Jill Stavert

[7] Recommendation 7 states: 'Existing measures such as powers of attorney and advance directives should be recognised for their potential as instruments of support for the exercise of legal agency in circumstances where decision-specific decision-making capacity is impaired, intermittent or absent. In order to fulfil this potential, however, such measures must be embedded in robust Art. 12.4 safeguards.'

[8] *Shtukarutov v Russia* (44009/05) (2008) ECHR 223, paras 87-89; *X and Y v the Netherlands* (8978/80) (1985) ECHR 4, paras 102 and 109; *Sykora v Czech Republic* (23419/07) (2012) ECHR 1960, paras 101-103.

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Conferences at which editors/contributors are speaking

4th World Congress on Adult Guardianship

Adrian will be giving a keynote speech at this conference in Erkner, Germany, from 14 to 17 September. For more details, see here.

ESCRC seminar series on safeguarding

Alex is a member of the core research team for an-ESRC funded seminar series entitled 'Safeguarding Adults and Legal Literacy,' investigating the impact of the Care Act. The third (free) seminar in the series will be on 'Safeguarding and devolution – UK perspectives' (22 September). For more details, see here.

Deprivation of Liberty in the Community

Alex will be doing a day-long seminar on deprivation of liberty in the community in central London for Edge Training on 7th October. For more details, and to book, see here.

Taking Stock

Both Neil and Alex will be speaking at the 2016 Annual 'Taking Stock' Conference on 21 October in Manchester, which this year has the theme 'The five guiding principles of the Mental Health Act.' For more details, and to book, see here.

Alzheimer Europe Conference

Adrian will be speaking at the 26th Annual Conference of Alzheimer Europe which takes place in Copenhagen, Denmark from 31 October–2 November 2016, which has the theme Excellence in dementia research and care. 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 Mind in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Chambers Details

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

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THE QUEEN'S AWARDS FOR ENTERPRISE INTERNATIONAL TRADE 2013

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Alex is recommended as a 'star junior' in Chambers & Partners 2016 for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations and is the creator of the website www.mentalcapacitylawandpolicy.org.uk. He is on secondment for 2016 to the Law Commission working on the replacement for DOLS. To view full CV click here.

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Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA 2009), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click here.

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Neil has particular interests in human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Neil is the Deputy Director of the University's Legal Advice Centre and a Trustee for a mental health charity. To view full CV click here.

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Annabel appears frequently in the Court of Protection. Recently, she appeared in a High Court medical treatment case representing the family of a young man in a coma with a rare brain condition. She has also been instructed by local authorities, care homes and individuals in COP proceedings concerning a range of personal welfare and financial matters. Annabel also practices in the related field of human rights. To view full CV click here.

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Anna regularly appears in the Court of Protection in cases concerning welfare issues and property and financial affairs. She acts on behalf of local authorities, family members and the Official Solicitor. Anna also provides training in COP related matters. Anna also practices in the fields of education and employment where she has particular expertise in discrimination/human rights issues. To view full CV click here.

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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 practising Scottish solicitor, a consultant at T C Young LLP, who has specialised in and developed adult incapacity law in Scotland over more than three decades. Described in a court judgment as: "*the acknowledged master of this subject, and the person who has done more than any other practitioner in Scotland to advance this area of law*," he is author of *Adult Incapacity*, *Adults with Incapacity Legislation* and several other books on the subject. To view full CV click here.

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