

Court of Protection: Health, Welfare and Deprivation of Liberty

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

- (1) In the Health, Welfare and Deprivation of Liberty Newsletter: getting tangled up in ineligibility, survey and statistical data relating to DOLS and news of a new COPDOL10 form;
- (2) In the Property and Affairs Newsletter: deputies and remuneration, capacity and influence, and updates from the OPG;
- (3) In the Practice and Procedure Newsletter: participation of P, extending the great safety net abroad, the limits of the coercive power of the inherent jurisdiction, and an expert beyond bounds;
- (4) In the Capacity outside the COP Newsletter: a report from the World Guardianship Congress, a new Jersey capacity law and a report on what Singapore can teach us about the MCA 2005;
- (5) In the Scotland Newsletter: case notes shedding light on practice in relation to adults with incapacity, new MWC reports and new supervision practices by the OPG.

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](#).

Editors

Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Annabel Lee
Anna Bicarregui
Simon Edwards (P&A)

Guest contributor

Beverley Taylor

Scottish contributors

Adrian Ward
Jill Stavert

Table of Contents

Tangled up in ineligibility	2
BIA survey	2
“Unnecessary” inquests – the Chief Coroner’s view	3
LGA MCA/DOLS resources	3
2015-2016 DOLS statistics	3
New COPDOL10 form	4
Conferences at which editors/contributors are speaking	5
For all our mental capacity resources, click here .	

Tangled up in ineligibility

BHCC v KD [\[2016\] EWCOP B2](#) (HHJ Farquhar)

Article 5 ECHR – DOLS ineligibility

Summary

KD was an 80-year-old lady with a long history of schizophrenia, slowly progressive dementia and a Parkinsonian syndrome. Previously detained under s.3 MHA 1983, she was now deprived of her liberty in a care home under a standard authorisation. The issue was whether she was ineligible.

The independent psychiatric expert who reported expressed disquiet over the comparative lack of statutory safeguards for someone lacking capacity receiving clozapine with regular blood tests due to side-effect risk of bone marrow suppression under the MCA when compared to a community treatment order under the MHA. He noted, in particular, the absence of an independent second opinion appointed doctor. But no-one was advocating for her detention in hospital and, pursuant to [AG v BMBC and SNH](#) [2016] EWCOP 37, the medication could be given covertly.

In relation to eligibility, the Official Solicitor submitted that Case E in MCA Schedule 1A was not limited to those cases where hospital treatment was required. After much analysis, the court disagreed. So she was not ineligible for the standard authorisation.

Comment

A “mental health patient”, for the purposes of Case E, refers to a person accommodated in a hospital, not a care home. This is clear from the legislation and *W Primary Care Trust v TB & Ors*

[\[2009\] EWHC 1737 \(Fam\)](#) (a case not apparently cited to HHJ Farquhar). There may be more to this case than is apparent from the judgment but, on its face, there was in fact no eligibility issue as KD did not fall within Case E (nor were any of Cases A-D relevant)

But the case does illustrate the well-known reality that there are less treatment safeguards under the MCA when compared with the MHA. If KD were unbefriended and if clozapine constituted “serious medical treatment”, she would of course be entitled to an independent mental capacity advocate. It will also be interesting to see whether the Law Commission proposes additional safeguards for these types of treatments to equalise the informal MCA framework with the SOAD system under the MHA.

BIA survey

Edge Training has recently conducted a [national survey](#) of 92 best interests’ assessors (BIAs), triggered by the publication of the Law Commission’s interim statement which reported that most consultees perceived DOLS to have failed to deliver improved outcomes for people. The survey of BIA assessors showed that, on many occasions, the assessment procedure had led to a positive outcome for many vulnerable people that had been missed by other professionals. In particular, the most commonly reported ‘positive outcome’ from BIA input was the reversal of incorrect decisions that people lacked capacity to make decisions about their care. There were also a number of welcome examples where DOLS assessments had led to people being supported to return home from sometimes inappropriate care home placements or led to improved social activities and access to the community on a regular basis.

“Unnecessary” inquests – the Chief Coroner’s view

In his 2015-2016 [annual report](#), the Chief Coroner in England and Wales, His Honour Judge Peter Thornton QC pulled no punches in relation to DOLS. He reported a substantial increase in the caseload of all coroners “for no good purpose” as an “unanticipated and unwanted” consequence of the Supreme Court decision in *Cheshire West*. For the first time, the report reveals the number of inquests held for people who died while under a DOLS authorisation which was 7,183 in 2015. As a consequence, bereaved families have been caused considerable distress. The Chief Coroner has called for the Coroners and Justice Act 2009 to be amended so that those who die while subject to a DOLS authorisation should not be subject to a coroner’s investigation unless there is a specific reason for referral to the coroner.

Readers may well be aware not just that this was an issue addressed in the Law Commission’s [Interim Statement](#) on its Mental Capacity and Deprivation of Liberty project, but that Ann Coffey MP sought to move a [probing amendment](#) to this end to the Police and Crime Bill in the House of Commons. She did not press it, but the Minister for Policing, Mike Penning noted that it was “probing in exactly the right direction,” and it may well be that this matter is revisited when the matter reaches the House of Lords.

LGA MCA/DOLS resources

The Local Government Association MCA/DOLS [resources page](#) has been updated recently to include a number of very useful guides, including:

- “Your Rights” Sheet: a summary of statement of rights for those deprived of liberty;

- A Best Practice Guide to Form 3;
- A Guide to Recognising and Reducing Restrictions.

A list of Independent BIAs (as of April 2016) is also available.

2015-2016 DOLS statistics

The DOLS statistics for England during the period of 1 April 2015 to 31 March 2016 have been [published](#). Here are the main headlines:

- This period saw the greatest number of DOLS applications ever: 195,840.
- 105,055 applications were completed.
- Around half of applications (55,320) were completed within 35 days.
- The average (mean) duration for completion was 83 days.
- 4% (4,335) took 365 days or more to be completed
- Half (51,330) of those not yet signed off had been awaiting completion for up to 188 days (of which 21,370 originated as urgent authorisations).
- Regional variation: for example, North East had three times as many applications compared to London. And 86% of applications granted in North East compared to 44% in South West.
- The highest proportion of applications originating as urgent authorisations was 70% in the East Midlands.

- 3240 Part 8 reviews were completed.
- 84% of standard authorisations were for less than 6 months.

A table demonstrating the effect of *Cheshire West* may be found in the screen-friendly version of the Newsletter.

New COPDOL10 form

As we went to press, we learnt a new COPDOL10 form has been approved which incorporates the additional questions posed by Charles J in *Re NRA* and set out in our Guidance Note on Judicial Authorisation of Deprivation of Liberty. It is available [here](#), but we do not yet know when it will come into force. We will provide a full update in the next edition.

Conferences at which editors/contributors are speaking

Switalskis' Annual Review of the Mental Capacity Act

Neil and Annabel will be speaking at the Annual Review of the Mental Capacity Act in York on 13 October 2016. 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](#).

Human Rights and Humanity

Jill is a keynote speaker at the SASW MHO Forum Annual Study Conference in Perth on 29 October, talking on "Supporting and extending the exercise of legal capacity." For more details, see [here](#).

Law (and the Place of Law) at the End of Life

Alex will be speaking alongside Sir Mark Hedley at this free seminar organised by the Royal College of Nursing on 1 November. For more details, 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](#).

Jordans Court of Protection Conference

Simon will be speaking on the law and practice relating to property and affairs deputies at the Jordans annual COP Practice and Procedure conference on 3 November. For more details and to book see [here](#).

Editors

Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Annabel Lee
Anna Bicarregui
Simon Edwards (P&A)

Guest contributor

Beverley Taylor

Scottish contributors

Adrian Ward
Jill Stavert

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.

Our next Newsletter will be out in early November. 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.

David Barnes

Chief Executive and Director of Clerking
david.barnes@39essex.com

Alastair Davidson

Senior Clerk
alastair.davidson@39essex.com

Sheraton Doyle

Practice Manager
sheraton.doyle@39essex.com

Peter Campbell

Practice Manager
peter.campbell@39essex.com

London 81 Chancery Lane, London, WC1A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

Manchester 82 King Street, Manchester M2 4WQ
Tel: +44 (0)161 870 0333
Fax: +44 (0)20 7353 3978

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

For all our services: visit www.39essex.com

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number OC360005) with its registered office at 81 Chancery Lane, London WC2A 1DD. 39 Essex Chamber's members provide legal and advocacy services as independent, self-employed barristers and no entity connected with Thirty Nine Essex Street provides any legal services. Thirty Nine Essex Street (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.

Editors

Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Annabel Lee
Anna Bicarregui
Simon Edwards (P&A)

Scottish contributors

Adrian Ward
Jill Stavert

CoP Cases Online



Use this QR code to take you directly to the CoP Cases Online section of our website





Alex Ruck Keene: alex.ruckkeene@39essex.com

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, including as Wellcome Trust Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. He is on secondment to the Law Commission working on the replacement for DOLS. **To view full CV click here.**



Victoria Butler-Cole: vb@39essex.com

Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. 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.**



Neil Allen: neil.allen@39essex.com

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.**



Annabel Lee: annabel.lee@39essex.com

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.**



Anna Bicarregui: anna.bicarregui@39essex.com

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.**



Simon Edwards: simon.edwards@39essex.com

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



Adrian Ward adw@tcyoung.co.uk

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.**



Jill Stavert: J.Stavert@napier.ac.uk

Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Incapacity Law, Rights and Policy and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee, Alzheimer Scotland's Human Rights and Public Policy Committee, the South East Scotland Research Ethics Committee 1, and the Scottish Human Rights Commission Research Advisory Group. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). **To view full CV click here.**