

Scotland

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](#).

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For all our mental capacity resources, click [here](#).

Edinburgh Sheriff Court – Applications under the Adults with Incapacity (Scotland) Act 2000 – Guardianship Court and AWI User Group

The Guardianship Court at Edinburgh Sheriff Court (and the associated AWI User Group) now has a dedicated web page for applications lodged at that court under the Adults with Incapacity (Scotland) Act 2000. It can be accessed via the Scottish Courts [website](#). Once you have reached the Edinburgh Sheriff Court homepage a link to the Guardianship Court hub can be found on the top right side of the screen.

For any enquiries please contact edinburghawi@scotcourts.gov.uk.

Public Guardian: new arrangement for supervision of professional guardians

The Public Guardian is launching new arrangements for the supervision of professional guardians who have five or more property and financial guardianships. It is hoped that the new scheme will bring time savings and cost benefits. One would anticipate that it will bring savings and benefits not only for the Public Guardian's Office, but for qualifying professional guardians and the estates under their care. At present there is no differentiation between professional guardians holding multiple guardianships, and other guardians holding a single guardianship. The requirements for full annual account review apply to every guardianship.

In the case of professional guardians holding five or more financial guardianships, in future the Office of the Public Guardian will no longer undertake a full annual account review in every

case. Instead, random samples will be selected. If the outcome of the audits of these is satisfactory, for all other guardianships and other years the Office of the Public Guardian will accept a covering one-page summary sheet only.

Adrian D Ward

J's Parent and Guardian v M & D (Leisure) Ltd, 2016 SLT (Sh Ct) 185

Sitting in the All Scotland Sheriff Court at Edinburgh on 17th March 2016, Sheriff P J Braid considered a contested motion for sanction of employment of junior counsel, for the purpose of computing the expenses payable by a defender following upon settlement of a personal injuries action. The injured party was a boy aged 11. The *ratio* of Sheriff Braid's decision would appear to be equally relevant to some adults with intellectual disabilities.

The boy slipped on wooden steps at a "crazy golf" course. He was holding a club. Part of the rubber grip was missing from the top of the club, exposing the metal shaft, which had ragged sharp edges. He struck his face against this, suffering a nasty injury and permanent disfigurement. He was very sensitive about the disfigurement.

The action was raised in October 2015. In their defences, the defenders contested liability. On 29th December 2015 the pursuers' agents instructed junior counsel, who met the boy at consultation and then drafted substantial adjustments, a specification for recovery of documents, and a statement of valuation of the claim. On 21st January 2016 a tender was lodged. Following a further consultation and negotiation, the action was settled at a somewhat higher sum, plus expenses.

The relevant provisions regarding sanction for counsel in the sheriff court (and Sheriff Appeal Court) are now contained in section 108 of the Courts Reform (Scotland) Act 2014. That section contains no explicit reference to the age or vulnerability of the party seeking such sanction. The relevant provisions of section 108 are these:

(2) The court must sanction the employment of counsel if the court considers, in all the circumstances of the case, that it is reasonable to do so.

(3) In considering that matter, the court must have regard to – (a) whether the proceedings are such as to merit the employment of counsel, having particular regard to – (i) the difficulty or complexity, or likely difficulty or complexity, of the proceedings, (ii) the importance or value of any claim in the proceedings, and (b) the desirability of ensuring that no party gains an unfair advantage by virtue of the employment of counsel.

(4) The court may have regard to such other matters as it considers appropriate.

Sheriff Braid concluded that the proceedings were not especially difficult or complex, and had no greater importance to the pursuer than to any other pursuer. There was no suggestion that an unfair advantage was gained by the employment of counsel. However, as liability was disputed it was necessary for the pursuer to approach the matter on the assumption that the case would go to proof on both liability and quantum. The boy would require to give evidence. Given the permanent and obvious nature of his injury, special skill would be required in taking his evidence effectively. It was therefore reasonable to have any proof conducted by counsel. Moreover, it would have been unreasonable to have introduced into the case, at a late stage,

counsel whom the boy had not previously met. It was therefore reasonable to sanction the employment of counsel for all the work which counsel had been instructed to do, at the time when he had been instructed to do it. The motion for employment of counsel was granted.

Experience of acting for people with many categories of intellectual disability indicates that it is of vital importance that there be consistency as to the person acting, gradually building trust and confidence. That applies even where there is no expectation that the person will have to undergo the stress of examination and cross-examination as a witness in court proceedings. It is all the more important where there is indeed a prospect, or even a risk, of the person having to give evidence in court. One would suggest that there could be a question as to whether a solicitor was failing to give an adequate professional service, if the solicitor did not take reasonable steps to ensure the likelihood that the person ultimately conducting such proceedings should – barring the unforeseen – be the person who builds up that relationship of trust over the course of the matter. In such cases, one would suggest that if it was anticipated that it would be appropriate to instruct counsel for any proof, then counsel should be instructed, and should be present at relevant meetings with the person, at latest at the point of proceedings where the possibility of the person requiring to give evidence, failing earlier resolution, is foreseeable. There will be cases where it will be appropriate for intended counsel to meet a vulnerable pursuer before proceedings are commenced, to help counsel assess the ability of a vulnerable pursuer to give evidence to the standard likely to be required.

Adrian D Ward

Argyll and Bute Council v Gordon, 2016 SLT (Sh Ct) 196

This decision, also by Sheriff P J Braid at Edinburgh, did not involve any disclosed element of intellectual disability, but did concern a situation not uncommon in relation to people with disabilities, generally those whose disabilities are increasing. Argyll and Bute Council sought to recover costs of the provision of care to an elderly lady, since deceased. She had gratuitously alienated her dwellinghouse to the defender. The Council argued that their determination that the alienation had been made knowingly with the intention of avoiding the accommodation charges could only be challenged by way of judicial review in the Court of Session.

The Council raised the action, seeking to recover the care costs, under section 21 of the Health and Social Services and Social Security Adjudications Act 1983. Section 22 of the National Assistance Act 1948, along with the National Assistance (Assessment of Resources) Regulations 1992, empowered the Council to treat a resident as possessing actual capital of which the resident had deprived herself for the purpose of decreasing the amount that she might be liable to pay for the accommodation. Sheriff Braid held that as between the Council and the resident, any such determination under section 22 of the 1948 Act was challengeable only by judicial review, since the local authority was exercising the function conferred upon it by the 1948 Act. He held, however, that it was not anomalous that the Council could make a decision which was binding in relation to the service user but not binding in relation to the transferee. Even if that was anomalous, it would be a matter for Parliament to resolve. The defender, as transferee, was entitled to defend the action on the basis that the conditions in section 21 had

not been satisfied, and that she accordingly had no liability thereunder. Unlike the position of the service user, this was not a matter which the defender could challenge only by judicial review. Sheriff Braid allowed a proof.

Adrian D Ward

New offence of wilful neglect or ill-treatment in Scotland

The Health (Tobacco, Nicotine, etc. and Care) (Scotland) Act 2016 received Royal Assent back in April 2016 and is yet to come into force. However, it is worthy of note at this stage and in the context of this newsletter given that its Part 3¹ introduces new offences of wilful neglect or ill-treatment in Scotland for adults receiving health care or social care.² These consist of two offences, one applying to care workers³ and the other applying to care providers.⁴

A 'care worker' is defined⁵ as care workers (employees and volunteers), their managers and supervisors, and directors or similar officers of organisations and the offence is committed where a care worker is providing care for another person and ill-treats or wilfully neglects that person. A 'care provider' is defined⁶ as a body corporate, a partnership or an unincorporated association which provides or arranges for the provision of adult health or social care or an individual who provides that care and employs, or has otherwise made arrangements with, other persons to assist with the provision of that care.

¹ ss 26-32.

² Largely mirroring that already in force in England and Wales under in ss20-25 Criminal Justice and Courts Act 2015.

³ ss 26.

⁴ ss 27.

⁵ ss 28(1).

⁶ ss 28(3).

Care that is only incidental to the care worker's or provider's other activities would not fall within either of these definitions.⁷

A care worker will commit the offence if they have the care of another individual by virtue of being a care worker and ill-treats or wilfully neglects that individual. A care provider will, on the other hand, commit the offence if (a) they provide care, under care arrangements, for another individual and ill-treat or wilfully neglect that individual; (b) the care provider's activities are managed or organised in a way which amounts to a gross breach of a relevant duty of care⁸ owed by the care provider to the individual who is ill-treated or neglected; and (c) in the absence of the breach, the ill-treatment or wilful neglect would not have occurred or would have been less likely to occur. The Mental Health and Disability Committee of the Law Society of Scotland had argued strongly for the inclusion of the care provider offence (as appears in the English legislation, see footnote 2) on the basis that it would enable liability to be fixed upon those responsible for situations in which the real issues are those of management and training.

If convicted a care worker is liable, on summary conviction, to imprisonment for a term not exceeding 12 months, a fine not exceeding the maximum limit (currently £10,000) or both and, on conviction on indictment, to imprisonment for a term not exceeding five years, an unlimited fine or both. Care providers are, on the other hand,

⁷ ss 28(4).

⁸ A 'relevant duty of care' is stated as meaning a duty owed in connection with providing, or arranging for the provision of, adult health care or adult social care and a breach of such duty occurs where there is a 'gross' breach meaning that the alleged conduct falls far below what can reasonably be expected of the care provider in the circumstances (ss 27(3) (a) and (b)).

only liable to a fine on both summary and indictment conviction.

The intention apparently is that the offences will cover the relatively few deliberate acts or omissions and will not include situations where mistakes have simply been made. This extends the criminal offence that has been around since 1913 but is now contained in the Mental Health (Care and Treatment)(Scotland) Act 2003⁹ of wilful neglect or ill treatment of patients in mental health care to all health or social care settings.¹⁰

There was some argument at the time of the passage of the Health (Tobacco, Nicotine, etc. and Care)(Scotland) Bill through the Scottish Parliament that such offences were superfluous and unnecessary in light of existing protection of common law assault, the Protection of Vulnerable Groups (Scotland) Act 2007, mental health legislation and professional body disciplinary procedures. However, it could equally be argued that they in fact reinforce and compliment the protection offered by these, and the Adult Support and Protection (Scotland) Act 2007, to vulnerable persons. It could also be seen to reinforce the state's positive obligation to ensure respect for the prohibition against inhuman or degrading treatment identified in Article 3 ECHR¹¹ and also in Article 15 CRPD.

The Act does not provide a definition of 'wilful neglect and ill-treatment' and concerns about this were expressed during the passage of the

⁹ s 315.

¹⁰ Scottish Parliament, *Official Report*, Session 4, 1 December 2015. s 83 Adults with Incapacity (Scotland) Act 2000 also creates an offence of ill-treatment and wilful neglect in relation to anyone exercising powers under the Act that relates to the person welfare of the adult.

¹¹ *A v United Kingdom* [1998] 2 F.L.R. 959 (ECHR), 23 September 1998.

Bill, notably that such definition might potentially capture non-intentional errors that could, if necessary, be adequately dealt with by disciplinary measures. However, the Scottish Parliament seems to have been persuaded that wilful neglect and ill-treatment offences are intended to cover intentional acts or omissions and not mere mistakes.¹²

Part 2¹³ of the Act also introduces a duty of candour in health and social care settings. This creates a requirement for health and social care organisations to inform people and their families when they have been physically or psychologically harmed as a result of the care or treatment that they have received, together with a requirement for such organisations to prepare and publish reports in relation to this duty of candour. There was some disquiet during the passage of the Bill that the creation of an offence of wilful neglect or ill-treatment might be counter-productive to such a duty of candour owing to fear of criminal prosecution. However, it would seem that the purpose of such duty is to enhance transparency in situations when the unintentional and unexpected, as opposed to deliberate, occurs.

As already mentioned, the provisions are not yet in force and, in any event, it would appear that as distressing and wholly unacceptable as any deliberate act of abuse in health and social care settings is they are, thankfully, rare. However, we can only hope that when in force such legislative provisions are used effectively to provide justice for the victims of any such abuse.

Jill Stavert

¹² It should also be noted that neither the Mental Health (Care and Treatment)(Scotland) Act 2003 (S 315) nor Adults with Incapacity (Scotland) Act 2000 (s 83) define these terms.

¹³ ss 21-24.

Mental Welfare Commission for Scotland AWI and 2003 Act Monitoring Reports

During September, the Mental Welfare Commission published its 2015/16 monitoring reports for the [Adults with Incapacity \(Scotland\) Act 2000\(AWI\)](#) and [Mental Health \(Care and Treatment\) \(Scotland\) Act 2003 \(2003 Act\)](#).

Readers are referred to the reports themselves for more detail. However, the Commission has flagged certain areas of concern which I will very briefly summarise and comment on below.

AWI: Increase in guardianship applications and orders

The Commission has noted a continued increase in guardianship applications and orders with the highest proportion of welfare guardianships being sought for people with dementia (45%) or learning disability (41%).

It is not entirely clear why this is the case although it would appear – and this is arguably rather self-defeating - that guardianship is being required in some situations in order to access self-directed support. Concern, following the *Bournewood* and, more specially, the *Cheshire West* rulings, that potential deprivations of liberty in social care settings are made lawful in terms of Article 5 ECHR may also be prompting the increase. Indeed, certain Scottish rulings¹⁴ have indicated that guardianship will effectively render a deprivation of liberty of an incapable adult lawful in terms of Article 5 ECHR. However, this is by no means certain given the very limited ability

¹⁴ *Muldoon, Applicant* 2005 SLT (Sh Ct) 52 at 58K,59B, *Doherty* (unreported), Glasgow Sheriff Court, 8 February 2005, *M, Applicant* 2009 SLT (Sh Ct) 185 at 84 and 87 and *Application in respect of R* 2013 GWD 13-293.

to challenge the lawfulness of such deprivation of liberty through the courts.¹⁵ Certainly, the fact that the highest proportion of welfare guardianships being sought is for people with dementia or learning disability begs the question as to how effectively the principles in section 1 of the AWI are being applied and the extent to which such persons are being properly supported to exercise their legal capacity as required by Article 12 CRPD and Article 8 ECHR.

It is hoped that such issues will be addressed in any legislative changes that result from the current Scottish Government review of the AWI.

2003 Act: Emergency detentions and community-based CTOs

The Commission notes that emergency detentions are increasing with only 56% having the consent of a mental health officer. In the [July 2016](#) issue of this newsletter I have already referred to an earlier report of the Commission [Emergency detention certificates without mental health officer consent](#) and mentioned the Article 5 ECHR issues that potentially arise in such situations.

Community-based Compulsory Treatment Orders (CTOs) are up and during 2015/16 40% of people on CTOs were being treated in the community. Whilst the value of such orders cannot be ignored it is important to ensure that compulsion of this nature is appropriate and, as such, in accordance with the principles¹⁶ that underpin the 2003 Act, particularly in terms of respect for patient autonomy and choice, and being the minimum necessary restriction of freedom and of

¹⁵ See Scottish Law Commission, *Report on Adults with Incapacity* (2014) and Mental Welfare Commission, *Deprivation of Liberty (update)* (2015).

¹⁶ Notable those in ss1 and 64.

maximum benefit to the patient.¹⁷ Moreover, as it has previously commented in its December 2015 *Visits to people on longer term community-based compulsory treatment orders* report,¹⁸ the Commission comments that more needs to be done in terms of supporting recovery plans for people who are subject to compulsion.

Jill Stavert

Report on World Guardianship Congress

Readers are also encouraged to read the report on the World Adult Guardianship Congress in the Capacity outside the Court of Protection section of this Newsletter, at which Adrian spoke and where news broke – to these editors – of a very significant decision of the German Constitutional Court which will be the subject of a detailed article in the next Newsletter. Adrian was also a member of the drafting group which prepared the revised Yokohama Declaration, adopted without amendment or dissent at the Congress. Recently retired Senior Judge Denzil Lush was also a member of the drafting group, which had met at the University of Gottingen on 11th and 12th August 2016.

¹⁷ See also Articles 8 ECHR and 12 CRPD.

¹⁸ Mental Welfare Commission for Scotland, [Visits to people on longer term community-based compulsory treatment orders](#), December 2015 See also 'The Mental Welfare Commission for Scotland Report; *Visits to people on longer term community-based compulsory treatment orders*' *Mental Capacity Law Newsletter* (February 2016 issue).

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](#).

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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.

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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, 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.**



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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.**



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.**



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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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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.**