Essex CHAMBERS

MENTAL CAPACITY REPORT: PRACTICE AND PROCEDURE

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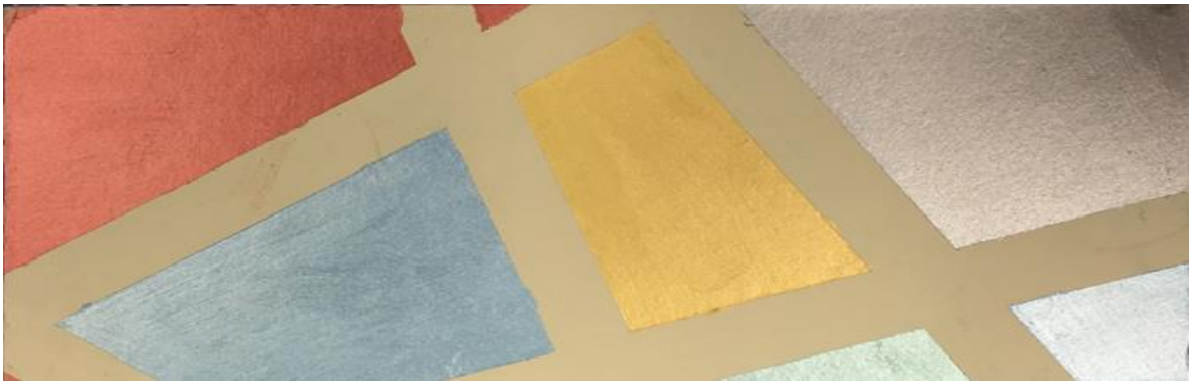

Welcome to the April 2019 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: an update on the Mental Capacity (Amendment) Bill; the DoLS backlog and the obligations on local authorities; capacity and social media (again); best interests and the 'institutional echo;' and judicial endorsement of the BMA/RCP guidance on CANH.

(2) In the Property and Affairs Report: a major new report on supported will-making;

(3) In the Practice and Procedure Report: a pilot designed to get the Accredited Legal Representatives scheme further off the starting block; the need for the early involvement of the court in medical treatment cases; transparency and committal; and DNA testing and the courts;

(4) In the Wider Context Report: oral care and learning disability; important consultations on criminal procedure/sentencing and those with mental disorders; the dangers of assessing in a vacuum; and a round-up of recent useful research articles.

(5) In the Scotland Report: major developments regarding the Mental Health (Care and Treatment) Scotland Act, the Adults with Incapacity Act and the Adult Support and Protection Act and a Scottish perspective on the English MHA review and compliance with the CRPD;

You can find all our past issues, our case summaries, and more on our dedicated sub-site here. With thanks to all of those who have been in touch with useful observations about (and enthusiasm for the update of our capacity assessment guide), and as promised, an updated version of our best interests guide is now out.

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The picture at the top, "*Colourful*," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

Contents

Accredited Legal Representatives – pilot

The Law Society have been in discussions with HMCTS regarding the issues related to the appointment process for ALRs, which has been far from smooth.

In a response to the concerns raised, HMCTS has agreed to run a pilot as of 1 April 2019. As of this date, where a nominated ALR is already involved within proceedings, they can seek appointment within the proceedings and be appointed by the judge. Where an ALR seeks to be nominated within application, they will need to provide reasons for their appointment to the judge.

If there is no nominated ALR within the proceedings, the judge will continue to appoint ALR's from the ALR list.

The pilot will run for a period of 3 months, where after HMCTS will take a view as to whether allowing direct nominations has been successful. The Law Society – and us – are encouraging all ALRs to put themselves forward for direct nomination during the period of the pilot, in order to demonstrate the effectiveness of the process.

The current list of ALRs can always be found on the Law Society website here.

Will, preferences, amputation – and the need for early involvement of the court

East Lancashire Hospitals NHS Trust v PW [2019] EWCOP 10 (Lieven J)

Best interests – medical treatment

Summary

The decision in this case is of real importance for its reminder of the obligations on treating hospitals where an application may need to be made in relation to medical treatment. It also of real interest as regards the application of a "will and preferences" approach to best interests decision-making.

Timing of application

For 9-12 months from the middle of 2018, it had been recognised by the treating team that an application might need to be made in relation to

PW, a 60 year old with paranoid schizophrenia, to address the consequences of a diabetic infection in his foot. By mid-February 2019, the application was being prepared. It was then lodged with the court on 12 March (the Official Solicitor receiving the draft application at around 4:00 pm on that day) on the basis that the application needed to be considered within one day and an operation required to address the high risk of sepsis within 48 hours. Lieven J heard the application on 13 March, but – understandably – observed that:

> *4.* […] *this application could and should have been made some weeks ago, even if at that stage it was on a slightly more precautionary basis. The effect of the delay has been detrimental to PW's interests and to a fair process which could fully take into account his wishes. The timing of the application has meant that the Official Solicitor had no time to visit PW and discuss the operation and his views with him; it has meant that there has been no time for the Independent Mental Capacity Advocate (IMCA) to visit him before the hearing , the last visit was in July 2018; and the OS has had no time to instruct an independent doctor for another opinion if he had felt one was justified.*
>
> *5. Although I spoke to PW over the phone, in order to try to understand his wishes and feelings, it would have been much better for the Court and PW if the OS had been able to visit him and prepare a report for the Court. The delay in making the application has therefore been contrary to PW's interests.*

Lieven J considered that it had been possible to achieve a fair process, not least because her view was ultimately that the decisions she had to make were fairly clear-cut, but "*this application should have been made weeks ago*."

Lieven J expressly endorsed the guidance given by Keehan J in *NHS Trust v G* [2014] EWCOP 30 and Baker J in *A University Hospital v CA* [2016] EWCOP 51 as to the need for timely applications, expressly endorsing the annex to the judgment in *G* as to the steps that need to be taken. She noted that, as in *CA*, the Trust was to carry out an investigation into the delay and provide the court and the Official Solicitor with the outcome.[1]

The substantive decisions

Lieven J had little hesitation in finding that PW lacked capacity to decide whether to have his foot amputated. He was, she found, delusional in his belief that his foot could be treated by antibiotics and that his GP surgery could heal his foot (indeed, the IMCA report prepared in July 2018 recorded him referring to a belief that his toes could grow back, in circumstances where said he did not have diabetes and that his leg was not infected).

As regards best interests, Lieven J considered that the medical evidence was overwhelming that if PW did not have a below the knee amputation in very short order then certain consequences will follow. Either the infection would spread and he would need a much more debilitating operation and in a worst case scenario die from sepsis spreading before it can be controlled; or in a best case there would be a

[1] Note, no report of the investigation in *CA*'s case ever seems to have been published by the court.

brief improvement from the IV antibiotics but his foot would inevitably become infected again. She further accepted the medical evidence that if he did have the operation, there was a good prospect that he would be able to cope well with the prosthetic leg below the knee.

Importantly, Lieven J was:

> *32.* […] *very aware of the fact that PW is strongly opposed to having an amputation. This is based at least in part on having had the previous amputation and not wanting an operation. Those are perfectly understandable feelings that would be shared by many. However, the medical evidence shows that PW is either going to have to have an amputation, or the infection will spread and he will die (though in an uncertain time frame). In my view, following Peter Jackson J in B* [[2]it *is appropriate to give weight to PW's wishes and feelings, even though he does not have capacity, and given that those wishes are clearly expressed, strongly and consistently held, give them considerable weight. However, unlike B, PW does not want to die. He does not understand the choices he faces - be is labouring under a delusion that there is an alternative, namely IV antibiotics, which the medical evidence shows will not solve or materially alleviate the condition.*
>
> *PW is a 60 year old man, so significantly younger than Mr B, and who if he has the below the knee amputation has a good prospect of regaining mobility, and indeed be in better physical health than he has been in the recent past. I also do not think, though I cannot be totally confident on this, that PW's opposition to the operation is as deep seated, or as fundamental to his dignity, as was Mr B's. I am therefore hopeful that the impact of him having the operation, albeit against his wishes will not fundamentally undermine his dignity and his independence.*

Lieven J therefore reached the clear conclusion that it was in PW's best interests to have the operation.

Comment

One hopes that the investigation into the delay will be published as a follow-up to the judgment, as, on the face of it, Lieven J appears to have been entirely justified in her criticisms. What is particularly important about them was the extent to which they recognise the fact of the delay both prejudiced the Official Solicitor (and hence the court) in terms of potential investigations, but also, more significantly, risked denying PW a fair crack of the whip in terms of participation in a decision of such moment to him. There is a significant body of research which highlights how much worse it is for a person who has been subject to (benign) coercion not to have been able to have any say in the process underpinning that coercion. One would like to hope that the fact that Lieven J was able to speak directly to PW undoubtedly went some way to remedying this aspect of the problem, but the emphasis here is on remedying; it was in reality no proper substitute for proper participation from a much earlier stage.

As regards the substantive best interests decision, the contrast that Lieven J drew with the *Wye Valley* case is of some interest. Not all would

[2] *Wye Valley NHS Trust v B* [2015] EWCOP 60

necessarily have identified Mr B as actively wanting to die – as he told Peter Jackson J: "*'m not afraid of dying, I know where I'm going. The angels have told me I am going to heaven. I have no regrets. It would be a better life than this.*" In any event, however, Lieven J was clearly right to identify that this appeared to be a qualitatively different position – PW appeared clear that he did not want to die, but incapable of appreciating both that his refusal was making that prospect very much more likely, and that his chosen means of trying to secure his life were simply going to be ineffective (insofar as anyone can ever predict anything in medical science).

Framed in CRPD terms, this case could therefore be seen as an example of the tension between a person's will and their preferences, [3] and a situation in which it is both legally and ethically right to override a person's preference to secure their will.

Short note: transparency and committal

In *Office of the Publican Guardian v Stalter* [2018] EWCOP 27, Williams J heard two applications to commit brought by the Public Guardian in relation to breaches of two transparency orders by publishing information about P's identity and whereabouts. The breaches were admitted but there had been failures of procedure in that one of the committal notices referred to the wrong order and, more seriously, one of the orders had not been served personally.

The court waived the defect in the committal notice and dispensed with service of the order not served on the basis that no injustice was caused as the terms of each order were similar and the respondent was aware of what was alleged against him and having been present at the hearing where the order that was not served was made, was aware of its terms and that he must obey it.

The end result was that the breaches were proved but the court decided that no order on the application was necessary because the respondent had confirmed he would thereafter obey the orders and the situation underlying the case had already caused him significant suffering.

The case contains a helpful summary of the procedural and substantive law of committal in the Court of Protection, as well as a reminder that "*applications to commit individuals to prison are essentially criminal in nature*," and that "*when applications are brought by public authorities* […] *the burden on them to ensure that procedurally those applications are sound is even more onerous than it might be in applications brought by a private individual*" (paragraph 34).

Short note: DNA testing and the Court of Protection

In *DCC v NLH* [2019] EWCOP 9 Baker J (as he then was, although the judgment was given after he had become a Court of Appeal judge) considered an application for an order permitting the taking of samples from NLH to assist with DNA testing. Whilst the application was not contentious (it was not disputed that the order was in NLH's best interests), it contains some important

[3] See here, in particular, the writings of George Szmukler: http://georgeszmukler.org/2015/10/about-george-szmukler/.

reminders for practitioners and decision-makers.

NHL was suffering in the late stages of a degenerative neurological disease known as Prion disease. The local authority applied to the Court for an order permitting the taken of samples from NLH to assist with DNA testing. A judge sitting in the family court had declared that the outcome of the DNA tests would be of vital importance to the resolution of proceedings to establish the paternity of a child and because there was a possibility that the child might have inherited the disease from NLH.

The application was listed for a hearing before a circuit judge but NLH's condition deteriorated rapidly and it was decided to make the application as a matter of urgency to the out of hours judge sitting in the Family Division. The Official Solicitor, appointed to act as NLH's litigation friend, agreed to the order being made. However, before the order was made, it emerged that a member of staff from a DNA testing company had already attended at the nursing home and taken the sample with the agreement of NLH's family but without either the formal consent of NHL or approval of the court.

Baker J was entirely satisfied that approval should be given for the taking of the sample and that no injustice or harm was perpetrated in this case. However, the court emphasised the following points:

- Where the patient lacks capacity, an application has to be made to the Court of Protection for an order authorising the taking of a sample; it will be unlawful for the sample to be taken without the Court's permission (although Baker J did not specify the precise basis of this unlawfulness, this must be because it falls outside the scope of 'care and treatment' for purposes of s.5 MCA 2005).
- There is always a judge of the Family Division on duty available to sit in the court of Protection twenty-four hours a day, seven days a week, every day of the year, to deal with urgent applications, usually by telephone.
- There is no excuse for failure to comply with the obligations to obtain the court's permission in circumstances such as these.
- Any infringement in future will run the risk of not only attracting severe criticism from the Court but also potentially incurring liability for damages if a breach of human rights occurred.

Baker J made an order "retrospectively authorising the taking of the sample" (although, perhaps, this should better characterised as a determination that there had been a breach of NLH's rights, but without causing him any loss).

Deputy statistics

In the context of the application recently before the Vice-President challenging the effective presumption against appointment of health and welfare deputies, the OPG provided a letter on an open basis with some interesting statistics regarding personal welfare deputyships, including numbers over time, age profile, and the (small) numbers of those discharged where the person has regained capacity.

Court of Protection statistics

The most recent statistics (covering the period

October to December 2018) have been published by the MoJ. They show that there were 8,626 applications under the MCA, up 10% on the same quarter for 2017. Over the longer term, there was a 2% increase in 2018 compared to 2017, continuing the upward trend seen since 2009. Half of applications made in 2018 related to applications for appointment of a property and affairs deputy. There were 1,052 Deprivation of Liberty applications in October to December 2018, broken down into 140 s.16 applications (presumably deprivation of liberty in the context of wider welfare matters), 663 community DoL applications, and 249 s.21A challenges. Only 780 orders were made in the same quarter, though, and unfortunately the tables do not show how many of these are community DoL orders. We have the distinct impression that the court system is finding it difficult to progress with suitable speed those community DoL applications that are being made (whether that be down to lack of suitable representatives, Visitor resource or judicial resource is not clear).

Short Note: experts and delay

In *Re X & Y (Delay: Professional Conduct of Expert)* [2019] EWHC B9, HHJ Bellamy – unusually – named a jointly instructed expert in family proceedings who had so singularly failed to report in a timely fashion that her instruction had to be terminated. Whilst the following observations were made in the context of family proceedings governed by statutory time-frames that do not (yet) apply in the Court of Protection proceedings, they are nonetheless apposite by analogy:

> *49. The Family Court is heavily dependent upon medical experts from a wide range of specialties to assist it in dealing with some of the cases that come before the court. Experts are required to assist the court in determining threshold issues – for example, in determining whether a child's injuries have been sustained accidentally or whether they are inflicted injuries, in identifying the likely mechanism by which injuries were caused, in identifying the likely window of time within which the injuries were sustained. Experts are also required to assist the court in making welfare decision – for example, as to whether the child is suffering from any mental or psychological difficulties and as to her treatment or therapeutic needs. The Family Court simply could not operate without the assistance of medical expert witnesses.*
>
> *50. However, it is also the case that although the Family Court needs the assistance of medical experts it also owes a duty to the child concerned to determine the proceedings without delay. That is a statutory obligation clearly set out in s.32 of the Children Act 1989. As Paediatricians as expert witnesses in the Family Courts in England and Wales: Standards, competencies and expectations makes clear, it is also an obligation that is placed on medical expert witnesses.*
>
> *51. There will always be occasions when, despite an expert having genuinely believed that he or she could complete a report by the date set by the court, circumstances change and that is no longer possible. Where that happens, the expert should let his or her instructing solicitor know promptly, giving reasons for the delay and indicating the new date by which the report can be completed. An application should be made to the court for the timetable to be varied. Where*

there are justifiable reasons for adjusting the timetable it is unlikely that the court would refuse. What is not acceptable is what has happened in this case where the expert has given a succession of dates by which her reports would be delivered but, as is patently obvious, with no genuine or realistic expectation that any of the dates suggested could, in fact, be met. Courts and experts must work together in a co-operative co-ordinated way. That simply has not happened in this case.

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Alex is recommended as a 'star junior' in Chambers & Partners 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 Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. 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), 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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Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes. To view full CV click here.

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Katherine has a broad public law and human rights practice, with a particular interest in the fields of community care and health law, including mental capacity law. She appears regularly in the Court of Protection and has acted for the Official Solicitor, individuals, local authorities and NHS bodies. Her CV is available here: To view full CV click here.

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

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Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

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Conferences

Conferences at which editors/contributors are speaking

Essex Autonomy Project summer school

Alex will be a speaker at the annual EAP Summer School on 11-13 July, this year's theme being: "All Change Please: New Developments, New Directions, New Standards in Human Rights and the Vocation of Care: Historical, legal, clinical perspectives." For more details, and to book, see here.

Local Authorities & Mediation: Two Reports on Mediation in SEND and Court of Protection

Katie Scott is speaking about the soon to be launched Court of Protection mediation scheme at the launch event of 'Local Authorities & Mediation - Mediation in SEND and Court of Protection Reports' on 4 June 2018 at Garden Court Chambers, in central London, on Tuesday, 4 June 2019, from 2.30pm to 5pm, followed by a drinks reception. For more information and to book, 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 the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

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

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