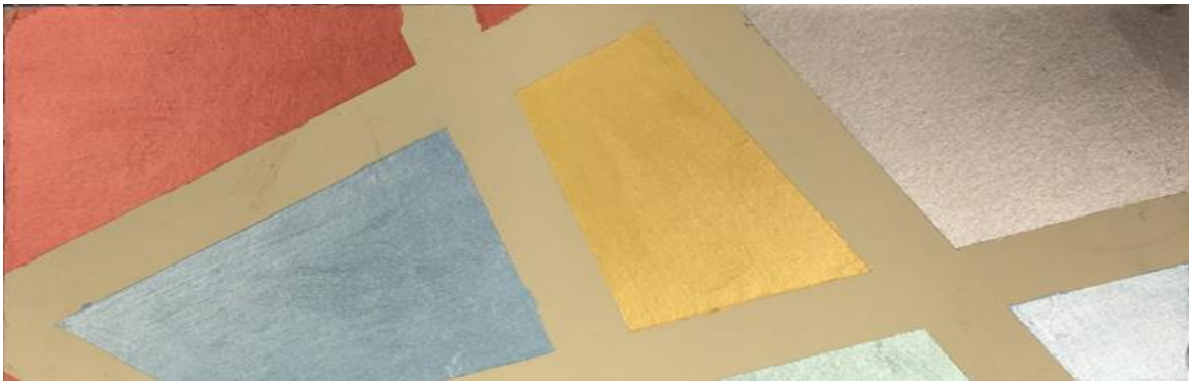
Essex CHAMBERS

MENTAL CAPACITY REPORT:
SCOTLAND

April 2019 | Issue 93



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

Scottish Government review extended and delayed

On 19th March 2019 Ms Clare Haughey MSP, Minister for Mental Health, announced a review of the Mental Health (Care and Treatment) (Scotland) Act 2003. This will substantially broaden the review already being conducted of the Adults with Incapacity (Scotland) Act 2000, and is likely to have the effect of delaying completion of the review of that Act. In my view, however, the Ministerial Statement is to be welcomed. Ever since passage of the 2000 Act, incapacity legislation and mental health legislation have been contained in separate statutes, preceded by separate law reform procedures. The third main relevant area of legislation, covering adult support and protection, is also separate. The Law Society of Scotland has consistently urged comprehensive review. Indeed, the original representations that led ultimately to the 2000 Act urged a comprehensive view of both mental health and adult incapacity law. That was in 1986!

Because of understandable constraints on resources, exacerbated by Brexit, the current Scottish Government review has so far addressed adult incapacity legislation only. Much excellent work has been done. There will be understandable disappointment that the adult incapacity review will now inevitably be slower to reach fruition. Until recently the target was that legislation should be introduced in the Scottish Parliament by the end of 2019. With the widening of the remit, that is now unlikely to happen. Necessary reform of the 2000 Act will be delayed. Nevertheless, I am firmly of the view that the Minister has got it right, for two reasons.

Firstly, the reasons why the Law Society of Scotland has advocated a comprehensive review of all three areas of legislation are sound and substantial. Compliance with modern human rights standards draws them together. The differences have always been troublesome, and have led to contested litigation in which the question "which Act prevails?" proved to be difficult and debatable. There are cultural differences in the ways in which the different regimes are delivered. There is not even a single integrated forum for dealing with cases that may often cross boundaries between different areas of legislation.

The second reason for welcoming the change is that delivering consistently on modern human rights standards requires not only compliance in legislation, but delivery in practice. Relevant Scottish legislation, and in particular Scotland's adult incapacity legislation, was originally world-

leading, and is still highly regarded internationally. It has fallen behind modern human rights standards, but a greater deficit is the result of outdated attitudes in practice. There seems to be a tendency to stick with old ways pending amended legislation. With the likely delay in amending legislation, there can now be no excuse for failure to update attitudes and practice in ways that – within the framework of existing legislation – can better achieve human rights compliance. Delay in law reform provides a space in which the deficits in practice under current legislation must now be tackled.

As noted in the next item, the remit for the review of the 2003 Act will be finalised in conjunction with the chair, once a chair for the review has been identified. In the meantime, there will be a strong "push" to improve practice under existing legislation. There will be consultation on a draft updated code of practice on powers of attorney, followed by consultation on a draft updated code of practice for guardianship and intervention orders. Scottish Ministers are keen to press forward without unnecessary delay, but it is acknowledged that the task will be a massive one.

Adrian D Ward

Mental Health Act review in Scotland: some initial observations

The announcement and scope of the Mental health Act review: a welcome opportunity

As noted above, on 19th March 2019 the Scottish Minister for Mental Health, Clare Haughey, announced what appears to be an ambitious and comprehensive independent review of the Mental Health (Care and Treatment) (Scotland) Act 2003 (the 2003 Act) which aims to improve all categories of rights and protections of those with mental illness, ensure mental and physical health parity and consider the future shape of incapacity, mental health and adult support and protection legislation. In doing so, it will gather the views from a wide a range of people including, importantly, those of service users and carers which will be central to the work. At the time of writing the review chair has not been announced but, once appointed, will decide how the review will proceed.

Before the Public Petitions Committee in the Scottish Parliament on 21st March, Ms Haughey stated:

> *…the principal aim of the review of the mental health legislation, …is to improve the rights of and protections for a person with a mental disorder and to remove barriers to those caring for their health and welfare. It will do that by reviewing developments in mental health law and practice on compulsory detention and care and treatment since the Mental Health (Care and Treatment) (Scotland) Act 2003 came into force and by making recommendations that give effect to the rights, will and preferences of the individual by ensuring that mental health, incapacity and adult support and protection legislation reflects people's social, economic and cultural rights, including requirements under the United Nations Convention on the Rights of Persons with Disabilities and the European convention on Human Rights, and by considering the need for convergence of incapacity, mental health and adult support and protection legislation."*

Such review will build on the current reviews of the Adults with Incapacity (Scotland) Act 2000 (further comment on this can be found in Adrian Ward's commentary in this issue) and of learning disability and autism under the 2003 Act. It should also be noted that on 8th March 2019 a review of the delivery of forensic mental health services was announced by the Scottish Government.

This is an exciting opportunity for Scotland. It not only provides a space for consideration of how to make our law and related practice work better for persons with mental disabilities and their families and carers and improved European Convention on Human Rights (ECHR) rights implementation (both in civil and criminal justice settings). It also provides a space to give serious consideration to what a UN Convention on the Rights of Persons with Disabilities (CRPD) approach to psychiatric care and treatment really looks like.

It is impossible to tell at present which way the review will go. However, the context within which it will take place is informative as to the issues that it will need to address. The following contains a fairly brief discussion and some observations on this.

Context to the review

(1) Mental Health (Care and Treatment) (Scotland) Act 2003

The objective of Scotland's principled and rights based mental health and incapacity legislation was to limit restrict interventions concerning persons with mental disorder and to maximise individual autonomy even where such interventions were deemed necessary.[1] In this it was considered to be world leading at the time of its enactment. However, largely owing to inevitable operational issues and to developments in international human rights standards - notably ECHR jurisprudence and particularly following the adoption of the CRPD – a certain amount of slippage has occurred since then. The Mental Health (Scotland) Act 2015 made some amendments to the 2003 Act – for example, extending the reach of its excessive security provisions, bolstering (to some extent) psychiatric advance statements and independent advocacy, and removing the appointment of 'default' named persons for persons over 16 years of age – but for those who had wished for a more extensive 'root and branch' overhaul of the Act it was a disappointment.

In common with many other jurisdictions these recent human rights developments have called into question some of the fundamental assumptions upon which our mental health and incapacity legislation has been based. For example, the European Court of Human Rights has increasingly expansively interpreted the individual autonomy of persons with mental disabilities, particularly in relation to Articles 5 (liberty) and 8 (respect for private and family life) ECHR rights.[2] This has included challenging the conflation of detention and compulsory

[1] See Scottish Law Commission, *Report on Incapable Adults* (Scot Law Com No 151, September 1995) and Scottish Executive, *New Directions: Review of the Mental Health (Scotland) Act 1984* (SE/2001/56, January 2001) both of which strongly influenced the content and nature of both pieces of legislation.

[2] For example, *Shtukaturov v Russia* (App no 44009/05) (2012) 54 EHRR 27, paras 87-89; *Sykora v Czech Republic* (App no 23419/07) (2012) ECHR 1960, paras

treatment, arguing that each requires separate justification and safeguards. [3] The CRPD Committee's interpretation of what it means for persons with mental disabilities to enjoy rights on an equal and non-discriminatory basis with others is also requiring states and society to reconceptualise how care, treatment, support and protection is justified and delivered.[4] Part of this requires that 'supported decision-making' that gives effect to ["gives effect to" or, per CRPD, "respects"?] the rights, will and preferences of the individual replaces arrangements, such as laws allowing for non-consultation psychiatric treatment and guardianship, that authorise others to make decisions for and about persons with mental disabilities based on diagnosis, capacity assessments and related impairment.[5]

(2) Scotland's Mental Health and Capacity Law: the Case for Reform

There have been several stakeholder calls for reform of the 2003 Act. Additionally, in May 2017, following a mental health and incapacity law reform scoping exercise, the Mental Welfare Commission for Scotland and Centre for Mental Health and Capacity Law (Edinburgh Napier University) published a report *Scotland's Mental Health and Capacity Law: the Case for Reform* . This also took into account the Commission report *Capacity, Detention, Supported Decision Making and Mental Ill Health* that was published following meetings with service user and carer groups.

The Case for Reform noted the international human rights developments. It also noted that although there still appeared to be widespread support for the principles of the Adults with Incapacity and Mental Health Acts these are not necessarily working in the way that was intended for persons with mental disabilities. Concerns existed that individuals may remain disempowered and that resource constraints were undermining the balancing of safeguards and rights. In this context, it should be noted that compulsion under the 2003 Act is rising. The Mental Welfare Commission 2017/18 *Mental Health Act Monitoring Data* report noted the highest number of new compulsory episodes since the 2003 Act was implemented and a general increase in new incidences of compulsion over the last ten years. Similarly, guardianship applications are also on the rise.[6]

The report came to a number of broad conclusions including:

101-103; *HL v UK* (2005) 40 EHRR 32 (see also how this was interpreted in *P (by his litigation friend the Official Solicitor) (Appellant) v Cheshire West and Chester Council and another (Respondents); P and Q (by their litigation friend, the Official Solicitor)(Appellants) v Surrey County Council (Respondent)* [2014] UKSC 19 (Cheshire West)); *A-MV v Finland* (App no 53251/13) (ECtHR, 23 March 2017.

[3] *X v Finland* (App no 34806/040) (2012) ECHR 1371, para 220.

[4] Clough, Beverley A (2018) 'New Legal Landscapes: (Re)Constructing the Boundaries of Mental Capacity Law' 26 *Medical Law Review* 246; Stavert, J (2018) Paradigm Shift or Paradigm Paralysis? National Mental Health and Capacity Law and Implementing the CRPD in Scotland 7(3) *Laws* 26.

[5] Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014) Article 12 Equal Recognition before the Law* (CRPD/C/GC/1, 19 May 2014).

[6] Mental Welfare Commission for Scotland *Adults with Incapacity Statistical Monitoring 2017/18* https://www.mwcscot.org.uk/media/433118/10.09.2018_2017-18_awi_monitoring_report_0709_with_appendix_b.pdf

1. The need to revisit and, where necessary reframe, our mental health and capacity law (also paying attention to its implementation).
2. The need to do more to maximise the autonomy and exercise of legal capacity of individuals with mental disorder (even where significant impairments of decision-making capacity exist).
3. Capacity assessments are potentially discriminatory and there is therefore a need to revisit how 'capacity' and 'significantly impaired decision-making ability' (the 2003 Act 'capacity' test) are assessed by clinicians and practitioners.
4. The need to rationalise and provide greater synergy between the Adults with Incapacity, Mental Health and Adult Support and Protection Acts.
5. It was unclear whether there was currently an overwhelming appetite for unified mental health and capacity legislation in Scotland. There did, however, appear to be enthusiasm for short to mid-term incremental changes which might ultimately pave the way for such legislation.

In summary, the report's recommendations, many of which appear to be reflected in the Minister for Mental Health's recent announcement, included that:

1. There should be a long-term programme of law reform working towards a coherent and non-discriminatory legislative framework that reflects CRPD and ECHR requirements and actively consults persons with lived experience in the process.[7]
2. Increased convergence of the legislation over time should be an explicit aim of this reform process, particularly in relation to the criteria justifying intervention.
3. There should be a single judicial forum to oversee non-consensual interventions.[8]
4. Consideration should be given to the replacement of the 2003 Act 'significantly impaired decision-making ability' test by a capacity test but that '…the priorities before considering such legislative change should be (a) to improve practice and develop consistent standards across medicine, psychology and the law on the assessment of capacity and (b) to identify and implement practical steps to enhance decision making autonomy whenever non-consensual interventions are being considered.'

(3) The review of the Mental Health Act in England and Wales

Of course, the announced review of Scotland's mental health legislation comes very soon after the Wessely Review of the Mental Health Act in England and Wales which reported in December 2018.

[7] Specifically noting this requirement in Article 4(3) CRPD.

[8] The balance of views in the scoping exercise appeared to favour the Mental Health Chamber of the new devolved tribunals structure in Scotland although this was not necessarily borne out by responses to the subsequent Scottish Government Consultation on Adults with Incapacity (Scotland) Act 2000 reform (see https://consult.gov.scot/health-and-social-care/adults-with-incapacity-reform/).

The review report recommended a new Mental Health Act underpinned by the four principles of choice and autonomy, least restriction, therapeutic benefit and the person as an individual. Informal treatment, detention as a last resort, statutory care and treatment plans, shared decision-making, greater legal effect for refusals of treatment, advance planning and independent advocacy are all seen as integral components of such principles. Amongst other things, it also recommends that community treatment orders be revisited, alternatives to coercion be promoted and better support, care and treatment environments tailored to the specific needs and characteristics of patients (including, notably, those from ethnic minorities, children and young persons and persons with learning disability and/or autism) be created in both the civil and criminal justice spheres. It also recommends that use of the Mental Capacity Act 2005 for admission to hospital and treatment for mental disorder should be confined to persons who lack capacity and who are not resisting this, otherwise the mental health legislation must be used.

Whilst some elements of these recommended principles go beyond those in the Scottish 2003 Act they very much broadly reflect the same principles. There is much to commend the English and Welsh review and it is important to acknowledge the enormity of its task and appreciate the remit and time constraints it was working to. Respect for ECHR, and to some extent, CRPD rights are reflected its findings and recommendations but it largely promotes a medical model of disability albeit arguably a more enlightened one that currently operates around the Mental Health Act in England and Wales. The challenge now for the Scottish Government and Parliament is whether or not they are prepared to build on and enhance this or go even further and reconceptualise the approach to laws that allow for the care and treatment of persons with mental disabilities in Scotland.

Certainly, the English and Welsh review had its reservations about fully giving effect to the CRPD Committee requirements regarding Article 12 CRPD (the right to equal recognition before the law)[9] in the context of psychiatric care and treatment. The review does go some way in endeavouring to take the CRPD's requirements into account, notably in relation to reducing the incidence of coercion in psychiatric care and treatment. However, its recommendations are influenced by concern that to give full effect to the CRPD Committee's requirements regarding Article 12 may leave persons who are deemed to lack capacity to take decisions for themselves without protection against exploitation, excessive detention and other abuses and from causing harm to themselves and to others. It is suggested, however, that such concern – which in fairness the review is not alone in expressing - is to misunderstand what the CRPD or its Committee are actually saying.

The CRPD: myth busting in the context of psychiatric care and treatment

Without doubt the CRPD message, particularly as articulated by the CRPD Committee, is challenging to the status quo concerning psychiatric care and treatment. It quite rightly gets to the heart of what equal human rights

[9] *General Comment No 1 (2014)* (see note 5 above).

enjoyment by persons with mental disabilities actually means and this requires a break with traditional understandings of rights enjoyment in this context.[10] It is no longer acceptable that the existence of a disability can be regarded as a reasonable and objective justification for the denial of rights. [11] The approach to rights realisation must be one of removing state and societal obstacles which effectively 'disable' persons with mental disabilities for enjoying their rights on an equal basis with others and also providing the necessary support to achieve this.

This new understanding – the so-called 'CRPD paradigm shift' - does not mean that those with mental disabilities will potentially and effectively be deprived of the necessary support and protection they may from time to time require. Nor does it mean that the public will be placed at greater risk. It is about recognising that persons with mental disabilities are entitled to enjoy the exercise of rights - and this includes the limitation of such rights - on an equal and non-discriminatory basis with others. In other words, parity of treatment in the same circumstances which cannot be achieved if disability or related impairment are used as justification for rights being restricted. This requires asking whether, and what, action be taken in particular circumstances if the person concerned did not have a mental disability and/or related impairment. It also prompts difficult questions about the potentially discriminatory effect of the means by which persons with mental disabilities are assessed in terms of requiring care, treatment, support and protection, or as presenting a risk to others, and how these might be improved or replaced. This includes, amongst other things, giving serious consideration as to when the state may or may not have a positive duty to protect an individual's right to life where the actual or potential harmcomes from that individual.[12]

Recognising, however, that not everyone starts from the same baseline the CRPD requires that persons with mental disabilities may need support for the exercise of legal capacity (or 'supported decision-making') and reasonable accommodation in order to achieve this equal

[10] *General Comment No 1 (2014)* (see note 5 above); Committee on the Rights of Persons with Disabilities, *Guidelines on Article14 of the Convention on the Rights of Persons with Disabilities: the Right to Liberty and Security of Persons with Disabilities* (September 2015); Committee on the Rights of Persons with Disabilities *General comment No. 5 (2017) on living independently and being included in the community* (CRPD/C/GC/5, 27 October 2017); Committee on the Rights of Persons with Disabilities *General Comment No. 6 (2018) on equality and non-discrimination* (CRPD/C/GC/6, 26 April 2018).

[11] *General Comment No. 6 (2018)* (above).

[12] Article 2 ECHR and Article 10 CRPD. To start this discussion it is well worth reading A Ruck Keene 'Deprivation of liberty and disability – its meaning and (il)legitimacy', *Mental Capacity Law and Policy* (22 February 2019) http://www.mentalcapacitylawandpolicy.org.uk/deprivation-of-liberty-and-disability-its-meaning-and-illegitimacy/; K Wilson 'The Call for the Abolition of Mental Health Law: The Challenges of Suicide, Accidental Death and the Equal Enjoyment of the Right to Life' (2018) (volume 18, issue 4) *Human Rights Law Review*; and E Flynn 'Disability, Deprivation of Liberty and Human Rights Norms: Reconciling European and International Approaches' (2016) (issue 22) *International Journal of Mental Health and Capacity Law* http://journals.northumbria.ac.uk/index.php/IJMHMCL/article/view/503

enjoyment of rights. Supported decision-making allows for a person's will and preferences to be given effect, either by the person themselves or by others on their behalf. Moreover, the CRPD Committee states that where it is impossible, despite significant efforts to do so, to ascertain a person's will and preferences then decisions can indeed be made on behalf of that person based on a 'best interpretation' of what these would be. The CRPD approach also acknowledges that where a person with a mental disability is at risk or poses a risk to others then interventions, under civil or criminal law (as appropriate), are permissible provided such interventions would be applied in the case of persons without mental disabilities in the same circumstances. It further requires that environments causing or human perpetrators of actual or potential harm to a person with a mental disability are targeted rather than the person themselves. Finally, although disability cannot be used to decide whether or not an intervention takes place the CRPD advocates that equal enjoyment of rights requires that support and reasonable accommodation appropriate to such disability is provided whilst that intervention is implemented.

It would, of course, be a mistake to underestimate the enormity of the task of achieving the CRPD paradigm shift in any meaningful sense. However, if Scotland is serious about giving effect to the CRPD then this must be embraced. It requires appropriately tailored resources to be allocated at the point of need so that this can be achieved for persons with mental disabilities. At a cultural, policy and practice level, it further requires both the state and society to adopt and respect a wider range of individual behaviour, choices and personality which will also necessitate a re-examining of existing notions of acceptable and unacceptable risk.

CRPD and ECHR: tension or enhancement?

Scottish devolved law must be enacted and implemented with ECHR compliance in mind.[13] Admittedly, despite it increasingly adopting an expansive approach to the autonomy of persons with mental disabilities, the European Court of Human Rights' approach is more aligned to the medical model of disability which seeks to merely define the perimeters of psychiatric and other intervention rather break down the obstacles to equal rights enjoyment this presents.

The tension between the ECHR approach and CRPD social model of disability, together with the fact that the ECHR constitutionally carries greater legal weight in Scotland, can sometimes be seen as an impediment to full CRPD implementation but there is no reason why this needs to be so. In fact, Scottish devolved legislation and policy must not violate the UK's international obligations, and this includes those as a CRPD state party, [14] and the Scottish Government is already engaging with this treaty.[15] It is possible for the ECHR and CRPD – if the CRPD model of equal and non-discriminatory rights enjoyment is properly operationalised – to complement each other.

[13] ss 29(2)(d) and 57(2) Scotland Act 1998; ss 2, 3 and 6 Human Rights Act 1998.
[14] ss 35(1)(a) and 58(1) Scotland Act 1998.
[15] See the Adults with Incapacity Act review (and related provision in the Scottish Government *Mental Health Strategy 2017-2027*) and Scottish Government December 2016 CRPD Delivery Plan.

However, if the CRPD is to be given genuine effect then it is necessary to view the rights of persons with mental disabilities through its lens of achieving equal and non-discriminatory enjoyment of such rights. This will not be achieved through a medical model lens.

Conclusion

Many issues will have to be addressed by the Scottish mental health legislation review quite apart from what will inevitably be a range of competing views on the role and purpose of mental health law in Scotland. These include, but are not to confined to, whether capacity and decision-making assessments – given that they trigger interventions - can be better done and truly be non-discriminatory or need to be replaced, whether unified legislation (such as that in Northern Ireland) will be the way forward and how the interface between the law and practice relating to capacity, mental health, adult support and protection and criminal justice can be improved. Continued research into what works in terms of alternatives to physical and psychological restraint and coercion, and supported decision-making, so that the voice of the individual is genuinely heard and drives the nature and implementation of any interventions will be required. The role of the courts and Mental Health Tribunal/Mental Health Chamber as guardians of the rights of persons with mental disabilities and how these will need adapt to developing human rights requirements must be examined.[16]

It is impossible at this stage to speculate just how radical the outcome of the proposed review will ultimately be. The possibilities in theory are almost endless and, given the international attention paid to our current mental health and incapacity legislation when originally enacted, it is highly likely the review will be observed with interest elsewhere. As mentioned earlier, *The Case for Reform* report noted that despite the best intentions leading to the principles that underpin our existing mental health, and incapacity, legislation the reality is that these principles are not necessarily being realised for persons with lived experience of mental disorder. The Scottish review thus provides a valuable opportunity to re-examine how adequately our law and practice caters for the real needs of persons with mental disabilities and their families and carers and how we can enhance human rights compliance.

Jill Stavert

Who pays? Yet again!

On a number of occasions, we have reported cases where there have been difficulties relating to movements of adults between Scotland and England. In the *Milton Keynes* case (reported upon in our December 2015 newsletter) an adult was permanently settled in a nursing home in Scotland, ordinary residence might well have been held to have moved to Scotland under English ministerial guidance, but the Scottish court arrived at a similar conclusion to the Scottish ministerial guidance and held that the English local authority was obliged to continue to pay.

[16] Noting here the ongoing Centre for Mental Health and Capacity Law (Edinburgh Napier University) led *Mental Health Tribunal for Scotland: The views and experiences of patients, Named Persons, Practitioners and Tribunal members* project.

The case of *Priory Healthcare Limited v Highland Health Board* ([2019] CSOH 17; 2019 SLT 356) is rather different. The adult in that case had been receiving care and support in Scotland under section 25 of the Mental Health (Care and Treatment) (Scotland) Act 2003. There is a significant difference between paragraphs (a) and (b) of section 25(1). Under section 25(1)(a), the relevant local authority has a duty to provide care and support for persons who are not in hospital and who have or have had a mental disorder (or must secure the provision of such services). Under section 25(1)(b), if the adult is in hospital then the local authority "may" provide such services.

The adult travelled to England voluntarily in or about early October 2016. She had been ordinarily resident in Scotland. She took a taxi to Cambridge. She was initially admitted to Addenbrookes Hospital, Cambridge. She was detained under the (English) Mental Health Act 1983. She was assessed as being a vulnerable adult and at risk of self-neglect, due to non-compliance with medication and delusional beliefs. NHS Cambridgeshire, who managed Addenbrookes Hospital, transferred her to a facility operated by Priory Healthcare Limited.

Some time after the adult's transfer to the Priory facility, Highland Health Board started paying Priory's invoices without challenge. They did so until 25th April 2017, when they advised Priory that they would no longer pay fees incurred after 30th April 2017. Priory maintained that Highland Health Board were obliged to continue paying. There were three strands to Priory's case. The first was an assertion that the contract with Priory was entered into by NHS Cambridgeshire as agents for Highland Health Board. The second was that Highland Health Board had adopted and ratified the funding agreement. The third was that Highland Health Board were personally barred from disputing their contractual liability. All three arguments failed.

It was not disputed that Highland Health Board was the relevant "local authority" for the purposes of section 25.

Priory contended that the contract that Priory alleged to have entered between the parties contained an implied term that the contract could not be terminated by Highland Health Board if such termination breached the statutory duties that Highland Health Board owed to the adult under section 25, and would place her at material risk of harm. In his decision, Lord Bannatyne stated that he "initially found the arguments, very powerfully and eloquently advanced by Senior Counsel for the Pursuer, in respect of the primary issue of contract formation to be attractive ones". Lord Bannatyne's lengthy and careful narration of the arguments, and his analysis of them, should be referred to. Ultimately, however, the following relatively simple point was crucial to Priory's claim failing. At the time of formation of the alleged contract, the adult was an adult already in hospital to whom the discretionary provisions of section 25(1)(b) applied. She was not an adult in the community to whom the mandatory provisions of section 25(1)(a) were applicable.

Adrian D Ward

Caution for powers of attorney?

Concern has been expressed by some practitioners who became aware of apparent moves towards requiring caution for powers of attorney. Upon enquiry, the Scottish

Government team conducting the review of the Adults with Incapacity (Scotland) Act 2000 has provided helpful clarification. They have explained that the general concept of caution for powers of attorney has been mooted for some years. Before any proposal could be made about such caution, it is necessary to assess whether there would be a viable market product. The Scottish Government team have initiated such an assessment. They are liaising with current providers of caution to assess product availability, and associated caveats and limitations that might be placed on such a product. Those providers have been clearly advised that this is a fact-finding exercise only, and that nothing should be inferred from the enquiry.

The Scottish Government team intend that, following this exploratory exercise, a report will be prepared covering the wider matters that ought properly to be considered in the course of such a deliberation. If thereafter any decision is made to make any proposal regarding caution for powers of attorney, that will be formally disseminated and consulted upon.

It is accordingly premature to comment beyond making the obvious points that (firstly) some granters might, particularly when properly advised, welcome the opportunity to stipulate that their attorneys should find caution, but (secondly) this would obviously be a matter for such granters, and it would be contrary to the basic human rights principles of autonomy and self-determination to impose such requirements upon granters who opted not to require caution.

Adrian D Ward

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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.

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 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.

Jill Stavert: j.stavert@napier.ac.uk

Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law 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. 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.

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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