39 Essex Chambers

MENTAL CAPACITY REPORT:
THE WIDER CONTEXT
July 2020 | Issue 106

Welcome to the July 2020 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: LPS delayed to April 2022; alcohol dependence and other capacity conundrums; stem cell donation and altruism, and when to come to court in medical treatment cases;

(2) In the Property and Affairs Report: updated OPG guidance on making LPAs under light-touch lockdown and a face-off between potential professional deputies;

(3) In the Practice and Procedure Report: a basic guide to the CoP; litigation capacity and litigation friends and observations about intermediaries and lay advocates;

(4) In the Wider Context Report: capacity and the Mental Health Tribunal, a change of approach to s.117 aftercare and lessons learned from a close encounter with triage;

(5) In the Scotland Report: the Scott Review summary of responses to its initial survey and a response from the Chair to the critique in our last issue.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also find updated versions of both our capacity and best interests guides. We have taken a deliberate decision not to cover all the host of COVID-19 related matters that might have a tangential impact upon mental capacity in the Report, not least because the picture continues to change relatively rapidly. Chambers has created a dedicated COVID-19 page with resources, seminars, and more, here; Alex maintains a resources page for MCA and COVID-19 here.

If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the Small Places website run by Lucy Series of Cardiff University.

Editors
Alex Ruck Keene
Victoria Butler-Cole QC
Neil Allen
Annabel Lee
Nicola Kohn
Katie Scott
Katherine Barnes
Simon Edwards (P&A)

Scottish Contributors
Adrian Ward
Jill Stavert

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.

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Social distancing, testing and COVID-19

We have updated our guide to social distancing and those with impaired decision-making capacity. Alex has also done a shedinar with the National Mental Capacity Forum on testing for those with impaired decision-making capacity.

"Abandoned, forgotten and ignored"

Inclusion London has published a hard-hitting interim report on the impact of Coronavirus on disabled people, drawing upon survey evidence, and, as the introduction outlines, painting

> *a stark picture. From the outset, we have been discriminated against, forgotten, and in some cases abandoned as policymakers have ignored our needs. Or, at best considered them as an afterthought.*

SCIE best interests guidance for COVID-19

SCIE has published a helpful guidance document "Best interests decisions: A COVID-19 quick guide" covering some of the most common scenarios encountered at present, such as testing, social distancing, self-isolating and hospital discharge.

4th LeDER report

The latest annual report from the Learning Disabilities Mortality Review (LeDeR) programme has now been published, showing deaths in the calendar year 2019. It shows that treatable causes of death accounted for 403 per 100,000 deaths in people with learning disabilities, compared to just 83 per 100,000 deaths in the general population. The report

indicates that the majority of people with learning disabilities continue to die before reaching the age of 65. In the general population, 85 per cent of deaths happen at or after the age of 65, but in sharp contrast this is the case for just 37 per cent of people with learning disabilities. As with previous years, the recommendations include recommendations relating to seeking to increase understanding of, and adherence to, the Mental Capacity Act.

LGO taking complaints again

The Local Government and Social Care Ombudsman has now resumed all existing casework and from 29 June has been taking on new complaints through its website. As the website notes:

> *Over the coming weeks, it is likely the Ombudsman will receive complaints about events which have happened during the crisis. The law still requires people to have complained to their local council or care provider before they bring their complaint to the Ombudsman.*

Short note – the lockdown regulations in the courts

We briefly mention the judicial review challenge to the legality of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020[1] in *Dolan et al v Secretary of State for Health and Social Care et al* [2020] EWHC 1786 (Admin). Amongst the wide-ranging arguments were that the Regulations were outside the powers conferred by Parliament, and that the restrictions breached Articles 5 and 8 ECHR. After setting the pandemic scene, Mr Justice Lewis dismissed each of the arguments. The Regulations were lawfully made under the Public Health (Control of Diseases) Act 1984. The challenge to the initial version of the restrictions on movement were historically academic, so focusing on the amended regulation 6 which prohibited people from staying overnight elsewhere, it was held that this did not constitute a deprivation of liberty:

> *71 … Persons will be in their own home overnight. They will be with their families or others living with them as part of their household. They will have access to all the usual means of contact with the outside world. The prohibition is on staying overnight at a place other than their home (although that will, in practice necessitate them staying in their own home overnight). They are able to leave their home during the daytime to work or to meet others (subject to the requirements of regulation 7 on gatherings). Furthermore, regulation 6 is limited in time and has to be reviewed regularly and the restriction must be removed as soon as it is no longer necessary to combat the threat posed. The facts fall far short of anything that could realistically be said to amount to a deprivation of liberty within the existing case law.*

In relation to Article 8 interferences, these were necessary and proportionate to the legitimate aim of protecting health:

> *78. Any interference is proportionate. The restrictions are limited. Persons remain free to live with family members or*

[1] Now repealed – Alex has summarised the current Regulations in England from the perspective of those working with people with impaired decision-making capacity here.

> *friends forming part of their household. They may communicate with other and family members by means of communication such as telephones and, if available, internet facilities. They may physically meet family and friends outdoors (subject to the restrictions on numbers in regulation 7). Given the limited nature of the restrictions, the gravity of the threat posed by the transmission of coronavirus, the fact that the Regulations last for a limited period and have to be reviewed regularly during that period, and restrictions must be terminated as soon as no longer necessary to meet the public health threat, there is no prospect of the current regulations, at the current time, being found to be a disproportionate interference with the rights conferred by Article 8 of the Convention.*

This is unlikely to be the last case to challenge aspects of the measures taken by the government, both in terms of the law and policy.

Lessons learned from a close encounter with triage

Readers may find of some interest this paper, a narrative reflection from the viewpoint of a COVID-19 Ethics Working Group (of which Alex was a member) in a large London hospital in the middle of the COVID-19 pandemic. Its ethical claim is that a lack of detail in national decision-support guidelines, together with a lack of good quality and visible information sharing between clinical decision-makers in hospitals and communities, led to fear-driven anticipatory triage with serious consequences for patients and NHS staff. The paper offers some recommendations for minimising these consequences ahead of a potential second wave.

Capacity to apply to the MHT revisited

SM v Livewell Southwest CIC (Mental health [2020] UKUT 191 (AAC) (Upper Tribunal (AAC) (Nicol J, UTJ Ward and Tribunal Judge Johnston, DCP))

Mental capacity – assessing capacity

Summary[2]

In an unusual split decision in the Upper Tribunal (Administrative Appeals Chamber), the question of the capacity that a patient requires to bring an application to the Mental Health Tribunal (strictly the First-Tier Tribunal (HESC) was reconsidered. In particular, the question was whether the decision in *VS v St Andrew's Healthcare* [2018] UKUT 250; remained good law. That decision set the test as a two part-one: does the applicant understand that she is detained; and does she understand that the Tribunal has power to discharge her?

The majority (Nicol J and UTJ Ward) held that the decision did remain good law, their reasons for so doing being set out at paragraph 77.

> a. *We repeat that the present legislative structure does not include an automatic referral to the Tribunal to test the legality of the patient's detention. In MH v UK the Strasbourg Court rejected the proposition that such an automatic referral was required by Article 5(4) of the ECHR.*

[2] Note, Neil having been involved in the case, he has not contributed to this summary.

b. *Instead the system chosen by our legislature depends in the first place on there being an 'application' to the Tribunal.*

c. *It is the case, as we have said, that there is no express requirement for the person who makes such an application to have capacity. However, we draw no conclusion from this. It is entirely unsurprising that that sort of matter should have been left to implication.*

d. *The making of an application has consequences. Only one application under s.66(1)(a) can be made. Under s.66(1)(b) only one application can be made every 6 months. We consider it sensible and appropriate that there should be some test of capacity for an 'application' to have those consequences.*

e. *The test of capacity in VS is deliberately couched at a low level. That is consistent with what Lady Hale in H (at [4]) described as the 'very limited capacity required to make an application'. As Judge Jacobs said, it would not be appropriate for the test as to capacity to initiate an application to be the same as the test of capacity to conduct the application. That would be too demanding. It would also, as Judge Jacobs also said, (though rather more diplomatically) make a nonsense of the power to appoint a representative for a patient who became incapacitated after starting the application.*

f. *It may be thought that those who have been subjected to detention under the MHA 1983 will be more likely, because of their mental ill health to lack capacity. That may be, but plainly there is not an automatic equation between the two.*

g. *Measures have been taken to assist patients who are detained so that they do have sufficient understanding of what is involved to make an application. (As Judge Dumont observed in granting permission to appeal, the government's response to the judgment in MH v UK drew attention to the provisions for IMHAs in the Mental Health Act 2007). Notably these include the mandatory explanation of rights under MHA 1983 s.132 and the assistance which can be (and was in the present case) offered by an IMHA.*

h. *However, Parliament has stopped short of giving an IMHA the power to make an application to the Tribunal on behalf of an incapacitated patient. That omission must have been deliberate. The difficulty faced by an incapacitated patient was apparent from the MH litigation (which had reached the House of Lords, if not the Strasbourg Court, by the time the Mental Health Bill 2007 was before Parliament) and the 2007 Act did specifically address the issue of incapacitated patients in other respects (see, for instance MHA 1983 s.130B(4) and s.130C(4A)). We note that Modernising the Mental Health Act: increasing choice, reducing compulsion: the Final Report of the independent review of the Mental Health Act 1983 (2018) p.124 recommended giving IMHAs such a power, but so far that legislative change has not yet been made.*

i. *In the present case there was the added complication of the Appellant's pregnancy. In our view the F-tT gave perfectly rational reasons why it decided against adjourning the hearing to see whether it could hear evidence from Mr Houghton, the Appellant's IMHA.*

j. *We agree with Mr Allen that the legislation does distinguish between 'wishes' (which may, for instance, include a wish to leave the hospital) and decisions. We also agree that the relevant decision in the present case was the decision to make an application to the Tribunal. We cannot see how the test for capacity to make that decision could be less than Judge Jacobs analysed in VS.*

k. *In our view the test for capacity to make an application under s.66(1)(a) (where the issue will be whether the patient could be detained under MHA 1983 s.2) must be the same as the test for capacity under s.66(1)(b) (where the issue will be whether the patient could be detained for treatment under MHA 1983 s.3). After all, in both paragraphs the legislation refers to 'an application' and, in accordance with the usual canons of statutory interpretation, one would expect Parliament to have intended that the same word had the same meaning in the two paragraphs.*

l. *There are alternative ways by which the Tribunal can have jurisdiction to determine the legality of detention. Notably, there is the Secretary of State's power to make a reference under MHA 1983 s.67. In the present case no one raised that possibility with the Secretary of State. We will return to that topic when we turn to Judge Dumont's third indent.*

m. *The legislative scheme with which we are concerned has significant differences to that which governs situations where it is thought necessary to deprive someone of their liberty. Both situations may involve people with mental ill health, but the legislative structures differ. Thus, there is scope for the legality of detention to be reviewed by the Court of Protection. Such a review may be triggered by the person concerned, but it may also be initiated by the 'Relevant Person's Representative' - see Mental Capacity Act 2005 Schedule 1A paragraph 102(3)(b). We respectfully do not consider that the second of the two limbs of para.86(1) of RD can bear the weight Judge Johnston seeks to place on it; it is discussing what the position is where the patient does not have capacity, rather than indicating when she should be taken to have it, and is a reflection of the existence of the role of Relevant Person's Representative with its attendant responsibilities. Because of these differences, we have not found the analogy with the situation in the Court of Protection to be particularly helpful.*

Deputy Chamber President Sarah Johnston (i.e. the judicial head of the Mental Health Tribunal in England) was in the minority, holding that *VS* sets the bar too high in requiring an understanding that the FtT has power to discharge the patient. She observed in so doing that:

> *120 It is hard to countenance that the law would operate to deny the opportunity for a hearing to a patient with a mental disorder who is waiting outside the Tribunal and is ready to participate. Justice would not be served.*
>
> *121. In my view striking out an application on the formal basis that the patient does not understand the Tribunal is a body who can discharge the applicant is not in keeping with the application of the overriding objective. There would be a duty to strike out an application if it was not properly made, for example, if the patient had already made an application in the specified period, or if it was an application made for detention under the wrong section. Even in the latter case it is the Tribunal's practice to ask for an amended application to be made to facilitate access to justice. It would not justify the striking out of M's application were it not for the test in VS. If the test is "I want to be free to leave" and the only avenue for this is an application to the Tribunal, striking out the case is not in accordance with the overriding objective.*

At paragraph 86, the UT also set out a useful summary of the procedure that should be followed

> a. *Wherever possible the applicant and her representatives should be alerted that her capacity to make the application may be an issue.* [...]
>
> b. *If the Tribunal considers that the applicant's capacity has fluctuated and, while she did not have capacity at the time of the application, she does have capacity at the time of the hearing, the Tribunal should consider inviting the applicant to make a fresh application, abridging any of the procedural obligations and proceeding to consider the substance of the application.* [...]
>
> c. *Otherwise, the F-tT was correct that what matters is whether the applicant had capacity at the time the application was made. Making a decision as to that issue may be difficult, but it is no different from the task that courts and tribunals are regularly called to make about events in the past.*

In terms of referrals to the Secretary of State, the mechanism by which patients who lack capacity to apply can nonetheless have their situation considered, the UT noted at paragraph 88:

> a. *The Code says that hospital managers should raise this possibility with the Secretary of State if, among other reasons, the patient lacks capacity to do so herself.*
>
> b. *However, the Code also says that anyone can make such a suggestion to the Secretary of State. The IMHA who will have seen the patient and had the opportunity to assess their wishes would be well suited to make the suggestion to the Secretary of State, if the IMHA considered that the patient wished to leave but lacked capacity to make an application to the Tribunal.*
>
> c. *A third possibility would be the Tribunal itself. In a case, such as the present, where the Tribunal had found (a) that the patient lacked capacity, but (b) wished to leave the hospital, it would have been very*

> *sensible for the Tribunal to have done so.*
>
> *d. Indeed, in other cases (uncomplicated by the patient's pregnancy and imminent confinement in this case) a combination of these factors may well lead the Tribunal to consider whether, before striking out the application, it would be sensible to adjourn for a short period to see if the Secretary of State wished to make a reference so that the Tribunal could consider as expeditiously as possible whether the statutory conditions for detention were made out*

Comment

It is perhaps striking that the judicial head of the Mental Health Tribunal took a different, and more expansive, view of Article 5(4) than did the majority. It is perhaps also to be hoped that in due course some of the issues that arose here will fall away if, as the Review of the Mental Health Act proposed, IMHAs could be empowered (in a similar fashion to RPRs under DoLS) to bring applications on behalf of patients who lack capacity, rather than having to go the round-the-houses route of bringing about a referral to the Secretary of State and then, in turn, to the Tribunal.

Vulnerable parties and witnesses in Employment Tribunal proceedings

Drawing heavily upon the recent work of the Civil Justice Council in this area, the President of the Employment Tribunal for England & Wales has issued guidance designed to:

> *focus the attention of all Employment Tribunal judges and members, parties, witnesses and representatives upon the issue of vulnerability, however that issue might arise or appear. There is no universal definition of vulnerability for this purpose, but a good test of vulnerability might be whether the person is likely to suffer fear or distress in giving evidence because of their own circumstances or those relating to the case.*

Change of approach to ordinary residence for s.117 after-care

On 24 June 2020, the Department of Health and Social Care set out its position when determining ordinary residence under s.117(3) of the Mental Health Act 1983. Although the 'note' is to be read alongside its statutory guidance, the two are entirely incompatible and the latter has yet to be amended to reflect the change of position. According to the guidance at para 19.68, there is no deeming provision for s.117. So a person's ordinary residence for MHA purposes is determined using the *Shah* test. As a result, the responsible after-care bodies can change if the person's ordinary residence changes. However, para 19.68 no longer represents the Department's position and will be updated once the case of *R (Worcestershire County Council) v Secretary of State for Health and Social Care and Swindon Borough Council* (ie Ordinary Residence 7: 2020 determination) has been decided.

In the *Worcestershire* case, the patient was ordinarily resident in Council B before being first detained under the MHA. Following discharge, she was placed by Council B into Council A and subsequently re-detained under a s.117 qualifying provision. Under the statutory

guidance, Council B would then be responsible for her after-care provision. However, the Secretary of State instead determined that such responsibility should stay with Council B for the following reasons:

1. The Supreme Court decision in *R (Cornwall CC) v SSH* [2016] AC 137 should apply and so "for fiscal and administrative purposes" Council B should be responsible.
2. Alternatively, "immediately before being detained" in s.117(3)(a) should be interpreted as "immediately before being *first* detained". And, at that time, she was ordinarily resident in Council B.
3. Alternatively, Council B's s.117 duties did not lapse when she was detained for a second period.

Pending the resolution of the judicial review proceedings, there is significant legal uncertainty. Disputing local authorities will need to ensure that without prejudice agreements are reached to avoid prejudice to patients. And no doubt a rush of referrals seeking Secretary of State determinations will now come which, pending *Worcestershire*, will be stayed unless there are exceptional circumstances. Interestingly, s.117 was an historical mistake made by the Conservative government when it accepted Labour's opposition amendment to what ultimately became the MHA 1983, assuming (wrongly) that it merely duplicated the general NHS duties. One cannot help but wonder whether a second mistake of similar gravity has been made in the wording of the Care Act 2014 which amended s.117. Given the significance of the issue, it could be some time before the *Worcestershire* case is finally resolved and clarity restored. If only the case could also look at which CCG is responsible for s.117 as that is even more uncertain!

RESEARCH CORNER

We highlight here recent research articles of interest to practitioners. If you want your article highlighted in a future edition, do please let us know – the only criterion is that it must be open access, both because many readers will not have access to material hidden behind paywalls, and on principle.

This month, we highlight the (slightly belated) second 2019 issue of the International Journal of Mental Health and Capacity Law, edited by our Scottish contributor Jill Stavert, and featuring, amongst others, a timely article by Lucy Series "On Detaining 300,000 People: the Liberty Protection Safeguards."

Editors and Contributors

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

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.

Victoria Butler-Cole QC: vb@39essex.com

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

Neil Allen: neil.allen@39essex.com

Neil has particular interests in ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. When time permits, Neil publishes in academic books and journals and created the website www.lpslaw.co.uk. To view full CV click here.

Annabel Lee: annabel.lee@39essex.com

Annabel has experience in a wide range of issues before the Court of Protection, including medical treatment, deprivation of liberty, residence, care contact, welfare, property and financial affairs, and has particular expertise in complex cross-border jurisdiction matters. She is a contributing editor to 'Court of Protection Practice' and an editor of the Court of Protection Law Reports. To view full CV click here.

Nicola Kohn: nicola.kohn@39essex.com

Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 5th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2019). To view full CV click here.

Editors and Contributors

Katie Scott: katie.scott@39essex.com

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.

Katherine Barnes: Katherine.barnes@39essex.com

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. 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; honorary membership of the Law Society of 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

Members of the Court of Protection team are regularly presenting at webinars arranged both by Chambers and by others.

Alex is also doing a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

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.

We are taking a break over August, and hope that at least some of you are able to do so too. Our next edition will be out in September. 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.

Michael Kaplan
Senior Clerk
michael.kaplan@39essex.com

Sheraton Doyle
Senior Practice Manager
sheraton.doyle@39essex.com

Peter Campbell
Senior Practice Manager
peter.campbell@39essex.com

Chambers UK Bar
Court of Protection:
Health & Welfare
Leading Set

The Legal 500 UK
Court of Protection and
Community Care
Top Tier Set

clerks@39essex.com • DX: London/Chancery Lane 298 • 39essex.com

LONDON
81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER
82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

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

KUALA LUMPUR
#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur,
Malaysia: +(60)32 271 1085

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