MENTAL CAPACITY REPORT: HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

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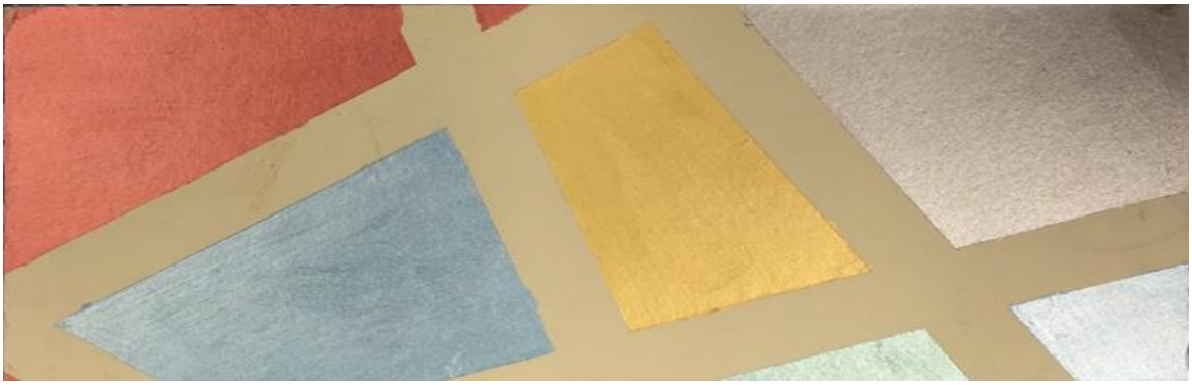

Welcome to the June 2017 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: standing in the shoes of P in a difficult decision as to cancer treatment, s.21A and the LAA, Welsh DoLS and Sir James Munby P on the warpath;

(2) In the Property and Affairs Report: Charles J puts statutory wills under the spotlight and new OPG guidance on travel costs;

(2) In the Practice and Procedure Report: the minutes of the Court of Protection Court Use Group;

(3) In the Wider Context Report: an election corner special report, new resources for GPs and about ADRTs, psychiatric treatment under scrutiny from Europe and moves to secure greater cross-border protection for adults;

(4) In the Scotland Report: important perspectives on supported decision-making, independent living and legislative reform;

Remember, you can find all our past issues, our case summaries, and more on our dedicated sub-site here, and our one-pagers of key cases on the SCIE website.

You are also invited to our 10th birthday party for the MCA 2005 to be held on 29 June, with the keynote speech to be delivered by Baker J and a packed programme of talks and masterclasses concerned with key aspects of the Court of Protection's work and future. For details, and to book, see here.

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Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Annabel Lee
Anna Bicarregui
Nicola Kohn
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.

Contents

Appeals update

To the considerable surprise of the editors, the Supreme Court has refused permission to appeal in the ***Ferreira*** case concerning deprivation of liberty in the intensive care setting. The judgment of the Court of Appeal is therefore authoritative and binding as concerned the very limited place of deprivation of liberty in the context of urgent life-saving medical treatment.

The Court of Appeal will be considering in July the appeal against the decision of Charles J in ***Briggs*** that he could consider the question of whether CANH was in Mr Briggs' best interests within the four walls of a s.21A application (and the consequential funding implications)

We still await the decision of the Court of Appeal in the *Birmingham CC v D* case heard in February concerning the ability of parents to consent to the confinement of their children.

Putting yourself in the shoes of P

The Acute Trust v R & The Mental Health Trust [2016] EWCOP 60 (Baker J)

Best interests – medical treatment

Summary

This application, heard before Christmas, but only recently appearing on Bailii, concerned a 40-year old man (R) suffering from chronic paranoid schizophrenia who had been diagnosed with an incurable brain tumour. The acute trust responsible for his care sought a declaration that it was lawful and in his best interests not to undergo treatment for the tumour but rather to be provided with palliative care only.

R had a long history of mental health problems. He had been admitted to hospital under s.3 MHA 1983 on a number of occasions and had been in hospital continuously for nearly six years. His illness was characterised by a range of paranoid delusional beliefs and abnormal perceptions, including the belief that he was being interfered with by other people. He had also exhibited intermittent hostile and threatening behaviour.

There was an uncontested assessment as to his capacity holding that he lacked capacity to conduct the proceedings or to make medical decisions about the medical treatment for his brain tumour by reason of the disturbance in the function of his mind or brain. R had been inconsistent about whether or not he has a tumour, on occasions accepting that he has, on other occasions denying it.

Standard treatment for R's brain tumour would be for the tumour to be removed by surgery and for the patient, thereafter, to receive a course of daily radiotherapy over a period of six weeks and possibly chemotherapy thereafter. The tumour was considered to be not curable so the aim of treatment would be to prolong his life and maintain his quality of life.

The judge noted that surgery had side effects which were exacerbated by the fact that R was overweight and because of his psychotic condition, it would be hazardous to use dexamethasone, a drug commonly used to reduce the risk of brain swelling post-operatively. Both radio therapy and chemotherapy also had side effects but the more important consideration on the facts of this case was that R would have to be compliant with the sessions of radiotherapy and chemotherapy.

The view of the clinicians and in particular the consultant oncologist was that the risks of the treatment were too high in relation to its potential benefits. R's psychiatrist considered that managing R in the pre-, peri- and post-operative periods would be very difficult, that the treatment would create a significant risk to R and would be likely to cause him distress which would exacerbate his mental health symptoms. R's family agreed with the view of the clinicians.

Baker J referred to ss.1(5) and 4 of the MCA 2005 and quoted the relevant passages of the Mental Capacity Act Code of Practice (paras 5.31 – 5.33). He also cited the Supreme Court case of *Aintree University Hospitals NHS Foundation Trust v James* [2014] AC 591 and in particular these paragraphs from the judgment of Baroness Hale of Richmond:

> *the starting point is a strong presumption that it is in a person's best interests to stay alive... this is not absolute. There are cases where it will not be in a patient's best interests to receive life-sustaining treatment* (para 35)
>
> and
>
> *The most that can be said, therefore, is that in considering the best interests of this particular patient at this particular time, decision-makers must look at his welfare in the widest sense, not just medical but social and psychological; they must consider the nature of the medical treatment in question, what it involves and its prospects of success; they must consider what the outcome of that treatment for the patient is likely to be; they must try and put themselves in the place of the individual patient and ask what his attitude to the treatment is or would be likely to be; and they must consult others who are looking after him or interested in his welfare, in particular for their view of what his attitude would be* (para 39).

The acute trust had completed a balance sheet exercise which concluded that taking account of all relevant factors, it was not in R's best interests to undergo surgery and or radiotherapy and or chemotherapy, so that he should be provided with palliative care only. A factor pointed to by the trust was that, insofar as he had expressed any wishes, he had said that he does not want to have the treatment, although, he had been inconsistent in what he had said about those matters.

The Official Solicitor's view was that it was the risk of starting but not completing radiology that was the key factor. The Official Solicitor submitted that this was a very difficult decision because of R's young age and because the possibility of the treatment may afford him considerably longer life than he would be likely to have if the application were granted and the tumour is allowed to take its course. However, on balance, the Official Solicitor concluded that the consequences of starting a course of radiotherapy to his brain would be so injurious to his mental health and wellbeing and so unpleasant that it was appropriate to conclude he should not, in his best interests, undergo such a course of treatment.

Baker J granted the application. Having regard to all the circumstances, in particular the probability that R would not cooperate and the likely significant adverse side effects of the treatment on his mental health, it was in his best interests, in the widest sense, to make the declaration that was sought in this case.

The judge agreed with the analysis put forward on behalf of the trust. He held that there was a strong presumption that it was in a person's best interests to receive life-sustaining treatment. However, looking at R's welfare in the widest sense (*Aintree*), he

considered that the balance plainly came down against surgery, radiotherapy, and chemotherapy. The treatment was not merely surgery but also involved post-operative care, radiotherapy, and chemotherapy. It was the whole course of treatment that must be considered in making the decision.

Baker J stated that if he were to put himself in R's position (as per *Aintree*), he considered it highly likely that he would not choose to have the surgery. Were he to start the treatment, he would suffer significant adverse effects, both in terms of the effects of the medication upon him, but also as a result of his likely non-compliance. Thus, the prospects of the treatment succeeding would be very much diminished. In any event, the evidence suggested that he would not be cured by the treatment. At most, his life would be extended for a period.

Comment

This case is another example of the *Aintree* judgment being followed with a judge putting himself in P's position, in this case leading to the refusal of medical treatment. Interestingly, however, in this case, and whilst (in a similar fashion to Charles J did in ***Briggs*** at almost exactly the same time) Baker J expressly framed his decision by reference to what P would have chosen, in this case, the choice was not driven solely – or even primarily – by P's identified wishes and feelings in relation to the proposed treatment. The case is therefore a useful reminder that it can be possible to construct a best interests decision even in the face of inconsistent wishes.

Section 21A appeals – LAA pitfalls

Readers will recall an email we reproduced from the LAA to Peter Edwards of Peter Edwards Law in which the LAA made clear that their position is that where there is no standard authorisation is in place, there can be no means-tested funding. We reproduce a further email which confirms that position, and also the knock-on effect on the funding of any expert who may have been instructed whilst an authorisation was in place. The approach being adopted by the LAA here is extremely hardline, and it serves as a crucial reminder that any representatives involved in s.21A applications must ensure that the supervisory body either extends or takes steps to bring about a fresh authorisation so as to ensure that there is in place a 'live' authorisation throughout the period of the s.21A application.

> *Apologies for the delay in getting back to you and thank you for your patience. As requested, here is an update of the LAA's position and guidance for future reference:*
>
> *Although it is the responsibility of the supervisory body to extend the standard authorisation and you are not in control of whether this happens or not, the authorisation does have an expiry date which you would of course be aware of. It is considered reasonable to check the status of the authorisation at the point of expiry in order for you to be clear about the funding position. Whilst you would not be on notice that funding would be withdrawn, you are aware of the conditions of non-means tested funding, The Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 Regulation 5 (1) (g) specifically state that non-means tested funding applies to the individual in respect of whom an authorisation is in force, which was not the position here at the relevant time.*
>
> *In terms of the experts fees, it is considered that the amount of this liability would be limited to that of a cancellation fee at the point that the authorisation expired. At this point there was a duty (Clause 2 Standard Terms) to restrict the LAA's liability so that only a cancellation fee would be payable on expiry of the standard authorisation.*

Welsh DoLS figures

The Care and Social Services and Healthcare Inspectorates in Wales have jointly produced the seventh annual DoLS monitoring report for 2015-16

for the 22 local authorities and 7 Health Boards. Amongst their headline findings were:

- DoLS applications rose by 15% from 10,681 in 2014/15 to 12,298 in 2015/16, although there was wide regional variation.
- 74% of applications combined with urgent authorisations exceeded the 7-day timeframe (with 54% exceeding the 14-day maximum) and two councils did not meet the timescale for assessments on any of the urgent applications they received. On the Isle of Anglesey it took 263 days on average for a standard with urgent authorisation application to be dealt with.
- 73% of standard applications were processed beyond the 21-day maximum timescale.
- The average authorisation rate across councils was 56% and for health boards the figure was 38%.
- Part 8 reviews during the authorised period remained low at only 1% of authorisations. The vast majority of authorisations lapsed before the review took place.
- Of the 12,298 applications, 336 had an Independent Mental Capacity Advocate appointed and 39 were referred to the Court of Protection (nearly half of which had an IMCA appointed).

As for England, this makes depressing (although unsurprising) reading. Prioritising the urgent applications has had a knock-on effect on the time taken to process standard applications. Most areas have significant backlogs. The length of authorisation is increasing, whilst the availability of review is decreasing. Very few authorisations are being challenged in the Court of Protection. Half of those challenged demonstrate IMCAs making a difference.

The President on the warpath

There was considerable media coverage of a speech by Sir James Munby to the Association of Directors of Adult Social Services (a transcript of which does not at present appear to be publicly available) in which he criticised placing elderly people in care homes, prioritising their physical safety over their emotional wellbeing. In reported comments which will come as no surprise to anyone who has quoted the judge's famous phrase from 2007 – what good is it making someone safer if it merely makes them miserable? – Sir James observed that 'It is no good just saying most people would prefer to live longer in nice new accommodation without breaking their neck; some people would not.' He went on to say 'You are actually putting someone in a regime which may not allow them to smoke, or a regime where for their own good they may be required or heavily persuaded to indulge in the kind of collective jollification which they would have loathed at home.' Sir James also said it was 'a profound indictment of our society' that elderly couples who had been together for decades were not always able to have shared accommodation and were required to spend their last years apart.

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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 Trust 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 2009), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click here.

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Neil has particular interests in human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Neil is the Deputy Director of the University's Legal Advice Centre and a Trustee for a mental health charity. To view full CV click here.

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Annabel appears frequently in the Court of Protection. Recently, she appeared in a High Court medical treatment case representing the family of a young man in a coma with a rare brain condition. She has also been instructed by local authorities, care homes and individuals in COP proceedings concerning a range of personal welfare and financial matters. Annabel also practices in the related field of human rights. To view full CV click here.

Anna Bicarregui: anna.bicarregui@39essex.com

Anna regularly appears in the Court of Protection in cases concerning welfare issues and property and financial affairs. She acts on behalf of local authorities, family members and the Official Solicitor. Anna also provides training in COP related matters. Anna also practices in the fields of education and employment where she has particular expertise in discrimination/human rights issues. To view full CV click here.

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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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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 4th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2015). To view full CV click here.

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Adrian is a Scottish solicitor, a consultant at T C Young LLP, who has specialised in and developed adult incapacity law in Scotland over more than three decades. Described in a court judgment as: *"the acknowledged master of this subject, and the person who has done more than any other practitioner in Scotland to advance this area of law,"* he is author of Adult Incapacity, Adults with Incapacity Legislation and several other books on the subject. To view full CV click here.

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Jill Stavert is Professor of Law, Director of the Centre for Mental Health and 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, Alzheimer Scotland's Human Rights and Public Policy Committee, the South East Scotland Research Ethics Committee 1, and the Scottish Human Rights Commission Research Advisory Group. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click here.

Conferences

Conferences at which editors/contributors are speaking

Essex Autonomy Project Summer School

Alex is speaking at the Essex Autonomy Project Summer School in July, which this year has the theme *Objectivity, Risk and Powerlessness in Care Practices*. The multi-disciplinary programme will give delegates the opportunity to discuss the challenges of delivering care in a framework that supports and empowers individuals. For full details, and to apply online, please see the Summer School website.

Deprivation of Liberty Safeguards: The Implications of the 2017 Law Commission Report

Alex is chairing and speaking at this conference in London on 14 July which looks both at the present and potential future state of the law in this area. For more details, 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 Report will be out in early June. 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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