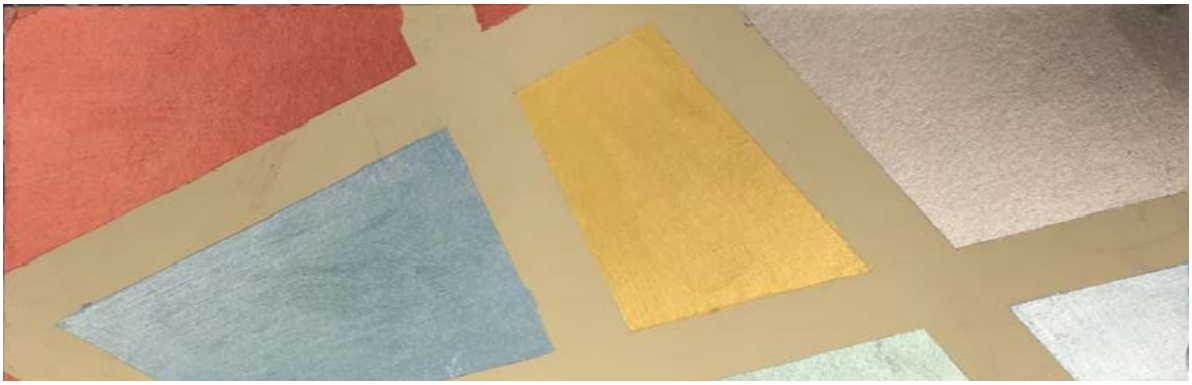

Welcome to the March 2017 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the limits of wishes and feelings and a different take on Article 5;

(2) In the Property and Affairs Report: changes to EPA/LPA registration fees;

(3) In the Practice and Procedure Report: a further amendment to the CoP Rules, a major on the participation of P, a guest article on ground rules in cross-examination and HRA damages, costs and the LAA;

(4) In the Wider Context Report: tools to address coercive control, the MCA and immigration detention, and the second issue of the International Journal of Mental Health and Capacity Law;

(5) In the Scotland Newsletter: an important Sheriff Appeal Court decision about care charges and the divestment of assets

And remember, you can find all our past issues, our case summaries, and much more on our dedicated sub-site here. 'One-pagers' of the cases in these Newsletters of most relevance to social work professionals will also shortly appear on the SCIE website.

Editors
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.

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The limits of wishes and feelings

Abertawe Bro Morgannwg University LHB v RY and CP [2017] EWCOP 2 (Hayden J)

Best interests – medical treatment – treatment withdrawal

Summary

The central issue in this case was whether it remained in the best interests of a 81-year-old man, RY, to receive deep suctioning via a tracheostomy which the court had previously consented to on his behalf in an *extempore* judgment ([2016] EWHC 3256). His life expectancy was predicted to be around 6 months from the hearing. His level of awareness

was on an 'upward trajectory', from him being in a coma to a vegetative state and now in a minimally conscious state. But his general physical condition was deteriorating and would so continue. Crucially, perhaps, he had the capacity for pain and, it must be assumed, the capacity for pleasure.

The man's daughter, CP, believed her father 'would want everything done' to preserve his life and he would have viewed that 'any life is better than no life'. However, her account of his wishes were unreliable. His 'voice' remained resistantly silent:

> *40… It is therefore particularly sad that, despite the efforts made, it has not been possible to identify RY's own wishes. I have arrived at the general conclusion that RY was a private, decent man who was not given to discussing his emotions and beliefs and had never allowed himself to contemplate, or at least discuss with others, the parlous situation in which he now finds himself. Perhaps this is no more (or less) than the 'sang froid' of an older generation.*
>
> *41. Thus I am in the position here of evaluating RY's best interests with no evidence of sufficient quality to indicate to me what his wishes would be, were he to be in a position to communicate them. It would be both wrong to speculate, and in my view judgement, flawed to assume that in the absence of clear and reliable evidence as to RY's views, the emphasis on the 'sanctity of life' becomes in some way greater. This powerful and important consideration will always weigh heavily in the balance but it must not be allowed to quash all other considerations. Those whose voices do not carry through to the courtroom are just as entitled to protection as those individuals in the cases I have referred to above.*

The true question was whether the tracheostomy was "*overly burdensome*." That is to say, "*whether it can be rationalised as a proportionate intervention in the context of RY's medical welfare, having regard to his overall clinical situation*." His Lordship found:

> *53. I have come to the clear conclusion that deep suctioning via RY's tracheostomy causes him pain, which may at times be considerable and at others less so. The tracheostomy serves its immediate function in the sense that it can, when required, substitute for RY's compromised cough reflex and clear secretions. In this sense the tracheostomy cannot be described as futile. The real question is whether, in the context of RY's poor prognosis and declining physiological circumstances, the deep suctioning can be said to contribute either to the quality or expectation of his life. Were it to do so it might justify the pain undoubtedly involved. I am satisfied on the evidence that it does not. Society cannot ask those in the medical profession to cause harm without purpose. To do so compromises both their integrity and, inevitably, the dignity of their patient.*

On balance, however, the court decided not at this stage to grant the application to withdraw the relevant treatment. This was because (1) the realisation that deep suctioning causes pain came late in the day and those involved needed time to reflect on that finding; and (2) no deep

suctioning had been required over the previous 4 days and so had become "*delicately poised between what can properly be described as 'burdensome' and that which is 'overly burdensome'. In the absence of understanding RY's own views I believe the balance tips, for now, in favour of supporting life*." If the suctioning became necessary as a regular and daily part of his life, Hayden J held that it would not be in RY's best interests and, in the absence of consensus, the Health Board would need to return to court.

Shortly after the judgment was delivered to the parties, RY died peacefully in hospital.

Comment

This judgment stands as an interesting counterpart to that in *Briggs v Briggs (2)* [2016] EWCOP 53. In that former case, it was possible to identify with a sufficient degree of certainty what P would have done; in this case, and despite very considerable efforts, Hayden J could not be satisfied that he had any equivalent basis to guide him in his determination of the decision that was right for RY. The case therefore stands as an important reminder that there may be circumstances where the starting point in determining what decision is right for the person cannot be their wishes, feelings, and alternatives must be sought. It also stands as a reminder, however, of the importance of that the duty to seek to identify those wishes and feelings.

On an entirely different note, Hayden J also made a number of observations as to the filming of patients in prolonged disorders of consciousness as part of an assessment of their awareness:

> *52. I also feel bound to record some unease with these video recordings more generally. It is axiomatic that they are highly invasive of RY's privacy and that he has no capacity to consent to them. They have been viewed by a variety of professionals. Though Mr Badwan has found them useful here, I do not consider that video recordings should ever be regarded as a routine investigative tool. Both the videoing and their distribution will require strong and well-reasoned justification.*

Short note: a different take on Article 5

On 15 February 2017, the Supreme Court handed down judgment on in the matter of *R (on the application of Hicks and others) v Commissioner of Police for the Metropolis* [2017] UKSC 9. The decision arose in an entirely different context to the health and social care context, but is of no little interest as a different take upon Article 5 ECHR. The appellants had been detained for various periods on the wedding day of the Duke and Duchess of Cambridge. Each had been separately detained on the basis that the police had good grounds to believe their arrest and detention was necessary to prevent an imminent breach of the peace. They had all been released once the wedding – and the risk of a breach of the peace – was over. The central issue was whether an arrest for breach of the peace complied with the requirements of Article 5(1)(c).

Lord Toulson, giving the sole judgment of the Supreme Court and holding that the arrests had been lawful, made a number of observations about Article 5 ECHR which have a very different flavor to those made in *Cheshire West*:

> *29. The fundamental principle underlying article 5 is the need to protect the individual from arbitrary detention, and an essential part of that protection is timely judicial control, but at the same time article 5 must not be interpreted in such a way as would make it impracticable for the police to perform their duty to maintain public order and protect the lives and property of others. These twin requirements are not contradictory but complementary* […]
>
> *30. In balancing these twin considerations it is necessary to keep a grasp of reality and the practical implications. Indeed, this is central to the principle of proportionality, which is not only embedded in article 5 but is part of the common law relating to arrest for breach of the peace."*

It will be interesting to see what, if any, use is made of these observations in the event the Supreme Court grant permission to appeal in the *Ferreira* decision, and takes stock of the "practical implications" of the decision in *Cheshire West* three years after it was handed down.

PROPERTY AND AFFAIRS

LPA and EPA Registration Fees Reduction

On 1 April 2017, and assuming that Parliament approves the relevant draft Statutory Instrument, the fees for registering LPAs and EPAs are to be reduced from £110 to £82 and for repeat applications to register a LPA from £55 to £41.

OPG seeks Public Authorities' Views about Digital Reporting

In a blog on 16 February 2017, the OPG published details of its research into the possibility of introducing digital reporting for deputies, specifically for Public Authority deputies.

The blog makes interesting reading, giving an insight into how Public Authority deputy teams work and the issues they have to confront (including the problems of too much paper, chasing telephone calls, payment by cheque, notification of changes in circumstances, notification of fees being due, manual registry searches, applications for fee remission and sending documents by post).

There is clearly a real need to move away from this last century mode of working. The OPG intends to move forward with this and invites input from Public Authority deputy teams.

PRACTICE AND PROCEDURE

The Court of Protection (Amendment) Rules 2017

The next tranche of amendments to the Court of Protection Rules have now been laid before Parliament. These amendments, which will take effect on 6 April (and do not form part of a Pilot), make provision for civil restraint orders, thereby making express powers of the court which had previously been implicit only. They also, for the first time, set out (in a new Part 24) procedural rules for the making of applications relating to Schedule 3 to the MCA 2005, i.e. the international jurisdiction of the CoP. The new Part 24 provides for three separate types of application: (1) an application for recognition and enforcement of a foreign protective measure; (2) an application to disapply or modify a foreign lasting power of attorney (including in this, importantly, a Scottish power) and (3) an application for a declaration as to the authority of a donee of a foreign power. The last of these is designed to address a problem that occurs with frustrating frequency, namely a failure by a public authority or – most often – a financial institution to accept a foreign power of attorney that is valid according to its governing law (see further in this regard Alex's overview article, and also *The International Protection of Adults* (OUP, 2015)).

Part 24 is accompanied by a new Practice Direction, available here. You will also find here a PD (PD23C) to accompany the new provisions relating to civil restraint orders, an updated PD10AA to give new contact details, and amendments to the transparency pilot PD, PD9E and PD13A to enable the merging in due course of the approaches to allowing public access to court in serious medical treatment and transparency pilot cases

The Participation of P in Welfare Cases in the Court of Protection

A huge – and hugely impressive – report on the participation of P has been published by Cardiff University's team (Lucy Series, Phil Fennell and Julie Doughty) looking into welfare cases at the Court of Protection. The report, available here, makes uncomfortable reading as regards the approach of a system which has as its focus an individual said to be of impaired capacity, but which is, in essence, designed around the needs of the professionals. It does, however, provide a detailed evidence base and concrete proposals for reform so as to meet a 'human rights model of participation.' We would very strongly recommend that anyone concerned with the work, and the future, of the Court of Protection take the time to read, at a minimum, the summary and the recommendations at the outset.

Re Martins anonymity lifted

Mr Martins now having died, the anonymisation order in place has been lifted, and the underlying best interests decision of Baker J giving rise to the contempt proceedings relating to Mrs Kirk and the frustrated appellate decision of Munby LJ has been now been reported.

Moving the Bar: Is cross-examination any good?

[*Editorial Note: we are very pleased to be able to publish this guest comment by Penny Cooper, Professor of law, Co-founder and Chair of The*

Advocate's Gateway, Barrister and Academic Associate 39 Essex Chambers.]

Lord Thomas and the judgment in Rashid [2017]

The recruitment process for the next Lord Chief Justice has begun. The headlines have been about the new age restriction and who this rules out of the running, but my thoughts have been turning to the current Lord Chief Justice's judgments. For me, his most significant judgment to date is *Rashid* [2017] EWCA Crim 2. It is a must-read for advocates, including those who work in the Court of Protection.

This is the essential paragraph:

> [Professional] *competence includes the ability to ask questions without using tag questions, by using short and simple sentences, by using easy to understand language, by ensuring that questions and sentences were grammatically simple, by using open ended prompts to elicit further information and by avoiding the use of tone of voice to imply an answer. These are all essential requirements for advocacy whether in examining or cross-examining witnesses or in taking instructions. An advocate would in this court's view be in serious dereliction of duty to the court, quite apart from a breach of professional duty, to continue with any case if the advocate could not properly carry out these basic tasks. (para 80)*

Rashid should make every advocate stop and re-consider the proper approach to questioning witnesses and clients, particularly when it comes to cross-examination.

Communicating with vulnerable people in court

In November 2016 Mr Justice Charles issued guidance on facilitating participation of 'P' and vulnerable persons in Court of Protection proceedings. The potential for cross-examination to do more harm than good is never more apparent than when a witness is vulnerable due to age or incapacity. The criminal courts brought in a range of special measures, including the communication facilitators, known as witness intermediaries (see section 29, Youth Justice and Criminal Evidence Act 1999), to help vulnerable witnesses give evidence. In one recent Crown Court case, an intermediary helped an adult witness at a remote location give evidence using an eye tracker device. Intermediaries have also assisted children as young as three to give evidence in England and are now used in Ireland, Northern Ireland and New South Wales, Australia. The Court of Protection's new guidance includes advice on the use of intermediaries.

Communicatively competent advocates

In *Rashid*, the adult defendant was vulnerable on account of his intellectual functioning. It was argued that he should have had an intermediary not only when he gave evidence, but also for the whole of the trial. The Court of Appeal disagreed; intermediaries are a scarce resource and advocates must be communicatively competent. Intermediaries should not be used to compensate for poor advocacy skills. There was no suggestion whatsoever in *Rashid* that the advocates lacked such competence – "*indeed they self-evidently displayed such competence*" (para 81).

Advocates must adjust their pace, tone, vocabulary and grammar so that a witness understands the questions. "*Advocates must*

adapt to the witness, not the other way round." (*Lubemba* [2014] EWCA Crim 2064, para 45).

Rashid is not only relevant to advocacy with vulnerable clients; the lessons go further than that. *Rashid* reminds us that advocates are always duty bound to be communicatively competent when questioning witnesses (or clients).

How can we tell if cross-examination is any good?

The short answer, scientifically speaking, is that we can't. But cross-examination is better if advocates 'ask' rather than 'tell' witnesses. There is no scientific basis to support the notion that the modern habit of asserting things to witnesses (telling rather than asking) is an effective way to elicit the truth. In fact, a wealth of research by psychologists tells us that witnesses may be compliant or in other ways unable to deal with the confrontational nature of such questions.

In 2013 the former Lord Chief Justice, in his last judgment before retiring (*Farooqi & Ors* [2013] EWCA Crim 1649), sent out this message about cross-examination:

> *Assuming that there is material to justify the allegation, "Were you driving at 120 mph?" is more effective than, "I put it you, that you were driving at 120 mph?" What ought to be avoided is the increasing modern habit of assertion, (often in tendentious terms or incorporating comment), which is not true cross-examination. This is unfair to the witness and blurs the line from a jury's perspective between evidence from the witness and inadmissible comment from the advocate. (para 113)*

Lord Neuberger's healthy scepticism about the value of oral testimony

Lord Neuberger said recently in an extra-judicial speech:

> *I am very sceptical about judges relying on their impression of a witness, or even on how the witness deals with questions. Honest people, especially in the unfamiliar and artificial setting of a trial, will often be uncomfortable, evasive, inaccurate, combative, or, maybe even worse, compliant. (para 10)*

Most witnesses are unfamiliar with courts and almost all are unfamiliar with the actual witness box/ chair from which they will be giving evidence. How many lawyers ensure their witnesses are familiar with the venue before they give evidence? How many explain the purpose of cross-examination and ensure that witnesses understand it is not a conversation?

Properly directed questions

It is not only about-to-retire judges who express views about cross-examination. Mrs Justice Parker said in *Re PB* [2014] EWCOP 14:

> *Advocates need to be able to control the witness by the form and structure of their questions and not permit discursive replies or to allow the witness to ramble (particularly if the witness has the tendency to be prolix). There is no necessity for a long introduction: apart from anything else it may distract and confuse the witness and the judge.*
>
> *Examination must not proceed by way of "exploration" of the evidence: i.e. a debate, or by putting theory or speculation, rather than by properly*

> *directed questions which require an answer. (paras 142 – 143)*

Universal ground rules for cross-examination?

What do these judgments and Lord Neuberger's views tell us about cross-examination? I think they give us the makings of some universal ground rules.

1. Lawyers should familiarise their witnesses with the trial setting before they give evidence (this of course must not include a dress-rehearsal of their evidence - see *Momodou* [2005] EWCA Crim 177).

Cross-examination questions should:

2. Be short and focus on one point.
3. Use simple vocabulary.
4. Use simple sentences. (Not 'tag' questions, that is statements with a generic question tacked onto the end. Avoid for example: "You would agree wouldn't you, [statement]?" or "[Statement], that's right isn't it?")
5. Properly direct the witness to the matter which requires their answer; a question should not invite the witness to speculate or debate.
6. Not contain preamble. (For example, a preamble "In light of your previous answers, let me ask you about this, if I may…" should be dispensed with altogether.)
7. Not contain comment on the evidence. (If it is a good comment, save it for the speech.)
8. Not use intonation to imply a question. For example, do not say: "You were unhappy about that?" Instead ask, "Did that make you unhappy?" or "Were you unhappy?"

Advocacy tutors will say that cross-examination questions must be 'leading' so that the advocate 'controls the witness'. Definitions of leading questions vary but it is not true to say that questions starting with who, what, why, where, when or how are not capable of being leading. "Were you unhappy?" is a leading question if it suggests something to the witness that they have not already said in evidence. "Were you unhappy?", is more effective and fairer than a comment with a tag on the end such as, "You were unhappy, weren't you?"

The bottom line about cross-examination

Lord Neuberger is right:

> *"[T]here is an argument for saying that, at least in some cases, it is safer to assess the evidence without the complicating factor of oral testimony."*

For those who do question witnesses, the message from the Court of Appeal is clear: It is not acceptable for the advocate's poor questioning to create or add to a witness's communication difficulty.

Penny Cooper

Short Note: Prisons and Courts Bill

Although not directly applicable in the Court of Protection, readers may care to keep an eye on the progress of the provisions of the Prisons and Courts Bill regarding cross-examination of witnesses in family proceedings as a bellwether for approaches that may in due course be

adopted in the CoP. These are addressed, and critiqued, in a useful article by Simon Burrows in Family Law here.

Capacity, representation and the MHT

PI v West London Mental Health NHS Trust [2017] UKUT 66 (AAC) (Upper Tribunal (AAC) (Upper Tribunal Judge Knowles QC))

Mental capacity – litigation

Summary

How should the First-tier Tribunal (Mental Health) react when, during the course of a tribunal hearing, it appears that the patient no longer has capacity to appoint or instruct his solicitor? The patient, detained under MHA s.3 with schizophrenia, had become more unsettled two weeks before the hearing but had the capacity to instruct. However, the day before, the responsible clinician told his legal representative that the patient lacked capacity to instruct a legal representative. The medical member of the panel was similarly concerned when conducting the pre-hearing examination when the patient told him that he had not made an application for discharge and did not want to attend the hearing.

On the morning of the hearing, the tribunal was informed that the patient was now considered to have capacity and the evidence was heard. However, during the course of the responsible clinician's evidence, the patient appeared to be responding to auditory stimuli unheard by others and was distressed. So his evidence was interposed, after which he left the hearing. As a result of his evidence, his legal representative asked the tribunal to review the capacity issue. For if he lacked capacity to instruct, the tribunal could appoint his representative who could then act in his best interests which might have led to an application to withdraw the challenge. The tribunal considered it unnecessary to do so.

Following *YA v Central and North West London NHS Trust and others* [2015] UKUT 0037 (AAC), the Upper Tribunal agreed that "*the issue of a patient's capacity to appoint a representative, to give instructions and to participate in proceedings before the tribunal should be kept under review by all those involved, not least the tribunal itself*." This may be thought to give effect not just to the patient's best interests but also to the procedural safeguards required by Article 5 ECHR (para 34).

The need for such ongoing review did not sit easily with rule 11(7)(b) of the Tribunal Procedure (First-tier) (Health, Education and Social Care Chamber) Rules 2008. But a broader reading was required. On the facts, the tribunal should have had a short pause in the proceedings to:

(a) Establish whether the patient lacked capacity which may have meant him being seen on the ward;

(b) Ascertain the patient's wishes about the continuation of the hearing; and

(c) Ascertain whether the patient's legal representative remained instructed.

However, the error of law did not affect the outcome. The legal representative was content to act for the patient on the basis of earlier instructions and was content to proceed in his absence. All the relevant submissions were made and it was difficult to see how the patient's participation in the proceedings was significantly compromised. Moreover, there was no unfairness.

As to best interests and applying to withdraw the challenge, Judge Knowles QC repeated the guidance given in *YA* as to how legal representatives ought to proceed where their patient lacks the relevant capacity. Such guidance provided a process of engagement with the tribunal. Applying to withdraw the application may allow the patient another challenge in the nearer future but would also deprive them of the opportunity to test the basis for detention at that point in time: "*In my view it is particularly important that the detention of a person who lacks capacity to instruct in relation to the proceedings is challenged without delay*" (para 50).

So, in conclusion, the tribunal erred in law by failing to give adequate reasons for its decision not to review the patient's capacity to give instructions to his legal representative during the hearing. However, that decision was not aside because the patient was neither disadvantaged by either the representation he then received nor by the process the tribunal followed having refused to review his capacity.

Comment

This decision develops the reasoning of *YA* and tackles the issue of incapacity arising during the course of a hearing. The substantive guidance as to the salient details of the decision to appoint a representative (which includes the capacity to conduct proceedings) was given in *YA*. It is not commonplace for Ps in the Court of Protection to have litigation capacity, bearing in mind mere 'reason to believe' incapacity is required for the interim powers under in s.48 MCA 2005. And it is interesting to note that this lower evidential threshold for incapacity is not applicable to First-tier tribunal proceedings. But if P was thought to have litigation capacity and such capacity deteriorated during the course of a hearing, the essence of this decision would be applicable by analogy. The decision also serves to provide useful guidance for those appearing in and on tribunals.

HRA damages, costs and the LAA

Three recent decisions have focused on the interaction between the statutory charge and human rights damages. In *GD and BD (children by their children's guardian), MD and FD v Wakefield Metropolitan District Council and West Yorkshire Police* [2016] EWHC 3312 (Fam), Cobb J explored (at paras 132-42) the impact of the statutory charge on a damages award under the HRA 1998. Although he did not give a conclusive view on the issue, he suggested that, unless the local authority and police, agreed to pay the costs of the proceedings which gave rise to the human rights case, the award of damages would be extinguished by the statutory charge.

In *Re CZ (Human Rights Act Claim: Costs*) [2017] EWFC 11, the same judge confirmed that, where a public funded certificate is granted to a party to pursue a claim under the HRA 1998 for declaration and damages arising within care proceedings, the statutory charge will apply (i.e. the damages will represent and the Legal Aid Agency has the ability to recoup its costs (or a proportion of them) from any damages award. Rejecting a submission that Article 13 ECHR (the right to an effective remedy) mandated the award of a sum sufficient to enable a claimant in such a case to recover their costs, Cobb J expressed himself (at para 71):

> *wholly satisfied that the Claimants have been able to access a court effectively, and have a remedy in the form of a*

> *declaration and an award of damages. The fact that the damages award is vulnerable to recoupment by operation of a statutory charge for costs arises because Parliament, in devising a scheme for assisting litigants to bring legal claims, has also devised a method of recoupment; the significant benefits of public funding to enable litigants to prosecute legitimate claims do not come without some trade-off. It seems to me that I should not interpret the provisions of the HRA 1998 (particularly by reference to a Convention right which has not found its way into English law), in such a way as to create what would swiftly become a dual-carriageway by-pass around the provisions of LASPO 2012.*

Separately, in *CZ,* Cobb J further confirmed that: (1) the costs relating to the care proceedings are to be considered within the framework of the FPR 2010; whereas (2) the costs of a declaration and/or damages claim under the HRA 1998 are awarded under the CPR 1998, on the conventional 'loser pays' basis, but subject to the important provisos as to the conduct of the litigation by both parties. We suggest that exactly the same approach should hold in the context of applications for declarations/damages under the HRA 1998 brought in the context of CoP proceedings. In *CZ*, the claimants, whilst successful in obtaining declarations and damages to reflect (conceded) breaches of the ECHR by the local authority in question, had the costs awards referable to their HRA 1998 claim reduced to reflect the judge's conclusion that, at some stages, their conduct of the litigation was such that they had forfeited their entitlement.

In *H (A Minor) v Northamptonshire CC* [2017] EWHC 282 (Fam), Keehan J, having taken the unusual step of ordering the Lord Chancellor to pay additional costs incurred by the local authority as a result of the LAA's failure timeously to make a decision as to whether or not the statutory charge would apply to HRA damages sought arising out of care proceedings, gave guidance as to how such claims should be run. They are of sufficient importance by analogy to CoP cases to merit reproduction in full:

> *117 Where damages are sought in just satisfaction of a HRA claim during the currency of public law proceedings, I provide the following guidance:*
>
> *(a) alleged breaches of Convention rights by a local authority must be set out with particularity in a letter before action as soon as ever possible;*
>
> *(b) every effort should be made by the claimant and the local authority to settle the issues of liability and the quantum of damages before and without the need to issue proceedings;*
>
> *(c) where liability and quantum are agreed prior to the issue of proceedings, it will invariably be in the interests of the child to issue a Part 8 claim to secure the court's approval of the proposed settlement pursuant to CPR r 21.10;*
>
> *(d) the local authority should, save in exceptional circumstances, pay the reasonable costs of the claimant's HRA claim/proceedings;*

(e) where is it necessary for a party to issue a formal HRA claim, proceedings should be issued separately from the care proceedings and a separate public funding certificate should be sought from the LAA in respect of the same;

(f) well in advance of the final hearing of the HRA claim the LAA should be invited to make a decision on whether it asserts that the statutory charge will be applicable to any award of HRA damages. Where

(i) the basis of threshold and the material facts of the case are agreed or the court has made findings of fact and given a judgment establishing the factual matrix of the public law proceedings; and

(ii) liability is agreed and the material facts relied upon to establish the breach or breaches of the claimant's Convention rights are agreed or have been determined by the court,

I see no reason in law or on public policy grounds or in practical terms why the LAA could not and should not notify the court and the parties of its decision on the applicability of the statutory charge prior to the final hearing and well in advance of the submission of the claimant's solicitor's final bill(s); and

(g) with the benefit of the LAA's decision, the court should have all the necessary information to assess the quantum of damages or, as the case may be, to approve the settlement, and to consider what are the appropriate orders for costs.

Keehan J also added a postscript relating to the fact that HRA damages against the state for breaches of Convention right by the State are not currently 'ring fenced' from the applicability of the statutory charge.

120. The issue I raise, in the context of HRA claims brought by children, and by parents, during the currency of pending care proceedings, is whether it is just, equitable or reasonable that damages awarded to a child, or to a parent, as a result of breaches of his/her Convention Rights by one organ of the State should be recouped by another organ of the State in respect of public law proceedings which would otherwise not be recoverable. Public funding in such cases is non means tested and non merits based. Furthermore, save in exceptional circumstances, the local authority issuing the care proceedings is not liable to pay the costs of any other party: Re T [2012] UKSC 36.

121. I very much doubt that such a recoupment is just, equitable or reasonable. In the vast majority of cases the effect of the recoupment of the child's or parent's costs of the care proceedings will be to wipe out the entirety of the HRA damages awarded. In this event, the child or the parent will not receive a penny.

123. In making these observations, I have well in mind that:

a. it is a founding principle of the introduction and provision of State funding to ensure that a legally aided party is in no better and in no worse a

> *position than a privately paying party to litigation; and*
>
> *b. a solicitor representing a privately paying client has a lien over any damages recovered by his/her client in respect of the solicitor's fees.*
>
> *124. Nevertheless, I question whether the time has come to exclude a child's and/or parents HRA claim damages from the application of the statutory charge in relation to costs incurred in 'connected' public law proceedings within the meaning of s.25 LASPO. This is, of course, solely a matter for the Lord Chancellor.*

Finally in this round-up we note the useful schedule of cases of damages awards in HRA claims involving children in care proceedings prepared by the Association of Lawyers for Children, to which reference was made by Cobb J in *CZ*. They may well be useful by analogy in CoP cases where the allegation is that the actions of a public body unlawfully interfered with the Article 8 ECHR right to family life enjoyed by children and their parents.

THE WIDER CONTEXT

Coercive control tools

A dedicated website has been created for social workers and other health and social care practitioners to develop their knowledge and skills in working with situations of coercive control. The Serious Crime Act 2015 created a new offence of controlling or coercive behaviour in intimate or familial relationships. These situations are likely to be difficult and will need to be handled with the utmost sensitivity. Commissioned by the Chief Social Worker's Office at the Department of Health, and produced by Research in Practice for Adults and Women's Aid, helpful resources that are available on the website include:

- Background reading and information;
- A set of five case studies with learning activities; and
- Tools for support effective, reflective practice.

These tools are extremely practical and helpful. They do not (and cannot), however, plug what is ever more obviously a gap in the legal framework – namely tools to address coercion and coercive control exercised between individuals who are not in intimate or familial relationships.

Dementia matching website

The Alzheimer's Society has launched a new online matching service called Side by Side which is designed to connect volunteers to someone with dementia over shared hobbies and interests. We think that this is a brilliant idea. There are nearly 2,000 individuals with dementia waiting to be paired up and Side by Side have urgently called for more volunteers. If you are interested, read more about it in the Guardian here: or on the Side by Side website.

The MCA and immigration detention

R (ASK) v Secretary of State for the Home Department [2017] EWHC 196 (Admin) (Queen's Bench Division (Administrative Court) (Green J) (Court of Appeal)

Article 5 – Deprivation of Liberty

Summary

This claim for unlawful detention concerned ASK, a 29 year old national of Pakistan. ASK came to the UK on a student visa. He started to exhibit signs of aggression and commenced drinking substantial amounts. ASK's brother sought medical help for him and ASK was detained in hospital under s.2 Mental Health Act 1983. During his time in hospital, his leave to remain expired and he became an over-stayer.

ASK was discharged from hospital into the community. His behaviour began to deteriorate and he commenced heavy drinking and cannabis consumption. His intransigence led to the police being called and, on the basis that ASK was an unlawful over-stayer, he was detained at an Immigration Removal Centre pending removal from the UK.

ASK's condition fluctuated during his time in immigration detention and there was disagreement between clinicians as to whether he was fit to be detained, fit to fly or whether he should be transferred to hospital. One psychiatrist concluded that ASK had a severe mental illness requiring admission to a

psychiatric hospital. The Secretary of State confirmed that no steps would be taken to remove ASK pending his transfer to hospital. ASK was subsequently admitted to a psychiatric unit.

ASK argued that he had been unlawfully detained in an immigration removal centre for an unreasonably long time before being transferred to hospital. His claim failed as the court was satisfied on the evidence that the Secretary of State had taken appropriate steps at all times including to transfer ASK to hospital once he received the psychiatrist's opinion.

Comment

The issues in this case were wide-ranging and a great deal of the judgment is devoted to analysing the relevant legislative framework, the attribution of legal responsibility for ASK's detention and the evidence. Some consideration was given to the MCA 2005 and at least part of ASK's claim rested on the contention that "ASK lacked mental capacity throughout and failure to accord to him legal or the appropriate representation materially delayed his transfer to hospital". However, Green J noted that that "*the scope for the operation of the MCA 2005* [in this context] *is limited since many of the pivotal decisions did not require ASK's consent, not the least because it was not argued that ASK has any sensible or meaningful immigration grounds upon which to object to removal. He did not need lawyers to contest removal on normal, non-medical, grounds. However this does not mean that ASK's capacity was irrelevant since important decisions relating to ASK still needed to be taken including in particular as to transfer to hospital upon which his views were relevant.*"

In an annex setting out competing arguments as to the relevance of (inter alia) the MCA 2005 in this context, Green J recorded the SSHD's position as to her duties under the Act, thus:

> *24. The Secretary of State argues that pursuant to section 1 MCA 2005 she is obliged to treat all detainees as having mental capacity to make decisions. However she contends that there are no decisions by the Secretary of State in issue in this case that are "consensual", i.e. decisions requiring agreement by an individual. Removal and deportation decisions are not consensual. They take place even if the detainee objects strenuously. Where a foreign national subject to removal actioned indicates that they wish to make a voluntary return the Secretary of State may seek confirmation of their mental capacity to make that decision, as happened in the present case. But there is no legal requirement for consensual removal or deportation to be given.*
>
> *25. She contends that it is the duty of responsible clinicians to ensure that detainees suffering from mental health issues receive appropriate treatment and assistance and as part of those duties the clinicians must ensure that there is mental capacity to make decisions concerning medical treatment and to ensure that the duties under the MCA 2005 are adhered to. But the Defendant has no statutory power under the Act or otherwise, and no practical ability, to assess the mental capacity of a detainee to make any type of decision or become involved in the detainee's decision making in medical, financial or legal matters.*

The Claimant agreed in part with this analysis, but "*in important respects disagrees with it...*

> *25.* […] *The Claimant accepts that the Defendant is correct that decisions by the Secretary of State to remove or deport an individual are non-consensual and do not require the consent of the individual concerned and it is also correct that there is a statutory presumption of capacity in section 1 MCA 2005. However the Claimant disagrees that, upon this basis, there is no duty upon the Defendant to assess, or request the assessment of, the mental capacity of a detainee or to take steps to assist an incapacitated detainee to participate in the process and in decision making. It is argued that the Defendant has recognised that there are situations in which a detainee's mental capacity will effect decisions taken about them whilst in detention. For example DSO03/2013 requires capacity to be assessed where a detainee is refusing food and/or fluid. DSO01/2016 (medical information sharing) expressly recognises the best interests duty in respect of an incapacitated detainee when decisions are taken requiring consent to information sharing. The Claimant also joins issue with the Defendant when she says that she has no power or practical ability to assess mental capacity. It is said that no specific statutory power is required since the MCA 2005 requires anyone working with an incapacitated person to assess capacity where there is a cause for concern. The Defendant's case workers are, it is said, able to recognise situations and information causing concern that a detainee lacks capacity and to request a capacity assessment from an appropriate clinician or health care professional. It is said the Defendant has not introduced procedural guidance to caseworkers on when and how the capacity of a detainee should be assessed at all. In the present case it is said that the duty to assess mental capacity was triggered by the Claimant's symptomatic behaviour which raised concerns from the outset that the Claimant could not understand communications from officers and by the consistent concerns raised by clinicians including the two section 48 psychiatrists as well as Dr Goldwin and Dr Dossett. The decision relating to immigration status and removal from the UK to Pakistan were decisions requiring the Claimant's participation. At various times he agreed to voluntary removal and at other times he suggested a claim for asylum.*

Because of the way in which the case unfolded, it was not necessary for Green J to determine which of these rival contentions were correct; they are, at least, set out clearly for determination in a further case.

Article 12 CRPD – further assistance

Mental Health Europe has published a useful position paper on Article 12 CRPD entitled: "*Autonomy, choice and the importance of supported-decision making for persons with psychosocial disabilities*," as well as an excellent animation on the meaning of the Article.

International Journal of Mental Health and Capacity Law – second issue

The second issue of this new online, open access journal is now available.[1] The articles include: *Disability, Deprivation of Liberty and Human Rights Norms: Reconciling European and International Approaches* (Eilionóir Flynn); *DoLS or Quality Care?* (Gordon Ashton OBE); *Capacity Assessment and Information Provision for Voluntary Psychiatric Patients: a service evaluation in a UK NHS Trust* (Benjamin Perry, Swaran Singh, David White); and *Deprivation of Liberty: the position in Scotland* (Laura Dunlop)

Shameless plug: Mental Health Ethics, Ethics and Law MSc at King's College London

Alex is very pleased to say that he will be teaching from September on the King's MSc in Mental Health, Ethics and Law, for which applications are now open. This MSc is delivered by two internationally recognised centres of excellence and provides an integrated, strongly interdisciplinary, education in mental health, ethics and law. It equips graduates to become leaders in healthcare, mental health law or policy. Students will have the unique opportunity to study alongside others from a wide range of academic and professional disciplines at the heart of London's legal and psychiatric world. For further information, see here.

[1] Full disclosure: Alex was on the editorial team for this issue.

SCOTLAND

Argyll & Bute Council v Gordon – Sheriff Appeal Court [2017] SAC (Civ) 6

We reported in the October 2016 Newsletter the significant decision at first instance in this case by Sheriff P J Braid at Edinburgh. Argyll & Bute Council had sought to recover costs of the provision of care to an elderly lady, since deceased, amounting to £42,750 from the defender. It was agreed between the parties that the lady had gratuitously alienated her dwellinghouse to the defender. It was also agreed that if the defender had a liability to the Council, that liability was correctly stated in the sum sued for. However, the defender contended that she was not liable because the Disposition of the dwellinghouse in her favour was not made knowingly and with the intention of avoiding accommodation charges. The Council argued that the defender could not contest liability on the basis of that defence because the Council's determination in the matter could only be challenged by judicial review. Sheriff Braid held that as between the Council and the elderly lady, any such determination was challengeable only by judicial review but that the determination was not binding upon the defender, as transferee. The defender was entitled to defend the action on the basis upon which she sought to do so. Unlike the position of the service user, this was not a matter which the defender could challenge only by judicial review. Sheriff Braid allowed a proof.

The Council appealed to the Sheriff Appeal Court. In this decision dated 9th February 2017, the Sheriff Appeal Court refused the appeal.

The Council submitted that its determination that the service user had disponed the house to deprive herself of an asset was a finding in accordance with section 22 of the National Assistance Act 1948, section 21 of the Act 1983 and Regulation 20 of the National Assistance (Assessment of Resources) Regulations 1992. The Council submitted that if there is any ambiguity in the construction of the words used in the Act, the correct approach is to identify the mischief Parliament sought to address, under reference to Lord Hope in *Robertson v Fife Council* (2001) SC HL 145. If there is ambiguity then following *Pepper v Hart* 1993 AC 93, resort can be had to parliamentary material, such as clear statements by ministers or other promoters of a Bill. It was submitted that the Hansard report of the debate on the Health Services and Social Security Adjudication Bill which became the 1983 Act makes clear the intention was to reduce the administrative burden placed on local authorities for the assessment and collection of charges. The Council argued that the exercise of determining liability for care charges by the service user under the 1948 Act and the 1992 Regulations, and the determination of the liability of a third party recipient of capital transferred by the service user knowingly and with the intention of avoiding charges, is a single scheme. It was erroneous of the sheriff to have found otherwise.

The Council further argued that the difference between "knowingly and with the intention of avoiding charges for the accommodation" in section 21 of the 1983 Act and "for the purpose of decreasing the amount that he may be liable to pay" in terms of Regulation 25 of the National Assistance (Assessment of Resources) Regulations 1992 is of no material difference;

and likewise that there is no meaningful distinction between the terminology of inadequate consideration found in section 21 and deprivation of capital in Regulation 25.

Finally, the Council argued that the sheriff's decision gave rise to an anomaly in that in terms of *Yule v South Lanarkshire Council (No2)* 2001 SC 203 the service user is prevented from founding upon the service user's own subjective intention in order to dispute liability, whereas the recipient would be able to rely on evidence of the same subjective intention in order to resist liability.

The respondent submitted that the sheriff was correct in holding that there was a clear distinction between section 21 of the 1983 Act and section 23 of the 1948 Act. In particular, the sheriff was correct to hold that the powers under the 1948 Act and the 1992 Regulations to determine the amount paid for provision of accommodation, and the power to treat a resident as having deprived herself of capital for the purpose of decreasing her liability to pay, does not empower the local authority to determine a third party should be liable to pay.

The Sheriff Appeal Court stated that it did not find it particularly useful to opine on whether there was a "unitary scheme". It determined the matter simply on the terms of section 21, which it quoted in full. It held that the terms of the section do not empower the local authority to make the determination which they argued for. For that power to have been given to the local authority there would require to be specific statutory authority. Specific statutory authority does appear in section 22 of the 1948 Act. A decision under that section may accordingly be challenged by judicial review. But the Appeal Court agreed with the sheriff that the charging regime imposed by section 22 of the 1948 Act and the 1995 Regulations only apply in a question between the local authority and the service user. The Appeal Court considered that there was nothing untoward in parliament having determined that the separate question of whether a third party might be liable to pay should be left to the courts to resolve.

While the Appeal Court did not think that there was such ambiguity as would allow consideration to be given to parliamentary material to assist the court in the interpretation of section 21, it nevertheless noted a statement by Mr Kenneth Clark, then the relevant minister, in evidence to the Standing Committee on the Bill that became the 1983 Act (Official Report 19th April 1983,[2] page 581). Mr Clark stated: "The litigation would be taking place between the local authority and the beneficiary of the transfer of the asset and the proceedings would be for the recovery of a civil debt. The plaintiff local authority would have to prove its claim and would have to satisfy the civil burden of proof for each element of its claim. When it came to the question of whether the resident had transferred assets "*knowingly and with the intention of avoiding charges*" the local authority would have to lead evidence to satisfy the court of its claim. That would be the general proposition which the court would have to apply to the facts of the case and to the evidence brought before it".

The Appeal Court pointed out that as the clause addressed by Mr Clark, and the section

[2] Note, this date was given in the judgment was 1993, but this must from context be 1983.

subsequently enacted, apply both in England & Wales and in Scotland, Mr Clark's statement supported the Appeal Court's interpretation "*were such support required*".

This case accordingly now goes back to the sheriff to hear proof.

Adrian D Ward

Clarification: *J, Solicitor*

I commented last month upon sequels to the original decision by Sheriff Braid at Edinburgh Sheriff Court dated 22nd March 2016 refusing to warrant an application by *J, Solicitor* for appointment of guardians to a client of hers under Part 6 of the Adults with Incapacity (Scotland) Act 2000. I commented that the original decision as appearing on the Scottish Courts and Tribunals Service website referred to it having been made "in respect of the child F". I printed it off as soon as it appeared, and referred back to that print when writing last month's Report. I am advised, and am happy to acknowledge and clarify, that the reference to "child" was a typographical error by a typist, which was promptly corrected so that the case has since appeared online as being "in respect of the adult F". I am assured that the sheriff was fully aware that he was dealing with an adult.

Adrian D Ward

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 Trust Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. He is on secondment to the Law Commission working on the replacement for DOLS. To view full CV click here.

Victoria Butler-Cole: 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 2009), 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 human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Neil is the Deputy Director of the University's Legal Advice Centre and a Trustee for a mental health charity. To view full CV click here.

Annabel Lee: annabel.lee@39essex.com

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

Anna Bicarregui: anna.bicarregui@39essex.com

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

Editors and Contributors

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.

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 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.

Adrian Ward: adw@tcyoung.co.uk

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

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

Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Incapacity Law, Rights and Policy and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee, Alzheimer Scotland's Human Rights and Public Policy Committee, the South East Scotland Research Ethics Committee 1, and the Scottish Human Rights Commission Research Advisory Group. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click here.

Conferences

Conferences at which editors/contributors are speaking

Seminar on Childbirth and the Court of Protection

39 Essex Chambers is hosting a seminar in conjunction with the charity Birthrights about caesarean-section cases in the Court of Protection. The seminar aims to take a critical look at these cases, with a distinguished multi-disciplinary panel. The seminar is at 5pm-7pm on 8 March 2017, and places can be reserved by emailing beth.williams@39essex.com.

Hugh James Brain Injury conference

Alex will be speaking at this conference aimed at healthcare professionals working with individuals with brain injuries and their families on 14 March 2017. For more details, and to book, see here.

Scottish Paralegal Association Conference

Adrian will be speaking on adults with incapacity this conference in Glasgow on 20 April 2017. For more details, 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 Mind in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

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

David Barnes
Chief Executive and Director of Clerking
david.barnes@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

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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