Essex CHAMBERS

MENTAL CAPACITY REPORT: COMPENDIUM

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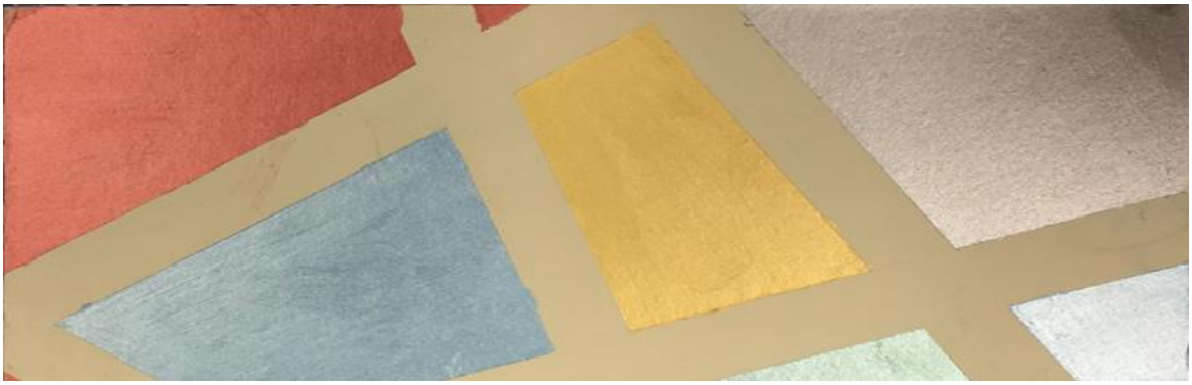

Welcome to the October 2017 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: serious medical treatment cases and the involvement of the CoP, family members and Rule 3A and DoLS before the European Court of Human Rights;

(2) In the Property and Affairs Report: financial abuse at home and tools to combat financial scamming;

(2) In the Practice and Procedure Report: a transparency update, a guest article on welfare cases in practice before the CoP and a problematic case on capacity thresholds and the inherent jurisdiction;

(3) In the Wider Context Report: the LGO and the MCA 2005, an update on the assisted dying challenge, the Mental Health Act review and guidance for enabling serious ill people to travel;

(4) In the Scotland Report: the Scottish Public Guardian on powers of attorney problems and a sideways judicial look at the meaning of support.

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.

We also take this opportunity to welcome Katie Scott to the editorial team!

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

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HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

A dramatic shift? Treatment withdrawal and the role of the Court of Protection

M v A Hospital [2017] EWCOP 19 (Peter Jackson J)

Medical treatment – treatment withdrawal

Summary[1]

In *M v A Hospital* Peter Jackson J (giving one of his last judgments before his elevation to the Court of Appeal) has made clear his view that there is no legal obligation upon medical practitioners to seek the sanction of the court before withdrawing clinically assisted nutrition and hydration ('CANH') from patients in a permanently vegetative state ('PVS') or minimally conscious state ('MCS'), where all concerned are in agreement that to provide such treatment is no longer in the person's best interests.

Peter Jackson J's judgment has been widely misreported as relating to a right to die – it is no such thing; rather, it relates to the right not to be subject to treatment to which a person cannot consent and which is not in their best interests. It has also been misreported as relating to the withdrawal of care – again, this is wrong, as palliative care would always be provided to the individual concerned even after CANH has been withdrawn. Finally, it has also been reported as determining conclusively, subject to any potential appeal by the Official Solicitor, the question of whether or not a legal obligation exists. This is a more nuanced question, to which we return below after putting this decision in its context.

Background

M was in what was described by Peter Jackson J as an MCS as the result of Huntingdon's Disease. Her family, in complete agreement with the treating team at the Trust responsible for her care, believed that it was not in her best interests to continue to receive CANH. However, and as Peter Jackson J found was entirely understandably to have been the case, all those concerned felt that "*an external decision*" was required before CANH could be stopped. The matter was formally brought to the court by M's mother as a challenge to a deprivation of liberty authorisation in place for M at the hospital where she was being cared for. In reality, this was a mechanism in order to ensure that non-means tested legal aid was available (a mechanism which has now been ruled out by the Court of Appeal in Briggs). As Peter Jackson J identified, the real application was for a determination "*if required*" that it was in M's best interests not to continue with CANH. Unusually, but not unprecedentedly, M was not represented by the Official Solicitor as her litigation friend, but rather by her mother, and, whilst we do not address this further here, Peter Jackson J's judgment contains some important observations as to when it is appropriate for a family member to act as P's litigation friend in a serious medical treatment case. As will be set out further below,

[1] Note, Tor having been involved in the case, this note is prepared without her input.

however, the Official Solicitor was to have a further – important – involvement in the proceedings.

The decision

On the substantive question before the court, Peter Jackson J had little difficulty in determining that it was not in M's best interests for CANH to be continued, and indeed found that the evidence had shown that it had not been beneficial for the previous year.

Had the judgment stopped there, it is likely that it would not have aroused the widespread interest that it has – although we would like to think that his observations about the interaction between family members and medical professionals would have been picked up as a welcome corrective to the narrative portrayed in many reported cases. At paragraph 27, Peter Jackson J noted:

> that the medical opinion on M's overall best interests was to some degree influenced by (and might, in the end, be said to have been tipped by) the views of her family. There is nothing wrong with that. For obvious reasons, it is not found in many of the reported cases, which often portray doctors and families in opposite camps, but those cases are surely unrepresentative of the much greater number where a common position is reached through people listening to each other. Just as family members will naturally pay regard to the views of carers and doctors, particularly on the medical aspects of the situation, so doctors will naturally listen to the views of the family about their relative's wider best interests. What is important is that those called upon to express a view should do so conscientiously, drawing upon their personal and professional knowledge of the individual concerned."

Future applications?

Why the judgment has aroused much wider interest is as a result of what Peter Jackson J then went on to do. Until very recently, the conventional wisdom has been that an application to court is required in any case where it is proposed to withdraw CANH from a person in a PVS or MCS. As Peter Jackson J noted (at paragraph 28), this "*reflected the dicta of the House of Lords in the 1993 case of Tony Bland that, until such time as a body of experience and practice was built up, good practice required a court application before withdrawal of CANH in cases of PVS*." This conventional wisdom was reflected in Practice Direction 9E to the Court of Protection Rules.

Recently, however, questions have been asked as to whether (a) the requirement to bring such cases to court is a legal requirement (as opposed to a requirement of good practice) or (b) if it is a legal requirement, it should remain so.

Earlier this year, King LJ, speaking for the Court of Appeal in *Director of Legal Aid Casework & Ors v Briggs* [2017] EWCA Civ 1169, offered some (apparently unprompted) obiter observations to the effect that "*if the medical treatment proposed is not in dispute, then, regardless of whether it involves the withdrawal of treatment from a person who is minimally conscious or in a persistent vegetative state, it is a decision as to what treatment is in P's best interests and can be taken by the treating doctors who then have immunity pursuant to section 5 MCA*." King LJ reached her conclusions in this regard on the basis of a

detailed analysis of the MCA 2005, its accompanying regulations, Code of Practice and PD9E, but without argument or reference to her of the jurisprudence in the area.

Peter Jackson J, however, did have the benefit of detailed argument (albeit of a specific nature, as discussed further below), and reached the conclusion consistent with the obiter observations of the Court of Appeal that it was not a legal requirement on the facts of M's case for the decision to withdraw CANH to have been taken by the court. He did so for a number of reasons. In particular, he concluded that there was no statutory obligation to bring the case to court, that the cases and materials brought to his attention did not support the proposition that a court decision was necessary as a matter of law (as opposed to a matter of practice), and, crucially, that the State's obligation under Article 2 ECHR did not mandate court oversight as a matter of law. Importantly, he noted the anomalous position that, save for the class of PVS and MCS patients under consideration, "*overwhelmingly*" treatment decisions up to and including the withholding and withdrawal of life-support are taken by clinicians and families working together in accordance with recognised good practice, and that there was no suggestion that such should all be the subject of external supervision. In the circumstances, therefore, he held that:

> *a decision to withdraw CANH, taken in accordance with the prevailing professional guidance – currently the GMC's Good Medical Practice guidance, the BMA guidance 'Withholding and Withdrawing Life-prolonging Medical Treatment' and 'End of Life Care' and the Royal College of Physicians' Guidance on Prolonged Disorders of Consciousness – will be lawful and the clinicians will benefit from the protection of s.5. The court is always available where there is disagreement, or where it is felt for some other reason that an application should be made, but this will only arise in rare cases, such as Aintree.*

Importantly, Peter Jackson J noted both that recognised medical standards will "*doubtless evolve*" (and highlighted current work in this regard) and also that every case is intensely fact specific, such that "*those considering withdrawal of CANH should not hesitate to approach the Court of Protection in any case in which it seems to them to be right to do so*."

Comment

The conclusions set out above regarding the need for the involvement of the court were reached in specific context, which it would be wrong to gloss over. They were reached after consideration of written arguments alone and in circumstances where, as Peter Jackson J was also careful to note (at paragraph 36) that the Official Solicitor had not been formally involved. It is important to note, however, that he had specifically invited the Official Solicitor ("*given his general interest in the issue and his passing involvement in the pre-proceedings stages*") to provide him with observations. The Official Solicitor responded to that invitation and provided him with a "substantial" skeleton argument, which, amongst other things "*trenchantly assert*[ed] *that an application to court should be made in every case of proposed withdrawal of CANH, unless there is a valid advance directive*" (paragraph 30).

In the circumstances, and not least given the very robust stance taken by the Official Solicitor, it seems to us clear that it is now beyond sensible argument that, where a valid advance decision to refuse treatment has been made which applies to CANH, there can be no need to apply to court. Put another way, had there been any argument to suggest that an application was required, then it is proper to presume that the Official Solicitor would have put it.

At the time of writing, however, the status of the remainder of Peter Jackson J's conclusions is perhaps more debatable. In particular, it is unclear whether:

1. the Official Solicitor will seek to appeal the decision (that he was not, himself, a party, to proceedings would not seem to us to be a bar, he obviously having sufficient interest – as the Official Solicitor – in the case: see, for example, *MA Holdings Ltd v (1) George Wimpey UK Ltd (2) Tewkesbury BC* [2008] EWCA Civ 12); or

2. whether (as foreshadowed in his written submissions) he will contend in any future case that the observations are obiter because the application in M's case had in fact been made and determined.

If the former course of action is taken, we will have to wait to see what the appellate court/courts do. If the Official Solicitor (or indeed, anyone else) adopts the latter path, it seems to us that, with respect, this is too simplistic. The question of whether an application for a determination of M's best interests needed to be made had been put in issue by M's mother at the very outset of the proceedings. Peter Jackson J's judgment noted in its opening paragraph that the real application was for a request "*if required*" for a best interests determination (see also paragraph 30). The priority, at that stage, was to decide the question of M's treatment; the "*prior*" question of the need for the proceedings then being addressed subsequently in the fashion set out above. As Peter Jackson J then went on to note at paragraph 36, "[i]*t is not good enough for the court to say that, because proceedings have in fact been issued and determined, the question of whether they were necessary in the first place has thereby become moot*." Peter Jackson J, in other words, does not appear to have taken the view that he was merely expressing "*gratuitous comment*" (paragraph 36), but rather to be giving a judicial determination of a question put to him. In the circumstances, and whilst acknowledging that the position is more nuanced than might at first appear from some of the reporting, it seems to us that it is difficult to cast these observations as 'mere' obiter and – by inference – easily put to one side. Even if, strictly, the observations do not constitute part of the ratio of the case, there are obiter and there are obiter: see Megarry J in *Brunner v Greenslade* [1971] Ch 993 at 1002: "*A mere passing remark, or a statement or assumption on some matter that has not been argued, is one thing; a considered judgment on a point fully argued is another, especially where, had the facts been otherwise, it would have formed part of the ratio. Such judicial dicta, standing in authority somewhere between a ratio decidendi and an obiter dictum, seem to me to have a weight nearer to the former than the latter*."

In the circumstances, and putting aside for one moment the fact that (as the Official Solicitor himself acknowledged in his written submissions) it is difficult to see how a 'live' case

could ever arise on this issue, we would respectfully suggest that these observations represent the most detailed judicial attempt so far to grapple with this question, and that (if no appeal is brought) it is unlikely that another court would depart from the conclusions reached by Peter Jackson J on the basis of their forensic status alone.

The way forward

We note that at the time of writing there have been reports that the President may seek to issue "guidance" (the precise nature and status of which is as yet unclear) to clarify when cases should come to court. We should note in this context that there is no obvious route within the MCA 2005 or the Court of Protection Rules by which the President can issue guidance as to when cases should come to court, as opposed to how such cases should be addressed when they do come to court.[2] To the extent that the guidance represents the President's view of the relevant legal obligations, interesting questions will arise as to the status of that view vis-à-vis the conclusions of Peter Jackson J, and also as to how that view could be challenged in court if and to the extent that anyone should disagree with it.

Pending the issuing of any such guidance, and notwithstanding the view of the authors that Peter Jackson J gave the correct answer to the question asked of him, it is important to note that we deliberately emphasised the word "judicial" the concluding paragraph of the sub-section above because we should put down a marker that it seems to us that it is arguably a question that engages more than merely issues of narrow legal responsibility, and hence a question that does not fall to be answered solely by the judiciary.

Put another way, it is entirely open to us to consider that society has an interest in deciding: (1) whether we are content to leave decision-making in this regard to the collaborative non-court-based process set down by the framework of the MCA 2005; and (2) if so, whether we think that the safeguards set down in the Act as it stands are sufficient to protect all the relevant interests, above all the interests of P.

Our view is that the most important consideration is that there should be a robust framework for decision-making, whether that framework be administered outside or by the Court of Protection. Declaring an interest (on Alex's part), this only makes more important that Parliament is given the opportunity to debate the draft Mental Capacity (Amendment) Bill proposed by the Law Commission which includes the proposals to limit the scope of the s.5 MCA 2005 defence so as to enshrine more robust safeguards in law. In the interim, the onus is on the relevant regulatory and representative bodies to ensure that (at a minimum) equivalent safeguards are implemented as a matter of practice, and we would hope that this can be achieved sooner rather than later.

[2] The problematic status of PD9E in this regard being discussed by Alex in 2016 in the Journal of Medical Ethics.

Families, confinement and Rule 3A Representatives

SCC v MSA & Ors [2017] EWCOP 18 (DJ Bellamy)

Article 5 ECHR – deprivation of liberty

Summary[3]

District Judge Bellamy has added to the small but important body of case-law concerning Rule 3A in the context of so-called *Re X* applications for judicial authorisation of deprivation of liberty. He has given guidance as to whether it is ever appropriate for a family member (or other person) responsible for implementing restrictive care arrangements that constitute a deprivation of liberty also to be appointed and to act as P's Rule 3A representative.

MSA was a young man whose care at his family home was delivered in accordance with a package of care commissioned by SCCG. MSA was recorded as being "*unable to communicate or mobilise independently, is frequently strapped into his wheelchair, is kept for some of the time in a padded room at his home with a closed door that he cannot open, is highly resistive to personal care interventions so that physical restraint is required, and does not have external carers in the home*." His mother was one of the key people assisting SCCG in the implementation of the care package resulting in P's deprivation of liberty. SCCG made an application for judicial authorisation of P's deprivation of liberty, with his mother identified as being a suitable candidate to be his rule 3A representative.

It is not immediately obvious from the judgment how the Official Solicitor became involved in the proceedings, although it was clear that MSA's mother, JA, indicated at some stage that she did not wish to act as Rule 3A representative (or as litigation friend). The Official Solicitor expressed concern that SCCG did not accept that it would be "*manifestly inappropriate for MSA's representative in these proceedings and future review hearings to be the very person responsible for implementing restrictive care arrangements that constitute a deprivation of liberty, in circumstances where those arrangements go well beyond mere 24 hour supervision*." SCCG took the position that JA could undertake the role of Rule 3A representative as it had been outlined by Charles J in *Re VE* as "*she is fully engaged with statutory services and care providers and has a history of advocating on MSA's behalf. There is nothing in her conduct to date by which JA has demonstrated she would be unsuitable if willing to so act*."

Both parties filed written submissions and, at the request of the Official Solicitor, the court agreed to consider the appropriateness of JA acting as MSA's Rule 3A representative, irrespective of the question of her willingness or otherwise to act in this capacity. As District Judge Bellamy noted, because JA did not want to be so appointed, "*the question posed by the Official Solicitor could be said to be academic*," nonetheless acceded to the request to give some guidance on this issue, as follows:

> *25. I have considered the submissions from both parties carefully and have also had an opportunity not only of reviewing*

[3] Note, Tor having been involved in the case, this note is prepared without her input.

the statutory framework but also considering the judgments of Charles J in NRA and VE. I would not wish to depart in any way from the guidance he gives to representatives or the conclusions he reaches as to the suitability of appointment of representative or litigation friend of family members.

26. As Charles J indicated in NRA (paragraph 163) the interest of devoted family members or friends does not give rise to an adverse interest to P and so to a conflict of interest, or otherwise mean that they cannot properly and effectively promote P's best interests. Indeed, in performing their supporting and caring role over the years many such family and friends will have been doing just that by, for example, investigating, negotiating, obtaining and reviewing care and support from public authorities to promote P's best interests at home and in the community. The performance of that role will often mean that they have fought P's corner over a long time to promote his or her best interests and that they are, and will be the best or an appropriate litigation friend because they know P best and will be best placed to ensure the promotion of P's best interests ...

27. However, whilst I accept that each case is fact-specific to which the general principles set out in NRA and Re VE should be applied, it must be right that where there is any possibility (even if it is perceived rather than actual) that a conflict of interest will arise, the appointment of a representative or litigation friend must be closely scrutinised by the court. Whilst I would not go so far as to say even in this particular case it was "manifestly inappropriate" for JA to act as P's representative, the circumstances of P's deprivation and the existence of an implementation of a care plan which significantly restricts P's liberty by way of restraint, require the court to give close scrutiny as to whether or not, if she is willing, JA would be an appropriate representative or litigation friend or whether such role should be undertaken by an independent person such as the official solicitor.

28. It would be inappropriate for this judgment to go beyond the facts and circumstances of this case. There are in my judgment sufficient guidelines both in the statutory framework and the decisions of Charles J in VE and NRA for the following issues to be recorded:-

> *(a) Whether or not a family member or friend who is responsible in part for implementing restrictive care arrangements is appropriate to be representative or litigation friend is fact and case specific.*
> *(b) The court will have close regard to the relationship between the family member and P,and*
>
> *(c) The conduct, if any, of the family member and any available evidence that he or she has acted otherwise than in accordance with Rule 140(1) or Rule 147.*
>
> *(d) That the court must consider the nature of the restrictive care package and the role that the family member would play in such regime.*

29. I entirely agree with the submission of the Official Solicitor that where, a family member is responsible for providing care that includes significant restrictive physical interventions, the court should take great care in exercising its discretion

as regards P's representation in proceedings pursuant to Rule 3A. However, I would go no further than that. If it be the case that a family member or friend who is so involved puts themselves forward to act as representative or litigation friend, subject to that scrutiny being carried out there can be no blanket objection, in principle, to their ability to undertake the role.

30. Provided the court is satisfied that such representative can:-

(i) elicit P's wishes and feelings and making them and the matters mentioned in Section 4(6) of the MCA known to the court without causing P any or any unnecessary distress;
(ii) critically examine from the perspective of P's best interests and with a detailed knowledge of P the pros and cons of a care package, and whether it is the least restrictive available option; and
(iii) keep the implementation of the care package under review and raising points relating to it and changes in P's behaviour or health then such appointment can be made.

All of these factors go to the essence of P's Article 5 rights and provided the court is satisfied they can and are being adequately protected such role can be undertaken by the friend or family member.

Comment

There are three comments to make about this judgment. The first concerns the substance of the guidance given by District Judge Bellamy. The judgment faithfully follows the approach adopted by Charles J (and also, in an entirely different context, that of Peter Jackson J in *M v A Hospital*, covered elsewhere in this Report, in which he held that there is no reason in principle why a family member cannot act as litigation friend in an application for withdrawal of clinically assisted nutrition and hydration, even if they support the application). It shows how far the pendulum has swung from an essentially instinctive suspicion of the ability of those with a personal connection to P to act as their litigation friend in CoP proceedings towards a view that they may, in fact, be exactly the right person to act because of that personal connection. There is a great deal to be said for this, although the more the pendulum does swing, the more that we may legitimately start to ask whether we may need, at least in certain classes of case, both a litigation friend (to advocate for P) and an amicus or other person to assist in the inquisitorial stress-testing of the arguments advanced by the parties. For more on this, see both the article Alex and Neil co-wrote with Peter Bartlett.

The second comment is of the 'dog that did not bark in the night' nature. There appears to have been no dispute that MSA was deprived of his liberty for purposes of Article 5(1) ECHR, notwithstanding the fact that (1) he was in his own home; (2) his mother was either his primary carer; and (3) on the face of the judgment, there were no external carers (i.e., it would appear, no carers employed directly by SCCG). We had thought that this scenario might be tested before the courts in test cases to be heard before Baker J in early September, but such was not to be, and this case serves as another reminder of the tentacles of Article 5 ECHR.

The third comment concerns the status and nature of the guidance given, which gives rise to two further points:

a. It seems now as a matter of routine accepted that it is entirely possible for District Judges sitting in the Court of Protection to address and give guidance upon 'systemic' matters (for another recent example, see The Public Guardian's Severance Applications). Many of their judgments on individual cases have also had very considerable impact in shaping approaches more widely (think, for instance, of the judgment in Manuela Sykes' case). This could be said to reflect a rather cavalier departure in the CoP from the approach that applies in the civil courts to the status of District Judges. Alternatively, it could be said to represent a realistic recognition that: (1) we are all still finding our way; (2) that the District Judges are entrusted to determine the vast bulk of the issues that come before the courts; and (3) that, in consequence, we can, and should, have regard to reasoned judgments reflecting their practical expertise in applying the MCA and the Court of Protection Rules.

b. For reasons discussed in relation to the comment on *M v A Hospital*, it suggested that the guidance given by DJ Bellamy, whilst strictly academic, stands on the spectrum between pure obiter (i.e. comment) and ratio decidendi (i.e. the basis of the decision) significantly closer to the latter.

DOLS before the European Court of Human Rights

RB v United Kingdom Application no. 6406/15, decision of 12 September 2017 (European Court of Human Rights (First Section))

Article 5 ECHR – DOLS authorisations

Summary[4]

When he was 31, RB experienced a significant head injury, including frontal lobe damage, which resulted in an organic personality change and physical disabilities. He was discharged from hospital in 2008 to a neuro-rehabilitation facility. Frustrated with his lack of rehabilitative progress towards independent living, he stopped co-operating with the programme, escaped the care home on a number of occasions and abused alcohol. Now 41, he challenged the standard authorisation and this reference to the European Court of Human Rights followed his unsuccessful appeal in the domestic courts.

RB contended that his rights had been violated. In relation to Article 5(1)(e) he argued that his detention was unnecessary as the restrictions imposed were excessive and alternative arrangements could be found; his best interests had not been taken into account; and the detention was based on his alcoholism. Under Article 8 he argued that his detention interfered with his rights and it was disproportionate to ignore his wishes and feelings. In short, he argued that he would be condemned to a lifetime

[4] Note, Alex and Nicola were both instructed on RB's behalf before the ECtHR; while Neil led on the writing of this note, as the case is now concluded Alex has not felt constrained from involvement in drafting by our usual editorial rules about involvement in notes on our own cases.

of detention in the care home because he did not want to comply with rehabilitation.

Being the first time it had passed comment on DoLS, the ECtHR held (in considering the admissibility of the application):

> *31… there is nothing in the facts of this case which would indicate that the necessary guarantees are missing… Accordingly, the Court concludes that in the circumstances of the case, fair and proper procedures to protect against the potential arbitrariness of the applicant's detention were in place.It found that the alternatives to detention had been properly considered by the domestic courts and his arguments to the contrary were not borne out.*

Article 5 ECHR permits the detention of alcoholics but RB argued that domestic law did not and that he was being detained as an alcoholic. Again this was rejected by the court:

> *37… The Court therefore concludes that the applicant was detained in accordance with the domestic law due to his lack of capacity (not as an "alcoholic"), or in Convention terms as a person of "unsound mind".*
> *38. As the applicant is detained as a person of "unsound mind", the three minimum conditions of Winterwerp must be fulfilled (see paragraph 24 above) and it appears that they were in this case. First, the applicant was reliably shown to be of unsound mind, as a true mental disorder was established before the domestic courts on the basis of objective medical expertise (see paragraph 8 above). Second, the domestic courts concluded that the disorder was of a kind or degree warranting compulsory confinement (see paragraphs 8, 9 and 11). Third, the validity of the continued confinement depends upon the persistence of such a disorder.*

Having rejected his Article 5 arguments, the court held that no separate issues arose under Article 8, and declared the application inadmissible.

Comment

Albeit only on an admissibility decision, the European Court of Human Rights appears to have given DoLS a clean bill of health, this being the first time it has considered the state of English law since *HL v United Kingdom*. In particular, it seems that the Court was satisfied that DoLS addresses the criticisms made in *HL*. There are three noteworthy points about the judgment.

The first relates to the grounds for RB's detention. The Convention refers to "unsound mind". DoLS requires both mental incapacity (under MCA ss2-3) and mental disorder (under MHA s.1). In this case, RB's personality change caused by his acquired brain injury would amount to a mental disorder (as per para 38) but it is interesting that the court equated his "lack of *capacity*" with "unsound mind" (in para 37).

Do paras 37-38 conflict with each other? Or does mental incapacity provide sufficient grounds for detention under Article 5(1)(e)? The point is quite significant. If mental incapacity alone suffices, there is no need for the DoLS mental health assessment (although objective medical expertise would still be required, presumably in relation to mental incapacity). It would also expand the remit of Article 5(1)(e) ECHR to potentially cover all those who lack mental capacity, and would also, ironically, cut against

the trend of the courts trying to 'de-medicalise' capacity and recognise it as a socio-legal construct. Whilst the Northern Ireland Mental Capacity Act 2016 (bravely) dispensed with a separate mental health requirement, the Law Commission was arguably well-advised to retain the mental health requirement for the Liberty Protection Safeguards, at least for now.

The second point to note is the court's clear endorsement of *Winterwerp* in this context. It demonstrates that the Court of Appeal erred in *G v E and others* [2010] EWCA Civ 822 in deciding that *Winterwerp* was not applicable to detention under the MCA 2005.

The third point is that the Court appeared to be entirely unfazed by the current debate as to whether deprivation of liberty on the basis of unsoundness of mind is illegitimate having regard to Article 14 CRPD. As the first time in which the Court had to have regard to the elaborate administrative mechanism created by DoLS, taking Article 5(1)(e) far outside the context of psychiatric hospitals in which it was created, it might have been thought that this was the opportunity for the court to baulk at its very existence in light of Article 14 CRPD. To the contrary – as noted above, it gave DoLS a clean bill of health.

10 years of the Mental Capacity Act

As many readers will be aware, the MCA came fully into force on 1 October 2017. The Principal Social Workers' Network led a day of action on 27 September. Twitterati can search #MCA10 for highlights of the day, including guest posts from both Neil and Mark Neary.

PROPERTY AND AFFAIRS

Financial Conduct Authority Proposes Online LPAs

On 21 September the Telegraph reported on the FCAs paper concerning improving financial services for the elderly, Occasional Paper 31 Ageing Population and Financial Services. The paper concentrates on the financial services industry but in a section headed *"Improving the consumer journey around third party access"* we find the following suggestion:

> *"This could include development of a secure, end-to-end digital LPA registration system and database that is fit for purpose now and as LPA numbers continue to grow supported by an appropriate arrangement to facilitate paperbased alternatives for those reliant on them."*

Not everyone is so keen on this idea as the Telegraph's article relates. The concern is that the requirement of a paper application with a *"wet"* signature is a valuable deterrent to fraud.

This issue is of particular interest given Denzil Lush's recently reported views on the lax supervision of LPAs generally. The difficulty we face, though, is the ever-increasing numbers of people who may need an LPA and, in this instance, the increasing expectation that the process, like so many others, can be accessed exclusively online.

Vulnerable individuals and their money – at risk of abuse in their own homes?

[*We are very pleased to be able to publish this guest article by Dr Gillian Dalley, Visiting Research Fellow, Brunel University, and lead author of an important report: Financial Abuse of People Lacking Mental Capacity*]

Recent research has begun to shine light on an under-investigated aspect of family life: the financial abuse of people lacking mental capacity. In a project funded by the Dawes Trust, a team from Brunel University has been searching widely for data on this difficult subject. Their search ranges from nationally-collected safeguarding statistics produced by local authorities, to the experiences of health, social work and legal professionals working in councils, the law, financial institutions and the voluntary sector, and finally to cases heard in the Court of Protection, by way of the OPG. All in all, it reveals an extent of intra-family financial abuse that some might find disturbing.

Many of the findings are clear and well-founded: analysis of safeguarding referrals shows that financial abuse is the third most commonly reported form of abuse (after neglect and physical abuse); over 40% of abuse is committed within the domestic setting, and at least half of it is committed by people known to the victim, often from within the family. A fair proportion of the subjects in these referrals were assessed as lacking capacity (over two thirds, in the case study undertaken of one London borough). Anecdotal accounts from professionals describe the sorts of financial abuse they encounter in the course of their daily work, and analysis of 34 cases heard by the Court of Protection provides both an in-depth – and sobering – illustration of the extent of financial abuse experienced by vulnerable individuals. It also identifies 'suspicion triggers' – crucial indicators of such abuse possibly occurring within families.

But data sources are also scarce and scattered. Questions remain: are the subjects of safeguarding referrals to councils ever – or never – the same individuals who are the donors of LPAs in cases heard by the Court of Protection? Is there one system of protection for poor individuals lacking mental capacity and another for those with more substantial financial and material assets? Is the OPG a protective bridgehead for both, or neither?

A significant problem widely acknowledged by professionals (police, lawyers, social workers) stands out – the difficulty of bringing perpetrators to book, often revolving round the question of evidential proof and the different standards required by the civil and criminal justice systems. Family members with LPAs are, too often, insufficiently cognisant of their duties and obligations towards the donor. Even when cases reach the public domain, chances of redress and restitution are rare. Victims may be unaware of the abuse and, often, may have died.

Inter-professional differences exist, abstract as much as practice-related – usually between social work and the law. Dichotomies, apparent in other areas of theory and practice governed by the Mental Capacity Act 2005, arise here, too: between notions of safeguarding and autonomy; protection and risk-taking. What place for "unwise decisions", "undue influence" and "best interests"? The debate carries on.

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Financial scamming resources

The indefatigable team at Bournemouth University led by Keith Brown has recently added to their extensive range of materials relating to financial (including cyber) scamming in in relation to vulnerable adults. These include a financial scamming resource page, a booklet on scamming, definitions, and specific materials relating to cyber-scamming.

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PRACTICE AND PROCEDURE

Court of Protection Rules 2017

As this issue goes to press, we await with – increasingly pressing – interest the laying of the Court of Protection Rules 2017 before Parliament (and the publication of the associated suite of Practice Directions). As the intention is that a full revised and consolidated package of Rules (reformatted into CPR/FPR format) will be ready to go by the time that the current pilot expire on 30 November 2017, we anticipate that these Rules will be laid in the very near future. Updates will be provided by the usual channels as soon as available.

Transparency update

The Court of Protection 'Transparency Pilot for increased access to public and media' was launched in 29 January 2016. The original intention was that it would run until 31 July 2016.

The note from the Vice President to the Court of Protection provided:

> *….the aim of the pilot is to effectively reverse the existing default position of private hearings. This means that there will have to be a good reason for not making an order that an attended hearing is to be in public including an anonymity order in terms of or based on the standard order (the Pilot Order).*

Serious medical cases to which Practice Directions 9E and 13A applied were not initially covered by the pilot, as they were not hearings that were held in private.

Amendments were made to the pilot order around April 2016 following a series of meetings between judges, lawyers, court staff and the media convened by the MOJ to feedback on the pilot, and again in June 2017 when the Vice President reported that the ad hoc Committee on the CoP Rules had recommended that a further amendment should be made to the Transparency Pilot to bring all proceedings in the CoP apart from applications for committal, within the pilot.

The pilot has now been extended until 31 November 2017.

For those of us who appear regularly in the CoP, it is rare for members of the public to attend, and save for the odd cases, Brian Farmer of the Press Association is almost the only journalist who attends CoP hearings with any regularity. Is that because the public and the press are not interested in what is going on in the Courts, or are there problems with the way the pilot is set up and run which creates barriers to greater public interest in these cases?

Three particular problems have come to our attention:

1. First, cases are either being incorrectly listed as being in private when they should in fact be in public, or signs indicating that the hearing is in private are incorrectly placed or left on the Court doors. This appears (anecdotally) to be a problem particularly in the Royal Courts of Justice and may be an inevitable consequence of the fact that Judges have a long list of family and CoP cases, some of which are in private (family) and some in public (CoP). This gives rise to a serious concern about how effectively the transparency pilot is working. Brian Farmer of the Press Association (when asked for

some comments to contribute to this article) puts it starkly:

> *There have been a number of cases recently where judges have serious medical treatment issues before them but are wrongly listed in private. I think it would be fair to say that when that happens judges are making life and death decisions in secret.*

2. Secondly, it is said that there is insufficient information available to the public/press about a case, for the public/press be able to make a judgment about whether it would be of interest to them. The only information that is available comes from the listing, which should include the names of those parties who have not been anonymised (P will almost always be anonymised, leaving only the names of the public bodies involved) and the case descriptor. The case descriptors derive from one of the suite of documents generated as part of the pilot entitled 'CoP Listing General description of cases for daily cause list'. The descriptors are pithy (such as '*where P should live' or 'healthcare')*. The drafter of the Pilot order is directed to choose the case descriptor that best suits the case, and this is then used when listing the case. Thus a case could raise issues of real public importance (such as whether life sustaining treatment should be withdrawn from someone), but the only information the public and the press will have about the subject matter of the case is that it involves healthcare. (This is of course a significantly different position to that which existed prior to serious medical treatment cases being dealt with under the pilot, when the Press would be not only be notified by the applicant when one of these cases was being listed, but would also be provided with an explanatory note setting out the issues in the case). More worrying, in some cases, the case descriptor is missing entirely.

3. Thirdly, even if the press or a member of the public finds themselves in a hearing, there is often a real reluctance to provide them with key documents such as skeleton arguments so as to enable them to be able to make sense of the hearing. Rule 18 makes it clear that if a hearing is in public and a document 'has been read to or by the court or referred to' then the parties are not restricted to using that document only for the purposes of the proceedings in which it was disclosed. This means that it is open to a party to provide a copy of a skeleton argument that is referred to during a hearing, to a member of the public or a member of the press. (Rule 17 also allows a non-party to make an application to the Court to obtain copies of documents on the court record. However as such applications need to be made in accordance with Part 10 (i.e. by filing an application notice supported by evidence), this is likely to deter most members of the public).

Clearly efforts need to be made to ensure that the system works as it is designed to work. As to whether further changes should be made, Brian Farmer of the Press Association makes the following suggestions:

- List all CoP cases being heard by judges at the RCJ in open court and include a brief

description of the issue on the list – such as "serious medical treatment"

- Start all hearings in public.
- At the start of each hearing counsel for the applicant should give the court a 60-second "explanatory note" opening which would describe the issue and explain what, if any, reporting restrictions are being sought, without revealing P's name.
- The judge would have the option of going into private, either to hear the whole case or part of the case, or simply to allow a debate at which P could be named.
- Allow journalists but not the public to sit in on private hearings thus bringing the CoP in line with the Family Courts.
- Where the Court is sitting in public and is considering making a reporting restriction order, any journalist present should be given, in writing, the name of P and a draft of the RRO being sought, thus allowing a reporter to raise any concern about reporting restrictions or ask for a bit of time to consult a lawyer, while still allowing the judge to keep control of private information before making an RRO.

In September, the MOJ facilitated a number of workshops with lawyers, HMCTS staff and the press to obtain further feedback on the pilot. All of these issues were raised. We will have to wait and see whether the result is a change to the order/accompanying guidance if/when the pilot approach becomes cemented into the practice and procedure of the CoP come the introduction of the Court of Protection Rules 2017 and their accompanying PDs.

Access to justice in the Court of Protection

[*We are delighted to be able to publish a guest article by the authors of the recently published report on welfare cases in the Court of Protection, which is by some margin the most detailed and comprehensive attempt ever to examine how the court actually works in practice*]

The Court of Protection (CoP) has an important and growing jurisdiction under the Mental Capacity Act 2005 (MCA) over decisions concerning the health, welfare and liberty of people with mental disabilities. We have been researching the accessibility, efficiency and transparency of the CoP's welfare jurisdiction in a four-year project funded by the Nuffield Foundation.[5] This has just concluded. Earlier this year we published a major report on the legal and policy issues surrounding the participation of P in CoP welfare proceedings.[6] In September 2017 we reported on findings from two empirical studies of the CoP's welfare jurisdiction during 2014-15.[7]

The first study from our recent report was conducted on 200 case files held in the CoP's main registry in London and 51 case files from CoP cases heard by High Court judges in the Royal Courts of Justice. This study was itself an exercise in 'transparency' – relying as it did upon the 2015 amendments to the Court of Protection

[5] www.nuffieldfoundation.org
[6] Series L, Fennell P and Doughty J, The Participation of P in Welfare Cases in the Court of Protection (Cardiff University, Report for the Nuffield Foundation 2017).
[7] Series L, Fennell P and Doughty J, Welfare cases in the Court of Protection: A statistical overview (Cardiff University, Report for the Nuffield Foundation, 2017).

Rules 2007 and a Practice Direction [8] which facilitated the sharing of information for research purposes. We are very grateful to the senior judiciary and the staff of the CoP for making this study possible, for hosting us and for supporting our research so strongly. The second study used the Freedom of Information Act 2000 (FOIA) to ask local authorities and NHS bodies in England and Wales about their involvement in CoP welfare litigation.

Our recent report covers a wide range of issues. Readers with a keen interest in the CoP's welfare jurisdiction might enjoy dipping into particular sections to see what we found. This article focuses on one of the most pressing questions facing the CoP's welfare jurisdiction at present: access to justice for P and those close to P where they object to a decision being made under the MCA.

The importance of access to justice under the Mental Capacity Act 2005

Most decisions about care or treatment on behalf of a person considered to lack mental capacity in relation to the matter are taken informally, with professionals and other carers relying upon the general defence contained in s5 for acts of care or treatment without consent. Alex has described the general defence as a 'de facto power' [9] when it operates in conjunction with the provision of health and social care services. Yet it is a power with little oversight and few safeguards against potential abuse. Its scope is increasingly uncertain and contested[10], and such duties as have sometimes been held to exist to involve the CoP for certain serious medical treatment decisions are unravelling, if indeed they ever did exist at law.[11] There is a growing suggestion in case law that the duty to refer serious medical treatments to court rests on the existence of conflict, rather than the nature of the treatment, but the precise scope and nature of this is unclear.[12]

In this context, it is important that the CoP is readily accessible for P and P's family where they object to acts of care or treatment proposed under the MCA with a major impact on their lives. It is likely that such a right of access to a court is required by Article 8 of the European Convention on Human Rights, in conjunction with Articles 6 and 13.[13] Yet our research paints a rather dismal picture in this regard.

Three routes into the CoP's welfare jurisdiction

There are three main routes into the CoP's welfare jurisdiction:

1. a personal welfare application to the CoP, using the COP1 and COP1B application forms for declarations or orders under ss 15-17 MCA (the 'personal welfare' route);
2. where P is subject to an authorisation issued by a supervisory body under the deprivation of liberty safeguards (DoLS), an

[8] Court of Protection, *Practice Direction 13A - Hearings (including reporting restrictions)* (2015)
[9] Ruck Keene A, (2016) 'Powers, defences and the 'need' for judicial sanction', *Elder Law Journal* 244 (Autumn issue)
[10] For discussion see *The Participation of P in Welfare Cases in the Court of Protection* pages 64 – 75.
[11] *Re M* [2017] EWCOP 19
[12] For discussion see *The Participation of P in Welfare Cases in the Court of Protection* pages 64 – 75.
[13] For further discussion see *The Participation of P in Welfare Cases in the Court of Protection* Sections 2.3 and 3.1.

application may be made under s21A MCA for a review of the authorisation, using the COPDLA forms (the 'DoLS review' route);

3. an application for authorisation of a deprivation of liberty where this is non-contentious using the *Re X* 'streamlined' procedure and the COPDOL10 form (the '*Re X*' route).

The CoP files study only looked at the personal welfare and DoLS review routes, although we did ask local authorities about their involvement in *Re X* applications in our study using the FOIA.

Our study found that the personal welfare route into the CoP's jurisdiction was mainly used by public authorities seeking declarations that P lacked mental capacity in relation to some matter, and orders that their proposed course of care or treatment was in P's best interests. We found very few applications by P, and only a small number by P's family, using the personal welfare route. This finding was supported by our FOIA data from local authorities, who reported very few personal welfare applications being initiated by P or P's family. It was very rare for a personal welfare application to seek a declaration that P had mental capacity. When we looked at final orders for personal welfare applications, it was also rare for the CoP to conclude that P *had* mental capacity in these cases. Thus although the personal welfare route is in theory available to P or P's family to contest decisions made under the MCA, our evidence suggests that it is only very rarely used for this purpose.

By contrast, our findings were very different for the DoLS review route into the CoP's welfare jurisdiction. A large proportion of applications for DoLS reviews came from P. It was often clear from the file that P had instructed a solicitor with support from an IMCA or paid RPR. Although the majority of disputes were about where P lived and their care arrangements, many of the disputes that found their way into the CoP's welfare jurisdiction under the DoLS review route were actually about other matters such as specific medical treatments, contact with specific individuals, or even the capacity to consent to sex or marriage. The DoLS seem to offer an enabling framework for accessing justice to bring MCA disputes to court, when the personal welfare route does not.

A (less disabling) framework for accessing justice

We should emphasise that we are not stating that the access to justice arrangements under the DoLS are satisfactory for the purposes of detention reviews in accordance with Article 5(4) ECHR: only a tiny proportion of those detained under DoLS do exercise their s21A rights of appeal. We also raise concerns about the lengthy timescales for a CoP DoLS review in our report. One of the saddest findings in our study was the significant number of P's who died before the CoP had made a final order in their case.

Yet for all the faults of the DoLS, they do seem to be more enabling (or less disabling) for those subject to health and welfare decisions made under the MCA to access justice to bring disputes to court. There are some good practical reasons for this. When a decision is made 'informally' under the MCA, there is no obligation to inform P or those close to P of the existence of a mechanism to challenge the decision in court. In many cases, they will not even know that the decision has been made under the MCA.

By contrast, because of the engagement of Article 5 in detention cases, the DoLS require the individual and their representative to be informed of their rights to appeal to the CoP.[14] When P or an unpaid representative has difficulty understanding or exercising rights of appeal, they should (in theory) have access to a s39D IMCA, who should (in theory) help them to exercise rights of appeal.[15] It was telling that we found only one case under the personal welfare route where an IMCA had been involved in the application, but IMCAs' involvement was clear from the file in 40% of cases where P was the applicant.

Although unlikely to be a barrier for P or P's family where they have access to skilled and experienced legal representatives, we also highlight that the personal welfare application forms are poorly designed for challenging decisions made under the MCA. Although the first principle of the MCA is that P should be assumed to have mental capacity, the personal welfare application process is predicated on the assumption that P lacks capacity: the COP1 form and guidance notes instruct applicants to submit a COP3 assessment of capacity form alongside, and the COP3 form is designed on the basis that those completing it will find that P lacks mental capacity. Nowhere in the personal welfare application forms or guidance are instructions given for those seeking a declaration that P *has* mental capacity.

Another very important reason why the DoLS may enable P or P's representative to access the CoP's welfare jurisdiction is the availability of non-means tested legal aid for DoLS reviews. By contrast, legal aid for personal welfare applications is means tested, and very often this means that access to justice is simply unaffordable for P or P's family. Our FOIA study found that the median value of a legal aid certificate for P was £7,672 for a medical case, £20,874 for a non-medical case and £7,288 for a deprivation of liberty case. The costs for self-funding litigants are likely to be higher, however, as legal fees are not restricted for privately paying clients as they are for legal aid work. Our research also indicated that cases about relationships – contact with others, or capacity to consent to sex or marriage – are especially complex: they last longer, and involve more parties and more hearings. These cases are likely to be especially costly.

One of the effects of *P v Cheshire West and Chester Council and another; P and Q v Surrey County Council*[16] is to bring within the ambit of the DoLS a wide range of related welfare issues. Whatever one thinks of the wider effects of this judgment, it has enabled access to justice for many who would otherwise be unable to access the CoP's welfare jurisdiction. Our sample of case files from 2014-15 suggests that many applicants were taking advantage of newly widened scope of the DoLS to bring before the CoP welfare matters such as medical treatment disputes and safeguarding issues around relationships.

[14] MCA Schedule A1 ss 57-58

[15] This duty was clarified by Mr Justice Baker in *AJ v A Local Authority* [2015] EWCOP 5, a case that fell towards the end of our reporting period.

[16] [2014] UKSC 19

Recent Court of Appeal rulings will, however, restrict the ability of Ps or families today to use the DoLS in this way, at least in relation to medical treatment disputes. Following *R (Ferreira) v HM Senior Coroner for Inner South London*[17] many medical treatment decisions will no longer be considered to engage the 'acid test' of *Cheshire West* and so P will not be eligible for DoLS. And following the Court of Appeal's recent ruling in *Director of Legal Aid Casework & Ors v Briggs* [18] serious medical treatment decisions have been excluded from the scope of s21A reviews. Mr Justice Peter Jackson described these rulings as sweeping away two 'fictions' in *Re M*[19], but leaving 'a serious practical concern for those families who do need specialist legal representation to enable serious medical treatment issues to be resolved'.[20] Without the DoLS review route into the CoP's jurisdiction, it is unclear how – if at all – P's and families in these circumstances can challenge decisions made under the MCA.

Outcome of DoLS reviews

Our research suggests that without the DoLS review route, the CoP's personal welfare jurisdiction is almost entirely inaccessible for Ps or families in dispute with health and social care professionals about serious medical treatment decisions or wider welfare matters. However, based on our relatively small sample of 52 DoLS reviews with final orders on the file, our findings indicate that a DoLS court review often results in a change of outcome for P. In 17% of cases the supervisory body terminated the application before a final order was made, and in 23% of DoLS review applications the CoP made orders that the qualifying requirements for the DoLS were not met. The CoP's DOLS jurisdiction may be difficult to access, but once engaged it does not appear to be operating as a rubber stamp.

We note with regret, however, that we were unable to offer any insights into how often the outcome of a CoP welfare application or DoLS review reflected what P wants or would have wanted. We found it impossible in many cases to locate information about P's wishes, feelings, values and beliefs from the information available in the files. The jurisdiction is increasingly placing P's wishes, feelings, values and beliefs at the heart of decision making. However, the absence of reference to P's wishes, feelings, values and beliefs in the COP1 form,[21] and lack of routine recital of what could be ascertained about P's subjective preferences in orders, means that the CoP's forms and processes do not yet reflect this direction of travel.

The future of the Court of Protection

The CoP faces a seemingly impossible challenge of balancing accessibility, efficiency and justice. The more accessible the court's jurisdiction, the higher the volume of litigation. The higher the volume of litigation, the harder it will be for the court to facilitate P's participation – another area of serious concern in our research – and the danger that it may become a 'rubber stamp' will

[17] [2017] EWCA Civ 31
[18] [2017] EWCA Civ 1169
[19] [2017] EWCOP 19
[20] Ibid, paras 39 and 40.
[21] Although the COP3 form does ask 'Has the person to whom this application relates made you aware of any views they have in relation to the relevant matter?' the capacity assessor will not necessarily have access to the range of information about P's wishes, feelings, values and beliefs that should be available to the applicant. Moreover, in our sample this section was often not completed by COP3 assessors.

increase. In one sense, the inaccessibility of the CoP's jurisdiction is precisely what enables it to function: it is doubtful that it could cope in its current form with the influx of cases if its jurisdiction were as accessible as it should for the purposes of reviewing detention and restoring legal capacity in the context of serious health and welfare disputes.

The root of the problem is the absence of any alternative mechanism for independent oversight of, and challenge to, decisions made under the MCA. When the Law Commission proposed what became the Mental Capacity Act 2005 in the 1990's, they proposed statutory restrictions on the general defence – with certain very serious decisions having to be made by a court, and with others subject to a second opinion scheme similar to that under the Mental Health Act 1983.[22] For reasons that have been lost to posterity,[23] the government chose not to take these proposals forward.[24] In the Law Commission's recent report on mental capacity and deprivation of liberty they proposed statutory restrictions on the general defence and the requirement for formally recording mental capacity assessments and best interests decisions in certain situations.[25] We suggest that this is an inadequate safeguard in the context of a dispute between a public body and P or P's family regarding serious human rights issues, and we should be thinking more creatively about radical modifications or alternatives to the CoP's current welfare jurisdiction where disputes arise.

At present, however, the CoP's welfare jurisdiction is all that is realistically available where P or those close to P object to decisions made by health and social care professionals with a significant impact on their lives and human rights. In the absence of an alternative mechanism to provide scrutiny and a means of challenge to health and welfare decisions, urgent action is needed to address these access to justice concerns. Improving legal aid for personal welfare disputes would be a good start, but it will also require public bodies to ensure that people are given the knowledge and assistance they need to exercise their rights to seek review of a deprivation of liberty authorisation and restoration of legal capacity.

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[22] Law Commission, *Mentally Incapacitated Adults* (Law Com No 231, HMSO 1995)

[23] The Ministry of Justice has not retained any records of the consultation response on this question. If any readers have any consultation responses, or information about why these proposals were not taken forwards, Lucy would be very interested in hearing from them regarding her current research on the history of the Mental Capacity Act 2005.

[24] Lord Chancellor's Office, *"Making Decisions" The Government's proposals for making decisions on behalf of mentally incapacitated adults. A Report issued in the light of responses to the consultation paper Who Decides?* (Cm 4465, London, HMSO, 1999) para 12.

[25] Law Commission, *Mental Capacity and Deprivation of Liberty* (Law Com No 372, 2017)

Inherently problematic? Capacity thresholds, autonomy and the inherent jurisdiction

LB Wandsworth v M & Ors [2017] EWHC 2435 (Fam) (Hayden J)

CoP jurisdiction and powers – interface with inherent jurisdiction

Summary

In *LB Wandsworth v M & Ors*, Hayden J was faced with a significant problem in relation to a child about to turn 18. The solution that he adopted, unfortunately, both casts unhelpful doubt upon a central plank of the Court of Protection's jurisdiction and highlights, again, just how unsatisfactory the current state of the inherent jurisdiction is in this context.

In order to understand the problem confronting Hayden J (and the problems his judgment arguably causes), it is necessary to set out the relevant facts in a little detail.

The case has received a degree of media attention, as it concerned three boys who were said to have been brought up by their mother in a "narcissistic cult," in extremely isolated conditions. For present purposes, the relevant boy was "J," who was about to turn 18. He was, at the point of the judgment, in a residential unit, and had been living there for nearly two years apart from his mother, and with no contact with her. Having previously expressed a strong wish not to live at home, he was now expressing a wish to live with his mother and his older brother N (who was 21 and had only left the flat on one occasion in over 3 years), although he was refusing to see her or availing himself of the opportunity of the telephone contact which has been offered. It was clear that J's assessment was of his own situation was "*fraught with danger both immediately and in the longer term*," and that the apparent contradiction in J not wishing to see his mother but wishing to return to live with her was driven was explained (by the Senior Family Therapist) as she describes as "*a form of suicidality*" by which she explained she considers J "*is giving up on the whole idea of having or developing any thing other than a very, very narrow and isolated life."* It appeared, further, that it was his elder brother, N, who was the real attraction for J's return, as he "*appear*[ed] *to have achieved precisely the refuge that J seeks*." J had also "volubly articulated a deep seated resistance to '*the intervention of the state*'."

The professional consensus was that J was making modest but important advances in the residential unit. The Senior Family Therapist's evidence as to the objectives to be achived were that "*J needs to have a home environment separate from his brothers, as they have encouraged and supported his cut-off and unrealistic approach to life,"* and that "[t]*here should be a slow and gradual exposure to external reality, including social relationships and education, so that [J] very slowly becomes accustomed to this and able to manage. To what extent he will be able to make progress in this is currently unknown. There are one or two hopeful indicators… …but it is possible that his personality structure has become so rigid as to make him feel unable to adapt and learn to become an independent, autonomous adult with a meaningful relationship to the world.*" It was considered that J's continuing reluctance to involve himself in "*external reality*" and his persistent self-aggrandisement, gave rise to a serious risk of his developing severe personality

difficulties such as Narcissistic Personality Disorder.

Given that J was about to turn 18, how could the goal of ensuring that he stayed at the residential unit be achieved? It appears from the judgment that it was only very late in the day that the local authority took the view that it might be possible to argue for this on the basis that J lacked the relevant decision-making, and put a mental capacity assessment before the court so as to get Court of Protection proceedings off the ground. The assessment concluded that due to J's *'lack of insight'* and *'inflexibility of thought'*, he *'on the balance of probabilities lacked mental capacity to make the decision as to where he should live'*. The social worker added to this in oral evidence that J was unable to 'sift and weigh the issues' underlying the decision. However, she did not illustrate her assertion by reference to identified difficulties.

Hayden J, however, was very concerned about this assessment.

> *46. I do not mean to be discourteous to those involved in this assessment. I suspect that the process was almost entirely driven by a determination to secure that which is undoubtedly in J's best interests i.e. continued placement at this residential unit. However, I am convinced that the assessment displays insufficient forensic rigour to justify its conclusion. Neither do I regard its determination that J lacks capacity as adequately reasoned.*
>
> *47. Furthermore, having listened to the evidence from those who undertook the assessment I am far from satisfied that they explained the purpose of the assessment to J. Indeed I would go further, I do not think they did. One of the key principles of the Mental Capacity Act is that a person should not be treated as unable to make a decision until everything practicable has been done to help the person make their own decision (see s1 (3)). The code of Practice dedicates an entire chapter to providing guidance and prompt consideration of a range of practical steps which might assist in this objective. It seems to me to be fundamental to the assessment process that P is informed of the purpose of the assessment. Mr Cheung insinuated that he had done this but, if he will forgive me for saying so, I did not find him convincing. In the written assessment there appears, at (5), the following question*: have you explained the purpose of the assessment to P? *The answer, which I repeat in full, reads* 'Yes'. J is aware of the current situation and this topic has been brought up and discussed on many different occasions.'
>
> […]
>
> *49. It seems to me that a prerequisite to evaluation of a person's capacity on any specific issue is at very least that they have explained to them the purpose and extent of the assessment itself. Here, that did not happen. In my view, it is probably fatal to any conclusion. In any event, it, at least, gravely undermines it. I have very much in mind* ***PC and Anor v City of York Council [2013] COPLR 409, [2013] EWCA Civ 478*** *where Peter Jackson J (as he then was) made the following observation:*
>
> > '… there is a space between an unwise decision and one which an individual does not have the mental capacity to take and … it is

> important to respect that space, and to ensure that it is preserved, for it is within that space that an individual's autonomy operates.'

Although he was very concerned about the assessment, Hayden J noted that, at an earlier stage J's solicitor had considered (during the course of assessing whether J was competent to instruct him) had also spent some time considering the question of where J should live. Although the observations were made in this specific context, J's observations were interesting. "*J said he wanted to return home, not to be with M or N but to the 'home itself'. J amplified this, saying he sees being at home as 'freedom – not in the sense of being allowed out as he does not wish to go out'. He said, 'at home there is freedom not being homogenised by society'. He also observed that education was 'indoctrination by the State to make people slaves'. He considered that being in the unit was 'like being in a prison'. He expanded on this saying 'not in the physical sense but the emotional'. He continued, that he was 'forced to communicate in a way with people that was not beneficial to him'.*" Hayden J was "*left with a real anxiety as to whether these remarks illustrate a lack of capacity to take the decision in focus or merely an illogicality or general unreasonableness on J's part*."

Hayden J then went on to consider whether the material before him passed the s.48 threshold. This threshold had – it was generally considered – been definitively considered by HHJ Marshall QC in *Re F* [2009] EWHC B30 (Fam) thus "*What is required, in my judgment, is simply sufficient evidence to justify a reasonable belief that P may lack capacity in the relevant regard. There are various phrases which might be used to describe this, such as "good reason to believe" or "serious cause for concern" or "a real possibility" that P lacks capacity, but the concept behind each of them is the same, and is really quite easily recognised.*" HHJ Marshall QC had, further, stated the "*proper test for the engagement of s 48 in the first instance is whether there is evidence giving good cause for concern that P may lack capacity in some relevant regard. Once that is raised as a serious possibility, the court then moves on to the second stage to decide what action, if any, it is in P's best interests to take before a final determination of his capacity can be made. Such action can include not only taking immediate safeguarding steps (which may be positive or negative) with regard to P's affairs or life decisions, but it can also include giving directions to enable evidence to resolve the issue of capacity to be obtained quickly. Exactly what direction may be appropriate will depend on the individual facts of the case, the circumstances of P, and the momentousness of the urgent decisions in question, balanced against the principle that P's right to autonomy of decision-making for himself is to be restricted as little as is consistent with his best interests. Thus, where capacity itself is in issue, it may well be the case that the only proper direction in the first place should be as to obtaining appropriate specialist evidence to enable that issue to be reliably determined.*"

Hayden J, however, took the view that this set the bar too low:

> *65. There can be no doubt that the cogency and quality of evidence required to justify a declaration of incapacity, pursuant to Section 15, will be greater than that required to establish the interim test. However, it is important to emphasise that the presumption of capacity is omnipresent in the framework*

> *of this legislation and there must be reason to believe that it has been rebutted, even at the interim stage. I do not consider, as the authors of the 'Mental Capacity Assessment' did that a '*possibility*', even a '*serious one*' that P might lack capacity does justification to the rigour of the interim test. Neither do I consider '*an unclear situation*' which might be thought to '*suggest a serious possibility that P lacks capacity*' meets that which is contemplated either by* **Section 48** *itself or the underpinning philosophy of the Act. In exchanges with Counsel the test has been referred to as '*a low one' *or '*a much lower threshold test at the interim stage'*. Additionally, when I look, for example, at the words of the Judge in Re FM [a decision of King LJ on permission to appeal] I am left with a real sense of unease, particularly as the facts in that case appear to have some similarity to those here.*
>
> […]
>
> *66. Ultimately whilst I recognise that, for a variety of reasons, it will rarely be possible at the outset of proceedings to elicit evidence of the cogency and weight required by* **Section 15***, I think it is important to emphasise that Section 48 is a different test with a different and interim objective rather than a lesser one. '*Reason to believe*' that P lacks capacity must be predicated on solid and well reasoned assessment in which P's voice can be heard clearly and in circumstances where his own powers of reasoning have been given the most propitious opportunity to assert themselves.*

Having "honed the test," Hayden J declared himself:

> *entirely satisfied that it is not met in J's case. In summary: the purpose of the assessment was not explained to J; the analysis of the extent of J's understanding of the relevant information is superficial and incomplete; the ultimate reasoning underpinning the conclusions of the assessment is vague and unsatisfactory. It would be entirely disrespectful to J to curtail any aspect of his autonomy on the basis of such unsatisfactory evidence. I am entirely unclear as to whether J has capacity to decide where he lives or not. Accordingly, even on an interim basis, the presumption of capacity has not been rebutted. These are important principles which must never be eclipsed by a paternalistic emphasis on welfare. To do so, lets in the dangers Lord Reid alluded to in* **S v McC: W v W** *(supra).*[26] *Further, I would add, to conclude otherwise, on this evidence would serve only to reinforce J's own heightened anxieties about the unmarshalled power of the State and thus potentially undermine the welfare objectives.*

However, the story did not end there, because Hayden went on to consider whether he could exercise the declaratory and injunctive powers of the High Court under its inherent jurisdiction, on the basis he could do so "*if I am satisfied that J is a vulnerable adult, at risk of harm, whose autonomy has been compromised in relation to his decision*

[26] "*English law goes to great lengths to protect a person of full age and capacity from interference with his personal liberty. We have too often seen freedom disappear in other countries not only by coups d'état but by gradual erosion: and often it is the first step that counts. So it would be unwise to make even minor concessions.*"

making processes and who may be sufficiently protected by this relief." In so doing, although dealing with the position where J was, in fact, still under 18, Hayden did not appear to limit his consideration of the scope of the inherent jurisdiction to its exercise in relation to a minor. Rather, his approach appears to have been predicated upon J being (for these purposes) an adult, quite possibly because he anticipated that relevant steps under the jurisdiction would need to be taken even after J's 18th birthday.

Having traced the concept of "vulnerable adult" through *No Secrets*, *Re SA* and *Re DL*, Hayden J held:

> *"82. It would be unconscionable and socially undesirable if, due to the weaknesses of an assessment which failed satisfactorily to resolve whether there are reasons to believe that J lacks capacity, he were to find himself beyond the reach of judicial protection. I am clear that he is not. The question that arises is how he can most effectively be protected with the least intrusive and most proportionate curtailment of his autonomy.*
>
> *83. The starting point is that a thorough, MCA compliant assessment of capacity be undertaken immediately.* […]
>
> *84. When the report is available, it will be necessary to revisit the question of capacity and therefore jurisdiction. I am entirely satisfied that the inherent jurisdiction of this Court permits J to be protected whilst these investigations resume. I have already set out the benefits of J remaining in the unit and have no doubt at all that to do so is in his best interest. Without revisiting these issues I would emphasise that the primary advantage that the unit offers to J is the opportunity of interacting with other people, precisely that for which he has no appetite and would wish to avoid.*
>
> *85. Having established jurisdiction, a question then arises as to how to frame the injunctive relief. The wide scope of this relief was considered in detail in the Court of Appeal in **Wookey v Wookey [1990] 1 Fam 126** and revisited in **P v P [1999] 2 FLR 857**. Whilst the relief available will invariably be bespoke, there are some identifiable characteristics to it which cast light on its application. Injunctive relief is a discretionary remedy, it acts in personam and it is derived from equitable principles. Furthermore, it may only be granted to those amenable to its jurisdiction and it must be capable of being put into effect. It follows logically from these general propositions that the injunction must serve a useful purpose and have a real possibility of being enforced in personam.*
>
> *86. Central in considering the extent of the relief to be granted is the requirement to identify a balance between the protection of the individual and respect for his liberty. Thus, the order must reflect the tension between these two competing rights and obligations. The interference must be the minimum possible and proportionate to the identified objectives. It should also be for the shortest duration. It follows that the need for the restriction should be kept in regular review."*

In the circumstances, Hayden found that the right balance was struck thus:

> *88. As J has emphasised, he is motivated to protect "freedom of mind", always an*

> *illusive concept. He is not concerned with freedom of the body. There is no evidence that he feels his physical movements to be restricted in the unit in any way at all. The identified danger to his welfare development is a return to M's home which, I repeat, has been identified by the experts as a* 'kind of suicide' *for him. Accordingly, I do not consider the injunction should be drafted in terms which compel him to live in any particular place but I do want to restrain him from living at M's home. This I believe to be the proportionate intervention having regard to the principles I have set out above. It is to endure only until I reconsider the question of capacity further and inevitably that of jurisdiction too when a detailed capacity assessment has been completed.*

Comment

On the basis of the material contained in the judgment, it appears absolutely clear that both the professionals involved and Hayden J were correct to wish to take steps to intervene to seek to secure J's longer-term welfare and wellbeing. This is arguably a classic case where taking a very narrow view of autonomy and simply deferring to his stated wish to live at his mother's home would be – ethically – entirely the wrong course of action. For more on the ethics of intervention in such situations, we would commend Camillia Kong's *Mental Capacity in Relationship* (Cambridge 2017) – and Alex suspects this case will feature in the forthcoming practical guide that he and Camillia are writing together to applying relational autonomy in practice.

If, ethically, the result being sought by Hayden J was entirely correct (and, again, it provides a useful way in which to test whether the outcome that might be dictated by the CRPD is one we wish to follow), legally the approach is much more problematic.

To start with, it is unfortunate (to put it mildly) that Hayden J did not have drawn to his attention that the *Re F* test is that which has been applied by the Court of Protection since 2009 (and is cited in the standard practitioner works such as Jordans' *Court of Protection Practice* and LAG's *Court of Protection Handbook*). It has also been applied in reported cases, including that of Charles J in *Re UF* [2013] EWHC 4289 (COP); [2014] COPLR 93 (at para 18). The test that Hayden J seeks to set out – which arguably includes in it a requirement for P to participate – would make it very difficult to obtain interim relief in cases in which social workers or others are being prevented from seeing and assessing P but in which there is nonetheless proper reason to believe (from surrounding evidence) that they may lack capacity to make the decision in question. An example of the very practical difficulties that can be caused in this context, and the power of s.48 to assist can be seen in *Re SA; FA v Mr A* [2010] EWCA Civ 1128, a case which also demonstrates how the court can and should calibrate the steps that it will take under s.48 so as to reflect that capacity is still in issue. [27]

The second problem is that, from an outside perspective, one could legitimately ask why Hayden J went to such lengths to decline to engage the interim jurisdiction of the Court of

[27] Whilst this started as a permission application before Munby LJ in the Court of Appeal, he also then, substantively, determined matters having granted permission.

Protection but then, through deploying the inherent jurisdiction, brought about an essentially identical outcome to that which would have been obtained had it been engaged, in other words: (1) requiring rapid steps to be taken to get better capacity evidence; and (2) directing relief against the subject matter of the proceedings to secure their well-being in the interim.

This was not a situation (at least from the judgment) where it could be said that J's decision-making was currently being compromised by the actions of M (or N) – i.e. this was not the sort of undue influence/coercion case envisaged in *Re SA* or *Re DL*, where relief would have been directed against the perpetrator of the abuse. Rather, in the (laudable) aim of securing a richer version of autonomy for J, Hayden J prevented him from taking precisely the course of action which – at least at face value – J was saying he wanted to take. We note in this regard that Munby J (as he then was) held in *JE v DE* [2006] EWHC 3459 (Fam) that preventing a person from living in the one place that they say they wish to live amounted to a deprivation of their liberty.[28] Although this definition may well not have survived the formulation of the 'acid test' in *Cheshire West*, it nonetheless shows that at least one judge has previously held that preventing an individual from living in one specific place is a very serious interference with their rights (and, if this applied to J's case, on what basis could the deprivation of his liberty be justified by reference to Article 5(1)(e)?).

In the circumstances, therefore, it seems to us that this case provides powerful evidence as to why it is so necessary that a long, hard look is taken at the way in which the inherent jurisdiction is evolving with a view – ultimately – to developing (1) a statutory basis upon which intervention in J's case can be justified (if we think it should); and (2) principles to govern what steps can be taken by way of such intervention. The High Court ducked the opportunity to undertake (2) in the decision in *Mazhar v The Lord Chancellor* [2017] EWFC 65, but in any event we think that the principles at stake are too important to be left to evolution through case-law. We should perhaps lay down a marker that if the process of setting down a statutory framework leads us to take a wider view of what autonomy may means, we would say "so much the better."

Short Note: judicial concern about inherent jurisdiction and deprivation of liberty

We note briefly the comments of Holman J in *A Local Authority v AT and FE* [2017] EWHC 2458 (Fam) in relation to the increasing use of the inherent jurisdiction to authorise children's deprivation of liberty as a result of the lack of places for secure accommodation orders. His Lordship observed that *"I personally have been*

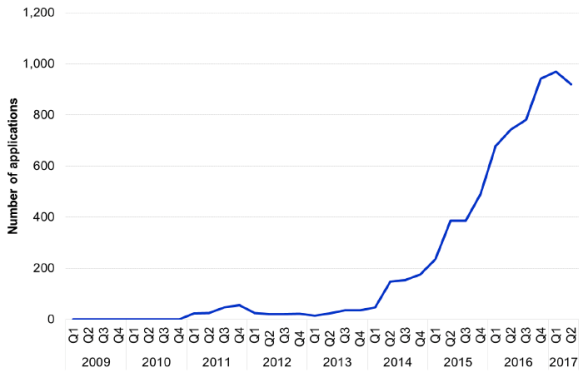
[28] "*But the crucial question in this case, as it seems to me, is not so much whether (and, if so, to what extent) DE's freedom or liberty was or is curtailed within the institutional setting. The fundamental issue in this case, in my judgment, is whether DE was deprived of his liberty to leave the X home and whether DE has been and is deprived of his liberty to leave the Y home. And when I refer to leaving the X home and the Y home, I do not mean leaving for the purpose of some trip or outing approved by SCC or by those managing the institution; I mean leaving in the sense of removing himself permanently in order to live where and with whom he chooses, specifically removing himself to live at home with JE.*"

almost drowned out by these applications this week" and "*There is a grave risk that the safeguard of approval by the Secretary of State is being denied to some of the most damaged and vulnerable children. This is a situation which cannot go on, and I intend to draw it to the attention of the President of the Family Division.*" His Lordship was particularly concerned that this "*child has been deprived of his liberty now for three months without any guardian being appointed to act on his behalf*" and ordered Cafcass to allocate one. Moreover, and with clear parallels to COP proceedings, the court observed that "*it is very important that ordinarily in these situations, which in plain language involve a child being 'locked up', the child concerned should, if he wishes, have an opportunity to attend a court hearing.*"

Court of Protection statistics: April to June 2017

The latest figures an increasing trend in applications and orders made in relation to deprivation of liberty. There were 919 of such applications made in this quarter, up 24% on the number made in April to June 2016. Similarly, orders made for deprivation of liberty almost doubled over the same period, from 375 to 689 respectively.

Figure 10: Deprivation of Liberty applications, January to March 2008 to April to June 2017 (Source: Table 20)



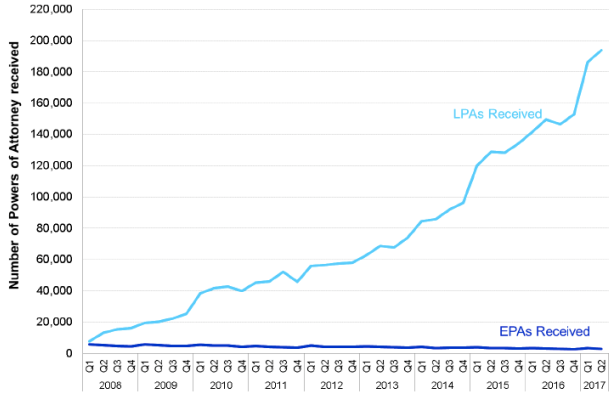
By burrowing into the supporting spreadsheet, we can see that the 919 deprivation of liberty applications were broken down into 106 applicatons for orders under s.16, 282 s.21A applications, and 531 applications under the *Re* X process.

Deprivation of liberty aside, there were 7,623 other applications were filed, unchanged from the equivalent quarter in 2016 (7,616 applications). Just under half (49%) related to applications for appointment of a property and affairs deputy. In comparison, there was a 52% increase in the number of court orders made in this period. The 10,205 orders were driven by a clearance of outstanding cases and an increase in the number of cases being dealt with by regional courts. Almost half (41%) of these related to the appointment of a deputy for property and affairs.

A significant increase was also seen by the Office of the Public Guardian, with 194,012 Lasting Powers of Attorney received in this quarter, up 30% on the same quarter for 2016. This is largely due to increased publicity and new online forms making it simpler and faster to apply for LPAs. Conversely, and perhaps unsurprisingly since it is now 10 years since it stopped being possible to create an Enduring

Power of Attorney, there was a 9% drop down to 2,953 in the receipt of Enduring Powers of Attorney.

Figure 11: Powers of attorney received, January to March 2008 to April to June 2017 (Source: Table 22)



Amendment to Explanatory Report of the 2000 Hague Convention

In a very unusual step, the Explanatory Report to the 2000 Hague Convention on the International Protection of Adults (which underpins Sch 3 to the MCA 2005 in complex ways explained here) has issued in a new and revised edition, available here. In addition to the correction of a few typos, the new and revised edition includes in particular a modification to paragraph 146 made by the Rapporteur, Professor Paul Lagarde relating to the confirmation of powers of representation (powers of the attorney and the like). The new paragraph reads thus:

> *The concept of the confirmation of powers must give every guarantee of reliability and be seen in the light of legal systems which make provision for this confirmation and place it in the hands of a particular authority, judicial in Quebec, administrative elsewhere. The first version of this report, which was based on a reading of the Convention text, set forth that this confirmation is not a measure of protection within the meaning of the Convention. If this indeed were the case, there would be no need to mention it alongside the measures of protection in Article 38. However, some delegations have since asserted that this analysis is not one which, according to them, flows from the discussion, difficult as it was.* […] *According to this view, a confirmation could constitute a measure of protection within the meaning of Article 3 and it could only be given by the competent authority under the Convention. A consequence of this might be that, if the adult has, in accordance with Article 15, paragraph 2, submitted the conferred power to an applicable law other than that under which the authorities have jurisdiction under the Convention, the representative risks being deprived of the possibility of having his or her powers confirmed, for instance, by the competent authority of the State whose law is applicable to the power of representation.*

In the domestic context, the CoP Rules now provide for a standalone application to be made in any case where there is doubt as to the basis upon which the attorney under a foreign power is operating (see Part 24, at present).

THE WIDER CONTEXT

The LGO and the MCA 2005

The Local Government Ombudsman has published a thematic report, "*The Right to Decide: Towards a greater understanding of mental capacity and deprivation of liberty*," which looks at the common issues from investigations where a council or care provider is involved with a person who lacks mental capacity. In 2016/17, the LGO investigated 1,212 adult social care complaints. Up to 20% of these complaints concerned mental capacity or DoLS. Following investigation, the LGO upheld 69% of these cases which was much higher than the average rate of 53% across all investigations. Supported by real life examples, the common issues highlighted include:

- Failure to carry out decision-specific assessments to ascertain whether someone has capacity to make the relevant decision;
- Unnecessary delays in carrying out capacity assessments;
- Poor decision-making when deciding on someone's best interests;
- Not appropriately involving family and friends in the process;
- Significant delays in obtaining DoLS authorisations.

Assisted dying challenge update

R (Conway) v SSJ [2017] EWHC 2447 (Admin) (Divisional Court (Sales LJ, Whipple and Garnham JJ)

Other proceedings – judicial review

Summary[29]

Mr Conway is 67. He suffers from a form of Motor Neurone Disease and has been given a prognosis of 6 months or less to live. When the time came, Mr Conway wanted to be able to seek assistance from a medical professional to prescribe medication which he could self-ingest to end his life. He argued that the prohibition on providing assistance for suicide should not apply where '*the individual is aged 18 or above; has been diagnosed with a terminal illness and given a clinically assessed prognosis of six months or less to live; has the mental capacity to decide whether to receive assistance or to die; has made a voluntary, clear, settled and informed decision to receive assistance to die; and retains the ability to undertake the final acts required to bring about his death having been provided with such assistance. …..: the individual makes a written request for assistance to commit suicide, which is witnessed; his treating doctor has consulted with an independent doctor who confirms that the substantive criteria are met, having examined the patient; assistance to commit suicide is provided with due medical care; and the assistance is reported to an appropriate body. …… permission for provision of assistance should be authorised by a High Court judge, who should analyse the evidence*

[29] Alex and Annabel being instructed by Mr Conway, they have not contributed to this report.

and decide whether the substantive criteria are met in that individual's case.'

Having got permission to bring judicial review proceedings from the Court of Appeal, Mr Conway's claim was heard by the Divisional Court in July 2017 and judgment handed down on 5 October 2017. The three judges (Lord Justice Sales, Mrs Justice Whipple and Mr Justice Garnham) all contributed to the judgment which rejected Mr Conway's application for a declaration that s.2 Suicide Act 1961 as amended by the Coroners and Justice Act 2009 ("section 2") (which prohibits as a matter of criminal law the provision of assistance for a person to commit suicide) is incompatible with his article 8 rights.

Given that the case of Hass v Switzerland (2011) 53 EHRR 33 establishes that article 8 encompasses *'"… the right of an individual to decide how and when to end his life, provided the said individual is in a position to make up his own mind in that respect and to take the appropriate action….."*, it was common ground that section 2 represents an interference with Mr Conway's article 8 rights.

The ambit of dispute was whether the interference was justified pursuant to article 8(2). It was accepted by Mr Conway that the ECtHR would follow their decision in *Nicklinson v UK* (2015) 61 EHRR SE7 and find that section 2 did not violate article 8, accordingly Mr Conway's claim was not for a declaration of incompatibility with Convention rights as contained in the ECHR itself, to indicate that the United Kingdom is in breach of its obligations under that Convention as a matter of international law, but for a declaration of incompatibility with the Convention rights as set out as distinct provisions in domestic law under the HRA.

The court received a wealth of written evidence from a wide range of medical experts, medical associations, charities, interest groups and legal experts (setting out the position in comparative jurisdictions) as well as examining through documentary evidence Parliament's engagement with the issue.

The court defined the questions it needed to answer as *"(a) is the legislative objective sufficiently important to justify limiting a fundamental right?; (b) are the measures which have been designed to meet it rationally connected to it?; (c) are they no more than are necessary to accomplish it?; and (d) do they strike a fair balance between the rights of the individual and the interests of the community?*"

The court found against Mr Conway in respect of all of these questions. With respect to question (a) the court held that the legitimate aims of section 2 were to protect the weak and the vulnerable, to protect the sanctity of life, and to promote trust and confidence between doctor and patient, which encourages patients to seek and then act upon medical advice. When considering question (b) the Court held that there was a rational connection between section 2 and all the identified legitimate aims.

When considering the question of necessity, the court gave great weight to the fact that parliament had considered it necessary to maintain section 2, and that there were therefore powerful constitutional reasons for the court to respect that assessment. As to the fair balance question, the court held that the arguments were similar to those deployed under the necessity

question. Interestingly the Court also held that the fact that Mr Conway is expected to die soon together with the evidence about the palliative care available to him meant that his interests are less badly affected by the interference with his Article 8 rights arising from section 2 than was the case in relation to Mr Nicklinson, Mr Lamb and Martin in the *Nicklinson* decision (who you may recall, were expected to live for many years in a state that they found intolerable).

Comment

Of particular interest to those of in the mental capacity field is the discussion from paragraphs 98 – 105 of the judgment in which their Lordships were considering the question as to whether section 2 could be said to be necessary to protect the weak and the vulnerable where Mr Conway's proposal was that there would, in particular, be the involvement of the High Court to review any application for permission to provide assistance to a person wishing to commit suicide so as to ensure that he or she was free of any pressure and had full capacity to make the decision to die.

The court said this:

> *Persons with serious debilitating terminal illnesses may be prone to feelings of despair and low self-esteem and consider themselves a burden to others, which make them wish for death. They may be isolated and lonely, particularly if they are old, and that may reinforce such feelings and undermine their resilience. All this may be true while they retain full legal capacity and are not subjected to improper pressure by others.*

While the judgment doubts that the High Court on an application for permission for assistance to commit suicide would be able to pick up issues of improper external pressure (which could be subtle), the court does appear to be stating that it nevertheless remains necessary to protect the weak and vulnerable via section 2 from their own capacitous and freely arrived at determination to die. This rather paternalistic view is at odds with the way the Court of Protection strives to protect the rights of those (often weak and vulnerable) to make unwise decisions, if they have the capacity to do so.

Mental Health Act Review

On 4 October, the Prime Minister Teresa May announced plans for an independent review of mental health legislation and practice *"to tackle the issue of mental health detention"*. The review will be chaired by Professor Sir Simon Wessely, a former President of the Royal College of Psychiatrists.

The terms of reference include by way of background governmental concern:

- rising rates of detention under the Act
- the disproportionate number of people from black and minority ethnicities detained under the Act
- stakeholder concerns that some processes relating to the act are out of step with a modern mental health system

Identified concerns include, but are not limited to, the following:

- the balance of safeguards available to patients, such as tribunals, second opinions, and requirements for consent

- the ability of the detained person to determine which family or carers have a say in their care, and of families to find appropriate information about their loved one
- that detention may in some cases be used to detain rather than treat
- questions about the effectiveness of community treatment orders, and the difficulties in getting discharged
- the time required to take decisions and arrange transfers for patients subject to criminal proceedings

Three features of the terms of reference are particularly striking:

- The review is very firmly directed to consider practice in the first instance, rather than the structure of the Act;
- There is a (welcome) emphasis on co-production with stakeholders;
- There is no suggestion in the terms of reference (or indeed anywhere else in the surrounding 'chat' coming from the government) of (1) fusion of the MHA 1983 with the MCA 2005 or (2) abolishing the MHA 1983 altogether to meet the demands of the Committee on the Rights of the Persons with Disabilities.

An interim report is expected to be produced in early 2018 and a final report with detailed recommendations by autumn 2018. We will keep our readers posted.

Vulnerability and mental health guide launched for energy sector

A new guide to help energy suppliers identify and support consumers in vulnerable circumstances has been launched by the Money Advice Trust and trade body Energy UK. In addition to covering a range of vulnerable situations, it also includes specific guidance on helping consumers with mental health problems or impaired mental capacity.

Supporting seriously ill people to travel abroad

The national hospice and palliative care charity Hospice UK launched new updated guidance for supporting seriously ill people to travel abroad: *Flying Home: Helping patients to arrange international travel*.

The guidance was initially written to help with arrangements for those who were in a palliative stage of illness and were making a 'final journey', but the updated version also considers the issues that arise for someone who is seriously ill and wishes to take a holiday (perhaps to tick off a goal on a bucket list). It is aimed at health professionals as '*the practical anxieties of health professionals can act as barriers to people flying at the end of life, which can cause significant delays*.'.

The guidance addresses what it identifies as the three key questions:

- Is the patient fit to travel safely on a commercial airline or will a repatriation service be required?
- What special arrangements need to be made for the flight?
- Are the necessary funds, equipment and support available?

It is an extremely detailed look at all the steps that need to be taken both prior to and during the flight, to make such journeys possible. It also covers the steps that need to be taken to ensure that the patient will receive appropriate medical care in the destination country as well as a summary of the possible costs that could be incurred.

In addition to its utility in relation to planning in relation to seriously ill individuals, it is also vital reading for those practitioners seeking approval from the Court of Protection of any plan that involves international travel, whether that is in order to re-patriate someone who has been removed from the jurisdiction or in order to allow someone to go abroad to fulfil a long term ambition.

End of life care

In July 2016, in response to an independent review on choice in end of life care, the Government made 6 commitments to the public to end variation in the end of life care across the health system by 2020. These were to support people approaching the end of their lives to:

- Have honest discussions with care professionals about their needs and preferences;
- Make informed choices about their care;
- Develop and document a personalised care plan;
- Discuss their personalised care plans with care professionals;
- Involve their family, carers and those important to them in all aspects of their care as much as they want;
- Know who to contact for help and advice at any time.

One year on, the Government has now published a report setting out the progress that has made towards implementing the 6 commitments. Whilst it is clear that there is still much more work to do, the key steps that have been taken so far are:

- Supporting the roll-out of digital palliative and end of life care records to all areas by 2020;
- Inspecting and rating NHS hospital and community services for end of life care;
- Providing support to Trusts to help them improve end of life care services;
- Testing personal health budgets for people approaching the end of life to given them choice and control over their care;
- Developing metrics to assess quality and experience in end of life care;
- Working to change the nursing and medical undergraduate and postgraduate curricula to improve patient and quality of care.

The National End of Care Programme Board remains responsible for overseeing the delivery of the Government's commitments by 2020 and papers from every meeting of the Programme Board are published on the Ambitions Partnership's Knowledge Hub.

SCOTLAND

A commotion next door – sequel from the Public Guardian

[*Last month we commented, from a Scottish perspective, on the controversy triggered by Denzil Lush (retired senior judge in the Court of Protection, England & Wales) when he expressed concern about the lack of safeguards in the power of attorney system in England & Wales on the BBC Radio Four Today programme on 15th August 2017.*]

We mentioned that in response to the concerns raised in Scotland, comments were posted both by the Public Guardian and by the Law Society of Scotland on their respective websites. We indicated that we hoped to be able to include further comments by the Public Guardian in this issue. Those comments by Sandra McDonald, Public Guardian, took the form of an article published in the Journal of the Law Society of Scotland. We are grateful to Sandra, and to Peter Nicholson (editor of the Journal), for permission to reproduce Sandra's article below.

Quite shocking accounts of the scope for abuse under some United States guardianship arrangements have appeared – see here and here. These help to explain the blanket antipathy towards the very concept of guardianship some quarters. Powers of Attorney do have the fundamental advantage that they are a measure that never can be initiated without the full knowledge and participation of the adult who may become subject to such measure.

Adrian D Ward]

There has been focus in recent weeks on the potential for [financial] "abuse" of powers of attorney (PoAs). In response, several articles, including one released by myself, concentrated on the safeguards within the Scottish PoA system, but I would not wish people to think that PoAs could not be, or are not, abused in Scotland.

The capacity requirement for the granting of a PoA is, I believe, one of the fundamental safeguards and that this capacity assessment has to be undertaken by a lawyer or doctor is added protection, but is there suitable training for this? One does see cases where one wonders 'how on earth?'. Should the assessment of capacity be restricted to those who have themselves been assessed as capable of assessing this?

Most grantors of PoAs in Scotland choose to consult a solicitor; which offers a significant safeguard. The Law Society of Scotland has detailed guidance both on taking instructions from vulnerable clients and on PoAs. Solicitors are advised to refer proposed attorneys to the Code of Practice and to the Public Guardian's website, but most attorneys do not have a sufficiently clear understanding of the responsibilities of the role – which substantially increases the risk of misuse of the PoA. Could we do more at the point of solicitor contact to mitigate this?

The inclusion of specific, express, powers is a helpful safeguard; but many deeds have much the same powers, such that they look very similar, despite the fact that the PoA deed does not have to be in a prescribed format; does this defeat the specificity of the powers?

As the deed is free format, the grantor could add in any particular safeguards they may wish, but I

have never seen additional commentary of this ilk. Would a prescribed format, which directed one to insert safeguards assist?

Many PoAs appoint joint attorneys but grant them 'joint and several' authority without specification, which allows opportunity for an attorney of ill intention to go unchallenged until too late. The appointment of joint attorneys is added protection but I emphasise the importance of specifying fully in the document the extent of and any restrictions on the authority granted and would advocate against "joint and several" appointments, without such detail.

Are there other ways of increasing protection – should we offer notification to interested parties; should attorneys have to have cautionary insurance; should there be routine supervision: could we make better use of existing safeguards?

The Public Guardian has a statutory remit to investigate concerns about the operation of a PoA, where these are reported. More could be done, by us all, to ensure the public are aware of, and use, this service. Linked to which, is increasing the general public awareness of what financial harm is and how to recognise this, as well as easing the discomfort felt about discussing other peoples' finances.

There is a view that guardianship, perhaps because it is supervised, carries greater protection; my own view is that a PoA executed properly and used well offers no less a protection, or conversely, a guardianship used badly offers no greater protection.

We are obliged to consider the least restrictive form of intervention consistent with achieving, in this case, the purpose of safeguarding; this surely is a properly executed, and managed, PoA, in contrast to either an onerous and costly guardianship, or leaving matters to the chance of some loose informal arrangement.

In conclusion, there is much to be reassured about with our current system but we are deluding ourselves if we do not recognise that there is abuse of PoAs. We have a potential opportunity over the forthcoming years to influence change, as the relevant legislation is likely to be reviewed and we will be able to 'benchmark' our system against other countries with information soon to be released by the Council of Europe; but any changes have to offer proportionality, we cannot make a burdensome, and thus less attractive, option for the majority in attempting to increase protections for the minority?

Sandra McDonald

Two points

Secretary of State for Work and Pensions v M [2017] CSIH 57; 2017 S.L.T. 1045 is a decision by an Extra Division of the Inner House of the Court of Session in which the central issue was the difference between "prompting" and "social support" for the purposes of the Social Security (Personal Independence Payment) Regulations 2013.

The points-based system for assessing eligibility for a personal independence payment ("PIP") is reasonably well-known. Separate calculations are made for daily living activities and for mobility activities. In each case, identified activities form the basis of assessment. Descriptors against each activity carry a specified number of points. A total of at least

eight points for daily living activities, or for mobility activities, is required in order to qualify for a PIP.

In a process depressingly familiar to many readers, and which lasted in all for 30 months, *M* was awarded a total of four points for daily living activities by a decision-maker; then seven points by the First Tier Tribunal ("FTT"). He contested before the Upper Tribunal ("UT") that he was entitled to nine points. The UT judge allowed the appeal, set aside the decision of the FTT, and remitted the case back to the FTT for re-hearing before a differently constituted tribunal, in accordance with directions set out in the decision of the UT judge. The Secretary of State appealed to the Court of Session against the decision of the UT judge. The Court of Session refused the appeal.

The case before the UT and before the Court of Session concerned the choice between two descriptors in Part 2 of Schedule 1 to the 2013 Regulations for Activity 9 "engaging with other people face to face". By then it was accepted that *M* had scored a total of five points for other activities. For Activity 9, was he entitled to two points under descriptor b "needs prompting to be able to engage with other people"; or four points under descriptor c "needs social support to be able to engage with other people". Descriptor b would take his total to seven, inadequate for a PIP. Descriptor c would take his total to nine, entitling him to a PIP.

The opinion of the Court of Session, delivered by Lord Glennie, helpfully presented the human picture of *M* and his circumstances. Salient points in that narrative included that he was a 47 year-old man, living with his partner and two young children. He had suffered from anxiety and depression for about six years, and had been on medication for that condition for about four years. Prior to that he had suffered intermittent bouts of depression, and had first seen his GP about that in 2000. He worked (as it happens, for Department of Work and Pensions) until November 2011, when his employment was terminated following a number of attempts by him to return to work. He was on medication, which had been helpful, and had had counselling and cognitive behavioural therapy in the past. He had no physical health problems.

M had separated from his ex-wife some years previously. The divorce had been very lengthy and acrimonious. He found it difficult to meet people from that period in his life. He had a fear of meeting his ex-wife. He no longer saw his children from that marriage. He tended to avoid social contact, meeting strangers being fine in some respects if completely impersonal, but very difficult for him if he was asked whether he had children. He had some social anxiety, with a very complex background of social stressors. He had had suicidal thoughts, but not since before Christmas 2014.

M had forgotten to take his medication on a number of occasions, leading to a sharp deterioration in his mood. His current partner ensures that he does take it. He is able to drive, mostly for local errands. His partner is with him most of the time, both when driving and otherwise. She does not work and is at home with him. His partner attends to household finances and has access to his current account. He tends to put things aside with the result that they do not get done.

The questions of law which fell to be determined by the court were:

1. Must the social support needed be contemporaneous with the engagement being supported?

2. Does anything that constitutes prompting also constitute social support, subject only to it being provided by "a person trained or experienced in assisting people to engage in social situations"?

Particularly relevant to the present case was the meaning of "experienced". The UT judge in his decision had quoted from p.38 of the government response to the consultation on the meaning of "social support": "*Some respondents were concerned that our definition of social support excludes friends and family. This is not the case, we recognise the importance of friends and family and that is why our definition of social support is: 'support from persons trained or experienced in assisting people to engage in social situations'. By referring to 'experienced' we mean both people such as friends and family who know the individual well and can offer support, or those who do not know them better and are more generally used to providing social support for individuals with health conditions or impairments.*"

On question 1 above, the court noted that there were conflicting decisions. In the hearing, Counsel for the Secretary of State "was constrained to recognise" that either social support or prompting might appropriately be given immediately before the occasion to which it related. As the court put it, "one can envisage the situation of a helper encouraging an individual to go into a meeting, or into a social function, standing at the door but not going in with him". The court pointed out that the definition of "supervision" in the 2013 Regulations used the words "continuous presence" (in relation to the person providing supervision), but that there was no such wording in the relevant descriptors for Activity 9. Once it is accepted that there is no need for absolute contemporaneity, the question becomes one of fact and degree in each case. There must be a "temporal or causal link" of some sort between the help given and the activity for which it is provided. It is for the decision-maker and, if necessary, the Tribunal to determine in each case whether that temporal or causal link is there. In the case of social support, the wording of the descriptor is "needs" social support, in the present tense. The court answered question 1 in the negative.

The court's answer to question 2 was: "*No, but a thing which constitutes prompting may also constitute social support if, to render it effective or to increase its effectiveness, it requires to be delivered by someone trained or experienced in assisting people to engage in social situations*."

This report does not summarise the full reasoning of the court, nor does it do justice to the helpful guidance given by the court on the proper interpretation of many elements in Part 2 of Schedule 1 to the 2013 Regulations, including "acceptable standard", "engage", "support", the possibility of overlap between "prompting" and "support", the use of "continuous" in the definition of "supervision", and that "it would be wrong to assume that there is necessarily an absolute consistency between the descriptors relative to the different activities listed in Part 2" where those descriptors use similar wording. For the court's guidance, and full reasoning, readers are referred to the decision itself.

Adrian D Ward

Health and Education Chamber, First Tier Tribunal for Scotland

Between January 2018 and 2020 the Additional Support Needs Tribunal for Scotland ("ASNTS"), two Scottish NHS Tribunals, and all 32 Local Authority Education Appeal Committees in Scotland will all transfer into the Health and Education Chamber of the First Tier Tribunal. While there does not appear to have been an official public announcement, it is now within the public domain that Scottish Ministers have confirmed their intention that May Dunsmuir, currently President of ASNTS, will be President of the new Chamber. May was appointed President of ASNTS in May 2014. At that point she retained her position as an in-house convener with the Mental Health Tribunal for Scotland, but it is understood that with her new appointment she now intends to step down as an in-house convener, but will still sit as a convener, of that Tribunal.

May was a member of the Law Society of Scotland's Mental Health and Disability Sub-Committee ("MHDC") for 17 years, becoming vice-convener in 2012 and thereafter joint convener with me. Her 2014 appointment meant that she had to stand down from that committee, but remains an observer to it. Colin McKay, the first lawyer to become Chief Executive of the Mental Welfare Commission for Scotland, likewise has observer status, similarly having had to step down from the committee when he took up his current appointment. Among other points in common, May and Colin were both members of the steering group of the major campaign which resulted in the Adults with Incapacity (Scotland) Act 2000 being enacted as the first major legislation by the then new Scottish Parliament. The steering group first convened towards the end of 1997. Other members included Jan Killeen, formerly of Alzheimer Scotland and Alzheimer International, author of a recent report on supported decision-making in Australia, a project funded by a Churchill Fellowship; Hilary Patrick, a massive contributor to the development of relevant law and sometime vice-convener of MHDC; and David McClements, who gave considerable service to the Council of the Law Society of Scotland, including as treasurer to the Society, and who is currently a vice-convener of MHDC. On a personal note, having acted as principal spokesperson for that campaign, it is a particular pleasure to see the cumulative contributions made by members of that steering group ever since, and which they continue to make.

Further information on May Dunsmuir's career up to 2014 may be found in the Scottish section of the November 2014 Mental Capacity Law Newsletter.

Adrian D Ward

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Conferences

Conferences at which editors/contributors are speaking

Adults with Incapacity: the Future is Now

Adrian is speaking at this half-day LSA conference on 18 October in Glasgow. For more details, and to book, see here.

'Taking Stock'

Neil is chairing and speaking at the 2017 Annual 'Taking Stock' Conference in Manchester on 19 October. For more details, and to book, see here.

International Congress on Vulnerabilities, Law and Rights

Adrian is speaking on 7 November 2017 at the International Congress on Vulnerabilities, Law and Rights, in Coimbra, Portugal, organised by Coimbra University. For more details, see here.

Deprivation of Liberty in the Community

Alex is delivering a day's training in London on 1 December for Edge Training on judicial authorisation of deprivation of liberty. For more details, and to book see here.

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

Alex is chairing and speaking at this conference in London on 8 December 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 Newsletter will be out in November. 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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