MENTAL CAPACITY REPORT: SCOTLAND

October 2021 | Issue 116

Welcome to the October 2021 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the 14th birthday of the MCA, an important case about the scope and limits of ADRTs, and the impact of coercive control on capacity;

(2) In the Property and Affairs Report: a deputy stand-off and new blogs from the OPG;

(3) In the Practice and Procedure Report: anticipatory declarations and medical treatment – two different scenarios;

(4) In the Wider Context Report: children, competence and capacity in different contexts, the JCHR launches an inquiry into human rights in care settings, and a Jersey perspective on deprivation of liberty;

(5) In the Scotland Report: the Supreme Court, devolution and implications for CRPD incorporation, and resisting guardianship.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also find updated versions of both our capacity and best interests guides. We have taken a deliberate decision not to cover all the host of COVID-19 related matters that might have a tangential impact upon mental capacity in the Report. Chambers has created a dedicated COVID-19 page with resources, seminars, and more, here; Alex maintains a resources page for MCA and COVID-19 here, and Neil a page here. If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the Small Places website run by Lucy Series of Cardiff University.

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

Scottish Contributors
Adrian Ward
Jill Stavert

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

Contents

Human rights and the hierarchy of Parliaments 2
Opposed application for renewal of guardianship 7
Compromise Agreement vitiated? 10
JK case reported, leave to appeal refused 11

Human rights and the hierarchy of Parliaments

The Supreme Court has held that the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill ("the UNCRC Bill"), and the European Charter of Local Self-Government (Incorporation) (Scotland) Bill ("the ECLSG Bill"), passed by the Scottish Parliament on respectively 16th and 23rd March 2021, are both invalid because provisions of both Bills were outside the legislative competence of the Scottish Parliament. This article concentrates on the Supreme Court's reasoning in relation to the UNCRC Bill. Similar considerations apply to the ECLSG Bill.

The matter was referred to the Supreme Court by the Attorney General and the Advocate General for Scotland for determination as to whether the Bills would be within the legislative competence of the Scottish Parliament, under section 33(1) of the Scotland Act 1998 ("the Scotland Act"). The respondents were the Lord Advocate, and also the Counsel General for Wales. The Supreme Court, presided over by Lord Reed (President), heard the parties on 28th and 29th June 2021, and issued its judgment on 6th October 2021.

Two aspects are of interest from the viewpoint of the Mental Capacity Report, and in particular this Scottish section of the Report. The first is that while the process of proposed incorporation culminating in the two Bills considered by the Supreme Court is well ahead of the similar process in relation to the UN Convention on the Rights of Persons with Disabilities ("CRPD"), up until now that process has been following along the same tracks. What are the implications for that process? Secondly, in light of the Supreme Court's decision and reasoning, where do the citizens of Scotland now stand in relation to human rights already assured by previous incorporation? I address that by reference to the incorporation of the European Convention on Human Rights ("ECHR") by the Human Rights Act 1998.

The judgment of the Supreme Court was unanimous. It was delivered by Lord Reed. The judgment may be accessed here. This article does not attempt to do justice to the full reasoning and manner in which it is presented by Lord Reed. The full judgment will certainly warrant reading by any Scots lawyer interested in either the matters addressed in it, or the broader implications which I have suggested.

This article picks out a few points relevant to the comments made in it.

The Supreme Court's findings (summarised briefly, and selectively)

The court was asked to determine four questions in relation to the UNCRC Bill. The first three concerned whether three provisions of the UNCRC Bill were outside the legislative competence of the Scottish Parliament. If so, the whole Bill would fall. The fourth question concerned whether one provision of the UNCRC Bill could be interpreted in such a way as to bring it within the competence of the Scottish Parliament.

The first question concerned section 19(2)(a)(ii) of the UNCRC Bill. Section 19 is headed "Interpretation of legislation". It provided that legislation of either the Scottish Parliament or the UK Parliament "must be read and given effect in a way which is compatible with the UNCRC requirements, so far as it is possible to do so". The second question concerned section 20(10)(a)(ii), under the heading "Strike down declarators". It would provide that a court could make a "strike down declarator" if any provision "that … would be within the legislative competence of the Scottish Parliament to make", whether comprising an Act of the Scottish Parliament, or an Act of the UK Parliament, in each case which received Royal Assent before the day that section 20 came into force. The third question concerned section 21(5)(b)(ii) of the UNCRC Bill, under the heading "Incompatibility declarators", which empowers a court to make an "incompatibility declarator" in respect of future subordinate legislation, if such legislation "would be within the legislative competence of the Scottish Parliament to make" and is wholly or partly made by virtue of an Act of either Parliament which receives Royal Assent on or after the day on which section 21 comes into force.

In respect of each of these, for reasons given by Lord Reed, the court held that these provisions were outside the legislative competence of the Parliament, engaging section 29(1) of the Scotland Act, which provides that: "An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament". A provision is outside the legislative competence of the Scottish Parliament *inter alia* if it breaches restrictions in Schedule 4 to the Scotland Act, paragraph 2(1) of which provides that: "An Act of the Scottish Parliament cannot modify or confer power by subordinate legislation to modify, the law on reserved matters". The same applies to modification by subordinate legislation. None of the exceptions to this provision includes section 28(7), which provides that: "This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland". As Lord Reed put it, that provision makes it clear that the power of the Scottish Parliament to make laws does not affect the power of the UK Parliament also to make laws for Scotland; which reflects the nature of devolution, and the fact that the people of Scotland continue to be democratically represented in both Parliaments. The court held that all three impugned sections were outside the legislative competence of the Scottish Parliament, because they would modify section 28(7) of the Scotland Act, contrary to section 29(2)(c).

The fourth question concerned section 6 of the UNCRC Bill, which would make it unlawful for

any public authority, carrying out any function, to act incompatibly with UNCRC requirements. If it should be believed to have done so, proceedings could be brought against it under section 7, and damages could be awarded under section 8. The only exceptions are the Scottish Parliament and persons carrying out functions in connection with proceedings in the Scottish Parliament. It was common ground that section 6, on its face, was outside the legislative competence of the Scottish Parliament, having regard to sections 28(7), and 29(2)(b) and (c), of the Scotland Act, and Schedules 4 and 5. It was conceded that there would be circumstances in which the compatibility duty created by section 6 of the UNCRC Bill "would be beyond the legislative competence of the Scottish Parliament", but it was asserted that such a question of competence would "fall to be analysed on a case-by-case basis". The interpretation rule set out in section 101(2) of the Scotland Act could be applied so as to render section 6 within competence. Section 101(2) provides that provisions within the scope of that section which "could be read in such a way as to be outside competence" should be read "as narrowly as is required for it to be within competence, if such a reading is possible, and is to have effect accordingly".

The court reviewed cases where restrictive interpretations had been applied by a court to give effect to a statutory provision, and noted that in those cases the difficulty appeared to have arisen through inadvertence. By contrast, section 6 had been deliberately drafted in a manner beyond the competence of the Scottish Parliament. Lord Reed opined that: "*The courts are not being asked to read section 6 in a way which is a possible reading of the provision which the Scottish Parliament enacted, but rather to give effect to that provision subject to the various limitations set out in section 29 of the Scotland Act, and Schedules 4 and 5. This is not in reality the interpretation of the provision which the Scottish Parliament enacted, but its modification or amendment by another enactment*." The court also had regard to the principle, that "is fundamental to liberal democracies", that there should be legal certainty, and that "the law must be accessible and so far as possible intelligible, clear and predictable" (Lord Bingham, "The rule of law" (2010), p37). There had been no attempt to draft section 6 of the UNCRC Bill in such a way as to provide a clear and accessible statement of the law. The deliberate intention was "to draft and enact a provision whose plain meaning does not accurately represent the law", and to rely on the courts applying section 101(2) "to impose a variety of qualifications upon the provision, on a case-by-case basis, so as to give it a different effect which is lawful". The court held that section 6 was outside the legislative competence of the Scottish Parliament because it relates to reserved matters, contrary to section 29(2)(b) of the Scotland Act; would modify section 28(7) contrary to section 29(2)(c); and would modify the law on reserved matters, contrary to section 29(2)(c).

Potential relevance to incorporation of CRPD

In pursuit of its programme of work, the Scottish Human Rights Task Force convened a "UNCRPD Reference Group" which met once. I declare an interest as a member of that Reference Group. I do not know whether progress on possible CRPD incorporation has stalled pending the outcome of the present case.

One must start with the proposition that if similar legislation to the UNCRC Bill were enacted in relation to CRPD, it would be at significant risk of being declared invalid for the reasons applied to the UNCRC Bill. Stepping back from the detail of the impugned provisions of the UNCRC Bill, I would suggest that at the heart of the matter is an attempt to "take a shortcut" in the process of translating human rights principles in an international instrument, into domestic law. That has been successfully done only once, in relation to ECHR, in the Human Rights Act 1998. Lord Reed referred to a submission on behalf of the Lord Advocate that section 19 of the UNCRC Bill "did nothing more than reflect the approach which the courts would take in any event to the interpretation of legislation". Section 3 of the Human Rights Act 1998, in relation to ECHR rights, "is much more far-reaching than the ordinary effect of unincorporated international treaties on the interpretation of legislation". It goes much further than the ordinary approach to statutory interpretation, including the impact of international law on the interpretation of statutes. Hence, Lord Nicholls had described it as imposing an obligation which was "of an unusual and far-reaching character" in *Ghaidan v Godin-Mendoza*, [2004], UK HL 30.

Standing the outcome of the present case, it would appear that the Scottish Parliament could opt to impose upon itself provisions following the same extraordinary approach as is to be found in the Human Rights Act 1998, but would have to ensure that such provisions were so drafted as not to contravene the limitations imposed by the Scotland Act upon the legislative competence of the Scottish Parliament, in ways such as those impugned in the present case. That might or might not be considered workable.

There is another approach. In some ways it would be more modest, it would involve more hard work in preparing legislation, but it might have the advantage of conferring more real benefit to more people, in a manner that would be certain and predictable. It would involve recognising that international instruments such as CRPD are not law, nor intended to be law, nor to be draft legislation. They certainly set standards and outcomes which should be achievable by legislation, but that is a different matter. The approach that I suggest would require the courts to do "business as normal", rather than being pressed into the extraordinary and unaccustomed role, fraught with the potential for uncertainty, narrated by Lord Reed in relation to the Human Rights Act 1998.

This approach would entail avoiding grandiose and essentially declaratory "legislation" and instead would go about the more normal legislative task of taking the purpose and provisions of an international instrument and facing up to the difficulties – which can be overcome – of enacting "good law" to achieve that purpose. Thus, to take one example from Article 12.4 of CRPD, an obligation that measures should "respect the rights, will and preferences" of the person in question would, as regards the elements of will and preferences,, place an attributable duty upon someone to ascertain what they are, with an enforceable right to have that duty performed, and appropriate remedies if that duty is not performed. To that extent, one could view the principles of the Adults with Incapacity (Scotland) Act 2000 as straying into similar generalised declaratory language, rather than creating attributable duties. Thus we have the curiously passive construction of "account shall

be taken of –" at the beginning of section 1(4). In section 1(4)(a), subsequently mirrored by Article 12.4 of CRPD, is the obligation to take account of the present and past wishes and feelings of the adult "so far as they can be ascertained by any means of communication …". Who has the obligation to ascertain them? Who has the obligation to show that what is obtained is the best that can be obtained "by any means of communication"? And so on: hence the recommendation in the Essex Autonomy Three Jurisdictions Report (available here) that this passive language be replaced with attributable duties. That is given just as one obvious example of the more general point.

The other problem with statements of principles in documents such as CRPD is that such principles can contradict each other in most circumstances, and therefore require to be balanced in their application to particular situations. To go no further than the definitions in Article 2, discrimination on the basis of disability "includes all forms of discrimination, including denial of reasonable accommodation". Benignly or otherwise, reasonable accommodations are discriminatory. Otherwise Article 5 would not be required. Article 16 requiring protection from exploitation, violence and abuse of disabled people because they have disabilities again points to special measures which may modify the status in law of the protected individual "on an equal basis with others in all aspects of life" guaranteed by Article 12.4, and so on. These are not criticisms of CRPD. They are important principles, fulfilling its task as an international human rights instrument. But as they stand they are not drafts of potential law, at least of "good law" which is effective and certain. It might be possible to realise the principle that in some situations "less is more", by addressing more specific legislative tasks that can achieve "good law" in ways consistent with CRPD, and ultimately better achieve its purposes in ways likely to achieve real results for people with disabilities.

Another possible approach would be a simple procedural one requiring compliance of all proposed primary and secondary legislation of the Scottish Parliament, or within the legislative competence of the Scottish Parliament, to be subject to a report as to compliance with CRPD. That would not employ the blunderbuss of rendering whole pieces of proposed legislation *ultra vires*. If however the Scottish Parliament were again to act with complete disregard of CRPD requirements, as it did when substantially replicating in Scottish legislation the existing UK provision for appointees to receive and administer someone else's state benefits, the extent of non-compliance would at least be reported upon before relevant legislation was finalised.

"Sauce for the goose is sauce for the gander"?

In its relationship with the Scottish Parliament, the UK Parliament is in effect the master. However, the UK Parliament was itself created by the Acts and Treaties of Union in 1707. The position in Scots law was established unanimously by the First Division of the Court of Session in *MacCormick v the Lord Advocate*, 1953 SC 396 (and 1953 SLT 255). Lord President Cooper, with the full concurrence (on this point) of the other two members of the First Division, observed that the principle of the unlimited sovereignty of Parliament is distinctively English, and has no counterpart in Scottish constitutional law. He did not see "why it should have been

supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament … That is not what was done." He pointed out that the Treaty and associated legislation by which the Parliament of Great Britain was created as the successor of the separate Parliaments of Scotland and England "contain some clauses which expressly reserve to the Parliament of Great Britain the powers of subsequent modification, and other clauses which either contain no such power or emphatically exclude subsequent alteration by declarations that the provisions shall be fundamental and unalterable in all time coming, or declarations to a like effect. There was nothing in the Union legislation which laid down that the Parliament of Great Britain should be "absolutely sovereign". As regards the justiciability of any breach by the UK Parliament of the fundamental law of the Treaty of Union, there was a distinction between legislation on questions of "public right" and "private right". As to the latter, the Treaty provides that Parliament has only a power to alter the law of Scotland when it is for the "evident utility of the subjects of Scotland", as to which the Court of Session might well one day have the duty to decide.

However, since *MacCormick* was decided almost 70 years ago, a new method has emerged of making decisions which the UK Parliament has chosen to consider itself bound to implement, and that is decision-making by referendum. In matters specific to Scotland, we have had referendums on whether the Scotland Act should be brought into force, and whether Scotland should be a separate country.

It would be interesting to speculate about the consequences if the UK Parliament were purportedly to legislate to remove from citizens of Scotland who have mental or intellectual disabilities the "private rights" that they enjoy by virtue of the protections provided by Articles 5, 6 and 8 of ECHR, and if in a referendum the Scottish electorate were to decide that this would not be for the "evident utility" of citizens of Scotland. By fundamentally the same tests that have been applied in the present case, would such purported legislation of the UK Parliament in such circumstances be at risk of being held to be *ultra vires*? If not, why not?

Adrian D Ward

Opposed application for renewal of guardianship

A trend appears to be emerging towards strenuous opposition by adults to the prospect of renewal of a welfare guardianship order, often where the chief social work officer of the relevant local authority is guardian. Typically, the adult's capabilities are limited by a learning disability expected to be lifelong; such renewal applications contain extensive averments and evidence of the adult being substantially dependent upon provision of care, support and guidance provided or arranged by the local authority in discharge of its functions under the Social Work (Scotland) Act 1968. Also typically, there is no evidence before the court that during the period of guardianship preceding the renewal application the guardian ever actually required to exercise guardianship powers. In consequence, the need to renew the guardianship order is dependent upon whether the adult only accepts the continuation of the care package, and only accepts the care, support and guidance given in

the context of the support package, because the adult is aware of the existence of the guardianship powers and only complies because the adult is aware that non-compliance would result in exercise of those powers to ensure compliance.

It is possible that in some such cases the adult may have been made aware, at least in basic terms, of the view expressed by the United Nations Committee on the Rights of Persons with Disabilities that the existence of a guardianship order is *per se* a breach of the adult's rights assured by that Convention, and amounts to discrimination on grounds of disability. If so, that awareness may be a motivating factor, though I personally am not aware of cases where submissions or evidence pointed towards that factor. Whatever the outcome in each individual case, it is surely to be welcomed that the voice of the adult is being increasingly heard by all engaged in such procedures, reminding them how discriminatory are such limitations to the rights of any individual, and testing out whether this most invasive of measures is in each case justified as unavoidable by reference to the section 1 principles of the Adults with Incapacity (Scotland) Act 2000, is the minimum necessary intervention, and applies all of the safeguards assured by Article 12 of the UN Convention on the Rights of Persons with Disabilities.

Typical of the general pattern outlined above is the case of *Fife Council v CH*, decided by Sheriff Alison McKay at Kirkcaldy Sheriff Court on 24th August 2021 (Case Reference KKD-AW7-08), which would appear not yet to have been reported on scotcourts website or elsewhere. One would observe in passing that in view of the gravity of imposing any limitation on the rights and freedoms of an adult by way of intervention under part 6 of the 2,000 Act, in the face of clear opposition by the adult, a full judgment in every such case should be made publicly available on the scotcourts website, albeit with the identity of the adult frequently at least partially anonymised (though we have reported previously on determinations under the Mental Health (Care and Treatment) (Scotland) Act 2003 that the broader interests of justice require that an adult's identity should only be anonymised on cause shown). We do not provide a link to the judgment at this point because it is not fully anonymised, but consider that we can relate the appropriate details below.

In the CH case, the sheriff notes a large number of categories of matters in which the adult has received and apparently accepted care, support, guidance and supervision, coupled with a finding that the adult "*is generally accepting of care services*" but that he "*lacks insight into the need for such services*". It is perhaps interesting to note that matters in which he had accepted guidance and supervision included management of his finances, which evidently was achieved without the need of guardianship powers being available "in the background", as the order was for welfare guardianship only. There is narration of the adult being "*reluctant on occasions to accept some aspects of his care and support plan*". In these circumstances it is surprising that the sheriff found, in unqualified terms, that "*the Adult does not have capacity to make decisions about his welfare*". The truth appears to be that provided that he received appropriate support, he did customarily accept guidance and decide to comply with that guidance, indicating that he did have relevant capacity subject to provision of the

support that he received by the care team. Provision of such support is of course his right, assured by Article 12.3 of UN CRPD. It remains the case, accordingly, that the key issue is whether the adult only accepted the support that he received, and only acted in accordance with the guidance given, because he was aware of the guardianship order and that compliance could be enforced by the guardian if need be, notwithstanding that there are no findings that the guardian ever in fact required to exercise his guardianship powers. On the question of willingness to comply, the sheriff recorded that:

> *"The Adult has consistently said he does not wish to be subject to the order currently in place. The Adult has stated he would work with staff if there was no guardianship in place. He has indicated a willingness to work with his carers on a voluntary basis."*

There was indeed before the sheriff an affidavit by the adult in which the adult stated inter alia that "he would continue to cooperate with care and support even if he was not subject to a guardianship order".

However, the sheriff then made a finding that contradicted those assertions by the adult:

> *"If the guardianship order was not in place the Adult would reduce the support package currently in place to part-time or possibly stop engaging at all. He would no longer seek support from staff and would not follow guidance offered to him."*

The judgment does not appear to contain an analysis of the basis on which the sheriff found against the adult on this crucial point. In a number of matters, the sheriff narrates that the adult "benefits from the Minuter having" powers the continuation of which was sought, but not that the adult has ever benefited from any actual exercise of any of those powers.

On one aspect of the submissions that the sheriff narrates, the judgment is tantalisingly silent. The sheriff recorded a proposal by the adult's solicitor as follows:

> *"In the event I found that the legal test for granting the renewal craved was met then she suggested a compromise was available to me short of granting the order in the terms sought. She proposed I could grant the order as craved but thereafter suspend operation of the powers granted, on the basis that if the local authority later considered the exercise of any of the powers requested had become necessary then a motion could be made in the process to vary that direction."*

The nearest that the sheriff came to responding to that was a non-response, in the following paragraph:

> *"In light of these factors I am satisfied on the balance of probabilities that no other means (except the renewal of the guardianship order with continuing powers as detailed above) would be sufficient to enable his interests in his personal welfare to be safeguarded or promoted. There is no other means provided by or under the 2000 Act which would be sufficient to enable that to happen. Renewal of the order is therefore the least restrictive option in relation to the freedom of the adult which is consistent with the purpose of keeping*

> *him safe and promoting and safeguarding his personal affairs."*

There appears to be a *non sequitur* in that reasoning. The sheriff had earlier narrated the provision of section 58(1)(b) that he might grant such an application if satisfied that no other means provided by or under the Act would be sufficient. But that is not enough. That provision has to be read subject to the non-discretionary requirement of section 1(2) that there must be no intervention unless it would benefit the adult and (crucially) that such benefit cannot reasonably be achieved without the intervention. That is reinforced by the requirement of section 1(3) that the intervention must be "the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention". For the purpose of complying with those requirements of sections 1(2) and (3), all options require to be considered, not just alternatives provided by the Act.

If the "compromise" proposed by the adult's solicitor had been accepted and implemented, one does not know whether the adult would continue to accept the support provided. To put the matter to the test in that way would however have been a less restrictive option than continuing operability of the guardianship order in full force. It would have enabled the guardianship order to be brought back into force and operation by motion or minute in the existing process, which could have been done expeditiously if there was clearly demonstrated need for exercise of guardianship powers.

It would be helpful if decisions, particularly in such contested cases, were to narrate compliance with all of the steps required by the Act before a court can make or authorise an intervention, including with reference to sections 1(2) and (3) what alternatives were considered and why they were rejected.

Adrian D Ward

Compromise Agreement vitiated?

D v D [2021] CSOH 66, decided by Lord Arthurson on 23rd June 2021, related to a purported Compromise Agreement in proceedings under the Family Law (Scotland) Act 1985. The court was required to determine whether a purported compromise in a wife's action for financial provision on divorce constituted a valid and binding Agreement and, if so, whether it should nevertheless be set aside on the basis of unfairness or unreasonableness in terms of section 16 of the 1985 Act. The impugned Compromise Agreement was entered on the morning of a proof diet fixed to address the matters that were subject to the Compromise Agreement which, she accepted, she had instructed her legal representatives to accept. The pursuer stated that two days later she had consulted her doctor, telling him that she had suffered a panic attack on the morning prior to the proof and felt unable to speak to her solicitors. She was worried that she could not cope with what was happening. When it became clear that the pursuer was contending that the purported Agreement was neither binding nor valid, and in any event was not fair and reasonable, the court assigned a proof diet to determine those issues. The pursuer's position was that she had been placed under duress by the very combatative approach taken on behalf of her opponent; that in the lead-up to the proof she had been bombarded with late documents; and that by the day of the proof her state of mind

had been overwhelmed and her cognitive ability compromised. Evidence was led on behalf of the opponent from her own legal advisers, who stated that the pursuer had given no impression that she was not thinking clearly or rationally when accepting the proposed compromise.

The judge accepted that it was very stressful for any party to negotiate and navigate significant decisions in their lives at the final stage of a financial provision on divorce action. There was however nothing exceptional in this case such as to warrant exercise of the exceptional jurisdiction in section 16. Both her assertions that the Compromise Agreement was neither binding nor valid, nor her position that if it was binding and valid it should nevertheless be set aside, were "entirely misconceived and ill-founded".

Such a situation does of course raise a question about "exceptional for whom". The stresses of being "put on the spot" to accept or reject a proposed compromise in the short time available on the morning of a proof is likely to be a quite exceptional situation in the life of the individual involved. However, to say that practitioners with any significant degree of experience of contested litigation of any kind are well aware of the exceptional stresses likely to be put upon a litigant in that situation, is also to say that viewed in the context of contested litigation generally that is not an exceptional situation, and is indeed one in which a competent and experienced litigator can be expected to provide all necessary support to the individual so placed.

That is not to say that there could not be situations in which the stress of such a situation might be proved to have generated or exacerbated a cognitive impairment to the extent of potentially vitiating a Compromise Agreement. The onus would however be upon the party asserting that to demonstrate it to the satisfaction of a court, by virtue of the usual test of balance of probabilities. One also has to conclude that where a situation such as arose in this case was exceptional in the experience of the individual, but unexceptional in the context of the process in which it arose, the court is unlikely to be persuaded to exercise exceptional powers such as those contained in section 16 of the 1985 Act.

Adrian D Ward

JK case reported, leave to appeal refused

In the Scotland section of the June Mental Capacity Report, we reported the case of *JK (Respondent and Appellant) v Argyll and Bute Council (Applicant and Respondent)*. Readers might care to note that this decision of the Sheriff Appeal Court has now been reported at 2021 SLT (Sh Ct) 293, and that that report concludes with a note that a motion by the appellant for leave to appeal to the Court of Session was refused on 24th June 2021 – see [2021] SAC (Civ) 25.

Adrian D Ward

Editors and contributors

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

Alex is recommended as a 'star junior' in Chambers & Partners for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court and the European Court of Human Rights. He also writes extensively, has numerous academic affiliations, including as Visiting Professor at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

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

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

Neil Allen: neil.allen@39essex.com

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

Annabel Lee: annabel.lee@39essex.com

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

Nicola Kohn: nicola.kohn@39essex.com

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

Katie Scott: katie.scott@39essex.com

Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes. To view full CV click here.

Rachel Sullivan: rachel.sullivan@39essex.com

Rachel has a broad public law and Court of Protection practice, with a particular interest in the fields of health and human rights law. She appears regularly in the Court of Protection and is instructed by the Official Solicitor, NHS bodies, local authorities and families. To view full CV click here.

Stephanie David: stephanie.david@39essex.com

Steph regularly appears in the Court of Protection in health and welfare matters. She has acted for individual family members, the Official Solicitor, Clinical Commissioning Groups and local authorities. She has a broad practice in public and private law, with a particular interest in health and human rights issues. She appeared in the Supreme Court in *PJ v Welsh Ministers* [2019] 2 WLR 82 as to whether the power to impose conditions on a CTO can include a deprivation of liberty. To view full CV click here.

Arianna Kelly: arianna.kelly@39essex.com

Arianna has a specialist practice in mental capacity, community care, mental health law and inquests. Arianna acts in a range of Court of Protection matters including welfare, property and affairs, serious medical treatment and in matters relating to the inherent jurisdiction of the High Court. Arianna works extensively in the field of community care. To view a full CV, click here.

Simon Edwards: simon.edwards@39essex.com

Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click here.

Scotland editors

Adrian Ward: adw@tcyoung.co.uk

Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; honorary membership of the Law Society of Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

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

Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click here.

Conferences

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

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

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next edition 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.

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

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

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

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

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

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

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

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

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

39 Essex Chambers is an equal opportunities employer.

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number 0C360005) with its registered office at 81 Chancery Lane, London WC2A 1DD.

39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services.

39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.