39 Essex CHAMBERS

MENTAL CAPACITY REPORT: SCOTLAND

September 2018 | Issue 88

Welcome to the September 2018 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: life-sustaining treatment and the courts, fertility treatment in extremis and an update on the Mental Capacity (Amendment) Bill;

(2) In the Property and Affairs Report: inheritance tax planning and the MCA;

(3) In the Practice and Procedure Report: a new Vice-President, a case study in poor care planning and its costs consequences, deprivation of liberty of children – the Court of Protection or Family Division?;

(4) In the Wider Context Report: an important decision on disability and challenging behavior, guidance from the LGA, ADASS and RCN, and deprivation of liberty looked at overseas;

(5) In the Scotland Report: disability discrimination and unfavourable treatment, AWI consultation response analysis published, and judicial training as part of increasing access to justice for people with disabilities;

You can find all our past issues, our case summaries, and more on our dedicated sub-site here.

Editors
Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Annabel Lee
Nicola Kohn
Katie Scott
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

Office of the Public Guardian: Guardianship questionnaire form 2

Disability discrimination: what is "something"? 2

Review of AWI: summary and analysis of consultation responses 3

Training judges about disability when the system is a work in progress 3

Office of the Public Guardian: Guardianship questionnaire form

The Office of the Public Guardian recently commenced issuing guardianship questionnaire forms to applicants for guardianship, upon intimation of their applications to OPG. Various concerns and representations about this development were passed to OPG. Following taking over as Public Guardian, Fiona Brown has reviewed the comments and views that she has received and instructed her team to stop issuing the form to potential financial guardians, pending further consultation and discussion.

Adrian D Ward

Disability discrimination: what is "something"?

In *City of Edinburgh Council v R*, [2018] CSIH 20; 2018 S.L.T. 652, the Inner House of the Court of Session (2nd Division) refused an appeal by City of Edinburgh Council against a decision of the Additional Needs Support Tribunal for Scotland that failures by the Council in relation to provision of a Coordinated Support Plan ("CSP") amounted to unfavourable treatment constituting discrimination in terms of section 15 of the Equality Act 2010. The matters addressed by the court included a point of potential relevance in any case concerning the proper interpretation of section 15(1)(a) of the Equality Act 2010, which provides that: "*[a] person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability …*". What is the "something" referred to in this provision? This Report concentrates on that question.

The child at the centre of the case, referred to as C, had an autistic spectrum disorder and mental health issues. Her mental health and behaviour had deteriorated significantly in the summer of 2013. She had not attended school regularly since December 2013, and she had not attended at all since 22nd December 2015. In April 2014 her mother had requested assessment for a CSP in terms of section 2 of the Education (Additional Support for Learning) (Scotland) Act 2004. Following failure by the education authority to provide a CSP, the tribunal directed that a CSP be issued no later than 6th January 2016. On that date the authority issued a CSP which the tribunal found to be inadequate. The authority was required to amend it by 11th November 2016. It was common ground that the final CSP was inadequate. The authority attributed the inadequacies to the child's lengthy absence from school. The submissions for the authority on appeal included a contention, as described by the opinion of the court delivered by Lord

Malcolm: "*that there had been no identification of the basis for the conclusion that, in terms of s.15(1)(a) of the 2010 Act, the authority had treated the pupil unfavourably 'because of something arising in consequence of (the pupil's) disability'*." It was submitted that this provision meant that the delays and inadequacies in respect of the CSP required to be caused or contributed to by the pupil's disability, rather than any other factors, and that the tribunal had not addressed the cause of the unfavourable treatment.

The court held that this approach to the construction of section 15(1)(a) was erroneous. It was not the intention of the legislation that the disability itself must be a cause of treatment being unfavourable. As Lord Malcolm put it: "*In the present case the 'something' was the delayed and then inadequate CSP. While as a generality a CSP can be required in respect of a pupil without a disability, in the context of this claim, if the pupil had not been disabled there is no reason to suppose that there would have been a CSP. It was the disability which resulted in the need for the CSP, and it was the CSP which was the unfavourable treatment.*".

The court concluded that the tribunal had not erred in its key finding on this point. Translated into generalised language, the tribunal's finding was that where a person, in consequence of disability, has needs which require provision in terms of a statutory obligation, and the responsible body either fails to make that provision, or makes provision which is not adequate, that is unfavourable treatment in terms of section 15 of the 2010 Act.

Adrian D Ward

Review of AWI: summary and analysis of consultation responses

In the May Report we reported that the period for response to the Scottish Government consultation on reform of adult incapacity law ended on 30th April 2018. We provided links to the responses by some key bodies. In the July Report we reported on the presentation given by the Scottish Government team on its initial analysis of the content of all 316 responses to the consultation at a meeting in Edinburgh on 28th June 2018. We concluded that Report by anticipating a full analysis of responses to the consultation by way of a report from the Scottish Government team. That analysis has now been published. Working parties have been established to consider particular topics. The three topics are (a) definition of deprivation of liberty, (b) graded guardianship and support training, and (c) supervision of guardians and attorneys. The augmented Scottish Government team will work on other aspects in-house. A further targeted consultation is expected in January 2019. It is hoped that legislation may be presented to the Scottish Parliament by the end of 2019.

Adrian D Ward

Training judges about disability when the system is a work in progress

"The most dangerous phrase in the language is 'we've always done it this way'."

Rear Admiral Grace Hopper

I was pleased when Alex drew my attention to Ward and Curk's *Judicial Training: Access to Justice For People With Disabilities*. It is well worth a read. This research was conducted by a lawyer

and a psychologist and I am all in favour of lawyers and psychologists teaming up. I have highlighted a few of my favourite bits.

Their paper for Scotland's Judicial Institute aims "to assist the judiciary in its primary duty to ensure that justice is done". The authors' starting point is the *United Nations Convention on the Rights of Persons with Disabilities* ("CRPD") and the *Optional Protocol* to CRPD ("the Protocol") ratified by the United Kingdom Government on behalf of all jurisdictions in the United Kingdom. Article 13 of CRPD is in the following terms:

> *Article 13 – Access to justice*
>
> *1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.*
>
> *2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.*

This exploratory work with recommendations that are "preliminary" runs to 65 pages and the authors have covered a lot of extremely useful terrain – legal obligations, anecdotal accounts as well as some of the relevant peer-reviewed publications.

Chapter 1 considers the evolving concept of disability and the wide range of impairments that result in disabilities and needs. The authors could also flag up the basic lack of agreed terminology: Special measures are now known as measures in the family court in England and Wales, and are also variously referred to as adjustments/reasonable adjustments, accommodations and adaptations (and probably other things besides). In this chapter the reader will also find the start of an important thread that runs throughout the paper; the recommendation for a court system of improved "universal design" which could "ensure full equality before the law".

In Chapter 2 the European Convention on Human Rights Articles 14 (prohibition of discrimination), 8 (respect for private and family live), 5 (right to liberty and security) and 6 (right to a fair trial) are discussed. I suggest Article 3 (prohibition of torture) has a place here too. "No one shall be subjected to torture or to inhuman or degrading treatment or punishment"; there is always the potential for cross-examination to be degrading if judges do not apply appropriate control.

The Scottish Bench Book is reviewed in Chapter 4 as well as the England and Wales counterpart, The Equal Treatment Bench Book (ETBB). The authors are at pains to point out that these books are useful and important, but they also call for some new thinking. For example, on oaths:

> *…there cannot be any good reason to assume that raising the right hand (and the ability to do so – if indeed one has a right hand) will enhance the accuracy and honesty of evidence given. Simply to observe the likelihood of a relevant*

> *physical disability, and to excuse someone from doing something required of others, can make the excused person feel that they are being treated as "lesser", affecting their confidence from then on, bearing in mind that such a person is already more likely than average to feel intimidated and disadvantaged by the court environment.*

I agree with the authors; the ETBB "is massive" and they may be right that there is "a question as to whether judges can reasonably be expected to find their way through it to relevant provisions when that may be necessary with some urgency." My own additional concern is that the ETBB may be so dauntingly huge that judges will be put off browsing it. That would be more than a shame since the content is so valuable. If the ETBB is to judgecraft what the Highway Code is to driving, shouldn't there be the e-equivalent of a carry-around guide that can be browsed in one sitting?

The authors point out that Scotland and England and Wales' Bench Books have the words "Equal Treatment" in their titles, but they actually recommend "precisely the opposite". It reminds me that in 2012 when I was assisting one of the ETBB contributors, I half-seriously suggested renaming it the Unequal Treatment Bench Book! Ward and Curk suggest changing the system rather than the title of the book. On the current long lists of special adjustments, they say:

> *They put people into various categories requiring long lists of adjustments in order to squeeze them into the archaic rituals of court practice. Many of the recommendations really come down to ways in which courts can better do their job, by avoiding unnecessary intimidation, disadvantage, discomfort and so forth. One might suggest that a better approach would be to review rigorously all of the recommendations in both Bench Books to assess the extent to which there would be any disadvantage in adopting them as general good practice, rather than as special practice for particular groups and categories. By accommodating particular characteristics of some people within general good practice, the proclaimed objective of "equal treatment" would be achieved rather than falsified; and needs which are specific to particular people and which can only be met by special provision would be identified, and better focused.*

Along with the authors of this paper, in recent years I and others (see for example, Cooper & Mattison 2017 and Cooper et al 2018) have called for:

- more research to tell us what works in the courtroom, and what doesn't,
- universal changes to create accessible justice for all, and
- an evidence-based approach to court practices.

At a time when HMCTS (in England & Wales) seems dead set on court digitisation with barely any evidence on the ramifications for disabled participants, the need for research is urgent and vital. Ward and Curk's paper will leave the reader in no doubt that in Scotland achieving a system that is providing accessible justice is a *work in progress*. The Judicial Institute of Scotland will no doubt find this research very helpful. However, and this goes for England and Wales as well, there is only so much the judiciary can

do when the system itself has so many bolt-ons, tweaks and in-the-event-of fixes that it requires an operating manual which is hundreds of pages long. Added to this, lawyers and judges frequently adopt rituals, the benefits of which have never been scientifically proven.

Professor Penny Cooper
B.Sc (Hons), Barrister, Ph.D.

Editors and Contributors

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

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

Victoria Butler-Cole: vb@39essex.com

Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA 2009), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click here.

Neil Allen: neil.allen@39essex.com

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

Annabel Lee: annabel.lee@39essex.com

Annabel 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. She sits on the London Committee of the Court of Protection Practitioners Association. To view full CV click here.

Nicola Kohn: nicola.kohn@39essex.com

Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 4th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2015). To view full CV click here.

Editors and Contributors

Katie Scott: katie.scott@39essex.com

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

Simon Edwards: simon.edwards@39essex.com

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

Adrian Ward: adw@tcyoung.co.uk

Adrian is a recognised national and international expert in adult incapacity law. While still practising he acted in or instructed many leading cases in the field. 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; 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, Alzheimer Scotland's Human Rights and Public Policy Committee, the South East Scotland Research Ethics Committee 1, and the Scottish Human Rights Commission Research Advisory Group. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click here.

Conferences

Conferences at which editors/contributors are speaking

Switalskis Annual Review of the Mental Capacity Act

Neil is speaking at the 10th Annual Review of the MCA in York on 18 October 2018. For more details, and too book, see here.

Taking Stock

Neil and Alex are speaking at the annual Approved Mental Health Professionals Association/University of Manchester taking stock conference on 16 November. For more details, and to book, see here.

Other events of interest

Peter Edwards Law has announced its autumn programme of training in mental capacity and mental health, full details of which can be found 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 edition will be out in early October. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: marketing@39essex.com.

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

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

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

International Arbitration Chambers of the Year 2014 Legal 500

Environment & Planning Chambers of the Year 2015

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.