MENTAL CAPACITY REPORT: THE WIDER CONTEXT

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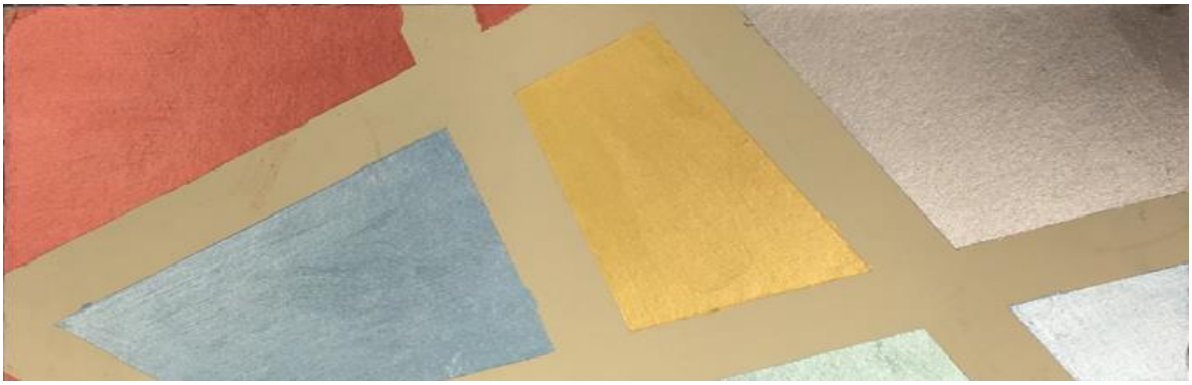

Welcome to the September 2018 Mental Capacity Report. Highlights this month include:

(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.

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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.

Contents

Short note: challenging behavior and disability

The Upper Tribunal decision in *C & C v The Governing Body of a School & Ors* [2018] UKUT 269 (AAC) case, arising in the context of education law, is significant for its interpretation of the meaning of "disability" for the purposes of the Equality Act 2010.

L was a child with autism, anxiety and Pathological Demand Avoidance. When he was 11 years old, he was given a fixed term exclusion from school for 1.5 days for aggressive behaviour. His parents brought a claim in the First-tier Tribunal ("FTT") under the Equality Act 2010 complaining of discrimination on grounds of L's disability. The FTT found that L had been involved in a number of incidents over a ten-month period, largely involving pulling, pushing and grabbing others. There was, however, one occasion when he hit a teaching assistant with a ruler, pulled her hair and punched her and another occasion when he hit the same teaching assistant with a book.

The FTT found that L generally met the definition of a disabled person for the purposes of the Equality Act. However, they dismissed this part of the claim because L had been given the exclusion as a result of his 'tendency to physical abuse' and so, pursuant to regulation 4(1)(c) of the Equality Act 2010 (Disability) Regulations 2010 ("the 2010 Regulations"), he was to be treated as not falling within the definition of 'disability,' that regulation.

L's parents appealed to the Upper Tribunal ("UT"). There was no challenge to the FTT's finding that L had a 'tendency to physical abuse'. Rather, the issue in the appeal was whether the FTT made an error of law in finding that L was not 'disabled' insofar as this 'tendency to physical abuse' was concerned. There was no dispute that the issue fell within the scope or ambit of Article 2 of the First Protocol to the ECHR (the right to education). The issue was whether the FTT's interpretation of regulation 4(1)(c) of the 2010 regulations was compatible

with Article 14 ECHR (freedom from discrimination).

The UT held that there was a difference in treatment between children with L's status and others in an analogous situation that fell to be justified. In assessing the justification for difference in treatment, the UT applied the conventional four-stage test. In applying that test, the UT accepted that, as the case concerned an issue of social policy, when considering the first three stages, the 'manifestly without reasonable foundation' test was the appropriate one but that the test did not apply to the fourth ('fair balance') stage. In answer to the four-stages, the UT considered that the measure had a legitimate aim, that there was a rational connection between the measure and the aim and that a less intrusive measure could not have been used. The central issue in the case was whether it struck a fair balance between the rights of the individual and the interests of the community.

In relation to fair balance, the UT reached the firm view in paragraph 90 that it was not satisfied on the evidence that a fair balance had been struck:

> *regulation 4(1)(c) comes "nowhere near striking a fair balance between the rights of children such as L on the one side and the interests of the community on the other. The profound severity of the consequences of the measure on the status group weigh extremely heavily and the arguments put in favour of the countervailing public interest by no means counter balance them. Indeed, in my judgment, this is not a case in which the issues are finely poised. Rather, the requirements for the protection of the status group's fundamental rights comprehensively outweigh the arguments put forward for the protection of the interests of others.*

The UT stated its conclusion at paragraph 91 in forceful terms:

> *In conclusion, I recognise that as a matter of domestic law the current interpretation of regulation 4(1)(c) is clear and well established. It was not questioned before me. However, I am now addressing that regulation in the context of human rights law. In that context, in my judgment the Secretary of State has failed to justify maintaining in force a provision to be made for them. In that context, to my mind it is repugnant to define as 'criminal or anti-social' the effect of the behaviour of children whose condition (through no fault of their own) manifests itself in particular ways so as to justify treating them differently from children whose condition has other manifestations.*

This is a welcome decision. Although this case did not deal with any issues of mental capacity, it is not difficult to imagine the same or similar issues arising in respect of someone who lacks capacity (due to a disturbance or disorder of the mind or brain) to make certain decisions about their actions. It is clearly right that such people should receive equal protection from discrimination under equality legislation and human rights law.

LGO annual review of local government complaints

The Local Government and Social Care Ombudsman has published its annual review of local government complaints. The total number of complaints (17,452) is up on the previous year

as is the proportion of complaints upheld (57%). The Ombudsman has also issued 40% more public interest reports about local authorities and made 21% more recommendations for service improvements. One of the public interest reports published was a themed Focus Report titled "The Right to Decide: towards a greater understanding of mental capacity and deprivation of liberty". As the annual review explains:

> *We highlighted that sometimes the proper checks are not happening or safeguards put in place when councils and care providers make decisions on behalf of people who lack mental capacity to choose how they are cared for. Our case studies showed how people were left in situations without the right consent in place and in one case forced to live somewhere against their will for a number of years.*

Recourse to the Ombudsman should therefore not be overlooked for complaints relating to the use of the Mental Capacity Act 2005 as a potentially more cost-effective route than going to court.

Ordinary residence guidance

The Local Government Association (LGA) and Directors of Adult Social Services (ADASS) have published a guide, "Ordinary Residence Guide: Determining local authority responsibilities under the Care Act and the Mental Health Act". The guide is aimed at supporting partners to understand and apply the concepts of ordinary residence. The concept is not only of relevance to the Care Act 2014 and Mental Health Act 1983, but also the Mental Capacity Act 2005 and DOLS in particular. The guide explains that, *"The supervisory body will be the local authority in whose area the individual is ordinarily resident, even if the person has been placed by the local authority or the CCG in a care home in a different area."*

In applying the ordinary residence test, it is always necessary to consider whether the individual had the mental capacity to choose where to live. As set out by the Supreme Court in the case of *R (Cornwall Council) v Secretary of State for Health* [2015] UKSC 46, a modified approach needs to be taken to establish ordinary residence for those individuals who do not have the mental capacity to voluntarily adopt a place of abode.

The 39 Essex Chambers Ordinary Residence Guidance Note, addressing mental capacity issues specifically, is available here.

Short note: suicide and the burden of proof

In a detailed review of the law, the Divisional Court has exposed as – in essence – an urban myth the understanding that a conclusion an inquest that a person took their own life only where it has been proved to the criminal standard of proof. In *Maughan v HM Senior Coroner for Oxfordshire* [2018] EWHC 1955 (Admin), the Divisional Court confirmed that the standard should be the balance of probabilities, bearing in mind that such a conclusion should only be reached if there is sufficient evidence to justify it. As the Divisional Court noted:

> [40]. *In circumstances where the function of an inquest is to determine the relevant facts concerning the death as accurately and completely as possible without determining even any question of civil liability, we can see no justification in principle for weighting the fact-finding*

> *exercise against any particular conclusion and requiring proof to any higher standard than the balance of probabilities. That is so even if the facts found disclose the commission of a criminal offence. Given that in civil proceedings the standard of proof of criminal conduct remains the ordinary civil standard, we can see no principled reason for adopting a different approach in coroner's proceedings. The position is a fortiori where the conclusion under consideration is one of suicide as, although it was once a crime, suicide has not been a crime for over 50 years since that rule of law was abrogated by section 1 of the Suicide Act 1961.*

Elder abuse: academic research

A special issue has recently been published of the British Journal of Social Work focusing on elder abuse, the articles being free to read for a limited period of time.

Guides for adult siblings of people with a lifelong learning disability and/or autism

The charity Sibs has recently published a series of useful guides for adult siblings of people with a lifelong learning disability and/or autism, including on: decision-making and mental capacity, managing finances, wills and trusts, and working with care providers.

New safeguarding guidance for healthcare staff

The Royal College of Nursing has published new guidance on safeguarding, on behalf of a wide-ranging collection of bodies, including BASW, the RCGP, the British Geriatrics Society and the RCP, designed to guide professionals and the teams they work with to identify the competencies they need in order to support individuals to receive personalised and culturally sensitive safeguarding. It sets out minimum training requirements along with education and training principles.

The Irish *Bournewood*?

In *AC v Cork University & the HSE* [2018] IECA 217, the Irish Court of Appeal grappled with the question of whether a hospital or other institution can refuse to permit an elderly patient to leave the institution in question on the basis that it considers that she lacks the capacity make a valid request to be permitted to leave. Although filtered through the language of the Irish Constitution rather than the ECHR, the debates will have a familiar ring to those steeped in those provisions.

As Grogan J noted:

> *36. Outside the special circumstances of the Health Act 1953 (which concerns the detention for those suffering from infectious diseases) and the Mental Health Act 2001 (which deals with the treatment of the mentally ill, including those suffering from severe dementia), the concept of detention is one which really has no place in our system of medical care. In this context, therefore, given our embedded tradition of voluntarism in this sphere of medical treatment – a tradition reflected in the Constitution's guarantee to protect the "person" in Article 40.3.2 - the question of whether somebody is being detained in hospital is something of an unpleasant question to have to ask. Now, however, that the issue has been presented to us in the course of these two appeals, ask it we must.*

On the facts of the case, Grogan J had no doubt that Ms A.C. was, in fact detained, as active steps were taken to prevent her from leaving.

The second question – which takes us straight into *Bournewood* territory, the question was whether the detention was lawful. Re-running the case in Irish terms, the first instance judge – the President of the Irish High Court

> *noted that Ms. A.C. was no longer capable of making decisions of this kind and, by implication, accepted the hospital's submission that Ms. A.C. was free to go save that she no longer had the capacity validly to make that decision, and that the CUH was accordingly entitled to make the appropriate decisions regarding her liberty and welfare which they considered to be in her best interests.*

However, Grogan J took a different view. He did not doubt that a hospital is entitled to take appropriate steps to regulate its own affairs in an orderly way:

> *the hospital could probably have prevented Mr. P.C. and Ms. V.C. from entering their mother's ward with a view to evacuating her in the middle of the night had they suddenly determined on this course of action. Had this occurred in that fashion the hospital would probably have been entitled to say that this would have been inconsiderate of the needs of other patients and disruptive of good order within the hospital.*

But, what the hospital was not entitled to do was:

> *to prevent Ms. A.C. from leaving the hospital at any appropriate time and place if this is what she wanted to do. As I put it in PL ([2018] 1 I.L.R.M. 441, 452) while "hospital personnel could lawfully attempt to persuade a patient not to leave, this must involve persuasion and not restraint." As matters stand there is currently no statutory power equivalent to s. 23 of the Mental Health Act 2001 ("the 2001 Act") (which enables a psychiatric hospital to detain a voluntary patient leaving the hospital for a 24 hour period) which would enable the hospital to detain the patient in such circumstances. The question therefore must be whether such a power exists under the common law.*

Grogan J was clear that there was no such power:

> *The power claimed by the hospital amounts to a paternalistic entitlement to act in the best interests of the patients whose capacity is impaired and, in effect, to restrain their personal liberty and freedom of movement and, if necessary, to do at the expense of close family members. But ever before the enactment of the Constitution the common law has always rejected the claim that personal liberty could be compromised on such a basis. In a celebrated case dating from the War of Independence, Connors v. Pearson [1921] 2 I.R. 51, the (old) Court of Appeal held that there was no justification for the detention by the police of a small boy which was said to be for his own good. O'Connor L.J. rejected the idea that this might provide a lawful justification for such conduct, saying ([1921] 2 I.R. 51, 91) that:*
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> > *You cannot incarcerate a man or a boy merely because his going abroad or his doing something that he is minded to do exposes*

> *him to some danger. If that were so, the adventurous spirits that sought the North Pole or the interior of Africa or that conquered the Atlantic in flight might have been locked up for their own good.*

Framing the argument through the prism of the Irish Constitution, the position was even clearer that no such power could exist. Grogan J could

> *certainly sympathise with the position of CUH, their self-created power of detention might, if unchecked, lead to widespread abuse. For if the power of detention claimed by CUH was to be judicially accepted, the logical consequence would be that tens of thousands of the infirm elderly who are suffering from dementia (or whose capacity is otherwise impaired) and who are presently residing in nursing homes and other similar institutions could equally be restrained from leaving. In many cases this would doubtless be for good clinical reasons. In other instances, however, this decision could be simply for reasons of convenience and, perhaps in a small minority of cases, for even less noble motives.*
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> [...]
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> *52* [...] *In many ways, it all comes back to the fundamental proposition so memorably articulated by Hanna J. in Dunne v. Clinton [1930} I.R. 336, 372: there is, simply, no "half way house" between liberty "unfettered by restraint and an arrest". Yet if the power to restrain contended for by CUH in the present case were to be admitted, it would mean that the personal liberty of Ms. C. – and, by extension, the personal liberty of tens of thousands of vulnerable, elderly patients suffering from dementia and residing in institutional care through the State – would be reduced to a half way house of ambiguity, variable and inconsistent grants of permission and subjective paternalism on the part of clinicians, nurses and care-givers.*
>
> *53. Those who contend that it would be appropriate that those caring for the elderly should have this power should not come as supplicants to this Court requesting that we should create it, for we lack that power and jurisdiction. If, as a result of this decision, the law is considered to be unsatisfactory, then any change is exclusively a matter for the Oireachtas* [Irish Parliament] *to determine.*

The Oireachtas will, indeed, seek to determine this question when long-awaited legislation to seek to provide the equivalent for DoLS is placed before it. Whether and how that legislation seeks to comply with the CRPD is going to be an open – and very interesting – question, especially in light of the Irish Government's declaration in respect of Article 14 CRPD to the effect that "*the Convention allows for compulsory care or treatment of persons, including measures to treat mental disorders, when circumstances render treatment of this kind necessary as a last resort, and the treatment is subject to legal safeguards*."

New Zealand and the Bournewood gap

Moving even further afield from our last item, those scarred by the DoLS wars in England and Wales may be interested to read "*Not my home: a collection of perspectives on the provision of aged residential care without consent*," recently compiled and published by the New Zealand

Human Rights Commission, starting the journey towards identification (and closure?) of the equivalent of the *Bournewood* gap in that jurisdiction.

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

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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.

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