Essex CHAMBERS

MENTAL CAPACITY REPORT: PRACTICE AND PROCEDURE

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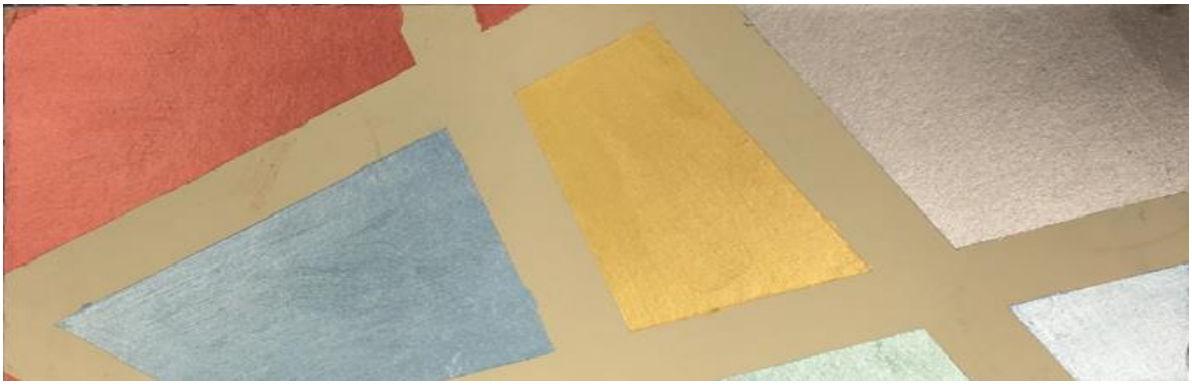

Welcome to the September 2022 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: Person-specific contact and sexual relations capacity; treatment plans for disordered eating; and updated DoLS statistics.

(2) In the Property and Affairs Report: Electronic billing pilot rolls out.

(3) In the Practice and Procedure Report: Transparency orders; and the BMA opines on s.49 MCA reports.

(4) In the Wider Context Report: Brain stem death testing; deprivations of liberty of young people in Scotland; the CRPD's application in the Battersbee case; foreign convictions; coercive control; litigation capacity; the Care Act considered in the Court of Appeal.

(5) In the Scotland Report: Further updates on Guardians' remuneration and the PKM litigation; nearest relatives; and the MHTS project concludes.

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.

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

Contents

Transparency Orders

Re EM [2022] EWCOP 31 (29 July 2022) (Mostyn J)

Practice and Procedure – Transparency

In *Re EM* [2022] EWCOP 31, Mostyn J expressed a number of concerns about the transparency order made in the case before him by Keehan J, in 'broadly standard' terms.[1] In particular, he expressed the concern (at paragraph 41):

> *that it may be technically unsound for two separate reasons namely (i) the order was made in the absence of a Re S-type balancing exercise, weighing the Article 8 ECHR rights of EM with the Article 10 ECHR rights of the public at large, exercised via the press; and (ii) notice of the intention to seek the order had not been given to the press pursuant to s12(2) HRA 1998.*

Mostyn J developed his concern[2] and continued:

> *"A practice direction may provide for circumstances in which the court will ordinarily make an order under paragraph (1), and for the terms of the order under paragraph (2) which the court will ordinarily make in such circumstances." (emphasis added)*
> *v) Practice Direction 4C has been made under r4.3(3), and provides that:*
> *"2.1 The court will ordinarily (and so without any application being made) –*
> *(a) make an order under rule 4.3(1)(a) that any attended hearing shall be in public; and*
> *(b) in the same order, impose restrictions under rule 4.3(2) in relation to the publication of information about the proceedings.*
> *2.3 An order pursuant to paragraph 2.1 will ordinarily be in the terms of the standard order approved by the President of the Court of Protection and published on the judicial website at www.judiciary.gov.uk/publication-court/court-of-protection/. (emphasis added)*
> *vi) The emphasised passages in r. 4.3(3) and PD4C, paras 2.1 and 2.3, provide for a*

[1] He also expressed strong views about the continued use of initials to anonymise orders and individuals within proceedings.

[2] Mostyn J then amplified his concerns as follows:

> *i) Rule 4.1(1) of the COPR provides that the "general rule is that a hearing is to be held in private". The rest of Rule 4.1 says nothing about what can be reported about such a hearing. It prevents a journalist attending the hearing, but its terms do not prevent any party talking to a journalist or that journalist subsequently writing a report.*
> *ii) Section 12 of the Administration of Justice Act 1960 imposes a blanket ban on reporting proceedings brought under the Mental Capacity Act 2005, but r.4.2 COPR and Practice Direction 4A allow, for the purpose of the law of contempt, certain disclosures to be made.*
> *iii) Rule 4.3(1) and (2) COPR supplies the court's power to order that a hearing be held in public and, consequentially to that order, to impose reporting restrictions.*
> *iv) Rule 4.3(3) provides that:*

43. Plainly, on 1 July 2022 the media were not notified that a reporting restriction order was being considered. It is equally clear that a Re S balancing exercise undertaken was not undertaken. Had these steps been taken the order would have said so on its face. It is, however, a standard practice, condoned by r.4 COPR and PD4C, not to take these steps. That being so, I respectfully suggest that the correctness (I hesitate to use the word lawfulness) of this standard practice is reviewed by the Rule Committee with input from all relevant stakeholders.

Mostyn J identified a possible solution as being to leave the proceedings to be heard "in private" but to make a standard order at the beginning of the case which relaxes the strictures of section 12 of the Administration of Justice 1960 Act by

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standard order to be made almost automatically: i.e. without any enquiry whether such an order is appropriate on the facts of a given case. That such an enquiry is necessary flows from the fact that the transparency order is undoubtedly a form of reporting restrictions order.

vii) Reporting restriction orders can only be made following a court conducting the 'ultimate balancing exercise' between Article 8 and Article 10 ECHR rights as described by Lord Steyn in Re S (a child) [2004] UKHL 47; [2005] 1 AC 593 as follows:

"The interplay between articles 8 and 10 has been illuminated by the opinions in the House of Lords in Campbell v MGN Ltd [2004] 2 WLR 1232. For present purposes the decision of the House on the facts of Campbell and the differences between the majority and the minority are not material. What does, however, emerge clearly from the opinions are four propositions. First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test." (emphasis added)

viii) There is no sidenote in the standard order template saying that a Re S balancing exercise must be undertaken, such as to prompt the judge to turn his or her mind to that exercise. Nor was there any statement in the specific order of Keehan J dated 1 July 2022 that this exercise had been actually undertaken.

ix) Save where there are compelling reasons why the press should not be notified, a reporting restriction order can only be made after all practical steps have been taken to give the press notice of the intention to seek such an order. But there is no provision to this end in r.4 COPR or PD4C. Such notification is required pursuant to s12 HRA 1998, which provides that:

(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

(2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied:

(a) that the applicant has taken all practicable steps to notify the respondent; or

(b) that there are compelling reasons why the respondent should not be notified."

x) There is no rubric or sidenote in the standard order template saying that the press must be notified prior to the order being made, nor is there any statement that this occurred in the order of Keehan J dated 1 July 2022.

permitting the press and legal bloggers to attend the hearings and allowing them (and the parties) to report the proceedings provided that they do not identify P directly or indirectly. He pointed to *Norfolk County Council v Webster & Ors* [2006] EWHC 2733 (Fam) where an equivalent order was made, although noted that Munby J considered in that case that such a permissive order should be characterised as a reporting restrictions order giving rise to both the need for a full balancing act and press notification.

Revisiting the standard transparency order, which dates from 2017, is undoubtedly something which could sensibly be done, not least to see whether it can be made simpler in light of experience. It also requires updating to take account of the fact that there is now a universal set of provisions relating to remote public access to proceedings. It is also to be hoped that the Law Commission's project on reforming the law of contempt can include consideration of the primary legislation under which the Court of Protection operates. That primary legislation dates from a time when almost all hearings were conducted in private. The position now, however, is that almost hearings take place in public, subject to limitations upon what can be reported (whether by member of the press or otherwise), designed, in particular, to secure the protection of the identity of P. However, because of the way in which the primary legislation operates, it is only possible to achieve that position by way of an individual order being made in each case.

Mostyn J's point (which appears to be one which he has taken of his own motion, as it does not appear to have been raised by the sole represented party before him) is a very important one – is the current practice of making such orders correct (or perhaps even lawful)?

In response, it might be said that Lady Hale appears to have considered that the court's approach is lawful, in observations made in relation to the pilot which preceded the changes introduced in the 2017 Rules. In *R (C) v Secretary of State for Justice* [2016] UKSC 2, concerning the approach to anonymity in civil cases concerning those subject to the Mental Health Act 1983, she outlined the specific considerations applying to proceedings before the Court of Protection before noting the pilot in apparently approving terms:

> *25. The other specialist jurisdiction dealing with people with mental disorders or disabilities is the Court of Protection. This decides whether or not, because of mental disorder, a person lacks the capacity to make certain kinds of decision for himself and if so, how such decisions are to be taken on his behalf. These include decisions about his care and treatment. Rule 90(1) of the Court of Protection Rules 2007 (SI 2007/1744)* [now Rule 4.1] *lays down the general rule that hearings are to be held in private. If the hearing is in private, the court may authorise the publication of information about the proceedings (rule 91(1))* [Rule 4.2]. *The court may also direct that the whole or part of any hearing be in public (rule 92(1))* [Rule 4.3(1)]. *But in either case the court may impose restrictions on publishing the identity of the person concerned or anyone else or any information which might lead to their identification (rules 91(3) and 92(2))* [Rules 4.2(4) and 4.3(2)]. *The starting point in the Rules, therefore, is both privacy and anonymity. However, from January 2016, there will be a six month "transparency pilot", in which the court will generally make an order that any attended hearing will be in public; but at the same time it will impose restrictions on reporting to ensure the anonymity of the person concerned and, where appropriate, other persons.*

In *V v Associated Newspapers Ltd & Ors* [2016] EWCOP 21, Charles J (the then-Vice President of the Court of Protection), who introduced the transparency pilot and the new provisions, identified that made clear that he considered that it would be wrong to take an approach to issues

relating to reporting (and hence to the weight to be given to competing ECHR rights) which proceeded on the basis that the starting point would be that there would be a public hearing, and that any reporting restrictions would be sought or granted from that position. Rather, he made clear at paragraph 87, the starting point was the default rule which:

> *i) reflects a well-established exception to the general approach that courts sit in public, and*
> *ii) founds a distinction, equivalent to that recognised in Re C at paragraph 21, between reporting restrictions orders and anonymity orders made by the COP and many such injunctions made in other circumstances.*

Whilst Charles J considered that a *Re S* balancing exercise needed to be carried out, he also made clear (in his summary, paragraph 9) that there was a distinction between:

> *(a) cases where pursuant to the default or general position under the relevant Rules or Practice Directions the court is allowing access (or unrestricted access) to the media and the public, and (b) cases in which it is imposing restrictions and so where the court is turning the tap on rather than off.*

As Mostyn J noted, Practice Direction 4C embeds the practice of the court 'generally making' an order that attended hearings are in public, but at the same time imposing reporting restrictions. Mostyn J did not address specifically in his observations the fact that Practice Direction 4C, read together with model transparency order, anticipates such an order would be made by the court at the point of listing the first attended hearing. In other words, and in the ordinary course of events, this would be an order made on the papers at the very earliest case management stage of the proceedings. Pragmatically, requiring (1) a full-scale *Re S* analysis and (2) notification of the press before any such order was made would build in a level of delay and complexity that would be unlikely to be attractive – let alone acceptable. Whilst I entirely agree that it would be appropriate for the ad hoc Rules Committee to take a further look at the practice and procedure, my starting proposition is that the pragmatic approach embodied in the transparency Practice Direction is defensible for the following reasons.

It is a perhaps unsurprising feature of the case-law such as *Re S* that it relates to situations where the competing rights are being asserted by specific individuals or organisations: most obviously, the press asserting a right under Article 10 ECHR, and a person or people asserting a right under Article 8. In other words, there are specific arguments being advanced in relation to a specific case. At that point, and as Lord Steyn made clear in *Re S*, the court's task to evaluate the competing rights with an intense focus as to their comparative importance.

The situation here, though, is rather different. It relates to the application of a general provision guiding judges as to the application of the *Re S* balancing exercise in circumstances where Parliament has decreed that the starting point is that the tap of publicity is off and the court is deciding whether to turn it on.

The making of a transparency order is a judicial decision. I would therefore suggest that the making of the order represents the implicit (summary) judicial determination that the appropriate *Re S* balance is as set down in the Practice Direction. In the absence of arguments having been advanced as to the comparative importance of the rights in play, I would suggest that such a summary determination is appropriate. It is clear from the work of the Open Justice Court of Protection Project that judges of the Court of Protection are acutely alive to the issues to which listing a hearing in public gives rise. The transparency order could undoubtedly include a recital expressly referring to *Re S*, but I would suggest that this would be

likely to be more for form's sake than anything else.

As regards the application of s.12 HRA 1998, requiring prior notification [3] before relief is granted which might affect the exercise of the ECHR right to freedom of expression, it is important to note the observations of Charles J made in 2017. To put these observations in their context, at that point there was separate category of serious medical treatment cases governed by their own practice direction. In a note he published explaining why the then-Transparency pilot approach of no prior notification would be the same for all categories of case, Charles J identified that:

> *A change for serious medical cases is that prior notice of the making of a Pilot Order will not be given to the media. On that topic in the Schedule to my judgment in V v ANL I said:*
> *"To my mind proper notification to the media of the existence of the proceedings and of the date of the public hearing of a case relating to serious medical treatment and the terms of any reporting restrictions order made when a public hearing is directed is what really matters. And when that order follows a standard process referred to in a practice direction or rules it seems to me that:*
> 1. *there are compelling reasons why the parties bound by the reporting restrictions order need not be notified of the application (see s. 12(2) of the HRA 1998), particularly if they are defined by reference to those who attend the public hearing (or get information from those that do), and*
> 2. *this view is supported by the approach of the Court of Appeal in X v Dartford and Gravesend NHS Trust (Personal Injury Bar Association and another intervening) [2015] 1WLR 3647 in particular at paragraphs 25 to 35.*
>
> *If those bound by the order (and so the media) have such notification they can then attend the hearing knowing, in general terms, what the case is about and the terms of the reporting restrictions order and they can challenge that order then or at another time.*

There is now formally no category of serious medical treatment cases, even if they are, in practice, treated differently. That makes it all the clearer that the logic applied by Charles J to dispensing with prior notice of the making of a transparency order either applies to **all** cases or no cases.

As can be seen, Charles J's approach was predicated upon proper notification of the existence and nature of the hearing on the relevant listing pages. This is provided for at paragraph 3 of the model order. The Open Justice Court of Protection Project has been – rightly – vocal in its identification of the ways in which this has not always happened, for reasons (by way of explanation, not excuse) which are often outside the direct control of the Court of Protection. However, it is not clear – at least to me – that the problem is systematically so great that it means that the logic of Charles J does not still apply.

In conclusion, therefore, I would respectfully agree that Mostyn J was right to raise the questions that he did (albeit that it is perhaps unfortunate that he did so in a case where he does not appear to have had any submissions made to him or, for instance, to have the observations of Charles J drawn to his attention). If – or, as I hope, when – the MCA 2005 is amended, it seems to me that it would be

[3] Mostyn J appears to have thought in terms of notification of the press. However, the transparency approach in the CoP is to open the doors to all comers, rather than just the press. Members of the public at large could also in principle assert a right to freedom of expression, so logically, in fact, such notification would have to be to everyone.

possible to make clear in primary legislation (1) that the statutory default position is for hearings to be held in public subject to reporting restrictions; and (2) the penalties for non-compliance with any such reporting restrictions. That would make life both easier and clearer for all concerned.

In the interim, the reality is that there is a choice between the court defaulting back to purely private hearings or to maintaining the current pragmatic balancing act that it does. Mostyn J's proposed potential alternative of maintaining the proceedings in private but relaxing the effect of s.12 Administration of Justice Act 1960 undoubtedly merits consideration by the ad hoc Rules Committee. However, as he identified, Munby J considered that even the making of such required a full *Re S* balancing exercise and press notification. Such would therefore not solve problem that such is simply not viable on a wide scale.

However, for the reasons set out above, it seems to me that the current approach of the Court of Protection, whilst a clunky workaround, is a defensibly clunky workaround.

Alex Ruck Keene KC (Hon)

British Medical Association publishes note on s.49 MCA reports

The British Medical Association (BMA) has published a brief note for doctors who are called on to complete s.49 MCA reports; this appears to have been informed by the recent article on the impact on learning disability psychiatrists who are called upon to complete s.49 reports, discussed in our April 2022 report. The note is written for doctors who are called upon to complete the reports, and offers certain guidance to medical practitioners who may feel pressured to complete these reports on their own time without compensation. The note also considers the status of s.49 orders made in respect of GP practices. It states in relevant part:

Can a Trust/Consultant charge a fee for the work undertaken?

NHS Health bodies are not allocated funds by the CoP to produce these reports. There is huge variation between courts as to the number of reports requested. At the same time, trusts vary in their approach to getting the work done and compensating those who do it.

Engagement with stakeholders

…The BMA Medico Legal Committee will work in partnership with the Royal College of Psychiatrists and other key stakeholders to find long term solutions to explore the possibility of other professions doing this work, professionals outside of the secondary care mental health services, which are hugely overstretched. If it continues to be done by doctors, it is the BMA's view that they must be properly remunerated.

Obligations on Trusts

The BMA firmly believes that all Trusts must have a Section 49 policy agreed between the trust senior management and the local negotiating committee. There should be a named lead who receives all court orders. They can then monitor the number and types of requests and make provision for the work to be done. The named lead would also be able to clarify timescales for providing the report. Additionally, the named lead should report to the trust board at least annually on the number of reports requested from the trust, the time taken, and the discipline of staff who have completed them. Policies should stipulate clearly that this work is not restricted to doctors and describe the staff who can be approached to provide reports (see above). There should be consideration in the first instance of contracting an external expert to complete these reports for the court on behalf of the trust, particularly if the

individual is not under the care of the organisation.
It is the BMA's view, that individuals completing this work must be compensated for the time taken to complete the report, regardless of whether the patient is currently under the care of the trust or not.

Compensation could take the form of one of the following (or if appropriate a combination, e.g., of TOIL and pay):

- *– Cancelling Direct Clinical Care (the "DCC") sessions to compete the work*
- *– A locum being employed to complete the DCC work on behalf of the person completing the report while they do it*
- *– As this is non contractual work, being compensated at an hourly rate commensurate with their skills and experience and agreed with the trust Local Negotiating Committee (LNC).*
- *– Administrative staff would also require appropriate compensation*
- *– Time Off In Lieu ("TOIL")*

Non contractual work

All non-contractual work needs to be agreed between the consultant and the employer and is subject to negotiation over terms, including pay. Consultants are within their rights to negotiate their own rates of pay and are not obliged to undertake this work if they deem the rates of pay to be inadequate. LNCs are able to negotiate standardised rates with employers locally. However, even where such agreements are in place this does not override your right to refuse non-contractual work.

BMA minimum rate card

The decision to engage in other activity worked beyond the standard contract (such as waiting list initiatives) rests entirely with the consultant. There is wide variation around the country in the amount paid for this work. In order to achieve uniformity, fairness and consistency, we have developed a BMA minimum rate card. The BMA is now advising all NHS consultants to ensure that such extracontractual work is paid at the BMA minimum recommended rate and to decline the offer of extracontractual work that doesn't value them appropriately.

General Practice

An NHS body takes its definition from section 49(10) of MCA 2005 and section 148 of the Health and Social Care (Community Health and Standards) Act 2003. The definition of NHS body in section 148 does not include GP practices. Therefore, GP practices cannot be directly ordered by the Court of Protection to produce a report under section 49.

The vast majority of GP practices in contract with the NHS are not NHS bodies even if their contractor CCGs/PCOs are. The court sending a Section 49 request to a GP practice is not able to compel the practice to undertake the work because the practice is not a public body. Orders under section 49 would normally be sent to an NHS body to complete itself, i.e., a NHS Trust delegates the most suitable clinician within the Trust to complete the report. However, it would be possible for an NHS body (e.g., an NHS Trust) that had been ordered to 'arrange for a report to be made' to request that a GP produce the report because it is entitled under section 49(3) to instruct 'such other person' that it 'considers appropriate' do it. However, in doing so, the trust cannot compel a GP as an independent practitioner to do the work and if the GP agrees to do the work, he/she is entitled to be paid a rate agreeable to the GP.

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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.

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Conferences and Seminars

Forthcoming Training Courses

Neil Allen will be running the following series of training courses:

14 September 2022	AMHP Legal Course Update
16 September 2022	BIA/DoLS legal update (full-day)
30 September 2022	Court of Protection training
13 January 2023	Court of Protection training

To book for an organisation or individual, further details are available here or you can email Neil.

The University of Essex is hosting two events in October:

3 October 4.30pm – 7pm: Evaluation of Court of Protection Mediation Scheme Report Launch

Garden Court Chambers,
57-60 Lincoln's Inn Fields, London, WC2A 3LJ, and online by zoom
Register at: *https://www.eventbrite.com/e/evaluation-of-court-of-protection-mediation-scheme-report-launch-tickets-411843032597*

5 October 1pm – 5pm Mental Capacity Law in Contract and Property Matters

Wivenhoe House Hotel, University of Essex, Colchester, and online by zoom
Register at: https://www.eventbrite.co.uk/e/mental-capacity-law-in-contract-and-property-matters-tickets-365658192497
Speakers include: Clíona de Bhailís, Researcher, NUI Galway, Shonaid and Andy, PA and Support Workers, Outside Interventions
Professor Rosie Harding, University of Birmingham, John Howard, Official Solicitor and Public Trustee Property and Affairs Team, Gareth Ledsham, Russell Cooke Solicitors, Her Honour Judge Hilder, Court of Protection

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 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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