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Introduction

Welcome to the November Mental Capacity Law Newsletters. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: an update on judicial authorisations of deprivation of liberty and two difficult cases, one involving the MHA and the MCA, and the other capacity to consent and to contact;

(2) In the Property and Affairs Newsletter (this month edited by Kelly Stricklin-Coutinho): the first revocation of a digital LPA and an update on necessaries;

(3) In the Practice and Procedure Newsletter: fact-finding against the odds, the limits of the inherent jurisdiction, an escalation of the legal aid debate and the launch of Alex's guidance on litigation friends in the Court of Protection;

(4) In the Capacity outside the COP newsletter: an important case on capacity and s.117 MHA 1983, an update on the new approach adopted by CQC to the MCA 2005 and a round-up of recent guidance on the MCA 2005, as well as call for best practice documentation, new guidance on DNACPR notices, and the Committee on the Rights of Persons with Disabilities' statement on Article 14.

(5) In the Scotland Newsletter: the hotly anticipated Scottish Law Commission report on plugging the *Bournewood* gap, updates on the position relating to powers of attorney, an important case on testamentary capacity and undue influence, and updates on recent reports from the Mental Welfare Commission.

Table of Contents

Scottish Law Commission Report on Adults with Incapacity

Introduction

The Scottish Law Commission published its Report on Adults with Incapacity[1] on 1 October 2014, making 45 recommendations and attaching a draft Bill amending the Adults with Incapacity (Scotland) Act 2000 (AWIA). The report seeks to address possible incompatibilities between Article 5 ECHR and the AWIA following the Strasbourg B*ournewood*[2] ruling, namely (1) what constitutes a deprivation of liberty engaging Article 5 in situations other than psychiatric hospitals and prisons; and (2) how to lawfully authorise such deprivation of liberty and provide the necessary legal and procedural safeguards required by Articles 5(1) and (4).

The task of the Commission, as was the case for the Supreme Court in *Cheshire West*,[3] was not assisted by the fact that there is little guidance to date from Strasbourg on these issues. However, until such time as there is clearer direction from the European Court of Human Rights we at least have the Cheshire West interpretation of deprivation of liberty engaging Article 5 which is influential, if not binding, in Scotland.

Overview of recommended legislative changes

The report proposes amendments to the AWIA to allow for measures to prevent an adult with incapacity leaving hospital, the authorisation of significant restriction of liberty and orders to cease the unlawful detention of adults. Moreover, rather than defining "deprivation of liberty" the draft Bill introduces the concept of "significant restriction of liberty" to encompass all potential deprivation of liberty situations. The precise provisions can be found in the draft Bill, and are also described by Adrian Ward here. See also his comments on immediate practical consequences in his items on powers of attorney and the *Smyth* judgment elsewhere in this Newsletter. The following are some initial observations arising from the suggested legislative amendments, although it they are not exhaustive and inevitably at this stage ask more questions than they answer.

Hospitals: Prevention of adults with incapacity receiving medical treatment, or being assessed as to whether medical treatment is required, going out of hospital or some part of an NHS or private hospital (s.50A draft Bill)

The assessment of the adult's capacity and the means employed to prevent them from leaving hospital, including use of any medication or use of force, must be in accordance with the definition of "incapable" in s.1(6) AWIA and the Act's principles such as benefit, necessity and least restrictive alternative.

Moreover, there are review and appeal provisions of the authorisation to implement the measure. The medical practitioner who authorised the preventing of the person from going out of the hospital is under a duty to review this authorisation "from time to time"[4]. It is also possible for the patient or anyone claiming an interest in their personal welfare to apply to the

[1] Scot Law Com No 240, 2014.

[2] *HL v UK* (2005) 40 EHRR 32

[3] *P (by his litigation friend the Official Solicitor) (Appellant) v Cheshire West and Chester Council and another (Respondents); P and Q (by their litigation friend, the Official Solicitor)(Appellants) v Surrey County Council (Respondent)* [2014] UKSC 19 ("*Cheshire West*").

[4] s.50B draft Bill.

sheriff for an order setting an end date for such a measure[5] or to review any action taken in reliance on the authorising certificate[6]. Additionally, administration of medication for confining the person to hospital can be brought under s52 AWIA (i.e. an appeal against medical treatment).

That being said, several aspects of the recommendations require further consideration.

Scope of authorisation process – immobile patients

It is the Commission's view[7] that the authorisation process will only be required where it is necessary to retrain the patient but that "in many cases it may not be necessary because of the state of their health"[8]. It is interesting that this view has been taken because Strasbourg and English jurisprudence indicate that even where the person does not try to leave if those responsible for them are clear that they will be prevented from leaving then this amounts to a deprivation of liberty[9].

Duration of authorisation – end dates and suitable alternative accommodation

In assessing whether or not to grant the order for an end date to be set, the sheriff is required to be satisfied that the treatment or assessment has ended, and that the patient is ready to return home or that suitable accommodation is available elsewhere. The Commission considers that[10], on balance, the advantages of including the provision regarding the suitable alternative accommodation outweighed the disadvantages of the court not being able to set an end date. It states:

> *"..we envisage that in its application, local authorities will be expected to provide full information to the court regarding the availability of suitable alternative accommodation or provision of care in the person's own home and to account for the performance of their statutory duties regarding these matters."*[11]

However, this does mean that if no such alternative accommodation exists then the adult may remain in hospital for an extended period where there is no therapeutic justification for this, which may not met the AWIA's requirements regarding benefit, necessity and least restrictive alternative. It this connection is perhaps worth noting that in *G(AP) v Scottish Ministers*[12] the Supreme Court noted that the objective behind the patient right in s.264 of the Mental Health (Care and Treatment)(Scotland) Act 2003 (relating to detention in conditions of excessive security at the State Hospital) was to actually drive forward the provision of sufficient medium-secure facilities.

Lack of automatic judicial oversight of authorisation and subsequent review

Whilst the Commission is not convinced that implementation of the authorisation automatically requires judicial approval, it is perhaps questionable whether the absence of such approval in light of the fact that the recommendations relate to vulnerable adults who may not be able to instruct someone to

[5] s.50C draft Bill.

[6] s.50A(6) draft Bill.

[7] Report, para 5.3.

[8] Report, para 5.3.

[9] *HL v UK*, para 91, *JE v DE* [2006] EWHC 3459(Fam), per Munby J at 77 and *Cheshire West*, per Lady Hale at 48-49.

[10] Report, para 5.23.

[11] Para 5.23.

[12] *G(AP) v Scottish Ministers* [2013] UKSC 79.

apply to the court on their behalf or there may not be anyone who is able or willing to do this. The European Court of Human Rights has after all referred on several occasions to the right to liberty being too important a right to be taken away simply because an incapacitated person appears to have given themselves up to detention[13].

Absence of welfare attorneys and guardians in authorisation process

The recommendations have deliberately not allowed guardians and attorneys to be involved in authorisation process, determined by a medical practitioner, because they may undermine the very purpose of the process[14] although they can apply to the sheriff as a person with an interest in the patient's welfare (see above). Again, given the importance placed on the right to liberty, should those who may be able to provide support to the adult be excluded at this early stage?

Community: Authorisation of significant restriction of liberty in relation to (1) placement in a care home or accommodation arranged by an adult placement service[15]; and (2) short term care (s.52 draft Bill)

In each case, the adult must again be assessed to be incapable in terms of the AWIA and the Act's principles must be applied. The "relevant person", being the manager of the material premises, failing which the adult's social worker, determines whether a significant restriction of liberty is required. The adult's welfare attorney and guardian will then authorise such significant restriction of liberty (or a sheriff if they do not exist or do not agree) and this will be deemed to be the consent of the adult with incapacity. Indeed, it will be assumed that with effect from commencement of the provision it will be assumed that this is included within their powers unless the contrary is expressly indicated[16].There are also review and appeal provisions.

The concept of "significant restriction of liberty" is substituted for deprivation of liberty and is intended to be clearer and easier to apply but will cover all situations involving deprivation of liberty in relevant care homes or placements without falling within the realms of a restriction of the right to liberty of movement[17]. If two of the listed factors are present then there is a significant restriction of liberty.

Once more, several observations can be made.

Objective factors constituting a "significant restriction of liberty"

A: Lack of social contact

The Commission decided not to include a lack of social contact as a factor when assessing what will constitute a significant restriction of liberty although it acknowledged that Supplementary Code of Practice on the Mental Capacity Act 2005 for England and Wales[18] includes this and that it has featured in Strasbourg jurisprudence[19]. It justifies its approach on the basis that to include it "is tantamount to creating a formal process for

[13] *De Wilde, Ooms and Versyp v Belgium (No 1)* (1971) I EHRR 373, paras 64-65, *Storck v Germany*, para 75 and *HL v UK*, para 90.

[14] Report, para 5.31.

[15] By reason of vulnerability or need resulting from infirmity, ageing, illness, disability, mental disorder, or drug or alcohol dependency.

[16] s.52E(3) draft Bill.

[17] Article 2, ECHR Protocol No.4.

[18] Report, paras 6.17-6.20.

[19] *HL v UK*, para 91, and *HM v Switzerland* (2004) 38 EHRR 17, para 45.

restriction of contact and communication"[20] and notes that all care arrangement standards encourage contact with family and friends, that to restrict access with others may have implications for those other people's Article 8 ECHR rights, and that there may be situations where contact with others may be legitimate for the adult's protection[21]. It is, however, submitted that it should be possible to distinguish between normal healthy contact situations that should be permitted and situations where it would be legitimate to restrict contact thus meaning that it can be included as an identifying factor.

Purpose and isolation

As in *Cheshire West*, the Commission rejects purpose as forming a factor to be taken into account when assessing significant restriction of liberty[22] although acknowledges that the context of the restriction may potentially be relevant[23].

Additionally, it does not consider that isolation[24] should be included as a factor because it cannot envisage that this would form part of a care arrangement. This approach is also to be welcomed because it is arguable that to include isolation as a determining factor in care placement situation may affirm the 'normality" approach, with its paternalistic and possibly discriminatory overtones, suggested by Lord Justice Munby in the Court of Appeal *Cheshire West* judgment[25].

Substituted consent: welfare attorney or guardian authorisation of implementation of a significant restriction of liberty

Given that welfare attorneys or guardians will be considered to have consented to the significant restriction of liberty on behalf of the adult, Article 5 will not be engaged and there is no independent oversight of, or protective framework for, such restrictions.

Whilst it is arguable that in most cases any suggested and authorised significant restriction of liberty will be made in good faith and for the benefit of the adult concerned this, occasionally and very sadly, will not always be so. It is precisely in these minority of cases that human rights are so important.

The Commission justifies[26] such surrogate decision-maker authorisation on the basis of a passage in *Stanev v Bulgaria*[27] which states that:

> *"…there are situations where the wishes of a person with impaired mental faculties may validly be replaced by those of another person acting in the context of a protective measure and that it is sometimes difficult to ascertain the true wishes or preferences of the person concerned…"*[28]

It is suggested, however, that it may not be entirely safe to rely too heavily on this statement. For example, the paragraph continues:

[20] Report, para 6.21.

[21] Report, paras 6.22-6.24.

[22] See, for example, report para 6.55.

[23] Report, paras 6.56-6.57, referring to *Austin v UK* (2012) 55 EHRR 14, paras 58-59.

[24] In *Chosta v Ukraine* (35807/05) judgment 14 January 2014, the European Court of Human Rights stated "Relevant objective factors to be considered include the possibility to leave the restricted area, the degree of supervision and control over the person's movements and the extent of isolation." (para 1). However, this case did not relate to a care placement situation.

[25] *Cheshire West and Chester Council v P* [2011] EWCA Civ 1257 per Munby LJ at 83 And 86.

[26] Report, para 6.42.

[27] (2012) ECHR 46, para 130

[28] *Stanev*, para 130.

> *"However, the Court has already held that the fact that a person lacks legal capacity does not necessarily mean that he is unable to comprehend his situation…"*[29]

and refers to *Shtukaturov v Russia*[30] in which it stated:

> *"…the applicant lacked de jure legal capacity to decide for himself. However, this does not necessarily mean that the applicant was de facto unable to understand his situation…"*

and in both cases, as well as in *Storck v Germany*[31] (referred to in *Shtukaturov*), it was noted that it was very clear that the applicant did not wish to be placed in the circumstances in which they found themselves (including, in *Stanev* and *Shtukaturov*, objecting to being subject to guardianship). In light of this, the aforementioned weight given by the Court to the right to liberty and the current direction from the Committee on the Rights of Persons with Disabilities on legal capacity[32] it does seem debatable whether such substituted consent would avoid Article 5 engagement and thus Article 5(1) and (4) legal and procedural safeguards are required.

Lack of automatic judicial oversight of authorisation, subsequent review and variation

As with the hospital measures, there will be no automatic authorisation or reviews by a court of the lawfulness of a restriction of liberty (although a sheriff will have to provide such authorisation where there is no welfare attorney or guardian or they refuse to give the authorisation). It should also be noted that, for the reasons already given, it may be that where welfare attorney or guardianship consent has been obtained it is possible to renew restriction arrangements indefinitely.

Moreover, the "relevant person" (defined as the manager of the premises or, failing this, the adult's social worker) may vary the significant restriction of liberty and implement such variation pending the outcome of any appeal against this by the adult, their welfare guardian or attorney and/or named person (if any), their primary carer and nearest relative, all of whom must be told about the variation[33] and why it is being made and are entitled to make such an appeal. It is, of course, possible that the level of restriction may be increased by these means and, again, there is no judicial authorisation of this.

Ability to apply to the sheriff in relation to an unlawful detention of an adult with incapacity (S.52J draft Bill)

Modelled on s.291 of the Mental Health (Care and Treatment)(Scotland) Act 2003, the draft Bill also provides for the sheriff to order that an adult who is, or may be, incapable is being detained in

[29] *Stanev*, para 130.

[30] *Shtukaturov v Russia* (2008) ECHR 228, para 108.

[31] *Storck v Germany* (2005) ECHR 406, para 144.

[32] Committee on the Rights of Persons with Disabilities, General Comment No. 1 (2014) *Article 12: Equal recognition before the Law,* adopted 11 April 2014, and UN Committee on the Rights of Persons with Disabilities Statement on Article 14 of the Convention on the Rights of Persons with Disabilities (right to liberty and security). Although the CRPD is not incorporated, and thus legally enforceable, within the UK, the UK nevertheless has a duty under international law to comply with its requirements and it should also be noted that devolved Scottish legislation and actions of the Scottish Ministers may be set aside if incompatible with the UK's international obligations (ss35 and 58 Scotland Act 1998). Moreover, the European Court of Human Rights must have regard to the requirements of the CRPD it being a higher source of international law.

[33] The Mental Welfare Commission for Scotland must also be informed (s.52I draft Bill).

accommodation provided or arranged for by a care home service or an adult placement service is unlawful and that those detaining the adult must cease to detain the adult. The order may be applied for by the adult or any person claiming an interest in the adult's personal welfare. The report and explanatory notes accompanying the draft Bill indicate that this provision will operate alongside s.3(1) AWIA to ensure that where the adult with incapacity will not be left unsupported where the detention ceases but they still have care needs that mean they cannot live independently.

However, Article 5 requires proactivity and it is therefore important to emphasise that the state, medical staff, care managers and social workers cannot adopt a reactive approach and simply wait for the adult to mount such a challenge.

Conclusion

As already mentioned, the Commission was not been helped by a lack of Strasbourg direction on the specific questions that have arisen post-*Bournewood*. Whilst acknowledging that the right to liberty is a fundamental right, the Commission also points out that it is considering the care of extremely vulnerable people and therefore that it has to be mindful that recommending legal procedures that are in excess of what is required for ECHR compliance this may take resources away from the care of individuals without providing an equivalent benefit[34]. It promotes what it considers to be a "common sense" approach to assessing what constitutes a significant restriction of liberty and endeavours to keep resource heavy bureaucracy and formality to a minimum. Moreover, it seeks to balance the Article 5 right to liberty, and reflecting the *Winterwerp* criteria, with the state's protective obligations in Articles 2 (the right to life) and 3(freedom from torture and inhuman or degrading treatment or punishment)[35].

If the report's recommendations are adopted and reflected in legislation it remains to be seen whether its approach will ultimately be compatible with ECHR requirements or be found to be too pragmatic affording too much deference to, and faith in, doctors, care managers and substitute decision-makers, as well as concern for the public purse, and not enough emphasis on the individual's autonomy and liberty, particularly in light of the approach adopted recently by the Committee on the Rights of Persons with Disabilities to capacity and liberty.

Jill Stavert[36]

Powers of Attorney

The case which we described as *B and F v B* last month has now been reported on the Scotcourts website as *B and G v F*. Following upon the uncertainty originally arising from *NW*, the Public Guardian has confirmed that she will make "*an application to the Inner House to afford us a definitive outcome*."

We previously reported on a case in the Court of Session identified as *DC*, a judicial review application in which it was asserted that the applicant, placed in a nursing home by his daughter acting as his attorney, had been unlawfully deprived of his liberty. The applicant asserted *inter alia* that an attorney could not be

[34] Report, para 1.21.

[35] Report, para 6.58

[36] The assistance of Rebecca McGregor, Research Assistant with the Centre for Mental Health and Incapacity Law, Rights and Policy, Edinburgh Napier University, in the preparation of this article is gratefully acknowledged.

empowered to authorise deprivation of liberty, and that in any event the attorney in that case was not so authorised. The case attracted considerable interest, with both Mental Welfare Commission and Equality and Human Rights Commission entering the process. That case has now been abandoned, after certain undertakings were given, clearing the way for the focus to return to the applicant, his own wishes and needs, and his family. A few days before that case was thus resolved, Scottish Law Commission published its Report on Adults with Incapacity (see the article above by Jill Stavert). The Report, and appended draft Bill, recommend that welfare attorneys and welfare guardians should be empowered to authorise a significant restriction of liberty "*unless the Power of Attorney or Guardianship Order expressly provides otherwise*". Hitherto, those who considered that principles of autonomy and self-determination should be respected so as to allow granters of Powers of Attorney to specify how any possible need for deprivation of liberty should be regulated, took the view that that should be expressed fully and clearly, and in a manner seeking to meet the requirements of Article 5 of the European Convention on Human Rights, in the power of attorney document. In doing this they looked to the principle enunciated, for example, in *McDowall's Executors* v IRC [2004] STC (SCD) 22 that anything contrary to the presumed purpose of granting a Power of Attorney should be expressly authorised. In *McDowall*, gifts for tax-planning purposes were held to be invalid because the presumed purpose of granting a financial Power of Attorney is to manage and conserve the granter's estate, not to give it away. From now on, it would appear that instructions should be taken as to whether power to authorise a significant restriction of liberty should be expressly excluded. Granters will have to be advised that this is a proposal only. They will also have to be advised that in the meantime the existing law remains unchanged, and some may opt to continue expressly to provide a mechanism for authorisation of deprivation of liberty.

Adrian D Ward

Damaging illegality of Scottish Social Work Authorities

We previously reported in July, August and October on the failure by local authorities to comply with the requirements of the Adults with Incapacity (Scotland) Act 2000 that reports by mental health officers for welfare guardianship applications should be prepared within 21 days of notification to the Chief Social Work Officer of intention to make such an application. The position appears to have worsened. The Newsletter would be interested to hear how many local authorities in Scotland still consistently comply with the 21-day limit. Provisions of the Mental Health (Scotland) Bill currently before the Scottish Parliament and of the draft Adults with Incapacity (Scotland) Bill proposed by the Scottish Law Commission in its Report on Adults with Incapacity discussed in the first item in this Newsletter will substantially increase the total workload for mental health officers. There are insufficient mental health officers to meet current requirements. There is accordingly an urgent need for Scottish Government to facilitate and resource the recruitment and training of substantially more mental health officers. That is already necessary to meet current requirements, and should be implemented immediately on a scale to ensure adequate provision when proposed new requirements come into force.

Adrian D Ward

Testamentary Capacity and Undue Influence

On 16th October 2014 Lord Glennie issued a decision, *Smyth v Rafferty and others*, in an action in which the pursuer sought production and reduction of a new Will, and a Codicil to a previous Will, made very shortly before her death by the pursuer's sister, on grounds of (i) lack of testamentary capacity, (ii) undue influence and/or (iii) facility and circumvention. The testator died without issue and divorced from her former husband. She was survived by the pursuer and other siblings, and by nephews and nieces. Under her previous Will, the pursuer stood to benefit substantially. Within a fortnight before her death she altered this radically by creating a substantial preferential provision in favour of a discretionary trust, with the intention that the trustees could if need be use those funds to support a family company in which the trust held a substantial shareholding derived from the testator, and of which the testator was managing director up until her death. The new arrangements substantially disadvantaged the pursuer compared with the position under the testator's previous Will. Shortly before the testator's death, her former husband returned from abroad. There was much unpleasantness. It was clear that the pursuer was justified in feeling suddenly excluded from contact with the testator and whatever was happening, and had understandable grounds for the concerns reflected in the conclusions of the action which she brought.

Up until close to death the testator had sought to conceal, even from those closest to her, that she was terminally ill, and suffering extreme pain and nausea, and the side effects of medication.

Lord Glennie's lengthy and meticulous decision is not ground-breaking in legal terms. It sets out the relevant law, applies it to a careful examination of complex facts, and reaches the conclusion that the pursuer's claim must fail. It is however worthy of attention because of the contemporary relevance of many of the points made by Lord Glennie in his judgment, and the clarity with which they were made. The following comments are no substitute for reading the judgment:

1. With reference to the characteristics of intellectual capacity which a testator must have, Lord Glennie commented: "*These requirements will be absent if the testator suffers from some disorder of the mind preventing him exercising his natural faculties. But the testator does not have to have an actual understanding of the nature of the act, the extent of the property and the claims of those who might expect or be expected to benefit. The question is whether he was capable of understanding such matters, not whether he actually understood them on the occasion in question*" (paragraph 40);

2. As regards the so-called "golden rule" that the making of a Will by an old and infirm testator should be witnessed and approved by a medical practitioner who satisfies himself as to a testator's capacity and understanding, Lord Glennie pointed out that this is at most a rule of good practice; that there is no general duty on solicitors to obtain medical evidence every time they are instructed by an elderly client; that such a requirement "*would be both insulting and unnecessary*"; and that it could result in a solicitor being criticised (or even sued) for delaying carrying out instructions if, for example, delay resulted in a Will not being executed before the would-be testator died;

3. Having defined the essence of undue influence as the abuse of a relationship of trust and confidence, Lord Glennie went on to say that: "*The word abuse may tend to give a misleading flavour of what is involved. The person exercising the influence may genuinely believe that the course which he is persuading the other party to pursue is desirable and for the benefit of that party; and, indeed, may even believe that is in accordance with that party's real wishes. The mischief lies not in the act induced by the application of pressure being itself objectionable in some way, but in the fact that it results from the undue exercise of influence by the person in the position of trust*" (paragraph 45) This dictum is particularly relevant in the face of concerns about the controversial promotion by the UN Committee on the Rights of Persons with Disabilities of the fiction that people with impaired capacity or inability to identify and resist undue influence can nevertheless be "supported" to act and decide validly;

4. As to the pressure which might result in a finding of facility and circumvention, Lord Glennie said: "*That pressure may, at one extreme, be direct, forceful and overpowering or, at the other, be more subtle or insidious, working by solicitation or importuning. Fraud is one example of the way in which a facile mind maybe subverted but it is not an essential part of the principle. Bullying or browbeating may equally amount to circumvention. A robust individual will usually be able to resist pressure, or at least decide whether or not he wants to resist it. A facile person may not. But facility is a spectrum; it comes in degrees. A deed will only be at risk of being reduced (or set aside) if the pressure applied is unacceptable having regard to the extent to which the person on whom it is exerted is facile*" (paragraph 49);

5. As regards all three head of challenge, Lord Glennie stressed the importance of the modern perception that the particular act or transaction at the particular time must be considered. A person may be capable at some times but not others, and facile on some occasions but not others. "*A person suffering from a grave, debilitating and painful illness will have moments when he is able to discuss matters calmly and sensibly and to resist pressure exerted by others, while at other moments he may be in such pain or so tired that, though capable of reasoning clearly, he simply goes along with what is proposed even though it is not what he would otherwise have done. The same applies, to some extent, to the existence of a relationship of trust relevant to the question of undue influence*" (paragraph 51);

6. Further to the foregoing point, Lord Glennie addressed a situation where: "*the testator, being incapable at the time, executes a will which is drafted to reflect what are known to be his wishes. If he was incapable when he executed the document, it cannot stand even if it reflects what he would have done had he been capable*" (paragraph 52). That impliedly supports the approach taken by Sheriff Principal Kerr (prior to his recent retirement) in *Application by Adrian Douglas Ward* discussed in the January 2014 Newsletter;

7. On the subject of expert witnesses, Lord Glennie referred to the duty to the court to give evidence honestly and impartially, without regard to the interests of those by whom he is instructed, but pointed out that there is no requirement in law that an expert witness be wholly unconnected with the parties. He held that there is no reason why a general practitioner should not be an expert

witness on matters with which a general practitioner is familiar. He recorded, however, that he had to restrain such a witness from offering opinions "*on legal and other non-medical issues*", such evidence being clearly inadmissible. Lord Glennie pointed out that: "*Ultimately the question of capacity is one for the court and does not depend solely upon an assessment of the expert medical evidence"* (paragraph 73);

8. Lord Glennie rejected a submission from the defenders that if the pursuer's case on incapacity failed, it was bound to fail also on facility and circumvention and undue influence. He pointed out that the latter concepts pre-supposed capacity;

9. Lord Glennie made it clear that difficulty in obtaining clear instructions is not necessarily evidence of incapacity. In the present case, the testator had changed her mind on a number of occasions, often reverting to matters which her solicitor thought had been settled. Lord Glennie however took the view that: "*This suggests an active and vigorous mind, not one which was capable of being easily subverted by undue pressure or undue influence*" (paragraph 135);

10. Lord Glennie's concluding comments are worth quoting in full: "*Many people make new wills towards the end of their lives, often at a time when they are less alert mentally than they were previously. In that condition they may be tempted to cut corners, make assumptions which they might otherwise not have made, reach quick decisions when ideally they might have thought about them at greater length and in greater depth, re-assess their priorities, become more hard-nosed on the one hand or sentimental on the other, change their minds and generally make all sorts of decisions that they might not earlier have dreamed of making. In such circumstances it may well be true that the deed or will was to some extent the result of physical, mental or emotional frailty, but that does not matter. Unless there was incapacity, in the sense described earlier, or unless undue pressure or influence was used to procure the deed or will in the form in which it was executed, then the deed or will must stand. There is no basis for setting it aside*" (paragraph 137).

It is notable that the pursuer had only a "lay representative". It appears that this situation was managed carefully by Lord Glennie and appropriately respected by the defenders. Perhaps there is scope in Scots law for considering more formalised provisions, such as the introduction of an equivalent of the English "litigation friend". The judgment appears to have lost nothing in being worded in a manner fully comprehensible to a literate lay person.

One final comment is worth making from a reading of the decision, without any other knowledge of the circumstances of this case. It would appear that the legal team acting for the testator devoted great care and effort to identifying and implementing a mechanism to implement the testator's dying wish to ensure that the family company could if necessary receive financial support from her funds after her death. They must have been aware that in doing so they could well find their actions subject to detailed scrutiny and challenge, in the course of cross-examination such as occurred in this case. That they persevered and succeeded shows true respect for the principles of autonomy and self-determination, and for the requirements of Article 12 of the UN Convention on the Rights of Persons with Disabilities for the provision of

support to facilitate the exercise of legal capacity. They set a commendable example.

Adrian D Ward

Mental Welfare Commission for Scotland Reports

The Mental Welfare Commission for Scotland has recently published the following reports:

AWI Act Monitoring 2013/14: Statistical Monitoring

This report notes that the number of new and existing welfare guardianship orders continues to rise (during 2013/14 a further rise of 9.6% in new applications granted). This increase was entirely in private applications. Encouragingly, there was another significant reduction in the granting of indefinite private orders (reduced from 45% in 2011/12 and 35% in 2012/13, to 32% during 2013/14) although indefinite local authority approved applications remained moreorless at the same level as the previous year (26%). That being said, there was a lack of uniformity across local authorities regarding indefinite orders.

Welfare guardianship orders granted where the cause of incapacity was dementia fell to 45%, a decrease from 46% during 2012/13. On the other hand, welfare guardianship orders for persons with learning disability increased from 41% to 44% of orders.

During 2013/14 the Commission visited 593 adults on welfare guardianship (39% were living in their own homes, 38% were resident in a care home, 15% lived in supported tenancies and 5% were in hospital). Unfortunately, concerns were noted on a quarter of the visits. Serious issues included:

a. AWIA principles were not being fully respected in relation to 7% (40) of the adults visited.

b. 15 adults were subject to restraint or seclusion without proper authorisation in guardianship powers.

c. 2 adults had visit restrictions without proper legal authorisation.

d. 9 adults needed further assistance with communication.

e. The mobility problems of 13 adults were not being adequately assessed or addressed

f. 112 guardians with power to consent to medical treatment were not consulted about the adult's medical treatment.

Mental Health Act Monitoring 2013/14: Statistical Monitoring

The main findings of this report included that, for the period concerned, short-term detention rates were highest in inner city areas, detention by nurses has increased, there was a significant reduction in the use of police stations as a place of safety, and that CTOs rose slightly.

Visits to Young People in secure care settings: Visit and Monitoring Report

This report highlights the need for clarity and continuing of care for children and young people and makes a number of recommendations in this respect.

Of course, for greater clarity and detail all three reports must be read in their entirety.

Jill Stavert

Smoking ban upheld

In 2013, the Outer House of the Court of Session ruled in *CM (Petitioner)*[37] that the State Hospital's ban on smoking at the hospital was a violation of Articles 8 and 14 ECHR. This decision was subsequently appealed by the State Hospitals Board to the Inner House of the Court of Session, which has held (*M v State Hospitals Board for Scotland*[38]) that Article 8 was not engaged.

The court recognised that the notion of private life covering physical and psychological integrity is broad and also that those deprived of their liberty nevertheless continue to enjoy ECHR rights. That being said, it considered that the extent of the respondent's Article 8 right was "*necessarily restricted to protection from interference beyond that which inevitably flows from the circumstances of lawful imprisonment or other detention*"[39], "*lawful*" being detention in accordance with the requirements of Article 5 ECHR (the right to liberty). The decision to ban smoking was compatible with the Board's general management powers[40] of patients detained in accordance with article 5[41]. Referring to and agreeing with *R (on the application of E) v Nottinghamshire Healthcare NHS Trust*[42] - concerning a smoking ban at Rampton Hospital - the court agreed that a comprehensive ban on smoking in an institute such as the State Hospital does not have a sufficiently adverse effect on a person's personal integrity so as to engage Article 8.

The court also commented that, even had Article 8 had been engaged, a limitation of the right in Article 8(1) would have been justified as lawful under Article 8(2) (under the National Health Service (Scotland) 1978 Act), proportionate (given that due consideration had been given to the views of staff and patients as well as to material on the risks of smoking) and in pursuit of a legitimate aim (the promotion of the health of detained patients and staff).[43] Additionally, Article 14 would not have been applied had Article 8 been engaged because to compare detained patients with prisoners (the latter not being subject to such a ban) and conclude that the former have therefore been discriminated against was inappropriate in light of the therapeutic and diversionary objective underlying detention of patients at the State Hospital.[44]

Finally, it should also be noted that the court considered that the principles in s.1 Mental Health (Care and Treatment)(Scotland) Act 2003 were irrelevant to the decision to ban smoking at the State Hospital given that this matter concerned the management powers of the Hospital Board and was not about the care and treatment of the patients.

Jill Stavert

Comment on Article 14 of the CPRD

We cover this elsewhere in this month's issue, but make no apology for noting it here as well.

In September 2014, the UN Committee on the Rights of Persons with Disabilities issued a

[37] [2013] CSOH 143. See also *Scolag* "Mental health law Update" November 2013.
[38] [2014] CSIH 71, Lady Paton dissenting. However, although she considered that article 8 was been engaged she also considered that its restriction was lawfully permitted under article 8(2) (Lady Paton at 106-107).
[39] Lord Justice Clerk (Carloway) at 88.
[40] Under s.102 National Health Service (Scotland) Act 1978.
[41] Lord Justice Clerk (Carloway) at 89.
[42] Lord Justice Clerk (Carloway) at 93 referring to *R (on the application of E) v Nottinghamshire Healthcare NHS Trust* [2009] EWCA Civ 795, Lord Clarke of Stone-cum-Ebony MR and Lord Justice Moses at 51.
[43] Lord Justice Clerk (Carloway) at 94-96.
[44] Lord Justice Clerk (Carloway) at 97-99.

statement concerning Article 14 CRPD (the right to liberty and security). It appears very much to reinforce the approach adopted in its General Comment on Article 12 CRPD (the right to equal treatment before the law) discussed before in this Newsletter[45].

Essentially, the statement makes the following clear:

1. Detention on the basis of disability is absolutely forbidden.

2. The involuntary detention of persons with disabilities based on presumptions of risk or dangerousness regarding themselves or others that is tied to disability is contrary to the right to liberty.

3. Declarations of unfitness to stand trial and the detention of persons based on such declaration are contrary to Article 14 CRPD because it deprives the person of their right to due process and safeguards to which every defendant is entitled.

4. Where persons with disabilities are sentenced to imprisonment after committing a crime they should be entitled to reasonable accommodation so as not to aggravate incarceration conditions based on disability.

Whilst point 4 above is compatible with Article 5 ECHR requirements,[46] the directions in 1-3 above continue to bring issues such as protection of the other rights and freedoms of vulnerable persons and others and how Scottish law will be regarded when the Committee considers the UK implementation of the CRPD next year.[47]

Jill Stavert

Mental Health and Disability Sub-Committee

Upon her appointment in May 2014 as Tribunal President of the Additional Support Needs Tribunal for Scotland, May Dunsmuir became the Judicial Head of that Tribunal and in consequence has had to resign from her committee appointments with the Law Society of Scotland. Her resignation from the Mental Health and Disability Sub-Committee took effect at its meeting on 29th October 2014. May has been an active and valued member of the Society's Mental Health and Disability Sub-Committee ("MHDC") for 17 years, becoming vice-convener in 2012 and thereafter joint convener with Adrian. She was also a member of the Health and Medical Law Sub-Committee ("HMC") since its establishment in 2013; a consultant to the Criminal Law Committee from 2004 and 2009; and a member of the Mental Health Accreditation Committee. May has made major contributions to the development of Scots law and the development of practices and procedures to safeguard and benefit vulnerable children and adults. As well as her Tribunal presidency, she continues as an in-house convener with the Mental Health Tribunal for Scotland. In that role her achievements include the development of Child and Adolescent Mental Health Tribunals, and finding new ways to give young patients a voice at hearings. Her past appointments include over a decade as Children's

[45] Committee on the Rights of Persons with Disabilities, General Comment No. 1(2014) *Article 12: Equal recognition before the Law*, adopted 11 April 2014

[46] *Ashingdane v UK* (Application No.8225/78) (1985) ECHR 8, para 44, *Aerts v Belgium* (Application No.25357/94) (1998) ECHR 64, para 46, *Hadzic and Suljic v Bosnia Herzegovina* (Application No.39446/06) (2011) ECHR 911, para 40.

[47] This article should not be construed as the author either supporting or not supporting the Committee's interpretation of CRPD rights.

Reporter and Authority Reporter with Scottish Children's Reporter Administration, significantly influencing the development of better responses and interventions for children at risk. Her previous positions included that of Legal and Parliamentary Officer with Scottish Association for Mental Health. As a student she worked a summer placement with Enable, meeting Colin McKay, then in-house solicitor at Enable, who subsequently supervised her traineeship as a solicitor. Like Colin (who is now Chief Executive of the Mental Welfare Commission), she served on the steering group of the major campaign which resulted in the Adults with Incapacity (Scotland) Act 2000 being put to and through the Scottish Parliament. She also played a major role in the law reform process resulting in the Mental Health (Care and Treatment) (Scotland) Act 2003, and through her many years with MHDC was involved in much other law reform and other work supporting improvements in the way in which the law and legal processes deal with vulnerable people.

Following the meeting on 29th October, May was thanked for her contribution to the work of the Law Society at a dinner hosted by Christine McLintock, the Society's vice-president, and attended by members of MHDC and Alison Britton as convener of HMC.

Ronnie Franks, Deputy Chief Executive of Legal Services Agency and a respected author on mental health law, and David McClements of Russell & Aitken, Solicitors, former Council member and treasurer of the Law Society of Scotland, both of them long-serving members of MHDC, have been appointed joint vice-conveners. Adrian remains convener. Alex Ruck Keene has become a member of MHDC, and is thus the first person to be a member of both MHDC and the Mental Health and Disability Committee of the Law Society of England and Wales. Alex has attended MHDC as a guest at earlier meetings this year, and now provides a valuable formal link between the two committees.

Jan Todd, principal solicitor with South Lanarkshire Council, and David Paton, Clerk to MHDC, both became married since the last previous meeting of MHDC.

Adrian D Ward

Milestones

Finally, a short note to mark two important milestones:

1. The fact that 4th November marks the first anniversary of the Centre for Mental Health and Incapacity Law, Rights and Policy, headed by Jill, at Edinburgh Napier. For more details of the Centre's work, see here;

2. Adrian's recent 70th birthday, which he celebrated by running the Jedburgh Half Marathon, which he considers that is likely to be nothing compared to the marathons ahead on the CRPD, the Scottish Law Commission's report, etc. etc.!

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Conferences at which editors/contributors are speaking

Edge AMHP Conference

Neil will be speaking at Edge Training's Annual AMHP conference on 28 November. Full details are available here.

Talks to local faculties of solicitors

Adrian will be addressing local faculties of solicitors on matters relating (inter alia) to adult incapacity law in Aberdeen on 20 November and Wigtown on 10 December.

Borderline Personality Disorder and Self Harm

Jill is chairing a jointly hosted seminar (the Centre for Mental Health and Incapacity Law, Rights and Policy NHS Tayside and Perth and Kinross Council) on "Borderline Personality Disorder and Self Harm" in Perth on 25 November

LSA Annual Conference

Jill is speaking about the Mental Health (Scotland) Bill 2014 at the Legal Service Agency's Annual Conference in Glasgow on 27 November. For details, see here.

Intensive Care Society State of the Art Meeting

Alex will be speaking on deprivation of liberty safeguarding at the Intensive Care Society's State of the Art Meeting on 10 December 2014. Details are available here.

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Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Anna Bicarregui
Simon Edwards (P&A)

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Adrian Ward
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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 Mind in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Chambers Details

Our next Newsletter will be out in early December. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Newsletter in the future please contact marketing@39essex.com.

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THE QUEEN'S AWARDS FOR ENTERPRISE INTERNATIONAL TRADE 2013

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Alex been recommended as a leading expert in the field of mental capacity law for several years, appearing in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively about mental capacity law and policy, works to which he has contributed including 'The Court of Protection Handbook' (2014, LAG); 'The International Protection of Adults' (forthcoming, 2014, Oxford University Press), Jordan's 'Court of Protection Practice' and the third edition of 'Assessment of Mental Capacity' (Law Society/BMA 2009). He is an Honorary Research Lecturer at the University of Manchester, and the creator of the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

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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. She previously lectured in Medical Ethics at King's College London and was Assistant Director of the Nuffield Council on Bioethics. 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.

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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.

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Anna regularly appears in the Court of Protection in cases concerning welfare issues and property and financial affairs. She acts on behalf of local authorities, family members and the Official Solicitor. Anna also provides training in COP related matters. Anna also practices in the fields of education and employment where she has particular expertise in discrimination/human rights issues. To view full CV click here.

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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.

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Adrian is a practising Scottish solicitor, a partner of T C Young LLP, who has specialised in and developed adult incapacity law in Scotland over more than three decades. Described in a court judgment as: "*the acknowledged master of this subject, and the person who has done more than any other practitioner in Scotland to advance this area of law*," he is author of *Adult Incapacity*, *Adults with Incapacity Legislation* and several other books on the subject. To view full CV click here.

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Dr Jill Stavert is Reader in Law within the School of Accounting, Financial Services and Law at Edinburgh Napier University and Director of its Centre for Mental Health and Incapacity Law Rights and Policy. 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 2013 updated guidance on Deprivation of Liberty) and is a voluntary legal officer for the Scottish Association for Mental Health. To view full CV click here.