Mental Capacity Law Newsletter March 2015: Issue 54

Capacity outside the Court of Protection

Editors
Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Annabel Lee
Simon Edwards (P&A)

Scottish contributors
Adrian Ward
Jill Stavert

Introduction

Welcome to the March 2015 Newsletters. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: a case rivalling Neary in its importance, a case at the outer limit of the COP's powers and an update on Re X;

(2) In the Property and Affairs Newsletter: recent decisions of Senior Judge Lush, including a rare refusal of an application by the OPG for revocation of a power of attorney including an interesting assessment of the place of P's wishes and feelings;

(3) In the Practice and Procedure Newsletter: the significant case of *Bostridge* on nominal damages, extreme product champions, veracity experts and the place of morality;

(4) In the Capacity outside the COP Newsletter: two extremely important decisions of Charles J in relation to the MHT and patients who may lack capacity, an extremely significant Strasbourg decision on Article 5; anonymisation, the capacity to drive; and a new SCIE directory of MCA resources;

(5) In the Scotland Newsletter: an appreciation of Sheriff John Baird, an update on deprivation of liberty in the context of the SLC report, new guidance from the MWC about managing the finances of those lacking the material capacity; an update on incapacity matters addressed (or not) in proposals for court reform and the further Devolution Command paper, and an update on the Assisted Suicide Bill.

And remember, you can now find all our past issues, our case summaries, and much more on our dedicated sub-site here.

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SCIE Mental Capacity Directory

Fulfilling one of the Government's commitments in response to the House of Lords Select Committee report on the MCA 2005, SCIE has recently established a very useful directory of MCA resources, available here. It is divided into categories, and will (a) be expanded over time; and (b) (we hope!) be kept up to date so as to ensure that it remains useful in this rapidly changing area of the law.

MHT appointed representatives: important guidance from the UT

YA v CNWL NHS Trust & Ors [2015] UKUT 37 (AAC) (UT (AAC) (Charles J))

Mental Capacity – Litigation – Mental Health Act 1983 – Interface with MCA

Summary

In a decision which is important not merely for practitioners before the First Tier Tribunal (Mental Health), but also for those acting for P (or protected parties) before the Court of Protection, Charles J in *YA v CNWL NHS Trust & Ors* has considered the appointment and duties of a legal representative appointed by the tribunal under Rule 11(7) of the Tribunal Procedure Rules at First-Tier Tribunal) (Health, Education and Social Care Chamber) 2008.

This note concentrates on the points of principle, rather than the facts giving rise to the questions put before him. It also concentrates on those aspects that are likely to be of wider application than before the MHT (and does not therefore in detail address the important questions of principle that Charles J determined in relation to when the Tribunal should appoint such a representative).

Charles J has confirmed that:

a. To have capacity to appoint a representative a patient needs to have more than solely an understanding that they can make an application to a mental health review tribunal or have someone else make it for them, and thus the limited capacity referred to in *R(H) v SSH* [2006] 1 AC 441. It also involves assessing their capacity to decide whether or not to appoint a representative in the first place.

b. A person's capacity (a) to appoint a representative and (b) to conduct proceedings himself are not mutually exclusive concepts. Although there is a substantial overlap between the two, and the differences between them in the context of the MHT are theoretical rather than real because a relevant factor to be taken into account in deciding whether or not to appoint a representative is the capacity of the patient to conduct the proceedings and an inability by the patient to appreciate that he or she lacks the capacity to conduct the proceedings themselves effectively determines that he or she does not have the capacity to make that choice.

c. When the patient has capacity to give instructions on all relevant matters relating to the conduct of the proceedings, the position of a solicitor acting for a patient with capacity to instruct him to conduct the proceedings, whether appointed by the patient or the tribunal is effectively, the same as that under any other retainer for the purposes of proceedings, including the consideration of the capacity of the client to give and

terminate instructions for that purpose. The retainer will be to advise on and conduct the tribunal proceedings pursuant to the patient's instructions and subject to the solicitor's professional obligations and duties.

d. When the patient does not have the capacity to instruct the solicitor on all relevant matters relating to the conduct of the proceedings, the position is more complicated. The best interests test in Rule 11(7)(b), and the general requirement to act in the best interests of a person who lacks relevant capacity, mean that the legal representative is not only appointed in the patient's best interests but must also seek to promote them (having regard to the relevant issues of fact and law that are relevant in the proceedings).

As Charles J identified, the main problems in the context of the appointment of a representative on the basis of a lack of capacity are likely to arise when:

a. the legal representative's views on what is in the patient's best interests and those of the patient diverge in respect of issues where factors that the patient does not have capacity to give instructions on are relevant;

b. the patient wants the legal representative to advance an unarguable point and/or;

c. the patient maintains that he does not want to be represented.

Charles J placed weight on the decision of the Court of Appeal and of the ECtHR in *RP v United Kingdom* [2012] ECHR 1796 in holding that:

a. withdrawal of representation or the advancement of unreasoned or hopeless argument may well not promote (a) the patient's best interests, or (b) an effective and practical review of a deprivation of liberty, and thus the underlying purposes of Article 5 and its procedural safeguards;

b. representation of a patient by another against the patient's wishes as to any representation, or parts of it, is not contrary to Article 6 or Article 5(4), although the departure from the views and wishes of the patient should only be when this is necessary; and

c. the failure to provide assistance to a litigant who lacks capacity may itself result in a breach of procedural safeguards.

In the particular context of deprivation of liberty on the basis of Article 5(1)(e), with the accompanying requirement for the effective testing and review of the detention and its continuation, Charles J considered that a legal representative appointed to act on behalf of a patient on the basis of a lack of capacity should act as follows.

> *"(16)* […]
>
> *i) so far as is practicable do what a competent legal representative would do for a patient who has capacity to instruct him to represent him in the proceedings and thus for example (a) read the available material and seek such other relevant material as is likely to be or should be available, (b) discuss the proceedings with the patient and in so doing take all practicable steps to explain to the patient the issues, the nature of the proceedings, the possible results and what the legal representative proposes to do,*

ii) seek to ascertain the views, wishes, feelings, beliefs and values of the patient,

iii) identify where and the extent to which there is disagreement between the patient and the legal representative,

iv) form a view on whether the patient has capacity to give instructions on all the relevant factors to the decisions that found the disagreement(s),

v) if the legal representative considers that the patient has capacity on all those factors and so to instruct the representative on the areas of disagreement the legal representative must follow those instructions or seek a discharge of his appointment,

vi) if the legal representative considers that the patient does not have or may not have capacity on all those issues, and the disagreements or other problems do not cause him to seek a discharge of his appointment, the legal representative should inform the patient and the tribunal that he intends to act as the patient's appointed representative in the following way:

- *he will provide the tribunal with an account of the patient's views, wishes, feelings, beliefs and values (including the fact but not the detail of any wish that the legal representative should act in a different way to the way in which he proposes to act, or should be discharged),*
- *he will invite the tribunal to hear evidence from the patient and/or to allow the patient to address the tribunal (issues on competence to give evidence are in my view unlikely to arise but if they did they should be addressed before the tribunal),*
- *he will draw the tribunal's attention to such matters and advance such arguments as he properly can in support of the patient's expressed views, wishes, feelings, beliefs and values, and*
- *he will not advance any other arguments.*

Importantly, Charles J emphasised that, in such circumstances:

> *"(17)* […] *the tribunal should not in my view delve into the areas of disagreement or why the legal representative is of the view he cannot properly draw matters to the attention of the tribunal or advance argument. These may be apparent from the account of the patient's wishes or what they say directly to the tribunal but in my view the decisions on what the legal representative can and cannot argue are matters for the legal representative and not the tribunal who are charged with deciding whether the legal representative it has appointed should continue to act and not with how he should do so."*

Where there is no conflict between the wishes of the patient and his views:

> *"(18)* […] *the legal representative should still consider whether or not the patient has capacity to instruct him on all relevant factors and act on the patient's instructions if he*

> *concludes that the patient has that capacity. But if the legal representative concludes that the patient does not or may not have such capacity generally he should advance all arguable points to test the bases for the detention in hospital. In those circumstances it may or may not be appropriate to invite the tribunal to hear directly from the patient."*

Although not addressed in detail here, Charles J's analysis of when a representative should be appointed on the basis of a lack of capacity bears careful reading for his review of the Strasbourg case-law on Article 5(4) (at paragraphs 36-44) and its requirements (alongside those of the common law and the UNCRPD) as to when legal representation is required in the case of those with mental disabilities.

His Lordship held that where the person lacks such capacity, the most important guiding principles to be applied under the best interests test (and so in deciding whether to exercise the power to appoint a legal representative) are:

- the underlying purpose and importance of the review and so the need to fairly and thoroughly assess the reasons for the detention;
- the vulnerability of the person who is its subject and what is at stake for that person (ie a continuation of a detention for an identified purpose);
- the need for flexibility and appropriate speed;
- whether, without representation (but with all other available assistance and the prospect of further reviews), the patient will practically and effectively be able to conduct their case; and if not whether nonetheless;
- the tribunal is likely to be properly and sufficiently informed of the competing factors relating to the case before it and so be able to carry out an effective review;
- the nature and degree of the objections and of the distress caused to a patient if his or her wishes are not followed;
- the likely impact of that distress on his or her well being generally; and
- the prospects that if a legal representative is appointed or not discharged that legal representative will seek a discharge of the appointment.

Comment

As we covered in our February Newsletter, the Law Society has recently issued a new Practice Note for those representing patients before the Tribunal. That Practice Note will have to be read subject to this judgment, although the two are essentially consistent as regards the core obligations of the representatives.

The decision is of wider importance because of Charles J's observations as to the "close analogy" that can be made between a rule 11(7) representative, appointed on the basis of a lack of capacity, and a litigation friend appointed by a civil court to act for a party. As Charles J observed at paragraphs 81-2:

> *"81.* […] *the purpose and effect of Rule 11(7) is to provide in mental health cases an equivalent procedure to the appointment of a litigation friend by civil courts to provide that a patient has an effective role in the proceedings and his best interests are advanced and*

> *considered in them. It follows that the cases on the approach to be taken by a litigation friend, who in the cases has instructed solicitors, provide applicable guidance.*
>
> *82. I acknowledge that, as for example appears from some of the commentaries in Court Rules relating to the appointment of a litigation friend, relevant differences may exist in some circumstances in respect of the extent of the respective roles and duties of a litigation friend and a tribunal appointed representative (e.g. when a litigation friend has instructed a solicitor, the relationship between such a solicitor and (i) the litigation friend and (ii) the patient, the position of a litigation friend as a decision maker for or agent of the patient, the gathering of evidence, in respect of the professional duties of a legal representative (who has been appointed as such by the tribunal) to the patient (who is in the position of his client) and to the tribunal). But, in my view any differences should be addressed as and if they arise.*" [the hope expressed in that paragraph that the role and duties of a litigation friend were to be considered by the Court of Appeal in *Re X* is, at present, to be unfulfilled]

The question of what – exactly – it means to act in the best interests of a patient (or P) and whether the system (both of 11(7) representatives and of litigation friends more generally) is, in fact, compatible with the ECHR and the CRPD is a project that is exercising Alex in particular at present. However, we would respectfully agree that the analogy that Charles J draws at paragraph 81 is, indeed, a close one.

We would further suggest that in cases involving deprivation of liberty, those acting as litigation friends in cases before the CoP (whether s.21A MCA 2005 applications or otherwise) would be very well advised to follow the steps outlined above when determining how to proceed, especially where their view as to the best interests of P differ from P's wishes and feelings. After all, a deprivation of liberty justified on the basis of unsoundness of mind is a deprivation of liberty for purposes of Article 5(1)(e), no matter where it takes place and the individual subject to such deprivation of liberty enjoys – or should enjoy – equivalent procedural protections, including, crucially, the protection of effective representation. This point is reinforced, we suggest, by the decision in *MS v Croatia (2)*, discussed below.

We note, finally, that the decision in *YA* is also likely in due course to be of even wider importance because, as was made public before the Court of Appeal in the *Re X* appeal heard on 17-18 February, a rule change is under consideration in relation to the participation of P in CoP proceedings which would, inter alia, allow – in an appropriate case – for the appointment of an 'accredited legal representative' by the Court to represent P directly. We hope to be in a position to provide more details of this potentially extremely important rule change in short order. If and when the Court is in a position to consider appointing such representatives, the consideration by Charles J as to when Rule 11(7) representatives should be appointed and their duties upon appointment are likely to be of no little importance by analogy for judges of and practitioners before the Court of Protection.

Capacity and withdrawal of MHT proceedings

AMA v Greater Manchester West Mental Health NHS Foundation Trust and others [2015] UKUT 36 (AAC) (UT (AAC) (Charles J))

Mental Health Act 1983 – Interface with MCA

Summary

In this case, the First-tier Tribunal ('FfT') was found by Charles J (as President of the Upper Tribunal (AAC)) to erred in acceding to the request of a welfare deputy to withdraw an application to challenge her son's detention under s. Mental Health Act 1983 because, in the absence of such an express power in the terms of the deputy's appointment, the deputy had no such right to withdraw the proceedings. The FfT's decision to consent to a withdrawal is a safeguard and "*has to be based on a conclusion of the tribunal that continued detention under the MHA is justified for the reasons founding the application to withdraw (or other reasons)*" (para 37).

Charles J examined the issue of capacity to instruct and to litigate in the context of a detained patient seeking discharge from s.2 MHA on the basis that he would agree to remain in hospital in circumstances potentially amounting to a deprivation of liberty. His Lordship held:

> *"41. I accept as submitted on behalf of AMA that the patient does not have to be able to fully appreciate or understand all aspects of the issues involved and that the capacity simply to instruct a solicitor to challenge a continuation of a detention on all available grounds can be described as very low or a very limited capacity.*
>
> *42. However, different and more complex factors relating to both the capacity to instruct a solicitor and in respect of other decisions, issues or activities that are relevant to the application of the tests under the MHA and a best interests approach will or are likely to arise in, for example:*
>
> *i) cases concerning compliance with a voluntary admission and consequential detention (deprivation of liberty),*
>
> *ii) applications to withdraw and so the reverse of the position that a review of the detention is likely to promote the patient's interests,*
>
> *iii) cases in which the wishes of the patient do not accord with the views of his representative as to what will promote his best interests and/or do not found arguable points, and*
>
> *iv) in cases where a central factor to the argument that detention is not necessary involves an assessment of the patient's ability to weigh and act in relation to issues that underlie an argument that he will remain in hospital as a voluntary patient (here the resolution of arrangements relating to his care package on leaving hospital).*
>
> *In all such cases it is likely that a sufficient appreciation by the patient of his impairment of, or disturbance in the functioning of, the mind or brain will be required if he is to have capacity to make the relevant decisions."*

The correct tribunal approach, he held, would have been to address the issues set out in para 33 which included the patient's capacity:

a. to appoint a representative, whether his legal representative or his mother,

b. to give instructions to his representative on issues arising and decisions to be taken in the conduct of the application to the FtT and thus the challenge to his detention under s. 2 MHA (his capacity to conduct proceedings or his litigation capacity), and in that context:

   i. to make and maintain decisions to remain in hospital on a voluntary basis,

   ii. to make a decision whether to pursue or to withdraw the proceedings before the FtT,

   iii. to consent to a deprivation of his liberty at the hospital for the purposes of his continued assessment, and so

   iv. to sufficiently understand, retain and weigh the issues and factors relevant to those specific decisions including issues relating to where and with whom he should live and his support in the community.

Had such issues been addressed, Charles J held, it was likely to have shown a need to investigate and determine the patient's capacity to (a) decide to continue or withdraw the application, (b) to agree to remaining in hospital on a voluntary basis and (c) to agree to a deprivation of liberty; the circumstances that led to his section and whether they continued and his risk of self harm on a return home; and (c) whether his care package in the community was or would be in place. Thus, the capacity issues "*go well beyond the capacity to instruct a solicitor to challenge the section on all available arguable grounds*" (para 58).

Comment

This decision ought to be read in conjunction with that in *YA* which identified the most important principles to take into account in the decision making process of the FfT in relation to those who (may) lack capacity in material domains. Although the Tribunal's remit is limited by the Mental Health Act 1983 and associated Rules, it is clear – if ever there was a doubt – that to achieve its underlying purpose, "namely a practical and effective review of a deprivation of liberty in an appropriate timescale" (para 35), it cannot operate in isolation from the Mental Capacity Act 2005. The fact that tribunals may be required to investigate and determine a patient's capacity to agree to a continued deprivation of liberty on the psychiatric ward is important; otherwise there is a risk of the tribunal discharging the patient into an unlawful detention. We suggest that this expansive interpretation of the Tribunal role is most welcome. Its detention and discharge decisions have significant human rights implications in terms of Articles 5 and 8 and it is, after all, a public body required not to act incompatibly with the ECHR.

Recognising the limits of a welfare deputy's power with regards to withdrawing Article 5(4) challenges, in the absence of express powers conferred by the Court of Protection, is also important and welcome. It is well-recognised that the right to challenge detention must not be dependent upon the exercise of discretion by a third party (see *AJ* at para 35(6)). Although the Upper Tribunal was not required to adjudicate upon the same, it should be noted that a welfare deputy's consent to a deprivation of liberty does not prevent it still being a deprivation requiring authorisation. Thus, if a person consents with capacity to their confinement they are not deprived. But if they appoint someone else to do so under awelfare LPA, or if the Court of

Protection does so by way of a welfare deputyship, and that person consents they are still deprived of liberty. The question of the role of 'consent' in this regard is rising up the agenda, as can be seen from the further article by Jill Stavert on the Scottish Law Commission's proposals as to how to close the "Bournewood gap" in Scotland, which appears to rely heavily on the exercise of consent by attorneys.

Finally, we note the concern Charles J expresses at paragraph 4 with regard to the lack of legal aid and his invitation to the Legal Aid Agency to factor and deal with the view of the judge giving permission to appeal that the case is a "guidance case".

What counts as effective representation in the context of deprivation of liberty?

MS v Croatia (No 2) [2015] ECHR 196 European Court of Human Rights (First Section)

Article 5 ECHR – Deprivation of liberty

Summary

In a lengthy and detailed judgment in *MS v Croatia (No 2)* [2015] ECHR 196, the ECtHR has emphasised the crucial importance of the need for the procedural safeguards provided for in Article 5(4) ECHR to be rendered effective for those with mental disabilities.

Before reaching Article 5, the Court considered the application of Article 3 in the context of physical restraint of a woman suffering from mental illness, where she was tied to a bed for 15 hours immediately upon her admission. It found that in the particular and distressing circumstances of her case (including where she was making repeated complaints of pain in her back, to which the hospital staff made no response, and where there was no proper evidence that restraint was necessary to calm the applicant down or to prevent her attacking others) that she had been subject to inhuman and degrading treatment contrary to Article 3. Whilst (we would hope) it is unlikely that Article 3 would be engaged in the course of psychiatric treatment in this country, we would note *ZH v Commr of Police for the Metropolis* where a breach of Article 3 was found – and upheld by the Court of Appeal – in the context of the disastrous intervention by the Police to move a young man with autism away from the side of a swimming pool.

In the context of Article 5, the ECtHR emphasised, first, that the proceedings leading to the involuntary placement of an individual in a psychiatric facility must necessarily provide clearly effective guarantees against arbitrariness given the vulnerability of individuals suffering from mental disorders and the need to adduce very weighty reasons to justify any restriction of their rights (paragraph 147).

The ECtHR then emphasised the signal importance of the provision of effective legal representation where a patient has been detained in paragraphs sufficiently significant to merit reproduction in full.

> *"152.* […] *the Court reiterates that in the context of the guarantees for a review of compliance with the procedural and substantive conditions which are essential for the "lawfulness", in Convention terms, of an individual's deprivation of liberty, the relevant judicial proceedings need not always be attended by the same guarantees as those required under Article 6 § 1 for civil or criminal litigation. Nonetheless, it is essential that the*

person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation (see, amongst many others, Stanev, cited above, § 171).

153. This implies, inter alia, that an individual confined in a psychiatric institution because of his or her mental condition should, unless there are special circumstances, actually receive legal assistance in the proceedings relating to the continuation, suspension or termination of his confinement. The importance of what is at stake for him or her, taken together with the very nature of the affliction, compel this conclusion (see Megyeri v. Germany, 12 May 1992, § 23, Series A no. 237-A). Moreover, this does not mean that persons committed to care under the head of "unsound mind" should themselves take the initiative in obtaining legal representation before having recourse to a court (see Winterwerp, cited above, § 66).

154. Thus the Court, having constantly held that the Convention guarantees rights that are practical and effective and not theoretical and illusory (see, inter alia, Stafford v. the United Kingdom [GC], no. 46295/99, § 68, ECHR 2002-IV), does not consider that the mere appointment of a lawyer, without him or her actually providing legal assistance in the proceedings, could satisfy the requirements of necessary "legal assistance" for persons confined under the head of "unsound mind", under Article 5 § 1 (e) of the Convention. This is because an effective legal representation of persons with disabilities requires an enhanced duty of supervision of their legal representatives by the competent domestic courts (see paragraph 45 above, Principle 18 of the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care).

155. Accordingly, as to the way in which the applicant was represented in the proceedings, the Court is of the opinion that given what was at stake for her proper legal representation, contact between the representative and the applicant was necessary or even crucial in order to ensure that the proceedings would be really adversarial and the applicant's legitimate interests protected (see Sýkora v. the Czech Republic, no. 23419/07, §§ 102 and 108, 22 November 2012, with further references)."

In MS's case, the legal aid representative never met the applicant, made no submissions on her behalf and, although he attended the hearing, acted rather as a passive observer of the proceedings. Although the domestic authorities were well aware of these omissions (see paragraphs 28 and 29 above), they failed to react by taking the appropriate measure for securing the applicant's effective legal representation. Furthermore, although the judge conducting the proceedings visited the applicant in the hospital, the ECtHR found that documents submitted before the Court do not show that he made any appropriate accommodations to secure her effective access to justice (Strasbourg here making specific reference to Article 13 of the CRPD). In particular, there was no evidence that the judge informed the applicant of her rights or gave any consideration to the possibility for her to participate in the hearing. MS was thus not given an opportunity to comment on the expert's findings at the court hearing which resulted in the delivery of the decision on her involuntary retention in a psychiatric hospital. Her right to be heard was particularly pressing taking into consideration the applicant's clear and undisputed refusal to undergo any treatment and the domestic courts' awareness of this fact. The ECtHR found that there was no valid reason justifying the applicant's exclusion from the

hearing, particularly since it noted that during her interview with the judge of the R. County Court, the applicant did not demonstrate that her condition was such as to prevent her from directly engaging in a discussion of her situation.

The Court therefore found (at paragraph 160) that the competent national authorities failed to meet the procedural requirement necessary for the applicant's involuntary hospitalisation, as they did not ensure that the proceedings were devoid of arbitrariness, as required under Article 5 § 1 (e) of the Convention.

Comment

This case makes particularly interesting reading in light of (1) the decisions in *YA* and *AJ* also discussed this month and the emphasis therein of the need – in different contexts – to ensure that Article 5(4) actually means something in the context of deprivation of liberty justified by reference to Article 5(1)(e); and (2) the question of whether P needs to be a party to all applications for judicial authorisation for deprivation of liberty, currently being considered by the Court of Appeal in *Re X*.

The judgment emphasises the importance of having *legal* – as opposed to generic advocacy or familial – assistance in Article 5(1)(e) proceedings. Moreover, the fact that those committed to care should not themselves have to take the initiative in obtaining such legal representation is another illustration of the positive obligation on detaining authorities to promote access to a lawyer in the absence of special circumstances.

We would also note in passing that, yet again, the Court has cited Article 14 of the CRPD (and, further, the reports of the Committee on the CRPD on Hungary and Austria and their comments upon Articles 14 and 15) without acknowledging that the Committee on the CRPD at least considers that Article 5(1)(e) is incompatible with Article 14 because it allows for detention on the basis of disability. This point was raised before, but not addressed by, the Supreme Court in *Cheshire West*, and will, we anticipate, have to be grappled with at some point (at which stage the rather different views of the UN Human Rights Committee, expressed in relation to the right to liberty in Article 9 of the ICCPR, will no doubt be prayed in aid: see, in particular, paragraph 19 of General Comment 35).

When (and when not) to anonymise

MX v Dartford & Gravesham NHS Trust & Ors [2015] EWCA Civ 96 Court of Appeal (Moore-Bick Black and Lewison LJJ))

Other proceedings – Civil

Summary

This decision of the Court of Appeal concerned the anonymisation of a child's name in clinical negligence proceedings. The first instance judge, approving a settlement agreement, had refused to make an order preventing publication of the child's name but did direct that her address should not be disclosed. The claimant, through her litigation friend, appealed.

The Court of Appeal cited the case of *Scott v Scott* [1913] AC 417 in which the court had explained that judgments about wards of court and 'lunatics' were of a different nature to other proceedings:

> *"the jurisdiction over wards and lunatics is exercised by the judges as representing His Majesty as parens patriæ. The affairs are truly private affairs; the transactions are transactions truly intra familiam; and it has long been recognized that an appeal for the protection of the Court in the case of such persons does not involve the consequence of placing in the light of publicity their truly domestic affairs."*

However, now that most such decisions were taken pursuant to statute, the Court of Appeal considered that the above justification for anonymity was no longer sufficient, saying *"any exclusion of such proceedings from* [the principle of open justice] *therefore must be found in an overriding need to ensure that justice in the broader sense is done in the individual case."*

This requires in each case consideration of whether it is *necessary* to derogate from open justice, not merely a balancing of competing Article 8 and Article 10 rights. In the instant case, the first instance judge had set the bar too high by requiring the child's family to provide evidence of specific risks of tangible harm to the child, noting that "[i]*t may be difficult for a claimant's parents or litigation friend to put into words the effect that an invasion of privacy is likely to have on the family's life and whatever fears are expressed may not in the end be realised*."

Despite having stepped back from the approach in *Scott v Scott* earlier in its judgment as providing a generic basis for anonymisation, the Court concluded that the functions being carried out in approving a settlement agreement were of a different nature to the usual 'direct administration of justice', and that the public interest in ensuring those functions were carried out properly did not require the child's name to be made known. Thus:

> *"although each application will have to be considered individually, a limited derogation from the principle of open justice will normally be necessary in relation to approval hearings to enable the court to do justice to the claimant and his or her family by ensuring respect for their family and private lives. In some cases it may be possible to identify specific risks against which the claimant needs to be protected and if so, that will provide an additional reason for derogating from the principle of open justice, but we do not think that it is necessary to identify specific risks in order to establish a need for protection. The circumstances giving rise to the settlement will inevitably differ from case to case, but the interference with the right to private and family life will be essentially the same in almost all cases. It is sufficient in our view that the publication of the circumstances giving rise to the settlement would, in the absence of relief, involve injustice in the form of an interference with the article 8 rights of the claimant and his or her family."*

The Court gave the following procedural guidance:

(i) the hearing should be listed for hearing in public under the name in which the proceedings were issued, unless by the time of the hearing an anonymity order has already been made;

(ii) because the hearing will be held in open court the Press and members of the public will have a right to be present and to observe the proceedings;

(iii) the Press will be free to report the proceedings, subject only to any order made by the judge restricting publication of the name and address of the claimant, his or her litigation friend (and, if

different, the names and addresses of his or her parents) and restricting access by non-parties to documents in the court record other than those which have been anonymised (an "anonymity order");

(iv) the judge should invite submissions from the parties and the Press before making an anonymity order;

(v) unless satisfied after hearing argument that it is not necessary to do so, the judge should make an anonymity order for the protection of the claimant and his or her family;

(vi) if the judge concludes that it is unnecessary to make an anonymity order, he should give a short judgment setting out his reasons for coming to that conclusion;

(vii) the judge should normally give a brief judgment on the application (taking into account any anonymity order) explaining the circumstances giving rise to the claim and the reasons for his decision to grant or withhold approval and should make a copy available to the Press on request as soon as possible after the hearing.

Comment

This judgment is of interest to Court of Protection practitioners on two fronts. First, it has implications for the evidence required to obtain anonymisation orders in medical treatment cases – evidence of specific harm to P may not be required, as the general approach should be that publication itself is an interference with P's Article 8 rights. Secondly, it is relevant to the ongoing debate about transparency in the Court of Protection. The Court of Appeal noted that 'quite rightly', no-one had suggested that infant settlement approval hearings should take place in private. It is not difficult to imagine that in the future, Court of Protection hearings may follow a similar route: held in public, or with press access at least, but with anonymisation orders 'normally necessary'.

Changes to CPR Part 21: costs payable by a child or protected party from a damages award

With effect from 6 April 2015, amendments are to be made to CPR Part 21 are made to address the growing number of applications at approval hearings for payment out of the child or protected party's damages to meet the success fee provided for in the conditional fee agreement or entered into between the litigation friend and the solicitor for the child\protected party. The rules are amended to reflect when and how a deduction from damages of a sum to meet any shortfall between the costs recoverable from the other party and the 'solicitor and own client' costs payable to the child or protected party's solicitors applies. The amendments are confined to those cases where the award or ordered do not exceed £25,000. Consequential amendments are made to Part 47, PD 21 and PD46.

Short Note: capacity to drive?

R (Hitchen) v Oxford Magistrates Court [2015] EWHC 271 concerned the revocation of a driving licence. Mrs Hitchen was a 78 year old woman who had been involved in a car accident. As a result of her observed confusion at the scene of the accident, steps were taken by the DVLA to investigate her fitness to drive. Although she did not have any diagnosed mental disorder, the DVLA concluded that her poor performance on

an on-road driving assessment was likely to be due to "age-related cognitive decline".

The Magistrates Court held that the statutory requirements for revocation of the licence were made out, and Mrs Hitchen appealed to the High Court, which overturned their decision.

Simler J accepted that since there was evidence that Mrs Hitchen had performed well on tests of cognitive function including an MMSE and the Addenbrooke's test, and since there was nothing in the DVLA's guidance which suggested that the existence of a relevant disability could be inferred from an on-road driving assessment alone, the lower court's decision had been unlawful. In light of the positive medical evidence provided by Mrs Hitchen, the decision was quashed.

The decision will be of interest to anyone working with people whose fitness to drive has been queried, as it sets out the relevant statutory scheme and the considerations to be applied.

The CQC and surveillance: guidance for families

Summary

The CQC has published guidance for the public (here) on the use of recording equipment for those receiving care services. It accompanies the guidance issued to providers of health and social care in December 2014. Given that use of such equipment is such a big step, the guidance emphasises that consideration should first be given to raising any concerns with the care service itself who should investigate them. Audio or visual recording involves a most delicate balance between having the peace of mind that loved ones are being properly care for and intrusion on privacy and dignity, not just of them but others. This in turn involves a difficult balance between competing areas of law.

The guidance emphasises the importance of ensuring that the person being recorded freely consents to it and, if they do, that the recording only takes place in private rooms. If the person lacks capacity to give such consent, then a best interests decision may be called for. The following considerations are given to reduce the legal risk and effect on people's privacy:

- Make sure that the equipment is set up in a way that avoids recording shared areas of the care service outside of your, or your loved one's, private room.
- Make sure that the equipment, and any recordings made, are only used for the purpose of monitoring and protecting your (or your loved one's) care, welfare and safety.
- Consider how long you will use the equipment for (you should not use it indefinitely).
- Think carefully about who may be recorded and the effect on others.
- Keep recordings secure and make sure that they are not tampered with or shared with anyone who does not have a good reason to see them, for example, if you use a camera that sends images over the internet, make sure that you choose a secure password and do not share it with anyone.

Comment

Guidance from the regulator on such a delicate issue is most welcome. However, the apparent

absence of law surrounding the issue is striking. To ensure compliance with Article 8 the interference in the person's private life must be in "in accordance with the law." In *J Council v GU and others* [2012] EWHC 3531, Mostyn J noted:

> *"… not every case where there is some interference with Art 8 rights in the context of a deprivation of liberty authorised under the 2005 Act needs to have in place detailed policies with oversight by a public authority… But where there is going to be a long-term restrictive regime accompanied by invasive monitoring of the kind with which I am concerned, it seems to me that policies overseen by the applicable NHS Trust and the CQC akin to those which have been agreed here are likely to be necessary if serious doubts as to Article 8 compliance are to be avoided."*

The need for a clearly defined legal structure, for the protection of all concerned (including, almost importantly, those without capacity to consent to being filmed) is becoming ever more pressing.

Information access and sharing on behalf of a person with dementia

A very useful new booklet has been produced by the Alzheimer's Society providing information and advice to anyone wishing to share information with, or access information held by, a company, if the information relates to a person with dementia for whom they are caring.

Care Act appeals consultation

The consultation on the regulations to accompany s.72 Care Act 2014, establishing a mechanism for appeals against local authority decisions under Part 1 of the Act closes on 30 March (alongside the consultation on draft regulations and guidance needed to implement the cap on care costs). We would strongly urge you to respond, as the current proposals do not, in fact, give rise to an 'appeal' structure at all, in the sense that that word is conventionally understood. In reality, it is a codified version of a complaints process, with no ability for an independent person (or body) to provide a decision binding upon the local authority. If – as anticipated – the Court of Appeal in the *ACCG* appeal broadly confirms the conventional understanding of the limited jurisdiction of the Court of Protection, the current proposals as set out in the consultation will not serve as the mechanism by which those without capacity are enabled to effect an appeal against care decisions taken by public bodies without recourse to the increasingly elusive Administrative Court.

Local Government Ombudsman's adult social care newsletter

The February issue of *ASC Matters*, the Local Government's adult social care newsletter, is now available. It focuses on charging for residential care and includes summaries and links to a number of decisions relating to charging decisions taken in relation to those without capacity in material domains.

Law Society MHDC vacancies

The Mental Health and Disability Committee has two vacancies and is seeking candidates with legal and/or policy expertise in these areas or in safeguarding the interests of vulnerable clients.

The Committee is particularly keen to receive applications from the Office of the Official Solicitor, and individuals whose focus is on issues affecting children with disabilities, the provision of legal advice to NHS trusts and those working in elderly law.

Alex, a member of the Committee, can vouch both for the width and the interest of the work covered by the Committee (and the warmth of the welcome extended by members to him when he joined last year!).

Full details can be found here and the closing date for applications is 19 March 2015.

Mental Health Law Online Annual Review 2014

Jonathan Wilson, the indefatigable brains behind MHLO, has just published the MHLO's annual review for 2014, collating the materials added to his site in 2014. It can be bought for £10 (paperback) and £3 (Kindle) here. The previous annual reviews (2011 - 2013) are also available for £5 paperback and £2 Kindle.

Book Review: Black Rainbow

Black Rainbow: How words healed me – my journey through depression: Rachel Kelly (Yellow Kite, 2014: £16.99)[1]

This book does not relate to mental capacity in the sense that we normally use it in this Newsletter, but it is such a powerful memoir of the crippling effects of depression, and of one person's path through, that it undoubtedly merits a review here.

Rachel Kelly was a successful *Times* journalist whose entire life changed shortly after the birth of her second child when she suffered the first of two major depressive crises. The book opens with the first of these crises, and tracks the course of her life in the years thereafter as she started to recover, sustained a second major crisis, and ultimately found a new and more stable path. During the course of her illness she came into contact with mental health services, spending a short period of time (it would appear informally) as a patient in a psychiatric hospital and being prescribed and taking the full gamut of modern day anti-depressants. She also sought help in other ways, and is clear-eyed and interesting about the assistance (or otherwise) she found from different practitioners. Her greatest solace, however, was in poetry, and her book contains 40 poems (woven into the text) that were of particular importance to her on her journey.

As strange as it may sound, Rachel Kelly was, in many ways, extremely lucky. The crises she suffered were intense, but she had the support of a loving and loyal family, as well as the financial resources to engage nannies who provided practical assistance at the points that she most needed it. However, as she is at pains to point out, many of the tools that she found to be of most assistance in managing depression need not be expensive, either in terms or time or money: poetry is free (at least until the libraries are all closed) and breathing techniques, again, come without a price tag.

Some might wonder why we need more additions to the "depression memoir" genre. However, as with all good journalists, Rachel Kelly seeks to use her personal story to illuminate the bigger picture, and footnotes liberally, but not intrusively, deployed through the book provide discussion of the extent to which her experiences reflect those of others and suggestions for

[1] Full disclosure: Alex is very grateful to Jordans for providing him with a copy of this for purposes of this (unpaid) review. We are always open to reviewing books in the area of mental capacity law and policy (broadly defined) – contact one of us with your suggestions and, ideally, a copy of the book!

further reading or assistance. As she discovers when she starts to share her experiences with others, each story of serious and crippling depression is intensely personal, but its manifestations are often strikingly universal. This book therefore serves both as a powerful story of her personal journey but also as a potential tool to help others facing the same challenges (a tool, we note, which has direct effects as the author's proceeds go to mental health charities).

Alex Ruck Keene

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Conferences at which editors/contributors are speaking

The National Autistic Society's Professional Conference

Tor will be speaking at this conference, to be held on 3 and Wednesday 4 March in Harrogate. Full details are available here.

DoLS Assessors Conference

Alex will be speaking at Edge Training's annual DoLS Assessors Conference on 12 March. Full details are available here.

Elderly Care Conference 2015

Alex will be speaking at Browne Jacobson's Annual Elderly Care Conference in Manchester on 20 April. For full details, see here.

'In Whose Best Interests?' Determining best interests in health and social care

Alex will be giving the keynote speech at this inaugural conference on 2 July, arranged by the University of Worcester in association with the Worcester Medico-Legal Society. For full details, including as to how to submit papers, see here.

Editors

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

Scottish contributors

Adrian Ward
Jill Stavert

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 April. 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.

David Barnes
Chief Executive and Director of Clerking
david.barnes@39essex.com

Alastair Davidson
Senior Clerk
alastair.davidson@39essex.com

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

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

London 39 Essex Street, London WC2R 3AT
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

Manchester 82 King Street, Manchester M2 4WQ
Tel: +44 (0)161 870 0333
Fax: +44 (0)20 7353 3978

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

For all our services: visit www.39essex.com

Editors

Alex Ruck Keene
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Neil Allen
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Scottish contributors

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Jill Stavert

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THE QUEEN'S AWARDS FOR ENTERPRISE INTERNATIONAL TRADE 2013

Alex Ruck Keene
alex.ruckkeene@39essex.com

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, 2015, 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.

Victoria Butler-Cole
vb@39essex.com

Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. 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.

Neil Allen
neil.allen@39essex.com

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

Annabel Lee
annabel.lee@39essex.com

Annabel appears frequently in the Court of Protection. Recently, she appeared in a High Court medical treatment case representing the family of a young man in a coma with a rare brain condition. She has also been instructed by local authorities, care homes and individuals in COP proceedings concerning a range of personal welfare and financial matters. Annabel also practices in the related field of human rights. To view full CV click here.

Simon Edwards
simon.edwards@39essex.com

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

Adrian Ward
adw@tcyoung.co.uk

Adrian is a 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.

Jill Stavert
J.Stavert@napier.ac.uk

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.