



Welcome to the May 2017 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the failed challenge to funding for DOLS, DOLS and conditions, and examples of judges grappling with both capacity and best interests in situations of complexity;

(2) In the Practice and Procedure Report: litigation capacity and the Court of Protection, and a strange saga of attempts to exploit the Court of Protection in the context of bone marrow donation;

(3) In the Wider Context Report: a reminder of the MCA and voting, new guidance on care for dying patients and a book corner reviewing relevant recent publications;

(4) In the Scotland Report: reflections in *AM-V v Finland* and law reform, recently decided cases shedding light on capacity and disability from a range of perspectives and a well-deserved honour for Adrian.

There is no Property and Affairs Report this month in the absence of a sufficient quantity of relevant material.

Remember, you can find all our past issues, our case summaries, and more on our dedicated sub-site [here](#), and our one-pagers of key cases on the SCIE [website](#).

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

Contents

HEALTH, WELFARE AND DEPRIVATION OF LIBERTY	3
Authorising at any price?	3
At the limits of best interests	4
Who guards the guards?	5
Short Note: capacity case study	6
PRACTICE AND PROCEDURE	8
Litigation capacity under the spotlight	8
A wider agenda at work?	9
Short Note: the <i>Al-Jeffery</i> saga concludes	11
Short Note: Radicalisation and young adults	11
THE WIDER CONTEXT	12
Voting, the MCA and urban myths	12
Short Note: sleep-in carers and the minimum wage	12
Reminder: new GMC Confidentiality Guidance now 'live'	12
Medical Examiner Scheme delayed until April 2019	12
Short Note: Judicial review and conditions of MHA detention	12
NICE Guidance on Dying Adults	12
Public attitudes to end-of-life care in neurological disease	13
Book corner	13
SCOTLAND	18
Adrian Ward appointed Honorary Member of the Law Society of Scotland	18
Debate, reform and <i>A-MV v Finland</i>	18
Mental Welfare Commission for Scotland and Centre for Mental Health and Capacity Law: Law Reform Scoping Exercise	21
Revised OPG fees	22
<i>McCann v Scottish Ministers</i>	22
Permanence order – parents with “learning difficulties”	23
<i>RAR v A University</i>	24
Centre for Mental Health and Incapacity Law, Rights and Policy is now Centre for Mental Health and Capacity Law!	28
Visit from the Norwegian Civil Affairs Authority	29

HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

Authorising at any price?

Liverpool City Council, Nottinghamshire County Council, LB of Richmond upon Thames and Shropshire Council v SSH [2017] EWHC 986 (Admin) (High Court (Administrative Court) (Garnham J))

Article 5 ECHR – DOLS authorisations

Summary

This case was brought by four local authorities challenging what they described as the Government's "ongoing failure to provide full, or even adequate, funding for local authorities in England to implement the deprivation of liberty regime". The local authorities suggested that the financial shortfall suffered by councils across the country generally as a result of *Cheshire West* was somewhere between one third of a billion pounds and two thirds of a billion pounds each year and sought a mandatory order requiring the Secretary of State of Health ('SSH') to fill the gap. The local authorities relied on the New Burdens doctrine, a recent policy invention which provides that if it is the Government's policy that authorities should do something and that this will cost them more money, the department responsible for the policy (within central government) must ensure that the necessary funding is provided.

The local authorities lost because they had not issued their claim promptly. Central government funding decisions were made annually, and the

claim had been issued 2 days short of the 3 month time limit for judicial review claims, which the court considered was not prompt enough given the prejudice to the SSH of having an annual budget decision quashed a quarter of the way through the year.

Garnham J did however go on to consider the merits of the local authorities' claims.

The local authorities argued that a public authority must ensure that there is no systemic flaw in practice which creates an unacceptable risk of illegality, and that a system would be unlawful where the funding shortfall to those implementing it creates an unacceptable risk of illegality. Garnham J rejected the idea that there was any principle of public law that public authorities who establish a system of safeguards are under a duty to ensure that the system does not give rise to an unlawful risk of illegality. Since the local authorities were not saying that the government's underlying funding allocation was irrational, they could not successfully mount an argument based on the risk of illegality. And in any event, said Garnham J, the local authorities were able to prevent any illegality by just rearranging their own budgets and making cuts in other areas – the local authorities had not filed evidence suggesting that having regard to their total budgets, they would be unable to meet the requirements of the DOLS systems.

Garnham J held that the New Burdens doctrine did not assist the local authorities as it did not say in terms that additional funding would be provided if required as a result of a change in

policy and so gave rise to no legitimate expectation.

Comment

This decision will no doubt be hugely disappointing to local authorities struggling to cope with the aftermath of *Cheshire West*, and wondering forlornly how long it will take for the Law Commission's proposals to make it to the top of the government's list of things to do (the General Election only having delayed matters further).

The suggestion that dealing with DOLS simply requires other budget cuts to be made is perhaps unrealistic, given the scale of cuts that have already taken place in recent years, unless one accepts that service provision will be reduced in order that procedural safeguards can be implemented. That would be a perverse effect of the Supreme Court's decision, which was premised on the need to support people with disabilities and to treat them equally.

It also seems odd to the authors to reject the claim on the basis of a lack of promptness since the problem is one that will inevitably arise again when the next Local Government Finance Settlement is published. By then, the problems facing local authorities will no doubt be even worse - perhaps their evidence at that stage would show that squeezing funds from other areas of their budgets will only be able to happen if other statutory duties are missed.

The authors understand that no decision has yet been taken whether to seek permission to appeal the decision. It will be interesting to see what impact this decision has on any challenge

brought following *Re JM* as to the provision of representation at DOLS hearings for incapacitated people. In this regard, we note also the Government's response to the *Re JM* decision (i.e. extra funding for s.49 visitors) and the less than enthused response of Charles J, both available [here](#).

At the limits of best interests

Newcastle-upon-Tyne City Council v TP and FW [2016] EWCOP 61 (HHJ Moir)

Best interests – residence

Summary and Comment

In a trilogy of judgments, HHJ Moir made findings of fact, determined mental incapacity, and made best interests decisions on behalf of a lady in her 60s with cerebral palsy. She had lived a very sheltered life with her parents in a large Victorian house in Gosforth until she was around 48 when her mother died. She strongly wanted to return to live with an individual, FW, in respect of whom the statutory authorities had very significant concerns, in particular in respect of the degree of (malign) control that he appeared to exercise over her.

The case is very fact specific but, in deciding that it was not in her best interests to return to FW, it provides an illustration of the overriding of P's clear wishes and feelings in the name of best interests. In terms of legal principles, the judge referred to, and endorsed, the keynote address of Peter Jackson J, given at the AMHPA conference, 'Taking Stock, Mental Health and Mental Capacity Reform', to supplement the MCA best interests checklist:

21 ... In this address the learned judge suggests a framework which can be used as a checklist in Court of Protection cases. He sets out:

"Here is a checklist that might have appeared in section 4 but did not. I have stolen most of it from existing well-trying checklists. It requires a decision maker in personal welfare cases to consider all the relevant circumstances and, in particular, the following:

- *Past and present wishes and feelings;*
- *Beliefs and values;*
- *Age, background, race, culture and language;*
- *Physical, emotional and educational needs;*
- *The extent to which they are being met; Relationships with relatives and other significant persons;*
- *The promotion of independence;*
- *The preservation of dignity;*
- *Harm or likelihood of harm;*
- *The effect of any change of circumstances;*
- *The range of services that are available; and finally, in cases concerning life preserving treatment,*
- *The right to life."*

22. *It is a useful suggested framework, or aide memoire, as to the relevant circumstances to consider... It is neither an exhaustive nor limiting list, but it is helpful in considering the factors which a person would wish to consider if he was able.*

Real enthusiasts might also want to "stress test" the process by which P's Article 8 rights were protected against the new (and – according to the ECtHR – CRPD compliant) test set down in *AM-V v Finland*, covered in our last Report.

Who guards the guards?

Re W [2016] EWCOP 58 (DJ Ralton)

Article 5 ECHR – DOLS authorisations – DOLS RPR

Summary

This recently published judgment from 2016 considers who is responsible for monitoring standard authorisation conditions. Managing authorities must comply with them, but who guards the guards? In the absence of an express statutory obligation, DJ Ralton held that supervisory bodies are under a duty to do so. This was for three reasons. First, a supervisory body has a discretion to carry out a review of the authorisation it has granted. It cannot exercise that discretion unless "it carries out its own function of considering the standard authorisation and monitoring the conditions that it has imposed" (para 13). Secondly, Article 5 ECHR requires continued justification of the deprivation of liberty which cannot be done passively by the decision-maker (para 14). And, thirdly, although "there is an obligation upon the RPR so far as he/she is able to ensure that conditions are complied with", the RPR's function is not to monitor compliance and report back to the supervisory body. The RPR acts on behalf of P and does not owe an agency-type duty towards the supervisory body (para 12).

The second legal issue related to how frequently condition compliance ought to be monitored. The judge held that “*Frequency all depends*” (para 15) and it is essentially a question of fact in each case.

Comment

The legislation’s silence on this significant issue has always been a concern. Authorisation conditions can make a real difference to the person’s care arrangements and well-being so an effective system for monitoring the managing authority’s compliance with them is necessary. Supervisory bodies may well despair at the prospect of having to fulfil this duty, but that is because of the scale of the challenge rather than because of the correctness of the legal principle underpinning it. How they are going to achieve this monitoring role will require careful thought. In the pre-*Cheshire West* days, for example, we recall some supervisory bodies requiring managing authorities to report back on condition compliance on a regular periodic basis.

There are many other issues relating to conditions that have yet to be determined in the case law. For example, what are the legal implications when authorisation conditions are not fulfilled? Who is responsible for condition breaches? The MCA states that it is managing authorities that “must” comply. But often the work necessary to achieve the condition needs to be undertaken by some other body or person. Hopefully further case law will explore these issues and plug the gaps left by the legislation.

Short Note: capacity case study

By way of an (entirely fact-specific) but useful

example of capacity assessment, we note the decision of HHJ Rogers in *Lincolnshire County Council v JK* [2016] EWCOP 59. The case concerned P’s capacity to conduct proceedings and take decisions in respect of residence, care needs and finances. P was 73 and a widow. She was suffering from a severe bout of depression when she was admitted to a care home. At the time she was admitted to the care home there were concerns about the state of her home and her ability to care for herself. Following admission she was diagnosed with Alzheimer’s dementia but recovered from the depression.

The judge began his assessment by reminding himself of the dicta of Baker J in *CC v KK* [2012] EWHC 2136 that the question of capacity needs to be approached in a detached and objective way where the natural desire to be protective of an adult individual should not drive the Court to a convenient outcome.

He referred to the recent judgment of *NHS Foundation Trust v C and V* [2015] EWCOP 80 for a recent exposition of the statutory framework and recent case law and adopted it as a starting point to analyse the facts in this case.

The judge set out the importance of P participating in proceedings, citing his recent judgment: *A County Council v AB and others* [2016] EWCOP 41. The judge in this case spoke to P on 3 occasions.

The judgment itself necessarily turns on its own facts but it provides useful guidance into the way a judge applies the statutory framework and the guidance in the case law.

In this case the judge held that the presumption of capacity was displaced by all of the evidence which came broadly from 5 areas: the background non-controversial facts (photographic evidence as to the state of P's home for example); the evidence of the local authority social workers both written and oral; evidence from those representing P (attendance notes principally); expert psychiatric evidence and evidence from P herself.

PRACTICE AND PROCEDURE

Litigation capacity under the spotlight

London Borough of Brent v (1) SL (2) NL [2017] EW COP 5 (DJ Glentworth)

Mental capacity – litigation

Summary

This case concerned SL, a 60 year old woman with a diagnosis of schizophrenia and obsessive compulsive disorder. The central issue in this case was whether SL had capacity to conduct proceedings in the Court of Protection in which she objected to the deprivation of her liberty in supported living accommodation.

There were three capacity assessments before the court:

- A COP3 capacity assessment which concluded that SL was unable to understand or weigh up all the relevant information in relation to her own needs, both mental and physical, or to weigh up the pros and cons of different types of accommodation as well as treatment and care in the community;
- A section 49 report which concluded that SL lacked capacity to conduct these proceedings because she did not understand the basis of the proceedings as she was preoccupied by the fact that she preferred to live at home;
- An independent expert report where the expert found it difficult to reach a conclusion about SL's litigation capacity but, if pressed, stated that he thought that she did not have capacity in that area.

District Judge Glentworth set out the relevant law in this area and considered that she had sufficient information in the reports to address the question of SL's litigation capacity without hearing oral evidence. The independent expert was clear in his diagnosis of SL which was accepted by the court. The independent expert was also clear that SL lacked capacity in relation to the issues which were the subject matter of the application namely her residence and care. The independent expert also concluded that SL did not have capacity to manage her property and affairs and that conclusion was accepted by the court.

In relation to litigation capacity, the independent expert and the court were mindful of the decision in *Sheffield City Council v E* [2004] EWHC 2808 where Munby J (as he then was) held that cases where someone had litigation capacity whilst lacking subject matter capacity are likely to be very rare. The expert's view was that the issue of SL's litigation capacity depended on the level of detail which the court considered SL would be expected to understand in making the kinds of decisions she would need to make in the course of litigation. If it was sufficient for SL to understand the matter in broad terms then he thought that SL had litigation capacity. If SL was required to have a more detailed understanding of the various potential outcomes and their consequences, then SL lacked litigation capacity.

Having considered the evidence in the reports, the judge was satisfied that SL could understand the information relevant to the proceedings but was not satisfied that she was able to use and weigh the relevant information to make decisions and give instructions in relations to

matters which were integral to the process of litigation.

Comment

This case does not lay down any new principles of law but is a useful example of how the law relating to litigation capacity was applied in practice. In analysing the independent expert's report, the court rejected the notion that it was sufficient for SL to understand the matter in broad terms in order to have litigation capacity. Rather what was required was for SL to use and weigh the relevant information to make decisions and give instructions in relation to matters which were integral to the process of litigation. It is a slight pity that the judgment does not spell out in more detail what the matters "integral to the process of litigation" were considered to be.

Practitioners may also wish to take note of the judge's comments on the letter of instruction that went to the independent expert. The letter of instruction, as we understand it, was modelled on the standard letter emanating from the Official Solicitor referred to an extract from the case of *The NHS Trust v Miss T* [2004] EWHC 2195. However, neither the expert nor the court could locate a copy of that case under that citation or by a more generalised search (although the case is referred to in the judgment of Munby J in the *E* case). Given the difficulty locating the case, the judge suggested that it would be appropriate for those responsible for the letter of instruction to consider whether reference to it should be included in future instructions.

A wider agenda at work?

In the Matter of SW [2017] EWCOP 7 (Sir James Munby P)

Practice and Procedure (Court of Protection) – Other

Summary

Re SW is a quite extraordinary case that came before Sir James Munby P in March of this year. The Applicant brought an application for a declaration that an allogeneic bone marrow transplantation from a living donor, SW, into her adoptive brother, SAN, would be both lawful and in SW's best interests. SAN was reported to be suffering from haematological cancer such that without the transplant, he would inevitably die.

The facts and relationships between the various actors in the case are complex albeit that the issues are relatively straightforward. The Applicant was the putative donor SW's son, acting under a Lasting Power of Attorney purportedly executed by SW in June 2015 and witnessed by a Dr Jooste. Dr Jooste was in turn the physician who proposed to carry out the transplant, alongside his friend and colleague, a Dr David Anthony Waghorn. Dr Waghorn was also the Applicant's father and SW's husband.

The Applicant son sought a declaration from the Court of Protection that it was lawful for his father and his father's colleague to carry out the transplant of bone marrow from SW to SAN, "notwithstanding the [Human Tissue Authority's] refusal to consent" to the treatment. The Applicant notified the court that both Dr Waghorn and Dr Jooste had relinquished their membership with the GMC in order to continue

their specialized medical practice in bone marrow transplantation.

This case followed an earlier failed application to the COP under an LPA purportedly being exercised on SAN's behalf and a failed judicial review by a company directed by Drs Waghorn and Jooste on the same issue. The instant application was similarly unsuccessful and was struck out.

Firstly, Sir James Munby P held that there was no evidence before the court that SAN did in fact wish any such treatment to be carried out and no attempt had been made to join him as a party.

Secondly, and more fundamentally, it was entirely unclear a) whether SW did indeed lack capacity to give consent to the transplant as was suggested by her son or b) if she did lack capacity, that any attempt had been made to ascertain her wishes and feelings on the matter. The sole evidence relied upon as to her capacity was a 15 year old letter from a clinical neuropsychologist noting that she had had a series of strokes following a road traffic accident and that there had been a drop in her IQ score; in addition to this there was a letter from a further neuropsychologist's report from August 2016 confirming that SW did *not* present as someone with dementia and that he could not form a conclusive opinion as to her capacity to consent to the operation. In fact the neuropsychologist himself voiced concerns that "assessment in mental capacity needs to be as specific as possible".

Sir James Munby P accordingly confirmed that the information put before him was well below the required threshold to make a declaration as to SW's lack of capacity, even on an interim

basis, and that as a result the entire matter fell outside the jurisdiction of the Court of Protection.

Quite apart from the jurisdictional issue, referring to the pre MCA case of *In Re Y (Mental Patient: Bone Marrow Donation)* [1997] Fam 110 Sir James observed there was no authority upon which the Court could make a declaration that the proposed treatment was in SW's best interests in the absence of, among other things, expert medical evidence regarding the nature of the procedure, details of the clinicians carrying out the procedure, or confirmation that the donee did in fact wish the procedure to take place as proposed. He noted that there was no evidence as to SW or SAN's wishes and feelings, save for the assertion by the son that SAN would "obviously.... agree because no-one wants to die".

Noting that the son had further failed to confirm that both his father and Dr Jooste had been struck off and that his skeleton argument appeared to be about the value to the wider public of SW undergoing the procedure, Sir James questioned "is there some wider agenda at work here, and, if so, whose agenda is it?" He observed that:

a prudent judge probably never says 'never', but I find it impossible to conceive of circumstances where the Court of Protection would ever contemplate authorising treatment of a kind referred to in PD9E... [serious medical treatment] where the treatment is to be given by a doctor who has been struck off (paragraph 25).

Given these facts, it is perhaps not surprising that Sir James determined to depart from the usual order in welfare cases and made a costs

order against the son for bringing the application. Significantly, despite the fact that they were not applicants in the proceedings, given that each had sought to be joined as a party and had “expressed themselves as consenting to the application”, Sir James Munby P further determined that Dr Waghoorn and Dr Jooste should share the burden of the costs with the applicant son.

Comment

This is a striking case not least because of the facts. It is in this context that Sir James Munby P took the decision to name Dr Waghorn and Dr Jooste, the anonymisation of SAN, SW and the son notwithstanding, on the basis that there is a “*very strong public interest in exposing the antics which these two struck-off doctors have got up to*”.

The decision itself is not surprising. It is a clear reiteration of the fundamental principle that the Court of Protection has no jurisdiction to determine the lives of those who are not found to lack capacity - and that a health and welfare LPA cannot be relied upon to make decisions on another’s behalf in circumstances where they are capable of doing so themselves.

It is also entirely unsurprising that the requirement under the Human Tissue Act 2004 (Persons who Lack Capacity to Consent and Transplants) Regulations 2006 for the matter to have been referred to the Human Tissue Authority by a registered medical practitioner and properly deemed to be lawful could not be circumvented by an application to the Court of Protection, the Court having no jurisdiction or power to exempt anyone from such a statutory scheme.

Short Note: the *Al-Jeffery* saga concludes

Readers will recall the coverage of the [Al-Jeffery](#) case, in which the High Court confirmed that it had a residual nationality-based jurisdiction protect vulnerable British nationals abroad even if they are no longer habitually resident in England and Wales. You may be interested to note that it has now [concluded](#) at Ms Al-Jeffery’s request, on the basis of her reconciliation with her father and his apparent change of heart as to her ability to leave Saudi Arabia should she wish. We will leave it to you to decide the extent to which this sits entirely comfortably with the picture painted previously.

Short Note: Radicalisation and young adults

In [A Local Authority v Y \[2017\] EWHC 968 \(Fam\)](#), Hayden J set out a very useful exegesis of both the duties upon statutory bodies and the possible steps that might be taken where a child at risk of radicalisation turns 18 and thereby moves beyond the remit of the Family Division of the High Court/Family Court. At the risk of sounding like a stuck record, Alex notes that this may be another area in which – in the case of those who have capacity to take relevant decisions - current tools may be lacking and [law reform](#) may be in order.

THE WIDER CONTEXT

Voting, the MCA and urban myths

Given the imminent General Election, we strongly recommend reading Lucy Series' [blog post](#) on the myths surrounding capacity, voting and voter registration.

Short Note: sleep-in carers and the minimum wage

The judgment of Mrs Justice Simler DBE in *Focus Care Agency Ltd v Roberts* in the Employment Appeal Tribunal considered the question of whether time spent asleep during a "sleep-in" shift qualified for the national minimum wage. Although this case did not consider the Mental Capacity Act 2005 directly, the judge noted that the issue in this case was particularly significant in the care sector where sleep-in duties commonly arise. The court's conclusion that sleep-in care is covered by minimum wage legislation (regardless of whether the carer was actually asleep or awake) may have a knock-on effect on the cost of care packages and a public body's willingness to commission a particular package of care with sleep-in support. This may in turn affect the "available options" to the Court of Protection when determining what care and support package is in P's best interests.

Reminder: new GMC Confidentiality Guidance now 'live'

The GMC's revised guidance, *Confidentiality: Good Practice in Handling Patient Information*, came into effect on 25 April 2017. Although primarily of relevance to medical practitioners, it is also useful for others seeking to grapple with

the balancing act between confidentiality and disclosure in the context of the delivery of health and social care, including where the individual concerned lacks the capacity to consent.

Medical Examiner Scheme delayed until April 2019

As highlighted in Mills & Reeve's most recent (and very useful!) [Health and Social Care Update](#), plans to introduce the medical examiner role and implement reform to the death certification process have been delayed from April 2018 to April 2019 to (the Department of Health notes) "allow for more time for preparation to ensure that the benefits of the new system [are] realised."

Short Note: Judicial review and conditions of MHA detention

In *R (YZ) v Oxleas NHS Foundation Trust & Anor* [2017] EWCA Civ 203, the Court of Appeal emphasised – in strident terms – that it is only in very exceptional cases that it will ever be appropriate to challenge by way of judicial review a decision to move a person under the MHA 1983 into a more secure unit.

NICE Guidance on Dying Adults

NICE has published a new quality standard, *Care of dying adults in the last days of life*, which covers the last 2 or 3 days before death. The document includes a requirement that "Adults in the last days of life, and the people important to them, are given opportunities to discuss, develop and review an individualised care plan". No mention is made of advance decisions to refuse treatment or health and welfare lasting powers of attorney, although there is a welcome focus

on the person retaining choice and control. The guidance also addresses hydration in the last days of life, requiring that ‘Adults in the last days of life have their hydration status assessed daily, and have a discussion about the risks and benefits of hydration options.’ The authors have experience of disputes between families and hospitals in relation to the use of artificial hydration at the end of life, and anticipate that such discussions may be difficult unless there is clear patient-friendly information available which includes an explanation of the circumstances in which artificial hydration does not in fact prolong life, as this can be very counter-intuitive and the source of significant conflict.

Public attitudes to end-of-life care in neurological disease

A fascinating [study](#) published recently reveals just how conflicted public attitudes are to end-of-life care in neurological disease (and also how much the answers given depend upon the questions asked).

Book corner

We include here four book reviews by Alex (who, where relevant, acknowledges with gratitude that copies were provided by the publishers – he is always happy to review works in or related to the field of mental capacity (broadly defined))

***Community Care Law* (6th edition) (Luke Clements, with Karen Ashton, Simon Garlick, Carolyn Goodall, Jean Gould, Edward Mitchell and Alison Pickup, Legal Action Group, 2017, paperback and ebook, £65.00)**

A great deal has changed since the last edition of this Bible for community care practitioners was published in 2011. First, the legislative

framework has been consolidated and in significant parts amended by the Care Act 2014 (England), and the Social Services and Well-Being (Wales) Act 2014. Second, Pauline Thompson is no longer with us to help navigate through the waters and fight the battles. Luke Clements pays a moving tribute to her at the start of the book, and the book itself (in this edition specifically named the “Pauline Thompson Memorial Edition”) stands as a tribute to the groundbreaking work she did in this area.

Whilst the book itself stays at roughly the same length as its predecessor, weighing in at a hefty 942 pages (of which an impressive 840 pages are narrative text), there have been some significant changes to its coverage. First, it no longer seeks to cover issues relating to disabled children, this now being the subject of a separate (excellent) LAG book, which is available for free [here](#) (and from the LAG bookshop [here](#)). Second, and reflecting the divergence between England and Wales, the book does not seek to give any coverage to the 2014 Welsh Act. This is entirely understandable, as Luke and his team of co-authors have more than enough on their plate to deal with in England. It is, however, a source of real regret, and indeed concern, that there is at present no book out there providing the same sort of authoritative analysis of the position in Wales.

Turning back to what this book [does](#) cover, one of its great strengths is that it places the Care Act in its context and in its history. Some of this history is very deep, and of considerable interest are the thumbnail sketches of the way in which the pendulum of concerns and drivers have swung backwards and forwards over time. Of

very practical use is the detailed and expert commentary on where pre- Care Act case-law, guidance, or other materials may still be of relevance in the post Care Act world, and where, by contrast, the Act marks a radical departure.

Although not expressly stated in the introduction, the book is – for the most part – reflective of the law as it stood in January 2017, although it does (impressively) manage to include coverage of the Law Commission’s Mental Capacity and Deprivation of Liberty proposals published in March 2017. The decision in the N case in the Supreme Court on available options and best interests came just too late for it, although the approach it sets down was anticipated in the chapter on the Mental Capacity Act. Further, for my part I regret that the authors were not able to include coverage of the Davey decision from February, as I would have liked to have seen their take on the approach taken by Morris J to well-being, in particular his extremely minimalist approach to the centrality of the individual’s wishes, at odds with the maximalist interpretation suggested in the book.

Within its new self-defined limits set out above, this edition is extraordinarily comprehensive, roaming far beyond the Care Act to include (for instance) useful coverage of the relevant provisions governing information, data protection and confidentiality. I can confidently predict that it will, as with its predecessor, become very well-thumbed in short space of time by those who purchase it.

Finally, some may wonder whether it is worth purchasing this book alongside Stephen Knafler QC’s recent book for LAG on Adult Social Care Law. For my part, the answer is unambiguously “yes” as the latter serves a different purpose –

primarily consisting of extracts from key cases, legislation and guidance. The selection of and introductions to the extracts is expert but does not pretend to the level of detail of commentary of that provided in the work under review. And, at the time of writing, there is no need to choose between the two as Stephen Knafler’s book is available for a limited period of time free online.

Mental Health Law (6th edition) (Brenda Hale (Baroness Hale of Richmond) with Penelope Gorman, Rachel Barrett and Jessica Jones, Sweet & Maxwell, 2017, paperback, £85.00)

The new edition of Lady Hale’s seminal textbook has been eagerly awaited for quite some time now. Though, as Lady Hale notes in her introduction, it represents an update rather than a complete rewrite of the nature of the 5th edition (in 2010), the book nonetheless represents a unique opportunity to see the state of mental health law through the eyes of the Deputy President of the highest court in the United Kingdom.

Indeed, the book does a lot more than that, and my only substantial complaint about is that its title radically undersells it. Written with the assistance of Lady Hale’s long-standing judicial assistant, Penelope Gorman and two recent judicial assistants, Rachel Barrett and Jessica Jones, the book provides clear, comprehensive and authoritative coverage of the provisions of the MHA 1983 as of January 2017. However, its focus is almost equally upon the provisions of the MCA 2005, for which Lady Hale bears such prime-moving responsibility. For my part, I regret not just the fact that the book undersells itself but also the (inadvertent) suggestion that mental capacity law is simply an offshoot of mental health law. Of course, though, by the

time of the next edition, it may be that there is no longer any distinction between mental health law and mental capacity law, and Lady Hale toys tantalisingly with the idea of fusion in chapter 2.

Indeed, it is a characteristic of this book that there are repeated and fascinating hints of where Lady Hale envisages the law might go, although obviously phrased with suitable caution given her judicial role. Examples include her observations on the obligations imposed by the CRPD in chapter 1, and her tantalising suggestions in Chapter 3 that a rebalancing of parental versus children's rights in the context of medical treatment is perhaps overdue. I strongly anticipate that passages from the work may well feature in skeleton arguments before appellate courts in the near future.

It would, however, be entirely wrong to give the idea that this book is solely for practising lawyers seeking to run clever arguments. Rather, it will be of enormous use and interest to all those seeking a clear guide not just to the complex statutory provisions governing mental health and mental capacity level, but an explanation of why and how of the laws in this area have come to take the shape they have. I cannot, for instance, think of a better single text to use to introduce students to this area.

A final thought – if the same gap, 7 years, exists between this edition and the next – will the 7th edition represent an update, or will have the legal landscape have changed sufficiently that an entire rewrite will be required? It would, of course, be an edition written from the perspective of a retired Supreme Court judge, but there is plenty of time before Lady Hale retires for her to continue to shape the law in this area...

Ethical Judgments: Re-Writing Medical Law (ed. Stephen W Smith, John Coggon, Clark Hobson, Richard Huxtable, Sheelagh McGuinness, José Miola and Mary Neal, Bloomsbury, 2017, paperback and ebook, £40.00)

This edited volume takes on an ambitious task, namely to revisit some of the core decisions in English medical law and to place them into a world in which decisions by judges have to be ethically as well as legally valid. To that end, and in each of the nine cases selected, two academic lawyers provided short (3,000 word) judgments, followed by a legal commentary and an ethical commentary.

There is undoubtedly an aspect of the academic parlour game about this exercise, and it is clear that Lord Montgomery of Botley (aka Jonathan Montgomery), say, or Lady Devaney of Preston (aka Sarah Devaney) have relished playing judge. However, there is a very serious purpose underlying the project, namely trying to tease out, through the prism of real cases, how judges seek to apply ethical concepts in grappling with medical cases in circumstances where not only are judges not given specific ethical training, but English legal tradition (at least) has its face set against the introduction of specific ethical considerations or reasoning.

The book is full of thought-provoking nuggets and I found, for instance the judgment of Lord Smith of Erie (Stephen W Smith) that the Official Solicitor's appeal in *Bland* stimulating in the way only the best counter-factual history can be. However, I must confess to a slight feeling of frustration that both the selection of the cases (and indeed the comments upon the cases) gave the distinct impression that medical law –

broadly defined – has stayed still over the past decade. With the notable exception of *Nicklinson*, none of the cases were decided later than 2006, and one might legitimately question why, say, *Bolitho* was included in the selection at the expense of *Montgomery*. This may well have had to do with the length of time it takes for projects of this nature to evolve, and, of course, to some extent, the exercise that the editors and contributors were engaged in is one that is not time-specific. There is, for instance, undoubted value in revisiting “oldies but goodies” such as the direction given by Macnaghten J to the jury in *R v Bourne* in 1939, where sufficient time has passed to lend distance and perspective.

However, and at the risk of sounding parochial, I must register particular disappointment at the near-total lack of mention of the MCA 2005. Even if a case such as *Aintree* or the *DD* caesarean-section and sterilisation saga) did not merit a full counter-factual judgment approach, it was to me surprising that *Aintree* does not even appear in the commentary on *Bland* (or indeed in the table of cases at all). This was undoubtedly not for lack of expertise amongst the editorial team, including as it does several who have written thought-provokingly on the MCA. It must, therefore, have been a deliberate decision, but for my part it is one that I regret (even if it leaves the way open for a further volume picking up the story...).

Overall, however, this is a book that serves admirably to stimulate thought – even if one of the main thoughts that it stimulated in this reader’s mind is that (as tacitly and somewhat ruefully recognised in the introduction) it is very much more difficult to be a judge than to be a commentator.

Independent Advocacy and Spiritual Care: Insights from Service Users, Advocates, Health Care Professionals and Chaplains (Geoff Morgan, Palgrave Macmillan, 2017, hardback and ebook, c£66.00)

This fascinating book, based (it would appear) upon the author’s PhD thesis, both sheds important light upon the practice of advocacy and suggests fruitful paths for its development. Written by a current hospital chaplain and former IMCA, the book looks at the history of advocacy in England and Wales, and in particular its growth as a professionalised occupation in the early years of the 21st century, and is particularly interesting in tracing out some of the (often unspoken or even unconsidered) religious roots of advocacy, and also how advocacy can draw on theology as a message of reaching a deeper and more effective purpose.

The book benefits immeasurably from the fact that the author has worked both as an advocate and as a hospital chaplain, and in a particularly self-aware fashion is able to reflect upon the ways in which the two approaches are similar and different. It also draws upon a relatively small but qualitatively rich body of interviews with advocates, NHS chaplains, and clients/self-advocates, and the author makes very good use of extracts from these interviews to develop his thesis. Although expressly drawing from the Christian tradition, the author makes a persuasive case that a recognition of the potential importance of spirituality is the important hidden dimension in the lives of many on behalf of whom advocates seek to act. More broadly, he seeks to draw upon theological insights (especially those of Practical Theology) to outline two models for the practice of

independent advocacy – Reconstructed Empowerment and Action Based on Equality, as well as a set of very practical recommendations for advocates and those who manage them.

Along the way, the author explores the number of fascinating issues, not least of which is the ambiguous nature of advocacy itself, and in particular the complex place that it occupies in a world in which statutory frameworks increasingly provide the advocates to act as the voice of the individual. With the growth of advocacy, especially following the Care Act, comes demands for increasing professionalisation. But as the author notes, legitimate questions can be asked as to what we might be losing by professionalising a service which is as much a ‘calling’ as anything else. And, further, what place is left in the statutory framework for self-advocacy?

If I have one regret about the book (other than the sometimes slightly frustrating use of academic paraphernalia which on occasion detracts from the clarity of the insights) it is as to its timing. As the author makes clear, much of the ground work for the book was done from 2005 to 2011, and the balance of the work seems to have been done in the period leading up to 2015. It would have been fascinating to have had the author’s perspectives on the relationship between the models of advocacy he seeks to promote and the demands of the CRPD, which has only really started to gain major significance and profile in England after the intellectual heavy lifting appears to have been done on this work. I would hope that he would be able to address this in any second edition of this work, as the models of advocacy he outlines are, on their face, profoundly aligned to the ethos

underpinning the Convention, but come from very different starting places.

This is only a minor regret, however, and I put this book down both with a renewed respect for the work of statutory independent advocates and a set of questions for myself as to the place and purpose of advocacy in supporting the exercise of legal capacity. As we seek to develop advocacy going forward I for one will regularly be returning to this work for inspiration.

SCOTLAND

Adrian Ward appointed Honorary Member of the Law Society of Scotland

The editors heartily congratulate Adrian on his appointment as an Honorary Member of the Law Society of Scotland (the first since 2009), as a person of distinction in the legal profession. The Law Society's Council, in appointing him, specifically (and in our respectful view correctly!) identified his work in the field of Mental Health and Incapacity Law meant that he was a person of such distinction.

Debate, reform and *A-MV v Finland*

The decision of the European Court of Human Rights of 23rd March 2017 in the case *A-MV v Finland* (Application No 53251/13) was described, and commented upon, in the [April Report](#). This supplementary report comments on some aspects of particular relevance in Scotland, in the light of the continuing work of Scottish Government towards reform of adult incapacity legislation, and potentially at least some aspects of associated legislation; and a discussion which took place at an Update Guardianship and Intervention Conference in Glasgow on 26th April 2017.

At the end of 2015 Scottish Government consulted upon its UN CRPD Draft Delivery Plan 2016-2020, and upon the Scottish Law Commission's [Report on Adults with Incapacity](#), which report proposed reforms to the Adults with Incapacity (Scotland) Act 2000 ("2000 Act") designed to ensure compliance with the provisions of Article 5 of the European Convention on Human Rights on deprivation of liberty. The Scottish Government Consultation

invited wider comment on possible reform to the 2000 Act. At a key meeting between the Scottish Government official leading the consultation process and the Mental Health and Disability Sub-Committee of the Law Society of Scotland ("MHDC"), discussion extended to matters of interface between the 2000 Act and related areas of legislation, and the Society was encouraged to submit its views on these wider topics. The Society did so. It made submissions about reforms necessary to achieve compliance with the UN Convention on the Rights of Persons with Disabilities, and general reforms of the whole area of legislation. That submission was made in March 2016, and was followed by publication on 6th June 2016 of the Three Jurisdictions Report "[Towards Compliance with CRPD Art 12 in Capacity/Incapacity Legislation across the UK](#)". MHDC provided half of the members of the core research group. In consequence of these developments, and wide-ranging and ongoing general debate in Scotland, Scottish Government finds itself engaged in a major law reform exercise. Imperatives include, but are not limited to, requirements to comply with Article 6 of the European Convention and with the UN Convention, and significant practical issues such as the currently unacceptable consequences of delayed discharges from hospital care because of both procedural and operating difficulties under present legislation. It is understood that Scottish Government has increased the resources for addressing this law reform process. Further, and more wide-ranging, consultation is expected later this year.

The following repeats quotations from the judgment in *A-MV v Finland* already quoted in the coverage last month, but with some specific

comments relevant to practice and reformed legislation here in Scotland.

Briefly, in *A-MV v Finland* the Court of Human Rights considered circumstances in which a mentor appointed by a court to a man with intellectual disabilities refused the man's wish to move home to the other end of the country. The European Court of Human Rights accepted that the man's right to a private life under Article 8 of the European Convention was interfered with. Was that interference justified? Did the UN Convention require that the man's will and preference in the matter be not only respected, but implemented, regardless of the mentor's reasons for refusing to permit the move?

In a context such as the present one, the interference with the applicant's freedom to choose where and with whom to live that resulted from the appointment and retention of a mentor for him was therefore solely contingent on the determination that the applicant was unable to understand the significance of that particular issue. This determination in turn depended on the assessment of the applicant's intellectual capacity in conjunction with and in relation to all the aspects of that specific issue,

Capacity must be assessed specifically by reference to the matter in question.

[T]he Court is satisfied that the impugned decision was taken in the context of a mentor arrangement that had been based on, and tailored to, the specific individual circumstances of the applicant.

To be ECHR-compliant, powers under any appointment must be tailored to the individual's

specific circumstances. That is well accepted as required practice under the 2000 Act, but there are increasing current concerns that in many cases serious under-funding of legally aided work under the adult incapacity jurisdiction means that solicitors are not being remunerated for time spent adequately tailoring powers sought to need in each individual case, or the same is achieved by constant abatements to Legal Aid accounts generating significant costs in unremunerated time to dispute them, however absurd and inappropriate they might be. The pressures to employ comprehensive "catch-all" lists of powers in all applications are significant. In a matter for which Scottish Government carries responsibility, there is cause for concern whether this situation violates procedural rights under Article 6 of the European Convention, private rights under Article 8 and, in association with these, the right to non-discrimination under Article 14.

[T]he impugned decision was reached on the basis of a concrete and careful consideration of all the relevant aspects of the particular situation.

In relation to any proposed intervention, all of the circumstances must be taken into account.

[T]he decision was not based on a qualification of the applicant as a person with a disability. Instead, the decision was based on the finding that, in this particular case, the disability was of a kind that, in terms of its effects on the applicant's cognitive skills, rendered the applicant unable to adequately understand the significance and the implications of the specific decision he wished to take, and that therefore, the applicant's well-being and interests

required that the mentor arrangement be maintained.

Intervention must be based not on the existence of a disability, but on assessment of specific relevant cognitive skills in relation to understanding of the matter in question.

The Court is mindful of the need for the domestic authorities to reach, in each particular case, a balance between the respect for the dignity and self-determination of the individual and the need to protect the individual and safeguard his or her interests, especially under circumstances where his or her individual qualities or situation place the person in a particularly vulnerable position.

In each particular case, it is necessary to balance respect for dignity and self-determination against protecting the individual and safeguarding the individual's interests. The degree of vulnerability of the individual is relevant.

The Court considers that a proper balance was struck in the present case: there were effective safeguards in the domestic proceedings to prevent abuse, as required by the standards of international human rights law, ensuring that the applicant's rights, will and preferences were taken into account. The applicant was involved at all stages of the proceedings: he was heard in person and he could put forward his wishes. The interference was proportional and tailored to the applicant's circumstances, and was subject to review by competent, independent and impartial domestic courts. The measure taken was also

consonant with the legitimate aim of protecting the applicant's health, in a broader sense of his well-being.

The following procedural requirements must be satisfied for any intervention contrary to the will of the individual to be ECHR-compliant.

Firstly, the individual should be involved at all stages of proceedings, and should be heard in person to put forward his wishes. Secondly, the intervention must be subject to review by competent, independent and impartial domestic courts.

It was the first of these that led to some debate, after I had presented the above quotations and comments largely as above at the conference on 26th April. On the first point, I further commented that in formal proceedings this probably requires separate legal representation for the adult, in appropriate cases, to ensure that the adult's own rights, will and preferences are adequately submitted and advocated. That would appear to be necessary, having regard to the combined effects of Article 6 of the European Convention as to procedural fairness and of Article 12.4 of the UN Convention requiring safeguards including respect for the rights, will and preferences of the individual (the same phrase as was used by the European Court in the last quotation above). That is a role distinct from, and potentially in conflict with, that of a safeguarder or curator *ad litem*. At the conference a solicitor spoke to experience of acting for an adult when there was also a solicitor acting as safeguarder. There is a fundamental question as to whether the provisions of section 3(5) of the 2000 Act for both a safeguarder and a separate person to

“convey the views” of the adult, are only intended to be applied where the adult has not instructed the adult’s own representation. The solicitor with this experience pointed out that an adult faced with a report and submissions from a safeguarder which do not accord with the adult’s own will and preferences, can well feel that the odds are being unfairly stacked against him or her. It would be interesting to know the outcome if appointment of a safeguarder were to be opposed by a solicitor instructed by the adult, simply on the basis that as the adult is represented, the appointment of a safeguarder is inappropriate, and was not intended by the legislature to be competent in that situation.

The second requirement above leads to questions about the meaning of “competent”. Is it “competent” in the narrow legalistic sense of having power to decide the matter, or does it extend to the ordinary meaning of “competence” pointing to a requirement for a court or tribunal sufficiently specialised to have the necessary competence, in that broader sense, to discharge the responsibilities of decision-makers under both the principles in section 1 of the 2000 Act and the application of the safeguards required by Article 12.4 of the UN Convention? Even without regard to the UN Convention, the section 1 principles of the 2000 Act have created an inquisitorial, rather than adversarial, jurisdiction. These are points which may well require to be developed as the law reform process proceeds.

In *A-MV v Finland*, the court held that neither Article 8 of ECHR, nor the right to freedom of movement under Article 2 of Protocol 4 to ECHR, had been violated. As the previous coverage referred to confirms, that case is substantially consistent with both the decision of the German

Federal Constitutional Court of 26th July 2016 in the case 1 BvL 8/15 (covered in the [November 2016 Newsletter](#)) and the interpretation of the UN Convention in the Three Jurisdictions Report. It is perhaps time to point out that these emerging limitations upon the views expressed by the UN Committee on the Rights of Persons with Disabilities do not detract from the imperatives of compliance with CRPD and with the main thrust of the assertions of the UN Committee, particularly as to the importance of the obligation to respect the rights, will and preferences of the individual.

Adrian D Ward

Mental Welfare Commission for Scotland and Centre for Mental Health and Capacity Law: Law Reform Scoping Exercise

Since 2016 the Mental Welfare Commission and Centre for Mental Health and Capacity Law have jointly been conducting a law reform scoping exercise focusing on the Adults with Incapacity (Scotland) Act 2000 and Mental Health (Care and Treatment) (Scotland) Act 2003 and possible areas for reform particularly in light of the requirements of the UN Convention on the Rights of Persons with Disabilities and *Cheshire West* ruling. Graded guardianship, unified mental health and mental capacity legislation and the basis for non-consensual care and treatment have been considered. The project will launch its resultant report at a seminar hosted by the Centre at Edinburgh Napier University on 30th May 2017.

Jill Stavert

Revised OPG fees

With effect from 1st April 2017 some fees – mostly the larger ones – payable to the Public Guardian have been modestly increased. Others – generally the smaller ones – remain unchanged. The new schedule of fees is reproduced [here](#). While creeping increases, albeit small ones, could be regarded as cause for concern, and while we have identified elsewhere possible arguments for subsidising and thus reducing costs in relation to powers of attorney, there is nothing in these changes to reawaken the anger at the doubling of registration fees for powers of attorney within a short period reflected in my article “Out of the wrong pocket” at 2008 JLSS 9.

Adrian D Ward

McCann v Scottish Ministers

On 11th April the UK Supreme published its ruling [\[2017\] UKSC 31](#) on the challenge to the No-Smoking policy at the State Hospital in Scotland.

This ruling is somewhat reminiscent of the 2011 Court of Session *L v Board of State Hospital*¹ (‘junk food ban’) ruling in terms of Article 8 ECHR (the right to respect for private and family life). It also reminds those of us who are immersed in CRPD discourse of the challenges that currently face individuals and clinicians in high security settings.

Mr McCann’s challenge related to the lawfulness of the ban on smoking in the grounds of (but not indoors) the State Hospital and on home visits

which had been created by a comprehensive ban that prevents detained patients from smoking anywhere.² It related to not only this comprehensive no smoking ban but also a prohibition of tobacco products and the power to search for and confiscate such products. This is the ruling on appeal from the Court of Session.³

There were three principal issues in this challenge:

1. Whether the smoking ban was unlawful on the basis that it did not adhere to the principles in section 1 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Act”) or the requirements of subordinate legislation made under the 2003 Act.
2. Whether the smoking ban was a violation of Article 8 ECHR because it unjustifiably interfered with his private life.
3. Whether, on the basis of Article 14 ECHR (non-discrimination) in combination with Article 8 ECHR, the smoking ban had treated the appellant in a discriminatory manner which cannot be objectively justified in comparison with people detained in prison and in other hospitals and members of the public who remain at liberty.

A reading of the full judgment is highly recommended but, in summary, Lord Hodge (with whom the other Justices agreed) delivering the judgment, stated that:

¹ *L v Board of the State Hospital* (2011) CSOH 21.

² Mr McCann moved to a medium secure setting in 2014 and a similar application relating to a smoking

ban relating to this setting was stayed pending the outcome of the appeal relating to the State Hospital.

³ *McCann v The State Hospitals Board for Scotland* (2014) CSIH 71.

1. The comprehensive smoking ban did not fall within the scope of the 2003 Act. In other words, it was not a treatment decision made under the 2003 Act but rather a management decision taken under the National Health (Scotland) Act 1978.
2. The comprehensive ban itself amounted to an interference with Mr McCann's Article 8 ECHR right which must therefore be justified in terms of it being lawful, necessary and proportionate and in pursuit of a legitimate aim (Article 8(2) ECHR). Lawful long term detention inevitably curtailed a detainee's autonomy and restrictions that were a necessary part of such detention would not fall within the scope of Article 8. However, subject to this, there was a need very carefully to ensure that the patient's autonomy that remained was respected as far as is possible.⁴ That being said, in this particular case, this comprehensive ban was justified in terms of Article 8 in that it was (i) in accordance with law; (ii) pursued a legitimate health related objective; (iii) was rationally connected to such objective; and (iv) was proportionate. For this reason, there was no Article 14 ECHR violation.
3. The prohibition of tobacco products and the power to search patients and visitors for such products and confiscate them fell within to scope of the 2003 Act and related regulations ⁵ because it related to the patient's autonomy in the context of 2003 Act care and treatment. In this case, there appeared to be no consideration of the principle in section 1(4) of the 2003 Act (that

the measure should be the minimum restriction of the patient's freedom as is necessary in the circumstances). The prohibition and search and confiscation powers therefore infringed Mr McCann's Article 8 ECHR because they did not comply with the 2003 Act and thus could not meet the Article 8(2) requirement that any limitation of his Article 8 right is 'in accordance with the law'.

Jill Stavert

Permanence order – parents with “learning difficulties”

In *West Lothian Council v B* [2017] UKSC 15, 2017 SLT 319, the Supreme Court allowed an appeal from a decision of the Second Division of the Court of Session, which had upheld a decision of a Lord Ordinary, granting a permanence order under the Adoption and Children (Scotland) Act 2007 in respect of a child whose parents were described as having “experienced learning difficulties throughout their lives”. To the extent that the case concerns the proper interpretation of section 84(5)(c) of that Act, and how the responsibilities placed upon the judge under that section should be discharged, it could be said to be concerned principally with matters of child law, rather than the apparent disabilities of the parents. There is no reference in the decision to adult incapacity law. Nevertheless, in applying for the permanence order the local authority relied – in relation to the child's parents – upon the test in section 84(5)(c)(ii) that “where there is such a person [which would include such a person as each parent in this case], the child's residence with the person is, or is likely to be,

⁴ Lord Hodge at 50-54.

⁵ The Mental Health (Safety and Security) (Scotland) Regulations 2005 (SSI 2005/464).

seriously detrimental to the welfare of the child". What was made crystal clear by the Supreme Court, and in which that court found that the judge at first instance had failed, was that this required the court to be satisfied, in relation to each of the child's parents, that the child's residence with that parent was likely to be seriously detrimental to her welfare, and that in this matter the judge was the primary decision-maker who was solely responsible for deciding issues arising under this legislation on the basis of his own findings upon the evidence. Any finding that the test under section 84(5)(c)(ii) was met should make clear the detriment which the court was satisfied was likely to arise, why the court was satisfied that it was likely, and why the court was satisfied that it was serious. The Lord Ordinary had not set out the material provisions of section 84 and related provisions. He had not identified the separate conditions, each of which had to be satisfied for a permanence order to become appropriate. In general, he had approached the matter on the basis of considering whether the local authority's actions had been justified, rather than basing a decision upon his own findings in fact. The Second Division had appeared to find that the threshold test had been satisfied without clearly explaining the exact nature of the apprehended detriment, why it was considered serious, and why it was considered likely. Contrary to requirements of statute, the child's racial origin and cultural and linguistic background had not been considered. The court stated other criticisms.

What is perhaps relevant to adult incapacity practice is the emphasis by the Supreme Court

upon the importance of analysing and applying in careful and reasoned manner all of the statutory tests relevant to a decision whether to make, or to refuse, an order provided for by statute. In the context of the adult incapacity jurisdiction, this probably does not discourage taking some matters to the final step of appeal to the Supreme Court, even though outcomes prior to that may have been discouraging.

Adrian D Ward

RAR v A University

RAR v A University [2017] CSIH 11,⁶ has significant implications in the field of actual or potential intellectual disabilities, and more generally for the administration of justice across areas which in particular include adult incapacity law and general intellectual disability law, even although no point of adult incapacity law arose in it, nor was there any reference to incapacity or mental health legislation, nor to the UN Convention on the Rights of Persons with Disabilities. In a narrow sense the decision could be seen as particular to its own facts: at [42] of the Decision, for example, it was noted that "*a number of statutory provisions and decided cases were cited to us in argument. We have taken them fully into account, but in view of the decisions we have reached we do not need to refer to many of them and certainly not in any great detail.*"

Yet the long and careful decision of the Second Division, Inner House of the Court of Session – occupying 28 pages of the Scots Law Times report – has significance and points to a need for investigation and research of key importance, across the areas of practice which it addresses,

⁶ Reported under the name *R v A University* 2017 SLT 284.

particularly as to the interaction between those areas of practice and issues or potential issues of intellectual disabilities: and the manner of disposal of the case sets a standard, particularly in relation to matters in which issues of incapacity and intellectual disability could feature, which is potentially profound.

The claimer had embarked on a three-year course of study for a PhD. All seems to have gone well until part-way through the third year, when, as the Opinion of the court delivered by Lord Glennie put it, "matters took a turn for the worse". There was a dispute about whether the claimer – identified as "R" – should be first-named author of an academic paper. In the apparent absence of a prompt and sensible resolution of that issue, a dreary history developed of complaints, supposed suspensions, increasingly tangled procedures and a refusal to re-enrol R as a student. Intertwined with these issues was a hardly surprising deterioration in R's health, and at least suggestions that she required psychiatric assistance. A petition for judicial review by R was dismissed at first instance. That no issues of incapacity arose at least at the time of the hearing may be taken from the narration in [2] of the Opinion of the Second Division that: "*The petitioner represented herself before us, as she had before the Lord Ordinary. Although not trained as a lawyer, and although English is not her first language, she presented her arguments with clarity and precision. We are grateful both to her and to counsel, who appeared for the University, for their help in enabling the many and potentially diffuse issues raised in the appeal to be properly focused.*"

The appeal was successful. If one jumps through most of that lengthy judgment to the

outcome, the Second Division held that the University, contrary to its own assertions, did not at any time either suspend or purport to suspend R under the provisions of its own Code of Practice on Student Mental Health; that from a stated date (6th August 2009) at the latest the University's suspension of R purportedly under its Code of Student Discipline was without any lawful basis and was unreasonable; that a demand by the University that R provide medical evidence of her fitness to return to her studies before permitting such return was a demand that, in all the circumstances, the University was not entitled to make; and that the University's refusal to register R for the academic year 2009/2010, insofar as based in whole or in part on the supposed suspension under the University's Code of Student Discipline, was to that extent unreasonable.

From a reading of the judgment, it would appear that on the one hand there is evidence that those responsible for communicating with R on behalf of the University were genuinely concerned about her health and wished to point her towards assistance which they thought might be necessary. On the other hand, firstly, the considerable narration of facts in the judgment does not disclose that the University went beyond considering the impact of R's health issues upon its procedures, to addressing the possibility that the way in which it handled matters, and the inherent nature of its procedures, evidently impacted upon the health issues, and may have been their cause. And secondly, as is evident from the outcome, the University failed in significant respects to comply with its own procedures, and to interpret them correctly.

This leads to three observations, one specific to academia but the others of wider potential application.

1. As narrated above, the problems which led to all of the procedural issues and subsequent litigation started with a question about the order in which names should appear on an academic paper. I doubt whether anyone with any contacts with academia is unaware of much angst caused by that issue. I must declare an interest of sorts, in that no lawyers in my experience have ever been troubled by the simple solution of listing names in alphabetical order, so that in any joint authorship over three decades my name has always appeared last – until, last year, the “Three Jurisdictions Report” from the Essex Autonomy Project, produced jointly by academics and practitioners, elevated me to fourth out of eight in non-alphabetical order: a matter of such memorable significance that I had to pull out a copy of the report to check that when writing this piece. At risk of prompting howls from my many good friends in academia, it does seem to me that there ought to be absolutely clear and robust regulation of such matters, in terms of both clear and robust guidelines, and speedy and accessible systems of mediation and arbitration. It would also seem that, by reference to the very definition of “education”, in cases of doubt there should be a presumption in favour of according pole position to a student who has done most of the hard work, albeit under guidance, the main reward for the mentor being the outcome achieved by the student.

2. This and the next point are relevant to the whole field of complaints, grievance and disciplinary procedures across employment, academia and the professions, and indeed similar procedures in any context. It is absolutely right that the conduct of any such procedures should where appropriate be combined with humanity and concern for the wellbeing of individuals embroiled in those procedures. However, far from being inconsistent with procedural correctness, that cannot realistically be achieved unless there is absolute procedural correctness, and complete clarity about the status and content of communications to those drawn into such procedures.

3. This leads to a concern about whether the potential impact of such procedures upon the health, including mental health, of those primarily engaged is adequately understood, and even if it is, whether such understanding is adequately translated into achieving procedural fairness (including, where relevant, procedural fairness in terms of Article 6 of the European Convention on Human Rights). Linked to that is whether procedures robustly ensure that where persons at the centre of them appear to be affected by intellectual disabilities, whether to some extent generated by the proceedings themselves or not, all disadvantages and discrimination resulting from those disabilities, in comparison with the position of anyone not suffering from such disabilities, are removed in accordance with the requirements of the UN Convention on the Rights of Persons with Disabilities (ratified without reservation by the United Kingdom). I would draw attention to a

strikingly significant article “Judicial approaches to health regulation” by Graeme M Henderson at 2017 SLT (News) 17. In his first sentence Mr Henderson wrote: *“It is not unknown for health regulators to convene disciplinary hearings where the health professional (HP) does not turn up and is not represented.”* Two paragraphs later he wrote: *“Despite efforts by employers, regulators, unions, lawyers and others, a significant number of HPs do not engage with the disciplinary process when it is initiated by their regulators. As a result they are likely to have their career curtailed, restricted or terminated without them having ever presented their side of the story. It is not unknown for them to seek help when it is thought to be too late.”*

It is no doubt possible that some persons subject to disciplinary proceedings will try to wriggle off the hook, or at least postpone matters indefinitely, by inventing or at least exaggerating health conditions. There will be some who have simply stopped caring. But it would appear, including from the cases considered by Mr Henderson in his article, that this apparent lack of engagement can occur even on the part of those who do dispute allegations and are not inhibited from disputing them and participating for reasons that are in any way invented. There appears to be a clear need for thorough investigation of the effect of the whole range of procedures mentioned above upon those at the centre of them, regardless in each case of what might be the ultimate proper determination of rights and wrongs. That research might contribute in a significant number of cases towards achieving prompt and fair outcomes, and in all cases towards ensuring procedural fairness.

Finally, in an era when the processes of the administration of justice are under almost constant challenge, and when it is not infrequently suggested that those engaged in those processes are motivated only by personal profit, the care given by the Second Division to the disposal of this case, and the manner in which they did so, if it does not set new standards at least reaffirms what should be best practice for all engaged in the administration of justice, in a manner which (at least to me, and with due respect to our judiciary) seems to be highly commendable. It is an approach which ought to commend itself in particular to all engaged in the adult incapacity jurisdiction, governed as it is by the statutory requirement to achieve benefit in any intervention (section 1(2) of the Adults with Incapacity (Scotland) Act 2000, and similar requirements in related legislation), and where real benefit cannot be achieved unless wounds are healed among people and agencies who will still have to relate to each other. Often in the adult incapacity jurisdiction, by the time a matter comes to final disposal there will be a lengthy history during which the wounding will have been exacerbated. In *RAR v A University*, paragraph [95] of the judgment commenced: *“What remedy we should grant is a matter of some difficulty.”* The court could have taken the narrowly legalistic position that in practical terms all of the matters before it were “water under the bridge” because of the lapse of time, and could have pronounced some narrowly legalistic final decision. The supposed suspension which R sought to have reduced *“is now spent and reduction would achieve nothing.”* Similarly, the decisions not to register her for the academic year 2009/2010 *“are of no current significance in 2017”*. But the court refused to take any easy option: paragraph [95] concludes:

"On the other hand, to refuse any remedy would mean that the petitioner's complaints, which we have found in part to be justified, would not be vindicated by any formal order. That would not be right."

In human rights language, the court could be said to have considered itself obliged to afford "just satisfaction". It decided to deal with the matter by way of declarator. The judgment states that it proposed to grant a declarator of the findings briefly summarised in the fourth paragraph of this article. The court explained that it proposed to grant an interlocutor in such terms "in due course". In support of my commendation of the approach of the court to its judicial responsibilities, I can do no other than allow the beautifully balanced wisdom and expression of the final substantive paragraph of the Decision [102], in its entirety, to speak for itself.

We would hope that our conclusions on the disputed issues might provide a basis on which the parties can get together to see whether there is any reasonable prospect of the petitioner being allowed to complete her PhD thesis. We were told that all that was required was for it to be written up, a task that at one time would have taken no more than about six weeks, though that estimate may not still be valid given the time that has passed since work was done on the thesis. It is in everyone's interests for this to be done. While this court cannot allow itself to be drawn into micromanaging the future relations between the parties, we are conscious that there are some issues which may not have been addressed in our interlocutor the resolution of which might assist parties in their attempts to move forward; and it may be that some

further orders are appropriate in light of the matters covered by this opinion. For that reason, before issuing any final interlocutor we propose to put the case out by order on a date approximately eight weeks from the date of this opinion, to enable parties in the meantime to discuss matters and see whether the court can provide any assistance. We emphasise that that is not intended as an opportunity to re-argue parts of the case. It is simply to see whether any other orders ought properly to be made in light of this opinion."

It is hoped that this case, and the general lessons suggested above, might reduce the number of occasions upon which such sad histories collide with effective application of wise common sense only before an appeal court some years after relevant events.

Adrian D Ward

Centre for Mental Health and Incapacity Law, Rights and Policy is now Centre for Mental Health and Capacity Law!

The Centre for Mental Health and Incapacity Law, Rights and Policy at Edinburgh Napier University has been renamed the Centre for Mental Health and Capacity Law. The decision to do this was based on the desire to have a shorter more functional title and also, importantly, to more closely reflect that it remains very much focused on considering these areas of law in light of developing human rights standards. The remit of the Centre remains entirely the same.

Jill Stavert

Visit from the Norwegian Civil Affairs Authority

In 2013 the Norwegian Civil Affairs Authority (“SRF” – Sivilrettsforvaltning) was appointed as the Central Guardianship Authority in Norway, at the same time as a new guardianship regime was introduced, and for the first time a statutory regime of powers of attorney and advance directives for incapacity was introduced. I had previously advised the Nordic countries on introduction of powers of attorney regimes, and in March 2015 gave a seminar at the Norwegian Ministry of Justice on topics including powers of attorney and the UN Disability Convention. In January 2017 I was asked to help arrange a study visit to Scotland by a team of six from SRF. The visit took place on 23rd and 24th March 2017, and was hosted by the Law Society of Scotland. Sandra McDonald, Public Guardian, gave a presentation and engaged in lengthy discussion: the work of her Office, how it is done and organised, and the systems that support it were all of great interest to the SRF team. For her part, Sandra was impressed by the resources which they have available. Colin McKay, Chief Executive of the Mental Welfare Commission for Scotland, also gave a presentation and had discussions. I discussed the UN Disability Convention, in terms of its consequences both for law and for good practice.

In 2015 the SRF team were already concerned about how they could proactively promote the use of powers of attorney, and were interested in what I could tell them about the then relatively early stages of the “mypowerofattorney” campaign. During the March visit the full team who have been taking forward the “mypowerofattorney” campaign and assessing

its effectiveness gave a fascinating presentation, which resulted in much further discussion, extending into such questions as to whether there would be overall benefit to the public purse – in terms, for example, of savings generated by reductions in delayed discharges and other advantages of having someone immediately available to make decisions – if the setting up of powers of attorney were to be subsidised by the state.

Christine McLintock, Immediate Past President of the Law Society of Scotland and convener of the Society’s Public Policy Committee, attended and was presented by the SRF team with a charming little statute of a polar bear.

Adrian D Ward

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Alex is recommended as a 'star junior' in Chambers & Partners for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, including as Wellcome Trust Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. He is on secondment to the Law Commission working on the replacement for DOLS. 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. 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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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](#).

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



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Adrian is a practising Scottish solicitor, a consultant at 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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Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee, Alzheimer Scotland's Human Rights and Public Policy Committee, the South East Scotland Research Ethics Committee 1, and the Scottish Human Rights Commission Research Advisory Group. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV [click here](#).

Conferences

Conferences at which editors/contributors are speaking

Mental Welfare Commission and Centre for Mental Health and Capacity Law Launch of Law Reform Scoping Exercise Report

Jill will be speaking at this seminar at Edinburgh Napier University (Craiglockhart Campus) on 30 May 2017. Please contact [Rebecca McGregor](#) for more details.

'Supporting Employee Mental Health and Wellbeing'

Jill is speaking at this Holyrood Events/MHScot conference on 'Supporting Employee Mental Health and Wellbeing' on 1 June in Edinburgh details. For more details, see [here](#).

Mental Health and Human Rights

Tor will be speaking at this free event organised by the HRLA Young Lawyer's Committee in London on 22 May. For details and to reserve a place, see [here](#).

Essex Autonomy Project Summer School

Alex is speaking at the Essex Autonomy Project Summer School, which this year has the theme *Objectivity, Risk and Powerlessness in Care Practices*. The multi-disciplinary programme will give delegates the opportunity to discuss the challenges of delivering care in a framework that supports and empowers individuals. For full details, and to apply online, please see the [Summer School website](#).

Deprivation of Liberty Safeguards: The Implications of the 2017 Law Commission Report

Alex is chairing and speaking at this conference in London on 14 July which looks both at the present and potential future state of the law in this area. For more details, see [here](#).

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to Mind in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next Newsletter will be out in early May. 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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