MENTAL CAPACITY REPORT: SCOTLAND

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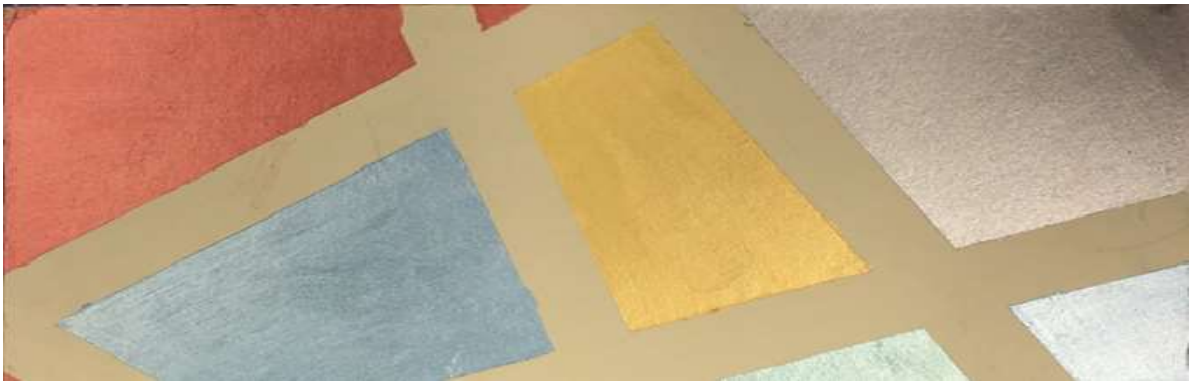

Welcome to the December 2019 Mental Capacity Report – our 100th*. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: an important guest article from Inclusion London, and reflections from Tor and Alex on 100 issues;

(2) In the Property and Affairs Report: a report of an interview with HHJ Hilder and deputyship refunds;

(3) In the Practice and Procedure Report: the administration of appeals, and important judgments shedding light by analogy on fact-finding, costs and vulnerable witnesses;

(4) In the Wider Context Report: assisted dying, Article 2 obligations and informal patients, and reports of developments in Northern Ireland, Jersey and wider afield;

(5) In the Scotland Report: an important judgment on guardianship and deprivation of liberty, a judicial review of conditions of excessive security and further observations on the operation of 'foreign' powers of attorney in England & Wales from the Scottish perspective.

You can find all our past issues, our case summaries, and more on our dedicated sub-site here. If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the Small Places website run by Lucy Series of Cardiff University.

Happy holidays, and we will return in February 2020.

* Confession: there was a numbering glitch a long way back which means that this is no.99 in this series, but in our defence no.1 in fact represented the formalisation of informal updates Tor and Alex had been doing for several months.

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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

Guardianship, deprivation of liberty, and human rights competence

The Judgment of Sheriff Janys M Scott QC, sitting at Jedburgh, in *Scottish Borders Council v AB*, an application for a welfare guardianship order opposed by the adult AB, in one sense could be seen as turning upon the unusually extreme level of risk to which the adult was exposed, but on the other hand addresses points of such fundamental significance to Scotland's adult guardianship regime in the modern human rights context as to be required reading for all practitioners in the field.

The Judgment of Sheriff Scott is available here. The extreme risks included the death of the adult if she resumed contact with former associates and they resumed injecting her with drugs at a level which she had previously been accustomed to, after she had not taken drugs for six months. The points of general significance addressed with clarity and care in the Judgment include these:

- Whereas the reporting mental health officer considered that the powers sought in the application were "protective, rather than a deprivation of liberty", the sheriff recognised that exercise of such powers would amount to a deprivation of liberty in terms of Article 5 of ECHR, and took care to ensure that the order that she granted complied with the requirements of Article 5.
- The sheriff recognised the significance of AB's assertions of her right to self-determination; took account of the relevance of the United Nations Convention on the Rights of Persons with Disabilities; and in particular considered the adult's rights under Article 19 of CRPD of her right to choose her place of residence and where and with whom to live, on an equal basis with others, and not to be obliged to live in a particular living arrangement.
- The sheriff rejected the applicants' submission with reference to the definition of "incapable" in section 1(6) of the Adults with Incapacity (Scotland) Act 2000, that the adult was incapable of acting. Upon careful assessment of the evidence, the sheriff held that the adult was capable of making decisions and communicating decisions, but that "the problem is that she cannot understand the consequences of her decisions".

- The sheriff emphasised that her finding of incapacity did not of itself justify overriding the expressed wishes of the adult.
- The sheriff considered carefully whether the adult's welfare could, in terms of section 58 of the 2000 Act, be adequately safeguarded or promoted by means other than a guardianship order.
- The sheriff considered rigorously all of the powers sought and rejected most of them as being unnecessary.
- While the sheriff did not expressly refer to the requirement of Article 12.4 of CRPD that measures relating to the exercise of legal capacity should apply for the shortest time possible, she was in fact careful to comply with that requirement.
- The case addressed circumstances in which protective measures available in relation to children fall away at a particular age (in the present case, the age of 18 being the maximum age to which the jurisdiction of a children's hearing can apply).
- AB's evidence was given by affidavit, presented by her solicitor Ms Millard. The sheriff noted that "[Ms Millard] had visited AB every three weeks since March and had established a good working relationship with her. This was apparent from the affidavit stating AB's wishes clearly and forcefully." The hearing took place on 9th October. Practitioners might find it useful to refer Scottish Legal Aid Board to this part of the Judgment in the event of discussion about the amount of client contact necessary in such cases to ensure that a party's position is adequately understood, expressed and presented so as to achieve human rights requirements for access to justice and fairness.
- Although the decision does not explicitly refer to the right to protection from abuse under Article 16 of CRPD, the case demonstrates the proper approach to balancing that requirement against principles in other Articles of CRPD.

It is sadly not particularly uncommon for vulnerable young women to be exposed to abuse, including sexual abuse; nor is it particularly unusual for a local authority to apply for a guardianship order for the purpose of safeguarding the adult in such circumstances. We commented here on the decision of Sheriff Susan A Craig, sitting at Livingston Sheriff Court, in the case of *West Lothian Council v KB*. KB in the Livingston case, like AB in the Jedburgh case, did not recognise that the conduct towards her was exploitative and abusive, and was opposed to the granting of the order sought. The notes appended to the interlocutors in both cases commenced with precisely the same words: "This was an anxious case ….", reflecting the heavy onus upon the sheriff as decision-maker in what is, unusually in Scots law, an inquisitorial jurisdiction with responsibility placed upon the sheriff to comply with the principles in section 1 of the 2000 Act, regardless of what evidence is led and what submissions are made. The difference between these cases is that in *KB* the exploitative relationship was a long-term and stable one with one individual male, whereas AB had been subjected to abuse by several males who frequented AB's flat in "Town X".

In *AB*, the sheriff drew attention to the powers available under the Adult Support and Protection

(Scotland) Act 2007. The basic approach of the 2007 Act is to remove risk from an adult, rather than remove an adult from risk; but in *AB* it had to be conceded that even if appropriate orders (under the 2007 Act or otherwise) were made, or sanctions imposed, in respect of past abusers, there was a significant risk that others would prey upon her in similar fashion. I am indebted to Ms Lucy Millard of Millard Law for explaining that point, and for providing clarification beyond that in the Judgment as to AB's relevant background, which was as follows.

There was a background of conflict between AB and AB's mother. In August 2018, AB was charged with vandalism and breach of the peace at her mother's address. The alleged offences were remitted to a children's hearing, which made a compulsory supervision order. A measure for secure accommodation was subsequently made by the children's hearing. She was moved to appropriate accommodation in Town Y. The jurisdiction of the children's hearing terminated upon AB's 18th birthday. AB's declared wish was to return to Town X and resume her association with her abusers. The local authority, Scottish Borders Council, obtained an interim guardianship order with power to decide where AB should reside and convey her back to that residence.

On 6th February 2019, Scottish Borders Council were granted an antisocial behaviour order banning AB from going within 100 metres of her mother's residence. AB breached the order, appeared before the sheriff, and was secured in specified secure accommodation in terms of an emergency variation to the compulsory supervision order. So far as Ms Millard is aware, there have not been any criminal proceedings against any of the perpetrators of abuse against AB, AB not at any time having sought to make reports of alleged abuse to the police.

As is narrated in the Judgment, AB saw the abusers as friends, and one of them as a partner, notwithstanding that she had ben observed to be bruised and cut, with an infected wound, and with cigarette burns inflicted by her "partner". The abusers moved into her flat and took her money. They obstructed contact between her and the social worker allocated to supervise her under the compulsory supervision order, and destroyed the mobile phone which the social worker had provided to her to let her maintain contact. The social worker resorted to standing by the ATM where he knew that AB's "partner" would take her to draw her benefits and hand them over. The abusers used her for sex and gave her drugs.

Evidence before the court suggested that AB had a borderline learning disability. There was reference to an assessment that had been carried out in the summer of 2018 by a consultant clinical psychologist, who did not give evidence. There was no current assessment of learning disability. The sheriff concluded that she could not treat suggested learning disability as the primary source of the problem. Two psychiatrists who gave evidence disagreed as to whether AB had an autistic spectrum disorder. However, both reported symptoms of complex post-traumatic stress disorder. The sheriff accordingly based her Judgment on the agreed diagnosis of complex PTSD. The evidence indicated that the PTSD could be addressed over time, with the potential to resolve AB's mental disorder.

Having concluded that AB suffered from a mental disorder in respect of her PTSD, and that in consequence she was incapable of understanding the consequences of her decisions in relation to the abusers, and having considered possible alternatives, the sheriff concluded that a guardianship order was necessary. However, the sheriff carefully considered all of the powers sought and rejected most of them, granting only power to decide where AB should reside on a temporary or permanent basis, power to return her to that place, and power to open, read, attend to, and as appropriate reply to, any mail or other communications addressed to or received by AB, or to make arrangements to deal with her mail. That third power was granted upon acknowledgement by AB that she would benefit from help with such communications, including communications intimating medical and other appointments.

The sheriff limited the duration of the order granted to a period of six months, making it clear that she expected that AB would receive treatment for her PTSD during that period, with the prospect that renewal would be unnecessary as successful treatment might enable her to regain insight into the consequences of her decisions. That relatively short duration also ensured that there would be judicial scrutiny of the deprivation of liberty, if it were to be continued.

As noted above, the decision does not explicitly mention AB's right to protection from abuse under Article 16 of CRPD. It was not necessary to mention it, because her need for protection was plainly obvious from the facts narrated. It extended to the need to safeguard her right to life under Article 10 of CRPD. It is sometimes suggested that Article 16 conflicts with the requirements of several other Articles, but that fails to appreciate that, in any document such as CRPD, there is a statement of principles which have to be balanced when addressing the facts of any particular case. Comment on Article 12.4 often focuses on the right for respect for the person's will and preferences, and suggest that this is a requirement to allow expressed will and preferences to prevail in all circumstances. It does not. The requirement in Article 12 is that "measures relating to the exercise of legal capacity" (including, in a Scottish context, guardianship orders) should "respect the rights, will and preferences" of the person. There are often conflicts among those three elements of rights, will and preferences. In AB's case, her "will and preferences" were to return to Town X and to resume association with her abusers. That would most certainly have violated her right to protection from abuse under Article 16, with the added risk that it might well have violated her right to life under Article 10. With reference to the prohibition of discrimination under Article 5, it has long been recognised that to protect, by putting special measures in place, is to discriminate. To apply any "reasonable accommodation" is self-evidently to discriminate, yet denial of reasonable accommodation is explicitly included in the definition of "discrimination on the basis of disability" in Article 2. The case of *AB* exemplifies an approach which carefully examines the extent to which any compulsion and/or failure to follow expressed "will and preferences" is necessary to ensure that Articles 10 and/or 16 are not violated; and if such measure is by that test necessary, to limit it strictly to the extent unavoidably necessary to achieve that purpose,

with full and careful compliance with all of the requirements of Article 12.4.

It is understood that there is to be no appeal.

Adrian D Ward

Appeals against excessive security

[*We are very grateful to Colin McKay, Chief Executive of the Mental Welfare Commission for Scotland, for contributing this case comment*]

One of the features which has been a source of pride to those involved in Scottish mental health law is the right of detained patients in medium or high secure settings to seek an order from the mental health tribunal requiring that a place at lower security be found for them.

Although the provision has been in effect since the coming into force in 2005 of the Mental Health (Care and Treatment) (Scotland) Act 2003, it has not been clear what remedy the patient has, if the relevant NHS Board fails to offer a place within the timescale set by the tribunal at the final stage of the process. Section 272 of the 2003 Act empowers the Mental Welfare Commission for Scotland to initiate proceedings in the Court of Session for specific performance of the statutory duty 'without prejudice to the rights of any other person', but it does not explicitly state what the patient can do at their own hand.

This right was initially afforded to patients in the high security State Hospital, and was extended to Scotland's three medium secure units by the Mental Health (Scotland) Act 2015. Unfortunately, there is considerable pressure on the low secure estate in Scotland, and some Boards have struggled to find low secure beds whose application has been upheld by the tribunal. These cases are now coming before the courts.

In the case of *Boyle v Greater Glasgow and Clyde Health Board* [2019] SC GLA 89, a patient at Rowanbank medium secure unit in Glasgow sought an order from the tribunal that he be accommodated in a low secure unit. At the first stage, in November 2016, the tribunal determined that he was held in excessive security and directed the Board to find a more suitable hospital within 3 months. They failed to do so, and in March 2017, the tribunal issued a final order directing the Board to find a suitable hospital by 16 June 2017. No such place was found until, finally, the patient was transferred to a low secure hospital on 6 December 2017.

The pursuer claimed damages, founding on an alleged violation of Article 5 of the European Convention of Human Rights, and a breach of the Board's statutory duties under sections 268 and 269 of the 2003 Act.

The sheriff found that there could be a claim for damages for breach of statutory duty under s269, but not s268. He was clear that the duties were framed in a mandatory form. He drew on comments by Lord Reed and Lady Hale in *G v Scottish Ministers* [2013] UKSC 79, to make clear that the tribunal order cannot 'simply be ignored, if no suitable alternative place is available or is likely to become available.' (para 69)

However, a claim for damages did not arise on the breach of the First Order – since the remedy at that stage was to return to the tribunal seeking a Second Order. 'The statutory compromise was that health boards were to be afforded a period of grace, variable from case to case but not

exceeding six months at best, in which to find suitable alternative accommodation for the trapped patient; but, after that period of grace, the boards would face civil proceedings if they failed to comply.' (Para 68)

Therefore, the maximum period in respect of which a claim for damages may apply in this case was the period from 16 June 2017 (expiry of the time limit in the Second Order) to 6 December 2017 (date of move).

Sheriff Reid dealt with the ECHR issue in short order. Drawing on the European Court of Human Rights ruling in *Ashingdane v UK* (1985) A 93, 7 EHRR 528, and the subsequent cases of *Munjaz* [2006] 2 AC 148 and *S v Scottish Ministers* 2015 SLT 362, he distinguished the *legality* of the detention from the *conditions* of the detention. The appeal concerned the latter. Since there was no suggestion that the patient was not lawfully detained, Article 5 was not relevant.

It does not appear that any consideration was given to the (admittedly very recent) Grand Chamber decision in *Rooman v Belgium* (Application no. 18052/11). In that case, the Grand Chamber said (para 208) that 'there exists a close link between the 'lawfulness' of detention of persons suffering from mental disorders and the appropriateness of the treatment provided for their mental condition.' It went on to say (para 210) that 'a specialised psychiatric institution which, by definition, ought to be appropriate may prove incapable of providing the necessary treatment.' It remains to be seen whether this evolving approach influences future cases.

There is little doubt that there will be further cases. The Mental Welfare Commission is aware of several patients who have not been transferred following an order at the second stage by the Tribunal. At least 3 patients have launched judicial reviews in the Court of Session.

In one case involving two patients, the Commission entered proceedings, because of the important issues of principle which were raised. A key concern was the argument that a health board should not be found to have breached their statutory duty if they have done all they can to find a suitable place, but this has proved impossible.

The case came before Lord Pentland on 28th November. In the course of the hearing, the health board abandoned its defence, places having been found for the two patients. The case will return to court in the New Year, to ensure that the patients have been moved, and to resolve expenses.

For the moment, therefore, Sheriff Reid's decision in *Boyle,* read alongside the Supreme Court ruling in *G,* is the main judicial authority – and that decision is very clear that Parliament was not 'expressing a mere pious aspiration' but was 'intending to create legal duties in the fullest sense with the intention of conferring upon persons correlative rights to enforce them and to be compensated for non-performance' (para 64).

Colin McKay,
Mental Welfare Commission for Scotland

Operation of "foreign" powers of attorney in England & Wales

Readers of this Scottish section may find it helpful to refer to the case report and comment on the English case "*re Various Applications Concerning Foreign Representative Powers*" [2019]

EWCOP 52. "Foreign representative powers" include Scottish continuing and welfare powers of attorney.

Many times over the years it has been necessary to point out that operation of a power of attorney, when capabilities are impaired, is as much an aid to overcome the consequences of such disabilities as is use of a wheelchair to overcome physical disabilities, and that to create difficulties in providing services to users of either type of aid equally amounts to disability discrimination; where the discrimination could perhaps be said to cross over from disability discrimination to discrimination on grounds – from a Scottish viewpoint – of being Scottish. In practice, difficulties can be encountered in many situations when an attorney first presents the power of attorney document. These can be exacerbated in cross-border situations, even within the United Kingdom.

When an "incoming" English enduring power of attorney is presented in Scotland, the position should be helped by reference to the case of *C, Applicant* (Airdrie Sheriff Court, 2nd April 2013, unreported), in which it was held that an English enduring power of attorney has automatic recognition in Scotland under the Adults with Incapacity (Scotland) Act 2000, and had the same effect (in that case) as a Scottish continuing power of attorney. At around the same time, in consequence of such difficulties, and with the intention that it be an interim measure pending resolution of uncertainties regarding "incoming" powers of attorney, the then Public Guardian placed on the website of the Public Guardian a certificate which may be downloaded, in the following terms: "*I, xxx, Public Guardian for Scotland, hereby advise that interpretation of Scottish legislation suggests a non-Scottish power of attorney is automatically valid in Scotland. There is no provision for having a non-Scottish power of attorney endorsed for use in Scotland; this action being unnecessary.*"

Difficulties continue to be encountered in England & Wales, not helped by the continuing failure of England & Wales to ratify Hague Convention 35 on the International Protection of Adults, though even under the Convention there are uncertainties about the status of such "powers of representation". At that level, the uncertainties are being addressed by the European Commission and by a project by the European Law Institute. In the meantime, many Scottish practitioners taking instructions to prepare a power of attorney, in circumstances where it is foreseeable that it might require to be operated in England, recommend that an English power of attorney be granted at the same time. There is also the option of registering the Scottish power of attorney in the Books of Council and Session, then relying upon section 4 of the Evidence and Powers of Attorney Act 1940, which provides that: "A registered extract from the Books of Council and Session is evidence of the contents of the document, in any part of the United Kingdom, without further proof". That may or may not prove sufficient.

It is of course absurd that there should be any difficulty in operating in one part of the United Kingdom a power of attorney properly granted and registered in another. It can help to suggest that if proceedings are necessary, an award of expenses against the obstructive third party will be sought; or to suggest that the third party's conduct amounts to disability discrimination which as such will be referred to the Equality and

Human Rights Commission; or – recognising that the underlying fault is lack of clear legislative provision putting matters beyond doubt – that this disability discrimination be referred to the UN Committee on the Rights of Persons with Disabilities under the procedure provided for in the First Protocol to the UN Convention on the Rights of Persons with Disabilities (which has been ratified by the UK).

Adrian D Ward

Lecture – Adrian Ward at 75

Adrian delivered a very well attended and received lecture entitled "Adult incapacity law: visions for the future drawn from the unfinished story of a new subject with a long history" on 13th November 2019 hosted by the Centre for Mental Health and Capacity Law at Edinburgh Napier University. Please see here to read the lecture in full.

Jill Stavert

Asian Congress on Adult Guardianship 2019

Readers of the Scotland section might also be interested in my account of my visit to the People's Republic of China in November/December 2019 which appears in the "Wider Context" section of this Report.

Adrian D Ward

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Neil has particular interests in ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. When time permits, Neil publishes in academic books and journals. To view full CV click here.

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

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Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; honorary membership of the Law Society of Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

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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. 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

Approaching complex capacity assessments

Alex will be co-leading a day-long masterclass for Maudsley Learning in association with the Mental Health & Justice project on 15 May 2020, in London. For more details, and to book, see here.

Other conferences of interest

Safeguarding and the Care Act 2014 - Self-neglect

Continuing the SALLY (safeguarding and legal literacy) series, this day-long seminar at Keele University on 31 January focuses on self-neglect. For more details, and to book a free ticket, 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 the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next edition will be out in February 2020. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: marketing@39essex.com.

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