MENTAL CAPACITY REPORT: THE WIDER CONTEXT

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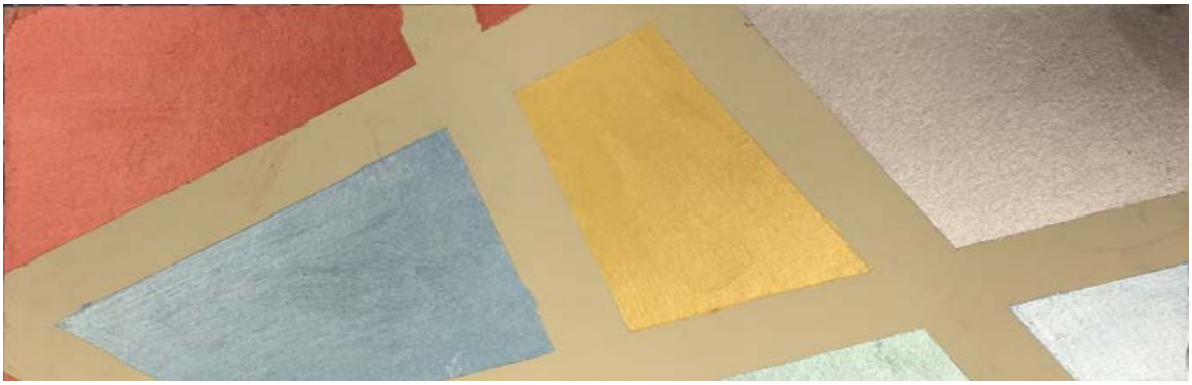

Welcome to the February 2023 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: is depriving a person of their phone depriving them of their liberty, a reminder that the court is the ultimate arbiter of best interests and an Ombudsman comes belatedly to the rescue;

(2) In the Property and Affairs Report: a reminder of the new process for applying for deputyship and how the Powers of Attorney Bill would amend the MCA 2005;

(3) In the Practice and Procedure Report: the Vice-President intervenes on s.49 reports and new contempt rules;

(4) In the Wider Context Report: Parliamentary consideration of the draft Mental Health Bill, a toolkit for supporting decision-making, and confidentiality and common sense;

(5) In the Scotland Report: the Supreme Court dismisses an appeal against assessment for services and an opposed application for guardianship.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also sign up to the Mental Capacity Report.

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

Contents

The draft Mental Health Bill scrutinised by Parliament

The Joint Committee on the Draft Mental Health Bill published its pre-legislative scrutiny report on the draft Bill on 19 January 2013. It is an extensive and detailed report, concluding thus:

> *During this inquiry we have heard concerns about how the reforms proposed in the draft Bill will play out in practice. We have heard again and again about the importance of proper implementation, resourcing, access to community alternatives to hospital and the need to take account of possible unintended consequences. These concerns should not take away from the broadly positive response to the draft Bill or the sense of urgency about introducing some of its reforms. Our recommendations are intended to strengthen the draft Bill, to address some of those unintended consequences and to ensure transparency and accountability about implementation. If the Government is willing to strengthen the draft Bill in the ways we have suggested it can make an important and necessary contribution to addressing the problems that the Independent Review was established to consider.*

Alex has done a walkthrough of the conclusions and recommendations available here.

Autism and learning disability: seeking to stem the tide of unnecessary hospital admissions

On 25 January 2023 NHS England announced a new policy, the snappily named Dynamic Support Register and Care (Education) and Treatment Review [1], aimed at preventing unnecessary hospital admissions of autistic people or those with a learning disability, both children and adults. The new guidance is aimed at exploring alternatives to hospital admission for people facing care crises and will be implemented on 1 May 2023. It is part of the NHS Long Term Plan commitment to reduce autistic people or those with learning disability in mental health inpatient services, avoid inappropriate admissions and develop what are referred to as "responsive, person-centred services in the community".

The report comes as the latest available statistics published in December 2022 show 2,030 autistic people and/or those with a learning disability were hospital inpatients at the end of the month, an increase from 2,005 the month before : over 50% of that number had a total length of stay over 2 years.

The Dynamic Support Register and Care (Education) and Treatment Review aims to use DSRs and C(E)TRs as means of helping avoid inpatient admissions. Any autistic person, or person with a learning disability at risk of hospital admission must be included on a DSR; inclusion on a DSR is then a trigger for a C(E)TR to take place. A review is contingent on patient consent: where informed consent is not available, the guidance specifically points readers to the MCA and the existing statutory guidance. Accountability for DSRs rests with ICBs – albeit that they can delegate this responsibility to partner organisations such as local authorities or relevant NHS Trusts. Nonetheless, each ICB should have a named lead person with responsibility for the maintenance of the DSR – usually its chief nurse or executive director for commissioning.

At a minimum, DSRs must (among other things) identify young autistic people and adults with or those with a learning disability awho are at immediate risk of admission to a mental health hospital and ensure a clear link between their DSR and C(E)TR so that those at risk are offered a community C(E)TR in line with the policy. The policy also identifies the minimum data which must be recorded.

Supported decision-making toolkit

In preparation for the recent National Mental Capacity Forum webinar "Speech and Language Therapy and the Second Principle of the MCA," the Royal College of Speech & Language Therapists Mental Capacity Clinical Excellence Network developed a very useful three page toolkit. The toolkit is available here, along with a recording of the webinar, the slides used (and all the previous webinars).

Formal support needs of disabled adult victim survivors of sexual violence

A detailed and challenging report commissioned by the Ministry of Justice (but independently authored [2]) has been published seeking to address the following questions:

Q1: What do disabled sexual violence victim-survivors want from victim support services?

[1] Care and Treatment Reviews apply to adults; Care, Education and Treatment Reviews include an educational element and apply only to children and young people. The term Care (Education) and Treatment Reviews (C(E)TR) is used when both approaches are being referred to.

[2] By Dr Andrea Hollomotz, University of Leeds, Dr Leah Burch, Liverpool Hope University and University of Leeds; and Ruth Bashall, Stay Safe East.

Q2: What do they consider to be effective in helping them (a) engage with the criminal justice process and (b) cope and recover from the crime?

Q3: How can sexual violence victim support services become more inclusive?

Those whom the researchers questioned included not just those with physical but also cognitive impairments, and Chapter 5 of the Report makes very helpful reading in terms of trying actually to redress the problems identified in the earlier chapters.

Confidentiality and common sense

The problems of inadequate social care or mental health support in the community will be sadly familiar to readers. The exclusion of family is also a common concern, including where the view is taken that the individual has capacity to refuse to permit family to be involved. Whilst we do not know the precise details, it would appear that this issue may have arisen in the case of Laura Winham.

In one ongoing case before the Court of Protection, proceedings were issued by P's mother seeking declarations as to P's capacity to share information with her mother and make decisions about her care, including to refuse support. On investigation by the court and an independent psychiatrist, the decision was taken that P needed to be detained under the MHA 1983 to receive in-patient treatment. Family members concerned about the welfare of someone living with severe mental health problems in the community may be able to ensure that scrutiny of decisions about their capacity and care arrangements takes place by bringing cases before the court, even if they have limited direct involvement.

And whilst Ms Winham's case does not on the face of press reports appear to be one of suicide, this is also our opportunity to remind practitioners of the DHSC-led consensus statement for information sharing and suicide prevention and the accompanying guidance from the Zero Suicide Alliance, both seeking to reinforce the message that (crudely) the duty confidentiality is there to help, not harm, the interests of those to whom it may be owed.

Book review

Looking after Miss Alexander: Care, Mental Capacity, and the Court of Protection in Mid-Twentieth-Century England (Janet Weston, McGill-Queens University Press, 2023, and free ebook available here)

The best books encompass worlds within their pages. This book, by Dr Janet Weston, Assistant Professor at the London School of Hygiene and Tropical Medicine, encompasses both lives and worlds within its 193 pages. Taking a detailed, sensitive, and generous approach to what we know of the life of Miss Beatrice Alexander, one of roughly 30,000 people whose affairs were managed by the Court of Protection in mid 20th century England and Wales, Weston examines how and why a 59 year old woman with no prior history of mental disorder was declared incapable, and how her life was changed in consequence – and remained changed for the next thirty years.

Weston uses Miss Alexander's story to illustrate the wider complexities of mental capacity law as it stood at the time, and to reflect upon what her story tells us about debates in relation to mental capacity now. A real strength of the book is the way in which Weston openly acknowledges both the gaps in the historical record and the leaps that she has had to make to recreate the decision-making in play, and also the dangerous temptation to project present-day assumptions upon people

in the past. Whilst I do not want to give away too much of Miss Alexander's story – as a particular delight of the book is the way in which it is unfolded, in often surprising ways – particularly interesting to me as a present-day Court of Protection lawyer was the way in which her case encapsulated one of the most difficult dilemmas faced in practice: what to do where a person appears (potentially) to be under the influence of others who (seemingly) do not necessarily have their interests at heart?

Some might think that a book about a court which no longer exists (the Court of Protection described in the book is not the same as that established under the Mental Capacity Act 2005) can – at best – be of historical interest. That is emphatically not the case here, and on almost all of its pages can be found the working out of challenges that remain just as live today as they did in 1939, when Miss Alexander came under the aegis of the Court of Protection. Whilst Weston makes clear her own – changing – perspectives on how those challenges were met in Miss Alexander's case, she provides ample evidence and intellectual space for other views to be taken, and, in consequence, this splendid book could just as easily serve as a focus for a practice discussion by contemporary social workers as it can for anyone wanting a fascinating trip into the pre-history of the Mental Capacity Act 2005.

The icing on the cake is that, as this book stems from a Wellcome-funded project, Managing mental capacity: a history, it is available for free as an ebook. The project's website also includes archival material and two fascinating short films, one about Miss Alexander, and another about Miss Jean Carr, another person determined incapable of managing her own affairs.

To hear Janet Weston and I talking about the book and the underlying project, see here.

[Full disclosure, Janet Weston and I were in correspondence in the course of writing her book about some modern day aspects of mental capacity law]

Alex Ruck Keene

Systemically failing the human rights of children: the President of the Family Division shouts as loudly as he can

Re X (Secure Accommodation: Lack of Provision) [2022] EWHC 129 (Fam) (Sir Andrew MacFarlane)

Article 5 – deprivation of liberty – children and young persons

Summary

It is exceptionally unusual for a judge, let alone a very senior judge, actively to invite a claim to be brought against the State for systemic human rights breaches, but that could be said to be the effect of the judgment of the President of the Family Division, Sir Andrew McFarlane, in the latest of the grim series of cases arising out of the lack of suitable secure provision for children. In *Re X (Secure Accommodation: Lack of Provision)* [2022] EWHC 129 (Fam), Sir Andrew gave a judgment designed to "*shout as loud as* [the court] *can*" about the shortfall in provision "*in the hope that those in Parliament, Government and the wider media will take the issue up*" (paragraph 1).

The facts of the individual case make grim reading, Sir Andrew deliberately giving the history in some detail in order to personalise (in

appropriately anonymised form) the plight of the 15 year old girl in question. What is almost worse is that, as he then continued:

> *21. Those unfamiliar with the circumstance of children like X may be shocked by the extreme behaviour that is described. The truly shocking aspect to the eyes of judges sitting in the Family Court is that X's circumstances are not that unusual. There is a cohort of young people who are in extreme crisis to the same degree as X.*

Sir Andrew then went on to make clear that:

> *22. Although the point has not been argued before this court, it must be the case that the State has duties under the European Convention of Human Rights, Articles 2 and 3, to meet the needs of these children and to protect them from harm. The positive obligation that arises for public authorities under Arts 2 and 3 in cases such as this was explained by Lord Stephens in the Supreme Court in Re T [2021] UKSC 35 at paragraphs 175 and 176. The discharge of this positive obligation is currently being left to the court and to individual local authorities, yet neither of these agencies has access to the necessary resources to meet this obligation, nor, in the case of the court, the knowledge or real expertise to do so. One consequence of the lack of sufficient secure placements is that local authorities turn to the High Court to authorise a DOLS placement in other accommodation, often at very significant additional cost. Frequently, as the reported judgments describe, and as X's circumstances demonstrate, the accommodation that is authorised via DOLS is not appropriate to meet the young person's needs and is simply chosen as being the 'least worse', and often the only, option that is available.* (emphasis added)

To give a sense of the scale of the issue, Sir Andrew also highlighted the work of the "national DoL court":

> *Since mid-2022 all new DOLS applications have been issued in, and mainly heard in, London. The statistics are still being collated, but it is likely that the annual total number of DOLS applications may exceed 1,000. Whilst some of these cases may be renewed applications with respect to the same child, the number of cases, given the extremity of the behaviour of each young person and their need for a secure placement, is truly shocking. Many of these applications relate to children, like X, who should be in secure accommodation. The data suggesting that it is regularly the case that there will be, on any given day, some 60 or 70 children for whom a formal secure accommodation order has been made under CA 1989, s 25, yet no registered secure placement can be found, is therefore likely to understate the true position in circumstances where, instead of applying for a secure order (because of the lack of secure placements) local authorities simply by-pass the s 25 procedure and apply directly to the High Court for DOLS authorisation.*

He also highlighted the findings of the previous Children's Commissioner, Anne Longfield, in her reports in 2019 and 2020 "'Who are they? Where are they?," in which she drew attention to 'invisible' placements outside the statutory scheme. Sir Andrew made clear that:

> *25. The insight gained by the Children's Commissioner is important. Her description of the situation is on all fours with the experience of the judiciary hearing these cases, with the court being obliged to sanction a range of less*

> *than satisfactory regimes because there is no available provision for placement in a statutorily approved unit. The report demonstrates that the number of children being placed in 'invisible' placements, outside the statutory scheme, is increasing and may roughly equal those who can be accommodated in a conventional secure home. On the basis of these figures, the current situation, where the scheme provided by the State is failing to meet the needs of half of the young people who need this level of State protection, is deteriorating so that soon, if not already, more than half of the children will be 'invisible' and under the radar.*

At a number of points in the judgment, Sir Andrew sought to spell out things which might be familiar with the system but to outsiders (and, indeed, frankly to everyone) are or should seem very odd indeed. A particularly odd point is that the making of an order under the inherent jurisdiction authorising placement in secure accommodation is not immediately followed by such placement. After all, he noted, if a criminal court passes a criminal sentence or makes a hospital order, the person in question goes straight to prison or hospital:

> *27.* […] *There is no question of the authorities then having to engage upon a potentially lengthy process to find a placement because there are insufficient prison or hospital places. Neither is there a need for the criminal court to engage with the relevant authorities in establishing and holding on to substitute care arrangements which, because they fall short of 'secure accommodation' are, by definition, inadequate to meet the young person's needs. If there were no prison cells available to house those sent to prison there would be a public outcry; why should the lack of provision of secure units when a court has made a secure accommodation order be any less scandalous.*

Sir Andrew then read into the judgment the rollcall of previous judgments emphasising the problem dating as far back as 2017, concluding at paragraph 42 that:

> *Despite the regular flow of judgments of this nature over recent years, it is, at least from the perspective of the experienced senior judges who regularly deal with these cases, a matter of genuine surprise and real dismay that the issue has, seemingly, not been taken up in any meaningful way in Parliament, in Government or in wider public debate.*

The one small ray of light that might be seen within an otherwise almost entirely bleak situation came from the written submissions of the Secretary of State[3] which, as Sir Andrew MacFarlane observed at paragraph 64, record:

> *it would seem for the first time, an acceptance by the Secretary of State for Education that, nationally, there are significant problems with the availability of sufficient placements and that 'this requires action by His Majesty's Government collectively to support local authorities to meet their statutory needs'. It is to be hoped that this marked change from the approach trailed in the Department's letter of 11 November* ["*to the effect that it was not its problem and was the responsibility of individual local authorities,* [*which*] *displayed a level of complacency bordering on cynicism*[4]*"*] *does indeed result in action and that the*

[3] Who initially declined to attend on the basis that this would not be an effective use of public funds, an observation which did not go down well with the President.

[4] Judgment, paragraph 55.

> *need for the court to hand down judgments of this nature will be a thing of the past."*

Comment

The fact that the courts are consistently having to "*operate outside the law as it has been made by Parliament*" (judgment, paragraph 63) is hugely problematic – especially in circumstances where "*Parliament has seemingly not even discussed this parlous and most worrying situation*." In part, and as the Nuffield Family Justice Observatory identified in its February 2022 report "What do we know about children and young people deprived of their liberty in England and Wales? An evidence review," this reflects the fact that the size of the secure estate has declined over the past two decades, with the closure of 16 secure children's homes since 2002. However, the NFJO continues:

> *There is some evidence that there is a cohort of children with particularly complex needs who are seen as too 'challenging' to be suitable for a secure children's home. This includes children with very complex mental health needs but who do not meet criteria for detention under the Mental Health Act.*

The consequence is that there has been a significant increase in the use of the inherent jurisdiction of the High Court to deprive children of their liberty in alternative placements. In 2020/21, 579 applications were made under the inherent jurisdiction in England – a 462% increase from 2017/18). In 2020/21, for the first time, applications made under the inherent jurisdiction outnumbered applications under s.25 Children Act 1989.

It is very important to emphasise that the situation being addressed by the President is not merely the equivalent of the post-*Cheshire West* situation in relation to adults with impaired decision-making capacity. In that 2014 case, the Supreme Court clarified that circumstances which had previously appeared to be entirely routine were in fact legally problematic, leading to a dramatic escalation in applications to seek authority. There may be some cases in which the 2019 decision of the Supreme Court in *Re D* (confirming that 16-17 year olds are deprived of their liberty if they cannot or do not consent to confinement) has led to a recognition that authority is required in previously unanticipated circumstances.[5] However, situations such as that of X are ones which would always have required authorisation – and, indeed, are ones which reflect the end point of an escalating chain of events which will often reflect upon the availability of services prior to that point. As the NFJO identifies:

> *Although there is a lack of research about children's experiences prior to entering secure care, a handful of studies have highlighted a lack of early intervention and support in the community for this group. We know that children in welfare placements tend to enter care late, and once in care, experience the repeated breakdown of arrangements made for their care in the community. There is a clear lack of suitable placements, including specialist foster care and residential provision, that can support children with complex needs both before and after a secure placement.*

In the circumstances, it is even more troubling that, as Sir Andrew MacFarlane identifies, even the accommodation that can be patched

[5] Leading also to applications for orders from the Court of Protection, as to which, see *Re KL* [2022] EWCOP 24.

together by local authorities and the courts (whether as a substitute for secure accommodation or for a child who is seen as requiring something other than secure accommodation) is so often not appropriate to meet the needs of the children in question. This, in turns, raises very starkly the question of whether the State is discharging its obligations to those children under the ECHR, not just under Articles 2 and 3, but also 5[6] and 8.

Differing approaches to openness

The issue in *R (Maher) v First Tier Tribunal (Mental Health) & Ors* [2023] EWHC 34 (Admin) was whether the First Tier Tribunal (Mental Health) had acted unlawfully with respect to the mother of the victim of a restricted patient who had been granted a conditional discharge. The court held that the FTT should have given the mother a summary of its reasons for the conditional discharge being granted, but had not been required to allow her to make a victim impact statement, nor to permit her to request a review of the conditional discharge decision.

In the course of her judgment, Stacey J considered the "*progress towards openness and transparency*" in the Court of Protection, among other tribunals, as a reason for imposing an obligation on the FTT to share the reasons for its decision, noting that the FTT was "*something of an outlier*" in terms of transparency. The judge observed that "[s]*uspicion and mistrust thrive when accurate information is not made available to the public about matters which affect them*."

Public law duties and waiting times

R (AA) a child, acting by her father and litigation friend) and others) v National Health Service Commissioning Board [2023] EWHC 43 (Admin), Chamberlain J rejected a challenge brought by both child and adult claimants who challenged the lawfulness of extremely long waiting times for gender identity development (GID) services in the NHS.

NHS England (NHSE) has been responsible for commissioning certain services for rare conditions; since 2012, this has included the gender identity development (GID) services for children, adolescents and adults. Demand for these services increased substantially between 2012 and 2017, and supply did not keep up. There are now extremely long wait times for those seeking to access appointments for GID services; the child claimants AA and AK had respectively been waiting 18 months and three years for a first appointment at the Tavistock and Portman NHS Foundation Trust (which is, at present the sole commissioned GID service for children in England). The adult claimants had been waiting two and four years respectively for a first appointment.

NHSE announced a plan in July 2022 to expand children's GID services available nationally by creating a number of regional centres. The judgment notes that Tavistock had struggled to recruit and retain staff even with funding available, and on a review of the service, it was felt that the model of a range of regional centres with links to other services in their areas was more appropriate than a sole provider of care. It is projected that seven or eight such centres (run in partnership with tertiary children's hospitals in the region) will be operational by 2024; these will be directly commissioned and funded by NHSE. There are already seven specialist centres which provide adult gender dysphoria clinics; this

[6] In relation to Article 5, a consistent feature of the judgments is that – to my mind problematically – they do not identify what limb of Article 5 is being relied upon. Whether it be under Article 5(1)(d) or Article 5(1)(e), however, the lawfulness of detention is contingent upon the person in question actually receiving some form of appropriate care.

followed a process which had been underway since 2015 to address long waiting times in the adult service (which included establishing training programmes for physicians and surgeons able to offer relevant services).

The evidence of NHSE was that the waiting times for patients to see GID services was considerably longer than for other services; by May 2022, a young person waited on average 152 weeks for a first appointment at Tavistock.

There were five grounds of challenge, broadly on the basis that NHSE had breached statutory and regulatory duties to ensure that 92% of patients were seen 18 weeks, and that NHSE acted unreasonably by operating with waiting times so long that children could not access these services prior to puberty. Challenges were also raised under ss.29 and 149 Equality Act 2010, on the basis that the delays in accessing services led to discrimination against people on the basis of the protected characteristic of gender reassignment.

Statutory duties

The claimants argued that regulation 45(3) of the NHS Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012 "*impose*[d] *a 'hard-edged' legal duty to ensure that treatment commences for at least 92% of patients within 18 weeks of referral*," and that this was a "*binding legal obligation*.'" They argued that Tavistock had been in breach of that duty for years, and NHSE had not enforced compliance. It was accepted that NHSE was failing to meet this 18 week target across services offered across the NHS, not just those in relation to children and adult GID services. They argued that even if it is properly characterised as a "target duty", NHSE had not shown that it is doing all it reasonably can to meet the target.

Chamberlain J accepted the submissions of the defendant that regulation 45 set a 'target duty' which was not owed to a specific individual. 'The obligation is to make arrangements to secure that 92% of the cohort are treated within 18 weeks, not to secure that outcome simpliciter. NHSE is required "*to aim to make the prescribed provision" and the legislative language "does not regard failure to achieve it without more as a breach*'" (paragraph 61). He found that NHSE was "*doing all it can reasonably be expected to do to reduce waiting times, which are the result not of under-funding, but of the many other factors*" relating to the challenges of recruiting and keeping staff, and a changing legal landscape as a result of multiple challenges over the last few years.

Chamberlain J also considered what characteristics might make a duty a 'target duty' rather than one owed to an individual:

a. "*a duty may be framed in terms so open-textured that the legislator must have intended to confer a broad discretion on the public authority, subject only to the constraints of rationality*" (paragraph 87);

b. "*a duty may, on its proper construction, require the person who owes it to act with a view to achieving a particular result, rather than simply to achieve that result*" (paragraph 88);

c. "*a duty may be owed to the population as a whole rather than to any individual*" (paragraph 89).

In considering whether Regulation 45 was a 'target duty,' the court noted that "*the duty imposed by reg. 45 of the 2012 Regulations is a duty to make arrangements to secure that 92% of the cohort commence treatment within 18 weeks. There are precise definitions explaining who is in the cohort and when treatment will be regarded as*

having commenced. The standard is therefore hard-edged, rather than open-textured. Whether it is being met will be capable of being ascertained precisely" (paragraph 91). However, *"the duty is not to achieve the standard, but rather to "make arrangements to ensure" that the standard is met*." Chamberlain J further noted that the standard "certainly" applied to the cohort, not to individuals, as "[i]*t would be possible to comply with it even though particular individuals have been waiting more than 18 weeks for treatment. Indeed, because the cohort is comprised of all patients referred to the services under NHSE's responsibility, it would be possible for the standard to be met even if no child or adult referred for gender identity services were treated within 18 weeks*." The court finally noted that the legislative scheme allowed the Secretary of State to give directions to NHSE how to exercise its functions "*and bespoke remedies for individuals whose treatment does not commence within 18 weeks (regs 47-49 of the Regulations). Both these features suggest that the legislator did not intend the duty imposed by reg. 45 to be an absolute duty to achieve the standard, enforceable by individuals*" (paragraph 94).

Chamberlain J further concluded that "*the clearest pointer to the content of the duty imposed by reg. 45 comes from considering the effect of the relief sought by the claimants*." The claimants conceded that a mandatory order to enforce the duty would be inappropriate, and the court considered that such an order might not assist the claimants,' as *"NHSE could comply with the standard set by reg. 45 without treating any gender identity patient within 18 weeks. More importantly, if the court ordered NHSE to comply with the standard set by reg 45 by a particular time, that would impose a legal obligation on NHSE to divert resources from elsewhere. Where would these resources come from? One possibility is that they could be taken away from the ICBs responsible for more mainstream services, but they too are subject to the same 18-week standard and they too are failing to meet it. More generally, mandatory relief would be inappropriate because it would inevitably result in a diversion of resources from one health service purpose to another. The court is not equipped, in terms of the information available to it or in terms of expertise, to form a judgment about whether such a diversion would be optimal*" (paragraph 95). The court also did not find that declaratory relief would be any better, as "*the practical result might be to divert resources from other important health service purposes in circumstances where the court could not gauge whether or not such a diversion would be beneficial overall*" (paragraph 97).

Chamberlain J concluded "*that the duty in reg. 45, on its proper construction, is a duty to make arrangements with a view to ensuring that the 18-week standard is met. As Sedley J put it in Rixon, the regulation does not regard failure to achieve that standard, without more, as a breach*" (paragraph 99). He found that NHSE was taking "*concrete steps…with a view to reducing waiting times for both children and young people's and adults' services*" (paragraph 101) and gave "*a cogent explanation of the reasons why it is expected that these steps will be successful in reducing waiting time, albeit not immediately*." He found it "*impossible to say that NHSE is currently in breach of its duty*" (paragraph 102).

Chamberlain J similarly found no irrationality was occasioned by long waiting times which meant that GID services started after the onset of puberty. The court noted that "*No-one suggests that a consultation at Tavistock is useless after puberty has begun. It is true that, for some patients, its potential utility may decrease as the waiting time increases, but this is true of a great number of NHS services*" (paragraph 109). He further found that where arrangements were underway to reduce waiting times, there was no

breach to the target duties imposed by s.3B NHS Act 2006 or s.2 2009 Act (the duty to have regard to the NHS Constitution).

Equality and discrimination grounds

The court considered challenges on the basis of both direct and indirect discrimination under the Equality Act 2010, as well as a challenge under the Public Sector Equality Duty. The court accepted the submissions of the defendant that "*Not every child referred to the children's GID service will have the protected characteristic of gender reassignment…Some of these may present with symptoms of gender-related distress, for which they may in due course receive psychological help. They may not, at the time of referral, have taken any settled decision to undergo any part of a process of changing any attribute of sex (to use the language of the 2010 Act). This is particularly likely to be true in the case of very young children*" (paragraph 132). Children and adults who have taken a "*settled decision to adopt some aspect of the identity of the other gender*" may have a protected status under the Equality Act, but this determination would depend on the facts of the particular case.

It was accepted that the claimants here had such a status. However, Chamberlain J did not conclude that their protected status had been the cause of their experiencing longer waiting times than other specialised NHS services. The court found that waiting times had been caused by a number of factors, including the marked increase in demand for such services, recent controversies surrounding GID treatment and the difficulties in recruiting staff. Chamberlain J found no evidence that other specialist services had this combination of difficulties and "*comparing those referred to GID services with those referred to other specialist services will not be comparing like with like*" (paragraph 145). He did not find that the claimants had established less favourable treatment as a result of their protected characteristic. Chamberlain J similarly found no breach of NHSE's Public Sector Equality Duties, noting that not all children awaiting an appointment with the GID service would have a protected characteristic (though many will). NHSE had carried out four Equality Impact Assessments, including one shortly prior to this case, and Chamberlain J found that "*no fair reader of that report could conclude that NHSE had failed to inform itself of the effects of long waiting times on those with the protected characteristic of gender reassignment*" (paragraph 170) and that NHSE had complied with the substantive duty.

Comment

The judgment is of some interest in relation to its findings that the possibility or impossibility of relief may define the scope of a public law duty. The broader context of the case set out that GID services were just some of the many services currently in breach of the 18-week target, though they were perhaps one of the most egregious examples of severe waiting times. The court considered carefully that either mandatory or declaratory relief would have the end result of creating a legal obligation to divert resources away from other services, either within the NHSE specialised commissioning framework or from ICBs (with a very high prospect that those other services were also in breach of the 18-week target). The court considered that the impossibility of it making such a judgment about the allocation of resources was germane to the scope of the duty imposed by the statutory framework, an interesting finding which may have broader implications to public law challenges at times of great scarcity. The Good Law Project has announced its intention to appeal this decision, so there may be further discussion of this issue to come.

Entirely separately, we should note that David Lock KC, who represented the claimants, has

recently retired from the Bar. We wish him well and happy slow cycling.

The paramountcy of wishes and feelings – the Isle of Man takes on mental capacity

Reminding us always that it is very helpful to look around outside England & Wales, the Capacity Bill 2022 completed its legislative passage in the Isle of Man shortly before Christmas. It awaits Royal Assent, and, if it receives it, should be coming into effect in the spring of 2023.

As with legislation in other surrounding islands, the legislation draws very heavily on the MCA 2005, but differs in some interesting ways. Particular points which leapt off the page to this capacity enthusiast were

- That the 'unwise decisions' principle is subtly modified in s.3(5) of the Capacity Bill to provide that "[a] *person is not to be treated as unable to make a decision merely because that person makes or may make an unwise*" (emphasis added). It still does not mean, we stress, that the fact that the person may make an unwise decision is to be ignored – it should be a trigger to consider capacity.
- That the 'retention' limb of the capacity test (in s.5 of the Capacity Bill) includes express reference to the requirement to be able to retain information for an appropriate period, which includes whether it is "*apt for the purpose for which it is given having regard to whether that purpose is for a single event or state of affairs or a continuing event or state of affairs*."
- That the relevant Department has an express power to make regulations as to the steps to be taken to assist a person to make a decision for themselves
- The best interests tests includes express requirements (in s.6 of the Capacity Bill):
  - To consider whether it is in the person's best interests to postpone making a determination if it is likely that the person will have capacity in the future in relation to the matter;
  - That, where ascertainable, the person's wishes, feelings, beliefs and values (and the other matters contained in, in English law, s.4(6) MCA 2005) are "paramount" in determining what is in the person's best interests.
- That, as with other legislation (for instance in Jersey), the term 'deputy' is not used, instead 'delegate.'
- That there is no provision for deprivation of liberty or advocates, but we understand that this is because these are going to be considered as part of Phase 2.

Council of Europe recommendation on equitable access to medicinal products and medical equipment in a situation of shortage

The Committee of Ministers of the Council of Europe adopted on 1 February 2023 a Recommendation (Recommendation CM/Rec(2023)1) to promote, in the 46 Council of Europe member states (including, for the avoidance of any doubt, the United Kingdom), equitable access to medicinal products and medical equipment in a situation of shortage and to safeguard the fundamental rights of individuals who need them for serious or life-threatening health conditions.

Prepared by the Steering Committee for Human Rights in the fields of Biomedicine and Health in response to the Covid-19 pandemic and to the shortage of medicinal products and medical equipment engendered by the health crisis, the Recommendation sets out both substantive and procedural principles. Of particular note given

the fact that no national triage guidelines have ever been promulgated in England & Wales are Articles 5, 6 and 7:

> *Article 5 – Attention to systematically disadvantaged individuals in relation to health*
> *Specific attention should be paid to individuals and groups who are systematically disadvantaged in relation to health, including as a result of economic and social conditions, legal status, disability, chronic disease or age.*
>
> *Article 6 – Prioritisation based on medical criteria*
>
> *1. Decisions on access to medicinal products and medical equipment should be based on an individual medical assessment, taking into account the following elements:*
> *- the severity of the health condition of the individual concerned and the healthcare needs to address it;*
> *- the expected effectiveness of the medicinal product or medical equipment;*
> *- the possible therapeutic alternatives;*
> *- the consequences of the lack of access to the medicinal product or medical equipment for the health of the individual concerned.*
>
> *2. When there is a need for urgent healthcare, priority should be given to minimising the risk of mortality and, subsequently, morbidity.*
>
> *Article 7 – Appropriate support and removal of barriers*
>
> *Barriers to accessing medicinal products and medical equipment should be removed and appropriate support should be given to those individuals or groups who may be disadvantaged or exposed to a higher risk of harm to their health.*

The recommendation also recommends ensuring that there is a system in place to prevent and mitigate situations of shortage and to better prepare for such shortages. The Recommendation applies to access to medicinal products and medical equipment certified through an appropriate regulatory process provided for by law, which are needed for patients with serious or life-threatening health conditions. As the Committee of Ministers points out, the principle of equitable access to health care remains valid during a situation of shortage of medicinal products and medical equipment, both in an emergency and during routine clinical practice, whatever the cause of the shortage.

The reverberating clang of the prison gates

AG of Trinidad and Tobago v JM [2022] UKPC 54, a case determined by the Privy Council, on appeal from the Court of Appeal in Trinidad and Tobago, concerned a 19-year-old with Prader-Willi Syndrome who had suffered appalling physical and sexual abuse and ill-treatment over a 5-year period in a young offenders institution and psychiatric hospital. He appealed (through his mother) for the restoration of damages that had been awarded at first instance but reduced on appeal.

Although JM had not been arbitrarily detained, his right to security of the person and protection of the law had been breached, contrary to the Trinidad and Tobago Constitution. This was because he had suffered physical or serious psychological harm by reason of the conduct of the State. Importantly, and contrary to the view of the Court of Appeal, it was held that vindicatory damages did not require deliberate misconduct or malice by the State and, on the exceptional facts, were appropriate in this case. Accordingly, the first instance award of $921,200 (Trinidad and Tobago dollars) compensatory damages and $1,000,000 vindicatory damages

was restored. The Privy Council also rejected the submission that there should be a tapering down over time of the compensatory award by analogy with the approach taken to per diem awards in cases of false imprisonment (see *Thompson v Comr of Police of the Metropolis* [1998] QB 498). However, Lord Burrows for the Privy Council found that:

> *the two situations are not analogous. No doubt in false imprisonment cases "the clang of the prison gates" can be expected to produce an initial shock to the system that may abate over time. But there is no direct parallel on the facts of this case and the trial judge was entitled to decide that the same per diem rate (of $450 at St Michael's and $700 at St Ann's) was appropriate throughout the time spent in each institution.*

It is depressingly easy to think of many situations in England & Wales where the same logic would apply, and it will be interesting to see whether any brave advocate seeks to argue for a modification of the rule relating to false imprisonment cases in situations akin to that JM.

Research corner

Challenges not just to the application, but the very legitimacy, of the concept of mental capacity over the past 10 years have been spearheaded by the Committee on the Rights of Persons with Disabilities, the treaty body for the UN Convention on the Rights of Persons with Disabilities (CRPD). It is often asserted that this challenge, and the associated challenge to mechanisms to respond to incapacity, have produced a 'paradigm shift' (as an admittedly unscientific data point, a search of 'paradigm shift' AND 'Convention on the Rights of Persons with Disabilities' on Google Scholar produces almost 5,000 results). However, in practice, the challenge has so far made little headway, with courts and legislatures around the world holding to models based on a functional model of mental capacity.

In an article Alex has co-written in the Medical Law Review (with Dr Nuala Kane, Dr Scott Kim and Dr Gareth Owen) as part of the Mental Health & Justice project, they examine why the challenge to the concept of mental capacity has such limited traction in the legal policy arena. They also examine whether the challenge should have greater traction, identifying four critiques of it. Driven by a desire to move forward, rather than endlessly circle around the campfire of hot but often unilluminating argument, they then identify a subtle, but important (and constructive) shift in the position of the Committee towards capacity.

The paper then develops an argument that the true goal, compatible with the CRPD, is the satisfactory determination of whether a person has or lacks mental capacity to make or take a relevant decision. Finally, we outline at the end what we think the true paradigm shift has been (but we won't spoil the surprise here).

If you want to hear Alex talking about the paper, see here.

The Medical Law Review paper accompanies research-based guidance in relation to capacity assessments available here.

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Conferences

Members of the Court of Protection team are regularly presenting at webinars arranged both by Chambers and by others.

Alex is also doing a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

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 March. 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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