MENTAL CAPACITY REPORT:
PRACTICE AND PROCEDURE
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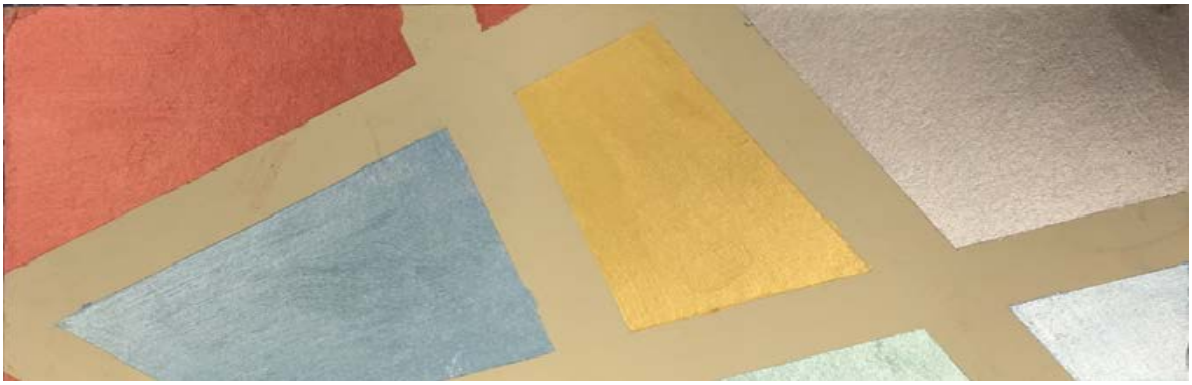

Welcome to the October 2023 Mental Capacity Report, which is much shorter than last month's blockbuster (to everyone's relief). Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: Brain stem death before the courts and conveyancing;

(2) In the Property and Affairs Report: the Powers of Attorney Act 2023 gets Royal Assent, and how it will change the Mental Capacity Act 2005;

(3) In the Practice and Procedure Report: revised guidance for Accredited Legal Representatives and anonymisation of clinicians in cases involving the MCA 2005;

(4) In the Wider Context Report: a revised online ADRT service and a revised clinical guide for staff working with autistic people and those with a learning disability, and our Irish correspondents highlight two specific aspects of the Assisted Decision-Making (Capacity) Act 2015;

(5) In the Scotland Report: attorneys as executors.

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

Important guidance for accredited legal representatives

A must-read for ALRs, the Law Society has produced a updated practice note that provides detailed guidance on the role of an accredited legal representative in the Court of Protection. The note has been updated to reflect the benefit of experience since the ALR scheme came into effect.

This role involves specialist, approved solicitors personally appointed by the Court to fairly and competently represent P in the proceedings, and to discharge such other functions as the court may direct, whether or not P is a party. That responsibility cannot be delegated where the making of substantive decisions about the case is concerned. Interestingly, as some may not be aware, the guidance notes that there is no such scheme to appoint ALRs in property and affair cases.

The usual conundrum is whether, where P is joined as a party, they should be represented by a litigation friend or an ALR. The guidance sets out the relevant factors:

- whether there will be a need for expert or other evidence to be obtained and filed, or other material gathered, on P's behalf
- the nature and complexity of the case
- the likely range of issues

It adds the following considerations pointing to a situation where a litigation friend may be appropriate:

- where acting as both ALR and representative before the court is likely to mean that it is not possible to establish or maintain a working relationship with P
- where complex and novel points of law are likely to be involved
- where the proceedings are likely to involve fact-finding
- where the matter is contested with evidence to be given at a final hearing

As a result, *Re KL* [2022] EWCOP 24 confirms that it will "generally be unlikely" for the court to appoint an ALR in a case concerning a 16 or 17-year-old.

The guidance helpfully sets out the types of tasks that will be expected of an ALR, which are similar to that of the litigation friend. They have a right of audience. Court attendance is desirable, unless the ALR is available to give instructions to counsel without delay. They should meet P personally save in exceptional circumstances. In terms of the case they advance on P's behalf, the guidance says that they are not required to advance a case that accords with P's wishes if they consider that to do so would be unarguable (*Re NRA and others* [2015] EWCOP 59 at paragraph 144). But, in all cases, they must take

all necessary steps to communicate P's wishes to the court upon the relevant issues.

Important information is provided on a whole range of other issues, including, for example, disclosure to P. It emphasises that an application for directions under rule 17.11 can always be made. A helpful summary of the usual rules regarding legal aid is also provided.

Short note: naming clinicians – a 'cooling off' period

We reported last month on the case of *ST*, in which Roberts J found that the 19 year old in question lacked capacity to decide upon her medical treatment because (we summarise) she could not believe her doctors when they told her that she was dying. ST did, in fact, die shortly after the judgment.[1] She can now be given her full name, as Sudiksha Thirumalesh, as can the treating Trust, University Hospitals Birmingham NHS Foundation Trust. In a judgment delivered on 29 September 2023, (*University Hospitals Birmingham NHS Foundation Trust v Thirumalesh & Ors* [2023] EWCOP 43),[2] Peel J endorsed the agreement of the parties as to the naming of Ms Thirumalesh (who, in light of that agreement had been named, in fact, following the hearing on 22 September), her families and the expert witnesses, and resolved the question of whether, in respect of the identification of the Trust, the hospital(s) attended by Ms Thirumalesh, and clinical / nursing staff, there should be an immediate discharge of the reporting restrictions, or a 'cooling-off' period of 8 weeks, as proposed by the Trust.

This required Peel J to consider the Article 8 and Article 10 ECHR rights in play, and the decision of the Court of Appeal in *Abbasi & Anor v Newcastle Upon Tyne Hospitals NHS Foundation Trust* [2023] EWCA Civ 331.

Peel J noted that:

> *36. The Trust points to its own evidence that relations between staff and parents during the care of ST was not always good. The witness statement in support expressly refers to "nurses and clinical staff". The parents made numerous complaints, which staff felt were unjustified. They "harassed" nurses and tried to interfere with care. Many clinical staff and nurses are extremely worried that they will now be named publicly, including in respect of criticism about care. The parents recorded a number of videos on mobile phones of staff working with ST, and staff are concerned that such videos may be released and might lead to adverse public reaction directed towards them. During the proceedings, media reporting, although anonymised, was perceived by staff to be negative, and two examples are attached to the statement. It is extremely difficult for staff to defend themselves against adverse reporting of this sort, and they would not want to comment publicly in any event. The witness statement prepared on behalf the Trust states that the author is "confident" that staff who cared for ST are likely to take time off work due to stress.*

At paragraph 41, Peel J made clear that he did not accept that there was "*insufficient evidence before me to weigh materially in the balance the Article 8 rights of clinicians and nursing staff. The witness statement to my mind sets out the anxieties clearly*." Nor did he accept, as was suggested by the family, that "*each individual member of staff should apply separately to be anonymised by a Transparency Order or, at the*

[1] We understand that her family intend to seek to appeal that decision, notwithstanding ST's death.

[2] Tor was involved in this part of the case, but has not contributed to this note.

very least, put in their own statement justifying being included within the Transparency Order. It is acceptable for a statement to be adduced in evidence which encompasses the views of all those affected. That is what took place here. To require dozens of members of staff to set out their own cases would be impractical" (paragraph 42).

Importantly, Peel J also took the view that:

> *42.* […] *when considering the evidence put forward on behalf of the Trust, I am entitled to place it in the context of the Court of Appeal's dicta at para 101 of Abbasi, quoted above:*
>
> > *"The Trusts place considerable reliance on the events surrounding the end-of-life proceedings of Charlie Gard and Alfie Evans. They certainly provide clear evidence of the real possibility of conduct impinging on the article 8 rights of staff before, during and immediately after end-of-life proceedings. It was part of the firm foundations for the making of RROs at the time. They do less to inform an assessment of article 8 risks associated with lifting the RROs at a later date."*
>
> *In my judgment, the fact that improper conduct directed towards clinicians has taken place in other cases can in principle be taken into account in the intense balancing exercise, particularly where, as here, the court is considering transparency issues before, during or immediately after the proceedings. Such previous cases are informative of the potential risks run by hospital staff.*
>
> *43. In respect of the identification of clinicians, the family allege failings on the part of certain individuals, stating in terms that this amounted to negligence which led to the death of ST. Although the family, I accept, have no intention to take any steps which might lead to harassment of named staff, the harsh reality of modern methods of communications, particularly by social media, is that they will have no control over the narrative. The publicity generated by this case has been heated in some quarters. There is likely to be heightened interest in the coming days as a result of my intention that the restrictions on identifying ST and her family should be immediately lifted. If anonymisation of clinicians is lifted, the consequences are unpredictable, but there is in my judgment a risk that abuse and harassment may follow, particularly as they may be reported by the family as having given ST inadequate care. Were that to come to pass, I would regard it as a very considerable interference with their Article 8 rights. That risk is likely to be at its most acute in the next few weeks and I consider that there should be a "cooling off period" measured in weeks. That would be a proportionate interference with the family's and the media's Article 10 rights, given the potential interference with the clinical/nursing staff Article 8 rights.*
>
> *44. This hearing is taking place only a matter of days after the tragic death of ST. That is factually different from the circumstances in both the Abbasi and Haastrup cases where, as para 1 of the Court of Appeal judgment says, "These appeals concern the principles to be applied when a court considers an application to vary or discharge a Reporting Restrictions Order ("RRO") **made long before in end-of-life proceedings in the High Court**" [emphasis added].*
>
> *45. Where an application is heard long after the conclusion of proceedings, it is easy to see why there may be little justification for continuation of a Transparency Order. Media and public interest may have diminished. There*

may have been no improper conduct (of any nature, to any person) in the interim which would indicate a continuing concern about improper conduct towards as yet unnamed clinicians or other staff. The raw emotions upon or shortly after the death of a much-loved person may have dissipated.

46. But in this case, at this point in time, so close to the tragic death of ST, the likelihood is that interest in the circumstances leading to her death will be at its highest, and the risk of improper conduct is similarly at its highest. It seems to me that what is needed here is a relatively short elapse of time to allow matters to settle and reduce the risk of inappropriate secondary activity of the sort described by the Court of Appeal. I do not read the Court of Appeal as determining that the strength of the case for lifting such orders long after the end of proceedings would be the same as immediately after the end of the proceedings, and it seems to me that there is a very considerable difference between the circumstances before the Court of Appeal and the circumstances here.

47. It is further submitted on behalf of the family that the potential clinical negligence claims which they are exploring demand an immediate lifting of the Transparency Order in respect of identifying individual doctors. Counsel relies on para 114 of Abbasi in which it was said that:

> *"Those involved in clinical negligence claims resulting in death would need a factually quite exceptional case to secure anonymity in civil proceedings or at an inquest touching the death".*

48. However, in this case clinical negligence proceedings are simply being considered. Unsurprisingly, given that only a few days have passed since death, no claim has been instituted. I understand that the family, sensibly, intend to take time to consider their position. It is accepted that were such proceedings to be instituted before discharge of the order anonymising clinicians (or were formal complaints to regulators or the like to be brought)), it would be appropriate to vary the order permitting the lifting of restrictions for the purpose of such proceedings.

Peel J therefore concluded that he should lave in place the transparency order insofar as it related to the non-identification of clinicians/nursing staff for a limited period of time before automatic discharge, considering 8 weeks to be a "proportionate and appropriate" timescale. He made clear at paragraph 49 that, "[f]*or the avoidance of doubt, this does not prevent the family from discussing or reporting openly their perception of failings by the Trust and its staff, but they are not permitted to identify any treating clinicians/nursing staff as part of any such discussions or reporting*" (paragraph 49).

Peel J declined to require that the order identify each member of staff within these two categories, as was commended in *Abbasi*. He noted at paragraph 51 that "[t]*he numbers would run into dozens, and there is a risk of not capturing all the relevant names. At the risk of repetition, my approach might have been different if this application was being considered long after the event; by then, it might be easier to identify if any particular individuals or individuals were at greater risk*." He also provided that any videos or photographs which the family may have taken of clinical and nursing staff should not be published, as they could lead to identification of individual clinicians/nurses. Again, these would be discharged in 8 weeks, although he noted that there might be separate written agreements in place between the family and the Trust which would in any event govern publication.

As regards, the Trust, Peel J noted at paragraph 53 that "*once ST is identified, it will swiftly be known where she lived, and the Trust will be easily identifiable. To retain the provisions of the Transparency Order in respect of the Trust would be futile*." However, he continued:

> *54.* […] *to identify specific hospitals attended by ST would carry a risk of jigsaw identification of the clinicians. I accept that as there are only four hospitals run by the Trust, there is inevitably a risk of identification even if a specific hospital is not named, but (i) the order will prevent naming of clinicians/nursing staff, and (ii) the fact that a particular person may know of the identity of the Trust does not lead automatically to identification of the particular clinicians who treated a particular patient at a particular time.*

Court of Protection and LPA statistics April – June 2023

The most recent set of statistics has now been published by the MoJ, showing, in headline terms:

- There were 1,432 applications relating to deprivation of liberty made in the most recent quarter, which is a decrease of 2% on the number made in the same quarter in 2022. Of these applications, 142 were for s.16 orders, 470 under s.21A and 820 for 'community DoL' orders. There was an increase by 162% in the orders made for deprivation of liberty over the same period from 648 to 1,698; although the statistics do not make this clear, it is likely that this is in large part down to a sustained push by the court to seek to clear the 'community DoL' backlog;
- In April to June 2023, there were 7,746 applications made under the MCA 2005, down by 9% on the equivalent quarter in 2022 (8,498 applications). Of those, 30% related to applications for appointment of a property and affairs deputy. There were 16,349 orders made under the MCA 2005, up by 45% on the same quarter in 2022. Of those, 39% related to orders by an existing deputy or registered attorney.
- There were 7,746 applications made in April to June 2023, down by 9%. During the same period there were 16,349 orders made, up by 45% - the highest quarterly volume for orders since the start of the series.
- In April to June 2023, there were 275,569 LPAs registered, the highest in its series and up 43% compared to the equivalent quarter in 2022.

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Alex 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 Visiting Professor at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

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Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes. 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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Conferences

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

Alex is leading a masterclass on approaching complex capacity assessment with Dr Gareth Owen in London on 1 November 2023 as part of the Maudsley Learning programme of events. For more details, and to book see here.

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 November. 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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