MENTAL CAPACITY REPORT:
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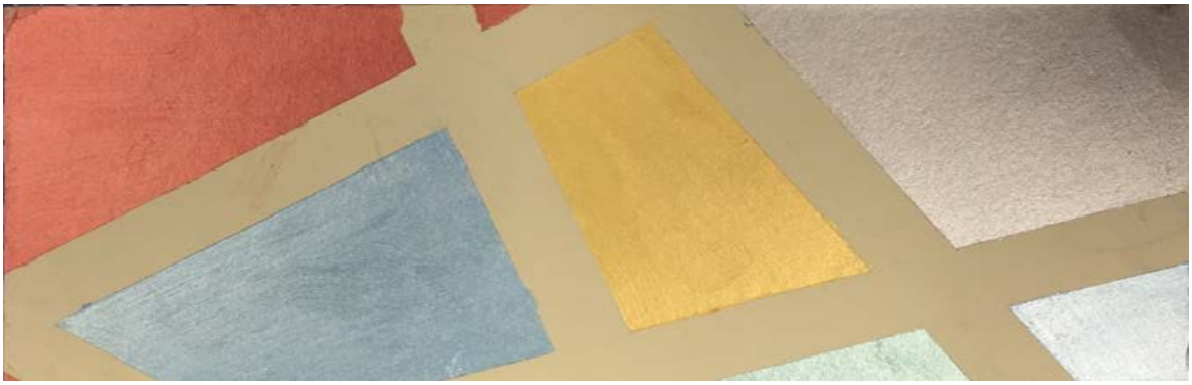

Welcome to the February 2024 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: medical treatment dilemmas of different hues, how risky can the court be, and capacity in context;

(2) In the Property and Affairs Report: useful guides for those creating LPAs and an Australian take on balancing risk and (false) hope in the context of scamming;

(3) In the Practice and Procedure Report: medical evidence, mental disorder and deprivation of liberty, and the approach to propensity evidence;

(4) In the Wider Context Report: the new framework for care home visiting in England, an important consultation on capacity in civil litigation, new core ethics guidance from the BMA, and the Circuit Court rolls up its sleeves in Ireland;

(5) In the Scotland Report: discrimination narrowly avoided, and a case posing questions about compensation for unlawful detention.

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.

The sharp-eyed amongst you will have noticed that there was no third edition of the informal Court of Protection Law Reports series at the start of this year: this is because there will shortly be announced exciting news about their future – watch this space.

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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

Manifestation of endemic disability discrimination rejected

Rarely can so much of significance be concealed by a decision requiring only "technical" interpretation of a rule of court, as in *S v M* [2024] SAC (Civ) 1, a decision of the Sheriff Appeal Court by Sheriff Principal Catherine Dowdalls KC, sitting alone. Even the basic facts are startling. According to an undisputed psychiatric assessment before the court, *S*, the defender in the proceedings, has a mild learning disability, but was able to exercise her right to instruct a solicitor to act for her in the case, and had competently done so, that being the position at all relevant times, and continuing to be so. The pursuer nevertheless sought to deprive her of that right, and thus delay further his own protracted case, by having a curator ad litem appointed.

The pursuer founded on his interpretation of rule 33.16 of the Ordinary Cause Rules 1993, a rule last reviewed and re-framed in 2017. In the words of the courts at both first instance and on appeal, the outcome of the pursuer's interpretation would have been "absurd". There were generalised references in the decisions, at both first instance and on appeal, to the European Convention on Human Rights: no more than that, as all concerned seem to have considered it unnecessary to "go there". But any commentary must "go there". People in Scotland with mental and intellectual disabilities live in an environment awash with platitudes and good intentions, but in reality face endemic discrimination, including institutional discrimination still lurking in places in our laws and procedures. The essence of the pursuer's case was that the label of "mental disorder", when attached to the defender, incapacitated her from the benefit of fundamental rights, even though the label was irrelevant to her ability to exercise those rights. It seems unarguable that this would have violated her rights under Articles 6 and 8, and in association with them Article 14, of the European Convention. That interpretation would need no external reinforcement, but is in fact indisputably reinforced by the UN Convention on the Rights of Persons with Disabilities, not part of Scots law but ratified in full by the United Kingdom, and thus a significant aid to interpretation where necessary.

The interpretation urged by the pursuer would not only have been "absurd", and have violated the defender's fundamental rights; it would also inevitably have meant that rule 33.16 was *ultra vires* of the Parliament – both in relation to the European Convention and as a devolution issue – and thus a nullity.

The possible nature of the pursuer's motive in instructing his solicitor to proceed as was done must at least be considered by a commentator. That will conclude this item. Suffice to say here that the legality of a party's motive was a significance in the other Scottish case considered below in this issue of the Report.

The case to which the application for appointment of a curator ad litem related was brought under section 11 of the Children (Scotland) Act 1995. The pursuer sought orders for declarator that he is the father of a three year-old child of the defender, orders for parental rights and responsibilities in relation to the child, and contact with the child. The defender opposes the making of any such orders in favour of the pursuer. Apart from noting the broader context of the litigation, rights and obligations of and in relation to the child are absent from the proceedings referred to in this Report. In particular, there is no reference to the requirement in section 11(7) of the 1995 Act that the court "*shall regard the welfare of the child concerned as its paramount consideration*" and should "*not make any such order unless it considers that it would be better for the child that the order be made than that none should be made at all*".

Sheriff Principal Dowdalls quotes all relevant provisions of rule 33.16. Taken in isolation, subsections (1) and (2) appear to make mandatory the outcome urged by the pursuer. The rule "*applies to a family action where it appears to the court that the defender has a mental disorder*" (33.16(1)). A psychiatric opinion to that effect was before the court. In an action to which the rule applies, and therefore in this action, "*the sheriff shall, after the expiry of the period for lodging a notice of intention to defend – (a) appoint a curator ad litem to the defender*". Reading no further, that would have been the beginning and end of the matter, had the rule been within the competence of the Parliament. That was the position urged by the pursuer, and upon a reading of the rule up to that point accepted as clearcut by the courts both at first instance and on appeal.

The picture changes completely if, as the courts did, one reads beyond rule 33.16(2)(a). Upon appointing the curator ad litem under (a), the court must make an order under (b) to lodge in process a report, based on medical evidence, stating whether or not, in the opinion of a suitably qualified medical practitioner, the defender is incapable of instructing a solicitor to represent the defender's interests. Right away, the requirement shifts from existence of a mental disorder to consideration of the relevant capability or incapability of the defender. That is where the focus stays for the remainder of rule 33.16. If the appointment of curator ad litem were to get beyond that first hurdle, the curator ad litem must, having regard to the nature of the defender's mental disorder, "*review whether there appears to have been any change in the defender's capacity to instruct a solicitor, in order to ascertain whether it is appropriate for the appointment to continue*". If it appears to the curator ad litem that the defender may no longer be so incapable, the curator ad litem must seek the sheriff's permission to obtain a medical opinion on the matter, the curator ad litem must lodge a copy of that opinion in process, and where the opinion concludes that the defender is not incapable of instructing a solicitor, the curator ad litem must seek discharge from appointment by Minute (33.16(8), (8A), (8B) and (8C)). In the present case, the practical effect of that, given the acceptance of all concerned of the medical assessment already before the court, is that any curator ad litem actually appointed would rapidly reach the point of being disqualified from acting, would be discharged, and the defender's right to instruct the representation of her choice would be reinstated. That is the "absurd" outcome referred to by both courts, an outcome with the consequences already described above. Sheriff Principal Dowdalls summarised the position in paragraph [20] of her opinion as follows:

> *"It is apparent from the above that the purpose of rule 33.16 is not to require that, in every case where the defender*

> *suffers from a mental disorder, the case is conducted on the defender's behalf by a curator ad litem. The purpose of the rule is to identify, through the appointment of a curator ad litem who will obtain a medical report, whether the defender is capable of instructing a solicitor. The rule requires that the defender's capacity to instruct a solicitor is kept under review by the curator ad litem and that, in the event that the defender is not incapable of instructing a solicitor, to seek discharge of the appointment."*

In paragraph [22] the Sheriff Principal stated that:

> *"… The purpose of the rule is twofold: firstly, …, it is to protect the interests of the defender; secondly it is to ensure that a defender who is not incapable of instructing a solicitor is permitted to do so and to conduct the litigation without the appointment of a curator ad litem …"*

The foregoing was sufficient to enable the Sheriff Principal to refuse the appeal. Sheriff Derek Livingston, at first instance, made the additional point that in rule 33.1(2) the definition of "mental disorder" was qualified by the words "*In this chapter unless the context otherwise requires*". Rule 33.1(2) in effect adopts a definition of "incapable" in the same terms as section 1(6) of the Adults with Incapacity (Scotland) Act 2000, including that the incapability be "by reason of mental disorder" as defined in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003. The relevant provisions of rule 33.1(2) and section 328 of the 2003 Act are quoted in the Appeal Court's decision. Though not commented upon in either decision, section 328 provides that "'*mental disorder' means any – (a) mental illness; (b) personality disorder; or (c) learning disability*". On the basis of currently quoted statistics, that very wide definition accordingly applies at any one point in time to a significant percentage of the population, inevitably including current litigants who, like *S*, are quite capable of instructing their own representation and are doing so, and quite possibly some of those so instructed.

Sheriff Livingston had granted leave to appeal *ex proprio motu*, on the basis that he considered that "*the matter might be worthy of further consideration by your Lordships and Ladyships*", so that the outcome is now clarification of the law on this point binding on sheriffs at first instance throughout Scotland.

The defender had also made an issue of the delay of more than three years from expiry of the period of notice following upon commencement of the action, that rule 33.16 related to something which should have been done at a much earlier point in time, that a proof fixed for 21st November 2023 was put in jeopardy by the pursuer's appeal, and that "*the ship has well and truly sailed on any such procedural irregularity*" (referring to the delay). The Sheriff Principal at [21] noted that paragraphs (2) and (3) of rule 33.16 "*appear to anticipate the appointment being made at a relatively early stage and certainly prior to a diet of proof*", but that the "*language of rule 33.16 does not set a time limit for the appointment of a curator ad litem*", therefore the Sheriff Principal did not agree with the defender's submission that "*the ship has well and truly sailed*".

The following four observations are not reflected in the decisions at first instance or upon appeal.

The first is that there was no consideration of my view, expressed soon after the passage of the 2000 Act in paragraph 10-43 of "*Adult Incapacity*" (W Green, 2003), pointing out that curators ad litem were not abolished by the Act, nor mentioned in it, but that following passage of the 2000 Act the options were appointment of a guardian with relevant powers, the granting of an intervention order authorising an appointee to pursue or defend an action, or appointment of a

curator ad litem; and that those first two options "*should normally be preferred over appointment of a curator ad litem*", because "*Having regard to ECHR Article 6 and the second general principle under the Incapacity Act, it would appear that the risks of contravention of the adult's rights and the restriction of the adult's freedom are likely to be less if the requirements of intervention order procedure are followed*".

Secondly, this case has arisen as Scottish Government are already pressing forward with consideration of the definition and application of the term "mental disorder" in legislation, in furtherance of the Programme of Work described in the December 2023 Report. This case highlights the inexcusably careless drafting of rule 33.16 in its use of "mental disorder", reinforcing misunderstandings arising from the way that the term is used in different contexts as the gateway to very different outcomes: in the 2003 Act, as the gateway to compulsion; in the 2000 Act, simply as a prerequisite for a finding of incapacity, which in turn has multiple applications; and so forth. One still encounters, with depressing frequency, the assumption by those who should know better that the existence of a mental disorder equates to incapacity. This can arise in many guises, including, for example, the need for the Lord Justice Clerk to clarify this point, in the decision of the Inner House issued on 14th March 2023 in an appeal by *Dr Mina Mohiul Maqsud Chowdhury v General Medical Council* in relation to fitness to practice proceedings. The case was described in the May 2023 Report and includes in full the relevant quotation from the Lord Justice Clerk. There are also concerns that reliance of the term "mental disorder" in some settings appears to be contrary to the UN Disability Convention. It may be that the term has outlived its usefulness, should be abolished, and should be replaced with definitions more clearly linked to the various purposes for which they are used.

Thirdly, while it was convenient in *S v M* that a psychiatric assessment of the defender's capability to instruct a solicitor was helpful, that is not essential and in a sense irrelevant, because (put shortly) having regard to relevant provisions of the code of conduct for solicitors, and the general human rights environment, success of the pursuer's application would have forced the defender's solicitor into breach of fundamental professional obligations. Having evidently engaged with the defender, and before accepting instructions, the defender's solicitor was obliged to provide all reasonable support to enable the defender to exercise her legal capacity in the matter of the proceedings brought against her (and indeed ensuring provision of such support is an obligation undertaken by the state in its ratification of the UN Disability Convention, under Article 12.3). The way in which the pursuer's solicitor discharged that obligation and, having ensured the provision of any necessary support, concluded that it was appropriate for her to accept instructions and to act, is a privileged matter between the solicitor and her client, and the conclusion of a solicitor that the solicitor is competently instructed is not a matter for enquiry by any other party, or indeed by the court, perhaps with the exception of some situation where a court might be aware of, or have drawn to its attention, real cause for concern about the performance by the solicitor of the solicitor's professional obligations. Otherwise, in all jurisdictions and for all purposes a court and other parties must accept as true, and beyond enquiry, the statement by a solicitor when that solicitor rises in court and announces that they are acting for X in the matter before the court. Except perhaps for some very good reason, it would be entirely inappropriate for the court, whether or not on the prompting of another party, to ask "Do you really?". That leads to the final point below.

Fourthly, by the same token, one has to accept that in *S v M* the pursuer's solicitor was acting upon the full instructions of the pursuer. Given the practical consequences of making the application and in instructing the appeal, it is difficult to see what legitimate motive the pursuer may have had. As explained above, if a curator ad litem had been appointed, the prescribed procedure would inevitably have resulted, probably quite quickly, in the curator ad litem stepping aside and the defender re-acquiring her right to instruct representation of her choice. Significant amounts of time would be lost in a case already three years in court. Expense, either to individuals or to the public purse, would have been incurred. Litigation is usually stressful, and often distressing, for participants, no more so than for a litigant with a mild learning disability facing opposed assertions of paternity and rights for contact with her three year-old child. If, for one reason or another, the pursuer's application or appeal were to mean that the defender had to start again from square one with other representation, that would clearly be further detrimental on all the grounds of delay, expense, and distress to the defender: on delay, see the sheriff's comments in *Scottish Borders Council v AB*, [2019] SC JED 85, 2020 SLT (Sh Ct) 41, which we described in the December 2019 report, commending the assistance provided to the court by the solicitor for a learning disabled party by having spent time with her client frequently over several months to reach the point where she could represent her client as she did. One would reasonably have thought that a person claiming paternity and anxious to have contact with his child would have sought to have his application determined without avoidable delay, one way or the other, so that either contact would commence, or he would know (albeit sadly, no doubt) that it was not going to happen. There is a dearth of authority in Scotland on what does and does not amount to an abuse of process, but while acknowledging that there might be some perfectly good and legitimate reason for the pursuer proceeding as he did, it is difficult to envisage what that might be, and to be reminded of the dictum of Goldberg J in the Australian case of *White Industries Pty Ltd v Flower & Hart* 213 (1998) 156 ALR 169 at 252 "*… It is not proper, in my view to adopt a positive or assertive obstructionist or delaying strategy which is not in the interests of justice and inhibits the court from achieving an expeditious and timely resolution of a dispute*".

Adrian D Ward

O' boats an' men

(Attribution obvious in this first Report after 25th January; with apologies accordingly)

The case of *Galbraith Trawlers Limited v The Advocate General for Scotland (as representing the HOME OFFICE)* [2024] CSIH 1, 2024 SLT 43, concerned the amount of damages to be paid by the Home Office, as defender and appellant in an appeal to the Inner House, to Galbraith Trawlers Limited, pursuers and respondents, for the admittedly unlawful detention of three fishing vessels. Though concerned with unlawful detention of boats, its potential relevance to unlawful deprivation of liberty of both men and, of course, women, is nevertheless of significance to adult incapacity practitioners. There are various references to cases of unlawful detention of a mentally disordered patient and other unlawful detentions and arrests, without explicit reference to Article 5 of the European Convention; a specific focus on the lawfulness of the motives for exercise of powers, whether the manner of exercise was lawful or unlawful; and some concluding comments on what, nowadays, should be awarded even as "nominal damages" where only nominal damages are held to be appropriate. The potentially relevant context for

adult incapacity practitioners includes the prolonged failure of the Scottish Parliament to comply with Article 5 by legislating for a method to authorise deprivations of liberty of adults unable to consent to arrangements in a manner compliant with Article 5; the prevalence in particular of unlawful discharges of adults from hospitals to care homes before, during and after the pandemic, and the emerging practice of unlawfully retaining them in hospitals when that is no longer medically justified; and issues about the lawfulness of the motives for such discharges.

In *Galbraith*, the Home Office appealed against an award by the sheriff at Campbeltown of damages of £284,227 plus interest for losses arising from the detention of the fishing vessels, the appeal having been referred to the Inner House by the Sheriff Appeal Court. The opinion of the Inner House was delivered by Lord Carloway, the Lord President, the other members of the court being Lords Malcolm and Pentland.

All three fishing vessels were detained under provisions of the Immigration Act 1971, section 25 of which provides that where a person is convicted on indictment of facilitating a breach of immigration law by an individual who is not a UK national, the court may order forfeit of a vessel which has been used in connection with the offence. Prior to forfeiture, under section 25D of that Act (as applied to Scotland), if a person has been arrested for an offence under section 25, such a vessel may be detained by a "senior officer" *inter alia* until a decision is taken as to whether or not to institute criminal procedures against the arrested person for the section 25 offence. A "senior officer" is an immigration officer not below the rank of Chief Immigration Officer. The Home Office conceded that the immigration officer was below that rank, but argued that this was a procedural error but for which the vessels would have been lawfully detained anyway, therefore damages should be limited to nominal damages.

The Lord President summarised the task before the court as follows:

> *"The Advocate General contends that, owing to the particular circumstances of the case, the sheriff ought to have restricted his award to a nominal amount. That contention flowed, in essence, from the reasoning in Parker v Chief Constable of Essex Police [2019] 1 WLR 2238 (Sir Brian Leveson at para 104) that the test, when assessing damages in a wrongful detention case, is not to compare the claimant's position with what would have happened, but for that detention, but with what would have happened if the relevant authority had appreciated what they ought to have done to effect a lawful detention. This test, which was said to be the product of R (Lumba) v Home Secretary [2012] 1 AC 245, has been criticised both by the High Court of Australia (Lewis v Australian Capital Territory [2020] 271 CLR 192) and the Supreme Court of Ireland (GE v Commissioner of the Garda Síochána [2022] IESC 51). In order to determine the appeal, the court must decide whether Parker is in line with Scots law or whether it should follow the Australian and Irish jurisprudence."* [From para [1] of his opinion]

He amplified that as follows:

> *"The Advocate General does not challenge the sheriff's finding that the vessels were detained unlawfully. He confines his appeal to a contention that only nominal damages ought to have been awarded. This is on the basis that the mistakes, which were made by the Home Office in detaining the vessels, were procedural or technical errors. Had*

> *the Home Office been aware of the correct method of detention, they could and would have lawfully detained the vessels. Therefore, the Advocate General argues, the unlawfulness of the detention did not cause the loss. The detentions could have been executed lawfully, and the same loss would have occurred if they had been."*

For the authorities relied upon and referred to by the Advocate General, and those by the pursuers and by the court, see the judgment. As narrated by the Lord President, the pursuer's case can be summarised as follows:

> *"The pursuers did not argue, nor did they lead evidence, that a senior officer or a constable could not have lawfully detained the vessels. Rather, they said that the power under section 25D had been exercised by someone who was not a senior officer or constable. The court had to consider what would have happened if the delict had not been committed. There was no point of principle which required damages to be approached differently from that of the detention of a person. Liberty of a person had generally been afforded greater protection by the law than property rights. If unlawfully detained persons were only entitled to an award of nominal damages, the same considerations should apply to property owners."*

The defenders contended that the authorities relied upon by the Advocate General were neither binding nor germane to, and were distinguishable from, the present case. The legislation was different. It mattered not that the deprivation could have been achieved lawfully. It was not. The sheriff had found that the pursuers had sustained a real loss. The Advocate General's argument was that even if the Home Office had laboured under a complete misapprehension as to the law, and followed that, causation was to be approached as though there had been proper compliance. The pursuers pointed out that there was no common approach in cases of delict. It varied according to the basis and purpose of the liability. For the steps in the pursuers' argument, and authorities, again see the Lord President's opinion.

The court's decision commenced with the basic proposition:

> *"When a wrong has been committed, the court will order the wrongdoer to compensate the person affected by assessing what, in monetary terms, will put that person back into the same position as he would have been in had the wrong not occurred."* [32]

After surveying the relevant authorities and drawing the principles from them, the Lord President said:

> *"Applying these straightforward principles, the question here is what, in fact, would have happened if the vessels had not been wrongfully detained. The sheriff was not prepared to find in fact that they would have been detained lawfully. On the contrary, he considered that the Home Office had a flawed understanding of what was required in order to detain a vessel. He was unable to accept that, had the Home Office properly understood what was required, they could and would have lawfully detained the vessels. The sheriff was well entitled to reach this view and to find in fact, as he did (ff 25), that the wrongful detention had had a 'severely detrimental effect on the [pursuers'] financial situation'.* [33]
>
> *"It appears from the evidence of Inspector Lindsay that the decisions to detain were tactical ones which were designed to 'drive compliance'. That is not a lawful ground for detention.*

> *Section 25D makes it clear that the only purpose of detention is to enable the court to make a forfeiture order. Such an order is a financial punishment. For there to be reasonable grounds for believing that it is in prospect, the person detaining the vessel must have in mind: the nature of the crime, notably its seriousness; the likely penalty in financial terms; and the value of the vessels and any other assets owned by the potential accused. There was no evidence that any form of analysis of these issues or balancing exercise was carried out by the Home Office in order to determine whether detention was required so that forfeiture could follow. The conclusion must be, as a matter of fact, that, had Inspector Lindsay signed and served the letters herself (see infra), a detention may have followed, but it too would have been unlawful."* [34]

The Inner House proceeded through several decisions to pick out contrasting strands. Was the test what would in fact have happened if the unlawful arrest or detention had not taken place; but what would have happened on the supposition that it had been appreciated what the law required and that had been followed, the latter being open to the criticism that to assume lawfulness was to assume what was sought to be proved. The Inner House arrived at the contrast between the view taken in England & Wales, and the view taken in the High Court of Australia and the Supreme Court of Ireland, referred to above, but this time addressing the decision of the UK Supreme Court in *R (Hemmati) v Home Secretary* [2021] AC 143, in which Lord Kitchin stated (at para 112) that only nominal damages would flow if it were established that the wrongfully detained person *could* have been lawfully detained. Following the Australian case *Lewis v Australian Capital Territory* [2020] 271 CLR 192, and the Irish case *GE v Commissioner of An Garda Síochána* [2022] IESC 51, the Inner House opted for the Australian and Irish view, and concluded that:

> *"Although the present case is resolved on the basis that it has not been found in fact that, had the Home Office appreciated the tests for lawful detention, a lawful detention would have followed, the court disagrees with the reasoning in Parker in favour of that in Australia and Ireland. The correct counterfactual is simply what would, on the balance of probabilities, have happened; not what might or could have happened."* [42]

The appeal was refused. The Lord President concluded by examining what "nominal damages" actually means. He reviewed various cases from the 19th century and one in 1933, quoting the sums awarded and their equivalent values now, and he quoted the comment of the Lord Chancellor in *The Mediana* [1900] AC 113, Halsbury LC at 117 [46], that nominal damages for the infringement of a right did not mean small damages. With reference to the present case, he concluded that:

> *"Had the court awarded only nominal damages it would have measured those in thousands of pounds and not in the shape of a £1.00 coin. The resultant figure ought to serve as a modest deterrent of unlawful detentions."* [46]

I simply pose the questions to be derived from this for practitioners in Scotland considering cases of apparent unlawful discharges from hospital, or failures to discharge, whether from a starting-point of delict or a starting-point of adult incapacity rights. Which of the factors considered in *Galbraith* are relevant to the variety of factual situations that have occurred? If it could be proved that the driver for discharges was an unlawful one, mainly to reduce so-called bed-blocking, did that equate to the unlawfulness

of the purpose of the detention of the vessels to "drive compliance" [34], which was not a lawful ground for detention and therefore any "remedial" steps taken would not have rendered the detention lawful? Its purpose was unlawful, therefore it was unlawful. Would the absence of such unlawful motive alter the outcome? While there may have been convergence between the laws of England & Wales and of Scotland in matters of tort/delict, would the Supreme Court – if such a case were taken that far – acknowledge and follow the fundamental differences between the two systems in matters of adult incapacity, and apply the preferred view of the (exclusively) Scottish courts? There could be different answers for different cases.

In the case of unlawfulness during the pandemic or earlier, practitioners would require to consider the various possible applicable rules of prescription and limitation under the Prescription and Limitation (Scotland) Act 1973 as amended, including whether the victim had since died, whether and to what extent the harm sustained was a "personal injury" (as defined in the 1973 Act to include a disease), whether the wrong was the deprivation of liberty itself without the personal injury element, the effect of impairment of the capabilities of the victim, and so on.

What victims of unlawful deprivation of liberty in terms of Article 5 are assured of is the right to compensation in Article 5.5. The question is: how much? Have potential claims in Scotland been deterred because of the view in England & Wales that only nominal compensation, and levels there awarded as such, would be payable anyway, so a claim was not worth the effort. Has the decision in *Galbraith* fundamentally altered such a judgement, with the prospect of even nominal monetary compensation being reflected "in thousands of pounds"?

Adrian D Ward

Streamlined Legal Aid applications for some Part 6 orders

The Scots Law Times of 26th January 2024 contained intimation of a new streamlined procedure for unopposed applications for Part 6 orders. The relevant Scottish Legal Aid Board web page is here. At first sight, it bears to relate only to guardianship applications, but in fact the new procedure relates to any "unopposed" applications where welfare powers are included (whether or not along with financial powers) for grant of intervention or guardianship orders, renewal of guardianship, and applications for appointment of joint or substitute guardians, whether or not under a guardianship order previously granted. The provisions of the 2000 Act quoted are sections 53(1), 57(1), 60(1), 62(1) and 63(1). It is helpful that SLAB have streamlined the process in this way, thus removing previous unnecessary difficulties to address the needs of adults to whom the 2000 Act applies, but there are some unfortunate infelicities at the link and in the form for streamlined applications at a further link. To mention two of them here, there is lack of clarity about the term "unopposed applications" because one could say that no applications are opposed at time of obtaining Legal Aid and prior to lodging in court (with the rare possible exception of applications for Legal Aid made only after the AWI application has been commenced and opposed). The better interpretation, it seems, is that this is intended to link back to the explanation in the fourth paragraph of the procedure when Legal Aid is sought to oppose an existing application and raise a counter-application. It would seem that the streamlined procedure is to be disapplied on the presumption that in these circumstances the counter-application will be opposed (though of course that is not a certainty).

Secondly, the information sought in the form is said to be the information needed to process the application, but seeking the "Applicant's relationship to adult" seems to be perhaps interesting but irrelevant (and in any event lacks the qualification "if any"), and the same would appear to apply to the question "Please explain the Applicant's involvement in the adult's everyday life".

It will be interesting to see whether the web link and form are improved, better further to remove avoidable difficulties.

Adrian D Ward

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Nyasha has a practice across public and private law, has appeared in the Court of Protection and has a particular interest in health and human rights issues. To view a full CV, click here

Simon Edwards: simon.edwards@39essex.com

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

Adrian Ward: adrian@adward.co.uk

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.

Jill Stavert: j.stavert@napier.ac.uk

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

Members of the Court of Protection team regularly present at seminars and 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.

Peter Edwards Law has announced its spring training schedule, here, including an introduction – MCA and Deprivation of Liberty, and introduction to using Court of Protection including s. 21A Appeals, and a Court of Protection / MCA Masterclass - Legal Update.

Adrian will be speaking at the World Congress of Adult Support and Care. This event will be held at the Faculty of Law of the University of Buenos Aires from August 27-30, 2024. For more details, see here.

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to 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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