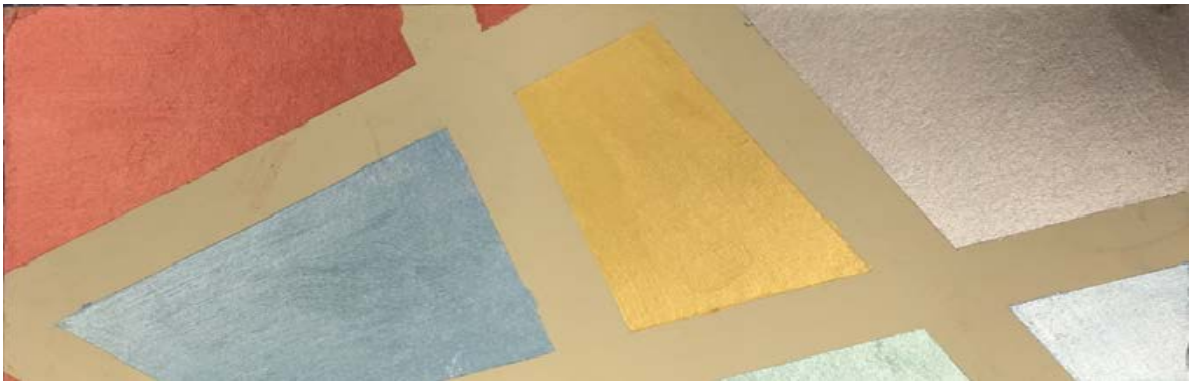

Welcome to the November 2024 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: anticipatory declarations; systemic failure in considering PDOC patients, and the CQC and DoLS.

(2) In the Property and Affairs Report: Senior Judge Hilder reversing reverse indemnities and considering the scope of deputies' authority in the context of Personal Health Budgets;

(3) In the Practice and Procedure Report: costs and delay and capacity in cross-border cases;

(4) In the Mental Health Matters Report: the Mental Health Bill is introduced;

(5) In the Wider Context Report: Strasbourg suggests that the Supreme Court was wrong in the *Maguire* case.

(6) In the Scotland Report: Scottish Government's law reform proceeds at breakneck speed, and a symposium for Adrian.

There is one plug this month, for a free digital trial of the newly relaunched Court of Protection Law Reports (now published by Butterworths. For a walkthrough of one of the reports, see here.

His fellow editors congratulate Alex on his receipt of a Honorary Fellowship of the Royal College of Speech and Language Therapists (and he uses this opportunity to give his usual plug for their vital role as capacity supporters).

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

Short note: was the Supreme Court wrong in the *Maguire* case?

The decision of the European Court of Human Rights in *Validity Foundation on behalf of TJ v Hungary* [2024] ECHR 796 is a significant decision in its own right, not least for highlighting the continuing invaluable work of the Validity Foundation in championing the rights of those with cognitive impairments in Central and Eastern Europe and in Africa.

This case concerns the death in a residential care home of a woman (Ms TJ) who had a severe intellectual disability.

Between 2015 and 2017 a team of monitors visited Ms TJ to discover that she was emaciated, and unresponsive, with an open wound to her forehead and a black eye. She was tied to her bed with a steel hoop at the waist. The care home did not consider this to be a restriction, but a nursing aid to prevent her from falling out of bed.

The team of monitors published a report, and the Government also inspected the care home and published a report into its failings. On 18 May 2017 the Hungarian Commissioner for Fundamental Rights published a report on the care home, concluding that the institution lacked adequate care facilities, that the fundamental rights of the residents were being violated, and the living conditions could give rise to inhuman and degrading treatment.

In the Spring of 2018, Ms TJ died in hospital having been admitted there with pneumonia. An autopsy confirmed the cause of death as bacterial pneumonia.

The monitoring organization lodged both a criminal complaint with the local police department, alleging amongst other allegations, that Ms TJ's death had occurred because of the professional misconduct of the staff, and a collective complaint in the civil courts. The criminal complaint was eventually dismissed. The civil complaint eventually led to the Budapest High Court giving a judgment in February 2024 in which it concluded that that the Directorate of Social Affairs and Child Protection, the Pest County Government Authority, and the legal successor of the Ministry of Human Resources, the Ministry of Culture and Innovation had failed to carry out their statutory obligation to supervise and manage the care home. Thereby they had infringed the personality rights, including the right to equal treatment and the right to dignity of the residents. They had maintained a humiliating and degrading environment, restrained the liberty of the residents in an inhuman manner, exposed the residents to indecent sanitary conditions, had not provided human living conditions, had not provided education, rehabilitation, participation in sport, cultural and social life, had not provided appropriate care and development and had not ensured the resident' right to access to healthcare.

The European Court of Human Rights concluded that Mrs TJ was under the exclusive control of the State. It placed particular reliance (in finding that the Article 2 duty to secure life was engaged) on three aspects of her background:

> *75. It first points out that since the age of ten, Ms T.J. had lived in the hands of the domestic authorities: she had grown up in Topház, where she had continued to live as an adult in the female ward until her death at the age of forty-five on 25 August 2018. She had been placed in the social care home since she needed constant assistance, which apparently could not be provided by her family. Her intellectual disability was considered to compromise her ability to make an informed choice about remaining in the social care home.*
>
> *76. In practice, she was fully dependent on the institution for her most basic human needs including her place of residence, her medical treatment, her daily activities, and her interaction with the outside world. The Court also considers that Ms T.J.'s long-term institutionalisation and her ensuing loss of contact with the outside world necessarily made such dependence even greater. Thus, contrary to the Government's argument, even if her guardian had sought her release from the social care home, Ms T.J. would have had no possibility - in any meaningful sense - of leaving the institution.*
>
> *77. Secondly, the Court emphasises the particularly vulnerable situation of Ms T.J., as a person with disability (see Z.H. v. Hungary, no. 28973/11, § 29, 8 November 2012, and Shtukaturov v. Russia (just satisfaction), no. 44009/05, § 18, 4 March 2010) which has been recognised as a relevant consideration when assessing a State's responsibility under Article 2 (see Centre for Legal Resources on behalf of Valentin Câmpeanu, cited above, § 131, with further references).*
>
> *78. Thirdly, it is also significant that the domestic authorities considered, apparently because of her disability, that Ms T.J. lacked legal capacity to act for herself and appointed a legal guardian for her.*
>
> *79. While in theory Ms T.J.'s guardian was supposed to represent her interests, take decisions about her placement and medical care, and provide legal assistance if necessary, no evidence has been produced by the parties to show that her guardian was notified of or consulted about the decisions on her medical treatment in the care home or her various admissions to hospital. The Court further notes that there is no evidence that Ms T.J. was ever informed about her care or assisted in understanding such information, apparently because the guardian herself considered that she was unable to communicate with her. Although there is no indication that Ms T.J.'s guardian acted in bad faith, there were serious shortcomings in the manner in which the guardianship system was implemented with respect to vulnerable patients admitted to social care institutions, who in practice were left without effective legal assistance or protection (see paragraph 31 above).*
>
> *80. For the Court, the above elements indicate that Ms T.J. was under the exclusive control of the State authorities who therefore assumed direct responsibility for her welfare and safety and were under an obligation to account for her treatment and to give appropriate explanations concerning that treatment (see Centre for Legal Resources on behalf of Valentin Câmpeanu, cited above, § 140, and Nencheva and Others, cited above § 119).*

The Court noted the many serious deficiencies in Mrs T J's care found by the domestic courts and came to the view that the Government had failed to account for the treatment of Ms T.J., who was under the exclusive control of the State, and failed to demonstrate that the domestic authorities had had the requisite standard of protection that would have enabled them to prevent the deterioration in health and untimely death of Ms T.J. This amounted to a breach of article 2.

It might be said that the conclusion the ECtHR reached in this case is at odds with the decision of the Supreme Court in the case of *R (Maguire) v His Majesty's Senior Coroner for Blackpool & Fylde* [2023] UKSC 20. In that case, the court held that when an individual is placed in a care home, a nursing home or a hospital, the state does not assume responsibility for all aspects of their physical health. Placing considerable reliance on the admissibility decision in *Dumpe* (not referred to by Strasbourg in the *TJ* case), the Supreme Court had sought to identify that the deprivation of liberty to which Ms Maguire was subject, in a care home, authorised under DoLS, was in some way different in character to deprivation of liberty in (for instance) a mental health hospital. In so doing it placed considerable emphasis on the fact that the care home's responsibility was said to be to look after the woman on behalf of the State in substitution for her family. Paragraph 80 of the judgment in *TJ* suggests, one might think, that the Supreme Court had moved too quickly to downgrade the scope of Article 2 in the context of DoLS.

Calibrating the definition of ill-treatment by reference to the victim: an important clarification from the Court of Appeal

R v Banner; R v Bennett [2024] EWCA Crim 1201 (Court of Appeal (Criminal Division) (Singh LJ, May and Griffiths JJ))

Summary

Whorlton Hall hospital housed patients with longstanding learning disabilities and significant additional psychological and behavioural needs, who required specialist care. Some were detained under s.3 Mental Health Act 1983. Over 38 days, an undercover reporter, Olivia Davies, filmed footage of abuse and mistreatment at the hospital for a BBC *Panorama* documentary. In consequence, 9 members of staff were charged; 5 were cleared, and 4 were convicted on a number of counts of ill-treatment of a person in care, contrary to s.20 Criminal Justice and Courts Act 2015. Two of those convicted, Matthew Banner and Paul Bennett, both of whom held senior healthcare roles there, appealed to the Court of Appeal against their convictions. The Court of Appeal's judgment in *R v Banner; R v Bennett* [2024] EWCA Crim 1201, provides an important addition to the (small) stock of reported cases concerning s.20 Criminal Justice and Courts Act 2015.

The material incidents bear setting out in full, relating to two patients, AD (a 20 year old autistic woman) and LH (an autistic woman with communication challenges).

> *10. The incident in Count 2 occurred on 6 January 2019. AD was agitated and the appellants went to her room and told her that, unless she calmed down, the female carers would not come back and three males would be supervising her: this was the subject of count 1, on which the appellants were acquitted. Whilst AD was screaming, Bennett "twanged" a balloon in her room. Although not caught on camera, he asked her if she liked balloons and was showing/describing different coloured balloons to her. When she said "No", he continued to talk about balloons, asking who had brought the balloons in for her. She said that her mother had and he*

asked her if that was cruel of her mother, if she did not like balloons.

11. Counts 3, 4 and 8 related to incidents that occurred on 11 January 2019. AD was distressed and screaming. Banner had pushed her back into her room in an appropriate manner. Once AD had calmed down, another defendant told her that if the calm behaviour did not continue, then the female carers would be sent away and she would have male carers: this was the subject of count 8, on which the other defendant was acquitted. Banner asked AD if he should tell the other defendant that she wanted two male carers and she continued to scream. Once she had calmed down Banner, from outside the room, asked if she liked balloons. Banner then left and when he returned he asked her again if she liked balloons (the subject of count 4). She continued to scream and he asked whether she wanted three, four, five or six men before saying "we can keep going" (the subject of count 3).

12. The incident in count 5 happened on 28 January 2019. AD had been intermittently screaming and, when Banner entered the room, AD screamed and said "No". Notwithstanding this Banner remained in the room and danced to the words that AD was repeating. He kept asking her whether she wanted him to stay and told her that he and another defendant would remain if she did not calm down. He asked her about balloons as that would take her mind off things. He pretended to forget her name and fist pumped when she screamed and repeated words. He left the room saying that he would not listen to her and singing "Olivia knows she likes to muff dive".

13. The incident in count 6 happened on 21 February 2019 when AD was distressed. Banner told a female carer to come out and turn the room light off. He asked AD if she liked balloons because, he told Olivia Davies, he was curious.

14. The incident in count 7 happened on 22 February 2019. AD was screaming and Banner stood at her open door and asked her if she liked balloons to which she said 'sorry' and he laughed, said it was weird and left.

15. The incident in Count 13, which concerned LH, happened on 28 February 2019. When LH was using sign language, Bennett spoke French to her and when she came out of the room he "bounc[ed] suddenly towards her, causing her fear".

Distilled to their essence, the appellants' cases, as set out at paragraph 32 of the judgment, were that:

(1) The Judge failed to give an adequate definition of the term "ill-treatment". For example, the Judge made no reference to adjectives such as "cruel" or "abusive", although those had featured in the Crown's opening to the jury. The appellants submit that it is one thing to engage in what may be regarded as unprofessional behaviour but that does not mean that Parliament intended it to be criminal. They also submit that the various dictionary meanings of the term "ill-treatment" are so broad that, without further assistance, the jury may have applied a meaning which was so broad that it would unacceptably cover conduct which ought not to be regarded as criminal. For example, the Oxford English Dictionary gives the following definition: "bad or unfavourable treatment; rough handling; harsh or unsympathetic feelings". The Cambridge Dictionary gives the following definition: "the act of treating someone badly, especially by being violent or by not taking care of them". The Collins Dictionary gives the

following definition: "harsh or cruel treatment".

(2) The second main submission advanced on behalf of the appellants is that, however wide the definition of ill-treatment may be, there was insufficient evidence before the jury upon which they could reasonably convict and therefore the case should have been stopped at half time on the relevant counts. For example, in relation to Count 2, it is submitted on behalf of Bennett that there was unchallenged evidence from his wife, Sarah Bennett, at the trial, to the effect that AD clearly had a desire to possess balloons on several occasions and therefore any reference to balloons by Bennett could not amount to ill-treatment, as it was commonly known that she chose to engage with balloons. In relation to Count 13, it is submitted that there was no reference in LH's care plan that she should not be spoken to in any language other than English. There is no other basis to conclude that speaking in a foreign language for only a few words would amount to ill-treatment on any interpretation. The same is submitted in relation to Bennett rising from his chair as LH advanced towards him.

The Court of Appeal had little truck with both of these:

33. We reject the first way in which the submissions for the appellants are put. There was no requirement for the Judge to define the term "ill-treatment" beyond what he had said in his written and oral directions of law.

34. First, the term is an ordinary one of the English language and should not be given any judicial gloss. Parliament has used the term in a number offences of this type, going back at least to section 1 of the Children and Young Persons Act 1933 ("the 1933 Act"). The same term appears in section 127 of the 1983 Act. It has not been suggested that this has caused difficulty to juries or otherwise in the many decades that they have had to apply similar legislation. As the term "ill-treatment" is an ordinary one of the English language, juries can be expected to understand what it means and apply it without the need for dictionary definitions.

35. Secondly, it is clear that the Judge carefully drafted his direction of law on the offence by reference to the decision of this Court in R v Newington (1990) 91 Cr App R 247, at 254, where Watkins LJ said:

"All of those considerations demanded a very careful direction as to mens rea. In our judgment the judge should have told the jury that for there to be a conviction of ill-treatment contrary to the Act of 1983 the Crown would have to prove (1) deliberate conduct by the appellant which could properly be described as ill-treatment whether irrespective of [this is a typographical error in the law report and should read 'irrespective of whether'] this ill-treatment damaged or threatened to damage the health of the victim and (2) a guilty mind involving either an appreciation by the appellant at the time that she was inexcusably ill-treating a patient or that she was reckless as to whether she was inexcusably acting in that way."

36. Both the elements of the offence, including the mental element, need to be proved by the prosecution. The words "properly" and the word "inexcusably" are important in this context. They will constrain the potential breadth of the term "ill-

treatment" to proper bounds, as intended by Parliament. In Newington the Court deprecated attempts by the Judge in that case to go beyond the wording used by Parliament. We also would deprecate such attempts.

37. It is also notable that there is an important distinction between the wording of section 1 of the 1933 Act and the later legislation such as section 127 of the 1983 Act and section 20 of the 2015 Act. Parliament has chosen not to include the further requirement, which does appear in section 1 of the 1933 Act, that the treatment must be likely to cause injury or harm. This was a significant distinction in the wording as between the 1933 Act and the 1983 Act, to which this Court drew attention in Newington, which was decided in 1990. When Parliament came to enact the 2015 Act, it can be taken that it was content to legislate on the basis of the interpretation which had been given by this Court in Newington to the materially identical provision in the 1983 Act.

38. Thirdly, what counsel say in speeches, including here the opening speech by the Crown, does not constitute either evidence or a direction of law to the jury. Directions of law come from the judge. In this case they were given to the jury in written form, as was a written route to verdict. Helpfully, the written directions of law were given to the jury at the outset of the trial. This was done with the agreement of all parties. The defence did not suggest at that stage that any further definition of "ill-treatment" needed to be given to the jury. We can see no reason why the Judge should have done so. To the contrary, we consider that the way in which the Judge handled this sensitive case was exemplary.

39. Turning to the second main way in which the submissions are put on behalf of the appellants, these squarely raise issues of fact which were classically for the jury to decide and not for the Judge nor for this Court. The jury had the whole of the evidence before them. This included the film footage, the relevant parts of which we have also seen. They could make their own mind up, for example, about what the appellant Bennett's motivation was when he rose from his chair towards LH. There was certainly a case for him to answer. In due course he did give evidence at the trial and gave his explanation, which was clearly rejected by the jury in light of his conviction on Count 13.

40. Similarly, in relation to the incident concerning balloons, there was an issue of fact for the jury to decide at the trial as to whether what was done by way of "twanging" the balloon was an effort in good faith to use a distraction technique so as to calm AD down or whether it was inexcusable ill-treatment, with the requisite mental element, either knowledge or recklessness. Again, there was a case for the appellants to answer and they had the opportunity to give evidence in response to the prosecution case after the Judge had rejected the submission that there was no case to answer.

41. In our judgement, the questions which this case raised on the relevant counts against these appellants were classically ones for the tribunal of fact (the jury) to decide after hearing all the evidence. The trial Judge cannot be criticised for leaving these issues to

> *the jury in accordance with the judgment of this Court in R v Galbraith [1981] 1 WLR 1039, at 1042 (Lord Lane CJ).*
>
> *42. Finally, we note that the jury clearly took their task seriously in this trial. They acquitted the appellants on Count 1. This illustrates the point that they were well able to decide for themselves whether what they saw and heard in the evidence as a whole constituted the offence of ill-treatment in accordance with the direction of law which they had been given by the Judge.*

Comment

The Court of Appeal's approach is helpful and important in confirming that conduct which might on its face appear to be entirely innocent – 'twanging' balloons or speaking French – could, depending upon the circumstances, amount to ill-treatment. There is a separate point, not before the Court of Appeal, as to whether the sentences that both men got (a suspended sentence of 4 months imprisonment, and unpaid work requirement of 280 hours) appropriately reflects the seriousness of the harm that they caused to AD and LH.

Book Review

Anselm Eldergill, Matthew Evans and Eleanor Sibley, *European Court of Human Rights and Mental Health* (Bloomsbury, 2024, 1301 pp, paperback / ebook c £150)

This has three authors and is three books in one. The three authors are Professor Anselm Eldergill, very recently retired as a Court of Protection judge; Matthew Evans, a solicitor and director of the indispensably important AIRE Centre; and Eleanor Sibley, a barrister at Garden Court and the AIRE Centre. They are an authoritative trio.

The three books include two expressly identified as such, and one which lurks beneath the surface.

The first book, in Part 1, is a detailed thematic analysis of the key issues that arise where the ECHR and mental disability (broadly defined)[1] intersect, covering such matters as hospitals, treatment and social care; legal capacity and civil rights; and, importantly, criminal law and extradition / deportation. It is very useful for those wanting to understand the general approaches of the Strasbourg court to these areas, and, even for those familiar with them, to be stimulated and challenged.

The second book, in Part 2, is a comprehensive review of the case-law concerning mental disability and Articles 2, 3, 5, 6, 8 and 12 ECHR (together with briefer summaries of other articles). Part 2 is particularly valuable for its detailed analysis of a whole range of cases broken down in a very practitioner-friendly way, including summaries of the more important ones; particularly helpful is the giving of the date in the body of the text each time a case is mentioned, which gives the reader a sense of where it sits on the Strasbourg court's evolving journey.

And, like *Pale Fire*, the Nabokov novel in which an entirely separate story starts to be told in the commentary to the poem which forms its alleged subject, the book contains woven throughout a third tale. This third tale is a

[1] To this end, the title is misleading, insofar as it suggests that the book is focused on those with mental health conditions; it is just as concerned with those with cognitive impairments such as learning disability or dementia.

sustained critique of the way in which business is done in England & Wales, in particular as regards the approach to deprivation of liberty, and the work of the Court of Protection. The critique is particularly powerful because so much of it clearly reflects the views and experiences of Professor Eldergill, a very recent 'insider' within the judicial system.

At times, I must confess that I wished that this third book could have been broken out and published separately, for two reasons. The first, negative, one was that focusing so much on one jurisdiction made me want to see the experiences of other jurisdictions brought out so as to compare them with the Anglo perspective (those jurisdictions could even have been very close to home, because Scotland's experiences of mental health and (in)capacity law are very different to those in England & Wales).[2] The second, more positive, one was that I would like to have seen the monograph pulling together all the disparate challenges to be found throughout the book into one place.

Some of the choices made in the book are ones that challenge in other ways. As the authors recognise, the fact that they are looking both to draw out themes and to address the case-law on an article by article basis means that there is a degree of repetition, although extensive and helpful cross-referencing mean that it is generally easy to identify where the most detailed discussion of a particular issue is to be found. And, whilst the authors explain why they use the term "commit suicide," (on the basis that as a matter of plain language, it is an act of commission, nor omission; p.3), it is one that many will find jarring as it has the connotation of the commission of a criminal offence, which suicide has not been in England & Wales since the Suicide Act 1961.

But the authors are not in the business of pulling their punches, as can be seen in their approach to the debates around the UN Convention on the Rights of Persons with Disabilities, and, in particular, the approach adopted by the UN Committee on the Rights of Persons with Disabilities. They are robust in their dismissal of that approach, at a legal, democratic and ethical level and, in effect, urge the Strasbourg court to hold the line in the face of demands to move towards greater compliance with the Committee's interpretation of the Convention. Before readers more sympathetic to the Committee's approach rush too quickly to dismiss the book in consequence, it is worth setting out in full footnote 137 to chapter 1, a footnote which is itself an important and powerful statement: "One of the authors, Judge Eldergill, has a long-standing diagnosis of depression, with a differential diagnosis of bipolar disorder. It is both an important part of who he is an individual and an illness. Both these things – the individuality and the illness – are true and to be respected. Psychiatric or psychosocial illnesses no less than physical illnesses have

[2] This is perhaps particularly on my mind having just returned from a symposium to celebrate the 80th birthday of Adrian Ward, instrumental in the development of adult incapacity law in Scotland. In this regard, those new to the deprivation of liberty wars would also be well-advised to start with the discussion in Part 2 of Article 5 before turning back to the detailed discussion of deprivation of liberty in Chapter 2, which is in significant part a challenge to the UK Supreme Court's decision in *Cheshire* West, and also delves deep into specifically English problems in response to the decision.

unwanted consequences and must be respected."

Overall, this is a magisterial work which is essential reading for those practising in the area of mental disability. I just hope that the authors have the energy for further editions to keep pace with the continuing evolution of Strasbourg case-law.

[Full disclosure: I was provided with a review copy by the publishers. I am always happy to review books in the fields of mental capacity, mental health law and healthcare law].

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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 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.

Adrian will be speaking at the European Law Institute Annual Conference in Dublin (10 October, details here).

Peter Edwards Law have announced their autumn online courses, including, Becoming a Mental Health Act Administrator – The Basics; Introduction to the Mental Health Act, Code and Tribunals; Introduction – MCA and Deprivation of Liberty; Introduction to using Court of Protection including s. 21A Appeals; Masterclass for Mental Health Act Administrators; Mental Health Act Masterclass; and Court of Protection / MCA Masterclass. For more details and to book, 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 December. 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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