



Welcome to the July 2025 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: what to do when an advance decision to refuse treatment may be in play, and the consequences of the gaps between services for those with disordered eating;

(2) In the Property and Affairs Report: capacity in the rear view mirror: how does the presumption work?;

(3) In the Practice and Procedure Report: disclosing position statements to observers; habitual residence, moving jurisdictions and 'lawful authority;' and the impact on P of being assessed;

(4) In the Mental Health Matters Report: progress of the Mental Health Bill and the tort consequences of a finding of Not Guilty by Reason of Insanity;

(5) In the Children's Capacity Report: a depressing snapshot from the national DoL court, human rights of children in the social care system and capacity and gender-affirming treatment;

(6) In the Wider Context Report: the Oliver McGowan statutory learning disability and autism training, and the pitfalls of facilitated communication

(7) In the Scotland Report: joint attorneys in dispute: appropriate remedies and; "If at first you don't succeed ...": res judicata in tribunal proceedings.

The progress of the Terminally Ill Adults (End of Life) Bill can be followed on Alex's resources page [here](#).

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.

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Joint attorneys in dispute: appropriate remedies

In almost a quarter of a century since the provisions of Part 2 of the Adults with Incapacity (Scotland) Act 2000, establishing a regime of continuing and welfare powers of attorney, came into force, many adults have been well served – or at least “well enough” served – by that regime. Cases where they have not might be a small proportion of the total, but allegations that they have not been well or appropriately served are not infrequent in total. Each such case is cause for concern. There is no automatic supervision of how attorneys act: that would be a major task, requiring a substantial increase in costs, and effectively defeating one of the main purposes of any such regime of providing an accessible and affordable alternative to guardianship and similar measures, serving the objective subsequently set out in Principle 1.1 of Council of Europe Ministerial Recommendation (2009)11: *“States should promote self-determination for capable adults in the event of their future incapacity, by means of continuing powers of attorney and advance directives.”* Addressing unsatisfactory situations accordingly requires someone either to seek to have the matter investigated by the Public Guardian or the local authority (under sections 6 and 9 respectively of the 2000 Act), or to seek from the sheriff either directions under section 3(3) of the Act, or remedies under section 20.

Sheriff Lugton, sitting at Alloa Sheriff Court, received and has determined such an application in the case of *C v M*, [2025] SC ALL 29, in terms of a judgment dated 20th March 2025 and appearing on scotcourts on 5th June 2025, followed by an ancillary order made on 9th May 2025. The main issues raised in the case are not particularly unfamiliar, but the judgment is to be commended for its careful consideration of several significant points. It is also, however, open to criticism for seeming not to address some apparent omissions.

I shall use the terminology adopted by the sheriff. He referred to the granter of the power of attorney as “the adult”. She granted a continuing and welfare power of attorney (“the POA”) on 13th May 2015. It was registered with the Public Guardian on 5th June 2015. She appointed two attorneys with both continuing and welfare powers, referred to in relation to the litigation as “the applicant” and “the respondent”. They are two of the adult’s four sons, the other two sons being referred to as Daniel and Michael.

The POA conferred wide continuing powers on the attorneys to manage the adult’s property and financial affairs, which came into effect upon registration of the POA. It provided for the welfare powers to be brought into effect upon issue of a letter or certificate by a medical practitioner, stating that the adult was not capable of exercising the welfare powers, or any of them. The judgment does not provide full details of all the powers conferred. The welfare

powers, as described by the sheriff, appear to be unhelpful in addressing situations of partial or fluctuating incapacity in such manner as to comply with section 16(5)(b) of the Act. I explain and comment later in this Report. A major concern, however, arises from the provisions described by the sheriff as follows:

"The POA entitles the attorneys to act separately or together, but each informing the other of all actions taken by them as soon as practicable."

The adult granted the POA shortly after the death of her husband in January 2015. As matters developed, a serious rift emerged between the applicant and Daniel on the one hand, and the respondent and Michael on the other, though each of the four was different, as regards his actions, his evidence, and the sheriff's assessment of his credibility. The applicant sought orders under section 20 revoking the respondent's continuing powers, and his appointment as continuing attorney, and ordaining the respondent to submit to the Public Guardian accounts covering his tenure as attorney.

The sheriff concluded that in relation to the adult's financial affairs, the respondent's breaches of duty were so serious that it was necessary to make orders under section 20(2) for the purpose of safeguarding the adult's property and her financial affairs; that he could identify no feasible alternative to such an intervention; and that no feasible alternative was canvassed by either party in submissions. See his judgment, and note appended thereto, for his account and analysis of the evidence, and the findings in fact and in law upon which he reached those conclusions. His account of his methodology in doing so may well be of assistance in subsequent such cases.

In his findings in fact and law, the sheriff held that the respondent had breached his fiduciary duty to the adult in several ways. In brief summary, the main points on which the sheriff founded in reaching those conclusions were that the respondent misled the applicant regarding the manner in which he had dealt with income from a property owned by the adult, and as regards the management of the property; that the respondent withdrew £6,000 from a bank account of the adult for the purpose of paying the adult's share of a common repair to the driveway of another property, without informing the applicant and obtaining his views and agreement; and that he transferred funds of the adult held within an ISA to his own bank account, for his personal benefit and to the detriment of the adult's interests, without informing the applicant and obtaining his views and agreement.

However, both the applicant and the respondent breached their duty to act with reasonable skill and care by failing to take reasonable steps to manage and maintain one of the adult's properties, to ensure that it was validly insured, and to make efforts to secure a tenant. In consequence, it was necessary to make orders in relation to both attorneys.

Further findings contained in the judgment, but not in the findings in fact and law, were that: the respondent "took control" of the adult's bank account; and on 28th September 2018 the adult and the respondent signed a Loan Agreement for the purpose of providing funding for a former family business that had been taken over by the respondent and Michael, the funds were transferred, but the applicant was not advised of this arrangement and its implementation.

The sheriff noted that to exercise powers under section 20 the sheriff required to be satisfied (in terms of section 20) that the adult was "*incapable in relation to decisions about, or of acting to*

safeguard or promote [his] interest in, [his] property, financial affairs or personal welfare insofar as the power of attorney relates to them, and that it is necessary to safeguard or promote those interests." The sheriff was also required to comply with the section 1 principles. His approach to complying both with section 1 and with section 20 is worth noting. He concluded that:

"It is hard to envisage circumstances in which an order would be deemed necessary to safeguard or promote an adult's interests in terms of section 20, if it did not both benefit the adult in such a way as could not otherwise be achieved, and constitute the least restrictive option available, in terms of sections 1(2) and (3), respectively. Nevertheless, the general principles must be applied in their own right. Without diminishing their fundamental importance to all interventions made under the 2000 Act, in this context they also serve as a cross-check to the test of necessity for which section 20 provides."

The sheriff also read section 20 together with section 3. After quoting sections 3(1) and (2), he concluded that:

"The import of this is that when making an order the court is not confined to the terms of the applicant's craves, but may make consequential or ancillary orders, provisions or directions if it is appropriate to do so. Just as under section 20, when the court is contemplating making an order in terms of section 3 it must apply the general principles."

Also of importance is the sheriff's view that if he were to make orders not within powers craved, he ought to give notice to the parties of his intentions, and allow them an opportunity to address him. He did so, as narrated below.

There appears to be an omission in the sheriff's judgment in that the sheriff does not appear to have advanced any basis on which (in the words of section 20(2)) he "is satisfied that the granter is incapable in relation to decisions about, or of acting to safeguard or promote, [her] interest in [her] property or financial affairs"; nor any basis on which he concluded in his findings in fact and in law that:

"Since at least 16 January 2019 the adult has been permanently incapable in relation to decisions about, or of acting to safeguard and promote her interests in, her property and her financial affairs."

He narrates that (paragraph 9 of his judgment) she was diagnosed with Alzheimer's dementia, and he narrates that (14 of his judgment):

"On 16 January 2019 the adult's GP assessed her as lacking capacity to act and to make, understand and retain the memory of decisions relating to medical treatment, her welfare and her financial affairs. The GP noted that the adult had very poor memory and recall and that she was not orientated."

This was coupled with (15 of his judgment):

"On the same date the GP issued a Certificate of Incapacity under section 47 of the Adults with Incapacity Act 2000 ('the 2000 Act'). The GP noted that the cause of the adult's incapacity was dementia and that she was likely to be permanently incapable."

In [10] of his subsequent, and separately numbered, note, the sheriff narrated that:

"On 16 January 2019 the adult was certified as lacking capacity by her GP. The applicant confirmed that he had arranged the GP's capacity assessment as a result of concerns regarding the

adult's mental health. Later in 2019 the adult was moved to B Care Home."

skilled witness with appropriate qualification."

Further information is given in the account of cross-examination of Michael. At [74] there is a reference to:

He went on to assert [108] that:

"an entry in the records dated 16 January 2018, which read: 'son came in – mother cognitive function deteriorating – wandering / he will try and get permission for home visit.' Michael said that at this time his mother was her usual self – it was possible to have a conversation with her and she would play sudoku and read the paper. Sometimes she was sharp as a tack but at other times she was a little bit forgetful."

"It is unfortunate that evidence of this kind was not available, but I do not consider that this precludes the court from determining that the adult lacks capacity for the purposes of section 20 of the 2000 Act. This is because on 16 January 2019 the adult's GP assessed her as lacking capacity to act and to make, understand and retain the memory of decisions relating to medical treatment, her welfare and her financial affairs. The GP noted that the adult had very poor memory and recall and that she was not orientated. On the same date the GP issued a Certificate of Incapacity under section 47 of the Adults with Incapacity Act 2000. The GP noted that the cause of the adult's incapacity was dementia and that she was likely to be permanently incapable. While the GP did not give evidence, the January 2019 assessment of incapacity is admitted by the applicant on record."

At [76] it is narrated that Michael was referred to an entry in the GP records, dated 16 January 2019, in the following terms:

"assessed today at home – memory poor – confused about who was – not orientated in time poor memory – no recall of address – did manage her date of birth and counting backwards but not her age – did not seem to recognise her own dog."

In the several pages of the judgment under the main heading "Capacity" ([99] to [118]), the sheriff explored the applicable law, and noted the dearth of evidence before him in this case, for example in [107]:

"In this case there was a significant gap in the evidence: the adult's GP and treating consultants were not called as witnesses. Similarly, no evidence was led from an independent medical expert in relation to the adult's capacity. While the lay witnesses were asked about various entries in the adult's medical records, those entries were not spoken to by their authors or interpreted by a

However, on the basis of everything contained in the judgment and note, was the "significant gap" adequately closed? The sheriff may have taken the view that the court was not precluded from determining that the adult lacked capacity for the purposes of section 20, but in a matter as important as this, was there sufficient before the court to determine that the adult was incapable in the comprehensive terms suggested to him. It is difficult to see how he may have felt able to come to that conclusion. There is much evidence about the adult's deteriorating mental health, the diagnosis of Alzheimer's dementia, and the development of symptoms compatible with that, but it is trite that although under the Act a diagnosis of mental disorder is a prerequisite for a finding of incapacity, that is the limitation of its function. By itself, it amounts neither to

evidence of incapacity nor a determination of incapacity: see the definition in section 1(5). It is also trite to say that capacity can be different, at different times and/or for different purposes, and in different circumstances. There appears to have been evidence of such variations, but no clear evidence of the basis for a finding of incapacity, or of such a finding in such comprehensive terms as asserted, or of methods and recording of assessment, all of which would require to have been robust.

Moreover, the accounts of the alleged assessment seem to be closely intertwined not only with questions of diagnosis, but the process of issuing a section 47 certificate, which in these circumstances appears also to have been irrelevant. On the part of some of the witnesses, there is a flavour of various quite common misconceptions about section 47. Only the certifying professional is self-authorized to act under section 47, and only in relation to the proposed treatment specified in the section 47 certificate, though the certifier may authorise others to carry out the relevant medical treatment, either under the certifier's instructions, or with the certifier's approval. The finding of incapacity is only applicable to the particular medical decision. It has no relevance beyond that, and creates no presumption of capacity except in relation to "the medical treatment in question". Thus it has no relevance to any other medical matters, nor beyond that to any other personal health and welfare matters, and plainly not to any aspect of the adult's property and financial affairs.

Where, as here (presumably), attorneys are empowered to make relevant medical decisions, the doctor must consult the attorneys. The usefulness of the section 47 certificate is then that it establishes the adult's incapacity to make decisions about the medical treatment in question, so that the attorneys may either

consent or refuse consent on the adult's behalf. That is the basis on which the treatment is authorised, if the attorneys do consent. If they do not, the matter must be referred for determination under section 50.

There is of course nothing novel about the proposition that capacity is task-specific: see for example Bell's *Commentaries*, 6th edition, 1858, page 10: "*The degrees of capacity required by law for different acts are various; and may so far be generally discriminated, that less capacity is required to make a Will or Settlement than to transact a bargain.*" He may have written the same in earlier editions. He was of course an institutional author, so this has the status of a decision on appeal by the Court of Session. Be all that as it may, it is odd that there was apparently no information before the court (or at least, none reflected in the judgment) as to what was the medical treatment authorised by the section 47 certificate, nor whether the attorneys were in fact consulted, nor what was the result.

Reverting to the position described earlier, there appears to have been no "trigger" bringing into operation the welfare powers in the power of attorney, though welfare powers are not in issue. However, although the property and financial powers came into force upon registration of the POA, regardless of capacity, to the extent that the adult's capacity was considered relevant (and it must have been, otherwise it would not have been addressed) there does not appear to have been any evidence of incapacity, nor does the question of undue influence (or other vitiating factors), often more significant than issues of capacity, appear to have been addressed.

For the purposes of this Report I shall only mention very briefly (because they do not appear to have been addressed in this case) the developing concerns about the appropriate interpretation of the 2000 Act in the face of growing understanding of the extent to which

“capacity” can be infinitely variable from one individual to another, and for any one individual variable as to subject-matter, over time, in response to circumstances and the provision of support, and so on; and the international trend towards re-considering whether “capacity” is a meaningful term at all. Against that background, it is to be noted that in the 2000 Act “adult” is defined solely by age, so that that definition applies where “adult” is used without qualification, for example to a large extent in Part 1. It would appear that exceptions in Part 1 prove the general proposition that without words of exception, “adult” is not to be interpreted by reference to capabilities, but only by reference to age. One of the first obvious exceptions in the Act is in section 6(2)(da), which contrasts starkly with the other provisions of section 6(2) in that “adult” is followed by the qualifying words “who is incapable for the purposes of this Act”. Powers in relation to section 20 (and in relation to many other provisions outwith Part 1) are explicitly only applicable if the court or other intervener is satisfied that an adult “is incapable in relation to decisions about, or of acting to safeguard or promote his interests in, relevant matters”. The sheriff’s powers under section 3 are not explicitly so qualified, leaving unresolved questions as to whether (for example) a financial attorney is exercising functions under the Act when acting under a continuing power of attorney where the attorney is empowered to act in the absence of any evidence of impairment if the adult’s capabilities, my view being that on balance it would be difficult to argue that such a continuing attorney is not exercising functions under the Act, because there is no requirement under the provisions of the Act to distinguish between actings where the adult’s capabilities may to some extent be impaired, and where they are not; or in relation both to some aspects of which the adult’s capabilities are impaired and those in which they are not.

Given that any “intervener” (covering the attorneys and the court) has an absolute obligation to comply with the section 1 principles in relation to any intervention, there is little or no evidence from the terms of the judgment that this was done by the attorneys or by the court. The adult was not present or represented at any stage of the proceedings. Any assumptions about her ability or inability to express present wishes and feelings are based, at best, upon untested hearsay. As to the adult’s past wishes and feelings, it would have seemed essential to make enquiry into these, including in particular her reasons for granting the POA, and for doing so in favour of the two selected sons. Was she aware of the family rift? Did she consider that appointing those two sons might help bridge the rift? Did she receive appropriate basic advice, including as to the hazards of optimistically making any such assumptions? What precisely were her reasons for instructing the odd wording as to the allocation of powers, quoted earlier? Was she warned of the risk that the attorneys could make incompatible decisions at about the same time, and before either informed the other?

The judgment concludes with a decision to revoke the respondent’s appointment as continuing attorney and order the respondent to submit accounts to the Public Guardian for audit for the period from 15th June 2015 to date of the court’s order, relating to the respondent’s intromissions *qua* continuing attorney. He decided to fix a hearing for discussion of whether the possible ancillary orders outlined in paragraphs [162] – [164] of his note should be made (and also for determination of all questions of expenses). He confirmed that his decision would be sent to the Public Guardian, in accordance with the relevant requirements of section 20. In addition he directed the Sheriff Clerk to send a copy of the judgment to the Procurator Fiscal at Alloa, for consideration of whether a criminal investigation should be

instigated. He did explicitly note that in doing so, he recognised he different standard of proof relevant for any criminal proceedings.

At that point, the matter paused, pending the court's decision about ancillary orders. The discussion and outcome evidently proceeded rather differently from the section about ancillary orders referred to above: that discussion is worth noting and considering by anyone concerned with a similar situation, but because the eventual outcome in this case was rather different, it is not narrated here. For the subsequent proceedings, we have only the ancillary order that was made. It is certainly of interest and relevance for anyone addressing similar situations, but as we have only the order, this Report concludes with simply quoting its terms:

"The sheriff, Makes an order under Section 3 of the Adults with Incapacity (Scotland) Act, Directing the Public Guardian to carry out an investigation into the attorneys actings' and the exercise of their functions relating to the property and financial affairs of the adult, namely (removed), from the date of registration of the power of attorney on 5 June 2015 to this date, fully utilising the Public Guardian's powers under Section 6 (2) of the aforementioned Act; Directs the Public Guardian to take any and all measures necessary to safeguard the property and financial affairs of the said adult, upon the conclusion of the investigation; Orders those appointed as continuing attorney on 5 June 2015, namely C and M, to comply with any and all requests made by the Public Guardian during these investigations and to submit an account of their actings' to the Public Guardian for audit for the period 5 June 2015 to date."

Adrian D Ward

"If at first you don't succeed ...": *res judicata* in tribunal proceedings

In May 2024, Scottish Ministers granted a warrant sought by GA's responsible medical officer ("RMO"), under cross-border regulations, for transfer of GA to a hospital in England. In June 2024 the warrant was successfully appealed to the tribunal by GA and her father (GA's named person). Three weeks after that decision the RMO sought another warrant for the same purpose. It was granted by Scottish Ministers in September 2024. GA and her father appealed again. In December 2024, before a differently constituted tribunal, they were again successful, by reference to the doctrine of *res judicata*. That decision was appealed by the RMO to the Sheriff Principal. GA and her father moved for remit to the Inner House, Court of Session. Their motion was granted. The appeal was heard by the Second Division (Lord Justice Clerk, Lord Malcolm and Lord Armstrong) on 11th June 2025. The opinion of the court was delivered by Lord Malcolm, the decision being reported as appeal by Dr Agnes Louise Johnston (Appellant) against GA and another (Respondents), [2025] CSIH 18, 2025 S.L.T. 814. In the SLT report, the Applicant is designated "GA's responsible medical officer". That decision related to proceedings of the Mental Health Tribunal. It is reasonable to suggest that it is substantially relevant to proceedings before other tribunals: cases cited related mainly to such other tribunals. It also seems reasonable to suggest that it is substantially relevant to proceedings under the Adults with Incapacity (Scotland) Act 2000: the main distinction, recognised and addressed by the court in the application of *res judicata*, was between private law proceedings and public law proceedings. Moreover, ever since initial consultation on what became the 2000 Act, the alternative of jurisdiction before a tribunal rather than the Sheriff Court has been almost constantly "on the

table”, never more so than currently with recommendations by the Scott Review, accepted in principle by Scottish Government, that jurisdiction under the 2000 Act, the Mental Health (Care and Treatment) (Scotland) Act 2003, and possibly also the Adult Support and Protection (Scotland) Act 2007, be combined in a single tribunal.

While the December decision (the decision appealed against) referred to *res judicata* (the matter has been decided), Lord Malcolm preferred *res noviter veniens ad notitiam* (things newly come to light), but Lord Malcolm made clear that:

“It does not follow from the non-applicability of strict res judicata that it is open season for repeated requests to a mental health tribunal until the desired outcome is achieved.”

That firmly rejected “try, try, and try again” in the eventuality that “if at first you don’t succeed”. The court addressed the question of when it might or might not be appropriate to “try again”.

In relation to that question, it is relevant to quote Lord Malcolm’s succinct and helpful summary of the findings of the June 2024 tribunal hearing. With numbers inserted for the tribunal’s reasons for upholding the appeal, Lord Malcolm narrated that:

“Given GA’s severe mental disorder, compulsory treatment remained necessary to ensure nutrition and survival. The improvement in her mental health had reached a plateau and the desire of the clinicians was to pass on the care to a suitable specialist unit more capable of addressing GA’s complex needs. None had been found in Scotland but one had been identified near London. The tribunal considered it a very difficult case. It concluded that [1] a transfer so far away from family and

friends was not the least restrictive option. [2] There had been insufficient investigation into the staff resources and skills available at the London unit to keep the patient safe. [3] None of GA’s clinical team had visited it. [4] Reliance had been based on anecdotal comments rather than research into patient outcomes. [5] There had been no rebuttal of inspectors’ criticisms. [6] There was no recovery plan should there be a traumatic response to the transfer. [7] The tribunal was not convinced that local solutions had been fully investigated, nor [8] that the benefits of a transfer would outweigh the serious risks for GA. [9] There was no clear evidence that the transfer would provide the patient with the maximum benefit or be in her best interests.”

For those reasons, a cross-border transfer order was refused.

Lord Malcolm’s narration in relation to the December 2024 tribunal hearing is equally helpful:

“After hearing submissions on the issue, the December tribunal commented that in principle the rationale underpinning res judicata is as desirable in disputes about mental health care as in any other type of case, though they may not apply with their full rigour. The essence of the dispute was whether the anticipated benefits of in-patient care at the London hospital outweighed the practical disadvantages and the identified risks of the move. Material additional to that before the June tribunal had been presented, but it was insufficient to overcome the application of res judicata in respect of the prior refusal of the transfer. Some of the new information was administrative in nature; some did not bear directly on the issues highlighted by the earlier tribunal. Other material pre-dated the June decision.

Recent documents vouching regulatory inspections were general in nature. The opinions of the RMO and other doctors were useful background but could have been presented in June. In any event, they did not rebut six of the nine identified particular concerns expressed by the June tribunal.” [That is to say six of the nine “particular concerns” as numbered above.]

The December tribunal referred to the judgment of Andrews LJ in *R (Abidoeye) v Secretary of State for the Home Department* [2020] EWCA Civ 1425. He held that an earlier decision will be final and binding on the parties to it unless there is a legal justification for departing from it; but that absent a change in circumstances, material which could and should have been presented to the original tribunal cannot be relied upon. As to what such legal justification might be, the Tribunal referred to *Ladd v Marshall* [1954] 1 WLR 1489. That test (again as summarised by Lord Malcolm) was that additional material “(i) could not have been used at the earlier tribunal, and (ii) if given to the tribunal, would have had an important influence on the outcome.” Both (i) and (ii) had to be met. The tribunal held that none of the material upon which the RMO sought to rely met both. Interestingly, Lord Malcolm narrated that: “the tribunal was sympathetic to the comment that the RMO did not have advance notice of the June tribunal’s concerns”. That seems to imply that the RMO was “caught out” by concerns raised in the course of the hearing. There appears to have been no discussion as to whether it would have been competent, and reasonable, for the RMO to request a short continuation to be able to address them.

See the published decision for a summary of the parties’ submissions and the relevant case law.

On the difference between application of *res judicata* in public law matters, and those of *res noviter veniens ad notitiam* in private law matters

(and that the boundary cannot always be strictly delineated), Lord Malcolm described the court’s conclusions as follows:

“The well-established rules of res judicata as they apply to adversarial private law claims cannot simply be transferred to cases of the present nature, nor indeed to many public law claims. The plea is designed to provide certainty when a matter has been finally determined, for example that X can exercise a right of access, or Y has breached a contract. (That said, there are public law examples of this in operation, for instance in respect of a decision that the mental health tribunal had no jurisdiction in the matter, see C, Petitioner 2012 SLT 521.) The result is that the parties cannot re-litigate the same issue. However, with regard to a tribunal required to make decisions which are best for the patient as matters stand at the time, there can be no such finality. And that was not the effect of the June decision; the tribunal could not and did not say that the transfer could never happen. Amongst other things, it commented on evidence which was missing and which might have made a difference. If come December those deficiencies had been remedied, how could one stop the issue being reconsidered by the tribunal?”

Further:

“The tribunal is a specialist body well able, as part of its case management powers, to assess the material relied on by the RMO and decide whether it justified exploration at an evidential hearing. Although not binding in the sense of res judicata, in the event the June decision was highly relevant to the outcome. To have granted an evidential hearing would, in effect, have allowed a repeat adjudication on substantially the

same basis as that which occurred in June.”

In *RG v Glasgow City Council 2020 SC 1*, it had been held that in cases of this kind the decision-maker can examine whether proffered evidence does or does not merit the re-examination of findings made earlier in related but different proceedings. The key finding of the December tribunal was that:

“the significant concerns raised by the tribunal in its decision in June do not appear to have been met by the material on which reliance is now placed.”

That decision having been made, the interests of justice did not require that it be explored at an evidential hearing.

Lord Malcolm expressed the court’s decision succinctly:

“While we might not have expressed matters in exactly the same way, we are satisfied that the December decision is not vitiated by a material error in law. It was a decision which the tribunal was entitled to make. It follows that the appeal is refused.”

The following comment would appear to have some relevance. More than once the judgment refers to the “best interests” of the patient. A test of “best interests” was rejected in relation to adults in Scotland, at least for the purposes of the 2000 Act, as long ago as 1995, in favour of a principles-based approach (see paragraph 2.50 of the Scottish Law Commission’s 1995 Report on Incapable Adults). I have not been able to identify that “best interests” has nevertheless intruded into the principles in the 2003 Act, or otherwise in a manner which could have been relevant to this case.

It is interesting to note that GA and her father were both parties, and were represented by counsel who made submissions on their behalf. The functions of named persons under the 2003 Act and of nearest relatives under the 2000 Act are different, but it may be noted that while GA had the support of her father as named person in this case, in the case *“In respect of the adult HS”* [2022] SC PAI 24, which we described in the [September 2022 Mental Capacity Report](#), the court removed HS’s nearest relative without replacement, and did so without apparently considering the consequences and potential consequences for HS in leaving her with no nearest relative. The item in the September 2022 Mental Capacity Report is entitled “Functions of nearest relative – application under AWI s4”.

Upon reading the judgment in the present case, having neither heard what took place nor seen the December 2024 decision, one is left with concerns, and a speculation, that can only be expressed tentatively. The concern is whether we see an example of current attacks on the doctrine of separation of powers by inappropriate attempts to expand executive power by failure to respect the essential role of the judiciary, not because any disrespect is by itself seriously wrong, but because the attitude that is perhaps revealed by this case is fundamentally wrong: that it was wrong in this case that the attitude of the relevant Health Board was to treat the tribunal’s function as rubber-stamping what health professionals thought best, without adequate preparation for the first hearing and careful assembly and submission of available material likely to assist the tribunal in discharging its own function. Likewise, the same concern applies both to the Scottish Government granting the second warrant upon submission by the RMO of a further application with no substantially different information, and then – GA and her father again having appealed the second warrant to the

tribunal – the Health Board jumping in to contest the appeal to the tribunal against the second warrant, and thereafter further appealing to the courts the outcome of that second determination by the tribunal. All of the foregoing perhaps occurred without either Scottish Government or the Health Board (in their respective roles) considering – with a modicum of humility – the terms of the tribunal decision. The speculation is whether the court aimed at such concerns its pungent comment that it is not “open season for repeated requests to a mental health tribunal until the desired outcome is achieved”. The costs incurred by the Health Board must have been significant, and perhaps better applied in other ways.

Adrian D Ward

UK Protocol on Judicial Cooperation amended

In the item in the [June Report](#) under this heading we quoted in full Article 2 of the UK Protocol on Judicial Cooperation. We commented on the peculiar wording as regards the references to Scotland in Article 2.2. It was suggested that the age of adulthood of 16 in the Adults with Incapacity (Scotland) Act 2000 had somehow been “glossed” into 18 by the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024. We noted that this was contradicted both by paragraph (b) in the section entitled “Operation of the Principles” of the Protocol, and by the handbook published along with the Protocol. We argued in some detail why Article 2.2 appeared to be wrong. At the end of the relevant item in last month’s Report, I wrote: *“I shall be pleased to hear from anyone who disagrees with my*

interpretation”. So far as I am aware, no-one has sought to dispute it.

Commendably, within a fortnight of having the apparent error drawn to their attention, the relevant senior judiciaries have agreed correction of Article 2.2, and the Protocol as thus amended appeared on the relevant judiciary websites. Article 2 now reads as follows:

2. In the Protocol, ‘adults’:

1. for proceedings raised in England and Wales, includes persons who are aged 16 or over (section 2(5) of the Mental Capacity Act 2005);

2. for proceedings raised in Scotland, includes persons who are aged 16 or over (section 1(6) of the Adults with Incapacity (Scotland) Act 2000); and

3. for proceedings raised in Northern Ireland, includes persons who are aged 16 or over (section 1(1) of the Mental Capacity Act (Northern Ireland) 2016.

Lady Wise announced the change at the launch of the Protocol on 24th June. Also, she intimated that Sheriff Joan Kerr, lead AWI sheriff in Glasgow, is Scotland’s liaison judge for the purposes of AWI cases.

Both commended the work of Helen McGinty (now Sheriff McGinty) on the handbook, and Sheriff Kerr expressed her pleasure that Sheriff McGinty would be joining her in Glasgow Sheriff Court.

Adrian D Ward

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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 also does 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 September. 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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