Mental Capacity Law Newsletter August 2014: Issue 49

COP: Practice and Procedure

Welcome to the August issue of the Mental Capacity Law Newsletter family. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: a very important medical treatment about life-sustaining treatment and MCS, a difficult case about capacity and pregnancy/contraception, deprivation of liberty in children's homes and the Law Commission's project on deprivation of liberty;

(2) In the Property and Affairs Newsletter: cases on revocation of EPAs, capacity and tenancy agreements, and the Law Commission's project on wills;

(3) In the Practice and Procedure Newsletter: an important case on when to hold a fact-finding hearing, a challenging case on the inherent jurisdiction and care management, the end (for now) of the *Redbridge* saga, and news of an important appeal on nominal damages for unlawful detention;

(4) In the Capacity outside the COP newsletter: an update on the work being done to assess the compatibility of the MCA with the CRPD, news of the consultation on the draft MHA Code of Practice, news of the Northern Irish Mental Capacity Bill

(5) In the Scotland Newsletter: an update on the legal consequences of delaying reporting by MHOs in welfare guardianship applications, news of the MWC's most recent investigation, and an important case on capacity to consent to sexual relations.

We are now taking a break and will return in early October, although will send out newsflashes where necessary (including as regards the post-*Cheshire West* cases). Enjoy your summer!

Editors
Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Anna Bicarregui
Simon Edwards (P&A)

Scottish contributors
Adrian Ward
Jill Stavert

Table of Contents

Hyperlinks are included to judgments; if inactive, the judgment is likely to appear soon at www.mentalhealthlaw.co.uk.

A true tangle – capacity, influence and the inherent jurisdiction

NCC v PB and TB [2014] EWCOP 14 (Parker J)

Court of Protection jurisdiction and powers – assessing capacity

Summary

This decision of Parker J was handed down in March, but only appeared on Bailii in the second week of July 2014. It contains an important analysis of the 'causative nexus,' some controversial obiter comments as to the scope of the inherent jurisdiction, and a robust discussion of case management before the CoP.

The issues before the court were whether PB had capacity to decide whether to live with her husband, TB, what contact to have with him, where and under what care arrangements she should live, and whether any deprivation of her liberty resulting from a placement in local authority care should be authorised by the court. They were complicated by the fact that TB also lacked the capacity to litigate, and was also represented by the Official Solicitor.

Background facts

The background facts are detailed and complex; they repay careful reading because they are – sadly – resonant of too many cases where self-neglect interacts with complex and unsatisfactory personal relationships. For present purposes, however, and to summarise wildly, the case concerns a married couple, both of whom had psychiatric conditions, and whose living circumstances (together and, on occasion separately), caused increasing concern to Norfolk County Council. The local authority ultimately brought proceedings in the Court of Protection in relation to the wife, PB (although, on the facts set out by Parker J, it is perhaps not immediately obvious that this was not, actually, a 'two P' situation).

The proceedings

The proceedings took a somewhat convoluted course, especially as regards the obtaining of expert evidence, and Parker J had some pithy comments about the management of the case that we set out in full below.

By the time of the final hearing, both PB and TB submitted that PB had capacity; TB played a full part in proceedings through Counsel and the cross-examination of experts. However:

> *"39. No concrete proposals were put forward as to where PB and TB were to live together. In my view the issue was not just whether PB was able to take a decision that she wants to be with her husband, but as to where she should live, in what circumstances, and with what care package.*
>
> *40. This case is a prime example of the need in Court of Protection cases to have regard to the factual matrix and evidence, and the actual rather than theoretical decisions to be made: both by the protected party, and by the Court*."

Parker J was profoundly unhappy with the state of the expert evidence as to capacity. At the hearing, she had three reports from an independent psychiatrist, Dr Barker, and two from Dr Khalifa, neither of who had given a clear view of capacity. Although they had made and produced a schedule of agreement, their overall view on capacity was still unclear. Dr Barker's final position in evidence was that the issue of PB's capacity was finely balanced and should be

decided by the court. He "lean[ed] *to the conclusion that she has capacity to make decisions about residence, care and contact in optimal conditions*." He wavered somewhat as to whether he thought that PB lacked capacity when not with TB, and eventually concluded that he thought that she might do. Dr Khalifa's consistent position in oral evidence was that PB's mental illness, anxiety and influence from TB all contributed to her inability to weigh information, but that TB lacked capacity at all times, sometimes at a greater level than at others.

Parker J was asked (before, and at the hearing) to see PB and TB. She expressed the need for care to be taken as to how such a meeting should be treated; as she noted:

> *"The protected party does not give an sworn/affirmed account, and in particular if the meeting takes place only in the presence of the judge, with no opportunity to test the evidence, then in my view no factual conclusions save those which relate to the meeting itself should be drawn, in particular with regard to capacity (see YLA v PM and Another* [2013] EWHC 4020 (COP) *at [35]."*

Both PB and TB spoke to Parker J in the courtroom with representatives present. Parker J considered PB to be "*likeable, highly intelligent, sophisticated and articulate, well-read and knowledgeable*," and that "*it* [was] *obvious to me from all that I have read and heard as well as from the meeting that PB's intellectual understanding is at a high level. She stated 'I understand that this Act only came in in 2005. I wonder whether it's working out as it should be.'*" TB was also likeable, articulate and sincere. Parker J accepted that, whatever their respective problems, the couple had a long standing and committed relationship and that they loved one another dearly. There was no issue as to their capacity to marry, and Parker J accepted that the relevant public bodies were trying to preserve the quality of their relationship as a couple, while promoting PB's physical and mental wellbeing.

Capacity

The core issue of law that Parker J had to decide was whether TB's incapacity (which it was common ground could only relate to her difficulties with using and weighing the relevant information) was caused by a material impairment or disturbance of the mind or brain, or whether it stemmed from the influence exercised over her by her husband.

Having heard submissions upon the proper meaning of "because of" in s.2 MCA 2005, Parker J concluded (at paragraph 86) that:

> *"the true question is whether the impairment/disturbance of mind is an effective, material or operative cause. Does it cause the incapacity, even if other factors come into play? This is a purposive construction*."

Parker J also rejected the submission advanced on behalf of both PB and TB that McFarlane LJ in *PC v City of York* [2013] EWCA Civ 478 stated that the 'diagnostic' and 'functional' questions should be asked in the reverse order to that set out in the Code of Practice, holding that:

> *"In my view MacFarlane LJ did not purport to lay down a different test: nor did he take the questions in the reverse order, but simply stressed that there must be a causative nexus between the impairment and the incapacity."*

At paragraph 92, Parker J held that PB's condition was the cause of her inability to use and weigh. "*Her inability to challenge TB may at one time have stemmed from a belief in the ties of marriage: I do not know. But now she is unable to use and weigh the information because of the compromise in her executive functioning and her anxiety*."

Parker J, addressing specific submissions about the importance of the principle contained in s.1(4) MCA 2005 that a person is not to be treated as unable to make a decision merely because he makes an unwise decision, held that:

> "*98. This decision* [i.e. where to live] *requires PB to factor in immediate and serious consequences. The principle of autonomy must have limits, or there would be no intervention under the MCA 2005.*
>
> *99. Where a decision has consequences of a serious impairment of health or welfare, the court is not considering a decision which is merely unwise. Ms Street submits that the foreseeable consequences must be proximate and not remote. The foreseeable consequences here are all too proximate, and have been repeatedly demonstrated. PB is unable to use this information to take into account foreseeable proximate consequences*."

In a section of the judgment entitled 'Influence/overbearing of the will,' Parker J returned to the question of whether the impairment or disturbance must be the sole cause of the inability to make a decision. Rejecting the submission made on behalf of PB (relying on dicta in *R v Cooper* [2009] UKHL 42, [2009] 1 WLR 1786) that the impairment or disturbance must be the sole cause of the inability, she held that "*inability to exert the will against influence because of the impairment or disturbance is relevant*" (paragraph 101). However, it should be noted that this conclusion (and the discussion of pre- and post-MCA 2005 case-law) was obiter because:

> "107 … *by reason of her condition alone, even without the influence of TB, in my view PB lacks capacity to use and weigh. The history over March and April 2013 in particular demonstrates that PB was not able in reality to make any decision at all which related to TB, or to her care needs. And what she has said during the course of these proceedings demonstrates the same process. Her impairment /disturbance is the effective cause, the primary cause of her inability to make a decision" (emphasis in original)*

Inherent jurisdiction

In a section of her judgment that is also obiter, Parker J went on to discuss whether – if PB had the capacity to decide where to live – she could impose a 'residence requirement' upon her under the inherent jurisdiction. In brief terms, she held that she could, because:

> "*113… The inherent jurisdiction exists to protect, liberate and enhance personal autonomy, but any orders must be both necessary and proportionate. Miss Burnham submits that what is proposed is protective and necessary and proportionate and is not a coercive restricting regime. I am inclined to the view that a regime could be imposed on PB if that is the only way in which her interests can be safeguarded. To be maintained in optimum health, safe, warm, free from physical indignity and cared for is in itself an enhancement of autonomy.*

> *114. I see no indication that the inherent jurisdiction is limited to injunctive relief. Each case depends on the degree of protection required and the risks involved. And the court must always consider Article 8 rights and best interests when making a substantive order."*

Parker J further held that Article 5 ECHR would be complied with because:

1. Any order would be in accordance with a procedure prescribed by law because any order would be "imposed by a court of law through a legal process of which notice had been given and it would be perfectly possible for a person of sufficient capacity to understand its effect. That fulfils the "Purdy" criteria [i.e. those set down in *R (Purdy) v DPP* [2010] 1 AC 345];

2. PB's diagnosed psychiatric condition would satisfy the requirement of "unsoundness of mind" in Article 5(1)(e) even if it had not sufficed to establish a lack of capacity. As Parker J noted, incapacity is not co-terminous with unsoundness of mind.

The conclusion on best interests

Parker J held that it was in PB's best interests to remain at the care home where she had been placed by the Council, and that that it was lawful and proportionate for PB to be deprived of her liberty by the court with controlled contact to TB until a statutory authorisation can be obtained.

Case management

Parker J concluded with some robust comments upon case management which we reproduce in full because it is clear that they were intended for wide dissemination.

> *"126. I stress that I do not wish to criticise the advocates in this case. But I take this opportunity to offer some general guidance derived from my experience in Court of Protection cases from the point of view of the decision maker. This is not a new stance: I have raised the same points in other cases. But over the years some effective steps have been taken to control and manage family cases from which lessons have been learnt. Even more progress is being made under the impetus of the family justice reforms.*
>
> *127. Adoption of a practical approach does not detract from intellectual analysis and rigour. Lord Wilson of Culworth as a puisne judge described himself as "family lawyer of practical disposition". The reality and practicality of the subject matter of the decision can in my experience sometimes get lost in Court of Protection cases. So can the focus on effective administration of justice. The quest to address arguments of increasing subtlety can, as in this case, paralyse effective decision making by a Local Authority and hamper the ability of the court to deliver a decision. All those who practice in the Court of Protection must appreciate that those who represent the vulnerable who cannot give them capacitous instructions have a particular responsibility to ensure that the arguments addressed are proportionate and relevant to the issues, to the actual facts with which they are dealing rather than the theory, and to have regard to the public purse, court resources, and other court users. I do not accept that (i) every possible point must be put (ii) the belief of a protected party is relevant to the issue of capacity. As Lord Judge reminded the profession in R v Farooqi and Others [2013] EWCA Crim 1649, it is for counsel to decide what question to ask and not the client. The fact that a client may lack capacity is not a green light for unmeritorious or unrealistic arguments to be put forward.*

128. Everything comes at a price. And every penny spent on litigation is in reality (because it all comes out of the public budget) a penny taken away from provision for care. There were many court hearings whether attended or not, at most of which almost nothing of any materiality was achieved. One of the problems may have been lack of judicial continuity. It took many months for a fact finding hearing to take place. The Court is still not in a position to determine best interests. I had to read and reread reams of material and law reports after my return from leave to conclude this judgement.

129. I recognise the importance of this field of litigation. I recognise the need to promote the Convention rights of as well as to protect the vulnerable and the incapacitated. But in cases under the Children Act 1989 equally important human, Convention and protective issues arise. As in the Court of Protection, the court has to have regard to the overriding objective. Experts are not routine and have to be "necessary", and the necessary expertise may come from the social worker.

130. Baker J in CKK and KK [2012] EWHC 2136 (COP) and Butler-Sloss J in Ms BS v An NHS Hospital Trust [2002] EWHC 429 (Fam) [2002] 2 All ER 449 reminded clinicians that a close professional relationship with P might lead them to be drawn to a supportive or emotional rather than analytical approach to capacity. I do not read these comments as supporting the appointment of an "independent" expert as the first line approach before the treating clinician has even set out the reasons behind the certificate of incapacity. Second opinions must be justified: and not just ordered as a matter of routine until there is no reason to doubt the first.

131. I am told Moor J queried the need for further evidence and the time estimate but was assured by the Official Solicitor that this was "reasonable" in order to ensure that the matter could be "properly resolved" by the Court. I cannot imagine that Moor J envisaged that there would be five reports in all, a "schedule of agreement" which was in fact not truly agreed, all of which led to considerable confusion, muddle, and prolongation of the court process. It certainly led to a prolonged examination of the witnesses, as fine distinctions in use of language and formulation of ideas were pursued and analysed.

132. The social care evidence has been crucial. The assessment of capacity is in the end for the Judge on the basis of all the facts (see in particular Baker J in CC & KK & STCC [2012] EWHC 2136 (COP)) echoed by me in YLA & PM MZ COP 1225464. After all a single expert can be challenged by the process of cross-examination.

133. Attempts have been made to encourage if not direct Court of Protection practitioners to comply with basic sensible rules of case management in order to assist the judge. Moor J's attempt to bring some order to the proceedings failed. The most basic of requirements, to provide a witness time estimate template, was ignored. Thus at the commencement of the hearing I was met with an assertion that there was insufficient time available: particularly for lengthy cross-examination. I had to take counsel in detail through the list of potential witnesses, and the issues which they were to address, in order to create a plan for the hearing of the case. This took up time. All this should have been done beforehand and a late return was no excuse. Specialist counsel had been on board throughout. Ms Street submitted that Dr Barker's evidence was still so unclear as to require two hours cross-examination by her alone. I managed to shorten this a little. Even so the case proceeded much more slowly than was necessary. In my view this should have been a two day case at most.

134. Before seeking a four day listing the advocates should have provided for Moor J a precise broken down time estimate of what time was required for each witness, submissions and judgment, focused on the actual issues, or likely issues. I insist on this at directions hearings, and I find that I can usually shorten the individual times required, and the overall time estimate, very considerably in the process. Time estimates must be adhered to.

135. A judge cannot easily understand the issues, or give an effective ex tempore judgment, without a chronology of essential dates. I asked for one at the outset. It was produced part of the way though the hearing, obviously in a hurry, and a number of important dates, particular court hearings, were not included. I had to trawl though the applications and orders in the bundle and the many lengthy statements in order to produce the analysis of the history above which I have found so essential here.

136. Fact finding schedules should be produced in a way which makes it easy for the Judge to utilise them as a tool for delivery of judgment. The contents of the document produced were in fact useful, but difficult to use. I hope it is not churlish to complain that it was created in landscape rather than portrait, that when answered the page references were omitted, and there was no space for the judge's comments. It would have been even more useful if there had been a chronology.

137. The evidence could have been addressed much more shortly. The actual issues raised were:

i) The psychiatric evaluation of PB

ii) The extent to which TB's influence or pressure affected capacity: the legal issue arising from that was a matter for the judge.

iii) The extent to which PB's beliefs may have been causative of her decision making: the interpretation of the words "because of" was for the judge and not the witnesses.

iv) Whether any potential decisions were simply unwise: again as Dr Barker recognised this was really a matter for judicial evaluation.

138. The joint statement should have addressed starkly:

i) Is there impairment or disturbance, if so what is it and what is its effect?

ii) What is the decision to be made?

iii) What is the information necessary to make that decision?

iv) Is the person able to retain, use or weigh, that information and/or communicate that decision?

v) Is there a lack of capacity and if so why?

139. And if the experts do not agree, they must make it clear. If they have not made it clear, they must be asked to do so. If their disagreement does not affect the outcome that is one thing. If they disagree on the fundamental issue, they must say so. The experts are not a jury considering whether they can give a unanimous verdict. There is no duty to "harmonise" views if in reality the experts do not agree. It simply makes the task of the judge more difficult.

140. Practitioners need to ask themselves:

i) What do I really need to challenge?

ii) What does the judge need to know?

iii) What is actually arguable and what is not?

141. Effective steps must be taken to reduce evidence to the essential. In Farooqi Lord Judge emphasised the requirement that cross-examination should proceed by short, focussed question rather than by comment, opinion and assertion. I also note that in The Law Commission lecture given last year Lord Judge stated (as I was taught) that in principle no question should be longer than one line of transcript. In any event, the judge is interested in the answer, not the question.

142. Advocates need to be able to control the witness by the form and structure of their questions and not permit discursive replies or to allow the witness to ramble (particularly if the witness has the tendency to be prolix). There is no necessity for a long introduction: apart from anything else it may distract and confuse the witness and the judge.

143. Examination must not proceed by way of "exploration" of the evidence: i.e. a debate, or by putting theory or speculation, rather than by properly directed questions which require an answer.

144. This is all the advocates' responsibility. However hard a judge tries to speed the process, this takes up time and interrupts the flow, and often leads to a debate with the advocate. Also it can give the wrong impression to the lay client about the judge's view of them or their case.

145. Where two parties have the same case to put, the same points must not be repeated.

146. Finally the advocate needs, if facts are challenged, to put the client's case.

147. I note and am glad to see that in IM v LM the Court of Appeal approved Peter Jackson J's decision to determine the issues in a 2 hour hearing. The second opinion psychiatrist was not cross–examined. I am sure that in that case it helped that there had been judicial continuity throughout.

148. I am certainly not suggesting that this case should not have been litigated. It may have been necessary to have two experts. I really cannot tell, because of the way their instruction progressed, which may have led to their lack of precision on paper. But more focus on case management and case progression is essential."

Comment

It is unfortunate in some ways that the Official Solicitor did not seek permission to appeal this decision (on behalf of either PB or TB), because we have considerable concerns about two aspects of the judgment.

That having been said, the comments made in relation to case-management are ones that practitioners would do very well to heed because they are reflective of an increasingly robust approach to case management which is likely to be adopted by ever judges and (in due course) potentially to be reflected in amendments to the Court of Protection Rules and/or Practice Directions so as to align them with the position in respect of family proceedings.

Capacity

With the greatest of respect to Parker J, her reasoning on this question is somewhat obscure. It is possible to read paragraph 86 as suggesting that the impairment or disturbance need be no more than a material cause of a person's inability

to decide; if so, this is plainly incorrect, and inconsistent with the decision of the Court of Appeal in *PC*.

If, however, as seems more likely from paragraph 107, Parker J was holding that s.2(1) MCA 2005 requires that the court identify whether the impairment/disturbance identified by the evidence was the material/effective/primary cause of the inability, then we would respectfully agree. It would appear, indeed, that this was, in fact, her conclusion because at paragraph 107 she was at pains to emphasise that she concluded that PB's impairment/disturbance was the effective/primary cause of her inability to take a decision.

We are, though, troubled by Parker J's (obiter) discussion of the role of influence. This is a very difficult area, not least because of the fact that two of the most important authorities (*Re G (an adult) (Mental capacity: Court's Jurisdiction)* [2004] EWHC 222 (Fam) and a *Local Authority v SA and others* [2005] EWHC 2942 (Fam) pre-dated the coming into force of the MCA 2005 and the sharp distinction that fell to be drawn thereafter between those lacking capacity and those who were 'merely' vulnerable. Further, a decision upon which Parker J placed particular reliance, *Re A (Capacity: Refusal of Contraception)* [2011] Fam 61, was a decision that pre-dated that in *PC* and, we would suggest would be approached rather differently in light of the emphasis in *PC* upon the causative nexus (for our part, *Re A* looks a lot more like – as was submitted on PB's behalf – an inherent jurisdiction case, rather than an MCA 2005 case).

It seems to us that there is a clear (and principled) distinction to be drawn between:

1. A person who because of their impairment/disturbance is unable to resist the influence of another; and

2. A person who is in some way vulnerable and is also subject to influence.

For a discussion of this difference which appears not to have been put before Parker J (it post-dated the hearing before her, but pre-dated her judgment) which makes the point very clearly indeed, see the judgment of Russell J in *LB Redbridge v G, C and F* [2014] EWCOP 485 (COP).

For our part, therefore, we would counsel considerable caution in placing reliance upon these paragraphs in Parker J's judgment and would reiterate that they are obiter because she was ultimately at pains to hold that the material cause of PB's inability to decide as to residence was the impairment/disturbance from which she suffered.

Inherent jurisdiction

We are even more troubled by Parker J's observations as to the scope of the inherent jurisdiction; we presume that the reason that the Official Solicitor chose not to seek to appeal the decision (as was intimated might be the case at paragraph 109) was because they were obiter.

We are, for a start, troubled by the soundness of the observations as a matter of law. In particular, it is difficult to reconcile her decision with that of Macur J in *LBL v RYJ and VJ* [2010] EWHC 2665 (COP), In that case, Macur J expressly rejected (at paragraph 62):

> *"the initial contention of this local authority that the inherent jurisdiction of the court may be used in the case of a capacitous adult to impose a decision*

> *upon him/her whether as to welfare or finance. I adopt the arguments made on behalf of RYJ and VJ that the relevant case law establishes the ability of the court, via its inherent jurisdiction, to facilitate the process of unencumbered decision-making by those who they have determined have capacity free of external pressure or physical restraint in making those decisions"* (emphasis added)

In this regard, recall also that the Court of Appeal in *Re DL* expressly endorsed the approach adopted by Macur J (at paragraph 67, per McFarlane LJ):

> "*Further, in terms of the manner in which the jurisdiction should be exercised, I would expressly commend the approach described by Macur J in LBL v RYJ and VJ* [2010] EWHC 2665 (COP)*, paragraph 62, which I have set out at paragraph 33 above. The facilitative, rather than dictatorial, approach of the court that is described there would seem to me to be entirely on all fours with the re-establishment of the individual's autonomy of decision making in a manner which enhances, rather than breaches, their ECHR Article 8 rights*."

On a proper analysis, it seems to us that Parker J's approach allows for decisions to be imposed upon a capacitous adult. Not only is this difficult to square with the two decisions set out above, but – more fundamentally – how is such an approach to be distinguished from taking a decision on behalf of such an adult? Or – where the decision that is dictatorially imposed upon the adult is different to that which they purported to wish to take – how is that to be distinguished from overriding their capacitous decision? And, if it cannot, what purpose does the MCA 2005 actually serve in identifying a distinction between two classes of individuals in circumstances where (as Parker J had herself previously recognised in *XCC*) "*The Court of Appeal in DL stressed that in contrast to incapacitated adults, the decisions of adults with capacity cannot be overridden on the best interests test or welfare grounds*"?

Further, whilst Parker J was at pains to identify the approach that she was suggesting as being supportive of PB's autonomy, it is perhaps not impertinent to suggest that it is very unlikely (given the description of PB's relationship with TB) that PB would regard this as being the case. There is a distinct flavour here of forcing an individual to be free.

That the balance may come down in an appropriate case under the MCA 2005 in favour of protection over autonomy may well be inevitable, but the MCA 2005 provides a framework within which this decision will be taken and principles against which it can be tested. There is no equivalent framework for the exercise of the inherent jurisdiction beyond the need to do what is necessary, proportionate and not incompatible with the ECHR. It is also worth recalling here that Parker J in *XCC* expressly held that when she was considering exercising the inherent jurisdiction that she was not bound by the provisions of s.4 MCA 2005 and could take into account – for instance – public policy considerations that the CoP could not. Her comments in *XCC* might be distinguished because she was concerned there with granting relief in respect of an incapacitated adult where the relief sought was outside the scope of s.15 MCA 2005, rather than granting relief in respect of an adult outside the scope of the MCA 2005. However, the decision in *XCC* is (perhaps inadvertently) revealing of some of the pitfalls that may lie

ahead if judges go down the path identified in this more recent case.

Finally, and with specific regard to Article 5(1) ECHR, it is far from obvious that the making of an order under the inherent jurisdiction in relation to a person who may have the capacity to decide where to reside but (as may well be the case) not have the capacity to litigate would satisfy the *Purdy* requirements. And it is also worth noting, perhaps, that very much greater safeguards are enshrined in the powers contained in the Adult Support and Protection (Scotland) Act 2007 to order the temporary removal of a capacitous but vulnerable adult from their own home: see this discussion paper here.

A substantial irony here is that the approach suggested by Parker J which is, at heart, predicated upon risk, irrespective of the capacity of the individual concerned, could be seen to be less discriminatory than that contained in the MCA 2005 and therefore, arguably, more compatible with the CRPD. But it is an approach that – with respect – flies in the face of the clearly established current threshold for intervention set down in the MCA 2005. It is also an approach which, for our part, we would wish to be considered very carefully – and, ideally – addressed in statute, rather than developing incrementally.

Meeting P

One final, very small point, it is perhaps worth noting that it is not instantly obvious that merely because PB and TB were P and a protected party respectively they could not give evidence (as Parker J appear to have held at paragraph 42). It may well have been that this section of Parker J's judgment was compressed in its reasoning, but it should be recalled that (where evidence is to be given on oath or after an affirmation) the test for competence to give such evidence is distinct from the test for whether P has capacity to conduct the litigation. The test is whether the witness is capable of understanding the nature of an oath and of giving rational testimony.

To fact-find or not to fact-find?

LBX v TT and others [2014] EWCOP 24 (Cobb J)

Practice and procedure – Fact-finding

Summary

TT was a 19 year old woman with moderate learning disabilities and global developmental delay. In November 2012, she alleged that her stepfather had sexually assaulted her and forced her to watch pornographic videos. She was placed in adult foster care and her stepfather was awaiting trial in the Crown Court. As a result of significant concessions by the parents, rather than a three-day hearing to conduct a full enquiry into the allegations, Cobb J was able to proceed to a more limited factual enquiry, principally directed to the issue of contact between TT and her mother ('MJ').

One issue was whether, in light of the concessions, the court could make orders upon an agreed basis of facts without having to make factual findings. Or, given that TT's mother's stance on contact would be likely to change following her husband's trial, whether a fact-finding hearing should proceed. Cobb J reiterated the principle that he who asserts must prove on the balance of probabilities, as described by Lord

Hoffman in *Re B (Care Proceedings: Standard of Proof)* [2008] UKHL 35 at §2:

> *"If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened".*

In determining what factors should influence the exercise of the court's discretion in deciding whether these should be a finding of fact hearing at the interim or final hearing, his Lordship drew upon some analogous jurisprudence from the family courts:

> *"46. I have had the relative luxury of three days of court time set aside to determine these issues; the court will however often be constrained by sheer practicalities of time and opportunity for an oral hearing. In each situation, the Judge surely has to make a determination – often under pressure of time – as to how far he or she can go to test the material. By analogy with the position in family law, the judge would in my judgment be well-served to consider the guidance of Butler-Sloss LJ in the family appeal of Re B (Minors)(Contact) [1994] 2 FLR 1 in which she said as follows:*
>
> > *'There is a spectrum of procedure for family cases from the ex parte application on minimal evidence to the full and detailed investigations on oral evidence which may be prolonged. Where on that spectrum a judge decides a particular application should be placed is a matter for his discretion. Applications for residence orders or for committal to the care of a local authority or revocation of a care order are likely to be decided on full oral evidence, but not invariably. Such is not the case on contact applications which may be and are heard sometimes with and sometimes without oral evidence or with a limited amount of oral evidence.'*
>
> *It is acknowledged that the 'spectrum' may now be narrower than that described in 1994 following the revisions to rule 22.7 of the Family Procedure Rules 2010, but the principle nonetheless remains, in my judgment, good.*
>
> *47. Butler–Sloss LJ went on to define the questions which may have a bearing on how the court should proceed with such an application (adapted for relevance to the Court of Protection):*
>
> *i. Whether there is sufficient evidence upon which to make the relevant decision;*
>
> *ii. Whether the proposed evidence (which should be available at least in outline) which the applicant for a full trial wishes to adduce is likely to affect the outcome of the proceedings;*
>
> *iii. Whether the opportunity to cross-examine the witnesses for the professional care or other agency, in particular in this case the expert witnesses, is likely to affect the outcome of the proceedings;*

iv. *The welfare of P and the effect of further litigation – whether the delay in itself will be so detrimental to P's well-being that exceptionally there should not be a full hearing. This may be because of the urgent need to reach a decision in relation to P;*

v. *The prospects of success of the applicant for a full trial;*

vi. *Does the justice of the case require a full investigation with oral evidence?*

48. In deciding whether to conduct a fact-finding hearing at all, I consider it useful to consider the check-list of considerations discussed by McFarlane J in the case of A County Council v DP, RS, BS (By their Children's Guardian) [2005] EWHC 1593 (Fam) 2005 2 FLR 1031 at [24]. Following a review of case-law relevant to the issue he stated that:

> *"… amongst other factors, the following are likely to be relevant and need to be borne in mind before deciding whether or not to conduct a particular fact finding exercise:*
> *(a) the interests of the child (which are relevant but not paramount*
> *(b) the time that the investigation will take;*
> *(c) the likely cost to public funds;*
> *(d) the evidential result;*
> *(e) the necessity or otherwise of the investigation;*
> *(f) the relevance of the potential result of the investigation to the future care plans for the child;*
> *(g) the impact of any fact finding process upon the other parties;*
> *(h) the prospects of a fair trial on the issue;*
> *(i) the justice of the case."*

> *49. There is some (but not universal) acknowledgement at the Bar in this case that this list (with modifications as to (a) to refer to the best interests of 'P' rather than 'the child') provides a useful framework of issues to consider in relation to the necessity of fact finding in the jurisdiction of the Court of Protection."*

According, Cobb J decided to conduct a limited fact-finding exercise and made resulting declarations and decisions. This included an authorisation to deprive TT of her liberty in the foster home.

Comment

When to hold fact-finding hearings in the Court of Protection is an issue in respect of which – unlike in relation to children – there is no guidance and a paucity of reported cases. The topic is discussed in some detail in the new Court of Protection Handbook (see further below) in which Alex expressed the view that a useful analogy could be drawn with the pre-MCA case of *Re S (adult's lack of capacity: carer and residence)* [2003] EWHC 1909 (Fam), [2003] 2 FLR 1235). However, this decision of Cobb J is by far the most comprehensive to date in terms of its analysis. Until and unless a Practice Direction or Practice Guidance is produced setting out a framework, it is suggested that the model set out by Cobb J is one that will be of considerable assistance to practitioners and judges in determining whether a fact-finding hearing is required and the need for oral evidence. It should, though, be recalled, that the tenor of recent judgments from the Family Division/Court of Appeal is that very considerable caution should be exercised before a separate fact-finding hearing is listed (see, for instance, *Re S, Cambridgeshire County Council v PS and others* [2014] EWCA Civ 25).

Short Note – the power to evict/duress and revocation of LPAs

The unedifying saga of the *Redbridge v G* case that we have been reporting on in recent newsletters has come to an end for now at least, in the form of the judgment of Russell J in *LB Redbridge v G (No 4)* [2014] EWCOP 17. For the full background, see our comment on the first judgment here.

In short terms Russell J has concluded that it is not in G's best interests for her carer C and C's husband F to continue to live in her house, or for her to have any contact with C or F. The judgment is, in our respectful submission, compelling for its detail and sympathetic engagement with G as an individual: it is, of particular note, that Russell J's balance of the current (and inconsistent) wishes and feelings expressed by G – caught in the middle of the 'spider's web' – with her previous past consistent wishes and feelings.

The judgment is of wider interest for two reasons.

The first is the clear holding by Russell J that she had the power to require C and F to leave G's house:

> *"93. Whether or not it is in G's best interests for C and F to continue to live with G is "a matter concerning P's personal welfare"; s17(1) (c) expressly provides that the court can prohibit a named person from having contact with P. I intend to make an order regarding contact between C and F and G. I consider that I have powers under s 17 to make the order I have that C and F vacate G's home, as I am making the decision on G's behalf in relation to a matter concerning her personal welfare as provided for in s 16(1) (a) and s 16(2) (a) and s 47 (1). The latter provides that the court has in connection with its jurisdiction the same powers, rights, privileges and authority as the High Court. I have considered the Court of Appeal case of DL v A Local Authority & Others [2012] EWCA Civ 253 and could under the inherent jurisdiction of the High Court, exercise the power under the inherent jurisdiction to make a mandatory injunction requiring C and F to leave the property. However I do not consider that to be necessary as the powers under the MCA are sufficient."*

The second is the approach adopted by Russell J to the revocation of a health and welfare LPA purportedly granted by G in favour of C. Russell J did not have before her sufficient evidence that G had lacked the requisite capacity at the material time, so could not revoke the LPA on the basis that such capacity is required by s.9(2) MCA 2005. However,

> *"95. The local authority submits that the LPA should be revoked, and I agree. The argument is put forward that the court can revoke the instrument based on the provisions of s.22(3) (a) (i) and (ii) and/or (b)(i) and revoke by virtue of s22 (4) (b). The need for a further hearing on this matter given the findings I have made in respect of C would seem to be disproportionate. On the findings I have made the provisions of s 22 (3) (a) (i) and/or (ii) are met; as it is more likely than not that C used undue pressure. It offends against logic to suggest that s22 (b) (i) can only refer to the behaviour of a donee when purporting to act under the authority of the instrument when the court has found that a donee has behaved in a way that is not in P's best interests, particularly when the behaviour relates directly to the specific LPA; in this case health and welfare. In view of my decision regarding the evidence of ML (which I accepted) that he*

discussed drawing one up granting her brother that power instead, very shortly before the existing LPA was drawn, therefore I revoke the LPA pursuant to s 22(4) (b).”

The approach adopted by Russell J should is consistent with and should perhaps be read alongside the decision of HHJ Marshall QC in *Re J* (which appears not to have been brought to Russell J’s attention). In that case, HHJ Marshall QC rejected a submission that s.22 embodied a broad concept of unsuitability; she also rejected a that the only conduct that the Court could take into account for purposes of s.22(3)(b) was that of the donee in his capacity as donee. Rather

“11. In my judgment, the key to giving proper effect to the distinction between an attorney’s behaviour as attorney and his behaviour in any other capacity lies in considering the matter in stages. First, one must identify the allegedly offending behaviour or prospective behaviour. Second, one looks at all the circumstances and context and decides whether, taking everything into account, it really does amount to behaviour which is not in P’s best interests, or can fairly be characterised as such. Finally, one must decide whether, taking everything into account including the fact that it is behaviour in some other capacity, it also gives good reason to take the very serious step of revoking the LPA.

[…]

13… noting the court’s powers with regard to directing an attorney under s 23 of the Act... on a proper construction of s 22(3), the Court can consider any past behaviour or apparent prospective behaviour by the attorney, but that, depending on the circumstances and apparent gravity of any offending behaviour found, it can then take whatever steps it regards as appropriate in P’s best interests (this only arises if P lacks capacity), to deal with the situation, whether by revoking the power or by taking some other course.”

Short Note – the costs of non-compliance

The case of *LB of Bexley v V, W and D* [2014] EWHC 2187 (Fam) contains a stark reminder of the need to comply with court directions concerning the filing of evidence. The local authority in this case failed to file its evidence in accordance with deadlines which had already been extended, and despite the court stating that if any party was going to be unable to comply with the extended deadlines, it should apply to the judge’s clerk for an extension. It was said on the local authority’s behalf that no application was made as the local authority did not know when it would be able to produce its evidence. Unsurprisingly, the court was not impressed, but fortunately it was possible for amended directions to be given which enabled all parties to file their evidence without jeopardising the final hearing in the proceedings. The local authority was criticised and required to pay the costs of the hearing: “*I understand that social work professionals and lawyers, whether engaged by public authorities or in private practice, are under enormous great strain in the current circumstances and economic climate, particularly given changes to public funding, but that does not relieve them of the obligation to comply with orders made by the court. The failures by the London Borough of Bexley in this matter are stark. This hearing would not have been required if they had complied with their orders and, in my judgment, it was right that this matter was listed at the earliest opportunity to address those failings and to enable the other parties to make submissions as to when they could comply with their obligations to file documents. Accordingly, I am in no doubt that it is right that the local*

authority should be ordered to pay the costs of this hearing."

Similar approaches may well be taken by judges in the Court of Protection, particularly where failures to meet court deadlines delay the substantive determination of an application. And we would note the case of *Re W (Children)* [2014] EWFC 22 as a further example of the very robust approach that is being taken in family cases – in the context of much tighter rules in the FPR; we anticipate that it is only a matter of time before the COPR includes similar provisions and a similar approach is taken in CoP cases.

Short Note – the Court of Appeal to examine nominal damages in the mental health context

Summary

The question of whether the principles relating to the assessment of damages set down in the Supreme Court decision of *Lumba* should be applied in the mental health context is to be reviewed by the Court of Appeal, permission having been granted on 1 July 2014 to the claimant to appeal the decision of HHJ Hand QC in *Bostridge v Oxleas NHS Foundation Trust*.

The appeal is of wider significance, because it is likely that it will also dictate the approach that would be taken to claims for damages for false imprisonment and/or unlawful deprivation of liberty arising out of deprivations of liberty under the MCA 2005.

The facts of Mr Bostridge's case are, insofar as relevant for present purposes, these. He was discharged from detention by the FTT (Mental Health) in April 2009, his discharge being deferred so a Community Treatment Order could be put in place. However, for technical reasons that need not detain us here, what was then purported to be put in place as CTO was not, in fact, a CTO such that, when his condition deteriorated in August 2009 and he was recalled to hospital and detained thereafter (with six days of leave) until November 2010, his detention was at all stages – and was admitted by the Defendant Trust – to be unlawful. The Defendant admitted that the period of 442 days amounted to false imprisonment and/or unlawful deprivation of liberty for purposes of Article 5 ECHR. His case was reviewed twice by a Tribunal during his detention (with no one realising the fact that the detention was unlawful), on both occasions the Tribunal finding that his condition warranted continued detention. The Claimant never realised that his detention was unlawful, nor did anyone involved in his care. A jointly instructed psychiatrist who reported in the subsequent claim brought on his behalf after it was realised that he had been unlawfully detained indicated that his re-admission to hospital in August 2009 was necessary as at that point, that there was no evidence that he had suffered damage during the period of unlawful detention due to his being unlawfully detained, and that he would have suffered the same unhappiness and distress had been lawfully detained.

Against that backdrop of agreed facts, HHJ Hand QC had to assess the quantum of damages that fell to be awarded the Claimant for both false imprisonment and unlawful deprivation of liberty. The Defendant relied heavily on the cases of *Lumba and Mighty v Secretary of State for the Home Department* [2011] UKSC12 and *Kambadzi v Secretary of State for the Home Department* [2011] UKSC 23 (discussed in more detail in Alex's article, co-written with Catherine Dobson, "*At what price liberty? The Supreme Court decision in*

Lumba and compensation for false imprisonment" [2012] *Public Law* 628)

HHJ Hand QC held that *Lumba* and *Kambadzi* were authority for three propositions (of application beyond the immigration detention context):

1. the tort of false imprisonment is established even where the detention has caused no loss because it would have been inevitable if the detainer had acted lawfully;

2. there is no principle in the law of England and Wales of "vindicatory" damages;

3. where there is no loss suffered as a consequence of unlawful detention, damages for false imprisonment will be nominal.

It being accepted that there was no loss: the Claimant would have been detained had his illness been correctly addressed via s.3 MHA 1983, as it should have been on 19 August 2009, and thereafter he would have received precisely the same treatment and he would have been discharged in September 2011. HHJ Hand QC therefore held that he was entitled to judgment and to nominal damages.

Mr Bostridge applied for permission to appeal. The transcript of the permission hearing before Kitchin LJ ([2014] EWCA Civ 1005) contains the following material passages:

> *"7 Mr Drabble submits that in approaching the matter as he did the judge fell into error because the decisions of the Supreme Court in Lumba and Kambadzi do not establish that only nominal damages follow where there was a complete absence of statutory authority for a detention. To the contrary, Mr Drabble argues, there is a distinction between an unlawful detention where there was no threshold power to detain and detention which is unlawful on other grounds despite there having been lawful authority to detain in the first place. Moreover, Mr Drabble continues, the Act reflects the particular importance of compliance with the procedural requirements for lawful detention and it is simply no answer to the appellant's claim to say that he could have been detained had the appropriate procedures been followed. What is more, says Mr Drabble, the appellant has lost the protection of the rights and procedures which Parliament has provided in the Act for vulnerable persons such as him. That, he says, is a real not a nominal loss.*
>
> *8 I have been persuaded that these are points which merit consideration by this court, both because an appeal would have a reasonable prospect of success and because the appeal raises a point of principle, namely the approach to be adopted where a person responsible for an unlawful detention was not in a position lawfully to detain the subject without ensuring that an important condition precedent had been fulfilled, the condition precedent being compliance with the safeguards contained in section 3 of the Act. Further, in the circumstances of this case, compliance with those safeguards was not a matter which lay wholly within the power of the respondent.*

Comment

Whilst the "*Lumba* principles" are well-established in the context of immigration detention, precisely how they apply in the mental health – and mental capacity – context is less obvious. As Alex and Catherine Dobson noted in their article in *Public Law* – in arguments echoed on behalf of Mr Bostridge:

> *"Policy arguments could, for example, be made that the causation approach should not apply to the power to authorise the detention*

> *of individuals under the Mental Health Act 1983 or the Mental Capacity Act 2005. Both statutory schemes already protect certain categories of decision-maker from damages claims where the relevant decisions are taken in good faith and with reasonable care. This might give rise to the inference that Parliament intended procedural errors falling outwith the statutory exceptions to sound in substantive damages. There are good reasons why this would be so. Procedural requirements for the detention of individuals with mental disorders under the Mental Health Act 1983 or the Mental Capacity Act 2005 provide a crucial framework for overseeing the decisions taken by a care professional or medical practitioner in the exercise of their judgment in respect of particularly vulnerable individuals. It might properly be thought to be particularly important that they not be devalued by the award of nominal damages."*

We also hope that the appeal will consider the question of whether the principles set down in *Lumba* and *Kambadzi* apply solely to the domestic tort of false imprisonment (which was the only cause of action run in those cases) or also extend to actions brought under the Human Rights Act 1998 for a breach of Article 5 ECHR. The tort of false imprisonment is not co-existent with a deprivation of liberty (see, very recently, *Walker v Cmr of Police for the Metropolis* [2014] EWCA Civ 897), and it may be said that the principles that apply to the award of damages should be those derived from the ECHR and ECtHR (in principle those of just satisfaction) rather than those from the context of domestic torts. The decision in *R (KB & Ors) v MHRT* [2003] EWHC 193 (Admin) suggests that the need for a claimant to establish their loss also applies in the context of (at least) Article 5(4) ECHR, but there remains some unhelpful ambiguity in this area which we hope that the Court of Appeal will address in due course.

It goes without saying that local authorities and CCGs will be likely to looking to the appeal with some interest given that – if (in broad terms) HHJ Hand QC's approach is correct – this will have a significant impact upon the quantum of any damages that those whom the decision of the Supreme Court in *Cheshire West* have shown are unlawfully deprived of their liberty might be able to recover.

Court of Protection Handbook

By way of a shameless plug, Legal Action Group has just published the *Court of Protection Handbook: A User's Guide* edited by Alex, and co-written by him with Professor Anselm Eldergill, Kate Edwards and Sophy Niles. The book is accompanied by a new website which contains links to relevant statutory materials and other guidance that space precluded the team from including in the appendices, precedent orders covering most of the most common situations that arise before the Court, useful (free) web resources, and updates on practice and procedure before the Court of Protection. These updates take the form of posts on the site's blog, and also (where relevant) updates cross-referenced to the relevant paragraphs in the book. The book is available from the LAG Bookshop for £48. It is also available in Kindle format. Rest assured, incidentally, that the website will stand alongside this newsletter and the resources on our site (and Alex's site) as an addition rather than a competitor!

`

Conferences at which editors/contributors are speaking

Implementing the Mental Capacity Act and the Deprivation of Liberty Safeguards

Alex and Tor are speaking at this conference arranged by Community Care in London on 8 October 2014, a re-run (with variations) of the sold-out and high octane conference held in March – on the day of the Supreme Court decision in *Cheshire West*. Full details are available here.

The Mental Capacity Act 2005: Annual Review 16 October 2014

Neil and Tor are speaking at the speaking at Langley's annual multi-disciplinary conference looking at the workings of the Mental Capacity Act 2005J in York on 16 October, alongside speakers including Mr Justice Baker and Fenella Morris QC. Full details are available here.

Court of Protection Practice and Procedure 2014

Alex and Tor are speaking at Jordan's annual Court of Protection Practice in London on 21 October, alongside Mr Justice Charles, Vice-President of the Court of Protection, the Public Guardian, Alan Eccles, District Judge Marin and David Rees. For further details and an early bird discount (for booking by 8 August), see here.

'Taking Stock'

Neil is speaking at the annual 'Taking Stock' Conference on 17 October, jointly promoted by the Approved Mental Health Professionals Association (North West and North Wales) and Cardiff Law School with sponsorship from Irwin Mitchell Solicitors and Thirty Nine Essex Street Barristers Chambers – and with support from Manchester University. Full details are available here.

Editors

Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Anna Bicarregui
Simon Edwards (P&A)

Scottish contributors

Adrian Ward
Jill Stavert

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 Mind in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Chambers Details

We are taking a break over the summer; our next Newsletter will be out in October, but we will circulate a newflash in the interim with any judgments or developments that cannot wait that long. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Newsletter in the future please contact marketing@39essex.com.

David Barnes
Chief Executive and Director of Clerking
david.barnes@39essex.com

Alastair Davidson
Senior Clerk
alastair.davidson@39essex.com

Sheraton Doyle
Practice Manager
sheraton.doyle@39essex.com

Peter Campbell
Practice Manager
peter.campbell@39essex.com

London 39 Essex Street, London WC2R 3AT
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

Manchester 82 King Street, Manchester M2 4WQ
Tel: +44 (0)161 870 0333
Fax: +44 (0)20 7353 3978

Singapore Maxwell Chambers, 32 Maxwell Road, #02-16,
Singapore 069115
Tel: +(65) 6634 1336

For all our services: visit www.39essex.com

CoP Cases Online

Use this QR code to take you directly to the CoP Cases Online section of our website

THE QUEEN'S AWARDS FOR ENTERPRISE INTERNATIONAL TRADE 2013

Contributors: England and Wales

Alex Ruck Keene
alex.ruckkeene@39essex.com

Alex been recommended as a leading expert in the field of mental capacity law for several years, appearing in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively about mental capacity law and policy, works to which he has contributed including 'The Court of Protection Handbook' (2014, LAG); 'The International Protection of Adults' (forthcoming, 2014, Oxford University Press), Jordan's 'Court of Protection Practice' and the third edition of 'Assessment of Mental Capacity' (Law Society/BMA 2009). He is an Honorary Research Lecturer at the University of Manchester, and the creator of the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

Victoria Butler-Cole
vb@39essex.com

Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. She previously lectured in Medical Ethics at King's College London and was Assistant Director of the Nuffield Council on Bioethics. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA 2009), and a contributor to Heywood and Massey: Court of Protection Practice (Sweet and Maxwell). To view full CV click here.

Neil Allen
neil.allen@39essex.com

Neil has particular interests in human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Neil is the Deputy Director of the University's Legal Advice Centre and a Trustee for a mental health charity. To view full CV click here.

Anna Bicarregui
anna.bicarregui@39essex.com

Anna regularly appears in the Court of Protection in cases concerning welfare issues and property and financial affairs. She acts on behalf of local authorities, family members and the Official Solicitor. Anna also provides training in COP related matters. Anna also practices in the fields of education and employment where she has particular expertise in discrimination/human rights issues. To view 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.

Contributors: Scotland

Adrian Ward

adw@tcyoung.co.uk

Adrian is a practising Scottish solicitor, a partner of T C Young LLP, who has specialised in and developed adult incapacity law in Scotland over more than three decades. Described in a court judgment as: "*the acknowledged master of this subject, and the person who has done more than any other practitioner in Scotland to advance this area of law*," he is author of *Adult Incapacity*, *Adults with Incapacity Legislation* and several other books on the subject. To view full CV click here.

Jill Stavert

J.Stavert@napier.ac.uk

Dr Jill Stavert is Reader in Law within the School of Accounting, Financial Services and Law at Edinburgh Napier University and Director of its Centre for Mental Health and Incapacity Law Rights and Policy. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee, Alzheimer Scotland's Human Rights and Public Policy Committee, the South East Scotland Research Ethics Committee 1, and the Scottish Human Rights Commission Research Advisory Group. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2013 updated guidance on Deprivation of Liberty) and is a voluntary legal officer for the Scottish Association for Mental Health. To view full CV click here.