Mental Capacity Law Newsletter July 2014: Issue 48

Scotland

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

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: a difficult case on the line between the MHA/the MCA, safeguarding gone wrong, and updates on post-*Cheshire West* developments;

(2) In the Property and Affairs Newsletter: cases on deputies, undue influence and the COP and the duty of attorneys in continuing healthcare disputes;

(3) In the Practice and Procedure Newsletter: a focus on different aspects of access by the media to the court;

(4) In the Capacity outside the COP newsletter: an update on DNACPR notices, a case on charging in relation to monies managed by a Deputy, and updates on the Government's response to the House of Lords Select Committee's post-legislative scrutiny of the MCA 2005;

(5) In the Scotland Newsletter: an update on the legal consequences of delaying reporting by MHOs in welfare guardianship applications, a case on the proper duration of guardianship and an update on the Mental Health Bill.

In this issue, we also introduce two changes. The first is that we are delighted to introduce Simon Edwards as our Property and Affairs editor. The second is that, to reflect that many more decisions are now being reported pursuant to the President's Transparency Practice Guidance, we are introducing 'Short Notes' on cases which do not merit reporting in full here but where one or more short points of wider interest appear. As ever, we welcome feedback to the editors.

.

ThirtyNine
ESSEX STREET

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.

Damaging Illegality of Scottish Social Work Authorities

Section 57(3)(b) of the Adults with Incapacity (Scotland) Act 2000 requires welfare guardianship applications to be accompanied by a report in prescribed form from a mental health officer ("MHO") (or in cases where incapacity is said to result solely from inability to communicate, the chief social work officer). During the legislative process concerns were expressed that it would be unacceptable for applicants to encounter delays in proceeding with applications because of this requirement. It was recognised that there might be workload and resource implications for MHOs and their employing authorities. It was concluded that it was clearly essential either to impose a time limit for submission of reports or to permit an alternative source of reports. The Parliament opted for a time limit. Accordingly, there was inserted in the Act a provision which had not appeared in the draft Incapable Adults Bill proposed by the Scottish Law Commission (annexed to the Commission's Report No 151, September 1995). Section 57(4) of the Act requires applicants, other than the local authority, to give notice to the chief social work officer of intention to apply for welfare guardianship and provides that the required report "shall be prepared by the chief social work officer or, as the case may be, the mental health officer, within 21 days of the date of the notice". That obligation is absolute. It is an essential safeguard for vulnerable people who might otherwise be left unnecessarily in inappropriate accommodation (including blocking beds in hospitals), or otherwise "in limbo" while necessary decisions in relation to their personal welfare (and, in "combined" applications, their property and financial affairs) cannot be made. Not even an interim order can be obtained until an application, accompanied by the necessary reports, has been submitted to court.

Following introduction of Part 6 of the 2000 Act with effect from 1st April 2002, failures by local authorities to comply with their statutory obligations were relatively rare, but were addressed by the courts in *Frank Stork and others*, 2004, SCLR 513. See also *Application in respect of AD*, a decision on appeal by Sheriff Principal Bowen, Glasgow Sheriff Court, 27th June 2005.

Regrettably, since then there has been a creeping disregard by local authorities of their statutory obligations, and the important human rights purpose of those obligations, by several Scottish local authorities. Some authorities have pretended that their obligation is to allocate the matter to an MHO within 21 days of intimation, rather than to produce the report within that period. Even that approach has been subject to slippage. It is reported that one authority generally regarded as amongst the most speedy in this respect nevertheless usually takes around four weeks from intimation to allocate an MHO. Another has introduced yet a further step by initially responding to intimations by advising the name of the person responsible for allocating an MHO. Thereafter, the allocation is still delayed. It is reported that one social work office makes the allocations on the first Friday of each month. Yet another local authority now appears to have standardised and institutionalised its breaches of statutory duty and of human rights by issuing in response to all intimations a standard response including the following: "*Unfortunately, due to the pressure of requests for such reports and limited availability of MHOs available to take on this work, it is not possible to allocate this report request at present. We are currently operating a waiting list for allocation and unfortunately I am unable to advise you at present when it will be possible for the report to be allocated. However I anticipate*

this will be 10-12 weeks from the date of the request unless a review, as undernoted, indicates that the allocation should be prioritised on a risk basis."

While these intimations continue with explanations of the risk assessment process and conclude with an apology, no indication seems to have been given by this or any other authority as to the measures to be taken as a matter of urgent priority to end their failure to comply with statutory obligations and their consequent disregard of the rights, welfare and needs of vulnerable people.

In terms of human rights, the delays impact on the person's right to a fair hearing within "*a reasonable time*" as directed by Article 6(1) ECHR. Moreover, during the period of delay potential deprivation of liberty situations engaging Article 5 ECHR may arise where the person is left exposed without the greater protective framework provided for under the 2000 Act.[1] An individual applying for welfare guardianship in such circumstances may also have the best available knowledge of the person's will and preferences but may be unable to ensure that these are regarded with consequences for that person's right to private and family life (Article 8(1) ECHR).

This is not a sudden or unpredicted emergency. There has been no dramatic and unexpected rise in the number of relevant applications. Local authorities have had years within which to plan for the recruitment and training of adequate numbers of MHOs or, as an alternative, to request Scottish Government to re-consider the alternative of permitting other sources of required reports. That local authorities should presume to decide which statutory duties to perform and which to disregard is an affront to the basic principle of the rule of law, and to the Scottish Parliament. One can only sympathise with existing MHOs themselves, under-resourced and facing competing pressures.

Adrian once found it necessary to apply to a sheriff under s3(3) of the 2000 Act for a direction requiring a local authority to produce an MHO report. He intimated to the local authority that that application had been sent for warranting. Remarkably, the awaited report arrived on his desk in time to withdraw the s3(3) application before it was warranted. Even if they are impervious to other considerations, local authorities might care to consider whether it might not be a better use of resources to ensure compliance with their obligations rather than to face a stream of such s3(3) applications, each no doubt concluding for awards of expenses against the local authority.

Adrian D. Ward
Jill Stavert

Duration of Guardianship

A sheriff is directed to grant a guardianship order initially "*for a period of three years or such other period (including an indefinite period) as, on cause shown, he may determine*" (s58(4) of the Adults with Incapacity (Scotland) Act 2000: all references below are to that Act, except where otherwise stated.)

Sheriff John K Mundy at Falkirk has issued a written judgment addressing more fully than

[1] It is acknowledged that currently there is some debate as to whether welfare guardianship under the 2000 Act, coupled with the powers and procedure under s70 of that Act, can sufficiently remedy a deprivation of liberty situation so as to be compatible with Article 5. However, until such time as this is clarified, it appears to be accepted by the Scottish Courts that it does (*Muldoon, applicant* 2005 SLT (Sh Ct) 52; *M, applicant* 2009 SLT (Sh Ct) 185;*Application in respect of R* 2013 G.W.D. 13-293).

hitherto the considerations relevant to determining duration of a guardianship order, and in particular whether, on the facts of the case before him, it should be granted for less than three years. He addressed the questions of onus; of balancing elements relevant to the principle in s1(3) requiring the least restrictive effective intervention in relation to the adult's freedom; the implication of the "acting" element of the definition of incapacity (s1(6)(a)); and the appropriate focus where there were related child welfare issues.

Falkirk Council applied for a guardianship order appointing their chief social work officer as welfare guardian to S for a period of three years. S opposed, but only as regards the duration of the order, which she contended should be limited to one year. At the time of the hearing in November 2013 she was aged 34. She had a learning disability. She had two children, G and A, to different fathers with both of whom she had had difficult relationships, and by the time of the hearing both children were in local authority care. Her adoptive mother was deceased and her relationship with her adoptive father had deteriorated. On 14th June 2013 the sheriff had granted a Removal Order under s293 of the Mental Health (Care and Treatment) (Scotland) Act 2003 as a result of which S was removed to M Care Centre.

On onus, the sheriff refused to accept that there was any onus on a party proposing a period of less than the three-year "norm": "*It seems to me, bearing in mind the principle of 'the least restrictive option' (on the hypothesis that intervention is justified), that it would be difficult to argue that there was a legal burden on a party who submitted for a lesser period of intervention*." More generally, where issue had been joined as to duration it seemed to the sheriff "*to be unhelpful to think in terms of onus*." The court's task "*must ultimately be to consider what the appropriate period is having regard to the principles contained in the Act*." In applying s1(3), on the one hand a shorter period could be said to be less restrictive, but the sheriff referred to Adrian's comment in relation to s58(4) in "Adults with Incapacity Legislation" that requiring everyone to go through the renewal procedure more frequently than necessary could be contrary to the benefit principle. The potential impact on the adult of a renewal application was relevant. The sheriff referred to the observations of Sheriff Thornton in *Application in respect of the adult JMR* (Kirkcaldy Sheriff Court, 27th February 2013 at para 20). In the present case, he identified as further disadvantage of a shorter period that S's knowledge that the order was only for a year could cause her – as she was reported to have said – to "*keep the head down*" for that period, thus inhibiting the progress of her rehabilitation. She was "*at risk of being taken advantage of*", and it would be "*a slow process in order to ensure her safety in the community without support*." Sheriff Mundy quoted evidence of a consultant psychiatrist that he "*did not think she would work with a one year order even if she agreed with that*."

The importance of the element of "acting", including acting in accordance with otherwise potentially competent decisions, was emphasised by the Mental Welfare Commission in the "*D Report*." In the present case, the sheriff accepted evidence of S's frequent inability to act consistently with decisions. Looking only to her expressed decisions, it might have been doubtful whether she was incapable so as to warrant the order sought.

The sheriff did not feel that he "*could attach a great deal of weight to the proposition that a shorter order would allow S a greater opportunity to play a significant part in A's upbringing*." In "*Two 'adults' in one incapacity case?: thoughts for*

Scotland from an English deprivation of liberty decision", 2013 SLT (News) 239, Adrian suggested that the section 1 principles should be applied to any adult within the wording of s1(1), which might be a "second adult" in addition to the adult regarding whom proceedings had been brought. This view could not apply to a person under 16, and thus not an "adult" in terms of the Act. A parent-child relationship would however be likely to engage the benefit principle (s1(2)), the wishes and feelings of the adult (s1(4)(a)), and the views of the child (s1(4)(d)). Sheriff Mundy did not refer to such considerations. He referred to evidence that the "*concern was S's welfare and safety rather than any issues relating to her child*" and that "*this application was about S, not her child*." Sheriff Mundy accepted, on the basis of evidence adduced, that "*the first concern was to achieve stability for S,*" upon achievement of which "*S's parenting ability in relation to A could be re-assessed*."

The Judgment does not refer to Article 12.4 of the UN Convention on the Rights of Persons with Disabilities of December 13, 2006, which provides that "*measures that relate to the exercise of legal capacity*" should "*apply for the shortest time possible*."

Adrian D. Ward

Mental Health (Scotland) Bill

Introduction

In the Newsletter's April 2014 issue comment was made about the draft Mental Health (Scotland) Bill (amending the Mental Health (Care and Treatment)(Scotland) Act 2003(the 2003 Act)) which the Scottish Government was consulting on. The final Bill was introduced into the Scottish Parliament on 19 June. Whilst detailed discussion is probably more appropriate as it progresses the following are some brief initial comments on the Bill as introduced into the parliament.

By way of a reminder, the draft Bill addressed some, but arguably not enough, of the McManus Review recommendations[2]. Some other matters raised by service users and practitioners in response to the Scottish Government's own consultation on such recommendations were also incorporated[3]. The introduction of a notification scheme for victims of mentally disordered offenders was also introduced[4].

Overall, the final Bill does not depart significantly from the draft.

Issues that remain unaddressed

The advance statements provisions have not been altered to reinforce these important expressions of individual will and preferences, in other words,

[2] Scottish Government, *Limited Review of the Mental Health (Care and Treatment) Act 2003: Report*, 2009 (accessed 26 February 2014) ('the McManus Review'). For the Scottish Government's response to this review see Scottish Government, *Mental Health: Legislation Scottish Government response to the "Limited Review of the Mental Health (Care and Treatment) (Scotland) Act 2003: Report*, 2010 (accessed 26 February 2014).

[3] Scottish Government, *Mental Health: Legislation: Consultation on the Review of the Mental Health (Care and Treatment)(Scotland) Act 2003*, 2009 (accessed 26 February 2014).

[4] Scottish Government, *Consultation : Disclosure of Information to Victims of Mentally Disordered Offenders*, 2010, (accessed 26 February 2010) and Scottish Government, *Disclosure of Information to Victims of Mentally Disordered Offenders: Analysis of Responses to the Consultation*, 2011 (accessed 26 February 2014).

autonomy, despite several consultation responses emphasising their importance. Nor have provisions to bolster independent advocacy been introduced.

It seems that the increased responsibilities for Mental Health Officers remain so important resourcing issues require to be addressed here[5]. Issues such as clarity regarding the use of covert medication and restraint, deaths of psychiatric patients and the ability of substituted decision-makers (in other words, welfare guardians and attorneys) to consent to treatment under the 2003 Act also remain unaddressed.

"New" provisions in the final Draft

It would be unfair to say that the Scottish Government has not taken any matters raised in responses to its consultation into account. Departures from the draft Bill that are relevant for the purposes of this Newsletter can be summarised as follows:

A. Named persons

There is no further clarity, by way of a definition, provided as to precisely what is a 'named person'. It will be recalled that in the April issue it was mentioned that there is a lack of understanding by many service users, named persons and even by professionals about the precise role of named persons[6]. However, the 'default' provision whereby the Mental Health Tribunal may appoint a named person where there is no one so appointed is to be removed although for individuals appearing before the Tribunal under 16 it may substitute another person to act as named person[7].

The draft Bill provided for the removal of the current automatic right of a named person to be involved in Tribunal proceedings and a requirement that leave must be applied for to be involved. These are now gone.

B. Removal of requirement for a second medical report in Compulsory Treatment Order (CTO) applications

The requirement for the second medical report has been retained. This is welcome in light of the consequences CTOs have in terms of an individual's liberty and autonomy.

B. Nurse's holding power under s299, 2003 Act

The Bill retains the provision extending the maximum period for a nurse's holding power[8] from two to three hours. As previously mentioned, no justification was given for this in the consultation document which is disappointing given the implications this has for a patient in terms of their liberty and autonomy and the inability of a patient to challenge this. The comment in the Policy Memorandum[9] accompanying the Bill arguably adds nothing to this either when it states "*This additional time seeks to balance the need for flexibility to arrange for a medical examination with maintaining the need for minimum restriction on patients. This additional time seeks to balance the need for flexibility to arrange for a medical examination*

[5] However, see the comments in paras 168-170 of the Policy Memorandum accompanying the Bill.
[6] This was also noted in Scottish Government, *Limited Review of the Mental Health (Care and Treatment) Act 2003: Report*, 2009.
[7] S.20.
[8] S.299.
[9] Para. 75.

with maintaining the need for minimum restriction on patients."

C. Mental Health Tribunal: timescales for referrals and disposals

The proposal in the draft Bill that the Tribunal "must do its utmost" to comply with timescales within which it must deal with various disposal has been removed. In the April issue it was commented that, given the Articles 5(4) and 6 ECHR obligations on the Tribunal, the requirement on the Tribunal to comply with timescales should be imperative.

D. Victim Notification Scheme

Concern was expressed in the April issue that the proposal in the draft Bill to extend the right for victims to receive information on offenders subject to compulsion orders may lead to discrimination[10]. Offenders subject to compulsion order have often committed only minor offences. The final Bill contains an additional provision that the right to receive information concerning an offender subject to a compulsion order applies only where "an offence has been perpetrated against a natural person"[11]. However, care will nevertheless still have to be taken that the effect of the operation of the VNS is not discriminatory.

E. s268, 2003 Act – detention in conditions of excessive security in non-state hospitals

As was previously mentioned, the necessary regulations or legislative changes needed to be effected to ensure that the right not to be detained in conditions of excessive security can be effectively exercised given that Article 8 ECHR and, potentially, even Article 3 (with corresponding Articles 17, 22 and 15 CRPD) are likely to be engaged. The requirement for this was emphasised in the 2012 Supreme Court ruling in *RM v The Scottish Ministers*[12]. This was a 'wish list' item for inclusion in the Bill in several consultation responses.

The final Bill deals with the matter to some extent but not entirely. It clarifies[13] who may appeal against excessive security for patients detained in a hospital other than in the State Hospital, namely patients detained by virtue of a restriction order, a compulsion order a hospital direction or a transfer treatment direction and provides some clarity regarding the definition of non-state hospitals. Otherwise, this is not progressed further and the regulations that the Supreme Court stressed were vital to make the right a genuine right are still absent.

The Bill also reduces the time in which a relevant Health Board must find suitable alternative accommodation to a maximum of 6 months where the Tribunal has made an order under s.264 that a patient detained in the State Hospital is being detained in conditions of excessive security[14]. Currently, the maximum period is 3 months plus 28 days.

Conclusion

The final Bill remains fairly 'light' in terms of legislative change and leaves unaddressed and unacknowledged several issues raised in the McManus Review and subsequently[15]. It would also appear that the Scottish Government has

[10] Articles 8 and 14 ECHR.
[11] Clause 44, Mental Health(Scotland) Bill.
[12] *RM v The Scottish Ministers* [2012] UKSC 58.
[13] S.11.
[14] S.10(2).
[15] See *Consultation on draft proposals for a Mental Health (Scotland) Bill*, April 2014 issue.

decided on this occasion to body-swerve the issue of the UN Committee on the Rights of Persons with Disabilities' General Comment on Article 12 CRPD (the right to equal recognition before the law) although this will have to be considered in due course. However, as stated, some matters raised during the consultation on the draft Bill have been taken on board.

Jill Stavert

`

Conferences at which editors/contributors are speaking

The duty of patient involvement in DNACPR decisions

Tor is speaking at a seminar at 39 Essex Street at the Hall in Gray's Inn at 6pm on 3 July on the implications of the decision in *Tracey*. The seminar is chaired by Fenella Morris QC, and the other speakers are Vikram Sachdeva Professor Penney Lewis of King's College London, and Dr Jerry Nolan, Royal United Hospital, Bath. For more details and to reserve a place, please email beth.williams@39essex.com.

'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

Our next Newsletter will be out in early August. 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

Editors

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

Scottish contributors

Adrian Ward
Jill Stavert

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' (forthcoming, 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.mentalcapacitylawandpolicylaw.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.