



Capacity outside the Court of Protection

Introduction

Welcome to the December Mental Capacity Law Newsletters. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Newsletter: Mostyn J takes on the Supreme Court over Article 5; the vexed OFSTED Guidance; the *Re X* process; guardianship and *Cheshire West*;
- (2) In the Property and Affairs Newsletter: decisions on planning for survivorship of attorneys, inheritance tax planning, retainers and the survival of the common law tests for testamentary and gift-making capacity;
- (3) In the Practice and Procedure Newsletter: an important case on habitual residence; a *cri de coeur* about case management; and what to do where a litigation friend is no longer in funds;
- (4) In the Capacity outside the COP Newsletter: prosecutions under s.44 MCA 2005; the battle of the UN Committees as to deprivation of liberty; the Law Commission's report on kidnapping and false imprisonment and legislative change post-Winterbourne View
- (5) In the Scotland Newsletter: an update on the position relating to powers of attorney, an important case on whether a local authority complaints procedure excludes the possibility of judicial view and Lady Hale in Glasgow.

As matters stand, our commitments mean that it is unlikely we will be able to bring you a Newsletter in January. If no Newsletter appears, a 'watching brief' on important developments will be maintained by Alex on his [website](#). In the meantime, happy holidays to all!

Editors

Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Anna Bicarregui
Simon Edwards

Scottish contributors

Adrian Ward
Jill Stavert

Table of Contents

Introduction	1
MCA Prosecutions Doubled	2
Deprivation of liberty – the battle of the UN Committees	2
Law Commission project on kidnapping and false imprisonment	3
Winterbourne View – Time for Change	3
Conferences at which editors/contributors are speaking	5

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

MCA Prosecutions Doubled

Figures obtained by Dave Sheppard from the Crown Prosecution Service and [reported](#) by Community Care identify that 349 charges of ill-treatment or wilful neglect under s.44 MCA reached a first magistrates' court hearing in England and Wales in 2013-4, compared to 168 the year before. Six charges were also brought against those with lasting power of attorney, compared to just one in 2012-3. A reduction was seen in the number of prosecutions under the equivalent Mental Health Act offences, from 57 to 47.

These figures do not reveal the conversion rate from charge to conviction. Moreover, the offences may well become somewhat surplus to requirements as the Criminal Justice and Courts Bill 2014 is set to criminalise those workers and providers who ill-treat or wilfully neglect adults under their care. This is regardless of whether the victim suffers from mental disorder or incapacity. This reform therefore plugs a major current gap in the criminal law with regard to vulnerable adults.

Deprivation of liberty – the battle of the UN Committees

We reported in our last Newsletter upon the [statement](#) issued by the UN Committee on the Rights of Persons with Disabilities on Article 14 of the CRPD. It was suggested to us in response that this might be a pre-emptive strike in advance of the UN Human Rights Committee comment on deprivation of liberty. This appears to have been borne out by the [General Comment](#) recently issued by that latter body on Article 9 (the right to liberty enshrined in the International Covenant on Civil and Political Rights).

The Committee on the Rights of Persons made it clear that they consider that detention on the basis of grounds of actual or perceived disability is incompatible with Article 14 of the CRPD.

The Human Rights Committee take a rather different view (and one likely to be much more palatable to signatories of the ECHR):

19. States parties should revise outdated laws and practices in the field of mental health in order to avoid arbitrary detention. The Committee emphasizes the harm inherent in any deprivation of liberty, and also the particular harms that may result in situations of involuntary hospitalization. States parties should make available adequate community-based or alternative social care services for persons with psychosocial disabilities, in order to provide less restrictive alternatives to confinement. The existence of a disability shall not in itself justify a deprivation of liberty but rather any deprivation of liberty must be necessary and proportionate, for the purpose of protecting the individual in question from serious harm or preventing injury to others. It must be applied only as a measure of last resort and for the shortest appropriate period of time, and must be accompanied by adequate procedural and substantive safeguards established by law. The procedures should ensure respect for the views of the individual, and should ensure that any representative genuinely represents and defends the wishes and interests of the individual. States parties must offer to institutionalized persons programmes of treatment and rehabilitation that serve the purposes that are asserted to justify the detention. Deprivation of liberty must be reevaluated at appropriate intervals with regard to its continuing necessity. The individuals must be assisted in obtaining access to effective remedies for the vindication of their rights, including initial and periodic

judicial review of the lawfulness of the detention, and to prevent conditions of detention incompatible with the Covenant.”

We await with interest to see how the game of “Committee Top Trumps” is played out in due course...

Law Commission project on kidnapping and false imprisonment

The Law Commission published on 20 November an extremely interesting [report](#) and recommendations relating to the reform of the law relating to kidnapping and false imprisonment.

The Law Commission considered whether to recommend the creation of a distinct offence to protect adults lacking capacity to decide whether to move in company with another, but ultimately decided not to because:

1. The Commission considered that such a recommendation should follow a consultation on how the law should protect those who may lack capacity; and
2. (as readers will know) the Law Commission is undertaking a project specifically on the issue of deprivation of liberty of those lacking capacity (and the protections under the Mental Capacity Act 2005)

We would also draw readers’ attention to the discussion of the common law relating to false imprisonment (which overlaps with, but is not identical to, the concept of deprivation of liberty for purposes of Article 5 ECHR). In a particularly interesting passage, which may well be examined in any appeal from the decision of Mostyn in the *Rochdale* case, the Law Commission reminds us that:

“4.34 False imprisonment is committed even if the victim is unaware of the fact his freedom of movement has been restricted (as where, for instance, V is locked in a room for a period whilst he is asleep). Such pure false imprisonment liability is recognition of the symbolic harm which was done by infringing V’s liberty, albeit without V’s knowledge. This demonstrates that the law recognises the harm involved in such a restriction itself, irrespective of V’s perception of it. The case for criminalising such behaviour is enhanced by the clear wrong done on the part of D since depriving V of liberty demonstrates a denial by D of V’s autonomy. In other words this shows D’s acute lack of respect for V’s freedom of choice to go where he or she pleases, whether or not V is aware of it.

4.35 A case of false imprisonment in which V remains unaware of the restriction on his freedom of movement therefore involves:

- (1) Restriction on V’s freedom of movement.*
- (2) Denial of V’s autonomy.”*

Winterbourne View – Time for Change

On 26 November 2014, a report on the future of services for people with learning disabilities was launched by Sir Stephen Bubb, CEO of the Association of Chief Executives of Voluntary Organisations. This report, commissioned by the CEO of NHS England, sought to explore how a new national framework of support might be delivered locally, in order to allow the growth of community provision required to move people out of inappropriate institutional care.

In his report Sir Stephen sets out a roadmap for action. The top-line recommendations are:

- To urgently close inappropriate in-patient care institutions;
- A Charter of Rights for people with learning disabilities and/or autism and their families;
- To give people with learning disabilities and their families a 'right to challenge' decisions and the right to request a personal budget;
- A requirement for local decision-makers to follow a mandatory framework that sets out who is responsible, for which services and how they will be held to account, including improved data collection and publication;
- Improved training and education for NHS, local government and provider staff;
- To start a social investment fund to build capacity in community-based services, to enable them to provide alternative support and empowering people with learning disabilities by giving them the rights they deserve in determining their care.

In response, the Government has [committed](#) to publish a green paper on options for legislative change early in 2015.

Whilst on their face these recommendations would appear entirely sensible, we would perhaps draw interested readers' attention to the comments [here](#) suggesting that very much more radical action is needed.

Conferences at which editors/contributors are speaking

Intensive Care Society State of the Art Meeting

Alex will be speaking on deprivation of liberty safeguarding at the Intensive Care Society's State of the Art Meeting on 10 December 2014. Details are available [here](#).

Talk to local faculties of solicitors

Adrian will be addressing local faculties of solicitors on matters relating (inter alia) to adult incapacity law in Wigtown on 10 December.

Capacity and consent: complex issues

Jill will be speaking at the next workshop of the Centre for Mental Health and Incapacity Law, Rights and Policy on 11th February, which will be addressing complex issues in capacity and consent. For further details, see [here](#).

Royal Faculty of Procurators

Adrian will be speaking at a half-day private conference for the Royal Faculty of Procurators in Glasgow on 11th February, at a one-hour lunchtime adult incapacity session on 25th February and with Alex on 13th May 2015.

IBC Planning for the International Older Client Event

Adrian will be speaking at the IBC Planning for the International Older Client event in London on 12th March 2015.

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.

Our next Newsletter will be out in early February. 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

Thirty Nine Essex Street LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number OC360005) with its registered office at 39 Essex Street, London WC2R 3AT. Thirty Nine Essex Street's members provide legal and advocacy services as independent, self-employed barristers and no entity connected with Thirty Nine Essex Street provides any legal services. Thirty Nine Essex Street (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 39 Essex Street, London WC2R 3AT.

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



Contributors: England and Wales



Alex Ruck Keene
alex.ruckkeene@39essex.com

Alex has 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.**