Mental Capacity Law Newsletter June 2015: Issue 57

Capacity outside the Court of Protection

Introduction

Welcome to the June 2015 Newsletters. Highlights this month

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: two more decisions about the vexed interaction between the MHA/MCA, revocation of a health and welfare deputyship and updated SCIE guidance on DOLS;

(2) In the Property and Affairs Newsletter: an important case on complex provisions in LPAs, calibration of risk, and new guidance from the OPG for attorneys;

(3) In the Practice and Procedure Newsletter: Schedule 3 under the spotlight, costs on appeal, and the possibility of damages for breach of the right to autonomy;

(4) In the Capacity outside the COP Newsletter: a very useful perspective from Singapore on undue influence and the MCA, and case-law and legislative developments impacting upon capacity issues;

(5) In the Scotland Newsletter: an important judicial review in the context of compliance with mental health obligations which sheds light on equivalent obligations under the 2000 Act, a useful case upon habitual residence, statistics from the OPG, and an update on relevant legislative developments.

Remember you can now find all our past issues, our case summaries, and much more on our dedicated sub-site here. We are also delighted to announce that, as of later this month, tailored summaries of key cases will be available on the SCIE website to assist front-line professionals access case-law updates.

Click here for all our mental capacity resources
Singapore, the MCAs and undue influence

*Re BKR [2015] SGCA 26* (Singapore Court of Appeal)

**Mental Capacity – Assessing Capacity**

**Summary**

This case, brought to our attention by Terence Seah of Virtus Law and David Lock QC of Landmark Chambers, sheds very interesting light upon the vexed question of the interaction between impairment and undue influence.

The case was decided by the Court of Appeal of Singapore, which ordinarily would mean that it would merit only a very passing mention. However, the Singaporean Mental Capacity Act (‘SMCA’) is identical – in material regards – to the MCA 2005; further, the Court of Appeal embarked upon a detailed examination of English case-law in order to resolve the questions that arose before it under the SMCA.

The judgment is very lengthy, but much of it is concerned with a detailed examination of the evidence. In short summary, the question before the court was whether BKR, an extremely wealthy elderly lady, had capacity for purposes of the SMCA to make decisions regarding her property and affairs, and whether deputies should be appointed to make all decisions relating to her property and affairs on her behalf.

The application for a declaration that BKR lacked capacity (and for consequential appointment of deputies) was brought by two of BKR’s sisters, supported by a number of their siblings and two of BKR’s three children. It was opposed by BKR herself, BKR’s youngest daughter, and that daughter’s husband. All were in agreement that the functioning of her mind was impaired in some way, but there was no agreement as to the nature or degree or extent of that impairment. Those contending that she lacked capacity (who were for reasons that need not detain us the appellants before the Court of Appeal) considered that she had dementia; BKR and the other respondents contended that she had Mild Cognitive Impairment, affecting her memory but not depriving her of the material decision-making capacity. There were also significant allegations and counter-allegations of undue influence and ulterior motives.

For our purposes, the key passages of the Court of Appeal’s judgment are to be found at paragraphs 88ff, where the Court of Appeal analysed the question of whether the court ought “in SMCA proceedings where there is interaction between mental impairment and undue influence, to take into account P’s actual circumstances or to adopt a more theoretical analysis that disregards those circumstances.” As the Court noted, “[i]n truth, this confluence of mental impairment and undue influence is not all that unusual; there are a number of English cases in which such a confluence features,” and the Court then looked to those cases for guidance.

1. *Re A (Capacity: Refusal of Contraception)* [2011] Fam 61, in which Bodey J had held that that Mrs A’s decision not to continue taking contraception was “not the product of her own free will”. He went on to say that Mrs A “was unable to weigh up the pros and cons of contraception because of the coercive
pressure under which she has been placed both intentionally and unconsciously by Mr A”. Such coercive pressure was the product of a number of factors, including the learning disabilities of both Mr and Mrs A, Mrs A’s dependence on Mr A and fear of rejection, Mrs A’s suggestibility and wish to please her husband, and Mr A’s own wish to start a family. “For these reasons”, which the Court of Appeal considered included reasons that related to Mrs A’s actual situation in life, Bodey J was in no doubt that Mrs A “lack[ed] capacity to take a decision for herself about contraception.” The Court of Appeal noted that there had been subsequent discussion in the case-law as to whether Re A was, in fact, an inherent jurisdiction case, but considered that, properly analysed, none of the subsequent cases had re-categorised it thus;

2. The London Borough of Redbridge v G and others [2014] EWHC 485 (COP), which we have discussed in detail here. The Court of Appeal highlighted those parts of the judgment of Russell J in which the judge took account both of the impairment in the functioning of G’s mind and of the influence C and F had over her in coming to the conclusion that G lacked capacity to take the material decisions for purposes of the MCA 2005.

The Court of Appeal considered that:

“98. It is apparent that in examining P’s mental capacity, the courts in Re A and Redbridge have had regard to their actual circumstances, in particular whether other persons were exerting pressure on P such as would make it more difficult for P to make the decisions in question. It was not even considered as a possibility that the court should divorce P from her actual circumstances and apply a theoretical analysis assuming P’s emancipation from all external pressure and influence.”

The Court of Appeal noted, however, that there are three, possibly inter-related, strands of argument for the proposition that the court should apply a theoretical analysis that assumes that P is getting the best appropriate assistance, even if this is not in fact the case.”

1. The first strand relied upon s.3(3) SMCA, which is identical to s.1(3) MCA 2005, and provides that P “is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success”. The Court of Appeal noted that it was argued that this provision postulates an assessment of capacity based on an ideal or theoretical set of circumstances in which all practicable steps are being taken, and it was said that such an approach is supported by the first instance decision of the Court of Protection in Wandsworth Clinical Commissioning Group v IA and another [2014] EWHC 990 (COP)

2. The second strand identified by the Court of Appeal depends on the legislative history of the UK MCA, as described by the English Court of Appeal in Re L. What this discloses, the Court of Appeal noted, is that a conscious decision was taken not to extend the MCA 2005 to adults who are “vulnerable” to undue pressure, which means that the MCA was not meant to address cases of undue influence. It follows, it might be argued, that allegations of undue influence – and, more generally, P’s actual circumstances – are not relevant to an assessment of mental capacity.

3. The third strand identified had to do with the causative nexus required to be shown
between P’s mental impairment and his inability to make decisions. This causal requirement is embedded in s 4(1) of the MCA, in the operative words “because of”: P will be declared to lack capacity under the MCA only where he is unable to make decisions because of a mental impairment. The Court of Appeal noted that, in this regard it might be contended that the English Court of Appeal case of York City Council v C and another [2014] 2 WLR 1 establishes the need for a very strong nexus so that, if P’s inability to make a decision is the result not only of his mental impairment but also his actual circumstances in which he comes under undue influence and pressure, that situation would fall outside the MCA.

The Court of Appeal analysed each strand in turn.

Section 3(3) SMCA/s.1(3) MCA 2005

The Court of Appeal discussed the (very brief) comments upon support in Redbridge and the Wandsworth case but found that in both cases the court had, in fact, focused on P’s actual circumstances. They further noted that:

“105. Moreover, there is the plain language of s 3(3) of the MCA: it speaks of “practicable” steps to help P. It directs us to look not at fanciful possibilities but at sensible ones. Hence, if P needs extremes of assistance which he could not realistically expect to receive in order to be able to make decisions, it would not be right to say that he possesses the ability to make decisions. By the same token, if in P’s actual circumstances there exists some positive impediment to his receiving assistance, it cannot be said that P has capacity just because he might theoretically be able to make decisions in some other imaginary set of circumstances in which that assistance might be forthcoming.

106. We are led to conclude that s 3(3) of the MCA does not suggest that a theoretical analysis is to be applied which assumes that P is able to obtain and is in fact obtaining assistance in making decisions, however removed such an assumption may be from P’s actual circumstances. We accept that in some situations, s 3(3) may oblige the court to look beyond P’s actual circumstances. But on no basis can it said that, when P’s actual circumstances are such that there is little realistic prospect of him getting the assistance he needs, the court is at liberty or is obliged to disregard those actual circumstances by reason of s 3(3).”

Legislative history of the MCA 2005

The argument advanced by the respondents – based upon the legislative history of the MCA and the decision in Re L – was that the court (in England, the Court of Protection) has no power to enter upon a dispute where what is being alleged is that P is unable to make decisions by reason of undue influence or unacceptable pressure, as opposed to an impairment of the mind. As the Court of Appeal noted, a related argument (though not one put forward in these terms by the respondents) was that, since the MCA was not designed to deal with cases concerning undue influence or unacceptable pressure, as opposed to an impairment of the mind. As the Court of Appeal noted, a related argument (though not one put forward in these terms by the respondents) was that, since the MCA was not designed to deal with cases concerning undue influence or unacceptable pressure, when the court assesses mental capacity, it ought to disregard such allegations and, in effect, apply a theoretical analysis assuming that P is free from such influence or pressure.

The Court of Appeal found this line of argument to be wholly misconceived:

1. At most, the legislative history and Re L showed that the MCA was not designed to deal with cases in which P is “vulnerable” but not at all as a result of mental impairment.
An example of such a case would be a wife of ordinary mind who is vulnerable to her husband’s influence by reason of her emotional and economic dependence on him. Such a case, the Court held, would not come within the scope of the MCA because it requires a functional inability arising because of a mental impairment;

2. Furthermore, the Court noted at paragraph 110, “there may be situations in which the whole reason that P is susceptible to undue influence is that he is labouring under an impairment of the mind – for instance, when P’s poor memory permits another person to plant falsehoods in his mind, or when the effect of the impairment is that P is unable even to conceive of the possibility that another person may be manipulating him. In these situations, it is inconceivable in our judgment that the court is to disregard P’s actual circumstances.”

Causative nexus between mental impairment and inability to make decisions

The Court of Appeal noted that it was argued that on the strength of the York case that the mental impairment must be the effective cause of the inability to make decisions. It followed, the argument then ran, that the causal requirement was not met if the inability to make decisions was also caused by factors other than mental impairment, such as undue influence. The consequence of the argument is that the court must find that P’s inability to make decisions is inherent to the mental impairment and wholly divorced from P’s actual circumstances. If that is accepted, it would seem to follow that York suggested the application of a theoretical analysis that divorces P from those actual circumstances. The Court of Appeal did not think that this was how York should be read. The Court of Appeal found that the court’s stress on the strength of the causative nexus was laid in a context where Hedley J had found PC to lack capacity in relation to co-habitation when it was agreed that she had capacity in relation to all other matters, including marriage. It therefore did not consider that the English Court of Appeal had meant to prescribe any particular approach in a situation where the evidence indicates that P’s inability to make a decision is a result of multiple causes of which P’s mental impairment is one.

The Court of Appeal noted that:

115 The court in York CC emphasised the words “because of“ in the MCA. In our view, those words most naturally suggest nothing more stringent than a “but for” connection. More crucially, those words do not suggest that there can be no other cause of P’s inability to make decisions besides mental impairment; we do not think that those words indicate that the MCA was intended to exclude situations in which the inability to decide was caused by both mental impairment and P’s actual circumstances.

116 In our judgment, York CC is consistent with the notion that P’s inability to make decisions may be the product of a number of effective causes and that the MCA will apply so long as one of those causes is P’s mental impairment.”

The importance of the actual circumstances

Returning to the York decision, the Court of Appeal considered that the decision underscored the importance of an analytical approach that does have regard to P’s actual circumstances.
The Court of Appeal noted the observation in York that removing the specific factual context from some decisions “leaves nothing for the evaluation of capacity to bite upon,” and that:

“118 The importance of that observation in York CC is that when P makes decisions in relation to other people, such as a decision to give away property to person X, it surely cannot be argued that P has capacity so long as she can understand the nature and consequences of giving away property to some theoretical or hypothetical person. On the contrary, part of the package of information relevant to the decision, which P must be able to retain, understand and use, is information about X and in particular whether X is the person to whom P wishes to make the gift. Should P be unable to retain, understand or use information relevant to that decision because of a mental impairment, P will be found to lack capacity under the MCA.”

The Court of Appeal noted, finally, the discussion in R v Cooper [2009] 1 WLR 1786 as to the Law Commission report informing the MCA 2005, and the observation of Baroness Hale (at paragraph 13) that the report envisaged that the MCA 2005 would cover those who could understand the nature and effects of a decision to be made but who were prevented by mental disability from using that information in the decision-making process. As the Court of Appeal noted “[o]ne of the examples given by the Law Commission was a person whose mental disability ‘meant that he or she was ‘unable to exert their will against some stronger person who wishes to influence their decisions…’. Thus it was recognised that mental impairment may in some instances affect decision-making ability only in conjunction with P’s actual circumstances.”

The Court of Appeal therefore held that “the court must take into account P’s circumstances in assessing his mental capacity. That is what the English cases do, and in this regard, we consider that theirs is a path that we also must take” (paragraph 120, emphasis in original).

The Court of Appeal further held in cases where there is interaction between mental incapacity and undue influence that it is only where there is no material question of any mental impairment causing the alleged mental incapacity that a court ought properly to find it has no jurisdiction under the SMCA.

The Court of Appeal also found that the lower court had been wrong to set aside findings of undue influence made by the Senior District Judge who had first considered the case. As the Court of Appeal noted, the proven or potential presence of undue influence is relevant to the issue of mental capacity in at least three ways:

1. The first is that it then becomes material whether P is able to retain, understand or use the information that relates to whether there might be undue influence being applied, for instance whether P can understand that a third person may have interests opposed to his; and if not, whether that inability is caused by mental impairment.

2. The second is that it must be considered whether P’s susceptibility to undue influence is caused by mental impairment; if so, and if the result of such undue influence is that P’s will is so overborne that he is unable to use and weigh information relevant to the decision in question, P would be unable to make decisions “because of” mental impairment.

3. The third way in which undue influence is relevant is that it might mean that P cannot
realistically hope to obtain assistance in making decisions. In such a situation, P may be found to lack capacity because of a mental impairment operating together with that lack of assistance.

In this last regard, the Court of Appeal noted that there were times when the appellants and their associates expressed the view under cross-examination that BKR would be able to make decisions for herself so long as she was taken out of the influence of the first and second respondents. In submissions, this was seized upon by counsel for the third respondent who argued that it is illogical to say that P lacks capacity when P is in the company of X but does not lack capacity when P is with Y. However, as the Court of Appeal noted at paragraph 127: “[a]ttractive as this contention might sound at first blush, we do not regard it as well-founded. This is because it fails to give due regard to the idea that capacity under the MCA is a highly context-dependent enquiry. It is “decision-specific” (York CC at [35]) and, as we have said, it must take into account P’s actual circumstances. If P is unable to retain, understand or use information relevant to a decision because of a combination of mental impairment and the circumstances he finds himself in, the statutory test for incapacity will be met, and it is no answer then to say that P’s mental impairment would not necessarily rob him of decision-making ability in a different set of circumstances.”

On the facts of the case, the Court of Appeal found that BKR lacked the material decision-making capacity because of a combination of mental impairment and the circumstances in which she lives. Therefore the statutory test for lack of capacity under the MCA was met in her case.

Comment

Alex, in particular, is something of an evangelist for the merits of comparative studies in the field of mental capacity law and it is perhaps unsurprising that he fell upon this judgment with delight as evidence as to its benefits. The judgment of the Court of Appeal grapples with one of the areas that causes most difficulty in practice (and one that is – as the Court noted – far from uncommon), and does so in with an extraordinary rigour of approach. We strongly suspect that it will not be long before it is referred to by judges before the Court of Protection (or indeed by sheriffs in Scotland). We also suspect that the discussion therein as to the approach to adopt will be likely to be of no little influence.

We would perhaps want to put three glosses upon the judgment:

1. Given the thoroughness of the tour d’horizon embarked upon by the court, it is perhaps a little surprising that it did not refer to NCC v PB and TB [2014] EWCOP 14 (although we are grateful to David Lock for confirming to us that it was, in fact, referred to the court in argument). In that case, Parker J considered, first, the meaning of ‘because of’ in (for English purposes) s.2(1) MCA 2005. She concluded 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 had cause to consider the interaction between impairment and overbearing of the will, dismissing the argument that the
impairment must be the sole cause of the inability to make the decision for the individual to fall within s.2(1) MCA 2005. The analysis in NCC is entirely consistent with that in Re BKR, although rather more shortly taken;

2. Whilst we entirely agree that it is necessary to place the primary focus on P’s actual situation when deciding whether they have the capacity to make a specific decision or decisions, we would nonetheless emphasise that consideration must still be given as to whether there exist practicable steps that can be taken to support P to take the decision. Those steps are not just steps that can be taken by the others in P’s life, but also include steps for which the court may have responsibility. A good example of this can be seen in An NHS Trust v DE and Others [2013] EWHC 2562 (Fam), in which the court adjourned determination of whether an individual had capacity to consent to sexual relations for work to be done with him by a clinical psychologist – with the result that he was assisted to acquire that capacity. The importance of ensuring that there is a proper examination of whether practicable steps can be taken is only highlighted by the continuing debate as to the impact of the CRPD on practice here and elsewhere;

3. In the case where P is truly suspended between capacity and incapacity depending on whether they are within the orbit of a third party, we remain of the view that there may be proper grounds to adopt the approach taken by Bennett J in Re G [2004] EWHC 2222 Fam. In that case, readers with a long memory will recall, the judge found that he had jurisdiction to make decisions as to residence and contact arrangements for a young woman who had regained capacity to make those decisions as a result of the protective arrangements put in place for her by the court, in circumstances where it was clear that it they were lifted, then the combination of her organic impairments and the baleful influence of her father would lead to a worsening of her condition and a consequential lack of capacity. Because this case was decided before the enactment of the MCA, it was determined under the High Court’s inherent jurisdiction (and was noted – and approved – as the exercise of such in Re L), but it would appear clear that Bennett J considered he had jurisdiction based upon G’s lack of capacity to take the material decisions, rather than upon her vulnerability. Re G has never – to our knowledge – been properly considered in a reported case since the MCA 2005 came into force. However, in such a Schrödinger’s cat case, it may still be that the Court of Protection (rather than the High Court) can properly have jurisdiction to implement a long term regime for the promotion of the autonomy of the individual on the basis of a holistic (or should that be social) interpretation of their capacity.

**Capacity and s.20 Children Act arrangements**

In two cases reported in very quick succession, family judges have emphasised the vital importance of ensuring that any parental consent to arrangements being made under s.20 Children Act 1989 is obtained from a parent with the capacity to do so. Guidance as to the importance of this was given by Hedley J in Coventry City
Council v C, B, CA and CH [2012] EWHC 2190 (Fam):

1. every social worker obtaining consent to accommodation of a child from a parent (with parental responsibility) is under a personal duty to be satisfied that the person giving consent does not lack the required capacity;
2. the social worker must actively address the issue of capacity, take into account all the prevailing circumstances and must consider the questions raised by s.3 MCA 2005 and in particular the mother’s capacity to use and weigh all the relevant information;
3. if the social worker has doubts about capacity, no further attempt should be made to obtain consent on that occasion. Advice should be sought from the social work team leader or management.

In Newcastle City Council v WM [2015] EWFC 42 Cobb J and in Medway City Council v AP [2015] EWFC B66 HHJ Lazarus were both extremely critical of the failure of the relevant social services authorities to take appropriate steps to ensure that the mother from whom purported consent was obtained in fact had capacity to do so.

In WM, Cobb J made it clear that the failure to take this step meant that the children in question had for a significant period of time been accommodated unlawfully. Further, there were considerable repercussions from the delay in bringing the necessary proceedings:

“47. [...] The children have been in limbo, living with a foster carer for such a significant time that they have formed positive attachments to her, but she cannot care for them in the long-term. On any view, the children need to move.

For a lengthy period, the children lost contact with their extended maternal family, who now (through SM) advance an entirely respectable case to care for them. Precious time in the lives of these children has been spent, I would say wasted, while the Local Authority has failed to progress any meaningful form of care planning.” (emphasis in original)

In Medway City Council, HHJ Lazarus made clear that, had it been properly recognised that s.20 1989 should not have been and proceedings had been issued at an earlier stage, “it is likely that arguments about appropriate placements and assessments would have been raised by the parents’ legal representatives, and an inappropriate placement and lack of assessment and ultimately early separation of baby A from his parents may well have all been avoided.” HHJ Lazarus noted the difficulties that:

“76. Several difficulties arise for vulnerable adults in these circumstances. They are unlikely to want to appear to be difficult or obstructive and so they may well agree to section 20 arrangements that are not necessarily appropriate. Once they have agreed to such arrangements, and are in a mother and baby foster placement as in this case for example, there is a natural impetus to remain with the child and so be locked into a continued agreement to the arrangement. Most significantly, the use of section 20 agreements results in vulnerable adults coping with such circumstances without legal advice or representation.”

In the case before her, HHJ Lazarus noted at paragraph 77, “[t]his was compounded by there being no referral to adult services and no input from social workers experienced in working with vulnerable adults and who are not focussing simply on child protection issues, but are able to
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bring their knowledge and experience to bear on the case.”

**Short Note: capacity to decide to disclose serious medical condition**

The very sad case of *ABC v St George's Healthcare NHS Trust & Ors* [2015] EWHC 1394 (QB) concerned a woman whose father was diagnosed with Huntington’s disease, but who refused permission to his doctors to inform his daughter of the diagnosis. He was, at the time, a detained mental health patient, having been convicted of murdering his wife. His daughter took part in family therapy which brought her into contact with the detaining hospital. She was subsequently informed of her father’s diagnosis by mistake, and was later diagnosed with the disease herself. She had been pregnant at the time her father was diagnosed. She brought a claim against the various health bodies involved, arguing that they had been negligent in failing to inform her of her father’s diagnosis, and that her Article 8 rights had been infringed. She said that had she been informed, she would have undergone pre-natal testing, and would have had a termination if the result was positive for the disease. The claim was struck out, there being no basis for contending that a duty of care was owed to the daughter, and no arguable infringement of her Article 8 rights had been infringed. She said that had she been informed, she would have undergone pre-natal testing, and would have had a termination if the result was positive for the disease. The claim was struck out, there being no basis for contending that a duty of care was owed to the daughter, and no arguable infringement of her Article 8 rights. In the course of the judgment, the court noted that the claimant asserted that no sufficient steps were taken to investigate whether her father had capacity to make decisions about the release of his confidential medical information. The court noted that capacity was presumed, and noted that there was no assertion that, had the father’s capacity been assessed, he would have been found to lack capacity to instruct the doctors to withhold the information from his daughter.

**Mental Health Service Interventions for Rough Sleepers: Tools and Guidance**

The second edition of these valuable tools and guidance has been brought together by statutory and voluntary sector representatives across various disciplines. They are designed to help those working with street homeless people – and those working in mental health services – to better assess and help those who are doubly social excluded both by homelessness and by serious mental illness.

A central feature of this guidance is to how to use the Mental Capacity Act 2005 to assess the mental state of someone making decisions involving sleeping on the street. It is aimed at outreach workers, approved mental health professionals, doctors, police and ambulance staff. In summary, the document includes:

- Guidance on assessing the risks associated with rough sleeping
- Guidance on the use of the Mental Capacity Act – whether the individual is really making an informed decision to sleep on the streets
- Guidance on the use of the Mental Health Act and developing a hospital admission plan
- Guidance on raising safeguarding adults alerts

The tools and guidance are a useful means of breaking down the complicated issues associated with homelessness and mental health. A key theme that has emerged from the evidence is that homeless people have been excluded from mental health services because it is thought that sleeping rough is a lifestyle choice. It is hoped that the use of these tools and guidance will lead to better assessment and decision making.
**Serious Crime Act 2015**

The concept of ‘best interests’ crops up in this new Act, in the context of a new offence called ‘controlling or coercive behaviour in an intimate or family relationship’. The relevant provision (for which no commencement date has been given) includes a limited defence based on best interests. The Explanatory Notes reveal that this defence applies ‘where the accused believes he or she was acting in the best interests of the victim and can show that in the particular circumstances their behaviour was objectively reasonable. The defence would not be available where a victim has been caused to fear violence (as opposed to being seriously alarmed or distressed). This defence is intended to cover, for example, circumstances where a person was a carer for a mentally ill spouse, and by virtue of his or her medical condition, he or she had to be kept at home or compelled to take medication, for his or her own protection or in his or her own best interests. In this context, the person’s behaviour might be considered controlling, but would be reasonable under the circumstances.’

Campaigners have criticised this as being unlikely adequately to protect disabled adults. Notably, the provisions of the Act do not include any reference to the victim’s capacity, so the defence would arguably apply even where the victim had capacity to make his or her own decisions about care and treatment. It is also unclear whether the term ‘best interests’ is intended to bear the same meaning as in the MCA (or whether this is – yet another – use of the term in a context where it will need to have its own definition).

**Use of restraint by hospital security staff**

On 5 May 2015, the Daily Mail reported the results of a Freedom of Information Act request concerning the use of security guards in hospitals:

*The Mail used Freedom of Information requests to ask all 160 NHS hospital trusts in England how many times security were called to restrain patients in 2012/13 and 2013/14. Of the 76 trusts that responded, just four said they banned security from restraining patients under any circumstances. And of the 42 trusts that admitted using security staff to deal with patients, 17 admitted calling security to control those with dementia.*

*Others used security staff to restrain patients who were under the influence of alcohol and drugs, or who had mental health or medical problems influencing their behaviour. Worryingly, 13 of the trusts that admitted using security guards to cope with patients did not routinely record why they had been called. In total, security guards restrained hospital patients 5,722 times across the 42 trusts in two years – more than seven incidents a day. Of these, 320 were recorded as being dementia or Alzheimer’s patients.*

The DoH guidance on restraint of adults, *Positive and Proactive Care: reducing the need for restrictive interventions*, specifically states that it will be of relevance to security staff working in health and social care settings. Perhaps the next FOIA request should enquire whether such staff have received specialised training in the use of restrictive interventions, as the guidance requires, and also in respect of the MCA 2005.

**Advance planning**

A recently published survey by the Dying Matters...
coalition has found that only 7% of people have discussed what sort of care they might want if they are unable to make their own decisions. Further efforts to increase the use of advance decisions to refuse treatment, health and welfare LPAs, and advance statements of wishes are clearly needed, throughout the health and social care system.

**New Mental Health, Ethics & Law MSc at King’s College London**

In a frankly shameless advertorial, justified on the basis that Alex will be contributing to it, we note here a new MSc which will be launching at KCL in September 2015.

In KCL’s own words:

*Consider in-depth and integrated clinical, philosophical and legal analysis of key issues in the field of mental health.*

*This exciting new MSc is for everyone concerned with mental health who wishes to study the clinical, ethical and legal thinking behind current law, policy and clinical practice. It has been designed for professionals and postgraduates who are keen to consider the key questions raised by mental ill health and society’s response. Students will study alongside others from a wide range of academic and professional disciplines at the heart of London’s legal and psychiatric world.*

*For further info and to apply, please visit our website*
Conferences

Conferences at which editors/contributors are speaking

Update Seminar: “Wills and Trusts”

Adrian will be speaking at this seminar on 11th June in Glasgow on “Incapacity Act: Development or Abolition”

Safeguarding Adults with Learning Disabilities – Capacity to Consent to Sexual Relations and Forced Marriage

Jill will be speaking at this Legal Services Agency Conference on 15th June 2015 in Glasgow on ‘Recognition of Rights to Sexual Relationships for People with Intellectual Disabilities.’

Social Work Scotland Annual Conference 2015

Jill will be speaking on ‘Deprivation of Liberty’ at this conference in Crieff on 17th June.

‘In Whose Best Interests?’ Determining best interests in health and social care

Alex will be giving the keynote speech at this inaugural conference on 2 July, arranged by the University of Worcester in association with the Worcester Medico-Legal Society. For full details, including as to how to submit papers, see here.

Mental Health Lawyers Association Court of Protection Conference

Alex will be discussing the Court of Protection rule changes at the MHLA’s Second Annual conference (keynote speaker, Sir James Munby P) on 3 July in London. For full details, including as to how to submit papers, see here.

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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 July. 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.

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