Mental Capacity Law Newsletter December 2015: Issue 61

Scotland

Introduction

Welcome to the December 2015 Newsletters. Highlights this month in a bumper set include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: landmark best interests and capacity decisions in the medical treatment sphere, more on the cross-over between the MHA and the MCA, forced marriage, and the CQC's latest DOLS report;
(2) In the Property and Affairs Newsletter: gratuitous care, conflicts of interest and the OPG's new guidance on safeguarding;
(3) In the Practice and Procedure Newsletter: a very important decision on fact-finding (and when it is and is not necessary), and guidance – by analogy – from the Supreme Court on the 'urgency' cross-border jurisdiction of the Court of Protection;
(4) In the Capacity outside the COP Newsletter: DNACPRs notices and capacity, a College of Police Consultation on Mental Health practice, a coroner fully grasping capacity, the inaugural UK Mental Disability Law Conference and a book corner;
(5) In the Scotland Newsletter: important amendments to the Education (Scotland) Bill, an important – and troubling – judicial review decision on ordinary residence in the cross-border context and guidance from the MWC on hidden surveillance.

And remember, you can now find all our past issues, our case summaries, and much more on our dedicated sub-site here. 'One-pagers' of the cases in these Newsletters of most relevance to social work professionals will also shortly appear on the SCIE website.

We are taking a break over the holiday period so (those of you who get them) happy holidays, and we will return in February.

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For all our mental capacity resources, click here. Transcripts not available at time of writing are likely to be soon at www.mentalhealthlaw.co.uk.

Education (Scotland) Bill – "best interests" no more

In the September Newsletter we reported concerns about aspects of the Education (Scotland) Bill, and described the submission of the Mental Health and Disability Sub-Committee of the Law Society of Scotland. We are pleased to report that 64 amendments lodged by Scottish Government on 23rd November 2015, and duly passed, met those concerns.

Concerns centered on the proposed "capacity" and "best interests" tests as to whether it would be appropriate that children and young persons (young persons being 16 and 17-year olds) should themselves participate in procedures. The Committee argued that the proposed "maturity" element of the capacity test should be eliminated in the case of 16 and 17-year olds. A new definition of "lacking capacity" has been introduced in the case of young persons, namely that "a young person lacks capacity to do something if the young person does not have sufficient understanding to do it". A large number of amendments delete references to young persons altogether.

As we and others commented, the introduction of a "best interests" test in Scots law – bearing in mind that such a test was explicitly rejected for the purposes of adult incapacity law – seemed particularly inappropriate at a time when the concept of a paternalistic "best interests" test had been rejected in General Comment No 1 (2014) "Article 12: Equal recognition before the law" of the Un Committee on the Rights of Persons with Disabilities. The Mental Health and Disability Sub-Committee submitted that if the purpose of the "best interests" test was to allow children to be shielded from potentially harmful information, then the approach should not be that a "best interests" test should be satisfied, but rather a question of whether application of safeguards to prevent any such apprehended harm would be justified. There will no doubt be a general welcome to the removal, by these Scottish Government amendments, of all references to "best interests". The amendments replace "is in the best interests" with "would adversely affect the wellbeing".

It is important to understand that both "capacity" and any adverse effect upon wellbeing are not automatic bars to participation. They are matters which the education authority is required to take into account. These are also matters to be considered by the Additional Support for Learning Tribunal in relation to proceedings before the Tribunal.

Some of the adjustments achieve consistency with existing legislation, and in some places it is proposed that there be regulatory powers to change criteria. The reason for this is that if criteria – particularly outcome criteria – are altered in future across a range of legislation, in practical terms it will be much easier to do that by regulation rather than by a raft of amending provisions to fixed statutory criteria. It has been confirmed that this will be covered in the Explanatory Notes. It is also understood that, in accordance with a subsequent suggestion by the Mental Health & Disability Sub-Committee, an obligation upon Scottish Ministers will be inserted in Stage 3 amendments to require them to consult before exercising such regulatory powers.

The willingness of Scottish Government to consult meaningfully and accept reasoned proposals is to be commended.

Adrian D Ward

[editorial note: these developments also show the power of cross-border working: it was concerns raised by Paul Skowron on Lucy Series' website which alerted Alex to the issues, and, in turn, led to work being done by the Scottish Law Society MHDC, led by Adrian and, ultimately, to these amendments].

Out of step across the borders

On 17th November 2015 Lord Armstrong dismissed a petition by Milton Keynes Council for review of a decision by Scottish Ministers determining the ordinary residence of a lady identified as Mrs JR: Decision [2015] CSOH 156, available here.

According to the Judgment, Mrs R was born on 19th March 1932. She formerly lived in her own home in Milton Keynes. In 2005 she was diagnosed with dementia. Her mental and physical health deteriorated, and on 20th December 2008 she was admitted to an assessment unit, still within the local authority area of Milton Keynes Council. On 7th January 2009 the Court of Protection appointed the Council's finance manager as Mrs R's property and affairs deputy. A mental capacity assessment at that time determined that "she lacked the capacity to decide for herself where she should live".

Mrs R's daughter decided that she would like her mother to reside close to her, in or near Edinburgh. She identified a care home in Musselburgh, within the area of East Lothian Council. Milton Keynes Council advised the daughter to approach East Lothian Council about funding, as Milton Keynes Council was of the view that Mrs R might be entitled to free personal and nursing care. On 25th February 2009 Mrs R was discharged from the care centre in the Milton Keynes area and driven by her daughter to the care home in Musselburgh, all on the same day. Mrs R has lived in the care home in Musselburgh ever since. East Lothian Council had no involvement in the placement of Mrs R in the care home in Musselburgh, nor initially did that Council make any payments in relation to her accommodation there. Financial matters were arranged privately between the home in Musselburgh and the daughter.

By order dated 2nd June 2009, taking effect on 2nd July 2009, the daughter was appointed property and affairs deputy in place of Milton Keynes Council's finance manager. On 10th July 2009 Mrs R's needs for community care services were assessed by East Lothian Council (under section 12A of the Social Work (Scotland) Act 1968). Mrs R was assessed as being in need of residential accommodation with nursing. East Lothian Council accordingly assumed responsibility as "authority of the moment" for the funding of her care placement, and made payments to the Musselburgh home from 8th July 2009. Mrs R's former home in Milton Keynes was sold in 2010. A reference in the Judgment (paragraph 38) to "East Kilbride" would appear to be a typographical error.

Under section 86 of the 1968 Act, where one local authority incurs expenditure under that Act in the provision of accommodation for a person ordinarily resident in the area of another local authority, that expenditure is recoverable from such other local authority, expressly including a local authority in England & Wales. Section 86 also provides that any question as to the ordinary residence of a person under that section shall be determined by Scottish Ministers.

On 26th March 2015, Scottish Ministers determined that there had been no change in Mrs R's ordinary residence for the purposes of section 86, and that she accordingly remained

ordinarily resident in Milton Keynes. Scottish Ministers had regard to the decision of the House of Lords in *Shah v London Borough of Barnet* 1983 2 AC 309 ("*Shah*") and to Scottish Government Guidance Circular 3/2010. Milton Keynes Council challenged that determination on the following grounds, namely (1) that Scottish Ministers applied the wrong legal test; (2) they erred in law by failing to consider the correct periods of residence; (3) they erred in their consideration of what constitutes a voluntary act; (4) perversity; and (5) in reaching their decision, they acted in a manner beyond their jurisdiction.

The application was opposed by Scottish Ministers. East Lothian Council entered the process as interested party. Remarkably, Mrs R was not represented in the proceedings and the Judgment does not narrate whether any consideration was given as to whether she, or at least her interests, should be represented. There also appears to have been no enquiry into whether she had ascertainable wishes and feelings (or, in the terminology of the UN Convention on the Rights of Persons with Disabilities, any will and preferences) at least to the extent of knowing whether she was content and settled in her placement in Musselburgh. One would have thought it appropriate for her and her interests to be central to the proceedings. Whether she should be deemed as having her settled home in one country or another is hardly unimportant, particularly in the circumstances that (as noted in the November Newsletter) whether she is subject to Scottish rates of income tax will now depend upon whether she has a "close connection to Scotland" or her "main place of residence" in Scotland. It might have been appropriate for the court to have heard submissions as to a possible scenario in which Scottish Ministers had determined that her ordinary residence remained in England, yet for purposes of any proceedings before the Court of Protection or alternatively under the Adults with Incapacity (Scotland) Act 2000 she would be regarded as habitually resident in Scotland, and for purposes of paying the Scottish rate of income tax (and thus contributing to the Scottish nursing and care payments denied to her if her ordinary residence remained in England) she were determined to be resident in Scotland under the tests for that purpose.

Lord Armstrong upheld the determination of Scottish Ministers. Although not disclosed in the Judgment, the hearing took place on 15th October 2015. By then, new Scottish Government guidance dated 1st June 2015 had been introduced – see "New guidance – old flaw?" in the July Newsletter and, following the decision of the Supreme Court in *Regina (Cornwall Council) Secretary of State for Health and Another* [2015] UKSC 46 ("*Cornwall*"), the further item "New guidance – old flaw – or new interpretation of the law?" in the September Newsletter. See those articles for our view on the core question of when ordinary residence changes where the adult in question may not be fully capable of making the relevant decision.

It is understood that only the 2010 Scottish Government circular was considered. However, it does not appear that the case was pled on the basis that Scottish Ministers had failed to follow their own guidance. On the face of matters, it appears that they did follow their own guidance. That is however irrelevant to the question of whether they applied the correct test. Of course, perhaps the English guidance is wrong and the Scottish guidance is correct, but it does seem relevant at least to consider a situation in which the guidance in the two countries, hitherto stated to have been derived from precisely the same (entirely English) case law, should produce a situation in which, as the 2015 Scottish guidance puts it: "The approach in England differs in that it

encourages a broader view than in Scotland". Put bluntly, it would appear that the English guidance, if applied to the available facts in the case of Mrs R, would have produced the opposite outcome.

The decision itself should be referred to for its long and somewhat complex arguments. Here we focus on one feature. English case authority was for long based, and current English guidance is still based, on the two tests generally referred to as "Vale 1" and "Vale 2" set out in *R Waltham Forest London Borough Council, ex p Vale*, The Times, 25 February 1995 ("*Vale*"). As they are not set out in the Judgment, it is worth quoting them here:

> *Vale test 1: "Where a person was so mentally handicapped that she was totally dependent on a parent or guardian, her ordinary residence was that of the parent or guardian: Mr Justice Taylor proceeds to expand on this to state that it was clear from Lord Scarman's speech in Shah that the mind of the claimant was important in two respects in determining ordinary residence: the residence must be voluntarily adopted and there must be a degree of settled purpose. In this case however, the applicant was not capable of deciding where to live and it is unreal to speak of settled purpose: the decision as to where she should live was at all times her parents' decision".*
>
> *Vale test 2: "The Alternative Approach involves considering a person's ordinary residence as if they had capacity. All the facts of the person's case should be considered including physical presence in a particular place and the nature and purpose of that presence as outlined in Shah without requiring the person themselves to have adopted the residence voluntarily".*

Lord Armstrong disregarded any question of "habitual residence" on the basis that its interpretation is a doubtful guide in matters of "ordinary residence", a view taken in *Cornwall* and noted in our commentary on *Cornwall*. The Supreme Court in *Cornwall* confirmed that there are not, in fact, two separate Vale tests, but *"they were complementary, common-sense approaches to the application of the Shah test to a person unable to make decisions for herself; that is, to the single question whether her period of actual residence with her parents was sufficiently 'settled' to amount to ordinary residence" (paragraph 47)*.

There may be scope for discussion as to whether Lord Armstrong's decision accorded with what Lord Carnwath intended. Just as the 2010 Scottish guidance founds upon Vale test 1 and disregards Vale test 2, likewise Lord Armstrong's decision included the following passages:

> *"*[51] *I am satisfied that the analysis of the dicta in the cases cited, in particular those to be found in the decisions of Shah and Cornwall, as submitted for the respondents and the interested party, is correct. Whilst it must be recognised that the factual circumstances in these cases were not on all fours with the present case, on the basis of the reported cases cited to me, the dictum of Lord Scarman as quoted in Shah, remains the leading modern authority on the correct meaning of the expression 'ordinary residence'. His identification of the two requisite elements required in any assessment was neither overruled nor undermined by the dicta in Cornwall. To the extent that, in Cornwall, the two approaches considered in Vale were reviewed, the conclusion reached was that they were not separable but complementary approaches to the test in Shah. In that context, it is to be noted that the last three lines of paragraph 47 of the decision in Cornwall, viz: '… that is …the single question*

whether her period of actual residence with her parents was sufficiently settled to amount to ordinary residence.' should, in my view, be read as an expression of the issue which was to be determined, rather than as a reformulation of the test set out by Lord Scarman in Shah, or as a statement intended to define exhaustively the constituent parts of the relevant test.

"[52] *On that basis, the determination of whether there has been a change in ordinary residence must necessarily involve an assessment of the extent to which any adoption of a particular abode has been voluntary. In the case of a person lacking mental capacity, such an assessment must necessarily involve a consideration of the nature of such legal authority as there is in place. That is consistent with the legal framework in place in Scotland to protect the interests of those lacking full capacity. The respondents and the interested party were correct therefore to assert that the Scottish Government Circular sets out a correct statement of the law in that regard, and that it was appropriate for the respondents to follow the guidance contained within it.*

"[53] *On that basis, given the lack of mental capacity on the part of Mrs R, the absence of any legal authority on the part of* [her daughter] *to make decisions regarding her mother's personal welfare was fatal to any prospect of a finding that, notwithstanding the duration of Mrs R's presence in Scotland, there had been a change of her ordinary residence from Milton Keynes to East Lothian."*

Perhaps it still remains relevant to take account of the view expressed by the Supreme Court in re LC (Children) [2014] UKSC 1, that "insofar as Lord Scarman's observation [in *Shah*] might be taken to exclude the relevance of a person's state of mind to her habitual residence, I suggest that this court should consign it to legal history, along with the test which he propounded".

The implications of this decision, and of the distinctive stance of Scottish Ministers which it endorses, are still being assimilated. There would appear to be a proliferation of widening fissures including in "ordinary residence" between England & Wales, and Scotland; between habitual residence and ordinary residence; between social care and taxation purposes (as suggested above); and even in "ordinary residence" between social care and health care purposes. For drawing that last point to our attention, we are indebted to delegates at a seminar for CCP Seminars in Edinburgh on 4th December 2015 at which Adrian's colleague with TC Young Alison Hempsey discussed this case (and at which Jill and Adrian also spoke – see "Conferences" below for the first repeat of that event): this point causes particular potential problems for integrated health and social care partnerships.

One can certainly say that whereas the Scottish guidance of 2010 and 2015 noted that there were no Scottish decisions on the interpretation of "ordinary residence" for the purpose of liability for social care costs, we do now have such a decision. At time of writing it is not yet known whether that decision may be appealed. Whether it is or is not, it is now unlikely to be the last exploration of these issues before the Scottish courts.

Adrian D Ward

Mental Welfare Commission for Scotland promotes awareness of powers of attorney

On 13 November, the Mental Welfare Commission commenced a campaign to promote

knowledge and understanding of powers of attorney amongst hospital ward staff, care home staff and GPs in Scotland. The awareness raising includes guidance on important considerations both when someone is thinking of signing a power of attorney and also when someone within their care has granted one. It is supported by three leaflets that can be accessed here.

Such a campaign is to be very much welcomed. The granting of a power of attorney is an expression of an individual's autonomy and can be used to ensure, insofar as it is possible, that the person's will and preferences are respected and acted on in the event of their incapacity. This is underpinned by an increasing body of European Court of Human Rights rulings on Article 8 ECHR which might not yet have directly addressed the issue of powers of attorney but certainly reinforce the importance of respecting a person's legal capacity[1]. Moreover, on the face of it powers of attorney may arguably fulfil the requirements of Articles 12(3) and (4) of the UNCRPD[2] although whether they pass muster under the Committee on the Rights of Persons' General Comment No 1 interpreting Article 12[3], which not specifically refer to powers of attorney or similar arrangements[4], remains to be seen.

This development comes at the same time as yet another repetition of the successful joint campaign by Glasgow City Council and Greater Glasgow and Clyde Health Board (with technical support from TC Young) to encourage people to grant Powers of Attorney.

Jill Stavert

Mental Welfare Commission for Scotland: Advice on hidden surveillance

On 2 December 2015, the Mental Welfare Commission published advice on the use of hidden surveillance which can be accessed here

This advice has been publlished as a consequence of an awareness of covert surveillance being used to monitor care staff in various settings. There are clearly are implications for such staff and for those in their care and, of course, the Commission's primary concern relates to the latter with mental illness, learning disability, dementia, or related conditions.

The Commission acknowledges that such surveillance occasionally has very valid uses, such as exposing serious abuse of vulnerable people, but is also mindful that there are serious legal, human rights and ethical implications involved. A balance therefore needs to be achieved between protection and respect for privacy.

As the advice rightly points out, capacity is everything. If someone is able to give valid consent to the surveillance and they refuse to consent then this must be respected. If there are concerns that a person with capacity is subject to undue influence and abuse or exploitation then the matter ought to be referred to the local authority who may consider adult protection measures. It also reminds of the need to assess capacity to consent to such surveillance on a

[1] *Shtukarutov v Russia*, paras 87-89; *X and Y v the Netherlands*, paras 102 and 109; *Sykora*, paras 101-103. See also Council of Europe Committee of Ministers Recommendation R(99) 4 *on principles concerning the legal protection of incapable adults*, paras 3, 6 and 9.

[2] J Stavert, 'The Exercise of Legal Capacity, Supported Decision- Making and Scotland's Mental Health and Incapacity Legislation: Working with CRPD Challenges' (2015) 4 *Laws* 296-313.

[3] Committee on the Rights of Persons with Disabilities General Comment No 1 (2014) *Article 12: Equal recognition before the law*, CROPD/C/GC/1, 19 May 2014.

[4] *Ibid*, para 17.

decision-specific basis[5]. It recognises that hidden surveillance is an intrusion of a person's privacy and the Article 8 ECHR (the right to respect for private and family life) issues surrounding this and need for proportionality. I would also add the potential Articles 5 (the right to liberty) and 3 (prohibition against inhuman and degrading treatment) ECHR engagement where such surveillance is excessive.

Practical considerations when considering hidden surveillance (for example, positioning of cameras, who images will be shared with and how they will be stored and the type of any recordings) are noted.

Importantly, the Commission acknowledges that surveillance can be conducted by a wide range of people and organisations and thus the need for the situation in terms of care homes and care providers, friends and families, welfare guardians and attorneys, criminal investigations and professional codes (medical and otherwise) to specifically address this.

The Commission is clear that it is not its place to advocate, or not, the use of hidden surveillance this is in the discretion of private individuals and employers but they must explore and exhaust all reasonable alternatives before proceeding with such measures which must be a last resort.

Jill Stavert

[5] As promoted by, amongst others, the WHO and the European Court of Human Rights (e.g. *Shtukaturov v Russia* (2008) ECHR 223) although admittedly not the UN Committee on the Rights of Persons with Disabilities (Committee on the Rights of Persons with Disabilities, General Comment No. 1(2014) *Article 12: Equal recognition before the Law,* adopted 11 April 2014, para 15).

Scottish Government consultation on AWI anticipated

We understand that Scottish Government expects to issue by the end of this year a consultation document not only upon the Scottish Law Commission report referred to in the parliamentary answer reproduced below, but seeking responses also for the purposes of the wider review mentioned in the answer. Sandra McDonald, Public Guardian, has often referred publicly to the "wish list" of desired improvements to the 2000 Act which she has been accumulating for some time. She has published her thoughts about possible introduction of a system of "graded guardianship" (see the OPG website). The wider review proposed by Scottish government, which is much to be welcomed, should also facilitate consideration of adjustments to the Scottish legislation to achieve full compliance with the United Nations Convention on the Rights of Persons with Disabilities - on which the work of the "Three Jurisdictions Project"(see [insert links]) continues.

The full text of the relevant Parliamentary question and answer is as follows:

Question S4W-28230: Michael Russell, Argyll and Bute, Scottish National Party, Date Lodged: 30/10/2015
To ask the Scottish Government whether it plans to review the adults with incapacity legislation and, if so, what the timescale is and what consultation arrangements it is planning.

Answered by Paul Wheelhouse (12/11/2015):
We have committed to consulting on the Scottish Law Commission's Report on Adults with Incapacity. The report covers compliance of the Adults with Incapacity (Scotland) Act 2000 with

Article 5 of the European Convention on Human Rights, specifically in relation to deprivation of liberty issues. It is anticipated that a consultation paper will issue around the end of 2015, and it will be open to anyone with an interest to respond. Thereafter, a scoping exercise will follow in relation to a wider review of the adults with incapacity legislation.

Adrian D Ward

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Conferences at which editors/contributors are speaking

International Protection of Adults

Alex and Adrian will be participating in a seminar at the British Institute of International and Comparative Law on 11 February on Hague 35 and cross-border matters. More details will be available soon on the BIICL website.

Fatal Accidents Inquiries and Psychiatric Patients

The next seminar in the Centre for Mental Health and Incapacity Law series will be on Fatal Accidents Inquiries and Psychiatric Patients, to be held on 27 January 2016, the speakers being Jill and Dr John Crichton. More details can be found here.

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 New Year, so our next Newsletter will be out in early December. 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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Annabel appears frequently in the Court of Protection. Recently, she appeared in a High Court medical treatment case representing the family of a young man in a coma with a rare brain condition. She has also been instructed by local authorities, care homes and individuals in COP proceedings concerning a range of personal welfare and financial matters. Annabel also practices in the related field of human rights. To view full CV click here.

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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.

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Adrian is a practising Scottish solicitor, a consultant at 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.

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