

Court of Protection: Property and Affairs

Introduction

Welcome to the May 2016 Newsletters. Unusually this month – but proving that we do not simply generate material for the sake of it – we do not have any Health, Welfare and Deprivation of Liberty or Scotland Newsletters because there have been no developments of sufficient note to merit coverage. Note, though, that we are anticipating shortly the interim statement from the Law Commission on their Mental Capacity and Deprivation of Liberty project which we will be covering in our next Newsletter.

Highlights this month include:

- (1) In the Property and Affairs Newsletter: causing your own incapacity and the consequences for personal injury proceedings;
- (2) In the Practice and Procedure Newsletter: the transparent fall-out from the C case;
- (3) In the Capacity outside the COP Newsletter: two guest pieces: (1) an introduction to her role by the Amanda Solloway MP, the new Rapporteur on Mental Health for the Joint Committee on Human Rights; and (2) an article by Patricia Rickard-Clarke outlining the provisions of the Assisted Decision-Making (Ireland) Act 2015.

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](#).

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

Guest contributor

Beverley Taylor

Scottish contributors

Adrian Ward
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Causing your own incapacity

AB v Royal Devon and Exeter NHS Foundation Trust [2016] EWHC 1024 (QB) (Queen's Bench Division (Irwin J))

Mental capacity – assessing capacity – finance – litigation

Summary

In this Queen's Bench Division case the court had to decide on various issues concerning the quantum of a claimant's claim for personal injuries resulting from clinical negligence. One of those issues was C's capacity both to litigate and to manage his property and affairs.

The case had been started without a litigation friend but his advisers became concerned as to his capacity so applied to Master Roberts who agreed that C was a protected party, appointed a litigation friend and retrospectively approved a liability settlement.

The want of capacity was caused by a combination of factors one of the most significant being long addiction to class A drugs. It was not caused by the injuries D caused.

The psychiatrists agreed, however, that by the time of the trial because C had abstained from drugs he had the capacity to litigate and could manage his financial affairs as they stood. The Judge held, however, that C's advisers were right not to return to court for the discharge of the litigation friend but instead to take instructions from both the litigation friend and C in a pragmatic way, see paragraph 67.

As regards the future, the Judge held that C would not have capacity to manage the large sum

that he would be awarded and that was whether or not he returned to his abuse of class A drugs, see paragraph 69.

The Judge went on to hold that it would take a year to set up a regime that would enable C to manage his award and that thereafter, unless he resumed his abuse of class A drugs, he would have capacity to manage his financial affairs so would not be a protected party, see paragraph 73.

The Judge went on to consider whether C should be awarded any sums for deputyship costs etc in the past and after the first year. He decided that there should be no award as any such damages resulted and would result from C's illegal acts of abusing class A drugs, see paragraphs 85-88.

Comment

This case is a good illustration of the difficulties that can arise with doubtful capacity and fluctuating capacity. The court plainly encouraged a practical approach although what would have happened if, when C had capacity, he disagreed with his litigation friend, is not clear.

It also is of interest to personal injury practitioners for its implications in relation to claims by people whose lack of capacity results from drug abuse. The sums involved were not small. C "lost" over £50,000 in relation to past costs and a claim for over £12,000 per annum for future costs.

Court of Protection practitioners may also want to think about the approach that might have been taken had these matters fallen for consideration in the Court of Protection. For purposes of the Mental Capacity Act, the reason *why* you have a particular impairment is

irrelevant, as it is the fact of that impairment which (if the “causative nexus” is satisfied) gives rise to the relevant lack of capacity. The approach to be taken to the appointment of the deputy would have to be predicated, instead, upon a requirement that the matter be returned to court for further consideration after a specific period of time, or by way of specific limits upon the deputy’s authority to act, so that the court could either directly or indirectly provide for the consequences of the individual’s conduct if – as a matter of fact – it was (or was not) causing him to lack capacity in the material domains.

Conferences at which editors/contributors are speaking

Adults with Incapacity

Adrian will be speaking on Adults with Incapacity at the Royal Faculty of Procurators in Glasgow private client half day conference on 18 May 2016. For more details, and to book, see [here](#).

CoPPA South West launch event

CoPPA South West is holding a launch event on 19 May at Bevan Brittan in Bristol, at which HHJ Marston will be the keynote speaker, and Alex will also be speaking. For more details, see [here](#).

ESCRC seminar series on safeguarding

Alex is a member of the core research team for an-ESRC funded seminar series entitled 'Safeguarding Adults and Legal Literacy,' investigating the impact of the Care Act. The second and third seminars in the series will be on "New" categories of abuse and neglect' (20 May) and 'Safeguarding and devolution – UK perspectives' (22 September). For more details, see [here](#).

Professorial Lecture

Jill will be delivering her inaugural professorial lecture entitled "Paradigm Shift or Paradigm Paralysis: Law, rights and mental health" on 2 June at Edinburgh Napier University. For more details, and to book, see [here](#).

The Use of Physical Intervention and Restraint: Helpful or Harmful?

Tor will be speaking at this free afternoon seminar jointly arranged by 39 Essex Chambers and Leigh Day on 13 June. For more details, and to book, see [here](#).

Mental Health Lawyers Association 3rd Annual COP Conference

Charles J will be the keynote speaker, and Alex will be speaking at, the MHLA annual CoP conference on 24 June, in Manchester. For more details, and to book, see [here](#).

Click [here](#) for all our mental capacity resources

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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 June. 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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CoP Cases Online



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





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Alex is recommended as a 'star junior' in Chambers & Partners 2016 for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations and is the creator of the website www.mentalcapacitylawandpolicy.org.uk. He is on secondment for 2016 to the Law Commission working on the replacement for DOLS. **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. 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.**



Annabel Lee: annabel.lee@39essex.com

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.**



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.**



Adrian Ward adw@tcyoung.co.uk

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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Professor 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 2015 updated guidance on Deprivation of Liberty). **To view full CV click here.**