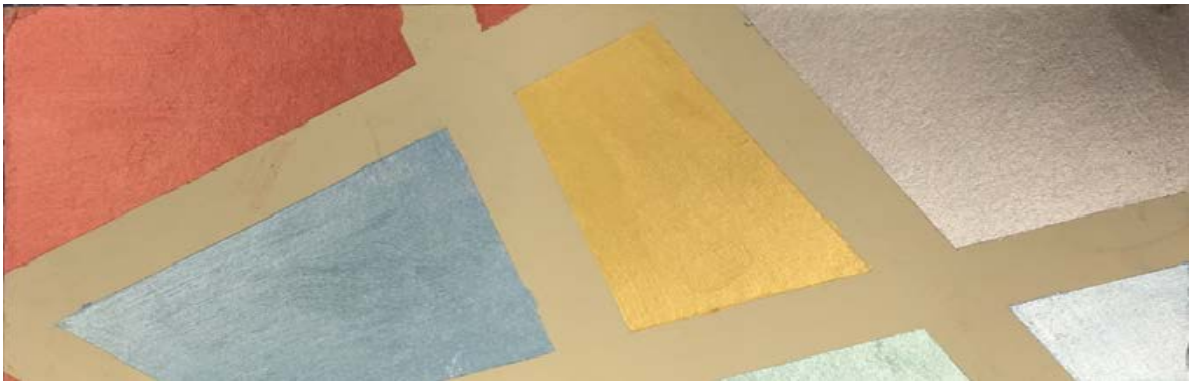
Essex CHAMBERS

MENTAL CAPACITY REPORT:
SCOTLAND

May 2017 | Issue 76



Welcome to the May 2017 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the failed challenge to funding for DOLS, DOLS and conditions, and examples of judges grappling with both capacity and best interests in situations of complexity;

(2) In the Practice and Procedure Report: litigation capacity and the Court of Protection, and a strange saga of attempts to exploit the Court of Protection in the context of bone marrow donation;

(3) In the Wider Context Report: a reminder of the MCA and voting, new guidance on care for dying patients and a book corner reviewing relevant recent publications;

(4) In the Scotland Report: reflections in *AM-V v Finland* and law reform, recently decided cases shedding light on capacity and disability from a range of perspectives and a well-deserved honour for Adrian.

There is no Property and Affairs Report this month in the absence of a sufficient quantity of relevant material.

Remember, you can find all our past issues, our case summaries, and more on our dedicated sub-site here, and our one-pagers of key cases on the SCIE website.

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Alex Ruck Keene
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Scottish Contributors
Adrian Ward
Jill Stavert

The picture at the top, "*Colourful*," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

Contents

Adrian Ward appointed Honorary Member of the Law Society of Scotland

His fellow editors heartily congratulate Adrian's appointment as an Honorary Member of the Law Society of Scotland (the first since 2009), as a person of distinction in the legal profession. The Law Society's Council, in appointing him, specifically (and in our respectful view correctly!) identified his work in the field of Mental Health and Incapacity Law meant that he was a person of such distinction.

Debate, reform and *A-MV v Finland*

The decision of the European Court of Human Rights of 23rd March 2017 in the case *A-MV v Finland* (Application No 53251/13) was described, and commented upon, in the April Report. This supplementary report comments on some aspects of particular relevance in Scotland, in the light of the continuing work of Scottish Government towards reform of adult incapacity legislation, and potentially at least some aspects of associated legislation; and a discussion which took place at an Update Guardianship and Intervention Conference in Glasgow on 26th April 2017.

At the end of 2015 Scottish Government consulted upon its UN CRPD Draft Delivery Plan 2016-2020, and upon the Scottish Law Commission's Report on Adults with Incapacity, which report proposed reforms to the Adults with Incapacity (Scotland) Act 2000 ("2000 Act") designed to ensure compliance with the provisions of Article 5 of the European Convention on Human Rights on deprivation of liberty. The Scottish Government Consultation invited wider comment on possible reform to the 2000 Act. At a key meeting between the Scottish Government official leading the consultation process and the Mental Health and Disability Sub-Committee of the Law Society of Scotland

("MHDC"), discussion extended to matters of interface between the 2000 Act and related areas of legislation, and the Society was encouraged to submit its views on these wider topics. The Society did so. It made submissions about reforms necessary to achieve compliance with the UN Convention on the Rights of Persons with Disabilities, and general reforms of the whole area of legislation. That submission was made in March 2016, and was followed by publication on 6th June 2016 of the Three Jurisdictions Report "Towards Compliance with CRPD Art 12 in Capacity/Incapacity Legislation across the UK". MHDC provided half of the members of the core research group. In consequence of these developments, and wide-ranging and ongoing general debate in Scotland, Scottish Government finds itself engaged in a major law reform exercise. Imperatives include, but are not limited to, requirements to comply with Article 6 of the European Convention and with the UN Convention, and significant practical issues such as the currently unacceptable consequences of delayed discharges from hospital care because of both procedural and operating difficulties under present legislation. It is understood that Scottish Government has increased the resources for addressing this law reform process. Further, and more wide-ranging, consultation is expected later this year.

The following repeats quotations from the judgment in *A-MV v Finland* already quoted in the coverage last month, but with some specific comments relevant to practice and reformed legislation here in Scotland.

Briefly, in *A-MV v Finland* the Court of Human Rights considered circumstances in which a mentor appointed by a court to a man with intellectual disabilities refused the man's wish to move home to the other end of the country. The European Court of Human Rights accepted that the man's right to a private life under Article 8 of the European Convention was interfered with. Was that interference justified? Did the UN Convention require that the man's will and preference in the matter be not only respected, but implemented, regardless of the mentor's reasons for refusing to permit the move?

> *In a context such as the present one, the interference with the applicant's freedom to choose where and with whom to live that resulted from the appointment and retention of a mentor for him was therefore solely contingent on the determination that the applicant was unable to understand the significance of that particular issue. This determination in turn depended on the assessment of the applicant's intellectual capacity in conjunction with and in relation to all the aspects of that specific issue,*

Capacity must be assessed specifically by reference to the matter in question.

> [T]*he Court is satisfied that the impugned decision was taken in the context of a mentor arrangement that had been based on, and tailored to, the specific individual circumstances of the applicant.*

To be ECHR-compliant, powers under any appointment must be tailored to the individual's specific circumstances. That is well accepted as required practice under the 2000 Act, but there are increasing current concerns that in many cases serious under-funding of legally aided work under the adult incapacity jurisdiction means that solicitors are not being remunerated

for time spent adequately tailoring powers sought to need in each individual case, or the same is achieved by constant abatements to Legal Aid accounts generating significant costs in unremunerated time to dispute them, however absurd and inappropriate they might be. The pressures to employ comprehensive "catch-all" lists of powers in all applications are significant. In a matter for which Scottish Government carries responsibility, there is cause for concern whether this situation violates procedural rights under Article 6 of the European Convention, private rights under Article 8 and, in association with these, the right to non-discrimination under Article 14.

> [T]*he impugned decision was reached on the basis of a concrete and careful consideration of all the relevant aspects of the particular situation.*

In relation to any proposed intervention, all of the circumstances must be taken into account.

> [T]*he decision was not based on a qualification of the applicant as a person with a disability. Instead, the decision was based on the finding that, in this particular case, the disability was of a kind that, in terms of its effects on the applicant's cognitive skills, rendered the applicant unable to adequately understand the significance and the implications of the specific decision he wished to take, and that therefore, the applicant's well-being and interests required that the mentor arrangement be maintained.*

Intervention must be based not on the existence of a disability, but on assessment of specific relevant cognitive skills in relation to understanding of the matter in question.

> *The Court is mindful of the need for the domestic authorities to reach, in each particular case, a balance between the respect for the dignity and self-determination of the individual and the need to protect the individual and safeguard his or her interests, especially under circumstances where his or her individual qualities or situation place the person in a particularly vulnerable position.*

In each particular case, it is necessary to balance respect for dignity and self-determination against protecting the individual and safeguarding the individual's interests. The degree of vulnerability of the individual is relevant.

> *The Court considers that a proper balance was struck in the present case: there were effective safeguards in the domestic proceedings to prevent abuse, as required by the standards of international human rights law, ensuring that the applicant's rights, will and preferences were taken into account. The applicant was involved at all stages of the proceedings: he was heard in person and he could put forward his wishes. The interference was proportional and tailored to the applicant's circumstances, and was subject to review by competent, independent and impartial domestic courts. The measure taken was also consonant with the legitimate aim of protecting the applicant's health, in a broader sense of his well-being.*

The following procedural requirements must be satisfied for any intervention contrary to the will of the individual to be ECHR-compliant.

> *Firstly, the individual should be involved at all stages of proceedings, and should be heard in person to put forward his wishes. Secondly, the intervention must be subject to review by competent, independent and impartial domestic courts.*

It was the first of these that led to some debate, after I had presented the above quotations and comments largely as above at the conference on 26th April. On the first point, I further commented that in formal proceedings this probably requires separate legal representation for the adult, in appropriate cases, to ensure that the adult's own rights, will and preferences are adequately submitted and advocated. That would appear to be necessary, having regard to the combined effects of Article 6 of the European Convention as to procedural fairness and of Article 12.4 of the UN Convention requiring safeguards including respect for the rights, will and preferences of the individual (the same phrase as was used by the European Court in the last quotation above). That is a role distinct from, and potentially in conflict with, that of a safeguarder or curator *ad litem*. At the conference a solicitor spoke to experience of acting for an adult when there was also a solicitor acting as safeguarder. There is a fundamental question as to whether the provisions of section 3(5) of the 2000 Act for both a safeguarder and a separate person to "convey the views" of the adult, are only intended to be applied where the adult has not instructed the adult's own representation. The solicitor with this experience pointed out that an adult faced with a report and submissions from a safeguarder which do not accord with the adult's own will and preferences, can well feel that the odds are being unfairly stacked against him or her. It would be interesting to know the outcome if appointment of a safeguarder were to be opposed by a solicitor instructed by the adult, simply on the basis that as the adult is represented, the appointment of a safeguarder is inappropriate, and was not intended by the legislature to be competent in that situation.

The second requirement above leads to questions about the meaning of "competent". Is it "competent" in the narrow legalistic sense of having power to decide the matter, or does it extend to the ordinary meaning of "competence" pointing to a requirement for a court or tribunal sufficiently specialised to have the necessary competence, in that broader sense, to discharge the responsibilities of decision-makers under both the principles in section 1 of the 2000 Act and the application of the safeguards required by Article 12.4 of the UN Convention? Even without regard to the UN Convention, the section 1 principles of the 2000 Act have created an inquisitorial, rather than adversarial, jurisdiction. These are points which may well require to be developed as the law reform process proceeds.

In *A-MV v Finland*, the court held that neither Article 8 of ECHR, nor the right to freedom of movement under Article 2 of Protocol 4 to ECHR, had been violated. As the previous coverage referred to confirms, that case is substantially consistent with both the decision of the German Federal Constitutional Court of 26th July 2016 in the case 1 BvL 8/15 (covered in the November 2016 Newsletter) and the interpretation of the UN Convention in the Three Jurisdictions Report. It is perhaps time to point out that these emerging limitations upon the views expressed by the UN Committee on the Rights of Persons with Disabilities do not detract from the

imperatives of compliance with CRPD and with the main thrust of the assertions of the UN Committee, particularly as to the importance of the obligation to respect the rights, will and preferences of the individual.

Adrian D Ward

Mental Welfare Commission for Scotland and Centre for Mental Health and Capacity Law: Law Reform Scoping Exercise

Since 2016 the Mental Welfare Commission and Centre for Mental Health and Capacity Law have jointly been conducting a law reform scoping exercise focusing on the Adults with Incapacity (Scotland) Act 2000 and Mental Health (Care and Treatment) (Scotland) Act 2003 and possible areas for reform particularly in light of the requirements of the UN Convention on the Rights of Persons with Disabilities and *Cheshire West* ruling. Graded guardianship, unified mental health and mental capacity legislation and the basis for non-consensual care and treatment have been considered. The project will launch its resultant report at a seminar hosted by the Centre at Edinburgh Napier University on 30th May 2017.

Jill Stavert

Revised OPG fees

With effect from 1st April 2017 some fees – mostly the larger ones – payable to the Public Guardian have been modestly increased. Others – generally the smaller ones – remain unchanged. The new schedule of fees is reproduced here. While creeping increases, albeit small ones, could be regarded as cause for concern, and while we have identified elsewhere possible arguments for subsidising and thus reducing costs in relation to powers of attorney, there is nothing in these changes to reawaken the anger at the doubling of registration fees for powers of attorney within a short period reflected in my article "Out of the wrong pocket" at 2008 JLSS 9.

Adrian D Ward

McCann v Scottish Ministers

On 11th April the UK Supreme published its ruling [2017] UKSC 31 on the challenge to the No-Smoking policy at the State Hospital in Scotland.

This ruling is somewhat reminiscent of the 2011 Court of Session *L v Board of State Hospital*[1] ('junk food ban') ruling in terms of Article 8 ECHR (the right to respect for private and family life). It also reminds those of us who are immersed in CRPD discourse of the challenges that currently face individuals and clinicians in high security settings.

Mr McCann's challenge related to the lawfulness of the ban on smoking in the grounds of (but not indoors) the State Hospital and on home visits which had been created by a comprehensive ban that prevents detained patients from smoking anywhere. [2] It related to not only this comprehensive no smoking ban but also a prohibition of tobacco products and the power to

[1] *L v Board of the State Hospital* (2011) CSOH 21.
[2] Mr McCann moved to a medium secure setting in 2014 and a similar application relating to a smoking ban relating to this setting was stayed pending the outcome of the appeal relating to the State Hospital.

search for and confiscate such products. This is the ruling on appeal from the Court of Session.[3]

There were three principal issues in this challenge:

1. Whether the smoking ban was unlawful on the basis that it did not adhere to the principles in section 1 of the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the 2003 Act") or the requirements of subordinate legislation made under the 2003 Act.

2. Whether the smoking ban was a violation of Article 8 ECHR because it unjustifiably interfered with his private life.

3. Whether, on the basis of Article 14 ECHR (non-discrimination) in combination with Article 8 ECHR, the smoking ban had treated the appellant in a discriminatory manner which cannot be objectively justified in comparison with people detained in prison and in other hospitals and members of the public who remain at liberty.

A reading of the full judgment is highly recommended but, in summary, Lord Hodge (with whom the other Justices agreed) delivering the judgment, stated that:

1. The comprehensive smoking ban did not fall within the scope of the 2003 Act. In other words, it was not a treatment decision made under the 2003 Act but rather a management decision taken under the National Health (Scotland) Act 1978.

2. The comprehensive ban itself amounted to an interference with Mr McCann's Article 8 ECHR right which must therefore be justified in terms of it being lawful, necessary and proportionate and in pursuit of a legitimate aim (Article 8(2) ECHR). Lawful long term detention inevitably curtailed a detainee's autonomy and restrictions that were a necessary part of such detention would not fall within the scope of Article 8. However, subject to this, there was a need very carefully to ensure that the patient's autonomy that remained was respected as far as is possible.[4] That being said, in this particular case, this comprehensive ban was justified in terms of Article 8 in that it was (i) in accordance with law; (ii) pursued a legitimate health related objective; (iii) was rationally connected to such objective; and (iv) was proportionate. For this reason, there was no Article 14 ECHR violation.

3. The prohibition of tobacco products and the power to search patients and visitors for such products and confiscate them fell within to scope of the 2003 Act and related regulations [5] because it related to the patient's autonomy in the context of 2003 Act care and treatment. In this case, there appeared to be no consideration of the principle in section 1(4) of the 2003 Act (that the measure should be the minimum restriction of the patient's freedom as is necessary in the circumstances). The prohibition and search and confiscation powers therefore infringed Mr McCann's Article 8 ECHR because they did not comply

[3] *McCann v The State Hospitals Board for Scotland* (2014) CSIH 71.
[4] Lord Hodge at 50-54.
[5] The Mental Health (Safety and Security) (Scotland) Regulations 2005 (SSI 2005/464).

with the 2003 Act and thus could not meet the Article 8(2) requirement that any limitation of his Article 8 right is 'in accordance with the law'.

Jill Stavert

Permanence order – parents with "learning difficulties"

In *West Lothian Council v B* [2017] UKSC 15, 2017 SLT 319, the Supreme Court allowed an appeal from a decision of the Second Division of the Court of Session, which had upheld a decision of a Lord Ordinary, granting a permanence order under the Adoption and Children (Scotland) Act 2007 in respect of a child whose parents were described as having "experienced learning difficulties throughout their lives". To the extent that the case concerns the proper interpretation of section 84(5)(c) of that Act, and how the responsibilities placed upon the judge under that section should be discharged, it could be said to be concerned principally with matters of child law, rather than the apparent disabilities of the parents. There is no reference in the decision to adult incapacity law. Nevertheless, in applying for the permanence order the local authority relied – in relation to the child's parents – upon the test in section 84(5)(c)(ii) that "where there is such a person [which would include such a person as each parent in this case], the child's residence with the person is, or is likely to be, seriously detrimental to the welfare of the child". What was made crystal clear by the Supreme Court, and in which that court found that the judge at first instance had failed, was that this required the court to be satisfied, in relation to each of the child's parents, that the child's residence with that parent was likely to be seriously detrimental to her welfare, and that in this matter the judge was the primary decision-maker who was solely responsible for deciding issues arising under this legislation on the basis of his own findings upon the evidence. Any finding that the test under section 84(5)(c)(ii) was met should make clear the detriment which the court was satisfied was likely to arise, why the court was satisfied that it was likely, and why the court was satisfied that it was serious. The Lord Ordinary had not set out the material provisions of section 84 and related provisions. He had not identified the separate conditions, each of which had to be satisfied for a permanence order to become appropriate. In general, he had approached the matter on the basis of considering whether the local authority's actions had been justified, rather than basing a decision upon his own findings in fact. The Second Division had appeared to find that the threshold test had been satisfied without clearly explaining the exact nature of the apprehended detriment, why it was considered serious, and why it was considered likely. Contrary to requirements of statute, the child's racial origin and cultural and linguistic background had not been considered. The court stated other criticisms.

What is perhaps relevant to adult incapacity practice is the emphasis by the Supreme Court upon the importance of analysing and applying in careful and reasoned manner all of the statutory tests relevant to a decision whether to make, or to refuse, an order provided for by statute. In the context of the adult incapacity jurisdiction, this probably does not discourage taking some matters to the final step of appeal to the Supreme Court, even though outcomes prior to that may have been discouraging.

Adrian D Ward

RAR v A University

RAR v A University [2017] CSIH 11, [6] has significant implications in the field of actual or potential intellectual disabilities, and more generally for the administration of justice across areas which in particular include adult incapacity law and general intellectual disability law, even although no point of adult incapacity law arose in it, nor was there any reference to incapacity or mental health legislation, nor to the UN Convention on the Rights of Persons with Disabilities. In a narrow sense the decision could be seen as particular to its own facts: at [42] of the Decision, for example, it was noted that "*a number of statutory provisions and decided cases were cited to us in argument. We have taken them fully into account, but in view of the decisions we have reached we do not need to refer to many of them and certainly not in any great detail.*"

Yet the long and careful decision of the Second Division, Inner House of the Court of Session – occupying 28 pages of the Scots Law Times report – has significance and points to a need for investigation and research of key importance, across the areas of practice which it addresses, particularly as to the interaction between those areas of practice and issues or potential issues of intellectual disabilities: and the manner of disposal of the case sets a standard, particularly in relation to matters in which issues of incapacity and intellectual disability could feature, which is potentially profound.

The reclaimer had embarked on a three-year course of study for a PhD. All seems to have gone well until part-way through the third year, when, as the Opinion of the court delivered by Lord Glennie put it, "matters took a turn for the worse". There was a dispute about whether the reclaimer – identified as "R" – should be first-named author of an academic paper. In the apparent absence of a prompt and sensible resolution of that issue, a dreary history developed of complaints, supposed suspensions, increasingly tangled procedures and a refusal to re-enrol R as a student. Intertwined with these issues was a hardly surprising deterioration in R's health, and at least suggestions that she required psychiatric assistance. A petition for judicial review by R was dismissed at first instance. That no issues of incapacity arose at least at the time of the hearing may be taken from the narration in [2] of the Opinion of the Second Division that: "*The petitioner represented herself before us, as she had before the Lord Ordinary. Although not trained as a lawyer, and although English is not her first language, she presented her arguments with clarity and precision. We are grateful both to her and to counsel, who appeared for the University, for their help in enabling the many and potentially diffuse issues raised in the appeal to be properly focused.*"

The appeal was successful. If one jumps through most of that lengthy judgment to the outcome, the Second Division held that the University, contrary to its own assertions, did not at any time either suspend or purport to suspend R under the provisions of its own Code of Practice on Student Mental Health; that from a stated date (6th August 2009) at the latest the University's suspension of R purportedly under its Code of Student Discipline was without any lawful basis and was unreasonable; that a

[6] Reported under the name *R v A University* 2017 SLT 284.

demand by the University that R provide medical evidence of her fitness to return to her studies before permitting such return was a demand that, in all the circumstances, the University was not entitled to make; and that the University's refusal to register R for the academic year 2009/2010, insofar as based in whole or in part on the supposed suspension under the University's Code of Student Discipline, was to that extent unreasonable.

From a reading of the judgment, it would appear that on the one hand there is evidence that those responsible for communicating with R on behalf of the University were genuinely concerned about her health and wished to point her towards assistance which they thought might be necessary. On the other hand, firstly, the considerable narration of facts in the judgment does not disclose that the University went beyond considering the impact of R's health issues upon its procedures, to addressing the possibility that the way in which it handled matters, and the inherent nature of its procedures, evidently impacted upon the health issues, and may have been their cause. And secondly, as is evident from the outcome, the University failed in significant respects to comply with its own procedures, and to interpret them correctly.

This leads to three observations, one specific to academia but the others of wider potential application.

1. As narrated above, the problems which led to all of the procedural issues and subsequent litigation started with a question about the order in which names should appear on an academic paper. I doubt whether anyone with any contacts with academia is unaware of much angst caused by that issue. I must declare an interest of sorts, in that no lawyers in my experience have ever been troubled by the simple solution of listing names in alphabetical order, so that in any joint authorship over three decades my name has always appeared last – until, last year, the "Three Jurisdictions Report" from the Essex Autonomy Project, produced jointly by academics and practitioners, elevated me to fourth out of eight in non-alphabetical order: a matter of such memorable significance that I had to pull out a copy of the report to check that when writing this piece. At risk of prompting howls from my many good friends in academia, it does seem to me that there ought to be absolutely clear and robust regulation of such matters, in terms of both clear and robust guidelines, and speedy and accessible systems of mediation and arbitration. It would also seem that, by reference to the very definition of "education", in cases of doubt there should be a presumption in favour of according pole position to a student who has done most of the hard work, albeit under guidance, the main reward for the mentor being the outcome achieved by the student.

2. This and the next point are relevant to the whole field of complaints, grievance and disciplinary procedures across employment, academia and the professions, and indeed similar procedures in any context. It is absolutely right that the conduct of any such procedures should where appropriate be combined with humanity and concern for the wellbeing of individuals embroiled in those procedures. However, far from being inconsistent with procedural correctness,

that cannot realistically be achieved unless there is absolute procedural correctness, and complete clarity about the status and content of communications to those drawn into such procedures.

3. This leads to a concern about whether the potential impact of such procedures upon the health, including mental health, of those primarily engaged is adequately understood, and even if it is, whether such understanding is adequately translated into achieving procedural fairness (including, where relevant, procedural fairness in terms of Article 6 of the European Convention on Human Rights). Linked to that is whether procedures robustly ensure that where persons at the centre of them appear to be affected by intellectual disabilities, whether to some extent generated by the proceedings themselves or not, all disadvantages and discrimination resulting from those disabilities, in comparison with the position of anyone not suffering from such disabilities, are removed in accordance with the requirements of the UN Convention on the Rights of Persons with Disabilities (ratified without reservation by the United Kingdom). I would draw attention to a strikingly significant article "Judicial approaches to health regulation" by Graeme M Henderson at 2017 SLT (News) 17. In his first sentence Mr Henderson wrote: "*It is not unknown for health regulators to convene disciplinary hearings where the health professional (HP) does not turn up and is not represented.*" Two paragraphs later he wrote: "*Despite efforts by employers, regulators, unions, lawyers and others, a significant number of HPs do not engage with the disciplinary process when it is initiated by their regulators. As a result they are likely to have their career curtailed, restricted or terminated without them having ever presented their side of the story. It is not unknown for them to seek help when it is thought to be too late.*"

It is no doubt possible that some persons subject to disciplinary proceedings will try to wriggle off the hook, or at least postpone matters indefinitely, by inventing or at least exaggerating health conditions. There will be some who have simply stopped caring. But it would appear, including from the cases considered by Mr Henderson in his article, that this apparent lack of engagement can occur even on the part of those who do dispute allegations and are not inhibited from disputing them and participating for reasons that are in any way invented. There appears to be a clear need for thorough investigation of the effect of the whole range of procedures mentioned above upon those at the centre of them, regardless in each case of what might be the ultimate proper determination of rights and wrongs. That research might contribute in a significant number of cases towards achieving prompt and fair outcomes, and in all cases towards ensuring procedural fairness.

Finally, in an era when the processes of the administration of justice are under almost constant challenge, and when it is not infrequently suggested that those engaged in those processes are motivated only by personal profit, the care given by the Second Division to the disposal of this case, and the manner in which they did so, if it does not set new standards at least reaffirms what should be best practice for all engaged in the administration of

justice, in a manner which (at least to me, and with due respect to our judiciary) seems to be highly commendable. It is an approach which ought to commend itself in particular to all engaged in the adult incapacity jurisdiction, governed as it is by the statutory requirement to achieve benefit in any intervention (section 1(2) of the Adults with Incapacity (Scotland) Act 2000, and similar requirements in related legislation), and where real benefit cannot be achieved unless wounds are healed among people and agencies who will still have to relate to each other. Often in the adult incapacity jurisdiction, by the time a matter comes to final disposal there will be a lengthy history during which the wounding will have been exacerbated. In *RAR v A University*, paragraph [95] of the judgment commenced: "*What remedy we should grant is a matter of some difficulty.*" The court could have taken the narrowly legalistic position that in practical terms all of the matters before it were "water under the bridge" because of the lapse of time, and could have pronounced some narrowly legalistic final decision. The supposed suspension which R sought to have reduced "*is now spent and reduction would achieve nothing.*" Similarly, the decisions not to register her for the academic year 2009/2010 "*are of no current significance in 2017*". But the court refused to take any easy option: paragraph [95] concludes: "*On the other hand, to refuse any remedy would mean that the petitioner's complaints, which we have found in part to be justified, would not be vindicated by any formal order. That would not be right.*"

In human rights language, the court could be said to have considered itself obliged to afford "just satisfaction". It decided to deal with the matter by way of declarator. The judgment states that it proposed to grant a declarator of the findings briefly summarised in the fourth paragraph of this article. The court explained that it proposed to grant an interlocutor in such terms "in due course". In support of my commendation of the approach of the court to its judicial responsibilities, I can do no other than allow the beautifully balanced wisdom and expression of the final substantive paragraph of the Decision [102], in its entirety, to speak for itself.

> *We would hope that our conclusions on the disputed issues might provide a basis on which the parties can get together to see whether there is any reasonable prospect of the petitioner being allowed to complete her PhD thesis. We were told that all that was required was for it to be written up, a task that at one time would have taken no more than about six weeks, though that estimate may not still be valid given the time that has passed since work was done on the thesis. It is in everyone's interests for this to be done. While this court cannot allow itself to be drawn into micromanaging the future relations between the parties, we are conscious that there are some issues which may not have been addressed in our interlocutor the resolution of which might assist parties in their attempts to move forward; and it may be that some further orders are appropriate in light of the matters covered by this opinion. For that reason, before issuing any final interlocutor we propose to put the case out by order on a date approximately eight weeks from the date of this opinion, to enable parties in the meantime to discuss matters and see whether the court can provide any assistance. We emphasise that that is not intended as an opportunity to re-argue parts of the case.*

It is simply to see whether any other orders ought properly to be made in light of this opinion."

It is hoped that this case, and the general lessons suggested above, might reduce the number of occasions upon which such sad histories collide with effective application of wise common sense only before an appeal court some years after relevant events.

Adrian D Ward

Centre for Mental Health and Incapacity Law, Rights and Policy is now Centre for Mental Health and Capacity Law!

The Centre for Mental Health and Incapacity Law, Rights and Policy at Edinburgh Napier University has been renamed the Centre for Mental Health and Capacity Law. The decision to do this was based on the desire to have a shorter more functional title and also, importantly, to more closely reflect that it remains very much focused on considering these areas of law in light of developing human rights standards. The remit of the Centre remains entirely the same.

Jill Stavert

Visit from the Norwegian Civil Affairs Authority

In 2013 the Norwegian Civil Affairs Authority ("SRF" – Sivilrettsforvaltning) was appointed as the Central Guardianship Authority in Norway, at the same time as a new guardianship regime was introduced, and for the first time a statutory regime of powers of attorney and advance directives for incapacity was introduced. I had previously advised the Nordic countries on introduction of powers of attorney regimes, and in March 2015 gave a seminar at the Norwegian Ministry of Justice on topics including powers of attorney and the UN Disability Convention. In January 2017 I was asked to help arrange a study visit to Scotland by a team of six from SRF. The visit took place on 23rd and 24th March 2017, and was hosted by the Law Society of Scotland. Sandra McDonald, Public Guardian, gave a presentation and engaged in lengthy discussion: the work of her Office, how it is done and organised, and the systems that support it were all of great interest to the SRF team. For her part, Sandra was impressed by the resources which they have available. Colin McKay, Chief Executive of the Mental Welfare Commission for Scotland, also gave a presentation and had discussions. I discussed the UN Disability Convention, in terms of its consequences both for law and for good practice.

In 2015 the SRF team were already concerned about how they could proactively promote the use of powers of attorney, and were interested in what I could tell them about the then relatively early stages of the "mypowerofattorney" campaign. During the March visit the full team who have been taking forward the "mypowerofattorney" campaign and assessing its effectiveness gave a fascinating presentation, which resulted in much further discussion, extending into such questions as to whether there would be overall benefit to the public purse – in terms, for example, of savings generated by reductions in delayed discharges and other advantages of having someone immediately available to make decisions – if the setting up of powers of attorney were to be subsidised by the state.

Christine McLintock, Immediate Past President of the Law Society of Scotland and convener of the Society's Public Policy Committee, attended and was presented by the SRF team with a charming little statute of a polar bear.

Adrian D Ward

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Alex is recommended as a 'star junior' in Chambers & Partners 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, including as Wellcome Trust Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

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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.

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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.

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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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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.

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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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Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 4th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2015). To view full CV click here.

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Adrian is a 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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Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. 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.

Conferences

Conferences at which editors/contributors are speaking

Mental Welfare Commission and Centre for Mental Health and Capacity Law Launch of Law Reform Scoping Exercise Report

Jill will be speaking at this seminar at Edinburgh Napier University (Craiglockhart Campus) on 30 May 2017. Please contact Rebecca McGregor for more details.

'Supporting Employee Mental Health and Wellbeing'

Jill is speaking at this Holyrood Events/MHScot conference on 'Supporting Employee Mental Health and Wellbeing' on 1 June in Edinburgh details. For more details, see here.

Mental Health and Human Rights

Tor will be speaking at this free event organised by the HRLA Young Lawyer's Committee in London on 22 May. For details and to reserve a place, see here.

Essex Autonomy Project Summer School

Alex is speaking at the Essex Autonomy Project Summer School, which this year has the theme *Objectivity, Risk and Powerlessness in Care Practices*. The multi-disciplinary programme will give delegates the opportunity to discuss the challenges of delivering care in a framework that supports and empowers individuals. For full details, and to apply online, please see the Summer School website.

Deprivation of Liberty Safeguards: The Implications of the 2017 Law Commission Report

Alex is chairing and speaking at this conference in London on 14 July which looks both at the present and potential future state of the law in this area. For more details, see 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.

Our next Report 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 Report in the future please contact: marketing@39essex.com.

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