



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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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.

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### Voting, the MCA and urban myths

Given the imminent General Election, we strongly recommend reading Lucy Series' [blog post](#) on the myths surrounding capacity, voting and voter registration.

### Short Note: sleep-in carers and the minimum wage

The judgment of Mrs Justice Simler DBE in *Focus Care Agency Ltd v Roberts* in the Employment Appeal Tribunal considered the question of whether time spent asleep during a "sleep-in" shift qualified for the national minimum wage. Although this case did not consider the Mental Capacity Act 2005 directly, the judge noted that the issue in this case was particularly significant in the care sector where sleep-in duties commonly arise. The court's conclusion that sleep-in care is covered by minimum wage legislation (regardless of whether the carer was actually asleep or awake) may have a knock-on effect on the cost of care packages and a public body's willingness to

commission a particular package of care with sleep-in support. This may in turn affect the "available options" to the Court of Protection when determining what care and support package is in P's best interests.

### Reminder: new GMC Confidentiality Guidance now 'live'

The GMC's revised guidance, *Confidentiality: Good Practice in Handling Patient Information*, came into effect on 25 April 2017. Although primarily of relevance to medical practitioners, it is also useful for others seeking to grapple with the balancing act between confidentiality and disclosure in the context of the delivery of health and social care, including where the individual concerned lacks the capacity to consent.

### Medical Examiner Scheme delayed until April 2019

As highlighted in Mills & Reeve's most recent (and very useful!) [Health and Social Care Update](#), plans to introduce the medical examiner role and implement reform to the death certification

process have been delayed from April 2018 to April 2019 to (the Department of Health notes) “allow for more time for preparation to ensure that the benefits of the new system [are] realised.”

### Short Note: Judicial review and conditions of MHA detention

In *R (YZ) v Oxleas NHS Foundation Trust & Anor* [2017] EWCA Civ 203, the Court of Appeal emphasised – in strident terms – that it is only in very exceptional cases that it will ever be appropriate to challenge by way of judicial review a decision to move a person under the MHA 1983 into a more secure unit.

### NICE Guidance on Dying Adults

NICE has published a new quality standard, *Care of dying adults in the last days of life*, which covers the last 2 or 3 days before death. The document includes a requirement that “Adults in the last days of life, and the people important to them, are given opportunities to discuss, develop and review an individualised care plan”. No mention is made of advance decisions to refuse treatment or health and welfare lasting powers of attorney, although there is a welcome focus on the person retaining choice and control. The guidance also addresses hydration in the last days of life, requiring that ‘Adults in the last days of life have their hydration status assessed daily, and have a discussion about the risks and benefits of hydration options.’ The authors have experience of disputes between families and hospitals in relation to the use of artificial hydration at the end of life, and anticipate that such discussions may be difficult unless there is clear patient-friendly information available which includes an explanation of the circumstances in

which artificial hydration does not in fact prolong life, as this can be very counter-intuitive and the source of significant conflict.

### Public attitudes to end-of-life care in neurological disease

A fascinating study published recently reveals just how conflicted public attitudes are to end-of-life care in neurological disease (and also how much the answers given depend upon the questions asked).

### Book corner

We include here four book reviews by Alex (who, where relevant, acknowledges with gratitude that copies were provided by the publishers – he is always happy to review works in or related to the field of mental capacity (broadly defined))

***Community Care Law* (6<sup>th</sup> edition) (Luke Clements, with Karen Ashton, Simon Garlick, Carolyn Goodall, Jean Gould, Edward Mitchell and Alison Pickup, Legal Action Group, 2017, paperback and ebook, £65.00)**

A great deal has changed since the last edition of this Bible for community care practitioners was published in 2011. First, the legislative framework has been consolidated and in significant parts amended by the Care Act 2014 (England), and the Social Services and Well-Being (Wales) Act 2014. Second, Pauline Thompson is no longer with us to help navigate through the waters and fight the battles. Luke Clements pays a moving tribute to her at the start of the book, and the book itself (in this edition specifically named the “Pauline Thompson Memorial Edition”) stands as a tribute to the groundbreaking work she did in this area.

Whilst the book itself stays at roughly the same length as its predecessor, weighing in at a hefty 942 pages (of which an impressive 840 pages are narrative text), there have been some significant changes to its coverage. First, it no longer seeks to cover issues relating to disabled children, this now being the subject of a separate (excellent) LAG book, which is available for free [here](#) (and from the LAG bookshop [here](#)). Second, and reflecting the divergence between England and Wales, the book does not seek to give any coverage to the 2014 Welsh Act. This is entirely understandable, as Luke and his team of co-authors have more than enough on their plate to deal with in England. It is, however, a source of real regret, and indeed concern, that there is at present no book out there providing the same sort of authoritative analysis of the position in Wales.

Turning back to what this book does cover, one of its great strengths is that it places the Care Act in its context and in its history. Some of this history is very deep, and of considerable interest are the thumbnail sketches of the way in which the pendulum of concerns and drivers have swung backwards and forwards over time. Of very practical use is the detailed and expert commentary on where pre- Care Act case-law, guidance, or other materials may still be of relevance in the post Care Act world, and where, by contrast, the Act marks a radical departure.

Although not expressly stated in the introduction, the book is – for the most part – reflective of the law as it stood in January 2017, although it does (impressively) manage to include coverage of the Law Commission’s Mental Capacity and Deprivation of Liberty proposals published in March 2017. The

decision in the N case in the Supreme Court on available options and best interests came just too late for it, although the approach it sets down was anticipated in the chapter on the Mental Capacity Act. Further, for my part I regret that the authors were not able to include coverage of the Davey decision from February, as I would have liked to have seen their take on the approach taken by Morris J to well-being, in particular his extremely minimalist approach to the centrality of the individual’s wishes, at odds with the maximalist interpretation suggested in the book.

Within its new self-defined limits set out above, this edition is extraordinarily comprehensive, roaming far beyond the Care Act to include (for instance) useful coverage of the relevant provisions governing information, data protection and confidentiality. I can confidently predict that it will, as with its predecessor, become very well-thumbed in short space of time by those who purchase it.

Finally, some may wonder whether it is worth purchasing this book alongside Stephen Knafler QC’s recent book for LAG on Adult Social Care Law. For my part, the answer is unambiguously “yes” as the latter serves a different purpose – primarily consisting of extracts from key cases, legislation and guidance. The selection of and introductions to the extracts is expert but does not pretend to the level of detail of commentary of that provided in the work under review. And, at the time of writing, there is no need to choose between the two as Stephen Knafler’s book is available for a limited period of time free [online](#).

**Mental Health Law (6th edition) (Brenda Hale (Baroness Hale of Richmond) with Penelope**

**Gorman, Rachel Barrett and Jessica Jones, Sweet & Maxwell, 2017, paperback, £85.00)**

The new edition of Lady Hale's seminal textbook has been eagerly awaited for quite some time now. Though, as Lady Hale notes in her introduction, it represents an update rather than a complete rewrite of the nature of the 5<sup>th</sup> edition (in 2010), the book nonetheless represents a unique opportunity to see the state of mental health law through the eyes of the Deputy President of the highest court in the United Kingdom.

Indeed, the book does a lot more than that, and my only substantial complaint about is that its title radically undersells it. Written with the assistance of Lady Hale's long-standing judicial assistant, Penelope Gorman and two recent judicial assistants, Rachel Barrett and Jessica Jones, the book provides clear, comprehensive and authoritative coverage of the provisions of the MHA 1983 as of January 2017. However, its focus is almost equally upon the provisions of the MCA 2005, for which Lady Hale bears such prime-moving responsibility. For my part, I regret not just the fact that the book undersells itself but also the (inadvertent) suggestion that mental capacity law is simply an offshoot of mental health law. Of course, though, by the time of the next edition, it may be that there is no longer any distinction between mental health law and mental capacity law, and Lady Hale toys tantalisingly with the idea of fusion in chapter 2.

Indeed, it is a characteristic of this book that there are repeated and fascinating hints of where Lady Hale envisages the law might go, although obviously phrased with suitable caution given her judicial role. Examples include her observations on the obligations imposed by

the CRPD in chapter 1, and her tantalising suggestions in Chapter 3 that a rebalancing of parental versus children's rights in the context of medical treatment is perhaps overdue. I strongly anticipate that passages from the work may well feature in skeleton arguments before appellate courts in the near future.

It would, however, be entirely wrong to give the idea that this book is solely for practising lawyers seeking to run clever arguments. Rather, it will be of enormous use and interest to all those seeking a clear guide not just to the complex statutory provisions governing mental health and mental capacity level, but an explanation of why and how of the laws in this area have come to take the shape they have. I cannot, for instance, think of a better single text to use to introduce students to this area.

A final thought – if the same gap, 7 years, exists between this edition and the next – will the 7<sup>th</sup> edition represent an update, or will have the legal landscape have changed sufficiently that an entire rewrite will be required? It would, of course, be an edition written from the perspective of a retired Supreme Court judge, but there is plenty of time before Lady Hale retires for her to continue to shape the law in this area...

***Ethical Judgments: Re-Writing Medical Law* (ed. Stephen W Smith, John Coggon, Clark Hobson, Richard Huxtable, Sheelagh McGuinness, José Miola and Mary Neal, Bloomsbury, 2017, paperback and ebook, £40.00)**

This edited volume takes on an ambitious task, namely to revisit some of the core decisions in English medical law and to place them into a world in which decisions by judges have to be

ethically as well as legally valid. To that end, and in each of the nine cases selected, two academic lawyers provided short (3,000 word) judgments, followed by a legal commentary and an ethical commentary.

There is undoubtedly an aspect of the academic parlour game about this exercise, and it is clear that Lord Montgomery of Botley (aka Jonathan Montgomery), say, or Lady Devaney of Preston (aka Sarah Devaney) have relished playing judge. However, there is a very serious purpose underlying the project, namely trying to tease out, through the prism of real cases, how judges seek to apply ethical concepts in grappling with medical cases in circumstances where not only are judges not given specific ethical training, but English legal tradition (at least) has its face set against the introduction of specific ethical considerations or reasoning.

The book is full of thought-provoking nuggets and I found, for instance the judgment of Lord Smith of Erie (Stephen W Smith) that the Official Solicitor's appeal in *Bland* stimulating in the way only the best counter-factual history can be. However, I must confess to a slight feeling of frustration that both the selection of the cases (and indeed the comments upon the cases) gave the distinct impression that medical law – broadly defined – has stayed still over the past decade. With the notable exception of *Nicklinson*, none of the cases were decided later than 2006, and one might legitimately question why, say, *Bolitho* was included in the selection at the expense of *Montgomery*. This may well have had to do with the length of time it takes for projects of this nature to evolve, and, of course, to some extent, the exercise that the editors and contributors were engaged in is one

that is not time-specific. There is, for instance, undoubted value in revisiting “oldies but goodies” such as the direction given by Macnaghten J to the jury in *R v Bourne* in 1939, where sufficient time has passed to lend distance and perspective.

However, and at the risk of sounding parochial, I must register particular disappointment at the near-total lack of mention of the MCA 2005. Even if a case such as *Aintree* or the *DD* caesarean-section and sterilisation saga) did not merit a full counter-factual judgment approach, it was to me surprising that *Aintree* does not even appear in the commentary on *Bland* (or indeed in the table of cases at all). This was undoubtedly not for lack of expertise amongst the editorial team, including as it does several who have written thought-provokingly on the MCA. It must, therefore, have been a deliberate decision, but for my part it is one that I regret (even if it leaves the way open for a further volume picking up the story...).

Overall, however, this is a book that serves admirably to stimulate thought – even if one of the main thoughts that it stimulated in this reader's mind is that (as tacitly and somewhat ruefully recognised in the introduction) it is very much more difficult to be a judge than to be a commentator.

***Independent Advocacy and Spiritual Care: Insights from Service Users, Advocates, Health Care Professionals and Chaplains*** (Geoff Morgan, Palgrave Macmillan, 2017, hardback and ebook, c£66.00)

This fascinating book, based (it would appear) upon the author's PhD thesis, both sheds

important light upon the practice of advocacy and suggests fruitful paths for its development. Written by a current hospital chaplain and former IMCA, the book looks at the history of advocacy in England and Wales, and in particular its growth as a professionalised occupation in the early years of the 21<sup>st</sup> century, and is particularly interesting in tracing out some of the (often unspoken or even unconsidered) religious roots of advocacy, and also how advocacy can draw on theology as a message of reaching a deeper and more effective purpose.

The book benefits immeasurably from the fact that the author has worked both as an advocate and as a hospital chaplain, and in a particularly self-aware fashion is able to reflect upon the ways in which the two approaches are similar and different. It also draws upon a relatively small but qualitatively rich body of interviews with advocates, NHS chaplains, and clients/self-advocates, and the author makes very good use of extracts from these interviews to develop his thesis. Although expressly drawing from the Christian tradition, the author makes a persuasive case that a recognition of the potential importance of spirituality is the important hidden dimension in the lives of many on behalf of whom advocates seek to act. More broadly, he seeks to draw upon theological insights (especially those of Practical Theology) to outline two models for the practice of independent advocacy – Reconstructed Empowerment and Action Based on Equality, as well as a set of very practical recommendations for advocates and those who manage them.

Along the way, the author explores the number of fascinating issues, not least of which is the ambiguous nature of advocacy itself, and in

particular the complex place that it occupies in a world in which statutory frameworks increasingly provide the advocates to act as the voice of the individual. With the growth of advocacy, especially following the Care Act, comes demands for increasing professionalisation. But as the author notes, legitimate questions can be asked as to what we might be losing by professionalising a service which is as much a 'calling' as anything else. And, further, what place is left in the statutory framework for self-advocacy?

If I have one regret about the book (other than the sometimes slightly frustrating use of academic paraphernalia which on occasion detracts from the clarity of the insights) it is as to its timing. As the author makes clear, much of the ground work for the book was done from 2005 to 2011, and the balance of the work seems to have been done in the period leading up to 2015. It would have been fascinating to have had the author's perspectives on the relationship between the models of advocacy he seeks to promote and the demands of the CRPD, which has only really started to gain major significance and profile in England after the intellectual heavy lifting appears to have been done on this work. I would hope that he would be able to address this in any second edition of this work, as the models of advocacy he outlines are, on their face, profoundly aligned to the ethos underpinning the Convention, but come from very different starting places.

This is only a minor regret, however, and I put this book down both with a renewed respect for the work of statutory independent advocates and a set of questions for myself as to the place and purpose of advocacy in supporting the

exercise of legal capacity. As we seek to develop advocacy going forward I for one will regularly be returning to this work for inspiration.

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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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## 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](mailto:marketing@39essex.com).

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