MENTAL CAPACITY REPORT:
HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

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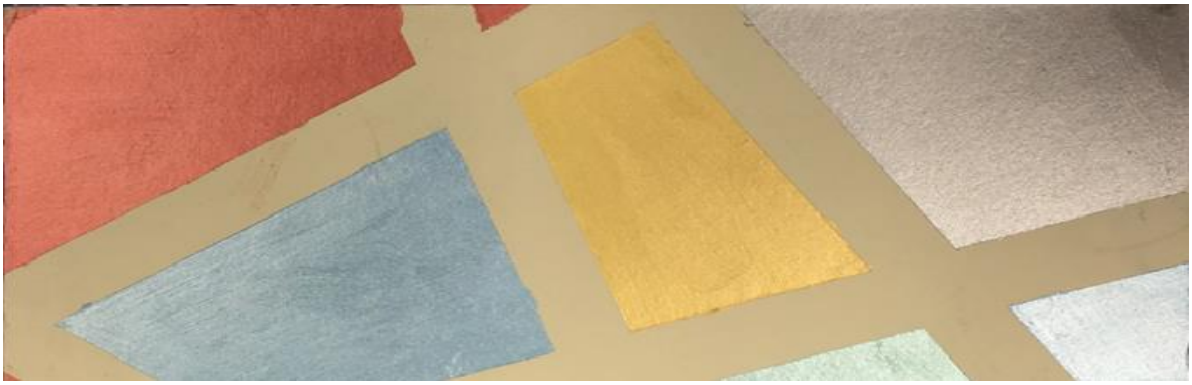

Welcome to the September 2019 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: fluctuating capacity, and two important decisions on the scope of the inherent jurisdiction at the border of the MCA 2005;

(2) In the Property and Affairs Report: appointing a charitable trust corporation as a deputy and donating/tax-planning in PVS;

(3) In the Practice and Procedure Report: procedure in medical treatment cases; disclosure from proceedings to the police; and an update from relevant associations

(4) In the Wider Context Report: guidance on advance decisions and covert medication; alcohol, capacity and vulnerability; the FCA and vulnerable customers;

(5) In the Scotland Report: the Scott Review terms of reference; guardianship and (the failure of?) legal representation; and the apparent downgrading of the Mental Health Tribunal for Scotland.

You can find all our past issues, our case summaries, and more on our dedicated sub-site here. If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the Small Places website run by Lucy Series of Cardiff University.

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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.

Contents

Fluctuating capacity – micro- vs macro-decisions

Royal Borough of Greenwich v CDM [2019] EWCOP 32 (Newton J)

Mental capacity – assessing capacity – care – medical treatment

Summary[1]

CDM was a 64 year old woman with a range of diagnosed personality disorders and physical health problems who was deprived of her liberty against her wishes in a care home. She was found by the court to have capacity to decide where to live and to make various other decisions, but to have fluctuating capacity with regard to the management of her diabetes. Readers may recall that CDM's case went to the Court of Appeal at the end of 2018 on the question of fluctuating capacity, but in light of fresh medical evidence the Court of Appeal decided that the matter needed to be dealt with fully by a first instance judge. This judgment is the decision of Newton J, in which the initial decision that CDM's capacity to manage her diabetes fluctuated as a result of her personality disorder, was more fully considered, with the benefit of additional expert evidence.

Newton J summarised the issues before him as follows:

> *1. Whether the assessment of capacity to make decisions about diabetic management or "the matter" in relation to which CDM is being assessed is one macro-decision which encompasses all of the many micro-decisions that CDM is required to make when managing her diabetes, or, whether CDM's capacity should be assessed in respect of each micro-decision or group of micro-decisions.*
>
> *2. In the light of that determination, whether the presumption that CDM has capacity to make decisions about her diabetes has been rebutted, and if so on what basis.*
>
> *3. If I conclude that as a matter of fact CDM's capacity to make decisions about any aspect of her diabetes management fluctuates, what preparations the court can and should make to reflect that finding.*

[1] Both Katie and Alex having been involved with this case, this summary has been prepared by Tor.

The court heard long and complex evidence about CDM's capacity. In short, the two experts instructed (one a psychiatrist and one a psychologist) agreed that the management of CDM's diabetes had to be viewed at a macro level, or as a group of micro-decisions, because the decisions had to be consistent and coherent with each other over time, and because decisions at one time would be affected by decisions taken earlier. CDM did not understand that she was at risk of death when her insulin levels were very poorly controlled, and her emotional dysregulation as a result of her personality disorders was frequent, and affected her ability to retain and to weigh information. The conclusion of Dr Beck, the expert psychologist, was that:

> *There may be some times when CDM makes a decision in relation to the management of her diabetes where she understands the elements of the decisions being made, retains the information, weighs it up without the defect of a dysregulated emotional state, and communicates this effectively. However, these times, if they occur, are infrequent and unpredictable. If this is fluctuating capacity, then CDM has fluctuating capacity to manage her diabetes.*

The Official Solicitor (on behalf of CDM) sought to argue that the diabetes management decisions should not be treated as one decision, as otherwise CDM would have her capacitous micro-decisions overridden. The Official Solicitor proposed that:

> *the appropriate way of "defining the matter", when assessing diabetic management, is not to accept the macro or micro-decision approach, but to group them together and consider whether CDM has the capacity:*
>
> *1. To make decisions about controlling her diabetes and diet.*
>
> *2. To make decisions about treatment for her diabetes, which is in turn subdivided into three separate decisions:*
>
> > *a. The capacity to make decisions about testing and the blood sugar at right glucose levels, which encompasses submissions about weighing and testing blood glucose levels.*
> >
> > *b. The capacity to make decisions about treatment being offered for her diabetes but falling short of life-saving treatment. Treatment by insulin as required. And,*
> >
> > *c. The capacity to make decisions about life-saving treatment for diabetes, which will include, in some cases, taking insulin or admitting herself and taking her to hospital.*

Newton J rejected this analysis, holding that:

> *a) on the assessment of capacity to make decisions about diabetes management, in all its health consequences, the matter is a global decision, arising from the inter dependence of diet; testing her blood glucose and ketone levels; administration of insulin; and, admission to hospital when necessary in the light of blood glucose levels. And*
>
> *b) that CDM lacks the capacity to make those decisions, and having regard to the enduring nature of her personality*

> *disorder which is lifelong and therefore unlikely to change.*

Newton J:

> *acknowledge*[d]*, as do the experts, that there may be occasions when CDM has the capacity to make micro-decisions in respect of her diabetes and occasions when she does not, i.e. that her capacity does in fact fluctuate. However, if the court accepts the expert's opinions, as I do, and approaches the matter on the basis of their conclusions, logically, legally and practically, it is a macro-decision, and CDM lacks capacity to take the macro-decision, the issue of fluctuating capacity simply does not arise.*

More broadly, Newton J did not think it:

> *necessary or helpful to draw inferences or parallels on examples of other conditions or other classes of individuals, since the interrelationship between the micro and macro-decisions still needs to be decided, having regard to a particular individual in particular circumstances, and having regard to their particular condition. No two people self-evidently are ever the same, their condition the same condition, or the circumstances the same. The elements in relation to CDM's own particular conditions are unique to her. CDM has diabetes which is not unique to her, being shared with many other millions of people in the United Kingdom, but as an individual the factors are unique.*

Comment

After a long route through the courts and a substantial volume of evidence, the conclusion for CDM was that she lacked capacity to manage her diabetes, viewed on a global basis, even though there would be times (which could easily be identified) when she could make individual decisions about aspects of the management of her condition with capacity.

This case could be contrasted with that of *United Lincolnshire Hospital NHS Trust v CD* [2019] EWCOP 24, in which Francis J held that where the circumstances under which the woman in question would lack capacity to make decisions about birth arrangements were sufficiently clear that it was possible to make a 'contingent' declaration about what could then happen in her best interests at that point. In this case, however, Newton J noted that:

> *during the course of evidence, Dr Beck was asked for more guidance as to the signs when CDM becomes emotionally dysregulated and whether she has lost capacity in respect to either of the micro-decisions but, Dr Beck was simply unable to do so, because it was impossible to do so.*

In CDM's case, therefore, every action in relation to the management of her diabetes would fall to be considered by reference to her best interests, taking into account, of course, her wishes and feelings.

On the facts of the case before Newton J, the practical benefits of taking this global approach were obvious – clarity about the ability to intervene to provide treatment to CDM to prevent her from becoming seriously ill, or to ensure that she was admitted to hospital when her condition is so serious that she might die.

However, as Newton J identified, the decision was highly fact-specific; it is also unlikely to be capable of easy application to other scenarios.

The limits of the inherent jurisdiction (1)

Wakefield MDC and Wakefield CCG v DN and MN [2019] EWHC 2306 (Fam) (Cobb J)

Inherent jurisdiction – mental capacity – deprivation of liberty

Summary[2]

DN was a 25 year old man described as having a severe form of autism, a general anxiety disorder and traits of emotionally unstable personality disorder. He was '*not significantly intellectually impaired*' and was '*capable of clear thinking*'. He had previously been detained under s.3 MHA 1983 and received s.117 aftercare. He was vulnerable to exploitation, and liable to have 'meltdowns', during which he would lose the capacity to manage his behaviour and make considered decisions.

DN had been convicted of a range of public order offences, and sentenced to a community order with a 2 year mental health treatment requirement under s.207 of the Criminal Justice Act 2003, and had then committed further offences. As part of that order he was required to live at a supported living placement. Other elements of his care plan meant that the objective element of a deprivation of liberty was satisfied. The statutory bodies took the view that DN could not give free and meaningful consent to the confinement, and since the CJA does not contain any power to deprive a person of their liberty, sought an order authorising the deprivation of liberty from the High Court under the inherent jurisdiction. The MCA 2005 was not relied on because it was accepted that DN did not lack capacity – the position of the statutory bodies was that he was a vulnerable adult in the *Re SA/Re DL* sense. It appears that by the time of the hearing, the statutory bodies had accepted that the court could not authorise DN's deprivation of liberty but still sought the court's authorisation of the interference in his Article 8 rights caused by the arrangements for his care.

Cobb J held that DN was not a person of unsound mind nor a 'vulnerable adult'. He was able to give genuine consent to the arrangements for his care, even though the choice he was faced with was stark – if he did not consent, the criminal court may say that he would have to serve his sentence in prison. Despite concluding that DN was not of unsound mind, the court accepted that at times when DN was having a 'meltdown' he would lack capacity under the MCA 2005 and his deprivation of liberty could be authorised in advance by the court, presumably on the basis that at these limited times he would be a person of unsound mind by reason of his temporary lack of capacity.

Cobb J took the view that the inherent jurisdiction was a potentially arbitrary mechanism for authorising a deprivation of liberty, and that there were '*strong judicial dicta*' that it should primarily be used as a facilitative rather than a dictatorial jurisdiction. Differing from the judgment in *Hertfordshire County Council v AB* [2018] EWHC 3103 (Fam), Cobb J

[2] Neil having been involved in the case, he has not contributed to this summary.

concluded that the inherent jurisdiction should not be used to deprive a capacitous person of their liberty. The net result was that the restrictions in place for DN would have to be reduced as there was no lawful basis on which he could be deprived of his liberty.

Comment

There have been a number of decisions in recent times about young people and adults and the use of the inherent jurisdiction to authorise deprivations of liberty where there is no statutory framework in place. It is clear from this judgment that different judges have different views about the appropriateness of relying on the inherent jurisdiction in such circumstances, as a matter of principle, and different interpretations of the Court of Appeal's decision in *Re DL*. It seems likely that at some stage, the appeal courts will have to decide whether the inherent jurisdiction does extend to the deprivation of liberty of a capacitous person, or a vulnerable adult, and if so, in what circumstances.

The limits of the inherent jurisdiction (2)

Redcar and Cleveland BC v PR and others [2019] EWHC 2305 (Fam) (Cobb J)

Summary[3]

In this case, Cobb J was concerned with a 32 year old woman who had recently been affected by mental health problems which had resulted in admission to hospital as a voluntary patient. During her admission she made allegations against one of her parents and was extremely anxious about returning to live with them (to the point of threatening to take her own life). When she was ready to be discharged, the local authority considered that it was required to safeguard her by applying to the High Court for orders under the inherent jurisdiction preventing PR from returning to live with her parents. Interim orders were granted, initially without notice, and were kept in place for around 4 weeks. Ultimately, PR decided she did not want to return to live with her parents, and they in turn agreed to have limited contact with her and not to try to persuade her to return home, and the inherent jurisdiction orders were discharged. The issues for Cobb J were whether the interim orders should have been made, and whether there was a proper basis for withholding disclosure of certain information from PR's parents.

Cobb J found that:

1. The interim orders should not have included an injunction against PR herself (restraining her from going to live with her parents) as the evidence was that she was sufficiently unwell that she would not have been able to make an informed decision whether to comply with the order, and it would not have been appropriate for any enforcement action to be taken if she had chosen to return home. Cobb J recommended that

> *'before a local authority makes an application under the court's inherent jurisdiction which is designed to regulate the conduct of the subject by way of injunction, particularly where mental illness or vulnerability is an issue, it should be*

[3] Alex having been involved in this case, he has not contributed to this summary.

able to demonstrate (and support with evidence) that it has appropriately considered:

i) whether X is likely to understand the purpose of the injunction;
ii) will receive knowledge of the injunction; and
iii) will appreciate the effect of breach of that injunction.
If the answer to any of these questions is in the negative, the injunction is likely to be ineffectual, and should not be applied for or granted as no consequences can truly flow from the breach.'

2. PR should have been given permission in the initial without notice order to apply to the court to vary or discharge the order without requiring notice to be given, to ensure her access to justice was not impeded.

3. It was, however, proper for the judge who had made the interim orders against PR's parents to invoke the inherent jurisdiction on an interim basis. The other statutory provisions which could potentially have been invoked (such a non-molestation orders, an order under the Serious Crime Act 2015 section 76 which creates a criminal offence of controlling or coercive behaviour where A and B live together and "are members of the same family", or the Protection from Harassment Act 1997) would not have offered PR sufficient protection and would have required her active co-operation which would have been difficult given her mental health problems and her susceptibility to coercion and control.

4. PR had not been deprived of her liberty. She had been content to move to the placement identified by the local authority on discharge from hospital. Even if the inherent jurisdiction could be used to deprive a capacitous person of their liberty as an emergency measure, such authorisation would only last a short time – probably not more than 6 weeks having regard to the decision in *Winterwerp v Netherlands*.

5. The question of whether documents should have been disclosed to the parents did not have to be determined as there was to be no further involvement of the court, but even though PR had not chosen to issue proceedings and was sufficiently anxious about disclosure to her parents that it was affecting her willingness to participate in therapeutic activities, the parents would have had '*a powerful case…to see relevant documents in order to able to participate effectively and fairly in the proceedings so far as they relate to them.*'

Comment

This judgment will provide some reassurance to statutory bodies faced with difficult and urgent situations concerning safeguarding people with capacity that the courts will exercise their powers, at least on a temporary basis, to assist in protecting vulnerable adults. In PR's case, temporary court orders were all that were needed to prevent PR returning home and to support her to move to alternative accommodation. Had PR subsequently decided she wished to return home, it is much less clear whether the court would have found a way to stop that from happening, given Cobb J's view

that the inherent jurisdiction ought not to be used to deprive capacitous people of their liberty.

Medical decision-making and the law

Tor recently gave a talk at Green Templeton College, Oxford University, on medical decision-making and the law, as part of the Sheila Kitzinger programme. A summary of her talk, and a full recording of it, can be found here.

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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 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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Conferences

Conferences at which editors/contributors are speaking

Liberty Protection Safeguards: Implementation of the Mental Capacity (Amendment) Act 2019

Alex is chairing and speaking at a conference about the LPS on Monday 23 September in London, alongside speakers including Tim Spencer-Lane. The conference is also be held on 5 December in Manchester. For more information and to book, see here.

Clinically Assisted Nutrition and Hydration Supporting Decision Making: Ensuring Best Practice

Alex is speaking at a conference about this, focusing on the application of the BMA/RCP guidance, in London on 14 October. For more information and to book, see here.

Taking Stock

Neil is giving the keynote speech at the annual national conference on 15 November jointly promoted by the Approved Mental Health Professionals Association (North West England and North Wales) and the University of Manchester. For more information, and to book, 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 the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next edition will be out in October. 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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