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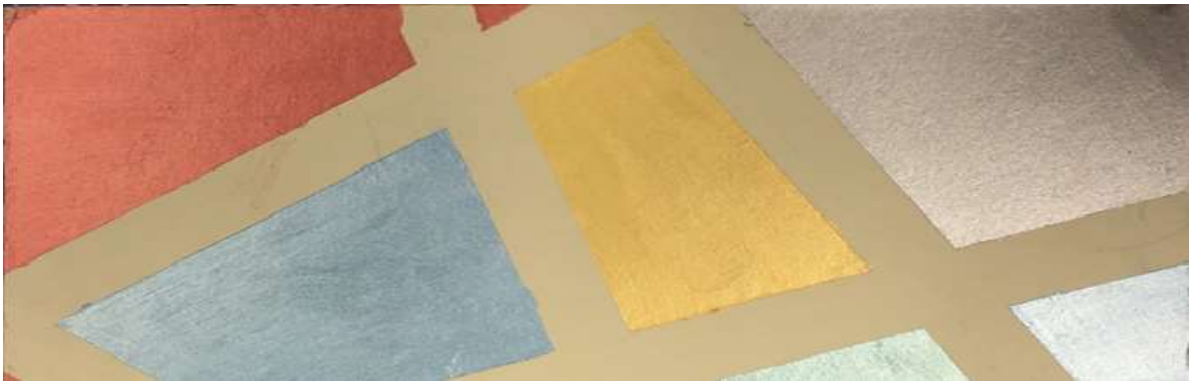

Welcome to the February 2021 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: vaccination; interim authority to treat pending a final order, and a further LPS impact assessment;

(2) In the Property and Affairs Report: guidance following *ACC* for professional deputies;

(3) In the Practice and Procedure Report: a checklist for international relocation, covert treatment and the courts, and recording of court proceedings;

(4) In the Wider Context Report: decision-making and 16/17 year olds, FAQs following the *Devon* judgment on personal assessment, spotting coercion and control and the BIHR's resources for service providers;

(5) In the Scotland Report: further developments relating to the Scott review, including an update from the Chair, and Scottish consideration of relocation.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also find updated versions of both our capacity and best interests guides. We have taken a deliberate decision not to cover all the host of COVID-19 related matters that might have a tangential impact upon mental capacity in the Report. Chambers has created a dedicated COVID-19 page with resources, seminars, and more, here; Alex maintains a resources page for MCA and COVID-19 here, and Neil a page 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.

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HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

Vaccination and the Court of Protection

E (Vaccine) [2021] EWCOP 7 (Hayden J)

Best interests – medical treatment

The Vice-President of the Court of Protection, Hayden J, has given the first reported judgment on capacity and best interests in relation to the COVID-19 vaccine. Whilst the judgment is fact-specific, it gives some clear and important reminders of the approach to be taken to this question (see also in this regard our vaccination

guide).

The issue arose in the context of ongoing proceedings concerning the residence and care arrangements for an 80 year old woman, E. E was resident at the time in a care home in which there had been a number of cases of COVID-19. On 8 January 2021, the local authority informed her Accredited Legal Representative (i.e. the lawyer acting for her in the proceedings) that she was to be offered the vaccination on 11 January 2021. Her son objected to this, and her representatives made an urgent application for a declaration that it would be in her best interests to receive the vaccine at the next possible date (the slot on 11 January being missed in consequence of the son's objection).

Capacity

In relation to the question of Mrs E's capacity, Hayden J was directed to an attendance note of a video conversation between Mrs E, her ALR and her GP. It is worth setting out the relevant paragraph (10) of the judgment in full as to what the attendance note said:

> *During the call, Dr Wade, who is based at the surgery where Mrs E receives medical treatment, asked Mrs E if she remembered Dr Wade explaining that there was a dangerous sickness called coronavirus. Mrs E replied that she did not. Dr Wade then asked her whether she remembered an earlier visit made by her and her colleague, Dr F, when they came to the care home to deliver injections to protect her against the virus. Mrs E did not reply. Dr Wade asked Mrs E whether she wanted the injection, to which Mrs E replied "Whatever is best for me. What do I have to do?". She was reassured by Dr Wade that she did not have to do anything at the moment, and that Dr Wade only wanted to know what Mrs E wanted. Mrs E repeated that she wanted "whatever is best for me". The conclusion of Dr Wade (which was not, in her assessment, in any way delicately balanced) is that Mrs E does not have the capacity to determine whether she should receive the Covid-19 vaccine offered to her.*

Hayden J acknowledged the informality of the assessment, but was nonetheless satisfied that it was sufficiently rigorous, concluding that she was (1) unable to understand information concerning the existence of the Covid-19 virus and the potential danger it posed to her health; (2) unable to weigh information relating to any advantages or disadvantages of receiving the vaccine; and (3) could not retain information long enough to use it to make a decision, and that this was because of her dementia.

Of wider note is Hayden J's observation at paragraph 11 that:

> *Evaluating capacity on this single and entirely fact specific issue is unlikely to be a complex or overly sophisticated process when undertaken, for example, by experienced GPs and with the assistance of family members or care staff who know P well.*

At paragraph 12, Hayden J recognised that assessment in the context of the pandemic and in relation to those in a care home posed an "challenge of unprecedented dimensions," but took the view that Dr Wade "*got the balance entirely right. Her enquiries respected Mrs E's autonomy and delicately assessed her range of understanding.*"

Best interests

Hayden J directed himself first by reference to s.4(6), requiring him to consider, so far as is reasonably ascertainable, her past and present wishes and feelings, the beliefs and values that would be likely to influence her decision if she had capacity, and any other factors she would be likely to take into account if she were able to do so. He noted at paragraph 13 that:

> *Mrs E had, prior to her diagnosis of dementia, willingly received the influenza vaccine and is also recorded as receiving a vaccination for swine flu in 2009. I consider the fact that, when she had capacity, Mrs E chose to be vaccinated in line with public health advice, to be relevant to my assessment of what she would choose in relation to receiving the Covid-19 vaccine today.*

He also noted that, whilst she lacked capacity to consent to receiving it, she had "articulated a degree of trust in the views of the health professionals who care for her by saying to Dr Wade that she wanted '*whatever is best for me*'. Hayden J considered that it was important to emphasise this statement "*particularly as it has been repeated. This is to respect Mrs E's autonomy, which is not eclipsed by her dementia. Moreover, her straightforward and uncomplicated approach resonates with the trust that she has placed in the medical profession in the course of her life, illustrated by her earlier reaction to vaccination.*"

Her son, whose views had to be considered by virtue of s.4(7), was "*deeply sceptical about the efficacy of the vaccine, the speed at which it was authorised, whether it has been adequately tested on the cohort to which his mother belongs, and, importantly, whether his mother's true wishes and feelings have been canvassed. He also queries whether the tests have properly incorporated issues relating to ethnicity*" (paragraph 15 – her ethnicity is not disclosed in the judgment). It is perhaps important to note that W told the court that he did not object to the vaccination in principle: he just did not consider that now was the right time for his mother to receive it.

At paragraph 15, Hayden J made clear that he respected W's right to his own views, but that:

> they strike me as a facet of his own temperament and personality and not reflective of his mother's more placid and sociable character. It is Mrs E's approach to life that I am considering here and not her son's. Mrs E remains, as she must do, securely in the centre of this process.

More broadly, Hayden J recongnised that:

> *17. […] the world faces the challenge of an alarming and insidious virus. Nobody can possibly have missed the well-publicised and statistically established vulnerability of the elderly living in care homes. I have had many occasions to confront it, in the Court of Protection, over the course of the pandemic. For the avoidance of doubt and though no epidemiological evidence has been presented, I take judicial note of the particularly high risk of serious illness and death to the elderly living in care homes. In stark terms the balance Mrs E, aged 80, must confront is between a real risk to her life and the unidentified possibility of an adverse reaction to the virus. This risk matrix is not, to my mind, a delicately balanced one. It does not involve weighing a small risk against a very serious consequence. On the contrary, there is for Mrs E and many in*

> *her circumstances a real and significant risk to her health and safety were she not to have the vaccine administered to her.*
> (emphasis added)

At paragraph 18, Hayden J identified the following characteristics which compounded Mrs E's vulnerability to becoming seriously ill with, or die from, Covid-19: (1) she was in her eighties; (2) she was living in a care home; (3) the care home in which she lives had confirmed recent positive cases of Covid-19; (4) she had been diagnosed with Type II diabetes; and (5) she lacked the capacity to understand the nature or transmission of Covid-19 and was "inevitably challenged, as so many living with dementia in care homes are, by the rigours of compliance with social distancing restrictions." In the circumstances, his conclusion is perhaps not a surprise:

> *19 It is a fact that Mrs E lives in a country which has one of the highest death rates per capita, due to Covid-19, in the world. By virtue of her vulnerabilities, the prospects for her if she contracts the virus are not propitious; it is a risk of death, and it is required to be confronted as such. The vaccination reduces that risk dramatically and I have no hesitation in concluding that it is in her best interests to receive it. Accordingly, I make the declaration, sought by Mrs E's representatives, pursuant to section 15 MCA 2005. I would add that, in the light of the Covid-19 outbreak at the home, I consider that Mrs E should receive the vaccine as soon as practically possible. I have delivered an ex tempore judgment on this application in order to avoid any further delay.*

Comment

It is important to note that this judgment is fact-specific, although more broadly relevant are: (1) the observations about the nature of the consideration of capacity; and (2) the approach to best interests (in particular the focus on the person, rather than on the views of their family/others interested in their welfare, save insofar as those views shed light on the person's likely decision). It undoubtedly helped in this case that Hayden J had what on the face of the judgment appeared to be reliable evidence to help make clear that this was a situation in which it was likely that, had Mrs E had capacity to make the decision, she would have consented to the vaccination. To that end, the judgment reinforces the importance of ensuring – as clearly had taken place here – that the process of considering capacity and (where required) best interests takes place in advance of the proposed vaccination so that there can be as little doubt as possible as to what on an individual basis is the right decision to take.

Finally, it should be noted that even if W had been granted Lasting Power of Attorney by his mother to make decisions in relation to her health and welfare (which it is clear from the judgment he could not have been), what would no doubt have been his refusal on her behalf to agree to the vaccination would not necessarily have been the end of the story. If discussion with him – in particular discussion aimed at ensuring that he understood that his role was to consider what decision she would have taken, not what decision he wanted to take – did not resolve the position, those involved would have had to consider whether to take the matter to the Court of Protection. At that point, the Court of Protection would have had to make the decision on her behalf – taking due account of W's views

(and the weight to be given to the fact that she had trusted him with decision-making in relation to health and welfare), but proceeding ultimately by what was in her best interests.

Getting the stages of the capacity test in the right order (and where rights, will and preferences do not pull in the same direction)

Pennine Acute Hospitals NHS Trust v TM [2021] EWCOP 8 (Hayden J)

Best interests – medical treatment

In this case, Hayden J considered an urgent application made by the Pennine Acute Hospitals NHS Trust in respect of a male patient, TM. It was not possible to be entirely accurate about TM's age, but he was thought to be 42, and was believed to come from Zimbabwe. The applicant Trust was seeking to perform a bilateral below-knee amputation upon TM, without which his treating clinicians believed he would develop sepsis and suffer life-threatening renal and cardiac failure very soon. TM strongly objects to the proposed surgery and treatment, and says he believed that his condition would improve without it.

In the course of his judgment Hayden J observed, as he has on previous occasions, that "[o]*ne of the surprising developments following the Court's move to video conferencing platforms during the pandemic is that it has become much easier for judges to visit the protected party*." With the agreement of the parties, he met remotely with TM, and observed him on the ward with one of his doctors; his short meeting confirmed everything that his treating consultant understood, namely that he was not man who wished to die; rather, he was a man who had consistently maintained, and Hayden J considered genuinely to believe that he would get better without treatment. Unfortunately, however, "*that possibility is entirely irreconcilable with the medical evidence*" (paragraph 25).

In relation to TM's capacity, Hayden J emphasised that it is the ability of the person to take the decision, not the outcome of the decision which is the focus, and that "[t]*his cornerstone of the court's assessment of a person's capacity to make a decision for him or herself remains equally applicable where the outcome of the person's decision is an untimely and unpleasant death*" (paragraph 29). Somewhat tantalising, as he did not develop this line of reasoning more, Hayden J went on to say in the next paragraph "[h]*owever, it does not follow that the outcome of a decision is wholly irrelevant to the court's assessment of capacity where a person's ability to understand and weigh the consequences of a decision is in contention*."

The Official Solicitor initially agreed with the Trust that KM lacked capacity to decide upon the amputation, but then contended that the Trust had failed to adduce sufficient evidence to displace the presumption. Counsel for the Official Solicitor emphasised that:

> *32.* […] *on each occasion that TM has been asked about amputation and treatment, he has declined it. He has consistently refused the procedure. But what is significant to my mind is the fact that, equally consistently, he has been unable to acknowledge the consequences of refusing treatment. Indeed, it is plain to me that he does not take on board those consequences or understand them; he simply insists that,*

> *in fact, he will get better without further treatment. This puts TM in a fundamentally different position from a patient who, having understood that refusing treatment would very likely lead to their death, nevertheless considers this preferable to the consequences of receiving the treatment.*
>
> *Such an approach strikes me as inconsistent with the philosophy of the MCA 2005. What is clear, on the evidence, is that the Trust has established an impairment of mind or brain and that has, in light of the consequences I have identified, rebutted the presumption of capacity.*

On the evidence before him Hayden J found that TM's treating consultant was correct to conclude that TM lacked the ability to understand and weigh the information necessary to consent to the amputation because he genuinely and honestly believed that he would get better without medical intervention.

Of no little interest is the fact that the Official Solicitor also submitted that TM should be found to have capacity because the Trust had not demonstrated on the balance of probabilities that TM's inability to contemplate the consequences of refusing treatment was because of an impairment or disturbance in the functioning of his mind or brain. A number of reasons had been advanced by his treating consultant, and Hayden J considered at paragraph 37 that it was

> […] *clear therefore that there are a number of identified pathologies which separately or in combination are likely to explain the disturbance or functioning in TM's mind or brain. It might well have been possible to be more precise if TM had been able to cooperate with the MRI scan. It is a misunderstanding of section 3 MCA 2005 to read it as requiring the identification of a precise causal link when there are various, entirely viable causes. Insistence on identifying the precise pathology as necessary to establish the causal link is misconceived.*

As to best interests, Hayden J noted that there "*would in some circumstances be force*" in the Official Solicitor's submission that TM's resistance had been so consistently expressed that his wishes should be respect notwithstanding his lack of capacity, and that in *WA* and *MSP* he had taken that approach. However, Hayden J considered that in both of those cases that it was significant that in his analysis the person concerned recognised that refusal of treatment would lead to certain death. By contrast, TM did not recognise this "[a]*s I have been at pains to emphasise, the life force beats very strongly within him. TM wants to live. He has an entirely misguided belief that he will recover without any treatment. The pervasiveness of this misguided belief contracts and substantially diminishes the weight that might, in other circumstances, properly be given to consistently expressed wishes*" (paragraph 39). He also found that neither of the possible other arguments against treatment advanced by the Official Solicitor (a likely lack of support following the amputation given his social isolation and the length of time TM would need to spend in hospital following the operation) carried weight. He agreed with Counsel for the Official Solicitor that "*a bilateral amputation for a relatively young man of around forty-two, and who has enjoyed sports, is a profoundly traumatic prospect. I can understand that some individuals may not feel they have the fortitude to cope with such a disability and may*

choose not to. This would be their choice and the Court would respect it. I can find no cogent evidence that this reflects TM's thinking. For the reasons I have set out above, I do not consider it does." Although Hayden J did not, in fact, expressly reach this conclusion, it is clear that he found that the procedure would be in TM's best interests.

Comment

In relation to capacity, this is a good opportunity to remind people that the Code of Practice is wrong when it talks of a two stage test, starting with a diagnostic element. Rather, the law requires, as Hayden J followed here (and the Code of Practice should in due course reflect when it is updated), an analysis starting with the question of whether the person is able to make the decision (i.e. understand, retain, use and weigh the information relevant to the decision, and to communicate that decision). It is only if they cannot do so – having been given all practicable support – that the question arises of why they cannot do so, which then leads to the analysis of whether that inability is because of an impairment or disturbance in the functioning of the mind or brain (incapacity for purposes of the MCA 2005) or because of some other factor (potentially a situation to be considered by the High Court under its inherent jurisdiction in relation to vulnerable adults). This decision is useful for highlighting that if there are multiple potential impairments in play, the fact that it is not possible to pinpoint exactly which one is causing the functional inability does not mean that the test for incapacity cannot be satisfied. For further guidance as to assessing and recording capacity determinations, see further our guidance note.

In relation to the decision as to TM's best interests this might, yet again, be thought to be in a situation which brings to life the realities of the duty under Article 12 UNCRPD to "respect the rights, will and preferences" of the individual in circumstances where they do not all pull in the same direction. To act upon TM's very clear preference – not to have the procedure – would have been to fail to respect both his will (to live) and his rights (including his positive right to life under Articles 2 ECHR and 10 CRPD, which would clearly have been breached had those involved simply acted upon his 'no' in the circumstances).

Deprivation of liberty, family members and what s4B does (and doesn't) say

Re AEL [2021] EWCOP 9 (SJ Hilder)

Article 5 ECHR – deprivation of liberty

In this case, SJ Hilder considered very strong objections levelled by a family member to the idea that they were depriving their adult child of their liberty. She also helpfully clarified the current (limited) scope of s.4B MCA 2005.

AEL was a 31 year old woman with diagnosis of Trisomy 4p syndrome, a rare chromosomal condition leading to a number of physical and mental disabilities. She had severe learning disability, significant visual impairment and profound deafness. She suffered from asthma, eczema and severe allergies. She was non-verbal and could only walk short distances. She did not have a regular sleep pattern. At times, she behaved in a way which caused herself injury. From a young age AEL she had attended a specialist school, latterly living in a residential unit under the school's management. When that

placement closed in July 2015, after a few months in an alternative placement, she returned to live in the family home with her parents. Since 2016 a care package had been funded by direct payments.

The local authority, LB Hillingdon, assessed AEL as needing 24-hour care and supervision, with 2:1 support for some activities in the community. In addition to her parents, two private carers were consistently involved in AEL's care for some time. She did not require sedation or restraint, and no assistive technology is used in her care arrangements. If the current level of care was not provided, the local authority considered that AEL would be a danger to herself and others because she had no concept of road safety, was unable to alert others to her needs, and was unable to manage her own nourishment or hygiene.

In light of the arrangements for AEL, to which it appeared to be clear that she could not consent, LB Hillingdon, had applied for a so-called community DoL order; at an attended hearing in 2017, the parties agreed, and the court declared that "in so far as AEL's care arrangements amounted to a deprivation of her liberty," such was authorised by the court." This was a compromise to avoid unnecessary litigation but also ensure appropriate oversight of AEL's circumstances. Unfortunately, that compromise led to extended disagreement at each review hearing as to whether or not the arrangements did, in fact, amount to a deprivation of her liberty. SJ Hilder identified that it was "everyone's ardent wish that further such proceedings can be avoided. The purpose of this judgment is therefore to determine the issue, for as long as AEL's current care arrangements subsist" (paragraph 3).

The hearing took place in the absence of AEL's father (the court being satisfied that he had chosen not to participate), but on the basis of a very clear understanding as to his position, namely that it was "*obvious to him that AEL 'is not the subject of 'continuous control'…* […]*, given that his approach to his daughter's care is founded on "the principle" that 'AEL decides what she wants to do and when she wants to do it excepting if her safety could be compromised*" (paragraph 21). JSL, who represented himself, considered that the exception to giving effect to AEL's wishes if her safety could be compromised was "*allowed by the Mental Capacity Act 2005 and as such not considered a deprivation of liberty*," Senior Judge Hilder noting that this appeared to be based upon his understanding of s.4B MCA 2005.

Seeking to persuade SJ Hilder that his daughter's circumstances did not amount to a deprivation of liberty, JSL relied upon three cases. SJ Hilder identified that "*there is limited usefulness in comparing facts of reported cases, since whether or not a deprivation of liberty exists is to be determined on the facts of each specific case and not by analogy. In any event, in my judgment, the three authorities on which JSL relies in truth do not assist him*" (paragraph 42). The three authorities were:

> *a. W City Council v. L [2015] EWCOP 20:*
>
> *Mrs. L continued to live in the home where she had lived before she lost capacity. Bodey J identified (at paragraph 8) the facts relied on for considering that her care arrangements amounted to a deprivation of Mrs L's liberty as that:*
>
> *(a) the garden gate is kept shut, thereby*

preventing or deterring her from leaving the property unless escorted;

(b) door sensors are activated at night, so that Mrs L could and would be escorted home if she left; and
(c) that there might be circumstances in an emergency, say if the sensors failed to operate at night, when the front door of the flat might have to be locked on its mortice lock, which Mrs L cannot operate (as distinct from the Yale lock, which she can). She would then be confined to her flat;

and noted (at paragraph 14) acceptance even by the applicant that there are periods of the day when Mrs L was left to her own devices. Carers' visits three times a day were described (at paragraph 26) as "the minimum necessary for her safety and wellbeing, being largely concerned to ensure that she is eating, taking liquids and coping generally in other respects." Bodey J concluded that the restrictions in place "are not continuous or complete. Mrs L has ample time to spend as she wishes."

Mrs. L's arrangements are markedly different to AEL's. There is no factual basis for contending that the same conclusions should also be drawn in respect of AEL.

b. Bournemouth BC v PS & DS [2015] EWCOP 39:

Mostyn J identified (at paragraph 14) that the subject of the proceedings, Ben, had some privacy, including periods of free unsupervised access to all parts of the bungalow where he lived and the garden; and (at paragraph 33) that "he is free to leave. Were he to do so his carers would seek to persuade him to return but such persuasion would not cross the line into coercion."

At paragraph 16 there is reference to a social worker acknowledging that "[i]f Ben was unescorted in the community it is highly likely he would walk out into the road…" and so he is escorted and "staff would intervene should he put himself at risk of significant harm." In the following paragraph Mostyn J noted that the social worker "accepted under cross-examination that such an act of humanity could not amount to a deprivation of liberty, and I emphatically agree." It may be that JSL is particularly focussed on this vignette.

However, care arrangements must be considered as a whole package. The "act of humanity" vignette in the context of the wider arrangements for Ben is clearly different to "the principle" which JSL says underlies AEL's care. The supervision and control of the activities which AEL is permitted to choose is more generalised than a response to immediate danger, as is seen clearly in JSL's account of the difficulties which the covid pandemic have brought for AEL. Again, there is no factual basis for contending that the Bournemouth BC v PS & DS conclusions should also be drawn in respect of AEL.

c. Rochdale MBC v. KW [2014] EWCOP 45:

The third case relied upon by JSL was a first instance decision of Mostyn J which was overturned by the Court of Appeal. The appeal was allowed by consent, with a statement of reasons attached to the approved order recording that

'The reason for inviting the Court of

> *Appeal to allow the appeal by consent is that the learned judge erred in law in holding that there was not a deprivation of liberty. He was bound by the decision of the Supreme Court in P (by his litigation friend the Official Solicitor) v Cheshire West and Chester Council and others [2014] UKSC 19, [2014] AC 986 ('Cheshire West') to the effect that a person is deprived of their liberty in circumstances in which they are placed by the State in a limited place from which they are not free to leave. It is accepted by both parties on facts which are agreed that this was the position in the case of KW.'*
>
> *In a subsequent judgment reported at [2015] EWCA Civ 1054, following Mostyn J's second consideration of the matter, the Court of Appeal confirmed (at paragraph 31) that the Supreme Court had settled the question of what amounts to deprivation of liberty and accordingly Mostyn J's analysis "was, and could be, of no legal effect. It was irrelevant."*

SJ Hilder found that it was clear that:

> *46. The law is now settled, and the facts of AEL's care arrangements are not in dispute. Viewed objectively, the key aspects of AEL's experience are that:*
>
> *a. she requires, and is given, 24-hour care and supervision - she is never "left to her own devices" but is accompanied by carers at all times; and*
>
> *b. although she is regularly given the opportunity to make choices, and carers generally strive to facilitate realisation of her choices, there is an acknowledged limit to AEL's ability to do what she wants – ultimately, all the activities she undertakes are risk assessed by AEL's parents and/or carers […] and "the principle" of such assessment is that they may decide not to allow her to do anything which they consider could compromise her safety.*

This meant, SJ Hilder, found that:

> *47. In my judgment, these two aspects of AEL's living arrangements clearly amount to "continuous supervision and control." Even if carers are available and willing to take AEL to McDonald's at whatever hour she wishes, she is not "free to leave" their care. The reality of her disabilities is that AEL's safety is permanently at risk unless she has support. Therefore, she has 24-hour support and she is thereby under continuous control in the sense that her freedom may be interfered with at any moment. The intention may be benevolent; the arrangements may indeed ensure that she has a much happier, healthier and longer life than she would otherwise have; but "a gilded cage is still a cage." The 'acid test' of deprivation of liberty is made out."*

SJ Hilder found that JSL was wrong in his understanding of the impact of s.4B MCA 2005. At paragraph 34, she had made clear that

> *It is important to understand that that sections 4A and B do not provide a general, unrestricted authority to deprive a person of their liberty if that is considered necessary to maintain their safety. The three "conditions" must be fulfilled before it applies. So, section 4A sets out the statutory basis of authorisation to deprive someone of their liberty; and section 4B permits deprivation of liberty wholly or partly consisting of limited acts*

> *for limited purposes whilst a decision is sought from the court*. (emphasis in the original)

This meant, she reiterated at paragraph 48, that s.4B could not be interpreted as a stand-alone provision as "unrestricted authority to deprive a person of freedom of action whenever a third party considers her safety is at risk."

SJ Hilder looked at AEL's circumstances in the round, with regard to the "underlying principle" of *Cheshire West* - what it means to be deprived of liberty must be the same for everyone. She noted that, "[a]*lthough I have not asked him, rhetorically I invite JSL to consider how he would categorise AEL's living arrangements and "the principle" if they were applied to him. I strongly suspect that he, and ordinary members of the public, would consider such arrangements to deprive them of their liberty*) (paragraph 49). Finally, and as Sir Mark Hedley had done in *A Local Authority v AB*, SJ Hilder had:

> *50.* […] *regard to the "policy" of Cheshire West. However benevolent AEL's carers, however much all relevant parties consider that the current arrangements for her care are in her best interests, AEL's disabilities make her vulnerable. If there is any room for doubt as to whether or not AEL's living arrangements are a deprivation of her liberty (which in my judgment there is not), as Baroness Hale identified, we should err on the side of caution. AEL should have the benefit of a periodic, independent check that arrangements continue to be in her best interests. Such requirement is not to stigmatise her or her loving family, but quite the opposite – to ensure recognition of her equal dignity and status as a human being.* (emphasis added)

Comment

On a procedural point, it is perhaps of some note that it is arguable that the court should not have made an order on the "in so far" basis in 2017 – the Court of Appeal in *Re KW* had had doubts about the wording in the then-template order ("*to the extent that the restrictions in place pursuant to the Care Plan amount to a deprivation of* [X's] liberty, such deprivation is hereby authorised"), because it left ambiguous what the court was holding. It said that it would be "*undoubtedly preferable*" to use the wording that "*P is deprived of liberty as a result of arrangements in the Care Plan and these are lawful*" (paragraph 18). It is clear, however, that the court was seeking to avoid unnecessary disagreements by the compromise wording used, even if, sadly, as so often is the case, it is clear in retrospect that grasping the nettle at the outset would have caused less pain all round.

More substantively this case, as with *AB*, is a clear indication that the courts (at least in those decisions which are reported) are loyally following the Supreme Court's policy in *Cheshire West*. This decision is of particular interest because SJ Hilder took on and carefully distinguished three cases sometimes relied upon to narrow the scope of that decision, and made clear that, in truth, they do not provide a sound basis to do so.

One real irony of this judgment, given the intense focus upon AEL's circumstances, is that the approach apparently mandated by the Supreme Court means that there is no attention paid to AEL's wishes and feelings in determining whether or not she is deprived of her liberty.

Those wishes and feelings were not ignored by the court, given that there was clear agreement that the arrangements for her were in her best interests. We might wonder, though, whether recognition of AEL's dignity and status as a human being might not lead us to allow those wishes and feelings to decide whether her will is being overborne (which is, at the end of the day, the conception of deprivation of liberty which the European Court of Human Rights appears to have).

Finally, the discussion of s.4B serves as a useful reminder of a health warning that has to be given about legislation.gov.uk. This otherwise wonderful website has the text of the MCA 2005 including those amendments introduced by the Mental Capacity (Amendment) Act 2019. What is – annoyingly – unclear from the version of the MCA on the legislation.gov.uk website is that these amendments are not yet in force. When those amendments come into force in 2022, s.4B will provide a standalone power to deprive someone of their liberty in an emergency (to provide life-saving treatment or prevent a serious deterioration in their condition). At present, though, s.4B is only relevant (in this context) where an application has been made to the Court of Protection.

Deprivation of liberty – paying the price

LB Haringey v Emile [2020] MHLO (CC) (County Court, HHJ Saggerson)

Summary[1]

This is a rare example of a contested determination of damages for deprivation of liberty in the context of DoLS. It arose out of a claim by the local authority for unpaid care home fees in respect of Ms Emile, who was placed in a care home by it in 2008 in the context of concerns about her welfare. The local authority took no steps to authorise the deprivation of liberty at that time or at the point when her placement was made permanent in 2010. She remained there until 2016 when she was moved to a nursing home, her condition having deteriorated; a DoLS authorisation was obtained at that point. Care home fees remained outstanding between 2013 and 2017. Ms Emile counterclaimed (by her litigation friend) for wrongful detention on the basis that, as she had lacked capacity to make decisions as to her residence, and the local authority required authority to take the steps which had done; as it had not sought that authority, it had no authority to detain her. Importantly, the local authority's argument in response was that, even if she had lacked capacity and been wrongfully detained, the failure to undertake the correct processes to authorise her detention was only a technical breach of the appropriate safeguards and protocols and proper authorisation would have inevitably followed had the local authority appreciated her lack of relevant capacity in 2008. The local authority contended, therefore, that this was a case for only nominal damages.

At first instance, the District Judge held that this was not a case for nominal damages. Whilst he allowed the local authority's claim for unpaid care home fees, he awarded Ms Emile the sum of £130,000 on the counterclaim for damages for unlawful detention for the entire period claimed plus a 10% uplift based on *Simmons v*

[1] Note, this case does not appear on Bailii. It comes via the Mental Health Law Online website, and we understand, in turn that it was provided by Leonie Hirst, Counsel for Ms Emile.

Castle, amounting to £143,000.00. The local authority appealed on the basis that (1) the District Judge was wrong to find that this was a case for nominal damages and (2) the award of damages was excessive (other grounds of appeal related to interest and costs, which are less relevant here).

On appeal HHJ Saggerson identified that it was clear that the District Judge had found that there were options short of (or other than) residential care, so the District Judge found, on the basis of the family's evidence that he accepted, that were not fully considered by the local authority. He decided that this all derived from the fact that the local authority thought that Ms Emile had capacity to make her own residential decisions rather than a conscientious consideration of less intrusive options including family options. HHJ Saggerson found that the District Judge was entitled to bear in mind that the personal reflections of Ms Emile tended to depend on who she was talking to as he was entitled to have in mind her historical preference not to be consigned to a care home.

This was the foundation of the District Judge's conclusion that this was not a case for nominal damages:

> *20.* […]. *He was plainly satisfied on the facts that care home 9 residence was not inevitable despite the Defendant's difficult and deteriorating condition and the complications presented by a struggling husband up to 2013. He was entitled so to conclude particularly as the burden of demonstrating that care home residence was inevitable (from whatever date) was on the local authority. The reality was that the Defendant's position was not reviewed at all between 2010 and 2016. The District Judge obviously considered this to be a further significant failure on the part of the local authority. So it was.*
>
> *21. The District Judge was entitled to conclude that the local authority's failure to comply with the Mental Capacity Act 2005 particularly with regard to the best interests provisions of Schedule A1 were substantial and causative of harm. He was entitled to conclude as he plainly did that the local authority had not proved that it was inevitable that the Defendant's care would have been the same had the statutory framework been properly deployed in 2008 or at any other time before August 2016 and that it was speculative to proceed on the basis of what the Court of Protection might or might not have done had a challenge been initiated. He was entitled to proceed on the basis that the local authority's failures were more than merely technical ones.*

Turning to the quantum of damages, HHJ Saggerson identified that the question of whether the award "so far off the wall or was based on inappropriate considerations such as to warrant reassessment" (paragraph 23). The Circuit Judge noted (at paragraph 24) that:

> *The District Judge did not apply a tariff. He did not award monthly damages and in doing so fail to taper the award. All he did was to try and maintain his bearings by a broad comparison with cases such as Neary with appropriate adjustments. He awarded a single lump sum covering a very long period of time, implicitly recognising that over such a long period of time there would be ebbs and flows with regard to the harmful impact on* [Ms Emile] *within that period.*

HHJ Saggerson held that it was:

> 24 *[…] impossible to criticise the District Judge for concluding that such a long period of time is likely to yield a significant sum of money in compensation once he had decided that it was not a nominal damages case. I do not consider that the "lump sum" approach is open to challenge in principle. I doubt that the District Judge considered that in adopting this approach there was any risk that others might crudely divide his total by 94 equal months in a forlorn attempt to find some sort precedent or benchmark.*

In an important passage, HHJ Saggerson observed at paragraph 25:

> *In assessing the damages the District Judge was entitled to bear in mind that for nearly 8 years the local authority had been unwittingly officious and had overridden properly formulated considerations of the Defendant's best interests and the potential this yielded for trespassing on her freedom of movement more than was essential in the light of family or other supported residential options that could have been considered short of consigning her to a care home. He was entitled to bear in mind that historically the Defendant had expressed a firm preference not to live in a residential home and that for 6 years the local authority had not properly reviewed the Defendant's status; neither had the position been properly reviewed after the death of her husband in 2013. Any award would also have to take into account, as did the District Judge, the fact that in her declining years the Defendant was unlawfully subject to routine direction by residential staff, had her daily life and visits subjected to a formal regime and contact with family subjected to official approval (however benign), or at least there was a greater degree of control than the family's evidence would have warranted. These are all real consequences of a confinement albeit falling short of being locked down or physically restrained.*

At paragraph 28, HHJ Saggerson observed that, if "[i]*f the submission was that the damages awarded were very generous; on the high side or even at the very top end of the permissible range for this sort of 'benign' confinement I would be inclined to agree*." But that was not the test on appeal, and the award was not so disproportionate to the harm suffered by Ms Emile. as to warrant its being set aside: "[t]*he District Judge was not only entitled, but obliged, to take into account the fact that as a result of the local authority's failures the Defendant's freedom was unlawfully compromised for the greater part of the last decade of her life where less intrusive options of accommodation and care should have been considered. The good intentions and benign motives of the local authority are scant consolation to the person deprived of their liberty*."

HHJ Saggerson made the important observation that comparison with personal injury damages (which the local authority sought to draw to identify that the damages award had been excessive) were necessarily inexact:

> *30.* […] *Comparisons with personal injury damages are only likely to be of some assistance in those cases where there has been short term incarceration where the shock element of the immediate loss of freedom is of particular importance and comparable to small personal injury*

> *claims for anxiety and distress. In addition the District Judge was entitled to bear in mind, as he obviously did, that limits on a citizen's freedom of movement in circumstances that are not lawful, warrant appropriately substantial damages.*

At paragraph 31, addressing an argument that many local authority readers may have in their minds, HHJ Saggerson identified that:

> *the fact that the local authority perceives itself to be beleaguered by what it may see as the shifting sands of guidance and continuing changes in emphasis regarding their legal obligations under 13 DoLS standards with significant impact on its resources, these factors do not disclose any error of law or principle on the part of the District Judge and are not grounds for reducing any damages awarded.*

Interestingly, the case was framed on the basis of unlawful detention – i.e. the common law tort. It was common ground, HHJ Saggerson identified, that "*Article 5 adds nothing in relation to the quantum of damages in the event that substantial damages are awarded. The point, therefore, does not fall for consideration in the present appeal*" (paragraph 34).

Comment

This case, coincidentally, came onto our radar at the same time as the LGO's decision into complaint against Cheshire East Council (19 010 786) where the local authority supervisory body failed to provide a DoLS authorisation for the first 11 months the complainant's father was in a care home. The Ombudsman found that the Council was at fault for not processing the (timely) DoLS authorisation applied for by the care home for 11 months, but that this fault "*did not cause Mr Y injustice. During the period of delay Mr Y was cared for in an appropriate environment and several best interest decisions confirmed it was in his best interests to stay at the Care Home, despite no DoLS authorisation being in place. I do not consider the fault caused Mr Y to lose the opportunity to be cared for at home or in a different care home*" (paragraph 50). However, the Ombudsman identified that:

> *56. As it seemed that the DoLS application for Mr Y may have been delayed significantly, I considered this might be a wider issue and that the Council's handling of DoLS applications may have caused injustice to other members of the public. I used our powers under Section 26D of the Local Government Act 1974 to look wider than just Mr X's complaint.*

Having obtained evidence from the Council about its triage policy for DoLS, the Ombudsman found that:

> *58. The Mental Capacity (Amendment) Act 2019 provides for the repeal of the DoLS and their replacement with a new system called the Liberty Protection Safeguards (LPS). The Act will not be implemented fully until 2022. Meanwhile, the current DoLS are the main legal protection available to vulnerable people deprived of their liberty in care home settings.*
>
> *59. Having such a backlog of DoLS applications awaiting assessment means the Council is at fault. For each case in the backlog, the Council is failing to comply with the Mental Capacity Act 2005 and DoLS Code of Practice. Without*

> *an authorisation in place, the people that are the subject of these applications are being unlawfully deprived of their liberty.*
>
> *60. Applying the process properly may not have changed the outcome for many of the people affected, other than confirming that it is in their best interests to be deprived of liberty. However, it is possible some of the people stuck in the backlog should never have been deprived of their liberty or there may have been less restrictive options available to meet their needs.*

The judgment in the *Emile* case is an important reminder that detention without authority carries both an emotional cost for the person and can carry a real financial cost for the body which is responsible for the arrangements. That body will not be the local authority supervisory body in a DoLS case, unless the local authority is also the body which has taken the steps in question to confine the person. Conversely, it could equally be a CCG arranging care which gives rise to a confinement of a person receiving CHC-funded care in a care or nursing home, or in their own home. In any such case, and in line with *Lumba* (in the Supreme Court) and *Bostridge* (in the Court of Appeal), and as the, the burden of proof will not lie with the person who has been detained to show that the actions/omissions of the public authority led to loss. Rather, the burden then lies with the public authority to establish that they made no difference. Otherwise, "*the result would be to transform the tort of false imprisonment from being one actionable without proof of damage into one in which the claimant, in a large number of cases, would have to prove loss*. [such an approach is] *incompatible with the approach of the Supreme Court in Lumba. If the* [public body] *wishes to say that a claimant would have been detained anyway, [they] must establish that proposition*" *R(EO & Ors) v SSHD [2013] EWHC 1236 (Admin)* per Burnett J at paragraph 74.

It should, finally, be noted that it is not in all cases that there will be a complete identity between a wrongful detention claim and a claim for breach of Article 5 ECHR. The two concepts are not identical, and there may be situations – in particular, those where (unlike here) the person is unaware that they are confined, and do not seek to express any desire to leave – where it may not be entirely easy to establish that they are falsely imprisoned at common law, even if for purposes of Article 5 ECHR they are clearly deprived of their liberty. It is entirely possible, therefore, that a self-funder in a private care home/hospital may well have no recourse against the care home/hospital which does not seek a DOLS. If they do not meet the rather tighter test for false imprisonment, they could not bring a claim for deprivation of liberty under the HRA 1998 against the care home/private hospital. As the Law Commission identified in its Mental Capacity and Deprivation of Liberty report, it is not obvious why this gap in protection is justified – its attempts to solve the gap by statutory means were not taken forward in the Mental Capacity (Amendment) Act 2019, so it will remain for the courts to craft a solution by (we suggest) bringing the common law concept of 'imprisonment' into alignment with the Article 5 concept of 'confinement'.

Capacity, sex and marriage

AMDC v AG and CI (No 2) [2021] EWCOP 5 (Poole J)

Mental capacity – contact – marriage – sexual

relations

Summary

These proceedings involve the development of a relationship between two care home residents. In light of the interim judgment, which we covered at [2020] EWCOP 58, the matter was adjourned for further capacity evidence. There being no dispute over the new expert's conclusions, the judge held that AG lacked capacity to make decisions about the conduct of litigation, residence, care, and property and affairs including termination of the tenancy for the following reasons:

> *14 … AG does not have insight into her own limitations, or her need for care and assistance. Her very simplistic belief is that since she was previously able to care for herself, find accommodation, and manage her affairs, she can do so in the future. She does not understand that she has dementia or that her cognitive functioning is impaired. Therefore, she expresses herself with confidence, even though her beliefs are patently ill-founded. She has no ability to process information relevant to more complex decision making such as would be involved in deciding where to live, the conduct of litigation, ways of providing the care she needs, or the advantages and disadvantages of different ways of managing her property or affairs. Her ability to retain anything more than basic information is severely impaired, and she is unable to weigh and use information relevant to these decisions.*

Contrary to the previous expert, Dr Mynors-Wallis' view was that AG had capacity to make decisions to engage in sexual relations and to have contact with others. Perhaps illustrating the need to calibrate the sexual capacity test when assessing someone aged 69, Dr Mynors-Wallis said, "*I asked whether she thought she was at risk of becoming pregnant. She laughed and said "I'm too old. There's just as much a chance of him becoming pregnant as me" and laughed again.*" In relation to contact with others, the expert explored AG's understanding by reference to contact with people about whom she would have to make decisions, including her family, and her partner CI. She demonstrated understanding of the advantages and disadvantages of contact, and of what to do if she wanted to be alone. The judge agreed with the expert's conclusions and accordingly the care plan would need to be changed to reflect her decision-making ability in these two regards:

> *24 … The previous position that AG did not have capacity to engage in sexual relations had significant consequences for AG, for CI, and for the management of the care home. Restrictions were put in place to prevent AG entering CI's room for example. Any form of physical intimacy between them could potentially have been viewed as an assault upon AG given the view and interim findings that there was reason to believe that AG lacked capacity to consent to sexual relations. Those restrictions will now be reconsidered and the safeguarding adults protection plan will be withdrawn. The care home will follow the CQC's guidance on "Relationships and Sexuality in Adult Social Care Services."…*

One tricky area concerned AG's capacity to marry. The expert was satisfied that AG demonstrated a basic understanding of the marriage contract but not the more complex information relevant to decisions about marriage and divorce, such as the financial implications. Having considered the previous case law, Poole J held:

21. In the light of this guidance, it is important not to apply too stringent a test for capacity to make decisions about marriage or divorce. Nevertheless, s 3(4) of the MCA 2005 provides that information relevant to a decision includes the reasonably foreseeable consequences of deciding one way or another, or not making a decision. A person with capacity to enter into a marriage may choose to disregard those consequences, but they must be able to understand and weigh such relevant information. A person may lack capacity in relation to decisions about residence, care or their financial affairs, but have capacity to make decisions about marriage. However, in this case, when determining capacity to marry, some consideration is required of AG's capacity in relation to decisions about care, residence, and financial affairs. AG herself sees marriage as a way of changing her care and residence. Furthermore, although previous authorities may have focused on the necessity for P to understand information relevant to marriage, it is important also to consider P's ability to retain, use and weigh such information.

22. Dr Mynors-Wallis reports that AG said she wished to marry CI because they loved each other. She said that one difference between being married and not being married would be that on becoming married she would be able to go out to work to support CI. She said that once married they would share their money and would find a bungalow in which to live but she did not know anything about her own finances, or CI's finances, did not know in what town she currently lives, could not recall the fact that she is currently married, and had no idea what would happen to money and property after any divorce, and so did not appear to understand that divorce may bring about a financial claim. She told Dr Mynors-Wallis, as recorded at paragraph 12.5 of his report, that she would have no difficulty living independently with CI because she had always been able to look after herself. She believes that becoming married would enable her to work, to look after CI, and to be fully independent. In fact, she is clearly unfit to work, and she was admitted to the care home because she was utterly unable to look after herself in the community even with considerable assistance. AG has no insight into her cognitive limitations or her physical health needs, and no real understanding of the financial and other implications of her entering into marriage so that she and her spouse could live together as she envisages. AG's view of her status as a married person is not at all grounded in reality.

23. I remind myself that the test is status specific not person specific, and that the wisdom of any particular marriage decision is irrelevant. However, applying the capacity tests from the MCA 2005, I agree with Dr Mynors-Wallis and the parties that AG lacks capacity to make decisions about marriage, and about divorce. Due to her inability to understand, retain and weigh information, she has fantastical beliefs that the act of getting married will result in her living independently in the community, free her of the need for care, and enable her to work. This is what married life was like for her in the past, and her impairments due to her frontal lobe dementia result in an inability to understand that marriage in the future will not return her to that same level of functioning and independence. AG is unable to retain information about her

> *present married status – she does not consistently recall whether she is married, divorced or widowed. She cannot weigh or use relevant information to allow her to consider the advantages and disadvantages of marriage so as to make a decision about marriage. Dr Mynors-Wallis reminded himself, as I do, that the test for capacity for marriage should not be over-complicated, but he considers that AG's dementia "means that she doesn't have capacity to fully weigh up the pros and cons of a marriage" and she is "unable to retain key necessary information to make a decision about marriage". I agree that AG does not have capacity to enter into marriage. I am also satisfied that she has no understanding of what divorce would entail financially or in relation to her status, not even in broad terms. In my judgment it is necessary to make a finding on AG's capacity to enter marriage because the finding that she has capacity to engage in sexual relations may well bring the contemplation of marriage, already remarked on by both respondents, into sharper focus.*

The local authority was directed to consider what options were available to AG in terms of accommodation and care and support packages, including the possibility that she and CI could reside together under some arrangement whereby sufficient care can be provided. A best interests meeting is to be convened in February 2021 after which the matter will return to court when, if reported, we might find out how the story of this couple ends.

Comment

This case illustrates the importance of getting the sexual and contact capacity assessments right, particularly when someone is already confined to an institutional setting where sometimes intimacy is one of the few things left. As these facts demonstrates, there is a fine line between consensual intimacy and a safeguarding alert and capacity defines where that line is drawn:

> *25. It is regrettable that delay in resolving her case has prevented AG and CI from sharing intimacy when, as the court has now found, AG does have capacity to engage in sexual relations. However, the need for a new expert to look at this case afresh, has been proven.*

Capacity enthusiasts will also note the reference to AG's lack of "insight" into her limitations and needs. But this case illustrates those scenarios where a lack of insight overlaps with a lack of capacity, with full reasoning given as to why insight was found wanting and how it was affecting her capacity, as recommended for practitioners by the NICE guidelines at para 1.4.24.

Interim treatment authority

University Hospitals of Derby and Burton NHS Foundation Trust & Derbyshire Healthcare NHS Foundation Trust v MN [2021] EWCOP 4 (Hayden J)

Best interests – medical treatment

Summary

This case concerned the medical treatment of MN, a 60 year old man with suspected bladder cancer. Having co-operated with an ultra-sound, he subsequently stopped co-operating with any further investigations or treatment. In particular he would not co-operate with the Trust's initial investigation and treatment plan to undertake a

CT scan and if clinically appropriate perform a cystoscopy procedure with surgery performed via telescope (transurethral resection of bladder tumour (TURBIT). Without such treatment (and in the event that MN had bladder cancer) there was a risk that he would suffer a painful deterioration due to blood clots forming in his bladder and could be prevented from urinating. The surgery would excise or debulk the tumour enabling MN to urinate painlessly.

The treating Trust together with the Trust responsible for meeting MN's mental health needs in the community (MN having a diagnosis of paranoid schizophrenia), sought orders from the court authorising them to take steps to investigate the cause of MN's difficulties by way of a CT scan and if appropriate perform a TURBIT under general anaesthetic. These steps would likely require a degree of restraint which the applicant's considered would amount to a deprivation of MN's liberty.

Which (if any) of the longer term treatment options for bladder cancer would be appropriate for MN was unknown, and no orders were sought in respect of this at the interim hearing (the options being radiotherapy, surgery to remove the bladder, chemotherapy or palliative care). It was however made clear that radical treatment was unlikely to be offered to him if he was unwilling to comply with it.

Hayden J was satisfied that it was appropriate to make a s.48 declaration that there was reason to believe that MN lacked capacity to both conduct the proceedings, and to make decisions about the investigations and treatment of his identified kidney obstruction. The more difficult question for the court was whether it should authorise the 'emergency' treatment plan in advance of the final hearing (namely the CT scan and TURBIT). Hayden J emphasised that MN had not been informed of these proceedings and so had not had an opportunity to express his wishes and feelings in relation to receiving pain-relieving emergency treatment for blood clots, as distinct from the primary treatment for his suspected bladder cancer.

The applicants recognised that they could rely on:

- Section 6(7)(a) MCA 2005 (which allows a person to provide life sustaining treatment while a decision is sought from the court)
- Section 6(7)(b) (which allows a person to do '*any act*' which they reasonably believe to be necessary to prevent a serious deterioration in MN's condition while a decision is sought from the court)
- Section 4B MCA 2005 (which authorises steps to be taken which would deprive MN of his liberty if the steps consist wholly or partly of giving MN life-sustaining treatment or doing any vital act whilst a decision is sought from the court).

Nevertheless, despite the potential legal cover that this would provide them, the applicants pressed for authorisation of their treatment plan on the basis that there was an 80% chance that the emergency treatment would be required before the final hearing, and it was far preferable for an order to be made now rather than during an emergency hearing (which might result in delay of the treatment being provided to MN).

Hayden J held (at paragraph 24) that "*it would be inconsistent with the principles of the MCA 2005 for the Court pre-emptively to authorise the deprivation*

of MN's liberty in circumstances where both the nature of the potential emergency situation could be anticipated (the foreseeable impact of blood clotting related to bladder cancer), and where MN's wishes and feelings might be sought and recorded in advance."

Hayden J directed that the interim order sought by the applicants would only be operative (pending the final hearing) if a number of conditions were met:

- MN was in pain and/or discomfort and/or was unable to urinate;
- MN's views had been canvassed regarding having emergency treatment (it having been explained to him that such treatment would release him from pain and/or discomfort and/or would enable him to urinate);
- The emergency treatment would include releasing any blood clots in his bladder (or other clinically indicated and operable obstruction) preventing him from urinating;
- MN continued to express a resistance to emergency treatment.

Comment

This judgment shows the critical importance (and rightly so) of obtaining P's wishes and feelings about any treatment plan being put before the court. Had the Trust known what MN's wishes and feelings about the proposed emergency treatment were, Hayden J might have acceded to the request to authorise the emergency treatment absent the conditions.

"Incomplete and non-final" LPS impact assessment

Despite its caveats, provisos and intention to undertake a more detailed version after public consultation, this latest impact assessment provides an insight into how the government thinks LPS might operate. It applies to both England and Wales and is based on 2018-19 demand levels but does not take account of the government's decision to abandon the different procedure for care home managers. As a result, we should expect some of the costs to change during the current course of implementation planning.

It is predicted that doctors, social workers, AMCPs and advocates will be the professionals taking on the largest role in the new system and the following points caught our eye:

- Numbers: It is estimated there will be 257,984 LPS applications per year. This is based on the 2018-19 DoLS figures plus 53,000 (community settings) and 6600 (16-17 year olds).
- Assessments: A new medical assessment (costing £115 each) will be required in 20% of cases (the remainder having an established diagnosis). A new capacity assessment (costing £162) will be needed in 40% of cases. The necessity and proportionality assessment will be required in all cases but this can be streamlined where care-planning is taking place under the Care Act or NHS continuing healthcare. This leaves 154,790 applications (60%) requiring a standalone necessity and proportionality assessment (costing £152 each).
- Training for assessments: 100% of adult social workers and 20% of doctors,

children's social workers and other social workers will require full LPS training. The remainder will need awareness training.

- AMCPs: 26% of the LPS applications will require an AMCP (67,076 per year). There are 2720 best interests assessors to convert to the AMCP role (8-hour conversion course at £615) and an extra 107 new AMCPs will need to be recruited.

- IMCAs: it is thought that 95% of those under LPS will have representation. Of that number, 75% will have an appropriate person (for which 40% will need IMCA support) and 25% will have direct IMCA support. Training will be required for 10,602 new IMCAs.

- Legal representation: 0.5% of LPS authorisations (1290 per year) will be challenged in the Court of Protection. Each case costs £8400 (legal aid), £12,000 (responsible body), and £12,000 (Official Solicitor acting in 25% of cases).

- Regulation: annual cost will be £13.5 million (CQC) and £600,000 (Ofsted).

Comment

These figures are clearly going to change as the government works through the implementation stage. Many are best estimates, or derive from the Law Commission estimates, and there are some known unknowns. For example, whether the estimated demand for AMCPs is accurate will depend upon how the AMCP trigger is interpreted by the courts and applied in practice. When will it be 'reasonable to believe' that the cared-for person 'does not wish' to reside in, or receive care or treatment at, the place? The figures also assume the enhanced care home manager role which the government will not be introducing, so there will be additional costs on responsible bodies. It is a worry though that 12,899 (5%) of people are not expected to have an appropriate person or IMCA to represent and support them. This 5% includes those who have (with capacity) declined support; more problematically, it will also include those who are 'unbefriended,' and for whom representation is in their best interests, but where the responsible body is unable to appoint one, having taken all the reasonable steps required of them under the Act. At that point, a serious problem will arise because will be without the representative required as a key human rights safeguard.

Short note: an update on the RS saga

The deeply disturbing saga in the case of RS we reported upon in the January Report (see here), saw the case return one last time to the Court of Protection, and Cohen J roundly reject an argument that the impact of the Vienna Convention on Consular Relations required him to enable the Polish Consul to visit RS in hospital as his birth family wished but in circumstances his wife could not support, RS being very close to the end of his life. In *Re RS* [2021] EWCOP 6, Cohen J found that that the right for consular officers to visit those in prison, custody and detention, "plainly" did not extend to those in hospital, noting that to hold "*the Consul General is under a duty or has the right to check the treatment of every citizen of his country in a NHS hospital would clearly be unsustainable*." Cohen J found that it was not in RS's best interest for the visit to take place when, if not the sole, at least a primary purpose of the visit would be to obtain a remote assessment from a doctor which would

carry little weight:

> 1. *To force this visit upon his unwilling wife with the attendant stay, whether described that way or not, is in my judgment the very opposite of what he would want and the opposite of what would be in his best interests. In my judgment, the hospital would be acting in his best interests not to accede to that. In reaching that decision, I do not accept that I am impeding the Republic of Poland or the Consul General in the execution of or complying with his Vienna Convention rights/obligations in any way.*

We have previously commented upon the limited relevance of the Vienna Convention in this context.

RS has subsequently died, but not before some further steps taken in Poland which we do not address here as we only have limited information about them (that limited information, on its face, painting a disturbing picture of how the position in England was being characterised before the courts there).

Short note: *B v A Local Authority*

Via the Mental Health Law Online website, we note that the Supreme Court (Lord Hodge, Lady Black and Lord Kitchen) refused permission to appeal from the decision of the Court of Appeal in *B v A Local Authority* [2019] EWCA Civ 913 on 13 October 2020 on the basis that *"the application does not raise a point of law of general public importance which ought to be considered at this time bearing in mind that the issue has already been the subject of judicial decision and reviewed on appeal."*

PROPERTY AND AFFAIRS

ACC and Others: Guidance for Property and Financial Affairs Deputies

The OPG has issued guidance for P&A deputies following the judgment of the Senior Judge in *Re ACC, JDJ and HPP* [2020] EWCOP 9. In that case the Senior Judge dealt with the issue of what steps a deputy should take before taking legal advice and starting proceedings. Our report of the case can be found here.

The guidance, available here, follows what the Senior Judge said and, as it is admirably succinct, we set out the material parts in full below.

> *2. Within general authority of property and financial affairs deputies*
>
> *2.1 This is confirmed as including ordinary 'non-contentious' tasks such as property conveyancing, managing leases, business and associated employment contracts, preparing tax returns, taking advice on tenancy liabilities and arranging care.*
>
> *2.2 Paragraphs 1-3 of the Appendix of the judgement outline actions included under the general authority of a deputy.*
>
> *3. Outside the general authority of property and financial affairs deputies.*
>
> *3.1 Specific authority is required to conduct litigation on behalf of the protected party except where the contemplated litigation is in the Court of Protection in respect of a property and financial affairs issue. Deputies can take advice on 'contentious litigation' on a property and financial affairs matter up to receiving a letter of response, but no further.*
>
> *3.2 Specific authority is also needed to use the protected party's funds to reimburse a third party instructed to act on behalf of the protected party. This includes costs incurred by a member of the protected party's family.*
>
> *3.3 A property and affairs deputy has no authority to make decisions that impact exclusively on health and welfare matters, unless stated in the court order. Where such decisions need to be made authorisation must be sought from the court.*
>
> *3.4 Litigation for Continuing Health Care funding appeals, and Education, Health and Care Plans require authorisation from the court, as these fall outside the scope of authority of a finance and property affairs deputy.*
>
> *3.5 Where OPG becomes aware of any unauthorised actions, it will refer the deputy to apply to the court for retrospective authorisation. If under OPG's supervisory role, we find a deputy has not been compliant, then we will refer the matter to the court to decide what is proportionate.*
>
> *4. Prospective deputies*
>
> *4.1 Prospective deputies should consider whether there is a potential need to instruct someone else to provide advice or carry out legal tasks at the time they apply to be appointed. If their own firm provides the service and they wish to instruct them, they should include a request for specific authority to do so, subject to a specified costs limit, with their initial application. The court will decide on whether this is in the client's*

best interests, the period of the authorisation, and the level of expenditure.
4.2 Where a prospective deputy has been granted authority to instruct someone else, but not specific authority to instruct their own firm, the deputy must obtain three separate quotations from appropriate providers, one of which can be from their own firm. The deputy should then make a best interests decision as to which provider best meets the needs of the client, and if they still wish to instruct their own firm should make an application for specific authority if the anticipated costs are in excess of £2,000 plus VAT.

5. Existing deputies
5.1 The judgment makes it clear that there is a continuing expectation that deputies will consider, in detail, the limits of their own specific authority and address any potential conflicts of interest. Authorisation from the court is required for all on-going and future work which falls outside of the authority of the deputyship.

5.2 Deputies will be expected to apply to the court for authorisation in any cases where projected costs exceed £2000 plus VAT.

5.3 The deputy should make a proportionate decision in instances where obtaining three quotations would cost more than the proposed work. In such cases the deputy must detail their decision in the annual report.

5.4 There may be some instances where it is not possible to obtain three quotations. In this case, OPG will take a proportionate approach and consider whether to refer the matter to court.

5.5 OPG expects deputies to have made the appropriate application for authorisation by 1 April 2021. Deputies will be expected to apply to the court for retrospective authorisation where the provision of services to a client may constitute a conflict of interests, and costs have exceeded £2000 plus VAT, in any case occurring or ongoing since the release of the judgment.

5.6 OPG does not envisage the need for deputies to make applications for retrospective authorisation in any cases completed prior to the release of the judgment, but this will be considered on a case by case basis to ensure that the best interest of the protected party are being met.

5.7 OPG's position is that these guidelines extend to any situation where a deputy is considering the procurement of services for a client which may include provision from the deputy's own firm and hence constitute a potential conflict of interest.

5.8 If a deputy believes that urgent action is needed to protect a client's interests, they may proceed at their own risk and make an application to the court for retrospective authorisation.

5.9 The judgment states that in welfare matters, other authorities may be better placed to act, such as local authorities and the NHS, who do not need court authorisation to carry out urgent work outside of the scope of deputyship. The deputy will need to consider whether they can ask someone else to handle the welfare issue and refer the issues to those agencies.

6. OPG's role in relation to this Judgment

6.1 The Public Guardian, supported by the OPG, has a statutory duty to supervise all deputies appointed by the Court of Protection. When we ask deputies to report to us, we will require them to demonstrate that they have the necessary authority to carry out their work.

6.2 OPG would expect any decisions made by deputies in relation to this judgment to be outlined in the annual report.

6.3 We require applications to have been made in respect of any unauthorised work started or ongoing since the date of the judgment by 1 April 2021. Following this date, action will be taken to address any non-compliance with the judgment which could include OPG making an application to the court.

6.4 The judgment states that if a client has capacity to give instructions for litigation work then they can understand the costs involved. This should always be approached on a case-by-case basis with consideration to the client's circumstances.

Separately, CoPPA, the Law Society, STEP, PDF and SFE have produced their own guidance and flowchart, available here, which HHJ Hilder has reviewed and (whilst not formally endorsed) has made clear she is happy to be circulated.

Comment

The mention of prospective deputies in the OPG Guidance brings into question one aspect of practice with which *ACC* and the guidance do not deal. That is the appointment of a deputy in severe acquired brain injury damages cases. This commonly happens after solicitors have been engaged, a CFA entered into with a litigation friend and proceedings issued. Commonly also, the deputy will be from the litigation solicitor's firm. In line with the philosophy of *ACC* and the guidance, should COP ask in such cases for 3 quotations from potential deputies, particularly as the costs of deputyship in such cases are very substantial and not always recovered 100% from the tortfeasor, due, perhaps to contributory negligence or causation doubts?

PRACTICE AND PROCEDURE

Official Solicitor Practice Notes

Two Practice Notes have been published by the Official Solicitor, Sarah Castle, setting out important practicalities relating the appointment of the Official Solicitor as litigation friend of the person concerned ("P") in the Court of Protection and requests by the court to the Official Solicitor to act as, or appoint counsel to act as an advocate to the court. Both are dated 3 February 2021. One note deals with health and welfare proceedings, and the other with property and affairs proceedings.

What to do when P wants to return home abroad?

Re UR [2021] EWCOP 10 (Hayden J)

International jurisdiction of the Court of Protection – other

In this case, Hayden J has set out a checklist for situations where the Court of Protection is to be asked to decide that a person should leave the country permanently. The case concerned a 68 year old Polish woman. It was framed as a s.21A challenge to the DoLS authorisation relating to the care home where she was residing, but evolved into a case where, by agreement, a plan was developed to secure her return to Poland where she had been expressing a strong and consistent wish to go. She had family there, including a sister and niece; she also had the financial wherewithal to fund her own package of care, should that be required.

The judgment included a review of the case-law relating to s.21A and also the determination of best interests, which is sufficiently familiar not to require repetition here. Hayden J had little difficulty in concluding that it was in UR's best interests to return to Poland (and hence that the best interests requirement in the DoLS authorisation was not satisfied). In passing, he repeated a judicial concern that the use of a balance sheet for these purposes risks becoming a "*map without contours*" (although he emphasised that the balance sheet in the case before him in fact was far more sophisticated than the term would suggest, and renamed it "*analysis of the competing issues*").

Hayden J also had to consider whether UR would be prevented from leaving her care home and flying to Poland by operation of the lockdown regulations current as at January 2021; Hayden J was clear that she was not prevented from doing so by them, nor would the carers who would travel with her be breaching the regulations as they would have a reasonable excuse to accompany her, acting as they did in a work capacity. Unsurprisingly, Hayden J was quick to praise the "selfless and dedicated professionalism" of the care home and manager, who had indicated that they would be prepared to travel with her, and self-isolate/quarantine upon their return.

Hayden J identified that it was possible and in UR's best interests to return home, although there were a number of remaining practical issues to be addressed for the plan to be put in place. More generally, he set a checklist for cases in the Court of Protection for permanent relocation from the jurisdiction of England and Wales:

> *i. Liaison with the relevant Embassy/ Consulate (in the first instance) to ascertain what guidance and assistance*

can be provided;
ii. Evidence as to physical health to travel (GP);
iii. Evidence as to mental health to travel (psychiatrist);
iv. Legal opinion regarding citizenship, benefit entitlement, health and social care provision in the relevant country, and such other issues relevant to the case;
v. Consideration of any applications that need to be made as a consequence of any legal opinion provided;
vi. Independent social work evidence regarding the viability of the proposed package of care in the relevant country if such evidence cannot be provided by the parties to the proceedings or a direction under section 49 MCA;
vii. Confirmation of travel costings from the commissioners of the care package, both in relation to P and any carers that may need to travel with them (who will pay?);
viii. Confirmation that the necessary medication/ care will be available during travel from the UK/ for the immediate future in the new country
ix. Transition plan/ care plan, to include a contingency plan and how the matter should return to court in the event of an emergency in implementing the proposed plan;
x. Best interest evidence from the relevant commissioners;
xi. Wishes and feelings evidence;
xii. Residual orders to allow the plan to be implemented, including single issue financial orders regarding opening/closing of UK bank accounts, the purchasing of essential items to travel (if necessary);
xiii. Covid-19 considerations prior to travel (if applicable)

Hayden J also set out the full (anoymised) order that he had made, again as a template for future cases.

Comment

As (despite Brexit and COVID-19) the situation described in this case arises with increasing frequency, the checklist set out in this case is very helpful. Two points should be noted by way of caveat:

1. The approach set out here applies where the individual is at the time of the judgment habitually resident in England and Wales, so the court is exercising its full jurisdiction over them; different considerations might arise if it was acting to give effect to a foreign order for return – see *Re MN*.

2. If, as is hoped, the UK ratifies the 2000 Hague Convention in respect of England and Wales during the course of 2021, it will also be necessary in any case in which both jurisdictions are signatories for Central Authorities to be involved at the planning stage so as to comply with Article 33 of that Convention and paragraph 26(1) of Sch 3 to the MCA 2005 (which will come into force upon ratification of the Convention). Adrian provides more detail of this, along with a discussion of how the case relates to the position in Scotland (which, remember, for these purposes, is a foreign country), in the Scotland section of this Report.

Covert medical treatment and the courts

An NHS Trust v XB & Ors [2020] EWCOP 71 (Theis J)

Best interests – medical treatment – Court of Protection practice and procedure

Summary

Theis J has further emphasised the thinness of the legal ice for professionals seeking to administer medication covertly. The case concerned a man, XB, detained at a high security mental health hospital. He was diagnosed with treatment resistant paranoid schizophrenia. He required antihypertensive medication, which he refused to take. He was considered to lack capacity to make this decision, and it was proposed to administer it covertly. His siblings recognised that this treatment might need to be administered if his condition was life-threatening, but were concerned about the position and wanted the matter to be considered by the Court of Protection, and the decision taken separately from those who had a therapeutic relationship with him and the family who supported him.

Although XB's siblings had expressly raised the potential for an application, the Trust proceeded to give the medication covertly following a best interests meeting to which they were not invited (which the Trust subsequently accepted had been a mistake). XB discovered, in fact, that he was being administered the medication covertly, but this did not, Theis J find, mean that an application was no longer being required, because it remained clear that XB was likely to continue to object, and that it remained urgently necessary for him to continue to have it. Substantial delays ensured in making the application, and then in listing the application because of a failure to set a fixed date at the first directions hearing; throughout that period XB continued to be administered medication covertly.

In her consideration of the legal framework, Theis J set out the following convenient summary of the factors in play:

> *54. In relation to covert medical treatment Baker J (as he then was) emphasised in A Local Authority v P & ors [2018] EWCOP 10 that such treatment is a serious interference with an individual's right to respect for private life under Article 8. He noted in that judgment that the Supreme Court decision in An NHS Trust v Y [2019] AC 978 was awaited but he observed that in the case he was concerned with (involving the covert insertion of a contraceptive device) 'it is in my judgment highly probable that, in most, if not all, cases, professionals faced with a decision whether to take that steps will conclude that it is appropriate to apply to the court to facilitate a comprehensive analysis of best interests, with P having the benefit of legal representation and independent expert advice'.*
>
> *55. In An NHS v Y Lady Black recognised at paragraphs 125 and 126 that although an application to the court is not necessary in every case [126] 'there will undoubtedly be cases in which an application will be required (or desirable) because of the particular circumstances that appertain, and there should be no reticence about involving the court in such cases'.*
>
> *56. The principle that underpinned the Guidance issued by Hayden J (Vice President of the Court of Protection) on 17 January 2020 relating to applications concerning medical treatment was that where there was agreement at the end of the relevant decision making process in accordance with the MCA 2005, with any relevant professional guidance being*

> *observed and relevant guidance in the Code of Practice being followed regarding the decision making capacity and best interests of the person in question then, in principle, medical treatment may be provided without application to the court (see paragraph 6). However, the Guidance equally makes clear at paragraph 8 that if at the end of the medical decision making process there remains concerns that the way forward in any case there is a 'lack of agreement as to a proposed course of action from those with an interest in the person's welfare' (paragraph 8 (c)) then 'it is highly probable that an application to the Court of Protection is appropriate. In such an event consideration must always be given as to whether an application to the Court of Protection is required' (paragraph 8). The Guidance also makes clear at paragraph 10 that in any case that 'involves a serious interference with the person's rights under the ECHR' it is 'highly probable' that an application should be made.*

Theis J was clear that, given the anxiety expressed by XB's siblings about the administration of the medication, and the serious nature of the interference with his rights under Article 8 ECHR involved in administering covert medication, this was a case where there should have been no reticence in involving the court (paragraph 74).

On the evidence before her, Theis J had no hesitation in finding that XB lacked capacity to make decisions about his medical treatment, and that it was in his best interests to be administered the hypertension medication covertly.

Comment

It is important, perhaps, to make clear what Theis J said in this case. She was not saying that an application had been required; what she was saying (and this emerges most clearly from paragraph 76) that the Trust should have given very serious consideration as to whether an application should be made – and that any Trust in future in such a situation should equally give such consideration. She also made clear that, unsurprisingly, if an application was to be made, it should have been made and progressed quickly.

At one level, it is somewhat frustrating the courts consistently decline to set out circumstances in which applications must be made (with the exception of situations concerning life-sustaining treatment identified in *NHS Trust v Y*). At another level, it is understandable that the focus of the decisions – and of the Serious Medical Treatment guidance – is upon the need for Trusts (and others) to consider carefully whether they can simply proceed on the basis of s.5 MCA 2005, or whether the decision has to be taken by the court. Keeping the focus there means that the risk is avoided of giving the message that professionals are always 'safe' in situations not clearly identified as requiring a court application. That Trusts are increasingly getting the message is undoubtedly suggested by the sharp, and continuing, increase in medical treatment applications over the past year – the demands of COVID-19 notwithstanding.

Recording proceedings – a no-no (as is

bombarding the court with correspondence)

A Local Authority v TA, XA, GA and SR (GA's deputy for property and financial affairs) [2021] EWCOP 3 (Cobb J)

Court of Protection practice and procedure – other

Summary

In this judgment Cobb J considered two discrete issues in respect of a litigant in person ("TA") whose challenging behaviour had meant that progress of the proceedings relating to P's care had been slow. The issues were:

- Whether TA could record the hearings in the Court of Protection; and,
- Whether an order was required restricting TA's contact with the Court of Protection court office.

As to recording, TA sought the court's permission on the basis that he, as a litigant in person needed to revisit the issue discussed in court and that he could not be expected to take handwritten notes whilst making full representations to the court. He made various arguments in respect of breach of his human rights and allegations of censorship. He made the point that he was not *"in court"* and was *"outside the jurisdiction of the court"*; and therefore could record conversations, if he wished.

Cobb J reminded TA that, whilst he was not physically in the court building, he was *"every bit as much 'in a court' on the video platform."* Cobb J refused TA's application to record the hearings, because he saw no reason to depart from the normal procedure in respect of recordings. He further made three observations:

- Whilst the Court of Protection is not specifically included in the list of courts to which section 55 and schedule 25 of the Coronavirus Act 2020 ("the 2020 Act") applies (namely in section 85D(2) of the Courts Act 2003), the statutory criminal prohibitions in respect of making, or attempting to make, an unauthorised recording of the proceedings are to be included in every standard order, accompanied by a penal notice and punishable by contempt proceedings. That is in accordance with the guidance issued by Hayden J (Vice President of the Court of Protection) on remote hearings.
- In any event, it would be contempt of court, punishable by imprisonment, for any party to record a hearing without permission of the judge (see section 9 of the Contempt of Court Act 1981). There is a discretion to permit recording in circumstances (see *Practice Direction (Tape Recorders)* [1981] 1 WLR 1981) but Cobb J was not persuaded that TA demonstrated a reasonable need for such a recording.
- There is also a standard form transparency order in place, which prohibits the reporting of any material which identifies, or is likely to identify, that GA is the subject of proceedings; any person as a member of the family of GA; that A Local Authority is a party; and where GA lives. The content of video-recordings of the proceedings is controlled by s 12(1)(b) of the Administration of Justice Act 1960 and may not be published unless publication falls within the exceptions contained in Practice Direction 4A, paragraphs 33 to 37. He was

satisfied that there would be a "publication" whenever the law of defamation would treat it as such, which includes most forms of dissemination, whether oral or written: *Re B* [2004] EWHC 411 at [82(iii)]. Thus, TA posting the recordings on a private YouTube channel constituted publication.

On the second issue, an order was sought at the court's own motion restricting TA's contact with the Court of Protection court office. The operations manager at the court office had filed a witness statement, which detailed the number of emails and the amount of correspondence from TA amounting to approximately 130 pieces of correspondence per month or 4.5 per day. TA had also made 39 COP9 applications over a 24-month period. The emails are copied into multiple recipients (with up to 100 on some occasions). TA would sign off the emails with his name followed by some epithet, including "Diligent and persistent as ever", "Not a Gentle Knight", "WikiLeaks Wannabe", "DPA [Data Protection Act] Pioneer", or "Leviathan Terminator". TA denied that his correspondence was excessive, inappropriate or intemperate.

Cobb J determined that there was no justification for the volume or tone of much of his correspondence; and his contact with the court office was wholly disproportionate to the issues in the various proceedings. He considered, *inter alia,* the *obiter* comments of King LJ in *Agarwala v Agarwala* [2016] EWCA Civ 1252, particularly:

> *Whilst every judge is sympathetic to the challenges faced by litigants in person, justice simply cannot be done through a torrent of informal, unfocussed emails, often sent directly to the judge and not to the other parties. Neither the judge nor the court staff can, or should, be expected to field communications of this type. In my view judges must be entitled, as part of their general case management powers, to put in place, where they feel it to be appropriate, strict directions regulating communications with the court and litigants should understand that failure to comply with such directions will mean that communications that they choose to send, notwithstanding those directions, will be neither responded to nor acted upon.*

Cobb J accordingly proposed to make an injunction, pursuant to the power invested in him by section 47(1) of the Mental Capacity Act 2005, restraining TA's communication with the court office. He noted that the order was exceptional, but it was entirely justified by the facts of the case (para 28):

> *There is a substantial risk that the process of the court will continue to be seriously abused, and that the proper administration of justice in the future will be seriously impeded by TA unless I intervene now with appropriate injunctive relief.*

Comment

Cobb J's decision is an important reminder to both litigants in person and legal representatives alike that remote hearings are still very much ordinary court proceedings, even if they are not taking place in the physical building; and therefore the usual restrictions in respect of contempt apply.

In terms of the restriction in contact with the court order, it is perhaps of note that Cobb J

specifically made the order pursuant to section 47(1) of the MCA 2005 (rather than sitting as a High Court exercising the inherent jurisdiction) so that it is open to Tier 1 and 2 judges sitting in the Court of Protection to make such orders in exceptional circumstances. He also usefully set out the terms of the order at the foot of his judgment.

THE WIDER CONTEXT

When is the refusal of treatment by a 16/17 year old binding?

Re X [2021] EWHC 65 (Fam) (Munby J)

Other proceedings – judicial review

Summary[2]

> *This case is about whether X, a young woman declared to be Gillick competent and "mature and wise beyond her years", should be afforded the exclusive right to decide her own medical care in the same way as her peers aged 18 years and older*

X, who was 15 at the time of judgment, is a Jehovah's Witness. She suffers from serious sickle cell syndrome. At times this results in a crisis, when the view of her treating clinicians is that blood transfusion is necessary.

Her case is also the latest consideration the courts have given to the question of when the refusal of medical treatment by a child under the age of 18 may be determinative.

The Trust had brought her case to court in May 2020, seeking authorisation for transfusion notwithstanding her objections, which was granted. In October 2020 a further crisis ensued, and the matter returned to court. The Trust was now seeking not only an order authorizing transfusion in this case, but a 'rolling order' which would authorise transfusions as and when needed until X is 18. At that hearing counsel for X raised the question of whether, as a Gillick competent child of nearly 16, her refusal of treatment should be determinative. The court authorized treatment in the circumstances of medical crisis, but set the matter down for full argument.

Gillick competence

It was common ground that X *was* Gillick competent, and so the judgment does not descend into detailed analysis of the concept. However, Sir James Munby did make two important observations:

- On the relationship between Gillick competence and s. 8, drawing on the analysis of Lord Donaldson in *In re R* [1992] Fam 11 and *In re W* [1993] Fam 64: in medical treatment cases the analysis is '(1) Until the child reaches the age of 16 the relevant inquiry is as to whether the child is Gillick competent. (2) Once the child reaches the age of 16: (i) the issue of Gillick competence falls away, and (ii) the child is assumed to have legal capacity in accordance with section 8, unless (iii) the child is shown to lack mental capacity as defined in sections 2(1) and 3(1) of the Mental Capacity Act 2005' (at [57]);
- On the relationship between Gillick competence and capacity under the MCA 2005: the tests have "*nothing obvious in common, not least because they are rooted in different areas of scientific knowledge and understanding*" (para 73) ; there is no obvious read-over between the two, save that it is difficult to see how a child who lacks capacity in the MCA sense would achieve Gillick competence (para 74). In this regard,

[2] Note, Tor and Alex having been involved in the case, they have not contributed to this note.

Sir James disagreed with the suggestion in *Re S* and repeated in *Bell v Tavistock* that it is appropriate and helpful when considering Gillick competence to read across and borrow from the concepts and language in the MCA: 'its premise is that Gillick competence is in some way related or even analogous to capacity in the sense in which the expression is used in the 2005 Act. It is not; the two are, as I have said, both historically and conceptually quite distinct" (at [75]).

Nothing in the MCA 2005 threw the validity of the approach outlined in *Re R* and *Re W* into doubt. Nor did a line of authority from the Supreme Court of Canada. Considering the case of *AC v Manitoba (Director of Child and Family Services)* 2009 SCC 30, Sir James held that the case *"is not authority for the proposition that the decision of either a Gillick competent child or a child aged 16 or more is always, and without exceptions, determinative in relation to medical treatment. In the final analysis, as I read her judgment, the court always has the last word*." (at para 99). Neither this case nor other Canadian authorities to which the court was referred suggested any need for judicial re-evaluation of *Re R* and *Re W*.

Compatibility with ECHR

The judgment then goes on to consider whether that approach is compatible with the European Convention of Human Rights. In short terms, the answer given is 'yes':

- Article 2: even if it was correct that Article 2 was not engaged, this did not prevent 'the preservation of life' being a factor that the State can consider when evaluating whether other rights are engaged;
- Article 3: assuming that it were the case that imposing medical treatment on an adult who did not wish it would amount to a breach of Article 3, the case is different where treatment of a child – even a Gillick competent child – is being considered. This is because of the strong arguments in favour of securing the child's future autonomy. The need to balance autonomy and the need to protect the child and support them to survive into adulthood is recognized in various provisions of the UN Convention on the Rights of the Child (at para 119]) and nothing in the Strasbourg jurisprudence requires a recognition that a child – even a Gillick competent child – is autonomous in the way an adult is (para 120).
- Article 5: on the facts of the case, Article 5 did not arise. No order had been made for X to be restrained or prevented from leaving hospital, and she did not in fact seek to do so. The difficult question as to how a Gillick competent child could be 'of unsound mind' did not therefore fall to be answered, but Sir James expressed the view that the solution is to be found in the 'carve out' recognized in *R (Ferreira) v Inner South London Senior Coroner* [2017] EWCA Civ 31.
- Articles 8 and 9: the analysis in relation to Article 3 applied to the argument that there was any breach of Articles 8 or 9. In fact, given that those rights are qualified rights, the argument that there was no breach where the intention is to preserve the lives of children until adulthood (which Sir James recognised as a legitimate aim at para 134) was all the stronger.

- Article 14: any differential treatment on the basis of age was justified, and no breach of Article 14 ensued. The reason for treating children differently was not a matter of administrative convenience, but the protection of children (see para 152).

The picture in the round

Sir James then considered the submission that times have changed and views as to the proper balance between medical paternalism and patient autonomy have altered. He agreed that "[o]*f course, a family court cannot be blind to the changes in society's views and values which are such a striking feature of modern life, and this is well recognised in the authorities*" (paragraph 159). Similarly, the common law is of course capable of moving with the times. However, the court could not simply reject the law as set out in *Re R* and *Re W*:

> *162. At the end of this lengthy analysis, my clear and firm conclusion is that the learning in In re R (A Minor) (Wardship: Consent to Treatment) [1992] Fam 11 and In re W (A Minor) (Medical Treatment: Courts Jurisdiction) [1993] Fam 64 emerges unscathed from Mr Brady's attack. The change for which he contends is a matter for Parliament, not the courts.*

X's application for declarations that she had the requisite decisional capacity to make exclusive decisions about her treatment, or would do once she attained the age of 16, was therefore refused.

The rolling order

The second question which arose for decision was whether to make the orders sought by the Trust.

Having found against X on the question of whether the court could make an order requiring her to be treated against her competent/capacitous will, Sir James was not persuaded that he should make the rolling order sought by the Trust. He was satisfied that it was possible to make such an order: "*I have no doubt that the court has jurisdiction to make the kind of contingent, anticipatory or prospective order*" which was sought (para 165]) but the real question was whether the court should.

Four submissions were made in support of the overall submission that an order should not be made, Sir James identifying that he agreed with the force of the submission, if not the detail of the points. Those four submissions were: (1) determining whether or not a medical treatment is required is highly fact specific, particularly in the context of whether blood transfusions are required; (2) granting a rolling order would run the risk of privileging medical paternalism over judicial protection; (3) there was a risk in a case such as X's of discrimination and religious stereotyping, based on the erroneous assumption that blood transfusions are always necessary whenever recommended by a clinician and that a patient who is a Jehovah's Witnesses is always wrong to refuse such a procedure; and (4) X had not yet had the opportunity to test the medical evidence rigorously, which would be a pre-requisite if there was to be a rolling order lasting two years.

Taken in the round, Sir James agreed that there should be no rolling order.

Comment

This case is a helpful restatement of principles,

and a firm indication that if the law in relation to 16 and 17 year olds is to change that is a matter for parliament.

The clarification made by Sir James as to the nature of s. 8 ("*for the purposes of section 8 we are concerned only with legal capacity; the effect of the statute, in relation to its specific subject matter (medical treatment) is, as it were, to reduce the age of majority from 18 to 16 – that, and no more. Section 8 is not concerned with and does not operate so as to deem the child to have mental capacity*" is welcome. Similarly, the observation at paragraph 139 that "*many attempts have been made to demonstrate that purely common law rules, found only in a mass of case law, fall foul' of the ECHR requirement of being 'prescribed by law*" but "*I am not aware of any that have succeeded*" is a helpful reminder, and not only in this area of the law.

More controversial is the open question as to how Article 5 operates in cases of this nature. As Sir James recognized, the application of the *Ferreira* carve out is potentially problematic: a Gillick competent child objecting to treatment is not in the same situation as the patient in *Ferreira.* The child is not incapable of giving consent: the issue is rather that they are not consenting. Although not requiring determination on the facts of this case, it is readily foreseeable that the issue may arise in the future: it is much less clear what the answer is.

Likewise, the 'pragmatic' approach adopted to the relationship between competence/capacity in children over the age of 16 – while making for a clear approach for practitioners to adopt – seems likely to attract further academic commentary, whether or not savouring "*of the Thomist schoolmen*" (at [71]).

Having determined that the court has the power to make a 'rolling' order but (rightly, given the facts of the case) deciding it was inappropriate to do so, the judgment also leaves open the question of when if ever such an order *will* be appropriate.

More than just anecdata about the MCA/MHA interface

For years, the debate about the interface between the MHA and the MCA (as to which, see further Alex's shedinar here) and where it should be drawn in future has been bedevilled by the lack of actual data about how it works in practice, and how practitioners (of different backgrounds) understand it. The King's Fund, in a really important piece of research commissioned by the DHSC, has published a report: Understanding clinical decision-making at the interface of the Mental Health Act (1983) and the Mental Capacity Act (2005): drawing upon survey and qualitative interviews, the research captured data from more than 600 health professionals, including approved mental health professionals, section 12 doctors, approved clinicians, and best interests assessors among others. A blog by the report's author – a Tale of Two Acts – can be found here, and the underlying report here.

Personal examination and the MHA – implications for practice under the MCA

NHSE and the DHSC had published guidance in November 2020 which had indicated that they considered that the provisions of the MHA allowed for video assessments to occur for purposes of making medical recommendations

in relation to admission and for the AMHP making the application for admission. That guidance made clear that only the courts could provide a definitive interpretation of the law. It also set out the circumstances under which they considered that such assessments could take place.

In *Devon Partnership NHS Trust v SSHC* [2021] EWHC 101 (Admin), handed down on 22 January 2021, the Divisional Court has held that "the phrases "personally seen" in s. 11(5) and "personally examined" in s. 12(1) require the physical attendance of the person in question on the patient."

It does not appear that either the Trust or the DHSC intend to appeal. Even if the DHSC does appeal, then as the court did not 'stay' its judgment, organisations should not proceed on the basis that there is any doubt as to the position – it would only be if an appeal court overturned the judgment and gave a different interpretation of the law that the position would change.

We set out below some answers to FAQs that arise in consequence.

What should happen now?

No further remote assessments should be carried out, either by doctors making medical recommendations (s.12(1)) or the AMHP making the application for admission (s.11(5)).

The NHSE/DHSC guidance has now been amended to remove the relevant section – it can be found here.

Although s.20 (providing for renewal) uses the term "examine," rather "personally examine," it is not entirely easy to see any basis upon which to differentiate the position,[3] so it is suggested that renewals henceforth should be done on the basis of personal examination. It may, in some cases, be necessary if the responsible clinician is shielding (as many are in different Trusts) for the position of responsible clinician to be transferred to someone able to carry out this function.

The language of s.23 (discharge) does not include these terms, so it is suggested that there is nothing to prevent the responsible clinician (or the hospital managers) discharging a patient on the basis of remote consideration of the position, so long as they can properly be satisfied that the person no longer meets the criteria for detention.

What about people who have been detained on the basis of remote assessments?

The judgment does not address this, but the logical implication of this is that the applications cannot properly have been made, such that fresh applications will have to be made in order lawfully to continue the detention if it is considered to required.

The same also applies where the detention was brought upon on the basis of an 'in person' examination but then renewed remotely.

The judgment does not address the position in relation to whether claims for unlawful detention can be made in relation to patients who were detained on the basis of remote assessments,

[3] Although see here for an argument that it may be possible to make the argument that renewals can be treated differently.

but it is important to note that even if a detention is unlawful because the correct procedure was not followed, this does not mean that the person will automatically be entitled to more than so-called nominal damages (i.e. £1). If it can be shown that, at all times, they met the substantive criteria for detention, then it is very likely that they will not be able to show that they suffered any loss, required to establish a claim for substantive damages (see *Bostridge v Oxleas NHS Foundation Trust* [2015] EWCA Civ 79).

What about CTOs?

Section 17A does not provide that there be personal examination (by either the RC or the AMHP), so there is nothing to stop the decision to put the person on a CTO being undertaken following remote consideration of the position if both the RC and the AMHP can be satisfied that the criteria are met.

One major area of potential difficulty is in relation to renewal; as set out above, it is not immediately obvious that it is possible to differentiate between "personal examination" (the language used for admission) and "examination" (the language used for renewal), and this applies equally to those who are on CTOs. This suggests that remote renewals cannot be used for CTOs and that CTOs which have at any stage seen the underlying detention renewed remotely cannot continue in force. The resulting audit that is no doubt taking place in many Trusts to identify which of their patients may be on these CTOs (and whom, in consequence, might have to be subject to fresh admission applications) may serve as an – inadvertent – natural experiment in identifying which patients are on 'legacy' CTOs are which really do require the framework of these instruments. That challenge had been levelled by the Independent Review of the MHA 1983, but the White Paper presumably did not expect that this challenge was to be brought to a head quite so abruptly.

It should be noted that the consequences in terms of liability where anyone has been on a CTO which has been the basis of a remote renewal are – or should be – different to the position where they have been detained. A CTO cannot be used to create a circumstance of deprivation of liberty (see *PJ*), so the challenge would be to the interference with the Article 8 rights of the patient.

Does the judgment have any implications in relation to Second Opinion Appointed Doctors?

Not directly, because the requirements in relation to SOADs in Parts 4 and 4A do not include the same statutory requirements for personal examination that the court was considering in the *Devon* case. The CQC's procedure for remote working in relation to SOADs (20 March 2020) remains in force. The judgment, though, does serve as a reminder that the protections contained within the MHA are there for a reason, and deviations forced upon practitioners by the pandemic should always be justified.

Does the judgment have any implications for DoLS?

Not directly. The MCA does not have any statutory requirement for face to face assessment for any part of DoLS. That having been said, the judgment serves as a reminder of the importance of procedural protections relating to deprivation of liberty. In this context, the DHSC's Emergency MCA/DoLS guidance reminds practitioners that face to face to visits are an important part of the DoLS

framework and "can occur if needed, for example to meet the person's specific communication needs, in urgent cases or if there are concerns about the person's human rights." However, the guidance also makes clear that "[d]ecisions around visiting are operational decisions and ultimately for the providers and managers of individual care homes and hospitals to make. DoLS professionals should work closely with hospitals and care homes to decide if visiting in person is appropriate, and how to do this safely. Visiting professionals should understand and respect their local visiting policies, including for individual hospitals and care homes."

What about longer term implications?

The court in the *Devon* case made clear that it was:

> acutely aware of the difficulties to which the statutory provisions – as we have construed them – give rise for the Trust and for others exercising functions under the MHA. Nothing we have said should be taken as minimising those difficulties. Whether and how to address them will be for Parliament to decide.

It is possible that Parliament might be asked to amend the MHA on a time-limited fashion (time-limited amendments were introduced in the Coronavirus Act 2020 in relation to other aspects of admission under the MHA, although they were never brought into force). However, it is unlikely that this would or could happen in the very short term.

It should be noted that when the DoLS regime is replaced in due course with the LPS, there will be no requirement within Schedule AA1 to the MCA 2005 for face to face assessment. We do not yet have the regulations relating to assessment, but unless they provide for face to face assessment (which, if they track DoLS, is unlikely) then the approach in relation to 'mental capacity' detention and 'mental health' detention will continue to be different.

Short note: domestic abuse and coercion and control

In *F v M* [2021] EWFC 4, Hayden J has returned to the problem of coercion and control that he had previously considered in the context of the Court of Protection in *Re LW* [2020] EWCOP 50. The case is a deeply troubling one, turning on its own facts, but of wider importance is the extent to which Hayden J identified that it was only against the checklist of possible factors pointing to coercive and controlling behaviour in the Home Office's statutory guidance published under the Serious Crime Act 2015 that it was possible to identify that apparently innocent conduct had a very different, and more sinister complexion. See paragraphs 61 to 63, and, further, the detailed extracts from the relevant police interviews at paragraphs 45-60, which illustrate "*both the insidious and manipulative nature of coercive and controlling behaviour and its impact on the victim*."

Elections and mental capacity

In *Strobye and Rosenlund v Denmark* [2021] ECHR 95, the European Court of Human Rights held, on its face perhaps rather surprisingly, that there was no breach of the right to vote enshrined in Article 3 of Protocol 1 ECHR involved in the provisions in Danish law disenfranchising the applicants because they had been deprived of

their legal capacity.

The Government argued that the measure complained of had pursued the legitimate aim of ensuring that voters in general elections had the required level of mental skills. Perhaps surprisingly, the applicants agreed. The court, in turn, agreed (and noted that in its earlier decision on voting rights and disability, *Alajos Kiss*, it had taken the same view, at paragraph 38).

The applicants' situation, and the proportionality and jurisdiction of the limitation on their voting rights, had been examined by the Supreme Court in Denmark with a degree of care that the ECtHR considered militated in favour of a wide margin of appreciation.

The court further found that there was no common ground at the international or European level. Whilst it identified that Article 29 of the UNCRD required that States Parties guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, it also noted that the Venice Commission in its Opinion no. 190/2002 on its Code of Good Practice in Electoral Matters had a more cautious approach, accepting that under certain cumulative conditions, provision may be made for depriving individuals of their right to vote. It should perhaps be noted that the court did not address the UNCRPD Committee's decision on the complaint brought by the applicants in the *Kiss* case, in which the Committee had held that "*an exclusion of the right to vote on the basis of a perceived, or actual psychosocial or intellectual disability, including a restriction pursuant to an individualized assessment, constitutes discrimination on the basis of disability, within the meaning of article 2 of the Convention*."

The ECtHR was also clearly struck by the fact that, with each legal amendment, the issue of disenfranchisement was considered afresh:

> *119. The Court recalls, however, that with each legal amendment, including the one leading to the right to vote in European Parliament elections in 2016, the issue of disenfranchisement was carefully assessed by the legislature in its laudable effort throughout many years to limit the restrictions on the right to vote. The fact that the development obtained required thorough legal reflection and time, cannot, in the Court's view, be held against the Government to negate the justification and proportionality of the restriction at issue. The Court also takes account of the changing perspective in society, which makes it difficult to criticise that the legislation only changed gradually (see, mutatis mutandis, Petrovic v. Austria, 27 March 1998, § 4, Reports of Judgments and Decisions 1998-II).*
>
> *120. The Court is therefore satisfied that the above elements significantly differed from the situation in Alajos Kiss (cited above, § 41), where the Court observed that there was no evidence that the legislature had ever sought to weigh the competing interests or to assess the proportionality of the restriction in question.*

The court therefore dismissed the application. Although it did not address the *Kiss* complaint to the UNCRPD Committee, it is inconceivable that it was not aware of it (and the Committee's observations on Denmark's compliance with the UNCRPD were in line with the decision). The ECtHR therefore clearly remains still to be convinced by the position adopted on

fundamental issues by the CRPD Committee.

The position in the United Kingdom, it should be noted, is nuanced. There is no explicit prohibition on voting based upon mental incapacity (or a status such as mental disorder), s.73 Electoral Administration Act 2006 explicitly having abolished "[a]*ny rule of the common law which provides that a person is subject to a legal incapacity to vote by reason of his mental state*," but as Lucy Series explains in this blog, inadvertent barriers are placed in the way of individuals with cognitive impairments through requirements relating to registration.

BIHR resources for professionals

The fantastic British Institute of Human Rights has continued to add to its suite of free resources for service providers who want to understand what human rights-based practice actually means. Their resources include

- Mental Health, Mental Capacity and Human Rights: A practitioner's guide
- Learning Disability and Human Rights: A practitioner's guide
- Mental Health Early Intervention and Human Rights: A practitioner's guide
- Hospital Discharge and Human Rights: A practitioner's guide
- Rehabilitation and Human Rights: A practitioner's guide
- Mental Health Care for Children and Young People and Human Rights: A practitioner's guide
- Mental Health Accommodation and Human Rights: A practitioner's guide
- Social Care Intervention and Human Rights: A practitioner's guide
- Dementia and Human Rights: A practitioner's guide
- Nursing and Human Rights: A Practitioners' Guide
- Midwifery and Human Rights: A Practitioners' Guide
- End of Life Care and Human Rights: A Practitioners' Guide

The EU, independent living and the CRPD

In 2019, the European Network on Independent Living – ENIL and the Validity Foundation submitted two separate complaints against the Managing Authorities in Romania and Estonia, for using European Structural and Investment Funds (ESI Funds) to build new institutions for persons with disabilities. The two complaints can be found on Validity's website, along with the response from the European Commission provided in December 2020, finding that Member States are not violating EU law if they use ESI Funds to invest in new institutions. The Commission's response (to the Romanian complaint, identical here to that in the Estonian complaint) addressing the UNCRPD Committee's General Comment 5 (on living independently and being included in the community), makes clear the Commission's position that "[c]*omments adopted by that body do carry policy weight and should be taken into account when it comes to the implementation of the UNCRPD. However, General Comment No 5 does not create legal obligations for the State parties under the UNCRPD*."

The Commission made clear that it does not consider that the size of a facility is key for assessing if it is a long-stay residential facility preventing the personal choice and autonomy or a community based care housing that is providing for independent living. Rather, "*focus should rather be put on assessing the existence of an institutional character and the lack of independent living in a residential setting*."

ENIL and Validity have made clear that intend to seek to take this matter further, on the basis that they consider that it seriously undermines the prospect of full implementation of the CRPD within the European Union.

Research corner: the MCA and the translation gap

In England and Wales, the concept of mental capacity is codified in the Mental Capacity Act 2005 (MCA). Central to this concept is the functional test – whether the person can understand, retain, use and weigh information relevant to the decision, and communicate the decision that they have made. But what does it actually mean to 'understand' information, or to 'use or weigh' information? The MCA does not contain any amplification of these phrases. While they carry legal meaning, these terms may not mean the same to all those who seek to apply them in health or social care practice.

Equally importantly, not all of the phenomena that professionals encounter in practice will fall cleanly under terms within the MCA functional test. Consider, for example, a person who declines to accept that they have an illness, or a person who seems not to care that the consequences of that illness could be very serious for them. This problem is well-identified in relation to the clinical concept of insight (and specifically 'red-flagged' as a concern in the 2018 NICE guidance on decision-making and mental capacity – see paragraph 14.24) but applies equally to many other phenomena.

As part of the Wellcome-funded Mental Health and Justice project, we wanted to start to bridge this translation gap. To do so, we turned in the first instance to the rich resource of Court of Protection (and relevant Court of Appeal) judgments, containing as they do both extensive extracts of evidence given by professionals (often, but not exclusively, psychiatrists) and the interrogation of that evidence by judges. In a paper published on 5 February 2021 in PLOS ONE, we analysed all available judgments where the terms of the MCA were applied in a way which went beyond merely repeating the words of the statute. Using this analysis, we developed a set of what we have called 'capacity rationales,' explanations given by the judge or expert witness for why a person did or did not have capacity to make the relevant decision. This typology has nine categories; (1) to grasp information or concepts; (2) to imagine/ abstract; (3) to remember; (4) to appreciate; (5) to value/ care; (6) to think through the decision non-impulsively; (7) to reason; (8) to give coherent reasons; and (9) to express a stable preference.

In our paper, we explain in detail how we developed these rationales from the text of the judgments, how different rationales appeared to be linked to particular impairments of mind or brain, and how we might begin to use these

rationales to develop a more transparent and accountable way of applying the legal test of mental capacity to the phenomena encountered in practice. This task will require some care, not least because one of our findings was that MCA terms such as 'use or weigh' are often used in different ways. But allowing identification of a set of capacity building blocks, with a clear foundation in Court of Protection judgments, means that, at a minimum, we can start the conversation about what an inability to use and weigh might mean at a more gritty level. It also means that we can start to interrogate whether any of the rationales that emerge from our study are 'edgier' than others, such that reliance upon them for capacity determinations either inside or outside the courtroom should draw more scrutiny. Last but by no means least, we suggest that outlining these rationales will enable us to offer more specific and targeted decision-making support, to better meet our obligation under s.1(3) MCA 2005.

For the full paper, see here, and for a discussion between lead author, Dr Nuala Kane, and Alex Ruck Keene, see here.

Written by Dr Nuala Kane and Alex

SCOTLAND

Scott Review Interim Report – discussion continues

In the January Mental Capacity Report I commented on the second Interim Report of the Scott Review, published on 18th December 2020. My further Comments were also written on the basis of what actually appears in the Interim Report, not what else might have been done or be planned. My Comments were provided in the first instance to John Scott QC, leading the Review, and also discussed at a cordial and helpful meeting with the Review Team, before being published. The published version nevertheless remains as originally written, as it is more appropriate that further comments be provided by the Review Team itself. We are grateful to John Scott QC for accepting our invitation to provide the comments below. For ease of access, we again provide the link for the Interim Report here.

Adrian D Ward

Scottish Mental Health Law Review Interim Report December 2020: Update from the Executive Team

The Executive Team of the Scottish Mental Health Law Review (the Review) welcomes comment on Scottish mental health, incapacity and adult support and protection legislation as it currently operates and on how it and related human rights observance might be improved. In this spirit, we therefore thank Adrian Ward for his most recent comments on our December 2020 Interim Report all of which are noted. The December 2020 interim report can be found here and all reports, the Review's Terms of Reference and notes of meetings of the advisory groups can be accessed via the Review's website. For those wishing to fully inform themselves about the Review and its work we recommend that you make full use of these resources. Minutes of advisory group meetings are updated regularly.

We have now entered a period of further investigating aspects of our remit, as set out in our Terms of Reference, and refining and taking forward areas that we have been working on to date. The Review will end with a final report in September 2022 and, given the time left to work on it, we must focus on this. Our December Report sets out over 30 specific actions we are taking over the next few months. In this note we will briefly explain key aspects of our direction of travel.

Nature of the December Interim Report: what is not said, terminological nuances and accessibility

It is worth commenting on the overall nature of the interim report before making some more specific comments.

Firstly, the report is very much intended to provide a broad overview of the progress of the Review to date. The fact that aspects of the Terms of Reference or important issues associated with the areas under consideration by the various Advisory Groups are not at this stage fully developed or specifically mentioned in the report does not mean that they are not being, or will not be, considered and investigated. We are only half way through the Review and have much to cover in the nineteen months leading to September 2022.

Secondly, the report is intended to provide a widely accessible and understandable flavour of the areas and issues covered to date. We are

aware that clarity around terminology and nuances in the use of language still need to be dealt with and this will be addressed in detail by our final report. As our work is ongoing, the interim report is not therefore the place to consider these. What we can say at this stage, however, is that different uses of language and expressions for essentially the same thing amongst different groups of persons and practitioners is very evident and we need to seek a more common language. Indeed, this is essential to the effectiveness of rights-based legislation and its implementation.

Scope of the Review: Terms of Reference

The Review's Terms of Reference – which can be accessed here and should be read in their entirety – state that:

> *'The principal aim of the review is to improve the rights and protections of persons who may be subject to the existing provisions of mental health, incapacity or adult support and protection legislation as a consequence of having a mental disorder, and remove barriers to those caring for their health and welfare.'*

This includes the right to the highest attainable standard of physical and mental health, rights related to the care and treatment and wider civil, political, social, economic and cultural rights, the equal and non-discriminatory enjoyment of which are essential for persons with mental disorder to overcome challenges that may be faced and participate in society on the same basis as others.

Which persons are covered by the Review?

As stated in the terms of Reference, the term 'mental disorder' is the one currently used in our legislation. We will continue to explore alternative phraseology. We are fully aware that use of the expression 'mental disorder' can have offensive connotations and is contrary to the ethos of the Convention on the Rights of Persons with Disabilities (CRPD). Moreover, the recent Scottish Independent Review of Learning Disability and Autism in the Mental Health Act considered whether or not learning disability and autism should continue to fall within the definition of 'mental disorder' in the Mental Health (Care and Treatment) (Scotland) Act 2003.

During the Review, we take the term 'mental disorder' to include all persons with psychosocial, cognitive and intellectual disabilities who actually or may potentially be subject to our mental health, incapacity and adult support and protection legislation.

As we set out in the interim report, our focus to date has been predominantly on mental illness, but all groups will be considered and included.

Legislation covered by the Review

The Terms of Reference specifically state that when we talk about 'mental health legislation' we are referring to the Mental Health (Care and Treatment) (Scotland) Act 2003 (the Mental health Act), Adults with Incapacity (Scotland) Act 2000 (the AWI Act) and Adult Support and Protection (Scotland) Act 2007 (the ASPA) and that the purpose of the Review is:

> *'To improve the rights and protections of persons, who may be affected by the Mental Health Act, the AWI Act or ASPA, because they have a mental disorder.*

> *To remove any barriers that carers who look after and support persons with a mental disorder might have in their caring role.'*
>
> *Whilst, to date, the Review has considered the Mental Health Act and its implementation this has not been to the exclusion of the other two Acts. They will be increasingly considered as we move forward, including the substantial body of work on reform of the AWI Act already undertaken by the Scottish Government. None of that work will be lost.*

Lived experience and carer involvement and consultation

The Review takes the involvement of persons with lived experience and carers in its work very seriously and notes the requirements of Article 4(3) CRPD. As the interim report states, our Executive Team currently has two members with lived experience both of whom are joint Vice-Chair of the Executive Team. Moreover, we are in the process of appointing another lived experience member to the Executive Team.

The membership of our workstream advisory groups includes lived experience and carer membership which continues to be, invaluable and integral to the development of areas under our consideration.

Moving forward

Over the next 3-4 months we will continue to gather evidence and investigate further the key issues we have identified, before we go on to test out options for reform. Our next steps include:

- The establishment of two reference groups representing practitioner interests and lived experience to test out our emerging thinking
- Work with the Mental Welfare Commission to interrogate data on the use of the Mental Health Act
- Commissioned research into the implications of the UN Conventions on the Rights of the Child and the Rights of Persons with Disabilities for mental health and incapacity legislation
- Work with the Royal College of Psychiatrists and other key professional groups to consider problem cases for the use of current legislation
- Engagement with peer support and collective advocacy organisations on priorities in securing rights for those with lived experience.

Further updates and information about the Review can be obtained from the Secretariat on secretariat@SMHLR.scot

John Scott QC, Chair, Scottish Mental Health Law Review

The child who didn't want to return to Poland

Children, like adults with mental or intellectual disabilities, can be the subject of disputes between individuals or factions in their lives. Sometimes such disputes have a cross-border aspect. *W v A*, [2020] CSIH 55; 2021 S.L.T. 62, concerned a 10 year-old child caught in such a situation, a dispute between her parents. In *F v S*, 2012 SLT (Sh Ct) 189, a French adult was caught in a dispute between members of her French family and her Scottish stepfamily, after she had been brought to Scotland. We cover *W v A* here because it was a decision upon appeal

by an Extra Division of the Inner House, overruling a decision by a Lord Ordinary, emphasising points which can readily be "read across" to similar cases concerning adults.

In *W v A*, the child's parents cohabited in Poland until she was seven. Thereafter mother sought permission from the Polish court to take the child to Scotland. Permission was refused. In June 2019 mother wrongfully removed the child to Scotland, in defiance of the Polish court order. In March 2020 father petitioned the Court of Session for the child's return to Poland. Although the child herself objected to the return, the Lord Ordinary took the view that the child's views were outweighed by other features of the case, and in particular the decision of the Polish court. He exercised his discretion in favour of father, and ordered her return to Poland.

Mother reclaimed. The decision of the Inner House was delivered by Lord Malcolm. He held that: "… in the circumstances of the present case we are driven to the conclusion that the Lord Ordinary viewed the Polish court's decision, and the mother's immediate defiance of it, as eliding any need to address other factors. This is an error in law, and thus we will quash his decision." He further held that in view of the Lord Ordinary's error of law, the appeal court had a discretionary power either to order or to refuse the child's return to Poland.

As to the child's views, Lord Malcolm narrated the information before the court as follows: "The reporter stated that the child was capable of expressing her views. She objects to a return to Poland. She prefers being in Scotland, where she has everything she wants, including her mother, a house, her own bedroom, a happy school life and friends. In Poland her living conditions were "mega-crowded". She did not want to spend time with her father. She had various complaints about him and her contact visits with him which need not be recorded in this opinion. If returned to Poland she thought she would not be allowed to come back to Scotland. She is "really happy" in Scotland. The reporter found no evidence of her views being influenced (intentionally or otherwise) by her mother. They were her own. She had no understanding of the purpose of a return to Poland, nor of the respective functions of the courts of the two jurisdictions."

The Inner House proceeded on the basis that theirs was an interim decision pending final determination of the matter by the Polish court. On that basis, it refused to order the child's return to Poland.

That case, of course, turned principally upon the Hague Convention of the Civil Aspects of International Child Abduction, which is incorporated into the Child Abduction and Custody Act 1985. Aspects relevant to those provisions, and the status of the 10 year-old as a child, are not covered in this Report. Broadly similar considerations would however apply to a dispute concerning an adult. In particular, as relevant proceedings in Scotland would be based upon Schedule 3 to the Adults with Incapacity (Scotland) Act 2000, the principles in section 1 of that Act would apply. Section 1(1) provides that those principles apply "to any intervention in the affairs of an adult under or in pursuance of this Act". Expressly included is any order made in proceedings under the Act, or for the purpose of proceedings under the Act "for or in connection with an adult". Even though such a dispute might be between others, such as

factions of a family, the person at the centre of the proceedings would be "the adult" for the purposes of the section 1 principles. In *W v A*, the child was represented by Counsel. One would have concerns if in a dispute concerning an adult the court did not ensure the availability of suitable representation to the adult.

Adrian D Ward

The adult who did want to return to Poland

The Judgment of Mr Justice Hayden, Vice President of the Court of Protection, in the case of *Re UR* [2021] EWCOP 10, is described in the Practice and Procedure section of this Report. I draw the attention of Scottish readers to it for three reasons. For ease of reference, the link to the Judgment is repeated here

Firstly, it provides a very good summary of the current approach in England & Wales to the general issue of decision-making in such cases, where (basically) there is a choice between overruling an adult's wishes, or implementing them. Increasingly in the modern world, sophisticated jurisdictions may have different routes towards arriving at decisions in such circumstances, but the goal tends to be the same, and the underlying principles of many of the dicta quoted by Mr Justice Hayden, and his own comments, may sometimes be helpful to practitioners in the context of Scottish cases.

That context may include circumstances such as those that I reported in the last three issues of the Report last year, leading me to ask in the November issue: "*Are the forces of institutional ageism and disability discrimination in Scotland so powerful as to exclude some people altogether from the scope of the rule of law, and from the concept of the universality of human rights and fundamental freedoms?*" Practitioners might find it useful, on occasions, to be able to cite passages quoted in the Judgment in the *UR* case, such as the following:

"… we must avoid the temptation always to put the physical health and safety of the elderly and the vulnerable before everything else. Often it will be appropriate to do so, but not always. Physical health and safety can sometimes be brought at too high a price in happiness and emotional welfare."

"*What good is it making someone safer if it merely makes them miserable?*"

"*… it seems to me that for the elderly there is often an importance in place which is not generally recognised by others; not only the physical place but also the relational structure that is associated with a place …*"

"*… several last months of freedom in one's own home at the end of one's life is worth having for many people with serious progressive illnesses, even if it comes at a cost of some distress*"

"*…although there is a significant risk that a home care package at home will 'fail', there is also a significant risk that institutional care will 'fail' in this sense (that it, produces an outcome that is less than ideal and does not resolve all significant existing concerns)*"

The sources of all of those quotations appear in paragraph 25 – 27 of the Judgment.

Secondly, among reasons for drawing the case of *UR* to the attention of Scottish readers, Mr Justice Hayden rightly commends the quality of preparation for the hearing before him, and the extent to which all relevant elements in the

process of reaching a decision were identified and addressed. Here again, with intelligent adaptation to the requirements of Scots law, the overall methodology, and presence of checklists, is helpful, particularly when one has to concede that the standard of pleadings and of safeguarders' reports in Scotland continues to vary from excellent at one extreme to simply not fit for purpose at the other. As admittedly a grumpy old former practitioner, I do rather wonder where – for example – some courts find safeguarders who apparently have not read section 1 of the 2000 Act and understand the need to consider all of the principles in relation to every intervention.

Thirdly, the particular question in this case was whether the court should grant an order acceding to, and implementing, *UR*'s wish to return to her native Poland. Here again, for Scottish practitioners the careful manner in which this was addressed, and the suggested checklist provided by Mr Justice Hayden in paragraph 57 of his Judgment, are likely to be helpful. The one possible mild criticism of the discussion of relevant cross-border considerations in paragraphs 36 *et seq* of the Judgment, and of that checklist, is the absence of reference to the involvement of the Central Authority in cases involving countries that have ratified Hague Convention 35 of 2000 on the International Protection of Adults. The provisions of that Convention are effectively incorporated in Scots law by Schedule 3 to the 2000 Act. Schedule 3 to the Mental Capacity Act 2005 serves a similar function for England & Wales, but with the obvious difference that Hague 35 has been ratified in respect of Scotland but not in respect of England & Wales; nor has it been ratified in respect of Poland, so that it was inapplicable to either the transferring state or the receiving state in this particular case. In consequence, as Mr Justice Hayden acknowledges in paragraph 38, the cross-border provisions of Hague 35 are not in force in England & Wales. He might have pointed out that, as is demonstrated by transfers from England to Scotland, the role of the Central Authority requires to be recognised in a transfer from England & Wales to a country that has ratified Hague 35: the role of Scotland's Central Authority in such cases was addressed in *Darlington Borough Council, Applicants*, 2018 SLT (Sh Ct) 53 (see also my case commentary at 2018 SLT (News) 26. The requirements to involve the Central Authority arise under Article 33 of Hague 35, as effectively replicated in paragraphs 7 and 8 of the 2000 Act. If current prospects of Hague 35 being ratified in respect of England & Wales during the course of this year materialise, Mr Justice Hayden's checklist will require to be updated.

Adrian D Ward

Caring responsibilities as mitigation

An accused's responsibilities as a carer was a principal mitigating factor, albeit along with other factors, in a successful appeal against sentence to the High Court of Justiciary in *Houten v HM Advocate*, [2019] HCJAC 43; 2021 S.L.T. 33. The accused had pleaded guilty to being concerned in the supply of controlled drugs contrary to s.4(3)(b) of the Misuse of Drugs Act 1971. He had no significant previous convictions, was of good record, and had already served a period in custody. He accepted that he had been involved in the supplying of Class A drugs, but on one occasion only when he performed for a friend the task of providing a

safe house and holding the drugs for that friend. He made no direct financial gain from this. Also, over a number of years he had been primary carer for his partner's son, aged 18, with what the court described as "a considerable range of disabilities". As well as caring for the son, he was "the boy's only male friend and therefore plays a very important part in his life".

Taking all relevant matters into account, the appeal court concluded that this was a case "that might exceptionally, and we would emphasise exceptionally, be dealt with by a community payback order". For the sheriff's sentence of 23 months' imprisonment, discounted from 30 months, the appeal court substituted a payback order for a period of three years subject to an unpaid work requirement of 250 hours to be completed over a period of 12 months.

Adrian D Ward

The executors who were also attorneys

The late James Campbell died on 14th June 2015 at the age of 92, leaving two sons. In 2008 he had appointed one of his sons, and that son's wife, to be both his joint welfare and continuing attorneys, and his joint executors. They acted as his attorneys, and provided him with substantial ongoing care and support, until his death. The other son lived overseas. He challenged various actions of his brother and sister-in-law both before and after their father's death. He petitioned the Court of Session for removal of them as executors, and appointment of a judicial factor to administer the estate. Lady Poole issued her Judgment in *Campbell v Campbell's executors*, [2021] CSOH 3, on 20th January 2021, having heard proof over two days on 3rd and 4th December 2020, followed by submissions on 6th January 2021.

"I've seen it all before" will be the reaction of many practitioners upon reading the preceding paragraph. Those aware of the solution to such situations proposed by John Kerrigan, solicitor, now a consultant with Blackadders LLP (and named here with his kind agreement) will have already concluded that the "Kerrigan solution" would offer a better way of addressing such situations. I refer further to that solution at the end of this article.

Beyond that bald summary, it seems that the parties were not quite as intransigently inflexible as often is the case in such family disputes. They certainly seem to have been litigious: the overseas brother had raised a previous action of count, reckoning and payment. He admitted to having stolen a bankbook belonging to the deceased when staying in the deceased's house, and he used the information in it to challenge the attorneys/executors. The overseas brother had sent important communications, including in relation to the previous action, to the wrong address for the attorneys/executors. They on their part had made many "mistakes", as they are somewhat charitably characterised in the Judgment. For example, after the deceased's death they withdrew substantial sums and applied them in accordance with what they maintained were instructions and wishes of the deceased, but those were not contained in his Will. The "mistakes" were however retrievable, and it does seem that in due course they were retrieved, or at least were being addressed with a view to retrieving them. A peculiarity is that at one stage they for some reason consulted

English solicitors, but as Lady Poole narrated and commented: "*… the executors chose not to instruct a solicitor in Scotland to assist with the executry to save expense. They have accordingly not had the benefit of legal advice about permissible expenses and distributions. There is no doubt in my mind this has led to problems. Ignorance of legal requirements does not absolve executors from carrying out their legal duties. Nevertheless, the question of whether or not executors have breached any duties is not the same question as whether they should be removed from office.*"

The competence of removing executors and appointing instead a judicial factor does not appear to have been in dispute, but Lady Poole pointed out that the view of the courts has always been that such a remedy is an "extreme" measure (see *Gilchrist's Trustees v Dick*, (1883) 11 R22); that "mere negligence", even resulting in some loss, might not afford sufficient grounds for removal but that "*persistent, wilful neglect, contempt, and obstruction, which taken together render execution of a trust a practical impossibility, might suffice, as might unreasonable and wilful refusal to perform the duty of a trustee*" (*MacGilchrist's Trs v MacGilchrist*, 1930 SC 635); and more recently the test in *Shariff v Hamid*, 2000 SCLR 351, as to whether on the facts there was something equivalent to, or as bad as, malversation of office when a trustee obstinately refuses to acknowledge his legal duty and to discharge his legal responsibility, as a result bringing the affairs of the trust into confusion. She referred to several further cases. She concluded that "at this stage" the test for removal had not been met: "*In my opinion it is premature to remove the executors and appoint a judicial factor in the particular circumstances of this case. I recognise the petitioner has some legitimate complaints about the executry administration to date. Nevertheless, for reasons set out below I do not consider that the difficulties so far justify removal of the executors. I therefore refuse the prayer of the petition in hoc statu. The order I make leaves it open to the petitioner to reapply to this court by note in this process (under Rules 14.10 and 15.2 of the Rules of the Court of Session) if matters cannot be brought to a satisfactory conclusion by the executors.*"

In conclusion, the most recent iteration of the "Kerrigan solution" (proposed by me to Scottish Government on behalf of the Mental Health and Disability Committee of the Law Society of Scotland) was as follows:

> *"Continuation of investigations and remedies after death of the adult – As a particular example of a relatively straightforward and self-contained amendment added to the list mentioned above, and one which would appear to be uncontroversial, we would select the proposals that the Public Guardian should have discretion to continue investigations after the death of the adult, that the obligation under section 81 to repay funds should also continue after the death of the adult, and that where an attorney is also executor the entitlement to hold the attorney to account should not be limited to the executor."*

Word is awaited as to whether Scottish Government intend to allocate in the next session of Parliament an opportunity for amendment to the Adults with Incapacity (Scotland) Act 2000, and if so whether the Kerrigan solution is adopted as one of the improvements thus to be made.

Adrian D Ward

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Conferences

Members of the Court of Protection team are regularly presenting at webinars arranged both by Chambers and by others.

Alex is also doing a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

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 March. 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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