

Compendium issue

Introduction

Welcome to the April issue of the Mental Capacity Law Newsletter. The Newsletter has a new look this month, and, in a step upon which we would welcome feedback, we have decided to split the newsletter into five members of a family: (1) CoP: Health, Welfare and Deprivation of Liberty; (2) CoP Property and Affairs; (3) Practice and Procedure; (4) Capacity outside the CoP; and (5) Scotland. Each will be available separately, but it is always possible to read the entirety as one newsletter. The introduction will also always be the same across each of the members of the family.

The division comes at a vital time for the MCA 2005 – in one week in March we had first the report of the House of Lords Select Committee on the MCA 2005 (covered in more detail in the Capacity outside the CoP newsletter), and then the landmark decision of the Supreme Court in *Cheshire West* and *P and Q* (to which we devote almost the entirety of the Health, Welfare and Deprivation of Liberty newsletter). The Supreme Court also handed down an important decision in relation to litigation capacity and the settlement of civil proceedings, covered in detail in the Capacity outside the CoP newsletter, as are two important decisions on testamentary capacity. In the Property and Affairs newsletter, we cover important cases on gifts and the notification requirements in relation to statutory wills. In our Practice and Procedure newsletter we cover, amongst other things, the evidence given by the President and Vice-President of the Court of Protection to the Justice Select Committee. Last, by very much no means least, we cover in the Scottish newsletter the implications of the decision in *Cheshire West* for Scotland and also the consultation on draft proposals for a Mental Health (Scotland) Bill.

As if this were not enough, we also this month offer guidance notes: (1) on the [implications](#) of *Cheshire West*; and (2) on [capacity assessments](#); the [second part](#) of Adrian's note on Scottish adult incapacity law; and an [article](#) by Simon Edwards on testamentary capacity and the MCA 2005.

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Hyperlinks are included to judgments; if inactive, the judgment is likely to appear soon at www.mentalhealthlaw.co.uk.

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Perspectives upon *Cheshire West*

Given the ramifications of the decision in *Cheshire West*, we wanted to go beyond the legal bubble to ask what those on the ground see as its implications. The majority of this issue is therefore dedicated to a wide range of such perspectives.¹ We start, though, with a summary of the case itself. We should note that there is – unusually – no single editorial comment upon the judgment.

Cheshire West – the judgment

(1) *P v Cheshire West and Chester Council and another*; (2) *P and Q v Surrey County Council* [2013] [2014] UKSC 19 (Supreme Court ((Lord Neuberger, Lady Hale, Lords Kerr, Clarke, Sumption, Carnwath and Hodge))

Article 5 ECHR – Deprivation of liberty

Summary

The Supreme Court has now determined the Official Solicitor’s appeals against the conclusions of the Court of Appeal that MIG, MEG and P were not deprived of their liberty. The appeals were allowed unanimously in the case of Mr P, and by a

¹ Disclaimer: all views expressed by those who have kindly provided a contribution are their own with which the editors may (or may not) associate themselves.

majority of 4 to 3 in the cases of P and Q (or MIG and MEG). The lead judgment was given by Lady Hale, with whom Lord Sumption agreed. Lords Neuberger and Kerr expressly agreed with Lady Hale in their separate concurring judgments. Lords Carnwath and Hodge gave a joint dissenting judgment in the cases of P and Q; they were, however, satisfied that Baker J had directed himself as to the correct legal principles in the case of Mr P (even if they might not have reached the same decision), so the decision of the Supreme Court was unanimous in relation to allowing the appeal on P's behalf. Lord Clarke also dissented in the case of P and Q, giving a separate judgment. In total, therefore, there are four judgments for the majority, albeit all of them state themselves to be in agreement with Lady Hale.

The ultimate question

The ultimate question before the Supreme Court was, in some ways, simple to pose: does liberty mean something different to an adult who is (for reasons of disability) unable to take advantage of it? Or does liberty mean the same for all? As Lady Hale put it (at paragraph 33): *"The first and most fundamental question is whether the concept of physical liberty protected by article 5 is the same for everyone, regardless of whether or not they are mentally or physically disabled."*

Lady Hale had no hesitation in holding that it was:

"45. [...] axiomatic that people with disabilities, both mental and physical, have the same human rights as the rest of the human race. It may be that those rights have sometimes to be limited or restricted because of their disabilities, but the starting point should be the same as that for everyone else. This flows inexorably from the universal character of human rights, founded on the inherent dignity of all human beings, and is confirmed in the United Nations Convention on the Rights of

Persons with Disabilities. Far from disability entitling the state to deny such people human rights: rather it places upon the state (and upon others) the duty to make reasonable accommodation to cater for the special needs of those with disabilities.

46. Those rights include the right to physical liberty, which is guaranteed by article 5 of the European Convention. This is not a right to do or to go where one pleases. It is a more focussed right, not to be deprived of that physical liberty. But, as it seems to me, what it means to be deprived of liberty must be the same for everyone, whether or not they have physical or mental disabilities. If it would be a deprivation of my liberty to be obliged to live in a particular place, subject to constant monitoring and control, only allowed out with close supervision, and unable to move away without permission even if such an opportunity became available, then it must also be a deprivation of the liberty of a disabled person. The fact that my living arrangements are comfortable, and indeed make my life as enjoyable as it could possibly be, should make no difference. A gilded cage is still a cage."

Lord Kerr, who agreed with Lady Hale and Lord Neuberger (and who had posed the ultimate question during the course of argument), noted that:

"Liberty means the state or condition of being free from external constraint. It is predominantly an objective state. It does not depend on one's disposition to exploit one's freedom. Nor is it diminished by one's lack of capacity" (paragraph 76).

Guidance from Strasbourg

Parliament by enacting s.64(5) MCA 2005 tied the operation of the DOLS regime not to a statutory definition of when it was to operate, but rather to a definition that required judges to seek to

determine what, exactly, the European Court of Human Rights would consider constituted a deprivation of liberty. Both s.64(5) MCA 2005 and the consequent requirement identified to seek to find clear guidance from Strasbourg gave rise to considerable discussion in the judgments. Indeed, perhaps the main point of division between the majority and the minority was whether such guidance existed and, if did not, what the Supreme Court should do in consequence.

It was common ground that, as Lady Hale – rightly – noted after summarising the jurisprudence of the ECtHR:

“32. The Strasbourg case law, therefore, is clear in some respects but not in others. The court has not so far dealt with a case combining the following features of the cases before us: (a) a person who lacks both legal and factual capacity to decide upon his or her own placement but who has not evinced dissatisfaction with or objection to it; (b) a placement, not in a hospital or social care home, but in a small group or domestic setting which is as close as possible to “normal” home life; and (c) the initial authorisation of that placement by a court as being in the best interests of the person concerned. The issue, of course, is whether that authorisation can continue indefinitely or whether there must be some periodic independent check upon whether the placements made are in the best interests of the people concerned.”

The majority went on to find that it was possible to discern clear principles from the Strasbourg jurisprudence which were applicable to the circumstances of the cases before them.

The acid test

Lady Hale “entirely sympathised” with the desire of Munby LJ to produce an acid test and thus to

avoid the minute examination of the living arrangements of each mentally incapacitated person for whom the state makes arrangements which might otherwise be required. Asking herself what the particular features of their concrete situation on which focus is needed, she held that:

“The answer, as it seems to me, lies in those features which have consistently been regarded as ‘key’ in the jurisprudence which started with HL v United Kingdom 40 EHRR 761: that the person concerned ‘was under continuous supervision and control and was not free to leave’ (para 91)” (paragraph 49)

Lady Hale found to be helpful the intervention of the National Autistic Society and Mind, in which they listed the factors which each of them has developed as indicators of when there is a deprivation of liberty. As she noted:

“Each list is clearly directed towards the test indicated above. But the charities do not suggest that this court should lay down a prescriptive list of criteria. Rather, we should indicate the test and those factors which are not relevant. Thus, they suggest, the person’s compliance or lack of objection is not relevant; the relative normality of the placement (whatever the comparison made) is not relevant; and the reason or purpose behind a particular placement is also not relevant. For the reasons given above, I agree with that approach” (paragraph 50).

Lord Neuberger, in a separate judgment agreeing with Lady Hale, recognised the importance of having as much authoritative guidance as possible to decide whether the circumstances of a particular case involve a deprivation of liberty falling within article 5 or a restriction on liberty falling outside article 5. As he noted (paragraph 60), “[w]hether a particular case involves deprivation or restriction must depend on the

specific facts of that case, but that does not mean that there can be no focussed guidance. It is also true that, however clear the guidance, there will be cases where it will be difficult to decide which side of the line the facts fall, but that is not a reason for the courts not seeking to minimise the uncertainty. On the contrary.”

Lord Neuberger, who agreed with Lady Hale that the Strasbourg court decisions indicated that the twin features of continuous supervision and control and lack of freedom to leave are the essential ingredients of deprivation of liberty (in addition to the area and period of confinement), went on to dissect the reasons advanced by Lords Carnwath and Hodge for distinguishing the facts of the cases before the Supreme Court from those Strasbourg cases in which those propositions had been repeated. They identified four factors, and against each we give the reasons why Lord Neuberger disagreed with them:

- (a) the person concerned lacks capacity to decide upon her placement but has not evinced dissatisfaction with or objection to it.

As Lord Neuberger noted, this conclusion would mean:

“67... that, however confining the circumstances, they could not amount to a deprivation of liberty if the person concerned lacked the capacity to object. That cannot possibly be right. Alternatively, there would be a different test for those who were unable to object and those who could do so. That would be a recipe for uncertainty.

68. In addition, the notion that the absence of objection can justify what would otherwise amount to deprivation of liberty is contrary to principle. It is true, and indeed sensible, that a person’s consent (provided that it is freely and properly given) may serve to defeat a

*contention that she has been deprived of her liberty. However, it involves turning that principle on its head to say that the absence of objection will justify what would otherwise be a deprivation of liberty – save in those rare circumstances where the absence of objection can be said to amount to consent, as in *Mihailovs v Latvia*, paras 138-139.” He further found that it would tend to undermine the universality of human rights to which Lady Hale referred.*

- (b) the placement is in a small group or domestic setting which is as close as possible to “normal” home life;

As Lord Neuberger noted (at paragraph 71), *“it is a fair point that the Strasbourg court has never had to consider a case where a person was confined to what may be described as an ordinary home. However, I cannot see any good reason why the fact that a person is confined to a domestic home, as opposed to a hospital or other institution, should prevent her from contending that she has been deprived of her liberty.”*

Lord Neuberger noted that, in the case of children living at home, what might otherwise be a deprivation of liberty would normally not give rise to an infringement of article 5 because it will have been imposed not by the state, but by virtue of what the Strasbourg court has called *“the rights of the holder of parental authority.”* He noted, though, that it was fair to say that;

“while this point would apply to adoptive parents, I doubt that it would include foster parents (unless, perhaps, they had the benefit of a residence order). But in the great majority of cases of people other than young children living in ordinary domestic circumstances, the degree of supervision and control and the freedom to leave would take the situation out of article 5.4. And, where article 5.4 did apply,

no doubt the benignly intimate circumstances of a domestic home would frequently help to render any deprivation of liberty easier to justify.”

- (c) a court authorised that placement for the best interests of the person concerned;

Lord Neuberger was not impressed:

“The court’s involvement in cases such as those to which these appeals relate is not equivalent to that of a court sentencing a criminal to a specific term of imprisonment. It is deciding that the circumstances of an innocent and vulnerable person, suffering from disability, are such that there must be an interference with his liberty. If that interference would otherwise amount to a deprivation of liberty, I find it hard to understand why it should be otherwise simply because the court has approved it. The court’s approval will almost always justify the deprivation from its inception, but, again, it is hard to see why it should continue to justify it for a potentially unlimited future. The only reason which can be advanced to justify such a conclusion is, as I see it, based on the purpose of the interference with liberty which brings one back to the observations in the Grand Chamber referred to in para 8 above.”

- (d) the regime is no more intrusive or confining than is required for the protection and well-being of the person concerned.

As Lord Neuberger noted (paragraph 66), ‘purpose’ was comprehensively rejected by Strasbourg in *Austin* and, more recently, *Creanga v Romania* (2012) 56 EHRR 361

Lord Kerr agreed with Lady Hale and Lord Neuberger, concluding that:

“87. ... for the reasons given by Lady Hale, it is apparent that two central features of the current Strasbourg jurisprudence point clearly to the conclusion that there is a deprivation of liberty in these cases. These are that the question of whether there has been a deprivation is to be answered primarily by reference to an objective standard and that the subjective element of the test is confined to the issue of whether there has been a valid and effective consent to the restriction of liberty. I do not accept that this clear guidance can be substituted with an “ordinary usage” approach to the meaning of deprivation of liberty. If deprivation of liberty is to be judged principally as an objective condition, then MIG, MEG and P are unquestionably subject to such deprivation, no matter how their situation might be regarded by those “using ordinary language.”

The individual cases

Mr P

P was an adult born with cerebral palsy and Down’s syndrome who requires 24 hour care. Until he was 37 he lived with his mother but when her health deteriorated the local social services authority obtained orders from the Court of Protection that it was in P’s best interests to live in accommodation arranged by the authority. Since November 2009 he had lived in a staffed bungalow with other residents near his home and had one to one support to enable him to leave the house frequently for activities and visits. Intervention was sometimes required when he exhibits challenging behaviour. Baker J had [held](#) that these arrangements did deprive him of his liberty but that it was in P’s best interests for them to continue. On the Council’s appeal, the Court of Appeal [substituted](#) a declaration that the arrangements did not involve a deprivation of liberty, after comparing his circumstances with

another person of the same age and disabilities as P.

Lady Hale found that Baker J had, in substance, applied the right test, derived from *HL v United Kingdom*, and his conclusion that “looked at overall, P is being deprived of his liberty” (para 60) should be restored (paragraph 51).

Lords Neuberger and Kerr did not address the specific facts of the case of Mr P, simply agreeing with Lady Hale.

Lords Carnwath and Hodge indicated that they considered that Baker J had directed himself correctly as to the law, and even if they might not have reached the same decision, agreed that Mr P’s appeal should be allowed.

P and Q (MIG and MEG)

P and Q (otherwise known as MIG and MEG) were sisters who became the subject of care proceedings in 2007 when they were respectively 16 and 15. Both had learning disabilities. MIG was placed with a foster mother to whom she was devoted and went to a further education unit daily. She never attempted to leave the foster home by herself but would have been restrained from doing so had she tried. MEG was moved from foster care to a residential home for learning disabled adolescents with complex needs. She sometimes required physical restraint and received tranquillising medication. When the care proceedings were transferred to the Court of Protection in 2009, Parker J [held](#) that these living arrangements were in the sisters’ best interests and did not amount to a deprivation of liberty. This finding was [upheld](#) by the Court of Appeal.

Lady Hale, considering their cases, held that:

“54. If the acid test is whether a person is under the complete supervision and control of those caring for her and is not free to leave the place where she lives, then the truth is that both MIG and MEG are being deprived of their liberty. Furthermore, that deprivation is the responsibility of the state. Similar constraints would not necessarily amount to a deprivation of liberty for the purpose of article 5 if imposed by parents in the exercise of their ordinary parental responsibilities and outside the legal framework governing state intervention in the lives of children or people who lack the capacity to make their own decisions.”

Lady Hale noted that:

“55. Several objections may be raised to the conclusion that both MIG and MEG are being deprived of their liberty. One is that neither could survive without this level of supervision and control: but that is to resurrect the comparison with other people sharing their disabilities and to deny them the same concept of liberty as everyone else. Another is that they are both content with their placements and have shown no desire to leave. If the “tacit acceptance” of the applicant was relevant in [Mihailovs](#), why should the same tacit acceptance of MIG and MEG not be relevant too?

Lady Hale distinguished *Mihailovs* because:

“he had a level of de facto understanding which had enabled him to express his objections to his first placement. The Strasbourg court accepts that there are some people who are not capable of expressing a view either way and this is probably the case with both MIG and MEG. As HL 40 EHRR 761 shows, compliance is not enough. Another possible distinction is that, if either of them indicated that they wanted to leave, the evidence was that the local authority would look for another placement: in other words, they were at least

free to express a desire to leave” (paragraph 55).

Lady Hale held that none of these suggested distinctions were very satisfactory, however, as she went on:

“56... Nor, in my view, should they be. It is very easy to focus upon the positive features of these placements for all three of the appellants. The local authorities who are responsible for them have no doubt done the best they could to make their lives as happy and fulfilled, as well as safe, as they possibly could be. But the purpose of article 5 is to ensure that people are not deprived of their liberty without proper safeguards, safeguards which will secure that the legal justifications for the constraints which they are under are made out: in these cases, the law requires that they do indeed lack the capacity to decide for themselves where they should live and that the arrangements made for them are in their best interests. It is to set the cart before the horse to decide that because they do indeed lack capacity and the best possible arrangements have been made, they are not in need of those safeguards. If P, MIG and MEG were under the same constraints in the sort of institution in which Mr Stanev was confined, we would have no difficulty in deciding that they had been deprived of their liberty. In the end, it is the constraints that matter.”

Lady Hale concluded with an observation upon policy. Because of the extreme vulnerability of people such as P, MIG and MEG, she believed that it was necessary to err on the side of caution in deciding what constitutes a deprivation of liberty in their case:

“56. They need a periodic independent check on whether the arrangements made for them are in their best interests. Such checks need not be as elaborate as those currently provided for in the Court of Protection or in the Deprivation

of Liberty safeguards (which could in due course be simplified and extended to placements outside hospitals and care homes). Nor should we regard the need for such checks as in any way stigmatising of them or of their carers. Rather, they are a recognition of their equal dignity and status as human beings like the rest of us.”

Lord Neuberger did not address the specific facts of the cases of MIG and MEG, simply agreeing with Lady Hale.

Lord Kerr in his separate concurring judgment was the only member of the majority to rely upon a comparator, in order to answer the question of whether MIG and MEG were deprived of their liberty:

“77. The question whether one is restricted (as a matter of actuality) is determined by comparing the extent of your actual freedom with someone of your age and station whose freedom is not limited. Thus a teenager of the same age and familial background as MIG and MEG is the relevant comparator for them. If one compares their state with a person of similar age and full capacity it is clear that their liberty is in fact circumscribed. They may not be conscious, much less resentful, of the constraint but, objectively, limitations on their freedom are in place.

78. All children are (or should be) subject to some level of restraint. This adjusts with their maturation and change in circumstances. If MIG and MEG had the same freedom from constraint as would any child or young person of similar age, their liberty would not be restricted, whatever their level of disability. As a matter of objective fact, however, constraints beyond those which apply to young people of full ability are – and have to be – applied to them. There is therefore a restriction of liberty in their cases. Because the restriction of liberty is – and must remain – a constant feature of

their lives, the restriction amounts to a deprivation of liberty.

79. Very young children, of course, because of their youth and dependence on others, have – an objectively ascertainable – curtailment of their liberty but this is a condition common to all children of tender age. There is no question, therefore, of suggesting that infant children are deprived of their liberty in the normal family setting. A comparator for a young child is not a fully matured adult, or even a partly mature adolescent. While they were very young, therefore, MIG and MEG’s liberty was not restricted. It is because they can – and must – now be compared to children of their own age and relative maturity who are free from disability and who have access (whether they have recourse to that or not) to a range of freedoms which MIG and MEG cannot have resort to that MIG and MEG are deprived of liberty.”

The case for the majority

Alex has expressed his support for the decision of the majority in posts upon his [website](#). He, Tor and Anna would associate themselves with the following comment that has been provided by Fenella Morris QC and Ben Tankel, both of whom appeared on behalf of P and Q (MIG and MEG).

All seven judges of the Supreme Court subscribed to the fundamental premise that the human rights of disabled people should be protected to the same degree as the human rights as everybody else. The decision of the majority is the only logical conclusion that can follow from this universally accepted premise: if to be subjected to total and effective control and shorn of my freedom of leave would be a deprivation of liberty for me, then why should it not be a deprivation of liberty for someone who lacks capacity?

This unavoidable logical conclusion at long last properly fills the *Bournewood* gap which, despite *HL* and the subsequent introduction of the DOLS regime, had continued to swallow many thousands of individuals who were deprived of their liberty in places other than psychiatric wards or care homes. In such cases, the State is interfering to the greatest extent imaginable in the lives of the most vulnerable. That large imbalance of power demands a level of procedural protection. Even if in our civil society the State usually exercises this power benignly, the majority judgment guarantees this is so by requiring the State to demonstrate in each case that the arrangements it makes are justified. The dangers of a lack of this type of protection have sadly been all too plain to see in recent years – see, for example, the Winterbourne View scandal.

The neat logic of the majority approach is reflected in many aspects of the various judgments: (1) It guarantees equality of rights for all; (2) It brings the law up to date by recognising the reality that more and more of those lacking capacity were falling into the *Bournewood* gap by – in line with current policy - being accommodated in foster placements, supported living arrangements, and other settings that provide them with as normal a life as possible; (3) It does away with the well-intentioned but conceptually problematic comparator approach advocated by the Court of Appeal, while retaining the aim of articulating a simple, workable, and authoritative test; (4) It supplants the notoriously slippery amorphous, multi-factorial approach that decision-makers had been required to adopt to date; (5) On an analytical level, it properly separates issues of justification from the definitional question of the objective components of a deprivation of liberty; And (6) it confronts, head-on, the “bewildering complexity” of the DOLS regime and places reform of an inadequate system firmly on the government’s agenda.

Still, one cannot but sympathise with the criticisms that are now being levelled against the majority judgment. That they are not to be dismissed lightly is attested by the fact that even now they have attracted three justices of the Supreme Court. But the criticisms take as their starting point the practical problems that the majority approach might cause, and work backwards from there. In doing so, they are required to depart from the simple logic of the majority approach. As such, they simply do not stand up to the same analytical scrutiny as the majority view. Witness Lord Neuberger's comprehensive dismantling of the joint dissenting judgment of Lords Carnwarth and Hodge, which he achieves within the space of a handful of paragraphs.

The major criticisms fall into three areas. First, it is said that the extension of the DOLS system will be put under strain. But where the State is interfering so heavily in the life of an individual, this seems a small price to pay for guaranteeing the protection of their human rights. Adults with capacity would accept no lesser level of protection, as demonstrated for example by our very well-developed (and no doubt very burdensome) criminal justice system. If this means that DOLS requires reform (and the recent report of the House of Lords Select Committee suggests it does), then it is quite right for the Supreme Court to point this out to the lawmakers across Parliament Square.

The second area of criticism is that it is difficult to digest that those placed in a loving and relatively normal environment should be described as being deprived of their liberty. The simple answer to this is that, as Lady Hale put it, "a gilded cage is still a cage". After over five decades of living with the ECHR we should be well used by now to human rights terms – such as "deprivation of liberty" having autonomous meanings that do not

correlate exactly with their ordinary usage. Moreover, on an analytical level, this criticism confuses questions of justification with the definition of deprivation of liberty: relative normality might help justify a deprivation of liberty, but it does not impact whether the deprivation of liberty has arisen in the first place. The third main area of criticism is that the majority judgment begs the question of what is meant by "control" and "freedom to leave". No doubt lawyers and judges will attempt to refine the definition of these terms over time. In the meantime, they provide a much more straightforward test than the previous multi-factorial approach. They also give decision-makers on the ground some necessary flexibility – those examining the facts of individual cases are far better placed than the Supreme Court to assess whether, applying the Supreme Court's "acid test", a particular set of facts amounts to a deprivation of liberty. It is also worth noting that part of the reason the Official Solicitor brought these three particular cases forward was because they provide a good range of facts, at or around the borderline, for testing the point of principle. The way in which the Supreme Court applied its test to the facts of the cases before it should therefore serve as a model for future decision-making, without much need for further elaboration of the test.

The case for the minority

The following comment is provided by Jenni Richards QC and Neil Allen, both of whom were instructed (along with Peter Mant) on behalf of the local authority respondents to both appeals.

According to Lady Hale, "*these cases are not about the distinction between a restriction on freedom of movement and the deprivation of liberty*" (paragraph 48). For the respondents, at least, that

distinction went to the very heart of the appeals.² Indeed, this was the seventh time in as many years that the highest Court had been approached for guidance on it. The distinction is reflected in the European jurisprudence between Article 2 of Protocol 4 and Article 5 ECHR. It can be seen in the Mental Capacity Act 2005 between s.6 (restriction on movement) and s.4A (deprivation of liberty), despite s.4A being confusingly entitled, “restriction on deprivation of liberty.”

So why does the distinction matter? “Depriving” liberty is unlawful unless the procedural and substantive safeguards of Article 5 are met. Care homes, hospitals, supported living schemes, and foster parents, for example, cannot care for a “deprived” person unless a prescribed legal procedure is first followed and their detention is justified on one of six grounds. Lord Kerr helpfully defined “liberty”: it is “the state or condition of being free from external constraint. It is predominantly an objective state. It does not depend on one’s disposition to exploit one’s freedom. Nor is it diminished by one’s lack of capacity” (paragraph 76). Liberty is intrinsic to the person: whether they be running around an open park or lying in a persistent vegetative state on a hospital bed, the degree of liberty remains the same.

The threshold at which the constraints upon such liberty are so intense as to constitute a deprivation of it is the same throughout the justificatory grounds in Article 5 and throughout the Council of Europe. Indeed, Parliament in MCA 2005 s.64(5) expressly aligns our domestic threshold with that of Strasbourg. Thus, whether it is a man with schizophrenia being kept in a Bulgarian care home, or a man with autism informally kept in

Bournemouth psychiatric unit; whether it is a woman kettled by police at Oxford Circus for 7 hours; or someone with a brain injury in a medically induced coma, the threshold for triggering Article 5 remains the same. In our opinion, that threshold cannot alter depending on whether the deprivation is potentially justifiable (type 1) or not (type 2)³: this puts the cart before the horse. It conflates the primary question of whether Article 5 is engaged with the secondary question of whether it can be justified.

The relevance of Strasbourg

Domestic courts must usually “take into account” European jurisprudence: Human Rights Act 1998 s.2. Doing no less but certainly no more than the ECtHR avoids judicial legislation and prevents member states from forging ahead out of kilter, albeit with the risk of falling behind in trying to stay level. Uniquely, however, MCA s.64(5) expressly gives “deprivation of a person’s liberty” the same meaning as in Article 5(1). Parliament’s intention was thereby to align our judicial definition with that of Strasbourg. It was, essentially, to give Strasbourg decisions direct effect in domestic law. Our threshold for Article 5 thereby rises and falls with every Strasbourg decision with no margin of appreciation.

This has the potential to create significant legal uncertainty. Strasbourg does not follow the doctrine of precedent. Its case law is not even binding upon itself. And yet Parliament has required our courts to abide by it. The Supreme Court accepted that there was an absence of direct authoritative guidance from across the water. None of the ECtHR decisions concerned the Article 5 threshold in “ordinary” homes, only

² It is not known why Lord Neuberger’s judgment focused on Article 5(4) rather than Article 5(1), the former only being

relevant if the latter is engaged (see paragraphs 60 and 73 of the judgment)

³ See paragraph 43 in the judgment of Lady Hale.

institutional (and often isolated) settings like social care homes and psychiatric hospitals. Moreover, the case law that was available was “clear in some respects but not in others” (paragraph 32). The majority of four lowered the threshold beyond that recognised – thus far - by Strasbourg; the minority of three did not.

Key Aspects of the Decision

Relative normality and the vexed question of a comparator

The concept of relative normality originates from *Engel* and resonates in some of the previous House of Lords decisions. It was embraced in the *Surrey* proceedings. And the more controversial yardstick of disabled normality originated in the *Cheshire West* proceedings. But none of the parties in the appeals supported a disabled comparator and its disappearance is welcome.

Disabled normality has gone; and so too has relative normality, in the sense used by the Court of Appeal in the *Surrey* case. Lady Hale considered comparing lives of MIG and MEG with the ordinary lives which young people of their ages might live to be “both sensible and humane” (paragraph 47), although it did not answer the question. Indeed, “the relative normality of the placement (whatever the comparison made) is not relevant” (paragraph 50). As for comparisons, paragraph 46 of her judgment suggests that an appropriate comparator is Lady Hale herself: “if it would be a deprivation of my liberty ... then it must also be a deprivation of liberty of a disabled person”.

Lords Carnwath and Hodge recognised that “the comparator should in principle be a person with unimpaired health and capacity” (paragraph 80),

whereas Lord Kerr’s comparator compared the person’s age and station in life⁴. Thus, for MIG and MEG the relevant comparator was “a teenager of the same age and familial background as them”. Lord Clarke, by contrast, expressly endorses the approach of Parker J. which considered the sisters’ lives as dictated by their own cognitive limitations. What role a comparator now plays in determining whether there is a deprivation of liberty is, we suggest, not as clear as it could be.

Objections

Both the English and the Strasbourg courts have often referred to the relevance of the person’s objections. And, of course, the “effect” of the measures is one of the criteria to be taken into account, according to the consistent jurisprudence of the ECtHR. However, objection or lack of objection is now irrelevant. The right to liberty is of course too important for a person to lose the benefit of protection for the single reason that he may have given himself up to detention. But ruling out objection entirely seems to render redundant the Strasbourg court’s “effect” criterion.

Purpose or Context?

In the control order case of *JJ*, Lady Hale held that, “... restrictions designed, at least in part, for the benefit of the person concerned are less likely to be considered a deprivation of liberty than are restrictions designed for the protection of society”. But benevolence is now irrelevant. It is also unclear whether the context of the restrictions is relevant: at best they “may not” be irrelevant (paragraph 43).

⁴ It is not clear to us what factors the term “station in life” is intended to embrace.

The Acid Test

The Supreme Court's decision winds the law back to the time before the deprivation of liberty safeguards came into force. We have an acid test. But its parameters and contents are not as clear as was hoped. Lady Hale refers to "complete supervision and control" and "not free to leave" (paragraph 54). For Lord Neuberger, the essential ingredients are "continuous supervision and control and lack of freedom to leave" as well as "the area and period of confinement" (paragraph 63). What is meant by area of confinement is not explained. For Lord Kerr the duration of the restriction seemed paramount (paragraph 78).

Regrettably the twin concepts are not straightforward. Practitioners have been told which factors are irrelevant. But no guidance is given as to when "supervision" is not "control"; or when "supervision and control" are not "complete" or "continuous." There is no analysis as to what it means to be "free to leave" or its inter-relationship with its twin concept. Reference is made to Munby LJ's, "*I mean leaving in the sense of removing himself permanently in order to live where and with whom he chooses...*" But that does not take us much further, particularly if there is no alternative to go to or no-one else to live with or if the person is living in their own home.

If the person lacks capacity to take these decisions, someone else will decide what is in their best interests. Thus, someone lacking such capacity is not free to leave by operation of the MCA. That seems clear. Finally, the area and period of confinement is said to be essential, but there is no guidance as to what this means or how these relate to complete supervision and control without freedom to leave. The most helpful aspect of the acid test is that its application to the particular facts of these individuals amounted to a deprivation. The facts of the individual cases may

therefore offer some touchstone or guidance for practitioners.

We note with interest a decision of the ECtHR that post-dates the Supreme Court hearing – *Chosta v Ukraine* (Application no. 35807/05, 14 January 2014) – in which the ECtHR observed that "relevant objective factors to be considered include the possibility to leave the restricted area, the degree of supervision and control over a person's movements *and the extent of isolation*" (emphasis added). Whilst the first two of these factors are consistent with the twin components of the acid test, the reference to the extent of isolation seems to us to reflect precisely those aspects of relative normality put forward by the Court of Appeal in the *Surrey* case but rejected by the majority in the Supreme Court.

Implications

The fact that the acid test identified these "ordinary" placements as deprivations of liberty has far-reaching implications. According to the Alzheimer's Society, there are 200,000 people with dementia in care homes in England and Wales. In addition, between 2012 and 2013 there were over 28,000 people aged 18-64 with learning disability in care and nursing homes. It would seem that all of those unable to give valid consent are now likely to be deprived, necessitating a DOLS authorisation. The same must surely apply to hospitals, with resulting ineligibility issues. It seems particularly odd to think of the unconscious hospital patient receiving life-sustaining treatment as deprived of their liberty, but that may be the consequence of this decision.

The impact of dropping the Article 5 threshold will also reverberate throughout supported living and shared lives schemes. All disabled and vulnerable adults lacking the relevant capacity who receive care or support funded by, or arranged by, a public

body may now need to be reviewed to see if the acid test satisfied. Foster carers, children in local authority care, and family members receiving support from health or social services may now be acting unlawfully unless the procedural and substantive safeguards in Article 5 are met. Indeed, the implications for children are far-reaching. Given the relatively limited [avenues](#) for authorising a deprivation of liberty in the case of a child, the possibility of a new Bournemouth gap – this time for children - arises.

Whether they will “retract the surprise” at being told that a person living in their domestic setting could complain of deprivation of liberty after the consequences are explained, as Lord Neuberger foresees, remains to be seen. If overcoming the ordinary usage of “deprivation of liberty” was difficult for hospital and care home managers, imagine how difficult it will be in these more familial settings. After all, the Court of Appeal has, in a different case, found that those with parental responsibility cannot consent to their child’s deprivation of liberty: *RK v BCC* [2011] EWCA Civ 1305, [14]. Moreover, according to the MCA Code of Practice, everyone working with and/or [caring for](#) an adult who may lack capacity must comply with the MCA (including therefore spouses or other family members).

Going beyond Strasbourg also has implications for the use of the Mental Health Act. Incapacitated informal patients are not free to leave if others are deciding what is in their best interests. Guardianship is vulnerable because patients have no choice over their place of residence and the intensity of their package of care may tip their regime into Article 5. No one can lawfully be deprived under that prescribed legal procedure because, amongst other things, the burden of proof is on the patient not the detaining authority. Although the point has yet to be argued, it is likely to be similarly unlawful to deprive liberty under a

community treatment order. The judgment also makes it more difficult for restricted patients to be lawfully conditionally discharged from hospital detention: *Secretary of State for Justice v RB* [2011] EWCA Civ 1608.

The MCA seeks to strike a careful balance between empowerment and protection. No-one would deny the importance of safeguards. The controversy surrounds the extent to which those safeguards found in Article 5 should be used by manipulating the language of “deprivation of liberty”. Whether the increased juridification of care resulting from this decision will lead to better safeguards for those that need it is a question for a later day. Some might say the best safeguards would be regular, unannounced inspections of these care settings with the threat of criminal sanction for ill-treatment and wilful neglect. And let it not be forgotten that those at Winterbourne View were tortured by “carers” despite having the benefit of their procedural and substantive safeguards of Article 5.

Practical guidance

Notwithstanding their editorial differences as to the correctness of the decision, the team has pooled their collective wisdom to pull together practical guidance for front-line staff (both social work and clinical) as to the questions that they should be asking themselves in light of the decision. It is available [here](#).

For further discussion of some of the implications, please see [here](#) for a free video featuring Jenni Richards QC, Fenella Morris QC, Nicola Greaney and Ben Tankel.

The DOLS lead

It’s been quite a week in the DoLS world with the House of Lords scrutiny report followed by the

ruling on *Cheshire West* and *P and Q*. We have gone from the depths to the heights in six days.

Does the Supreme Court judgment help us in practice as BIAs and as DoLS leads? It does indeed, it both helps us and challenges us with the implications.

When the earlier Court of Appeal judgment in *Cheshire West* came out, many professionals expressed the view that this heralded the “death of DoLS” a view I never subscribed to. So what is the Supreme Court judgment - the rebirth and resurrection of DoLS? Rebirth to live another day in a purer, simplified form. Something like that I feel.

The decision is superficially quite simple and straightforward. Watching it live at a Regional DoLS Leads group there was no surprise at all about *Cheshire West* we were unanimously agreed about that and resolved to the decision that it was a deprivation of liberty, but *P and Q*...well that raised a few more eyebrows and as the ripples of reflection went round the room, one after the other we began to say “so this means”

Reading the full judgment helps and I am sure many learned people will summarise it, so for practitioners I only make reference here to its implications. Before I do I want to say that on a personal level I think that the best part of the judgment is the clear declaration that human rights are universal, physical liberty is the same for everyone regardless of whether or not they have a physical or mental disability. My 17 year old daughter was an ordinary sixth form student with all the rights and responsibilities of the human race on the 26th September 2010. The following day she was hit by a car and sustained a massive brain injury as a result of which she is now significantly impaired. It was anathema to me that

also she lost the right to be treated equally overnight.

How do practitioners now decide on deprivation of liberty?

In establishing whether the objective element is met we will now in practice consider whether the arrangements result in the person being under continuous supervision and control and we will determine whether they are not free to leave.

The continuous supervision and control do not need to be reason that the person is not free to leave, it appears these are two self-standing requirements which both need to be met. The judgment says for example it is possible to imagine situations where someone is under continuous supervision and control but free to leave should they choose to.

We will still begin with the concrete situation of the individual and examine the type, duration, effects and manner of implementation of the measures in questions, in order to answer the acid test is the person under continuous supervision and control and are they not free to leave

You can immediately see why the DoLS Leads group began to go into meltdown. This applies much more widely at least on the face of it to older people detained in EMI units, most of them meet this criteria although we do have to balance it with the fuller meaning of free to leave including whether there is viable home to go to. There is no doubt that this judgment at least for the moment has simplified and relaxed the concept of deprivation of liberty.

The ripples will spread far and wide I feel - in Adult Learning Disability settings we need to revisit decisions on deprivation, we need to return to those we have assessed as not being deprived of

liberty based on *P and Q*, we also need to assess those in Adult placement, small group homes and supported living based on this criteria and consider making many more applications to the Court of Protection. Can there genuinely be an incapacitated informal patient in a mental health setting now?

The indicators of deprivation in the Code of Practice need to be revisited to give continuous supervision and control highest importance, a matter which will no doubt be considered by the full review of the Code.

For assessors I feel we will be freed from the constraints of increasingly conflicting case law and as such will be able to independently assess the situations we are called to with the professionalism which has developed within the role of BIA. This remains a skilful carefully balanced assessment which requires critical analysis of a range of factors and opinions. It was never the case that the Court of Appeal decision in *Cheshire West* screened everybody out neither is it the case that this judgment screens everybody in but it will increase the workload of an already overstretched BIA resource.

The DoLS have risen from the ashes with a new-slim line body and will live on (until redrafted). However I truly feel the value of the safeguards and the protection which was intended is now more likely to be applied where it should be.

*Lorraine Currie,
MCA/DoLS Manager,
Shropshire County Council*

The NHS lead

To ensure the dignity and rights of vulnerable groups are recognised is a notable aim. Taken alongside the House of Lords review, this

judgment gives us the opportunity to realise that aim. It also brings dangers.

The new test will mean I have to change the way I think about what liberty means in a legal discourse (what triggers the safeguards) whilst continuing to use a critical concept of liberty as socially constructed when deciding on best interest and what opportunities a person actually has open to them (when seeking the best care and opportunity for someone).

The test does raise some questions: To what degree does each, of the two parts, need to be met? Does a condition of residence meet it or can paragraph 49 be read so, in itself, it does not? What about people who are long term unconscious? How relevant is the period of time of the placement?

There is a danger in widening the net. It is therefore key that the right test for capacity is applied and capacity is promoted, best interest starts with the world through the person's eyes and public bodies do not use the safeguards to enforce their will. Perhaps more CPRD compliant supported decision making could be part of the new safeguards? Maybe, also a more independent authoriser and tribunals?

We are at a crossroads, shouldering a burden of care. Will the structures we introduce fulfil this or just fill the silk pockets of the guards that patrol freedom's ramparts, with the gilding from the cages of the vulnerable?

*Richard Murphy
Social Care, Mental Health Act and Mental
Capacity Act Lead
Solent NHS Trust*

The Acute Hospital Trust

Mental capacity and deprivation of liberty are pertinent issues in acute hospitals, particularly within the brain injury population where cognition for decision making capacity is often severely affected by acute stroke or trauma.

The current MCA and DoLS processes are useful tools to assist clinicians in thinking about the complex issues and to safeguard patients and their human rights.

Assessing capacity in the acute clinical setting for patients with highly complex needs continue to be a challenge when faced with uncertainties whether the patient has capacity to understand the risks associated with serious medical decisions. The strategy should be to take on a more person-centred approach and heed the advice of Peter Jackson J that “*unpalatable dilemmas- for eg indecision, avoidance or vacillation – are not to be confused with incapacity*” (*Re JB* [2014] EWHC 342 (CoP)), and that where there are serious identified risks, the courts, rather than the public authorities, should decide outcomes (*Re M* [2013] EWHC 3456 (COP)).

However, often there is a lack of expertise and limited resources for managing these issues within the acute setting. Therefore, at times, added processes and paperwork may add considerable burden and delay acute procedures and plans.

Due to the limited resources, there is a “disconnect” between the process of making DoLS applications and the local authorities who are responsible for determining their appropriateness.

Putting in too many safeguards without the necessary amount of resources can sometimes leave the clinicians feeling lost and doubting their

clinical judgement in determining what is in the patient's best interest.

Although we welcome the recent Supreme Court judgment in *Cheshire West*, we consider it vital that the Department and Health and the NHS provide additional resources to address the implications for the judgment for the additional numbers of patients who will be brought within the scope of the DoLS process, and also to support the MCA more generally.

*Dr Edgar Chan, Neuropsychologist
Betsey Lau-Robinson, Trust Lead for Safeguarding
& the Mental Capacity Act,
University College London Hospital Foundation
Trust*

The independent social worker

A Triumph for Social Justice

‘The most far-reaching human rights case heard in the UK for a decade’ (Burrows, 2014)

The Fog Clears:

This judgment reunites us with our Bournemouth roots, established by the European Court. Namely, that the ‘acid test’ in determining a deprivation of liberty, is whether the person concerned is under continuous supervision and control and is not free to leave.

Implications:

Many are concerned that the aftermath of this judgment will effectively capsize existing DoLS and Court of Protection infrastructures. Whilst I agree that this presents an enormous challenge. I cannot accept that it is proportionate to subject many thousands of adults at risk, to the unscrutinised use of restrictive practice, in a manner that

resembles this judgment's 'acid test'. Surely, equitable access to a right of review by an independent body 'should be effectively afforded to all those who properly require it' ([Ruck Keene, 2014](#)). Rather than punish adults at risk by reducing access to vital protection; why not lobby the Government for meaningful and effective investment in safeguarding human rights in this country (perhaps some re-distribution of the £4.26 billion allocated to the HS2 project, (BBC News, 2014).

Few involved in the complex, heart-wrenching, labyrinthine process of assessing deprivation of liberty, would refute the complexity and inaccessibility of the scheme. Most acknowledge the need to protect individuals' right to liberty and security of person, in accordance with Article 5 of the European Convention on Human Rights (ECHR). The sticking point it seems, is how best to achieve this.

For me, any extension of the sound, person-centred principles of the MCA 2005 will suffice, provided it achieves what has to be the founding safeguard:

'...that those whom we commit to the complete and effective control of others, enjoy safeguards to ensure it is exercised in a legitimate and proportionate fashion' (Series, 2013).

Whilst we await a response from Government as to the House of Lords Select Committee recommendations concerning MCA/DoLS. We continue to rely upon case law as guidance for practice. Gladly, now at least, we have case law that is itself fit for purpose.

Dawn Whitaker was the Independent Social Worker in the Cheshire West case, and is a Lecturer in Social Work in the Department of Sociology at Lancaster University.

The paid carers

In December 1997 the Appeal Court ruled that HL (L) was being deprived of his liberty. In July 1998 Lord Steyn in his judgment at the House of Lords stated *"in my view 'L' was detained because the health care professionals intentionally assumed control over him to such a degree as to amount to complete deprivation of his liberty"* and *"The only comfort is that counsel for the Secretary of State has assured the House that reform of the law is under active consideration."*

Six years on and with no 'reform of the law' in sight the ECHR in *HL* ruled: *"Accordingly, the concrete situation was that the applicant was under continuous supervision and control and was not free to leave. Any suggestion to the contrary was, in the Court's view, fairly described by Lord Steyn as 'stretching credulity to breaking point' and as a 'fairy tale'."*

Ten years further on and after 5 months deliberation the Supreme Court says of the acid test for deprivation of liberty, analysing the 'concrete situation' that *"the answer lies....in the jurisprudence which started under HL v UK 'that the person concerned was under continuous supervision and control and was not free to leave.'"*

The HoL Report on MCA particularly in relation to DoLS contains nothing that we haven't said to DoH over many years. The apparent unwillingness of managing authorities and local authorities to engage must not continue. Information and support for families/carers also needs to significantly improve. Whether safeguards remain as they are or are 'simplified' there needs to be a penalty for non-compliance with the law. The proliferation of supported living arrangements many of which are nothing more than unregistered care homes requires that their

vulnerable occupants are protected under the same safeguards.

Seventeen years on since 'Bournewood' and the dithering looks likely to continue as professionals look for more 'clarification' rather than get on and make things work.

Mr and Mrs E – the carers of Mr L

The judge and father

For whose benefit?

When Alex asked me to contribute to this issue of the Newsletter about the implications of the judgment of the Supreme Court in Cheshire West he no doubt expected to receive the views of a (now retired) district judge who sat in the former and the present Court of Protection. I make no apology for disappointing him. Instead I wish to put on record my views as parent of a child with severe learning disabilities and challenging behaviour who encountered almost all forms of adult care before dying in the Bournewood gap at the age of 28 years due to inadequate supervision.

Such parents seek the re-assurance of suitable care for the life of their child, but whilst there are many examples of quality care for those who are compliant there is scarce good provision for those who are not. This is partly due to lack of adequate funding for what may need to be one-to-one care, but there is also a shortage of professional carers with the skills and tolerance required to cope with the demands made upon them. It goes without saying that these (adult) children need total supervision and cannot make their own choices as to the care regime even if they can indicate some preferences within it. The same might be said of elderly adults with severe dementia. The Deprivation of Liberty safeguards (DoLS) have nothing to offer them and seem little more than a sham to the parents, being designed to reassure

society and the lawyers that personal human rights have not been infringed whilst failing to ensure that suitable care provision has indeed been achieved. Even the Court of Protection is impotent in this respect because in making a best interests decision for the individual it is restricted to the care plan or plans put forward by the funding authority, although an enterprising judge can seek reports as to what other options have been considered and why they have been rejected. In one of my last cases I even threatened to invite the press in to the 'secret court' to hear an explanation as to why only institutional care was being proposed for a young man whose whole future was in question. The court of public opinion may be more powerful than the judge's court!

For these adults what really matters is the package of care provision that is to be provided rather than the somewhat academic issue as to whether they are justifiably being deprived of their liberty. It upsets me as a parent to see so much of the available funding being spent on this issue on a periodic basis. For whose benefit is that? The parents have no confidence that those involved in the assessment process are concerned with securing better care provision, and would be appalled if there was no effective restriction on the liberty of their mentally incapacitated child. The problem is that the 'best interests' assessor is merely required to determine whether it is in the best interests of the individual to be detained in this way, not whether it is in his or her best interests to accept this particular care package. In any event, I cannot believe that an assessor under the DoLS process has any more influence on the nature of care provision than a judge of the Court of Protection.

Certainly safeguards are required for some vulnerable adults, but for those like my son I would sooner see all this professional expertise expended on securing adequate care provision

rather than justifying the fact that he was confined for most of his time between four walls.

So what was my approach as a judge? I simply concentrated upon the care options that could be available and sought to achieve what appeared to be in the 'best interests' of the adult. The balance between empowerment and protection is always difficult especially when a young life is involved, and there is a difference which has to be coped with between the perspective of the parents and that of professional care workers. I love the expression: 'What is the point of wrapping someone up in cotton wool if it merely makes them miserable?' When there was a dispute I sometimes, but not always, supported the authorities against the parents but only after strenuous efforts to achieve a consensus by mediation or conciliation or any other form of discussion. Unless there was a specific application relating to DoLS (and in my day these were reserved to High Court Judges) I treated these safeguards as a parallel process and declined to become involved.

I have no doubt that the approach of Lady Hale in the Supreme Court is the only possible interpretation of the present legislation despite the understandable efforts of the Court of Appeal to reduce the number of people to whom the safeguards applied. The practical and funding issues that now arise are such that a re-think is inevitable. In my view the question should, in layman's terms, be: 'Is this adult being justifiably and appropriately cared for', rather than is he or she being improperly deprived of personal liberty. The emphasis should shift towards whether the care being provided meets all the needs of the individual because that can be the only proper justification for depriving someone of their liberty. If the safeguards had been in existence when my son died the outcome should have been a better standard of care rather than mere acquiescence in

that which was being provided because a deprivation of liberty was justified. We all knew that.

*Gordon R Ashton OBE
Co-author of Mental Handicap & the Law (1995),
Mental Capacity – Law & Practice (2012), Elderly
People & the Law (2nd ed. 2014)*

Assaults in care homes and best interests

Re RGS (No 3) [\[2014\] EWHC B12 \(COP\)](#) (District Judge Eldergill)

Best interests – residence – Media

Summary

As District Judge Eldergill says in his introduction, "*these proceedings have a long history.*" They concern an elderly man (now 84 years old), RGS who suffers from vascular dementia and his son, RBS. They have involved a 'seek and find' order for RGS when RBS removed him from a care home, financial mismanagement, the sale of a Pissarro painting and issues related to the media reporting of COP cases.

We summarised the two previous cases [here](#) (November 2012 case) and [here](#) (July 2013).

This time the proceedings focused on the following issues:

1. RGS's residence at X Care Home;
2. Contempt of court;
3. Media attendance, reporting and publicity;
4. Contact and Article 8.

RGS's residence at X Care Home

In July 2013, District Judge Eldergill found that it was in RGS's best interests to reside at the X Care Home. Shortly after the judgment, RGS was assaulted on three occasions over a period of three days by a fellow care home resident with dementia. RGS was hit on each occasion with a walking stick resulting in bruising, a skin tear and a broken tooth. Following these incidents Y was closely monitored and no further incidents occurred. Y was sectioned under the Mental Health Act 1983 on 22 August 2013. He did not return to the X Care Home and the court was informed that he would not be returning there.

The incidents were reported to RBS and the county council so that they could be investigated under the council's safeguarding procedures. On 15 November 2013 the court commissioned a report from the county council as to the circumstances which was produced on 29 November 2013. The report found that "there was a failure to ensure that RGS's safety needs were met. An action plan was put in place to ensure that practice at the home was improved and further placements at the home were suspended". On 13 December 2013 the court considered of its own motion that it was in RGS's best interests for the court to review the existing arrangements.

The court commissioned a best interests report from one of its social work General Visitors who was asked to file a report reviewing whether it continues to be in his best interests to reside at X Care Home.

District Judge Eldergill held that it remained in RGS's best interests to reside at X Care Home. That conclusion was based on clear evidence (from a large number of independent sources) that RGS was content at X Care Home and that transferring him to a different environment would add to his

confusion and would be likely to make him more agitated.

District Judge Eldergill also added the following comment of more general application when P is to be placed in a residential setting:

"Having spent almost 30 years in mental health, chaired inquiries and worked as a Coroner, I can say without qualification that it is a sad fact that assaults and other serious incidents do sometimes occur at well-run care homes, nursing homes and psychiatric units because of the mental ill-health of someone receiving care or treatment there. That is one important factor to consider when deciding whether it is in someone's best interests to be at home or in a shared environment".

Contempt of court issues

RBS was held to be in clear contempt of court – publishing court documents online (the Official Solicitor's position statement had already been published online at the time of the hearing) and releasing information to the press. District Judge Eldergill held (as he had on previous occasions) that despite many and persistent breaches, he was not going to take action against RBS due to his significant mental health problems and the fact that his father, RGS, would (if he had capacity) have been likely to take a forgiving approach to his son's actions as he had done in the past.

Media attendance, reporting and publicity

The judgment considers in detail the competing interests of privacy and transparency and makes reference to the President of the Court of Protection's recent [guidance](#).

The judge held that there were good reasons in this case to allow the press to attend the hearings, report what was said in court and publish the court's judgments because the case involved

important matters such as the rights of people incapacitated by dementia, the quality of their care, laws which permit the sale of private property to finance their care and the way in which the Court of Protection functions.

As well as the important issues which were aired, the judge also felt that there needed to be a balancing of RBS's publishing of information which was inaccurate, unfair and one sided.

The judgment adopts a detailed balance sheet approach to assessing the arguments for and against broadening identification of those involved in the proceedings. District Judge Eldergill concluded that current reporting restrictions (which allowed the local authority and experts to be identified but no other party) struck the correct balance.

Contact and Article 8

The contact issues turn on the specific facts of this case. Since the seek and find order was made contact between RGS and RBS has been supervised and regulated by the local authority and/or the care home and temporarily suspended by them *"if in their professional opinion it is necessary to do so."*

District Judge Eldergill emphasised that it continued to be important to restore normality but that RBS would have to demonstrate that he could be trusted before unsupervised contact could be authorised. The local authority was asked to file a short report in three months' time setting out any ways in which a relaxation of the existing restrictions was possible.

The judge acknowledges that his decision interferes with the family's Article 8 rights but that such an interference was lawful, necessary and proportionate and that the purpose for which the

decisions are needed cannot be achieved in a way which is less restrictive of RGS's freedoms.

Comment

The issues which this case raises are typical of many Court of Protection cases: disagreement between family members and professionals about P's best interests; tensions within P's family about financial and welfare issues; media interest and the balance between privacy and transparency. But in this case, these issues are heightened by the mental health problems of P's son, RBS.

This third judgment (as previous judgments) resonates with both sympathy for and exasperation with RBS. In a previous hearing RBS was held not to have capacity to litigate and to a certain degree, the judgment seeks to consider his best interests whilst formally adjudicating on his father's best interests. In our view, this case is a good illustration of the Court of Protection grappling pragmatically, sensitively and comprehensively with difficult and emotive issues. It is interesting in a broader sense for its comments in relation to decisions to place people in care homes. District Judge Eldergill makes clear that the fact that even in well run homes there is the possibility of serious incidents is an 'important factor' when assessing whether it is in someone's best interests to be placed in a care home or cared for at home.

The judgment also deserves to be read in detail in relation to its assessment of the pros and cons of publically naming parties to the proceedings. This is an issue which will no doubt continue to be raised as the court grapples with the balance between privacy and transparency.

Gift-giving to parents

Re AK (Gift Application) [\[2014\] EWHC B11 \(COP\)](#)
(Senior Judge Lush)

Gifts

Summary

This case considered whether a substantial gift (£150,000) should be made from the damages award of an eleven-year-old boy to his parents.

Senior Judge Lush began by noting that, although the MCA 2005 applies only to persons aged 16 and over (section 2(5)), the effect of section 18(3) is to enable the Court of Protection to appoint a deputy who can take a long term view where a child has been awarded substantial compensation for personal injury or clinical negligence and it is unlikely that the child will have the capacity to manage the award when they attain adulthood.

AK was born in October 2002 and due to a prolonged period of hypoxia at the time of birth he has cerebral palsy. Acting by his mother as litigation friend, he sued the local NHS Trust for clinical negligence. In 2009 a High Court judge approved a substantial settlement which included a lump sum payment of £1,050,000 plus a series of index linked periodical payments which were calculated on the basis that it was unlikely that AK would live beyond the age of 15. The assessment of life expectancy was made in 2006 by a consultant paediatric neurologist who strongly recommended that a further assessment was made in 4 or 5 years' time. At the date of the hearing such an assessment had not been carried out which Senior Judge Lush described as regrettable.

AK's estate was worth £1,311,156 and he had a surplus income of £95,363.71 a year due to the fact that his mother provided his care gratuitously or at a much lower cost than was envisaged when his claim was settled. His care costs were therefore subject to possible change in the future.

Julia Lomas of Irwin Mitchell Solicitors was appointed as AK's deputy for property and affairs in 2009. Senior Judge Lush commented that she had considerable experience of managing the estates of people with cerebral palsy and acquired brain injury. In November 2013 she applied to the court for an order "*gifting AK's parents £150,000 towards the building of a property in Pakistan suitably adapted to AK's complex needs*". In a witness statement that accompanied the application Ms Lomas set out the following facts:

- AK and his family are Pakistani. Most of their family live in Pakistan and they recently visited for 4 months;
- AK's mother and father have purchased land with the intention of building a family home near their extended family;
- They have requested £150,000 as a contribution to the property being built so it is suitably adapted;
- A gift is the more practical approach given the difficulty of obtaining receipts for all works to be carried out in Pakistan. Further, receipts would have to be translated which would cause additional expense;
- There were health benefits to AK from being in Pakistan, associated with the climate;
- There would be long term financial benefits for AK as it was anticipated that the family would spend 6 months of the year in Pakistan

which meant that expenditure on agency care would decrease dramatically as there were more family members in Pakistan to help with care and even professional care was far cheaper than in the UK;

- AK would inherit the property if his parents should die;
- AK's life expectancy 'does not greatly exceed 20' and the property would allow him to experience a better quality of life.

Given that the application sought a substantial lifetime gift, Senior Judge Lush joined AK as a party and invited the Official Solicitor to act as his litigation friend.

The Official Solicitor took the view that the deputy had not properly considered all the ways in which AK might contribute to the purchase or adaptation of a home for himself and his family in Pakistan by way of an investment rather than simply as a gift to his parents. The suggestion made was that AK might be able to purchase either the relevant land or interest in that land which would mean that he was left with a valuable asset. The OS acknowledged that if that was not possible or reasonably practicable then a gift should be authorised but only on the basis that the deputy was satisfied that it was to be used within a certain period for the construction of an adapted home for AK.

Senior Judge Lush noted that where P is profoundly disabled and has lacked capacity from birth the application of the best interests' checklist in s.4 MCA 2005 is not always conclusive because of its strong emphasis on supported decision making and substituted judgment. Given the limitations of the s. 4 checklist, Senior Judge Lush applied a 'balance-sheet' approach, setting out the advantages and disadvantages of the proposal.

The advantages were essentially those set out above in the witness statement of Ms Lomas. The disadvantages were those highlighted by counsel for AK instructed by the Official Solicitor, namely that he would have £150,000 less in capital, there were no architect's plans and no costings for the construction of the house or its adaptations and no guarantee that the £150,000 would actually be used by AK's parents to build and adapt a property for his use.

Senior Judge Lush also held that it was important to exercise "caution and prudence" when applying AK's funds because of a series of uncertainties: (i) care costs increasing significantly if his parents predeceased him or became incapable of looking after him; (ii) his parents separating or divorcing in which case a second property may have to be purchased and adapted; (iii) political circumstances in Pakistan deterring the family from travelling there; (iv) AK's condition deteriorating so that he could not travel; (v) AK's condition deteriorating so that he required a more intensive and expensive care regime; (vi) AK's life expectancy exceeding the original prediction so that he needed 'every penny he can get'.

However, Senior Judge Lush acknowledged that if his life expectancy were only 15, as originally predicted, then time was of the essence and it was essential that the works be carried out without further delay (AK was 11.5 years old at the time of the hearing).

Senior Judge Lush noted that the purpose of the application was to provide suitably adapted accommodation for AK's use and enjoyment (a proper use of his funds) and not to reduce the amount of inheritance tax payable which was not a purpose for which the award was intended (see [Re JDS: KGS v JDS](#) [2012] EWHC 302 COP).

Senior Judge Lush held that it was in AK's best interests to allow the transaction to proceed by way of an interest free loan of £150,000 to his parents rather than as an outright gift. A loan was preferable to a gift because (i) AK retained the capital as part of his estate and (ii) it was more likely to ensure that his parents complied with the purpose for which the loan is intended.

The details of the loan were that it was repayable over 10 years at a rate of £15,000 a year. The judge further authorised the deputy to make annual gifts of £15,000 to AK's parents, if there is sufficient income surplus to his requirements in each accounting period, to assist them in repaying this loan.

Whilst not material to his decision, Senior Judge Lush noted that the annual gifts of £15,000 would fall within the normal expenditure out of income exemption contained in section 21 of the Inheritance Tax Act 1984.

Comment

With apologies for apparent (or actual) judicial toadying, Senior Judge Lush's solution in this case strikes us (with one partial exception) as neat and approaching ingenious. He mitigated the disadvantages he set out in his judgment by the making of a loan rather than a gift whilst also making a gift in all but name as long as AK has sufficient surplus funds (this loan/gift could be christened a "lift"). The solution is therefore elegantly straightforward but takes account of the following complexities: (i) concern that the parents will actually use the money for the intended purpose (a loan gives the incentive to fulfil the purpose); (ii) uncertainties about AK's life expectancy – a pragmatic solution if life expectancy is short (let's get on with it so AK can get some enjoyment from it) and also if his life expectancy is greater than predicted (the £15,000

annual gifts are only made if there are sufficient surplus funds); uncertainties about care costs in the future (again, the £15,000 annual gifts are dependent on sufficient surplus funds).

The judgment also exposes (not for the first time) the deficiencies of the s.4 MCA 2005 checklist when P is profoundly disabled and has lacked capacity since birth. The judge's careful application of a 'balance sheet' approach is a useful tool in such cases.

The one caveat that we would enter is that it does not appear that thought was given by either the Official Solicitor or to the court as to the fact that the payment out from AK's funds was being authorised out in respect of the purchase and modification of property outside England and Wales. What – if any – jurisdiction the Court of Protection would have over the way that those monies were actually spent in Pakistan is an interesting question that – we rather hope – does not fall for further consideration in this case in due course.

When can you dispense with service in a statutory will case?

Re AB [\[2013\] EWHC B39 \(COP\)](#) (District Judge Batten)

Practice and Procedure – Statutory Wills

Summary

This judgment, delivered some time ago, but only very recently made publicly available, deals with a short but important point as to whether (and upon what basis) the CoP can dispense with service upon the father of the adult upon whose behalf an application was made to authorise a statutory will.

AB, a young adult, suffered a brain injury whilst a teenager, as a result of which she suffered a severe brain injury and ultimately recovered substantial damages. Her property and affairs were managed by two solicitors, appointed jointly and severally as property and affairs deputies, one of whom applied for execution of a statutory will be authorised by the CoP on AB's behalf under s.18(1)(i) MCA 2005.

AB lived with her mother, stepfather and step brother. The whereabouts of her father, PQ, was unknown. On the basis of the (at that point unchallenged) evidence before the Court there was a substantial history of violence by PQ towards CD prior to CD leaving the family home, and PQ had at one stage thereafter abducted AB. CD and AB had not seen PQ for many years. PQ has not paid maintenance for AB and CD has not claimed maintenance from him. CD had not sought contact with AB and did not know where PQ was living now or indeed whether he was alive. It was known that PQ had two other daughters, RS and TS, by a different mother.

AB told the Official Solicitor's representative that her mother had left her birth father and that her father stopped turning up for contact at a contact centre. She said that she did not want to see him or have anything to do with him; he had the opportunity to make contact with her and chose not to do so. She further said that she not want her father to get anything from her estate and he did not deserve anything.

The effect of the proposed will advanced for endorsement by the CoP was to remove PQ's entitlement to half of AB's estate under the rules on intestacy, his share being worth about £750,000 at the present time. If PQ should predecease AB, then his biological children who are AB's half-siblings would suffer a loss of entitlement under the intestacy.

The evidence before the CoP was not conclusive as to whether AB had testamentary capacity, and District Judge Batten directed that a further assessment of AB's testamentary capacity be filed. She was, however, satisfied that she had power to make interim orders and give directions because the evidence was sufficient to pass the s.48 MCA 2005 threshold.

District Judge Batten had to decide whether to grant the Applicant's application to dispense with service of the application on PQ and on RS and TS (and any others who are the biological children of PQ). In summary, the Applicant submitted that the decision was one falling within the scope of s.1(5) MCA 2005, such that it was a decision to be taken in AB's best interests; the Official Solicitor submitted that it was not, but that it should be taken with regard to the overriding objective contained in COPR r3, and the engagement of the rights of PQ (and the half-siblings) under Articles 6 and 8 ECHR as well as Article 1 Protocol 1 to the ECHR.

District Judge Batten held that she was not making a best interests decision when directing that a party not be served with an application. Rather:

"63. ...This decision is one made by a judge in the exercise of powers given by the Court of Protection Rules. It is not an act done or a decision made on behalf of P. The principles of the Mental Capacity Act 2005 cannot be strictly applied to such a decision. For example the principle that a person is not to be regarded as lacking capacity because he does something unwise is clearly not a principle which can be applied to a decision by a judge made pursuant to the Court of Protection Rules. The principles set the context in which the case before the Court of Protection proceeds but do not strictly govern its case management or other decisions under the Court of Protection Rules 2007. In any event the overriding objective refers

explicitly to the way in which the court must have regard to P; dealing with a case justly includes so far as practicable ensuring that P's interests and position are properly considered (Rule 3(3)(b)). The case of [MN](#) while not strictly analogous, supports this conclusion.

64. Article 6 of the European Convention on Human Rights entitles PQ to a fair hearing. This is not a qualified right. To direct that the application not be served on PQ is to interfere with his rights under Article 6. PQ will be excluded from the knowledge that his statutory entitlement to benefit from AB's estate has been removed and he will be prevented from putting forward his own evidence in response to the allegations made on behalf of the applicant and his submissions as to why he should benefit from AB's estate and to what extent.

65. Article 8 gives AB the right to respect for her privacy and family life. Article 8 is a qualified right and allows interference with the right to respect for privacy and family life in circumstances where it is necessary for the protection of the rights and freedoms of others, which includes the right of PQ to a fair trial.

66. If PQ is served with the application and as a result acts as CD fears in a threatening and harassing manner, AB's privacy and that of CD, DD and ED will be invaded and their right to family life interfered with. The court must be satisfied on the balance of probabilities that this is likely to happen and that the outcome for AB and CD, DD and ED as her family is likely to be so serious that it justifies an interference with PQ's rights under Article 6. I must make that judgment without seeing the evidence that PQ may seek to adduce to challenge the factual evidence and submissions of the Applicant.

67. Article 8 also applies to the right of PQ to a family life with AB. His decision to cease contact with AB when she was still an infant and failure to maintain any kind of parental

relationship with her since that time are relevant matters to be taken into account by the court in considering how far to give effect to PQ's rights in this regard.

68. Article 1 of the First Protocol to the Human Rights Act protects the right of persons to the peaceful enjoyment of their possessions. It is beyond my remit to provide a definitive answer to the issue of whether an expectation of inheritance under the laws applying to intestacy constitutes a possession for the purpose of Article 1.

69. The cases of *Re HMF* and *Re B* were decided before the Mental Capacity Act 2005 came into effect and are thus not binding on this court. They dealt with a comparable issue, that of notification of applications under the Rules which then applied to proceedings in the old Court of Protection, and thus are of some assistance. To the best of my knowledge there is no reported case on this issue since the inception of the Mental Capacity Act 2005. According to those cases, there needs to be a compelling argument and exceptional circumstances to justify not serving an application on a person who will be materially affected by it. Both judgments were given before the Human Rights Act 1998 was implemented. Article 6 serves to reinforce the principle that parties to be materially affected by an order of the court should be notified of or served with proceedings and given an opportunity to be heard unless there are exceptional circumstances."

Having outlined the relevant elements of the overriding objective, and then the factors for and against the order sought by the Applicant, District Judge Batten concluded that, on a fine balance, the factors in favour of notifying PQ outweighed those against notifying him. As she held (at paragraph 78): "The allegations against him are significant and serious; they are partly but far from fully supported by corroborative evidence.

However I have not been able to hear PQ's side of the story which may shine a different light on the events described. Weighing all the factors in the balance I have come to the conclusion that I am not satisfied that the circumstances of this case are so exceptional or that there are sufficiently compelling reasons that I must direct that service of the application on PQ and his children should be dispensed with and I will not grant the Applicant's application."

District Judge Batten did not direct that PQ and his children be served with the application papers, but rather that they be notified of the application and, if necessary, was prepared to direct that any documents sent to the Respondents must be redacted to remove any reference to AB's address or which may assist PQ in tracing AB (for example the name and address of her general practitioner). She noted that, even without a fact-finding exercise, there were some salient factors which were effective incontrovertible, and which are likely to be given very significant weight when the court makes its final decision. She considered these factors should be brought to PQ's attention when he is notified of the application. They were that (i) PQ had not seen AB since the contact proceedings were in progress; AB suffered a severe head injury over ten years after she last had contact with PQ; AB's estate was a very substantial one solely because of the personal injury damages she has received as a result of the injury; AB's mother had devoted herself to AB's care; AB's funds were required for her care throughout her life and were likely to be exhausted by the date of her death.

District Judge Batten then concluded with some important general observations:

"82. It may be thought that the circumstances of AB's case are very rare. In fact that is not the case. The Court of Protection deals several

times a year with applications for permission to dispense with service of an application for approval of a statutory will, declaration of trust or the making of gifts on a person who is a respondent to be served according to practice direction 9F. Typically such a respondent is a family member (often an absent father) who is no longer in contact with P and those caring for P, and/or who has a poor relationship with them. Frequently such applications involve large sums of money. I have been asked to give a written judgment in this application to provide some guidance as to how the court is likely to deal with such an application.

83. Each case must be dealt with in the light of its own particular facts and the judge will apply the overriding objective in the light of those facts. I am well aware that other judges may take a different view from the view I have expressed in this judgment.

84. In my judgment permission to dispense with service or notification of an application altogether should only be made in exceptional circumstances, where there are compelling reasons for doing so. Otherwise the interests of justice will not be served and the court will not be seen to be acting fairly towards all parties.

85. The conduct of the Respondent may justify such an order: for example if he has been convicted of an offence of physical or sexual abuse of P, or if P's funds derive from a Criminal Injuries Compensation award where the Respondent was the assailant.

86. In matters concerning the Respondent's conduct, the court has to take a decision to dispense with service of the application while only having available evidence from the party seeking the order to dispense. The application is more likely to be successful if supported by objective evidence than unsupported allegations. The court is more likely to be persuaded of the strength of the case if there is independent and reliable corroborative

evidence as to the past behaviour of the Respondent, whether in the form of criminal convictions, court orders, CAFCASS, or other reports by professionals, or other similar evidence.

87. The court may be willing to make an order to dispense with service of the application where the value of the financial benefit lost to the Respondent by the making of the order is not significant. Value should be considered both in absolute terms and relative to the Respondent's means. (A legacy of £10,000 may be of considerable significance to an elderly person on a low income but less important to a person of substantial wealth).

88. The court may also reach the conclusion, usually after enquiries have been made, that the cost to P's estate or to the parties, and the delay caused in concluding the application, of proceeding with service of an individual or class of Respondents (usually where tracing of potential Respondents will be necessary) is disproportionate relative to the value to the Respondents of the benefit they will lose by the proposed final order.

89. These examples are not intended to be exhaustive or to limit the circumstances in which judges may make an order to dispense with service of an application on a Respondent.

*90. This judgment should also not be taken to apply to service of an application for a holding will, where there is acute urgency in the face of P's likely imminent death. The cases of *In re Davey* [1981] WLR p164 and *In the matter of R* [2003] WTLR 1051, although decided before the Mental Capacity Act 2005 came into force are of assistance as to service/notification of such applications."*

Comment

Whilst strictly not of precedent value, this is nonetheless an important judgment setting out a number of principles that we would suggest are incontrovertible as to the principles that the Court will apply when considering the (rightly) exceptional step of granting permission to dispense with service upon a Respondent to a statutory will application. We would also respectfully suggest that District Judge Batten was clearly correct to hold that her decision was not one falling within the scope of s.1(5) MCA 2005 - to this end, the judgment also stands as a useful further confirmation of the fact that not all steps taken by the Court of Protection can be said to be 'taken for or on behalf of P.'

The Justice Select Committee: the judges speak

On 18 March 2014 the President and Vice-President of the Court of Protection, Sir James Munby and Mr Justice Charles, gave evidence to the Justice Select Committee in relation to the operation of the Court of Protection. The session relied on written evidence which had previously been submitted and which has since been [added](#) to the Justice Select Committee's website.

Written documentation

A number of interesting documents were provided to the Select Committee by the Government, summarised and discussed [here](#). For present purposes, we concentrate on the evidence given by Sir James Munby P and Mr Justice Charles. In advance of the oral evidence session, they submitted a memorandum which made the following key points:

1. The jurisdiction of the CoP *"is conferred by statute and the court does not have an inherent jurisdiction or an administrative law jurisdiction. So it has no jurisdiction over a vulnerable adult who has the relevant capacity and, subject to some arguments under the Human Rights Act, no power to overturn or declare unlawful decisions of public authorities concerning the provision of care or support on administrative law (judicial review) grounds"* (paragraph 3)
2. There are "significant differences" between the issues that arise in the two types of work undertaken by the CoP (i.e. health and welfare/property and affairs) *"The policy directive at the time the CoP Rules were drafted was that one process should fit all. As identified by the ad hoc Rules Committee this caused, and is still causing, problems"* (paragraph 8).
3. *"In his first report to the President and Vice President in November 2011, the Judge in Charge recommended that as a matter of urgency a process for the transfer of cases to High Court Judges and to judges on the circuits be agreed and implemented. He reported that this recommendation related to the issues about which he had heard the most complaints. Since then attempts have been made to achieve this but they have not succeeded... There can be no doubt that ad hoc arrangements for transfer are unsatisfactory and are causing problems and justifiable annoyance to litigants, practitioners, judges and court staff"* (paragraphs 12-3)
4. The two main problems relating to the day to day performance of the CoP are the long running problems relating to the failure to make amendments to the CoP Rules and to introduce a process for transfer of cases to the circuits. *"The solution to these problems is not in the hands of the CoP"* (paragraph 14)
5. In the context of revisions to the COPR previously recommended, *"Issues relating to the appointment of a litigation friend, the representation of P and obtaining the views of P also need to be addressed in the context of amongst other things the resource and other difficulties faced by the Official Solicitor. New provisions need to be introduced relating to costs, to appeals to address the wider pool of judges who can now be nominated to sit and the disclosure of documents to defined people for defined purposes e.g. to researchers, regulators etc. The balance between the provision of a quick, convenient and inexpensive procedure for the honest and checks and balances and the provision*

of security to guard against the dishonest needs regular review” (paragraph 24).

6. In relation to the changes made to transparency:

“29. There are strongly held views on both sides of the debate on whether the default position should be that hearings are in private or in public and if in public what the general position should be on what can be reported and so on what restrictions on reporting should generally be imposed.

30. There is much to be said for there being general consistency between the Rules of the two courts. But there are differences between the arguments on the underlying issues. They flow from differences between the relevant factors concerning persons who lack capacity and children and so their respective families and carers. These differences and issues relating to size and resource could lead to the CoP taking a different course to the Family courts on the default position, or to the CoP holding a greater percentage of its hearings in open court.

31. The differences have founded a slightly different and wider approach being taken in respect of the CoP in the Guidance given by the President of the CoP and the Family Division on the reporting of judgments in the Family courts and the CoP (see [2014] 1 WLR 230 and 235) [...]. As can be seen from a comparison of the two, the CoP Guidance includes some cases relating to property and affairs, and for clarity includes the Senior Judge (who is treated for all purposes as if he were a circuit judge) and has a different provision on costs.”

(7) Finally, in relation to steps being taken to address the two main problems identified above and transparency:

“39. Following his appointment in January 2014 the Vice President, with the full support of

the President, had a helpful meeting with HMCTS and MoJ officials to discuss Rule change and transfer to the circuits. These issues are being addressed again and, hopefully, progress will be made in the near future. If not, the CoP will continue to do what it can to try to overcome these problems and the difficulties they cause.

40. The President’s Guidance on the reporting of judgments sets out that he is adopting an incremental approach. If resource is provided to consider and to make changes to the CoP Rules, this exercise would provide an appropriate vehicle to further that approach. Nominated judges have been, and will continue to be, encouraged to report more judgments and to consider under the existing CoP Rules whether there is “good reason” to depart from the default position of the hearing being in private and duly accredited members of the media being excluded from it.”

The oral evidence session

In the oral evidence session, Sir James Munby P and Mr Justice Charles elaborated upon the points made in their written memorandum. The following key points emerged:

1. In relation to transparency, Sir James Munby indicated that he considered that there had already been an impact as a result of the publication of his guidance in terms of the number of judgments published on Bailii and also the number of stories in the media relating to cases before the CoP. He indicated that he proposes to issue in the next month for discussion and consultation a draft document identifying categories of cases in which, subject to suitable restrictions and protections, documents could be made available to the media. He also contemplates that the categories of judgment which must rather than may be published may be

- extended (subject always to the particular circumstances of the case dictating a different outcome), as well as including the judgments of District Judges within the scope of the guidance. He noted, though, that there will come a point in implementing his transparency agenda when he will come up against the Rules, and in particular the default position (unlike in family cases after the changes brought about by the FPR 2010) that there is no right of media access. He expressed his ‘continuing concern’ (in his words, “a diplomatic phrase”) at the fact that the need for changes in rules identified as long ago as 2010 had thus far fallen on deaf ears;
2. Charles J indicated that he did not think that there was much scope for giving further work to authorised court officers. In relation to the regionalisation agenda, it appears that there may very recently have been progress (whether or not related to the hearing before the Justice Committee), such that the necessary actions required to bring about effective transfers of cases out of London should be able to be implemented by the end of May;
 3. In relation to the position of the Official Solicitor, Sir James Munby P suggested that the Justice Committee might wish to care to probe the Official Solicitor as to the allocation of his resources between his different functions, in particular between the balance of resources dedicated to those cases involving children in which he was appointed to act as litigation friend for a parent, and welfare cases before the Court of Protection;
 4. Both the President and Vice-President indicated a degree of scepticism that it would be possible for increased use of mediation (which both of them indicated that they saw as valuable in the right case) significantly to reduce the case-load of the

Court of Protection;

5. As regards the dissemination of information relating to the Court, both indicated a degree of dissatisfaction with the use of the gov.uk portal as a route. Further (and most importantly) Sir James Munby P gave an (unsolicited) endorsement of the utility of this newsletter as a service for professionals, but indicated that the much bigger problem was engaging the public at large.
6. Both judges declined to answer substantive questions relating to the impact of legal aid which were, as the President noted, matters of policy of considerable controversy, but noted that there were cases in which – on the facts of those cases – judicial comment had been made as to the non-availability of legal aid (for example Re UF).

Comment

The evidence given to the Committee and summarised above is very important, and will hopefully be read alongside the strong recommendations of the House of Lords Select Committee. In particular, this evidence underlines the fact that the failure to implement all but one of the recommendations of the ad hoc Rules Committee is causing real problems. Further changes are now required to reflect the fact that the world has moved on since 2010 – not least in terms of the introduction of the Family Procedure Rules 2010. These rules set in place a very clear forensic framework for the determination of cases involving children which is, in many ways, a much better model for the determination of cases involving – in particular – the health and welfare of incapacitated adults than is the CPR upon which the COPR were in significant part modelled.

The above is not intended as a suggestion that the CoP should be part of the Family Division (despite its current location). Nor should it be read as

suggesting that incapacitated adults are to be equated with ‘big children.’ The law that Court of Protection judges have to apply and the factors to take into account when considering what substantive decision to take upon an application relating to an incapacitated adult is – and should be – very different from the law and factors that apply in relation to a child. However, the forensic processes in both types of proceedings are very similar, and for very good reason: they are designed to ensure that, as far as possible, a judge is put in a position to take the decision that is right for a person who is not a full player in the proceedings but their subject (see also Baker J (*“Reforming the Court of Protection: lessons to be learned from the Family Justice Reforms”* [2014] 4 Elder Law Journal 1, 45-50).

Domestic Violence Protection Orders

With effect from 8 March, by virtue of the enactment of the Crime and Security Act 2010 (Commencement No. 7) Order 2014/478, police officers across England and Wales of the superintendent or above can now issue a Domestic Violence Protection Notices (DVPN) under s.24 Crime and Security Act 2010. A DVPN can be issued to a person over 18 if that officer has reasonable grounds for believing that:

1. the person “*has been violent towards, or has threatened violence towards, an associated person,*” i.e. person falling within the categories of associated person defined by s.62 Family Law Act 1996, which includes children, spouses, cohabitants, members of the same household (otherwise merely by reason of one of them being the other's employee, tenant, lodger or boarder); and that
2. the DVPN is necessary to protect that person from violence or a threat of violence. Such a

notice can be issued even if the vulnerable adult does not agree.

A DVPN prohibits the suspected perpetrator from molesting the victim and, where they cohabit, may require the suspected perpetrator to leave those premises. The issue of a DVPN triggers an application for a Domestic Violence Protection Order (DVPO). This is a court order (issued by the magistrates’ court) lasting between 14 and 28 days, which prohibits the perpetrator from molesting the victim and may also make provision about access to shared accommodation. The magistrates’ court must hear the application within 48 hours to limit the length of time for which the suspected perpetrator can be excluded from his home without the chance to defend himself.

We would suggest that such notices and orders may provide an additional tool that may be of assistance for local authorities seeking to protect vulnerable adults who fall outside the scope of the MCA 2005.

Cross-border update

Readers may be interested to note that permission was refused by a single Lord Justice of Appeal at an oral hearing on 28 March 2014 to JO to appeal the important decision of the President in [JO v GO](#) on Schedule 3 to the MCA 2005.

The role of international judicial liaison

N v K (No 2) [2014] EWHC 507 (Fam) (Cobb J)

Practice and Procedure – Other

Summary

This case provides a useful summary of the role of international judicial liaison. It arises in the context of a private law case involving a child, but the principles of judicial liaison are equally applicable in the context of cases involving incapacitated adults. Cobb J took the opportunity to rehearse the principles that govern such liaison exercises, which we reproduce here:

“8. Many judgments and articles in international legal journals over the last fifteen years or so have identified, and paid tribute to, the value of international judicial liaison (from Re HB (Abduction) (Child's objections) [1998] 1 FLR 422 to HSE Ireland v SF (A minor) [2012] EWHC 1640 (Fam), and others). I intend to do no more than to add my own public recognition of its value, having engaged in collaboration usefully through the medium of Network Judges in Ireland (Re LM [2013] EWHC 646 (Fam)) and Spain (PB v SE Re S [2013] EWHC 647 (Fam)) in the last twelve months.

9. The principles by which international judicial communications are achieved through the Hague Network Judges, together with practical advice, are authoritatively set out in the guidance 'Direct Judicial Communications' ('DJC') published by the Hague Conference on Private International Law (2013).

10. While this is not the place to rehearse the regime in its entirety, it should be noted that it

is common practice, where direct communication is indicated, for written

questions to be prepared for consideration by the judges in the two jurisdictions. This guidance is specifically to be located in §7.5(f) of the DJC: the provision 'in writing' of 'any specific questions which the judge initiating the communication would like answered,' and corresponds with the more general expectation that 'a record is to be kept of communications' §6.4 (ibid.)

11. The DJC publication illustrates the sort of matters which may be the subject of direct judicial communications; this is not an exhaustive list:-

- a. scheduling the case in the foreign jurisdiction:
 - i. to make interim orders, e.g., support, measure of protection;*
 - ii. to ensure the availability of expedited hearings;**
- b. establishing whether protective measures are available for the child or other parent in the State to which the child would be returned and, in an appropriate case, ensuring the available protective measures are in place in that State before a return is ordered;*
- c. ascertaining whether the foreign court can accept and enforce undertakings offered by the parties in the initiating jurisdiction;*
- d. ascertaining whether the foreign court can issue a mirror order (i.e., same order in both jurisdictions);*
- e. confirming whether orders were made by the foreign court;*
- f. verifying whether findings about domestic violence were made by the foreign court;*

- g. *verifying whether a transfer of jurisdiction is appropriate.*

12. *For a wider review of the evolution of this important mechanism for achieving international communication and collaboration, and a digest of relevant case-law, reference should further and usefully be made to the article by Edward Bennett, formerly Legal Secretary to the Head of International Family Justice, at [2013] (July) Family Law 845. Mr. Bennett gives practical advice to practitioners, consistent with the DJC Guidance referred to above, which I respectfully endorse. Relevant to the problems which arose in this case, I draw attention to a particular passage from that article (at p.850):*

'All requests [for direct judicial communication] should be accompanied by: (a) a (preferably agreed) concise case summary; and (b) a set of questions to be put to the network judge which: (i) ask for information of a practical and emphatically non-legal nature; and (ii) are in no way phrased in anything other than a neutral, non-tactical way. Direct judicial communication is not intended as a tool for practitioners to: (a) receive legal advice by the back door; (b) avoid having to seek expert evidence as to foreign law or procedure in circumstances where it is appropriate; or (c) use as a substitute for their own legal research into English family law and practice. Likewise it would be a grave abuse of process to attempt to use network judges as a means of making submissions to a foreign court, thus short-circuiting the relevant procedural rules for such matters in the jurisdiction concerned. This is not to say that sealed orders and judgments cannot be transmitted to judges in other jurisdictions quickly via network judges in certain circumstances, which is relatively common.'

On the facts of the case before him Cobb J found that the representatives for the father in the proceedings had embarked upon an entirely different – and inappropriate – exercise, thus:

"21. The questions from the parties' solicitors were therefore received by the Office for IFJ on 30 October. I do not intend to set out the detailed narrative of the father's questions in this judgment, but can summarise them thus:

- a. *The father first invited the judges to consider and determine the extent to which the mother could maintain that she was not bound by a judgment entered in the American court (Panama City, Florida) in August 2007;*
- b. *The second question referred to the father's agreement in 2009 (see §12 [\[2013\] EWHC 2774 \(Fam\)](#)) to extend the period of the mother's temporary relocation in the UK. After an exposition of the background history, the question posed was: 'To what extent, if any, should the fact that the extension was granted voluntarily detract from the validity of the final judgment in requiring [M]'s return to Florida by 1 September 2009?'*
- c. *Thirdly, the father asked whether the finding of habitual residence in England is 'incompatible with the recognition and enforcement of' the Florida order?*
- d. *The fourth question concerned the question of whether the English court would 'uphold' the 'visitation provisions' of the original Florida order;*
- e. *Finally, the father set out a detailed proposed time-table for future holiday staying contact over the ten-month*

period to September 2014, involving five separate visits to the USA during M's school holidays and half-terms. Specific dates were proposed. He invited the judges to 'discuss' these arrangements in the 'anticipated judicial liaison'.

22. At least three of these five questions (§21 (a), (b) and (e)) were completely unsuited to judicial liaison, as contemplated by the International Hague Network; the first question was self-evidently not a matter on which an English Judge could or should contribute or 'liaise' effectively or at all. International judicial communication is not intended to be a substitute for obtaining legal advice, nor can it be used as a means to avoid having to seek expert evidence as to foreign law, or procedure. It cannot be deployed as a mechanism for judges to settle welfare disputes (§21(e) above), nor can it be used 'as a means of making submissions to a foreign court' (Bennett: p.850)."

Comment

As noted at the outset, judicial liaison can be useful – indeed – essential in terms of ensuring that cross-border protection for incapacitated adults can be coordinated effectively between both judicial and administrative authorities. A good example is that of [Re MN](#), where Hedley J gave a decision that was strictly – academic so as to be able to assist the California courts as to what the English courts would and would not do, and what it would do of its own volition as opposed to only at the invitation of the California courts. This case serves as a helpful reminder of the core principles that apply together with the limits of liaison.

Law Society Practice Note on International Aspects of EPAs, LPAs and deputyships

The Law Society has recently published a useful [practice note](#) providing guidance on the international aspects of enduring powers of attorney (EPAs), lasting powers of attorney (LPAs) and deputyships. The note addresses the issues that arise in relation to the use of such powers abroad; the issues that arise in respect of the use of foreign powers of attorney are discussed in this [article](#) by Alex.

The House of Lords Select Committee

Undoubtedly the most important development in the capacity field outside the Court of Protection is the report of the House of Lords Select Committee convened to conduct post-legislative scrutiny of the MCA 2005.

The House of Lords Committee appointed to consider the MCA 2005 has now reported. After a mammoth evidence gathering exercise (the transcripts of the oral evidence received and the written evidence submitted ran to almost [2,000 pages](#)⁵), the Committee has provided a damning [report](#) upon almost all aspects of the implementation of the MCA 2005.

In its 143 page report, the Committee was unanimous that the MCA 2005 is important – indeed visionary – legislation, with the potential to transform lives. However, they were equally clear that the Act is not working well, because people do not know about the Act and, where they do know about it, they do not understand it. As the Committee notes in the summary at the outset: “[f]or many who are expected to comply with the Act it appears to be an optional add-on, far from being central to their working lives. The evidence presented to us concerns the health and social care sectors principally. In those sectors the prevailing cultures of paternalism (in health) and risk-aversion (in social care) have prevented the Act from becoming widely known or embedded. The empowering ethos has not been delivered. The rights conferred by the Act have not been widely realised. The duties imposed by the Act are not widely followed.”

The Committee reserved some of its most damning criticisms for the DOLS regime, noting that the evidence that it had heard suggests that “[t]he provisions are poorly drafted, overly complex and bear no relationship to the language and ethos of the Mental Capacity Act. The safeguards are not well understood and are poorly implemented. Evidence suggested that thousands, if not tens of thousands, of individuals are being deprived of their liberty without the protection of the law, and therefore without the safeguards which Parliament intended. Worse still, far from being used to protect individuals and their rights, they are sometimes used to oppress individuals, and to force upon them decisions made by others without reference to the wishes and feelings of the person concerned. Even if implementation could be improved, the legislation itself is flawed.”

The Committee has made a number of important recommendations to bring about the effective implementation of the Act, chief amongst them being that:

- (1) overall responsibility for the Act be given to an independent body whose task will be to oversee, monitor and drive forward implementation;
- (2) The DOLS regime be ripped up and the Government goes back to the drawing board to draft replacement provisions that are easy to understand and implement, and in keeping with the style and ethos of the Mental Capacity Act;
- (3) The Government works with regulators and the medical Royal Colleges to ensure the

⁵ Alex gave oral evidence to the Committee; Tor coordinated a written submission with contributions from Counsel and

solicitors with a health and welfare specialism, to which Alex and Neil contributed.

Act is given a higher profile in training, standard setting and inspections;

- (4) The Government increases the staff resources at the Court of Protection to speed up handling of non-controversial cases;
- (5) The Government reconsiders the provision of non-means tested legal aid to those who lack capacity, especially in cases of deprivation of liberty;
- (6) Local authorities use their discretionary powers to appoint Independent Mental Capacity Advocates more widely than is currently the case;
- (7) The Government addresses the poor levels of awareness and understanding of Lasting Powers of Attorney and advance decisions to refuse treatment among professionals in the health and social care sectors;
- (8) The Government review the criminal law provision for ill-treatment or neglect of a person lacking capacity to ensure that it is fit for purpose.

The Committee also recommended that the House of Lords seek an update from the Government twelve months from now to find out what they have done in response to their key recommendations.

For a much longer discussion and commentary upon the report, see this post by Alex [here](#). For an example of why we would suggest that the Government would be well-advised to look north of the Border to take the Mental Welfare Commission as a template for a 'Mental Capacity Act Commission,' we would recommend reading the report of the investigation into *Ms E* discussed in the Scotland newsletter.

The effect of incapacity upon settlements

Dunhill v Burgin (Nos 1 and 2) [\[2014\] UKSC 18](#)
(Supreme Court (Lady Hale, Lords Kerr, Dyson, Wilson Reed SCJJ))

Mental Capacity – Litigation

Summary

Ms Dunhill sought to have a compromise agreement into which she had entered declared void due to her having lacked litigation capacity at the time it was agreed. She had suffered a brain injury in a car accident with Mr Burgin and had instructed solicitors to bring a claim for personal injury. The claim was settled for £12,500 on the first day of trial, but it had subsequently transpired that if properly pleaded, the claim would have been worth at least £790,000, and possibly as much as several million pounds.

At first instance ([2011] EWHC 464 (QB)), the Court [held](#) that Ms Dunhill had not lacked capacity at the time the consent order was agreed, and had been given a sufficiently clear explanation of the terms of the order, which she had understood. Silber J made it clear that he reached his decision by asking himself whether the Claimant had had capacity to enter into the consent agreement, rather than whether she had the capacity to conduct the proceedings as a whole.

Ms Dunhill appealed. The Court of Appeal [allowed](#) her appeal ([2012] EWCA Civ 397). Giving the sole reasoned judgment (with which Lewison LJ and Sir Mark Potter agreed), Ward LJ noted (paragraph 22) that the case raised the same broad issue as in the pre-MCA cases of *Masterman-Lister v Brutton & Co* [2003] 1 WLR 1511, and *Bailey v Warren* [2006] EWCA Civ 51, namely whether a previous compromise/order could be set aside for want of

capacity. Those cases had established that the proper question is whether the individual in question “*ha[s] the necessary capacity to conduct the proceedings or, to put it another way, to litigate*” (paragraph 24). In the circumstances, Ward LJ considered that Silber J. had fallen into error because he had approached matters too narrowly by treating the relevant transaction as the actual compromise negotiated outside court which led to the consent order in question because: “[s]ince the compromise [was] not a self-contained transaction but inseparably part and parcel of the proceedings as a whole, the question is not the narrow one of whether [the Claimant] had capacity to enter into that compromise but the broad one whether she had the capacity to conduct the proceedings.” (paragraph 24). Framing the test this way, Ward LJ had no hesitation in finding that she lacked the requisite capacity.

Mr Burgin appealed to the Supreme Court. In the interim, the claim was remitted to the High Court for case management, and a further issue arose as to the effect of Ms Dunhill’s incapacity upon the settlement agreement because it had not been approved by the Court as was required under CPR r.21.10, Ms Dunhill being a protected party. Bean J [held](#) ([2012] EWHC 3163 (QB)) that her incapacity rendered the settlement void, but granted Mr Burgin permission to appeal directly to the Supreme Court.

The two appeals were heard together, so the Supreme Court had the opportunity to consider: (1) the test for deciding whether a person lacks capacity to conduct legal proceedings; and (2) the consequences if legal proceedings are compromised without it being recognised that one of the parties lacked that capacity.

The Supreme Court unanimously dismissed Mr Burgin’s appeals. Lady Hale gave the judgment on

behalf of the court. In the material parts of her judgment, she held:

1. The general approach of the common law, now confirmed in the Mental Capacity Act 2005, is that capacity is to be judged in relation to the decision or activity in question and not globally. Hence it was concluded in [Masterman-Lister](#) that capacity for this purpose meant capacity to conduct the proceedings (which might be different from capacity to administer a large award resulting from the proceedings). This was also the test adopted by the majority of the Court of Appeal in *Bailey v Warren* [\[2006\] EWCA Civ 51](#), [2006] CP Rep 26, where Arden LJ specifically related it to the capacity to commence the proceedings (para 112). Lady Hale noted that “*it would have been open to the parties in this court to challenge that test, based as it was mainly upon first instance decisions in relation to litigation and the general principle that capacity is issue specific, but neither has done so. In my view, the Court of Appeal reached the correct conclusion on this point in Masterman-Lister and there is no need for us to repeat the reasoning which is fully set out in the judgment of Chadwick LJ*” (paragraph 13);
2. Construed properly, CPR r 21 (in requiring that a protected party must have a litigation friend) “*posits a person with a cause of action who must have the capacity to bring and conduct proceedings in respect of that cause of action. The proceedings themselves may take many twists and turns, they may develop and change as the evidence is gathered and the arguments refined. There are, of course, litigants whose capacity fluctuates over time, so that there may be times in any proceedings where they need a litigation friend and other times when they do not. CPR 21.9(2) provides that when a party ceases to be a patient (now, a protected*

person) the litigation friend's appointment continues until it is ended by a court order. But a party whose capacity does not fluctuate either should or should not require a litigation friend throughout the proceedings. It would make no sense to apply a capacity test to each individual decision required in the course of the proceedings, nor, to be fair, did the defendant argue for that" (paragraph 15);

3. Further, apparent suggestions in earlier cases which could be read as to the effect that, "having identified a problem and gone to a lawyer, all that is needed is the capacity to understand and make decisions based upon the actual advice given by that lawyer" could not be correct as this would mean that whether a person had or lacked litigation capacity would depend upon whether they received good advice, bad advice or no advice at all. Rather

"the test of capacity to conduct proceedings for the purpose of CPR Part 21 is the capacity to conduct the claim or cause of action which the claimant in fact has, rather than to conduct the claim as formulated by her lawyers" (paragraph 18)

4. Judged by that test, it was common ground that Ms Dunhill did not have capacity to conduct the claim (paragraph 18). She should therefore have had a litigation friend from the outset of the proceedings;
5. As Kennedy LJ had noted in *Masterman-Lister*, CPR r 21.3(4) does suggest a solution to the fact that litigation conducted in the absence of a litigation friend is ineffective. This provides: "[a]ny step taken before a child or patient has a litigation friend, shall be of no effect, unless the court otherwise orders." Lady Hale

endorsed the comments of Kennedy LJ to the effect that "[p]rovided everyone has acted in good faith and there has been no manifest disadvantage to the party subsequently found to have been a patient at the relevant time I cannot envisage any court refusing to regularise the position," but noted that "[b]ut of course, everything must depend upon the particular facts. It might be appropriate retrospectively to validate some steps but not others. In this case, we have not been asked to validate anything, but no doubt we could do so of our own motion if we thought it just" (paragraph 19);

6. In the instant case, it would not be just retrospectively to validate the settlement (and the Supreme Court had not been asked to do so). As Lady Hale noted, "[w]hile every other step in the proceedings might be capable of cure, the settlement finally disposing of the claim is not" (paragraph 20). The purpose of requiring approval by the court of a settlement involving a protected party "is to impose an external check on the propriety of the settlement and the accompanying practice direction sets out the evidence which must be placed before the court when approval is sought" (paragraph 20);
7. As CPR r.21.10 was *intra vires*, and did not require that Mr Burgin be on notice of Ms Dunhill's incapacity (the rule being a substantial, but specific exception to the common law principle set down in *Imperial Loan Co Ltd v Stone*), the combined effect of Ms Dunhill's incapacity and the absence of court approval of the settlement order meant that that order was of no effect (paragraphs 20, 22 and 30);
8. Policy arguments could not answer the legal questions before the court, but to the extent

to in any event that “*the policy underlying the Civil Procedure Rules is clear: that children and protected parties require and deserve protection, not only from themselves but also from their legal advisers. The notes to Order 80 in the last (1999) edition of the Supreme Court Practice stated that among the objects of the compromise rule was ‘to protect minors and patients from any lack of skill or experience of their legal advisers which might lead to a settlement of a money claim for far less than it is worth’, a sentiment which has been carried forward into the current edition of Civil Procedure.*” (paragraph 33).

The consent order was therefore set aside, and the matter remitted to be set down for trial.

Comment

The Supreme Court’s decision as to litigation capacity does not perhaps come as a substantial surprise given the careful and comprehensive judgment of the Court of Appeal on this aspect. It is interesting, though, to note that Lady Hale left open the possibility that the parties could have challenged the long-established test for litigation capacity (albeit that she then shut down such a challenge by affirming the reasoning of the Court of Appeal in *Masterman-Lister*).

The decision in relation to CPR r.21.10, likewise, is perhaps not altogether surprising. The decision is also useful confirmation of the limits of the power under CPR r 21.3(4) to remedy steps taken in the absence of a litigation friend. It is perhaps also worth noting in this regard that there is no equivalent to this power in the COPR. However:

The silence in the COPR may, in and of itself, mean that the court retains a discretion retrospectively to approve any steps to be taken prior to the appointment of a litigation friend

(whether or P or another party to the proceedings) – see in this regard the commentary in *Jordans’ Court of Protection Practice 2014* (Jordans, 2014) at p. 762, in the commentary to COPR r141;

It would also be open to a Court of Protection judge to apply CPR r.21.10 through the (often overlooked) provisions of COPR r.9, which provide that “*In any case not expressly provided for by these Rules or the practice directions made under them, the Civil Procedure Rules 1998 (including any practice directions made under them) may be applied with any necessary modifications, insofar as is necessary to further the overriding objective.*”

No matter how the discretionary power arises, we would suggest that the comments of Lady Hale would be applicable so as to suggest that the court should proceed with caution before endorsing any steps that went beyond the merely procedural.

Is *Banks v Goodfellow* history?

Fischer v Diffley [2013] EWHC 4567 (Ch) (HHJ Dight sitting as a Deputy High Court Judge)

Testamentary capacity

Summary

This Chancery Division case is of some interest because it is the first one of which the editors are aware in which the MCA 2005 has been expressly prayed in aid in determining whether an individual had testamentary capacity.

The claimants were the representatives of the family in Germany of Louise Beck, who died on 17 January 2011. They sought a declaration that she died intestate and that the two wills executed by her and dated 1 March 2009 (‘the first will’) and 2 May 2010 (‘the second will’) were invalid.

The deceased had substantial assets in both England and Germany and on the literal construction of the wills they purported to deal with her assets in both jurisdictions. If the wills are invalid, then the deceased's estate in England and Wales are passed on intestacy to the family whom the claimants represent and her estate in Germany would pass according to the laws of that country.

The claimants contended that at the date of execution of each of the wills, the deceased suffered from such severe dementia brought on by Alzheimer's disease that (a) she lacked testamentary capacity and (b) there was a want of knowledge and approval and that in those circumstances they ask the court to pronounce against both wills. The only active defendants to the claim were the former tenants and neighbours of the deceased and by their counterclaim they ask the court to pronounce in solemn form for both wills notwithstanding the apparent discrepancy between the terms of each will. By the wills, the defendants stood to benefit from a life interest in either the whole or part of the deceased's estate in both jurisdictions. If the first will was upheld, the remainder would be to the Battersea Dogs and Cats Home absolutely. If the second will was upheld, the remainder is to the family in Germany.

For our purposes, the key passages from the judgment are those relating to the law, which HHJ Dight referred to as not being in dispute (paragraph 24).

At paragraph 25, HHJ Dight held:

"As far as capacity is concerned, there are many reported decisions setting out the common law, the principal case being Banks v. Goodfellow, which has recently been supplemented by statute, to which, it seems to

me, that I am entitled to have regard as a starting point in connection with the question of capacity."

HHJ Dight then set out the key provisions of the MCA 2005. He noted that the general principles to be applied were now contained in s.1, holding (at paragraph 28) that:

"28. Notwithstanding the wording of subsection 1 [i.e. '[t]he following principles apply for purposes of this Act.'] it seems to me, having regard to the terms of the Act and the context in which it was enacted, that the principles go further and are applicable in situations such as the present and must be looked at alongside the classic test contained within the common law as set out in the case of Banks v. Goodfellow."

Having set out and commented upon the provisions of ss.2-3 MCA 2005, he held at paragraph 34 that it was apparent to him from the terms of the expert evidence that he heard that *"each of the experts had in mind this modern statement of the principles relating to the assessment of capacity in a court of law and have addressed their evidence so as to deal with the factors that have been identified in the provisions that I have just referred to."*

HHJ Dight recited the classic authorities on want of knowledge and approval, placing particular reliance upon the decision of the Court of Appeal in *Hawes v Burgess* [\[2013\] EWCA Civ 74](#) and that of Newey J in *Greaves v Stolkin* [\[2013\] EWHC 1140 \(Ch\)](#).

On the basis of the tests set down above, and after an exhaustive review of the evidence, lay and expert, HHJ Dight held that the deceased had not had the requisite capacity to make either of the two wills, nor had the defendants discharged the burden of establishing that she knew and

approved the contents of the first will (for 12 reasons) or the second will (for 16 reasons). He therefore found against both wills and declared that the deceased died intestate.

Comment

As noted at the outset, this is, as far as the editors know, the first time in which a Chancery judge has expressly prayed in aid the MCA 2005 in determining the test to apply (retrospectively) to decide whether the deceased had had testamentary capacity. Alex's commentary upon the case can be found [here](#), whilst Simon Edward's article upon testamentary capacity in light both of this case and that of *Simon v Byford* discussed also in this issue can be found [here](#).

Keeping it concrete

Simon v Byford [\[2014\] EWCA Civ 280](#) (Court of Appeal (Sullivan, McFarlane and Lewison LJ))

Testamentary capacity

Summary

This is the appeal from the decision of Nicholas Strauss QC that we [covered](#) last year in the newsletter. In summary, one of the sons ('R') of a Mrs Simons ('S') brought proceedings in the Chancery Division challenging a will made by his mother, at her 88th birthday party in 2005. Mrs Simo's previous will, made in 1996, was more generous to R than his other three siblings in that, although the majority of her estate was split equally between them, R also received a flat owned by C and shares in the family company. R was not present at the birthday party but other members of the family were there, including his brother J and sister H. The will made by C at the birthday party provided for her assets (with the exception of a relatively small sum) to be divided

between her children in equal parts. There was evidence that S was suffering from mild to moderate dementia at the time she made that will and R argued that she lacked testamentary capacity. This was rejected by J and H. S died in 2009.

Nicholas Strauss QC held at first instance that S had had the requisite testamentary capacity, that she knew of and approved of the provisions of the will made in 2005 and that it was her last and valid will. Importantly, he considered that although S would not have been able to remember the terms of her previous will, she would have been able to ask to see that will if she wished to do so, when she was told at the time of making the 2005 will that it did not (as she believed) leave her property to her children equally.

R appealed to the Court of Appeal on the grounds that (1) the judge was wrong in his analysis of the requirement (deriving ultimately from *Banks v Goodfellow*) that the testator is able to comprehend and appreciate the claims to which he ought to give effect; (2) the judge was wrong to infer that S was capable of understanding the extent of her estate; and (3) the judge set the requirements of establishing knowledge and approval too low.

The appeal was dismissed, with Lewison LJ giving judgment on behalf of the Court of Appeal. As a preliminary point, he reminded himself (as he said in *Fage UK Ltd v Chobani UK Ltd* [\[2014\] EWCA Civ 5](#) at [114]) that a first instance's judges findings about testamentary capacity and knowledge and approval are findings of fact, based on his appreciation of the evidence as a whole, such that an appeal court should be wary of interfering with them.

In relation to grounds (1) and (2), Lewison LJ considered the principles relating to testamentary

capacity. He held that *Banks v Goodfellow* was the applicable test, although – interestingly – on the basis that the will was made before the MCA 2005 came into force (paragraph 39). Importantly, however, citing dicta of Peter Gibson LJ in *Hoff v Atherton* [2004] EWCA Civ 1554; [2005] WTLR 89, he (re)emphasised (at paragraph 39) that what one is dealing with is “*capacity*, in other words with potential” (paragraph 39, emphasis in original). In other words, “*capacity depends on the potential to understand. It is not to be equated with a test of memory*” (paragraph 40). As he noted, this was not a new point:

“40... [i]n Harwood v Baker (1840) 3 Moo PC 282 Erskine J giving the judgment of the Privy Council said:

*‘... in order to constitute a sound disposing mind, a Testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard; but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom by his will he is excluding from all participation in that property.’
(Emphasis added)*

He did not say that the testator must actually remember the extent of his property. Mrs Simon did in fact remember the extent of her estate, partly as a result of executing the deed of gift, and partly as a result of the discussions that followed. In my judgment, when the judge said that Mrs Simon was not “capable” of remembering why her earlier will had benefited Robert, he meant no more than that she had forgotten. Once I knew the dates of all the Kings and Queens of England, and the formula for Hooke’s law; and was “capable” of remembering them. Now I would have to look them up. The judge’s important finding was not that Mrs Simon had forgotten the terms of and

reasons for her earlier will. It was that she was capable of accessing and understanding the information; but chose not to...”

The appellant’s more substantial point, Lewison LJ found, was the contention that, by dividing her shareholding equally between her children S must have overlooked the reason why in her earlier wills she had left them all to R. It was contended on R’s behalf, although S might, with the help of an explanation, have been able to understand why she had done that, in the absence of an explanation she could not. Thus while she might have understood that she owned the shares (as was apparent from the deed of gift) she did not understand their significance. Their significance was that if they all went to R then deadlock in the company would be prevented; whereas if divided equally among the children deadlock was possible. It was said, that, while it would have been open to S to change her mind about the desirability of leaving all the shares to R, she did not have capacity to do so without first understanding the consequences of doing that. This was not simply a failure of recollection. It was an inability to replicate the thought processes that had led her to her earlier disposition.

As Lewison LJ noted, “*it seems to me that the question that divides the parties is whether a testator or testatrix must not only be capable of understanding what assets are at his or her disposal and the persons who have claims on those assets, but must also understand not simply the direct consequences but also the collateral consequences of disposing of them in one way rather than another*” (paragraph 43).

Significantly, Lewison LJ held (at paragraph 45) that:

“I do not believe that previous authority goes to the length of requiring an understanding of the collateral consequences of a disposition as

opposed to its immediate consequences. Nor do I think it desirable that the law should go that far. As Mummery LJ put it in Hawes v Burgess [\[2013\] EWCA Civ 74](#); [\[2013\] WLR 453](#) at [14]:

‘The basic legal requirement for validity are that people are mentally capable of understanding what they are doing when they make their will and that what is in the will truly reflects what they freely wish to be done with their estate on their death.’

46. *The significance of the shares on their own was slight. What gave them significance (at least to Robert) was the fact that, combined with his existing shareholding in the company, acquisition of Mrs Simon's shares would give him the power to avoid deadlock. But that would have required Mrs Simon to have understood (and remembered) not only what her own estate was, but also what Robert's assets were. I do not think that any of the authorities requires as a condition of testamentary capacity that the testator should understand or remember the extent of anyone else's property. Again, what Ms Reed's submission really amounts to is a memory test. In fact the classic formulations of testamentary capacity ... limit themselves to requiring the testator to understand no more than the extent of his property. They do not require him to understand the significance of his assets to other people” (emphasis in original).*

In relation to knowledge and approval, Lewison LJ held that:

“what we are looking for is actual knowledge and approval of the contents of the will. But it is important to bear in mind that it is knowledge and approval of the actual will that count: not knowledge and approval of other

potential dispositions. Testamentary capacity includes the ability to make choices, whereas knowledge and approval requires no more than the ability to understand and approve choices that have already been made. That is why knowledge and approval can be found even in a case in which the testator lacks testamentary capacity at the date when the will is executed. The reason for this requirement is the need for evidence to rebut suspicious circumstances: Perrins v Holland [\[2010\] EWCA Civ 840](#); [\[2011\] Ch 270](#) at [25]. Normally proof of instructions and reading over the will will suffice: *ibid* at [25]. The correct approach for the trial judge is clearly set out in *Gill v Woodall* [\[2010\] EWCA Civ 1430](#); [\[2011\] Ch 380](#). It is a holistic exercise based on the evaluation of all the evidence both factual and expert. The judge's starting point in our case was one of ‘initial suspicion’, given that the disputed will was prepared and executed without a solicitor and without Mrs Simon having been medically examined: see [11]. But having heard the evidence he held that his initial suspicion had been dispelled. He found it clear that Mrs Simon knew that she was making a will, took a conscious decision to make it and approved its terms. This conclusion was, in my judgment, fully supported by the evidence that the judge accepted. In particular he accepted the evidence of Ms Schachter that she read the draft will to Mrs Simon twice; and having typed the will, she read it again to Mrs Simon who appeared to understand it. She did that because, as a former legal secretary, she understood that the will had to be read and understood by its maker. Mrs Simon also read it to herself. Given that the will was relatively simple, and that the judge had found that Mrs Simon had testamentary capacity, his finding of knowledge and approval is in my judgment unassailable.”

The appeal was therefore dismissed.

Comment

Lewison LJ's restatements of the principles governing the test for testamentary capacity for pre MCA 2005 wills and those governing the test for knowledge and approval are helpful in their focus upon: (1) the realities of the situations in which wills are drawn up; and (2) the concrete requirements of a person choosing to make a will. His message – even if it relates to cases which formally do not engage the MCA 2005 – is very much in line with the spirit of the Act in terms of securing against the risk of (retrospectively) finding incapacity by asking too much of the testator.

For further commentary upon this case by Simon Edwards, see [here](#), and by Alex see [here](#).

The burden of proof in testamentary capacity revisited?

Bateman v Overy and Overy [2014] EWHC 432 (Ch) (John Male QC sitting as a Deputy High Court Judge)

Testamentary capacity

Summary and comment

We do not formally provide a case note upon this case relating to (inter alia) testamentary capacity, which is highly fact-specific, but note the decision of the Deputy High Court Judge upon the approach to be adopted to the determination of testamentary capacity. Counsel for the Claimant contended that the agreed medical expert evidence raises a real doubt about capacity and that this shifts the evidential burden on to the Defendants as propounders of the will. In so doing, he relied upon the well-known summary of the relevant principles by Briggs J in *Key v Key* [2010] EWHC 405 (Ch) at paragraph 97:

“97. The burden of proof in relation to testamentary capacity is subject to the following rules:

- i) While the burden starts with the propounder of a will to establish capacity, where the will is duly executed and appears rational on its face, then the court will presume capacity.*
- ii) In such a case the evidential burden then shifts to the objector to raise a real doubt about capacity.*
- iii) If a real doubt is raised, the evidential burden shifts back to the propounder to establish capacity nonetheless.*

See Generally Ledger v. Wootton [2007] EWHC 2599 (Ch) per HHJ Norris QC at paragraph 5.”

Counsel for the Defendants sought to rely upon what he said was the rather approach of the different approach of the Court of Appeal in *Hawes v Burgess* [2010] EWCA Civ 74. He relied upon the following passages from the judgment of Mummery LJ:

“13.... [t]he court has to consider and evaluate the totality of the relevant evidence, from which it may make inferences on the balance of probabilities. Although talk of presumptions and their rebuttal is not regarded as specially helpful nowadays, the courts realistically recognise that, for example, if a properly executed will has been professionally prepared on instructions and then explained by an independent and experienced solicitor to the maker of the will, it will be markedly more difficult to challenge its validity on the grounds of either lack of mental capacity or want of knowledge and approval than in a case where those prudent procedures have not been followed.

14. I should add a statement of the obvious in order to dispel any notion that some mysterious wisdom is at work in this area of the law; the freedom of testation allowed by English Law means that people can make a valid will, even if they are old or infirm or in receipt of help from those whom they wish to benefit, and even if the terms of the will are hurtful, ungrateful or unfair to those whose legitimate expectations of testamentary benefit are disappointed. The basic legal requirements for validity are that people are mentally capable of understanding what they are doing when they make their will and that what is in the will truly reflects what they freely wish to be done with their estate on their death."

The Deputy High Court Judge rejected the suggestion advanced by Counsel for the Defendants, and proceeded in accordance with the approach set out in *Key v Key*. At paragraph 138, he held that, as he *"read the earlier paragraphs 11 and 12 in Mummery LJ's judgment in Hawes, the passages cited by Mr Lonsdale deal with more general matters rather than with the specific issue of testamentary capacity. So, I will apply the approach set out by Briggs J in Key v. Key. However, I will step back at the very end of what I say on the issues about the 2011 will and test my conclusions against Mummery LJ's more general remarks."*

Alex has addressed the question of the burden of proof further in his paper [here](#); for further discussion of this case, see also Simon Edwards' paper [here](#).

107 Days of Action

Readers may already be familiar with LB, who was the star of his mother's blog until his tragic and unnecessary death last year in an assessment and treatment unit. LB's mother has started a

campaign called 107 Days of Action which aims to bring people together to achieve justice for LB, and for other learning disabled young adults. Of particular resonance to readers may be her goal to *"prevent the misuse/appropriation of the mental capacity act as a tool to distance families and isolate young dudes."*

Please visit www.107daysofaction.wordpress.com to support the campaign.

Research Project: Welfare Cases in the Court of Protection

The Centre for Health and Social Care Law at Cardiff University is undertaking research on welfare cases in the Court of Protection. The project is funded by the [Nuffield Foundation](#). The project is led by Professor Phil Fennell. Dr Lucy Series is the researcher working on the project, and Professor Luke Clements and Dr Julie Doughty are project consultants.

The project aims to gather information about the *process* of using the Court of Protection, and the views of those who work within the court or use it as litigants. The researchers will use a range of research methods, including: a *statistical* analysis of court files to look at patterns of use, demographic issues and procedural questions; focus groups and interviews with a range of stakeholders involved in the Court of Protection; observations of proceedings and roundtable discussions on key policy themes with invited stakeholders.

Research findings and information about the project for both specialists and the general public will be published on a dedicated [website](#).

The researchers are very grateful to the judges and staff at the Court of Protection and the Ministry of Justice for their considerable assistance and

support in helping to set up this project. Questions, comments or suggestions for the research team from practitioners and others are welcomed; please direct them to Professor Phil Fennell (Fennell@cardiff.ac.uk).

NAO Report upon Adult Social Care in England

The National Audit Office has recently [published](#) the first in a series of report upon the (not entirely happy) picture of Adult Social Care in England. It details increasing pressures on the system: adults with long-term and multiple health conditions and disabilities are living longer; demand for services is rising while public spending falls; and there is unmet need for care. As the NAO notes, whilst the need for care continues to rise, local authorities' spending on adult social care fell by 8 per cent in real terms between 2010-11 and 2012-13. As the NAO notes:

“The adult care system is changing significantly and rapidly. The Department for Communities and Local Government is expecting local efficiency initiatives, service transformation and the Better Care Fund to help local government manage financial pressures. However, there is weak evidence for which ways of commissioning and providing services are the most cost-effective. The Care Bill will introduce significant changes for local authorities which will be challenging to plan for because of a lack of information, lack of evidence on what works and short timescales.”

It warns that:

“while the Department of Health and the Department for Communities and Local Government are working together to understand the cumulative implications of changes to, and reduced spending on, health and social care, welfare and related local services, other departments are not. For

example, changes to benefits for adults with disabilities and their carers will put further strain on care users' ability to pay for their own care and for informal carers to provide support.”

Torture in Healthcare Settings

We reported last year upon the Special Rapporteur on Torture's 2013 Thematic Report on torture in healthcare settings. A series of important – and difficult – essays responding to this report can be found [here](#), in a volume produced by the Center for Human Rights & Humanitarian Law at American University Washington College of Law. It is particularly important, and challenging, as regards the interaction between the UN Convention on the Rights of Persons with Disabilities (CRPD) and UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in the healthcare setting.

Scottish Adult Incapacity Law Part 2

We would invite even those readers who consider themselves familiar with the provisions of Scottish adult incapacity law to read Adrian's note because of the points at which he considers that the 2000 Act requires amendment in order to ensure compliance with the UNCRPD as well as his view that the intervention orders could be used to authorise defined interventions expected to recur intermittently into the future.

Deprivation of liberty and adults with incapacity: A Scottish perspective – Addendum after *Cheshire West*⁶

In the January 2014 issue of this newsletter a brief overview was provided of the post-*Bournewood* implications for Scottish legislation, notably the Adults with Incapacity (Scotland) Act 2000 and s13ZA Social Work (Scotland) Act 1968⁷. Since then, there has been the Supreme Court *Cheshire West* judgment.⁸ So, what does this mean for Scotland?

What *Cheshire West* does not answer for Scotland is whether the consent of substitute decision-makers, such as welfare attorneys and welfare guardians, can or can be made to provide the necessary valid consent to restrictions that would otherwise amount to a deprivation of liberty⁹ or lawful authority to a deprivation of liberty. This remains to be resolved regarding the Adults with Incapacity (Scotland) Act 2000. However, as

⁶ Note: this version is edited down from the fuller version that appears in the standalone Scottish version.

⁷ J. Stavert, [Deprivation of liberty and adults with incapacity: a Scottish perspective](#).

⁸ *P (by his litigation friend the Official Solicitor) (Appellant) v Cheshire West and Chester Council and another (Respondents); P and Q (by their litigation friend, the Official*

mentioned in the January 2014 issue,¹⁰ *Application in respect of R* indicates that provided the guardianship order permits a welfare guardian to deprive a person with incapacity of their liberty this constitutes the requisite lawful authority for the of Article 5, presumably because this is impliedly permitted by the 2000 Act. What is clear from *Cheshire West*, however, is that, as stated in *Application in respect of R*, s13ZA of the Social Work (Scotland) Act 1968 provides neither the lawful authority nor the necessary legal and procedural safeguards to be compliant with Article 5. See also Adrian Ward's discussion of s13ZA below for a further discussion of this.

The Scottish Law Commission's report and guidance is now eagerly awaited.

Jill Stavert

Cheshire West – the impact on s.135ZA Social Work (Scotland) Act 1968

Section 13ZA of the Social Work (Scotland) Act 1968 was inserted by the Adult Support and Protection (Scotland) Act 2007 to provide an alternative to a guardianship or intervention order where (in terms of section 13ZA (1)) a local authority determines under the 1968 Act that an adult's needs call for the provision of a community care service, and it appears to the local authority that the adult is incapable in relation to decisions about the service. In such situations the local authority may take any steps which they consider would help the adult to benefit from the service, and in terms of subsection (2) that expressly

Solicitor)(Appellants) v Surrey County Council (Respondent) [2014] UKSC 19.

⁹ The European Court of Human Rights seems to have indicated that this may be possible. *Stanev v Bulgaria* (36760/06) judgment 17 January 2012, para 130.

¹⁰ *Application in respect of R* 2013 G.W.D. 13-293.

includes moving the adult to residential accommodation provided under the 1968 Act. Previously that outcome was achieved by way of guardianship or intervention orders. Sheriff Baird, in Glasgow, in *Muldoon, Applicant*, 2005 SLT (Sh. Ct.) 52, held that where an adult is compliant with a move into such a care regime, but legally incapable of consenting to or disagreeing with it, then to impose the regime deprives the adult of his or her liberty in breach of Article 5 of the European Convention on Human Rights. He held that such a step should not be taken without express authority, and that in such a situation the appropriate statutory intervention was a guardianship order, because in every case where the court is dealing with an incapable but compliant adult, the least restrictive option would be the granting of a guardianship order, provided that all the other statutory requirements are satisfied for it. Only in that way would the necessary safeguards and statutory regulatory framework to protect the adult (and the guardian) come into play. The sheriff's reasoning would appear to apply equally to intervention orders.

Local authorities are required to exercise their functions under the 1968 Act under the general guidance of Scottish Ministers, and to comply with their directions (section 5 of the 1968 Act). The relevant guidance is *Guidance for Local Authorities (March 2007) Provision of Community Care Services to Adults with Incapacity*. It sets out the procedure to be followed under section 13ZA and addresses the question of when that procedure is and is not to be followed. It is not to be followed when "the person with impaired capacity is opposed to the proposed course of action as far as can be ascertained", nor where "in providing the care intervention needed, the circumstances amount to a deprivation of liberty". If Sheriff Baird were correct in *Muldoon* that such a move, without valid consent, is always a deprivation of liberty, then section 13ZA would not be applicable

in the circumstances expressly described in subsection (2). The guidance, with scant regard for the respective roles of legislature, judiciary and executive, and without giving reasons, asserted that "*The Scottish Executive does not agree with this interpretation of the ECtHR cases*". Sheriff McDonald nevertheless agreed with and supported Sheriff Baird's views in *M, Applicant*, 2009 SLT (Sh. Ct.) 185. Adrian sought to break through this circularity by focusing upon Article 6 of the Convention rather than Article 5 in "Adults with Incapacity: Freedom and Liberty, Rights and Status (Part 1) 2011 SLT (News) 21. However, the debate has been re-opened by the decision of the Supreme Court in *P v Cheshire West and Cheshire Council and another* and *P and Q v Surrey County Council* [2014] UKSC 19. The guidance asserts that a guardianship or intervention order is appropriate where the adult is "opposed to the proposed course of action" but not where the adult is compliant. At least to that extent, Sheriff Baird's position has been vindicated by the Supreme Court. As Lord Neuberger pointed out (para 68): "*The notion that the absence of objection can justify what would otherwise amount to deprivation of liberty is contrary to principle*". It will remain necessary in any case to consider whether the circumstances into which an adult is transferred amount to deprivation of liberty, but currently the last word on how to determine that is to be found in *Cheshire West*, excluding many of the suggested grounds upon which the circumstances of an adult could be categorised as not amounting to a deprivation of liberty.

Section 13ZA was a response to perceived problems which never have existed. Local authorities were said to be overburdened with the volume of applications which they required to handle, and moves of adults typically from hospital into other accommodation were said to be subject to unacceptable delay. However, the financial

memorandum accompanying the Bill which became the Incapacity Act predicted 1,500 applications per annum by local authorities, which would have produced 4,500 such applications in the three years up to the *Muldoon* decision. In fact, as pointed out in Adrian's commentary on *Muldoon* included in the SCLR Report, there were in fact only 996. The delays which are still being experienced, particularly in discharging adults from hospital, could be shortened substantially by more efficient procedures, such as were explored at a conference of health and social work professionals and administrators hosted in Glasgow City Chambers on 8th March 2013. Given that section 13ZA has the additional problems of non-compliance with Article 12 (4) of the United Nations Declaration on the Rights of Persons with Disabilities, the debate about section 13ZA is proceeding, even at the level of whether the procedure created by it is properly operable at all.

Adrian Ward

Consultation on draft proposals for a Mental Health (Scotland) Bill

1. Background

a. Consultation and proposals for a Mental Health (Scotland) Bill

In December 2013, the Scottish Government published a consultation paper inviting comment on proposed amendments to the Mental Health

¹¹ Scottish Government, [Limited Review of the Mental Health \(Care and Treatment\) Act 2003: Report](#), 2009 (accessed 26 February 2014). For the Scottish Government's response to this review see Scottish Government, [Mental Health: Legislation Scottish Government response to the "Limited Review of the Mental Health \(Care and Treatment\) \(Scotland\) Act 2003: Report, 2010](#) (accessed 26 February 2014).

¹² Scottish Government, [Mental Health: Legislation: Consultation on the Review of the Mental Health \(Care and Treatment\)\(Scotland\) Act 2003, 2009](#) (accessed 26 February 2014).

(Care and Treatment)(Scotland) Act 2003 and to the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"). It closed on 25th March 2014.

The consultation addresses some of the McManus Review recommendations¹¹ as well as other matters raised by service users and practitioners in response to the Scottish Government's own consultation on such recommendations.¹² It also proposes the introduction of a notification scheme for victims of mentally disordered offenders following consultation on this particular issue.¹³

a. Mental Health (Care and Treatment)(Scotland) Act 2003 ("the 2003 Act")

The 2003 Act governs the compulsory care and treatment of persons with mental disorder. It is designed to operate in an environment that supports the right to the highest attainable standard of physical and mental health and the recovery and rehabilitation of individuals with mental disorder¹⁴. Various principles, therefore, that reflect European Convention on Human Rights (ECHR) and other international human rights standards underpin its provisions and implementation. Indeed, any legislation of the Scottish Parliament and its implementation must be compatible with ECHR rights and those identified in other international human rights treaties such as the UN Convention on the Rights of Persons with Disabilities (CRPD).¹⁵

¹³ Scottish Government, [Consultation : Disclosure of Information to Victims of Mentally Disordered Offenders, 2010](#), (accessed 26 February 2010) and Scottish Government, [Disclosure of Information to Victims of Mentally Disordered Offenders: Analysis of Responses to the Consultation](#), 2011 (accessed 26 February 2014).

¹⁴ See Scottish Government, *New Directions: Report on the Review of the Mental Health (Scotland) Act 1984*, 2001("the Millan Report") that shaped the Act.

¹⁵ ss29(2)(d), s.35(1), s.57 and s.58 Scotland Act 1988 and s.6 Human Rights Act 1998. Indeed, increasing reference to the CRPD is being made in European Court of Human Rights

The Act directs that anyone exercising functions under it must consider a number of factors. These include having regard to the range of available options, patient participation, the least restrictive option, whether the intervention will be of maximum benefit to the individual and non-discrimination¹⁶. Additionally, the patient's wishes, background and circumstances and the views of named persons, carers, guardians and attorneys must be taken into account as well as encouraging patient participation.¹⁷ For children or young persons under 18 years of age any functions must also be discharged in a "manner that best secures the welfare of the patient."¹⁸ Moreover, and importantly, the presence of mental disorder alone is insufficient justification for compulsory treatment to be ordered by the Mental Health Tribunal under the Act. Issues of treatability, risk, the existence of significantly impaired decision making ability owing to mental disorder, and the necessity for such involuntary treatment, must also be considered.¹⁹

The Act also provides for the patient, their named person, primary carer and welfare attorney, amongst others, also have the right to make oral or written representations and to lead or produce evidence before the Mental Health Tribunal.²⁰

cases which is likely to ultimately influence interpretation of ECHR rights.

¹⁶ ss1(3)(c)-(g) and 1(4).

¹⁷ ss1(3)(a),(b) and (h).

¹⁸ s.2(4).

¹⁹ s.64(5). In the case of short-term detention, the presence of mental disorder, significantly impaired decision making ability, necessity, risk, absence of conflict of interest and the consent of a Mental Health Officer are conditions that must all be met before the approved medical practitioner before the certificate may be granted (s.44(3) and (4)).

²⁰ s.64(2) and (3).

²¹ Article 5 (equality and non-discrimination), Article 12 (equal treatment before the law), Article 14 (the right to liberty), Article 15 (freedom from torture or cruel, inhuman

Further, short-term and emergency detention is time-limited and it is possible to appeal short-term detention certificates and compulsory measures. Compulsory measures are also subject to periodic review.

The amendments proposed by the Draft Bill must therefore be assessed in light of their compatibility with the Act's principles and with European and international human rights standards. Articles 3 (freedom from torture and inhuman or degrading treatment or punishment) 5 (liberty), 6 (fair trial), 8 (privacy and family life, or autonomy) and 14 (non-discrimination) ECHR and the corresponding rights identified in the CRPD.²¹

It should also be noted that at present the outcome, and its implications, of the recent consultation by the UN Committee on the Rights of Persons with Disabilities on its Draft General Comment on Article 12 CRPD (the right to equal treatment before the law)²² is unclear. However, it is probably safe to assume that, at the very least, it will result in a reinforcing of patient autonomy in treatment situations.

or degrading treatment or punishment), Article 17 (protecting personal integrity), Article 19 (independent and community living), Article 22 (respect for privacy) and Article 23 (respect for home and family).

²² UN Committee on the Rights of Persons with Disabilities [Draft General Comment on Article 12 of the Convention – Equal Recognition before the Law](#) (Adopted by the Committee at its tenth session (2-13 September 2013) (accessed 7 March 2014). In essence, the Draft General Comment interprets Article 12 CRPD in such a way that legal capacity cannot be denied on the basis of disability (as this would constitute discrimination), that decision-making be supported not substituted (and the removal, therefore, of guardianship) and the abolition of laws providing for the compulsory treatment of mental disorder.

1. Draft Bill proposals

Several proposals in the draft Bill are merely to remedy inconsistencies in the original legislation and are reasonable and logical. However, some other proposals are more worthy of comment from a mental capacity perspective. The following will briefly highlight these although it will not provide an in depth analysis of the law or human rights involved. A more detailed description of the draft Bill's proposals can, of course, be found in the consultation paper and draft Bill.

a. Advance Statements

Where a valid and subsisting advance statement relating to psychiatric care and treatment exists and the maker's ability to make informed decisions about treatment for their mental disorder is "significantly impaired" because of that disorder, then both the Mental Health Tribunal for Scotland²³ and persons giving medical treatment authorised under the 2003 Act or 1995 Act²⁴ are obliged to "have regard to the wishes specified in the statement." Such regard must also be had in connection with treatments requiring second opinions.²⁵ The 2003 Act requires that reasons for disregarding the wishes expressed in such statements are recorded.²⁶

Proposed amendments

The draft Bill obliges Health Boards to place a copy of any advance statements received in the patient's medical records and to send a copy to the Mental Welfare Commission. It also requires that the Mental Welfare Commission maintains a

central register of advance statements, such register being accessible by the maker and anyone acting on their behalf. It is also accessible, in the course of treatment of the person, by their mental health officer, responsible medical officer and the relevant health board, and by the Mental Health Tribunal in connection with proceedings before it.

Comments on draft Proposals

These proposed amendments are to be welcomed. Psychiatric advance statements are an important expression of individual autonomy even in compulsory treatment situations where a patient's autonomy must be respected insofar as it is possible.

Advance statements also arguably provide an indication of whether a patient would consent to a particular measure which is integral in assessing whether a deprivation of liberty engaging Article 5 ECHR has occurred or they have been subject to inhuman or degrading treatment (Article 3 ECHR).²⁷ Moreover, they are an important element of supported decision making advocated the UN Committee on the Rights of Persons with Disabilities (see above).

The problem is, however, that few advance statements are actually made. This is due to several factors but often owing to a lack of awareness or patient belief that they are ineffective.²⁸ General information and awareness-raising is obviously of use here but the placing of a statutory duty on specified medical staff to discuss the making of advance statements and explain

²³ s276.

²⁴ s276(3).

²⁵ s276.

²⁶ s276. See also J. Stavert "Added value: using human rights to support psychiatric advance statements" (2013) 17(2)

Edinburgh Law Review 210 for a discussion of the role of advance statements under Scottish law.

²⁷ Stavert, *ibid.*

²⁸ Mental Welfare Commission for Scotland, *Advance Statements Guidance*, 2013, p5.

their effectiveness as part of after-care plans would certainly be beneficial.

b. Named Persons

Named persons tend to be relatives, carers or someone close to the patient and therefore possess valuable information about a patient that will assist in the tailoring of their care and treatment plans. As with advance statements, where a patient nominates a named person this is an expression of autonomy and fits well with the supported decision-making model.

At present, a patient may nominate or prevent someone from being their named person.²⁹ Where there is no named person, the Mental Health Tribunal may appoint one and may also remove a person as named person if it is satisfied that is not appropriate that they act or replace them.³⁰

Proposed amendments

The draft Bill provides that a person aged 16 years or older will be able to make a written and witnessed declaration that they do not wish to have a named person appointed. It also provides that anyone nominated as a named person must give written consent to acting as such.

Comments on draft proposals

The proposed amendments to the 2003 Act seem to be reasonable but certain issues warrant further consideration.

Firstly, the Act currently contains no definition of “named person”. There is a lack of understanding

²⁹ ss250 and 253.

³⁰ s257. Note that the Draft Bill does provide that this Tribunal power will operate subject to any declaration that the individual does not wish to appoint a named person.

by many service users, named persons and even by professionals about the precise role of named persons.³¹ It would therefore be useful if a definition of “named person” were included in the draft Bill.

Secondly, the Bill does not remove the default provision permitting the Mental Health Tribunal to appoint a named person where one has not been appointed.³² This requires closer scrutiny. On the one hand, such a provision may in some circumstances provide a protective safeguard of the patient’s interests. On the other, in these particular circumstances the named person is not being appointed with the patient’s consent and this is a restriction of their right to autonomy (Article 8(1) ECHR) which would be difficult to justify under Article 8(2).

Finally, the draft Bill provides for the removal of the current automatic right of a named person to be involved in Tribunal proceedings and a requirement that leave must be applied for to be involved. The consultation document is unclear about how the Tribunal’s discretion will be exercised in these circumstances (although this will subsequently be dealt with, it would appear, in secondary legislation). Refusal to permit a named person to automatically be included in proceedings to represent the patient’s interests, where that person has been nominated by the patient, is contrary to the exercise of the patient’s right to autonomy. It removes an important additional patient safeguard which, again, is difficult to justify under Article 8(2).

³¹ This was also noted in Scottish Government, [Limited Review of the Mental Health \(Care and Treatment\) Act 2003: Report](#), 2009 (“the McManus Report”).

³² s257(1).

c. Removal of requirement for a second medical report in Compulsory Treatment Order (CTO) applications

Proposed amendments

The proposed amendments provide for only one report, from the approved medical practitioner, to accompany the application. However, the patient or the Mental Health Tribunal may request that a second independent report is obtained.

Comment on draft proposals

The consultation paper justifies this amendment on the basis of concern about the involvement of GPs, a perceived lack of independence between the two reports and of conflicts of interest³³. This is at odds with the McManus Report³⁴ which indicated widespread support for the involvement of primary care in long term compulsory treatment³⁵ and little support for CTOs being accompanied by a single medical report. The consultation paper does not mention resourcing issues as justification for this amendment but the McManus Report did state that a lack of availability of GPs should not be justification for preventing them from providing such report.³⁶

Given the implications for a person who is subject to a CTO application, particularly in terms of restriction of an individual's autonomy and liberty, this clearly of concern. It is therefore hoped that the Scottish Government will not pursue this amendment when the Bill is introduced into the Scottish Parliament.

³³ Para 14.

³⁴ *Op cit*, pp28-31.

³⁵ Even though it also identified that GPs were requested to provide the second report in less than 50% of cases (*op cit*, p.28).

d. Nurse's holding power under s299, 2003 Act

The draft Bill contains a proposal to extend the maximum period for a nurse's holding power³⁷ from two to three hours although the consultation document gives no reason for this. Given the implications this has for a patient in terms of their liberty and autonomy, and the inability of a patient to challenge this, it is essential that any proposal of this nature is specifically explained and justified before its acceptability is properly determined.

e. Mental Health Tribunal: timescales for referrals and disposals

The draft Bill proposes an amendment that the Tribunal "must do its utmost" to comply with timescales within which it must deal with various disposal. Where such timescales are not met, the Tribunal must record the failure and the reason why.³⁸

Comment on draft proposal

The Tribunal will be well aware of its obligations under Articles 5(4) and 6 ECHR. However, given the significance of the matters to be considered, the requirement on the Tribunal should be imperative.

f. Victim Notification Scheme

As mentioned at the outset, the draft Bill provides for the introduction of a notification scheme for victims of mentally disordered offenders.

³⁶ *Op cit*, p28.

³⁷ s299.

³⁸ Clause 15, Draft Bill.

It should be noted that it would be discriminatory for mentally disordered offenders to be treated differently to other offenders in this respect under Article 14 ECHR in conjunction with Article 8 ECHR and taking into account of Articles 3(b), 4(1)(b) and 5 CRPD. The provisions must not, therefore, go beyond that which would apply to other offenders.

It is also proposed that the right to receive information will be extended to receive information about offenders subject to compulsion orders. Offenders subject to compulsion order have often committed only minor offences. To allow the proposed notification in such cases may therefore be an unnecessary and disproportionate limitation of their right to private and family life which may be difficult to justify (under Articles 8 and 14 ECHR).

g. Increased responsibilities for Mental Health Officers (MHOs)

The draft Bill contains several provisions what will increase the workload for MHOs, for example, in connection with extending a CTO and being consulted in connection with a proposed Treatment Transfer Directions to name but two. Local authorities will need to ensure that adequate resourcing is made available if this is to work effectively. MHPs are already stretched in terms of their duties under the 2003 Act. However, human rights recognition and protection must not be compromised by inadequate resourcing. This is reinforced by state duties in the ECHR and other international treaties identifying civil and political rights and by the human rights observance duties imposed on the

Scottish Parliament and Scottish Government in the Scotland Act. It was also fully recognised in the Millan Report.³⁹

2. Additional Matters

The introduction of the Bill into the Scottish Parliament also provides a useful opportunity to attend to other matters that have come to light since the enactment of the 2003 Act.

a. s268, 2003 Act – detention in conditions of excessive security in non-state hospitals

Following the 2012 Supreme Court ruling in [RM v The Scottish Ministers](#),⁴⁰ the Scottish Government, via consultation, sought views on appeals against excessive security for psychiatric patients in non-state hospitals.⁴¹ An analysis of the responses was published in December 2013.⁴² The necessary regulations or legislative changes now need to be effected to ensure that this right can be effectively exercised given that individuals detained in conditions of excessive security engages Article 8 ECHR and, potentially, even Article 3 (with corresponding Articles 17, 22 and 15 CRPD).

b. The use of covert medication and restraint

At present, there is little reference to the use of force, restraint or covert medication in the 2003 Act's Code of Practice. Given the potential for Articles 2, 3, 5 and 8 ECHR to be engaged in such situations, and taking in account the aforementioned comments on Article 12 CRPD, clearer direction and guidance is required in the legislation itself and its supporting Code of Practice. For further discussion of this issue see

³⁹ *Op cit*, pp378-382.

⁴⁰ *RM v The Scottish Ministers* [2012] UKSC 58.

⁴¹ Scottish Government, [Mental Health \(Care and Treatment\) \(Scotland\) Act 2003 Consultation in relation to section 268 appeals against conditions of excessive security](#)

⁴² Scottish Government, [Consultation in relation to section 268 appeals against conditions of excessive security: Analysis of Responses Report](#)

[Covert medication: Scottish legislation, human rights and the Mental Welfare Commission for Scotland's updated guidance](#) in the February 2014 issue of this newsletter.

c. Deaths of psychiatric patients

It is questionable whether the investigative framework relating to deaths of psychiatric patients in Scotland is fully compliant with Article 2.⁴³ This was partially explored in the 2009 Report of Findings of Review of Fatal Accident Inquiry Legislation⁴⁴ and subsequently brought into sharper relief by the Savage and Rabonne rulings⁴⁵ and the Mental Welfare Commission for Scotland's recent monitoring report *Death in detention* monitoring that reinforces this need.⁴⁶ The necessary legislative changes and any outstanding procedural measures must be made in order to give full effect to the requirements of Article 2.

d. Incompatibility between s242 of the 2003 Act and the Adults with Incapacity (Scotland) Act 2000: Ability of substituted decision-makers to consent to treatment under the 2003 Act

Essentially, s.50 of the 2000 Act permits substituted decision-makers (welfare attorneys and guardians) to consent to medical treatment on behalf of an adult with incapacity. However, where such an adult falls to be treated for mental disorder under the 2003 Acts, s242 (relating to treatment for mental disorder other than that

⁴³ For a full discussion of this issue see H Patrick, J Stavert and J Malcolm "The right to life, and to proper inquiries on death: A human rights perspective on the investigation of deaths of psychiatric patients in Scotland" (2012) 1 *Juridical Review* 51 and J Stavert, "Deaths of Psychiatric Patients, Article 2 ECHR & Proper Investigation: a case for reform in Scotland?" (2012) 419 *Scolag Legal Journal* 206.

⁴⁴ Scottish Government, [Report of findings of Review of Fatal Accident Inquiry Legislation: An independent review, 2009](#) (accessed 7 March 2014) paras 4.15- 4.17. See also

requiring special safeguards) it is unclear as to whether such consent is permitted. For a more detailed discussion of the issues involved see [Substituted decision makers and the interaction between the Adults with Incapacity \(Scotland\) Act 2000 and Mental Health \(Care and Treatment\) \(Scotland\) Act 2003](#) in the February 2014 issue of this newsletter.

A full consideration of any areas of incompatibility between the two Acts may be more productive following the forthcoming Scottish Law Commission report on adults with incapacity and deprivation of liberty. However, clarification on this particular issue, in the 2003 Act, would be useful now.

e. Independent advocacy

The McManus Review Report reaffirmed the importance of independent advocacy for persons with mental health issues and noted the inadequacy of its provision across Scotland⁴⁷ making several recommendations to reinforce the right to independent advocacy.⁴⁸ It is therefore disappointing that no provision is made in the draft Bill to strengthen the duty to provide for such advocacy so that the right to independent advocacy can be fully realised by those who are entitled to it under the 2003 Act.

⁴⁵ *Savage v South East Partnership NHS Foundation Trust* [2010] EWHC 865 (QB); *Rabonne v Pennine Care NHS Foundation Trust* [2012] UKSC 2.

⁴⁶ Mental Welfare Commission, [Death in detention monitoring](#), 2014 (accessed 25 March 2014).

⁴⁷ pp10-11.

⁴⁸ Paras 3.1-3,6, p12.

3. Conclusion

The 2003 Act has been internationally regarded as an example of good practice in terms of patient-centred and human rights compatible legislation. However, this is not an excuse for complacency and it must be kept under review in light of developments in European and international human rights law and practice. It is therefore hoped that the Bill that will be eventually introduced into the Scottish Parliament will take these and the Act's principles fully into account.

Jill Stavert

“Who benefits?” The investigation into the case of Ms E

The last [investigation](#) on Dr Donald Lyons' watch as Chief Executive of the Mental Welfare Commission stands - all us of suggest – both as a testament to the power of the work that the MWC has done under his stewardship in Scotland and also as a clear example of the type of work that a Mental Capacity Act Commission could do if established in England and Wales to champion the MCA 2005.

The MWC investigated the case of a woman who took her own life in December 2011. She had recently had a work capability assessment following which the Department for Work and Pensions (DWP) decided her benefits were going to be reduced. She was on incapacity benefit and was told she would not be able to be transferred to Employment and Support Allowance so would receive Jobseekers allowance

Ms DE was a woman in her fifties who had worked for most of her life but had been experiencing mental and physical health issues so was signed off work and receiving incapacity benefit. She intended to return to work when she was able to. Ms DE had a teenage son and was engaged and

planning to get married in 2012. She had been receiving care and support from her GP and her psychiatrist for over 20 years. Her doctors had never been worried during this time about her taking own life.

During the MWC's investigation the MWC spoke with people who were involved with Ms DE's care and treatment. The MWC discussed the case with relevant officials from the DWP. The MWC also conducted a survey of psychiatrists to find out how they felt the system was affecting their patients.

The MWC found that the decision was made on the basis of an assessment that contained insufficient information about her mental health. It found that the work capability assessment needed to be more sensitive to mental health issues. The MWC was also disappointed at how the DWP communicated with Ms DE. The MWC felt that not enough effort was made to contact Ms DE and this meant she was not given the opportunity to fully engage with the process. The MWC found that she was not treated as a vulnerable claimant and so was not given any additional support to help her with the process around the assessment by the DWP.

Importantly, the MWC was then involved in useful discussions with the DWP about the recommendations it had made in the report, discussions which remain ongoing.

Conferences at which editors/contributors are speaking

5th anniversary conference for the National Preventive Mechanism (Optional Protocol to the Convention against Torture)

Jill is chairing the session on de facto detention at this conference to mark this important anniversary, being held in Bristol on 8 April. Details are available [here](#).

The Assisted Suicide Bill: Does Scotland Need to Legislate?

Adrian is speaking at a medico-legal seminar at the Mason Institute of the University of Edinburgh Law School on the subject of assisted dying on 24 April 2014 at the Royal College of Physicians in Edinburgh. Details can be found [here](#) and initial details can be found [here](#).

A Deprivation of Liberty: Post Cheshire West and P and Q

Neil is speaking with Jenni Richards QC at the conference arranged by Langleys on 1 May on the *Cheshire West* judgment. Full details are available [here](#).

Annual private law conference convened by the Royal Faculty of Procurators

Adrian will be speaking at the annual private law conference convened by the Royal Faculty of Procurators in Glasgow on 29 May 2014. Full details are available [here](#).

Hot topics in adult incapacity law

Adrian will be speaking on hot topics in the incapacity field at the Solicitors' Group Wills, Trust & Tax conference in Edinburgh on 7 May 2014. Full details are available [here](#).

The Deprivation of Liberty Procedures: Safeguards for Whom?

Neil is speaking at the conference arranged on 13 June by Cardiff University Centre for Health and Social Care Law and the Law Society's Mental Health and Disability Committee. The conference will focus on the implications of the ruling of the Supreme Court *Cheshire West* as well as the likely impact of the Report of the House of Lords Committee on the

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If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to Mind in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Conferences

Mental Capacity Act. Other speakers include Richard Jones, Phil Fennell, Lucy Series, Professor Peter Bartlett, Sophy Miles and Mark Neary. Full details are available [here](#).

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Our next Newsletter will be out in early May. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Newsletter in the future please contact marketing@39essex.com.

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