

Compendium

Introduction

Welcome to the March 2015 Newsletters. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Newsletter: a case rivalling *Neary* in its importance, a case at the outer limit of the COP's powers and an update on *Re X*;
- (2) In the Property and Affairs Newsletter: recent decisions of Senior Judge Lush, including a rare refusal of an application by the OPG for revocation of a power of attorney including an interesting assessment of the place of P's wishes and feelings;
- (3) In the Practice and Procedure Newsletter: the significant case of *Bostridge* on nominal damages, extreme product champions, veracity experts and the place of morality;
- (4) In the Capacity outside the COP Newsletter: two extremely important decisions of Charles J in relation to the MHT and patients who may lack capacity, an extremely significant Strasbourg decision on Article 5; anonymisation, the capacity to drive; and a new SCIE directory of MCA resources;
- (5) In the Scotland Newsletter: an appreciation of Sheriff John Baird, an update on deprivation of liberty in the context of the SLC report, new guidance from the MWC about managing the finances of those lacking the material capacity; an update on incapacity matters addressed (or not) in proposals for court reform and the further Devolution Command paper, and an update on the Assisted Suicide Bill.

And remember, you can now find all our past issues, our case summaries, and much more on our dedicated sub-site [here](#).

Editors

Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Annabel Lee
Simon Edwards (P&A)

Scottish contributors

Adrian Ward
Jill Stavert

For all our mental capacity resources, click [here](#). Transcripts not available at time of writing are likely to be soon at www.mentalhealthlaw.co.uk.

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Update on *Re X*

The Court of Appeal heard the appeal against the decisions in *Re X* on 17 and 18 February 2015. Judgment is reserved, and we will update you as soon as we have any news. In the interim, the procedure should continue to be used, but we would strongly suggest that the procedure should not be used in circumstances where P has no family members and an independent advocate has not been appointed to elicit their views and identify whether any of the 'triggers' are present.

Neary 2? Making Article 5(4) real

AJ (*Deprivation of Liberty Safeguards*) [\[2015\] EWCOP 5](#) (Baker J)

Article 5 ECHR – Deprivation of Liberty – DOLS Authorisations

Summary

In an extremely important judgment, Baker J has given detailed guidance as to the heavy burden that is placed upon local authorities in making sure that individuals deprived of their liberty in care homes (and, by extension, hospitals) are afforded effective access to the Court of Protection so as to secure their rights under Article 5(4) ECHR. He has also confirmed again the importance of taking appropriate steps in advance where it is clear (or should be clear) that a person will be deprived of their liberty.

For those in a hurry, Baker J gave at the conclusion a series of wider lessons, which we reproduce here, although this is no substitute either for reading the balance of this note or – more importantly – the judgment itself.

“113. First, I emphasise that the scheme of the DOLS is that, in the vast majority of cases, it should be possible to plan in advance so that a standard authorisation can be obtained before the deprivation of liberty begins. It is only in exceptional cases, where the need for the deprivation of liberty is so urgent that it is in the best interests of the person for it to begin while the application is being considered, that a standard authorisation need not be sought before the deprivation begins.

114. Secondly, professionals need to be on their guard to look out for cases where vulnerable people are admitted to residential care ostensibly for respite when the underlying plan is for a permanent placement without proper consideration as to their Article 5 rights.

115. Thirdly, a RPR should only be selected or confirmed by a BIA where he or she satisfies not only the criteria in regulation 3 of the Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person’s Representative) Regulations 2008 but also the requirements of paragraph 140 of Schedule A1 of the MCA. This requires that the BIA not only checks that the facts set out in regulation 3 are satisfied but also carries out an analysis and reaches a judgment as to whether the prospective representative would, if appointed, (a) maintain contact with the relevant person; (b) represent the relevant person in matters relating to or connected with the Schedule and (c) support the relevant person in matters relating to or connected with the Schedule.

116. Fourthly, the local authority is under an obligation to satisfy itself that a person selected for appointment as RPR meets the criteria in regulation 3 and in paragraph 140 of Schedule A1. If the local authority concludes that the person selected for appointment does not meet the criteria, it should refer the matter back to the BIA.

117. Fifthly, it is likely to be difficult for a close relative or friend who believes that it is in P’s best interests to move into residential care, and has been actively involved in arranging such a move, into a placement that

involves a deprivation of liberty, to fulfil the functions of RPR, which involve making a challenge to any authorisation of that deprivation. BIAs and local authorities should therefore scrutinise very carefully the selection and appointment of RPRs in circumstances which are likely to give rise to this potential conflict of interest.

118. Sixthly, an IMCA appointed under section 39 D must act with diligence and urgency to ensure that any challenge to an authorisation under schedule A 1 is brought before the court expeditiously. Failure to do so will lead to the evaporation of P's Article 5 rights.

119. Seventhly, the appointment of a RPR and IMCA does not absolve the local authority from responsibility for ensuring that P's Article 5 rights are respected. The local authority must monitor whether the RPR is representing and supporting P in accordance with the duty under paragraph 140 and, if not, consider terminating his appointment on the grounds that he is no longer eligible. The local authority must make sufficient resources available to assist an IMCA and keep in touch with the IMCA to ensure that all reasonable steps are being taken to pursue P's Article 5 rights.

120. Finally, in circumstances where a RPR and an IMCA have failed to take sufficient steps to challenge the authorisation, the local authority should consider bringing the matter before the court itself. This is likely, however, to be a last resort since in most cases P's Article 5 rights should be protected by the combined efforts of a properly selected and appointed RPR and an IMCA carrying out their duties with appropriate expedition."

Although the principles set down by Baker J are of general application, the particular factual context in which they arose is of some importance, not least because they represent a not uncommon state of affairs.

An elderly lady, AJ, had lived for a considerable period of time in an annexe of the home of her niece and her husband ('Mr and Mrs C'). She developed vascular dementia and became increasingly dependent on others, in particular Mrs C. She was, however, very reluctant to acknowledge her condition, and insistent that she could manage without any help. In April 2013, she signed LPAs in respect of health and welfare and property and financial affairs naming Mr and Mrs C as donees.

At around this time, AJ was referred to social services by a psychiatric nurse. When a local authority case co-ordinator visited on 22nd April 2013, Mrs C raised the possibility of respite care for AJ to prevent the breakdown of the care arrangements. In June 2013, Mrs C made it clear that she could not continue with her caring role in its current form as she and her husband had planned a fortnight's holiday. She said that she now felt that permanent residential care was required. The local authority social worker offered to find the nearest suitable home for respite while Mr. and Mrs. C were away, and duly identified a home, X House, for that purpose. It was clear that, in fact, it was hoped that if AJ settled she could remain in the care home on a permanent basis.

On 13 June, just before they went on holiday, Mr and Mrs C took AJ to X House. Upon arrival, she stated that she did not wish to be there and repeatedly asked to leave. No assessment under Schedule A1 to the MCA 2005 had been carried out prior to her arrival but an urgent authorisation under the Schedule was granted by the manager at X House on 14 June. The urgent authorisation recorded inter alia that AJ had

been placed at the home whilst her main carers, Mr and Mrs C, went on holiday for two weeks, “*with a view to [AJ] staying here on a permanent basis.*” On the same day, a request was made to the local authority as the supervisory body for a standard authorisation, which was granted for a period of 21 days because of the uncertainty of the situation.

Mr C was appointed AJ’s RPR, on the basis that AJ had a donee whose power under the LPA permitted them to select a family member, friend or carer to be their RPR, that the donee had selected Mr C to act in that capacity and that he was eligible to be appointed. It was clear at this stage that Mr C supported AJ continuing to be accommodated in a care home, even though it amounted to a deprivation of her liberty. A s.39D IMCA was also appointed, a Mr R.

At the start of July 2013, AJ was moved to Y House, and remained there thereafter, subject to repeated standard authorisations. Despite AJ’s known opposition to living at Y House, no legal challenge was made to the standard authorisations for several months. As Baker J noted, “[t]he reasons for this failure lie at the heart of this case” (paragraph 18). A critical reason was the lack of effective communication between Mr C and Mr R.

When Mr R and Mr C finally spoke in November 2013 Mr R realised that Mr. C was not going to initiate proceedings and after further conversations with his manager he agreed to act as her litigation friend and instruct solicitors to make an application to the Court on her behalf. Proceedings were eventually issued in December 2013, challenging the standard authorisation made in July 2013. Mr R was replaced in March 2014 as AJ’s litigation friend by the Official Solicitor. Although ultimately the substantive challenge under s.21A MCA 2005 was not actively pursued, in view of evidence as to a deterioration in AJ’s condition and behaviour, and to the fact that there was no domiciliary care agency willing to offer to provide care, the Official Solicitor (1) raised concerns as to the extent to which the care plan accurately reflected the type and degree of physical interventions being used; and (2) pursued a claim for a declaration under s.7 HRA 1998 that AJ’s rights under Article 5(1), 5(4) and 8 ECHR had been breached (but not a claim for damages). In order to determine the claim, Baker J conducted a hearing in May 2014 at which he heard oral evidence from Mr R, Mr C and the local authority’s BIA, Ms G, and then subsequently sought (and received) extensive written submissions, inter alia, on the effect of the [Re X](#) judgment).

Restraint

As a preliminary issue, Baker J addressed the question of the use of restraint and its documentation. It became clear that the level of physical restraint being used by carers in Y House was greater than acknowledged in the care plan (and indeed, even in an amended care plan).

As Baker J noted:

“25. In supplemental submissions, Ms Butler-Cole on behalf of the Official Solicitor submitted that in any case in which physical restraint is used in the care of an incapacitated adult, any physical intervention, whether considered to amount to “restraint” or not, should be recorded in the care plan maintained by the service provider and monitored by the statutory body responsible for commissioning the person’s care. Furthermore,

precise details of all physical interventions should be ascertained and documented as part of the Deprivation of Liberty Safeguards process or indeed any best interest assessment from direct discussion with care staff implementing the interventions

26. I agree. In this case, whilst there may at one stage have been a discrepancy between the care plan and what was actually being provided, I am now satisfied that the local authority has addressed this issue in its amended plan. If, however, any further issue arises, or any party seeks any further declaration or order on this issue, the matter should be referred to me for further review."

Article 5(4)

Baker J provided a careful and comprehensive summary of the principles to be derived from the case-law relating to Article 5(4), which merits reproduction in full:

"35. In applying [the provisions of Schedule A1 to the MCA 2005], and assessing whether there was any infringement of Article 5(4) in this case, I have had regard to the case law, both European and domestic. The leading European cases are X v United Kingdom (1981) 4 EHRR 188; Winterwerp v The Netherlands (1979) 2 EHRR 387; Waite v UK [2002] ECHR 804; Shtukatarov v Russia (2008) 54 EHRR 962; Stanev v Bulgaria (2012) 55 EHRR 696, MH v UK [2013] ECHR 1008, and, most recently, Ivinovic v Croatia [2014] ECHR 964. From those authorities, the following principles can be summarised:

- (1) "There is a positive obligation on the state to protect the liberty of those within its jurisdiction. Otherwise, there would be a sizeable gap in the protection from arbitrary detention, which would be inconsistent with the importance of personal liberty in a democratic society. The state is therefore obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge": Stanev v Bulgaria at paragraph 120.*
- (2) The procedure required by Article 5(4) must have a judicial character and be independent of the detaining authority: X v United Kingdom, *supra*, para 53, MH v UK, *supra*, para 77(c).*
- (3) Article 5(4) guarantees a remedy that must be accessible to the person concerned: MH v UK, *supra*, para 76.*
- (4) The state has an obligation to ensure that a mentally incapacitated adult is afforded independent representation, enabling them to have their Convention complaints examined before a court or other independent body: Ivinovic v Croatia, *supra*, para 45.*
- (5) Special procedural safeguards may be called for in order to protect the interests of persons who, on account of mental disabilities, are not fully capable of acting for themselves. Where a person lacks the capacity to instruct lawyers directly, the safeguards required may include empowering or even requiring some other person to act on that person's behalf: Winterwerp v The Netherlands, *supra*, para 60, MH v UK, *supra*, paras 77(e) and 92.*
- (6) Article 5(4) may not be complied with where access to a court is dependent on the exercise of discretion by a third party, rather than an automatic entitlement. Where the third party supports the deprivation of*

liberty, reliance on the third party to initiate proceedings may not satisfy the requirements of Article 5(4): Shtukatarov v Russia, supra, para 124.

(7) *An initial period of detention may be authorised by an administrative authority as an emergency measure provided it is of short duration and the individual is able to bring judicial proceedings speedily to challenge the lawfulness of any such detention including, where appropriate, its lawful justification as an emergency measure: MH v UK, supra, para 77(a).*

(8) *The likelihood of the judicial hearing leading to release from detention is irrelevant. Article 5(4) is first and foremost a guarantee of a fair procedure for reviewing the lawfulness of detention – an applicant is not required, as a precondition of enjoying that protection, to show that on the facts of his case he stands any particular chance of success in obtaining his release: Waite v UK, supra, para 59.*

36. *In domestic law, the fundamental principle to be applied by the Court of Protection in cases of deprivation of liberty was summarised by Peter Jackson J in Neary v LB of Hillingdon [2011] EWHC 1377 (COP) at para 202:*

‘... there is an obligation on the State to ensure that a person deprived of liberty is not only entitled but enabled to have the lawfulness of his detention reviewed speedily by a court.’

Baker J noted the “guidance” given by the President in *Re X* as to the question of whether P needed to be joined as a party to proceedings for judicial authorisation for deprivation of liberty, and, in particular, paragraph 19, the conclusions of the President as to Article 5(4) as regards the requirements of “representation” if P is not to be a party to proceedings.

Initial authorisation

Baker J found that it was clear that Mr and Mrs C were clearly saying before they went on holiday that they could not continue to care for AJ and that a move to permanent residential care was required.

Therefore:

“47. As it was clear that AJ would not go willingly to X House, and that such a move would only be achieved by depriving her of her liberty, the local authority, prior to that move taking place, ought to have either carried out a DOLS assessment or made an application to the Court. During the first few days of her stay at X House, there was no authorisation in place, nor was there an RPR or an IMCA appointed to support her. The fact that the first two weeks of her stay at X House were nominally labelled as “respite” care cannot justify the local authority’s failure either to instigate the DOLS process or apply to the court. The local authority plainly knew that Mr. and Mrs. C would not agree to AJ returning home at the end of their holiday and that, whatever may have been said about respite care, the move was intended to be permanent from the outset.

48. In this case, the local authority had sufficient time to commence the process of authorisation. This case therefore fell within the ‘vast majority of cases’ in which, as Chapter 3 of the Code of Practice recognises, “it should be possible to plan in advance so that a standard authorisation can be obtained before the deprivation of liberty begins”. Given the scheme of the Act is that urgent authorisations are expected to last for no more

than seven days save in exceptional circumstances, the local authority ought to have been able to complete the process of assessment and grant of a standard authorisation before AJ arrived at X House on 13th June. In the alternative, given the fact that AJ's objections to being placed in residential care were clear and well-known, the local authority could have applied straight to the Court of Protection without going through the authorisation procedure under Schedule A1. As Keehan J observed in [NHS Trusts 1 and 2 v FG \[2014\] EWCOP 30](#) at paragraph 101(iii), 'the mere fact that a deprivation of liberty could be authorised under Schedule A1 does not absolve [the authority] from making an application to the court where the facts would otherwise merit it.'"

Importantly, this failure meant that there was no proper analysis of alternative options for AJ's care, nor was she afforded any opportunity to have her views considered, before the move to X House occurred. Baker J also found that it was irrelevant that the initial move took place, as a measure of interim support, not on the basis of s.21 National Assistance Act 1948, but rather under the statutory duties imposed by s.47(5) of the National Health Service and Community Care Act 1990. As he noted at paragraph 50: "[the consequence of the decision was that she, an incapacitated adult, was thereby deprived of her liberty. The local authority was therefore under an obligation to comply with Article 5 and it was unlawful under s.6 of the Human Rights Act 1998 for the authority to act in a way that was incompatible with AJ's rights under that Article."

Baker J therefore found at paragraph 51 that there had been:

"a clear breach of the principles identified in the European and domestic case law. As the European Court made clear in [Stanev v Bulgaria](#), supra, the state is obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge. In this case, the local authority was in breach of that obligation by failing either to instigate the standard authorisation procedure under Schedule A1 or alternatively apply direct to the Court of Protection in advance of AJ's admission to X House."

The RPR

The core of the Official Solicitor's case on behalf of AJ was that the local authority ought not to have appointed Mr C to act as RPR at all, or at least not without ensuring that he would bring proceedings under s.21A in the light of AJ's known objections, or alternatively, having appointed him, replaced him when it became apparent that he was not going to facilitate a speedy review of her detention.

After a detailed analysis of the (inordinately) complicated statutory provisions, Baker J concluded that Mr C was not eligible to be AJ's RPR because:

1. A person is only eligible to be an RPR if they will, as part of supporting the relevant person, take appropriate steps to support the person to challenge any authorisation granted under Schedule A1 (paragraph 82). This construction of paragraphs 140(a) and (b) of Schedule A1 was supported, Baker J, noted by the Strasbourg case-law, in particular the case of *Shtukatarov v Russia*;

2. The evidence “manifestly demonstrate[d] that Mr. C was unwilling or at least very reluctant to represent or support AJ in challenging the authorisation because he and his wife had concluded that they could no longer safely look after her at home and he believed that it was in her best interests to live in residential care” (paragraph 84). As Baker J noted, Mr C had immediately noted that he had a conflict of interest, and raised it with Ms G. Ms G’s response had been to arrange for the appointment of an IMCA, but “the appointment of an IMCA cannot overcome the ineligibility of the RPR” (paragraph 84).
3. Further, at paragraph 86, Baker J accepted the Official Solicitor’s submission that:

“the local authority ought not to have appointed Mr. C as RPR notwithstanding the fact that he was selected by the BIA. The European and domestic case law make it clear that there is a positive duty on public authorities under the Convention to ensure that a person deprived of liberty is not only entitled but enabled to have the lawfulness of his detention reviewed speedily by a court, to ensure that a mentally incapacitated adult is afforded independent representation, enabling them to have their Convention complaints examined before a court or other independent body, and not to permit access to a court to be dependent on the exercise of discretion by a third party who supports the deprivation of liberty. As the President has made clear in of Re X and Others (Deprivation of Liberty) [2014], it is not always necessary for P to be joined as a party to any proceedings, but the state is under a clear duty to ensure that he or she is able to challenge a deprivation of liberty in a process that is judicial, accessible and independent of the detaining authority. To my mind, these obligations impose on the local authority as supervisory body a duty to scrutinise the prospective RPR selected under regulations 5 to 8 before making the appointment. I do not accept Mr. Dooley’s submission that it was not open to the local authority as supervisory body to refuse to appoint Mr. C as RPR. The fact that, under regulation 11, a supervisory body may not (except where regulation 9 applies) appoint a RPR unless the person is recommended by a BIA under regulation 7 or 8 does not mean that it is obliged to appoint a person who is so recommended. Where a supervisory body has reason to believe that the person selected as RPR will not comply with the obligations under paragraph 140 of the Schedule, its duties under Article 5 compel it to refer the matter back to the BIA.

4. Having (wrongly) appointed Mr C as RPR, the local authority as the supervisory body ought to have quickly realised (1) that AJ was extremely unhappy in residential care and wished to challenge the authorisations and (2) that Mr C was not taking any or any sufficient steps to represent or support her in pursuing that challenge. “The local authority should therefore have taken steps to replace Mr C as RPR when it became apparent that he was not intending to issue proceedings promptly and that there was not going to be a speedy review of AJ’s detention by a court, since s.21A proceedings must be brought very promptly to ensure compliance with Article 5(4)” (paragraph 90).

IMCAs

Baker J was called to determine a number of questions in relation to the provisions relating to s.39D IMCAs. In summary form, he concluded that:

1. The functions of a section 39D IMCA are as set out in that section, as supplemented by Schedule A1, and concern matters relating to the deprivation of liberty provisions under the Schedule. An IMCA

- appointed under section 39D does not have a broader, general role of representing or supporting P, and is not under a general duty to assist in determining what is in P's best interests but, rather, to perform the specific functions set out in section 39D(7), (8) and (9) [i.e. in very broad terms, supporting the RPR and the relevant person to understand matters relating to the authorisation and helping them exercise their rights to apply to court or for a Part 8 review] (see paragraph 108);
2. Where P has executed a LPA, the duty to appoint an IMCA under section 39D is not excluded under section 40(1)(b) unless the donee of the LPA is authorised to make decisions in relation to the matters in section 39D(7) and (8) (paragraph 112);
 3. Standard health and welfare LPAs do not grant authority to the donee to make decisions relating to matters to which the duty to appoint an IMCA under section 39D(2) relates (paragraphs 115-6);
 4. The fact of the grant of a standard health and welfare LPA will not therefore relieve a local authority of its duty to appoint a s.39D IMCA if any of the three cases in 39D(3),(4) or (5) arise [i.e. the relevant person or their RPR request one or the local authority consider the appointment of one is – in essence – necessary to ensure the person's rights are secured] (paragraph 116).

On the facts of the case, therefore, Baker J concluded that, in fact, a s.39D IMCA had to be appointed.

Very importantly, Baker J found that the fact of the appointment of the s.39D IMCA did not absolve the local authority of further responsibility:

“125. The principal errors committed by the local authority in this case were, as analysed above, the failure to initiate the authorization process prior to the 13th June 2013 and wrongly appointing Mr. C to act as RPR. In my judgment, however, the local authority's obligations did not stop there. The local authority thought that it would be meeting its obligations by appointing an IMCA and making resources available to assist the IMCA to act as litigation friend. As set out above, the appointment of an IMCA under section 39D was entirely appropriate and, although Mr. C was uncertain about how to take matters forward, I accept the local authority's case that resources were in fact available, for example to assist an IMCA acting as litigation friend. In most cases, that would in all probability have been sufficient. In this case, however, the local authority knew that Mr. C was unwilling or at least very reluctant to represent or support AJ in challenging the authorisation because he and his wife had concluded that they could no longer safely look after her at home and he believed that it was in her best interests to live in residential care. In those circumstances, I find that the appointment of Mr. R and the provision of resources to assist him in his role as IMCA did not absolve the local authority from its continuing obligation to ensure that AJ's rights under Article 5(4) were respected. The local authority knew at all times that AJ did not wish to be in X House or Y House. In those circumstances, I consider that the local authority, in addition to monitoring the actions of Mr. C as RPR and taking steps to replace him if appropriate, should have made enquiries as to why the IMCA was not taking steps to ensure that the right to apply to the court was being exercised.” (emphasis added)

Baker J emphasised that – as a last resort – the local authority should have considered bringing proceedings before the court itself. This was “[p]lainly this is a last resort, because of the comprehensive and complex provisions for the selection and appointment of RPRs and the appointment of IMCAs are followed, and if

RPRs and IMCAs appointed under these provisions carry out their responsibilities as they should, the rights of an incapacitated person to challenge a deprivation of liberty normally will be protected” (paragraph 126).

However, the local authority “remained under a continuing and positive obligation to “ensure that AJ’s Article 5(4) rights were respected. Thus, if it was not satisfied that the IMCA was taking the necessary steps to apply to the court, and if in all the circumstances it considered such a course to be appropriate, it should have brought court proceedings itself.” (paragraph 126, emphasis added).

Conclusion

Baker J found that the case told a sorry tale of a series of failures by a number of people to ensure that the procedures designed to ensure that AJ’s rights under Article 5 were respected, for which ultimate responsibility lay with the local authority. He therefore granted the declarations sought by the Official Solicitor.

Wider practice

As set out above, Baker J then pulled the threads together to give wider guidance for practitioners.

Comment

Whilst much of the judgment concerned extremely technical interpretation of the provisions of the MCA and the relevant secondary legislation (much of which strongly suggests that the whole regime is beyond repair as a statutory mechanism), it is, at heart, a vitally important assertion of the importance of public bodies taking appropriate steps:

1. To recognise when apparently beneficent steps will lead to a deprivation of liberty;
2. To be honest about what exactly those steps will be;
3. To pause before taking those steps to check whether, in fact, they are necessary or whether a less restrictive option can be pursued;
4. If they are necessary, to ensure – wherever possible – that the necessary authority is in place before they are taken;
5. To recognise the continuing and positive obligation imposed upon local authorities to ensure that those subject to standard authorisations are afforded an effective right to challenge their detention before the Court of Protection.

The case is also a clear recognition of the ‘hard-edged’ nature of rights under Articles 5(1) and 5(4). It is clear that Mr C thought that he was acting in AJ’s best interests, and that, as a family member, he had a more complete and rounded picture of the circumstances than an RPR who had only met AJ on a limited

number of occasions. However, through a truly Lemony Snicket series of events, her family members and the local authority ended up inadvertently conspiring to preclude her raising her fundamental objections to being “dumped” (as her friends perceived it) in a care home.

The final point relates to the preliminary point determined by Baker J in relation to the need for honesty in care plans as to exactly what level of restraint is being imposed upon an individual. This point is equally, if not more, important in relation to those in respect of whom *Re X* applications are being made – where, as matters currently stand, the court will only have the applicant’s word for what is going on...

The outer limits of the MCA

The Mental Health Trust & Ors v DD and BC [\[2015\] EWCOP 4](#) (Cobb J)

Best interests – capacity – medical treatment – deprivation of liberty – CRPD

Summary

This is the sixth judgment in nine months, five of which have been publicly reported, concerning DD – a 36-year old woman with Autistic Spectrum Disorder and mild to borderline learning disability – who has an extraordinary, tragic, and complex obstetric history. Permanent substitute carers, five of them in adoptive homes, are raising her six children, now aged between 6 months and 12 years. She has no continuing contact with any of them and has never demonstrated the desire or capacity to engage with the level of support which is likely to be required to assure a child’s safety in her care. A summary of the background to the proceedings can be found [here](#).

The earlier judgments concerned:

1. Ante-natal care and pre-birth scanning ([\[2014\] EWCOP 8](#));
2. The manner and location of delivery of the baby (caesarean section in hospital) ([\[2014\] EWCOP 11](#));
3. The administration of short-term contraception at delivery, and education about future contraception ([\[2014\] EWCOP 13](#));
4. The administration of short-term contraception post-delivery ([\[2014\] EWCOP 44](#));
5. The further administration of short-term contraception pending this hearing (December 2014).

We summarised and commented upon the two major decisions (2) and (3) [here](#).

The present instalment called upon Cobb J to determine DD’s capacity to litigate and to consider and make decisions concerning long-term contraception and/or therapeutic sterilisation, and, if lacking such capacity, to determine what was in her best interests. His Lordship held that she lacked the relevant capacity and

that it was in her best interests to be sterilised. It should be stressed at the outset that this is an exceptional case on its facts requiring judicial relief in most extreme circumstances.

(1) Mental incapacity

Illustrating the importance of identifying the relevant information before determining capacity, Cobb J held:

“66. ... [I]n deciding on contraception, type of contraception and/or sterilisation, DD would in my judgment be expected to have regard to the following ‘relevant information’ specific to her:

- i) the risk of a thrombo-embolic disease during any future pregnancy (as mentioned above, DD suffered a thrombotic embolism during her fourth pregnancy);*
- ii) the risk of delivering a pre-term infant (her fourth child was born at 29 weeks and suffered breathing difficulties);*
- iii) the impact on DD's mental and emotional health of any further pregnancy (DD has suffered from a delusional disorder following her second and third pregnancies);*
- iv) the additional risks of a home birth for DD (which would always be likely to be her preferred mode of delivery);*
- v) the risk of placenta accreta; as mentioned above ([9](ii)), given that DD has undergone four caesarean sections, this would be particularly dangerous for DD, given the significant risk of extensive haemorrhaging at the point of removal; if bleeding cannot be stemmed DD faces the prospect of hysterectomy;*
- vi) that she faces considerable (and, with each pregnancy, increasing) risks to her life through the delivery of any child. Vaginal birth after caesarean carries considerable risks associated with rupture of the uterus; this is particularly acute given that the uterine wall is now seen to be ‘tissue thin’; caesarean section carries risk of operative failure, adhesions or bowel or bladder injury, and the general risks associated with general anaesthetic.”*

After a careful and comprehensive analysis of the evidence, it was decided that, by virtue of her Autistic Spectrum Disorder, “[t]he evidence strongly indicates that DD is unable to retain much, if any, information relevant to this critical decision. However, I am wholly satisfied that she is unable to understand, and more specifically to weigh, the relevant information” (para 79).

(2) Human rights

The proposed treatment plan involved authorising the applicants to enter her home, if necessary by force, and remove and convey her to hospital as a day patient for the sterilisation procedure under general anaesthetic, and to use reasonable and proportionate measures to provide the treatment, even if any deprivation of liberty resulted. DD’s human rights considerations were inextricably bound up in the best interests determination.

Permission to intrude into the privacy and sanctity of her home and authorising compulsory treatment clearly interfered with Article 8. Moreover, insofar as the proposed sterilisation was concerned, Cobb J held that “private life” under Article 8 incorporated the right to respect for both the decisions to become and not to become a parent which applied to both DD and her partner, BC, who had a more significant learning disability. Interestingly, with respect to Article 12 (the right to marry and to found a family), his Lordship held:

“100. Although Article 12 reflects an absolute right, its limits remain poorly defined. Both counsel submit that Article 12 ECHR does not contain a free standing right to found a family in the absence of marriage; they submit that this is one ‘conjunctive’ right, not two ‘disjunctive’ rights. In my view the words “this right” in the Article strongly suggests that these two apparently separate rights, which are capable of operating independently of each other (i.e. “to marry” and “to found a family”), are in fact to be treated as linked, indeed effectively as one single right, and therefore is of no immediate application here.

101. It seems to me, in any event, that even if “the right... to found a family” were to be viewed independently of the “right to marry” it would offer little more protection to the individual (DD) than the provisions of Article 8. I would further have had little trouble in concluding that the sterilisation procedure proposed is neither an arbitrary nor disproportionate interference with any Article 12 right to found a family (if it were indeed found to exist separate from marriage). As I have heard no detailed contrary argument beyond that reflected in this judgment, it is not appropriate, or necessary, for me to make further comment.” (emphasis added)

Further pregnancy, especially if concealed from the authorities, would be a significantly life-threatening event for DD. The risk of uterine rupture was not predicable and, were it to occur, would almost certainly be fatal to her and the infant if a vaginal birth were attempted unsupervised outside of a maternity unit. Not intervening therefore potentially engaged her right to life under Article 2:

“32. ... It may well be that as the jurisprudence further develops beyond Rabone, DD’s current situation would be considered to give rise to an operational duty. But my view, on these facts and at this time, is that the risk to DD’s life is not so ‘immediate’ as to impose on the Applicants a positive operational duty to act under Article 2, separate from its statutory and common law obligations.”

Interesting reference was also made to the CRPD:

“102. I have been addressed briefly by counsel on the potential import of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), ratified by the UK in 2009 although not yet incorporated into English law. In my judgment, no discrete argument under the UNCRPD arises in this case. In any event, as an undomesticated international instrument, the Convention has no direct effect (see Lord Bingham in A v Secretary of State for the Home Department [2005] UKHL 71; [2006] 2 AC 221 at [27]) and I do not consider it necessary to address its potential relevance further.”

(3) Best interests

Four of DD’s six children were born by caesarean section, and four children were born in the last five years.

The realistic options with regard to best interests were limited to (a) the insertion of a 'coil' or (b) laparoscopic sterilisation. This was a rare case because the pregnancy stakes were high: DD could pay for pregnancy with her life. The professionals were unlikely to be made aware of the removal of a long-term coil, leaving her exposed to the risk of further pregnancy. Moreover, repeated administration of long-term contraceptive, by way of three-monthly injections or repeated coil insertion, would cause further intrusion into her private life which she found utterly objectionable.

Cobb J emphasised that "best interests" was not confined to best "medical" interests but instead embraced a wider notion. In a careful balancing exercise, to which we cannot here do justice, his Lordship considered the benefits and burdens of the coil and sterilisation options (paras 108-111). Those in favour of the latter considerably outweighed the former. There were also two factors of magnetic importance namely:

1. Future pregnancy poses such a high risk to DD's life that the option which most effectively reduces the prospects of this should be preferred; this is one of those exceptional cases where medical necessity justifies the considerable interference;
2. Sterilisation is the treatment which most closely coincides with DD's dominant wishes and feelings to be left alone to enjoy a 'normal' life free from intrusion by health and social services.

Her fertility was not found to be a magnetic factor: "*while this case is not about eugenics, it is clear that her fertility brings no realistic prospect of parenting a child. Rather than being a benefit, it is a burden to her, bringing with it the prospect of ongoing long-term intrusion by health and social services into her life*" (para 114). Her wishes and feelings (paras 115-122), and those of her partner (paras 123-128), were taken into account during the detailed best interests analysis.

With regard to less restrictive options, Cobb J held:

"97. Section 1(6) does not require me necessarily to choose the less restrictive option where a choice exists. I am obliged to have "regard" to the principle of less intervention, but can plainly opt for the intervention which is not the least restrictive if it is in the best interests of the individual involved: see C v A Local Authority [2011] EWHC 1539 (Admin) per Ryder J, at [61].

98. It is accepted by counsel, unsurprisingly, that sterilisation is not the 'less restrictive' medical option in terms of irreversible (or largely irreversible) treatment to bring an effective end to child-bearing opportunities for DD; it is indeed the more, or most, restrictive. DD's "rights and freedoms" must be viewed in a wider context than just the medical procedure itself; her 'rights and freedoms' include the clear right to respect for her privacy. Sterilisation is in this context, in fact, much more likely to free her from further intrusion of her 'private life' from professionals, whereas the insertion of a coil (carrying with it a greater need for monitoring and in due course replacement/removal) would not. In this wider sense, sterilisation is in my judgment the less restrictive of the two principal options under consideration."

In conclusion, it was held to be in DD's best interests to have the therapeutic sterilisation and that it was necessary to withhold the date of the procedure, due to the risks, from DD and BC. In terms of the practical arrangements:

"136. Thus it can be seen that each forced entry to the home has been (understandably) followed by escalating levels of distress experienced and displayed on the part of DD and BC. This is of real concern to me. I repeat what I said prior to the third such forced entry which I authorised in my 4 July 2014 judgment ([2014] EWCOP 11 [131]):

'Any physical restraint or deprivation of liberty is a significant interference with DD's rights under Articles 5 and Article 8 of the ECHR and, in my judgment, as such should only be carried out:

- a) by professionals who have received training in the relevant techniques and who have reviewed the individual plan for DD;*
- b) as a last resort and where less restrictive alternatives, such as verbal de-escalation and distraction techniques, have failed and only when it is necessary to do so;*
- c) in the least restrictive manner, proportionate to achieving the aim, for the shortest period possible;*
- d) in accordance with any agreed Care Plans, Risk Assessments and Court Orders."*

Comment

This case illustrates perhaps the extremities of the powers available to the Court of Protection in the most extreme sets of circumstances. The judicial assessment of capacity, best interests, and human rights considerations is textbook (when gauged by reference solely to the MCA as it stands: see the last paragraph below). Whilst the outcome of the case is of course extreme – envisaging the forcible entry, removal, and sterilisation of a vulnerable adult – the reasoning is comprehensive with delivered the utmost careful consideration.

We would emphasise three interesting, though somewhat ancillary, aspects of the judgment. The first is the helpful summary of the source of respective duties on the public authorities involved in DD's welfare (see paras 22-28, with mention of the Care Act 2014). The second is the potential recognition of the Article 2 operational duty, developing *Rabone v Pennine Care Foundation Trust* [2012] UKSC 2. The law in England and Wales presently promotes ugly Samaritanism (see N. Allen, 'The right to life in a suicidal state' (2013) 36 *International Journal of Law and Psychiatry* 350–357). And the domestic courts have yet to formally recognise the duty to take reasonable precautions where public authorities know, or ought to know, of a real and immediate risk to the life of someone suicidal in the community. His Lordship's recognition of potentially further development of the duty is therefore welcome, albeit that the duty would not have been triggered on the facts.

Finally, it is worth stressing the somewhat short shrift given to the arguments regarding the potential import of the 'undomesticated' UNCRPD with its lack of direct effect. We note, first, that the ECtHR is

increasingly citing the CRPD in its analysis of issues relating to capacity (for example, the case of *MS v Croatia*, discussed elsewhere this month), as did the Supreme Court in *Cheshire West*. Second, we would suggest that the CRPD would, in fact, have added a significant element in this case. Indeed, paying proper heed to the demand from the Committee on the Rights of Persons with Disabilities that decisions in relation to those said to lack capacity are to be taken on the basis of their will and preferences may have led to a very different outcome to that reached by Cobb J. Whether that outcome would – in fact – have served DD is a question that will no doubt be debated for some time as we continue to wrestle with the implications of the CRPD for domestic law.

RB v Brighton and Hove: update

Readers will no doubt remember the decision of the Court of Appeal in [RB v Brighton and Hove](#) [2014] EWCA Civ 561, relating to the lawfulness of deprivation of liberty in the context of risks posed by excessive drinking. Although the Supreme Court refused permission to appeal to RB, the Official Solicitor has applied on his behalf to the European Court of Human Rights,¹ a central plank of the appeal being the place that wishes and feelings (in particular those reflecting the desires of the individual expressed before any questions were posed as to their capacity) should play in the determination of best interests. We will keep you posted.

¹ Full disclosure, Alex and Nicola Kohn are instructed, pro bono, as junior Counsel for RB.

Short Notes of recent decisions by Senior Judge Lush

Senior Judge Lush has loyally been following the guidance of the President as to the publication of judgments, and we note here four recent decisions with implications going beyond the facts of the individual cases.

Re GW [\[2015\] EWCOP 9](#)

In the course of ordering the revocation of a LPA, the Senior Judge remarked on the unerring monotony of cases where attorneys do not pay care home fees and personal allowances to a patient with the result that the Public Guardian has to intervene.

Clearly, the message is not getting through.

Re SB [\[2015\] EWCOP 7](#)

Again whilst revoking a LPA, the Senior Judge considered whether simply to appoint one of P's close friends as sole deputy or as joint deputy with a panel deputy. He did the latter because of the need for an impartial third party to help deal with potential family conflict even though he noted that many panel deputies are reluctant to take such joint deputyships because of extra cost and professional indemnity issues (the panel deputy in this case had, after discussion with her partners, agreed to this course).

Re EG [\[2015\] EWCOP 6](#)

In revoking a LPA because of unauthorised gifts (more messages not getting through), the Senior Judge remarked that had an application for authority been made, it would have been received sympathetically in relation to one of the attorneys because she had given up her job to look after P. He also stated that such an allowance ordered by COP would be treated by HMRC as voluntary and therefore not subject to tax, see HM Revenue & Customs Employment Status Manual, [ESM4016](#)

Re DT [\[2015\] EWCOP 10](#)

Unusually, the Senior Judge dismissed the Public Guardian's application for the revocation of a EPA. The application had been brought because of a failure to pay care home fees and a failure to account when required so to do.

The application was dismissed, however, principally because P was adjudged to retain capacity to revoke the EPA and vigorously expressed his desire not to do so, He wanted his sons to continue to act as his attorneys. The Senior Judge remarked on the fact that the former factor would have prevented him revoking a LPA.

He found that the revocation would cause P significant distress and could not be in P's best interests. Further, P's house had just been sold and after payment of care home arrears, P's assets would be very limited and a panel deputy's fees would soon reduce them to nothing so that such an appointment would be disproportionate even if necessary (which it was not).

This last decision is also of some interest for Senior Judge Lush's (very deliberate) invocation of the remarks of Her Honour Judge Hazel Marshall QC in *Re S and S (Protected Persons)* [2008] COPLR Con Vol 1074, where she held that, if P expresses a view that is not irrational, impracticable or irresponsible, "*then that situation carries great weight and effectively gives rise to a presumption in favour of implementing those wishes, unless there is some potential sufficiently detrimental effect for P of doing so which outweighs this.*" These remarks were held by Lewison J in *Re P (Statutory Will)* [2009] EWHC 163 (Ch) [2009] COPLR Con Vol 906 to have gone too far in terms of prioritising P's wishes and feelings (see paragraph 41). They are, though, absolutely in line with the subsequent construction of the best interests test given by the Supreme Court in *Aintree v James* at paragraph 45, and, we would further suggest, represent the only construction of the MCA 2005 compatible with Article 8 ECHR, let alone Article 12 of the CRPD. It will be interesting to see whether these arguments are given a hearing by the European Court of Human Rights in the application made by RB discussed in the Health, Welfare and Deprivation of Liberty Newsletter.

When will nominal damages alone be awarded?

Bostridge v Oxleas NHS Foundation Trust [[2015](#)] EWCA Civ 79 (Court of Appeal (The Chancellor, Clarke and Vos LJ))

Article 5 ECHR – Damages

Summary

The Court of Appeal has dismissed the appeal in the case of *Bostridge v Oxleas NHS Foundation Trust*, confirming that the principles set down in the immigration detention context in *Lumba v Secretary of State for the Home Department* [[2011](#)] UKSC 12 (*Lumba*) and *Kambadzi v Secretary of State for the Home Department* [[2011](#)] UKSC 23 (*Kambadzi*) also apply to claims for false imprisonment/breach of Article 5 ECHR brought in the context of the MHA 1983.

The facts of Mr Bostridge’s case are, insofar as relevant for present purposes, these. He was discharged from detention by the FTT (Mental Health) in April 2009, his discharge being deferred so a Community Treatment Order could be put in place. However, for technical reasons that need not detain us here, what was then purported to be put in place as CTO was not, in fact, a CTO such that, when his condition deteriorated in August 2009 and he was recalled to hospital and detained thereafter (with six days of leave) until November 2010, his detention was at all stages – and was admitted by the Defendant Trust – to be unlawful. The Defendant admitted that the period of 442 days amounted to false imprisonment and/or unlawful deprivation of liberty for purposes of Article 5 ECHR. His case was reviewed twice by a Tribunal during his detention (with no one realising the fact that the detention was unlawful), on both occasions the Tribunal finding that his condition warranted continued detention. The Claimant never realised that his detention was unlawful, nor did anyone involved in his care. A jointly instructed psychiatrist who reported in the subsequent claim brought on his behalf after it was realised that he had been unlawfully detained indicated that his re-admission to hospital in August 2009 was necessary as at that point, that there was no evidence that he had suffered damage during the period of unlawful detention due to his being unlawfully detained, and that he would have suffered the same unhappiness and distress had he been lawfully detained.

It was therefore common ground that the Claimant had suffered no actual loss, because he would have been detained had his illness been correctly addressed via s.3 MHA 1983, as it should have been on 19 August 2009, and thereafter he would have received precisely the same treatment and he would have been discharged in September 2011.

Against that backdrop of agreed facts, HHJ Hand QC at first instance had to assess the quantum of damages that fell to be awarded the Claimant for both false imprisonment and unlawful deprivation of liberty. In concluding that the Claimant was not entitled to any more than nominal damages, HHJ Hand QC relied heavily on the cases of *Lumba* and *Kambadzi* (discussed in more detail in in Alex’s article with Catherine

Dobson, “At what price liberty? The Supreme Court decision in *Lumba* and compensation for false imprisonment” [2012] *Public Law* 628).

False imprisonment

The Claimant appealed. Before the Court of Appeal, the main ground of the appeal was that *Lumba* and *Kambadzic* could be distinguished because, in those cases, the Secretary of State always had power to detain the claimants in question, and that she would have exercised that power anyway had the unlawfulness come to light, whereas, in the instant case, the NHS trust did not have such a power at all; the NHS Trust was dependent on lawful compliance with ss.3 and 11 MHA 1983, which required actions by third parties, namely by two medical practitioners and by either the nearest relative of the patient or by an approved mental health professional. It was also argued on Mr Bostridge’s behalf that the prior cases of *Christie v. Leachinsky* [1946] KB 124 (CA) [1947] AC 547 (HL) (*Christie*) and *Kuchenmeister v Home Office* [1958] 1 QB 496 (*Kuchenmeister*), when read together with *Lumba* and *Kambadzi*, mandated the result that nominal damages were only appropriate when the defendant itself (as opposed to some third party) could and would anyway have detained the claimant under a lawful power had the illegality come to light.

The Court of Appeal disagreed. Giving the sole reasoned judgment, Vos LJ held that:

“20... [t]he tort of false imprisonment is compensated in the same way as other torts such as to put the claimant in the position he would have been in had the tort not been committed. Thus if the position is that, had the tort not been committed, the claimant would in fact have been in exactly the same position, he will not normally be entitled to anything more than nominal damages. The identity of the route by which this same result might have been achieved is unlikely to be significant

[...]

23. As I have said, the principle dictates that the court, in assessing damages for the tort of false imprisonment, will seek to put the claimant in the position he would have been in had the tort not been committed. To do that, the court must ask what would have happened in fact if the tort had not been committed. In each of *Lumba* and *Kambadzi*, the answer was obvious. Had the torts of false imprisonment not been committed, the Secretary of State would have applied the published policy or undertaken the appropriate custody reviews. In both cases, the claimants would still have been detained. They sustained no compensatable loss. The majority of the Supreme Court determined, in addition, that vindictory damages were not available in these circumstances (see paragraph 74 of Baroness Hale in *Kambadzi*).”

Vos LJ held that none of the authorities relied upon by Mr Bostridge compelled the conclusion argued for (and that, to the extent that *Kuchenmeister* suggested that vindictory damages were appropriate in a case of false imprisonment even where the claimant could have been lawfully detained or anyway impeded in his journey, that first instance authority should no longer be followed as inconsistent with *Lumba*).

Vos LJ therefore held that the judge was right to decide on the basis of *Lumba* and *Kambadzi* that the appellant was only entitled to nominal damages and, now that the law has been clarified by these cases, neither *Christie* nor *Kuchenmeister* pointed to any different conclusion.

Article 5

Perhaps a little surprisingly, Leading Counsel for Mr Bostridge placed little reliance upon Article 5 and the right to compensation enshrined in Article 5(5). Both *Lumba* and *Kambadzi* were cases solely concerned with the common law tort of false imprisonment, and it might perhaps have been expected that arguments might have been addressed as to the fact that the tort is not entirely co-existent with Article 5.

A tentative argument was advanced that, on the basis of *Winterwerp* (confusingly called ‘*Wintwerp*’ in the judgment), there was a ‘policy’ reason for the award of substantial damages in cases such as Mr Bostridge. However, whilst Vos LJ accepted that it was “*not in doubt that a breach of either substantive or procedural rules will lead to a finding of false imprisonment. In my judgment, however, the ECtHR’s decision says nothing about the appropriateness of the compensation to be awarded once that finding is made. In the circumstances of this case, I do not think that there were any policy considerations that required a substantial award of damages.*”

It was also argued – again somewhat tentatively – that damages should have been more than nominal to reflect both the appellant’s loss of liberty and the loss of the procedural and substantive protections afforded by a lawful detention. However, as Vos LJ noted:

*“30. This point too was not much pressed by Mr Drabble. Indeed, it was also not suggested with any force that the judge ought to have made a greater than nominal award under section 6 of the Human Rights Act 1998 by way of ‘just satisfaction’ for a breach of article 5 of the Convention. In my judgment, once it is clear that the appellant sustained no loss, because he would in fact have been lawfully detained anyway whether or not the breach had occurred, it is hard to see how an award of anything more than nominal damages could be justified, whether as compensatory damages or as a just satisfaction. For this reason, I do not think that the damages ought to have been more than nominal either to reflect the loss of liberty or the loss of the procedural and substantive protections afforded by a lawful detention. Both these grounds for a substantial award are ruled out, as Baroness Hale acknowledged at paragraph 74 in *Kambadzi*, by the inappropriateness after *Lumba* of vindicatory damages in this kind of case.”*

Comment

This decision will, we suspect, be greeted with considerable relief by public authorities, and in particular those concerned with potential liability for claims for unlawful deprivation of liberty in post-*Cheshire West* cases. Although concerned with damages in relation to unlawful detention under the MHA 1983, the confirmation that the principles set down in *Lumba* and *Kambadzi* apply not only outside the immigration detention setting and also in relation to claims relying upon Article 5 ECHR, very strongly suggest that the same approach will be adopted wherever it is clear that an individual has suffered no loss as a result of an unlawful deprivation of liberty. That will apply to very many of those who have been subjected to what is – in shorthand but inaccurately – known as ‘technical’ deprivation of liberty – i.e. where there is no question but that the deprivation has fulfilled at all stages all the substantive criteria for detention under

Article 5(1)(e) ECHR and would have fulfilled the procedural criteria if (for instance) the supervisory body been able to complete the assessment procedure more speedily.

There will undoubtedly still be room for claims to be brought where it can be shown that the claimant has, in fact, suffered loss. This will most obviously be where it can be shown that, had the public body taken the steps mandated of it by the MCA at an earlier stage, a less restrictive option would have been identified, and they would, for instance, have been returned home.

It is also important, perhaps, to highlight that the burden of proof does not lie with the claimant to establish that the actions/omissions of the public authority led to loss, at least if the claim is framed both in terms of false imprisonment and unlawful detention contrary to Article 5 ECHR. Once it has been established that imprisonment was false as a result of the actions/omissions of the public body, it then lies with the public authority to establish that they made no difference. Otherwise, *“the result would be to transform the tort of false imprisonment from being one actionable without proof of damage into one in which the claimant, in a large number of cases, would have to prove loss. [such an approach is] incompatible with the approach of the Supreme Court in Lumba. If the [public body] wishes to say that a claimant would have been detained anyway, [they] must establish that proposition” R(EO & Ors) v SSHD [2013] EWHC 1236 (Admin)* per Burnett J at paragraph 74. We would suggest that the same principles also hold true in relation to claims brought in relation to Article 5 given the requirement in Article 5(5) that everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation (even if compensation may not amount to more than a declaration as to the breach).

Short Note: extreme product champions and their effect on P

In a decision from October 2014 which was only very recently placed on Bailii (and which we are very grateful for to Caroline Hurst of Switalskis for bringing to our attention), District Judge Mainwaring-Taylor made a heartfelt plea to an ‘extreme product champion’ to reflect upon the consequences of his actions. In *Re MW* [2014] EWCOP B27, proceedings concerning an elderly lady, MW, had been concluded with a decision that she should continue living in a care home rather than being cared for by her son at home. A significant factor in that decision had been the fact that he had taken, and posted on a private section of YouTube, a video of his mother in an extremely distressed state at home.

Some two years later, the matter came back to court, it appears because of the son’s continued conduct and – in particular his continued practice of videoing. In a description that may ring bells, District Judge Mainwaring-Taylor noted that “[Mr W] is entirely convinced that in all the circumstances he is always right and he produces what he says are justifications. Unfortunately, Mr W’s justifications really centre on his needs, rather than on his mother’s needs. I quite accept and believe that Mr W is entirely genuine in thinking and having a perception that what he is doing and wants is in his mother’s best interests, but, sadly, that is simply not the case.”

In maintaining the status quo, namely that Mrs W should continue to reside in the care home, the judge made a plea that:

“Perhaps in his future dealings and thoughts, Mr W might think that, every time he does something which provokes the need for court proceedings, he is directly diminishing his mother’s resources. Because it always seems to get to the stage where the matter has to come before the court and, as soon as that happens, Mrs W needs representation; that representation has to be through the Official Solicitor and it has to be funded. As long as Mrs W has financial resources, it will be she who funds it, rather than the monies being there for her care and comfort.”

Comment

Cases such as this (and that of [A Local Authority v M & Ors](#) [2014] EWCOP 33 and [Re A and B \(Costs and Delay\)](#) [2014] EWCOP 48 will no doubt be considered carefully by the ad hoc Rules Committee when in due course in the course of their deliberations as to how to seek to enshrine into the Rules mechanisms to ensure that the resources of the court – and, significantly, the resources of privately paying Ps – are deployed proportionately.

When does the court need an expert to assist as to veracity?

Wigan Council v M, C, P, GM, G, B and CC [\[2015\] EWFC 8](#) (Family Court (Peter Jackson J))

Practice and Procedure – Other

Summary

This case concerns expert evidence in family proceedings in relation to (1) the capacity of a witness to give evidence and (2) the witness’s veracity. As materially similar principles apply by analogy in COP proceedings, the conclusions reached by Peter Jackson J are equally applicable to judges of and practitioners appearing in that court.

Two children, aged 15 and 16, alleged that they had been sexually abused by their stepfather. At a case management hearing, the stepfather applied for a ‘veracity assessment’ and an assessment of the children’s ability to give evidence. The application was supported by the other parties and granted by the court.

An experienced clinical psychologist with special experience in the analysis of forensic interviews was instructed. The expert concluded that there was nothing in what the children said that required the interpretation of an expert. The children were articulate teenagers who were capable of giving evidence.

Peter Jackson J, whilst acknowledging that an assessment of capacity to give evidence, and the arrangements that should be made to assist a witness to do so fairly is a proper subject for expert advice where necessary, it is not necessary in every case. He identified three principles:

1. As a matter of law, there is no bar on the admission of expert evidence about whether evidence is or is not likely to be true.
2. Expert evidence can only be adduced if it is necessary to assist the court to resolve the proceedings. The fact that expert evidence is admissible and might be relevant or even helpful in a general way is not enough.
3. Cases in which it will be necessary to seek expert evidence will nowadays be rare. Judges have been trained in and are expected to be familiar with the assessment of evidence. The court is only likely to be persuaded that it needs expert advice if it concludes that its ability to interpret the evidence might otherwise be inadequate.

Peter Jackson J also expressly agreed with what was said by Baker J in *A London Borough Council v K* [2009] EWHC 850 (Fam) that veracity or validity assessments have a limited role to play in family proceedings. The ultimate judge of veracity, i.e. where the truth lies, is the judge and the judge alone.

Comment

In the COP, as in the Family Court, an expert may give evidence on questions going to factual matters, such as the veracity or truthfulness of a witness but the final decision upon those matters remains for the judge. Indeed, the ultimate questions of whether P has capacity and what is in their best interests are matters for the court.

The equivalent to Part 25 of the Family Procedure Rules 2010 is COPR Part 15 accompanied by PD 15A. Pursuant to rule 121, the COP is under a specific duty to limit expert evidence to that which is “reasonably required” to resolve the proceedings. This is in contrast to s.13(6) Children and Families Act 2014, which dictates that expert evidence can only be adduced if it is necessary to assist the court to resolve the proceedings justly. It is likely that this change will be introduced in due course in the COP. It would therefore be wise for COP practitioners to take heed of the three principles identified by Peter Jackson J when considering whether to seek to adduce expert evidence going to veracity. Indeed, it is only like ever to be required where there are real doubts (for instance) as to whether a person has the mental capacity to understand the import of what they saying. An example from the experience of the editors where this has arisen is where a person with a severe learning disability placed in a care home made allegations of sexual abuse but where there were doubts as to whether the words that they are using reflected their own experience or words that they had picked up from contact with other service users or from the media. In that case, the assistance of an expert psychologist was undoubtedly necessary, but these cases are likely to be rare.

What place morality (as compared to forensic rigour)?

In the matter of A (A Child) [\[2015\] EWFC 11](#) (Family Court (Sir James Munby P))

Practice and Procedure – Other

Summary

In this case, the President of the Family Division, Sir James Munby P, was extremely critical of the local authority's analysis, handling of the case and conduct of the litigation in what he described it as "*an object lesson, in almost a textbook example of, how not to embark upon and pursue a care case.*"

This case concerned an application for a care order and placement order. The child in question had been born while his mother was serving a prison sentence. He was accommodated in local authority foster care and the care application was not issued until some 8 months after his birth.

As well as proceeding on assumptions with no evidential basis, the local authority made repeated reference to the "immoral" nature of the father's behaviour. The father's immoral behaviour included having had sex with a 13 year old girl when he was 17 years old, and being a former member of the English Defence League (EDL). Sir James Munby P made clear that the "morality" of the father's character was neither appropriate nor relevant and that these aspects should never have featured as part of the local authority's case. He was also at pains to emphasise that it was for the local authority to prove, on a balance of probabilities, the fact upon which it seeks to rely.

Comment

Although not a COP case, COP practitioners should take note of the President's warning that:

"...the father may not be the best of parents, he may be a less than suitable role model, but that is not enough to justify a care order let alone adoption. We must guard against the risk of social engineering, and that, in my judgment is what, in truth, I would be doing if I was to remove A permanently from his father's care."

The same concerns hold true in cases relating to adults particularly where there are safeguarding concerns.

The tone of Sir James Munby P's approach also chimes with the key principles governing the MCA. One principle is that a person is not to be treated as unable to make a decision merely because he makes an unwise decision. The fact that others, including the court, think that a decision is unwise or unsavoury, is an insufficient basis upon which to displace their decision. Another principle is that the best interests

requirement should take into account the particular wishes and feelings of the incapacitated person, again, even where others, or the court, would not necessarily agree.

Short note: who decides as to death?

In an unusual and tragic case, *Re A (A Child)* [2015] EWHC 443 (Fam), brought by an NHS Trust seeking declarations as the fact that a child was brain dead and that the ventilator providing them with life support could be turned off, Hayden J has confirmed what should happen where there is doubt as to whether brain stem death has occurred in a child. Although a Coroner has concurrent jurisdiction and the High Court has jurisdiction over a body, Hayden J referred with approval to the passage in *Jervis on Coroners* (13th Edition) at paragraph 5-14, which provides that:

"The coroner may also be faced with the difficult task of deciding whether a body in his area is actually dead, for instance when it is connected to a life support machine in an irreversible coma... it appears that once a person has suffered brain stem death which no medical treatment is able to reverse, the person is 'dead' for the purposes of the coroner acquiring jurisdiction even whilst a machine ventilates the body."

Hayden J continued:

"21. [...] That proposition is said to be supported by Mail Newspapers v Express Newspapers [1987] FSR 90; Airedale NHS Trust v Bland [1993] AC 789. The footnote also refers to Thurston's Coronership: 3rd Edition 1985, which sets out the view that I have just recorded but also the opposing one, that while the heart beats and the blood circulates, there is no "dead" body i.e. for the purposes of establishing the Coroner's jurisdiction. I note that the distinguished authors also make the following observation which, in tone, seems to imply that they regard it as self evident:

'Of course, in practice no Coroner would insist on taking possession of the body were it was still connected to a life support system.'

22. I associate myself entirely with those observations. I cannot conceive of any circumstances in which the Coroner should seek to intervene, where a body remains ventilated, beyond those circumstances concerning the removal of organs where the family are consenting. Any other approach I regard as likely to generate immense distress and contribute to an atmosphere where sound judgment may be jeopardised."

Exactly the same propositions must hold true in relation to adults and, as with a child, the proper forum for resolution of the questions that follow upon brain death must be the Court (in that case, the Court of Protection).

SCIE Mental Capacity Directory

Fulfilling one of the Government's commitments in response to the House of Lords Select Committee report on the MCA 2005, SCIE has recently established a very useful directory of MCA resources, available [here](#). It is divided into categories, and will (a) be expanded over time; and (b) (we hope!) be kept up to date so as to ensure that it remains useful in this rapidly changing area of the law.

MHT appointed representatives: important guidance from the UT

YA v CNWL NHS Trust & Ors [\[2015\] UKUT 37 \(AAC\)](#) (UT (AAC) (Charles J))

Mental Capacity – Litigation – Mental Health Act 1983 – Interface with MCA

Summary

In a decision which is important not merely for practitioners before the First Tier Tribunal (Mental Health), but also for those acting for P (or protected parties) before the Court of Protection, Charles J in *YA v CNWL NHS Trust & Ors* has considered the appointment and duties of a legal representative appointed by the tribunal under Rule 11(7) of the Tribunal Procedure Rules at First-Tier Tribunal) (Health, Education and Social Care Chamber) 2008.

This note concentrates on the points of principle, rather than the facts giving rise to the questions put before him. It also concentrates on those aspects that are likely to be of wider application than before the MHT (and does not therefore in detail address the important questions of principle that Charles J determined in relation to when the Tribunal should appoint such a representative).

Charles J has confirmed that:

- a. To have capacity to appoint a representative a patient needs to have more than solely an understanding that they can make an application to a mental health review tribunal or have someone else make it for them, and thus the limited capacity referred to in *R(H) v SSH* [\[2006\] 1 AC 441](#). It also involves assessing their capacity to decide whether or not to appoint a representative in the first place.
- b. A person's capacity (a) to appoint a representative and (b) to conduct proceedings himself are not mutually exclusive concepts. Although there is a substantial overlap between the two, and the differences between them in the context of the MHT are theoretical rather than real because a relevant factor to be taken into account in deciding whether or not to appoint a representative is the capacity of the patient to conduct the proceedings and an inability by the patient to appreciate that he or she lacks the capacity to conduct the proceedings themselves effectively determines that he or she does not have the capacity to make that choice.

- c. When the patient has capacity to give instructions on all relevant matters relating to the conduct of the proceedings, the position of a solicitor acting for a patient with capacity to instruct him to conduct the proceedings, whether appointed by the patient or the tribunal is effectively, the same as that under any other retainer for the purposes of proceedings, including the consideration of the capacity of the client to give and terminate instructions for that purpose. The retainer will be to advise on and conduct the tribunal proceedings pursuant to the patient's instructions and subject to the solicitor's professional obligations and duties.
- d. When the patient does not have the capacity to instruct the solicitor on all relevant matters relating to the conduct of the proceedings, the position is more complicated. The best interests test in Rule 11(7)(b), and the general requirement to act in the best interests of a person who lacks relevant capacity, mean that the legal representative is not only appointed in the patient's best interests but must also seek to promote them (having regard to the relevant issues of fact and law that are relevant in the proceedings).

As Charles J identified, the main problems in the context of the appointment of a representative on the basis of a lack of capacity are likely to arise when:

- a. the legal representative's views on what is in the patient's best interests and those of the patient diverge in respect of issues where factors that the patient does not have capacity to give instructions on are relevant;
- b. the patient wants the legal representative to advance an unarguable point and/or;
- c. the patient maintains that he does not want to be represented.

Charles J placed weight on the decision of the Court of Appeal and of the ECtHR in [RP v United Kingdom](#) [2012] ECHR 1796 in holding that:

- a. withdrawal of representation or the advancement of unreasoned or hopeless argument may well not promote (a) the patient's best interests, or (b) an effective and practical review of a deprivation of liberty, and thus the underlying purposes of Article 5 and its procedural safeguards;
- b. representation of a patient by another against the patient's wishes as to any representation, or parts of it, is not contrary to Article 6 or Article 5(4), although the departure from the views and wishes of the patient should only be when this is necessary; and
- c. the failure to provide assistance to a litigant who lacks capacity may itself result in a breach of procedural safeguards.

In the particular context of deprivation of liberty on the basis of Article 5(1)(e), with the accompanying requirement for the effective testing and review of the detention and its continuation, Charles J considered

that a legal representative appointed to act on behalf of a patient on the basis of a lack of capacity should act as follows.

“(16) [...]

- i) *so far as is practicable do what a competent legal representative would do for a patient who has capacity to instruct him to represent him in the proceedings and thus for example (a) read the available material and seek such other relevant material as is likely to be or should be available, (b) discuss the proceedings with the patient and in so doing take all practicable steps to explain to the patient the issues, the nature of the proceedings, the possible results and what the legal representative proposes to do,*
- ii) *seek to ascertain the views, wishes, feelings, beliefs and values of the patient,*
- iii) *identify where and the extent to which there is disagreement between the patient and the legal representative,*
- iv) *form a view on whether the patient has capacity to give instructions on all the relevant factors to the decisions that found the disagreement(s),*
- v) *if the legal representative considers that the patient has capacity on all those factors and so to instruct the representative on the areas of disagreement the legal representative must follow those instructions or seek a discharge of his appointment,*
- vi) *if the legal representative considers that the patient does not have or may not have capacity on all those issues, and the disagreements or other problems do not cause him to seek a discharge of his appointment, the legal representative should inform the patient and the tribunal that he intends to act as the patient’s appointed representative in the following way:*
 - *he will provide the tribunal with an account of the patient’s views, wishes, feelings, beliefs and values (including the fact but not the detail of any wish that the legal representative should act in a different way to the way in which he proposes to act, or should be discharged),*
 - *he will invite the tribunal to hear evidence from the patient and/or to allow the patient to address the tribunal (issues on competence to give evidence are in my view unlikely to arise but if they did they should be addressed before the tribunal),*
 - *he will draw the tribunal’s attention to such matters and advance such arguments as he properly can in support of the patient’s expressed views, wishes, feelings, beliefs and values, and*

- *he will not advance any other arguments.*

Importantly, Charles J emphasised that, in such circumstances:

“(17) [...] the tribunal should not in my view delve into the areas of disagreement or why the legal representative is of the view he cannot properly draw matters to the attention of the tribunal or advance argument. These may be apparent from the account of the patient’s wishes or what they say directly to the tribunal but in my view the decisions on what the legal representative can and cannot argue are matters for the legal representative and not the tribunal who are charged with deciding whether the legal representative it has appointed should continue to act and not with how he should do so.”

Where there is no conflict between the wishes of the patient and his views:

“(18) [...] the legal representative should still consider whether or not the patient has capacity to instruct him on all relevant factors and act on the patient’s instructions if he concludes that the patient has that capacity. But if the legal representative concludes that the patient does not or may not have such capacity generally he should advance all arguable points to test the bases for the detention in hospital. In those circumstances it may or may not be appropriate to invite the tribunal to hear directly from the patient.”

Although not addressed in detail here, Charles J’s analysis of when a representative should be appointed on the basis of a lack of capacity bears careful reading for his review of the Strasbourg case-law on Article 5(4) (at paragraphs 36-44) and its requirements (alongside those of the common law and the UNCRPD) as to when legal representation is required in the case of those with mental disabilities.

His Lordship held that where the person lacks such capacity, the most important guiding principles to be applied under the best interests test (and so in deciding whether to exercise the power to appoint a legal representative) are:

- the underlying purpose and importance of the review and so the need to fairly and thoroughly assess the reasons for the detention;
- the vulnerability of the person who is its subject and what is at stake for that person (ie a continuation of a detention for an identified purpose);
- the need for flexibility and appropriate speed;
- whether, without representation (but with all other available assistance and the prospect of further reviews), the patient will practically and effectively be able to conduct their case; and if not whether nonetheless;
- the tribunal is likely to be properly and sufficiently informed of the competing factors relating to the case before it and so be able to carry out an effective review;

- the nature and degree of the objections and of the distress caused to a patient if his or her wishes are not followed;
- the likely impact of that distress on his or her well being generally; and
- the prospects that if a legal representative is appointed or not discharged that legal representative will seek a discharge of the appointment.

Comment

As we covered in our February [Newsletter](#), the Law Society has recently issued a new Practice Note for those representing patients before the Tribunal. That Practice Note will have to be read subject to this judgment, although the two are essentially consistent as regards the core obligations of the representatives.

The decision is of wider importance because of Charles J's observations as to the "close analogy" that can be made between a rule 11(7) representative, appointed on the basis of a lack of capacity, and a litigation friend appointed by a civil court to act for a party. As Charles J observed at paragraphs 81-2:

"81. [...] the purpose and effect of Rule 11(7) is to provide in mental health cases an equivalent procedure to the appointment of a litigation friend by civil courts to provide that a patient has an effective role in the proceedings and his best interests are advanced and considered in them. It follows that the cases on the approach to be taken by a litigation friend, who in the cases has instructed solicitors, provide applicable guidance.

82. I acknowledge that, as for example appears from some of the commentaries in Court Rules relating to the appointment of a litigation friend, relevant differences may exist in some circumstances in respect of the extent of the respective roles and duties of a litigation friend and a tribunal appointed representative (e.g. when a litigation friend has instructed a solicitor, the relationship between such a solicitor and (i) the litigation friend and (ii) the patient, the position of a litigation friend as a decision maker for or agent of the patient, the gathering of evidence, in respect of the professional duties of a legal representative (who has been appointed as such by the tribunal) to the patient (who is in the position of his client) and to the tribunal). But, in my view any differences should be addressed as and if they arise." [the hope expressed in that paragraph that the role and duties of a litigation friend were to be considered by the Court of Appeal in *Re X* is, at present, to be unfulfilled]

The question of what – exactly – it means to act in the best interests of a patient (or P) and whether the system (both of 11(7) representatives and of litigation friends more generally) is, in fact, compatible with the ECHR and the CRPD is a project that is exercising Alex in particular at present. However, we would respectfully agree that the analogy that Charles J draws at paragraph 81 is, indeed, a close one.

We would further suggest that in cases involving deprivation of liberty, those acting as litigation friends in cases before the CoP (whether s.21A MCA 2005 applications or otherwise) would be very well advised to

follow the steps outlined above when determining how to proceed, especially where their view as to the best interests of P differ from P's wishes and feelings. After all, a deprivation of liberty justified on the basis of unsoundness of mind is a deprivation of liberty for purposes of Article 5(1)(e), no matter where it takes place and the individual subject to such deprivation of liberty enjoys – or should enjoy – equivalent procedural protections, including, crucially, the protection of effective representation. This point is reinforced, we suggest, by the decision in *MS v Croatia (2)*, discussed below.

We note, finally, that the decision in *YA* is also likely in due course to be of even wider importance because, as was made public before the Court of Appeal in the *Re X* appeal heard on 17-18 February, a rule change is under consideration in relation to the participation of P in CoP proceedings which would, inter alia, allow – in an appropriate case – for the appointment of an 'accredited legal representative' by the Court to represent P directly. We hope to be in a position to provide more details of this potentially extremely important rule change in short order. If and when the Court is in a position to consider appointing such representatives, the consideration by Charles J as to when Rule 11(7) representatives should be appointed and their duties upon appointment are likely to be of no little importance by analogy for judges of and practitioners before the Court of Protection.

Capacity and withdrawal of MHT proceedings

AMA v Greater Manchester West Mental Health NHS Foundation Trust and others [\[2015\] UKUT 36 \(AAC\)](#) (UT (AAC) (Charles J))

Mental Health Act 1983 – Interface with MCA

Summary

In this case, the First-tier Tribunal ('FfT') was found by Charles J (as President of the Upper Tribunal (AAC)) to erred in acceding to the request of a welfare deputy to withdraw an application to challenge her son's detention under s. Mental Health Act 1983 because, in the absence of such an express power in the terms of the deputy's appointment, the deputy had no such right to withdraw the proceedings. The FfT's decision to consent to a withdrawal is a safeguard and "*has to be based on a conclusion of the tribunal that continued detention under the MHA is justified for the reasons founding the application to withdraw (or other reasons)*" (para 37).

Charles J examined the issue of capacity to instruct and to litigate in the context of a detained patient seeking discharge from s.2 MHA on the basis that he would agree to remain in hospital in circumstances potentially amounting to a deprivation of liberty. His Lordship held:

"41. I accept as submitted on behalf of AMA that the patient does not have to be able to fully appreciate or understand all aspects of the issues involved and that the capacity simply to instruct a solicitor to challenge a continuation of a detention on all available grounds can be described as very low or a very limited capacity.

42. However, different and more complex factors relating to both the capacity to instruct a solicitor and in respect of other decisions, issues or activities that are relevant to the application of the tests under the MHA and a best interests approach will or are likely to arise in, for example:

- i) cases concerning compliance with a voluntary admission and consequential detention (deprivation of liberty),
- ii) applications to withdraw and so the reverse of the position that a review of the detention is likely to promote the patient's interests,
- iii) cases in which the wishes of the patient do not accord with the views of his representative as to what will promote his best interests and/or do not found arguable points, and
- iv) in cases where a central factor to the argument that detention is not necessary involves an assessment of the patient's ability to weigh and act in relation to issues that underlie an argument that he will remain in hospital as a voluntary patient (here the resolution of arrangements relating to his care package on leaving hospital).

In all such cases it is likely that a sufficient appreciation by the patient of his impairment of, or disturbance in the functioning of, the mind or brain will be required if he is to have capacity to make the relevant decisions."

The correct tribunal approach, he held, would have been to address the issues set out in para 33 which included the patient's capacity:

- a. to appoint a representative, whether his legal representative or his mother,
- b. to give instructions to his representative on issues arising and decisions to be taken in the conduct of the application to the FtT and thus the challenge to his detention under s. 2 MHA (his capacity to conduct proceedings or his litigation capacity), and in that context:
 - i. to make and maintain decisions to remain in hospital on a voluntary basis,
 - ii. to make a decision whether to pursue or to withdraw the proceedings before the FtT,
 - iii. to consent to a deprivation of his liberty at the hospital for the purposes of his continued assessment, and so
 - iv. to sufficiently understand, retain and weigh the issues and factors relevant to those specific decisions including issues relating to where and with whom he should live and his support in the community.

Had such issues been addressed, Charles J held, it was likely to have shown a need to investigate and determine the patient's capacity to (a) decide to continue or withdraw the application, (b) to agree to remaining in hospital on a voluntary basis and (c) to agree to a deprivation of liberty; the circumstances

that led to his section and whether they continued and his risk of self harm on a return home; and (c) whether his care package in the community was or would be in place. Thus, the capacity issues “*go well beyond the capacity to instruct a solicitor to challenge the section on all available arguable grounds*” (para 58).

Comment

This decision ought to be read in conjunction with that in *YA* which identified the most important principles to take into account in the decision making process of the FfT in relation to those who (may) lack capacity in material domains. Although the Tribunal’s remit is limited by the Mental Health Act 1983 and associated Rules, it is clear – if ever there was a doubt – that to achieve its underlying purpose, “namely a practical and effective review of a deprivation of liberty in an appropriate timescale” (para 35), it cannot operate in isolation from the Mental Capacity Act 2005. The fact that tribunals may be required to investigate and determine a patient’s capacity to agree to a continued deprivation of liberty on the psychiatric ward is important; otherwise there is a risk of the tribunal discharging the patient into an unlawful detention. We suggest that this expansive interpretation of the Tribunal role is most welcome. Its detention and discharge decisions have significant human rights implications in terms of Articles 5 and 8 and it is, after all, a public body required not to act incompatibly with the ECHR.

Recognising the limits of a welfare deputy’s power with regards to withdrawing Article 5(4) challenges, in the absence of express powers conferred by the Court of Protection, is also important and welcome. It is well-recognised that the right to challenge detention must not be dependent upon the exercise of discretion by a third party (see *AJ* at para 35(6)). Although the Upper Tribunal was not required to adjudicate upon the same, it should be noted that a welfare deputy’s consent to a deprivation of liberty does not prevent it still being a deprivation requiring authorisation. Thus, if a person consents with capacity to their confinement they are not deprived. But if they appoint someone else to do so under a welfare LPA, or if the Court of Protection does so by way of a welfare deputyship, and that person consents they are still deprived of liberty. The question of the role of ‘consent’ in this regard is rising up the agenda, as can be seen from the further article by Jill Stavert on the Scottish Law Commission’s proposals as to how to close the “Bournewood gap” in Scotland, which appears to rely heavily on the exercise of consent by attorneys.

Finally, we note the concern Charles J expresses at paragraph 4 with regard to the lack of legal aid and his invitation to the Legal Aid Agency to factor and deal with the view of the judge giving permission to appeal that the case is a “guidance case”.

What counts as effective representation in the context of deprivation of liberty?

MS v Croatia (No 2) [\[2015\] ECHR 196](#) European Court of Human Rights (First Section)

Article 5 ECHR – Deprivation of liberty

Summary

In a lengthy and detailed judgment in *MS v Croatia (No 2)* [\[2015\] ECHR 196](#), the ECtHR has emphasised the crucial importance of the need for the procedural safeguards provided for in Article 5(4) ECHR to be rendered effective for those with mental disabilities.

Before reaching Article 5, the Court considered the application of Article 3 in the context of physical restraint of a woman suffering from mental illness, where she was tied to a bed for 15 hours immediately upon her admission. It found that in the particular and distressing circumstances of her case (including where she was making repeated complaints of pain in her back, to which the hospital staff made no response, and where there was no proper evidence that restraint was necessary to calm the applicant down or to prevent her attacking others) that she had been subject to inhuman and degrading treatment contrary to Article 3. Whilst (we would hope) it is unlikely that Article 3 would be engaged in the course of psychiatric treatment in this country, we would note [ZH v Commr of Police for the Metropolis](#) where a breach of Article 3 was found – and upheld by the Court of Appeal – in the context of the disastrous intervention by the Police to move a young man with autism away from the side of a swimming pool.

In the context of Article 5, the ECtHR emphasised, first, that the proceedings leading to the involuntary placement of an individual in a psychiatric facility must necessarily provide clearly effective guarantees against arbitrariness given the vulnerability of individuals suffering from mental disorders and the need to adduce very weighty reasons to justify any restriction of their rights (paragraph 147).

The ECtHR then emphasised the signal importance of the provision of effective legal representation where a patient has been detained in paragraphs sufficiently significant to merit reproduction in full.

“152. [...] the Court reiterates that in the context of the guarantees for a review of compliance with the procedural and substantive conditions which are essential for the “lawfulness”, in Convention terms, of an individual’s deprivation of liberty, the relevant judicial proceedings need not always be attended by the same guarantees as those required under Article 6 § 1 for civil or criminal litigation. Nonetheless, it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation (see, amongst many others, Stanev, cited above, § 171).

153. This implies, inter alia, that an individual confined in a psychiatric institution because of his or her mental condition should, unless there are special circumstances, actually receive legal assistance in the proceedings relating to the continuation, suspension or termination of his confinement. The importance of what is at stake for him or her, taken together with the very nature of the affliction, compel this conclusion

(see Megyeri v. Germany, 12 May 1992, § 23, Series A no. 237-A). Moreover, this does not mean that persons committed to care under the head of “unsound mind” should themselves take the initiative in obtaining legal representation before having recourse to a court (see Winterwerp, cited above, § 66).

154. Thus the Court, having constantly held that the Convention guarantees rights that are practical and effective and not theoretical and illusory (see, inter alia, Stafford v. the United Kingdom [GC], no. [46295/99](#), § 68, ECHR 2002-IV), does not consider that the mere appointment of a lawyer, without him or her actually providing legal assistance in the proceedings, could satisfy the requirements of necessary “legal assistance” for persons confined under the head of “unsound mind”, under Article 5 § 1 (e) of the Convention. This is because an effective legal representation of persons with disabilities requires an enhanced duty of supervision of their legal representatives by the competent domestic courts (see paragraph 45 above, Principle 18 of the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care).

155. Accordingly, as to the way in which the applicant was represented in the proceedings, the Court is of the opinion that given what was at stake for her proper legal representation, contact between the representative and the applicant was necessary or even crucial in order to ensure that the proceedings would be really adversarial and the applicant’s legitimate interests protected (see [Sýkora v. the Czech Republic](#), no. [23419/07](#), §§ 102 and 108, 22 November 2012, with further references).”

In MS’s case, the legal aid representative never met the applicant, made no submissions on her behalf and, although he attended the hearing, acted rather as a passive observer of the proceedings. Although the domestic authorities were well aware of these omissions (see paragraphs 28 and 29 above), they failed to react by taking the appropriate measure for securing the applicant’s effective legal representation. Furthermore, although the judge conducting the proceedings visited the applicant in the hospital, the ECtHR found that documents submitted before the Court do not show that he made any appropriate accommodations to secure her effective access to justice (Strasbourg here making specific reference to Article 13 of the CRPD). In particular, there was no evidence that the judge informed the applicant of her rights or gave any consideration to the possibility for her to participate in the hearing. MS was thus not given an opportunity to comment on the expert’s findings at the court hearing which resulted in the delivery of the decision on her involuntary retention in a psychiatric hospital. Her right to be heard was particularly pressing taking into consideration the applicant’s clear and undisputed refusal to undergo any treatment and the domestic courts’ awareness of this fact. The ECtHR found that there was no valid reason justifying the applicant’s exclusion from the hearing, particularly since it noted that during her interview with the judge of the R. County Court, the applicant did not demonstrate that her condition was such as to prevent her from directly engaging in a discussion of her situation.

The Court therefore found (at paragraph 160) that the competent national authorities failed to meet the procedural requirement necessary for the applicant’s involuntary hospitalisation, as they did not ensure that the proceedings were devoid of arbitrariness, as required under Article 5 § 1 (e) of the Convention.

Comment

This case makes particularly interesting reading in light of (1) the decisions in *YA* and *AJ* also discussed this month and the emphasis therein of the need – in different contexts – to ensure that Article 5(4) actually means something in the context of deprivation of liberty justified by reference to Article 5(1)(e); and (2) the question of whether P needs to be a party to all applications for judicial authorisation for deprivation of liberty, currently being considered by the Court of Appeal in *Re X*.

The judgment emphasises the importance of having *legal* – as opposed to generic advocacy or familial – assistance in Article 5(1)(e) proceedings. Moreover, the fact that those committed to care should not themselves have to take the initiative in obtaining such legal representation is another illustration of the positive obligation on detaining authorities to promote access to a lawyer in the absence of special circumstances.

We would also note in passing that, yet again, the Court has cited Article 14 of the CRPD (and, further, the reports of the Committee on the CRPD on Hungary and Austria and their comments upon Articles 14 and 15) without acknowledging that the Committee on the CRPD at least [considers](#) that Article 5(1)(e) is incompatible with Article 14 because it allows for detention on the basis of disability. This point was raised before, but not addressed by, the Supreme Court in *Cheshire West*, and will, we anticipate, have to be grappled with at some point (at which stage the rather different views of the UN Human Rights Committee, expressed in relation to the right to liberty in Article 9 of the ICCPR, will no doubt be prayed in aid: see, in particular, paragraph 19 of [General Comment 35](#)).

When (and when not) to anonymise

MX v Dartford & Gravesham NHS Trust & Ors [\[2015\] EWCA Civ 96](#) Court of Appeal (Moore-Bick Black and Lewison LJ)

Other proceedings – Civil

Summary

This decision of the Court of Appeal concerned the anonymisation of a child's name in clinical negligence proceedings. The first instance judge, approving a settlement agreement, had refused to make an order preventing publication of the child's name but did direct that her address should not be disclosed. The claimant, through her litigation friend, appealed.

The Court of Appeal cited the case of *Scott v Scott* [\[1913\] AC 417](#) in which the court had explained that judgments about wards of court and 'lunatics' were of a different nature to other proceedings:

“the jurisdiction over wards and lunatics is exercised by the judges as representing His Majesty as parens patriæ. The affairs are truly private affairs; the transactions are transactions truly intra familiam; and it has

long been recognized that an appeal for the protection of the Court in the case of such persons does not involve the consequence of placing in the light of publicity their truly domestic affairs."

However, now that most such decisions were taken pursuant to statute, the Court of Appeal considered that the above justification for anonymity was no longer sufficient, saying *"any exclusion of such proceedings from [the principle of open justice] therefore must be found in an overriding need to ensure that justice in the broader sense is done in the individual case."*

This requires in each case consideration of whether it is *necessary* to derogate from open justice, not merely a balancing of competing Article 8 and Article 10 rights. In the instant case, the first instance judge had set the bar too high by requiring the child's family to provide evidence of specific risks of tangible harm to the child, noting that *"[i]t may be difficult for a claimant's parents or litigation friend to put into words the effect that an invasion of privacy is likely to have on the family's life and whatever fears are expressed may not in the end be realised."*

Despite having stepped back from the approach in *Scott v Scott* earlier in its judgment as providing a generic basis for anonymisation, the Court concluded that the functions being carried out in approving a settlement agreement were of a different nature to the usual 'direct administration of justice', and that the public interest in ensuring those functions were carried out properly did not require the child's name to be made known. Thus:

"although each application will have to be considered individually, a limited derogation from the principle of open justice will normally be necessary in relation to approval hearings to enable the court to do justice to the claimant and his or her family by ensuring respect for their family and private lives. In some cases it may be possible to identify specific risks against which the claimant needs to be protected and if so, that will provide an additional reason for derogating from the principle of open justice, but we do not think that it is necessary to identify specific risks in order to establish a need for protection. The circumstances giving rise to the settlement will inevitably differ from case to case, but the interference with the right to private and family life will be essentially the same in almost all cases. It is sufficient in our view that the publication of the circumstances giving rise to the settlement would, in the absence of relief, involve injustice in the form of an interference with the article 8 rights of the claimant and his or her family."

The Court gave the following procedural guidance:

- (i) the hearing should be listed for hearing in public under the name in which the proceedings were issued, unless by the time of the hearing an anonymity order has already been made;
- (ii) because the hearing will be held in open court the Press and members of the public will have a right to be present and to observe the proceedings;
- (iii) the Press will be free to report the proceedings, subject only to any order made by the judge restricting publication of the name and address of the claimant, his or her litigation friend (and, if different, the names and addresses of his or her parents) and restricting access by non-parties to

documents in the court record other than those which have been anonymised (an “anonymity order”);

- (iv) the judge should invite submissions from the parties and the Press before making an anonymity order;
- (v) unless satisfied after hearing argument that it is not necessary to do so, the judge should make an anonymity order for the protection of the claimant and his or her family;
- (vi) if the judge concludes that it is unnecessary to make an anonymity order, he should give a short judgment setting out his reasons for coming to that conclusion;
- (vii) the judge should normally give a brief judgment on the application (taking into account any anonymity order) explaining the circumstances giving rise to the claim and the reasons for his decision to grant or withhold approval and should make a copy available to the Press on request as soon as possible after the hearing.

Comment

This judgment is of interest to Court of Protection practitioners on two fronts. First, it has implications for the evidence required to obtain anonymisation orders in medical treatment cases – evidence of specific harm to P may not be required, as the general approach should be that publication itself is an interference with P’s Article 8 rights. Secondly, it is relevant to the ongoing debate about transparency in the Court of Protection. The Court of Appeal noted that ‘quite rightly’, no-one had suggested that infant settlement approval hearings should take place in private. It is not difficult to imagine that in the future, Court of Protection hearings may follow a similar route: held in public, or with press access at least, but with anonymisation orders ‘normally necessary’.

Changes to CPR Part 21: costs payable by a child or protected party from a damages award

With effect from 6 April 2015, amendments are to be made to CPR Part 21 are made to address the growing number of applications at approval hearings for payment out of the child or protected party's damages to meet the success fee provided for in the conditional fee agreement or entered into between the litigation friend and the solicitor for the child\protected party. The rules are amended to reflect when and how a deduction from damages of a sum to meet any shortfall between the costs recoverable from the other party and the 'solicitor and own client' costs payable to the child or protected party's solicitors applies. The amendments are confined to those cases where the award or ordered do not exceed £25,000. Consequential amendments are made to Part 47, PD 21 and PD46.

Short Note: capacity to drive?

R (Hitchen) v Oxford Magistrates Court [\[2015\] EWHC 271](#) concerned the revocation of a driving licence. Mrs Hitchen was a 78 year old woman who had been involved in a car accident. As a result of her observed confusion at the scene of the accident, steps were taken by the DVLA to investigate her fitness to drive. Although she did not have any diagnosed mental disorder, the DVLA concluded that her poor performance on an on-road driving assessment was likely to be due to “age-related cognitive decline”.

The Magistrates Court held that the statutory requirements for revocation of the licence were made out, and Mrs Hitchen appealed to the High Court, which overturned their decision.

Simler J accepted that since there was evidence that Mrs Hitchen had performed well on tests of cognitive function including an MMSE and the Addenbrooke’s test, and since there was nothing in the DVLA’s guidance which suggested that the existence of a relevant disability could be inferred from an on-road driving assessment alone, the lower court’s decision had been unlawful. In light of the positive medical evidence provided by Mrs Hitchen, the decision was quashed.

The decision will be of interest to anyone working with people whose fitness to drive has been queried, as it sets out the relevant statutory scheme and the considerations to be applied.

The CQC and surveillance: guidance for families

Summary

The CQC has published guidance for the public ([here](#)) on the use of recording equipment for those receiving care services. It accompanies the [guidance](#) issued to providers of health and social care in December 2014. Given that use of such equipment is such a big step, the guidance emphasises that consideration should first be given to raising any concerns with the care service itself who should investigate them. Audio or visual recording involves a most delicate balance between having the peace of mind that loved ones are being properly care for and intrusion on privacy and dignity, not just of them but others. This in turn involves a difficult balance between competing areas of law.

The guidance emphasises the importance of ensuring that the person being recorded freely consents to it and, if they do, that the recording only takes place in private rooms. If the person lacks capacity to give such consent, then a best interests decision may be called for. The following considerations are given to reduce the legal risk and effect on people’s privacy:

- Make sure that the equipment is set up in a way that avoids recording shared areas of the care service outside of your, or your loved one’s, private room.
- Make sure that the equipment, and any recordings made, are only used for the purpose of monitoring and protecting your (or your loved one’s) care, welfare and safety.

- Consider how long you will use the equipment for (you should not use it indefinitely).
- Think carefully about who may be recorded and the effect on others.
- Keep recordings secure and make sure that they are not tampered with or shared with anyone who does not have a good reason to see them, for example, if you use a camera that sends images over the internet, make sure that you choose a secure password and do not share it with anyone.

Comment

Guidance from the regulator on such a delicate issue is most welcome. However, the apparent absence of law surrounding the issue is striking. To ensure compliance with Article 8 the interference in the person's private life must be in "in accordance with the law." In [J Council v GU and others](#) [2012] EWHC 3531, Mostyn J noted:

"... not every case where there is some interference with Art 8 rights in the context of a deprivation of liberty authorised under the 2005 Act needs to have in place detailed policies with oversight by a public authority... But where there is going to be a long-term restrictive regime accompanied by invasive monitoring of the kind with which I am concerned, it seems to me that policies overseen by the applicable NHS Trust and the CQC akin to those which have been agreed here are likely to be necessary if serious doubts as to Article 8 compliance are to be avoided."

The need for a clearly defined legal structure, for the protection of all concerned (including, almost importantly, those without capacity to consent to being filmed) is becoming ever more pressing.

Information access and sharing on behalf of a person with dementia

A very useful new [booklet](#) has been produced by the Alzheimer's Society providing information and advice to anyone wishing to share information with, or access information held by, a company, if the information relates to a person with dementia for whom they are caring.

Care Act appeals consultation

The [consultation](#) on the regulations to accompany s.72 Care Act 2014, establishing a mechanism for appeals against local authority decisions under Part 1 of the Act closes on 30 March (alongside the consultation on draft regulations and guidance needed to implement the cap on care costs). We would strongly urge you to respond, as the current proposals do not, in fact, give rise to an 'appeal' structure at all, in the sense that that word is conventionally understood. In reality, it is a codified version of a complaints process, with no ability for an independent person (or body) to provide a decision binding upon the local authority. If – as anticipated – the Court of Appeal in the [ACCG](#) appeal broadly confirms the conventional understanding of the limited jurisdiction of the Court of Protection, the current proposals as set out in the consultation will not serve as the mechanism by which those without capacity are enabled to

effect an appeal against care decisions taken by public bodies without recourse to the increasingly elusive Administrative Court.

Local Government Ombudsman's adult social care newsletter

The February issue of [ASC Matters](#), the Local Government's adult social care newsletter, is now available. It focuses on charging for residential care and includes summaries and links to a number of decisions relating to charging decisions taken in relation to those without capacity in material domains.

Law Society MHDC vacancies

The Mental Health and Disability Committee has two vacancies and is seeking candidates with legal and/or policy expertise in these areas or in safeguarding the interests of vulnerable clients.

The Committee is particularly keen to receive applications from the Office of the Official Solicitor, and individuals whose focus is on issues affecting children with disabilities, the provision of legal advice to NHS trusts and those working in elderly law.

Alex, a member of the Committee, can vouch both for the width and the interest of the work covered by the Committee (and the warmth of the welcome extended by members to him when he joined last year!).

Full details can be found [here](#) and the closing date for applications is 19 March 2015.

Mental Health Law Online Annual Review 2014

Jonathan Wilson, the indefatigable brains behind MHLO, has just published the MHLO's annual review for 2014, collating the materials added to his site in 2014. It can be bought for £10 (paperback) and £3 (Kindle) [here](#). The previous annual reviews (2011 - 2013) are also available for £5 paperback and £2 Kindle.

Book Review: Black Rainbow

[*Black Rainbow: How words healed me – my journey through depression*](#): Rachel Kelly (Yellow Kite, 2014: £16.99)²

This book does not relate to mental capacity in the sense that we normally use it in this Newsletter, but it is such a powerful memoir of the crippling effects of depression, and of one person's path through, that it undoubtedly merits a review here.

² Full disclosure: Alex is very grateful to Jordans for providing him with a copy of this for purposes of this (unpaid) review. We are always open to reviewing books in the area of mental capacity law and policy (broadly defined) – contact one of us with your suggestions and, ideally, a copy of the book!

Rachel Kelly was a successful *Times* journalist whose entire life changed shortly after the birth of her second child when she suffered the first of two major depressive crises. The book opens with the first of these crises, and tracks the course of her life in the years thereafter as she started to recover, sustained a second major crisis, and ultimately found a new and more stable path. During the course of her illness she came into contact with mental health services, spending a short period of time (it would appear informally) as a patient in a psychiatric hospital and being prescribed and taking the full gamut of modern day antidepressants. She also sought help in other ways, and is clear-eyed and interesting about the assistance (or otherwise) she found from different practitioners. Her greatest solace, however, was in poetry, and her book contains 40 poems (woven into the text) that were of particular importance to her on her journey.

As strange as it may sound, Rachel Kelly was, in many ways, extremely lucky. The crises she suffered were intense, but she had the support of a loving and loyal family, as well as the financial resources to engage nannies who provided practical assistance at the points that she most needed it. However, as she is at pains to point out, many of the tools that she found to be of most assistance in managing depression need not be expensive, either in terms of time or money: poetry is free (at least until the libraries are all closed) and breathing techniques, again, come without a price tag.

Some might wonder why we need more additions to the “depression memoir” genre. However, as with all good journalists, Rachel Kelly seeks to use her personal story to illuminate the bigger picture, and footnotes liberally, but not intrusively, deployed through the book provide discussion of the extent to which her experiences reflect those of others and suggestions for further reading or assistance. As she discovers when she starts to share her experiences with others, each story of serious and crippling depression is intensely personal, but its manifestations are often strikingly universal. This book therefore serves both as a powerful story of her personal journey but also as a potential tool to help others facing the same challenges (a tool, we note, which has direct effects as the author’s proceeds go to mental health charities).

Alex Ruck Keene

Sheriff Baird retires – end of an era

Sheriff John A Baird is expected to sit in Glasgow Sheriff Court for the last time on 24th March 2015. His contribution to the development of the new jurisdiction introduced by the Adults with Incapacity (Scotland) Act 2000 has been vast. None of his judicial colleagues would be likely to dispute or begrudge the assertion that it has greatly exceeded that of any other member of Scotland’s judiciary, and because it took place during the formative years of the jurisdiction, it may well never be matched. His achievement is comparable to that of Lord Penrose in developing the specialist commercial court in the Court of Session.

John Baird was educated at St Aloysius College, Glasgow and Glasgow University. He was admitted as a solicitor in 1976, and as an advocate in 1986, practising mainly in the areas of personal injuries, administrative law (including licensing law), and the criminal appeal court. He was appointed as a temporary sheriff in 1992 and as a full-time sheriff in 1996. As a personal injury lawyer he had always had an interest in psychiatric illness as a consequence of personal injury. Early in his judicial career he developed an interest in the area of mentally disordered offenders. He describes himself as never comfortable with former legislation which involved the court in the civil law aspects of mental health issues. With the 2000 Act, he saw the opportunity to try to combine his interests to ensure, within the jurisdiction of Glasgow Sheriff Court, consistency of approach, notwithstanding that despite widespread support the recommendation of the Scottish Law Commission that this jurisdiction be entrusted to specialist sheriffs had not been taken up. He was attracted in particular by the opportunity given to the court to help people, principally those who came to court under this jurisdiction, but also in trying to provide a prompt and efficient service to lawyers involved in processing this work. He says that he has found this very rewarding.

Part 6 of the 2000 Act, governing guardianship and intervention orders, came into force on 1st April 2002. It quickly became apparent to Sheriff Baird that the volume of such work was going to grow substantially and the court needed to organise itself to deal with that work properly. It was his own suggestion that one sheriff should become principally responsible, and he proceeded to develop the processes which now exist in Glasgow Sheriff Court with the aim of enabling applications to be processed effectively and efficiently. He developed the process of “front loading” the requirements for applications, as eventually enshrined in the Glasgow Practice Note. In consequence the Glasgow court has been able to achieve a rate of disposal of incapacity cases at first calling which has varied in a narrow band from 88% to 90%. The court has also been able, partly through the effective use of specialist safeguarders, to minimise the number of disputed cases, and in particular to minimise the number of contested proofs. He generously acknowledges the contribution of solicitors regularly practising in the jurisdiction to achieving these outcomes.

This is not the place for, nor would space accommodate, a full description of his contribution to adult incapacity jurisprudence. It is unlikely that any account even of any one aspect of that jurisprudence will not include one or more of his decided cases, which have in particular developed the range of the use of the jurisdiction under Part 6 of the 2000 Act, the use of procedure to obtain directions under section 3(3), and the interface with other jurisdictions, notably criminal and mental health law. The practicality of his approach perhaps has derived from his early years as a solicitor, for example when sending parties off to

check the file notes when a Will was made, in a case where it was suggested that testamentary provision be varied to take account of changed circumstances. He has supported the need for high standards of professionalism where circumstances of a particular adult have required this, on occasions appointing a solicitor as guardian and on another granting an application by an experienced accountant acting as financial guardian for additional remuneration. He has not hesitated to respond robustly when an adult's interests have been poorly served, whether by relatives in situations of conflict more interested in their own interests than those of the adult, or poor professional services in drafting a Will which clearly did not effectively reflect the adult's intentions, or a power of attorney document found to be "not fit for purpose". Over the years he has given much encouragement, and so far as properly possible from the bench assistance, to solicitors developing an interest in this work.

He has assisted developments in other courts similar to his own pioneering work, notably and recently in Edinburgh Sheriff Court, and it is to be hoped that the possibilities now opened up by the Courts Reform (Scotland) Act 2014 will allow his pioneering work to be developed further, and to be formalised. One of his regrets is that, in comparison with similar jurisdictions in other countries, Scotland's adult incapacity jurisdiction has not normally directly involved members of the senior judiciary, so that the work of the sheriff court in this most important area of activity has not perhaps achieved the profile which it might deserve.

The Newsletter wishes him well as he sets off to pursue his cultural and historical interests in the United States, taking in part of the Masters Golf Competition at Augusta, using accumulated leave before he moves officially into retirement in the middle of April.

Adrian D Ward

Financial matters – new good practice guidance

On 12th February 2015 the Mental Welfare Commission published new guidance entitled "Managing the finances of people who are unable to manage their own money – a new guide". The guidance has been produced by the Commission in consultation with the Office of the Public Guardian and the Care Inspectorate. It is available [here](#), or in hard copy by request to the Commission at Thistle House, 91 Haymarket Terrace, Edinburgh EH12 5HE.

The guidance is intended for professionals such as doctors, nurses, social workers and care home managers. It includes in "quick guide" form the whole range of options from informal arrangements and DWP appointeeships through continuing powers of attorney to the methods available under Parts 3, 4 and 6 of the Adults with Incapacity (Scotland) Act 2000. The quick guide is followed by more detailed information, with links to relevant provisions of the Act and relevant codes of practice. Sensibly, the use of trusts is also covered, again with many appropriate links. The document concludes with some informative case examples.

Adrian D Ward

Deprivation of liberty, adults with incapacity and Scotland: the ongoing debate

Introduction

At the time of writing the Scottish Government's response is still awaited to the Scottish Law Commission's October 2014 report and recommendations³ for legislative change endeavouring to address the deprivation of liberty and Article 5 ECHR compatibility issues raised by both the European Court of Human Rights *Bournemouth* and UK Supreme Court *Cheshire West* rulings.

The Mental Welfare Commission for Scotland will also shortly be publishing its updated guidance on *Deprivation of Liberty*. It has already issued guidance on s.13ZA Social Work (Scotland) Act 1968 in response to the *Cheshire West* ruling⁴.

Whether the Scottish Law Commission's recommended amendments to the Adults with Incapacity (Scotland) Act 2000 will completely close the '*Bournemouth* gap' remains to be seen. Some questions arise about these and for a full discussion of the proposals please see the October 2014 and December 2014 issues of this newsletter. However, amongst other things, consideration should be given as to whether or not the proposals will fully meet the procedural safeguards required under Article 5(4) ECHR where persons lacking capacity to consent to a deprivation of liberty are concerned, notably in the realm of automatic judicial review.

European Court of Human Rights - special procedural safeguards and persons with incapacity

In rulings involving persons who had been declared to lack capacity the European Court of Human Rights (the Court) has emphasised that forms of judicial review may differ between jurisdictions but that where such review is not automatic there must be the ability to apply periodically for judicial review of indefinite or lengthy periods of detention⁵. Moreover, special procedural safeguards may be necessary where a person lacks capacity to fully act for themselves⁶. This is particularly pertinent where a court did not initiate the placement⁷.

The Court is reluctant to specify exactly what these special safeguards should look like and acknowledges that automatic judicial review might not be the only means of providing such safeguards⁸. However, one should not overlook the fact that a person who lacks capacity may be unable to instigate judicial review and

³ Scottish Law Commission (2014) [Report on Adults with Incapacity](#), Report No.240, Edinburgh: The Stationery Office (the Report)

⁴ Mental Welfare Commission for Scotland (2014), [Mental Welfare Commission response to queries related to when to use s13ZA v Guardianship following the Cheshire West Supreme Court decision](#).

⁵ *Stanev v Bulgaria* (2012) 55 EHRR 22 at paras 168-171, *DD v Lithuania* [2012] ECHR 254 at para 163 and *MH v UK* (2013) ECHR 1008 at para 77.

⁶ *Stanev* at para 179, *DD* at para 163 and *MH* at para 77. See also *Megyeri v Germany* (1992) ECHR 49 at para 22.

⁷ *DD* at paras 164-165.

⁸ *MH* at para 82.

there may not be anyone else who is willing or able to do this on their behalf. It is therefore difficult to envisage that anything other than automatic judicial review will meet Article 5(4) requirements. Article 5(4) case law, as developed, makes it clear that the procedural safeguards must be real and effective⁹ and to guarantee the right for an individual who lacks capacity “as nearly as possible as practical and effective...as it is for other detainees.”¹⁰ It must not be an illusory and theoretical right but one which practically and actively assists the individual in the appeal process¹¹. The individual must not be reliant on the person who authorised the deprivation of liberty to challenge its lawfulness¹². Moreover, a third party may be able to initiate such judicial review provided only that they are subject to a non-discretionary duty to do¹³.

SLC recommendations

Broadly, the SLC recommends amendments to the Adults with Incapacity Act to allow for:

1. Preventing an adult with incapacity who is in hospital and receiving medical treatment, or being assessed as to whether medical treatment is required, from going out of hospital or some part of an NHS or private hospital¹⁴.
2. The authorisation of significant restriction of liberty in relation to (1) placement in a care home or accommodation arranged by an adult placement service¹⁵; and (2) short term care¹⁶.
3. The ability to apply to the sheriff in relation to an unlawful detention of an adult with incapacity¹⁷.

The SLC acknowledges¹⁸ that the *Stanev* ruling indicated that substitute decision makers may be able to consent to a deprivation of liberty on behalf of an incapacitated person. However, it equally recognises that the case law is as yet not sufficiently developed to rely on this entirely. It accordingly provides for various safeguards. Specifically, in terms of the availability of judicial review, these are:

- a. In the case of the authorisation of preventing an adult with incapacity from going out of hospital:

⁹ *Stanev* at para 170, *DD* at para 165 and *MH* at paras 82-86.

¹⁰ *MH* at para 82.

¹¹ *MS v Croatia (No.2)* (2015) ECHR 196.

¹² *DD* at para 166

¹³ *Stanev* at para 174, *Shtukaturov v Russia* (2008) ECHR 223 at para 124 and *MH* at paras 92 and 94.

¹⁴ s.50A of the draft Bill accompanying the Report.

¹⁵ By reason of vulnerability or need resulting from infirmity, ageing, illness, disability, mental disorder, or drug or alcohol dependency.

¹⁶ s.52 of the draft Bill accompanying the Report.

¹⁷ S.52J draft Bill accompanying the Report.

¹⁸ Paras 3.56-3.60 of the Report.

- i. The ability for the patient or anyone claiming an interest in their personal welfare to apply to the sheriff for an order setting an end date for such a measure¹⁹ or to review any action taken in reliance on the authorising certificate²⁰.
 - ii. Noting that the possibility to challenge administration of medication for confining the person to hospital under the existing s52 (Appeal against decision against medical treatment) of the Act.
- b. In the case of authorisation of significant restriction of liberty by welfare attorneys or guardians or the sheriff court, such of restriction will last for one year only (but this can be renewed).
- c. The adult or any person claiming an interest in the adult's personal welfare may apply to the sheriff in relation to an unlawful detention of an adult with incapacity.

However, whilst acknowledging the potential resourcing issues involved, there is an absence of automatic judicial review to challenge the legality of the deprivation of liberty in each case. As mentioned above, this may not therefore meet the 'special procedural requirements' identified in related ECHR case law for persons lacking capacity who are unable, or have no one else able/willing, to institute judicial review proceedings. Moreover, where the authorisation to a significant restriction of liberty, and its renewal, is granted by a welfare attorney or guardian the potential thus exists for indefinite deprivation of liberty to occur without 'real and effective' safeguards being available. Admittedly, where such situations arise the decision to authorise the deprivation of liberty will undoubtedly be made solely with the objective of benefitting the individual concerned. However, we must also be mindful of the cases where this may not be the case and this is where the protective measures of Article 5 are of fundamental importance.

It will be interesting to see how this debate, and any related implementation, evolves as well as the ongoing developments in England and Wales.

Jill Stavert

Court reform timetable

The Lord President, Lord Gill, set out the timetable for reform of the justice system following upon the Courts Reform (Scotland) Act 2014 in a major address to the Holyrood Digital Justice Conference on 28th January 2015, available [here](#). It contains much of interest for practitioners engaged in the adult incapacity jurisdiction, but does not once mention that jurisdiction and indeed is notable for what it does not say about that jurisdiction. Thus it could have been mentioned, but is not, in the following paragraph:

"In consequence of the reforms, the shrieval bench will be relieved of the burden of minor criminal work. The sheriffs will have the opportunity to pursue specialisms in the field of civil law, such as family law and commercial law, and to specialise in the criminal field in cases of serious crime under solemn procedure. This

¹⁹ s.50C draft Bill.

²⁰ s.50A(6) draft Bill.

will present the sheriffs with the demanding task of improving their judicial skills and in accepting a high degree of responsibility; but that is a challenge that any sheriff should be glad to accept.”

The following passage resonates with the preceding item on the work of Sheriff Baird:

“The reforms seek to remedy one of the besetting problems in our courts in modern times – that of maximising the productive use of available court time. The three keys to the successful implementation of the reforms will be judicial specialisation; judicial case management and flexibility of shrieval deployment.”

A welcome feature of the reforms is that there will be a single Sheriff Principals Appeal Court, so that there will no longer be a system in which the first level of appeal from the sheriff will result in a decision binding only within one sherriffdom. It is to be welcomed that Sheriff Principal Mhairi Stephen QC has been appointed President to the Sheriff Appeal Court, which will first be established to deal with criminal cases and from January 2016 will have jurisdiction also in civil cases. Sheriff Stephen is reported to have been supportive of the modernisation of adult incapacity procedures in Edinburgh Sheriff Court – see the discussion of the Practice Note in our February Newsletter [here](#).

Adrian D Ward

Further Devolution Command Paper

In January 2015 the Secretary of State for Scotland presented to Parliament a Command Paper entitled “Scotland in the United Kingdom: an enduring settlement”. It included draft clauses for amendments to the Scotland Act. Disappointingly, a matter which has caused concern and difficulty in relation to Scottish adult incapacity law has not been addressed. The new arrangements would give legislative force to the Sewel Convention, the proposed wording being to the effect that:

“it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.”

The problem is that although provisions are proposed (paragraph 31 of the Command Paper) for involving Scottish Ministers in agreeing the UK position in EU negotiations, there is no equivalent to the Sewel Convention where the UK Government enters an International Instrument which has direct implications for Scots law in devolved matters. Thus the UN Convention on the Rights of Persons with Disabilities has the potential to impact seriously and significantly upon Scotland’s Adults with Incapacity (Scotland) Act 2000, and other laws in that area, but it appears that the Scottish position was not taken into account, and there was certainly no meaningful consultation in Scotland, regarding the negotiation of that Convention, the entry into it, or the decision to ratify without reservations. There is a risk of the same happening in relation to any other International Instrument.

Adrian D Ward

Assisted Suicide (Scotland) Bill – Update

In the [January 2014](#) newsletter Jill Stavert reported that the Assisted Suicide (Scotland) Bill had been introduced into the Scottish Parliament in November of 2013. Now, over one year later, the Bill remains at Stage 1 and the Health and Sport Committee has stopped taking evidence. Commissioned by the Health and Sport Committee, an 'Analysis of submissions of evidence on the Assisted Suicide (Scotland) Bill'²¹ has, however, been published which further highlights the significant human rights concerns in relation to the Bill which require further consideration.

The European Convention on Human Rights (ECHR) and Assisted Suicide

The European Court of Human Rights (ECtHR/the Court) has ruled that the right to life under Article 2 does not encompass a right to die.²² Likewise, the Court has not declared that Article 8, right to private and family life either requires states to have legislation permitting assisted suicide or prohibits the enactment of such legislation. However, the Court has stated that, *'...an individual's right to decide by what means and at what point his or her life will end, provided he or she is capable of freely reaching a decision on this question and acting in consequence, is one of the aspects of the right to respect for private life within the meaning of Article 8 of the Convention.'*²³ Nevertheless, owing to the lack of consensus across the Council of Europe, the margin of appreciation afforded to states in this regard is wide and restrictions may be justified based primarily on the state's assessment as to the *'...risk and likely incidence of abuse if the general prohibition on assisted suicides were relaxed or if exceptions were to be created.'*²⁴

Owing to the wide margin of appreciation afforded to states in this area, it is therefore unlikely that the Court would deem any Assisted Suicide (Scotland) Act to be fundamentally incompatible with the Convention. However, it may take issue with the particular statutory provisions. In *Gross v Switzerland*, its most recent pronouncement on assisted suicide, the Court held that *'...Swiss law, while providing the possibility of obtaining a lethal dose of sodium pentobarbital on medical prescription, does not provide sufficient guidelines ensuring clarity as to the extent of this right.'*²⁵ The Court here was concerned with legal certainty and the clarity of the extent of the right to assisted suicide provided for under Swiss law. Thus, it is imperative that any Scottish law is sufficiently clear and precise, and clearly demarcates the limits of the provisions, while also providing robust safeguards.

The following sections will explore some aspects of the Bill which require further consideration.

Assisted Suicide (Scotland) Bill – Section 12 – Capacity and Mental Disorder

The 'Analysis of submissions of evidence on the Assisted Suicide (Scotland) Bill' (hereafter 'Analysis of Submissions') highlights that there is widespread concern and confusion regarding how the Bill would apply

²¹ Scottish Parliament, 'Analysis of submissions of evidence on the Assisted Suicide (Scotland) Bill' Michelle Rostant-Bell, Commissioned by the Scottish Parliament Health and Sport Committee (2014) http://www.scottish.parliament.uk/S4_HealthandSportCommittee/Reports/HS_Assisted_Suicide_Report.pdf (hereafter 'Analysis of Submissions')

²² *Pretty v. the United Kingdom* (2346/02) (2002) 35 EHRR 1 para.40

²³ *Haas v Switzerland* (31322/07) (2011) 53 EHRR 33 para.51

²⁴ *Pretty v. the United Kingdom* (2346/02) (2002) 35 EHRR 1 para.74

²⁵ *Gross v Switzerland* (67810/10) (2013) 58 EHRR 7 para.67

to individuals with mental disorder. Under s.12(1)(a) of the Bill it is provided that a person has capacity to make a request for assisted suicide if the person ‘...is not suffering from any mental disorder (within the meaning of section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13)) which might affect the making of the request...’. Consequently, it appears that anyone with a mental disorder as defined under the 2003 Act is automatically excluded from using the provisions of the legislation. While this may be viewed as a safeguard, it raises questions regarding the discriminatory nature of such provisions.

As is widely acknowledged, the presence of mental disorder does not automatically equate with incapacity. Someone with a mental disorder, be that a mental illness, personality disorder or learning disability, may retain capacity, or indeed experience fluctuating capacity. To exclude someone with a mental disorder from seeking assisted suicide may give rise to a violation of Article 14 ECHR, prohibition of discrimination, on the basis of disability in connection with Article 8.²⁶

As mentioned in the January 2014 edition of this newsletter, the capacity provisions in the Bill should be seen in light of the recent UN Convention on the Rights of Persons with Disabilities (CRPD) developments. The General Comment published by the Committee on the Rights of Persons with Disabilities in 2014, interprets Article 12, right to equal recognition before the law, as a right of all persons to possess full legal capacity and calls for assessments of mental capacity to be abolished, as well as substituted decision-making.²⁷ Therefore, under this interpretation, the provisions of the Bill requiring individuals requesting assisted suicide to have capacity would be incompatible with Article 12. The removal of the capacity requirements from the Bill would, however, raise significant opposition, particularly from those who are concerned that the Bill, as it currently stands, contains insufficient safeguards. It should also be noted that while the CRPD is not incorporated into UK law, enactments of devolved legislation can be prevented if they are in contravention of the UK’s international obligations.²⁸

Regardless of CRPD considerations, there appears to be another aspect of section 12 of the Bill which casts doubt on the exclusion of individuals with mental disorder from seeking assisted suicide. Namely, that capacity is considered to be lacking in those with a mental disorder ‘which might affect the making of the request.’ It is unclear whether this means that an individual with a mental disorder which does not affect their making of the request for assistance would be permitted to make such a request. This would evidently undermine any safeguard designed to protect vulnerable mentally ill persons from taking their own life.

‘Life-Shortening’ Illnesses and Conditions

²⁶ There is also the potential for discrimination claims to be raised in regard of persons who meet the criteria but are unable to complete the physical act of suicide without assistance.

²⁷ Committee on the Rights of Persons with Disabilities, [General Comment No. 1](#) (2014) Article 12: Equal recognition before the law, adopted 11 April 2014

²⁸ s.35 Scotland Act 1998

The use of the term 'life shortening' in relation to illnesses or conditions which may qualify an individual for assisted suicide, is also raised as a contentious issue in the 'Analysis of Submissions'. Those in support of the Bill were generally content with this wording, however others suggested that it should be extended to also include those who consider their lives to be 'intolerable'.²⁹ Those opposing the Bill were critical of the inclusion of 'life-shortening' illnesses or conditions as one of the criteria for requesting assistance, on the basis that this could be interpreted to include a vast range of illnesses and conditions, including disability and mental illness.³⁰ In its submission, the Law Society of Scotland, observed that for people with major types of mental illness, their condition can often impact upon their life expectancy by between 10 and 20 years.³¹ It is therefore not implausible that the argument could be made that a mental disorder constitutes a 'life-shortening' illness. If this is combined with the previously mentioned interpretation of section 12(1)(a), it follows that an individual with a mental disorder, who can show that their illness/condition will be life-shortening and that the mental disorder itself is not affecting the making of the request, may be able to seek assisted suicide.

Article 2 ECHR and the Need for Safeguards

The above considerations, while casting doubt over whether the provisions of the Bill are sufficiently clear, also raise issues in terms of whether the Bill provides sufficient safeguards for the protection of Convention rights. In relation to assisted suicide the ECtHR has stated that '*...it is appropriate to refer, in the context of examining a possible violation of Article 8, to Article 2 of the Convention, which creates for the authorities a duty to protect vulnerable persons, even against actions by which they endanger their own lives...*'³² It is considered that individuals with mental disorder would be considered 'vulnerable persons' by the Court.

In this regard, the 'Analysis of Submissions' highlights the widespread unease surrounding the lack of provision for psychiatric assessment within the Bill.³³ Rather, the Bill makes provision for medical practitioners endorsing the first and second requests for assistance to provide statements which specify that they are of the opinion that: the person has capacity; that the person has a terminal or life-shortening illness or condition; and that the person's conclusion that their quality of life is unacceptable is not inconsistent with the facts known to the practitioner.³⁴ As previously noted, there are issues with the provisions concerning capacity which may affect their robustness as safeguards. In addition, the 'Analysis of Submissions' conveys that respondents considered the basis for assessment of capacity to be unclear, in that there are inconsistencies between the definition in the Bill, the definition of incapacity under the Adults with Incapacity (Scotland) Act 2000 and the 'significantly impaired decision-making ability' test under the Mental Health (Care and Treatment) (Scotland) Act 2003.³⁵

²⁹ 'Analysis of Submissions' p.25

³⁰ 'Analysis of Submissions' p.25

³¹ Law Society of Scotland, 'Assisted Suicide (Scotland) Bill' [submission](#).

³² *Haas v Switzerland* (31322/07) (2011) 53 EHRR 33 para.54

³³ 'Analysis of Submissions' p.3

³⁴ s.9(2) and s.11(2)

³⁵ 'Analysis of Submissions' p.28

Thus, owing to the questionable effectiveness of the capacity requirements within the Bill, and the lack of a need for psychiatric assessment, the Bill could potentially be incompatible with the ECHR. In *Haas v. Switzerland* the Court stated that ‘...the risks of abuse inherent in a system that facilitates access to assisted suicide should not be underestimated...the right to life guaranteed by Article 2 of the Convention obliges States to establish a procedure capable of ensuring that a decision to end one’s life does indeed correspond to the free will of the individual concerned.’³⁶ The Court then went on to find that the requirement for a medical prescription to be issued on the basis of a ‘full psychiatric assessment’ ensures compliance with this obligation.³⁷ The implications of not requiring a psychiatric assessment are therefore potentially problematic. In essence, the failure to include the need for a psychiatric assessment may mean that the Bill provides insufficient protections for ensuring that a decision to end one’s life truly reflects the will of the person, particularly for individuals with mental disorder.

In connection with the capacity requirement, it should also be noted that there is no requirement for a capacity assessment for the completion of a preliminary declaration under section 4 of the Bill. It is considered that this omission may leave vulnerable persons open to undue influence and also contributes to the conclusion that there is insufficient protection for those with mental disorder considering assisted suicide.

Conclusion

Regardless of the moral and ethical debate surrounding assisted suicide, any legal provisions sanctioning such acts must contain sufficiently robust safeguards in order to achieve a balance between protecting the right to life under Article 2 and personal autonomy protected by Article 8. For persons with mental disorder, assisted suicide raises particularly difficult questions surrounding capacity, the potential for undue influence and the protection of potentially vulnerable individuals. The above considerations are intended to raise just some of the potential human rights implications of the Bill which require further consideration.

Jill Stavert and Rebecca McGregor, Research Assistant, Centre for Mental Health and Incapacity Law, Rights and Policy, Edinburgh Napier University

³⁶ *Haas v Switzerland* (31322/07) (2011) 53 EHRR 33 para.58

³⁷ *Ibid*

Conferences at which editors/contributors are speaking

The National Autistic Society's Professional Conference

Tor will be speaking at this conference, to be held on 3 and Wednesday 4 March in Harrogate. Full details are available [here](#).

DoLS Assessors Conference

Alex will be speaking at Edge Training's annual DoLS Assessors Conference on 12 March. Full details are available [here](#).

Elderly Care Conference 2015

Alex will be speaking at Browne Jacobson's Annual Elderly Care Conference in Manchester on 20 April. For full details, see [here](#).

'In Whose Best Interests?' Determining best interests in health and social care

Alex will be giving the keynote speech at this inaugural conference on 2 July, arranged by the University of Worcester in association with the Worcester Medico-Legal Society. For full details, including as to how to submit papers, see [here](#).

Editors

Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Anna Bicarregui
Simon Edwards (P&A)

Scottish contributors

Adrian Ward
Jill Stavert

Advertising conferences and training events

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

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David Barnes

Chief Executive and Director of Clerking
david.barnes@39essex.com

Alastair Davidson

Senior Clerk
alastair.davidson@39essex.com

Sheraton Doyle

Practice Manager
sheraton.doyle@39essex.com

Peter Campbell

Practice Manager
peter.campbell@39essex.com

London 39 Essex Street, London WC2R 3AT
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

Manchester 82 King Street, Manchester M2 4WQ
Tel: +44 (0)161 870 0333
Fax: +44 (0)20 7353 3978

Singapore Maxwell Chambers, 32 Maxwell Road, #02-16,
Singapore 069115
Tel: +(65) 6634 1336

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Editors

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Neil Allen
Annabel Lee
Simon Edwards (P&A)

Scottish contributors

Adrian Ward
Jill Stavert

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Alex Ruck Keene
alex.ruckkeene@39essex.com

Alex been recommended as a leading expert in the field of mental capacity law for several years, appearing in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively about mental capacity law and policy, works to which he has contributed including 'The Court of Protection Handbook' (2014, LAG); 'The International Protection of Adults' (forthcoming, 2015, Oxford University Press), Jordan's 'Court of Protection Practice' and the third edition of 'Assessment of Mental Capacity' (Law Society/BMA 2009). He is an Honorary Research Lecturer at the University of Manchester, and the creator of the website www.mentalcapacitylawandpolicy.org.uk. **To view full CV click here.**



Victoria Butler-Cole
vb@39essex.com

Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. She previously lectured in Medical Ethics at King's College London and was Assistant Director of the Nuffield Council on Bioethics. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA 2009), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). **To view full CV click here.**



Neil Allen
neil.allen@39essex.com

Neil has particular interests in human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Neil is the Deputy Director of the University's Legal Advice Centre and a Trustee for a mental health charity. **To view full CV click here.**



Annabel Lee
annabel.lee@39essex.com

Annabel appears frequently in the Court of Protection. Recently, she appeared in a High Court medical treatment case representing the family of a young man in a coma with a rare brain condition. She has also been instructed by local authorities, care homes and individuals in COP proceedings concerning a range of personal welfare and financial matters. Annabel also practices in the related field of human rights. **To view full CV click here.**



Simon Edwards
simon.edwards@39essex.com

Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. **To view full CV click here.**



Adrian Ward
adw@tcyoung.co.uk

Adrian is a practising Scottish solicitor, a partner of T C Young LLP, who has specialised in and developed adult incapacity law in Scotland over more than three decades. Described in a court judgment as: *“the acknowledged master of this subject, and the person who has done more than any other practitioner in Scotland to advance this area of law,”* he is author of *Adult Incapacity, Adults with Incapacity Legislation* and several other books on the subject. **To view full CV click here.**



Jill Stavert
J.Stavert@napier.ac.uk

Dr Jill Stavert is Reader in Law within the School of Accounting, Financial Services and Law at Edinburgh Napier University and Director of its Centre for Mental Health and Incapacity Law Rights and Policy. Jill is also a member of the Law Society for Scotland’s Mental Health and Disability Sub-Committee, Alzheimer Scotland’s Human Rights and Public Policy Committee, the South East Scotland Research Ethics Committee 1, and the Scottish Human Rights Commission Research Advisory Group. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2013 updated guidance on Deprivation of Liberty) and is a voluntary legal officer for the Scottish Association for Mental Health. **To view full CV click here.**