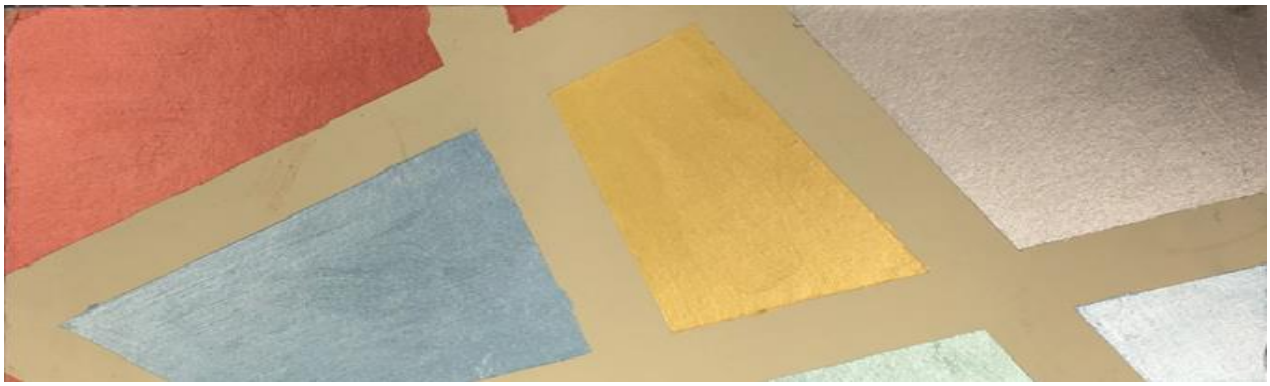

Welcome to the October 2022 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: Capacity to make decisions regarding hoarding, parental consent for deprivations of liberty, and Article 2 and informed consent.

(2) In the Property and Affairs Report: A new guidance notes on selling properties;

(3) In the Practice and Procedure Report: The Court of Appeal weighs in on the test for injunctions in the Court of Protection, and a new Civil Justice Council working group considers litigation capacity in civil proceedings;

(4) In the Wider Context Report: Withdrawal of treatment; jurisdiction of the Ombudsman; mental capacity and Article 14 status; and 'Shedinars' galore.

(5) In the Scotland Report: An update on the Mental Health Law Review.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also subscribe to this Report, and where you can also find updated versions of both our capacity and best interests guides.

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The picture at the top, "*Colourful*," is by Geoffrey Files, a young autistic man. We are very grateful to him and his family for permission to use his artwork.

Contents

HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

Hoarding: capacity and best interests

AC and GC (Capacity: Hoarding: Best Interests) [2022] EWCOP 39) (15 August 2022) (HHJ Clayton)[1]

Best interests – care
Best interests – property and affairs
Mental capacity – care

Summary

In *AC and GC*, HHJ Clayton was concerned with two individuals: AC, 92, and her son, GC. The court considered whether they lacked capacity to make decisions about their items and belongings.

An application had been made for an order that AC should be moved from her home where she was living with GC to a respite placement so that the property could be cleaned and made safe after a long period of 'hoarding.' The local authority then issued proceedings in relation to GC, seeking an order requiring him to leave the home as well to allow for it to be cleaned.

The issues for consideration, at this hearing, were:
(1) whether GC had capacity to:
    a. Manage his own property and affairs;
    b. Manage AC's property and affairs;
    c. Make decisions regarding his items and belongings;
    d. Make decisions regarding AC's items and belongings;
(2) whether AC should return home for a trial period, receiving a package of care;
(3) whether to appoint a deputy for AC's property and affairs.

The parties had reached a consensus (inter alia) that GC lacked capacity to make decisions regarding his own items and belongings, based upon the expert evidence of Professor Salkovskis; and the court accepted that analysis.

The following information was identified as relevant to the decision in respect of one's items and belongings [para 14]:

(1) Volume of belongings and impact on use of rooms: the relative volume of belongings in relation to the degree to which they impair the usual function of the important rooms in the property for the individual concerned (and other residents in the property) (e.g. whether the bedroom is available for sleeping, the kitchen for the preparation of food etc). Rooms used for storage (box rooms) would not be relevant, although may be relevant to issues of (3) and (4).

(2) Safe access and use: the extent to which the individual concerned (and other residents in the property) are able or not to safely access and use the living areas.

(3) Creation of hazards: the extent to which the accumulated belongings create actual or potential hazards in terms of the health and safety of those resident in the property. This would include the impact of the accumulated belongings on the functioning, maintenance and safety of utilities (heating, lighting, water, washing facilities for both residents and their clothing). In terms of direct

[1] Neil having appeared in this matter, he has not contributed to this note.

hazards this would include key areas of hygiene (toilets, food storage and preparation), the potential for or actual vermin infestation and risk of fire to the extent that the accumulated possessions would provide fuel for an outbreak of fire, and that escape and rescue routes were inaccessible or hazardous through accumulated clutter.

(4) Safety of building: the extent to which accumulated clutter and inaccessibility could compromise the structural integrity and therefore safety of the building.

(5) Removal/disposal of hazardous levels of belongings: that safe and effective removal and/or disposal of hazardous levels of accumulated possessions is possible and desirable on the basis of a "normal" evaluation of utility.

The court determined that it was in AC and GC's best interest to enable the family to be supported to have house-clearing and cleaning services enter the property to clean it and make it safe to occupy.

The issue in dispute was whether it was in AC's best interests for a trial to take place at home. One of the principal issues was the risk that GC would continue to hoard (and relatedly (i) the impact of his mental health if items were taken away and (ii) the care package at home would breakdown because of the conditions in the house). Professor Salkovskis therefore provided further evidence to the court in respect of the interactions between GC's obsessive compulsive disorder and hoarding disorder.

The Local Authority's view was that the risk of placement breakdown was too great and that AC should therefore remain in the care home. The Official Solicitor, on AC's behalf, supported a trial at home with a number of conditions on to GC (given he had litigation capacity).

Whilst acknowledging that a trial at home was not without risk, HHJ Clayton was ultimately not satisfied that a final placement at the care home would be an appropriate and justifiable interference with AC's article 8 rights.

Comment

The judge observed that, particularly in light of *A Local Authority v JB* [2021] UKSC 52, no declaration was ultimately required in respect of GC managing his own property and affairs, because there was no need for any deputyship order in respect of his own finances and he had disclaimed his lasting power of attorney for AC. The Supreme Court in *JB* had emphasised the importance of (1) identifying the precise matter upon which the person's decision is required; and (2) identifying the information relevant to the decision.

Parental consent to deprivations of liberty

Lincolnshire County Council v TGA & Ors [2022] EWHC 2323 (Fam) (17 August 2022) (Lieven J)

Article 5 ECHR -"Deprivation of liberty"

Article 5 ECHR – Children and young persons

Two recent cases appeared in quick succession considering whether parents could consent to a child's deprivation of liberty; the second took into account the holdings in the first. We consider each in turn.

Summary

In *Lincolnshire County Council v TGA*, a 14-year-old boy with epilepsy, autism, Attention Deficit Disorder and global developmental delay was accommodated by the local authority under s.20 of the Children Act 1989 with the consent of his testamentary guardians. The issue was "*whether K is deprived of his liberty*" and "*whether the testamentary guardians can consent to such a deprivation*". It was common ground that it would make no difference if his parents were alive and themselves exercising parental responsibility. In case law terms, the issue was whether the decision in *Re D (Deprivation of Liberty)* [2015] EWHC 922 (Fam) (which held that parents could consent to the confinement of a child under 16) had been overtaken by the Supreme Court decision in *Re D (A Child)* [2019] UKSC 42 (which held that no such consent could be given upon turning 16). The short answer was 'no' it had not.

After traversing the case law, Lieven J held that a parent could consent to the confinement of their child under 16 if the child lacks *Gillick* competency to make the decision as to his liberty and there is no dispute that such confinement is in the child's best interests (paras 47 and 58). However, no consent can be given upon the child turning 16:

> *50. The contrast with the statutory position of children aged 16 and over is set out by Lady Hale in Re D at [26]. There are a host of statutory provisions which mark the legal importance of attaining the age of 16, and the legal separation that gives between a child's rights and those of his/her parents.*
>
> *51. However, the position is different for a child under 16 years old, both in common law and under the ECHR. It follows that the very nature of "family life" and therefore the protections under Article 8 for the parents' rights, will be different for a younger child. It is however critical to have in mind that the exercise of any parental rights in respect of a child must be for the benefit of the child. If the parent was exercising parental rights, including consenting to the deprivation of liberty, in a way which was said to be contrary to the child's best interests then such a decision would no longer fall within the zone of parental responsibility.*

Comment

This judgment reaffirms the current understanding that natural parents (and testamentary guardians) can consent to the confinement of their under-16-year-old if the arrangements are in the child's best interests. As a result, no deprivation of liberty occurs because the subjective element of the *Storck* trinity (objective-subjective-state responsibility) is not made out.

Perhaps owing to the parties' arguments, within the judgment there is not an insignificant amount of analysis of the role of a child's particular characteristics when considering the objective element of confinement. What was described as "*the heart of the issue in this case*" was *"whether the Court should take the approach of Lord Scarman and Lord Fraser in Gillick and consider the scope of parental responsibility (and the powers inherent within it) as depending on the specific characteristics of the individual child. Alternatively, whether the Court should take the approach of Lord Kerr in Cheshire West*

and compare the child to a hypothetical child of the same age in deciding the extent of parental responsibility." [para 52] This may have derived from the local authority's argument that K was not deprived of liberty because his freedom was not restricted more than would be the case of another 14-year-old who was of similar competence. No details are provided in the judgment of the actual arrangements in place for K.

Whether there is "*considerable tension*" between Lord Kerr in *Cheshire West* (and, for that matter, Lady Hale in *Re D*) and Lords Scarman and Fraser in *Gillick* may in fact have been an unnecessary concern. The former were focusing on the objective question of confinement, introducing for those under 16 a comparator of children of the same age and relative maturity who are free from disability. The latter was focusing on the validity of a child's decision to consent. To confuse the two elements by focusing on the characteristics of the particular child when determining whether a child is confined – in effect removing the non-disabled child comparator – runs the risk of narrowing the safeguards of Article 5 ECHR.

Instead, we suggest, a child's particular characteristics are relevant when determining whether such confinement is in the child's best interests and, therefore, whether it is an appropriate exercise of parental responsibility to consent to those arrangements. Such an approach accords with that taken by Keehan J in *Re D* [2015] EWHC 922 (Fam):

> *57.The decisions which might be said to come within the zone of parental responsibility for a 15 year old who did not suffer from the conditions with which D has been diagnosed will be of a wholly different order from those decisions which have to be taken by parents whose 15 year old son suffers with D's disabilities. Thus a decision to keep such a 15 year old boy under constant supervision and control would undoubtedly be considered an inappropriate exercise of parental responsibility and would probably amount to ill treatment. The decision to keep an autistic 15 year old boy who has erratic, challenging and potentially harmful behaviours under constant supervision and control is a quite different matter; to do otherwise would be neglectful. In such a case I consider the decision to keep this young person under constant supervision and control is the proper exercise of parental responsibility.*

Lancashire County Council v PX & Others [2022] EWHC 2379 (Fam) (21 September 2022)(HHJ Burrows)

Article 5 ECHR -"Deprivation of liberty"

Article 5 ECHR – Children and young persons

Summary

PX was a 15-year-old boy had ADHD, learning disabilities, and suffered frequent epileptic seizures every day for which he took a high level of medication. He was prone to act in a way that made it extremely difficult to meet his needs at home and he was accommodated by the local authority under s.20 of the

Children Act 1989. There was no dispute that his care arrangements amounted to confinement which included [para 43]:

1. *1:1 supervision and support in the placement and the community*
2. *He has support with all aspects of his care including personal care and independent living skills*
3. *His medication is managed and administered for him*
4. *A harness is used within vehicles which physically restrain him and prevents him from interfering with the driver*
5. *Doors to the premises are locked- front and back doors and side gate and there are window restrictors*
6. *There are waking staff as well as sleeping staff at night*
7. *Restraint is used as a last resort.*

An application was made to invoke the inherent jurisdiction to authorise PX's deprivation to liberty. HHJ Burrows agreed with the comparator approach in determining whether a child under 16 was confined for Article 5 ECHR purposes. The test was whether the "*restrictions imposed on PX [are] beyond what one would expect to be imposed on an average child of 15, without mental health issues and challenging behaviour?*" The comparator was not "*a 15-year-old with the same characteristics as PX*", otherwise the test risked being discriminatory on the grounds of disability.

As to whether his parents could consent to his confinement, but for the recent decision in *Lincolnshire County Council v TGA & others* [2022] EWHC 2323 (Fam), HHJ Burrows would have held that the arrangements went far beyond what any parent should be called upon to approve or authorise. After all, "*there is always a danger that good and devoted parents such as PX's might simply follow the advice given to them by clinicians and social workers who are, after all, agents of the State.*" [para 53] However, *Lincolnshire* held that parents could consent to the confinement of their under-16 child and HHJ Burrows observed:

> *56. This means that the Court will only become involved if there is a dispute between the parents and the local authority or other State body, such as the NHS, or between the parents themselves, as to what is in the child's best interests. As I understand it, Article 5 is not engaged unless and until the matter is referred to a Court. At that stage if, and only if the Court then concludes that it has to override the parent's decision because it is not in the child's best interests, is Article 5 engaged. That is because it is the Court that is authorising the State detention of the child rather than the parents, and the subjective limb in Article 5 is present.*

As a result, PX's parents were held to be entitled to use their parental responsibility to consent to his confinement and, given the consensus that the same was in his best interests, "*the court has no business interfering*" with their exercise of it (para 57). The judge went on to note:

> *59. Ironically, of course, had I concluded that PX ought to be subject to a care order, I would have been required to authorise his deprivation of liberty. The law, however, is that where parents agree with statutory bodies as to what care provision is in the best interests of their under 16 year old child, there is no place for the Court to intervene as a separate guarantor of the human rights of the child.*

However, PX will be 16 in two months' time so the matter would need to pass to the Court of Protection for future authorisation. [para 62]

Comment

In relation to the objective question of a child's confinement, the (conventional) approach in this case is at odds with the (conflated) approach taken in the *Lincolnshire* case. We suggest it better reflects the jurisprudence by comparing a disabled child's arrangements with those of a non-disabled child of the same age. However, the judicial U-turn on the validity of parental consent to confinement in this case illustrates what some might see as a precarious legal position regarding the interface of Articles 5 and 8 ECHR for those under 16. The majority of reported judicial thinking at present recognises the (Article 8) rights of parents to make decisions regarding the arrangements for their disabled child, with the underlying safeguard that a dispute over best interests must come before the court. But there remains a lingering question of to extend *Re D* to those under 16.

Is it in P's best interests to move to Jamaica?

XX v West Northamptonshire Council & Anor [2022] EWCOP 40 (22 July 2022) (Lieven J)

Best interests - residence

XX was an 89-year-old man who had come from Jamaica to the UK to live and work in the 1960s. XX had been living in a care home since December 2020. An application was brought by AA, one of XX's nieces, and asked the court to consider whether it is in XX's best interests to travel to Jamaica for his last years.

It was noted at the outset at [5] that the case was an example of the "*human cost of delays that have built up in the family court and Court of Protection*" both before and during the pandemic, as it took a number of months before the case was heard.

XX had only retuned to Jamaica on 2/3 occasions since he emigrated. However, he had paid tax on a property that he had inherited, which was relied upon by AA as evidence of his intention to return. XX's family called almost daily, but the care home staff did not believe that he appeared to know who they are. A s.49 report by a psychiatrist did not advise against XX's move to Jamaica if he were to receive the same standard of care.

Mrs Justice Lieven considered that the case was similar to the one considered by Mr Justice Hayden in *Re UR* [2021] EWCOP 10. which concerned a lady from Poland and whether she should return to Poland. That case, cited at [27], emphasized at paragraphs [25]-[27] the dangers of an overly paternalistic approach. Mrs Justice Lieven accepted that there may be some physical risk to XX making the move.

Mrs Justice Lieven concluded that the evidence indicated that when XX had capacity he did wish and intend to move to Jamaica for his final years, once he had dealt with his affairs in the UK. She concluded that he would have the "*intangible benefits that lie in the nature of human feeling and experience for XX to spend those last years with a loving family around him rather than being cared for by strangers in a care home. It is a benefit hard to explain or quantify.*"

Article 2, mental illness and informed consent

Traskunova v. Russia - 21648/11 (Judgment : Article 2 - Right to life : Third Section) [2022] ECHR 631 (30 August 2022)

In *Traskunova v Russia*, the Third Section of the Strasbourg Court revisited the issue of capacity and informed consent, this time in the context of experimental treatment and a breach of Article 2 ECHR.

The applicant's daughter, Ms AT, died age 59 of complications arising out of cardiac and respiratory arrest following participation in clinical trials for a drug, Asenapine. Asenapine was being trialled for the treatment of schizophrenia, a condition from which Ms AT had suffered since early adulthood.

The court was told that part of the mandate for the trial was monthly check-ups by a doctor and six-monthly ECGs and 3 monthly blood tests. Having taken part in one year-long trial, from 2004-5, following which she was hospitalised as a result of her worsening mental health, Ms AT was signed up for a further trial in December 2005. On both occasions she signed consent forms agreeing to take part in the study.

In April 2006 Ms AT suffered a cardiac and respiratory arrest. She lapsed into a coma and died a few days later. Subsequent to her death it was revealed that not only was Ms AT not provided with the relevant check-ups, after agitation and insomnia all increased during the trial in addition to weight gain, no steps were taken to remove her from the study.

Expert evidence indicated that her death was as a result of pneumonia (overlooked by her doctors), the cardiotoxic effect of Asenapine, and latent cardiovascular disease. An indirect causal link between her death and the taking of Asenapine was found [38]. Further investigation revealed a lack of general health monitoring and no recognition of the fact that she had suffered side-effects in the first trial.

Reiterating the limited scope of Article 2 in so-called "healthcare cases", the court held [69]

> *the States' substantive positive obligations relating to medical treatment are limited to a duty to regulate, that is to say, a duty to put in place an effective regulatory framework compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives. The Court has, moreover, emphasised that the States' obligation to regulate must be understood in a broader sense which includes the duty to ensure the effective functioning of that regulatory framework. The regulatory duties thus encompass necessary measures to ensure implementation, including supervision and enforcement (see Lopes de Sousa Fernandes v. Portugal [GC], no. 56080/13, §§ 186 and 189, 19 December 2017 and Sarishvili-Bolkvadze, cited above, § 74; see also, for the summary of the applicable principles regarding effective functioning of relevant framework in the broader context of unintentional taking of life, Smiljanić v. Croatia, no. 35983/14, § 66, 25 March 2021)."*

The Court went on to emphasise [70] the importance for individuals facing risks to their health

> *to have access to information enabling them to assess those risks. It has held in particular that States are bound to adopt the necessary regulatory measures to ensure that doctors consider the foreseeable impact of a planned medical procedure on their patients' physical integrity and to inform patients of these consequences beforehand in such a way that the latter are able to give informed consent (see Ioniță v. Romania, no. 81270/12, § 84, 10 January 2017, in the context of*

the Article 2 complaint; and Csoma v. Romania, no. 8759/05, § 42, 15 January 2013; and Botoyan v. Armenia, no. 5766/17, § 93, 8 February 2022, in the context of the Article 8 complaint).

Notwithstanding that Ms AT was deemed to have "retained her legal capacity" throughout the trials, the Court was critical of the failures to provide her with the heightened protection her vulnerability mandated:

79. The Court furthermore notes that Ms A.T. suffered from a serious mental illness for many years. It considers that, in view of their vulnerability, it is important that mentally ill patients enjoy a heightened protection and that their participation in clinical trials be accompanied by particularly strong safeguards, with due account given to the particularities of their mental condition and its evolution over time. It is essential, in particular, that such patients' decision-making capacity be objectively established in order to remove the risk that they have given their consent without a full understanding of what was involved (compare Arskaya v. Ukraine, no. 45076/05, §§ 87-90, 5 December 2013). The facts of the case reveal that Ms A.T.'s mental illness worsened during the first clinical trial (see paragraphs 24-25 above). It is noteworthy in this connection that a mental illness such as the one which the applicant's daughter suffered from could manifest itself, among other things by disordered thinking and difficulties in communicating with others (see paragraphs 5 and 9 above). Yet there is no evidence in the case file that, when inviting her to take part in the second clinical trial and accepting her consent thereto, the doctors in charge duly assessed whether the applicant's daughter was indeed able to take rational decisions regarding her continued participation in the trial.

80. Bearing in mind the above shortcomings, Ms A.T.'s vulnerability, and the serious consequences of those decisions for her, the Court finds that the practical implementation of the existing framework was deficient and that the existing guarantees ensuring the informed consent of participants of clinical trials were not complied with in the present case, with the result that there has been a breach the State's substantive positive obligations under Article 2 of the Convention."

Comment

The court ultimately awarded damages for breach of both the substantive and procedural obligations under Article 2. This is an interesting judgment in an expanding area of law – one which is shortly to be debated before the Supreme Court in the appeal of *R (Maguire v HM Senior Coroner for Blackpool & Fylde* [2020] EWCA Civ 738. A substantive breach of Article 2 was found, *not* because of deficiencies in the legal or regulatory framework but rather because of a failure to implement the same [76]. This underlines a point made previously by the Grand Chamber in the leading case of *Lopes de Sousa v. Portugal* [GC], no. 56080/13, at [189] – *"that the States' obligation to regulate must be understood in a broader sense which includes the duty to ensure the effective functioning of that regulatory framework. The regulatory duties thus encompass necessary measures to ensure implementation, including supervision and enforcement."* We consider this an important message for decision-makers to take home: the fact of the Mental Capacity Act 2005 is not enough; it must be properly implemented and adhered to if rights are to be protected.

PROPERTY AND AFFAIRS

Guidance on seeking an order for sale of property

The Society of Trusts and Estates Practitioners (STEP), in conjunction with Solicitors for the Elderly (SFE), the Professional Deputies Forum and COPPA, have produced a short guidance note on seeking an order for sale of property. It includes guidance on:

- When the Court of Protection may prevent a deputy from selling a property;
- The evidence required to make an application for sale;
- What steps should be taken if there is a live question as to where the person should live; and
- Which trustee application is needed.

PRACTICE AND PROCEDURE

The test for the grant of an injunction, the need for notice, and when is anonymous hearsay evidence acceptable?

Re G (Court of Protection: Injunction) [2022] EWCA Civ 1312 (11 October 2022) (Baker LJ, Phillips LJ, Nugee LJ) [2]

Injunctions

In *Re G (Court of Protection: Injunction)* [2022] EWCA Civ 1312, arising out of a difficult and long-running medical treatment case being heard by Hayden J, the Court of Appeal has definitively set out the test that needs to be applied by a Court of Protection judge in deciding whether to grant an injunction. The facts of the case are complicated, and the jurisdictional arguments on the appeal somewhat esoteric, but for wider purposes, the Court of Appeal helpfully summarised the position at paragraph 82 as follows:

> *The Court of Protection does have power to grant injunctions under s.16(5) of the 2005 Act, both in the case where a deputy has been appointed under s.16(2)(b) and in the case where the Court has made an order taking a decision for P under s.16(2)(a). In doing so, it is exercising the power conferred on it by s.47(1) and such an injunction can therefore only be granted when it is just and convenient to do so. This requirement is now to be understood in line with the majority judgment in Broad Idea as being satisfied where there is an interest which merits protection and a legal or equitable principle which justifies exercising the power to order the defendant to do or not do something. In the present case* [where the injunction was granted in support of a best interests decision in relation to contact between P and family members]*, as is likely to be the case wherever an injunction is granted to prevent the Court's decision under s.16(2)(a) from being frustrated or undermined, those requirements are satisfied because* [P's] *interest in the December order being given effect to is an interest that merits protection, and the principle that the Court may make ancillary orders to prevent its orders being frustrated is ample justification for the grant of injunctive relief if the facts merit it.*

The Court of Appeal found that the decision of Hayden J to grant injunctions against P's father and mother, had, in fact, fulfilled the 'just and convenient' test, even if he did not spell it out in the terms set out above. However, the position was different in relation to P's grandmother. She had only been joined as a respondent on the first day of the hearing, was not represented, and attend remotely by mobile phone from her granddaughter's bedside. During the course of the hearing a revised draft order was produced, naming the grandmother as a respondent to the injunction and including a penal notice. The Court of Appeal identified at paragraph 104 that "[i]*t does not appear that the grandmother was served with this document and it seems unlikely that she knew of the very significant changes from her point of view, let alone understood their nature and effect."* In the circumstances, the Court of Appeal observed that it was an "understatement" to say that that she had not been given proper notice of the case against her, continuing at paragraph 104 that:

[2] Nicola having appeared in this matter, she has not contributed to this note.

> […] *it was obviously unjust and inappropriate to proceed with a full trial as against the grandmother and to have granted a final injunction endorsed with a penal notice against her. Basic principles of fairness required that she be given proper notice of the relief sought against her and the grounds for it. The proper course, in such circumstances, would have been to adjourn the hearing as against the grandmother and, if appropriate, to grant an interim injunction against her, on a without notice basis, with a return date specified. Such a course would have ensured the proper protection of G and her interests, whilst ensuring that the grandmother's rights to a fair trial were also preserved.*

Separately, another point of wider importance arose in consequence of Hayden J's acceptance of anonymous hearsay evidence from 8 nurses as to the conduct of P's father. P's father criticised the judge for doing, so but the Court of Appeal rejected this criticism:

> *93. In our judgment, there is no merit in Mr McKendrick's criticisms of the judge's treatment of the anonymous hearsay evidence. Very properly, Mr McKendrick had made similar submissions at first instance both on the interpretation and application of s.4 of the* [Civil Evidence Act 1995] *and on the case law, including the Moat Housing decision. It is evident that the judge accepted those submissions and applied the guidance in the statute and case law when considering the hearsay evidence given by the anonymous nurses. The judge plainly recognised that he had to proceed with caution when assessing the weight to be attached to the evidence and took conspicuous pains to explain his approach and analysis. There was clear evidence from Nurse T and Dr B, accepted by the judge, demonstrating, as suggested by Brooke LJ in the Moat Housing case, the route by which the anonymous evidence had emerged and why it was neither reasonable nor practicable to identify and adduce direct evidence from the nurses. The fact that they are professionally qualified, trained and supported within the Trust, and accustomed to working with the families of patients did not obviate the need for anonymity in this case, given the evidence about the father's attitude provided by Nurse T, Dr B and the father himself.*

Comment

The Court of Appeal's confirmation of the test to grant an injunction is helpful, and it is particularly helpful that that they made clear that it is in line with the "just and convenient" test applied by the High Court when deciding whether to grant an injunction, such that there is no need for another line of jurisprudence to have to develop to identify whether and how "just and convenient" differs to "necessary and expedient" (the words that appear in s.16(5) MCA 2005). It is equally helpful that the Court of Appeal recognised that the mere fact that the individuals concerned were professionals did not obviate a need for the protection of anonymity. Given the hoops that need to be jumped through before weight can be placed upon anonymous evidence, this should not be seen as licence for the creation of anonymous professional whispering campaigns, but rather a recognition that professionals can and do have their own rights.

Procedure for Determining Mental Capacity in Civil Proceedings: CJC Working Group

The Civil Justice Council has approved the creation of a working group *'to look at a procedure for determining mental capacity in civil proceedings. The working group was created as a result of a request to the Council by a legal practitioner.'*

Its terms of reference are as follows:

> *The Working Group will consider how the Civil Courts approach mental capacity. It will have regard to the procedure and common practice in use for determining whether a party lacks capacity to conduct proceedings (i.e. is a protected party within the meaning of Part 21 CPR).*
>
> *It will seek to make recommendations to improve rules, practice directions, or other matters relating in this regard. The Working Group will consider the following areas in particular:*
>
> 1. *How the issue as to a party's mental capacity is identified and brought before the court.*
> 2. *The procedure for investigating the issue.*
> 3. *The procedure for determining the issue.*
> 4. *The position of the substantive litigation pending determination of the issue.*
> 5. *The particular issues that arise in relation to these issues as regards:*
>   1. *Litigants in person*
>   2. *Parties who do not engage with the process of assessment of capacity*
>
> *The Working Group may also find it necessary to consider wider aspects of the procedure and experience of protected parties (i.e. after the determination of protected party status) which appear of relevance during the course of its work.*

The CJC announcement states that *'[t]he Working Group will seek to engage with relevant groups. If you wish to get in touch, please email cjc@judiciary.uk'*

Representation Before Mental Health Tribunals: Practice Note

The Law Society has published and updated Practice Note on Representation before Mental Health Tribunals. The note covers:

- *communicating with and taking instructions from your client*
- *your duties of confidentiality and disclosure*
- *the representation of children and young people*
- *good tribunal practice*

THE WIDER CONTEXT

Withdrawal of treatment

Guy's And St Thomas' NHS Foundation Trust v A & Ors [2022] EWHC 2422 (Fam) (28 September 2022) (Poole J)[3]

Medical treatment – treatment withdrawal

Summary

Following *Re: A (Withdrawal of Treatment: Legal Representation)* [2022] EWCA Civ 1221, a second full hearing was held in the of the tragic case of baby 'A' who at the age of 9 weeks had been found floppy and unresponsive at home. By the time the paramedics had arrived he was in cardiac arrest. He was admitted to ICU and provided with mechanical ventilation after suffering a catastrophic brain injury.

Brain stem testing was performed on 17 to 19 June 2022 and death was declared on 19 June 2022. Baby A's parents did not consent to the discontinuance of mechanical ventilation and so the matter was brought before the Court. The first trial was heard by Hayden J. This judgment was overturned by the Court of Appeal and the summary can be found here. The matter was listed back in the Family Division of the High Court and came before Mr Justice Poole.

The Judge identified three unusual features of the case:

(i) First that A had been found in June 2022 to have met the tests for brain stem death but in early July 2022 he started to breathe intermittently. The tests for brain stem death were from that time therefore no longer met but had the court determined the Trust's initial application on the evidence available before 1 July 2022, it may well have declared that A was dead.

(ii) Secondly that legal proceedings had been protracted by the amendment of the application (arising from the fact that Baby A no longer met the tests for stem death) and then the appeal.

(iii) Thirdly, that investigations into A's injuries had raised concerns that they may have been inflicted non-accidentally.

After a careful and detailed consideration of both the factual evidence, the expert evidence and the legal framework, the Judge concluded that baby A had suffered a catastrophic brain injury which had resulted in an irreversible loss of a significant amount of brain tissue; that there was no detectable electrical activity in his brain; that MRI scans showed the devastating extent of his brain damage; and that it was virtually certain that he would not recover consciousness. The court therefore concluded that treatment was futile in the sense that it would not bring about any improvement in baby A's condition and would not bring about a return to consciousness. The Judge however went on to carry out a best interest assessment, concluding (with little hesitation), that the burdens outweighed the benefits of his current life. The Judge therefore concluded that it was not in baby A's best interests to continue receiving mechanical ventilation.

[3] Tor and Arianna having appeared in this matter, they have not contributed to this note.

Comment

One of the interesting parts of this judgment is the path taken by the Judge in relation to findings of fact about whether baby A experienced pain, or whether '*to avoid a binary determination and to carry forward both the probability that A does not feel pain and the possibility that he does feel pain into the best interests assessment*.' [para 62] What the Judge did, was to (a) make a finding of fact on the balance of probabilities that Baby A '*has no awareness of pain or discomfort*' [para 64] and (b) resist the calls to determine on the balance of probabilities (on the basis that such a finding was 'not necessary') whether or not baby A had a reflex response to pain. Instead the Judge found was that some vestigial reflex responses to pain or discomfort, for example, when suctioning takes place could not be excluded. He proceeded on the basis that it was legitimate for the court *'to feed possibilities as well as probabilities into a best interests assessment'* feeding into the best interest assessment of baby A's situation, a finding of fact that baby A had *'no conscious awareness of pain (on the balance of probabilities) but may have a vestigial reflex response to pain.'* [para 65] This led the Judge to take the burdens of treatment into account *'even though they probably did not cause pain or discomfort to baby A of which he is aware.'* [para 66]

The Court's approach, that it was not necessary to make a finding of fact on the balance of probabilities regarding baby A's reflex response to pain, appears to have been predicated on the basis that there was no disputed evidence on this point – the Judge describing the weight of evidence as being at one on this issue – and that a finding was not required in order to resolve a crucial issue.

Prolonged disorders of consciousness: POSTNote

The Parliamentary Office of Science and Technology (POST) has published a short note on Prolonged Disorders of Consciousness. The brief (five page) note helpfully pulls together significant research on prolonged disorders of consciousness, treatment and rehabilitation for them, commissioning care, and summarises key legal cases concerning them.

Settling a claim in Ireland where a person has an English COP deputy

M.K. v Sacred Heart Missionary Education Trust (Approval of proposed settlement) (Approved) [2022] IEHC 500 (16 September 2022)

Summary

This Irish case concerns the approval of a settlement of a case for personal injury where the claimant lacked capacity. The claimant was 60 years old, habitually resident in England and had since 2015 been detained pursuant to the Mental Health Act 1983. In 2007, the relevant local authority had been appointed by the COP to act as deputy for his property and financial affairs.

The claimant had brought a claim for damages for personal injury arising from sexual abuse while a pupil at secondary school in 1974 and 1975. The court considered the reasonableness of the proposed settlement, noting this was to be assessed by considering what the likely outcome would have been.

In this case, the Defendants had raised limitation as a defence. The court noted that the claimant had reached his majority in 1981, and had expressed a wish to commence proceedings in relation to the alleged abuse in his early 20s: the limitation defence therefore appeared to have good prospects. On the chronology before the court, it appeared that the cause of action had accrued and limitation expired before the claimant had subsequently lost capacity. The court also noted the evidential difficulties the claimant faced. In those circumstances, where the claim was likely to fail at trial, the proposed settlement was a good outcome for the claimant.

The judgment also contains discussion of the current routes for legal proceedings to be pursued on behalf of a person who lacks capacity in Ireland, noting that the legal landscape will change once the Assisted Decision Making (Capacity) Act 2015 comes into force. One option is an application for wardship; the other, that a person acts as 'next friend'. Similarly to a litigation friend in England and Wales, the 'next friend' is personally liable for the costs of proceedings.

The court discussed the proper procedure to follow where it becomes apparent that a claimant lacks capacity to conduct the litigation once it was already live, noting that the appropriate course was to make an application to appoint a next friend backed by medical evidence. That had not happened in this case, but would have been preferable, and would have enabled consideration to be given to the interaction with the deputyship under the MCA 2005.

The judge was satisfied in this case that the approval of the settlement did not cut across any orders made by the Court of Protection: the case had been pursued without any financial risk to the claimant, and the settlement itself represented a significant benefit to the claimant. Had the claimant been admitted into wardship, that might have risked a conflict between the orders of the courts in the two jurisdictions: however, there was no necessity for such a course in this case, and indeed no obvious jurisdictional basis for doing so.

Is capacity a relevant status for Article 14?

Dudley Metropolitan Borough Council v Mailley [2022] EWHC 2328 (QB) (14 September 2022) (Cotter J)

Summary

In *Dudley Metropolitan Borough Council v Mailley* (2022) EWHC 2328 (QB) the court considered the application of Articles 8 and 14 ECHR to a possession claim and the question of whether time spent in residential care by a person lacking mental capacity should deprive a family member of their right to succeed to that property.

The Defendant, Marilyn Mailley, had lived in the property with her mother since she was 11. As the court records in the opening of its judgment, had Ms Mailley's mother died at any point between the coming into force of s.30 Housing Act 1980 (now s.87 Housing Act 1985) and moving into respite care in October 2016, Ms Mailley would have succeeded her as tenant pursuant to s.87 of the Housing Act

1985. Alternatively, while she retained mental capacity so to do, Ms Mailley's mother could have assigned the tenancy to her.

However, her mother having lost the mental capacity to assign the tenancy and having died while in residential care, and Ms Mailley being unable to use the lasting power of attorney her mother had granted to secure the tenancy for her own sole benefit, there was no succession in tenancy. The local authority accordingly brought possession proceedings against Ms Mailley.

Considering the case in the round, including the "(overly) extensive expert evidence", the court held that the Defendant's mental health difficulties and likely anxiety and depression at the loss of her house were not of sufficient significance to weigh against granting the possession order on article 8 grounds. Noting the huge dearth of family size properties in the area and the substantial underuse of Ms Mailley's property which was significantly cluttered, the court held that eviction was a proportionate means by which the local authority might manage its very limited housing stock.

The Defendant also sought to make out a defence based on a breach of Article 14 taken with Article 8. She argued that if s.87 Housing Act 1985 (the right to succeed a secure tenant) could not be read so as to include within those entitled to succeed to a tenancy *"the members of the family of those removed by reason of their ill health who due to mental incapacity cannot assign their secure tenancies under Section 91(3) Housing Act 1985"* [165], it would be incompatible with Article 14 (taken with article 8).

The court considered whether a lack of decision-making capacity might be construed as an "other status" for the purposes of Article 14. While noting the broad remit of other status and generous interpretation in cases such as *Mathieson-v-Secretary of State for Work and Pensions* [2015] 1 WLR 3250, the court noted previous circumstances in which capacity had been dismissed as a potential status for the purposes of Article 14.

In MOC (by his litigation friend, MG)-v-Secretary of State [2022] Singh and Peter Jackson LJJ had both dismissed such an argument on the basis that capacity can change and cannot be a sound foundation for status [65]; as per Jackson LJ, that "status is likely to be found in the disability itself, and not in the separate matter of capacity" [76].

Cotter J, having analysed the case law, reached the conclusion that capacity could not form the basis of a status on grounds of which a party could make out a claim of discrimination contrary to article 2:

179. Mr Stark submitted that the Defendant is the potential successor of a tenant who was permanently removed from her home as a result of her ill-health and who did not have capacity to assign her tenancy to her potential successor. He argued it is not capacity alone that defines status but being the daughter of a tenant with both of those particular characteristics. As a result of that status she was treated differently than two comparators in analogous situations (a) the potential successor of a tenant who dies at home and (b) the potential successor of a tenant who is permanently removed from her home as a result of her ill-health but is capable of assigning her tenancy i.e. retains capacity to assign her tenancy to a qualifying successor

180. Ms Caney submitted that the contention must be that the Defendant is discriminated against on the ground of her 'status' as a member of the family of a tenant who had ceased to have mental capacity to be able to assign their tenancy. Otherwise there would be no difficulty in succession. So

the Defendant's argument relies upon the capacity of a third party as the essential defining characteristic.

181. Section 1(2) of the Mental Capacity Act 2005 provides that a person must be assumed to have capacity unless it is established that he/she lacks it. Section 2(1) provides that:

> *"For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain." (Underlining added)*

Section 2(2) provides that it does not matter whether the impairment or disturbance is permanent or temporary. People do lose and regain issue specific capacity.

183. Assuming status can be identifiable solely through the circumstances of others a characteristic is still required, which must be something more than being identified through the discrimination. As held in MOC an individual's own capacity is not a sufficient status for the purposes of Article 14. Status requires a characteristic which has the quality of reasonable certainty a fortiori when considering discrimination which concerns an ability to make a permanent change i.e. assign a tenancy. The main determinant of impaired capacity is cognition and any condition affecting cognition can affect capacity. For example, capacity can be impaired in head injury, psychiatric diseases, delirium, depression, and dementia. All can have varying impact on the functioning of, the mind or brain and mental capacity can change over the short and long term. I cannot accept Mr Stark's submission as it would mean that status for can rest on shifting sands. Whereas death is a certainty both in terms of inevitability and timing (i.e. when it occurred), capacity may be lost and gained and the material time may be down to a chance occurrence e.g. a temporary deterioration in symptoms, or manipulated, for instance by a relative who wished to delay the assessment until they had lived in the property with the tenant for the qualifying period of 12 months.

184. Mr Stark argued that there need not be uncertainty as the assessment of capacity could be at an identifiable point in time; the point at which a person permanently ceased to reside at the property. However this ignores the ability to regain capacity and in any event itself begs a question and introduces yet further uncertainty. It is in no way an answer to say that the issue could be determined ex post facto.

185. The lack of certainty also has practical significance. Mr Stark could not adequately address the obvious problem of what happens if a person does regain capacity and does not wish to assign and/or decides to return to the property. Unless a notice to quit had been served, and the relevant time period expired, the tenant could resume occupation even if the relevant property had for a period of time ceased to be their principal place of residence. There could be direct conflict with a relative who wishes to succeed to the tenancy (who may not want/agree with the tenant's return to the property). Given the advances in old age care and increased number of people who have temporary or respite care the potential for problems would be very real.

186. *In my judgment identification through the incapacity of a third party cannot be sufficiently certain to provide status for an Article 14 claim.*

Comment

While this conclusion is arguably inevitable given the conclusion of Singh and Peter Jackson LJJ in *MOC*, it still seems somewhat surprising given the previously broad and generous ambit of "other status" in both Strasbourg and domestic case law. We cannot help but wonder whether, if argued on different bases and with more helpful facts, a claim based on lack of capacity as a status – particularly in circumstances where the status is manifestly unlikely to change – might succeed. It seems otherwise odd that a condition as immutable as "homelessness" or past employment with the KGB (see *RJM* [2009] 1 AC 311 [5]) might be considered sufficiently immutable to be construed as a status whilst an absence of decision-making capacity is not.

Jurisdiction of the Ombudsman

R(Milburn) v The Local Government and Social Care Ombudsman [2022] EWHC 1777 (Admin) (06 July 2022)(HHJ Sephton QC sitting as a High Court Judge)

Summary

The claimant, Mr Milburn, brought a judicial review against a decision by the Ombudsman that he did not have jurisdiction to investigate complaints Mr Milburn had made regarding Oldham Metropolitan Borough Council.

Mr Milburn was a young person in education who had an Education, Health and Care Plan (EHCP). He did not wish to attend a college and wished to have *'a bespoke package of education which included funding for relationship development intervention programmes designed to address his tendency to ruminate.'* [para 3] The Council declined this request, and Mr Milburn appealed to the SEND Tribunal, which allowed his appeal.

Mr Milburn went on to make a complaint regarding his treatment by the Council, alleging that *'they withheld most of his education in the run up to the Tribunal; they were rude and hostile towards his Mum; they made needless requests for irrelevant information and were obstructive and unhelpful. It is clear from Mr Milburn's witness statement that he was extremely distressed by the conduct of the Council.'* [para 4]

Mr Milburn's mother assisted him to make a complaint first to the Council and later to the Ombudsman, alleging 11 specific complaints regarding their treatment in the period leading up to the SEND Tribunal decision.

The Ombudsman found fault on the part of the Council for failing to make provision for Mr Milburn's education while he was appealing to the Tribunal. The Ombudsman declined to consider key complaints for the following reasons:

> [7]…*"I do not dismiss Ms X's concerns, but I cannot consider her complaint. The Ombudsman cannot consider complaints about matters that have been the subject of an appeal to the Tribunal. In this case, Ms X and Mr Y's dealings with the Council, including their attempts to secure interim provision and to agree amendments to Mr Y's EHC Plan working document, are inextricably linked to their appeal and are not matters the Ombudsman can investigate."*

Mr Milburn's mother invited the Ombudsman to reconsider, as she did not have *'a right of appeal to a tribunal in relation to the behaviour of Council officers.'* [para 8] The Ombudsman reconsidered his decision, but again declined to investigate:

> 9…*"In her complaint, Ms X identified what she believes to be contradictions in statements the Council has made about its attempts to obtain Mr Y's views. Ms X has also identified opinions expressed by Council officers about her role as Mr Y's representative which she finds offensive. I do not propose to investigate the details of these issues further. While I appreciate Ms X and Mr Y remain aggrieved, I do not consider it a good use of the Ombudsman's limited resources to pursue the matter further."*

The key issue was whether the Ombudsman was barred from investigation because *'the complainant "has or had a right of appeal, reference or review.'* [para 26] The court found that it was necessary to characterise the precise issue being complained of to the Ombudsman. The court considered that there were two discrete points:

> [29]…*(a) One matter is that the Council failed to obtain Mr Milburn's views and wishes, and when it received evidence regarding them, it ignored them.*
>
> *(b) The other matter is a complaint about the "numerous claims" that the Council had sought Mr Milburn's views from him when in fact it had not.*

The court agreed that the Omdbudsman lacked jurisdiction to consider the first matter as *'…there can be no doubt that the failure to obtain and act on Mr Milburn's view was something in respect of which he had a right of appeal to a tribunal… the consequence is that, since the Ombudsman is precluded from investigating this issue, Mr Milburn has no remedy in respect of the Council's deplorable conduct in not seeking or acting on his views.'* [para 30]

However, the court found that the 'numerous claims' in (b) were arguably maladministration of a type the Ombudsman could investigate, as the local authority had not made a showing that these claims could be considered by a tribunal or court of law. The court further considered that the Ombudsman had not given sufficient reasons explaining his view of why he lacked jurisdiction.

Mediation in the Court of Protection

An Evaluation of Mediation in the Court of Protection has published its findings (which can be found here). Dr Jaime Lindsey and Gillian Loomes-Quinn evaluated 6 cases that were mediated under a practitioner designed mediation scheme over a period of 21 months. The cases covered property and financial affairs, deputyship, and welfare matters. No medical treatment cases were mediated under the Scheme. In all six cases, full or partial agreement was reached at the mediation. Some of the key findings from the participant survey are as follows:

- 68.75% (n=11) of respondents to the participation survey (response rate 63% (n=19)) indicated some degree of improvement in working relationships.
- 93.33% (n=14) of respondents answered that it was cost effective to take their case to mediation and 64.29% (n=9) of respondents indicated that they would be prepared to pay for mediation.

- 62.50% (n=10) of respondents indicated that cases were resolved sooner via mediation than if the case had gone to a judicial hearing.

Overall, the authors concluded that CoP mediation has the potential to save costs, time and enhance working relationships between participants. Furthermore, satisfaction with the Scheme itself was very high. The authors go on to make a series of recommendations, most importantly (1) that the CoP ought to develop a mediation information scheme, based on the MIAM approach in the family courts or the MIAS approach in SEND, with a specific timeframe in which information about mediation should be provided, and a requirement for parties to consider the use of mediation in specific types of cases; and (2) a court-authorised mediation scheme should be piloted with authorisation from the CoP.

Advance choice documents: their potential and prerequisites – in conversation with Dr Lade Smith CBE

In the latest 'in conversation with,' Alex talks with Dr Lade Smith CBE about advance choice documents in the mental health context, their potential, and the prerequisites for making them work.

Online safeguarding, capacity and rights to participation – in conversation with Professor Andy Phippen

In this 'in conversation', Alex speaks with Professor Andy Phippen about online safeguarding, capacity, and why Andy really dislikes the term 'online safety'.

Piloting co-produced advance choice documents – in conversation with Dr Lucy Stephenson

In this 'in conversation', Alex talks with Dr Lucy Stephenson about a pilot project she has led on as part of the Wellcome-funded Mental Health and Justice Project which aimed to co-produce and evaluate implementation strategies for advance choice documents with those who experience fluctuating mental capacity in the context of bipolar.

Compendium of shedinars

Alex has compiled a compendium of his 'Shedinar' and 'In Conversation' series, which may be of particular interest to those starting new terms and new jobs for those coming to work in, study, or generally chew over the field of mental capacity. The 'shedinars' are 20 minute or so video introductions to key topics, and 'in conversations' are again roughly 20 minute conversations with people with interesting things to say about mental capacity (broadly defined).

The shedinar page is always the place to go for the full list.

SCOTLAND

Scottish Mental Health Law Review

The Scottish Mental Health Law Review (Scott Review), which ran from May 2019 until September 2022, published its final report and recommendations on 30th September. The review was chaired by Lord John Scott KC who with an Executive Team comprising Alison Rankin, Karen Martin, Graham Morgan, and Professors Jill Stavert and Colin McKay conducted the review with the support of a Secretariat. It consulted widely with stakeholders with lived experience and unpaid carers at the centre of its activities.

The broad remit of the Scott Review was:

> *'…to improve the rights and protections of persons who may be subject to the existing provisions of mental health, incapacity or adult support and protection legislation as a consequence of having a mental disorder'*

and its final report, of over 900 pages and with over 200 recommendations, its chapters cover consideration of law built on equality and human rights, the purpose of the law relating to persons with mental and intellectual disabilities and what it should look like. It then goes on to consider specific aspects of such law including supported decision making, specialist support in legal and administrative proceedings, economic, social and cultural rights, the role and rights of unpaid carers, Human Rights Enablement, Autonomous Decision Making and deprivation of liberty, reducing coercion, forensic mental health law, accountability, children and young people, and adults with incapacity and adult support and protection legislation.

Very much part of an ongoing process, its recommendations encompass the short, medium and long term with many things that can be done to improve human rights compliance, including moving closer to CRPD compliance, in advance of actual legislative change.

The extent to which the Review's recommendations are embraced and adopted largely depends on the Scottish Government whose response is currently awaited.

Professor Jill Stavert

Mental health law reform – the Scottish perspective: in conversation with Professor Jill Stavert and Professor Colin McKay

In this 'in conversation,' Alex speaks with Professors Jill Stavert and Colin McKay, both members of the executive team of the Scottish Mental Health Law Review chaired by (Lord) John Scott QC. The Review reported in September 2022, and our discussion explores why the Review was needed, how it was carried out, and its key recommendations. They look in particular at what it means to carry out a review seeking to implement positive rights in the mental health and capacity sphere.

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Conferences and Seminars

Forthcoming Training Courses

Neil Allen will be running the following series of training courses:

30 November 2022	BIA/DoLS Update Training
13 January 2023	Court of Protection training
26 January 2023	MCA/MHA Interface for AMHPs
16 March 2023	AMHP Legal Update
23 March 2023	Court of Protection training

To book for an organisation or individual, further details are available here or you can email Neil.

25 October 2022: Understanding the Law around Dementia

Are you a carer or partner of someone with dementia in the North West of England? Neil Allen with university students and lawyers from Simpson Millar solicitors will be offering free legal information and advice from 1-4pm at the Greater Manchester Law Centre. There will be four talks and drop-in advice clinics (and refreshments!). No need to book, but please do come along for what will be a super afternoon. Further details are available here.

National Mental Capacity Forum new series of webinars: starting 20 October with DNACPR and the MCA

NEVER STOP LEARNING ABOUT MENTAL CAPACITY:

The National Mental Capacity Forum is pleased to announce the launch of a second series of National Mental Capacity Webinars, produced in collaboration with the Autonomy Project at the University of Essex, and with support from the MoJ and DHSC.

Born of necessity during the COVID-19 pandemic, National Mental Capacity Webinars provide a forum for free training and discussion for anyone involved in applying the Mental Capacity Act in practice. These 1-hour webinars bring together experts to address specific challenges relating to the MCA, and provide an opportunity for participants to ask questions and raise concerns, shaping the agenda for future webinars. The webinars are designed for new, novice and experienced practitioners. There are many paths to learning and the webinar series will provide learning prompts for individual professionals, professional associations and networks.

The first webinar in the new series will take place on **Thursday, 20 October, 2022, 1-2pm**. It will focus on the application of the Mental Capacity Act to decisions around the initiation of Cardiopulmonary Resuscitation, along with practices concerning DNACPR (Do Not Attempt Cardiopulmonary Resuscitation). We will review existing law regarding DNACPR, launch a new set of educational videos, and address some hard questions about the use of best-interests decision-making in the context of cardiac arrest. Confirmed speakers include: Karen Chumbley (Clinical Lead for End-of-Life Care; Suffolk & North East Essex ICS); Margaret Flynn (Chair, National Mental Capacity Forum); Alex Ruck Keene (Barrister, 39 Essex Chambers); Prof Wayne Martin (Director, Essex Autonomy Project) and Ben Troke (Partner, Hill Dickinson solicitors).

HOW TO REGISTER: Participation is free but places are limited. **Advance registration is required.** To register, please follow this link and take a few moments to answer the registration questions.

Advertising conferences and training events

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

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

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