



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

(1) In the Health, Welfare and Deprivation of Liberty Report: an update on the Mental Capacity (Amendment) Bill; reproductive rights and the courts; capacity to consent to sexual relations; and one option in practice.

(2) In the Property and Affairs Report: an attorney as witness; barristers as deputies and a range of new guidance from the OPG;

(3) In the Practice and Procedure Report: the need to move with speed in international abduction cases; executive dysfunction and litigation capacity, and a guest article on meeting the judge;

(4) In the Wider Context Report: new capacity guidance; a fresh perspective on scamming the Irish *Cheshire West* and the CRPD and life-sustaining treatment.

(5) In the Scotland Report: two judgments in the same case relating to anonymity and the 'rule of physical presence' in the context of the Mental Health Tribunal;

You can find all our past issues, our case summaries, and more on our dedicated sub-site [here](#). With thanks to all of those who have been in touch with useful observations about (and enthusiasm for the update of our [capacity assessment guide](#)), and as promised, an updated version of our [best interests guide](#) is now out.

We trust we are also allowed to with some pride that no fewer than 5 of the editors have recently been appointed or reappointed to the Equality and Human Rights Commission panel of counsel, along with 3 other members of Chambers: see [here](#).

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

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### Relocation of Glasgow AWI Court

Glasgow Sheriff Court announced on 7<sup>th</sup> May 2019 that, with effect from 15<sup>th</sup> May 2019, the Glasgow Adults with Incapacity Court will be conducted in the Glasgow Tribunals Centre, 20 York Street, Glasgow G2 8GT. The Sheriff Clerk’s Office have intimated that all parties for each application should be advised of the change of venue, but that no formal intimation is required. There must however be fears that confusion will ensue, given the distance from Glasgow Sheriff Court to the Tribunals Centre, and also that even after the date of this intimation, Glasgow Sheriff Court continued to issue warrants for intimation showing the Glasgow Sheriff Court address rather than the Tribunals Centre address.

It would be tempting, but apparently incorrect, to link this move in any way with suggestions that the adult incapacity jurisdiction be transferred from the Sheriff Court to a new Tribunal. It is understood that the move is for practical reasons of accommodation only, and is intended to be temporary.

The move also applies to the Glasgow Family Court.

*Adrian D Ward*

### OPG fees increase

Fees payable to the Office of the Public Guardian have been increased with effect from 1<sup>st</sup> April 2019. Generally speaking, all of the matters for which the previous fee was £87 (including registration of guardianship and intervention orders, and other registrations under Part 6 of the 2000 Act) have been increased to £89. Astonishingly and controversially, the fee for registration of powers of attorney has also been increased, from £77 to £79, despite all of the evidence-based research results from the “mypowerofattorney” campaigns that there would be overall savings to public funds if the granting of powers of attorney were to be encouraged by reductions in cost. Put the other way round, if one potential granter were to be deterred by this increase, and in consequence were to require a Part 6 application – with consequent delays – to be moved out of a hospital bed, the cost to the NHS would exceed all the “profits” to public funds generated by this increase for a very substantial period.

Scottish Courts and Tribunals Service are responsible for matters in relation to the Office of the Public Guardian such as fixing fees. The Report has no information as to whether, in deciding to impose this surprising increase,

account was taken of information in the public domain such as the article at <http://blogs.bmj.com/bmj/2017/09/12/kate-a-levin-low-uptake-of-advance-directives-and-the-cost-to-public-health/>. I previously criticised as discriminatory the earlier substantial increases in registration fees for powers of attorney: see "Out of the wrong pocket", 2008 JLSS 9.

*Adrian D Ward*

### Fair hearing/access to justice and how 'present' should 'present' be?

Issues relating to access to justice and the actual physical presence of members of the judiciary in hearings concerning the liberty and autonomy of persons with mental disabilities were considered in the recent Court of Session (Inner House) 3 May 2019 ruling of *MH, Appeal by MH against the Mental Health Tribunal for Scotland (2019) CSIH 28*.

Adrian has also written in this issue<sup>1</sup> about the separate preliminary decision created by this case<sup>2</sup> on whether the names of parties in civil court proceedings arising from the Mental Health (Care and Treatment) (Scotland) Act 2003 should be anonymised.

#### The Facts

The appellant, MH, suffered from anorexia nervosa and a learning disability and had been subject to a Short Term Detention Certification authorised under the Mental Health (Care and Treatment) (Scotland) Act 2003. Her Mental Health Officer then applied to the Mental Health

Tribunal for an interim Compulsory Treatment Order (ICTO).<sup>3</sup>

On the date scheduled for the Tribunal hearing of the ICTO application adverse weather conditions prevented the Tribunal convenor from being in the same building as the other Tribunal members. He therefore decided that the hearing could nevertheless proceed with his participation by telephone conference facilities. The appellant's legal representative objected but the convenor decided that the Tribunal would be properly constituted on the basis that he could fulfil all aspects of his role and the appellant would not therefore be prejudiced by his not being physically present.<sup>4</sup> The fact that the Short Term Detention Certificate was due to expire at midnight on the day of the hearing, no substitute convenor could be found and the convenor had undertaken the necessary preparatory work for the hearing were also all influential here. It also should be noted that another ICTO and then a full Compulsory Treatment Order were subsequently made by the Tribunal where a full panel was in attendance and these were not challenged by the appellant.

The appellant appealed to the sheriff principal against the initial ICTO on the basis that the Tribunal was not properly constituted, Article 5 ECHR (right to liberty) and the need to avoid arbitrary detention<sup>5</sup> was unsuccessful. She therefore appealed to the Court of Session (Inner House).

The Court of Session ruling turns on the particular facts of this case and a reading of the

<sup>1</sup> See *No anonymity for patients in mental health cases*.

<sup>2</sup> *MH v Mental Health Tribunal for Scotland (2019) CSIH 14*.

<sup>3</sup> S 65 Mental Health (Care and Treatment) (Scotland) Act 2003.

<sup>4</sup> *R v Soneji* [2006] 1 AC 340.

<sup>5</sup> *Winterwerp v Netherlands* (1979) 2 EHRR 387.

full law report is recommended. However, much of the focus of the appeal was on the construction of rule 64 of the Mental Health Tribunal for Scotland (Practice and Procedure) (No 2) Rules 2005 and whether this required the physical presence of the convenor at the hearing to see and hear all the evidence and argument and witness the reactions of the appellant to the evidence and legal submissions. The appellant argued that she had been prejudiced by his absence and her common law right for the convenor to be in the same room as the appellant at the hearing as well as her Articles 5, 6 (right to a fair hearing) and 8 (respect for private life) rights had thus been violated.<sup>6</sup> The vulnerability of the appellant was also emphasised.

*Relevant provisions of the Mental Health Tribunal for Scotland (Practice and Procedure) (No 2) Rules 2005*

*2. – Interpretation*

*(1) ... 'hearing' means a sitting of the Tribunal for the purpose of enabling the Tribunal to take a decision on any matter relating to the case before it;*

...

*'Tribunal' means the Mental Health Tribunal for Scotland and 'tribunal' means a tribunal constituted ... to discharge the functions of the Tribunal; ...*

*4. – The overriding objective*

*The overriding objective of these Rules is to secure that proceedings before the Tribunal are handled as fairly, expeditiously and efficiently as possible.*

*43. – Interim or preliminary matters*

*(1) The Tribunal may ... consider and determine any interim or preliminary matter in relation to the case including any matter for which specific provision is made ...*

*(2) Any matter referred to in paragraph (1) may be considered by the Convenor alone ...*

*49. – Directions*

*(1) Except as otherwise provide (sic) for in these Rules, the Tribunal may at any time ... give such directions as the Tribunal considers necessary or desirable to further the overriding objective in the conduct of a case ...*

*52. – Other case management powers*

*(1) Subject to the provisions of the Act and these Rules, the Tribunal may regulate its own procedure.*

*(2) The Tribunal may in any proceedings –*

–

...

*(c) hold a hearing and receive evidence by telephone, through video link or by using any other method of communication if the Tribunal is satisfied that this would be fair in all the circumstances.*

...

*63. – Procedure*

...

*(2) The Tribunal may, in accordance with the overriding objective, conduct the hearing –*

*(a) as informally as the circumstances of the case permits; and*

*(b) in the manner the Tribunal considers –*

*(i) to be just; and*

*(ii) most suitable to the clarification and determination of the matters before the Tribunal.*

<sup>6</sup> *Shtukaturov v Russia* (2012) 54 EHRR 27 at para 73; *AN v Lithuania* (2017) 65 EHRR 23);

*Elys v Marks and Spencer* [2014] ICR 1091 at paras 16-17.

*64- Absence of a member of the Tribunal  
(1) Except as provided for otherwise in these Rules, a tribunal shall not decide any question unless all members are present and, if any member is absent, the case shall be adjourned or referred to another tribunal.*

*(2) If a member of a tribunal ceases to be a member of the Tribunal or is otherwise unable to act before that tribunal has commenced hearing the case, the President may allocate the hearing of that case to a differently constituted tribunal.*

*(3) If, after the commencement of any hearing, a member other than the Convener is absent, the case may, with the consent of the parties, be heard by the other two members and, in that event, the tribunal shall be deemed to be properly constituted."*

### Court of Session ruling

Whether justice has been seen to be done must be an objective test "judged by the perception of the fictitious yet ubiquitous fair minded and informed observer" who, in this case, would have been aware of things such as:

- The importance in the appellant's own interests that a decision on the ICTO be made on the day of the hearing. If no ICTO was made the appellant would be released from in-patient care and might suffer serious adverse consequences to her health.
- All the Tribunal members had considered the written material (including medical reports) before the hearing so would have

been aware of the issues involved at the time of the hearing.

- The convener was participating in the hearing as the convener (albeit by telephone link) and any lack of real engagement in the hearing on his part would have been discernible.
- The other two panel members were present who could observe the appellant.
- Two of the three psychiatrists who had seen the appellant were available for questioning.
- The appellant was legally represented at the hearing.
- There was a right of appeal.

The Court therefore refused the appeal on the basis that there appeared to be no unfairness to the appellant, justice was done and could be seen to be done.

### Comment: a note of warning!

As yet there is no clear ruling on the meaning of 'personal presence' (of the judiciary) in proceedings but *MH* does appear to turn on its own particular facts and justice seems to have been done here. The appellant does not seem to have been prejudiced by the convener's decision to proceed with his attendance by telephone. However, given that the determinations to be made in cases involving persons with mental disabilities under mental health and capacity law have significant far-reaching implications for individual liberty and autonomy – engaging Articles 5, 6 and 8 ECHR and Articles 12, 13 and 14 CRPD - it is vital that remote judicial presence is viewed as the exception rather than the norm. Intuition dictates that determining whether or



not a deprivation of liberty or autonomy (including restriction of the exercise of legal capacity) is proportionate and non-discriminatory, and therefore lawful, requires full meaningful engagement with a person with psychosocial, intellectual or cognitive disability and this can only normally be achieved through the physical presence of members of the judiciary.

*Jill Stavert*

Alex adds his own observation – prompted in part by the article by Paula Case in the Practice and Procedure Report that engagement by the judiciary through physical proximity between the person and the judge/tribunal presupposes that we (a) know what the engagement is for; (b) ensure the judges are properly trained; and (c) recast courts/tribunals around the person.

### No anonymity for patients in mental health cases

The case reported by Jill above also gave rise to a separate preliminary decision on whether it was appropriate to anonymise the names of parties in civil court proceedings arising from the Mental Health (Care and Treatment) (Scotland) Act 2003: see *MH v Mental Health Tribunal for Scotland* [2019] CSIH 14, also reported at 2019 SLT 411. The First Division of the Inner House unanimously refused a motion to anonymise the patient's details to initials and to design her care of her solicitors, in order to protect her privacy. The Inner House approached the matter on the basis that there were statutory exceptions to the principle of open justice in relation to proceedings before the Mental Health Tribunal, but these were not extended to appeals to the courts from decisions of mental health tribunals.

The Inner House acknowledged that there would be cases where the court should take steps to protect a patient from having privacy unnecessarily disrespected, but that this did not apply where an appeal concerned a point of law in relation to which it was not necessary to divulge details of the patient's illness. An argument that the very fact that the patient had a mental illness should warrant protection was unsuccessful. See the report of this decision for a full and lengthy consideration of the relevant law, including comparative consideration of relevant law applicable in England & Wales.

It is perhaps notable that in his second sentence the Lord President referred to "an important issue of practice in relation to the anonymisation of the names of parties in civil court proceedings". It is fair to say that the matter was approached broadly in the context of civil court proceedings, rather than treating the mental health jurisdiction as distinct from civil court proceedings generally, and adopting a teleological approach focusing upon the separate mental health jurisdiction alone. That point would perhaps apply even more strongly to any suggestion that this precedent should be transferred to the adults with incapacity jurisdiction, which is very clearly fundamentally different from civil court jurisdiction generally in that the responsibilities of the court are inquisitorial, with a requirement upon the court to comply with the general principles in section 1 of the Adults with Incapacity (Scotland) Act 2000, rather than the traditional adversarial jurisdiction of the civil courts in other matters.

Some might question the consistency between this preliminary decision emphasising the importance of parties to such proceedings being

known, and the decision described by Jill above in which the Inner House seemed to be relaxed about the implications of the convener of a tribunal hearing not being personally present to see parties, to observe the demeanour of all concerned, and so forth. An interesting footnote is that in Scots Law Times this decision was immediately followed by the case of *Murray, Petitioner* [2019] CSOH 21; 2019 SLT 424, in which the name of a firm of solicitors interdicted upon application by a wife from acting for her husband in matrimonial proceedings, on grounds of conflict of interest, was anonymised to initials.

The judgments in *MH* make no mention of the “secret court” controversy in England & Wales concerning the Court of Protection. However, the Lord President did emphasise the fundamental principle that: “ ... public scrutiny of the courts facilitates public confidence in the system. It helps it to ensure that the courts are carrying out their function properly.”

*Adrian D Ward*

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## Conferences

### Conferences at which editors/contributors are speaking

#### Essex Autonomy Project summer school

Alex will be a speaker at the annual EAP Summer School on 11-13 July, this year's theme being: "All Change Please: New Developments, New Directions, New Standards in Human Rights and the Vocation of Care: Historical, legal, clinical perspectives." For more details, and to book, see [here](#).

#### Local Authorities & Mediation: Two Reports on Mediation in SEND and Court of Protection

Katie Scott is speaking about the soon to be launched Court of Protection mediation scheme at the launch event of 'Local Authorities & Mediation - Mediation in SEND and Court of Protection Reports' on 4 June 2018 at Garden Court Chambers, in central London, on Tuesday, 4 June 2019, from 2.30pm to 5pm, followed by a drinks reception. For more information and to book, see [here](#).

### Advertising conferences and training events

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

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Our next edition will be out in June. 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](mailto:marketing@39essex.com).

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