39 Essex CHAMBERS

MENTAL CAPACITY REPORT:
THE WIDER CONTEXT

January 2021 | Issue 110

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

(1) In the Health, Welfare and Deprivation of Liberty Report: vaccination; life-sustaining treatment decisions and the limits of the court processes; capacity and unusual sexual practices; and the lockdown regulations and care in the context of incapacity;

(2) In the Property and Affairs Report: removing attorneys and Child Trust Funds in the context of those with impaired decision-making capacity;

(3) In the Practice and Procedure Report: party status and restricting the provision of information; a rare judgment on transparency, and the police and the Court of Protection;

(4) In the Wider Context Report: DNACPR decision-making under scrutiny, safeguarding and the MCA – SARs under scrutiny; and important decisions relating to different aspects of childhood;

(5) In the Scotland Report: the interim review of the Scott Mental Health Law Review under scrutiny and recent developments from Scottish Government.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also find updated versions of both our capacity and best interests guides. We have taken a deliberate decision not to cover all the host of COVID-19 related matters that might have a tangential impact upon mental capacity in the Report. Chambers has created a dedicated COVID-19 page with resources, seminars, and more, here; Alex maintains a resources page for MCA and COVID-19 here, and Neil a page here. If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the Small Places website run by Lucy Series of Cardiff University.

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

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DNACPR decision-making under further scrutiny

The widespread concerns about decision-making in relation to DNACPR recommendations during the pandemic have prompted both a CQC inquiry, the interim report from which (3 December) found that a combination of increasing pressures and rapidly developing guidance may have contributed to inappropriate advance care decisions as well as detailed work from the British Institute of Human Rights, including, to date, a report (20 December) entitled "Scared, Angry, Discriminatory, Out of my Control: DNAR Decision-Making in 2020"

For those wanting an easy guide to trying to get advance care planning right, Alex's shedinar may be a good start.

The JCHR and COVID-19

The Government has published its response to the Joint Committee on Human Rights Report on the response to Covid-19.

The JCHR published its Report in September 2020. The Report found (unsurprisingly) that the response to Covid-19 had had wide-ranging impacts on human rights. In particular, readers of these newsletters may recall in particular findings that:

- There was evidence DNACPR notices were being applied in blanket fashion by some care providers without involving individuals or their families, amounting to a systematic violation of Article 2 and 8 ECHR;
- There were concerns that decisions in

relation to hospital admissions (in particular critical care) had discriminated against older people and disabled people;

- The very high levels of deaths in care homes engaged Article 2 ECHR and a thorough investigation would be required to meet the state's procedural obligations under Art 2;
- Blanket restrictions on visiting in care homes and other residential settings breached the Article 8 rights of residents and their families;
- It is very likely an inquiry will be needed to investigate structural issues affecting Covid deaths, including deaths in care homes and those where a person had been denied access to critical care.

The Government's response addresses these points, emphasising some of the guidance which has been published (for instance in relation to care home visits). Other key areas, however – in particular – the recommendation to provide clear policies governing prioritization of healthcare, are hardly addressed.

In relation to DNACPR notices, the Government identifies that the CQC has been tasked with reviewing how DNACPR decisions were made during the pandemic, with a full report expected early this year (as noted above, the CQC's interim report in December 2020 found that a combination of the unprecented pressures caused by the pandemic and lack of clarity around guidance may have led to inappropriate decision making). It also refers to work being done by NHSE to produce accessible public facing guidance on the issue. However, the response stops short of committing to producing a national DNACPR policy.

Concerns around potentially discriminatory hospital admissions is dealt with very shortly, with the response simply recording that the Government does not accept the premise. The JCHR's recommendations are not addressed. This is (put politely) a little unfortunate: even if the premise is not accepted, there is an appreciable risk that the number of patients requiring hospital admission outstrips capacity. This is especially the case in light of the increased transmissibility of the new variant, but even at the time the response was published (14 December 2020) a second national lockdown had been required for the month of November. There was a foreseeable risk of further peaks over the winter leading to large numbers of hospital admissions. It is difficult to see what burdens would have been imposed to ensure clear policies governing prioritization of healthcare were in place to guard against the risk of unlawful discrimination, as recommended. The Government's failure to engage with this recommendation may come to seem unnecessarily short-sighted.

Reference is made to the Adult Social Care Winter Plan, in response to the recommendation that the government ensure that local authorities and care providers are able to meet increased care and support needs during and resulting from the pandemic. This committed to providing £546 million through the Infection Control Fund to help restrict the transmission of the virus by staff moving between care homes, and a commitment to provide free PPE to care homes and domiciliary care providers until March 2021. We note however that the Adult Social Care Winter Plan was published in September, at a time when very assumptions as to the facts were operative. The response itself

was published in December, prior to the current national lockdown: it may therefore be that additional considerations needs to be given – or is being given – to whether the change circumstances require additional support.

In relation to care homes, the response reiterates the commitment made by the Prime Minister on 15 July 2020 to establishing an independent inquiry 'at the appropriate time' (though the response does not shed any further light on when this might be). The issue of visits during national lockdowns was addressed by way of the introduction of guidance in November. That guidance (available here, and last updated on 12 January 2021) sets out as a 'default position' that visits should be supported and enabled wherever it is safe to do so. Visits for residents who are approaching the end of life should always be supported whatever the circumstances, with a recognition that this means supporting visits in the months and weeks leading up to this and not merely days and hours.

The introduction of Liberty Protection Safeguards is addressed: in response to the recommendation that it is essential that LPS is introduced by April 2020, the Government notes that 'we are making good progress towards a public consultation in Spring 2021 and are aiming for full implementation by April 2022'. It remains to be seen whether this timetable will hold.

Safeguarding and the MCA – a review of SARs

The first national analysis of Safeguarding Adult Reviews (SARs) in England (between April 2017 and March 2019) has now been published. Funded by the Care and Health Improvement Programme, supported by the Local Government Association (LGA) and the Association of Directors of Adult Social Services (ADASS), its purpose was to identify priorities for sector-led improvement. Building on published regional thematic reviews and analyses focusing on specific types of abuse and neglect, the analysis fills a significant gap in the knowledge base about adult safeguarding across all types of abuse and neglect.

The report is detailed and wide-ranging, but for present purposes we single out its discussion of mental capacity. As the authors, Michael Preston-Shoot, Suzy Braye, Oli Preston, Karen Allen and Kate Spreadbury, note "[a]ttention to mental capacity was one of the most frequently noted deficiencies in direct practice in the SARs in this analysis, with concerns about how assessment, best interests and deprivation of liberty were addressed. The concerns are identified under the following headings: (1) failure to assess; (2) the assumption of capacity: (3) shortcomings in capacity assessment: (4) record-keeping; (5) staff understanding and confidence in applying the MCA; (6) best interests decisions: (7) deprivation of liberty; (8) the (non) involvement of the Court of Protection; and (9) capacity outside the MCA.

Transforming Care Programme Update

The most recent Transforming Care Update has now been published. Focusing on adults with autism and/or learning disability in inpatient mental health hospitals, the update shows that of the 44 Transforming Care Partnerships in England, 10 have met their March 2020 target (no more than 37 per 1 million adults), and 8 have met their March 2024 target (no more than 30

per 1 million adults). In practice, this means that 70% (2040) of the original 2895 people with autism and/or learning disability are no longer in inpatient care. Over 9,300 individuals have had a stay in hospital at some point between March 2015 and September 2020. But there remained 765 people in hospital on 30 September 2020 that had been there since March 2015, 360 of which are restricted patients under the MHA 1983.

The same report shows that, as at the end of September 2020, the LeDeR programme had been told about 9,200 people with a learning disability who had died. All reviews should be completed within 6 months of a death being reported. Of the 7,240 reviews that should have been completed 5,235 had been done. 2,005 reviews still needed to be completed.

Sir James Munby, 'Whither the inherent jurisdiction?'

In his lecture to the Court of Protection Bar Association on 10 December 2020 (available here), Sir James provided a fascinating analysis of the historical development and re-invention of the inherent jurisdiction. The paper describes the three jurisdictional strands, namely (1) under 18s; (2) adults who lack capacity; and (3) capacitous but vulnerable adults. It explains how the family judges had created the second strand – a full-blown welfare-based *parens patriae* jurisdiction – and plugged the Bournewood gap, by the time the MCA 2005 came into force. And how the third strand was developed in 2004-5.

Of particular current interest is Sir James' exploration of the more controversial third strand, which unlike the older two branches, is founded on vulnerability (as opposed to age and incapacity). Read alongside David Lock's paper, 'Decision making, mental capacity and undue influence: do hard cases make bad – or least fuzzy-edged law?' [2020] Fam Law 1624, one gets an excellent sense of the debate at hand.

In light of *Mazhar v Birmingham Community Healthcare Foundation NHS Trust and others* [2020] EWCA Civ 1377, one pressing issue is the extent to which the third strand can be used to deprive a vulnerable (capacitous) person of their liberty. Only two decisions have done so: *Hertfordshire County Council v AB* [2018] EWHC 3103 (Fam) and *Southend-On-Sea Borough Council v Meyers* [2019] EWHC 399 (Fam). Both, Sir James argues, were wrongly decided and:

> *There is, however, an even more fundamental objection to the approach in Meyers. In seeking to control the life choices of the vulnerable person one is necessarily limiting and controlling rather than facilitating the exercise of his autonomy and, moreover, in a manner breaching his rights under Article 8.*

For the third strand, Sir James suggested that the court cannot either (a) grant an injunction preventing the vulnerable adult from doing anything which would otherwise be lawful, or (b) make an order depriving him of his liberty.

Instead, "[t]*he only scope for this branch of the inherent jurisdiction is to protect someone who is vulnerable from improper or other vitiating influences with a view to establishing that his apparent wishes are indeed his true wishes*." Injunctive relief against the abuser (i) must be confined to what is necessary to protect the vulnerable adult from the improper pressure (see *FS v RS and another* [2020] EWFC 63); and (ii) must not be such as to breach the vulnerable adult's own rights, in particular those protected by Article 8:

> *Let me spell it out. Niemietz v Germany surely means that if Mr Meyers's capacitous wish was that KF no longer live with him (as it was in October 2018), then it would have been permissible, if appropriate, to grant an injunction against KF requiring him to leave; but if Mr Meyer's capacitous wish (as it was in February 2019) was that KF live with him, then it was no longer permissible to grant such an injunction.*

Like his judgments, Sir James' paper is rich in legal content and, as well as analysing the present debates around the role and scope of this jurisdiction, some predictions are made about its future development including: (a) the availability of damages/compensation; (b) possession orders; and (c) property matters more generally, where a vulnerable adult is being inappropriately influenced by others. The paper will no doubt inform skeleton arguments for years to come.

Short note: police powers of entry in situations of concern

In *Nassinde v Chester Magistrates Court* [2020] EWHC 3329 (Admin) the Divisional Court has helpfully reconfirmed the scope (and the limits upon) of the ability of a police officer to enter a private property where they have concerns for the person's welfare, including their mental state. The case arose out of an appeal by a woman convicted of assault upon two constables who had entered her flat after having been called by neighbours having heard sounds of shouting. When the police arrived at the scene the neighbour had been fearful of leaving their own flat to grant access to the police officers. There was shouting in the Appellant's flat to such an extent that it was believed that there was more than one person involved. On entering the flat the police officers observed the Appellant's behaviour to be bizarre in the extreme, and aggressive. She appeared to be in a psychotic state. After her arrest, the officers' suspicions that the Appellant was under the influence of drugs were confirmed. She was taken from the police station to the hospital for assessment in restraints, and her behaviour once again became aggressive and provocative. At paragraph 12, Macur LJ had:

> *no hesitation in re-iterating the fundamental principles, however archaically expressed in the authorities, that an individual may resist trespass onto his/her property by the police regardless of their genuine 'welfare concerns' for the occupants therein. That is, a police officer may enter on reasonable suspicion to investigate danger to physical health, but must depart in the absence of evidence that there is a risk of imminent serious bodily harm save if the occupant acquiesces to his/her continued presence, in which case the police officer remains as invitee and not "in the execution of his/her duty". The evidence of the threat of harm may*

> *be equivocal and the police officer may well find themselves on the 'horns of a dilemma', "damned if they do [act] and damned if they do not" as Collins J said in Syed, but there is no question that their 'good intentions' to secure best welfare outcome will provide relief from challenge, such as made by this Appellant; nor should a court allow any sympathies for a police officer's dilemma in such a situation to distract it from a robust scrutiny of the facts. Therefore, in this case the mere fact that a police officer thought it would be "neglectful" or "inappropriate" to leave the Appellant in the flat alone would not, taken in isolation, be sufficient to cross the high threshold.*

On the facts of the case, the court found that the Magistrates had been entitled to conclude that the appellant reasonably and genuinely believed that the Appellant posed a danger of serious harm to herself, which meant that the constables were lawfully present in her flat, and her conviction for assault would therefore stand.

Short note: children - competence, access to justice and the CRPD in the domestic courts

In *Z (Interim Care Order)* [2020] EWCA Civ 1755, the Court of Appeal were considering the situation where the court had placed a 15 year old boy, Z, in the interim care of the local authority on the basis of a care plan which provided that he should be removed from his father's home and placed with foster carers as a bridging placement with a view to placing him in due course in the care of his mother. The Court of Appeal granted the father's appeal; the majority of its reasoning is not directly relevant, but of particular interest is the court's concern with the way in which the boy's wishes had (or had not) been before the court. The court was firstly concerned with the approach taken to Z's competence to give instructions. Baker LJ gave a convenient summary of the principles at paragraph 45, and found that, on the facts of the case that the court should not have relied upon an assessment of competence prepared in July 2020 at the interim care hearing in November 2020, not least because Baker LJ considered that – applying a decision-specific approach – Z's understanding of the primary issue in relation to removal from his father (at stake in November 2020) might be materially different to his understanding of the issues relating to contact with his mother (at stake in July 2020).

Most relevantly for our purposes, Baker LJ noted that:

> *47. There is a further reason for concern in this case to which I alluded during the hearing. Z has a diagnosis of autistic spectrum disorder. In those circumstances, he falls within the protection of the UN Convention on the Rights of Persons with Disabilities 2006. Under Article 13 (1) of the Convention:*
>
> > *"States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages."*

48. The application of this provision in the context of rules relating to representation in care proceedings was not considered in submissions before us. But it seems to me that there are strong arguments for saying that, in a case where a 15-year-old boy without disabilities would be able to participate directly in court proceedings, it is incumbent on the court and professionals working with a disabled 15-year-old boy to take such steps as may be necessary to facilitate his participation in the proceedings, particularly where the proceedings involve a fundamental question such as his removal from the family home.

Short note: the price of getting responsibility for care wrong

Surrey County Council v NHS Lincolnshire CCG [2020] EWHC 3550 (QB) was a novel claim brought by a LA in restitution against a CCG in respect of sums paid by the LA for the costs of accommodation and care of a young man with an autism spectrum disorder in circumstances where the predecessor, primary care trust, had made a public law error and declined to assess whether P was eligible for NHS care. Thornton J considered that a claim for unjust enrichment could be brought against the CCG by the LA – the inflexible procedural divide between public and private law claims no longer applied. The LA had discharged a liability to P which would have been owed by the CCG. Thus, the CCG was enriched to the extent of the cost of the care fees paid by the LA to the care home and was freed to spend an equivalent sum on other patients. It was open to the CCG to raise the defence of change of position but on the facts that defence was not made out.

Short note – when is capacity not enough?[1]

The judicial review decision in *Bell & Anor v The Tavistock And Portman NHS Foundation Trust* [2020] EWHC 3274 (Admin) relating to prescription of puberty-suppressing drugs ('PBs') to persons under the age of 18 who experience gender dysphoria has caused considerable waves, with much (often rather ill-informed) comment. Not least as it is not yet clear whether this is the final word, we do not address the case in detail here, save to note that, as with the Supreme Court in *Re D*, the Divisional Court found there to be a sharp dividing line between the position of those under and over 16. By way of reminder, the Divisional Court found that

- it would be highly unlikely that a child aged 13 or under would ever be Gillick competent to give consent to being treated with PBs; and
- In respect of children aged 14 and 15, the Divisional Court was very doubtful that a child of this age could understand the long-term risks and consequences of treatment in such a way as to have sufficient understanding to give consent. However, plainly the increased maturity of the child meant that there was more possibility of achieving competence at the older age.

The Divisional Court found, however, that the legal position was different in respect of a young

[1] Nicola being involved in this case, she has not contributed to this note.

person aged 16 or over:

> 146. […] *In respect of a young person aged 16 or over, the legal position is different. There is a presumption of capacity under section 8 of the Family Law Reform Act 1969. As is explained in Re W, that does not mean that a court cannot protect the child under its inherent jurisdiction if it considers the treatment not to be in the child's best interests. However, so long as the young person has mental capacity and the clinicians consider the treatment is in his/her best interests, then absent a possible dispute with the parents, the court generally has no role. We do not consider that the court can somehow adopt an intrusive jurisdiction in relation to one form of clinical intervention for which no clear legal basis has been established.*

Significantly, however, the Divisional Court indicated that clinicians "may well" consider that it was not appropriate to proceed, even in the case of a capacitous 16/17 year old, without the involvement of the court, observing at paragraph 147 that: "[w]*e consider that it would be appropriate for clinicians to involve the court in any case where there may be any doubt as to whether the long-term best interests of a 16 or 17 year old would be served by the clinical interventions at issue in this case*." The Divisional Court gave three reasons:

1. The clinical interventions involve significant, long-term and, in part, potentially irreversible long-term physical, and psychological consequences for young persons. The treatment involved is truly life changing, going as it does to the very heart of an individual's identity;
2. At present, the court considered it was right to call the treatment experimental or innovative in the sense that there are currently limited studies/evidence of the efficacy or long-term effects of the treatment;
3. Requiring court involvement would not be an intrusion into the young person's autonomy. Whilst:

> *In principle, a young person's autonomy should be protected and supported; however, it is the role of the court to protect children, and particularly a vulnerable child's best interests. The decisions in respect of PBs have lifelong and life-changing consequences for the children. Apart perhaps from life-saving treatment, there will be no more profound medical decisions for children than whether to start on this treatment pathway. In those circumstances we consider that it is appropriate that the court should determine whether it is in the child's best interests to take PBs. There is a real benefit in the court, almost certainly with a child's guardian appointed, having oversight over the decision. In any case, under the inherent jurisdiction concerning medical treatment for those under the age of 18, there is likely to be a conflict between the support of autonomy and the protective role of the court. As we have explained above, we consider this treatment to be one where the protective role of the court is appropriate* (paragraph 149)

The curious legal grey area occupied by the 16 / 17 year old is also under examination by Sir James Munby from the opposite angle – that of treatment **refusal**, rather than consent. Assuming that it is out by then, we will report

upon that judgment in the next issue.

Children and deprivation of liberty

The problem of a lack of suitable accommodation for children with high levels of need continues. The Children's Commissioner for England published her report 'Who are they, where are they' in late November, reporting the numbers of children in secure accommodation and secure mental health units, and investigating the circumstances of the hundreds of children detained pursuant to orders under the inherent jurisdiction. The report found that Black children, especially boys, were more likely to be in youth custody, and that girls are much more likely than boys to be in mental health wards. It notes that there are a significant number of children in placements which are not registered with Ofsted and reports finding children who should have been subject to deprivation of liberty orders but who were not. The Commissioner also expressed concern about the use of physical restraint such as 'safe space' beds and walking harnesses.

Some of the same concerns continue to be identified by the court, including in the case of G, in which Macdonald J has given a number of judgments lamenting the absence of appropriate placements for a child in care with a high level of need, most recently *Lancashire CC v G (No3)(Continuing Unavailability of Secure Accommodation)* [2020] EWHC 3280 (Fam). Notwithstanding the difficulties in finding such accommodation MacDonald J has, separately, at paragraph 32 of *London Borough of Lambeth v L (Unlawful Placement)* [2020] EWHC 3383 (Fam) also reinforced he fact that:

> *"The common law has long protected the liberty of the subject, through the machinery of habeas corpus and the tort of false imprisonment." The inherent gravity of any violation of a child's longstanding right to liberty and security of the person makes it essential that the State adhere to the rule of law when seeking to deprive a child of his or her liberty (see again Brogan v United Kingdom* (1988) 11 EHRR 117 *at [58]). If the child's right to liberty and security of the person is to be properly protected this approach must be applied with rigor by local authorities notwithstanding the current accepted difficulties in finding appropriate placements for children with complex needs who require their liberty to be restricted. Local authorities are under a duty to consider whether children who are looked after are subject to restrictions amounting to a deprivation of liberty. A local authority will plainly leave itself open to liability in damages, in some cases considerable damages, under the Human Rights Act 1998 if it unlawfully deprives a child of his or her liberty by placing a child in a placement without, where necessary, first applying for an order authorising the deprivation of the child's liberty.*

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Annabel has experience in a wide range of issues before the Court of Protection, including medical treatment, deprivation of liberty, residence, care contact, welfare, property and financial affairs, and has particular expertise in complex cross-border jurisdiction matters. She is a contributing editor to 'Court of Protection Practice' and an editor of the Court of Protection Law Reports. To view full CV click here.

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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.

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Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; honorary membership of the Law Society of Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

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Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click here

Conferences

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

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

Advertising conferences and training events

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

Our next edition will be out in February. 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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