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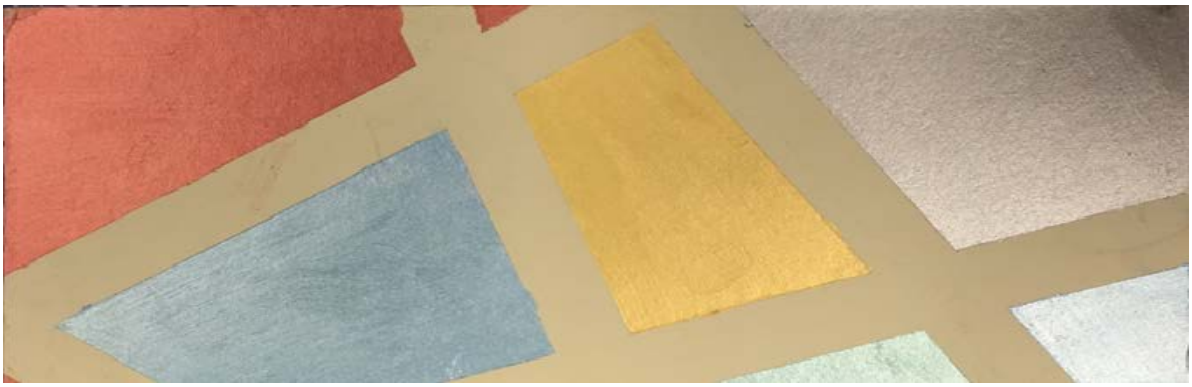

Welcome to the November 2023 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: reasonably adjusting to disability in the context of dialysis and identifying will and preferences across a spectrum of difficult medical cases;

(2) In the Property and Affairs Report: the Law Commission's further consultation on wills;

(3) In the Practice and Procedure Report: two sets of 'Ps' and the costs of welfare appeals;

(4) In the Wider Context Report: the CQC's State of Care report, deprivation of liberty and those under 18, litigation capacity and access to court, and the inherent jurisdiction in Ireland;

(5) In the Scotland Report: bureaucracy vs justice and a tribute to Adrian upon his retirement from one of his posts.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also sign up to the Mental Capacity Report.

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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.

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HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

The Court of Protection and reasonably adjusting to disability in the context of dialysis

Norfolk and Norwich University Hospitals NHS Foundation Trust & Ors v Tooke & Ors [2023] EWCOP 45 (Hayden J)

Best interests – medical treatment

Summary

As explored in this paper and this "in conversation with," the potential for discrimination in the treatment of conditions requiring dialysis and/or organ donation is large where the person has impaired decision-making capacity. *This case shows* the steps which are required to ensure that such discrimination does not take place, in the case of a young autistic man with severe learning disabilities and William's syndrome, suffering from end-stage renal failure.

We know the name of the young man at the heart of the case – Jordan Tooke – as Hayden J expressly permitted its publication at the behest of his parents, not least in hopes that it might lead to the identification of a suitable kidney donor, and, more immediately, specialist clothing for him which might help in the dialysis process.

As Hayden J identified at paragraph 3 of his judgment, Jordan had a long-standing phobia of hospitals in general and needles in particular, such that, when the case was last before him in April 2023, "i*t was thought by all concerned, not least Jordan's parents, that he would not be able to tolerate the considerable restrictions and privations involved in haemodialysis treatment.*" At that stage, the question was whether it might be possible for him to receive a kidney transplant, with a consultant nephrologist identifying that "[t]*he capacity to participate, co-operatively, in haemodialysis was a prerequisite of eligibility to be placed on the transplant list*." He was placed on the transplant list but despite his achievements on the desensitisation programme, a conclusion was reached that he would not be able to undertake haemodialysis without sedation.

This meant that, before Hayden J in October 2023:

> *16.* […] *as Mr Patel KC, on behalf of Jordan, through the Official Solicitor, rightly says, "stripped to its basics this case is truly about life-sustaining treatment" i.e., whether it would be lawful, right and in Jordan's best interests to receive haemodialysis even where that can only be achieved by the unusual measure of intravenous sedation throughout the process. I agree with that characterisation, it follows that we are really considering matters of life and death.*

As Hayden J identified (at paragraph 31) in relation to the plan for the actions required to ensure that Jordan could receive haemodialysis in that fashion:

> *There is no doubt that the proposals contemplated by the plan are beyond what has previously been undertaken with other patients. The plans may properly be characterised as pioneering. At every dialysis session, there would need to be an anaesthetist, an operating department practitioner, and airway equipment, including anaesthetic machine/ventilator. This would require haemodialysis to be on the main site and, inevitably, involve allocating important resources which are much in demand.*

As identified by the consultant anaesthetist, Dr M, the plan carried "*significant and troubling risks. Some of those risks involve potentially very serious consequences*" (paragraph 33), but, as Hayden J identified "*the calibration of risk really requires confrontation with the alternatives. Jordan's parents have been both intellectually and emotionally rigorous in the way that they have addressed this issue. They have identified Jordan's quality of life, as I have set out. They have reflected on Jordan's temperament and personality and concluded that he would choose to live. I agree with that conclusion*," such that:

> *35. In many cases where the Courts are asked to consider issues of this magnitude, the contemplated treatment, usually advanced by the family, is often burdensome but ultimately futile. Here, though dialysis is undoubtedly burdensome, it is certainly not futile. On the contrary, it holds out the possibility, by transplantation, of a restoration to health. The real issue is whether the process of dialysis with all its attendant risks is so contrary to Jordan's best interests that it should not be pursued.*

> *Having regard to Dr M's clear view that Jordan's sedation can be managed, I have come to the view that the opportunity of dialysis ought to be afforded to Jordan and that such opportunity can properly be said to be in his best interests.*

Comment

In Equality Act terms, this case shows what it means to make reasonable adjustments in order to respond to the needs of a person with both cognitive and physical impairments. The question of resources, hinted at paragraph 31, may well feature in a future case, and we do not envy the judge who has to grapple with the dilemma that will arise at that point.

In MCA terms, the case shows the proper location of decision-making capacity (i.e. relevant only insofar as it was going to make compliance with the requirements of haemodialysis more difficult), and analysis of best interests (i.e. probing the availability of relevant options, and proceeding carefully in light of those options to respect the person's known will and preferences).

In human terms, the case shows the difference that having an advocate makes – in Jordan's case, he had his parents, but what about all of those cases where there is no such advocate?

Termination, will and preferences – another difficult dilemma for the Court of Protection

Re H (An Adult; Termination) [2023] EWCOP 183[1] (John McKendrick KC (sitting as a Tier 3 Judge))

Best interests – medical treatment

Summary[2]

This very difficult case stands out for the careful attempt by the judge – John McKendrick KC (sitting as a Tier 3 judge) – to comply with (in CRPD language) the will and preferences of a woman with a mental disorder undergoing a profound crisis. The questions he had to answer were whether the woman, H, had capacity to make the decision to consent to terminate her pregnancy,[3] and, if she lacked that capacity, whether a termination was in her best interests; and, if a termination were to be in her best interests, whether this should be carried out by a medical procedure (i.e. the administration of drugs) or a surgical procedure.

Ms H was detained under the Mental Health Act 1983 and, with one exception, had been consistent in her wish to terminate her pregnancy, and the judgment contains numerous very graphic descriptions of how she was expressing her wishes. After some judicial probing to obtain clarification, it was common ground that the test under s.1(a) of the Abortion Act 196 had been met in that two registered

[1] Note, this case citation is clearly wrong, because the Court of Protection has decided very many more than 183 cases in 2023, only 46 have so far been placed in the public domain with neutral citations. For people who want to understand more about why so many cases are not reported, section 2.4 of this article may be useful.

[2] Katie was involved in this case, but has not contributed to the summary or comment.

[3] Parenthetically, and whilst this was the way it was framed before the court, it might in this case be thought that it was not so much a question of consent to a termination, but rather to seeking a termination, in the same way that in JB's case, it was not a question of consenting to sexual relations, but seeking to engage in sexual relations. Indeed, later in the judgment, the judge talks in terms of "capacity to decide whether to terminate her pregnancy" (see, for instance, paragraph 106 ff).

medical practitioners had in good faith formed the opinion that the termination was less than 24 weeks, and that continuing the pregnancy involved greater risk to her mental health than if the pregnancy were terminated.

No one before the court contended that Ms H had capacity to make the decision whether to terminate her pregnancy, and, endorsing and applying the approach set down by HHJ Hilder in *S v Birmingham Women's and Children's NHS Trust And Another* [2022] EWCOP 10 [4] to the relevant information, John McKendrick KC agreed that H lacked the material decision-making capacity.

No one before the court contended that a termination was anything other than in H's best interests. In circumstances where there was in the view of the court, a "*sustained negative view of her pregnancy and a sustained wish for a termination*" (paragraph 116), John McKendrick KC identified that:

> *124. Considering the terms of section 4 2005 Act and the case law above* [including the 'usual suspects' such as *Aintree*]*, in the context of this personal and profound decision for Ms H, I attach significant weight to her wishes and feelings. The fact that her wishes and feelings are supported by the two applicants, their professional witnesses and the Official Solicitor on her behalf, adds significant weight within my assessment of the section 4 2005 Act factors.*
>
> […]
>
> *126. Applying significant weight to Ms H's wishes and feelings and the clear medical evidence which points to the significant harm to her mental health, and in the context of manageable risks to her physical health of what is often a routine medical procedure, I am satisfied that a termination represents the correct balancing of the section 4 2005 Act factors and make an order to that effect.*

The much more difficult matter, however, was what form the termination should take – medical or surgical. Ultimately, and agreeing with the approach set out by the Official Solicitor, John McKendrick KC found that:

> *137.* […] *Ms H's very strong wish for a termination and her stronger wish not to have a surgical termination have a powerful role in the section 4 2005 Act best interests analysis. Whilst I have found her to lack capacity to make this decision and I have found her to have false and delusional beliefs, the termination of her pregnancy remains a profoundly personal one for her. It may not matter very much to her whether the foetus is alive or dead, whether it is one foetus or twins or whether the conception was a result of rape. She has a visceral desire to be free from her pregnancy and she has elaborated consistently and clearly her firm desire for a medical termination and opposition to a surgical termination. This perspective is not one the court is unable to give effect to. On the contrary, it is supported by two NHS Trusts. It is also, on balance, supported by the Official Solicitor. Notwithstanding my concerns in respect of Ms H's non-compliance with a medical termination and the risks of her being deeply anguished during the 24-48 hour period, I consider this less psychologically harmful to her than being conveyed and possibly restrained en route to Newcastle* [where a surgical

[4] And gently but firmly distinguishing the somewhat problematic decision of Holman J in *Re SB (A Patient: Capacity to Consent to Termination)* [2013] EWHC 1471 (COP).

> termination could take place], *where she would then be faced with being in hospital against her will for around 24 hours and would quite likely require chemical or physical restraint, given her opposition to a surgical termination.*
>
> […]
>
> *139. Sadly, there is no good option for Ms H. Both procedures are fraught with risk to her mental health and lesser risks to her physical health. Having heard all the evidence and met with Ms H, when she clearly told me she wants a medical termination, respect for her autonomy and dignity in matters of her reproductive health, lead me, by applying section 4 of the 2005 Act, to authorise a medical termination in her best interests. I will make that order accordingly pursuant to section 16 of the 2005 Act.*

Whilst he was content to the authorise covert medication as potentially having a "powerful role" in comforting Ms H (paragraph 140), John McKendrick KC was much more uncomfortable with the proposal to authorise restraint:

> *141.* […] *This arises primarily because the case articulated by the Trusts is that such a procedure is consistent with Ms H's wishes. I also consider that the state must pause very carefully before authorising the restraint of a vulnerable young woman as she undertakes an intimate procedure in respect of her reproductive health. However, I am persuaded to authorise restraint only in circumstances where the medical termination has begun, Ms H has been administered the medication described above, but after the passage of time, either the foetus or placenta or both have not been discharged and the clinicians require, to protect Ms H's safety, to carry out a vaginal examination.*

However, he was not prepared to make further orders or declarations beyond those identified above:

> *142.* […] *If there is a medical emergency then clinicians must be guided by what is necessary to safeguard Ms H's life. Those clinicians, in the moment, are likely to have better information than the court has, considering hypotheticals now.*

Having focused on Ms H's immediate needs, John McKendrick KC concluded with a marker that:

> *144.* […] *I have not had time to consider whether this application has been delayed and whether it should have been brought earlier. If an application is made for further relief, I shall consider that matter. I note Mrs MH's anguish that it has taken until now for a decision to be made on behalf of her daughter.*

Comment

Unlike the only other reported case where the question of whether a termination is in the best interests of the woman lacking the material decision-making capacity – *AB* – this case was, on one view, 'easier,' because of the very clearly expressed, if incapacitous, wishes and feelings of Ms H. However, following through on her will, and her preference not to have a surgical termination, placed the court in a very difficult situation. And, as with his judgment in *Barnet Enfield And Haringey Mental Health NHS Trust & Anor v Mr K & Ors* [2023] EWCOP 35, John McKendrick's judgment here is conspicuous in the way in which he sought to work methodically (even under very considerable time pressure) through that dilemma.

Procedurally, John McKendrick's observations in relation to his judicial visit are also of wider relevance:

12. At the outset of the hearing on 16 October 2023 I was informed by Mr Hallin that Ms H wished to meet with the judge who was making the decision. I consulted the Practice Note on Judicial Visits found at [2022] EWCOP 5, dated 10 February 2022. I endeavoured to follow this guidance. I consulted with the parties regarding the purpose of the meeting and the practicalities. I agreed to meet with Ms H by way of Microsoft Teams with her solicitor, Ms O'Connell, present. Ms O'Connell took a note of our meeting which I approved the following day which was then circulated to all parties. When I met with Ms H she was in a room at the hospital where she is detained. She was initially present with her two support workers and Ms G (the family liaison officer). As she is a witness, I asked Ms G to leave, which she agreed to. I spoke with Ms H for around ten minutes in the presence of her two support workers. She was agitated. She told me she was wanted a termination and when I asked her whether she would want a medical or surgical termination she clearly chose a medical termination.

13. The purpose of my visit was largely to comply with Ms H's wish to meet with the judge. Given the terms of section 4 (4) of the 2005 Act, there is a duty on the court "so far as reasonably practicable, [to] permit and encourage [Ms H] to participate, or to improve her ability to participate, as fully as possible in any act done for her and any decision affecting her." I did not require to see Ms H to ascertain her wishes and feelings. These had been comprehensively set out in a most helpful attendance note exhibited to a witness statement (see below).

14. A decision to terminate a pregnancy is a profoundly personal one. It would have been inconsistent with the duty on the court to both promote Ms H's autonomy, and to respect her dignity, for the judge not to have met with her, at her request. It was a privilege to meet with Ms H.

Short note: is the will to live determinative?

Northern Care Alliance NHS Foundation Trust v KT & Ors [2023] EWCOP 46 concerned a 53 year old man with end-stage kidney failure who had sustained brain damage during treatment and was now in a prolonged disorder of consciousness. The treating Trust sought a determination that continued dialysis was not in KT's best interests given the risks of treatment, his limited life expectancy, his lack of awareness and the risk of an unplanned and unpleasant death. The application was opposed by members of KT's family, all of whom were Pentecostal Christians who believed in the power of prayer and the potential for miracles. KT himself was a pastor, and his family argued that in light of his firmly held religious beliefs, he would want treatment to continue. They also considered that KT retained some minimal awareness.

Despite neither the Trust nor the Official Solicitor accepting the family's evidence., the court unhesitatingly found that KT would not have wanted treatment to be withdrawn notwithstanding the medical evidence. '*He would rather suffer and hold out for the will of God'*.

Nevertheless, Hayden J found that continued treatment was not in KT's best interests. His likely wishes were not determinative, and, the court found, he would not have wanted to cause distress to medical professionals and carers by requiring them to continue to provide futile and burdensome treatment to him.

Previous cases have held that where a person's wishes as to the continuation of life sustaining treatment prior to losing capacity should be

followed, where they can be ascertained with sufficient certainty. This case suggests that the same approach will not necessarily be applied when those wishes are for the continuation of treatment rather than its withdrawal, though no explanation of the difference in approach is given.

Short note: anorexia and the impossibility of the Official Solicitor's role

Gloucestershire Health & Care NHS Foundation Trust v FD & Ors [2023] EHWC 2634 (Fam) concerned the capacity and best interests of a 17 year old woman who first developed anorexia around the age of 4 or 5, and who had been in one medical institution or another since 2007. She described her situation as 'torture.' The treating Trust responsible for her care sought declarations that she did not have capacity to conduct the proceedings, or to make decisions regarding her nutrition and hydration, and that it was not in her best interests to for active treatment to be provided in the face of her wishes. The Trust also sought declaratory relief as regards their obligations under the Mental Health Act 1983.

Francis J's judgment is careful and comprehensive, but it is not necessary for present purposes to set out the details of FD's life and challenges, underpinning his decision to grant the declarations sought. Of wider relevance are the observations about the role of the Official Solicitor in circumstances where FD assert she had capacity to make decisions about nutrition and hydration. Francis J set out a note on the role of the litigation friend prepared on behalf of the Official Solicitor, to explain to FD the "*apparent dichotomy between FD's wishes and what been advocated to me by the Official Solicitor on her behalf*" (paragraph 41). The note concluded that:

> *Hence, in acting as litigation friend, the Official Solicitor must act in P's best interests. In so doing, the Official Solicitor will have careful regard to P's wishes and feelings, but ultimately she [the Official Solicitor] must act for P's benefit and in P's interests. She must consider and assess legal advice that she receives. In fulfilling her role she may sometimes have to take a position that is contrary to the wishes and feelings of P.*

In acceding to the Trust's application in relation to the MHA 1983, Francis J accepted the Trust's' submission that declaratory relief not to impose such treatment was likely *"to be extremely helpful to FD in understanding that compulsory treatment has, on the basis of current evidence, been taken off the table*" (paragraph 57). Francis J did not order, because he could not, that FD be discharged from detention under the MHA 1983, but accepted that what he had decided in relation to treatment would have that effect – if that turned out to be different, he wished to be kept informed so that consideration could be given to what should be done.

As with the case of *A Mental Health Trust v BG* [2022] EWCOP 26, this case is fact-specific, and not a general judicial statement about how to address cases of severe and enduring anorexia in teenagers. It is also extremely important to remember that the cases which reach the Court of Protection in this field are, by definition, the most difficult, and there are very many where it is possible to provide appropriate care and treatment so as to enable the person not only to survive but to go on to thrive.

The note read into the record about the role of the Official Solicitor for FD's benefit is to not surprising, reflecting as it does long-standing case-law. It is, however, a standing problem for the representation of P – in this case, as in very many others, the Official Solicitor is having to do

the dual role of being the advocate for P, and assisting the court with what might be best for P. Many, including Alex, have long thought that this is – properly analysed – to give rise to a fundamentally impossible position, no matter how diligently and conscientiously the current incumbent of the post, her office holders, or the lawyers she instructs are. In the instant case, I note, had FD's case been determined before the Family Division, it is quite possible that she would have had her own lawyer arguing the case on her behalf, and CAFCASS assisting the court to tease out what, ultimately, the right course of action to take would be. It might be thought that the time has come to rethink whether or not there should be a similar split in the Court of Protection.

Sexual capacity and sexual risk

Re PN (Capacity: Sexual Relations and Disclosure) [2023] EWCOP 44 (Poole J)

Mental capacity – sexual relations

Summary[5]

This matter related to PN, a 34-year-old man who had diagnoses of a mild learning disability and autistic spectrum disorder. There was no dispute as to PN's diagnoses or his lack of capacity to conduct proceedings, or to make decisions as to his residence, care, contact with others and use of the internet and social media. The issue before the court was whether PN had capacity in relation to three issues:

(1) to make decisions about engaging in sexual relations;

(2) disclosing information about the risk of sexual harm he posed to others; and

(3) about allowing the Local Authority to disclose information about the risk of sexual harm he posed to others.

The local authority heard evidence from forensic psychiatrist Dr Chris Ince, and PN's social worker, Mr Curran (who gave evidence only in relation to the second and third domain). By the conclusion of the hearing, all three parties in the matter agreed that PN had capacity to take decisions in the three domains above for himself.

PN had a history of sexual offending, and the judgment states that it had been given "*a very long list of incidents of concern stretching back to 2001 which includes multiple examples of sexual assault by unconsented-to touching, typically of women's breasts or legs*" (paragraph 5). The judgment states that most of these acts were opportunistic, and there was no evidence that PN had ever committed rape or had sexual intercourse with consent. He had one police warning but no convictions. PN's sexual interests related to adult women, not children. PN had a full-scale IQ of 69 and Dr Ince felt that where PN had been offered a range of interventions over a matter of years, he would not likely to "make substantive gains in terms of the internalisation of risk management and self-awareness of risk" (paragraph 4).

PN's ability to make decisions regarding sex appears to have been considered over a period of years, by many professionals. The evidence appeared to be consistent that PN did understand what sexual assault and consent were, and what conduct was illegal. The primary issue was that PN continued to behave impulsively when he was in proximity to women. PN did accept that he had touched women without their consent in sexual manner, but appeared to minimise his conduct by saying that

[5] Tor having been involved in the case, she has not contributed to this note.

the incidents were not "serious" (paragraph 6(v)). In discussions with his social worker, PN stated that others might want to know about his history for their own protection.

Poole J summarised the evidence at paragraph 6(vii)-(x):

> *vii) In his oral evidence, Dr Ince was asked to analyse why, if as he confirmed, PN can understand, retain, and weigh the relevant information in relation to the decision to engage in sexual relations, including the relevant information in relation to consent, he nevertheless sexually assaults women. Dr Ince's view was that PN was able to use the relevant information but that he chose to touch women even though he knew they had not consented to him doing so. His impulse to touch women in this way was not rooted in his ASD. He was not generally impulsive – there is no evidence that he acts on impulse in other fields of activity. Dr Ince does not accept that PN is overwhelmed by impulse due to his impairments.*
>
> *viii) Reports are that when PN is with his brother or with a member of staff whom he respects, he does not engage in sexual offending. This suggests that he is capable of suppressing his sexual impulses.*
>
> *ix) After the most recent sexual assault, on 24 August 2023, PN admitted what he had done and told staff afterwards that he felt bad about his actions. This shows awareness both of the consequences of his actions and that he ought not to act as he did on that occasion.*
>
> *x) Dr Ince's opinion is that even if the view were taken that PN is unable to use the relevant information about consent at a moment when he has an impulse to touch a woman sexually, that inability is not caused by his ASD and/or learning disability. His impulsive actions are not a manifestation of his impairments but are behaviours that stem from PN's character and outlook.*

Poole J applied the test for capacity as set out by the Supreme Court in *A Local Authority v JB* [2021] UKSC 52, [2022] 3 All ER 697, and considered other cases (in particular the judgment in *Hull City Council v KF* [2022] EWCOP 33, in which he previously adopted a person-specific approach) where the court had applied a test for sexual capacity which was tailored to the individual circumstances of the person. Poole J considered that in *JB*:

> *10.* […] *Lord Stephens judgment appears to me to recognise that the relevant information may differ from case to case. He expressly held that in certain cases the approach should be person-specific and that the "reasonably foreseeable consequences of deciding one way or another may be different" [72]. He gave the example that the risk of a sexually transmitted infection may not be part of the relevant information that has to be understood, retained, weighed or used if the circumstances of the case render that irrelevant. Hence, Lord Stephens' judgment establishes that there is no requirement that all of Baker LJ's relevant information must apply in every case. The relevant information will depend on P's circumstances, their sexual orientation, sexual practices and preferences, whether there is an identifiable person or persons with whom they are likely to have sexual relations, and what the characteristics are of that person or those persons.*

Poole J also considered the 'protection imperative' post-*JB*, finding that:

> *11.* […] *there may be a natural desire to protect those with whom P might want*

> *to have sexual relations, in particular in cases where P has a history of sexual offending. Lord Stephens repeatedly refers to the MCA 2005 protecting not just P, but others – at [92], [106], and [107]. However, it seems to me, although the issue of the consent of others to sexual relations has entered the list of relevant information, the Court of Protection must not allow the desire to protect others unduly to influence a clear-eyed assessment of P's capacity. The unpalatable truth is that some capacitous individuals commit sexual assault, even rape, but also have consensual sexual relations. An individual with learning disability, ASD, or other impairment, may act in the same way, but it is only if they lack capacity to make decisions about engaging in sexual relations that the Court of Protection may interfere. If P would otherwise have capacity, then the court should not allow its understandable desire to protect others to drive it to a finding that P lacks capacity, thereby depriving P of the right they would otherwise have to a sexual life. The Court of Protection should not assume the role or responsibilities of the criminal justice system. One of the core principles of the MCA 2005 is that "a person is not to be treated as unable to make a decision merely because he makes an unwise decision" – s1(4). Deciding to act in a way that might be a criminal offence would be an "unwise" decision. Such decisions might contribute to a determination of a lack of capacity, but P is not to be treated as unable to make a decision merely because they may make a decision to act in a way that might amount to a criminal offence.*

In applying this framework to PN, Poole J considered that "[d]*ue to his living arrangements, character, and impairments he is not, has never been, and is very unlikely to be involved in a relationship or even in an encounter where there is a prospect of the other person becoming pregnant or where there is a chance of either contracting a sexually transmitted infection. The decisions he will be making in the future are in relation to touching others. I cannot completely exclude the possibility that PN might find himself having to decide about engaging in sexual intercourse but in reality, paragraphs (1), (4) and (5) of Baker LJ's formulation of the relevant information are not likely to be relevant to PN's decision-making about sexual relations. Nevertheless, as it happens, the evidence is very clear that he has an understanding of and is able to retain, and weigh or use the relevant information within those paragraphs of Baker LJ's formulation*" (paragraph 12).

Poole J similarly considered that there was no history of PN being propositioned to engage in sexual activity, and PN did not fixate on any particular person. The evidence was that PN did understand, retain and was able to use and weigh the bilateral nature of consent, and was able to do so even when he felt the impulse to touch a woman without her consent:

> *16.* […] *He chooses to surrender to the impulse but that does not mean that his ability to use the information is lost. To borrow a phrase used by Dr Ince during his oral evidence, PN knows that he should not touch, but thinks "Hang it! It is what I want to do." In any event, accepting as I do the expert opinion evidence of Dr Ince on this matter, I find that PN surrenders to his impulse because of his character and outlook not because of his impairments. His impairments do not cause him to lose his control in other fields of activity, or his sexual control in other settings. His sexual impulsivity is not a manifestation of his ASD and/or learning disability. There is no pattern of impulsivity due to his impairments of which his sexual offending is a part. When with his*

> *brother or others whose disapprobation he might want to avoid, he controls any impulses to sexually touch women. He disregards the need for consent but he remains able to use the information he retains, namely that the consent of the other person is necessary.*

Poole J was mindful that PN might ultimately end up committing criminal offences, but emphasised that the court must make the decisions currently before it on the basis of the MCA. Poole J considered whether to have capacity, it was necessary for PN to understand, retain and use and weigh information about the likely repercussions for him of sexually assaulting people. Poole J noted that as a matter of fact, PN had had very few such repercussions, and he had "*managed to avoid sexually assaulting others in circumstances where they or another person with them might react violently towards PN. I am quite satisfied, on the evidence provided to me, that PN understands and retains the information that there are liable to be such repercussions from his decisions*" (paragraph 18).

Poole J considered the extent to which "*the potentially harmful consequences to the other person of sexual assault or even rape should be part of the relevant information P must be able to understand, retain, and weigh or use in order to have capacity to make a decision to engage in sexual relations*" (paragraph 19). Looking to *JB*, Poole J considered that "[t]*he Supreme Court has determined that understanding of the necessity of consent is sufficient. If P is able to understand, retain, and weigh or use information that it is necessary for others to be able to consent, and to consent in fact to sexual relations with him, then the court need not enquire into whether P has the ability to understand or envisage the ramifications of initiating or continuing sexual relations without consent*" (paragraph 19).

Poole J concluded that PN had the requisite capacity both to give consent to sexual relations and to initiate sexual activity.

In relation PN's capacity to make decisions relating to disclosure of information, Poole J noted that PN would at times deny his history. However, the view of his social worker, who knew him well, was that PN was motivated by embarrassment and fear of getting into trouble. At more candid times, Poole J found that "*PN does understand that he has a history of sexual offending which others might wish to know in order to protect themselves*" (paragraph 22). Poole J queried the practicality of how disclosures of his offending history would be made – and identified that people with capacity might also struggle to decide when to share information about a history of offending. Poole J also noted that decisions about sharing information would need to be taken in the best interests of PN, rather than the best interests of those who might be protected from him. Poole J was also unclear the extent to which decisions about disclosures would be required.

> *24.* […] *…He has never been in a relationship, he has not, it appears, had intercourse, and he has not ever been accused trying to rape anyone or to persist with an assault after his initial sexual contact has been repelled. Decisions about disclosure of information about past behaviour to others are very complex. Many capacitous individuals would struggle with them. It is important not to allow consideration of capacity to make a complex decision on disclosure to deprive PN of autonomy in relation to his decisions to engage in sexual relations for which he does have capacity.*

Poole J was keen to establish that his findings should not be taken as 'guidance for future decision-makers,' but set out that "*for present*

purposes I assume that the relevant information will include the risks to others that arise from the previous offending, how the disclosure of information might be given so as to allow others to avoid or mitigate such risks and prevent P from committing offences which could have adverse consequences, and the reasonably foreseeable consequences of sharing or not sharing the information" (paragraph 25).

Poole J found that PN had the requisite capacity "*to make decisions about sharing information about his offending history with others*" (paragraph 26). PN had been clear about his opposition to the local authority's sharing information on his offending history with others, even though he recognised that it would do so to keep himself and others safe.

Poole J finally considered whether the totality of the findings on capacity were consistent (in particular the finding that PN lacked capacity to make decisions about contact with others). He concluded that these findings were consistent, as while

> *28.* […] *PN understands sexual boundaries but he does not understand social boundaries. He sometimes stares at other people and he stares at women's breasts. He knows, as I have found, that he ought not to touch them without their consent. He retains that understanding, and can weigh or use the information even when the urge takes him to touch the other person. However, he does not have the same understanding in relation to staring at or speaking to others. He does not understand the foreseeable consequences of speaking offensively to others, but he does understand the foreseeable consequences of touching them without consent. His lack of understanding in relation to non-sexual contact with others is because of his impairments. That was the conclusion of Dr Ince. Mr Curran's evidence is consistent with that conclusion. Sexual boundaries are perhaps clearer and so more easily understood by PN even with his impairments, whereas social boundaries are less clear to him and are not understood by him because of his impairments.*

Poole J noted that while there were "*no particular issues about PN's past decisions about whether to spend time with specific people, such as his brother, but there is a concern that he might wish to have in person contact with someone he has "met" online. With PN, his inability to understand social boundaries because of his impairments, means that he cannot understand and weigh or use information about the positive or negative aspects of interacting with members of the public, or other people with whom he does not have a relationship. He cannot foresee the reasonable consequences of interacting with others with whom he has contact when he says offensive things to them or acts in an intimidatory manner*" (paragraph 28). Poole J thus made a refinement to its previous contact capacity declaration, amending it to a finding that he lacks capacity "*in relation to non-sexual contact with others*" (paragraph 28).

Poole J concluded by noting the need for the court to make clear and coherent decisions for those caring for PN, while acknowledging that "[t]*he more refined the decision-making under consideration, the more difficult it can be to delineate the boundaries between different kinds of decision-making and to implement practical care and support. Rather than seeking to identify yet more specific kinds of decision-making, it might be simpler and of more practical use to focus on the core decision-making areas, such as residence, care, contact, marriage, sexual relations, property and affairs, use of social media and the internet, and conduct of litigation, but to be astute to apply the principles involved in*

assessing capacity to the particular individual characteristics and circumstances of P" (paragraph 29).

Comment

The case is an interesting and careful consideration of sexual capacity post-*JB*. It appears that in making a finding that PN had capacity, the court and parties both put weight on PN's ability to control his impulses in certain circumstances, and his ability to use and weigh up information about the consequences of offending behaviour. Poole J also repeatedly cautioned against setting the bar for capacity too high, and against succumbing to the 'protection imperative.' The judgment is one which recognises that inherent in autonomy is that people will sometimes use that freedom make bad decisions, or even decisions that harm others, and the Court of Protection must be cautious not to equate poor decisions with an inability to make those decisions.

Separately, it was also helpful that Poole J reiterated the need to approach questions of sexual capacity when they were before the Court of Protection by reference to the MCA 2005, and not by reference to the criminal law. In this regard, some may find useful this webinar on *When P is an Offender*, together with this article: *What place has 'capacity' in the criminal law relating to sex post JB?*

The MHA / MCA interface on discharge

ML v Priory Healthcare Ltd & SSJ [2023] UKUT 237 (AAC) (Upper Tribunal (AAC) (UTJ Jacobs))

Mental Health Act 1983 – interface with the MCA 2005

The interface between the MHA 1983 and the MCA 2005 has recently been considered at the point of entry. In *ML v Priory Healthcare Ltd & SSJ* [2023] UKUT 237 (AAC), UTJ Church considered the question from the point of view of exit from detention under the MHA 1983.

The appeal concerned a 63 year old man, ML, who was a restricted patient detained under ss.47/49 MHA 1983. He had been detained for over 35 years, the last 15 years of which had been spent in secure psychiatric hospitals. His tariff (i.e. the criminal aspect of his detention) expired more than 30 years ago. In practical terms, ML wanted to secure a conditional discharge by the Secretary of State. The first step towards this was to seek a notification from the First-tier Tribunal under s.74(1)(a) MHA 1983.

The First-tier Tribunal heard evidence that ML lacked capacity to make decisions in relation to various matters, including whether he should take prescribed psychotropic medication. While the ML's responsible clinician and all but one of the other witnesses for the detaining authority supported ML's continued detention in hospital, expert evidence from an independent forensic consultant psychiatrist instructed by ML and an independent social worker and approved mental health professional instructed by ML, as well as the evidence of ML's primary nurse at the hospital, indicated that he could be managed effectively in the community with 24 hour support in the context of a conditional discharge, with any necessary deprivation of liberty being authorised under MCA 2005, in accordance with the principles set down in *MC v Cygnet Behavioural Health Ltd and Secretary of State for Justice (Mental Health)* [2020] UKUT 230 (AAC).

It was argued before the First-tier Tribunal that, in light of this evidence: (a) continued detention in hospital was not necessary; (b) s.72(1)(b)(ii) MHA 1983 was not satisfied; and (c) s.73 MHA 1983 required that ML be discharged from detention.

The First-Tier Tribunal decided, however, that (a) each of the statutory criteria for detention were

satisfied; and (b) had ML been subject to a restriction order under s.41 MHA 1983, he would not have been entitled to be discharged from liability to be detained in hospital for medical treatment. UTJ Church noted that:

> *25. While the First-tier Tribunal acknowledged Mr Pezzani's submission, it did not say what it made of it: "Mr Pezzani also contends that the Patient lacks capacity to make decisions about many of his post discharge needs and that a DoLs care plan would be available" (see para. 16 of the FtT Decision at p. 258 of the appeal bundle).*
>
> *26. It appears from this short acknowledgement, and its "noting" in para. 21 that "the only environment where his medication regime can be enforced is in hospital" that, rather than rejecting Mr Pezzani's argument, the First-tier Tribunal simply ignored it.*

On appeal, UTJ Church endorsed the approach taken by UTJ Jacobs in the *Cygnet* case. He had:

> *38.* […] *considerable sympathy for the First-tier Tribunal having to grapple with what was a very complex matrix of considerations, but Mr Pezzani had made a clear case, supported by evidence, that conditional discharge with a full care package to 24-hour staffed specialist accommodation represented an alternative means of containing the risks that a failure by the Appellant to comply with his prescribed medication might eventuate. It was incumbent on the First-tier Tribunal to address that case and to explain how it came to conclude that the section 72(1)(b) criteria were nonetheless satisfied, and that continued detention represented the least restrictive option for the management of the concerns arising from the Appellant's mental disorder.*
>
> *39. It appears that the First-tier Tribunal was under the misapprehension that there was no way for it to co-ordinate the 1983 Act proceedings with a 2005 Act authorisation, and it made its decision on the section 72(1)(b) criteria without reference to the possibility that an alternative framework for managing the Appellant was available. That amounted to a material error of law.*

If, contrary to UTJ Church's understanding of the position, the First-tier Tribunal considered the possibility but dismissed it, he found that the Tribunal's failure to deal with it expressly rendered the reasons inadequate which, itself, amounted to a material error of law.

The decision therefore fell to be remitted to the First-Tier Tribunal to be reconsidered on the correct legal basis.

Comment

The decision provides a helpful reiteration of the need for coordination between those concerned with the MHA 1983 and those concerned with the MCA 2005 on exit from detention under the MHA 1983. It might be thought that the presence of alternative frameworks in the community to manage the concerns arising from mental disorder should be considered equally relevant to the question of whether a person should be detained under the MHA 1983 in the first place.

PROPERTY AND AFFAIRS

Law Commission Supplementary Consultation Paper on the Law of Wills

On 5 October 2023, the Law Commission published a supplementary consultation paper on the law of wills. The original consultation paper closed in November 2017. This supplementary paper discusses two specific proposed areas of reform: the recognition of electronic wills as valid and the abolition of the automatic revocation of wills on a testator's subsequent marriage or civil partnership.

Since the original consultation in 2017, the Law Commission considers that developments in technology, the experience of the COVID-19 pandemic and the perceived rise in predatory marriages may have led to the views of consultees to change in relation to these two specific areas justifying a supplementary consultation on these particular issues.

The consultation period closes on 8 December 2023, Written consultation can be sent using the online response form, available here. Where possible, it would be helpful if this form was used. Alternatively, comments may be sent:

- by email to wills@lawcommission.gov.uk; or
- by post to Wills Team, Law Commission, 1st Floor, 52 Queen Anne's Gate, London, SW1H 9AG.

It should be noted that that the Law Commission is not re-consulting on the proposals originally set out in its paper in November 2017, including the provisional proposal to replace the *Banks v Goodfellow* test with a test modelled on the Mental Capacity Act 2005.

PRACTICE AND PROCEDURE

'Two Ps' - navigating two sets of best interests

HH v Hywel DDa University Health Board & Ors [2023] EWCOP 18 (Francis J)

Practice and procedure (Court of Protection) – other

How should the Court of Protection should proceed in a 'two P' situation: i.e a situation where two individuals both appear to lack the capacity to make the relevant decisions, and where those decisions are interconnected? In *HH*'s case, the individuals concerned were husband, AH, and wife, HH. For reasons that are very relevant to the husband and wife, but not relevant for the wider point, both were the subject of separate s.21A MCA 2005 proceedings. The question was whether they could (or should) be either consolidated or heard together by the same judge, a question which regularly arises, but which has not been the subject of a reported case.

Everyone before the court agreed that the court had the power to consolidate the proceedings or hear them together; the question was whether it should. The local authority – the supervisory body for both s.21A applications – and the litigation friends for both husband and wife considered that the applications should be heard together before the same judge. The Health Board objected. The Health Board's objections were framed in multiple different ways, but essentially could be reduced down to the fact that the court should not be tempted into a position where it was required to find a compromise between the best interests of two Ps. Francis J was not persuaded:

> *40. Judges are, in the Family Division, completely used to making decisions about children in families where their interests may conflict with each other. Furthermore, there is a significant danger, in my judgement, that if the interests of the husband and wife such as AH and HH in this case were to be determined by two different judges, there is a real risk that those judges might make different findings of fact. In a case such as the instant one, issues such as whether the parties might be abusive towards each other or encourage each other to drink could be at the heart of a best interests determination.*
>
> *41. There is an obvious risk that a judge in court A hearing the case of AH might make different factual determinations from the judge in court B next door in respect of HH. This would lead, it seems to me, to an absurd and impossible situation. In my judgement, it is essential to go back to the statutory framework and the rules which govern that. Rule 3.1(2) of the Court of Protection Rules 2017 sets out a list of the Court's general powers of case management. Among those powers referred to above, the Court may consolidate proceedings and/or may hear two or more applications on the same occasion.*
>
> *42. Both husband and wife in this case, through their representatives, ask for the two applications to be heard on the same occasion by the same judge. It would, I suggest, defy common sense if different judges were to make different determinations in respect of each of them when they are and have been a couple for decades. Just because they may now have different interests does not mean that I, as the judge, cannot apply a best interests test in respect of each of them.*
>
> *43. I accept that this may lead the judge, and if that is me, it may lead me, to making a finding that each of them has different needs and different best interests, and so their best interests may*

conflict. Surely the appropriate thing then that we need to do is to balance these interests, to consider the conflict and to make a proper determination in a holistic manner having regard to the needs of each of them and the best interests of each of them.

44. The idea that a judge sits in one court dealing with AH whilst another judge sits in another court dealing with HH without even consulting each other would, it seems to me, be remarkable and would be regarded by most people, I suggest, as plainly wrong. It is so often the task of the judge to balance interests, and I have already referred to the circumstances which so often arise when dealing with cases pursuant to the Children Act 1989.

45. I have already said that I am not going to consolidate because nobody is asking me to do so. My view is that the same judge should hear these cases having heard the evidence and submission in respect of each case and should make a determination in respect of each of AH and HH. It is, as I have said, entirely possible that they may have different needs and different interests and therefore different decisions have to be made in respect of each of them. As I have said, this is not very different from a judge in the Family Court making decisions in respect of a sibling group.

46. Accordingly, I find that I agree with the submissions made by Counsel respectively for AH and HH and the Local Authority, and there is no reason in principle why both applications cannot be heard concurrently by the same judge at the same time. I agree that this is properly characterised as a case management decision and that there is nothing within the framework of the Mental Capacity Act which expressly prohibits the same decision maker from making a best interests decision on behalf of one or more incapacitated adults whose interests are closely connected and might conflict. Indeed, I go further and find that it is likely to be appropriate in cases such as this for the same court to hear the best interests decisions and that this should be the accepted approach in circumstances such as this.

On the facts of the case before him, Francis J made a specific point of noting that:

10. [...] *HH is not a party to AH's proceedings and that she is not eligible therefore for legal aid for such purposes. This means that her litigation friend is not funded by any public body for these proceedings. AH is a party to HH's proceedings, but his litigation friend is compelled to act on a voluntary basis as no legal aid is available.*

11. Not for the first time in Court of Protection proceedings, I find myself dismayed at the absence of Legal Aid in these circumstances where it is plainly needed. Whilst technically the Health Board may not be an arm of the state, to all right minded people I venture to suggest that a publicly funded NHS body is exactly that. I find it hard to imagine that the legislators intended that people in these circumstances should be without public funding. I wish to acknowledge the Court's gratitude to those who have acted pro bono in this case.

Later, at paragraph 59, Francis J also noted that he agreed with the submission that:

any proposal that AH's case could be resolved without his wife also being joined as a party would be plainly wrong. I agree that this also raises issues of fairness, natural justice and compliance with article 6 ECHR. I also agree with Mr

> *Hadden that any proceedings which effectively excluded HH as a party would also raise concerns about whether this would represent an unjustified interference with their rights under article 8 ECHR. Mr Hadden submits that the practical difficulties identified in these cases serve to highlight why the Court should direct that the case should be heard together not separately or consecutively. I agree with that submission.*

Comment

Francis J used some quite uncompromising language in his rejection of the arguments put before by the Health Board, but we would suggest he was right to do so, for the reasons he gave. More 'existentially,' the Supreme Court made clear in *A Local Authority v JB* [2021] UKSC 52 that we not exist in isolation when it comes to considering whether we can process the consequences of our actions. Similarly, what is in a person's best interests is inevitably going to be viewed in context – and life is such that there will be many situations where that context includes interactions with others who may have their own cognitive impairments.

Appeals from personal welfare decisions – the Court of Appeal allocates the costs

Re VA (Medical Treatment) [2023] EWCA Civ 1190 (Court of Appeal (Baker, Lewis and Wiliam Davis LJJ))

CoP jurisdiction and powers – costs

In this case, the Court of Appeal considered an appeal by a litigant in person (on her behalf, and on behalf of other family members) from a decision[6] of Hayden J relating to her mother, a 78 year old woman identified as VA. Hayden J had declared that VA lacked capacity to conduct proceedings or consent to medical treatment including extubation and associated treatment and care. The order further provided that, pursuant to s.16 MCA 2005, it was in VA's best interests, and the court consented on her behalf, to undergo extubation and the provision of palliative care in accordance with a care and treatment plan prepared by the treating team at the hospital where she was being looked after. The order was made some seven weeks after Morgan J endorsed a consent order that a tracheostomy and insertion of a PEG was in VA's best interests, but in circumstances where very shortly afterwards the woman's daughter, VK, sought to challenge the position.

As the Court of Appeal made clear, there had been a very difficult relationship between the family and the treating team at the hospital where VA was being cared for, and much of the appellant's argument focused on complaints about the Trust's alleged failure to engage with the family. However, Baker LJ noted:

> *Furthermore, complaints about the Trust's failure to engage with the family do not give rise to a ground of appeal against the order. The complexity of the issues involved and the grave consequences of the decision to be taken plainly required that every effort be made to engage with the family. The Trust strongly refutes the suggestion that it failed to engage with the family in an attempt to identify what course lay in VA's best interests. In the course of the hearing before us, Mr Parishil Patel KC drew attention to a chronology in the bundle which illustrated the efforts made by hospital staff to engage with the family. The family members reject these assertions and insist that the efforts made by the Trust were*

[6] Made in August 2023, but not appearing on Bailli until October 2023.

> *insufficient. As Mr Patel conceded, the deterioration in relations between the Trust and the family is deeply regrettable.*
>
> *This Court is in no position to resolve this aspect of the dispute between the parties and it is unnecessary to do so for the purposes of this appeal. Whatever shortcomings there may or may not have been in the hospital's efforts to engage with the family, there can be no doubt about the opportunities afforded to the family by the courts. There is no merit in VK's assertion that the Trust failed to follow proper procedure in initiating the proceedings. Whatever may or may not have happened prior to the proceedings, the documents filed with the court and disclosed to the family in the course of the proceedings provided a comprehensive picture of VA's condition and full details of all matters relevant to the best interests decision. The reason why successive judges have agreed to reopen the decisions recorded in Morgan J's order was because of the family's assertions that its terms do not reflect what the family had agreed. It is clear from the transcript of his judgment delivered on 25 August that Hayden J gave the family members a fair opportunity to present their case and conducted a characteristically careful and sensitive analysis of the family's evidence. I therefore reject VK's assertion that there has been any breach of human rights so as to invalidate the court's decision.*

Baker LJ had initially considered that there were three aspects of Hayden J's judgment which justified review by the Court of Appeal.

> *First, it is striking that, within seven weeks of a court order made by consent authorising the carrying out of a tracheostomy in preference to extubation, another judge reached the opposite conclusion. Secondly, it seemed to me at least arguable, on a preliminary reading of what is a relatively brief judgment, that the judge did not carry out a sufficiently thorough analysis of the benefits and disadvantages of the two options. Thirdly, it also seemed to me at least arguable, on an initial reading of the judgment, that the judge's assessment of VA's wishes and feelings fell short of what was required. Admittedly, none of the family members who addressed the court articulated their criticism of the decision in precisely those terms, although they underlie points made by the family, in particular by MA.*

However, after hearing full argument, Baker LJ (with whom the other members of the Court of Appeal agreed), reached the clear conclusion that none of these concerns stood up to scrutiny so as to give rise to a meritorious ground of appeal.

As it had indicated it would, the Trust sought its costs of the appeal against the appellant, although, at the hearing, the Trust noted that the fact that an order was made did not mean that it would be enforced "*thereby hinting that, in the event that such an order was made here, the Trust might refrain from enforcing it against the appellant*" (paragraph 50).

The reasons given by Baker LJ for his refusal to accede to the Trust's application, but instead to make no order for costs (save for the usual provision that the Trust should pay 50% of the Official Solicitor's costs) are sufficiently important to set out in full:

> *51. Rule 19.3 of the Court of Protection Rules 2017 provide that, "where the proceedings concern P's personal welfare the general rule is that there will be no order as to the costs of the proceedings". Rule 19.4(1) permits the court to depart from the general rule if*

the circumstances so justify, adding that "in deciding whether departure is justified the court will have regard to all the circumstances including (a) the conduct of the parties; (b) whether a party has succeeded on part of that party's case, even if not wholly successful, and (c) the role of the public body involved in the proceedings". The Court of Protection Rules do not, however, apply to appeals to this Court from the Court of Protection. Such appeals are governed by Part 44 of the Civil Procedure Rules.

52. CPR rule 44.2, headed "Court's Discretion as to costs", provide, so far as relevant:

> *"The court has discretion as to*
> *(a) whether costs are payable by one party to another;*
> *(b) the amount of those costs; and*
> *(c) when they are to be paid.*
> *If the court decides to make an order about costs –*
> *(a) the general rule is that an unsuccessful party will be ordered to pay the costs of the successful party; but*
> *(b) the court may make a different order.*
> *The general rule does not apply to the following proceedings –*
> *(a) proceedings in the Court of Appeal on an application or appeal made in connection with proceedings in the Family Division;*
> *(b) proceedings in the Court of Appeal from a judgment, direction, decision or order given or made in probate proceedings or family proceedings.*
> *In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –*
> *(a) the conduct of all the parties;*
> *(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and*
> *(c) any admissible offer to settle made by a party ….*
> *The conduct of the parties includes*
> *(a) conduct before, as well as during, the proceedings ….*
> *(b) whether it was reasonable for a party to raise, pursue, or contest a particular allegation or issue;*
> *(c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and*
> *(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim."*

53. My reasons for concluding that there should be no order as to costs fall into two categories – general reasons applicable to such cases and specific reasons relating to this particular case.

54. For many years, the general practice in proceedings relating to children has been to make no order as to costs save in exceptional circumstances, for example, as identified by Wilson J (as he then was) in Sutton London Borough Council v Davis (No 2) *[1994] 2 FLR 569 where "the conduct of a party has been reprehensible or the party's stance has been beyond the band of what is reasonable". This applies to the costs of an appeal as well as to costs at first instance, although the application of the principle may be different. As Baroness Hale of Richmond observed in in* Re S *[2015] UKSC 20 at paragraph 29:*

> *"Nor in my view is it a good reason to depart from the general principle that this was an appeal rather than a first instance trial. Once again, the fact that it is an appeal rather than a trial may be relevant to whether or not a party has behaved reasonably in relation to the litigation. As Wall LJ pointed out in EM v SW, In re M (A*

> *Child) [2009] EWCA Civ 311, there are differences between trials and appeals. At first instance, 'nobody knows what the judge is going to find' (paragraph 23), whereas on appeal the factual findings are known. Not only that, the judge's reasons are known. Both parties have an opportunity to 'take stock' and consider whether they should proceed to advance or resist an appeal and to negotiate on the basis of what they now know. So it may well be that conduct which was reasonable at first instance is no longer reasonable on appeal. But in my view that does not alter the principles to be applied: it merely alters the application of those principles to the circumstances of the case."*
>
> *55. This case is about an incapacitated adult, not a child. Accordingly, the express exclusion of the "general rule" that costs follow the event, which applies in family appeals to this Court under rule 44.2(3), does not apply. But the jurisdiction exercised by the Court of Protection in proceedings relating to P's welfare is akin to the jurisdiction relating to children in family proceedings. In children's proceedings, under s.1 of the Children Act 1989, the welfare of the child is the paramount consideration. In proceedings in the Court of Protection, under s.1(4) of the Mental Capacity Act 2005, any act done, or decision made, under the Act for or on behalf of a person who lacks capacity must be done, or made, in her best interests. Accordingly, for my part I would anticipate that, save in exceptional circumstances, there will usually be no order for costs of an appeal against a decision relating to P's personal welfare.*
>
> *56. On the specific facts of this case, it was manifestly appropriate to make no order for costs against the appellant, because (1) the issue involved was of the utmost gravity and importance to VA and her family; (2) there was nothing in the conduct of the appellant or her siblings to warrant any such order; (3) it was not unreasonable of them to pursue their case that a tracheostomy was in their mother's best interests; (4) whatever difficulties may have arisen in their relations with the Trust, there was nothing inappropriate in the way in which they pursued their case – on the contrary, they presented their arguments in a helpful and articulate manner; (5) there was sufficient merit in their case to lead me to conclude that this Court should grant permission to appeal, although ultimately for the reasons set out above I reached the firm conclusion that the appeal should be dismissed.*
>
> *57. For those general and specific reasons, I concluded that there should be no order for costs against the appellant.* (emphasis added)

Comment

It is perhaps not entirely surprising that the Trust did seek costs – medical treatment cases are not only costly for families (who, some might think problematically) are not eligible for non-means-tested legal aid,[7] but also for the Trusts involved, not least because of a convention that the Trust must not only bear its own costs, but 50% of those of the Official Solicitor. Whilst the convention has been judicially endorsed (see *An NHS Trust v D* [2012] EWHC 668 (COP)), it might be thought that it would be much more satisfactory if the Official Solicitor was properly

[7] By contrast with the position, as of 3 August 2023, of parents of children involved in cases about life-sustaining treatment.

funded to allow her to discharge her function as litigation friend of last resort (including acting as both litigation friend and solicitor in medical treatment cases) without needing to drain the limited funds of Trusts involved in medical treatment cases.

However, as Baker LJ has made clear, Trusts will face an equally uphill battle seeking their costs of an appeal as they do seeking their costs at first instance. That the Court of Appeal should follow the same 'no order for costs' regime as the Court of Protection does in welfare cases is undoubtedly correct at the level of broad principle. But it is important to note that it is not a decision that is entirely neutral in its effects.

THE WIDER CONTEXT

Short note: State of Care Report

The CQC published on 20 October 2023 its most recent State of Care report. Even by the standards of recent such reports, it is profoundly depressing, detailing how the health and care system in England is at, or in some cases, well past breaking point in almost every area. In relation to DoLS, the CQC note their concern about the delay to implementation of LPS, and:

> *what this means for people being potentially deprived of their liberty unlawfully, for their family and friends, and for providers and local authorities. Disabled people and older people are more likely to require the safeguards offered by DoLS and will therefore be disproportionately affected by the decision to delay LPS.*

The CQC note that:

> *Faced with increasing volumes of applications, local authorities are having to triage assessments. A member of our Expert Advisory Group from a local authority explained having to make "decisions you should never have to when it comes to prioritising one person above another". A recent survey by the Association of Directors of Adult Social Services (ADASS) found 50% of directors of adult social care services in local authorities lack confidence in meeting their statutory duties relating to DoLS. When asked about all statutory duties, DoLS was identified as the third highest concern.*

Whilst the DoLS section does an excellent job of highlighting the current problems relating to DoLS, what is frankly somewhat frustrating is that CQC does not actually say what those providing care are actually supposed to do. For instance, they note that '[p]*roviders are not always clear on how to navigate the difficult legal situation of caring for people who are waiting for an assessment*" in situations where the urgent authorisation has run. Fine. But does CQC want providers simply to discharge people so that they are not unlawfully deprived of their liberty? Presumably not.

In similar vein, the CQC note that:

> *The legal framework around deprivation of liberty is particularly complex in certain hospital settings, such as urgent and emergency care. Delays in the wider health and care system mean people are spending longer in an emergency department. A member of our Expert Advisory Group told us they are particularly concerned about the number of people in emergency departments who are waiting for a bed on a ward. These people may lack the mental capacity to consent to their care arrangements but be prevented from leaving because of potential risks to their physical health. If people spend significant periods in an emergency department, staff treating them may be unsure about whether the person is being deprived of their liberty and whether the safeguards apply. This puts people at risk of being unlawfully deprived of their liberty.*

Again, so far so good, and so true (in particular in the context of those who are awaiting assessment under the MHA 1983 and / or a bed to become available). But again, what is worse: unlawful deprivation of liberty or a breach of the operational duty to secure life under Article 2 ECHR?

We entirely appreciate that the CQC has to call matters out, but, as with the Local Government and Social Care Ombudsman's challenges to 'triaging' of DoLS applications, it might be thought that there are diminishing returns to

simply telling people to do their job when it is impossible. Might it not be better, perhaps, to give people tools to work out how to break the law in the least bad way possible pending some mythical time when the law might be changed?

DHSC's response to the *Worcestershire* judgment

DHSC has announced that consideration of ordinary residence disputes which had similar issues to those in the Worcestershire case, and that had previously been stayed, will now be progressed. DHSC notes that:

> *As we have several stayed cases to work through, we ask for your patience as we make determinations on these in a reasonable time considering all the relevant circumstances. We will be working through previously stayed cases in the order in which they were stayed.*
>
> *If in light of the judgment in the Worcestershire case, you feel that a determination on a stayed case is no longer needed, contact* ordinaryresidencereferrals@dhsc.gov.uk *as soon as possible.*
>
> *We will continue to accept new referrals in line with the Care and Support (Disputes between Local Authorities) Regulations 2014/2829 while we work through previously stayed cases.*

Law Commission Social Care for Disabled Children

The Law Commission has launched a project to review the framework governing social care for disabled children in England.

The project was recommended in the 2022 Independent Review of Children's Social Care, which heard from families of disabled children struggling to understand what support they are entitled to and how to access it.

The terms of reference are as follows:

- To review the laws relating to the provision of support and services for disabled children in England, and the wider legal frameworks in which they are contained; with a view to making recommendations aimed at simplifying and modernising them, and at promoting clarity and consistency of understanding as to entitlements.
- The review will focus on the provision of support and services in the context of familybased care. In particular, it will not extend to deprivation of liberty[8] or secure accommodation of disabled children.
- The review will consider whether existing duties (specifically the inclusion of disabled children as children in need under section 17 of the Children Act 1989) and accompanying statutory guidance sufficiently meet the specific needs of disabled children and their families.
- In carrying out this review, the Law Commission will have regard to the Government's wider work on children's social care, and how the legislation relating to disabled children aligns with other parts of the statute book concerning social care,

[8] Although, editorially, we note that it is difficult to avoid deprivation of liberty in this context – see, for instance, the report of the Nuffield Family Justice Observatory in relation to the 'pilot' year of the national DoL court between July 2022-July 2023, showing that 'disability' was the primary reason for 22.2% of applications heard in the first two months, further broken down as "the child's severe learning disabilities, physical health problems (e.g. epilepsy, incontinence, mobility difficulties) and/or severe autism."

support for Special Educational Needs and children's rights more generally.

Deprivation of liberty and those under 18

EBY (A Child) (Deprivation of Liberty Order: Jurisdiction) (17-year-old) [2023] EWHC 2494 (Fam) is a judgment of some technical interest, in which Paul Bowen KC (sitting as a Deputy High Court Judge) confirmed that it is possible for the High Court to exercise its inherent jurisdiction so as to authorise the deprivation of liberty of a competent, non-consenting, 17 year old accommodated under s.20 Children Act 1989. We do not set out the route by which Paul Bowen KC reached his conclusion, save to note that we entirely agree with it. The only observation that we make is in relation to paragraph 33, identifying potential sources of an Article 5 ECHR compliant procedure for a deprivation of liberty (footnotes omitted):

> *Three such sources of legal authority may be available for children of 16 and 17 who have mental capacity for the purposes of the 2005 Act such as EBY, leaving aside the short-term powers of detention under s 44 and 46 of the 1989 Act. First, a Gillick competent child may consent to restrictions placed upon them, in which case the second component of a deprivation of liberty (a lack of valid consent) is not present, although in such a case the Court will have to give careful consideration to whether the consent is real and the risk that it might be withdrawn: Re. T, [162]. As EBY does not consent to her current placement, this option is not available. Second, a secure accommodation order under s 25 of the 1989 Act may authorise the detention of 'looked after' children and certain other categories of children, including children aged 16 and 17 (Re. LS, [33]), for periods of up to six months at a time. Section 25 is not satisfied in EBY's case, so this provision is not relied upon by the Local Authority.*
>
> *Third, the High Court may authorise the deprivation of liberty in its inherent jurisdiction.*

For our part, we would not have referred to *Gillick* competence here for two reasons:

(1) the Supreme Court in *Re D* proceeded on the basis that the test for the ability to consent to confinement in the case of a someone aged 16 or over is that set out in the MCA 2005:

(2) Such an approach appears to add a further layer on top of MCA capacity for a 16 or 17 year old: i.e. they need **both** to have the MCA capacity to consent **and** to be *Gillick* competent to consent to confinement. What, we might ask rhetorically, could be required in addition to the MCA capacity to be able to understand, retain, use and weigh the relevant information, and to be able to communicate the decision to consent?

In the context of deprivation of liberty and those under 18, we note two recent developments announced by the President of the Family Division, Sir Andrew McFarlane:

1. Following the conclusion of the initial pilot scheme in July 2023 and the extensive consultation with judges and other stakeholders which followed, the organisation and listing of DoL orders relating to children under the inherent jurisdiction is being revised. The National DoL Court will no longer operate under that title. In future, all initial applications will be dealt with as part of the National DoL List, which will continue to be overseen as part of the work of the Family Division. More details can be found here;

2. The 2019 Practice Guidance: Placements in unregistered children's homes in England or

unregistered care home services in Wales, and the 2020 Addendum has been withdrawn, and the courts will no longer take an active role in monitoring the steps being taken by the provider in question to obtain regulation. Rather, revised guidance issued in September 2023 provides that the courts when considering a DoL application should enquire into whether the proposed placement is registered or unregistered. If it is unregistered it should enquire as to why the local authority considers an unregistered placement is in the best interests of the child. Further, the guidance provides that the court may order the local authority to inform Ofsted/CIW within 7 days if it is placing a child in an unregistered placement.

Consultation on clinical guidelines for alcohol treatment

A consultation has been launched seeking views on views on the draft of the first ever UK clinical guidelines for alcohol treatment. The consultation closes at 11:59pm on 8 December 2023. Of particular interest is the material relating to assessing capacity, especially in relation to alcohol related brain damage.

Fitness to plead

The Government has responded (finally) to the Law Commission's report on Unfitness to Plead, published in 2016. The unfitness to plead framework addresses what should happen in criminal courts where a defendant lacks sufficient capability or capacity to effectively participate in their trial, including understanding the charges against them and deciding how to plead.

The government has accepted the majority of the Law Commission's recommendations, which will modernise the unfitness to plead procedure. The government "*will look to bring forward legislation to implement these recommendations when Parliamentary time allows*."

The Law Commission[9] proposes that the test for unfitness to plead be reformulated as the test of capacity to participate effectively in trial. This recommendation is accepted, as are the following recommendations:

- That the court in applying the test, to take into account the assistance available to the accused in the proceedings.
- That the test should specify a list of relevant abilities and that the court be entitled to consider "any other ability that appears to the court to be relevant in the particular case".
- That the test should be structured so that the defendant will be considered to lack capacity where his or her relevant abilities are not, taken together, sufficient to enable the accused to participate effectively in the proceedings.
- That the ability to understand the charges should require the defendant to have an understanding of what the charge means, its nature, and also an understanding of the evidence on which the prosecution rely to establish the charge in the particular case.
- That the test include an ability to understand the trial process and the consequences of being convicted.
- That the ability to exercise the defendant's right to challenge a juror should not be a

[9] Which considered the UNCRPD in its report at 3.163-3.178.

specified factor in the test.

- That the ability to give instructions to a legal representative should be included within the statutory test.
- That the statutory test include the ability to "follow the proceedings in court".
- The inclusion of the ability to give evidence as part of the statutory test.
- The test should include as relevant abilities: the ability to make a decision about whether to plead guilty or not guilty, the ability to make a decision about whether to give evidence, and (where relevant) the ability to make a decision about whether to elect Crown Court trial.
- That the test should include as a relevant ability the ability of the defendant to make "any other decision that might need to be made by the defendant in connection with the trial".
- That ability to make decisions should be defined in the test by specific reference to the Mental Capacity Act criteria, but without the inclusion of a diagnostic threshold as part of the legal test.

Short note: litigation capacity and the fundamental right of access to court

In *Galo v Bombardier Aerospace UK* [2023] NICA 50, the Northern Ireland Court of Appeal made a number of very trenchant observations about the importance both of identifying where a person may lack capacity to conduct proceedings, and of an appropriate system to support the provision of litigation friends for those unable to do so The judgment relates to the position in Northern Ireland and the NI Court of Appeal were at pains to point out that they were considering the NI legislation and approach,[10] but the wider observation at paragraph 59 is one that rings true in England & Wales.

> *59. As the foregoing brief reflection demonstrates, the affordability of justice, the availability of legal representation and the provision of support measures such as a litigation friend are closely related subjects, all of them inextricably linked to every litigant's fundamental rights of access to a court and to a fair hearing. An assessment in any given case that alitigant is entitled to the support of a litigation friend is a matter of enormous importance to the person concerned. Its value must not be underestimated. The need for a simple, accessible, expeditious and cheap framework to give effect to the assessment that any litigant should have the benefit of a litigation friend is incontestable. In the absence of this - coupled with the necessary related public funding - the pioneering decisions in AM (Afghanistan) will be set to nought and our legal system will find itself paying mere lip service to the hallowed common law right to a fair hearing.*

CPS updated prosecution guidance on homicide

The CPS has updated its prosecution guidance on homicide, following public consultation. Of particular relevance is the section on 'mercy

[10] There were in this regard some slightly curious statements about English law, including that the MCA 2005 "created" a presumption of capacity to litigate applicable to every adult, a presumption apparently inapplicable in Northern Ireland. The presumption of capacity to litigate was not created by the MCA 2005, but was rather identified at common law, and such a presumption must surely have existed at common law in Ireland, not least given the NICA's endorsement of *Masterman-Lister* in which the presumption is roundly endorsed (at paragraph 17).

kilings.' The guidance states that generally, prosecution is "almost certainly required in the public interest," and that "*In particular, a prosecution is likely to be required if any of the following factors are present….The victim did not have the capacity (as defined by the Mental Capacity Act 2005) to reach an informed decision to request another to end their life*." Influence or coercion are similarly likely to mean a prosecution is required. In contrast, a prosecution is "*less likely to be required if…The victim had reached a voluntary, clear, settled and informed decision that they wished for their life to end. They must have the freedom and capacity to make such a decision.*"

Nuffield Council project to explore public views on assisted dying

On 30 October 2023, the Nuffield Council on Bioethics formally launched their project to design, facilitate, and organise a series of surveys and a Citizens' Jury. Together, these activities will enable the Council to explore and best reflect how people living in England think and feel about assisted dying including the underlying ethical, social, and practical complexities.

In this context, some might find of interest the evidence led on by Alex for the Complex Life and Death Decisions Group submitted to the Health and Social Care Select Committee's inquiry into assisted dying, highlighting matters relating to the approach to mental capacity in this context.

Short Note: capacity is not a status

In *Dudley Metropolitan Council v Mailley* [2023] EWCA Civ 1246, the Court of Appeal has reiterated in ringing terms that 'mental capacity' is not a status for purposes of considering discrimination under the ECHR. The question arose in the context of succession to and assignment of secure tenancies in the Housing Act 1985, and specifically in circumstances where the appellant's case was that, if her case is that if her mother had not had to move permanently into a care home and had remained living at the property in question until her death, she would have been entitled to succeed to the secure tenancy as a family member living with her, under section 87(b) HA 1985. Equally, if her mother had assigned the tenancy to her before she lost capacity to do so (pursuant to section 91(3) HA 1985), she could have succeeded to it on that basis. Neither of these eventualities occurred however.

The Court of Appeal had previously identified the problem with asserting mental capacity as a status in *MOC (by his litigation friend, MG) v Secretary of State* [2022] EWCA Civ 1. In dismissing the appeal, Simler LJ noted in material part that:

> *34. While I accept, as Mr Stark submits, that the ratio of MOC is not that capacity can never form part of a status, it seems to me that the uncertainty which Singh LJ regarded as fatal in MOC applies equally to the capacity element of the status as advanced by the appellant below. This is not a mere question of having to answer legal and factual questions as Mr Stark submits. The Mental Capacity Act 2005 makes clear, capacity is assumed, and further, proof of loss of capacity is to be judged by reference to a person's capacity to take particular kinds of decision at a particular time. Treating capacity as an important element of status leads to potentially significant conceptual uncertainty just as it did in MOC. In both cases the capacity issue was decision-specific – here in relation to a permanent assignment of a secure tenancy and in MOC, decisions (no doubt with potentially serious consequences) in relation to care and medical treatment; both related to a*

specific capacity at a material time (here when Mrs Mailley left the Property permanently), and in MOC "for the time being"; and in both cases capacity formed only one aspect of the status contended for. The context in which status linked to capacity is being considered in this case is one in which reasonable certainty is required given that at stake is the ability to make a permanent assignment of a protected (or secure) tenancy. I therefore reject Mr Stark's attempts to distinguish the facts in MOC from the facts in this case.

35. Although in the appellant's particular case, once her mother lost capacity as a result of her vascular dementia, she was extremely unlikely ever to regain it, that will not always be the case, and we are concerned in this case with legislation that has a wide application. Capacity can be impaired by head injury, psychiatric diseases, delirium, depression, and dementia. The impact of such a variety of different events on the proper functioning of the mind or brain can vary in terms of severity and duration. Mental capacity can change over the short and long term, and loss of capacity might be fully or partially reversed (depending on its cause), leading to the capacity to take certain decisions being regained. It is possible to envisage situations where a temporary deterioration in symptoms leads to loss of capacity at a particular time, which is subsequently regained, and this might also give rise to the risk of manipulation. Coma cases where the patient comes out of the coma with some (or full) capacity are another example. These are not technical or merely theoretical possibilities, as Mr Stark submits. They are real and perfectly likely to occur. Unlike death (which is certain in terms of its occurrence and timing), there is a penumbra of uncertainty surrounding capacity and its loss that risks people moving in and out of capacity, and contributes to the uncertainty regarded as fatal in MOC.

The appellant's attempt to introduce a different formulation of status on appeal as being (in essence) disabled so as to lack capacity to assign the tenancy equally failed.

46. Capacity and disability are distinct and different concepts: section 6 of the Equality Act 2010 defines disability by reference to a physical or mental impairment that has a "substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities"; capacity relates to a "material time" and may be temporary: see section 2(1) and (2) of the Mental Capacity Act 2005. The reasoning in Jwanczuk relied on by Mr Stark does not apply or meet the factually different situation in this case. Jwanczuk concerned a lifelong disability and inability to work (viewed in retrospect), where the potential for fluctuation in condition, significant change over time, and potential recovery were not realistically present. As Underhill VP explained, the uncertainty regarded as fatal in MOC was the conceptual uncertainty arising from the fact that under the Mental Capacity Act 2005, capacity has to be judged by reference to the capacity to take particular kinds of decision at a particular time; but the claimant's case in Jwanczuk required the application of the single criterion of whether the disabled person was unable to work at any point in her working life: if she was able to work for some part of the period but not others, that would cause no difficulty because the criterion was binary and she would fall outside the group. The same is not true here.

IRELAND[11]

In the Matter of KK (No 2) [2023] IEHC 565

Background

On the 6th of October 2023, the Irish High Court published its second judgment in *In the Matter of KK*. We discussed the first judgment in KK in the September issue of the Wider Context Capacity Report. To recap, in *In the Matter of KK* [2023] IEHC 306, the High Court considered the legal basis for making a new detention order for KK, a ward of court, following the implementation of the Assisted Decision-Making (Capacity) Act 2015 ('ADMCA'). In the first judgment the court found that new detention orders could only be made under its inherent jurisdiction, and not the transitional provisions in section 56(2) of the ADMCA.

KK, born in 2003 with mild intellectual disability and a history of self-harm, had been a ward of court since July 2020. Initially under detention orders, these were discharged in July 2021, but concerns resurfaced in December 2021 leading to new orders in June 2022 based on Dr. M's evidence. An application to reinstate the detention orders was refused in February 2023 due to lack of fresh evidence, and although Dr. M advocated for their reinstatement in April 2023, the court determined the application had to be made under its inherent jurisdiction due to the commencement of the ADMCA. While the court in *In the Matter of KK (No 2)* refused to hear the inherent jurisdiction application in the context of the wardship proceedings the court found that "*it is appropriate to specify the types of proofs that are likely to be required in any such application*". Thus, the judgment is one which does not determine an application for detention orders, but which sets out the necessary proofs.

Application for Detention

In its review of the court's inherent jurisdiction to make such orders, the court referred to the decisions in *Health Services Executive v JO'B* [2011] and *Health Services Executive v VE* [2012] to establish its authority to detain adults lacking capacity in limited or rare cases where legislative gaps exist. Consequently, *In the Matter of KK (No 2)*, the court concluded that "*because the legislature has not legislated to provide for the detention of persons lacking capacity, it falls to the judiciary to identify the circumstances in which its inherent jurisdiction should be invoked in order to detain such people*." Ms. Justice Hyland added that she hoped the legislature would act on this important issue "*sooner rather than later*."

Proofs in an application for a Detention Order pursuant to the Inherent Jurisdiction of the High Court

a. Establish a lack of capacity - assessed functionally and to be decision specific

The court found that the initial step in a detention application for someone purportedly lacking capacity is a decision-specific assessment aligned with the ADMCA. The ADMCA requires a functional approach, evaluating an individual's ability to understand, retain, use, and communicate relevant information for a specific decision rather than a global capacity assessment.

b. Establish that the person's detention is necessary to defend and vindicate their constitutional rights – the balancing exercise

The court determined that if KK is found to lack capacity for romantic and sexual relations, the

[11] Prepared by one of our Irish correspondents, Emma Slattery BL.

court must undertake a balancing exercise to justify her detention. This involves weighing factors like the nature of the restrictions on her liberty, impacted constitutional rights, and the rights to be protected, to ascertain the proportionality of the measure. Constitutional rights to liberty, autonomy, and self-determination must be balanced against the right to life and bodily integrity. Detention will be deemed necessary only if it defends and vindicates the individual's constitutional rights. Additionally, Ms. Justice Hyland noted that the Constitution, interpreted in light of current legislation including the ADMCA, now gives greater weight to an individual's right to autonomy. Thus, it is "*appropriate for a court to take into account the enhanced legislative weight that has been given to the autonomy of such persons*".

c. Establish that the type of detention proposed is the least restrictive and most proportionate way of vindicating the constitutional rights to be protected

The court found that once the court has decided which rights are to prevail i.e., whether the person is to be detained or not, it is necessary to consider the nature of the detention proposed and to decide whether it is the least restrictive and most proportionate way of vindicating the constitutional rights requiring protection. The court must assess the least restrictive and most proportionate form of detention to safeguard those rights, considering a spectrum of detention types that can vary in restrictiveness, as exemplified in cases such as one where leaving an institution would require permission from its director, and understand that even a "light" form of detention significantly impinges on an individual's liberty.

Safeguards which must be afforded to the person the subject of an application for a Detention Order pursuant to the Inherent Jurisdiction of the High Court

In addition to the necessary proofs for a detention application under the inherent jurisdiction, parties must also consider the safeguards mandated by both the Constitution and the ECHR, guided by cases that outline the required protections for detaining individuals who lack capacity.

a. Medical Evidence from the Applicant as to a) the person's capacity and b) the necessity of the proposed measures

In applications to detain a person lacking capacity, all parties *In the Matter of KK (No 2)* agreed that the court must have medical evidence regarding the person's capacity and the necessity of the proposed restrictive measures. Essentially, this is the evidence as to capacity presented by the applicant. The court commented at par. 39 that "*the Court must have medical evidence in relation to (a) the capacity of the person and the decisions in respect of which the person lacks capacity (unless that has already been provided to the Court in the context of wardship and the Court is satisfied with same) and (b) the necessity of the restrictive measures proposed. Where an application is brought to detain a person, the applicant for the detention orders will be required to put forward such evidence.*"

b. Independent Medical Evidence as to a) the person's capacity and b) the necessity of the proposed measures

Ms. Justice Hyland found at par. 41 that "*for a court to accede to a detention application on the basis of inherent jurisdiction, I am of the opinion that the Court should generally have medical evidence from at least two separate sources i.e., from the body seeking the detention Order and from one other source*". This was, like the first judgment in KK, rooted in considerations of the

procedures under Part 10 of the ADMCA. Though the court declined (at par. 45) to "*establish immutable rules in the context of inherent jurisdiction given the flexibility of the jurisdiction*". Ultimately, the court found that the optimum is "*that a court would usually be presented with medical evidence from two separate sources in respect of any application to detain*."

c. Regular Reviews

While it was not dealt with substantively in the case, Ms. Justice Hyland noted at par. 44 that "*the parties all accept that where a person is detained pursuant to the inherent jurisdiction, it will be necessary to have regular reviews of that detention*."

d. Representation *and* Hearing the Views of the Person

Ms. Justice Hyland noted that the ADMCA modernises the approach to persons lacking capacity, reinforcing their right to be heard in legal processes. The court reviewed the provisions of section 8(7) of the ADMCA which mandates that the intervener must, where practicable, facilitate the full participation of the relevant person in the intervention, respect their past and present will and preferences, and consider their beliefs, values, and other factors they would likely consider if able. The court commented that the manner in which a person's views are heard in court varies by circumstance; the pandemic has enabled greater participation through remote methods like video links, as exemplified in the case of KK, who actively participated via video. Ultimately, the court found expressed the view at par. 56 that "*it is desirable that a similar approach will be taken in any application made by CFA under the inherent jurisdiction*".

The Court also considered the issue of the representation of the person the subject of the application for detention, at par. 54, as follows:

"At a minimum, any court hearing an application of this type must be satisfied that a person is represented by a person competent to assist them in responding to the application, whether that be a lawyer or the Committee of the ward where the person is already a Ward of Court or a guardian ad litem, or some other appropriate person. Second, and separately, a court should ensure that the views of the person themselves have been heard. This is not precisely the same as representation. A person whose capacity is in question is often already disadvantaged in their communications with the world and needs a clear pathway in the context of court proceedings to be heard in relation to their wishes and preferences."

Conclusion

While both Order 67A, Rule 19 and High Court Practice Direction HC123 detail the procedure for making an application for detention pursuant to the inherent jurisdiction of the High Court, neither detail the proofs of such an application. Therefore, the guidance provided by Ms. Justice Hyland in this case is welcome guidance to practitioners and clearly draws on the ethos of the ADMCA in putting the rights and views of the person the subject of the application to the fore. How the court's findings in relation to the difference between representation and hearing the views of the person concerned will impact the developing practice and procedure in the Circuit Court is something to keep a keen eye on.

Emma Slattery BL

Editorial comment: from an English perspective, the focus on medical evidence as to capacity is of some interest. It is entirely possible for capacity evidence to be provided, including in cases concerning deprivation of liberty, by someone other than a medical professional; albeit that, in such a case, medical evidence is

required to establish that the person is (to use the dated term in Article 5(1)(e) ECHR) of 'unsound mind). The focus on medical evidence of capacity – including in non-detention cases – also finds its way into the Rules of Court for cases under the Assisted Decision-Making (Capacity) Act 2015, and in some ways stands at interesting odds with the fact that (unlike the MCA 2005) the Act does not require any finding that the person is incapable of making the decision in question to be grounded upon a conclusion that the functional incapacity is caused by an impairment or disturbance in the functioning of the person's mind or brain. Put another way, it might be thought that what could be seen as a de-medicalised model of capacity contained in the 2015 Act is very firmly remedicalised by the Rules of Court.

Alex Ruck Keene

Research Corner

In Alex's most recent 'in conversation' with, we talk to Isabel Astrachan and Dr Scott Kim about the paper we recently published together looking at the ways in which the presumption of capacity in the Mental Capacity Act 2005 (and many other equivalent legislative frameworks in other countries) can be misunderstood, and why 'suspending' the presumption in the face of legitimate reason to be concerned about a person's ability to make a decision is not only the legally, but the ethically correct thing to do.

The paper we discuss was published in the Journal of Medical Ethics in September 2023, Questioning our presumptions about the presumption of capacity. (If you are not able to access it, please email Alex at alex.ruckkeene@39essex.com).

Book reviews

Recent book reviews by Alex include:

A Clinician's Brief Guide to Dementia and the Law (Nick Brindle, Michael Kennedy, Christian Walsh and Ben Alderson, Cambridge Medicine, 2023, paperback and ebook, 180 pages, c.£25).

Mason and McCall Smith's Law and Medical Ethics 12th edition (Anne-Maree Farrell and Edward S. Dove, OUP, 2023, paperback, 702 pages, c.£42).

The Future of Mental Health, Disability and Criminal Law (edited by Kay Wilson, Yvette Maker, Piers Gooding and Jamie Walvisch, Routlege, 2023, Hardback and ebook).

Kafka and care homes

In the rather Kafkaesque case of *Calvi and CG v Italy* (app no. 46412/21), [12] the ECtHR has grappled with issues regrettably common to many elderly people in care home across Europe: vulnerability and social isolation. Both issues, it concluded, can lead to breaches of the Article 8 ECHR rights of older citizens.

The case was brought by Mr Calvi, cousin of the elderly CG who had been placed in a nursing home against his wishes in 2020.

CG's difficulties began in 2017 following an application by his sister for a guardianship order "amministratore di sostegno" as a result of his extravagant spending ("prodigalité") and apparent inability to understand the vulnerability of his circumstances. An initial expert examination found no evidence justifying psychiatric treatment; a second assessment

[12] Available in French only, but with an English summary here.

however identified a narcissistic personality disorder was considered was likely to affect CG's ability to take responsibility for himself.

A year later, CG's sister applied, with CG, for the protective measure to be lifted. By this time however, social services considered the intervention of a legal guardian had become necessary and they successfully resisted the application. It was noted that CG had been living in unsanitary conditions, travelling around by bicycle even though he was almost blind: a further psychiatric assessment was recommended.

In 2020 a guardianship judge overseeing CG's case extended CG's legal guardian's powers further to include all aspects of CG's personal care. Again, conflicting reports suggested on the one hand that CG did not suffer from any psychological pathology and had retained his capacity for judgement; on the other, he was found to have obsessive-compulsive personality disorder such that it was considered essential for him to be placed in a nursing home.

An order was made for CG to be taken to the nursing home with the assistance of the local police – the carabinieri. CG subsequently began to refuse food in protest at his confinement. When a documentary film crew produced a report questioning the legality of CG's placement in the home, the administrator took steps to restrict direct contact between CG and anyone except the mayor of his home town. This decision was subsequently shored up by a decision of the guardianship judge, who determined that no conversation could take place between CG and third parties without his express agreement.

In January 2021 an application by Mr Calvi and his sister for permission to visit their cousin was refused. Despite CG being visited in the nursing home on several occasions by the National Guarantor of the rights of persons deprived of their liberty, no further investigation of CG's position was carried out; rather, a visitor to the nursing home who had visited CG without the guardian's permission was sentenced to a year in prison.

Mr Calvi subsequently made an application to Strasbourg, with his cousin CG as second applicant, Mr Calvi complaining of his inability to contact CG; CG complaining of his inability to return home or have visitors in the nursing home.

Admissibility

The Italian government contested the case's admissibility on the grounds that Mr Calvi had not produced a power of attorney and did not have standing to bring the case. Interestingly, the court determined Mr Calvi did have sufficient standing on the basis that CG could not have lodged the application himself, having effectively lost that power to the legal guardian.

Merits

The claim was brought under Articles 5 and 8 ECHR but the court determined the substantive issues raised should be examined under Article 8 alone.

The court noted (at paragraph 87) that while the judicial authorities had placed CG in a nursing home for his own protection, to guard him against the risk of impecuniosity and physical and mental danger, they had not put in any measure either to maintain his social relations or to facilitate a return home. The court noted that the decision to place CG in the home and deprive him of his legal capacity was not based on a medical finding of impairment, but on his reckless behaviour "une prodigalité excessive" and the physical and mental weakening from which he had suffered since 2020. Because of this, the Court considered it had greater powers to scrutinise the decisions reached by the

national judges than it might otherwise have had – ie the usual margin of appreciation was somewhat narrower.

The court considered, under Article 5 ECHR, that in certain circumstances the welfare of a person suffering from mental disorders could amount to a further factor, in addition to medical considerations, to be taken into account when assessing whether it was necessary to place him or her in an institution. Nevertheless, the objective need to provide an individual with housing and social assistance should not automatically lead to measures depriving him or her of liberty. It also emphasised at paragraph 96 that any protective measure imposed in respect of a person able to express his or her wishes should in so far as possible reflect those wishes.

The court noted there were no effective guarantees in the domestic procedure which prevented potential abuse and no mechanism by which the preferences of CG were taken into account. CG was not given any opportunity to present his case while in the placement. The Court referred to the Convention on the Rights of Persons with Disabilities and at paragraph 106 noted that where substituted decision-making by guardians is put in place, proper training in "decision-making support systems" is vital.

The court noted with concern the hospitalisation of people on grounds of disability without consent albeit that it did not go so far as to analyse this within the context of Article 5. In terms of Article 8, the court found the restrictive measures were neither proportionate nor appropriate, and a breach of CG's article 8 rights was found.

Comment

The majority of Strasbourg cases concerned with a lack of mental capacity to make decisions about residence or care (and thus engaging Article 5) are concerned with mental illness usually seen (in English terms) through the prism of the MHA 1983, rather than impairments arising out of learning disabilities or cognitive decline such as are frequently encountered in the CoP.

Regrettably the court did not actually delve into the Article 5 implications of CG's case – a missed opportunity in our view. Nonetheless, the implications of the court's findings on article 8 could – and should – be profound. Citizens moved to care homes against their wishes who are socially isolated as a result may well have valid Article 8 ECHR claims arising from the actions of the relevant public authority: all those working in this field should exercise due care to ensure their social networks and familial contacts are preserved as far as possible.

SCOTLAND

Bureaucracy v Justice

The description "bureaucracy v justice" does not overstate the significance of a landmark decision by Lord Sandison in the Court of Session (Outer House) on 22nd August 2023 in the case of *DML, Petitioner* [2023] CSOH 55; 2023 S.L.T. 921. "Bureaucracy" has a range of meanings. Sadly, I use it at the opposite end of that range from the most benign, indicating a rising trend in recent years by more than one bureaucracy towards obstructing, rather than supporting, the ends of justice, particularly for our most disadvantaged and vulnerable citizens.

In this case, David took the form of DML, a party litigant before the court, a 50 year-old at the time of the hearing, who had been the victim of sexual assaults at the ages of 11 and 12 and on whose behalf it had been stated that he "had been the victim of a horrendous crime of violence at a very young age which had affected him throughout the rest of his subsequent life, [and] that he had been traumatised and continued to suffer from a range of psychiatric conditions" (narrated at paragraph [7] of Lord Sandison's judgment). Lord Sandison recorded that "Although the petitioner had had some background pro bono assistance from a person with experience of judicial review proceedings in the English courts, he represented himself throughout the course of these proceedings, ultimately accompanied by a lay supporter who provided him with moral support and who, with the court's permission, read out part of his pre-prepared submissions when he became too affected by emotion to do so clearly himself." [24]

Goliath on this occasion was the criminal injuries compensation mechanism, including both the Criminal Injuries Compensation Authority ("the Authority") and the First-tier Tribunal (Social Entitlement Chamber) ("the Tribunal") to which DML, through solicitors at that stage, had taken an appeal against the Authority's refusal of compensation. Goliath was unsuccessful and, one hopes, duly chastened.

General Issue

On the general issue of principle upon which this commentary on the decision focuses, Lord Sandison found it necessary to quote from the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 the terms of Rule 2(1), headed "Overriding objective and parties' obligation to co-operate with the Tribunal": "The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly." [40]

Lord Sandison commented that:

> *"It is difficult to see how the petitioner's case before the Tribunal was dealt with justly. It was a case which was important not only for him, but for the public interest in seeing to it that the victims of serious crime, especially child victims, receive appropriate compensation as a societal mark of condign sympathy for their suffering. Rule 2 required the case to be accorded a treatment proportionate to that importance …" [41].*

He subsequently pointed out that:

> *"… any set of statutory rules which does not proclaim itself to be a comprehensive and entirely self-contained code for the disposal of a particular kind of dispute (and the 2008 Rules do not so seek to classify themselves) is subject to supplement by common law principles of fairness …".*

He referred to the decision of the Supreme Court in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 at [35]:

> *"The duty of fairness governing the exercise of a statutory power is a limitation on the discretion of the decision-maker which is implied into the statute. But the fact that the statute makes some provision for the procedure to be followed before or after the exercise of a statutory power does not of itself impliedly exclude either the duty of fairness in general or the duty of prior consultation in particular, where they would otherwise arise. As Byles J observed in Cooper v Wandsworth Board of Works (1863) 14 CBNS 180, 194, 'the justice of the common law will supply the omission of the legislature.' In Lloyd v McMahon [1987] AC 625, 702–703, Lord Bridge of Harwich regarded it as well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness. …" [42].*

Lord Sandison referred to, and quoted from, several other relevant judgments, in subsequent paragraphs which (this author would submit) helpfully outline where the law stands on what I have characterised as the "bureaucracy v justice" issue.

An earlier quotation from the judgment sets the tone of the view taken by Lord Sandison of the Authority's conduct: "… It is rather disappointing that a public authority should seek to take a technical pleading point against a party litigant, particularly one of such vulnerability. …" [26].

Perhaps readers of this Report could suggest other "Goliaths" who might profitably read the foregoing account of what I describe as the "general issue" in this case, as well as the "particular issues" to follow.

Particular Issues

Narration of the particular issues relevant to this case takes up several pages of the judgment. A brief summary hardly does them justice, but in essence they were these. The Authority refused to compensate DML for two reasons, both referred to by reference to relevant paragraphs of the Criminal Injuries Compensation Scheme 2012, as laid before Parliament under section 11(1) of the Criminal Injuries Compensation Act 1995 and amended under section 11(3) of that Act. Paragraph 26 refers to an Annex which "*sets out the circumstances in which an award under this Scheme will be withheld or reduced because the applicant to whom an award would otherwise be made has unspent convictions. …*". Paragraphs 88 and 89 set out the "normal" time limits for lodging an application; with authority to the Claims Officer to extend those periods where the Claims Officer is satisfied that, due to exceptional circumstances, the applicant could not have applied earlier, and the evidence presented in support of the application means that it can be determined without further extensive enquiries by a Claims Officer. In the judgment, and in the materials referred to in the judgment, these two grounds of refusal are dealt with by reference to those paragraph numbers. The link between them is that, as the Authority submitted, consideration of possible exceptional circumstances for delay is not relevant if entitlement to compensation is in any event blocked by paragraph 26.

The Authority relied on paragraph 26 on the basis that DML was ineligible for compensation because he had an unspent conviction that had resulted in a community payback order. It had not. Solicitors then acting for him produced an email from the relevant court advising that a community payback order had initially been imposed on 7th November 2019, but had been revoked in favour of a 30-day restriction of liberty

order on 5th March 2020. The significance of the difference is that a restriction of liberty order did not disqualify DML from compensation. Solicitors then acting for DML pointed this out, in writing, by emails to the Authority on 30th March 2021 and 19th May 2021, and yet again on 7th December 2021 forwarding an Opinion of Counsel that a restriction of liberty order was not the equivalent of a community payback order, together with a Minute from the relevant court confirming the change. Notwithstanding this, the Authority wrote on 17th August 2021 continuing to adhere to the paragraph 26 ground. After solicitors then acting had intimated an application to the Tribunal, a Legal Officer for the Authority issued a directions notice on 3rd October 2022 which included: "*Parties are reminded that the only issues before the Tribunal in this appeal are those contained in the CICA's review decision, dated 17 August 2021, which concern the refusal of the application under paragraphs 88, 89 and 26 of the Scheme.*" This was despite the fact that on 22nd December 2021 the Authority had made a written submission to the Tribunal conceding that a restriction of liberty order did not disqualify DML from eligibility. That concession appears to have been obscured, or at least not noticed by the solicitor then acting, perhaps by reason of the continuing references to paragraph 26 thereafter, leading to the consequences summarised below.

Also apparently obscured was that if the blockage under paragraph 26 no longer applied, then the Authority intended to support the refusal by reference to paragraphs 88-89.

There was also an issue before the Tribunal as to whether that hearing should be postponed because of a change of solicitor.

It is relevant to narrate that the Authority's own guidance on "exceptional circumstances" under paragraph 89 of the Scheme included:

> *"Exceptional circumstances are more likely to exist in cases involving sexual abuse, especially where the applicant was a child at the time of the offence. This is because the silence of the victim, and ongoing psychological and emotional trauma, are well known to be direct consequences of such crimes. These effects continue into adulthood. Further, the process of a criminal investigation and trial in such cases will often increase the psychological impact of the crimes. For these reasons, where you are dealing with a case involving sexual abuse in which the applicant did not apply until criminal proceedings concluded, you should accept that exceptional circumstances exist unless you consider there are compelling reasons not to do so. …"*

It appears that that guidance was not addressed before the Tribunal. DML's solicitor concentrated entirely on the paragraph 26 issue, and neither addressed the "exceptional circumstances" issue, nor questioned DML about the circumstances leading to the delay. DML himself attended by telephone, separately from his solicitor. In his submission to the court, as narrated in the judgment [19]:

> *"In these circumstances he found it difficult to follow. He was floundering and nervous. He had been told by his solicitor that the issue at the hearing was the nature of his 11 previous convictions, and that in light of the opinion of counsel provided to him, the Authority was not going to oppose his appeal to the Tribunal. He was not aware of any separate issue about the lateness of his application, and did not understand that his solicitor was aware of any such issue either. His solicitor did not address the Tribunal about that issue. Mr Kelly started asking him questions about it. He was taken by surprise by that, as he had been told that he would only have to state his name*

and date of birth, and then there would be legal argument in which he would not be expected to participate. He was extremely agitated when matters transpired otherwise, and in something of a haze. He remembers briefly saying that he had been suffering from terrible anxiety and other mental health symptoms since the sexual assaults and that the last thing on his mind had been making a compensation claim. He had explained that he had gone to the police only because a friend had effectively forced him to do so. He maintained that, even on the telephone, it would have been obvious that he was finding it difficult to answer the questions being asked, and not much was asked of him about the state of his mental health at the relevant time. In retrospect, he feels that he was not given any real opportunity or time to explain his circumstances, and that no one wanted to understand the gravity of what he had endured or the impact it had had on him. Whenever he has to confront what happened to him, he becomes distressed and confused."

On this situation, Lord Sandison said:

> *"… the petitioner was not able to participate fully in the proceedings. It is true that he was on the end of a telephone and could have said whatever he wanted to say when asked questions about the paragraph 88 and 89 issues. However, that was participation in point of form only. It lacked substance, because he had no idea that he was going to be asked about those issues, was (because of his ongoing mental health issues and understandable reticence to speak about times which had been extremely difficult to live through) singularly ill-prepared to be asked about them, and had not had the benefit of lodging any material about them to which he could have referred and on which he could have made comment in the course of the presentation of his case. Further, and importantly, it must (or at the very least ought to) have been apparent to the Tribunal during the course of the hearing that the petitioner's case on the paragraph 88 and 89 issues was not merely being badly presented, but that it was not being presented at all. …" [41].*

Lord Sandison dismissed any suggestion that because DML's then solicitor ought to have known what was to be addressed before the Tribunal amounted to fair notice to DML himself by reference to *Majorpier Ltd v Secretary of State for the Environment and Others* [1990] 59 P and CR 453 at 466, "*… when one is considering questions of natural justice, one ought to have regard to the position of the lay client personally and not simply to that of his legal advisers as his representatives.*"

The concluding, and commendably succinct, summary by Lord Sandison [50] is as follows:

> *"1. The proceedings before the Tribunal were of particular sensitivity and of importance not merely for the petitioner but for the public interest.*
>
> *"2. The petitioner was, to the knowledge of all concerned, a victim of childhood sexual abuse and, as such, particularly vulnerable in connection with proceedings requiring that abuse and its consequences to be canvassed.*
>
> *"3. No clear express notice of the matters to be dealt with by the Tribunal was given by it to the petitioner; in context, such prior indication as was given was capable of being misunderstood and was in fact misunderstood by the petitioner's agent.*
>
> *"4. That misunderstanding resulted in the petitioner being totally unprepared for the questioning he faced by the*

> *Authority and the Tribunal at the hearing, to the extent that he was not given a substantively fair opportunity to present his case on the paragraph 88 and 89 issues.*
>
> *"5. The Tribunal ought to have appreciated from the nature of the appeal and the way that matters were transpiring before it in the course of the hearing that something had gone badly wrong in the presentation of the petitioner's case, and should have stepped in to ascertain the reason for that and used the powers of adjournment available to it to provide a remedy for what had occurred, instead of carrying on regardless."*

He reduced the relevant judgment of the Tribunal and required the Tribunal to re-hear DML's appeal before a differently-constituted panel within a reasonable time.

Remaining Concern

One is left with at least the strong whiff of a potentially more serious concern that the Authority may, throughout, have abandoned any realistic attempt to do justice to an applicant as vulnerable as DML obviously was. The Authority's whole approach to the matter was clearly dominated by the supposed "unspent conviction", and the fact that it rendered irrelevant any reasonable enquiry into the "exceptional circumstances" issue. There is nothing to show that, even after dropping the paragraph 26 argument, the Authority got as far as its own guidance (quoted above) under which DML's application plainly accorded with a situation in which its guidance instructed acceptance that exceptional circumstances existed except where there were "*compelling reasons not to do so*". It is regrettable that the Authority seems not to have made enquiry into the conviction, that – one would suggest – ought reasonably to have gone beyond identifying that the sentence did not disqualify DML from compensation, rather than leaving it to solicitors then acting for DML to unearth even that.

All that we know about the offence is that DML was convicted "for threatening and abusive behaviour on 13th June 2019". Given the background, and in particular DML's entirely understandable and (in his circumstances) normal reticence to unearth his horrendous childhood experiences, were those experiences disclosed before he was convicted and sentenced? What were the circumstances that provoked his "threatening and abusive behaviour"? Anyone with any understanding of the consequences of the trauma from childhood, with which DML had been living for the rest of his life, would immediately have wanted to know whether the "threatening and abusive behaviour", went beyond what would otherwise be regarded as acceptable in the circumstances because it was a manifestation of the consequences of that trauma. Did the Authority not think to eliminate, beyond the technicality of the nature of the sentence, the possibility that it risked refusing compensation because of a manifestation of the consequences of the appalling trauma for which compensation was sought?

A potentially most grievous injustice was averted in this case, principally by an example of the essential requirement of any "free and democratic society" (as Nelson Mandela described it) of a fully independent judiciary, capable if need be of ensuring that justice can be done where one party is vulnerable and unrepresented, yet ensuring a fair balance between both parties for both respective cases to be heard and duly considered.

Adrian D Ward

From Guardian to Ward - A Tribute

When I was Public Guardian, Adrian Ward and I frequently found ourselves speaking at the same events and most regularly with consecutive sessions, he always first, of course. In handing the floor to me Adrian would oft quip that they had heard from 'the ward' now they would hear from 'the guardian'. Well, for once we have it the other way round, here we have from guardian to ward - a tribute.

On 25 October 2023 Adrian Ward, convenor of the Mental Health and Disability Committee (MHDC) of the Law Society of Scotland, chaired his last MHDC meeting. Why is this worthy of note? Well, his first meeting as convenor was 34 years earlier, 9th November 1989. (well 34 years if we overlook 14 days)! In those 34 years he has missed less than a handful. When people say Adrian is hugely committed to the mental health and capacity agenda you need only look at this one statistic.

MHDC first met in April 1989, albeit then classed as a 'Mental Health Working Party' as it was considered the time may be right for a review of mental health law in Scotland – it seems everything is cyclical, as this will sound terribly familiar to colleagues today who have recently emerged from the Scottish Mental Health Law Review (SMHLR). Even more so when I say that the said working party had firmly in its sights an England and Wales consultation document entitled 'Decision Making and Incapacity'. I wonder how far we have come in 34 years?

I have seen a letter from Adrian in which he warns the Working Party facilitator that the arena is "huge" and of the significant amount of work that a review will entail – having been involved with the SMHLR that's all sounding terribly familiar too.

Adrian accepted the invitation to be a member of the MHDC founding working party but commented that he would have to be mindful of the time pressures it would entail and the potential impact on business and family life. One would never know that Adrian had this initial reservation about time commitment given the gusto which Adrian has 'attacked' any and every aspect of the mental health and capacity agenda over his 34 years as convenor.

In 1991 the MHDC hosted a seminar to launch the Scottish Law Commission's Consultation on adult with incapacity (AWI) "Reform" (really one could say "creation") and were part of a steering committee which campaigned so effectively for what ultimately became the 2000 Adults with Incapacity (Scotland) Act. Thus, under the leadership of Adrian and the MHDC, we went, in a decade, from no real relevant statutory law at all, and far behind the world leaders, to delivering a regime that was then itself seen as a world leader.

In 1995 MHDC started the process of mental health law reform, pioneering the organisation of the seminal "Consensus for Change?" conference which created an irresistible drive towards establishing the Millan Review and the 2003 Mental Health (Care and Treatment)(Scotland) Act.

MHDC had similar involvement with the Scottish Law Commission's "Vulnerable Adults Report", again driving that through to actual legislation in the Adult Protection (Scotland) Act 2007. A key achievement of the MHDC in this was proposing, and ensuring the implementation of, the concept of removing the problem from the adult, rather than always removing the adult from the problem.

In more recent years MHDC has in some ways had the even more challenging role of trying to sustain necessary progress, playing a significant role in the Scottish Law Commission's proposals for deprivation of liberty, and with the membership of the committee providing half the

UK-wide team that produced the Three Jurisdictions Report on Compliance with Article 12 of CRPD.

Along the way, there has been much more. An early, but highly significant example, is the success of the MHDC in getting what became section 71 of the 1990 Law Reform (Miscellaneous Provisions) (Scotland) Act – a section which would revolutionise our law on powers of attorney, explicitly permitting them to survive incapacity of the granter. This set Scotland on a trajectory, which it still maintains, as a world leader, with our substantial involvement in developing voluntary provisions for future incapacity, initially powers of attorney and now advance directives/advance choices as well.

This joint work on advance choices, with the Health and Medical Law Committee, has been promoted worldwide, including in the current European Law Institute's project. The by now international reputation of Adrian, as a founding father of adult incapacity, led to the approach for Scotland to host the 7th World Congress on Adult Capacity, a successful event held in Edinburgh in 2022, which brought world leaders in this field together in person, for the first time in 4 years (thanks to an interruption from a global pandemic).

At the outset of Adrian's time as convenor mental health and incapacity was not a recognised legal subject, there were no legal textbooks on it, and no group of lawyers specialising in it. To build from that zero base must certainly have been a challenge. The achievement can be seen in what we have today with it being a recognised specialism, with a significant number of highly accomplished lawyers practicing in this field, many of whom are authors or co-authors of a range of legal textbooks on the subject and are, or have been, members of the MHDC.

As an aside, I recognised a number of names when researching historic papers for this article, including Colin Mackay. Scottish readers will know Colin well: he too was on the original working party and has recently served on the Executive Team of the SMHLR. A definite full circle in mental health and capacity law for Colin. The names of David McClements and May Dunsmore also appeared in early correspondence, both still involved, David as Vice Convenor of the MHDC. The other name on the very first of Adrian's letter is the initial "EB". EB is Adrian's secretary Evelyn. To this day Evelyn is still Adrian's secretary. We think of Adrian as a prolific correspondent, let us too respect the 'right hand' role Evelyn has played over all these years. You may wonder why, in a reflection on Adrian's time as convenor, I mention these other names, well, it's because I've heard Adrian, a-plenty, thanking and acknowledging the support of others. We tend to think of Adrian as a one man 'power house' [as he was recently described to me] but I know he is only too aware that whilst he may be the face of success it is a team effort. Out of respect for him I don't think he would wish such a Tribute to him to not recognise the support of so many others over the years.

What of the man himself, here's a few of adjectives I've heard, "tenacious" " "motivated" "passionate" "enthusiastic" "committed" "loyal" "dogged" "driven" "determined" – it's like a thesaurus, but it's certainly sums Adrian up. If I may indulge in some personal reflection, I don't deny that over my time as Public Guardian (14 years) I may have been heard to use other words to describe Adrian's "dogged determination", a formidable force to be reckoned with, but at no time did I have anything other than the utmost respect for his drive and ambition. It was a huge privilege to be invited, as Public Guardian, to be an observer on the MHDC and now, as an independent advisor on adult capacity issues, to have been appointed as an official [lay] member

of such a key and influential committee, "Adrian's committee" as many refer to it.

At the outset I wondered how far had we come in 34 years; my goodness, I hope this narrative is sufficient to answer that question. It is perhaps best summarised by the close of Adrian's initial letter, accepting a place on the working party, "In this country we really do not have a proper body of law dealing with mental disability at all if we're talking about law reform then British law is so backward in this area that it is almost an advantage that we can start with a fairly clean slate". The fact that for 20 plus years [in Scotland] we have had statutorily enshrined rights for persons with mental health and incapacity and we have a willingness to update these to ensure such people have equal rights in an ever-changing modern society demonstrates just how far, significantly so, we have come. But Adrian was right when he recognised the size of the agenda, promoting mental health and capacity issues remains a massive task. At the time of writing we have yet to hear who has been appointed as Adrian's successor, that person has enormous shoes to fill but as an MHDC committee member and someone who has been hugely invested in capacity issues for 20 years now that person will have my full support.

But what of the future for Adrian, well he has not retired (despite nearing 80! I hope he won't mind me saying) nor slowed down (I told you, a force to be reckoned with); Law Society of Scotland regulations require his term of office as convenor of MHDC to complete but he has applied for ordinary membership, we have yet to hear if he has been successful. He too has undertaken to support the new convenor in whatever way he can and I'm sure will continue to be as prolific as ever both nationally and internationally. He will continue to be a Scottish contributor to this Newsletter, so will very much continue to be at the forefront of mental health and adult capacity law for, we hope, many years to come.

This has made me think of our late Queen Elizabeth II, who, on her 21st birthday, devoted her whole life, be it long or short, to our service, and the Paddington Bear sketch on her platinum jubilee which concluded with Paddington's words "Thank you Ma'am … for everything". Well, it strikes me that Adrian has devoted his life to the service of the vulnerable in our society. So it seems only fitting to close this tribute by stealing Paddington's line: "Thank you, Sir … For everything".

Sandra McDonald

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Conferences

Members of the Court of Protection team regularly present at seminars and 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 December. 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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