MENTAL CAPACITY REPORT: HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

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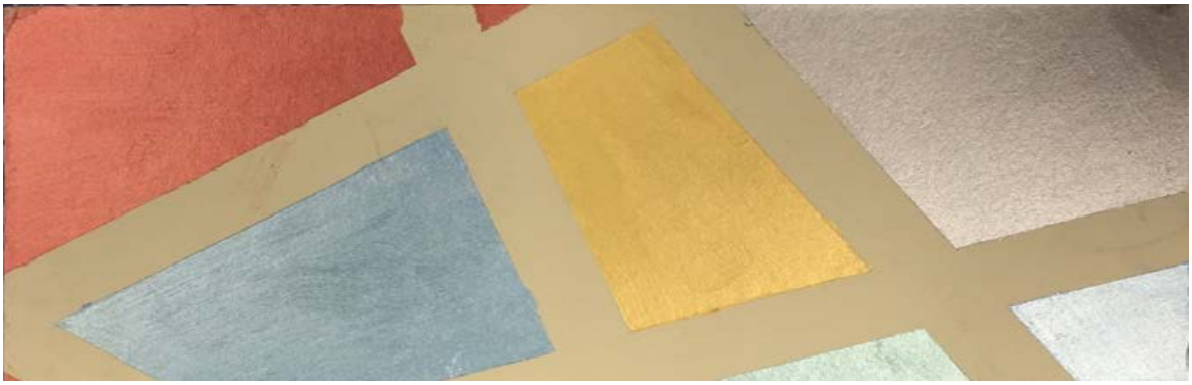

Welcome to the April 2024 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: a very difficult dilemma arising out of covert medication, and key deprivation of liberty developments;

(2) In the Property and Affairs Report: fixed costs for deputies, deputies and conflicts of interest, and the Child Trust Fund saga continues;

(3) In the Practice and Procedure Report: three amended Practice Directions, when (and why) should the judge visit P and fact-finding in the Court of Protection;

(4) In the Mental Health Matters Report: the Government (rather surprisingly) responds to the Joint Committee on the draft Mental Health Bill, and important reports from the PHSO and CQC;

(5) In the Wider Context Report: a snapshot into litigation capacity and Jersey sheds light on the concrete realities of assisted dying / suicide;

(6) In the Scotland Report: the Assisted Dying for Terminally Ill Adults (Scotland) Bill.

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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How is the Mental Capacity Act faring? In conversation with Dr Margaret Flynn

To mark 10 years since the publication of the report of the House of Lords select committee convened to conduct post-legislative scrutiny of the Mental Capacity Act 2005, Dr Margaret Flynn, Chair of the National Mental Capacity Forum, joined Alex in the shed. Their conversation examines where the Act came from, and how we are (or are not) making progress in making it an Act which matters.

To tell or not to tell?

A Local Authority v A, B and the Hospital Trust [2024] EWCOP 19 (Poole J)

Best interests – medical treatment

Summary

This 5-year long case concerned a 25-year-old woman ('A') who was being covertly medicated in a care home whose mother sought her return to which all other parties were opposed. The previous judgments were reported at [2019] EWCOP 68; [2020] EWCOP 76; [2022] EWCOP 44. By way of reminder, in a previous closed hearing, it was decided to be in her best interests to be administered hormone replacement treatment ('HRT') covertly. Two years later Poole J decided her mother should be informed and for contact between them to be reintroduced. In September 2022 it was decided that a plan should be prepared to transition to open medication.

A was told that she has gone through puberty and she steadfastly refused to take the medication voluntarily. The issues at this hearing were whether it was in her best interests to return to her mother's, in respect of which the issue of covert medication was inextricably linked. Poole J noted that:

> *24. … the assessment of best interest involves consideration of very different concepts such as medical risks and benefits, human rights, wishes and feelings, autonomy, and relationships. Those disparate matters have to be taken into account but a balance sheet exercise may not be particularly helpful.*

Covert HRT had produced a significant medical benefit for A by ensuring she went through puberty, protected her against the loss of bone density and the very significantly increased risk

of cardi-vascular disease. However, Poole J was troubled by the fact that the plan for covert medication had no end date in sight; she was not severely cognitively impaired; its purpose – to induce puberty – had happened; and if HRT ceased, she would likely experience menopausal symptoms.

Poole J was concerned about the impact on A's health and welfare if she made the discovery and that, if her mother lost hope of her return home, she may tell her. Poole J doubted it was sustainable for years ahead. The mother's proposal to covertly medicate her at home until she persuaded her daughter to take HRT voluntarily was unrealistic as her actions did not match her words. There was a high risk she would find out if she moved to her mother's. However, the provision of covert medication required her to be deprived of her liberty, to live away from home, and for her contact with her mother to be regulated.

Dr X, who acted both as A's treating clinician and as the expert reporting to the court, gave evidence to the effect that A should be covertly medicated for the rest of her life and it was unlikely she would do so voluntarily. Nothing attempted so far to move to open medication had been successful and no transition plan had been prepared. To do so would require (a) honesty about her having been covertly medicated and (b) the input of her mother to whom she was more likely to listen.

Poole J carefully analysed the benefits and burdens of returning to her mother's against her continued stay. On balance, and contrary to the position advanced by the local authority, the Trust and the Official Solicitor, his Lordship decided it was in her best interests (i) to return home to her mother's care; (ii) for covert medication to cease; (iii) for her to be informed that she has been covertly administered HRT and that it has been of benefit to her health and stopping it would be harmful to her health; (iv) to allow her mother to try to persuade her to take HRT voluntarily; and (v) for support to be provided to her in the community whilst she is living at home. Poole J held:

> *84. The assessment of best interests in this case is complex. Whatever decision is made, or if no decision is made, there will be both positive and negative consequences for A. I acknowledge the risk that my determination of A's best interests will result in her returning home to an unhealthy relationship and will expose her to the harmful consequences of ceasing HRT. However, those risks are outweighed by the benefits of ending the deprivation of A's liberty and the serious interference with her Art 8 rights, and of avoiding the risk of an unmanaged disclosure to her of the covert administration of HRT. The Court is enjoined to seek to achieve purposes "in a way that is less restrictive of the person's rights and freedom of action" (MCA 2005 s1(6)). Here, severe restrictions have been imposed in order to achieve the benefit of medical treatment. Now, the continuing and remaining benefits of treatment are not sufficient to justify the continued restrictions.*

Accordingly, he directed, a plan should be prepared for her return home and for the release of information to be carried out in stages (paragraph 85).

Comment

The covert medication stakes were particularly high in this case and could not be siloed from residence. Rather than adopting a balance sheet exercise, the court's analysis very much focused on the issues of necessity and proportionality. Given the risks and benefits of the two options, was her continued detention and separation from her mother's care still necessary and

proportionate to the health benefits of HRT? With the primary goal of the treatment having been realised - with A having gone through puberty - the balance had shifted and honesty was now the best policy.

Poole J's observations about the dual role of Dr X are also of note. Dr X himself had said in evidence before Poole J that this was not a satisfactory combination of roles, and Poole J agreed that this should be avoided (paragraph 7). That is not the same as saying that clinicians cannot give evidence based upon their expertise. As Hayden J noted in *London Borough of Southwark v NP & Ors* [2019] EWCOP 48

> *vi. In Court of Protection proceedings, the Court will frequently be asked to take evidence from treating clinicians. Invariably, (again especially at Tier 3) these will be individuals of experience and expertise who in other cases might easily find themselves instructed independently as experts. Treating clinicians have precisely the same obligations and duties upon them, when preparing reports and giving evidence as those independently instructed. Further, it is the obligation of the lawyers to ensure that these witnesses are furnished with all relevant material which is likely to have an impact on their views, conclusions and recommendations. (see: Re C Interim Judgment: Expert Evidence) [2018] EWFC B9). This should not merely be regarded as good litigation practice but as indivisible from the effective protection of P's welfare and autonomy.*

Exercising legal capacity and termination: a creative approach by the Court of Protection

Rotherham and Doncaster and South Humber NHS Foundation Trust v NR & Anor [2024] EWCOP 17 (Hayden J)

Best interests – medical treatment

Summary[1]

This very difficult case concerned a pregnant woman, detained under the Mental Health Act 1983, who was ambivalent about carrying her baby to term. She had an extensive history of drug and alcohol abuse. This was her fifth pregnancy. She had two daughters, H and L (now in their teens), both of whom were removed from her care. H was 10 years of age when removed and L, 9 years. The children's social care records reveal that NR experienced difficulties with her mental health during the pregnancy with H. When NR was approximately four months pregnant with H, she attended the hospital on what was described as *"multiple occasions"*, reporting self-harm. Following the birth of her second daughter, she was identified as suffering from post-natal depression. NR was, in this period, living with the father of the children, BG, who was a violent man who subjected her to repeated domestic violence. At the time, the judgment records, she was unable to understand or confront the effect of this violence on either her or the children. BG has had no contact with the children for several years. NR had experienced a miscarriage in the past and a termination of pregnancy prior to the birth of her daughters when she was 15 years of age.

As regards her capacity, the evidence of her responsible clinician, Dr A,[2] and its implications was recorded at paragraph 12 thus:

> *On 23rd February 2024, Dr A met with NR in her room, which I note was at her request, supported by a staff nurse with whom she felt comfortable. The discussion revolved around "termination*

[1] Katie having been involved in the case, she has not contributed to the note.

[2] Note, no independent expert appears to have been instructed in this case to report upon capacity.

> *of pregnancy" in its broadest and non-specific sense. NR understood what the word involved but she declined to hear anything as to what the procedure would entail at this stage for her. When I say declined to hear anything, I should emphasise that she was completely adamant that she did not want to know anything about what would actually be involved. She has, by and large, stuck to this view throughout these enquiries. This poses rather a challenge in assessing her capacity. As I have set out above, an understanding of what the termination procedures is a significant facet of evaluating P's understanding. Of course, it is not axiomatic that a refusal to think about something infers an inability to do so. However, Dr A told me that it is the agitation caused by her mental health condition that prevents her from engaging in a consideration of what is involved in the termination. He told me that she was, in effect, "unable" and "incapable of" participating. It is this that renders her incapacitous. No party disputes this conclusion and I have accepted the analysis as rebutting the presumption of capacity erected by the MCA 2005.*

The much more difficult question was at best interests, given the consistently inconsistent statements that NR was making as regards her pregnancy. Having reviewed the evidence at some length, Hayden J identified at paragraph 37 that:

> *NR finds herself on the horns of the most invidious dilemma. She clearly, and most probably correctly, apprehends that if she carries the baby full term, it will be removed from her at, or shortly after birth. This may even be her wish, though she plainly anticipates the possibility of being ambushed her own emotions. Many of the notes set out above reflect NR, at very least contemplating these possibilities. Equally, she plainly contemplates a termination, even though that may not sit easily with her prevailing beliefs. Ultimately, I do not, as I have said, find that the evidence in this case supports a determined view either to terminate or to continue with the pregnancy. The evidence, in my judgement, reflects a woman who is paralysed by conflict, which is pervasive. I accept Dr A's opinion that her unwillingness to confront the practical realities of the termination is also a facet of her mental ill health. However, NR certainly confronts the ethical and emotional aspects of both the termination and a continued pregnancy. Even if they are to be regarded as distorted by her condition, they are real for her and require to be afforded both weight and respect. I emphasise that I am entirely satisfied that it would be wrong and unsafe to draw a concluding view as to what NR's wishes and feelings truly are.*

Hayden J therefore had to look more widely to determine where NR's best interests lay, and read into the judgment the detailed plan for the termination procedure should it go ahead. He then zeroed in on the discussions that the Official Solicitor's representative, Ms Crow, had had with her, and in particular this passage from one of her attendance notes:

> *I explained to [NR] that my role is to make sure that the Judge knows what she would like to happen and so I wanted to be sure I had that right. I summarised that she had said that she didn't want to have the baby and that she would like a "caesarean" to terminate the pregnancy, and that she would like this to be done under a general anaesthetic. [NR] said that was right. She said that she was getting hot and so she moved seats and removed her fleece top; she had another jumper on underneath. [NR] said "you can't really tell [I am pregnant], can you?". I*

> *confirmed that if I didn't know then I wouldn't necessarily be able to tell. [NR] said "I don't really like people to see it [her bump]. I think it is a boy, I saw the scan and thought that. It is not like I don't want it, but I just don't think I would be able to cope". I told [NR] that I thought she was being very brave and she said "I don't want it, it will make me more ill and my family don't want me to have it. I need to make the right decision for me for once".*

Hayden J considered that NR's conclusion that she needed to make the right decision for her "captures where her best interests lie, i.e. that this decision should be NR's" (paragraph 47. He also agreed that this case was similar to that of *Avon and Wiltshire Mental Health Partnership v WA & Anor* [2020] EWCOP 37 where, although he had similarly found the person to lack capacity on the central issue, he had nonetheless left the decisions to him, because he had considered that the priority was to recognise and enable him to assert his own autonomy. He considered that this was precisely what he wished to achieve with NR:

> *50. What is required is that the Court, having considered best interests, makes a declaration as to lawfulness. The care plan which has been dynamic and has evolved during this hearing now emphasises the importance of helping NR to reach a decision by giving her clear and tangible options but emphasising that the decisions are hers. The amended plan sets out its overall aim in the introductory paragraphs in these terms:*
>
> > *"Prior to the commencement of this plan (preferably in the days before), staff at [the Yorkshire hospital] will take [NR] through the stages involved in the plan, explaining to her what is involved at each stage, that it is [NR]'s choice whether to go through each and every stage and that she can stop the process at any stage until the termination has reached an irrevocable stage…"*
>
> *51. The centrality of NR's autonomy is emphasised throughout the plan, and I am entirely satisfied, is recognised by all involved:*
>
> > *[NR] will not be compelled to undertake the termination or to undertake any of the stages in the plan. The staff shall use their clinical judgment (including verbal encouragement and discussion) to support [NR] to make her choice whether to go through each stage in the plan. No coercion or force will be used".*
>
> *52. The initial application for a declaration was that I should state that it is lawful and in NR's best interests to have a termination. I expressly decline to make that declaration. I do, however, approve the proposed care plan and confirm the lawfulness of it. Thus, I make a declaration that the care plan, setting out the arrangements for a termination of NR's pregnancy is lawful. I go no further. So far, the options presented to NR have been uncoupled from the practical realities. There is now a finely structured plan where a decision, one way or the other, is unavoidable. It is important that NR knows that I am respecting her rights as an autonomous adult woman to make this decision for herself, with the help of those she chooses to be advised by. I should also like Ms Crow to explain to NR that whatever decision she takes, will have my fulsome support. As I discussed during the course of the hearing, a copy of this judgment is to be made available*

> *to all the key professionals involved in the plan in order that they know the reasoning behind the conclusions I have reached and what the objective of the plan is.*

Comment

On the face of it, it might seem somewhat odd for the court at the same time to conclude that the person lacks capacity to make the decision in question, but that it is in their best interests for them to decide what should happen (or perhaps, to be more precise, for their choice to be respected as determinative[3]). It might also seem somewhat odd for the court to decline, expressly, to make any best interests decision, given that a key part of its statutory raison d'être is to make such decisions on behalf of individuals unable to do so. It might, finally, be thought somewhat odd on the facts of the case that NR was, in fact, unable to make a decision about whether to undergo a termination given the passage of the attendance note of the meeting with Ms Crow that Hayden J placed such weight upon.

However, taking a step back, it might equally be said that this case represented a truly CRPD compliant approach to supporting the exercise of legal capacity by NR and, ironically, but importantly, did so by focusing not on NR herself, but rather on those who would need to act upon her wishes and, in effect, telling them that they would be legally determinative.

Short note: "Two Ps" – a worked example

Not enough judgments of District Judges are published. This is in part because very many decisions that they make are set out in oral judgments, rather than in reserved judgments (i.e. those handed down after the hearing, and written up after the hearing by the judge). It is also in part because of the extraordinary pressures of time on such District Judges. However, the end result is that the body of case-law does not capture many of the realities of the decisions that are taken up and down England & Wales by the judges who hear the vast majority of cases before the Court of Protection.[4] It is therefore all the more interesting to see the judgment of District Judge Simpson in *Re MA & AA (Re Section 21A of the Mental Capacity Act 2005)* [2023] EWCOP 65, which recently appeared on Bailii. As a decision of a District Judge, it can have no precedent value, but is a very thorough 'worked example' of the 'two P' scenario addressed in *HH v Hywel Dda University Health Board & Ors* [2023] EWCOP 18, where Francis J set out how the Court should proceed. After confirming that proceedings should be consolidated, and that the same judge should hear both sets of proceedings, Francis J had held (at paragraph 43) that:

> *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*

[3] Given that the MCA 2005 refers expressly to a person's mental capacity to make the decision in question, by definition a view expressed where it has been held that they do not have that capacity cannot, legally, be a 'decision' in the sense of an act with an automatically determinative legal effect.

[4] For more on this, see this article. The Open Justice Court of Protection website contains many blogs of hearings before such judges which give invaluable insights into these cases, but there is a difference between a report of such a hearing and the public record of a judgment.

> *each of them and the best interests of each of them.*

The two – conjoined – decisions are sufficiently complex that they cannot easily be reduced to a summary but they do show the workings out of a very difficult situation where it was not possible (on the face of the evidence) to meet the care needs of the two spouses with dementia in the same place, one spouse no longer seemed to recognise the other, and video calls between the two seemed to cause nothing but pain to the spouse whose dementia was less advanced.

Lieven J puts the (Cheshire West) cat amongst the pigeons

Peterborough City Council v Mother (Re SM) [2024] EWHC 493 (Fam) (Family Division (Lieven J))

Article 5 – deprivation of liberty – children and young persons

Summary

Lieven J is proving herself the spiritual successor to Mostyn J as regards challenging *Cheshire West*. Readers with long-ish memories will recall that Mostyn J took on the Supreme Court decision in full-frontal fashion in *Rochdale MBC v KW* [2014] EWCOP 45, concerning a woman who was 'barely ambulant,' and was thought soon not to have the motor skills to walk even with her frame. At that point, Mostyn J observed (at paragraph 22):

> *If she becomes house-bound or bed-ridden it must follow that her deprivation of liberty just dissolves. It is often said that one stress-tests a proposition with some more extreme facts. Imagine a man in hospital in a coma. Imagine that such a man has no relations demanding to take him away. Literally, he is not "free to leave". Literally, he is under continuous supervision. Is he in a situation of deprivation of liberty? Surely not. So if Katherine cannot realistically leave in the sense described above then it must follow that the second part of the acid test is not satisfied.*

And then, at paragraph 25:

> *She is not in any realistic way being constrained from exercising the freedom to leave, in the required sense, for the essential reason that she does not have the physical or mental ability to exercise that freedom.*

He observed that the definition of deprivation of liberty in *Cheshire West* should be reconsidered by the Supreme Court, and sought unsuccessfully to bring about a leapfrog appeal. An appeal against his decision was allowed by consent; Mostyn J then sought to reconsider the question, and, on a further appeal, was firmly told off (to use a legal term) by the Court of Appeal, who made it clear that in endorsing the consent order they were necessarily deciding that KW was deprived of her liberty and that his legal analysis was of no legal effect (see here at paragraphs 18 and 31 respectively).

Now, 10 years later, and just in advance of the 10 year anniversary of *Cheshire West*, Lieven J has taken another run at a situation involving a person with profound cognitive and physical impairments. SM was a 12 year old girl with profound and enduring disabilities, who was non-mobile and non-verbal, and whose situation was described at paragraph 4 of the judgment thus:

> *In practical terms SM cannot leave her bed of her own volition, and according to her Mother does not like sitting up. Her only body control is to be able to push her hands away and to wriggle and roll from side to side. She is moved by her carers from the bed to the floor, which according to her Mother she enjoys. She cannot communicate in any form and*

> *does not understand language. It is difficult to assess her cognitive functioning, but her Mother described her responding like a child of a few months. She does respond to stimuli, and for those who know her well it is possible to tell whether she is responding positively or negatively. All her care needs are met by carers.*

Having been made subject to a final care order, SM lived with foster carers who provided her with a high quality of care. The local authority applied for an order authorising the deprivation of liberty to which they said she was subject in consequence of the following restrictions:

> *a. SM is supervised 1:1 in the home at all times either by a physically present person or by remote live only video feed;*
>
> *b. SM is moved by her carers as appears reasonable or necessary to meet her welfare needs;*
>
> *c. SM's feeding and administration of medicine is managed by her carers through her gastrojejeunal button as appears reasonable or necessary to meet her welfare needs;*
>
> *d. SM is dressed and undressed, washed and her needs arising from her incontinence are managed as appears reasonable or necessary to meet her welfare needs;*
>
> *e. SM's bed has bars on the side to prevent her moving while in bed so as to fall and injure herself;*
>
> *f. SM is supported outside of the home at all times, with up to 2:1 supervision to ensure her safety and ability to mobilise as appears reasonable or necessary to meet her welfare needs;*
>
> *g. External doors to the property are kept locked for the purpose of ensuring the integrity and security of SM's home.*

The case was referred to Lieven J by a circuit judge concerned as to whether was an appropriate case for such an order. SM's Guardian opposed the making of the order on the basis that it was not necessary.

Lieven J started her analysis at paragraph 8 by observing that:

> *Quite apart from the overarching issue as to whether SM should be subject to a DoLs order at all, there are a number of aspects of the above restrictions which do not amount to a deprivation of liberty. In my view (a), (b), (c), (d) and (e) are on any analysis part of her care provision, and not actions which deprive her of her liberty. This would be the case whether or not SM was severely disabled. It is important that the "mission creep" that seems to have set into the DoLs applications to the High Court. There are many aspects of care which may intrude on an individual's privacy and autonomy, and which may interfere, albeit with justification, into the scope of Article 8. But they are not interferences with the right to liberty enshrined in Article* [5].[5]

She also noted at paragraph 10 that such orders had:

> *become a depressingly common matter in the Family Division of the Family Court. Over the period of 12 months something in the region of 1700 such orders have been made. The exponential growth in these orders has been referred to in numerous cases in the High Court, Court of Appeal and Supreme Court, see Re T (A Child) [2021] UKSC 2136.*

[5] The judgment says Article 8, but from context clearly means Article 5.

> *The enormous expansion of this area of law can be traced to two factors. Firstly, the caselaw, in particular the judgment of the Supreme Court in Cheshire West v P [2014] AC 896; and secondly the severe shortage of places in secure accommodation units, see Re T. The present case does not concern the problem of the shortage of places. It is a product of the decision in Cheshire West and the approach that has been taken to potential prospective breaches of Article 5 European Convention on Human Rights ("ECHR").*

Lieven J then turned to *Cheshire West* itself, observing that

> *24. The ratio of Cheshire West* [i.e. what the Supreme Court decided as a matter of law] *is therefore that for there to be a deprivation of liberty the individual must be under constant supervision and control, and not be free to leave. The test that Lord Kerr sets out at [78] that the child should be compared to someone of the same age is not a separate test adopted by the majority of the Supreme Court. The dissenting judgments (Lord Carnwath and Lord Hodge, and Lord Clarke in a separate judgment) largely focused on the need to consider the "concrete situation" and the fact that the individuals had no wish to leave and were living in a "domestic setting", see [98].*
>
> *25. It is not straightforward, certainly in the more complex cases, to apply Lord Kerr's approach in a meaningful manner. Firstly, assuming that one should compare SM with someone of "her age and station" is a difficult exercise with a child. There is no paradigm 12 year old who can be assumed to have a particular level of maturity, and therefore subject to a particular level of restraint and control. Secondly, and more fundamentally, it is a wholly unreal exercise to compare SM with another 12 year old. To the degree that such comparisons are useful, she functions cognitively in a way comparable to a baby of a few months in age and therefore, on the facts, that would be a much more useful comparator. Lord Kerr was simply not addressing the type of facts, and thus the legal issue, that therefore arises in this case.*

Lieven J considered that the local authority's application took the principles set out in Cheshire West:

> *31.* […] *to a logical but extreme conclusion that, in my view, defies common sense and is not required by the terms of the Supreme Court decision. It is important to note that Cheshire West was concerned with the three individuals' inability to consent to the deprivation of their liberty, and their apparent compliance with the restraints placed upon them. They were all physically capable of leaving the property, and would have been stopped if they had tried to do so. That is not the facts of the present case.*

At paragraph 33, Lieven J identified that she considered that it was "*axiomatic that* [the three individuals] *were not free to leave because of some action (or inaction) of the State*," and that the Supreme Court's decision did not "*deal with the situation of a child such as SM who is incapable of 'leaving' because of a combination of her physical and mental disabilities, not by reason of any restraints placed upon her*." She identified that both Counsel in the case had not found any case either in the UK courts or in Strasburg where a court had not found any case, whether in Strasbourg or the UK Courts, where a court had found a deprivation of liberty in circumstances similar or analogous to those of SM.

Lieven J considered that there were a number of different ways of explaining why SM was not deprived of her liberty, but that they:

> *35.* […] *all come down to focusing on the reason why she cannot leave where she is living. That reason is her profound disabilities, not any action of the State, whether by restraining her or by failing to meet the State's positive obligations to enable her to leave.*

Lieven J considered that:

> *36 Fundamental to a breach of Article 5 is a deprivation of liberty attributable to the State, whether by negative or positive action. Often this will involve putting in place restrictions, such as locked doors or windows; or physically restraining the individual. However, the action to prevent someone leaving could be purely verbal or indeed psychological, which often will involve "close supervision and control". In Cheshire West the facts suggest that there was little physical restraint, but the nature of the supervision was such that the individuals knew they were not allowed to leave and would be prevented if they tried to do so. So simply telling someone that they are not allowed to leave, may be sufficient to amount to a deprivation of liberty.*

In response to the emphasis placed by the local authority on the extent to which SM was under supervision and control, Lieven J noted that this was to confuse two things:

> *37. SM is undoubtedly under close supervision and control, but that is not in order to prevent her leaving. The close supervision is to meet her care needs. It does not need to be, and is not, for the purpose of preventing her leaving, because she is wholly incapable of leaving, both because of physical inability but also because she is unable to form any desire or intent to leave. It is simply not a concept of which she has any consciousness.*

Lieven J then emphasised that:

> *38. On a conceptual level it is difficult to see how one can be deprived of something that one is incapable of doing. Equally, how can one be deprived of a right that one is incapable of exercising, not through the actions of the State or any third party, but by reason of ones own insuperable inabilities.*
>
> *39. In Cheshire West the Supreme Court, particularly in the speeches of Lady Hale and Lord Kerr, were concerned to protect and facilitate the rights of disabled people. There will be many instances where a disabled person cannot do something through their own volition, by reason of their disability, but could do it with appropriate support. An obvious example is a disabled person who cannot move without a wheelchair, and therefore cannot leave the property without assistance. It is easy to see that that person may be deprived of their liberty because they are not free to leave, even though they need third party help in order to leave. In that situation the State may be under an obligation to assist the person in leaving, and failing to do so might amount to a breach of Article 5. Equally, there will be people with mental disabilities, who may not assert their right to liberty, but are restrained by being told that they are not allowed to leave. Those are the type of situations which were in contemplation in Cheshire West.*

Lieven considered that this was a wholly different situation to that of SM, because she was both physically incapable of exercising her right to liberty, and mentally incapable of

asserting it. Returning to Lord Kerr's focus on the comparison with a child of the same age and station, she identified that it was not quite clear what he meant by this, but that neither Lady Hale nor Lord Neuberger adopted the argument that the comparison must simply be a child of the same age and station, such that "*the binding ratio of the case is the test of close supervision and not being free to leave, rather than necessarily comparing SM with a non-disabled 12 year old.*" That having been said, "*in many, indeed most cases, such a comparison will be very useful, and the approach has been applied in many subsequent cases as an appropriate exercise, never so far I am aware on facts similar to SM's*" (paragraph 40). Lieven J was clear that:

> *41. As I have said, the approach of comparing SM with a non-disabled 12 year old, as an "objective" analysis, is a wholly unreal exercise, and one that leads to a nonsensical result. Ms Scarborough submitted that not finding SM was deprived of her liberty would involve discriminating against her as a disabled person. To some degree this was the concern of the majority in Cheshire West. The Court emphasised the universal quality of the rights granted by the ECHR, see [36]. This was not however a legal argument of unlawful discrimination under Article 14, as opposed to a general concern to protect the rights and interests of disabled people.*

Aware, perhaps, that her approach could be seen as potentially discriminating against those who are physically and mentally incapable of exercising their right to liberty, Lieven J tackled Article 14 ECHR head on, noting that "[i] n order for there to be a breach of Article 14 it is necessary for there to be different treatment between people in a relevantly similar situation for the purposes of the decision or matter in question" (paragraph 42) and that

> *The able bodied 12 year old is plainly not an appropriate comparator because there is a material difference between them and SM as regards the matter in question, here the constant control and supervision. There may be good reason to apply a strict approach to Article 5 in respect of disabled people given the fundamental importance of protecting liberty. However, a discrimination argument does not, certainly on the facts of SM's case, progress the analysis.*

Before refusing the application for a DoL order, Lieven J concluded by observing that:

> *The need to ensure the universal applicability of Convention rights is central to the analysis in Cheshire West, and how the term "deprivation of liberty" is defined. However, that does not mean that where the facts show overwhelmingly that the State is not depriving someone of their liberty the universal quality of the right force the Court to a conclusion that defies the facts and commonsense.*

Comment

It is undoubtedly true that it is depressing how many applications are being made for authorisation of deprivation of liberty in relation to children, it is important to note, as did Lieven J, that many of these applications are being made because of the crisis in service provision. That crisis does not just relate to the provision of secure accommodation. As the work of the Nuffield Family Justice Observatory shows, it is also relates to the crisis in both social and health care provision for children with complex needs, with situations escalating in consequence.

SM's case, however, is very different to the cases covered by the Observatory's report, and indeed, we anticipate, to the vast majority of those cases involving children being put forward for

authorisation, and it is easy to see why the case was referred to Lieven J to determine whether an order authorising deprivation of liberty was required in her case. Her conclusion that one was not required is likely to have considerable resonance with many people – and not, we hasten to add, just because of the potential for reducing the number of deprivation of liberty applications which might need to be made.[6] It is also entirely easy to see that Strasbourg might find SM not to be deprived of her liberty, even if perhaps less easy to work out the principled basis upon which it might do so, given that the only case in which it has previously considered the position of children (Nielsen) is one whose logic is somewhat difficult to disentangle.

Because of the way in which she approached the question before her, Lieven J's judgment perhaps represents the most serious (albeit first instance) challenge to *Cheshire West* in the 10 years since it was handed down, more serious, even that the challenges launched by Mostyn J in *Rochdale* case noted above, and also *Bournemouth Borough Council v PS* [2015] EWCOP 39, because engages with the judgment in a more sustained and detailed fashion. Whilst it relates to a child, and on its face can only apply to a child given its focus on the 'comparator' approach of Lord Kerr, an approach that does not apply to those over 18, its underpinning logic is not so limited as Lieven J's analysis was founded upon a conceptual approach towards the meaning of liberty which is not limited to children.

That conceptual approach to what it means to be deprived of one's liberty chimes with the extra-judicial observations of District Judge (and Professor) Anselm Eldergill in an article published in 2019 called "Are all incapacitated people confined in a hospital, care home or their own home deprived of liberty?" It might also be thought to be consistent with the underpinning rationale of the Court of Appeal in the *Ferreira* case which, as expressed by Lady Arden in *Re D* [2017] UKSC 42 (now as a Supreme Court judge, having sat previously on the Court of Appeal panel hearing *Ferreira*) that there may be circumstances where the person may lose their liberty but fall outside the scope of Cheshire West because "*the loss of liberty is due to the need to provide care for them on an urgent basis because of their serious medical condition, is necessary and unavoidable, and results from circumstances beyond the state's control*" (paragraph 120).[7]

We do understand that the decision will be appealed, so the appellate courts are not going to be able to pronounce upon her observations or her conclusion. This is particularly unfortunate, because the judgment does give rise to some significant questions that it would be very helpful to have addressed at an appellate level.

The first is in relation to the application of the decision of the Supreme Court in *Re D* [2019] UKSC 42, not referred to by Lieven J, but in which the Supreme Court expressly considered the position of those under 18 (at least, those aged 16 and 17). In that decision, Lady Hale (for the

[6] Although the reality is that cases such as SM's case are likely to be so far down the priority / triage list for local authorities working with children with complex needs that it is on one view quite surprising that the council in this case in fact even considered making an application.

[7] However, it is important to note that the Court of Appeal in *Ferreira* found that they were not bound by *Cheshire West* because that case concerned living arrangements, whereas *Ferreira* concerned immediately necessary life-saving physical health treatment: see paragraph 91. SM's case undoubtedly concerns living arrangements.

majority) identified that the crux of the matter was whether the restrictions fell within normal parental control for a child of the relevant age (see paragraph 39), and by reference to Lord Kerr's discussion in *Cheshire West* analysed by Lieven J considered that: "[i]*t follows that a mentally disabled child who is subject to a level of control beyond that which is normal for a child of his age has been confined within the meaning of article 5*" (paragraph 42). For Article 14 ECHR purposes, Lady Hale was therefore giving a clear comparator: a child of the same age, with the question being whether the restrictions went beyond those which would be considered societally acceptable for a child of that age.[8] Lady Black agreed with, and did not add to, the analysis of Lady Hale (see paragraph 90), as did Lady Arden (see paragraph 116). For Article 14 purposes, therefore, it might be said that not treating the disabled child as deprived of their liberty would be to allow unjustified differential treatment in the form of socially unacceptable restrictions being placed upon them that would not be accepted in respect of a non-disabled child of the same age.

One response to the question of the relevance of *Re D* might be that, whilst Lady Hale in *Re D* observed that her conclusions would also apply to a child below the age of 16, the other judges (both in the majority and minority) specifically did not address their position. However, when SM turns 16, and given that it is unlikely on the face of the judgment that her position will materially have changed, she will be firmly into *Re D* territory. Further, Lieven J did not purport to limit her observations about the scope of deprivation of liberty to those under 16. The question of the application of Re D to cases of children below the age of 16 (or, at a minimum, the question of why it should not apply) is therefore a live one. This is perhaps particularly important for the fact that *Re D* makes clear that each element of the Article 5 "trinity" needs to be considered separately, i.e. confinement, consent and state imputability. Whilst Lieven J expressly addressed the question of confinement, she appeared in effect, also, to link it to SM's cognitive abilities: a matter which would, for those in the Re D zone, be relevant to consent, not confinement. Does this mean that there is a different approach required altogether for younger children?

The second is as to the applicability of the Court of Appeal's decision in *KW*, which it might be thought to have been a little surprising that the researches of the Counsel appearing before Lieven J did not identify, given that – as noted above – the case expressly considered the position of a person said not to be "*in any realistic way being constrained from exercising the freedom to leave, in the required sense, for the essential reason that she does not have the physical or mental ability to exercise that freedom*." Whilst KW was an adult, and SM a child, the framing is identical.

A third question is as to Lieven J's observations at paragraph 37 in relation to the supervision and control to which SM was subject. It is entirely

[8] See also in this regard Sir James Munby's 'rule of thumb' at paragraph 43 of Re A-F (Children) [2018] EWHC 138 (Fam) that "(*i) a child aged 10, even if under pretty constant supervision, is unlikely to be "confined" for the purpose of Storck component (a); (ii) a child aged 11, if under constant supervision, may, in contrast be so "confined", though the court should be astute to avoid coming too readily to such a conclusion; and (iii) once a child who is under constant supervision has reached the age of 12, the court will more readily come to that conclusion*," although "*all must depend upon the circumstances of the particular case and upon the identification by the judge in the particular case of the attributes of the relevant comparator as described by Lord Kerr*." As noted above, the 'wiggle room' in terms of the attributes of the comparator has been significantly reduced by *Re D*, handed down subsequently.

understandable that she focused on the issue of whether such supervision and control was directed to preventing SM leaving. Indeed, this was precisely what the Official Solicitor argued in Cheshire West, only to be met with the response from Lady Hale at paragraph 49 that she would not go so far as to agree that "[t]*he supervision and control is relevant only insofar as it demonstrates that the person is not free to leave. A person might be under constant supervision and control but still be free to leave should he express the desire so to do. Conversely, it is possible to imagine situations in which a person is not free to leave but is not under such continuous supervision and control as to lead to the conclusion that he was deprived of his liberty. Indeed, that could be the explanation for the doubts expressed in Haidn v Germany*." So the fact that supervision and control was in SM's case was not directed specifically at stopping her leaving would not, applying Cheshire West, itself, be determinative.

A fourth question is how the decision sits with that in *HL v United Kingdom*, in which a central feature of the case before the domestic courts was the assertion that HL (who was autistic and non-verbal) never tried to leave, the judgments giving the strong sense that HL did not appear to have the capacity to understand that he could try to. The ECtHR had little truck with the fact that false imprisonment at English common law only arises where the person seeks to leave and is prevented, noting that such a distinction was not of central importance under the ECHR, and that (paragraph 91) "*the key factor in the present case to be that the health care professionals treating and managing the applicant exercised complete and effective control over his care and movements* [and that] *the concrete situation was that the applicant was under continuous supervision and control and was not free to leave. Any suggestion to the contrary was, in the Court's view, fairly described by Lord Steyn as 'stretching credulity to breaking point' and as a 'fairy tale.'*" In the passage from *Cheshire West* cited in the paragraph above, and consistent with *H*L, it can be seen that Lady Hale proceeded on the basis of asking what would happen if the person did express a desire to leave, not on whether they had done so.

Alex is on record as considering that the Supreme Court did take a wrong turn in *Cheshire West*, but that, as discussed here, the wrong turn was (in effect) not listening closely enough to P, MIG and MEG to discern whether the arrangements were – to use CRPD language – in line with their will and preferences or otherwise. That wrong turn arose because they assumed, on the basis of the agreed position of the parties before them, that MCA 2005 incapacity to consent to the arrangements meant that they could not give valid consent for purposes of Article 5 ECHR. However, the reversal of that wrong turn would require the Supreme Court to reconsider the matter.

Our concerns in relation to any attempt to narrow the scope of *Cheshire West* – as understandable as they are, and especially in *SM*'s case – by reference to the objective test, is how to avoid falling into the trap of discriminating against those who are physically incapacitated. Lieven J was undoubtedly alive to this in *SM*, and her reference (at paragraph 35) to the State's positive obligations that might be in play to support a person to leave is clearly very important – it is clear that she considered that, in effect, there as was (and could be[9]) no evidence that SM would wish to leave, and that her conclusions would have been different had she

[9] Although we note that, although she was described as being unable to communicate, it was also identified that it was possible to identify that she responded positively or negatively to stimuli. Likewise, it is clear from all that is known about HL that he hated being in Bournewood Hospital.

had such evidence. However, it is all too easy to see the judgment being applied to situations where little or no work is done to identify what the person wants. To this end, it is perhaps important to reiterate that, whilst its underlying logic may be thought to apply to those over 16 / over 18, it is a decision which relates to a child of 12.

For all these reasons, it will be very unfortunate if there is no appeal, such that the questions will remain to be resolved – but hopefully before SM reaches the age of 16 so that those responsible for her at that point know what they should be doing in her case.

Law Society guidance on deprivation of liberty

The Law Society has updated its practical guidance on identifying a deprivation of liberty.[10]

Since the publication of the original guidance in 2015, there have been important developments in the law relating to deprivation of liberty, including clarification of the position of:

- those under 18
- those in receipt of life-sustaining medical treatment

For several years, it had been anticipated that these developments would be reflected in an updated version of the statutory Code of Practice.

However, with the announcement of an indefinite delay to the implementation of the Liberty Protection Safeguards (LPS) in April 2023, there is no immediate prospect of an updated code to accompany the LPS.

This guidance draws together the assistance that can be found in the case law and from the practical experience of the authors who, in different contexts, advise upon and act in cases involving questions of deprivation of liberty.

It includes an overview of the legal framework, including the special considerations relating to those under 18.

The guidance applies that framework to different settings:

- hospitals
- psychiatric care
- care homes
- supported living/shared lives/extra care
- at home
- palliative care and hospices

For each setting, a list of potentially 'liberty-restricting' factors are given that may indicate that a deprivation of liberty is occurring.

Scenarios are also given, which illustrate:

- a deprivation of liberty
- a potential deprivation of liberty depending on the circumstances
- a situation unlikely to amount to a deprivation of liberty

Each chapter concludes with a list of questions that professionals can ask themselves whenever they are confronted with a situation which may amount to a deprivation of liberty.

You can download the whole guidance, or as individual chapters covering specific care settings.

[10] Alex edited it, and Neil was one of the authors.

You can also download quick reference guides for each setting.

Alex has done a walkthrough of the key points here.

DoLS prioritisation tool and rights guide

West Midlands ADASS has published an updated DoLS prioritisation tool, a Rights Guide for people subject to DoLS authorisations, and an Easy Read Rights Guide. All of these have been endorsed by ADASS nationally.

Deprivation of liberty and care providers – how thick is your legal ice?

In a recent report, entitled *A Hidden Crisis*, Age UK has highlighted the extent of the problems with DoLS, setting out the results of qualitative research carried out with care home staff, representatives of local authority DoLS teams, and families of those affected by DoLS. Age UK sets out clearly the (depressingly familiar) problems, and notes that:

> *The problems with DoLS are arguably part of a wider story of policy neglect and underfunding impacting social care. The current social care staffing crisis means that care homes often do not have sufficient staffing levels to deliver care in a way that properly reflects the human rights principles set out by the DoLS and the Mental Capacity Act. Care home managers do not always have the resources to provide person-centred care and this means that care practices can be more restrictive than they ought to be, and that the minimal restrictions specified in DoLS authorisations are not always adhered to or reviewed. For example, people may be locked up for long periods in their room in a care home, or not supported to go outside or to leave the setting at all due to a lack of staff to accompany them. There are also concerns that in some instances restless residents are simply sedated to keep them quiet.*

Age UK further identify that its research found "*a marked lack of concern from some professionals and others caught up in the system about the absence of proper DoLS processes being followed on the basis that what really mattered was that the individuals in question were safe.*" Age UK notes that:

> *This is understandable, given our beleaguered system of social care and health services, but the Charity believes it is important to challenge this narrative, as infringing liberty can be a 'slippery slope' and freedom is such a fundamental right in our society.*

We do not for one minute disagree, but it is important to highlight that those delivering care are on the horns of a true dilemma. The CQC has already noted in its most recent State of Care report that:

> *Meanwhile, people who are waiting to be assessed may be restricted without the appropriate authorisation in place. This could mean that people are being deprived of their liberty for longer than they should have been, or where less restrictive options could have been identified if they had been assessed. When assessments are delayed, staff face the challenge of keeping people safe while protecting their rights. This is particularly difficult if an urgent DoLS authorisation expires before the person has been assessed for a standard authorisation. Providers are not always clear on how to navigate the difficult legal situation of caring for people who are waiting for an assessment. This situation also affects people's ability to challenge the deprivation of liberty, as public funding for legal support depends on an authorisation being in place.*
>
> (emphasis added)

As the Age UK report notes:

> *Once an urgent authorisation has expired, any deprivation of liberty without a standard authorisation is unlawful. In these circumstances, care home staff are faced with a difficult choice. If they place restrictions on someone who may need them, they are at risk unlawfully depriving the person of their liberty, but if they follow the law and do not deprive someone of their liberty while they wait for a DoLS authorisation to be approved, they then face the challenge of keeping someone who may be at high risk of harm safe.*

A case study then follows, of 'Helen's Grandad,' which we reproduce in full below:

> *"I was saying 'let's do it [the DoLS application] today". But it took ages. It took six weeks and he was running around all over the place. They said there was backlog and there were more urgent ones they had to deal with. I was pleading with staff … saying "stop him", they were saying "Helen*, we can't – we're not allowed to". It was frustrating." Helen's Grandad, Peter, has had Alzheimer's for a long time and has been living in care for two years. He was regularly leaving the care home and being found roaming the streets as he thought he was going to work. As the care home was close to a dual carriageway, Helen and her family felt a constant sense of dread that something serious would happen. Each time he left the care home, Helen had to come into the care home to speak to the staff.*
>
> *As her Grandad's power of attorney, Helen was approached by the care home about implementing a DoLS. It was framed as a way which would enable staff to prevent him from leaving the home, and she was relieved that there might be a solution. They contacted the local authority and a BIA was assigned who organised a multi-agency meeting with the care home, Peter's GP, the family and the local authority. This was followed by a BIA assessment.*
>
> *Following these assessments and meetings, Helen and her family heard almost nothing from the local authority about the application for over 6 weeks. They were informed there was a backlog, but in this time – as there was no emergency DoLS in place – her Grandad was regularly leaving the home on his own and the care home staff could do nothing to force him to remain. Helen describes feeling totally helpless during this period and frustrated because she couldn't understand what was taking so long.*
>
> *When Peter's DoLS eventually came through it was a relief.*
>
> *(emphases added)*

The case study is interesting in that, rather contrary to the picture painted in the extract from the report set out above, this shows a care provider intensely concerned about the right to liberty. The underlined passages are also concerning because they suggest the care provider may not have been assisted to think through the balancing act required as between life and liberty. Whether it is framed by reference to the European Convention on Human Rights or at common law,[11] we can confidently state that, in the context of those reasonably believed to lack capacity to take the relevant decisions, the courts will almost invariably prioritise life over liberty, at least when it comes to determining the

[11] If 'Peter' is a self-funder, or his care is funded by NHS Continuing Health Care, complicated questions might arise about the application of the Human Rights Act to the care provider (as flagged here in this report from the Joint Committee on Human Rights on Human Rights in Care Settings).

consequences for the care provider which has deprived the person of their liberty unlawfully because their attempts to get the position authorised have not yet succeeded (see this presentation here).

If CQC could be tempted to come off the fence to help care providers work out what they are meant to do, it might be said that assessing the thickness of the legal ice for the care provider might be tested by reference to the extent to which they can say they reasonably believe that preventing the person leaving is necessary in order to:

(a) give life-sustaining treatment, or

(b) to carry out any act which the person doing it reasonably believes to be necessary to prevent a serious deterioration in the person's condition.[12]

If the provider (a) reasonably believes that either of these apply; and (b) they have done all that they can to help the relevant body authorise the situation,[13] it seems to us that there is a strong case that they are the right side of a line we should not be having to draw.

Sharing information about health and care

In an unreported case determined in January 2024 by Sophia Roper KC sitting as a Tier 2 judge, permission was given by the judge to publish a note setting out the relevant information given to the capacity expert to assess P's capacity to consent to permit professionals to share information about her health and care provision with her family, which was agreed between the parties. The relevant information was identified in the note as being:

(a) What sort of information might be shared by professionals.

(b) The benefits of sharing this sort of information with their family including support with appointments, monitoring of care provision, support to engage with services and medication and so on.

(c) The risks of not sharing this information with their family, including the risk of deterioration, the reported risk of death due to substance abuse, the risk of non-engagement with services. The court also identified that P would need to be able to recall and weigh up past events where their family have, and have not been provided with information, and the impact of those decisions on P.

This provides us with the opportunity to remind me people of our recently updated guidance note on relevant information for different categories of decision.

[12] The nerds will have spotted that this comes from s.4B MCA 2005, which we need to emphasise only applies to give legal authority to deprive someone of their liberty where an application has been made to the Court of Protection to determine a question about whether D is authorised to deprive P of his liberty under s.4A. However, this does provide a useful framework to tease out the level of risk to the person. In legal terms, this would, in turn, then provide a basis upon which it could be argued that any unlawful deprivation of liberty to which the person was subject pending authorisation caused them no harm, and hence, in turn, only grounds the right to a declaration and nominal damages (i.e. £1).

[13] And to contact the relevant body on a regular basis to enquire as to when their request for authorisation will be processed (and, if necessary, to alert them to any change in circumstances).

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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.

Adrian will be speaking at the following open events: the World Congress on Adult Support and Care in Buenos Aires (August 27-30, 2024, details here) and the European Law Institute Annual Conference in Dublin (10 October, details here).

Peter Edwards Law has announced its spring training schedule, here, including an introduction – MCA and Deprivation of Liberty, and introduction to using Court of Protection including s. 21A Appeals, and a Court of Protection / MCA Masterclass - Legal Update.

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 May. 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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