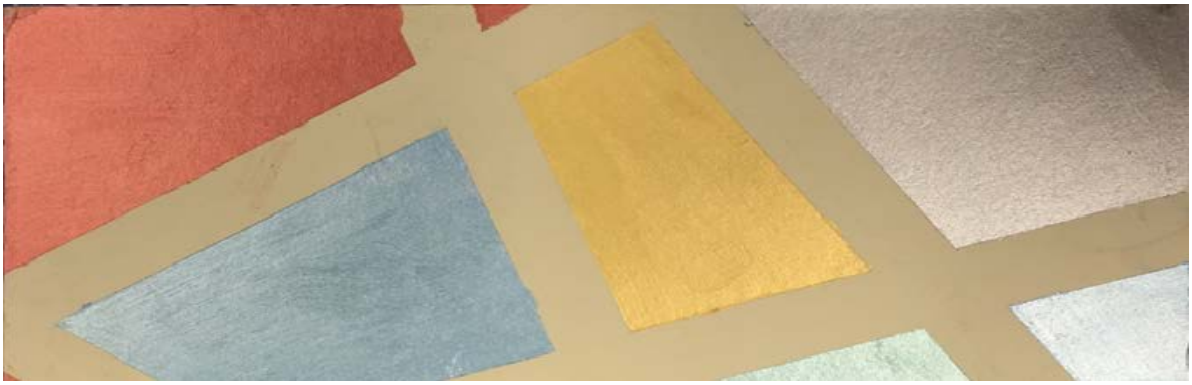

Welcome to the November 2024 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: anticipatory declarations; systemic failure in considering PDOC patients, and the CQC and DoLS.

(2) In the Property and Affairs Report: Senior Judge Hilder reversing reverse indemnities and considering the scope of deputies' authority in the context of Personal Health Budgets;

(3) In the Practice and Procedure Report: costs and delay and capacity in cross-border cases;

(4) In the Mental Health Matters Report: the Mental Health Bill is introduced;

(5) In the Wider Context Report: Strasbourg suggests that the Supreme Court was wrong in the *Maguire* case.

(6) In the Scotland Report: Scottish Government's law reform proceeds at breakneck speed, and a symposium for Adrian.

There is one plug this month, for a free digital trial of the newly relaunched Court of Protection Law Reports (now published by Butterworths. For a walkthrough of one of the reports, see here.

His fellow editors congratulate Alex on his receipt of a Honorary Fellowship of the Royal College of Speech and Language Therapists (and he uses this opportunity to give his usual plug for their vital role as capacity supporters).

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.

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

Contents

Delays, delivery and deprivation of liberty

Cardiff and Vale University Health Board v NN [2024] EWCOP 61 (T3) (Victoria Butler-Cole KC, sitting as a Deputy Tier 3 Judge)

CoP jurisdiction and powers – costs

Summary[1]

NN was a 32-year-old woman with a history of substance abuse and schizophrenia, repeatedly detained under the Mental Health Act 1983 from the age of 17 and homeless since 2023. She experienced a coercive, abusive relationship leading to a relapse and became pregnant before being detained under MHA 1983 s.3. There was no dispute that she lacked capacity to conduct the proceedings and to make decisions as to termination, and that she should have a termination if she chose to proceed with it. But the hospital applied for authorisation to deprive liberty if, having taken the first doses of medication she tried to leave the hospital at which point physical and chemical restraint would be required. By the time of the hearing, under the time limits of the Abortion Act 1967 there were only a few days left.

Considering *Ferreira*, the court agreed that since a capacitous woman would be able to leave the hospital and refuse surgery for any reason, the treatment proposed for NN was materially different to that which would be given to a person of sound mind. Moreover, given the treatment would be given in the general hospital, outside the psychiatric unit, she was not ineligible to be deprived of liberty. Sitting as a Deputy Tier 3 Judge, Victoria Butler-Cole KC declared that NN lacked such capacity, no best interests decision was required, and the authorisation to deprive liberty was granted if required. Ultimately, NN accepted the medical treatment, did not try to leave so the authorisation did not have to be relied upon. She stayed in the general hospital for just under 24 hours then returned to the psychiatric unit.

Departing from the general costs rule, the Judge ordered the Health Board to pay the Official Solicitor's full costs because of a month's unreasonable delay in bringing the application. NN would have been saved a month of waiting and wondering why her expressed wishes were not being acted upon, where the procedure would have had lower risks of physical or mental harm. The delay had a negative impact on both her and her mother, who said this had been the worst experience of her life and that it was '*absolutely barbaric*'. She was traumatised by watching her daughter having to continue her pregnancy well into the second trimester despite having requested a termination, and then supporting her through a late medical termination which resulted in the baby being born alive. The Judge observed:

> *43* […] *It is incumbent on those concerned with obstetric cases to give the most careful scrutiny at the earliest possible stage to whether orders are*

[1] Tor having been the judge in the case, she has played no part in writing this summary or comment.

actually required from the Court of Protection, and if so, the substance of those orders. In this case, the minutes of various professionals meetings held in June and July 2024 suggest that there was a mistaken belief that any best interests decision about termination of pregnancy for a person without capacity required court authorisation. If there is a professional consensus about the treatment proposed, no intention to impose treatment on P against her wishes, and no disagreement from those concerned with P's welfare such as close family members, the provisions of s.5 and s.6 MCA 2005 permit medical best interests decisions to be taken without court involvement, having followed the requirements of the MCA and any associated professional guidance: An NHS Trust v Y [2018] UKSC 46.

44. If aspects of a treatment plan may constitute a deprivation of liberty, serious thought must be given to how likely it is that those measures will be needed. Is there evidence suggesting that the particular patient, if they have chosen to undergo a medical procedure in hospital, and are in need of pain relief and support from medical professionals, will suddenly refuse help even if they are told their health and potentially their life are at risk? Where the patient is in agreement with the underlying treatment, and, as here, is not suffering from persecutory delusions or an ingrained fear of hospitals or medical professionals, what is it that suggests the risk of needing to take such steps is materially different than for a patient who does not have a diagnosed mental disorder and is not detained under the MHA 1983?"

Comment

This case is of interest for two reasons. The first is that, despite lacking capacity to decide on termination, whether the termination was in her best interests remained NN's choice. Her 'will and preferences' determined the outcome. In UN CRPD terms, despite lacking *mental* capacity it could be said she retained *legal* capacity as a rights-holder to determine the outcome. The court was only required if, having expressed her will and beginning the process, her subsequent preferences conflicted with her will, at which point her right to life and health would necessitate physical and chemical restraint.

The second area of interest relates to an issue which perhaps calls for a more general debate: for Article 5 ECHR purposes, do these types of medical treatment cases in fact amount to deprivations of liberty rather than liberty restrictions under MCA ss.5-6? The facts fell outside the *Ferreira* exception, because more restrictive arrangements would be necessitated because of mental disorder. But the relevant treatment lasted for less than 24 hours. If a deprivation of liberty means non-consensual confinement in a particular place for more than a negligible period of time, should such short-term physical and chemical restraint engage Article 5? If so, why should the statutory DoLS scheme not be used, rather than a court authorisation? Or are these in reality significant Article 8 interferences which, if disputed, require judicial determination?

The case is also usefully, finally, for reminding people (at paragraph 45) that, despite a persistent urban myth to the contrary, s.4B MCA 2005 does not provide a standalone detention authority in an emergency. It only provides such authority where a court order is being sought. If the Government were to bring into force the relevant part of the Mental Capacity (Amendment) Act 2019, s.4B would give such an emergency detention power, but, as yet, we do not have any indication that implementation of any part of that Act is on the cards.

Capacity and cross-border protection

The Health Service Executive of Ireland v SM [2024] EWCOP 60 (T3) (Hayden J)

Mental capacity – assessing capacity

Summary

This case is the sequel to a decision in 2020 concerning SM, an Irish citizen with a number of complex mental health needs. The application was for recognition and enforcement of a further order of the Irish High Court, made by the President of that court, providing for her continued detention and treatment at an English mental health facility, Ellern Meade. Materially, the order made by the President of the High Court provided substantively for the Medical Director of Ellern Mede, to be permitted to detain SM for the purpose of providing assessment, treatment, welfare, and therapeutic services for her, pending further Order. The Order also permitted the Medical Director to:

> *take all necessary and/or incidental steps (including the provision of consent for any medical psychiatric psychological or other assessment treatment or assistance whether at Ellern Mede or (if necessary and appropriate) at some other location or facility) and to use such reasonable force and/or restraint as may be necessary in so doing to promote and/or ensure the care protection safety and welfare circumstances of [SM] and to provide [SM] with such hydration, sustenance, medication and treatment as may be clinically and /or medically indicated in accordance with the operational policies of Ellern Mede, including for the avoidance of doubt the provisions of nasogastric feeding.*

At a hearing in January 2024 before the Irish High Court, Heslin J had noted that:

> *this is an application to ensure the continuation of vital treatment in the context of a necessary care regime for [SM], plainly in her best interests and the evidence makes clear, looking at it through the lens of the inherent jurisdiction that this is someone who lacks capacity and that the orders sought today constitute a necessary and proportionate response by the court to ensure that [SM]'s fundamental and constitutionally protected rights are vindicated and protected.*

Hayden J identified that:

> *29. Evaluating capacity "through the lens of the inherent jurisdiction" appears to be a very different exercise from that required by the MCA in this jurisdiction. I emphasise 'appears' because the jurisprudence regulating the application of the inherent jurisdiction in the Irish Court may serve, as I strongly suspect it does, to deliver a similar approach to our own.*

Hayden J identified that he had, in 2020, been "exercised about the highly intrusive nature of the order (broadly replicated here) and its continuing duration." He noted that:

> *42. In my judgement, the obligation to act compatibly with ECHR Convention Rights when recognising and/or enforcing a foreign order exists both independently from and as a facet of public policy. Whilst, to repeat Munby LJ's phrase, "the test in stringent, the bar is set high", the obligation to evaluate compatibility remains, and is not perfunctory.*
>
> *43. SM's welfare has been unswervingly in focus during the Irish High Court's exercise of its inherent jurisdictional powers. It is clear, however, that SM's capacity has fluctuated over the last 6 months and may well continue to do so.*

Some of her recent recorded observations are, as I have commented, both measured and insightful. I consider that, in such circumstances, having emphasised both the duration and the draconian nature of the order that I am invited to recognise and enforce, I am required, properly respecting SM's rights, to satisfy myself that she continues to lack capacity in the sphere of decision taking surrounding her medical treatment. This I regard as my obligation, both under the Human Rights Act 1989 and in ensuring that this order remains compatible with public policy in England and Wales. As the papers presently stand, I am not yet able to undertake this exercise in the way that is required, as analysed above. For this reason, I propose to direct an up-to-date assessment of SM's capacity to understand and consent to her continuing treatment. For the avoidance of doubt, I do not require any assessment as to whether such treatment remains in her best interests. Like the Irish High Court, I am entirely satisfied that it is.

44. Having foreshadowed my concerns in respect of capacity, Mr Setright indicated that the HSE would instruct a psychiatrist to assess SM's current capacity relating to her treatment and extending this to litigation capacity. I am grateful to him for adopting that collaborative approach, which if I may say so, has been a feature of the history of this difficult case. That report is to be filed by 21st November 2024. For the avoidance of doubt, I am satisfied that the evidence as it presently stands, enables me to continue to recognise and enforce the orders of the Irish High Court.

Comment

As set out in this article written by Alex and Chiara Cordone, securing distributed rights protection – especially in the context of compulsory admission and treatment – is a complex matter, but is vital in circumstances where, in effect, a corner of an English mental health hospital becomes for a sustained period of time a patch of foreign soil. Whilst we cannot pre-empt the evidence that may be forthcoming as to SM's capacity, it is perhaps worth highlighting that Hayden J was (mostly) correct to identify that the approach to capacity under the inherent jurisdiction of the High Court of Ireland reaches a similar end point to that under the MCA. Since the coming into force of the Assisted Decision-Making (Capacity) Act 2015 (and, indeed for some little time prior), the High Court takes its approach to capacity from that contained in the 2015 Act.[2] That approach is a purely functional one – i.e. it looks very much like the functional test contained in the MCA 2005, but does not have any requirement for the functional inability to process the information to be caused by an impairment of or disturbance in the functioning of the mind or brain. That may give rise in some cases to interesting questions of:

(1) Whether a person lacking capacity for purposes of the 2015 Act lacks capacity for purposes of the MCA 2005 (an interesting example would be a victim of domestic abuse who cannot use and weigh the risk that they are at if they return home – in Ireland, they could arguably be found to lack capacity to make the decision to return; in England & Wales, they could not be found to do so unless their inability to use and weigh the

[2] See, in particular, *In the Matter of KK* [2023] IEHC 565 at paras 22-25.

risk was caused by an impairment or disturbance in the functioning of their mind or brain);

(2) Whether, even if they do not lack capacity for purposes of the MCA 2005, they nonetheless fall within the scope of Schedule 3, which does not talk of incapacity, but talks of a person who "as a result of an impairment or insufficiency of his personal faculties, cannot protect his interests" (paragraph 4(a) of Schedule 3).

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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.

Peter Edwards Law have announced their autumn online courses, including, Becoming a Mental Health Act Administrator – The Basics; Introduction to the Mental Health Act, Code and Tribunals; Introduction – MCA and Deprivation of Liberty; Introduction to using Court of Protection including s. 21A Appeals; Masterclass for Mental Health Act Administrators; Mental Health Act Masterclass; and Court of Protection / MCA Masterclass. For more details and to book, see here.

Advertising conferences and training events

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

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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