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Mental Health and Capacity Law Newsletter

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Editorial

Welcome to this first Mental Health and Capacity Law Newsletter from Arnot Manderson Advocates. This follows our well-received conference on this topic in September. Arnot Manderson members practice across a range of areas involving mental health and capacity, and regularly appear for claimants and for public authorities in tribunals as well as courts. This newsletter aims to appear quarterly and to point to developments of interest to practitioners in this important and growing area.

In this issue:

The SLC's proposals to fill the Bournewood Gap

Practitioners will be aware of the lively debate about the safeguards required where the liberty of adults with incapacity may be subject to restrictions, particularly in the months since the seminal UK Supreme Court decision in to *P v Cheshire West and Chester Council* and *P& Q v Surrey CC*, otherwise known as 'Cheshire West' ([2014] AC 896; [2014] UKSC 19). Although these were English cases, the fundamental issues about application of Art 5 ECHR are equally relevant in Scotland and these have recently been addressed in detail by the Scottish Law Commission in its *Report on Adults with Incapacity* (Scot Law Com 240), published in October (available online here.) Aware of the criticisms which the statutory deprivation of liberty safeguards adopted in England and Wales have provoked, the SLC's 45 recommendations offer a more nuanced regime which aims to balance protection with practicality. This contribution summarises the main points.

Noting that the level of detail which would be required for a compulsory treatment order the Mental Health (Care and Treatment)(Scotland) Act 2003 will not usually be appropriate in this context, the Commission proposes a "simple and straightforward process" to authorise measures to prevent an adult with incapacity requiring treatment for a physical condition from leaving a hospital unaccompanied. They conclude that process ought to be tied to the existing provisions of section 47 of the Adults with Incapacity (Scotland) Act 2000 and should authorise the use of measures during inpatient assessment as well as actual treatment. It should include rights to challenge the decision to take such measures, and also have a fixed or determinable end date.

In that connection, the Commission propose that the Scottish Government should consider whether a single report from a medical practitioner should be sufficient for the granting of an intervention order. However, the latest draft of the Mental Health Bill has departed from just such a proposal in relation to certain orders under the 2003 Act in favour of retaining a 2-report requirement (a development which the writer welcomes), and it is at least arguable that the same protection should apply to adults with incapacity. Overarching the process for authorisation of restrictions in a community setting is organised around the concept of "significant restriction of liberty", defined in the draft Bill annexed to the Commission report as arising "if (and only if)" one or more of the following "apply on a regular basis as respects the adult—

(a) the adult either—

(i) is not allowed, unaccompanied, to leave the premises in which placed, or

(ii) is unable, by reason of physical impairment, to leave those premises unassisted,

(b) barriers are used to limit the adult to particular areas of those premises,

(c) the adult's actions are controlled, whether or not within those premises, by the application of physical force, the use of restraints or (for the purpose of such control) the administering of medication.

... But measures applicable to all residents at those premises (other than such staff as reside there) and intended to facilitate the proper management of the premises without disadvantaging residents excessively or unreasonably are not to be regarded as giving rise to significant restriction."

Authorisation to detain for treatment, it is proposed, should authorise any person involved in the medical treatment of a patient to do what is reasonable to prevent the patient from going out of a hospital, including the use of medication where that is the only means possible, or to use force, but only where immediately necessary.

It is proposed the authorisation process should make provision for authorisation of significant restriction of liberty by guardians and those acting under welfare powers of attorney, with scope for application to the sheriff where there is no guardian or attorney. There is the welcome suggestion that authorisation should be periodic review, at intervals of no more than a year, and renewal where that is appropriate. Drawing an analogy with section 291 of the Mental Health (Care and Treatment) (Scotland) Act 2003, the Commission

proposes that it should be possible to apply to the sheriff for the cessation of de facto detention in premises where people are accommodated in order to receive care but which are not covered by section 291.

Addressing concerns about application of rules to care homes, the Commission propose that the process for authorisation of significant restriction of liberty should apply to there and to arrangements made by adult placement services. In identifying whether an adult is subject to significant restriction the following should be relevant considerations:

- Absence of unrestricted right of egress from the accommodation
- Confinement within the accommodation
- The use of measures to control the actions of an individual.

Further, it is proposed that the person who manages the accommodation in which the adult is living or the adult's social worker should prepare a Statement of Significant Restriction setting out the measures deemed to be necessary in caring for the adult but which have restrictive effect.

Finally, and again mirroring s 291 of the 2003 Act, the Commission propose that there should be provision for an adult who may lack capacity to consent to his or her own living arrangements, or any person claiming an interest in the personal welfare of such an adult, to apply to the sheriff to make an order requiring cessation of the adult's unlawful detention in a care home or other placement.

The Scottish Government's detailed response is awaited with interest.

Kenneth Campbell QC

Assessment mechanisms and self-directed support

Since April 2014, the Social Care (Self-directed Support)(Scotland) Act 2013 provides the mechanism by which a local authority will determine care packages provided to support the needs of physically and/or mentally disabled adults, and is likely to create sharper focus upon the operation of social care law in Scotland. Prior to 2014, some local authorities operated non-statutory schemes for needs assessment. Contrary to the experience in England, few decisions made under such arrangements appear to have been made subject to challenge via judicial review. Commencement of the 2013 Act may be instrumental in shining a light on the processes involved in establishing the needs of an individual and the parameters of a care package, particularly given the Acts application to all local authorities, and the continuing climate of financial stringency.

Nevertheless, Section 12A of the Social Work (Scotland) Act 1968 imposes a duty on a local authority to assess a person's needs for "community care services". Where an individual has been assessed as having need for such services, the duty of the local authority is to make arrangements to provide for these needs (*R*

v Gloucester CC, ex.p.Barry [1997] AC 584, per Lord Clyde). Of necessity, both assessment of an individual's needs and the means of meeting such needs raise significant issues. No specific methodology is specified under statute or extra-statutory guidance about conduct of such assessments. Consequently, local authorities operate a number of different systems including Resource Allocation Systems – which itself can operate in a variety of forms – and Equivalence.

As a matter of principle, the adoption of such systems may not be questionable on grounds of rationality (See, for example*, R (Savva) v Kensington and Chelsea RLBC* [2010] 13 CCLR 227); rather, the question may be how these systems operate in individual cases which may attract scrutiny. Anecdotally, many social work clients are finding the care packages which they received prior to the introduction of the 2013 Act are being substantially reduced via the SDS assessment process. It may be that the reassessment exercises are simply facilitating a more critical analysis of individual needs, but it is difficult to shed the suspicion that financial factors may also be in play.

The effect on the level of support provided to the carers of vulnerable adults – as well as to what may be established routines – can be considerable, and the rationale given for such changes may warrant careful scrutiny. A failure by a local authority to follow its own procedures, or to devise a system which avoids perverse consequences for specific individuals or client groups may be open to challenge as irrational or unreasonable in law (cf. *Barry*). Similarly, the means by which support is actually provided to a client may be open to challenge in future. As the title of the 2013 Act suggests, part of its intention is to allow a client and/or carer(s) to exercise control over how the budget arising from the assessed care package is spent. Accordingly, four options are specified in s.4 of the 2013 Act, which can be summarised as:-

Option 1: Direct payment by the local authority to the client

Option 2: Arrangement of services selected by the client by the local authority and payment for such services

Option 3: Provision by local authority of services selected by the client.

Option 4: Combination of options 1,2 & 3.

Many clients and carers may well be happy to continue what may be long-established arrangements with day centres or home helps provided by a local authority. That said, information collected by the Disability Learning Alliance Scotland (DLAS) covering the first 6 months of operation of the 2013 Act suggest that the uptake of options 1 (501), 2 (312) and 4 (277) has represented a relatively small proportion of the uptake of around 8,500 options surveyed overall.

A major difficulty for local authorities will lie in maintaining a range of services available to those who choose option 3, whilst seeing resources leak away as a result of decisions made under the other options. Taking one simple example, a day centre with 40 places may not be viable if 20 clients decide to spend their care

budgets elsewhere, and yet the 20 who remain still require such provision. Nevertheless, circumstances where a client is prevented or hindered in exercising the full range of options now provided under the Act will also warrant careful scrutiny. At present, it is not clear to what extent the headline figure has been inflated as a result of re-assessments of individuals made during the DLAS Survey period. On a broad reading, however, a question as to whether the purpose of the 2013 Act of giving clients the power to determine how their care needs are met necessarily arises, and it remains to be seen how these issues will be considered by the courts.

David W Cobb, advocate

Challenging decisions under the 2013 Act

Judicial challenge to decisions about self-directed support, like other social care issues, comes with a number of practical considerations. Leaving to one side the challenges of obtaining legal aid, s.89 of the Courts Reform (Scotland) Act 2014 will introduce a 3 month time limit for the raising of judicial review proceedings, and is likely to come into effect in 2015. Beyond this, the general reluctance of the courts to entertain judicial review where an alternative means of appeal or review has not been exhausted creates a further potential barrier.

This approach was recently affirmed by Lord Jones in *McCue v Glasgow City Council* 2014 SLT 891. This case concerned an attempt to challenge the assessment of the needs of an adult with Down's Syndrome under an Resource Allocation System. At the point when the judicial review had been raised, the appeal process had gone as far as the Council's Resource Allocation Steering Group, beyond which appeal could be made to the Council's Complaints Review Committee. Availability of this further right of appeal was sufficient to persuade Lord Jones that an available mechanism for appeal had not been exhausted, and that the Petition should be refused as incompetent (para.37). This decision is subject to a Reclaiming Motion which is due to be heard in the New Year, but the case is important as one of the first considered under the 2013 Act. If upheld, *McCue* appears to require the determination of the Complaints Committee to have been issued before any question of judicial review can arise.

This may cause significant practical problems in use of the remedy. A specific regime for the processing of complaints by social work authorities was established by the Social Work (Representation Procedures) (Scotland) Directions 1996. Whilst not all complaints will require such latitude, the maximum period permitted by the Directions for the process is 126 days, ending at a point where the social work authority is required to make a reasoned response to any recommendation by the Complaints Committee. This is, of course, additional to any informal discussion or review which may have taken place at managerial level after a care budget is initially determined. A real difficulty which may arise in practice is that some form of review or variation of a care package may occur during the appeal process, or soon after its completion. If so, has a

new “decision” been made sending a client back to the beginning of the appeal procedure? Even where the care package is confirmed, where annual reviews occur, the time available to initiate a judicial review may be narrow indeed, and the court may be reluctant to prejudge the outcome where such a review is ongoing.

What may become a significant issue in future is whether the interplay of the requirement to exhaust alternative mechanisms beside the functioning of the SDS process creates a situation whereby access to the Courts becomes impossible in practice. Little may be gained by attempting to litigate the merits of a specific decision; rather, it is establishing an ability to ensure that a particular SDS system has rational outcomes and is applied correctly, which may prove particularly vital. Absent such scrutiny, a significant imbalance of power may arise between a Local Authority and its clients if the potential for scrutiny by the Courts is constrained to the point of non-existence. This is an outcome which the authors of the 2013 Act are unlikely to have intended, and it may demand some ingenuity of those operating in the field to prevent a serious impasse arising in future.

David W Cobb, advocate

Practical guidance about judicial intervention - *A Local Authority v M*

In a lecture this month in the Court of Session, Sheriff Principal Stephen described cases concerning vulnerable adults, particularly those which involve state intervention in family life, as requiring some of the most difficult decisions a judge has to make. A useful illustration is a recent decision from the English Court of Protection, *A Local Authority v M* [2014] EWCOP 33. The case concerned M, a 24 year old man with autistic spectrum disorder. M did not have capacity to litigate, to make decisions about his residence and contact, or his medical treatment. The proceedings were raised by a local authority seeking a number of orders, including removing M from his parents’ home and placing him in a named residence, ordering that he should not take medication unless prescribed by his doctor, and ordering that care staff were not required to follow M’s mother’s instructions. The local authority also sought a number of findings in fact, all of which were disputed by M’s parents. The hearing took 20 days, 32 witnesses gave evidence and there were 35 files of documents.

The findings in fact made by the Ward J included that M’s mother had (i) given professionals many false accounts of M’s health, (ii) subjected M to numerous unnecessary tests and interventions, and (iii) controlled all aspects of M’s life. The Judge was careful to emphasise that M’s mother adored M, but concluded that she had a fanatical desire to control his life. As a consequence, the Judge made a number of interim orders, which included keeping M from the family home and ensuring that contact with his parents was supervised.
In Scotland, such orders would be sought from a Sheriff under the Adults with Incapacity (Scotland) Act 2000. Ward J’s careful judgement considers a number of points which may be useful for Scots practitioners to consider.

The principal focus of the hearing was to make findings in fact which would form the basis for future decisions about M's life. Ward J outlined a number of procedural principles. First, the onus of proof rested with the local authority, as it had brought the proceedings. Secondly, the standard of proof was the balance of probabilities. If the local authority proved something to that standard, all future decisions concerning M's future would be based on that finding. If it did not, the allegation would be disregarded. Ward J rejected any suggestion that the more serious the allegation, the greater the evidence required. Reference was made to *Re B (Children)* [2009] 1 AC 11 (HL): as Baroness Hale of Richmond explained in that case, the consequences of failing to make an order can be just as serious as the consequences of making one. The law in Scotland is the same (*B v Scottish Ministers* 2010 SC 472 (IH)). The whole circumstances of the case, including the nature of any allegations and the quality and weight of the evidence relied upon, will be factors in determining whether the evidence tips the balance of probabilities (*A v A* 2013 SLT 355 (IH)). Thirdly, Ward J considered expert evidence. He commented that the roles of the expert and the Court are distinct, that the Court had to consider the expert evidence against the totality of the evidence, and had to ensure the expert did not stray out with the bounds of his or her expertise. Fourthly, Ward J noted it is not uncommon for witnesses in such cases to lie. This could be for many reasons, including shame, misplaced loyalty, panic, fear and stress, and the fact that a witness lied about some matters did not mean that he or she has lied about everything.

Ward J also observed that Article 8 ECHR requires M's private life to be respected, although noted an inherent conflict in the Article because elements of it, such as the right to personal development and to establish relationships, might be incompatible with existing family life in the sense of continuing to live in the family home. He was wary that professionals and the Court itself may feel drawn towards an outcome more protective of someone than may be required: the so called 'protection imperative'. He noted that in relation to medical treatment, M's welfare in the widest sense had to be considered: medical, psychological and social (*Aintree University Hospitals NHS Foundation Trust v James* [2014] AC 591 (SC)). Each of these factors had to be bone in mind in determining whether to order intervention.

David Massaro, Advocate

Validity of proforma continuing powers of attorney

Practitioners will have followed with interest the debate raised by Sheriff Baird's decision in May 2014 in *NW* 2014 SLT (ShCt) 83 holding that a style of power of attorney available from the Office of the Public Guardian, and widely used, was invalid by reason of the absence of reference to ss 15(3)(b) or 15(3)(ba) of the Adults with Incapacity Act (Scotland) 2000 and the absence of clear intent that the power be a continuing power. The proforma contained the following wording:

> "I, [name], residing at [address] appoint [attorney] to be my continuing attorney in terms of section 15 of the Adults with Incapacity (Scotland) Act 2000" was sufficient to comply with section 15(3)(b) of the Act,

which requires a statement "which clearly expresses the granter's intention that the power of attorney be a continuing power".

A Special Case was presented to the Inner House by OPG, and the Law Society Journal Online edition reports that the Court indicated on 10 December 2014 the Court considered the wording was valid and would advise its reasons in writing in due course.

Kenneth Campbell QC

Mental Health & Scots Law in Practice

New Edition now published

The 2nd Edition of Mental Health & Scots Law in Practice has just been published by W. Green having first been trailed by Arnot Manderson Advocates at its Mental Health & Incapacity Conference in September.

The text was co-authored by Arnot Manderson silk Joanna Cherry QC and Professor Lindsay Thomson (Professor of Forensic Psychiatry at the University of Edinburgh and Medical Director, The State Hospital) and features a significant contribution by another Arnot Manderson silk, Kenneth Campbell QC.

This new Edition expands upon the impact of the Mental Health (Care and Treatment) Scotland Act 2003 on those involved with mental health in Scotland. Increased detail on effectiveness of tribunals is included along with a new chapter on risk. An essential description on the provisions of the Adults with Incapacity (Scotland) Act 2000, as amended, is also provided. The authors provide key guidance on psychiatric systems and services for mentally disordered offenders, including the new legislation for psychiatric defenses as of 2012. The book goes further and offers practical advice on providing expert reports and giving evidence in court, ensuring you can confidently confront the challenges this raises.

More information on the book can be found here .

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