MENTAL HEALTH MATTERS
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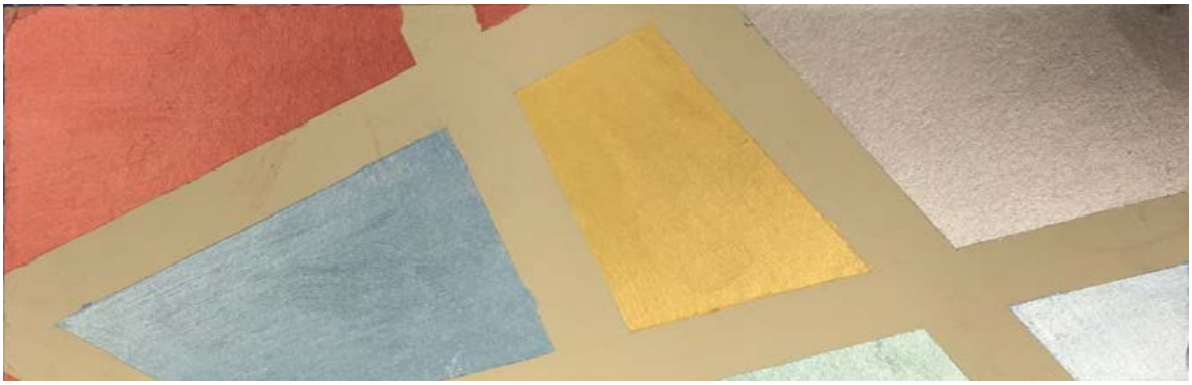

Welcome to the July 2024 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: sexual capacity complexities, wishes and feelings in the balance, and finding the P in a PDOC case;

(2) In the Property and Affairs Report: deputy bond provider problems and a job opportunity in the Official Solicitor's office;

(3) In the Practice and Procedure Report: how far can the Court of Protection go to ensure its orders are complied with, and risk taking, best interests and health and welfare deputies;

(4) In the Mental Health Matters Report: Tier 4 beds (again) and the Mental Health Tribunal and the Parole Board;

(5) In the Wider Context Report: local authority consent to confinement, the Irish courts continue to grapple with the consequences of the framework, and Strasbourg pronounces on assisted dying;

(6) In the Scotland Report: exasperation at the pace of the Scottish Government's Mental Health and Capacity Reform Programme.

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.

Alex trusts that readers will not mind a slight blowing of the trumpet at his having been awarded Outstanding Legal Achievement at the 2024 Modern Law Private Client Awards for his work sharing knowledge about the Mental Capacity Act 2005 (and hence, in significant part, thanks to his fellow editors on this Report), and being appointed Professor of Practice at King's College London from August 2024 (a position which reflects the opportunities given by Chambers to him to moonlight so often away from the day job – for which he is very grateful!).

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.

Contents

Tier 4 beds – again

Re MK: Deprivation of Liberty and Tier 4 Beds [2024] EWHC 1553 (Fam) (High Court (Family Division) (Lieven J))

Mental Health Act 1983 – treatment for mental disorder

Summary[1]

This case concerned MK, a seventeen and a half year old girl who was subject to a care order and so was therefore a looked after child. MK was described by Lieven J in the following way:

> *MK has a significant mental health history with difficulty regulating emotions, fluctuating mood, and suicidal ideation. She is currently an in-patient in a paediatric unit children's ward of a general hospital run by the Applicant, which is not intended to be a secure unit.*

The matter came before Lieven J on the application of an acute hospital trust who sought an order allowing it to deprive MK of her liberty on their paediatric ward.

Prior to the index admission, MK had had a series of placements in both in-patient children and adolescent (CAMS) mental health beds (referred to as Tier 4 placements in the context of the commissioning structure), and community placements (some of which had been authorised by the High Court as amounting to a deprivation of her liberty). MK had also had very frequent admissions to the acute hospital.

Since March 2024 MK had begun to take frequent overdoses of paracetamol. In the few weeks before the hearing, there had been a deterioration in MK'ss mental health in that she had become increasingly dysregulated and much more determined to end her life. The matter came before the court after MK, who had been found trying to climb across a motorway bridge having taken an overdose of paracetamol, was taken to the acute hospital, where she was assessed by two doctors approved pursuant to s.12 of the Mental Health Act ('MHA 1983') and an Accredited Mental Health Professional ('AMHP'), as meeting the criteria for detention under s.2 of the MHA. As the Judge noted, in order for a young person to be offered a Tier 4 bed, an application must be made to NHS England (who commission all NHS tier 4 placements). NHS England have developed an access assessment procedure (which in practice is devolved to a number of Provider Collaboratives across the country) to determine whether a placement or bed will be offered at a Tier 4 unit.

The access assessment undertaken in respect of MK did not lead to an offer of a tier 4 bed being made. The reasons for this were set out by one

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

of the CAMHS Consultant Psychiatrists (Dr M) as follows:

> *[MK's] health needs can be understood as emotional crisis in context of several stressors rather than due to severe and enduring mental illness. Moreover, admission to inpatient psychiatric unit may cause side effects including increase in severity of risk behaviours, 'contagion effect' due to unhelpful dynamics with peers and institutionalisation."*

The parties positions before the Court were as follows:

- Despite it being agreed by the acute Trust that a placement in a Tier 4 bed would be counter-therapeutic for MK, the acute Trust submitted that there was an "*immediate need …. to prevent MK from significantly harming herself, absconding and committing suicide, or dying through misadventure brought on by dysregulation"* which in the acute Trust's submission was "*more easily achieved in a Tier 4 bed with the potential for locked doors and segregation, than the paediatric ward of a general hospital, or a placement in the community in what can only be described as unsuitable accommodation*"
- The local authority's position was that if MK could not be placed in a Tier s4 bed they would provide a community placement "*in an Airbnb, not designed to be a therapeutic placement, which is a mid-terraced house of normal* construction" with "*a series of carers who would try to keep MK safe to the best of their ability.*"
- It was accepted by NHS England that MK had a mental disorder within the meaning of the MHA 1983 (namely emerging Emotionally Unstable Personality Disorder) and met the criteria for detention under the MHA 1983. However, it submitted that the court could not force a unit to offer a Tier 4 bed to MK in light of the view taken that such an admission would be anti-therapeutic.

Lieven J acknowledged that her powers were very limited – having no power to force NHS England or the Tier 4 assessment unit to admit MK to a Tier 4 bed or to provide her with treatment it believes to be countertherapeutic. However, she went on to set out her conclusions in order "*to try to persuade the Mental Health Trust and NHS England to focus on what in my view is the real issue in the case*." Her conclusions were as follows:

With respect to the local authority's position, Lieven J found that

> *no community placement can provide MK with anything that can be described as suitable care, because it is very unlikely to be able to keep her safe. Great efforts have been made by the LA to find a suitable therapeutic placement, but there simply are no such placements available that are prepared to offer MK a bed.*

With respect to the position put forward by NHS England:

> *It is a common misconception put forward in these cases that when a young person is experiencing emotional distress due, it is said, to "environmental" factors or behavioural issues, that they do not fall within the MHA. That is plainly wrong.*

She went on to state that Emerging Personality Disorder is a mental disorder within the meaning of the MHA: "*The fact that a person has such a disorder does not mean it is beneficial to them to*

be detained but does mean that the person is detainable because they meet the MHA criteria."

Lieven J accepted that a placement in a tier 4 bed might be counter-therapeutic "*in terms of psychological therapy and future effective functioning*" but as a result of the article 2 ECHR operational duty on the State (which requires the state to do all that can reasonably be expected to prevent a patient from taking their own life where the state knows that a particular patient presents a real and immediate risk of suicide) she held that:

> *Unless MK is provided with a very high level of supervision and containment, she will abscond and there is a real and immediate risk that she will buy paracetamol and try to kill herself. The obligation at present is simply to keep her alive and in that context, the fact that her treatment needs may not be well met in a Tier 4 bed simply misses the point. In my judgement, it must be the case that the State is more likely to achieve its obligations under Article 2 by keeping her in a locked unit, than either on a general paediatric ward or in Airbnb with high turnover of staff and not physically designed for containment*

She concluded:

> *I fully appreciate that the Mental Health Trust does not want and should not in an ideal world, be forced to use Tier 4 as a containment facility for a suicidal person. However, unless and until somewhere else is found that can effectively protect MK from a significant risk of killing herself (whether through suicide or misadventure) and meet her therapeutic needs, it is, in my view, in her best interests to be admitted to a Tier 4 bed. Arts 2 and 3 ECHR are engaged and the State, particularly NHS England, is on notice of what was said by the House of Lords in Savage: "article 2 requires them to do all that can reasonably be expected to prevent the patient from committing suicide."*

Comment

Mrs Justice Lieven noted at the outset that "*the decrease in judgments in such cases is a function of the existence of the National DOLS list, there are fewer cases going to full-time High Court Judges, and is not a function of there being fewer cases or fewer troubled children.*" Indeed anyone practicing in this area is all too familiar with the high number of cases that are still coming before the court. These are tragic cases involving acutely distressed children who will in almost every case, have experienced a number of failed placements.

What is interesting about this judgment is that Lieven J chose not to focus on the State's failure (via the local authority) to find MK a suitable therapeutic placement to protect her given the statutory duty on local authorities to provide sufficient places for looked after children in their area (see section 22G of the Children Act 1989). Lieven J noted that that there is a national shortage of such placements (a situation that has existed for many years) but did not suggest that the local authority was on notice that Articles 2 and 3 are engaged so as to require the local authority to do all that could be reasonably expected to prevent MK from taking her own life. Instead, she focused her comments about the State's obligations under Articles 2 and 3 ECHR on those who have refused to offer KM a bed in circumstances where it was accepted that such a placement was likely to cause MK iatrogenic harm. It hardly needs saying that such beds are precious resources, which, on their face, should be reserved for those who will benefit therapeutically from them. The distinct sense of 'pass the parcel' that the judgment engenders is

one that is also exercising Alex considerably in his current work at the Law Commission on the Disabled Children's Social Care project.

Short note: the Mental Health Tribunal and restrictions

A very heavily redacted decision of the Mental Health Tribunal has recently appeared on the Mental Health Law Online judgment.[2] It is so heavily redacted that it does not have a name, and the decision has been reduced from 8 pages to barely as many paragraphs. However, it is of considerable interest given how infrequently decisions of the Mental Health Tribunal are published.

The patient argued that she should be discharged from the conditional discharge under s.37 / 41 MHA 1983 to which she was currently subject. Her argument was that she should be discharged on the basis that the "life licence" conditions to be imposed by the Parole Board could replicate the framework of the MHA 1983. The Responsible Authorities resisted this argument on the basis that the MHA 1983 framework was a specialist one, operating with the involvement of clinicians and politicians and with a specialist focus on helping those with mental disorders.

Granting the application, the Mental Health Tribunal determined that the purpose of s.41 MHA 1983 must be determined in the moment – "now" - rather than at some future date on which the patient might be released (see paragraph 27).

The patient/prisoner, it held, would be detained until the Parole Board was considered it was no longer necessary for the protection of the public. In the event this stage were ever reached, and in the event the patient were released, it would be on licence only, meaning she could be recalled to prison without the need for another offence to be recalled; in such circumstances, the Tribunal considered, the ongoing supervisory power of a conditional discharge under s.41 MHA 1983 was unnecessary.

Comment

The logic of this decision is clear, the licence conditions and the conditional discharge essentially fulfilling the same function. They make interesting reading alongside the judgment of the Court of Appeal in the *Calocane* case we reported on in the June 2024 report, where essentially the same point was made from a different perspective. They do, however, raise the question of the respective purposes of the custodial and mental health regimes – a question which may come into sharper relief depending on the attitude the new Government takes towards prison more generally.

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

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Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click here.

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

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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:

1. The World Congress on Adult Support and Care in Buenos Aires (August 27-30, 2024, details here)
2. The European Law Institute Annual Conference in Dublin (10 October, details 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 September. 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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