

Reflections from Scotland: Difficult Decisions Ahead

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Introduction

This article looks at recent developments in Scottish mental health and incapacity law.

Whilst Scotland clearly leads the way in mental health and social care law reform in the UK, its incapacity legislation is under strain. Scotland is struggling with the implications of *H.L v U.K*² which, because of problems with the Adults with Incapacity (Scotland) Act 2000, appear even more complex than in England and Wales.

Scotland is consulting on new laws to protect vulnerable adults, but lags behind England and Wales in its use of appropriate adults when people with mental disorders are interviewed by the police.

Problems with the Adults with Incapacity Act

Contrast with Mental Capacity Act

Like the Mental Capacity Act 2005 (MCA), the Adults with Incapacity (Scotland) Act 2000 (AWI) contains a hierarchy of measures for assisted decision making. The measures in AWI are more complex and detailed than those in MCA, including in the financial field, for example, procedures for access to bank accounts and management of finances by care homes and hospitals³. For medical matters Part 5 of the Act gives doctors an authority to treat, following a formal certification of incapacity, and requires second opinions or court approval for more complex medical decisions.

This approach has much to commend it. It deals with some of the concerns expressed that the MCA gives care and treatment providers too wide an authority, undermining the autonomy and dignity of adults with incapacity. Simple procedures for common or routine transactions, containing proper safeguards against abuse, fit well with the principles of minimum necessary intervention and ensuring benefit to the adult.

No general authority / indemnity

Unlike England and Wales, the specific procedures in AWI are not underpinned by a general authority or indemnity for carers⁴. The writer is not aware of any discussions prior to the passing of the Act around a possible general authority for Scotland and it is certainly not mentioned in the

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² *E.Ct.H.R. Judgement 5th October 2004*

³ *In Parts 3 and 4 of the Act.*

⁴ *Contained in Mental Capacity Act 2005, s5.*

Scottish Law Commission's consultative paper⁵ or final report⁶.

The suggestion of a general authority has not met with favour in Scotland, at least to date. Representatives of the Law Society of Scotland, giving evidence before the Joint Committee on the Draft Mental Incapacity Bill, expressed concern that it was too wide and even suggested it might be in breach of Article 6 ECHR. They argued that a general authority takes away an adult's right to make decisions him/herself. This is a determination of the adult's civil rights and obligations and Article 6 requires the authority of a court after a hearing⁷.

Problems experienced in Scotland

However, while there may be good arguments against too wide a general indemnity, such an indemnity could have helped alleviate some of the problems experienced in Scotland over the interpretation of AWI. It has become unclear whether the Act is *enabling*, as those promoting it (including the author) had assumed, or *prescriptive*, automatically required whenever significant decisions are made in the life of an adult with incapacity.

These concerns have centred around the use of the Act for welfare interventions, where the Act contains a less well developed series of measures. Apart from the creation of welfare attorneys⁸, the other remedies are court-based, the one-off 'intervention order' or full or partial welfare guardianship⁹.

Use of welfare guardianship

Very early in the implementation of the AWI it became clear that there was considerable uncertainty about when it was appropriate to use a guardianship order if a significant welfare intervention (such as a change of residence) was proposed¹⁰. Should a guardianship or intervention order always be obtained, even if there is no evidence that any of the parties involved objects to the proposed move and there are no other reasons why an order may be necessary?

Legal advice received by some local authorities stated that a local authority which fails to obtain an order could be open to challenge. The local authority could be regarded as in breach of both its responsibilities under the Act and of its human rights obligations. Other lawyers held the equally strongly held view that it was not the intention of the Act that every welfare intervention for an adult with incapacity should require the court authority.

The Mental Welfare Commission for Scotland advised that if guardianship orders were used in all such cases, the numbers could run into thousands. Beds would be blocked by people remaining in hospital while their applications were processed and significant local authority resources (legal and social work) would be tied up in processing applications. Private carers required by local authorities to make applications for relatives could face heavy legal expenses. The courts would also be burdened with a large number of applications. This might reduce their effectiveness in those cases where there was a genuine need for court scrutiny¹¹.

5 'Mentally Disabled Adults: Legal arrangements for managing their welfare and finances' Scottish Law Commission Discussion Paper No 94 1991.

6 'Report on Incapable Adults' Scottish Law Commission 1995

7 See Minutes of Evidence, Q32 and 39.

8 In Part 2 of the Act.

9 See Part 6 of the Act.

10 'The Adults with Incapacity (Scotland) Act 2000: Learning from Experience' Scottish Executive Social research 2004, para 3.53 ff.

11 See 'Authorising significant interventions for adults who lack capacity' Hilary Patrick for Mental Welfare Commission for Scotland 2004.

Legal opinion divided

A discussion paper for the Mental Welfare Commission¹² highlighted some of the divisions, from what had previously been a broad spectrum of support for the AWI. There appeared to be a genuine difference in philosophy between those who believed that the Act should be used where necessary to provide practical benefits, and those more concerned to ensure the human rights of, and legal protections for, vulnerable people.

The discussion paper concluded that a selective approach, where use of the Act was linked to benefit to the adult and the least restrictive alternative could be justified, and guidance from the Scottish Executive has to date supported this approach¹³.

Could general authority assist?

When the English Law Commission first highlighted the lack of legal clarity about what action may lawfully be taken by carers of persons without capacity¹⁴, it could not have foreseen that it would be in Scotland that problems would first surface

AWI has given people in Scotland a greater awareness of the rights of people with mental incapacities, but lacks the tools properly to meet people's needs. Lack of an underlying authority for carers has created such absurdities as the guidance that a court order may be necessary to authorise (among other things) arrangements for respite care for an adult, the adult's attendance for medical treatment or the granting of access to certain professionals¹⁵.

Unless legal authority under Scots law can be found to authorise such care giving these kinds of questions will remain. While it might be possible to rely on the doctrines of necessity, duty of care, or *de minimis non curat lex*¹⁶, the interface of the common law and statute law is proving difficult to resolve.

While critics of the general authority south of the border may be concerned the general indemnity gives carers too wide a discretion, they might feel sympathy for carers in Scotland, possibly needing court authority simply to carry out their day to day caring duties.

Implications of H.L. v U.K.¹⁷ ('Bournewood')

These problems have been exacerbated following a decision in the sheriff court in *Muldoon*¹⁸. This was an application for financial and welfare guardianship by the relative of an adult who had already moved to a care home. Neither the adult's mental health officer (approved social worker) nor the safeguarder appointed by the court supported the application, which they regarded as an unduly restrictive option in a situation where the adult appeared settled in the care home.

The sheriff did not specifically consider the question of whether the adult was deprived of her liberty within Article 5 of the ECHR. He noted that she was held in a locked facility but also noted that she seemed happy there and did not attempt to leave. However he ruled that the effect of

12 See 'Authorising significant interventions for adults who lack capacity' Hilary Patrick for Mental Welfare Commission for Scotland 2004. *op.cit.*

13 'Interventions under the Adults with Incapacity (Scotland) Act 2000' Social Work Services Inspectorate 2004.

14 In *Mental Incapacity (LC231)* 1995.

15 'Code of Practice for local authorities authorising functions under the Adults with Incapacity (Scotland)

Act 2000' Scottish Executive, March 2001, para 5.34.6. While clearly an order may be necessary if the adult appears unwilling to accept such care, the guidance suggests an order may be necessary whether or not s/he appears to object, to fill a 'legal vacuum'.

16 *The law should not concern itself with minor matters*

17 *E.Ct.H.R. Judgment 5th 2004*

18 *Glasgow Sheriff Court, W 37/04*

H.L. v U.K. is that if an adult is legally incapable of consenting to or disagreeing with a change of residence, s/he is deprived of his/her liberty within Article 5 and in addition his/her Article 6 rights are breached. Express statutory authority should be obtained. He therefore granted the guardianship order, as the least restrictive alternative.

In a later case, *Docherty*¹⁹, the same sheriff made it clear that a 'statutory warrant' should be obtained for all patients lacking capacity to consent who are 'resident but compliant', including patients already in hospital.

Conclusion: legal reform needed

The decision of the sheriff in *Muldoon* is not binding on other courts in Scotland, but clearly these decisions highlight the need for further guidance.

Reform of the law in Scotland may be necessary. Any reform should not just clarify how the AWI should deal with people who are deprived of their liberty following *H.L. v U.K.*, but should also consider the appropriate procedures for authorising significant welfare interventions for adults with incapacity in Scotland where a court order would produce no practical benefit²⁰.

The Scottish Executive has now issued further guidance to chief social work officers²¹. The guidance confirms that whether an adult is deprived of liberty is a matter of the facts of his/her individual case. The Executive intends to give further guidance on how to determine what constitutes detention. This will take into account not just *H.L. v U.K.*, but also *HM v Switzerland* (where detention of a person in her own interests was seen as a 'responsible measure taken by the competent authorities'²².)

Protection of vulnerable adults

Following its review of incapacity law, in 1997 the Scottish Law Commission produced a short report considering the way in which the law deals with the needs of vulnerable adults²³.

The report recommended that local authorities should be under a new duty to investigate whenever a vulnerable adult might be at risk. The law should give them the power to gain access to premises, to inspect papers and to arrange for the medical examination and assessment of the adult. This should include the power to remove the person from his/her home for up to seven days and, more controversially, to seek an order excluding a violent person from the home.

Powers to investigate and gain access are contained in the Adults with Incapacity Act and in the new mental health act²⁴. The Scottish Executive is now consulting on extending this protection to other groups²⁵.

The Executive proposes limiting the definition of vulnerable adults to people who use or are in need of community care services by virtue of mental disorder, or disability, age or illness. People such as women subjected to domestic violence, for example, would not be covered. The consultation asks

19 Glasgow Sheriff Court, AW/56/04.

20 For further discussion see 'Adults With Incapacity Act: When to invoke the Act' Mental Welfare Commission September 2005. (Available on the MWC website.)

21 'Interventions under the Adults with Incapacity (Scotland) Act' 29 September 2005

22 Application No 39187/98, 26 February 2002.

23 SLC Report 158, 1997.

24 Adults with Incapacity (Scotland) Act 2000, s10. Mental Health (Care and Treatment) (Scotland) Act 2003, Part 19.

25 'Protecting vulnerable adults – securing their safety' Consultation from Scottish Executive July 2005.

whether and which of the Scottish Law Commission's recommendations should be implemented and it is not ruling out the most extreme remedy, the exclusion of the abuser²⁶.

These proposals appear to go further than the Protection of Vulnerable Adults scheme established in England and Wales under the Care Standards Act²⁷. However new legal duties and powers in Scotland will be effective only if local authorities are given adequate resources to carry them out.

Police interviews of vulnerable adults

The Police and Criminal Evidence Act 1984 does not apply in Scotland. This means that, unlike England and Wales, Scotland has no legally based procedures to protect mentally disabled people being interviewed by the police.

Such protection as exists is set out in guidance from the Scottish Executive, which requires that an 'appropriate adult' is involved whenever a person who appears to have a mental disorder is interviewed by the police, whether as suspect, witness or alleged victim²⁸.

Research on behalf of the Scottish Executive shows that the scheme is now in operation in most of Scotland, but there are still some areas where there is no access to appropriate adults²⁹. The scheme has not been widely used and this must suggest that not all those who required an appropriate adult were offered one.

In 2002 such records as were available (surprisingly not all areas kept records) showed that an appropriate adult was involved on only around 50% of the occasions that would have been expected in the light of the number of persons with a mental disorder proceeded against in court³⁰. In addition, the researchers observed proceedings in one police station, where they saw high levels of mental disorder but no use of appropriate adults.

It is a matter of concern that lawyers were generally unfamiliar with the scheme, as were forensic medical advisers, despite the fact that the guidance requires them to ensure that an appropriate adult is present at any examination of the mentally disordered person.

The absence of an appropriate adult in police interviews does not necessarily render evidence received at the interviews inadmissible. The question for the court is whether the evidence has been obtained fairly³¹. If the court considers the absence of an appropriate adult has not prejudiced the fairness of the interview, it can admit the evidence. However a statutory Code would clearly have greater force. Compliance with the PACE Code in England and Wales is a critical issue in deciding whether an admission has been obtained unfairly³².

The Scottish Executive is revising its guidance in the light of these research findings, but the current system is leaving people with mental disorders who come into contact with the criminal justice system particularly vulnerable in Scotland. If improvements are not forthcoming there will be growing calls for the scheme to be put on a statutory basis.

26 See consultation document, para 2.2.

27 Department of Health, July 2004.

28 'Interviewing people who are mentally disordered: 'Appropriate Adult' schemes' Scottish Office June 1998.

29 See 'An Evaluation of Appropriate Adult Schemes in Scotland' Dr Lindsay Thomson, Viki Galt, Dr Rajan Darjee

30 Thomson, Galt, Darjee (above). Appropriate adults were used 827 times. The number of persons proceeded against in court estimated to have a diagnosis of schizophrenia, learning disability or dementia was 1557.

31 *Thompson v. Crowe* 2000 J.C. 173

32 See *R v Mason* (1987) 3 All ER 481; *R v Absolam* (1980) TLR 9 July CA; *R v Walsh* (1990) 91 Cr. App. R. 161; *R v Keenan* [1990] 2 QB 54.