

Will the New Court of Protection Damage Your Mental Health?¹

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Introduction

In this short talk I do not propose to consider the entire new jurisdiction established by the Mental Capacity Act 2005. You can read that for yourselves, and I commend to you *Mental Capacity: the new law* published by Jordans (2006), not least because I had a hand in it. Instead I wish to address the challenges faced by the new Court of Protection in four specific areas: care delivery, discrimination, access to justice and human rights. But first . . .

A PERSONAL PERSPECTIVE

The previous climate

In the past, care was generally provided by members of the family who had to cope with whatever support happened to be available. If they could not cope, then the state provided institutional care and people with mental disabilities were generally hidden from society. Discrimination was accepted and acceptable – in fact the norm – and there was a degree of social stigma associated with mental disabilities and little integration into mainstream society.

People with mental disabilities were largely denied access to justice because the culture was that people were expected to cope with the courts rather than the courts with them. Human rights were not identified, let alone recognised for mentally disabled people. So, in effect, a lack of mental capacity resulted in no status or legal rights.

A new social climate

A policy of community care has now been introduced. This means different things to different people, but in essence it promotes care in the community with an assessment of needs and provision to meet those needs. At least that is the theory; the reality is often that due to a lack of funding, community care is reduced to crisis care. Nevertheless, the policy does involve a degree of responsibility moving from the family to the state.

¹ This was the title of the lecture delivered by Professor Ashton at the North East Mental Health Law Conference on 16 June 2006. Professor Ashton has kindly updated the text of that lecture for this issue of the *Journal of Mental Health Law*.

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Discrimination laws now include disability discrimination and there is a move from a medical to a social model of disability. In substance this means that one should not concentrate upon the impairment of the individual but on the obstacle imposed within society. So don't blame the individual; blame society for the way it conducts itself and require reasonable adjustments to be made. Human rights have also been 'brought home' by the Human Rights Act 1998 and this is of particular significance to people with disabilities because they have these rights too! It follows from all this that a paternalistic approach to people with impaired mental capacity is no longer acceptable.

It follows that people with disabilities are entitled to expect *equal* access to justice. Attitudes, facilities and procedures must not present an obstacle to the attainment of justice. There is now a recognition of diversity in society and judges and the courts are learning to cope with all manner of people. The Equal Treatment Advisory Committee of the Judicial Studies Board (of which I am a member) has produced an *Equal Treatment Bench Book* which is issued to all judges and available on the web at www.jsboard.co.uk/etac/etbb/index.htm. In reality we should not be talking about equal *access* to justice but equal *opportunity* for justice because in the delivery of justice the special needs of people with disability must be met. A level playing field is not enough because treating disabled people in the same way as everyone else would not be sufficient.

The role of the Law

People without capacity are vulnerable to neglect, abuse and exploitation. The law should tackle these vulnerabilities by regulating the support that is provided by the state, providing protection and facilitating empowerment. It must also cope with the resulting conflicts, because when you seek to protect a vulnerable individual it is almost inevitable that you will disempower that individual.

The conclusion must be that:

The absence of legal procedures for decisions to be taken on behalf of mentally incapacitated adults is the worst form of discrimination against people with disabilities and a breach of their human rights

THE NEW JURISDICTION

Overview

The Mental Capacity Act 2005 is a *SINGLE* piece of legislation with *TWO* fundamental concepts: a definition of **incapacity** and clarification of **best interests**. There are *THREE* areas of decision-making: personal welfare, health care and property and affairs. There are *FOUR* levels of decision-making: a person acting under *general authority to act*, an *attorney* under a *lasting power of attorney*, the Court of Protection making decisions and a *Deputy* appointed by the Court. There are *FIVE* general principles:

- a decision-specific approach to capacity based on understanding and the ability to make and communicate a decision;
- adults are presumed to have capacity so unjustified assumptions are outlawed and there is a 'balance of probabilities' approach;
- individuals should be helped to make own decisions with simple explanations and they may make unwise decisions;
- there must be participation in decision-making and consultation with others;
- a 'least restrictive' approach is to be applied to intervention.

The new Court of Protection

SIX key changes have been made in creating a new Court of Protection – it may be the same name but it is a very different body. So:

- the new court is a Superior Court of Record and not merely an office of the Supreme Court;
- there is a President and a Vice-President, respectively the President of the Family Division of the High Court and the vice-Chancellor of the Chancery Division, so senior Judges with clout!;
- there is also a resident Senior Judge, initially the former Master of the old Court of Protection to provide continuity;
- there will be nominated High Court, Circuit & District Judges who will sit in the new Court;
- there will also be regional courts, following the example of the ‘Preston pilot’ whereby for the past five years I have sat as a Deputy Master running the northern Court of Protection;
- new Court of Protection Rules will be created which are likely to follow the Civil Procedure Rules 1998.

It may therefore be anticipated that the new Court will be more accessible with greater involvement of local practitioners. There will be active case management and hopefully improved training and more reporting of court decisions. But the most important point is that we now have a proper court with full status to deal with the entire range of decision-making on behalf of those who cannot make their own decisions.

Office of the Public Guardian

The Public Guardian, with an office and staff, has SEVEN key functions:

- maintaining register of LPAs;
- maintaining register of deputies;
- supervising deputies;
- arranging reports from Visitors;
- receiving security from deputies;
- receiving reports from attorneys/deputies;
- hearing representations about attorneys/deputies.

The new role is both administrative and supervisory. The Public Guardian will be a supporter of patients, family and carers and a friend of good attorneys and deputies. Also a channel for whistle-blowers and an enemy of abusers. The intention is that the Office of the Public Guardian (OPG) will administer the Court of Protection and clearly in most cases there is a need to work in collaboration, but this may not be wise if the Public Guardian desires to be represented in hearings and reserves the right to appeal decisions. The new Public Guardian now has a statutory existence and role, whereas the former Public Guardianship Office did not exist as a legal body.

The new Jurisdiction

There are *EIGHT* general points that I wish to make about the new statutory jurisdiction.

- there will be a wider range of cases;
- there will also be an increased volume of cases;
- more people will be involved;
- the unmet need will emerge;
- there will be a new variety of outcomes;
- the Court should be more accessible;
- many parties will be unrepresented.
- alternative dispute resolution is likely to be imposed prior to any contested hearing

Implementation has been put back from 1st April 2007 to 1st October 2007 because there is still so much work to be done in writing the new Rules, nominating and training the Judges and setting up the new regional courts.

WILL THE NEW COURT DAMAGE YOUR MENTAL HEALTH?

Under this final heading I intend to return to the issues identified at the beginning of this presentation, but first identify some specific issues for the Court and the Public Guardian.

Issues for the *new* Court of Protection

One thing that troubles me is that there is a merger of two cultures, namely that of the historically mature Court of Protection and the residual inherent jurisdiction discovered by the Family Division High Court Judges when they started making declarations of best interest. Which will prevail, the informal yet essentially practical style of the Master or the Rolls-Royce trial of the High Court? It is my hope that both will co-exist and that as part of active case management a District Judge will either adopt an informal procedure or direct that the case must be heard by a High Court Judge. This means that the formality of each hearing will depend on the type or the severity of the case and be a matter for judicial discretion. There may be allocation to a Track as under the Civil Procedure Rules but I hope that cases will be dealt with by two levels of judge rather than three, with district and circuit judges being interchangeable. This is a specialist area and experience is needed rather than seniority.

I see a closer working relationship with the main stream courts under the new system. I already find that other judges turn to me for help when they encounter capacity issues because of my known involvement in this field of work. I contemplate that there will be cases where it is sensible to 'kill 2 birds with 1 stone'. In other words a judge may sit in a dual capacity, for example following a broken marriage where there is a dispute over residence and contact relating to the children and one is an adult with severe learning disabilities. We must, however, recognise that there may be a conflict of roles in multi-tasking – I have encountered this when asked to determine the amount and apportionment of a past care award following a large damages claim. The role of the Court of Protection is to address the best interests of the 'patient' and not to determine disputes with others.

Who should be the parties to proceedings in the Court of Protection? The claim will usually arise as a result of a dispute so clearly the parties to that dispute must be parties, and the opportunity should be

given to other members of the family and carers to be involved. But there are human rights arguments to the effect that the incapacitated person should always be a party. That would involve appointing someone (perhaps the Official Solicitor) to act for him or her as a 'litigation friend' and such person will generally wish to be represented by a solicitor who in turn may instruct counsel. Who will pay for all this, and would it be proportionate? There is, of course, a costs vulnerability for any party and the new Court will have to work out its policies in regard to costs orders. This should penalise those who pursue cases without merit or in an unreasonable way, but should not discourage genuine whistle blowers.

Issues for the Public Guardian

What is the true role of the Public Guardian,? Is it administrative, supervisory or interventionist? Active or passive? Will the office become a facilitator of mediation? Who will be the personnel involved as Visitors, reporters, independent advocates and litigation friends? Will the Public Guardian seek to become a party to some proceedings (albeit on rare occasions) with a right of appeal? There will be close involvement with the Court and a special relationship, but how close can this be?

Community care

Who will use the Court? Presumably spouses and partners, families and carers but also social services and health authorities. Will it support community care provision by removing uncertainty and avoiding delay? Will it support health care by facilitating medical treatment whilst guaranteeing patient autonomy? Whatever the answer, there must be an increased potential under the new jurisdiction for social services and health care providers to intervene in family affairs (for better or worse). Even though the Court holds the balance, the threat of proceedings is likely to intimidate many people into accepting the approach of the public authority. The balance of power and influence is likely to shift, unless the involvement of the legal profession and the reporting of cases educates society.

Discrimination

The new Court must be a model for other courts in avoiding discrimination. In particular it must operate in disability friendly premises with a range of aids being available, and be served by disability aware judges and adequately trained staff.

The Act is intended to remove the discrimination in decision-making, but is a decision specific assessment of capacity viable or will it create too much uncertainty compared with the present system where a person either is or is not a patient? Is there sufficient protection for those who are vulnerable to influence (not just undue influence) due to mental frailty? Will family and carers adopt best interests as defined or do what they think is best? Will the emphasis be on protection (which means playing safe) or empowerment (which involves risk taking)?

Access to Justice

Will the Court be used by those who need it? Only if it is accessible and affordable. Will people be able to cope with the procedures or will legal representation be available, in which event who will pay the costs in non-financial cases? There may be too many unrepresented parties but will those advocates who do attend be litigators or personal client lawyers? For many of these cases the latter would be preferred, in particular the type of solicitor who is willing to be an attorney, but all too often they are deterred from appearing as an advocate in court and involve their litigation partners. This is unfortunate when the issue is the best interests of the incapacitated person and they best understand this concept.

Will the procedure be inquisitorial whilst seeking consensus, adversarial based on resolving disputes or conciliatory with encouragement for mediation? Will the emphasis be on resolving disputes or addressing best interests, in which event what will happen if there is a struggle for control with no-one seeking to address best interests (as so often happens when dysfunctional families bring their long-standing disputes to the Court)? The approach adopted may well depend upon the type of case and some flexibility should be built into the system.

Human rights

Whose rights are we talking about? Those of the incapacitated person, the spouse or partner, or the relatives and carers? It seems to me that family and personal relationships also give rise to human rights in others. Does a 'best interest' test for the incapacitated person infringe the human rights of those others? If the primary rights to be protected are those of the incapacitated person, how is he or she to be represented? Must this person be a party to proceedings in every case with a litigation friend and solicitor, or may a report by one of the Visitors be sufficient as in private law children cases with the best interests test being applied? In the case of a dysfunctional family the appointment of a professional Deputy introduces an independent element.

Conclusion

I am sorry that I have asked more questions than I have attempted to answer. But there is a reason for this. The new jurisdiction will be what we now make it and all these questions will need to be addressed in the process. For my part, I am beginning to worry that the legislation may prove to be too complex and theoretical. Something a bit more rugged could perhaps have proved more workable, but then it might discriminate against disabled people and would not comply with the ever growing jurisprudence of human rights.