

# Mental Incapacity: An Overview

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Our legal system is still much admired by those who can gain access to it, but what about those who can't? Our courts present physical barriers to people in wheelchairs, but today I am not talking about the logistical problems of people with physical disabilities – I am concerned about the jurisdictional problems of individuals who lack mental capacity.

## Background

### *The problem*

In May 1989 the *Mental Health Sub-Committee* of the Law Society (as it then was) held a Conference here in London. One of the speakers was a new Law Commissioner, Professor Brenda Hoggett (as she then was). I was present and captivated because I was in the midst of writing my first book *Mental Handicap and the Law*. That Conference highlighted the vacuum in our law and procedures in regard to decision-making for adults who lack mental capacity. Those present recognised that the handicap that these people encountered in society should not be reinforced by the legal system and agreed that we should all have a say in our own future. I spent the next 10 years on that Committee and the next 6 years heavily involved in the Law Commission consultation which was provoked by that far-sighted Conference. Since then I have been an unashamed advocate for the reform of our law and procedures. Before I became a judge I encountered the vacuum in our law as an 'elderly client practitioner' but the problems came much closer to home than that. As many of you know, my son Paul who is now 27 years old has severe learning disabilities. So what has happened since then?

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*and 'Elderly People and the Law' (Butterworths – 1995); Contributor to numerous legal publications.*

### *Law Commission recommendations*

Law Commission Report No. 231 *Mental Incapacity* was published in February 1995 after extensive consultation. The architect was Brenda Hoggett. It contained comprehensive proposals with a draft Bill. I have been selling the proposals as follows:

“The individual with capacity will be able to appoint someone to make his personal, financial and medical decisions in the event that he loses capacity. For those who do not take advantage of this facility or are unable to do so the court will be able to make decisions or appoint someone to do so but carers will be authorised to make everyday decisions which need to be made. The courts at appropriate levels will be able to deal with any vacuum or dispute, with specially trained judges and an appeal system that allows this area of law to develop.”

Of equal importance, guidance is given as to how capacity should be determined and how decision-making for other people should be tackled with ‘*best interests*’ defined to take account of: ascertainable past and present wishes, the need to participate, views of connected persons and conflicts of interest. In other words it is not simply what the decision-maker thinks best, which may be based on self interest.

There was widespread support but for reasons that I still do not understand one section of the media saw this as an attack on family values. My family felt potentially empowered, not attacked.

### *The Government’s response*

After a period of uncertainty the Government responded in December 1997 with the consultation paper *Who Decides?*<sup>1</sup> We were all busy again on that consultation. This was followed by the report *Making Decisions*<sup>2</sup> in October 1999.

The Lord Chancellor has stated that we can expect legislation ‘when Parliamentary time allows’. Scotland had its own simultaneous Law Commission report and there was legislation in the first Scottish Parliament. In England and Wales there has been time to tackle the evils of dangerous dogs and fox-hunting – is society less concerned about the legal status of all those grannies with Alzheimers? Legislative time has been found for racial discrimination following the Stephen Lawrence Report yet disability discrimination is apparently seen as less insidious. It already seems that medical treatment will be omitted due to an alleged link with euthanasia and protection of vulnerable adults has been side-tracked.

If we have the new legal jurisdiction will it be accessible to those who need it? That would require a regionalised *Court of Protection* with supporting services and suitable people to fill the new roles. What an exciting prospect!

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1 *Who Decides? Making Decisions on behalf of Mentally Incapacitated Adults* (Lord Chancellor’s Department) (December 1997) Cm 3803.

2 *Making Decisions* (Lord Chancellor’s Department) (October 1999) Cm 4465.

## Changing times

### *The social perspective*

Society is changing. More people lack mental capacity because the population is living longer and more brain damaged babies survive. More money is involved due to greater home ownership and savings for the confused elderly, and larger damages awards in the courts. There is now a new social perspective: the old paternalistic approach is no longer acceptable and we increasingly recognise personal autonomy. The need for a new jurisdiction has become even more compelling.

### *A new legal climate*

There is also a new legal climate. The *Law Commission recommendations* are influencing how the courts tackle issues arising from a lack of mental capacity, with the architect playing a key role in her new identity as Lady Justice Hale. Examples are assessment of capacity, interpretation of best interests and the extension of declarations to personal welfare decisions. The problems identified at our 1989 Conference are now reaching the judiciary with increasing frequency, and part-solutions are emerging from the back door of the courts instead of the front doors of Parliament.

Under *Community Care policies* introduced in April 1993 we now assess and provide for the needs of people with disabilities instead of expecting them to cope with whatever services happen to be available. There is as a result an increased expectation that the needs of those who lack mental capacity will be fairly addressed. For some years we have had legislation that outlaws discrimination on account of race and sex, but discrimination in any form is now disapproved of and this has resulted in the *Disability Discrimination Act 1995*. It does not cover everything but the *Human Rights Act 1998* helps to fill the gaps and obliges lawyers to look at situations from the individual's point of view. The person who lacks mental capacity is recognised as an individual rather than just a patient to be cared for – and overlooked.

The courts are not excluded from the provisions in the Disability Discrimination Act which relate to the delivery of services, and if we judges do not modify our approach we could find ourselves in breach of this legislation. To the disabled individual it does not matter whether the problem is physical access to the court building, understanding what is going on or actually being heard and understood by the judge. All would be seen as discrimination. Could it not be argued that the absence of legal procedures for decision-making discriminates against people who cannot make their own decisions?

### *Judicial training*

The Judicial Studies Board is responsible for the training of judges. Discrimination was first addressed by the JSB in the context of people from ethnic minorities. But surely people with other disadvantages should be considered in a similar manner? EMAC (the Ethnic Minorities Advisory Committee of the JSB) has become ETAC – the *Equal Treatment Advisory Committee* – and its remit now extends to discrimination on account of race, gender, sexual orientation and disability.

This Committee, of which I am proud to be a member, has produced an *Equal Treatment Bench Book*. The 'Disability' section to which I contributed has almost been given the status of law by the Court of Appeal (see the judgment of Brooke LJ in *R v Isleworth Crown Court*).<sup>3</sup> I think we got it

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3 *R (on the application of King) v Isleworth Crown Court [2001] EHLR14*

wrong when we began by highlighting people from ethnic minorities – that was seen as teaching judges to be ‘politically correct’ and became a turn-off to many. There are underlying issues which are of general application. I made such a fuss about this that I was asked to re-structure the Bench Book to include an introductory section dealing with *Judgcraft* which means creating a *level playing field* for all litigants – or in Human Rights speak ensure *Equality of Arms*.

I regularly lecture to judges at residential seminars on disability issues and have been pointing out that for people with physical and mental disabilities it is not simply a question of avoiding discrimination but also addressing *special needs*. This involves ensuring that all parties and witnesses are properly listened to. It is, after all, the strongest case that should win – not the strongest litigant. Because some people have special needs the phrase ‘equal treatment’ seems inadequate to me – we should be ensuring *equal opportunity*.

## The legal vacuum

### *The problem*

We do not have proper legal decision-making procedures at present, because the Court of Protection only deals with financial issues. It is unacceptable that ‘he who holds the purse controls the person’ but this is what happens in practice. What happens when family or carers cannot agree about arrangements for care and attempts at conciliation fail? Or when there is uncertainty about what can legally be done and an authoritative decision is needed? Some examples are given in the Appendix to these Notes.

The High Court has attempted to fill the legal vacuum by assuming jurisdiction to make ‘declarations of best interests’ for incapacitated adults – it started with *Re F* (sterilisation case)<sup>4</sup> and then Tony Bland<sup>5</sup> (switching off life preserving equipment). More recently this has been extended (by Mrs Justice Hale, as she then was) to personal welfare decisions such as where to live.<sup>6</sup> I have used this approach to tackle adult contact disputes, but the procedures are slow and incredibly expensive when compared with those for resolving such issues in respect of children. This is not an accessible dispute resolution procedure.

### *What is the problem about legislation?*

At a joint Law Society/BMA conference in 1996 I said that:

“we need a government with the foresight and courage to lead society rather than follow the ill-informed wishes of the unconcerned masses who only wake up to the real problem when it hits their families”.

A government that has given us the Civil Justice Reforms and the Human Rights Act would appear to be suitably qualified so, in 1999 at a *Disability Law Conference* organised by the Bar, I asked the Lord Chancellor this question:

“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. What is the Government doing about this?”.

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4 *Re F (Mental Patient: Sterilisation)* [1990] 2 A.C. 1.

5 *Airedale NHS Trust v Bland* [1993] 1 All ER 821.

6 *Re S (Hospital Patient: Court's Jurisdiction)* [1995] 1 All ER 449. Affirmed in Court of Appeal [1995] 3 All ER 290. Also see *Ref (Adult: Court's jurisdiction)* 2 F.L.R. 512

His response was that the matter was then 'before cabinet'. At a further Law Society Conference in November 1999 to mark the New Millennium I expressed doubts as to whether funding concerns were dominating the Government's thinking and enquired: 'What is the cost of not having adequate procedures?' The cost of the uncertainty and abuse is unquantifiable but undoubtedly exists although it does not come out of the Lord Chancellor's budget. What about the adult contact dispute that I case managed, which cost £150,000 and many months to reach a hearing where it collapsed? If the learning disabled son had been a few years younger I could have resolved the dispute in as many months for less than £8,000.

### *What are my concerns about the legislation?*

I do have concerns about the proposed reforms but only because they don't go far enough. They provide a new jurisdiction to assess capacity and make or delegate decision-making, but what about *vulnerability*? We all need advice, whether in making investments or tuning the new video. There is an ill-defined line between accepting help and being taken over. We are all liable to be influenced by others, and in our private relationships these influences can be profound. When does this become undue influence?

#### Undue influence

How do we tackle undue influence for those who, perhaps by reason of advancing years, have reached the stage where they are of questionable capacity? Do we look at outcomes – the influence is not undue if it is in the best interests of the individual? The civil courts scrutinise the nature of the relationship and the case law has developed independently of incapacity issues but these issues may be inter-linked. This crops up in so many of the cases in the Court of Protection where capacity is disputed. I imagine you will say this is a matter for the Courts, not the legislation – well, thank you very much!

#### Abuse

How do we prevent abuse, especially by those to whom decision-making has been delegated? There are indications that empowerment may lead to an unacceptable level of abuse. Supervision is expensive, intrusive, demeaning and the cause of delay. I favour an open jurisdiction with people in authority who will hear the whistle blowers and respond. That brings me to the next topic.

### The legal system

#### *The Public Trust Office*

I dream of a new incapacity jurisdiction exercised by a reconstituted Court of Protection with a regional presence. The Court will need a strong administrative arm and there had been much criticism of the antiquated *Public Trust Office* (PTO) which was performing that role. But I was horrified by the terms of an administrative *Quinquennial Review*<sup>7</sup> by Ann Chant in November 1999. This proposed the break-up of the PTO and questioned the need for some of its services.

After 10 years of working with the Law Society for a new mental incapacity jurisdiction it seemed to me that the administrative means of achieving this was to be destroyed and valuable expertise dissipated. Proposals to delegate functions to the Inland Revenue, social services and the Benefits

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<sup>7</sup> *The Public Trust Office of the Lord Chancellor's Department: A Quinquennial Review* (November 1999).

Agency overlooked conflicts of interest. This would have been big-brother protection rather than independent best interests empowerment. We wanted something better but instead what we had was to be destroyed.

### *The Public Guardianship Office*

Those of us who realised what was happening were quite vocal and after the *Making Changes*<sup>8</sup> consultation the Government acknowledged in *The Way Forward*<sup>9</sup> the need for a 'centre of excellence' for adults who lack mental capacity. In April 2001 the *Public Guardianship Office* was born and now it must grow up and mature. Those of us who work within the system are familiar with the process of change – the setting up of committees and working groups, great activity, new names and logos, different job titles, published standards and policy documents. *Plus ça change mais ces la meme chose* – everything changes but it is always the same thing!

There are in fact some promising signs following an injection of new management and funding. One initiative is the *Consultative Forum*, a representative body which meets regularly and advises on the *Change Programme*. I am a member and, I suspect, something of a nuisance because I keep asking for items to be put on the Agenda. There is a new focus on the needs of the client with an early needs assessment. The office is to be more accessible and properly organised, though as a result of the changes and move to Archway Tower there has been a serious deterioration – hopefully short-lived. Visiting services are extended to receivers as well as patients with more visits. A new *Website*<sup>10</sup> provides information and after being the poor relation for so long the office is to be the envy of the Court Service by having computerised, paperless files – I just hope that being the guinea pig does not prove too painful!

### *The Court of Protection – and Human Rights!*

Having battled over the administrative body, I then compared the procedures of the civil courts with those of the Court of Protection in the context of Human Rights. The official view appears to be that only the decision that an individual is a patient engages Article 6 (the right to a fair trial) and once this status – of lack of it – is achieved there are no further human rights implications. The reality is that the rights of other members of the family are affected by decisions about control of money. Anyone who has dealt with a dispute between son and daughter as to how mother should be cared for knows that. Unless there is an expensive High Court action for a declaration the issue will be determined by the appointment of a receiver or attorney. Article 8 provides a right to respect for family life and if this is alleged to be infringed there must be a right to a fair trial under Article 6. That would happen if the matter arose in the High Court so why not if it is dealt with on step removed by the Court of Protection?

I pointed out that the Assistant Masters are not judges (this is a courtesy title) and hearings in London may not be accessible to those involved. I questioned existing procedures because the distinction between judicial and administrative decisions is unclear, there are no procedures in the Rules for advance disclosure of evidence and judgments are not made public. These factors may provide a useful disincentive to litigation but do they achieve justice to the families involved?

8 *Making Changes: The Future of the Public Trust Office (April 2000).*

*Office, the way forward and an analysis of the consultation (December 2000).*

9 *Making Changes: The Future of the Public Trust*

10 <http://www.guardianship.gov.uk>.

My short-term solution was simple, inexpensive and did not require legislation. Appoint a handful of part-time Deputy Masters from the body of District Judges in the provinces who could hear disputed cases near where the parties live and apply parts of the Civil Procedure Rules 1998 by reference. But then I would say this, wouldn't I!

### *A regionalised Court of Protection*

To my surprise the Lord Chancellor took up my suggestion and I was appointed a Deputy Master for a six month Pilot to handle disputed cases arising in the North from my court at Preston. Master Lush and I have worked together for many years, so with the co-operation of the senior managers at the Public Guardianship Office we soon set up a procedure based on email communication. The pilot was deemed a success and I have now been appointed for a five year period – so we have a Northern Court of Protection. But please do not try to come to me direct – the administration is done in London and hearings are referred to me when this is more convenient to the parties. I am just a satellite trying not to go – or be pushed – out of orbit. It has been a steep learning curve.

But there are additional benefits. I am trying to introduce case management and dispute resolution techniques based on experience of the civil and family courts, and local practitioners who would not have ventured to London are getting involved. There may also be the potential for one judge to sit in a dual jurisdiction.

### *The future*

What next? Could there be a Court of Protection for Wales? That would be politically attractive, and welcomed by the lawyers too! Would other areas benefit from regionalisation? I am confident that we are in the process of re-building the Court of Protection in a form that is ready for the new jurisdiction – when it comes. All we need now is the legislation?

## **APPENDIX**

### **Cases under the new Jurisdiction**

The following are examples of situations that may need to be dealt with under the new jurisdiction but are not encountered by the existing Court of Protection. They illustrate the need for local dispute resolution by a District Judge appointed as a Deputy Master of the Court of Protection. An appeal would go before a nominated Circuit Judge or High Court Judge also appointed to sit on Circuit in the Court of Protection.

#### *Care dispute*

Dispute between a son and daughter who live some distance apart as to which residential care or nursing home their mother should move to. She has Alzheimer's disease and is incapable of participating in the decision but has adequate funds to meet the fees. Her solicitor has an enduring power of attorney so is able to make financial decisions but unwilling to become involved in this family dispute. Some method is required of resolving this dispute which is becoming increasingly

acrimonious but does not address mother's best interests. It could readily be resolved by a Deputy Master sitting in a local court under the new jurisdiction.

### *Contact disputes*

(a) A daughter from an Asian background has married outside her ethnic origins and adopted a way of life that results in her being cut off by her family. She still wishes to visit her learning disabled brother but the family prevent this.

(b) Older parents with a learning disabled son became involved in a bitter divorce which results in father being excluded from the matrimonial home where mother continues to care for this son. A daughter who has sided with father is then denied access to her brother.

At present expensive applications must be made in the High Court for declarations with the intervention of the Official Solicitor. Although the individuals concerned are 'patients' there is a preliminary issue as to whether they have capacity to decide whom they wish to have contact with. Directions hearings take place before a District Judge followed by at least one hearing before a High Court Judge sitting in the Family Division. The existing procedure is disproportionate in its use of legal resources and a Deputy Master could resolve the issue under the new jurisdiction.

(Note: I encountered both these cases whilst sitting as a District Judge in the Preston District Registry of the High Court of Justice).

### *Activities*

A charity providing outdoor adventure holidays for adults with learning disabilities wishes to take an individual on a mountaineering course but mother (who may be over-protective) thinks it is too dangerous and objects. Care workers and a personal advocate wish to support this opportunity for personal development. The charity seeks reassurance that they would not be vulnerable to legal proceedings irrespective of fault. A Deputy Master could resolve this dispute under the new jurisdiction in a local court according to the best interests of the incapacitated individual.

(Note: I have been asked about this when speaking to care providers at conferences).

### *Education*

Father wants the 19 year old son with severe learning disabilities to attend a residential training college and has arranged funding. Mother prefers him to live with her but has made no arrangements for his daytime activities. The local authority has offered a place at the local training centre and is very concerned that mother will not allow him to attend. She will not discuss the matter further and the son's future is in doubt. An application could be made under the new jurisdiction for a declaration as to his best interests and be dealt with in a local court by a Deputy Master who would see the parties, consider welfare reports and make a decision (if an attempt at mediation did not result in the deadlock being resolved).

(Note: these situations arise in practice without an opportunity for judicial intervention).



*Minor medical decisions*

Parents wish to arrange for their 23 year old daughter with Downs Syndrome to have some dental treatment which will improve her appearance but is not otherwise necessary. She appears to want this treatment but there is doubt as to whether she can legally consent so the dentist is unwilling to proceed perhaps because there is some element of risk. An application to a Deputy Master in a local court could resolve the matter.

(Note: this is not an uncommon scenario for such families).

*Dispute over medical intervention*

Parents are concerned that it is proposed to remove the teeth of their incapacitated son who presents challenging behaviour and is biting everything and everyone in the local authority home where he is cared for. They wish to oppose this decision before it is implemented and encourage other methods of behaviour control but receive no support from those responsible for his care. A Deputy Master could provide the necessary intervention and ensure that all relevant options are taken into account before a decision is reached.

(Note: this question was raised at a previous Conference by a distinguished lawyer).

*Sexual relationships*

Care workers are concerned as to whether a resident with severe learning disabilities being supported in a group living arrangement is competent to enter into a sexual relationship with another resident. They seek a declaration from the Court. Such an application might be referred to a Deputy Master who arranges to sit locally to take evidence from a consultant psychiatrist and others who have experience of the conduct and level of understanding of the individual.

(Note: these problems arise in practice but there is no adequate way that they can be brought before a court).

**Cases under a dual jurisdiction**

The following further examples (all of which have been encountered at Preston County Court!) illustrate the need for an overlap with the existing role of the civil and family courts. The Court of Protection when exercising the new jurisdiction cannot be seen as a separate court, but needs to function in part through judges working on a regional basis within the existing court system exercising a dual jurisdiction.

*Residence dispute*

Following a divorce there is a dispute as to which parent is to continue to care for an adult mentally disabled child. The future of the matrimonial home may depend on this. A Deputy Master sitting concurrently as a District Judge could deal with the residence issue under the new jurisdiction and also the ancillary relief claims. (The Master of the Court of Protection would have no such dual jurisdiction).

(Note: I have encountered this problem at Preston County Court).

### *Possession action*

A landlord or mortgagee brings a possession claim and the tenant or mortgagor attends the hearing but appears confused and unable to cope. Doubts arise as to mental capacity and the District Judge finds himself in difficulty knowing how to proceed. If this defendant is a *patient* a litigation friend must be appointed but a separate application may then have to be made to the Court of Protection for the appointment of a Receiver. That may be a disproportionate response if the tenant or mortgagor has no savings and is simply failing to cope with state benefits. Under the new jurisdiction the claim could be transferred to a Deputy Master who could deal locally with the capacity issue, exercise powers of the Court of Protection over personal financial affairs and resolve the possession claim (possibly all in the same series of hearings).

(Note: this is not an unusual scenario at possession hearings).

### *Action for 'necessaries'*

A local shopkeeper sues a customer with learning disabilities who has been placed 'in the community' for non-payment of bills for normal provisions. Support from social services (who set up this living arrangement) has evaporated with everyone passing the buck. A District Judge dealing with the matter as a 'small claim' will be in great difficulty, but under the new jurisdiction he could pass the case to a Deputy Master who would have the powers (under a dual jurisdiction if necessary) and experience to deal with it.

(Note: I have encountered this problem whilst sitting in the 'small claims track').

### *Ancillary relief claim*

Following a divorce between an elderly couple financial claims are made which include the future of the former matrimonial home. At an FDR ('financial dispute resolution hearing') the husband makes proposals under which she may remain in the home for life. The lawyers involved agree that these proposals are more beneficial to the wife than she is likely to achieve at a contested hearing. She cannot grasp the implications and refuses to accept. The District Judge is in a dilemma because if she persists in refusing the offer she is in danger of paying all the costs and losing the home. He questions whether she lacks mental capacity and should be treated as a 'patient' with a 'next friend' appointed to conduct the proceedings on her behalf, but she refuses to be medically examined. If this case was transferred to a local Deputy Master he could tackle all the issues and resolve them locally with minimum delay and expense.

(Note: I am facing this problem at the moment and wondering how progressive to be!).