Mental disabilities, specific learning difficulties and mental capacity

Mental disabilities

Key points

- A mental disability may arise due to mental ill-health, learning disability or brain damage.
- Only mental incapacity will generally have legal significance in civil, family and tribunal hearings. Lack of mental capacity may also be significant in criminal proceedings (i.e. whether the accused is fit to plead) and sentencing options may be affected by the mental state of the defendant.
- Adjustments to court and tribunal procedures may be required to accommodate the needs of persons with these mental disabilities whether as witnesses, parties in civil/family/tribunals proceedings or defendants in criminal proceedings.
- Judges are responsible for the conduct of hearings and should ensure that people with mental disabilities can participate to the fullest extent possible whilst avoiding prejudice to other parties.

Introduction

1. Mental disability should be considered in the same way as physical disability when it does not render a person incapable of playing their part. Judges should be able to recognize the existence of a mental disability if not informed of it, identify its implications in the court or tribunal setting and understand what should be done to compensate for areas of disadvantage without prejudicing other parties.
2. In practice, it can be much more difficult to understand the problems experienced by the individual in accessing the courts or tribunals or participating in the proceedings, although a general enquiry may be made in case reasonable adjustments are required. This may lead to erroneous perceptions, such as that the person is being awkward or untruthful and inconsistent. In fact, the problem may come down to a difficulty in communication or understanding.

Categories of mental disability

3. A mental disability may arise due to:
    a. mental ill-health;
    b. learning disability; or
    c. brain damage.
4. There are fundamental differences between these conditions. Being diagnosed as being within one or more of them does not necessarily result in lack of mental capacity. For example, not everyone with cerebral palsy will lack capacity to make decisions and an individual may be sectioned under the Mental Health Act yet not a 'protected party' (see below under *Mental capacity*) because the criteria are different.

Mental ill-health

5. People can become mentally ill through their life experiences, their genetic background or a combination of the two. Most respond to medical treatment and recover from their symptoms with the right treatment. Mental ill-health takes many forms including neurosis (a functional derangement, e.g. phobias) and psychosis (a severe mental derangement involving the whole personality, e.g. paranoia, schizophrenia). There are increasing numbers of elderly people who are medically classified as having an acquired organic brain syndrome, such as dementia, caused by Alzheimer's disease or vascular disease.

Learning disability

6. People can be learning disabled when they have a brain that will not develop or function normally. There is no cure, although education and training, coupled with a disability awareness culture, assists them to become independent members of society able to fulfil their personal potential. The causes are varied and in many cases unknown, but fall into the following general categories.

Genetic

7. The best-known example is Down's Syndrome but there are many others. Medical intervention at an early stage may assist and the right adjustments in educational methods and adult working life can enable individuals to use their abilities more fully.

External causes

8. These include maternal disease (e.g. German measles), toxins (substances taken during pregnancy, vaccine damage or food allergies) and trauma (birth injury or accident in childhood).

Non-specific

9. The largest category comprises conditions whose causes have not yet been recognised. These are people at the lower end of the normal range of intelligence, but many are near the borderline and may not require any great amount of specialist services, and some go unrecognised. Environmental and social factors may play a part.

10. Until recently, identification tended to be based upon level of intelligence as identified by the IQ score (intelligence quotient). Such assessment is of little use to care workers who prefer to classify people according to their degree of independence, which involves consideration of levels of competence in performing skills such as eating, dressing, communication and social skills. Nor should it be relied upon by lawyers who wish to establish whether the individual lacks capacity (see below).

Brain injury

11. The third general category is those who have brain injury (see Glossary). Their care and treatment differs from that for adults with a mental health problem or learning disability. Traumatic or acquired brain injury is caused at least initially by outside force, but includes the complications which can follow, such as damage caused by lack of oxygen and rising pressure and swelling in the brain. Road traffic accidents account

for half of all head injuries, with domestic and industrial accidents, sports and recreation making up the other half.

12. The physical, observable effects of brain injury may be limited; many people, particularly children and young people, will not experience any physical consequences. However, damage to the frontal lobe of the brain may give rise to impairments of various cognitive functions that may need particular accommodation in the context of courts and tribunals because of problems related to memory, concentration, and understanding fast speech, among other things. Damage caused during the developmental years (e.g. during childbirth) is generally classified as a learning disability.

Terminology

13. Words used by society to describe mental conditions or limitations have changed in their usage and meaning since the early Acts of Parliament intended to protect the individuals involved. For this reason, terms such as moron, idiot and imbecile are no longer used by the caring professions and are not acceptable in modern society. There is a constant search for appropriate terms that do not carry a judgmental stigma, but there has been no consistency in the terminology adopted.

Learning disability

14. In England and Wales the legal term for this condition used to be 'mental subnormality' and later 'mental handicap', whereas in Scotland it was 'mental deficiency' and in the USA 'mental retardation'. 'Learning disability' or 'learning difficulties' and 'intellectual impairment' are increasingly being used. In an educational context the expression 'learning difficulties' is more often used.

15. There are many voluntary groups that concentrate upon particular types of learning disability and it is convenient (and reassuring to the parents) to identify an impairment by means of a name or 'label' which is immediately recognised by the public and enables people to offer the most appropriate support. It is therefore helpful to be aware of the more common names, although they may not represent a precise medical classification and have no legal significance. Identified medical conditions include Down's Syndrome, cerebral palsy, autism, hydrocephalus and the effects of meningitis and encephalitis (see the Glossary). Some children are referred to as being 'hyper-active' although this condition frequently subsides as they grow up. Each identified condition exhibits its own features, whether these are in the form of behavioural or physical manifestations – most of us can identify a child with Down's Syndrome.

Mental disorder

16. The term mental disorder is defined by the Mental Health Act 1983 s. 1 (2) as 'any disorder or disability of the mind'. For the purposes of the Act a person with a learning disability is not be considered by reason of that disability suffering from mental disorder ….'unless that disability is associated with abnormally aggressive or seriously irresponsible conduct on his part' s 1(2) (A). Although this definition is

exclusive to the compulsory detention procedure, it does provide useful guidance for wider purposes.

17. Dependence on alcohol or drugs is not (per se) considered to be a disorder or disability of the mind s. 1 (3).

The conduct of court and tribunal hearings

18. Most solicitors are unlikely to provide documentation on the needs of a client with a mental disability, together with information on how the symptoms are likely to disadvantage him or her. Hearing management aims to recognise and accommodate any aspects of disability that could place the affected individual at an unfair disadvantage so a general enquiry could be part of the routine.

Pre-hearing planning

19. If a disability is indicated on court or tribunal pro-formas both the administration and the judiciary should act on this information, requesting further documentation or arranging a directions hearing to consider requirements arising out of special needs. There may be a duty to make reasonable adjustments under the Equality Act 2010

20. Rather than making assumptions based on generic information or knowledge of previous cases, decisions concerning case and hearing management should address the particular needs of the individual concerned insofar as these are reasonable. The individual should be consulted or given an opportunity to express their needs. Expert evidence may be required.

Practical measures

21. In some instances the impairment will comprise a combination of mental and physical disabilities. Both should then be addressed, separately or together, as appropriate.

Place of trial

22. The need to arrange for evidence to be taken by depositions or for the trial to take place other than in a courtroom may be less evident as access is unlikely to be a problem, although the individual may be better able to give evidence in a familiar environment. A longer time estimate may be required because of the need to take evidence more slowly and with more breaks.

Communication

23. A modified approach may be required when seeking to obtain reliable evidence from a person with mental health problems, especially those who are mentally frail, and the judge will wish to control any form of harassment by an over- zealous advocate. It is necessary to ascertain whether any communication difficulties are the result of mental impairment or caused by physical limitations which can be overcome by the use of physical aids or other techniques. An interpreter may be able to assist with strange or distorted speech.

Facilities

24. The environment may be unsuitable to the individual for reasons that are not apparent (e.g. certain kinds of lighting can affect those with epilepsy). Appropriate changes may then need to be made.

Rights of audience

25. It is difficult for almost anyone to represent themselves in court or tribunal hearing and if a person has a learning disability or mental health condition that is worsened by stress, for example, then it becomes much more difficult. Representing oneself may be inadvisable for people with mental disabilities, so the difficulties of doing so should be made clear and information on legal advice provided. If the individual still decides to go ahead, clear written guidelines should be provided on court and tribunal procedures and terminology. The presence of a McKenzie friend in civil or family proceedings or an independent mental health advocate in a tribunal should be encouraged in order to help locate information, prompt as necessary during the questioning of witnesses and provide the opportunity for brief discussion of issues as they arise. A more tolerant approach to the use of a lay representative may assist.

Witnesses with mental disability

Evidence

26. In civil, tribunal and family proceedings evidence may only be given by an individual who is considered by the judge to be competent to give evidence. There is no reason to assume that a witness who has a learning disability or mental health condition is not competent to give evidence. There may be some instances across the range of mental disabilities where a particular witness may have difficulty recalling or recounting information.

27. Evidence may be admitted as to the capacity of the witness in general terms, but not as to the likelihood of the witness being able to give a truthful account. Unlike criminal proceedings, the oath is not obligatory so there is no requirement of ability to understand the nature and consequences of taking the oath. Much may depend upon the approach of the individual judge, and this may depend upon understanding of mental disability, tolerance and prejudices. Witness Intermediaries may also assist; this service is no longer restricted to criminal cases but a fee may be charged in family and civil cases.

Vulnerability

28. Health and abilities can affect people's experience of contacts with the justice process and their performance as witnesses. Research has identified the following three main areas of personal functioning which can be affected by mental impairment or learning disabilities.

Memory

29. This may take the form of taking longer to absorb, comprehend and recall information. Recall of details such as chronological order may be particularly affected and recall of significant events may be blocked if they were traumatic. Questions may need to be repeated or rephrased.

Communication skills

30. Having a limited vocabulary results in remembering things in pictures rather than words, leading to difficulties in understanding and answering questions. There may also be difficulty in explaining things in a way other people find easy to follow, or understanding subtleties of language or social etiquette.

Response to perceived aggression

31. Some people with mental disabilities are especially sensitive to negative emotion and may be suggestible. They may respond to rough or persistent questioning by trying to please the questioner. Others may respond with tearfulness or panic and be traumatised by the legal process of cross-examination. For responses to be reliable, questions should be kept simple and non-threatening.

Taking evidence from a witness with a mental disability

32. Speak more slowly where appropriate, allow pauses for assimilation, use simple words and sentences, and do not go on too long without a break.

33. Avoid 'yes/no' answers and questions suggesting the answer or containing a choice of answers which may not include the correct one.

34. Do not keep repeating questions as this may suggest that the answers are not believed and by itself encourage a change, but the same question may be asked at a later stage to check that consistent answers are being given.

35. Deal with issues in chronological order and do not move to new topics without explanation (e.g. "can we now talk about") or ask abstract questions (e.g. ask "was it after breakfast" rather than "was it after 9.00 am").

36. Do not make assumptions about timing and lifestyles – a tag to link the question may be helpful (e.g. a TV programme or phone call).

37. Allow a witness to tell their own story and do not ignore information which does not fit in with assumptions as there may be a valid explanation for any apparent confusion (e.g. the witness may be telling the correct story but using one or more words in a different context at a different level of understanding).

38. Advocates often do not have the necessary understanding of particular mental impairments (e.g. learning disabilities) to formulate questions in a way that the witness can understand – it may be necessary to explain something more than once using simple language.

39. Always ensure that witnesses are treated with due respect and are not ridiculed if they are unable to understand the way questions are being asked.

MIND's report *Achieving justice for victims and witnesses with mental distress* [www.mind.org.uk/assets/0000/9950/Prosecutors__toolkit.pdf] sets out suggestions including use of screens to help witnesses to focus, allowing companions in the witness box, removal of wigs and gowns and taking regular breaks.

Specific Learning Difficulties (SpLDs)

Key points

- Specific learning difficulties such as dyslexia are a family of related conditions and must not be confused with learning disabilities which affect all areas of daily living and correlate with low intelligence.
- Many people with specific learning difficulties show signs of more than one profile and some develop a mental illness as well (typically depression or anxiety).
- Some of the reasonable adjustments required for people with mental disabilities may also be appropriate for those with specific learning difficulties but other more specific adjustments may be required.

Overview of SpLDs

40. These are a family of inter-related neurological conditions affecting 10% of the population to a lesser or greater extent. The word 'specific' is useful because it conveys the fact that only some areas of functioning are affected, whereas other areas operate normally.

Terminology

41. Specific learning difficulties is generally used as an umbrella term to cover dyslexia, dyspraxia/ developmental co-ordination disorder, dyscalculia and attention deficit (hyperactivity) disorder. Dyslexia is the best known; it was initially referred to as 'word blindness' but has implications beyond literacy.

42. In the more positive climate of recent years, people with SpLDs now tend to refer to themselves as having 'specific learning differences'. Some adults regard a label containing the word 'learning' as inappropriate since they are no longer in school or college and favour 'processing differences' or neuro-diversity.

Causes

43. SpLDs are congenital, largely heritable conditions which may affect the development of a range of cognitive, motor and attentional skills. They are life-long in their effects and characterised by weaknesses in key areas of functioning which contrast with normal or above-average abilities in unaffected areas. Some people are unaware that they have a recognised condition and struggle without understanding the underlying reason for their problems. Acquired dyslexia following brain injury, trauma or infection is far less common than developmental dyslexia and will generally be documented following medical assessments. However psychologists or suitably qualified tutors are appropriate to supply documentation on developmental dyslexia.

Characteristics

44. The brains of people with SpLDs operate differently from those of the rest of the population and show anatomical differences in some cases. This difference often manifests itself as an unexpected combination of competence and incompetence. In

the case of dyslexia areas of skill can include creative thinking and intuitive understanding of how things work, good spatial skills and entrepreneurship.

45. The overall profile of difficulties varies considerably from person to person as does the extent to which they are affected. Only those who experience a substantial and long-term adverse effect are covered by the disability discrimination provisions of the Equality Act 2010, but the needs of many more should be considered in the conduct of court proceedings.

46. Since a number of key problem areas are associated with more than one SpLD it is now good practice not to consider these conditions in isolation but to be aware of the possible overlap. The range of difficulties include:

    a. a weak short-term memory;

    b. a poor working memory - this shows itself as the inability to hold on to several pieces of information at the same time;

    c. poor organisation and time management with particular difficulties estimating the passage of time;

    d. inefficient processing of information which could relate to written texts, oral responses or listening skills – there may be a delay between hearing something and understanding it;

    e. difficulty presenting information in a logical sequential way;

    f. word-finding problems, lack of precision in speech, misunderstandings and misinterpretations;

    g. lateness in acquiring reading and writing skills – even though these may become adequate there are residual problems, such as the struggle to extract the sense from written material and an inability to scan or skim through text;

    h. problems retaining sequences of numbers or letters and muddling left and right;

    i. limited awareness of the consequences of their speech or actions – this relates in particular to people with attention deficit (hyperactivity) disorder.

47. In addition to the above, many people with SpLDs experience visual stress. Symptoms include continually losing their place, perceived distortions when reading so that the letters appear to move or become blurred, and a dazzling glare from white paper.

48. Autistic characteristics can co-exist with SpLDs, whilst Asperger Syndrome requires particular consideration due to acute difficulties with social interaction, which are not always apparent.

Coping strategies

49. By adulthood most individuals with SpLDs have developed an array of compensatory and coping strategies which require sustained effort and energy. These are likely to break down in stressful situations, leaving the individual struggling to process spoken or written language (e.g. an individual with dyslexia may appear completely incompetent in situations of stress).

50. Some people with SpLDs have come to rely so heavily on technology for many aspects of their daily lives that they feel quite disabled when they are not allowed to use it, for example in court. Others report that they experience mental overload and are unable to recall what has transpired or the outcome of the hearing so they may need, yet cannot always obtain or afford, a transcript.

Impact of SpLDs in a court setting

Problems encountered

51. The following problem areas are reported by people with SpLDs who have experience of court or tribunal proceedings:

    a. a build up of stress, due to long delays at the hearing;

    b. impossibility of following the cut and thrust of court exchanges;

    c. difficulty coping with oblique, implied and compound questions;

    d. failure to grasp nuances, allusions and metaphorical language;

    e. difficulties giving accurate answers relating to dates, times or place names;

    f. problems providing consistent information on sequences of actions;

    g. inability to find the place in a mass of documentation, as directed;

    h. impossibility of assimilating any new documentation at short notice;

    i. coping with a room full of strangers in unfamiliar settings;

    j. maintaining concentration and focus, mental overload;

    k. feelings of panic, resulting in the urge to provide any answer in order to get the proceedings over with as quickly as possible;

    l. anxiety that use of inappropriate tone may create a misleading impression;

    m. an experience of sensory overload from the lights, bustle and distractions – this is a major factor for people with Asperger Syndrome.

52. People with SpLDs will be concerned about how their behaviour might be perceived: inconsistencies could imply untruthfulness; failure to grasp the point of a question could come across as evasive; lack of eye contact could be misinterpreted as being 'shifty' and an over-loud voice might be regarded as aggressive. The overriding worry is that a loss of credibility occurs when they do not 'perform' as expected.

53. Communication skills are often poor in people with SpLDs. They may miss the point, go off on a tangent, appear garrulous and imprecise or find that words fail them altogether so that they are unable to proceed. Despite their efforts they may only respond to the last part of a question or may unintentionally mislead the court through incorrect word usage.

Taking evidence from adults with SpLDs

54. The reasonable adjustments required for people with mental disabilities may also be relevant for those with SpLDs but other more specific adjustments may be required. It is of paramount importance that adults with SpLDs are reassured that:

    a. they may seek clarification at any stage by asking for a question to be repeated or re-phrasing it to check understanding;

    b. they can take their time when considering responses and can inform the judge when they are no longer able to maintain concentration;

    c. misunderstandings on their part will not be treated as evasiveness and inconsistencies will not be regarded as indications of untruthfulness;

    d. they are not expected to rely on their memory alone for details of dates, times locations and sequences of events;

    e. they will not be expected to skim through and absorb new documentation or locate specific pieces of information in the court bundle.

55. In some cases lighting and temperature will be an issue. Some people will also encounter visual stress and be unable to read easily (if at all) from black text on a white background. Once 'mental overload' has been reached the individual is unable to participate in the process and requires an opportunity to recover. In order to cope with these types of problems, advocates and judges must show patience, understanding and flexibility.

56. Written communication should be in plain English and font size should be at least 12 point. Court and tribunal location details should include local landmarks, public transport information and a contact phone number. Electronic communication helps those who rely on speech recognition software.

Mental Capacity

Key points

- An adult who lacks mental capacity (in the legal sense) will not be able to make decisions that others should act upon, so may be unable to enter into contracts, administer their own affairs, conduct litigation or even choose their own lifestyle.
- There is no universal test of mental capacity – the legal test to be applied relates to the decision made or to be made.
- Capacity depends upon the individual's understanding rather than status or the outcome of any decisions made.
- Capacity is a question of fact to be determined by the court on all the available evidence of which the views of a doctor as an expert only comprise a part.
- Court rules identify parties who are incapable of conducting litigation without a representative.

Introduction

57. The legal system relies on the assumption that people are capable of making, and thus responsible for, their own decisions and actions. It is therefore necessary to be able to recognise a lack of mental capacity (or 'incapacity') when it exists and to cope with the legal implications.

58. Whilst at first glance in might seem convenient if people could be legally categorised as either capable or incapable according to a simple test based upon a general assessment, this is over simplistic and would be inappropriate. The test of capacity to drive is clearly different from that to get married, and the capacity required to sign a will differs from that for an enduring power of attorney. It would be discriminatory to apply a standard test for all purposes, as most individuals have some level of capacity and this should be identified and respected.

Approaches

59. There are three possible approaches to the question of mental incapacity:

    a. Outcome

       Determined by the content of the decision (e.g. if it is illogical or foolish the maker must lack capacity). This approach is flawed because we are all entitled to be eccentric and a judgment as to what is foolish is subjective.

    b. Status

       Judged according to the status of the individual such as age (e.g. over 90 years), a medical diagnosis (e.g. senile dementia) or place of residence (e.g. being in a mental hospital). Except in the case of children this approach was abandoned long ago (at one time women lacked capacity). Detention under the Mental Health Act 1983 does not necessarily deprive the patient of decision-making capacity.

    c. Understanding

       The ability of the individual to understand the nature and effect of the particular decision and to act on that understanding is assessed. A test based on understanding is generally appropriate, although the outcome of decisions or the individual's status may result in capacity being questioned and the appropriate test should then be applied.

Appearance

60. Whilst the law is concerned with what is going on in the mind, society tends to be concerned with the outward manifestations but we should never make assumptions based on appearance.

    a. The difference between ability and capacity must be recognised, as it is not unusual for communication difficulties to create a false impression of lack of mental capacity.

    b. A person's appearance (perhaps the consequence of physical disabilities) can create an impression of lack of mental capacity which is not justified.

c. Observance of the conventions of society or communication skills can disguise lack of capacity (e.g. a learnt behaviour pattern).

Criteria

61. When making assessments different professions apply different criteria.

    a. The medical profession is concerned with diagnosis and prognosis, and health authorities are increasingly being relieved of the responsibility to care for those with mental disabilities who do not respond to conventional medical treatment.

    b. Care professionals classify people according to their degree of independence, which involves consideration of levels of competence in performing skills such as eating, dressing, communication and social skills.

    c. The lawyer is concerned with legal capacity, namely whether the individual is capable of making a reasoned and informed decision, and able to communicate that decision.

62. This should be borne in mind when seeking opinions about capacity. A multi-disciplinary approach is usually best in difficult or disputed cases, and the assessment should not then be left entirely to the doctor. A lawyer who gathers evidence and expert opinion from a variety of sources may be in the best position to make an assessment of capacity, and in disputed cases that is the role of the court.

Assessment of capacity

63. Legal tests vary according to the particular transaction or act involved, but generally relate to the matters which the individual is required to understand. It has been stated (in regard to medical treatment, though the test is no doubt universal) that the individual must be able to (a) understand and retain information and (b) weigh that information in the balance to arrive at a choice (per Butler-Sloss LJ in *Re MB* [1997] 2 FCR 541, CA).

Presumptions

64. There is a presumption that an adult is capable but this may be rebutted by a specific finding of incapacity.

    a. If a person is proved incapable of entering into contracts generally, the law may presume such condition to continue until it is proved to have ceased, although there may be a lucid interval.

    b. If an act and the manner in which it was carried out are rational, there is a strong presumption that the individual was mentally capable at the time.

    c. Eccentricity of behaviour is not necessarily a sign of incapacity and care should be exercised before any assumption is made.

Determining capacity

65. Where doubt is raised as to mental capacity the question to ask is not ‘Is he (or she) capable?’ or even ‘Is he (or she) incapable?’ but rather ‘Is he (or she) incapable of this

particular act or decision at the present time?' It may be necessary to determine the issue of capacity at a separate hearing. Note in particular that:

a. Capacity is an issue of fact, though it is necessary to identify and apply the appropriate legal definition or test.

b. Capacity depends upon understanding rather than wisdom, so the quality of the decision is irrelevant as long as a person understands what they are deciding.

c. Capacity must be judged for the individual in respect of the particular decision or transaction at the time it was taken or is to be taken.

d. In legal proceedings, a judge makes the determination, not as medical expert but as a lay person influenced by personal observation and on the basis of evidence not only from doctors but also from those who know the individual.

Evidence

66. General reputation is not admissible in evidence, but the treatment by friends and family of a person alleged to lack mental capacity may be admissible. Evidence of conduct at other times is admissible, and the general pattern of life of the individual may be of great weight, although it is the state of mind at the time of the decision that is material.

67. Medical evidence is admissible and usually important, but it must be considered whether the opinion of a medical witness as to capacity has been formed on sufficient information and on the basis of the correct legal test.

68. A person alleged to lack capacity should be given the opportunity to make representations unless the issue is beyond doubt, and if present capacity is the issue it will generally be desirable for the judge to see and attempt to converse with this person before making a decision.

Implications

69. In general terms, lack of capacity will mean that the person is (or was) not capable of entering into the particular contract and therefore that any contract purportedly entered into is not binding if the other party was aware of the lack of capacity. In a more specific context, it may be a will or an enduring power of attorney that is not valid.

70. Different tests will be imposed when considering the responsibility of an individual (e.g. in negligence). The criminal law imposes its own requirements and the approach to capacity outlined here will be less relevant, although issues of capacity still arise in the course of criminal proceedings (e.g. is the accused fit to plead?).

Guidance

71. Helpful guidance is given in *Assessment of Mental Capacity: Guidance for Doctors and Lawyers* published jointly by the Law Society and BMA (3rd edition, 2009).

Civil and family proceedings - procedure

Rules

72. For many years special procedures have applied in respect of proceedings by and against a 'person under disability' (as defined). These ensured that a representative was appointed, compromises and settlements of claims were approved by the court, and there was supervision of any money recovered. The rules dealt with proceedings involving children (variously described as 'minors' and 'infants') and 'patients' as parties. Both categories are deemed incapable of conducting their own proceedings, the former due to age and the latter due to personal factors other than age (old age by itself is not a barrier to conducting proceedings). We are only concerned here with adults.

73. The expression 'person under disability' is no longer used and, following implementation of the new mental capacity jurisdiction, a person should not be stigmatised as a 'patient' so the term has been replaced by 'protected party' and a new definition introduced. The procedures are now to be found in the following rules:

    a. Civil Procedure Rules 1998 (CPR), Part 21;

    b. Family Procedure Rules 2010 (FPR), Part 15;

    c. Insolvency Rules 1986, Part 7, Chapter 7.

Patient/protected party

Old definition

74. The term 'patient' was defined in the former rules as:
'a person who by reason of mental disorder within the meaning of the Mental Health Act 1983 is incapable of managing and administering his property and affairs'.

75. A similar definition was used to establish the jurisdiction of the 'old' Court of Protection to administer the property and affairs of 'patients' (i.e. under Part VII of the Mental Health Act 1983).

76. This was a three stage test: (i) did the party have a mental disorder (the term is widely defined and the threshold not high); (ii) was the party incapable; (iii) was the incapacity due to the mental disorder? The need for a 'mental disorder' acted as a screening process to exclude mere eccentricity and the effect of alcohol or drugs, but the term remains widely defined. Whilst incapacity by itself might result in a transaction being unenforceable, it was only when it was by reason of mental disorder that the law took away personal powers and enabled these to be delegated. A diagnosis of mental disorder was required, but this did not necessarily result in a finding of incapacity – an assessment of capacity still had to be made.

77. Recognising that tests of capacity are decision specific, the Court of Appeal held that the rule should be read as 'incapable of managing the proceedings' (i.e. giving instructions for the conduct of the proceedings) in *Masterman-Lister v Brutton & Co and Jewell & Home Counties Dairies* [2002] EWCA Civ 1889.

New definition

78. Following the Mental Capacity Act 2005, the term in the CPR and FPR has changed to protected party and the definition has become:
'a party, or an intended party, who lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct the proceedings.'

79. Section 2 of the 2005 Act provides that:
'… a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.'

80. Section 3 then amplifies 'unable to make a decision.' This thus becomes a two stage test: (i) is there is an impairment of, or disturbance in the functioning of, the person's mind or brain, and (ii) is this sufficient to render the person incapable of conducting the proceedings?

Implications

Assessment of capacity

81. Courts should always investigate the question of capacity whenever there is any reason to suspect that it may be absent. This is important, because if the condition is not recognised any proceedings may be of no effect although the civil and family rules do provide some discretion in this respect – see CPR r.21.3(2) and (4) and FPR r.15.3). Those rules assume that you know whether a party is a protected party and do not make any specific provision as to how an issue as to capacity is to be dealt with.

82. The solicitors acting for the parties may have little experience of such matters and may make false assumptions on the basis of factors that do not relate to the individual's actual understanding. Even where the issue does not seem to be contentious, a district judge who is responsible for case management will require the assistance of an expert's report. This may be a pre-existing report or one commissioned for the purpose. It no longer needs to be by a medical practitioner but could, where appropriate (e.g where there is a learning disability), be a clinical psychologist. The judge may be assisted by seeing the person alleged to lack capacity.

83. In case of dispute, capacity is a question of fact for the court to decide on the balance of probabilities, with a presumption of capacity. Evidence should be admitted not only from those who can express an opinion as experts but also those who know the individual.

84. Guidance has been given in the Masterman-Lister case (see above):
'… the test to be applied … is whether the party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisers and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings. If he has capacity to understand that which he needs to understand in order to pursue or defend a claim, I can see no reason why the law – whether substantive or procedural – should require the interposition of a … litigation friend.'

85. According to this decision the mental abilities required include the ability to:

    a. recognise a problem, obtain and receive, understand and retain relevant information, including advice;

    b. weigh the information (including that derived from advice) in the balance in reaching a decision; and then

    c. communicate that decision.

86. The Official Solicitor may be referred to where assistance is not available from any other source (see www.officialsolicitor.gov.uk/)

Need for a representative

87. A party who is incapable of conducting the particular proceedings must have a representative to do so, whether bringing the proceedings or defending them. The term for this representative is now 'litigation friend' but was previously 'next friend', if bringing the proceedings, or 'guardian ad litem', if responding. Any doubt should be resolved as a preliminary issue before proceedings are allowed to continue. There is no procedure for the appointment of a litigation friend in the magistrates' court for family proceedings and when this requirement may arise the case should be transferred up to the county court.

Conduct of the proceedings

88. The representative potentially has the rights of audience of an unrepresented party but in a substantial claim may not be regarded as suitable if he does not instruct a lawyer. The duty of the representative was defined by a Practice Direction to the CPR (since removed) as:
'. . . fairly and competently to conduct proceedings on behalf of (the) patient. He must have no interest in the proceedings adverse to that of the ... patient and all steps and decisions he takes in the proceedings must be taken for the benefit of the ... patient.'

89. Any settlement or compromise will have to be approved by the court under the CPR and any money awarded may only be dealt with pursuant to the directions of the court. The appointment only relates to the proceedings and the representative has no authority as such outside those proceedings. Where significant sums are involved it will be necessary for the representative or some other suitable person to apply to the Court of Protection unless there is an attorney under a registered enduring or lasting power of attorney. There may be circumstances where the trial judge will need to contact the Court of Protection for guidance or stay the proceedings pending an application to that Court.

Appointment

90. The procedure for the appointment is to be found in CPR Part 21 and FPR Part 15. The representative will need to sign a Certificate of Suitability and give an undertaking as to costs unless authorised by the Court of Protection to conduct the litigation. Although the rules do not so provide, a protected party should be notified of proceedings and given an opportunity to express views unless totally incapable.

91. Care should be taken to select a representative who has no actual or potential conflict of interest with the protected party. Where there is no suitable person willing and able to act, the Official Solicitor will consider accepting appointment but generally wishes to have provision for payment of his costs.

Injunctions

92. An injunction can be granted against a protected party, but only if he or she understands the proceedings and the nature and requirements of the injunction – *Wookey v Wookey* [1991] 3 All ER 365. This is because the tests of capacity to litigate and to comply with an injunction are different – see *P v P (Contempt of court: Mental capacity)* [1999] The Times, 21 July, CA.

Consequences

93. The consequences of being a protected party tend to be dealt with as a procedural matter although they may be fundamental to the proceedings. The decision as to whether proceedings are commenced, how they are conducted and whether they are settled may depend upon the identity of the representative, yet there is little guidance as to how this representative should be selected or act.

94. Phrases such as 'best interests' are commonly used with little understanding of what they actually mean. It is instructive to consider the interpretation in the Mental Capacity Act 2005 which includes considering the person's views, if ascertainable. Judges cannot simply leave an unfettered discretion to the representative and should satisfy themselves on these matters during the course of the proceedings. The need for any settlement or compromise to be judicially approved underlines this role.

Decision making and mental incapacity

Background

95. For many years procedures for delegation of decision-making powers have comprised:

    a. *Agency* – e.g. a bank mandate or ordinary power of attorney.

    b. *Specific* – e.g. an appointee for state benefits or litigation friend for court proceedings.

    c. *Statutory* – the jurisdiction of the (former) Court of Protection and enduring powers of attorney.

    d. *Trusts* – either a bare trust or settlement.

96. Each has its own limitations and normal agency methods do not survive a loss of capacity. But these procedures all relate to financial decisions and there were no procedures available for other types of decision (i.e. personal welfare or healthcare).

The mental capacity jurisdiction

Overview

97. The Mental Capacity Act 2005 (implemented on 1 October 2007) establishes a comprehensive statutory framework, setting out how decisions should be made by and on behalf of those whose capacity to make their own decisions is in doubt. It also clarifies what actions can be taken by others involved in the care and medical treatment of people lacking capacity.

98. The framework provides a hierarchy of processes, extending from informal day-to-day care, to decision-making requiring formal powers, and ultimately to court decisions. An individual can anticipate future lack of capacity by completing a lasting power of attorney for either financial affairs or personal welfare decisions (which includes health care). Failing this, the new Court of Protection has jurisdiction to make declarations or decisions or to appoint a deputy to make decisions on the incapacitated person's behalf.

99. The common law relating to 'advance refusals of (medical) treatment' is also placed on a statutory footing and there is a new offence of 'ill-treatment and neglect' on the part of carers, donees of lasting powers of attorney and deputies.

100. The Act's provisions apply in general only to people lacking capacity who are aged 16 years or over, but the property and financial affairs jurisdiction may be exercised in relation to a child who will lack capacity into adulthood.

101. A *Code of Practice* provides guidance for the courts, professionals and those concerned with the welfare of mentally incapacitated adults and a Public Guardian is appointed to supervise and promote the new jurisdiction.
The Code is available with further guidance at www.justice.gov.uk/protecting-the-vulnerable/mental-capacity-act.

Fundamental principles

102. There are five underlying principles:

    1. A decision-specific approach to capacity based on understanding and the ability to make and communicate a decision.
    2. Adults are presumed to have capacity so unjustified assumptions are outlawed and there is a 'balance of probabilities' approach.
    3. Individuals should be helped to make their own decisions with simple explanations, and they may make unwise decisions.
    4. There must be participation in decision-making and consultation with others.
    5. A 'least restrictive' approach is to be applied to intervention.

Key concepts

103. There are two new concepts that apply for the purposes of this Act, namely a definition of incapacity and clarification of best interests (the basis on which decisions must be made).

Incapacity

104. Section 2(1) sets out the definition of a person who lacks capacity:
'A person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.'

105. This is a two-stage test, because it must be established first, that there is an impairment of, or disturbance in the functioning of, the person's mind or brain (the diagnostic criteria); and secondly, that the impairment or disturbance is sufficient to render the person incapable of making that particular decision. Capacity is thus decision-specific but it does not matter whether the impairment or disturbance is permanent or temporary.

106. Section 3 provides that a person is unable to make a decision if unable to:

    a. understand the information relevant to the decision,

    b. retain that information,

    c. use or weigh that information as part of the process of making the decision, or

    d. communicate his decision (whether by talking, using sign language or any other means).

107. Explanations must be provided in ways that are appropriate to the person's circumstances.

Best interests

108. All relevant circumstances must be considered when deciding what is in a person's best interests, but the Act sets out in section 4 a checklist of factors aimed at identifying those issues most relevant to the individual who lacks capacity (as opposed to the decision-maker or any other persons). Not all the factors in the checklist will be relevant to all types of decisions or actions and the weight accorded to them will vary according to the circumstances, but they must still be considered if only to be disregarded as irrelevant to that particular situation. They include:

    a. whether the person will at some time have the required capacity,

    b. encouraging the person to participate in the decision,

    c. the person's past and present wishes and feelings,

    d. the beliefs and values that would be likely to influence the person's decision,

    e. the views of others who should be consulted.

Decision-making

109. There are two areas of decision-making, namely personal welfare (which includes healthcare) and property and affairs. There are then progressive levels of decision-making:

    a. A person acting informally under section 5 which may be regarded as a general authority regarding personal welfare (although in reality it is a statutory defence).

b. A person expending the individual's money to pay for 'necessary' goods and services under section 6 (or pledging his credit under section 7).

c. An attorney under a lasting power of attorney (or the former enduring power of attorney).

d. The Court of Protection making decisions or declarations.

e. A deputy appointed by that Court.

The new public bodies

Court of Protection

110. The new Court of Protection is a very different body to its predecessor of the same name. It is a Superior Court of Record administered by HMCTS with full status to deal with the entire range of decision-making on behalf of incapacitated adults. It takes over the financial jurisdiction of the existing Court of Protection and extends this to personal welfare (which includes health care) decisions thus absorbing the existing declaratory jurisdiction of the Family Division.

111. Most applications are dealt with 'on paper' by district judges at the Court's principle office in London but hearings may be either there or before nominated district judges sitting in regional courts, with nominated circuit judges and High Court judges hearing the more important cases and appeals. The new Court of Protection Rules 2007 promote active case management drawing on the Civil Procedure Rules 1998.

Public Guardian

112. The Public Guardian has a statutory appointment with an office and staff known as the Office of the Public Guardian (OPG). The new role is both administrative and supervisory and there are five key functions:

a. To maintain a register of lasting powers of attorney (and the former enduring powers that still remain valid).

b. To maintain a register of deputies.

c. To supervise and receive security from deputies.

d. To receive reports from and hear representations about attorneys and deputies.

e. To provide reports to the Court and arrange reports from visitors.

The new jurisdiction

113. There is a wider range of cases under the new jurisdiction and a consequent increase in the volume of cases. The unmet need has emerged and there is a new variety of outcomes. The Court and the Office of the Public Guardian have attained greater prominence with a wider influence, but there is a constant struggle to maintain the balance between protection and empowerment of these potentially vulnerable people.

114. At a personal level this new jurisdiction has a considerable potential to affect all our lives and those of our families in the future. We may need to have recourse to it! In terms of our judicial role the following implications may be identified:

    a. Enduring powers of attorney previously executed are still effective but since 1 October 2007 only lasting powers of attorney may be completed and registration of these does not point towards lack of capacity.

    b. The new Court of Protection is able to deal with the full range of decision-making on behalf of adults who lack capacity in accessible local courts.

    c. Serious medical treatment decisions are now dealt with by Family Division Judges in the Court of Protection under the statutory jurisdiction.

    d. There is a closer working relationship between the Court of Protection and the civil and family courts with nominated judges becoming a resource for other judges when they encounter mental capacity issues.

    e. Cases in the county courts involving a significant mental capacity element may be transferred to a suitable nominated judge as a 'specialist' and a nominated judge may sit in a dual jurisdiction.

    f. A discrete body of law is developing in regard to the assessment of capacity with a more professional approach towards decision-making issues.

    g. The inherent jurisdiction of the High Court continues to exist for vulnerable adults who are found to lack capacity for reasons not within the Mental Capacity Act 2005.